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# DISPUTE SETTLEMENT

INTERNATIONAL  
COMMERCIAL ARBITRATION

5.9 Electronic Arbitration



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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## WHAT YOU WILL LEARN

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Electronic commerce is experiencing continued rapid growth, and contractual practices are constantly changing. To keep abreast of disputes that might be referred to them, legal professionals must develop their analytical spirit and rigorously apply known, proven concepts to this new phenomenon. The objective of this module is therefore not only to provide exhaustive knowledge that needs constantly to be kept up to date, but also to stress that electronic activities lend themselves to a methodical approach. The aim is to show that international commercial arbitration law can cope with the peculiarities of electronic commerce, even if these peculiarities (especially dematerialization) have an impact on the methods of dispute resolution.

Submitting disputes in electronic commerce to the kind of arbitration practised offline or in classical alternative dispute resolution (ADR) raises immediate problems. Can the parties become properly engaged through electronic channels? Will they be able to furnish electronic evidence in support of their claims? Additional difficulties arise with the emergence of online dispute resolution. Under what conditions can an exclusively electronic arbitration procedure be organized without the litigants having to be present? Can an award be made electronically?

Arbitration practitioners know that there are many sources of international commercial arbitration. They have to consult a variety of regulations in order to answer questions relating to the arbitration of disputes in electronic commerce. This module is concerned mainly with international sources, such as the New York Convention of 1958 or the various Model Laws of the United Nations Commission on International Trade Law (UNCITRAL) (e.g. the Model Law on Electronic Commerce and the Model Law on Arbitration). National sources must also be taken into account, since, in practice, they influence the outcome of the arbitral tribunal. To illustrate this, we will look at recent adaptations of various national arbitration laws, as well as case law in electronic commerce. Finally, we consider private sources of arbitration, principally arbitration rules. Today, the market for online dispute resolution is still in a state of flux. Many institutions offering electronic arbitration have emerged and experimental projects, such as the Cybertribunal, have disappeared. Therefore when a dispute arises, the practitioner must undertake a careful study of the rules of the chosen institution.



# 1. DISPUTE RESOLUTION METHODS IN ELECTRONIC COMMERCE

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## 1.1 Introduction

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Electronic commerce operations are based on contracts concluded electronically between “absent” co-contractors (i.e. those who do not physically meet). The conclusion of an electronic contract is often prolonged by the electronic execution of the contract, which consists of opening access to a database, downloading software and transmitting an item of information. These electronic operations can give rise to disputes, just as in traditional commerce. A co-contractor might complain of poor execution of the contract, stating that the goods that were ordered electronically, for delivery by traditional logistical means, arrived in a damaged condition or did not conform. Another complaint might be that, at the time when a contract was to be executed electronically, a transmission error occurred, impeding access to the information. The service was thus not provided or the non-physical object of the contract was not delivered.

The electronic network on which co-contractors “meet” may also give rise to more specific disputes relating to the use of computer resources. For example, a client might not have sent his/her electronic acceptance of a contract offer immediately, yet maintains that the contract exists, whereas the offerer might claim to have retracted the offer before it was accepted.

Sometimes, disputes may even arise that are outside the sphere of the contract. For example, an Internet user who has downloaded a piece of software might discover a security failing that allows third parties to access the personal data on his/her computer; that user might then accuse the publisher of having committed or facilitated an invasion of privacy.

Finally, disputes may arise between electronic commerce operators in a strictly extra-contractual situation. For example, a false piece of information concerning a competitor is distributed on the network, causing that competitor significant harm. In this scenario, there is no contract linking the litigants.

These electronic commerce disputes can involve fairly diverse protagonists. Traditionally, operations are divided into those between businesses (business to business, or B2B) and consumer operations (business to consumer, or B2C).<sup>1</sup> B2B operations involve transactions worth higher amounts, as they are concluded, for example, between a manufacturer and a number of suppliers in an electronic marketplace. By contrast, B2C operations often involve low amounts, causing them to be termed “micro-transactions”,<sup>2</sup> for example where a contract covers access to an article or a music file. These operations represent

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<sup>1</sup> UNCTAD, E-Commerce and Development Report 2001, *New York, 2001*, esp. p. 99

<sup>2</sup> Cachard, O, «La régulation internationale du marché électronique» [International Regulation of the Electronic Market] *Paris, Librairie Générale de Droit et de Jurisprudence 2002*, p. 480.

a small fraction of the value of overall electronic commerce activity. However, they should not be underestimated, since consumer activities are mass activities, meaning that while the unit value of the transactions may be low, the number of operations is large, and there is potential for many disputes to arise.

At first sight, these electronic trade disputes can be resolved by traditional means. The parties are still at liberty to refer the case to a State court, although if one of the co-contractors is based in another country, it is not certain that the other party will go to court on the claimant's home territory. Even if a decision is handed down, it is not certain to be executed in a foreign country. The parties may then resort to ADR, and even to arbitration, as in disputes in the physical world. In theory, there is therefore no need to use online dispute resolution to settle an electronic commerce dispute. Conversely, disputes concerning the non-electronic world can be submitted to online dispute resolution, even though the litigants are in a position physically to meet. In practice, there is, however, an indissociable link between electronic commerce operations and online dispute resolution. For economic and sociological reasons, online dispute resolution will be the preferred means of dealing with disputes on the Internet and on private networks (Intranet).

First of all, a brief overview of online dispute resolution is in order. It is necessarily brief because the private organizations that offer dispute resolution services are very inventive. The variety of approaches that this creates, already highlighted in the ADR methods<sup>3</sup> between operators in traditional commerce, is further increased by technology.

The most immediate contribution of information technology in ADR is in the implementation of automated settlement assistance systems. Each party to the dispute assesses the value of its claim and sends it to the automated system. Using methods of calculation and criteria known to the litigants, the computer suggests - when the difference is not too great - a price on which the parties can agree. This system has enjoyed considerable success in disputes between insurers and insured. However, it is applicable only when the claimant is seeking a sum of money.

Information technology also contributes to the development of online mediation and conciliation systems. The conciliation or mediation body tries to bring the conflicting parties together, in order to arrive at an agreement that is then formalized in a settlement agreement. While the mediator or conciliator does play an active role, he/she cannot impose an agreement on the parties. The new technology removes the need for the parties to meet physically; it replaces these meetings with electronic exchanges.

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<sup>3</sup> Fouchard P, «Arbitrage et modes alternatifs de règlement des litiges du commerce international», [Arbitration and Alternative Dispute Resolution in International Trade]. In: Souveraineté étatique et marchés internationaux, A propos de 30 ans de recherche du CREDIMI [State sovereignty and International Markets, 30 Years of CREDIMI Research], pp. 95-115; Jarrosson C, «Les modes alternatifs de règlement des conflits, présentation générale» [Alternative dispute resolution, general presentation], Revue Internationale de Droit Comparé [International Review of Comparative Law], 1997 (2) pp. 325-345.

Finally, arbitral institutions propose a partially or totally electronic procedure. The arbitrator is the third party, entrusted by the disputing parties with the task of settling their dispute. At the end of the arbitration procedure, he/she makes an award which is binding on the parties and which is invested with the authority of *res judicata*. Here too, the Internet facilitates the remote administration of the procedure and does not require the attendance of the parties or their legal representatives.

There is one last type of online dispute resolution worth mentioning briefly, even though it concerns a particular kind of dispute. When owners of trademarks cannot register their domain names because other more diligent operators have registered those names in bad faith (“cybersquatting”), they can refer the matter by electronic means to one of the organizations approved by the Internet Corporation for Assigned Names and Numbers (*ICANN*) in order to have the disputed domain name transferred or deleted. *ICANN*'s competence is based on the contract signed by the owner of the domain name when it was registered. This is not strictly speaking an arbitration procedure, since once the decision has been handed down, the parties can always refer to a judge for settlement of the dispute. It is a *sui generis* procedure, also known as an “administrative procedure”.

At first sight, the simplistic view is that electronic arbitration lends itself to B2B disputes, whereas B2C disputes would be more satisfactorily resolved by mediation or conciliation. This is the dominant view in Europe by virtue of current legislation, but it needs to be qualified. In reality, mediation and conciliation are also used between businesses in traditional international trade. Moreover, in some legal traditions (e.g. that of the United States), arbitration is accepted as being able to settle disputes involving one weak party, such as the consumer.

Thus, for a matter to be submitted to *online dispute resolution*, it must meet two conditions. First, the rules of the body chosen to settle the dispute, need to be verified, to ensure that they are not restricted to one particular type of player (businesses or consumers). Secondly, it should be ascertained that the law allows the dispute to be submitted to a particular form of online dispute resolution. This applies particularly to the question of the arbitrability of consumer disputes.

In section 1.2, we look at the advantages of online dispute resolution. The effectiveness of this method should make it the natural choice for resolving disputes in electronic commerce. While all methods of online dispute resolution depend on the will of the parties and the force of the contract, the extent of the litigants' obligations differs according to the type of online dispute resolution chosen. The method of dispute resolution should therefore always be specified in order to define the obligations of the parties and to consider the sanctions for non-fulfilment of those obligations.



## 1.2 Advantages of Online Dispute Resolution

Online dispute resolution helps reduce the costs of dispute resolution. Secondly, it encourages better enforcement of the solution recommended or imposed by the chosen institution.

### 1.2.1 *Cost-effectiveness*

Dispute resolution is cost effective because of (a) rapid processing of disputes, (b) the lower costs involved, and (c) only partial assumption of the operating costs by the parties.

#### **(a) Speed of Dispute Resolution**

Traditionally, the main advantage associated with ADR is in achieving a rapid solution that does not paralyse business life and the normal exchanges between commercial partners. Proceedings in a State court are known often to take months, even years, to reach a conclusion. By contrast, ADR shortens the process of handling disputes. The same is true of fast-track arbitration systems, the main advantage of which is the speed of the procedure. When working online, the instantaneous circulation of information reduces the time still further. Of course, the arbitrators always need a certain amount of time to familiarize themselves with the file and to make an award. It is also true that the lack of complexity in “quality disputes” helps speed up the procedure. Thus the majority of organizations offering online dispute resolution emphasize the speed of the procedure.<sup>4</sup>

#### **(b) Lower Costs**

Online dispute resolution allows the dispute to be settled remotely, without requiring the parties or their legal representatives to be physically present. The parties merely have to connect from their workplaces to the site of the chosen organization and transfer documents and data messages for the cost of a local phone call. This is a crucial advantage in international disputes, where, normally, one of the parties would have to travel to appear before the courts in the country of the other party. This would also be the case in traditional forms of arbitration or ADR (including mini-trial and fast-track arbitration), all of which require hearings and a physical meeting between the parties.

Certain methods of online dispute resolution offer even greater cost reduction, because they reduce the need for human intervention in the dispute handling process. For example, with automated settlement assistance systems, the computer calculates the value of the settlement on the basis of the claims of each party. The costs are generally a proportion of the value of the dispute;

<sup>4</sup> See for example the electronic procedure to which the clients of the Ford website have agreed. The time between submission of documents and the rendering of the award should not exceed 15 working days. Chartered Institute of Arbitrators, United Kingdom, at: <[www.arbitrators.org/fordjourney/index.htm](http://www.arbitrators.org/fordjourney/index.htm)>.

for a dispute involving a sum of less than US\$ 10,000, the average cost is US\$ 100.<sup>5</sup>

When human intervention is necessary, whether in systems of electronic conciliation or electronic arbitration, significant cost reduction seems possible only for disputes that do not involve overly complex legal questions and that do not require an expert's presence. Disputes relating to registration of domain names is a case in point, because the panel members only have to confirm that the claimant is the owner of the trademark and that the respondent made a bad-faith registration. The same is true in some "quality disputes", where one party complains about the non-performance of a contract. The third party chosen by the parties merely has to confirm non-performance. Electronic non-performance is not always easy to establish. When a software publisher or database owner does not supply the necessary access code, non-performance is quite clear. However, it is much less clear when, for example, the software does not work well on the client's computer, and it is not known whether that is the fault of the software or the operating system.

### (c) Financing of Online Dispute Resolution

The system for financing online dispute resolution sometimes further reduces the costs charged to the Internet user/consumer. The costs are not always shared equally between the litigants.<sup>6</sup> If the business is affiliated to a quality label programme, then electronic arbitration or mediation<sup>7</sup> costs the claimant nothing. It is financed by the business's annual subscription to the certification programme. Another system charges the entire arbitration costs exclusively to the business.<sup>8</sup> Traditionally, arbitration costs are shared equally between the parties, unless the award specifies that the losing party is to pay the entire cost.<sup>9</sup> At first sight, these systems therefore seem very favourable to the client, who benefits from free access to extra-judicial methods of dispute settlement. This unilateral financing does, however, call for particular vigilance regarding the independence of the dispute resolution body, which might show a certain bias towards the business. After all, the business might be a "serial litigant", providing regular cases for the arbitral tribunal. This argument should not, however, be overstated, because an arbitration award made contrary to the principle of independence will not receive the exequatur of the State courts in the majority of States.

## 1.2.2 Effectiveness of Solutions, Recommended or Imposed

Online dispute resolution tends to be more effective, either because of spontaneous implementation or by the exercise of a form of electronic

<sup>5</sup> Schultz T et al., «Online Dispute Resolution: The State of the Art and the Issues». E-com Research Project of the University of Geneva, Geneva, 2001, p. 61. Available on the Internet at: <<http://www.online.adr.org>>.

<sup>6</sup> Schultz T and Gabrielle Kaufmann-Kohler G op. cit., passim.

<sup>7</sup> <http://www.webassured.com>.

<sup>8</sup> <http://www.fordjourney.com>.

<sup>9</sup> Fouchard P, Gaillard E and Goldman B. On Commercial International Arbitration, *Kluwer Law International*, 1999; Fouchard P, Gaillard E and Goldman B. *Traité de l'arbitrage commercial international* [International Commercial Arbitration Treaty], Paris, Litec, 1996, p.1225

constraint.

The idea of spontaneous implementation of the solution by the parties is often presented as the natural outcome of alternative methods of dispute resolution. Parties are likely to implement a settlement agreement concluded following mediation or conciliation. Where arbitration is concerned, the spontaneous implementation of awards has prevailed despite a rise in post-arbitral disputes. The electronic nature of the process and the players' involvement in the electronic market tend to favour proper enforcement of the settlement agreement or the award. Also, since the parties do not meet physically in online dispute resolution, it takes the emotion out of the dispute and encourages a rational settlement.

In general, instantaneous circulation of information on communication networks can make the recalcitrant party fearful of bad publicity in the electronic market. When the arbitration or mediation is part of a labelling or certification programme, the label can be withdrawn as a sanction for refusing to enforce the award or the settlement agreement. This can have the effect of making consumers or other clients somewhat mistrustful of that business. Also, blacklisting and even calls for boycotts may cause damage to the operator. The increase in satirical sites that misappropriate brands often constitutes an illegal threat that operators must counter by referring the matter to State courts in order to put an end to these unfair activities. A dissatisfied client should therefore be wary of malicious misuse of a brand on the Internet, because the law ensures that trademarks and logos are respected.

