International Commercial Arbitration in Cyberspace: Recent Developments

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International Commercial Arbitration in Cyberspace: Recent Developments

Dr. Ljiljana Biukovic*

I. INTRODUCTION

In the off-line world of international commerce, there are many ways in which international commercial disputes may be resolved. Litigation and international commercial arbitration have been the dominant methods for centuries. Parties who feel that they can rely on justice being delivered by national courts favor litigation, but parties who are reluctant to litigate in a foreign forum and under the rules of foreign law favor international commercial arbitration. International merchants prefer enforceable decisions rendered in a workable, less expensive, private and confidential procedure. Arbitration procedure presents a flexible solution and combines it with negotiation and mediation. Thus, disputes may be resolved at an earlier stage.

Since the expansion of international trade and investment over the past few decades, international commercial arbitration (either in an institutional or an ad hoc forum) has been resolving disputes arising from a variety of commercial agreements. Examples include everything from traditional sales of goods, transportation agreements, distributorship and agency agreements to long term construction contracts, joint ventures, licensing, patents, and technology transfers. International commercial arbitration has become big business. There are more than 120 institutional arbitration centers worldwide. The list of choices in the Pacific Rim is particularly impressive. Between 1952 and 1993, every country in the region established

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its own arbitration center.\textsuperscript{2}

When international commerce went online, international commercial arbitration followed. Traditional off-line international arbitration centers launched their own Web sites.\textsuperscript{3} In addition, new online or virtual centers and new groups of traders (small and medium enterprises involved in transactions over smaller quantities and lower value goods), emerged to facilitate the new economy (electronic commerce or e-commerce), as well as to reduce costs and time spent on dispute resolution (using the new technologies to by-pass traditional procedure). Three years ago, one author who wrote about online international commercial arbitration asked herself if the future had come too early.\textsuperscript{4} Many authors and practitioners subsequently offered their answers. In sum, scholars agree that, with a few exceptions, virtual arbitration can and should be used as a technique for the resolution of online international commercial disputes.\textsuperscript{5}

This article examines some features of virtual arbitration and argues that the use of new technology and the development of e-commerce raise some interesting questions to international arbitration laws. Part II describes initiatives to develop online dispute resolution. Part III discusses virtual dispute resolution centers, including, how, why, and where they function. More importantly, however, Part III investigates the differences between online and off-line arbitration, where the focus remains on three questions. The first question is a crucial one. It has been debated by schol-


ars and practitioners but still remains unresolved: will arbitration agreements concluded online and arbitration awards rendered online meet the formal requirements of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and enjoy the benefits of worldwide enforcement? The second question probes how flexible international commercial arbitration is as a process: does online arbitration retain all the advantages traditional arbitration had over litigation? Finally, the third question asks whether these online commercial disputes are really something new.

II. INITIATIVES TO DEVELOP ONLINE DISPUTE RESOLUTION

Many professional associations are advocating a new technology-focused dispute resolution service. At the same time, even civil courts in some countries (the U.S. and the U.K., in particular) are considering starting a program that will at least allow small claims to be filled out by computer.

In conjunction with a number of law firms and business giants, the American Arbitration Association has launched the “E-Commerce Dispute Management Protocol.” The purpose of this protocol is to establish the fundamental principles of online dispute resolution for business-to-business

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7. Clare Dyer, a legal correspondent for The Guardian, the U.K. newspaper, recently reported that the U.K. government has plans to bring the Victorian county court system online. Dyer reports that a pilot scheme was launched in July 2000 to enable the court of appeals and Leeds and Cardiff county courts to experiment with video-conferencing for brief court applications. The article also announced that another pilot project to explore the use of e-mail for interim applications intended to reduce the need to attend court in certain situations was scheduled to start on February 5, 2001. See C. Dyer, Net Pulls Civil Courts into 21st Century, THE GUARDIAN, Jan. 16, 2001, available at http://www.guardianunlimited.co.uk/internetnews/story/0,7369,422758,00.htm (last visited January 17, 2001). Jonathan Groner for the LEGAL TIMES writes about a pilot electronic-filing program developed by the Administrative Office of the U.S. Courts that will include most or all of the ninety-four districts and their courts by 2003. See Jonathan Groner, Courts Consider Privacy Perils of Electronic Filing; Federal Judges Weigh Privacy Concerns as Access Becomes Easier, LEGAL TIMES, Jan. 16, 2001, available at http://www.law.com/cgi-bingx.cgiAppLogi...summary=0&useoveridetemplate=ZZZHCC0Q95C (last visited January 19, 2001).

e-commerce and to offer arbitration via e-mail and web-based technology.\textsuperscript{9} The protocol is founded on the principles of: fairness (including access to neutral dispute resolution providers), continuity of business (dispute resolution with minimal disruption to other transactions), clear dispute management policies, range of options (variety of cost-effective methods of dispute resolution) and commitment to technology.

Moreover, a group of international companies, including Hewlett-Packard, Time Warner and Daimler-Chrysler, established the Global Business Dialog on E-Commerce ("GBDe") which provides recommendations or guidelines for the development of an electronic dispute resolution system for business-to-consumer electronic commerce.\textsuperscript{10} The GBDe's "Alternative Dispute Resolution and E-Confidence Recommendations" were presented in September 2000.\textsuperscript{11}

Next, in May 2000 the Joint Research Center of the European Community presented a report entitled, "Out-of-Court Dispute Settlement Systems for E-Commerce" that suggested that arbitration, mediation or conciliation and consumer complaint or ombudsman schemes could be the major out-of-court resolution mechanisms applicable to business-to-business and business-to-consumer e-commerce.\textsuperscript{12} The report envisions online arbitration but suggests that some modifications may be needed to make this form of online arbitration workable and enforceable.\textsuperscript{13}

Finally, Trans Atlantic Consumer Dialogue ("TACD"), a forum of U.S. and E.U. consumer organizations that promotes consumer interests in E.U. and U.S. policy making, also argues for alternative dispute resolution ("ADR") in the context of business-to-consumer transactions in e-commerce.\textsuperscript{14}


\textsuperscript{13} Id. at 16.

III. VIRTUAL DISPUTE RESOLUTION CENTERS

Several virtual dispute resolution institutions, Web sites and centers have emerged in the past several years. They offer online information banks, mediation, arbitration, administrative proceedings and automated negotiation (settlement) of claims. They settle disputes over domain names, insurance and consumer contracts, in addition to the more traditional commercial disputes over the sale of goods and services.

The Global Arbitration Mediation Association, Inc. ("GAMA") from Conyers, Georgia, a pioneer in online legal services, was established on the Internet in 1995 (www.gama.com). It launched its e-directories of arbitrators and mediators in July, 2000. GAMA is not a dispute resolution forum but an information resource created to facilitate parties to disputes and ADR professionals. GAMA gives parties the opportunity to find arbitrators who meet their needs (not only in terms of knowledge and experience but also in terms of cost).