The power of electronic constraint is even more direct in the particular case of domain name disputes. If, following an administrative procedure, the panel orders the transfer or deletion of a domain name registered in bad faith by a squatter, this deletion is actually implemented by the registering authority. However, there is no such power of constraint for contractual disputes in the electronic market. When the dispute relates to a sum of money, the parties are required to block the disputed sum in a bank account. Such a demand makes access to justice more difficult. In any case, the obligation of *cautio judicatum solvi* no longer exists in many States. This system could not therefore be reintroduced for online dispute resolution.

### **1.3 Assessing Methods of Online Dispute Resolution**

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The rapid rise of online dispute resolution, using various formulae specific to each resolution organization, does not dispense with the need to assess the process or procedure being considered. Indeed, this assessment determines the subsequent conduct of the parties and their respective obligations throughout the online dispute resolution process. In this subsection, we first identify the determining factors, and then measure the extent of the obligations of the parties when they agree to settle their dispute by electronic means.

### 1.3.1 Determining Factors

The first determining factor is the mission given by the parties to their chosen third party. When this third party's mission is to try to bring the parties together so that they can reach an agreement among themselves, this automatically means mediation or conciliation. The various systems give differing scope for initiative on the part of the conciliator or mediator, who may go so far as to formulate proposals or recommendations. The mediator is generally seen as more active than the conciliator.<sup>10</sup> The task of an arbitrator, on the other hand - if his/her competence is based on a contract - is jurisdictional. He/she therefore settles disputes in law, and his/her decision is binding on the parties.

The second determining factor, which is an immediate extension of the first, depends on the authority vested in the chosen arbitrator. An arbitral award settles the dispute definitively, and is final and binding. It is deemed to have the authority of *res judicata* as soon as it is made. The losing party must therefore abide by it, under constraint if necessary, once the award has been ratified. The proposals or recommendations of a mediator, on the other hand, are not binding. At the end of the process, the parties must conclude a settlement agreement.<sup>11</sup>

The determining factors for choosing arbitration and mediation are therefore mutually exclusive. However, often the parties use both these methods of dispute resolution in succession. If mediation or conciliation fails, the litigants have to submit to arbitration. When the two methods of dispute resolution are used in succession, a person may not, in principle, be appointed as arbitrator if he/she has previously acted in the role of conciliator.<sup>12</sup>

### 1.3.2 Consequences of a Decision

Depending on whether mediation or arbitration is chosen, the litigants have different obligations. While conciliation or mediation may seem less restrictive, the parties are nonetheless bound by obligations of diligence or result, and face sanctions for non-performance. The arbitral clause for its part shows the commitment of the parties to submit their dispute to arbitration. Therefore, when the client concludes a contract electronically, he/she must take care to observe its general terms which do not allow either passive conduct or direct referral to State courts.

#### **(a) Conciliation or Mediation**

The clause on mediation or conciliation by electronic means, as with any contractual clause, commits the parties that have consented thereto. The parties

<sup>10</sup> Jarrosson C, (La notion d'arbitrage1 [The concept of arbitration], Paris, Librairie Générale de Droit et de Jurisprudence, No. 348, 1987.

<sup>11</sup> Articles 7 and 8 of the ICC Conciliation Regulations, January 1, 1988.

<sup>12</sup> Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, No. 21. The authors point out the exception of «MedArb», where the mediator is designated as an arbitrator in the event that mediation fails.

are therefore obliged to initiate the conciliation or mediation procedure. Once a dispute has arisen, they may not seek to avoid resort to conciliation on the grounds that their claims are firm and they consider them to be well founded. However, since the mediation or conciliation clause imposes an obligation to achieve a result, the parties must take part in the electronic mediation process. The obligation to initiate negotiations does not mean that they have to be continued if they seem likely to fail, nor of course that the parties have to reach an agreement. The co-contractors must simply take the first step towards mediation or conciliation. Non-performance of this obligation is liable to various sanctions. First, it can give rise to an award for damages and interest, as with any contractual non-performance. This sanction does not seem very widespread; comparative law shows that a procedural sanction is more common. When the parties ignore the obligation to go to conciliation, the French courts refuse to acknowledge the dispute and declare that the claimant has no right to bring the action (*fin de non recevoir*).<sup>13</sup> As for American courts, they enforce the clause in kind and send the parties back to the mediator or conciliator.<sup>14</sup> Such decisions, rendered in respect of traditional mediation or conciliation, are entirely transferable to online dispute resolution.

Once the procedure is under way, the parties are only bound by a “duty of diligence”, i.e. they must negotiate in good faith, but are not in any way bound to come to an agreement. In common law countries, the “duty of diligence” is known as the obligation to make “best efforts”.<sup>15</sup> When the parties see that the conciliation or mediation process is not heading for a successful outcome, they can stop it. Stopping the negotiations at this stage does not incur any sanction. A ruling that the recalcitrant party will have to pay damages and interest requires proof, by citing specific conduct, that it refused to negotiate in good faith.

If the parties see the mediation or conciliation process through to the end, and make reciprocal concessions, a settlement agreement is recorded. This has the effect of ending the dispute, with each party making specific undertakings that are binding. Their enforcement may subsequently be pursued before the State courts. When mediation takes place entirely online, the settlement is recorded in an electronic agreement. It has to be confirmed that this electronic agreement is effective under common law. On the face of it, this does not appear to raise any difficulties, because of the universal trend towards accepting electronic documents<sup>16</sup> as evidence (*ad probationem*) and as a condition for validity (*ad validitatem*). Moreover, in the absence of specific conditions regarding validity, the settlement agreement is subject to the rules of common contract law.<sup>17</sup>

<sup>13</sup> In French law, the case of *Polyclinique des fleurs*, Cass. 2<sup>nd</sup> civ., July 6, 2000, note Jarrosson C, *Revue de l'arbitrage* [Arbitration Journal], 2001, p. 759; *Revue trimestrielle de Droit civil* [Quarterly Civil Law Journal], 2001, p. 359, obs. Jacques Mestre and Bertrand Fages.

<sup>14</sup> In United States law, *Hoertl Wolff Parker Inc. v. Howards Wright Construction Co*, 1989, *Dt Oregon*, December 4, 1989, *Westlaw*, WL 151765, cited by Joëlle Thibault, *Les procédures de règlement amiable des litiges au Canada* [Procedures for Amicable Dispute Resolution in Canada], *Montreal, Wilson and Lafleur*, 2000, No. 54.

<sup>15</sup> Fontaine M, *Droit des contrats internationaux: Analyse et rédaction des clauses* [International Contract Law: Analysis and Drafting of Clauses], Paris, *Forum européen de la communication* [European Communication Forum], 1989, 368 p., especially «Best efforts, reasonable care, due diligence and règles de l'art», pp. 91-125.

## (b) Arbitration

The decision to go to arbitration places greater constraints on the parties in dispute, in terms of their conduct both during and after the electronic procedure. The arbitral clause, by which the parties consent in advance to submit any dispute that arises to an arbitral tribunal, has a dual effect. The *positive effect* lies in according competence to the arbitrator or to the arbitral tribunal appointed in the clause. According competence in this way also has the *negative effect* of rendering State courts incompetent. Consequently, when the parties agree electronically to an arbitral clause, the validity of which is not contested, they cannot bring the dispute before a judge in their own country. Clicking to accept the electronic general conditions must therefore not be done lightly.

That being the case, the co-contractors cannot choose not to take part in the arbitration just because the procedure is electronic. If they refuse to appoint an arbitrator, to produce a statement of defense or to communicate electronic documents, the electronic procedure will go ahead without the defaulting party and an award may be rendered by default. If the electronic document fulfils the necessary conditions for the award to be rendered, it is binding on the parties. The party that wins can even demand ratification (*exequatur*) in the State of the losing party.

## 1.4 Conclusion

The drafter of an extra-judicial dispute settlement clause and the clients must carry out a thorough analysis of terms. The choice of the mediation, conciliation or arbitration clause defines their respective obligations during and after the electronic procedure. The online mediation or arbitration process, while appearing more innocuous and less formal, nonetheless places obligations on the parties that are sanctioned by law. Electronic mediation and conciliation fall entirely within the contractual field. It is the will of the parties that determines the form they take and the consent of the parties is sought when the settlement agreement is concluded. Once the principle of concluding contracts electronically is accepted, electronic mediation and conciliation do not raise any particular difficulty.

Electronic arbitration, on the other hand, raises more of a problem because of the various demands imposed by national laws and international agreements. This is discussed in greater detail later in this module: section 2 discusses the formation of the electronic arbitration agreement, section 3, the conduct of the online arbitration procedure and section 4 the efficacy of electronic arbitration. In all these cases, it needs to be established whether electronic arbitration satisfies the conditions of the law or of international agreements.

<sup>16</sup> UNCITRAL Model Law on Electronic Commerce, available at: <<http://www.uncitral.org>>; Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Communities, 17 May, 2000, L 178/1.

<sup>17</sup> Jarrosson C, «Les concessions réciproques dans la transaction», [Reciprocal Concessions in the

## 1.5 Case Study

Before concluding a number of contracts by electronic means and indicating, on each site, your agreement to the general conditions by clicking on the “I accept” button, you acknowledge the clauses reproduced below.

### ***Electronic Contract No. 1: Dispute Settlement Clause***

1) *“Any dispute arising over the validity, interpretation, performance or non performance, suspension or termination of the present contract, shall be submitted to exclusively online mediation, in accordance with the mediation rules of the Cybermediation Center (Cybermediation Center, available on the Internet, <<http://www.cybermediation.net>>, fictitious address)”*

### **Questions**

1. Define the dispute resolution method proposed in this clause. How will the settlement process be organized?
2. The Cybermediation Center sends you an e-mail informing you that it has received a request for electronic mediation from your co-contractor. In accordance with the rules, a mediator has been appointed and the center invites you to make contact. Can you refuse, without repercussions, to take any part in the online dispute resolution process? What risk are you taking if you continue to ignore the entreaties of your co-contractor and the institution?
3. If electronic mediation does not provide satisfaction, are you obliged to come to an agreement? When will you be able to bring the dispute before the State courts?

### ***Electronic Contract No. 2: Dispute Settlement Clause***

2) *“Any claim, dispute, or controversy against the seller, arising from or relating to this agreement, its interpretation or validity thereof, advertising, or any related purchase, shall be resolved exclusively and finally by binding arbitration administered online by the Cyber Arbitration Center under its code of procedure then in effect (available via the internet at <<http://www.cybermediation.net>> or via telephone). Any award of the arbitrator(s) shall be final and binding on each of the parties.”*

### **Questions**

1. Define the dispute settlement method proposed with reference to the relevant elements. Under what rules will the procedure be organized?
2. Will you be able to refer the substance of the dispute to the state courts before the arbitral tribunal is constituted or after the award has been made?

**Electronic Contracts Nos. 3 and 4: Dispute Settlement Clauses**

3) *“The parties will attempt to resolve any claim, or dispute or controversy (whether in contract, tort or otherwise) arising out of or relating to this agreement against the seller (the “Dispute”) through an on-line mediation utilizing a mutually agreeable mediator in accordance with the then current Cybermediation Rules, rather than through litigation. If the parties are unable to resolve the dispute, despite their best efforts, through negotiation or mediation within a reasonable time after written notice from one party to the other that a dispute exists, the dispute will be settled by binding on-line arbitration in accordance with the then current rules established by the Cyber Arbitration Center. Any award of the arbitrator(s) shall be final and binding on each of the parties.”*4) *“Any dispute arising over the validity, interpretation, performance or non-performance, suspension or termination of the present electronic contract shall be submitted to settlement by mediation, or failing that, to settlement by arbitration of the Cyber Arbitration Center, to which the parties undertake to adhere (rules available on the Internet, <http://www.cyber-arb.net> and by telephone).”*

**Questions**

1. What dispute settlement methods do these clauses propose? Refer to the phrases and expressions defining the obligations of the parties.
2. Do either of these clauses contain internal contradictions?
3. If you accept one of these clauses, will you be able to submit the substance of the dispute to a State court?

**Electronic Contract No 5: Dispute Settlement Clause**

*“Any dispute arising over the validity, interpretation, performance or non-performance, suspension or termination of the present electronic contract shall be submitted to mediation or arbitration, in accordance with the rules of the Cyber Arbitration Center, to which the parties undertake to adhere (rules available on the Internet, <<http://www.cyber-arb.net>>). The proposal formulated at the end of the electronic procedure by the arbitrator(s) is binding on the parties, subject to right of appeal to the state courts.”*

**Questions**

1. What methods of dispute settlement does this clause propose?
2. Which passages in the clause seem to cause difficulties?
3. If you accept this clause, will you be able to refer the substance of the dispute to the State courts?





## 2. FORMATION OF THE ELECTRONIC ARBITRATION AGREEMENT

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### Introduction

Traditionally, the stipulation and acceptance of arbitral clauses are subject by law to conditions designed to protect the consent of the co-contractors. Indeed, in an arbitral clause, the parties undertake in advance to submit any dispute that arises to an arbitral tribunal. In so doing, they renounce the right to refer the dispute to State courts. The commitment should therefore not be taken lightly, nor imposed by the drafter of the contract. This being the case, any arbitral clause is subject to two conditions. First, it is necessary to confirm the consent of the party against whom the clause is invoked. In general terms, consent to arbitration is often contested when the clause appears in the general provisions. Second it should be ensured that the requirements of form *ad validitatem*, prescribed by national laws and certain international conventions, have been properly observed. This second condition therefore relates to the form of the arbitration agreement.

In electronic commerce operations, the arbitral clause often appears in the general conditions that have been proposed and accepted by electronic means. In checking the validity of the arbitral clause, therefore, two questions need to be addressed: (i) Does the electronic contractual process really allow the informed consent of the parties to be obtained? (ii) Does an arbitral clause posted on a computer screen, without a hard-copy contract, meet the formal requirements of a written? These questions are discussed in subsections 2.1 and 2.2 respectively.

A further difficulty arises when the co-contractor is a consumer, as the consumer is protected by provisions of special law, the application of which is monitored by a judge. Acceptance of an arbitral clause, because it excludes the dispute from State courts, may therefore be taken to be a renunciation by the consumer of his/her rights before the dispute arises. That explains why the arbitrability of consumer disputes and the validity of arbitral clauses are sometimes contested. The question of arbitration in consumer disputes is central in the electronic market, where operations often involve consumers. In subsection 2.3, we therefore look more closely at the arbitration of disputes arising from B2C operations.

### 2.1 Electronic Consent to Arbitration

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The creation of an arbitration agreement in a contract concluded by electronic means raises two sets of difficulties. The first concerns the party that drafted the electronic contract: To what extent must that party ensure the accessibility of the arbitral clause and how should it organize the electronic contractual process? The second set of difficulties concerns the party accepting the electronic offer: How can it express its consent electronically?

### 2.1.1 *Accessibility of the Arbitration Agreement*

On the Internet, the communication protocol allows navigation from one file to another, particularly by hypertext links. Electronic documents are no longer presented sequentially; on the contrary, it is the user who takes the initiative in moving from one file to another. This method of organizing navigation by the designers of a site encourages what is known in legal terms as *incorporation by reference*. On the Internet, incorporation by reference of contractual conditions in the contract calls for particular precautions regarding *accessibility of information*.