Some of the most prominent online dispute resolution centers currently are: the World Intellectual Property Organization Arbitration and Mediation Centre ("WIPO") in Switzerland (http://arbiter.wipo.int/domains/index.html); the National Arbitration Forum ("NAF") in the United States (www.arbitration-forum.com); Virtual Magistrate in the United States (www.vmag.org); Cybercourt in Germany (www.cybercourt.org); IRIS Mediation in France (www.iris.sgdg.org), Cyberarbitration.com, which is probably in India (www.cyberarbitration.com), CyberSettle.com in the United States (www.cybersettle.com); eResolution in Canada (www.eresolution.com); CyberTribunal in the United States (www.cybertribunal.com); ClickNsettle in the United States (www.clicknsettle.com); Center for Public Resources Alternative Dispute Resolution ("CPRADR") in the United States (www.cpradr.org); Online Resolution in the United States (www.onlineresolution.com); iCourthouse in the United States (www.icourthouse.com); and Webdispute.com (www.webdispute.com) and SquareTrade also in the United States (www.squaretrade.com).15

Please note that all of the cited Web sites were available during the ASIL Conference in February 2001, but some have since become unavailable. For example, Cyberarbitration has disappeared from cyberspace. One of the recent studies on online ADR prepared for the National Association of Attorneys General by Professor Anita Ramasastry, Associate Director of the Center for Law Commerce & Technology of the University of Washington School of Law, lists seventeen providers. The study identifies six providers as facilitators of arbitration (Virtual Magistrate, Webdispute.com, i-Courthouse.com, Cyberarbitration.com and BBB online). See a working draft of the study as presented at the Internet Law and Policy Forum Conference 2000, San Francisco, Sept. 11-12, 2000, http://www.ilpf.org/confer/present00/ramasastry_pr/ramasastry2_pr.htm (last visited Feb. 10, 2001). Another author listed fifty-one online dispute resolution providers. See the list compiled by Harry B. Endsley and Associates at http://www.intlawyers.com/odr_providers.htm (last modified on Dec. 6, 2001, last vis-
These institutional virtual centers work either as "official" dispute resolution tribunals for particular e-markets or as traditional resolution (and arbitration) institutions for any private parties who have an international trade dispute. For example, SquareTrade offers dispute resolution services to eBay auction site customers. CyberSettle.com and ClickNsettle primarily offer automated negotiation of insurance and personal injury claims. The whole procedure is conducted online. CyberSettle's Web site claims that the center has been used by 475 insurance companies and that it helped its clients to settle over US$80 million in claims.\(^\text{16}\) ClickNsettle can also conduct international arbitration. eResolution, WIPO, NAF and CPRADR are approved providers for the Internet Corporation for Assigned Names and Numbers' ("ICANN") Uniform Domain Name Dispute Resolution Policy and domain name related disputes, but they provide other services as well. For instance, eResolution plans to get involved in international commercial dispute resolution as both an on- and off-line center. There is little content on their web sites written about this service except that they would apply General Arbitration Rules and that arbitration is available for members of specific marketplaces. In contrast, CPR is focused more on providing ADR services even though it facilitates non-administered arbitration of international disputes. SquareTrade.com has online tribunals focused primarily on business-to-consumer services and services to specialized markets, but they offer arbitration in the form of binding, but non-confidential, process. On the other hand, iCourthouse is a simulation of litigation before virtual volunteer jurors who render legally non-binding "verdicts." Another virtual center, Germany's Cybercourt, provides no information on online international arbitration procedure even though it is listed as one of the services it facilitates. French IRIS Mediation is, as its name suggests, primarily focused on mediation, while Cyberarbitration.com provides online arbitration (from filing to evidence and award). Finally, America's Webdispute.com has e-mail based arbitration, or rather e-mail based hearings, while the submission of documents and delivery of an actual award are performed off-line.

It is obvious from the list provided that the majority of virtual dispute resolution centers operate in the United States. Thus far, the value of electronic commerce in the United States is greater than in any other country, including Sweden and Canada, both of which have per capita access to the Internet close to that of the United States.\(^\text{17}\)


In sum, all above mentioned centers facilitate online filing of claims and responses. Nevertheless, only a few, like NAF, eResolution, Online Resolution, Cybercourt or ClickNsettle, reveal their software and other capabilities to conduct online international arbitration procedure, such as providing a secured e-mail system, chatrooms and videoconferencing.

NAF and its arbitration forum created a program for subscribers, mostly law firms and their clients, to use with the forum’s online filing and case management system.\(^{18}\) eResolution has also developed such a program in Canada in cooperation with Xwave software company. Online Resolution developed “Resolution Room” and made it available for purchase by private companies for use in practice. Thus, it is also possible for large companies, application service providers (“ASP”s), to operate and maintain online arbitration systems for rent or lease upon demand by the parties to a dispute. Private companies are already providing such services for hospitals, by storing medical files and data on drugs and diseases. At the LegalTech conference held in Chicago on November 13 and 14, 2000, many participants argued that law firms can rely on ASPs when accessing not only time and billing software, but also any other documents and files from any location.\(^{19}\) Lawyers would be able to file claims and participate in the dispute resolution process from any place and at any time.

While online privacy protection of ASPs is a major issue for lawyers, it has been less of a concern to software engineers.\(^{20}\) However, as some authors suggest, the engineers will have to become more responsive to this issue as acceptance of the concept of the public’s right to online information gains momentum.\(^{21}\)

A. Going online: More business, more disputes

Cyberspace has truly emerged as a real global, borderless marketplace. Commerce inspired by high technology has now transformed itself into electronic commerce and the Internet has become a new, fast-developing means of communication and a new business tool. A few months ago, European Commissioner for Health and Consumer Protection David Byrne, said that online commerce has at least three advantages over off-line or traditional commerce: lower prices, greater choice and better information.\(^{22}\)


\(^{20}\) Id.

\(^{21}\) See, e.g. Gibbons Privacy, *supra* note 5, at 778-793 (arguing that arbitration in cyberspace has yet to gain the confidence of private parties and that one way to achieve confidence would be to legitimize arbitral awards by publishing them and making the decision-making process more transparent).

\(^{22}\) David Byrne, *Cyberspace and Consumer Confidence*, Address before The Kangaroo
Indeed, both merchants and consumers think that they are better off when they trade online because online transaction costs are low, and the greater number of suppliers and buyers brings greater diversity and more competition to the market. Buyers think that they can buy cheaper and sellers think that they can sell more goods than through the channels of traditional commerce. Small companies and individuals who could not afford to participate in international commercial transactions by traditional means are now able to shop around the world and to pay their providers as little as $10 per month for access to the global market. An entire transaction may be concluded in just one depersonalized contact. Indeed, personal contact between sellers, distributors and final buyers, for example, may become completely obsolete.

In less than a decade, the Internet has transformed the world into a global marketplace where anyone having access to a computer linked to the World Wide Web may participate in some sort of international commercial transaction. By 2005, nearly one billion people will be online, and more non-English-speaking people will be using the Internet. According to one survey, fifty-one percent of current Internet users are English-speaking. The same survey predicts that by 2005 only twenty-seven percent of the Internet users will speak English as a first language. The Organization for Economic Co-operational Development (“OECD”) studies credit the United States with about four-fifths of the world's electronic commerce, Western Europe with ten percent, and Asia with five percent. This means that in the future we may expect more disputes to arise between parties speaking different languages and coming from completely different legal, cultural, political and economic backgrounds. Transactions will become more unpredictable and uncertain, and there will be a greater likelihood that the parties will become involved in disputes over contract performance.

Now that individuals and small and medium-sized companies are starting to participate in international commerce, we notice a dramatic growth in the value of e-commerce. However, it is difficult to track such a growth due to the relatively recent arrival of e-commerce and the fact that it is virtual. Trade patterns change in terms of commodity diversification and trading partners.

25 Id.
Consequently, initial research findings vary significantly and reveal some measurement difficulties.\textsuperscript{27} For example, according to the OECD, electronic commerce value for 1997 totaled US$26 billion and is expected to increase to US$330 billion per year by 2001-02 and one trillion U.S. dollars per year by 2003-05.\textsuperscript{28} Other sources show that the value of business-to-business e-commerce exceeded one trillion U.S. dollars in 2000 and may approach five trillion U.S. dollars in 2004.\textsuperscript{29} Yet other reports predict that by 2003, business-to-consumer transactions will reach US$108 billion.\textsuperscript{30} Despite the fact that their estimates are speculative, all reports show that development of the Internet has dramatically increased the total value of e-commerce. Nevertheless, it is difficult to say whether that increase in the value of e-commerce has led to an increase in the median value of online transactions. There are no estimates of the median value of business-to-business online transactions.

Consumer contracts are now being analyzed simultaneously by governments and also by various interest groups, and there seems to be consensus that disputes arising from these contracts should be resolved by alternative dispute resolution ("ADR") methods, but that governments should provide some sort of public legal framework for such ADRs. Unlike consumer contracts, business-to-business contracts remain firmly within the domain of "private justice" for those parties who prefer to avoid litigation. In traditional off-line international commerce, if the parties prefer "private justice," they rely on institutional or ad hoc international commercial arbitration. International commercial arbitration is a purely consensual institution, based on the autonomous will of the parties. Parties who decide to arbitrate have a choice: they can do so online or off-line.

\textsuperscript{27} George Sciadas of Statistics Canada found that trade in services is particularly difficult to track because services are intangibles that do not physically cross borders. An additional difficulty is identifying the correct unit of observation. According to Sciadas, research done by Statistical Canada shows there is a trade pattern change in terms of diversification of commodities and countries' trading partners. See George Siadas, Problems with Tracking E-Commerce, (unpublished manuscript, presented at the conference, Rethinking the Line: The Canada-U.S. Border (Oct. 2000)(Vancouver, British Columbia, on file with the author).

\textsuperscript{28} OECD Report, supra note 26.

\textsuperscript{29} Gibbons, supra note 9, at 5; Roemer, supra note 9 (according to Roemer about US$1.2 trillion was spent in business-to-business e-commerce in 2000 and an estimated US$4.8 trillion will be spent in 2004).

\textsuperscript{30} Welge, supra note 23.
B. First preliminary issue: What is an off-line or an online international transaction?

As previously mentioned, off-line international commercial arbitration has been successfully used for resolving disputes arising out of different types of very complex international business transactions. Outside the reach of international commercial arbitration, disputes remain that national arbitration laws declare non-arbitrable. From that perspective, there is little doubt that international commercial arbitration may be used to resolve online disputes, assuming that those arose out of transactions that are international and commercial.

Any transaction over the Internet has the potential to be an international transaction. International conventions and national laws governing international commercial arbitration have developed different definitions of an international transaction and an international dispute. In other words, there is no universal test to determine when a dispute is "international" in nature. One can definitely say that if a dispute arises out of a contract, and that contract is an international one, then the dispute is also international. But then, when is a contract international?

The European Convention on International Commercial Arbitration indirectly defines international disputes as "disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting State." French law sets out in Article 1492 of the Civil Procedure Code that "an arbitration is international when it involves the interests of international trade." With respect to international arbitration, Article 1 of the UNCITRAL Model Law on International Commercial Arbitration states that an arbitration is international if:

the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business indifferent States; or one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the

subject-matter of the dispute is most closely connected; or (iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.  

According to the 1996 English Arbitration Act, arbitration is international when it is not domestic: when at least one of the parties is not a U.K. national, a resident of the U.K., or is an entity incorporated or managed in a state other than the U.K. or the seat of arbitration is outside of the U.K.

But how does one determine when a dispute arising out of an online transaction is international? Where are the places of business of the parties? Sometimes it is easy to find out, and other times it is not. When a small company posts an offer on its Web site, acceptance may come from anywhere across the Internet at any time. Often no off-line address is given, and the web address is generally too generic to indicate the off-line source. In other words, parties may not know in advance that they are entering into an international contract and that any dispute arising from it constitutes an international dispute.

C. Second preliminary question: What is an off-line or an online "commercial" transaction? 

When is a transaction commercial? In international commercial arbitration proceedings associated with off-line commerce, definition of the term "commercial transaction" has occasionally been the subject of controversy. Moreover, national laws and international conventions do not al-

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35 Arbitration Act, 1996, c. 23, s. 85(2) (Eng.). For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is- "(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom; or (b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom." Id.

36 For some commercial arbitrations, the requirement is not to be an international commercial transaction, but an international business or international trade transaction. This paper will not deal with such differences even though the author recognizes that these concepts do have different scope.
ways offer a definition. States adopting the New York Convention, for example, have a possibility to opt-in so-called "commercial reservations" and thus limit the application of the rules of the Convention to contracts that are considered as commercial under their national laws Article 1(3). The 1961 European Convention on International Commercial Arbitration has no reference to the "commercial" nature of contracts or disputes.

While it does not provide an actual definition, a footnote to UNCITRAL Model Law does give a simple non-exhaustive list of transactions of a commercial nature. The qualification is more important in civil law countries where only disputes over commercial contracts between two merchants in the ordinary course of their business may be submitted to arbitration. European continental law shows concerns that international commercial arbitration should not be used in consumer contracts unless under specific rules.

If these commercial transactions are affected by electronic means, they constitute electronic commerce. In other words, a transaction of the type traditionally conducted off-line, if it involves computer-to-computer communication in open or a closed network, is electronic commerce or an e-commerce transaction.

In addition to traditional off-line commercial transactions, new types of transactions have emerged and their emergence is related specifically to the birth of electronic commerce and the fact that they can be carried out in cyberspace. For example, some new modalities are interconnection contracts between telecommunications operators and the companies that want to use the telecommunications infrastructure to offer Internet services, contracts between Internet service providers (ISPs) and users (companies or individuals), electronic data interchange (EDI) contracts, and contracts for licensing or selling software.

37 The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether or not contractual. "Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road." UNCITRAL MODEL LAW, supra note 34, note to art. 1.


39 Many transactions have already been concluded online, relying on use of electronic communication, such as the following: the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing (in particular software licensing), investment, financing, banking, insurance, carriage of goods or passengers by air, sea, rail or road.
D. Advantages and Disadvantages of the Use of International Commercial Arbitration

For several reasons, parties participating in off-line international commercial activities have favored arbitration over litigation for the purpose of resolving disputes. International commercial arbitration is based on the principle of party autonomy—on giving the parties involved in a dispute control over its resolution. Therefore, it can be closely tailored to the needs of the parties and allow them to avoid uncertainties related to the application of foreign laws with which they are unfamiliar and the unpredictable outcome of litigation before foreign courts and under foreign legal procedures. The parties have the right to choose the arbitrators, the language of arbitration, the place, and the procedural and substantive rules.

The whole undertaking can be a great challenge for the parties and their legal counsel and many international commercial arbitration proceedings have turned into expensive, lengthy ordeals because of a badly drafted arbitration clause or agreement. However, various modalities such as fast-track arbitration or arbitration with an accelerated procedure, arbitration that includes mediation as the first step of dispute resolution, and special arbitration procedure for dealing with disputes over small sums, have evolved. The result of this is that international commercial arbitration can be very successful and efficient if planned and designed properly.