#### **(a) Incorporation by Reference**

Traditionally, the technique of incorporation by reference is used so as not to lengthen the principal contract. Rather than reproduce pre-existing documents, the parties refer instead to a document accessible from elsewhere. For example, the general conditions are not included in the contract, but are available simply on request. Can an arbitration agreement that appears in a document to which reference has simply been made be invoked against the co-contractor? Since the arbitral clause has the effect of depriving the co-contractor of access to the State courts, should it not be reproduced in the principal contract? In international trade law, the practice of incorporation by reference is currently allowed. French case law merely requires confirmation that the principal contract does contain a reference to the arbitral clause. Silence on the part of the receiving party regarding this reference implies acceptance. In France, the Court of Cassation now takes an entirely consensual approach, since it does not even require that the reference to the arbitral clause be made “in writing”.

*“Whereas in matters of international arbitration, an arbitral clause is valid when incorporated by reference to a document mentioning it, as long as the party against which it is invoked was aware of it at the moment the contract was concluded and, even if through its silence, accepted this reference”<sup>18</sup>*

It is therefore sufficient that the accepting party be made aware of the arbitral clause, so that acceptance of the principal contract also implies acceptance of the arbitral clause. This case law is perfectly transposable to electronic commerce operations, in particular operations carried out on a web page, as the general conditions containing the arbitral clause are often accessible on a separate Web page through a hypertext link. Moreover, the *UNCITRAL Model Law on Electronic Commerce* enshrines incorporation by reference in its Article 5 bis, in the following form:

<sup>18</sup> Cass. 1<sup>st</sup> civ., December 20, 2000, Prodexport II, unpublished, cf. judgement Prodexport I, Cass. 1<sup>st</sup> civ, June 3, 1997, Revue de l'arbitrage [Arbitration Journal] 1998, p. 537, note Xavier Boucobza in which the Court of Cassation still required «a written reference to the document» containing the clause.

*“Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.”*

### **(b) Permanent Accessibility of Contractual Terms**

Incorporation by reference depends on the actual accessibility of the arbitral clause: the co-contractor should have been able to access <sup>19</sup> this external information, failing which he cannot have given his consent. On the Internet and on electronic networks, the general conditions may be unavailable for technical reasons (e.g. the hypertext link may have been broken or the computer language may be illegible on the co-contractor's computer). There is thus a universal legislative trend towards provisions that explicitly require accessibility of the general conditions in electronic contracts.

Article 10.3 of the *Directive on Electronic Commerce* <sup>20</sup> stipulates that

*“Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.”*

In the United States, the Maryland legislator requires in the *Uniform Computer Transactions Act* <sup>21</sup> that contractual terms be available before and after the electronic conclusion of the contract. The sanction for failing to comply with this requirement is that the inaccessible contractual terms may not be invoked.

## **2.1.2 Electronic Expression of Consent**

The client of an electronic commerce operator orders a corporeal or incorporeal asset on a website. The website operator has made it possible for him to access the general conditions where the arbitral clause appears. How can the client express his consent to the electronic contract? In particular, does a click on the “I accept” button signify acceptance of the contract and the arbitral clause?

American case law generally views a click on the “I agree” button as sufficient for a contract to be formed. Thus in a decision in *I.Lan systems, Inc. v. Netscout Service Level Corp* <sup>22</sup> on 2 January 2002, the American judge decided that the user of a software program who, when downloading, had clicked on the “I

<sup>19</sup> Actual accessibility does not necessarily signify that the co-contractor has read the general conditions. This lack of diligence is then entirely imputable to him/her and he/she is deemed to have read those conditions.

<sup>20</sup> Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, OLEC, July 17, 2000, L 178/1, Dalloz 2000, leg., p. 133.

<sup>21</sup> Maryland Uniform Computer Transactions Act, H.D. 19, 2000 MD Laws, ch. 11, sections 21-209 A.

<sup>22</sup> I.Lan Systems, Inc. v. Netscout Service Level Corp, Civ. Act No. 00-11489-WGY (D. Mass., January 2, 2002).

agree” button at the bottom of the licensing contract, was bound by the contract. The judge in this case applied classical contract law, which authorizes the acceptor to consent by means of actions specified in advance by the offerer.<sup>23</sup> In this instance, the click on the button represented the method of acceptance specified by the offerer. This principle is well established in American case law, particularly with regard to sales of software online.

However, the “I accept” button must be visible, and the Internet user must be obliged to click on it to start the download. Thus, in a decision in *Specht v. Netscape Communications Corp.*,<sup>24</sup> the Court decided that general conditions containing an arbitral clause could not be invoked against a user who had downloaded a piece of software. In this instance, the user was able to download the software directly by clicking on the “download” link, without having to click on the “I accept” button. This particular button expressing agreement to the general conditions was even relegated to the bottom of the Web page, in a place that the user might not find. In summary, a click does not signify acceptance unless it is linked explicitly to the general conditions. A click that simply starts the download without any other reference is therefore considered inoperative.

Finally, we need to determine whether the arbitral clause should be specifically highlighted among the general conditions. In one case - *Lieschke, Jackson & Simon v. Realnetworks Inc*<sup>25</sup> - the claimants maintained that they had not been able to consent to an arbitral clause buried among the general conditions posted on the computer screen. The judge found that while the clause was not specifically highlighted under the heading “arbitration agreement”, it was nonetheless perceptible. It was in the same font as the rest of the agreement, in a position that attracted attention. This decision relating to the downloading of software was in line with traditional case law regarding general conditions.

The balance of case law allows the following recommendations to be formulated on the drafting and presentation of general conditions in electronic channels:

- (i) The website operator must ensure that the co-contractor is routed through the general conditions, or at least must make a very explicit reference to them, before the contract is concluded.
- (ii) The general conditions must be easily accessible, before and after the conclusion of the contract. It is desirable that the general conditions be automatically downloaded onto the hard disk of the user's computer so that they can be filed.
- (iii) The arbitral clause must not be hidden away within the general conditions. On the contrary, it must be clearly highlighted. The

<sup>23</sup> Uniform Commercial Code, *Section 2-204*: «A contract for sale of goods may be made in a manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.»

<sup>24</sup> *Specht v. Netscape Communications Corp.*, 2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001).

<sup>25</sup> United States District Court, Northern District of Illinois, Eastern Division, May 11, 2000, *Lieschke, Jackson & Simon v. Realnetworks Inc*, 2000 WL 631341. See below, in subsection 2.2.2(b)

addition of a heading and bold type, though not mandatory, does seem preferable.

- (iv) The “I accept” button only binds the user when he/she closes the contractual procedure, after having viewed the general conditions.

## 2.2 Electronic Form of the Arbitration Agreement

The party invoking the arbitration agreement must provide evidence of its existence. The presentation of a written document will certainly convince the arbitrator who is called to rule on his/her jurisdiction. Other means of proof may, however, be admitted by the judge or arbitrator who is asked to rule on the existence of the arbitration agreement.<sup>26</sup> Beyond this question of proof, it is important to determine whether the validity of the arbitration agreement is conditional on there being a written document. In other words, is the penalty for the lack of a written document the invalidity of the arbitration agreement?<sup>27</sup> When a written document is demanded on pain of invalidity, is it still possible to stipulate an arbitration agreement electronically?

The validity of the electronic arbitration agreement must first be assessed from the point of view of international agreements setting out the material rules relating to arbitration. It is by no means sure that these international agreements can be interpreted as favouring electronic documents, since the agreements were adopted almost 50 years ago, at a time when the drafters could not foresee that a written document could take other than a physical form. The legal systems in some countries still require a written document *ad validitatem*. Arbitration law must therefore be adapted to electronic commerce by legislation or by application of case law. Finally, the link between the New York Convention and national provisions that are more favourable to electronic documents must be specified.

### 2.2.1 *Requirements of International Agreements: Document Signed by the Parties*

The New York Convention of 10 June 1958 *on the Recognition and Enforcement of Foreign Arbitral Awards* has enjoyed worldwide success, with over 100 States having ratified or signed up to it.<sup>28</sup> Its range of application is very broad, since it only requires one Party to seek ratification of the award before the courts of a contracting State for the Convention to be applicable. The main objective of the Convention is to determine the conditions for awards to be recognized and enforced. Article II is concerned specifically with the conditions regarding the form of the arbitration agreement:

<sup>26</sup> See below, section 3.2.

<sup>27</sup> Fouchard P, Gaillard E and Goldman B. *On International Commercial Arbitration*, no 590.

<sup>28</sup> As of April 2002, 129 States had ratified the New York Convention.

**Article II of the New York Convention”**

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

Article II can be adapted to electronic exchanges in a variety of ways, depending on the contractual process adopted by the parties. If the parties conclude the contract by an exchange of electronic mails, Article II (2) can be interpreted by analogy *in fine*. The signature of the parties is not required when the agreement is “*contained in an exchange of letters or telegrams*”. Also, case law has accepted that faxed copies and telexes are comparable to letters and telegrams.<sup>29</sup> It is therefore reasonable to argue that an arbitration agreement is a written agreement when it is contained within an exchange of e-mails.<sup>30</sup> Of course, there is a greater risk of fraud with e-mails than with telegrams or telexes. The argument is, however, not persuasive, because security procedures (encryption, intervention of a third-party certification body) can give the e-mail an equivalent degree of security. In more general terms, hard-copy documents can also be subject to fraud. This risk cannot therefore be put forward as an argument against granting the status of written agreement to an arbitration agreement stipulated and accepted by e-mail.

Is the same true when the contract is concluded on a website that invites the user to fill out an electronic form and to click on the “I accept” button? It could be argued that if the clause appears in an electronic contract, it has not been signed by the parties, as required by the first alternative in Article II(2). In reality, the acceptance of the electronic signature in different legal systems by adoption of the *UNCITRAL Model Law on Electronic Signatures* or by transposition of *Directive 1999/93/EC on Electronic Signatures* leads to the conclusion that the clause is valid as long as the signature processes are secure. In any event, the conclusion that such a clause is valid can also be reached by applying the second alternative in Article II(2), namely that acceptance of an offer on a website constitutes an exchange of data comparable to the exchange of letters or telegrams.<sup>31</sup>

To increase legal safeguards and encourage a uniform interpretation of the New York Convention, UNCITRAL sees two possibilities. The first is to propose an interpretative instrument relating to the Convention, and thereby

<sup>29</sup> Paris, 20 January 1984, *Revue de l'arbitrage* [Arbitration Journal], 1987, p. 482, C. Kessedjian.

<sup>30</sup> *Arsic J, International Commercial Arbitration on the Internet – Has the future come too early?* Journal of International Arbitration, 1997, p. 209-221; Hill R, *New paths for dispute resolution, in Improving International Arbitration*, Liber amicorum Michel Gaudet, Paris, ICC publishing, 1998, p. 64.

<sup>31</sup> Hill R, *op. cit.*

avoid the need for a revision of the text. UNCITRAL would recommend that the definition of the term “*agreement in writing*” be interpreted so as to include electronic processes.<sup>32</sup> This interpretative instrument would be based on the revised version of the *UNCITRAL Model Law on International Commercial Arbitration*. Article 7 of this model law, which has been the inspiration for many national legislators, will soon be adapted to cover explicitly the electronic document, as defined in the *Model Law on Electronic Commerce*.

*Art. 7 “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”*

The drawback of an interpretative instrument relating to the New York Convention, even one based on the revised version of the *Model Law on International Commercial Arbitration*, is that it is optional; it would therefore only be of indicative value to judges and arbitrators.<sup>33</sup> That is why UNCITRAL envisages the adoption of a subsidiary protocol in addition to the New York Convention.

The Geneva Convention of April 21, 1961 is a regional agreement that binds mainly European States. This convention has a broader scope than the New York Convention and is even more favourable to arbitration.<sup>34</sup> Article 1.2(a) defines the arbitration agreement as:

*“either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter”*

This material regulation relating to the form of the arbitration agreement resembles that set out in the New York Convention, with the additional mention of communications by teleprinter. Although the reference is to out-of-date technology, the mention of the teleprinter certainly encourages an interpretation favourable to arbitration agreements concluded electronically. Moreover, according to expert opinion, it “should be interpreted as liberally as the New York Convention”.<sup>35</sup>

### **2.2.2 Requirements of National Laws**

National legal systems have adopted different regulations concerning the form of the arbitration agreement. Some systems take a consensual approach, which is not subject to any conditions regarding form. Conversely, other systems

<sup>32</sup> UNCITRAL, «Preparation of uniform provisions on written form for arbitration agreements», February 6, 2002, A/CN.9/WG.II/WP.118.

<sup>33</sup> Ibid, section 30.

<sup>34</sup> On this Convention see Fouchard P, Gaillard E and Goldman B, On Commercial International Arbitration, No. 274 ff.

<sup>35</sup> Fouchard P, Gaillard E and Goldman B, op.cit ., No. 622.



adopt a more formalized approach, requiring the stipulation of an agreement in writing. In these systems, an electronic document is acceptable to legislators and in case law (see below). In any case, the validity of the arbitration agreement is not subject to the conflict-of-laws method, but is assessed directly according to the material regulations available to the judge considering the matter.

### (a) Flexibility of the Consensual Approach

French law on international commercial arbitration provides a good illustration of the consensual approach to an arbitration agreement. The provisions of the new Civil Procedure Code on international arbitration<sup>36</sup> do not specify any requirement of form, or even of evidence. French case law has concluded that the existence and enforceability of the clause

*“are assessed according to the mandatory regulations of French law and of international public order, in accordance with the common will of the parties, without the need to refer to a State law”*<sup>37</sup>. (Emphasis added.)

This constitutes a material regulation under the French law on international arbitration, which means that the judge does not have to decide the law applicable to the arbitration agreement. The judge merely has to demonstrate the consent of the parties, which need not necessarily be expressed in writing. In these conditions, a click indicating acceptance of an electronic arbitration agreement constitutes sufficient expression of consent. It is not necessary to determine whether the electronic document should be considered a written document or not. This system is preferable to that which requires, on pain of invalidity, that the arbitration agreement be stipulated in writing.

### (b) Adaptation of Formalized Requirements

French law is less liberal with regard to domestic arbitration,<sup>38</sup> since it demands, on pain of invalidity, that the arbitral clause be stipulated in writing.<sup>39</sup> The United States *Federal Arbitration Act*, Article II also requires that the arbitration agreement be stipulated in writing:

*“an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”*.

<sup>36</sup> Book IV, chapter V of the New Civil Procedure Code

<sup>37</sup> Cass. Com, December 20, 1993, *Dalico*, Revue de l'arbitrage [Arbitration Journal] 1993, p. 116, note *Hélène Gaudemet-Tallon*; Civ., June 3, 1997, *Prodexport*, Revue de l'arbitrage [Arbitration Journal] 1998, p. 537, note *Xavier Boucobza*

<sup>38</sup> French arbitration law is a twin-track law that distinguishes between domestic and international arbitration. International arbitration is that which deals with international commerce (see Article 1492 of the New Civil Procedure Code, which defines international arbitration). In twin-track systems, arbitration would have to be designated as either domestic or international in order to determine the applicable regime.

<sup>39</sup> Article 1443 of the New Civil Procedure Code.