Some international business people favor arbitration over ADR because arbitration is a form of adjudication. Some commentators believe that "an ADR clause without a traditional binding disputes clause, at least in the international context, is a recipe for disaster." 41

To summarize, business people favor international commercial arbitration for two main reasons. First, it allows them to be in almost total control of dispute resolution proceedings. Second, international commercial arbitration awards are enforceable with the assistance of national courts of most of the countries in the world if the losing party refuses to perform the award voluntarily.

The following is an analysis of the extent to which some of the previously mentioned advantages of international commercial arbitration can also be obtained online.

1. Party Autonomy

It is widely accepted that the basic principle of international commercial arbitration is party autonomy. This principle is recognized and incor-

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40 See REDFERN & HUNTER, supra note 38, at 301-304 (3d ed. 1999) (discussing fast track and arbitration for small cases).
porated into the majority of national laws on international commercial arbitration and in all international arbitration treaties. In off-line international commercial arbitration, the parties opt out of court jurisdiction. Subsequently the parties can: (i) determine which law would be applicable to the substance of a dispute and which procedural rules would be followed; (ii) enforce privacy and confidentiality; (iii) decide on the place and language of arbitration; (iv) select the arbitrators; and (v) determine the time limit within which an award has to be rendered. However, it is important to note that there are rules of procedural fairness included in all national laws, international treaties and model laws such that the parties may not derogate from these rules.

The parties to online international commercial arbitration, too, can enjoy the benefits of the principle of party autonomy. They are just as limited by the mandatory principle of procedural fairness as are the parties to off-line arbitration. Therefore, all means of electronic communication must be equally accessible to all parties under the same conditions; that is, both parties must have equal access to information and an equal opportunity to be heard. This is a very important point, particularly since the parties might have different levels of technical infrastructure.

(a) Jurisdiction

It is very important for small and medium-sized businesses to be able to avoid jurisdictional problems related to disputes arising out of e-commerce. Since jurisdictional rules are not internationally harmonized, any online business that does not incorporate an arbitration clause or reference to arbitration in its contracts faces the possibility of simultaneous litigation in very many jurisdictions. Small and medium-sized businesses cannot afford to litigate in different courts and different countries, but by opting for international commercial arbitration, businesses can resolve jurisdictional uncertainty.

According to some estimates, by 1998 there had been almost one hundred reported U.S. decisions dealing with personal jurisdiction in online transactions. The U.S. courts have used all methods available to establish their jurisdiction over disputes. For small and medium-sized businesses from other countries, litigation before the U.S. courts is a very costly and stressful experience. The U.S. litigation style is intimidating to many of these companies and their lawyers. In the recent case *Braintech v. Kostiuk*, two Canadian high-tech companies with their offices on the same street in downtown Vancouver ended up litigating in the United States be-

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cause the plaintiff decided to use the distant link it had with the U.S. forum (being registered and operational for six months in the U.S.) in order to avail itself of the opportunity to sue for higher damages. Ultimately, the plaintiff could not enforce its U.S. judgment in British Columbia. The case illustrates the uncertainty that surrounds international disputes if the parties do not opt for arbitration.

The newly adopted E.U. Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which came into force in March 2002, will allow consumers to an online retail sue in their own country even though the retailer is domiciled in another E.U. country, regardless of whether the retailer has E.U. nationality. Even though the Regulation has been passed for a good reason—to encourage consumers to make online purchases—it adds to the uncertainties small and medium-sized businesses face when operating online. Article 1, however, explicitly excludes the application of the Regulation to arbitration.

(b) Applicable Law

Parties to international commercial arbitration are free to choose the law applicable to the substance of their dispute. This is a basic principle of party autonomy that has been recognized by most national laws regarding international arbitration and by the UNCITRAL MODEL LAW. The law applicable to an arbitration agreement is generally the same as that applicable to the contract of which it is a part, but it may be any other law or lex mercatoria. It is possible to say, though, that the law applicable to the merits of a dispute is usually some national law.

By determining the law applicable to the merits of a dispute, the parties avoid the application of national conflict-of-laws rules. In fact, international commercial arbitration gives parties the opportunity to shop around for the most favorable law. The parties may empower arbitrators to act as amiable compositeurs and to decide ex aequo et bono. In other words, the parties thus authorize arbitrators to disregard the application of rules of national laws. When acting as amiable compositeurs, arbitrators can disregard only non-mandatory national provisions. On the other hand, when acting ex aequo at bono, arbitrators may disregard even mandatory provisions of law,

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45 Id. at art. 16.
46 Id. at art. 1 ("This Convention shall not apply to: ... (4) arbitration.")
48 UNCITRAL MODEL LAW, supra note Error! Bookmark not defined., art. 28.
but they still must act within a framework of public international policy. In both situations, parties indirectly make a decision on applicable law.

If the parties fail to make a choice, the national laws of most countries provide for the arbitrators to choose. However, not every national law gives arbitrators the same freedom of choice that it gives to the parties, and some national laws limit arbitrators to the choice among national conflict of-laws rules. This freedom of choice afforded to the parties is particularly valuable in the borderless world of the Internet and e-commerce. Whoever goes online avails herself or himself of many foreign laws and the only way to predict applicable law is to make a choice of law in advance. In practice, it is usually the law of the country of a supplier.

(c) Privacy, Confidentiality and Security

As a purely private and consensual institution, international commercial arbitration is an option for parties who do not want their proceedings to be open to the public, as they would be in a standard civil litigation case. However, in very many common law and civil law countries,\(^{49}\) the right to privacy is not explicitly stated in the arbitration laws. The right to privacy is recognized in English common law as an implied right attached to all agreements to arbitrate unless explicitly excluded by agreement between the parties,\(^{50}\) but in the 1996 English Arbitration Act\(^ {51}\) there is no reference to a requirement for privacy.

The UNCITRAL MODEL LAW is also silent on the matter of privacy of proceedings. However, the British Columbia International Commercial Arbitration Act, based on the UNCITRAL MODEL LAW, states in section 24(5) that unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held in private.\(^ {52}\) Also, the rules of some institutional arbitrators, such as the London Court of International Arbitration and the International Chamber of Commerce, specifically stipulate privacy.\(^ {53}\)

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\(^{49}\) There is no such provision in the French New Code of Civil Procedure, Book IV: Arbitration. Fouchard, Gaillard and Goldman do not make reference to privacy of arbitral proceedings in their book LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, supra note 40, but discuss confidentiality, only, on a number of occasions. See REDFERN & HUNTER, supra note 38 at 1412 (arbitral proceedings), 1168 (awards), 1259, 1265-66 (documents).

\(^{50}\) See REDFERN & HUNTER, supra note 38, at 28. Redfern & Hunter quote Colman, J., in Hassneh Insurance v. Mew, 2 Lloyd's Rep. 243 at 246-247 (1996): "if the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and [is] I believe undisputed." However, there is no mentioning of privacy requirements in the English Arbitration Act of 1996.

\(^{51}\) Arbitration Act, 1996, C. 233 (Eng.).

\(^{52}\) Commercial Arbitration Act, R.S.B.C., Ch. 55, (1996) (Can.).

One should note that, according to national arbitration laws and the most recent case law, confidentiality is also a matter of choice to be made by the parties rather than a duty or a presumption. National laws on international commercial arbitration have no express confidentiality clause; neither does the UNCITRAL MODEL LAW make any reference to confidentiality. Some institutional rules include the duty of confidentiality, but others do not. The London International Court of Arbitration explicitly includes the duty of confidentiality. The International Arbitration Rules of the American Arbitration Association state that an award may be made public only with the consent of all parties or as required by law. Constantine Partasides explained in great detail that in Sweden, if the parties want confidentiality, they must contract for it expressly because neither the Swedish Arbitration Act nor the Economic Commission of Europe ("ECE") Rules impose such a duty.

Privacy and confidentiality are issues that may be of concern to e-commerce parties. The possibility of excluding third parties from the proceedings and of limiting public access to awards may influence parties' choice of dispute resolution mechanisms. As in off-line situations, parties doing business online that desire privacy or confidentiality must make explicit reference to this in their contracts unless they opt for the application of institutional rules that regulate these issues. It is noteworthy that SquareTrade web arbitration explicitly disclaims on its web site that this online arbitration procedure is non-confidential. In contrast, Online Resolution explicitly guarantees confidentiality.

The issues of privacy and confidentiality in relation to electronic commerce have been debated elsewhere, but primarily in the context of the technological capabilities to adequately protect proceedings and awards. In other words, the question has been whether online arbitration, based on the use of the Internet (e-mail communications, chatrooms and video conferences), is sufficiently secure and whether online arbitration can be protected from unauthorized access, monitoring or spoofing. Criminal laws of many

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56 C. Partasides, Bulbank-The Final Act, 15:12 MEALEY'S INT'L ARB. (2000). Rep. Partasides went on to analyze the Oct. 27, 2000, decision of the Supreme Court of Sweden dealing with the challenge of an award on the basis of the breach of confidentiality. The decision is interesting because the Supreme Court of Sweden made the distinction between privacy and confidentiality. The Supreme Court found that privacy means simply that "the public does not have any right of insight by being in attendance at the hearings or having access to documents in the matter." On the other hand, confidentiality is related to the right of the parties to disclose information to outsiders concerning the arbitration proceedings or award.
59 See, e.g., Gibbons, supra note 5; Hill, supra note 5; Schneider & Kuner, supra note 5.
states are to be modified to ensure that three crucial principles for e-commerce and for the Internet—no interception, no alteration, and no fraudulent authentication—are protected. Daily reports on damage done by computer hackers may impact parties' confidence in software capabilities to protect the privacy of data they submit to arbitration. One may ask how anti-globalization computer hackers managed to infiltrate the computer systems of the World Economic Forum in Davos.\(^6\) If personal information of the majority of the high-profile participants, CEOs of the world's biggest companies and heads of states, were not secured appropriately, is there anything that can protect a small business owner?

Richard Hill and Llewellyn Joseph Gibbons argue convincingly that the existing technology, in conjunction with special electronic crime and privacy laws already enacted by many states, can protect the privacy and confidentiality of arbitration. Moreover, both authors insist that online arbitration is as secure as traditional off-line arbitration, an opinion with which this author concurs. Unauthorized interception of telephone communication or disclosure of faxes is no less likely to occur than a breach of security involving e-mail. In other words, it is impossible to establish absolute security off-line and online. Accordingly, it would be impossible to claim absolute privacy and confidentiality.

The security issue has already been addressed by virtual dispute resolution centers, all of which provide software that allows only the parties, arbitrators and, to some extent, the centers themselves to have access to data. For example, eResolution, CyberTribunal, ClickNsettle, Online Resolution and all other virtual centers already in operation have been very careful about using software capable of limiting access to information only to authorized persons. An interesting question is whether these institutions have the obligation to provide security or whether the duty is simply implied. In other words, could parties sue virtual dispute resolution centers if confidential information related to their disputes is accessed by unauthorized third parties? They probably can, but this author has no information that any such case has ever been brought. If an ASP maintains facilities for online arbitration and stores data for its clients, then that ASP has the obligation to provide security.

Encryption and PKI (Public Key Infrastructure) are becoming dominant standards. In addition, many countries are enacting laws on digital signatures that will give legal effects to secure electronic/digital signatures.\(^6\) Many of

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\(^6\) A disc that included a list of 27,000 names, some with e-mail addresses and phone numbers, and a list of 1,400 names with matching credit cards numbers was handed to a Swiss newspaper. See the Industry Standard Europe's Intelligencer Europe, Feb. 7, 2001, available at http://europe.thestandard.com (last visited Feb. 8, 2001).

these laws determine technical guidance for electronic authentication and certificates issued by accredited service providers. Unfortunately, national laws governing electronic authentication are not harmonized. Problems also remain with respect to the capacity of a person linked to a particular electronic signature. Certification authorities are not authorized to confirm such capacity.

There is as much opportunity for the advantages of privacy and confidentiality in online international commercial arbitration as there is in traditional arbitration. However, authors such as Gibbons argue that in certain circumstances, the public right to know prevails over the parties' right to privacy. Gibbons rightly points to various inequalities in the bargaining positions of big high-tech companies or other corporations and individual consumers. For those reasons he argues that virtual arbitration dealing with business-to-consumer disputes has to put more emphasis on the transparency of the process and on public access to awards decisions than on confidentiality. He goes on to explain why dispute resolution institutions attached to or affiliated with particular specialized virtual marketplaces should publish their awards or judgments as a means of helping consumers both to gain more confidence in e-commerce and virtual justice and to learn more about their rights. A third outcome should be the publication of the virtual arbitrators' reputations, particularly those targeting consumers in those markets. Some institutions publish their decisions. WIPO's decisions in ICANN-related disputes are made public. It is important, though, to note that ICANN's Uniform Domain-Name Dispute Resolution Policy ("UDRP") does not provide traditional arbitration, but a kind of administrative procedure.

When considering business-to-consumer transaction-related disputes, Gibbon's arguments are indisputable. As far as business-to-business e-commerce-related disputes are concerned, the parties should have the right to opt for privacy and confidentiality. Arbitration is a consensual institution.


62 Gibbons, supra note 5, at 780-781.


no one agrees on what the procedure is--the name used is an administrative procedure, but some panelists have referred to themselves as arbitrators in their decisions. It has been called 'arbitration in the press' and the term 'arbitration with a twist' has also been used. Given the fact that there is recourse to State courts before or after the proceedings for independent resolution (and-in one view-during it, possibly subject to the panel's determination as to what to do, including termination), the procedure lacks the finality of international arbitration. The procedure may be considered binding (at least in a contractual sense) once invoked, but it is not clear how non-compliance with the decision would be sanctioned.

Id.
and those who opt for it should be given the opportunity to tailor it to their specific needs. Indeed, that is what transpires in off-line international commercial arbitration. Awards have been published and information about proceedings has been made available to the public, not only in cases in which the award has been attacked before courts. The same rule should apply to virtual dispute resolution centers and for ad hoc online arbitration. Virtual marketplaces that have their own dispute resolution mechanisms, including arbitration, should leave the choice to the parties. If national laws give parties the right to arbitrate certain disputes and to be in total control of arbitral proceedings, virtual marketplaces or dispute resolution centers cannot take that right away from them.

(d) Speed and Costs

In general, international commercial arbitration is expensive and is not a particularly speedy procedure. It is cheaper and quicker than litigation, but for individuals and for disputes involving small amounts, it is not as affordable as ADR. As previously mentioned, arbitration is a purely consensual and private institution. All costs, therefore, have to be paid by the parties.