On the basis of these texts, the validity of electronic arbitration agreements is not clear, since the letter of the law does not explicitly mention electronic methods of communication, as is sometimes the case. In Switzerland, on the other hand, Article 178 of the *Federal Law on International Private Law* adopts wording that explicitly specifies the means of communication:

*“As for the form, the arbitration agreement is valid if it is made in writing, by telegram, telex, teleprinter or any other means of communication that can be proven by a written text.”*

In the absence of such a clear formulation, the legislator or judge has to adapt texts requiring the stipulation of the arbitration agreement in writing. The intervention of the legislator is the first means of adapting the law to new technologies. In France, an *Information Society Bill* will soon include electronic written evidence *ad validitatem*:

*“When a written document is required to confirm the validity of a legal act, it may be drawn up and preserved in electronic form as provided for in articles 1316-1 and 1316-4”.*<sup>40</sup>

The conditions of Article 1443 of the new Civil Procedure Code would then be fulfilled by an electronic document, making electronic arbitration agreements valid in domestic arbitration.

In the United States, the arbitration law adopted in each state should also be adapted following the revision of the model law on arbitration - the *Uniform Arbitration Act*. The revision of this model law, adopted on 28 August 2000,<sup>41</sup> should be the basis for United States state legislators. Article VI of the *Revised Uniform Arbitration Act* enshrines the validity of arbitration agreements, as long as they appear in a document. Article I(6) allows for documents in an electronic format when the information stored is accessible in an intelligible form:

*“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.*

The second means of adapting the law to new technology is for the judge to interpret legislative texts on arbitration. This is preferable because it saves going through a sometimes lengthy legislative process. Thus in the United States the federal judge, interpreting the text, can specify the conditions under

<sup>40</sup> See the commentary in the Information Society Bill by the Chamber of Commerce and Industry of Paris, 18 October 2001, available on the Internet at: <<http://www.ccip.fr>>.

<sup>41</sup> Revised Uniform Arbitration Act, 28 August 2000, available on the Internet at: <<http://www.law.gmu.edu/drc/UAA.2000.htm>>; Lurie, P-M, «Recent Revisions to the Uniform Arbitration Act in the United States», *Journal of International Arbitration*, April 2001, vol. 18, no. 2, p. 223.

which an electronic arbitration agreement constitutes a document under Article II of the *Federal Arbitration Act*. *Lieschke, Jackson & Simon vs. Realnetworks*,<sup>42</sup> concerned a dispute over the downloading of free software on the Internet. The users of the software accused the publisher of invasion of privacy and of allowing access to their personal data through a lack of security that made their electronic communications vulnerable. They therefore sought to obtain redress before the United States courts for the damage caused. The publisher of the software countered, pointing out the general conditions to which they had agreed before downloading the software. These conditions did indeed contain an arbitral clause that deprived the State courts of their competence to hear the dispute. The claimants, in order to avoid arbitration, contested the validity of the arbitral clause, arguing that it was not a clause stipulated “in writing” under the terms of the *Federal Arbitration Act*.

In a decision of 11 May 2000, the chief federal judge decided, however, that an arbitration agreement stipulated electronically did constitute an agreement “in writing” under Article II of the *Federal Arbitration Act*. On the one hand, in the absence of a definition of a document in federal arbitration law, the commonly accepted meaning of the term “in writing” has to be used, which does not exclude electronic messages. Even in 1925, a document was not necessarily confined to symbols inscribed on a physical medium. On the other hand, the licensing contract, communicated electronically when the software was downloaded, could easily be printed and automatically kept safe on the user's computer. It would therefore be filed and available at any time, just like a hard-copy contract. Some weeks after this decision, Congress adopted a Federal law concerning the validity of electronic documents: *Electronic Signatures in Global and National Commerce Act*.<sup>43</sup>

In conclusion, national legal systems generally favour the validity of the arbitration agreement concluded electronically, whether through a consensual or formalized approach. In the latter case, the legislative trend in favour of the electronic document and the authority of the judge suggest that the law should be adapted to electronic commerce.

### 2.2.3 *Link Between the New York Convention and More Favourable National Provisions*

A study of positive law has revealed that the New York Convention and national laws stipulate different levels of requirement regarding, in particular, the form of an arbitration agreement. French law on international commercial arbitration, for example, does not impose any condition of form on the arbitration

<sup>42</sup> *United States District Court, Northern District of Illinois, Eastern Division, 11 May 2000, Lieschke, Jackson & Simon vs. Realnetworks Inc., Yearbook, vol. XXV, 2000, p. 530 and the commentary on the decision, Cachard O, «La validité des conventions électroniques d'arbitrage en droit des Etats-Unis» [The validity of electronic arbitration agreements in United States law], Revue de l'arbitrage [Arbitration Journal], 2002, vol. 1., p. 193-200*

<sup>43</sup> *The E-Sign Act came into force in two stages: on 1 October 2000, for the majority of its provisions, and on 1 March for the provisions relating to electronic filing (15 USC 7001-7006). See in particular Article 101.*

agreement, whereas Article II of the New York Convention mentions an “agreement in writing”. Which provisions take precedence when a State, such as France, is a party to the New York Convention? The answer is to be found in Article VII of the Convention, which provides as follows:

*“The provisions of the present Convention (...) shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”*

This Article shows that the Convention, intended to favour the circulation of awards, only does so to a minimal degree. The judge should therefore give precedence to the more favourable national provisions. Can the requirement for a written agreement set down in Article II therefore be dispensed with because the national law only requires the judge to verify the existence of consent? As an UNCITRAL working group points out, a position must be taken on the scope of the regulations in Article II, in order to determine whether it can be superseded by a more favourable law using the mechanism of Article VII. Does Article II establish a maximum requirement of form that allows for dispensations, or rather a unified requirement of form that does not? <sup>44</sup> To date, the majority view does not seem to favour dismissing the requirements of Article II. <sup>45</sup>

## 2.3 Arbitration in Consumer Disputes

There is no uniform definition of consumer; each State and each international agreement has its own criteria. It is therefore necessary to confirm whether the criteria for applying the text in question are fulfilled. Generally, the consumer often seems to be a subject in law that merits particular protection by reason of his/ her supposed weakness. In essence, the category of “consumer” indeed signifies a natural person who contracts for his/her personal use. Of course, the Internet reduces the imbalance between consumers and businesses, for example by facilitating price comparisons using intelligent agents. <sup>46</sup> The need to confer an equal level of protection online and offline is, however, generally agreed. Arbitration may represent a threat to the consumer, especially if the costs of arbitration are high.

Will the arbitrator apply the mandatory provisions protecting the consumer? As a rule, these considerations are not an obstacle to the arbitrability of consumer disputes (see subsection 2.3.1 below). They do, however, have an impact on the validity of arbitral clauses and require specific precautions (see subsection 2.3.2 below).

<sup>44</sup> UNCITRAL, Preparation of uniform provisions on written form for arbitration agreements, *A/CN.9/WG.II/WP.118*.

<sup>45</sup> Fouchard P, Gaillard E and Goldman B, *On Commercial International Arbitration*, no. 271, on the grounds that Article II deals with the arbitration agreement itself, «separate from any proceedings concerning the recognition and enforcement of the decision»; and is sceptical about dismissing the requirements of Article II, *A/CN.9/WG.II/WP.118*.

<sup>46</sup> UNCTAD, *E-Commerce and Development Report 2001*, p. 110, *UNCTAD/STDE/ECB/1*.

### 2.3.1 Arbitrability of Consumer Disputes

For the arbitration agreement to be valid, it must relate to a matter that can be settled by arbitration. This concerns the arbitrability *ratione materiae* of consumer disputes. A quick review of comparative law shows that just because consumer protection regulations are applicable, that is not sufficient to render the dispute unarbitrable. In fact, the arbitrator may apply policing laws and ensure that principles of public order are observed.

Thus in *Hill v. Gateway 2000 Inc.*,<sup>47</sup> a federal court set aside the claim of inarbitrability of a consumer dispute. In the case in point, some consumers had purchased, through a remote sales contract, a computer that was unsatisfactory. The general conditions, contained in the package, stipulated that if the goods were not returned within 30 days, the consumers would be deemed to have accepted the contractual terms. These contractual terms contained an arbitration clause of the International Chamber of Commerce (ICC). The customers, who wished to block the arbitration clause, maintained that the applicability of a federal text, the RICO Act, rendered the dispute ineligible for arbitration. The decision to reject their application is in line with well-established case law. The protection of the consumer against the dangers of arbitration, in particular its high cost, must follow other courses than the systematic challenging of the validity of the clause. In another case involving *Gateway 2000* <sup>48</sup>, the judge decided that the dispute was arbitrable, but that the clause appointing the ICC placed an excessive burden on the consumer. He therefore ordered that the arbitration take place before another arbitral institution, where the procedure was less costly.

In French law, the arbitrability of consumer disputes is also admissible in international arbitration, when the arbitration “*calls into play the interests of international commerce.*” The Court of Paris recognized, in a case involving the automobile firm, Jaguar, that

“*the competence of the arbitrators is not ruled out purely because a mandatory regulation is applicable to the legal relationship in dispute, and because they have the power to apply principles arising from this regulation and to sanction their refusal to take it into consideration, under the supervision of the judge who set it aside.*” <sup>49</sup>

In this case, a dispute arose between a collector and a seller of restored prestige cars. Where domestic arbitration is concerned, however, the arbitrability of consumer disputes is more contested and requires a more detailed analysis.<sup>50</sup>

<sup>47</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7<sup>th</sup> Cir. 1997), particularly p. 1141.

<sup>48</sup> *Day Brower v. Gateway 2000 Inc.*, 246 A.2d 246 (NY App. 1998).

<sup>49</sup> *Paris, January 7, 1994*, *Revue de l'arbitrage* [Arbitration Journal], 1996, p. 72, note Charles Jarrosson; see the decision to reject the appeal against this decision, *Cass. 1<sup>st</sup> civ.*, 21 May 1997, *Méglio v. Sté V 2000*, *Revue critique de droit international privé* [Critical Review of International Private Law], 1997, p. 504, note V. Heuzé.

<sup>50</sup> On this question, see Loquin E, “*L'arbitrage des litiges du droit de la consommation*” [Arbitration of Consumer Law Disputes], in *Osman F. Vers un code européen de la consommation* [Towards a European Consumer Code], Brussels, Bruylant, 1998, p. 360.

### 2.3.2 *Validity of the Arbitral Clause*

The acceptance of the arbitrability of consumer disputes does not prejudice the validity of the clause attributing competence to the arbitrators. There are in fact two types of arbitration agreement, depending on when the clause was concluded. When the arbitral clause is concluded before the dispute arises, it covers any dispute that might occur. It leads the consumer to renounce, in advance, the guarantees offered by State courts. That explains why arbitral clauses are viewed with disfavour in some legal systems, because they imply a renunciation by the consumer of his/her own rights. This being the case, even if the matter is arbitrable, the arbitral clause cannot be invoked against the consumer. Conversely, if the arbitration agreement is concluded after the dispute has arisen, it gives the consumer the choice of going to arbitration in preference to going before the State courts. The disadvantage of this type of arbitration agreement is that either party may refuse to go to arbitration when a dispute arises.

Therefore, electronic commerce operators, to be certain of the efficacy of the arbitration agreements they stipulate, must give the consumer the choice of whether to go to arbitration, a choice that the consumer will make when the dispute arises. To offer this choice, there are two ways in which the agreement can be drafted, while demonstrating the commitment of the operator to submit to arbitration.

The first is for the operator to make a unilateral commitment to submit to arbitration. The experimental Cybertribunal<sup>51</sup> site offered this solution to electronic commerce operators who wanted to benefit from using its label. The commitment was drafted as follows:

*“[Name of business, organization, body], undertakes to submit to the process of mediation and arbitration of the Cybertribunal any dispute arising in the course of our commercial electronic activities with a client rather than refer the matter to a court of law. For further information on online mediation and arbitration, visit the Cybertribunal site at <http://www.cybertribunal.org>.”*

This is not however a very safe solution for the consumer, since it is not a contract between the two parties. The scope of the unilateral commitment is uncertain in civil law, especially when it is expressed in an ambiguous way.

The second, safer, technique, is that of the optional clause, whereby the business gives the consumer a choice between the courses available to him by law and by mediation or arbitration. Unlike the unilateral commitment, the option given to the consumer here has the force of a contractual stipulation linking the two co-contractors. This is the solution used in the United Kingdom by a site selling motor vehicles online.<sup>52</sup>

<sup>51</sup> Caprioli EA, “Arbitrage et médiation dans le commerce électronique (L’expérience du “Cybertribunal”)”, [Arbitration and Mediation in Electronic Commerce (The Experience of the “Cybertribunal”) Revue de l’arbitrage [Arbitration Journal], 1999, p. 226.

<sup>52</sup> Ford, available on the Internet at: <<http://www.fordjourney.com>>.

*“Any dispute you may have with Ford arising out of or in connection with this contract shall be resolved in one of two ways, either (i) it may be referred to arbitration under the Chartered Institute of Arbitrators, ‘The Rules of the Independent Dispute Resolution Service for Purchasers from Ford Journey’ (the ‘Rules’), which Rules can be accessed via the Chartered Institute of Arbitrators web site (www.arbitrators.org) or by phoning 0207 8374483. Any arbitration award shall be final and binding, save where the arbitration award is against you in which case you will be entitled to pursue your claim as set out at (ii). However, any dispute shall first have been referred to the Ford Journey office, or (ii) by proceedings, if you are a resident of the European Union (EU), in your home EU courts subject to your home EU laws, or if you are not a resident of the EU in the English courts subject to English Law.”*

The validity of these optional clauses is accepted<sup>53</sup> in French law and in English law, as long as the option is offered explicitly.

## 2.4 Case Study

Mr J. Montoya, director of a large accounting and audit practice in Bogota, concluded a multi-user licensing contract for a range of software on the Internet site of a publisher based in Seattle. The contract value was US\$ 6,000. The contractual process was conducted entirely through electronic channels on the publisher's website. The client specified his order using drop-down menus and by filling in electronic forms. He paid the licence fee by providing his payment card number. After installation, the downloaded software did not work satisfactorily on the computers in his practice. It worked slowly and frequently went wrong. Moreover, he discovered through the media that there was a security failing that made the electronic data he held on his clients vulnerable. He feared these data risked being disseminated and that he would lose customers. A number of clients had already expressed their concerns to him.

The software publisher does not offer any significant remedy and invokes an ICC arbitration clause against the client. Mr Montoya, fearing the high cost of arbitration, consults you on the possible inapplicability of the arbitral clause.

### Question 1

Mr Montoya claims not to have been aware of the clause, which was to be found within the general conditions; the conditions were not displayed automatically, either before he clicked to conclude the contract or before he provided his card number. All that appeared on the web page from which the order was sent was the following warning, positioned just above the “I accept” button:

*“This contract is subject to our general conditions of sale. For matters relating to applicable law, settlement of disputes and limitation of liability, please*

<sup>53</sup> For example, in French law, *Court of Appeal of Angers, September 25, 1972*, *Revue de l'arbitrage [Arbitration Journal]*, 1973, p. 164-170, note Rubellin-Devichy J.

*refer to the general conditions by clicking on this link. They can also be viewed on the site of our local distributor or sent by e-mail on request.”*

Do you think that the arbitral clause can be invoked against the purchaser, who did not ask to be sent the general conditions? If he had enquired about the general conditions, the publisher would not have failed to point out to him that a version of the conditions was installed automatically on his hard disk. Is the arbitrator competent to rule on his jurisdiction? What would be the outcome if the matter were referred to United States courts?

**Question 2**

Mr Montoya doubts the validity of the arbitral clause. Is there anything in the form of the clause that could support the view that it is invalid? In reality, is it invalid? Your client suddenly remembers that he had to send a confirmation e-mail before the software could be unlocked. He had to attach his electronic signature accompanied by a certificate to this e-mail, which contained a reference to the general conditions. Does that change your view?