In addition to their own travel costs, parties pay the fees and travel costs of their lawyers and arbitrators, the costs of renting rooms for the hearing and deliberation of the award, and the travel costs for any third party involved in the proceedings as an expert or as a witness. Costs are high for both ad hoc and institutional arbitration. In the case of institutional arbitration, the parties have to pay non-refundable administrative fees, and these may be significant. The chart below shows the cost of having disputes resolved by some of the busiest off-line international commercial arbitration centers. It reveals that it is difficult for parties to spend less than USS2,500 to resolve their international commercial dispute using the facili-

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64 For example, ICCA's Yearbook International Arbitration publishes excerpts of arbitral awards, sometimes providing names of the parties and sometimes only indicating nationality.

65 European Consumer Law Group (ECLG) published in 1998 a report suggesting that the use of cross-border litigation has economic effects only above a value in litigation of 2,000 ECU. See "Jurisdiction and applicable law in cross-border consumer complaints: Socio-legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Community?" (ECLG/157/98-29/04/98), http://europa.eu.int/comm/consumers/policy/egl/rep01_en.html (last visited Mar. 8, 2001). This view is supported by a socio-legal study conducted by Prof. Gessner, Bremen University. Prof. Gessner's study is included as Annex II of this Report and is available at the same Web site. According to John Yates, a partner with Oxley & Coward in Rotherham, UK, litigation of information technology and computer related disputes in England costs up to 1,000 GPB per day in legal fees. See J. Yates, Did you Spill My Pint? (1997), 7 SCL ELECTRONIC MAGAZINE, at http://www.scl.org/scl/emag/emagazine/ vol7/iss6/vol7-iss6-joh-yates-art.html (last visited Jan. 10, 2001).
ties of some traditional institutions. On the other hand, it could cost the parties as little as US$150 to settle their dispute by online ADR provided by some online dispute resolution providers.

Chart 1: Off-line international commercial arbitration fee:

<table>
<thead>
<tr>
<th>ADMINISTRATION CENTER</th>
<th>AMOUNT OF CLAIM*</th>
<th>FILING FEE*</th>
<th>ADMINISTRATIVE FEE*</th>
<th>ARBITRATOR’S FEE*</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAMCA</td>
<td>From up to 1,000 to 5 mil.</td>
<td>450-7,000; for 3 arbitrators: 2,000</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>BCICAC</td>
<td>From up to 50,000 to 10 mil.</td>
<td>500-10,000; for undetermined claims 1,500</td>
<td>300-500 per party</td>
<td>N/A for individual arbitrators; 1,000 when the BCICAC is appointing authority</td>
</tr>
<tr>
<td>AAA</td>
<td>From up to 10,000 to 5 mil.</td>
<td>500-7,000; for undetermined claims 3,250; for 3 arbitrators: 2,000</td>
<td>750-3,000</td>
<td>N/A</td>
</tr>
<tr>
<td>ICC</td>
<td>From up to 50,000 to 80 mil.</td>
<td>N/A as separate costs</td>
<td>2,500-75,800</td>
<td>For claims up to 50,000-min 2,500 --max 17% Over 100 mil.:min. 0.01%- max. 0.05%</td>
</tr>
<tr>
<td>LCIA</td>
<td>N/A</td>
<td>1,500</td>
<td>N/A</td>
<td>1,000 for appointing authority; 800-2,000 per tribunal per day and 100-250 per hour when less than one day</td>
</tr>
</tbody>
</table>

*All amounts in the chart No. 1 are in U.S. dollars except for LCIA, which is in UK pounds (compiled on February 8, 2001).

Online arbitration can reduce these costs significantly. The mere fact that parties, lawyers and arbitrators can participate from wherever they happen to be, eliminates travel and related costs. This more than compensates for the negligible cost of Internet access. Furthermore, the administrative fees charged by virtual dispute resolution centers are lower than fees of traditional arbitration centers.
Chart 2: Online dispute resolution centers fee:

<table>
<thead>
<tr>
<th>CENTERS</th>
<th>AMOUNT OF CLAIM*</th>
<th>FILING FEE*</th>
<th>ADMINISTRATIVE FEE*</th>
<th>ARBITRATOR’S FEE*</th>
</tr>
</thead>
<tbody>
<tr>
<td>CyberSettle</td>
<td>0-250,001+</td>
<td>No fee *only success fee from 100-1,000</td>
<td>No fee</td>
<td>N/A</td>
</tr>
<tr>
<td>ClickNsettle</td>
<td>0-10 mil. and above</td>
<td>450-20,000; 1,800 for under-mined amount of claim; 1,800 minimum for any case with 3 or more arbitrators</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Arbitration-Forum</td>
<td>15,000-4.9 mil. and above</td>
<td>500-3,000 (2,500 for each additional session)</td>
<td>N/A</td>
<td>Included in costs for document hearing</td>
</tr>
<tr>
<td>RESOLUTION</td>
<td>1-15 domain names</td>
<td>No fees when using e-mail and eResolution secure site (otherwise 100-250)</td>
<td>250-500 (1 panelist) 400-600 (3 panelists)</td>
<td>1,000-1,800 (1 panelist); 2,500-4,000 (3 panelists)</td>
</tr>
<tr>
<td>Online Resolution</td>
<td>Up to 10,000; 10,000-50,000 above 50,000</td>
<td>100 per party for 2 hours (min.) plus 50/hour per party; 150 per party for 2 hours (min.) plus 75/hour per party; 200 per party for 2 hours (min.) plus 100/h per party</td>
<td>Included</td>
<td>Included</td>
</tr>
</tbody>
</table>

*All amounts in the Chart 2 are in U.S. dollars (compiled on February 8, 2001).
It is also possible that online arbitration may accelerate arbitral proceedings. In general, time spent on arbitration will depend to a great extent on the complexity of the disputed issues and on the rules of procedure adopted. Rules of some international commercial arbitration centers limit the duration of an off-line traditional arbitration case to six months and even allow parties to reduce time limits. However, if the parties are not committed to efficient dispute resolution, if they do not cooperate but instead use dilatory tactics, the proceedings will be lengthy. In practice, total average duration of international arbitration process is nine to thirty-six months. The very first international commercial arbitration case held at the British Columbia International Commercial Arbitration Centre in Vancouver, Quintette Coal Ltd. v. Nippon Steel Corp. case, has become well-known for its 142 days of hearings in Vancouver in Tokyo and 14,000 pages of testimony. The Rules of BCICAC were modeled on the UNCITRAL Rules and British Columbia’s international commercial arbitration law is based on the UNCITRAL Model Law on International Commercial Arbitration. Yet, the Quintette Coal arbitration was obviously very lengthy and very expensive.

In sum, online arbitral proceedings may save some time and provide a speedy resolution, but only if the rules discourage parties from using dilatory tactics and limit time allowed to the parties and arbitrators for certain actions.

However, technical knowledge and skill levels are also a factor. Arbitrators must be well trained in the use of arbitration software and the parties should opt for online arbitration only if they are comfortable with the use of new technology. There is no doubt that some participants may be intimidated by the software, but others will love it. In the case of institutional international commercial arbitration, the dispute resolution centers should have the obligation to provide the necessary training for arbitrators and to introduce the parties to the use of the software.

(e) Place and Language

As a general rule of off-line international commercial arbitration, the parties determine the language of arbitration and, if they have failed to do so, the arbitrators make the choice. In the case of institutional arbitration, the arbitrators’ choice is governed by institutional procedural rules. In the

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66 See ICC Rules of Arbitration, art. 24 (time limit for the award); art. 32 (modified time limits).
67 See C. BÖHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 112 (1996).
case of e-commerce, which allows an unprecedented number of small and medium-sized businesses to get involved in international transactions, it is important to be able to avoid having the proceedings conducted in a foreign language, which could happen in litigation before a foreign court. So far, since the majority of users of the Internet speak English as their first language, the potential for a language problem may appear to be overstated, but as other nations increase their Internet use, its significance must be acknowledged.

In off-line international commercial arbitration, the location of arbitration is very important for several reasons. In the off-line world, arbitration still operates within the framework of a patchwork of national laws. Although the laws of the major trading nations and the countries housing the most prominent institutional arbitration centers are arbitration-friendly, there are fundamental differences among them. The most important differences relate to the limitation of court intervention in arbitral proceedings and the possibility of judicial review. Business people and, of course, their legal counsel, know that if they want to avoid the right to appeal to local courts, they must draft the arbitration clause very carefully in order to avoid setting the place of arbitration in a country that gives such right of appeal. (Another way around this would be to word the arbitration agreement so as to explicitly exclude the right to appeal.) Moreover, in online arbitration, determination of arbitration location is decided by the parties and, if they fail to make that determination, the arbitrators decide on the location and state it in the award. In institutional arbitration, if the parties fail to make a choice, then the rules of the institutions provide a default solution.

It is also well-known that in off-line arbitration the place of arbitration need not reflect the real location of one or more of the arbitrators when they render the award. Furthermore, hearings need not be conducted in the place stipulated in the arbitration agreement as the place of arbitration. As mentioned earlier, the place of arbitration will be stated on the face of the award and that stated place will impact the enforcement of the arbitration agreement and the finality of the award. That will be the place where any court battle to set aside the award will take place. It is true that the enforcement of arbitration agreements and awards is governed by the New York Convention, but it is also true that the interpretation and application of the Convention rests with national, local courts of the place of arbitration. Thus, local legal culture and precedents may come into play.

How important is the place of arbitration in cyberspace, in the virtual world of many places\(^69\) that dematerializes, deterritorializes and detemporalizes our perception of law?\(^70\) How important is the place of arbitration

\(^{69}\) Lawrence Lessig, Code and Other Laws of Cyberspace 63 (Basic Books 1999).

\(^{70}\) See J. Hoeren, Electronic Commerce and Law; Some Fragmentary Thoughts on
and how can it be determined if, for example, arbitration centers, too, are virtual? These questions form part of the debate as to whether it is possible to put the Internet and e-commerce into the traditional territorial framework of our laws. Territoriality is a problem with which international commerce has grappled for centuries and the only efficient solution in the off-line world has been the harmonization of national laws and the creation of international frameworks. As for e-commerce, we still see it simply as commerce inspired by high technology and we use a significant number of our pre-Internet laws to regulate business practices on the Internet. Some new laws have been adopted in the countries that dominate the Internet, but in general, the application of off-line laws still prevails.

In contrast to off-line international commerce, which is harmonized in many areas, there are no international treaties regulating any aspect of e-commerce. Some sort of soft harmonization may be reached in the future by adoption of the UNCITRAL Model Law on Electronic Commerce in a greater number of countries, or at least by adoption of major principles established by this Model Law. In the meantime, parties to online arbitration have no options other than those the parties to off-line arbitration already have. They have to specify the place of arbitration in their agreement, addressing the same considerations as the parties to off-line arbitration. If they fail to specify the place, the arbitrators will do so by default. In any event, the New York Convention will be applicable as long as other requirements of the Convention (in particular, written form and signature by the parties and the arbitrators) are met.

(F) The Neutrality, Independence and Expertise of Arbitrators

One of the greatest advantages of international commercial arbitration is that the parties may pick the arbitrators they want to deal with their dispute. Some national court judges based in big international business centers

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71 UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE was adopted by the General Assembly Resolution 51/162 of December 16, 1996. Legislation based on the UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE has been adopted in Australia, Bermuda, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and, within the United States of America, Illinois. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted as law by a number of jurisdictions in those countries. See United Nations Commission on International Trade Law, Status of Conventions and Modern Laws, available at http://www.uncitral.org/status/status-e.htm (last visited Jan. 24, 2002).
such as New York, Paris and London, have proven to have a good knowledge of international trade law; others lack exposure to the complex issues. It has always been emphasized as one of the greatest advantages of arbitration over litigation is that the parties to arbitration can opt for individuals who are highly experienced and knowledgeable in the subject matter of their dispute. There is a general requirement in all national laws, institutional rules and international arbitration treaties that arbitrators be neutral and independent in their decision making and the parties cannot derogate from these rules. Because the neutrality and independence of arbitrators has been widely debated in the literature, I will focus on other qualities that arbitrators may bring to the proceedings.

The arbitrators' expertise or competence in the subject matter is a vital factor in the online arbitration of disputes that arise out of e-commerce transactions and disputes related to high technology applications. Arbitrators dealing with these disputes must be experts in comparative commercial law and international law, but they also must have knowledge of the technical particularities and the skills to use online arbitration software. As in off-line international trade, it is desirable to have arbitrators who know the laws of different countries and who speak different languages. Not only can that help in reaching a better understanding of the positions of parties coming from different cultures and speaking different languages, but it can also make the proceedings more time- and cost-efficient by obviating the expenditure of time and money on the translation of documents.

In the world of off-line international commerce, it has always been difficult for parties inexperienced in international commercial arbitration to select arbitrators wisely. In response, institutional arbitration centers provide lists of experts, usually highly qualified and experienced individuals from different countries. These centers are interested in maintaining high standards and therefore provide continuing training to keep their arbitrators abreast of new trends in law and technology. Now we see virtual dispute resolution centers showing the same concern with quality. Parties who plan to take their online disputes to arbitration should give serious consideration to this function of institutional arbitration in order to control the quality of arbitrators. As more companies become involved in e-commerce and as their transactions grow more complex and diverse, it is increasingly obvious that arbitrators must constantly update their knowledge of market and technology trends.

In addition to quality control, arbitration institutions are trying to give full disclosure as to the variety of services they provide and the expertise of arbitrators or mediators associated with them. The Internet, the emergence of online dispute resolution centers and the establishment of Web sites dedicated to traditional off-line arbitration have greatly simplified the process of choosing a proper arbitrator. For example, those interested in having
their dispute decided by the eResolution center can simply go to eResolution’s list of arbitrators, click on any name, immediately get full information on that individual and contact her or him instantly. It is true that offline institutions offer the same quality of information, but “snail mail,” or even a fax, seem very slow in comparison with direct and instant access to information online. The same quality of information about its 1,500 “hearing officers” (not arbitrators) is provided by ClicknSettle. CPR has a panel of 700 “neutrals” and the list is also available online. From the Cyberarbitration web site, in contrast, one could not see the place of registration of the center, who works for the center, what the costs of arbitration are, or the list of arbitrators.

Now that it is possible for them to perform their duties online, arbitrators may be able to undertake more cases and it may be easier to establish larger panels (three or more). Online tribunals may have a logistical advantage since they can communicate simultaneously through chat rooms and on a twenty-four hour basis by e-mail. Advances in communication technology enable arbitrators and parties to transmit all sorts of documents instantly, from simple letters to audio and visual files. All this new technology makes the arbitrators' work more coordinated despite the fact that they are communicating from remote locations.