N.B. In Colombia, a law dated 18 August 1999 establishes the electronic signature and arranges for electronic signature certificates to be issued by the certification authorities (*Law no. 527 of 1999 defining and regulating access to and use of data messages in electronic commerce and digital signatures; establishing the certification bodies; and making other provisions*).

**Question 3**

Attacks on personal data and computer systems are covered by mandatory provisions in Colombian and United States law. Some texts even provide for criminal sanctions in certain circumstances. Does this make the dispute unarbitrable? What will be the limits of the arbitrators' powers?





## 3. ELECTRONIC ARBITRATION PROCEDURE

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### 3.1 Introduction

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First and foremost, the Internet and information technology have a practical impact on dispute resolution procedures: documents are transmitted instantaneously to the arbitrators at a modest cost, and the parties avoid incurring travel costs. For the arbitrators themselves, electronic documents present significant advantages, particularly when the parties' submissions are large, because they can do a keyword search without having to review the entire file. Also, arbitrators are already using new technology widely. In addition to this daily use of information technology (IT) equipment, the Internet has had a profound impact on dispute resolution procedures. Although alternative dispute resolution traditionally relied on interviews and meetings between the litigants and the arbitrator or mediator, the Internet now encourages remote dispute resolution. Physical meetings have thus been replaced by electronic exchanges. This total or partial elimination of the physical meetings between the litigants and the third parties they have chosen to resolve their dispute is a feature of electronic procedures. By the same token, the use of the Internet and IT leads to the replacement of traditional documents and written evidence by electronic documents and written evidence. The electronic procedure can therefore be organized using a variety of models, involving the complete or partial elimination of hard-copy documents.

An electronic arbitration procedure, although having to be organized in a particular way because of the use of technology, is nonetheless still subject to the principles that traditionally govern any arbitration case. A study of comparative arbitration law shows a convergence of the general principles governing arbitration procedure in the various legal systems. There are two commonly accepted principles that are relevant in particular to electronic arbitration procedures. The principle of procedural autonomy allows the parties to organize the arbitral procedure. In general, when it is a case of an institutional arbitration, it is the arbitrator who organizes the procedure in accordance with the arbitration rules to which the parties have agreed. The principle of procedural autonomy therefore leaves it to the parties and the arbitral institutions to adapt the procedure to the electronic arena. Electronic cases are admissible when there is contractual freedom. Nevertheless, contractual freedom cannot undermine the mandatory regulations that govern the arbitration procedure. Among these mandatory regulations, those resulting from the *due process of law* are of particular relevance. The arbitration proceedings must always respect the impartiality of the tribunal, the equality of the parties and the principle of contradiction. An electronic procedure organized without due care could fail to recognize these principles. For example, unequal electronic access of the parties to the website of the institution could undermine the principle of equality or contradiction.

When the electronic procedure is organized in accordance with the principles of good justice, additional precautions still need to be taken in electronic commerce disputes to preserve the rights of the parties. The outcome of the arbitration depends on the supporting evidence produced by the parties. This evidence is what will determine the arbitrator's decision. On the Internet, the question of evidence raises specific questions because of the risk of fraud and alteration of data files. How can evidence of an electronic act be provided? What can the arbitrator do if the authenticity of a document is contested? In short, there is a risk that electronic commerce may encourage disputes over evidence to arise within the arbitral proceedings.

Subsection 3.1 describes the conduct of electronic proceedings before looking at the particular question of administration of electronic evidence in the subsequent subsection.

## **3.2 Conduct of Electronic Proceedings**

The various stages of the electronic proceedings can be organized by electronic means. However, it is important to make sure that the principles of good justice are not adversely affected by electronic exchanges.

### **3.2.1 Stages of Electronic Proceedings**

In this subsection, we look at the major stages of the proceedings in turn, from initial submission to deliberation and rendering of the award.

#### **(a) Initiation of Electronic Proceedings**

When a disagreement between parties that have stipulated an arbitration agreement cannot be resolved, it is up to the claimant to refer the matter to the arbitral tribunal. This referral can be drawn up and sent electronically. Secure electronic signature technology allows the arbitral tribunal to be certain that the referral e-mail is indeed sent by the person claiming to be the author. The arbitral institution then informs the respondent of the existence of the proceedings by e-mail. The referral by the claimant and the notification to the respondent can perfectly well be done by e-mail if the arbitration rules to which the litigants have signed up so provide. In the case of *ad hoc* arbitration, the claimant would have to notify the respondent that it is incumbent upon him/her to appoint an arbitrator. At this stage, the electronic proceedings are under way. The litigants are then able to exchange their conclusions and arguments in electronic written statements.

#### **(b) Electronic Request for Arbitration**

The Request for Arbitration sets out the claims of the parties and the questions at issue for the arbitral tribunal to resolve. It also defines the main rules that will govern the arbitration procedure. In principle, it should bear the signature of the arbitrators and the parties. It can be of particular use in electronic

procedures when the arbitration rules do not specifically deal with certain questions. The parties could use the Request for Arbitration to agree to exchange documents electronically<sup>54</sup> or even to decide on the seat of the electronic arbitration.<sup>55</sup>

### **(c) Production of Written Statements and Documents**

At this stage, the litigants must produce their written statements and documents, which they address to the arbitrator and to the adverse party in order to respect the principle of contradiction. In electronic commerce disputes arising out of an electronic contract, the parties are able to produce and exchange exclusively electronic documents in the form of files attached to e-mails. For example, Article 3(2) of the ICC Rules authorizes electronic communication with the Court and the Secretariat. However, physical documents may be necessary in support of an argument. For example, one party may produce a bailiff's affidavit. In many States, the law has not yet put in place procedures for rendering into electronic format authentic acts drawn up by ministerial officers. The litigant will therefore use the postal service.

### **(d) Absence of Electronic Hearings**

The organization of electronic hearings is technically possible, but it involves considerable technical resources, which are currently accessible only at a high cost. Some experimental projects have been undertaken in the United States by state courts, using specially prepared rooms. In the short and medium term, electronic arbitration will have to do without actual electronic hearings between absent persons if costs are to be kept under control.

Are arbitral proceedings possible without a hearing that brings together the parties and their legal representatives? They are possible; the United Kingdom has for a long time recognized “documents-only arbitration”, requiring no hearing. The absence of a hearing does, however, make the procedure more difficult to administer in three respects.

First of all, procedural hearings, which generally take place before State courts, often allow a simple verbal resolution of questions relating to the presentation of documents. In this situation, there is an exchange of electronic mails, ensuring that the principle of contradiction is respected.<sup>56</sup>

Secondly, the absence of a hearing also seems to compromise the hearing of witnesses' statements and expert opinions by the arbitral tribunal. Here again, the obstacle is not insurmountable. The use of testimonial evidence is not universal; it is mainly favoured in countries that have adopted common law, where there is direct examination and cross-examination of witnesses.

<sup>54</sup> Huet J and Valmachino S, “Réflexions sur l'arbitrage électronique dans le commerce international” [“Observations on electronic arbitration in international commerce”], *La Gazette du Palais*, January 9-11, 2000, p. 14.

<sup>55</sup> See below, subsection 4.1.2

<sup>56</sup> See below, subsection 3.1.2 (a).

Moreover, testimony can be received in writing, or in this case, by a written electronic message. Some Anglo-Saxon institutions that propose electronic arbitration nonetheless require hearings. These are physical hearings<sup>57</sup> that could be very costly in international arbitration cases.

Lastly, the absence of a “statement of defense” hearing is certainly the most unique aspect of electronic arbitration. Of course, “statement of defense” hearings are not a necessity, and it is acceptable for the parties to confine themselves to a written procedure.<sup>58</sup> However, such hearings do allow the parties and their legal representatives to order their arguments and to put forward the most salient points. An exclusively written procedure risks presenting the arbitrator with very long written statements and subsidiary arguments that could be difficult to prioritize.

### **(e) Online Deliberation**

At the end of the procedure, provision has to be made for electronic deliberation when the arbitral tribunal is composed of arbitrators based in different States. Modern texts on arbitration law do not preclude electronic deliberation, since they do not stipulate the form of the deliberation.<sup>59</sup> Arbitral practice already allows for deliberation by telephone, fax and even videoconference.

### **(f) Notification and Filing of Award**

An electronic award raises several issues. The question of whether an electronic document satisfies the requirements of form laid down by the law and by international agreements, is discussed later in subsection 4.2. Here we focus on the arbitration procedure itself. In this context, it is necessary to determine the obligations of the arbitral institution. Awards, such as court judgements, must be notified to the parties. This could be done by publishing the award on the website of the arbitral institution, on condition that this does not affect the confidentiality of the arbitration. The rules of the Cybertribunal and of the World Intellectual Property Organization (WIPO) provide for the publication of the award on the website of the case at hand within 60 days of its delivery. The site of the case at hand must only be accessible to the parties to the dispute, so as to safeguard the confidentiality of the award.

Placing the award online in this way is certainly not sufficient to satisfy the demands of arbitration laws that require the text of the award to be notified or for the award to be sent to the parties.<sup>60</sup> It is certainly more prudent, in addition to placing the award online, to send a secure e-mail with acknowledgement of receipt, or even to send a hard-copy version of the award by registered mail.

<sup>57</sup> <<http://www.webdispute.com>>.

<sup>58</sup> *Paris June 21, 1990*, *Revue de l'arbitrage [Arbitration Journal]*, 1991, p. 96, note J-L Delvolvé, regarding ICC arbitration.

<sup>59</sup> *Fouchard P, Gaillard E and Goldman B*, *On International Commercial Arbitration*, No 1372, cite *French law and Italian law*, which explicitly allow for deliberation by videotelephony.

<sup>60</sup> *Huet J and Valmachino S*, “*Réflexions sur l'arbitrage électronique dans le commerce international*” [*Observations on Electronic Arbitration in International Commerce*], *Gazette du Palais*, January 9-11, 2000, p. 6 ff., quoting Article 31 (4) of the UNCITRAL Model Law of June 21, 1985.

A hard-copy version of the award is also necessary to enable the arbitral institutions to keep and archive awards. The constant evolution of technical standards in the area of computer archiving platforms is a threat to this activity in the long term. In these circumstances, such a well-known arbitral institution as the ICC has chosen to continue to archive awards in hard copy, even when arbitration is electronic.<sup>61</sup>

### **3.2.2 Principles Governing Electronic Proceedings**

Electronic arbitral proceedings are subject to the principles of good justice that govern any arbitral proceedings. However, electronic participation of the parties in the procedure and the rapid circulation of information require particular care to ensure that two well-established principles are not undermined. The *principle of contradiction* may not be observed if the use of computer resources is unequal. And the speed of electronic circulation of the data in the dispute *threatens the confidentiality of the arbitration*. The arbitral institution and the parties must therefore ensure that these principles are respected.

#### **(a) Principle of Contradiction**

The principle of contradiction is defined differently in different national systems.<sup>62</sup> It covers what common law professionals refer to as *due process of law*. The parties must be in a position to present their arguments on equal terms. Electronic arbitration threatens this equal treatment of the parties at various stages of the proceedings.

Respect for the principle of contradiction implies that the parties have equal access to documents. Electronic documents sent by one of the parties to the arbitrator should therefore be sent to the other party, either directly or via the arbitral institution.

Secondly, written statements must be exchanged within a strict framework so as to respect the equality of the parties. Traditionally, the parties present their statements of reply (and counterclaim) to the arguments of the adverse party. There is therefore a real debate between the parties, assisted by their legal representatives. However electronic cases are limited to a short period, and sometimes only allow for a single exchange of written statements. When one party fails to recognize the arbitration rules and submits a reply when this should not have been done, the arbitral tribunal must disregard the arguments presented in this reply. If these arguments are not ignored, he/she would be favouring one party.

There must also be a ban on exchanges *ex parte* (*caucuses*) between a litigant and the arbitrator. These are a feature of mediation and conciliation, but they

<sup>61</sup> Gélinas PA, "Les activités arbitrales en ligne de l'ICC" [ICC Online Arbitral Activities], *Colloque: Justice en ligne* [Online Justice Colloquium], Paris, September 14, 2001, available on the Internet at: <<http://www.justice-en-ligne.org>>

<sup>62</sup> Fouchard P, Gaillard G and Goldman B, *On International Commercial Arbitration*, no. 1638

are not allowed in cases of arbitration. It is therefore not desirable to substitute a sequence of e-mail exchanges for the classic arbitration hearings. At the least, a copy of the e-mails exchanged between the arbitrator and one of the parties should be sent to the other party. Technically, a better solution is for the arbitrator and the parties to meet in a “chat room”. This makes the exchanges simultaneous, rather than successive, thus respecting the principle of contradiction.

Organizing videoconferences<sup>63</sup> raises other problems. Exchanges are of course simultaneous, so the principle of contradiction appears to be respected. However, the parties must have exactly the same technical capabilities and the same quality of connection. If the quality of communications is poorer for one of the parties, that party is disadvantaged in the presentation of its arguments during the electronic hearing. Some purely factual details, such as the focusing of the web camera (webcam), can also affect the arbitrator's perception of the arguments of one or other of the parties. If the Webcam focuses on the face of one of the legal representatives, it can highlight in an exaggerated way the body language of a litigant and cast doubt on the sincerity of his/her arguments. Some United States observers have expressed concern that the due process of law is called into question whenever the conditions of camera positioning and transmission are not exactly identical. These conditions can only be identical if the statements of defense and the statements of claim are made from identical electronic hearing rooms. It is hard to imagine in the short term that each party will use its own video equipment to participate in electronic hearings. At the least, a standard protocol needs to be adopted governing electronic hearings in the finest detail.

### **(b) Confidentiality in Electronic Arbitration**

The principle of confidentiality in the arbitration procedure is generally considered to be an aspect of international arbitration. Confidentiality is presented as a decisive factor in opting for this alternative method of dispute resolution in preference to State justice. In certain States, such as the United Kingdom and France, case law explicitly enshrines the confidential character of the arbitration procedure.<sup>64</sup> When this is not the case,<sup>65</sup> the obligation of confidentiality is based on other factors, such as acceptance by the parties of arbitration rules that ensure confidentiality or the express agreement of the parties to ensure confidentiality of the arbitration.

The reach of the obligation of confidentiality is fairly broad, covering both the parties and the arbitral institution. First and foremost, it concerns all the

<sup>63</sup> Several online arbitral institutions offer videoconferencing facilities, e.g. MARS, Novaforum, Webdispute Resolution

<sup>64</sup> In the United Kingdom, enshrining the requirement of confidentiality, *Ali Shipping Corporation v. Shipyard Trogir*, Court of Appeal, Civil Division, 19 December 1997, [1998], All England Law Report 2, p. 136; in France, Court of Appeal of Paris, 18 February 1986, *Revue de l'arbitrage* [Arbitration Journal], 1986, p. 583, note Georges Flécheux

<sup>65</sup> For example, Swedish law, *Supreme Court of Sweden*, 27 October 2000, *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, Mealey's International Arbitration Report, vol. 15, December 2000, p. A 1.

documents and information submitted by the parties during the electronic procedure. These must not in any circumstances be disclosed to third parties. When the award is made by an arbitral tribunal, the panel's deliberations must remain confidential, and must not be disclosed to either the parties<sup>66</sup> or the secretariat of the arbitral institution. Finally, the obligation of confidentiality covers the award made by the arbitral tribunal; it may only be made public with the express consent of the parties.<sup>67</sup> At each of these stages of the arbitral proceedings, electronic communications make the confidentiality less robust, since electronic data are more vulnerable than paper records. Moreover, with the Internet, a confidential piece of information can be disseminated rapidly. The least infringement of confidentiality can have serious consequences for the litigants.

It is therefore incumbent on the online arbitral institutions and the parties to put in place security processes ensuring that the confidentiality of the arbitral proceedings is protected from the dissemination of information caused by inexpert or fraudulent use of information technology.

First of all, e-mails and exchanges of data on the web should be protected, particularly when filling out forms on websites. A recent study reveals that online arbitral institutions rarely apply security to e-mails.<sup>68</sup> They only ensure the security of online forms using the SSL protocol.<sup>69</sup> Yet securing e-mails by use of encoding and electronic signature techniques seems vital, especially when written statements and attachments are exchanged.

Secondly, every institution needs to be equipped with adequate IT resources to protect its databases from external attack. In practice, it is hard to assess what firewalls the online arbitral institutions have.

Finally, it is difficult to assess whether electronic arbitral institutions are respecting the confidentiality of awards, because there is still only a small amount of arbitral case law. To date there has been no publication of online arbitral awards, although some institutions are planning publication online, either with<sup>70</sup> or without<sup>71</sup> the anonymity of the parties.

The ICC is putting in place a more systematic approach to the security of electronic proceedings with an electronic management system for the arbitral procedure, entitled "Netcase".<sup>72</sup> A secure intranet will be created for each case, open only to the parties and the members of the arbitral institution. Each individual, depending on his/her status in the procedure, will have a different

<sup>66</sup> Fouchard P, Gaillard E and Goldman B, *On International Commercial Arbitration*, no. 1374

<sup>67</sup> Art. 32 (5) of the UNCITRAL Arbitration Rules

<sup>68</sup> Schultz, T et al., *Online Dispute Resolution: The State of the Art and the Issues*, University of Geneva, accessed on the Internet, December 2001, at: <<http://www.online-adr.org>>, p. 49

<sup>69</sup> *The Secure Sockets Layer protocol seeks to assure the privacy of communications over the Internet by designing the communications in a way that prevents eavesdropping, tampering or message forgery.*

<sup>70</sup> Online Dispute Resolution

<sup>71</sup> Virtual Magistrate

<sup>72</sup> Gélinas PA, "Les activités arbitrales en ligne de l'ICC" [ICC Online Arbitration Activities], in *Justice en Ligne*, Paris, 14 September 2001; available on the Internet at: <<http://www.justice-en-ligne.org>>



level of access to certain documents. For example, the ICC secretariat will not have access to the deliberations when they are carried out online, thus preserving their secrecy.

An overall view therefore needs to be taken of the security of communications and of access to the data in the case. A badly designed computer system or negligent conduct by the parties could lead to the imposition of damages and interest. On contractual grounds, the arbitral institution or the adverse party could be accused of failing to observe the obligation of confidentiality. On criminal grounds, one or other could be accused of an offence if it had negligently used computer resources.<sup>73</sup>

### 3.3 Administration of Electronic Evidence

*“Very often, it is as if rights did not exist, because they cannot be proven. An old saying expresses it well: not to be is the same thing as not to be proven.”<sup>74</sup>*

This saying, quoted by Dean Carbonnier, underlines the traditional importance of evidence in support of arguments in legal proceedings. The unique aspect of electronic commerce operations is that evidence of the legal acts or facts often can only be reported by electronic means. Thus the *instrumentum* of an electronic contract will take the form of a computer file. Likewise, the proof of an act of unfair competition committed on the Internet will be reported by the production of a computer file, for example a screenshot of the competitor website. This being the case, electronic commerce operators must put in place a real “probatory strategy” to provide themselves, as operations progress, with electronic evidence of the legal acts and facts on which their rights are based. It is all the more important to have such a probatory strategy because very often the only evidence that they will be able to produce will be electronic. The gathering of electronic evidence is useful in that such evidence is admissible before the arbitral tribunal and carries probative force. It then becomes necessary to analyse how the arbitrator administers the electronic evidence. Under what conditions is electronic evidence admissible? What is its probative force? These questions are addressed in the following subsections.

#### 3.3.1 Gathering of Electronic Evidence

In electronic commerce, operations are partially or totally performed online. When the operations are partially conducted electronically, the parties have physical elements at their disposal that may provide evidence of one phase of the contract only (formation or execution). If the contract for access to a database has not been concluded electronically, the co-contractors each have

<sup>73</sup> It would also be necessary to establish that disclosure of the information following the offense caused damage. See Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, No. 1412, p. 774,

<sup>74</sup> Jean Carbonnier, Droit civil, introduction [Civil Law, Introduction], 26th ed, Paris: 1999, PUF, No. 174

an original version of the contract. If, on the other hand, the sales contract has been concluded electronically and provides for physical delivery of the goods, the parties then have material evidence of the correct or incorrect execution of the contract. The seller can point to the delivery note, while the buyer can produce the item if it is defective. Either way, the parties will have to provide electronic evidence of the purely electronic phase of the contract. When the operations are performed entirely online, they consist only of exchanges of data messages between the co-contractors. The contract is initially established electronically, without a hard-copy document being sent, and then executed electronically, without physical delivery or movement of people. This is the case with contracts giving access to databases or for downloading software. In these scenarios, the “trails” of the formation and execution of the contract are found almost exclusively on the computers of the client and the supplier. The electronic evidence thus relates to the whole contractual process.

In practice, electronic documents are saved automatically on the company's computers and servers, and sometimes even on the client's.<sup>75</sup> The computer equipment effectively keeps track of the data flow (messages sent or received). The fact of automatically saving documents is, however, not enough to be considered preconstitution of evidence. It is necessary for the co-contractors to save the trail of their operations in the contractual process in an intelligible and lasting manner. They must, for example, take additional steps to protect themselves against the accidental deletion of data.

A basic means of saving order forms and contractual conditions seems to be within the reach of Internet users in the B2C arena. Internet users can simply print out the various screens that they encounter in the contractual process and thereby keep a timed and dated paper trail of the conditions that have been communicated to them. If they have a better knowledge of computing, they can take screenshots and keep the web pages stored in their computer memory. New versions of a globally popular navigation software made it simple to take screenshots and to file dated web pages in an “album”. Internet users wishing to protect themselves against accidental deletion of these contractual data will save them on a reliable external medium, for example by burning them to a compact disk.

For businesses, the gathering of evidence can take much more sophisticated forms. A computer systems expert can collate a large amount of data, without the client even being aware of it. For example, the administrator of a B2B electronic marketplace will certainly be able to produce the login data of the members. He/she can easily establish that a particular member logged in on a given day, that the member used the personal password for identification purposes and that by his/her conduct failed to observe the conditions of use of

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<sup>75</sup> United States District Court, Northern District of Illinois, Eastern Division, May 11, 2000, *Lieschke, Jackson & Simon v. Realnetworks Inc where the general conditions of use of the software were downloaded automatically onto the hard disk of the user at the same time as the software*. See Cachard O, “La validité des conventions électroniques d’arbitrage en droit des Etats-Unis” [*Validity of Electronic Arbitration Agreements in US Law*], *Revue de l’arbitrage* [Arbitration Journal], 2002, vol. 1., pp. 193-200.

the marketplace, i.e. sent spam or distributed false information to other subscribers. Similarly, the operator of an electronic commerce B2C site can produce the login data of a client, who did indeed click on the “OK” button, indicating that he/she was aware of the contractual conditions and accepted them.

Nevertheless, in some legal systems, case law sometimes limits self-constituted evidence. In France, for example, the Court of Cassation recalls the principle that “No-one can constitute evidence for himself.”<sup>76</sup> In other words, when the judge bases a decision on a single piece of evidence, this evidence must not have come from one of the parties. The scope of this oft-invoked principle<sup>77</sup> must not be overstated in cases involving IT. Case law consistently allows suppliers of water or electricity to establish the proof of the amount they are owed by producing readings from counters that they themselves installed.<sup>78</sup> Electronic commerce professionals who are expert in IT systems could therefore exploit the data they have collected in order to prove that they have properly carried out their obligations.

### **3.3.2 *Electronic Evidence Before an Arbitral Tribunal***

The arbitrator's freedom to organize the procedure allows him/her to ensure the admissibility and probative force of electronic documents. Whether applying a national law or the UNCITRAL uniform rules, the arbitrator will assess the trustworthiness of such documents using convergent criteria. The privileged position of Internet intermediaries who store login information raises the problem of communication of documents by the adverse party and by third parties.

#### **(a) Freedom of the Arbitrator in the Organization of Procedure**

When the parties have not chosen the law applicable to the procedure, the arbitrator has considerable freedom in the administration of evidence. In this situation, the arbitrator may choose as appropriate to abide by a State law or a soft law text. In French law on international arbitration, for example, the arbitrator may determine the State law(s) that will govern the procedure. He/she may refer to arbitration rules or even resolve the procedural questions directly by taking decisions on a case-by-case basis.<sup>79</sup> Several systems share this liberal approach, leaving it to the arbitrator to organize the instruction

<sup>76</sup> *Civ. 3<sup>rd</sup>. November 18, 1997, Contrats, concurrence, consommation [Contracts, Competition, Consumption], 1998, n° 21, note Laurent Leveneur. The decision states that a debtor cannot produce an entry in his/her purchase ledger as evidence of payment of an invoice that he/she claims to have made. Cass. Civ. 1<sup>st</sup>, June 23, 1998, Bull. I, n° 220, RTD civ., 1999, p. 402, obs. Jacques Mestre.*

<sup>77</sup> *See the publications of the Demonstration, Evidence and New Technologies Committee of the Paris bar, and the report by Cachard O, “Le barreau et l’émergence des technologies nouvelles. Compte-rendu” [The Bar and the Emergence of New Technologies. Report], Droit de l’informatique et des télécoms [Computer and Telecoms Law Review], 1998/3, esp. pp. 124-125*

<sup>78</sup> *Cass. Civ. 1<sup>st</sup>, March 28, 1995, Dalloz, 1995, jur., p. 517, note Jérôme Huet*

<sup>79</sup> *Article 1494 of the new Civil Procedure Code, para. 2: “If the agreement says nothing on the subject, the arbitrator shall decide on the procedure to the extent necessary, either directly or by reference to a law or set of arbitration rules”. In On International Commercial Arbitration, No 1203 Fouchard, Gaillard and Goldman express approval of the liberal nature of the regulations.*

and administration of evidence. The arbitrator decides on the admissibility and probative force of the documents submitted. Thus Articles 24 and 25 of the *UNCITRAL Arbitration Rules* confer on the arbitrator considerable latitude in the administration of evidence and the organization of hearings. Article 25.6 in particular, provides as follows:

*“The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”*

The *UNCITRAL Rules* have inspired national laws such as the Tunisian Arbitration Code, Article 64.2 of which states:

*“The powers conferred on the arbitral tribunal include the power to judge the admissibility, relevance, efficacy, materiality and weight of all evidence produced.”*

This freedom allows the arbitrator to adapt to new forms of evidence that are submitted by the parties. He/she may therefore declare admissible the electronic documents produced by the parties. That raises far fewer difficulties, because, in principle, all forms of evidence are admissible before the arbitrator.<sup>80</sup>

### **(b) The Arbitrator and Electronic Documents**

The most serious difficulties relate to the probative force of electronic documents. The risk of fraud that particularly affects data messages is often used as an argument for granting probative force only to electronic documents that are perfectly trustworthy. Such a strict approach cannot be justified, because the law of proof is not based on absolute certainty. The only requirement is to convince the arbitrator on the grounds of reasonable probability. In any case, as mentioned earlier, fraud exists with hard-copy documents as well as electronic ones. The arbitrators should therefore not oppose electronic documents as a matter of principle. The assessment of admissibility and probative force differs according to whether the parties have or have not chosen the law applicable to the procedure.

When the parties have chosen the law applicable to the arbitration procedure, the arbitrator must apply the provisions of the law of proof in order to establish the existence of a legal act. For example, if the parties have submitted the arbitration procedure to French law, the arbitrator must assess the admissibility of the electronic documents according to the criteria set out in Article 1316-1 of the Civil Code<sup>81</sup> relating to civil disputes with a value in excess of 800

<sup>80</sup> Perrot R, “L’administration de la preuve en matière d’arbitrage (Le droit continental de la preuve)” [Administration of evidence in arbitration cases (Continental Law of Proof)], *Revue de l’arbitrage* [Arbitration Journal], 1974, p. 163

<sup>81</sup> Article 1316-1 of the Civil Code: “Written statements in electronic form shall be admitted as evidence in the same way as written statements in hard copy, as long as the person from whom they emanate can be duly identified and they can be kept in conditions such that their integrity can be guaranteed.”

euro. Since the reform of the law of proof, “*written evidence on an electronic medium has the same probative force as written evidence on a hard-copy medium.*”<sup>82</sup> A private agreement concluded by electronic means will, however, have to bear a trustworthy electronic signature supplied by the parties. In French law, an electronic signature is deemed to be trustworthy when it fulfils the conditions established by a decree, largely based on the *Directive on Electronic Signatures*. The arbitrator will therefore have to verify that the electronic signature is accompanied by a certificate issued by an approved certification authority.

When the parties do not submit the arbitration procedure to a particular law, how can the arbitrator decide on the probative force of an electronic document? How can he/she resolve disputes over probative force between two electronic documents? The emergence of a transnational law on electronic documents relieves the arbitrator of the need to resolve these difficulties using a particular national law. The arbitrator can base a decision both on the *UNCITRAL Model Law on Electronic Commerce* and on the *UNCITRAL Model Law on Electronic Signatures*.

Several national laws have in fact incorporated these UNCITRAL texts to a large degree. Article 5 of the *Model Law on Electronic Commerce* establishes the *principle of non-discrimination* between hard-copy and electronic documents. The arbitrator could thus base a decision on this Article, and those that follow,<sup>83</sup> to declare admissible the electronic documents produced by the parties.

*The Model Law on Electronic Signatures* also provides the arbitrator with the criteria that allow an assessment of the trustworthiness of the electronic signatures attached to the electronic documents.<sup>84</sup> This law is implicitly based on the model of asymmetric key encryption. The electronic signature consists of two keys (one public, one private) that the user applies to the document to be signed. It is the responsibility of a third party - the certification authority - to confirm that this pair of keys is indeed allocated to the person claiming to own them. The trustworthiness of the electronic signature can be confirmed by the existence of a link between the signatory and the pair of keys, and it can be assessed using standard criteria that appear in the *Community Directive on Electronic Signatures* and in various national laws. The arbitrator will find in Article 10 of the *Model Law on Electronic Signatures* a non-exhaustive list of criteria for assessing the trustworthiness of electronic signature certificates, including, in particular, the trustworthiness of hardware and software, or procedures for processing certificates.

The greatest difficulties arise when one party contests the authenticity of the documents produced by the other, alleging fraud in the electronic document.

<sup>82</sup> Article 1316-3 of the Civil Code

<sup>83</sup> Particularly Article 5 “Legal Recognition of Data Messages”, Article 6 “Writing”, Article 7 “Signature”, Article 8 “Original”

<sup>84</sup> *On the certification of electronic signatures and the international effect of signatures*, Cachard O, La régulation internationale du marché électronique [International Regulation of the Electronic Market], no. 512 ff., p. 311

In principle, it is up to the arbitrators to verify the identity of the writer when the authenticity of a document is contested.<sup>85</sup> Where electronic evidence is concerned, the electronic verification of authenticity brings into play competences and technology that are only available to qualified experts.

In practice, it is sufficient for the arbitrator to confirm that an electronic signature certificate has been issued by a certification authority inspected and approved in the state in which it is established. The electronic certificate, issued by a recognized certification authority, constitutes a form of expert evidence that will often satisfy the arbitrator. However, there has to be a facility for proving when the electronic signature certificate issued by the certification authority is a forgery. The party contesting authenticity should be able to produce an expert's report written by an IT expert. The arbitrator may also take the initiative and order an expert opinion, although he/she is not bound to appoint an expert, even when the parties request this.<sup>86</sup>

### (c) Disclosure of Login Data

Information and data messages pass through the servers and computers of the parties and of various Internet intermediaries. Useful information is therefore archived for varying lengths of time on the computers of the suppliers of hosting services, on the servers of the access providers or even on the machines of the administrator of electronic market places. These login data, held by the adverse party or by a third party, could constitute evidence in support of an allegation. Thus, it would be possible for example to check that a client did indeed log on to the offerer's website and that he/she did indeed view the general conditions. It would also be possible to establish that the offerer did indeed make an offer at a given price in a discussion forum and that the client's acceptance was sufficient to form a contract. Will the arbitrator be able to obtain these data held by the adverse party or by third parties or be able to order their disclosure?

Arbitration rules and national laws generally allow the arbitrator to order the adverse party to disclose the exhibits in its possession.<sup>87-88</sup> This injunctive power is however restricted in two ways. First, the arbitrator does not have any power of imperium, in that he/she cannot constrain a recalcitrant party to disclose documents. The arbitrator can however draw conclusions from this refusal to disclose the documents, to the detriment of the recalcitrant party. Second, the injunction to disclose the documents must be well defined. There is within the arbitration profession a consensus on exactly which documents

<sup>85</sup> Perrot R, "L'administration de la preuve en matière d'arbitrage (*Le droit continental de la preuve*)" [Administration of evidence in arbitration cases (Continental Law of Proof)], *Revue de l'arbitrage* [Arbitration Journal], 1974, p. 164

<sup>86</sup> On these questions, see Fouchard P, Gaillard E and Goldman B, *On International Commercial Arbitration*, 1290 ff., p. 703

<sup>87</sup> Article 20 (5) of the ICC Arbitration Rules (1998); Article 24(3) of the UNCITRAL Arbitration Rules; Article 19(3) of the International Arbitration Rules of the American Arbitration Association.

<sup>88</sup> In France, article 1460 of the new Civil Procedure Code «If a party holds a piece of evidence, the arbitrator may also order him to produce it»; in the United Kingdom, see Articles 34, 43 and 48 of the English Arbitration Act of 1996.

are to be disclosed, in order to avoid “*fishing expeditions*”.<sup>89</sup> Within these limits, the arbitral tribunal may order the adverse party to produce the exhibits deemed to be relevant; and may draw conclusions from these exhibits or from the refusal to produce them. Similarly, the arbitrator could order a party to provide access to clearly identified computer files. An arbitrator could for example ask to view the report of logins to a web page on a given day. Of course, this assumes that the party receiving the injunction to disclose has archived and kept the relevant data. Systematic archiving is expensive because it takes up disk space. The data are often deleted automatically after a certain period of time, in which case the arbitrator would not be able to draw any conclusions.

In certain States, the law requires the preservation of login data by hosting companies and access providers.<sup>90</sup> In principle, access to these data is open to the judge and to the authorities under their powers of criminal investigation. The operators are obliged to delete technical data after a fairly short period and they are forbidden to use them for any purpose other than those provided for in law. The effects of an injunction made by an arbitrator are therefore even more limited than when the data are archived by the parties. The arbitral tribunal may not draw conclusions from the refusal of the third party to disclose the technical login data.

### 3.4 Case Study

An access contract is concluded between a paint manufacturer based in the United Kingdom, *Fine Colors Ltd*, and the operator of a database based in Germany, *Chemcolorbase AG*, which collects and offers various chemical formulae and technical data sheets on the manufacture of colours (e.g. chemical interactions between components and colour charts). The legal representatives of *Chemcolorbase AG* also give personal advice to resolve certain issues. A dispute arises because the client claims that the database operator is not respecting his contractual commitments. On the one hand, access is often impossible for technical reasons that have nothing to do with the client. On the other, contrary to what is stated in the general conditions of use of the database, an additional payment is demanded for downloading the method of manufacturing complex colours. *Chemcolorbase AG* maintains that the general claim of faulty access is groundless. Moreover, the client, *Fine Colors Ltd*, is said to have accepted the additional payment for access to the complex colours by virtue of an electronic endorsement bearing an electronic signature.

When the contract was formed, the parties accepted an arbitral clause giving competence to a body organizing online arbitration, the *Electronic Court of Arbitration*. The paint manufacturer, *Fine Colors Ltd*, consults you regarding the arbitral procedure and wishes to obtain your advice on what probatory course to follow in the electronic proceedings.

<sup>89</sup> Webster TH, “*Obtaining Documents from Adverse Parties in International Arbitration*”, *Arbitration International*, vol. 17, n° 1, p. 41 ff.

<sup>90</sup> See in France, Article 29 of Law no. 2001-1062 of 15 November 2001 on day-to-day security, which provides for the preservation of login data “for purposes of research, confirmation and prosecution of criminal offences”.

**Question 1**

In support of the allegation of denied access to the database, the client has a number of pieces of evidence, but is not sure that they are admissible. He has taken several dated and timed screenshots of the database home page that shows the following message:

*“Access denied. Please check your Id. number and your connection.”*

The client has also kept the e-mails sent to the customer service department of the database as well as the replies from his Internet access provider, assuring him that his connection was fully operational.

- (i) In your view, will the electronic documents held by the client be admitted as evidence by the arbitral tribunal? (The parties have not chosen the law applicable to the arbitration procedure, and the arbitration rules have nothing to say on this point).
- (ii) Your client thinks that the respondent's servers (the online database) still have a record of his many fruitless attempts to log in. What might one suggest to the arbitrator?
- (iii) Your client also thinks that his Internet access provider still has connection data that could convince the arbitrator of his good faith and of the hours wasted trying to connect to *Chemcolorbase AG's* server. Assess the chances of obtaining these data and justify your answer.

**Question 2**

Your client strongly refutes the allegations of the adverse party on the content of the database access contract. He disputes having agreed to an endorsement imposing an additional payment for accessing a technical data sheet in the database. According to him, in accordance with the general conditions (of which he has kept an electronic copy), the annual fee gave access to all files in the database. However, he is concerned that the adverse party will produce an electronic document bearing his signature accompanied by the certificate of a certification authority.

- (i) He asks you whether the arbitrator could accord probative force to this endorsement. What texts might the arbitrator use to decide on the probative force of the endorsement?
- (ii) Can the claimant dispute the electronic endorsement, which he denies ever having signed?
- (iii) What supporting evidence would he have to produce to convince the arbitrator? Is the fact that the electronic signature certificate issued by the certification authority is no longer valid (date expired) of any use?

**Question 3**

Your client is concerned over the conduct of the arbitral procedure. He is particularly concerned about the electronic exchanges with the arbitrators.

- (i) In accordance with the arbitration rules that restrict the exchanges to one written statement and one reply, your client has sent the



arbitrator a written statement setting out his arguments and a statement of reply to the adverse party's arguments. He wants, however, to respond to the adverse party's reply (*reply to counter-claim*), but the arbitrator refuses to acknowledge this reply to counter-claim and states that he has destroyed it. Has the arbitrator violated the principle of contradiction by refusing to acknowledge the arguments of the claimant in his reply to counterclaim? Should the arbitrator accept a communication *ex parte*?

- (ii) *Fine Colors Ltd* wants to know whether it must disclose its documents using secure communication means, or whether it can simply attach a file to a non-secure e-mail. *Chemcolorbase AG* insists on the confidentiality of the arbitration, both in terms of its existence and its outcome. It is true that the arbitration rules provide for absolute confidentiality of the arbitration, but it does not specify any particular method for disclosure of documents. Is *Fine Colors Ltd* exposed to legal action if it discloses the existence of the arbitration and the facts of the dispute in a discussion forum? Does it run the risk of such action if it simply sends the documents by a non-secure e-mail and they then accidentally become known to third parties?

## 4. EFFICACY OF ELECTRONIC ARBITRATION

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The outcome of an online dispute resolution procedure varies according to the task given to the online dispute resolution body. As we have seen, co-contractors who participate in mediation or conciliation must negotiate in good faith, but they are not bound to come to an agreement. They may abandon the process without going through multiple procedures. If successful, electronic conciliation or mediation is concluded by a settlement agreement confirming the reciprocal concessions made by the litigants. The main unique feature of this contract is that it will often be an electronic contract. In practice, the parties execute the settlement agreement spontaneously. The outcome of online mediation or conciliation is therefore in the hands of the parties, before and after the final conclusion of the settlement agreement.

By contrast, arbitration raises more issues because it is a binding procedure that ends in the rendering of an award that has the authority of *res judicata*. Parties that have accepted the arbitral clause may not end the procedure unilaterally. That being the case, a recalcitrant party may be tempted to use a number of delaying tactics and incidents during the proceedings and after the award has been made. In these circumstances, there must be a concern over the efficacy of electronic arbitration, particularly when the procedure does not manage to appease the parties. The electronic nature of the procedure appears to threaten the efficacy of the arbitration in two ways.

Firstly, electronic arbitration appears not to lend itself to one particular location. Does the electronic character of the case affect the implementation of rules that are based at the location of the seat of arbitration?

Secondly, the spontaneous execution of the award by the losing party is not automatic. Very often, the award has to be ratified in the State where the assets of the losing party are located. What one then sees in international arbitration is the development of a post-arbitral dispute; rather than execute the award, the losing party increasingly often attacks it. Is an award rendered by electronic means as effective as an award rendered in hard copy? Is it a true award, which the State judge will be able to ratify?

### 4.1 Seat of Electronic Arbitration

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It is difficult to centralize the electronic arbitration procedure in a single location, since it is a procedure that brings together litigants and arbitrators who interact from different places. The various procedural acts are performed by means of electronic communications and exchanges of data. This obvious multiple location of the arbitration procedure may raise concern because it is necessary to determine the place of arbitration in order to implement certain rules (see subsection 4.1.1 below). The concept of the seat of arbitration overcomes the problem of multiple locations of procedural acts. The seat of arbitration is in fact a strictly legal concept (see subsection 4.1.2 below).

### **4.1.1 Utility of Determining Place of Arbitration**

Linking the arbitration procedure to a state is useful in determining the rules applicable to a number of questions. For a long time the location of the arbitration has allowed the law applicable to the procedure to be determined. The appointment of the assisting judge and the definition of the methods for ensuring the lawfulness of the arbitral award still require the place of arbitration to be determined.

#### **(a) Law Applicable to the Procedure**

Traditionally, the view was taken that if the parties did not choose otherwise, the law applicable to the arbitration procedure was that of the seat of arbitration. The choice of seat of arbitration was an implicit indication of the desire to submit the arbitration to the law of that state. This concept has been abandoned in most national laws and it is now considered that the arbitrator is free to decide on the rules applicable to the arbitration procedure when the parties have said nothing on the subject.<sup>91</sup>

The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, however, makes reference to the law of the place of arbitration. Article V.1 (d) authorizes the judge in the country where recognition and enforcement is sought, to refuse to recognize and enforce an award when, in the absence of agreement between the parties, “*the arbitral procedure was not in accordance with the law of the country where the arbitration took place*”. The place of arbitration is therefore not neutral when the local arbitration law does not allow electronic procedures.

#### **(b) Competence of the Assisting Judge**

In some States, the determination of the place of arbitration makes it possible to establish the competence of the assisting judge. Such a judge is sometimes required to provide assistance to the State judge in order to ensure the proper conduct of the arbitration proceedings. For example, in the event of problems with the constitution of the arbitral tribunal, the parties may refer to the President of the *Tribunal de grande instance* in Paris “*for arbitrations taking place in France*”.<sup>92</sup> Similarly, in Switzerland Article 179 of the Federal Law on Private International Law gives courts competence in the jurisdiction in which the arbitration has its seat to hear petitions concerning the nomination, challenge and replacement of an arbitrator. Thus France, Switzerland and Austria base the international competence of the assisting judge exclusively on the place of arbitration.

#### **(c) Ensuring Lawfulness of an Award**

Determining the place of arbitration is necessary in order to decide the methods of reviewing the award. A direct application to have the award set aside is

<sup>91</sup> *Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, 1178 s., p. 635 ff.*

<sup>92</sup> *Article 1493 para. 2 of the New Civil Procedure Code.*

possible when the award has been made on home soil. French law on international arbitration makes the distinction between “arbitral awards made in France”, which may be subject to an application to be set aside, and “arbitral awards made abroad”, which must first of all be recognized in France. It is only when an appeal is lodged against the decision to grant or refuse recognition that the review of an award made abroad may take place.<sup>93</sup>

Determining the place of arbitration, therefore, has the effect of linking the award beneficially to a State, namely the State of origin, since “*the New York Convention accords both primacy and priority to a legal review performed in the country of origin*”<sup>94</sup>. Indeed, according to Article V.1(e) of the Convention, setting aside the award in the country of origin is a reason to refuse enforcement in other signatory States. If the State in which ratification is requested does not have a more liberal arbitration law that allows the circulation of awards, irrespective of whether the original judge has set them aside, then the action taken in the State of origin also deprives the award of any effect in the State where enforcement is sought, which is where the assets are located. Determining “*the country in which, or according to the laws of which, the award was made*” is therefore crucial to whether its international circulation is authorized or not.

#### **4.1.2 Seat of Arbitration - a Strictly Legal Concept**

Determining the place of arbitration on the basis of objective indices is scarcely conceivable when dealing with electronic arbitration. The procedural acts are performed remotely. When there is an arbitration panel (rather than a sole arbitrator) comprising arbitrators established in different States, it is not even possible to determine the place of arbitration by relying on the domicile or establishment of the arbitrators. Nor can one use the location of the technical equipment of the arbitral institution (server centres), because their location is incidental and of no significance. In comparative law there is a tendency not to use the operator's electronic presence or technical equipment to determine his/her location. The determination of the place of arbitration must therefore rest on legal criteria.

Rather than research the place of electronic arbitration in terms of its geographical location, the seat of arbitration should be designated, i.e. a legal link needs to be established between the arbitration proceedings and a State.<sup>95</sup> The choice of the seat of arbitration rests initially with the parties,<sup>96</sup> either directly or by reference to the arbitration rules. Failing that, the arbitrators

<sup>93</sup> See Articles 1498, 1501, 1502 and 1504 of the New Civil Procedure Code.

<sup>94</sup> Fouchard P, “*La portée internationale de l’annulation de la sentence dans le pays d’origine*” [*International Scope of Setting Aside Awards in the Country of Origin*], *Revue de l’arbitrage* [Arbitration Journal], 1997, p. 331

<sup>95</sup> Kaufmann-Kohler G, “*Le lieu de l’arbitrage à l’aube de la mondialisation. Réflexions à propos de deux formes récentes d’arbitrage*” [*The Place of Arbitration at the Dawn of Globalization. Observations on Two Recent Forms of Arbitration*], *Revue de l’arbitrage* [Arbitration Journal], 1998, p. 517, particularly in relation to Swiss law.

<sup>96</sup> For the United Kingdom, see Article 3 of the English Arbitration Act; also Article 20 (1) of the UNCITRAL Model Law

determine the seat of arbitration. The fact that procedural acts and hearings take place elsewhere is irrelevant. Case law allows the seat of arbitration to be “*a strictly legal concept dependent on the will of the parties*”.<sup>97</sup> Statistics show that in more than 80 per cent of ICC arbitrations, the parties choose the seat of arbitration.<sup>98</sup>

It is therefore up to the parties in electronic arbitration proceedings to choose the seat of arbitration. This choice is made all the more crucial by the fact that the regulations of new online arbitral institutions do not deal with this point.<sup>99</sup> If the parties fail to designate the seat of arbitration, it is not certain that the arbitral tribunal can do so when the arbitration rules say nothing on the subject.

## 4.2 Electronic Award

Can an electronic arbitration procedure be concluded by the rendering of an award that will be transmitted exclusively by electronic means? Does the absence of a hard-copy back-up damage the efficacy of the award? The hard-copy award is normally presented to the judge in the ratification proceedings for appending to the executory form. It is therefore necessary to confirm whether the electronic form of the award affects its international efficacy. Communication of the award in hard copy to the parties at the end of the procedure also appears to be called into question when the award is made online.

### 4.2.1 Form of the Electronic Award

International or transnational texts appear to require that the award be written down and that it be signed by the arbitrators, while national laws take less consistent approaches.

#### (a) International texts

Article IV of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* requires that the party seeking recognition or enforcement of the award produce the “*duly authenticated original award*”. If the original is not produced, the successful party in the arbitration will not be able to invoke the New York Convention system, and will therefore not be able to have the award enforced. According to IT experts, the requirement for an original cannot be met by the presentation of a computer file, since there is no such thing as a copy or original for such files, and they are infinitely reproducible. However, this frequently raised objection can be overcome by analysing the function of the original. According to the authors, “*the role of the original is essentially to be a point of reference and a means of measuring the fidelity of the copies*”.<sup>100</sup> In these circumstances, an electronic document,

<sup>97</sup> For France, see *Court of Appeal of Paris*, 28 October 1997, *Société Procédés de préfabrication pour le béton v. Lybie*, *Revue de l'arbitrage*, 1998, p. 399, note Bruno Leurent.

<sup>98</sup> ICC Bulletin, Vol. 10, No. 1, 1999.

<sup>99</sup> Concerning the lack of regulations, see *Huet J and Valmachino S*, op. cit., p. 12

the integrity of which is guaranteed by third parties and by technology, can be considered an original. In practice it is sufficient for the arbitrators to apply their electronic signature to the document, with a certification authority guaranteeing that the pair of keys belongs to the arbitrator. It would be paradoxical not to accept as original an electronic award guaranteed in this way, while elsewhere States admit as authentic acts performed by electronic means.<sup>101</sup>

This flexible interpretation of Article IV of the New York Convention is legitimate from several points of view. Firstly, it is based on the “functional-equivalent” approach promoted by the *Model Law on Electronic Commerce*.<sup>102</sup> Article 8 of the UNCITRAL Model Law thus provides that a data message satisfies the requirements of an original when there is a reliable assurance of its integrity and when it is capable of being displayed to the person to whom it is to be presented. Secondly, eminent authors rightly consider that the object of Article IV of the Convention is to confirm the integrity of the award and the identity of the arbitrators.<sup>103</sup> The function of Article IV is thus respected by a secure electronic document. Finally, other texts, such as Article 31.1 of the *UNCITRAL Model Law* on arbitration, make no mention of an original, but simply require that the award be in writing and that it be signed by the arbitrators. Nevertheless, for greater legal security, the revision of Article IV is envisaged.

### (b) National Texts

Some national texts, including French law in respect of domestic arbitration, expressly require the award to be in writing and signed by the arbitrators.<sup>104</sup> Many other States require awards to be in writing,<sup>105</sup> and most States require that it be signed by one or more of the arbitrators.<sup>106</sup> Other texts do not expressly require the award to be in writing. In international arbitration, French and Swiss<sup>107</sup> law do not expressly stipulate that the award be so rendered.

Finally, States can legislate to adopt a special text enshrining electronic arbitral awards. In the United States, the Revised *Uniform Arbitration Act* of 28 August 2000,<sup>108</sup> provides for the use of electronic signature by the arbitrators, and its Article 33 is accepted by the various states in the United States.

<sup>100</sup> Lucas A, Devèze J, and Frayssinet J, *Droit de l’informatique et de l’Internet* [Law on IT and the Internet], Paris, PUF, 2001, 870, p. 577

<sup>101</sup> For France, see Article 1317 para. 2 of the *Civil Code* relating to the authentic act: “It may be on an electronic medium if it is established and kept in conditions specified by a decree of the State Council.”

<sup>102</sup> See the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, *United Nations*, New York, 1997, 15, p. 20.

<sup>103</sup> Fouchard P, Gaillard E and Goldman B, *On International Commercial Arbitration*, 1675, p. 970.

<sup>104</sup> Article 1473 of the *New Civil Procedure Code*.

<sup>105</sup> In Germany, Article 1054 (1) ZPO; in the Netherlands, Article 1057 (2) of the *Civil Procedure Code*; and in Sweden, Article 31 of the *Swedish Arbitration Act*.

<sup>106</sup> In comparative law, exceptions relate to the refusal of one or more of the arbitrators to sign as a means of expressing a dissenting opinion. They do not concern the actual principle of signature.

<sup>107</sup> In France, title V of Volume IV of the *New Civil Procedure Cod*, and in Switzerland, Article 189 para. 2 of the *Federal Law on Private International Law* do not mention awards in writing.

<sup>108</sup> Revised Uniform Arbitration Act, available on the Internet at: <<http://www.law.gmu.edu/drc/UAA2000.htm>>

In conclusion, the legal obstacles to the electronic award can be overcome. When an original is required, the production of an electronic document is sufficient if a secure electronic signature guarantees its integrity and attribution to the arbitrators. The general recognition of electronic documents and electronic signature by many States often allows the formal requirements of local arbitration law to be respected. The difficulties that remain are often practical ones arising at the time of communication of the electronic award.

#### **4.2.2 Communication of the Electronic Award**

The arbitral award must first be notified to the litigants. It is then up to them to request ratification of the award. However, in practice, the procedure for producing and depositing the electronic award with the registrar of the State court are still unclear.

##### **(a) Notification of the award to the parties**

The notification of the award to the parties has both a substantive and a procedural effect. First, it allows the parties to take cognizance of the substance of the decision and to exercise the rights that the award has granted them. The award immediately acquires the authority of *res judicata*. It is therefore important for the award to be transmitted without alteration. Article 28(1) of the ICC regulations of 1998 thus provides for the Secretariat to notify the “text signed by the arbitral tribunal”. Article 26(5) of the arbitration rules of the *London Court of International Arbitration* of 1998<sup>109</sup> provides for the transmission of “certified copies”. The notification then has a procedural effect because it constitutes the starting point for various time periods<sup>110</sup> for action. Requests for correction and interpretation,<sup>111</sup> and appeals against the award, must be made within a time period following notification, on pain of the request being dismissed. The date of notification must therefore be certain. Do IT resources allow these two requirements to be met? Notification by secure e-mail ensures that the award is timed and dated, and guarantees its integrity and attribution to the arbitrators.

##### **(b) Ratification and Deposit of an Electronic Award**

The low level of computerization of State courts, even those in States that pioneered electronic documents, raises questions over the actual methods of depositing the award and of ratification.

<sup>109</sup> *London Court of International Arbitration*, available on the Internet at: <<http://www.lcia-arbitration.com/lcia>>.

<sup>110</sup> Huet J and Valmachino S, “*Réflexions sur l’arbitrage électronique dans le commerce international.*” [Observations on Electronic Arbitration in International Commerce], *Gazette du Palais*, 9–11 January 2000, p. 16.

<sup>111</sup> Article 29 of the ICC Arbitration Rules of 1998 provides that the parties may request correction of material errors within 30 days of notification of the award to the parties.

<sup>112</sup> Article 30 of the UNCITRAL Arbitration Regulations provides that the request for interpretation must be made within 30 days of notification of the award.

What is the procedure today for depositing an electronic award with the registrar's office, when so required by law <sup>113</sup> or desired by the parties? <sup>114</sup> In France, it is the registrar of the court who draws up an act of deposit on a special register. The magistrate and the depositor must sign the act. The deposited award then becomes a formal registrar's minute. A system of electronic registration is therefore necessary, allowing archiving of awards and electronic signature by the judge and the depositor.

Electronic justice must therefore develop in line with electronic arbitration. Some Intranet projects aimed at facilitating the electronic exchange of documents between lawyers and registrars' offices are already being evaluated and tested in various States. <sup>115</sup> The general availability of such electronic networks and the establishment of data archiving capacity are indispensable for the judge to be able to have an electronic means of becoming familiar with electronic awards and keeping them. In the case of an award rendered exclusively by electronic means, the production of a computer printout by the party requesting ratification would certainly not be sufficient. In France, for example, the deposit is required by Article 1499 of the New Civil Procedure Code for recognition and enforcement of foreign arbitral awards or when dealing with international arbitration:

*“The existence of an arbitral award is established by the production of the original, accompanied by the arbitration agreement or copies of these documents that meet all the conditions required to prove their authenticity.”*

A computer printout is at best a copy of the award, but without any guarantee of its integrity or attribution to the arbitral tribunal. In the absence of a connected and compatible computer system installed in the registrar's office at the court, the deposit of an electronic award is therefore impossible. That explains why an experienced arbitral institution such as the ICC has chosen to continue to publish hard-copy awards bearing the physical signature of the arbitrators.

The material difficulties surface again when the arbitrator decides to ratify the award after a *prima facie* examination of the electronic award and the arbitration agreement. Traditionally the judge stamps the award to acknowledge receipt. <sup>116</sup>

<sup>113</sup> In the Netherlands, see Article 1058 of the Civil Procedure Code.

<sup>114</sup> Concerning the deposit of awards, irrespective of any request for enforcement, see Crépin S, *Les awards arbitrales devant le juge français* [Arbitral Awards in French Courts], Paris, 1995, 138 ff., who points out that the deposit confers a definite date on the award and puts pressure on the other party to enforce the award spontaneously; in Switzerland, see Article 193(1) of the Federal Law on International Private Law.

<sup>115</sup> In France, the “Justice Network” should make it easier for lawyers to ensure that files are in order, since they will be connected to the registrar by electronic means. In the United Kingdom, the computerization of state justice has also been the subject of some debate sparked by Lord Woolf's report entitled “Access to Justice” in 1996. See Henderson L, “Lord Woolf and Information Technology”, *Information & Communications Technology Law*, vol.5, no. 1, 1996, p. 45-55.

<sup>116</sup> In France, the stamp bears the following inscription: “We ... (1<sup>st</sup>) President of the Tribunal de grande instance, assisted by Mr ... our registrar, Given the minute of the decision opposite, Whereas the said decision does not contain anything contrary to the law and to public order. State that the said decision will be enforced in accordance with its purposes and terms. Done at the Palace of Justice at Paris on [date]... and have signed with the registrar”



It is then sufficient for the party benefiting from the award to apply to a ministerial officer to obtain its mandatory enforcement. In practice, there needs to be an electronic process put in place that allows the judge to make known his/her decision to ratify the electronic award. Above all, it will be necessary for ministerial officers, as well as bailiffs to be connected to the justice network.

### 4.3 Conclusion

The natural outcome of an online arbitration procedure is the publication of the award by exclusively electronic means. The obstacles to electronic awards are more practical than theoretical. In theory, an inspired analysis of the functional-equivalent principle and the general acceptance of electronic documents would lead one to believe that an electronic award accompanied by the secure signature of the arbitrators meets the requirements of form set by the law and by international agreements.

However, in practice, the successful party needs the agreement of the ratifying judge of the State in which the assets of the losing party are located. The successful party also needs the agreement of the huissier in order to carry out any mandatory enforcement. State courts and ministerial officers do not necessarily have the necessary computer resources to receive, examine and archive electronic awards. A practitioner concerned about the international efficacy of an award would therefore be well advised to obtain a hard-copy original as well, signed by the arbitrators. This hybrid solution is necessary for the time being, until all State courts where the award may be enforced have become computerized.

### 4.4 Case Study

A French modem manufacturer based in France replies to an electronic call for tenders issued by a computer manufacturer based in Japan. The two co-contractors make contact on the electronic market place <hardwareretail.com> (*fictitious*) and conclude a supply contract by electronic means. The general terms of the contract contain an arbitral clause stipulating that any dispute that might arise will be submitted to electronic arbitration organized by the arbitral institution *Electronic Arbitral Tribunal (fictitious)*. A dispute arises regarding the delivery of the modems, which are refused by the Japanese manufacturer, who considers that they do not conform to the description. The parties do not dispute the validity and acceptance of the arbitral clause.

The French supplier is concerned over the outcome of the procedure, particularly because he does not know the arbitral institution chosen. The website of this arbitral body, available at <http://www.ecourtarb.tv> (*fictitious*), mentions a postal address in Switzerland. The electronic address gives reason to suppose, although not with any certainty, that the server is situated in the Tuvalu Islands (<.tv>). Before drawing up the request for arbitration, the manufacturer consults you on the arbitration procedure in order to find out what the options will be if the arbitration proceedings go badly.

**Question 1**

The arbitration rules provide for the constitution of an arbitral tribunal comprising three arbitrators, each party appointing one arbitrator. The arbitrators appointed by the parties will choose the president.

- (i) In the event of difficulties in constituting the arbitral tribunal, to which assisting judge could your client refer the matter?
- (ii) What would have to be established in order to ensure the competence of the French assisting judge? At what stage of the process can the parties determine this?

**Question 2**

In the event that the award were not satisfactory and if justifiable complaints could be raised against the arbitral procedure, the French supplier is considering actions that would deprive the award of its efficacy.

- (i) Will he be able to request the French or Swiss courts to set aside the award if he does not find the result acceptable? What factor determines the answer to this question?
- (ii) If this appeal were to result in the setting aside of the award in France, would that also be an obstacle to its enforcement abroad?

**Question 3**

The arbitration rules provide for the award to be posted on the website of the case at hand and notified to the parties by a secure e-mail bearing the electronic signature of the arbitrators.

- (i) Will the award be valid if these procedures are followed?
- (ii) What practical difficulties are raised by this form of notification?
- (iii) How can the parties remedy this? At what point in the procedure should they concern themselves with this question?

**Question 4**

What would be the effect on the validity of the arbitral clause if the body appointed by the parties ceased operations? This is not an academic question, since some institutions that organize online arbitration, whether as an experiment or commercially, have ceased to operate (cf. the disappearance of a long-standing East German arbitration institution, see *Bundesgerichtshof*, 20 January 1994, *Bulletin. ASA*, 1994, p. 433).