2. Enforcement of Agreements and Awards

In December 2000, Fabien Gelinas, Vice President and General Counsel of “eResolution,” disclosed in an interview reported by the Metropolitan Corporate Counsel that this center has ambitions to become a successful dispute resolution tribunal for international commercial disputes. eResolution is currently best known as one of the ICANN centers for the resolution of domain name disputes, but it plans to deal more and more with international commercial disputes arising out of both online and off-line transactions. It is also significant that eResolution has the technical and software capabilities to conduct the entire arbitral process online, from the filing of the claim (complaint(s) and response(s)) through to uploading the documents and evidence and rendering the award. Mr. Gelinas explained that the center intends for online arbitration to gain the advantages of the worldwide applicability of the New York Convention in the off-line world. We have not yet gathered enough empirical data on online international commercial arbitration, but a review of some of the concerns related to the

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74 Indeed, Mr. Gelinas argues that eResolution was the first center able to conduct the entire process online. See Editorial Interview: Making E-Markets Work by Overcoming Legal Uncertainties: Online Dispute Resolution, THE METROPOLITAN CORP. COUNS., Dec. 2000 at 1.
application of the New York Convention on the recognition and enforcement of awards rendered online would be worthwhile.

First, it must be noted that it is impossible to analyze how successful international commercial arbitration really is in the off-line world and how many disputes it resolves annually in comparison to litigation. Privacy and confidentiality prevent public access to arbitration proceedings and the publication of awards. We normally learn about international commercial arbitration cases when problems are encountered in the enforcement of arbitration agreements or awards. Nevertheless, anecdotal information indicates that the losing parties voluntarily perform about ninety percent of off-line international commercial awards.

This author has not yet found any record of problems encountered in enforcing international arbitration agreements or awards concluded online. Of course, the fact that nothing has yet been published does not mean that online international commercial arbitration is not occurring. As previously discussed, there is new technology capable of supporting the day-to-day practice of online dispute resolution. For example, the software that most recently joined the struggle for support from the public and experts is the Resolution Room offering made by Mediate.com and Online Resolution.75 Cisco Systems, Inc. recently announced that it has developed a conferencing system that can support up to four hundred simultaneous users. Software engineers are certain that the technical capability exists to perform the entire arbitration process online and to provide the necessary privacy and confidentiality. Both Jasna Arsic and Richard Hill have dealt extensively with this from the legal point of view.76 Both authors agree that the practice of online arbitration is more limited by the strict formal requirements of the New York Convention than by software.

(a) Problems with e-arbitration agreement

Many authors point out that the strict formal requirements of the New York Convention cannot be met when an arbitration agreement is concluded online.77 To reiterate, the Convention in article II (2) provides that “[t]he 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” [emphasis added].

It is obvious that the New York Convention is a very old piece of international legislation and that it did not foresee unprecedented development of high technology as a means of communication. Thus, debates over

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76 ARSIC, supra note 4; Hill, Online Arbitration: Issues and Solutions, supra note 5.
77 See ARSIC, supra note 4; Hill, Online Arbitration: Issues and Solutions, supra note 5.
its modernization are ongoing. Some experienced arbitrators argue that it needs to be modernized, but that it is difficult to modify an international convention. In the meantime, some new national laws on international commercial arbitration and contracts in general have softened the written form requirement to include modern means of communication. Those new national laws are simply validating the technological equivalent for the old legal requirement (written form) rather than changing or repudiating it.

So far there is no arbitration law that directly refers to e-mail and the Internet as a means of contracting an arbitration agreement. However, some, such as the 1996 English Arbitration Act Section 5, open the door for it with a broad formulation of "agreement in writing." One may also note that the courts of different countries have taken different approaches in dealing with the formal requirements of the New York Convention in the context of off-line arbitration. Indeed, it was not unusual that an agreement was signed by only one party, although other records of communications exchanged by the parties (via telex, for example) were deemed to be sufficient proof of their intention to arbitrate. The Hong Kong High Court, for example, showed great sensitivity in this respect even before the 1996 change of the requirement, in writing, in its Arbitration Ordinance, section 2AC.

Richard Hill who argued compellingly that, from the technical point of view, e-mail has the same credibility as a fax or a telex. Hill explained in detail that an arbitration clause, as part of a contract concluded over the Internet as an offer and the acceptance of that offer, satisfies the requirements of the New York Convention as long as there has been a clear and obvious offer from the buyer and a clear and obvious acceptance by the seller.

Rules of many arbitration institutions reflect a more sensitive approach towards written form and signature requirements. For example, NAF Code of Procedure defines "writing or written" as any form intended to record in-

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78 See N. Kaplan, Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice? 5 ASIA PAC. L. REV. 1 (1996). Kaplan rightly pointed out that the outdated requirement serves well in old-fashioned economies where transactions are concluded in direct negotiations around the table, but that it might become obsolete in modern times when most transactions are conducted electronically without direct contact by the parties. Kaplan further insisted that the fear that removal of the requirement would lead to insecurity surrounding transactions was overstated. He initiated modification of provisions related to the written form requirement in the 1996 Arbitration Ordinance of Hong Kong.

79 For example, the 1996 English Arbitration Act, section 5 and the 1996 Hong Kong Arbitration Ordinance, section 2AC(4).


81 Hill, Online Arbitration: Issues and Solutions, supra note 5, at 202-203.
formation, including symbols on paper or other substance including, recording tape, computer disk, electronic recording, and video recording and anything else. The same Code defines "signature or signed" as any mark, symbol or device intended to be an attestation produced by any reliable means including an electronic transcription intended as a signature.

Finally, it is important to note that many countries have recently, in one form or another, adopted laws on electronic commerce ("e-commerce") and electronic signatures ("e-signatures") and that others are working towards the creation of new laws that will enable electronic contracting. Most national laws are influenced by the 1996 UNCITRAL Model Law on Electronic Commerce. In sum, those laws give e-signatures the same legal effect as traditional signatures and make e-transactions legally equivalent to paper ones although the application of these laws is not mandatory. Parties are free to opt-in with regards to the application of these laws because they are not obliged to contract online contract. New laws generally state that any electronic substitute for a written document must be accessible to both parties and must be capable of retention by the receiving party.

It is noteworthy that the United States, the leading country in e-commerce, passed the federal Electronic Signatures in Global and National Commerce Act recently and that it came into effect on October 1, 2000. There is no federal law on e-commerce even though there are significant effort to harmonize state legislation through adoption of the Uniform Electronic Transaction Act ("UETA") and the Uniform Computer Information Transaction Act ("UCITA") (Nonetheless, UCITA regulates computer information transactions; that is, all licenses of computer information.)

In the E.U., several directives were enacted to deal with harmonization of member states’ rules on e-signatures and e-commerce. The Electronic Signature Directive, which has to be implemented in all member states before July 19, 2001, determines that e-signatures, when certified by a licensed certification service provider, are legally equivalent to a handwritten signature and admissible as evidence in legal proceedings. The member states must adopt this Directive by January 17, 2002.

83 Id. at 2(L).
84 See UNCITRAL Model Law, supra note 71.
85 For an overview of electronic commerce legislation see http://www.mbc.com/ecommerce/ecomoverview.asp and Poggi, Online Arbitration: Issues and Solutions, supra note 44.
87 For a comparative overview of the UETA and UCITA status, see http://www.mbc.com/ecommerce/legislative_1_2.asp?state=all (last visited Jan. 24, 2002).
Unfortunately, there is little hope for international unification or harmonization of these laws that facilitate electronic contracting. At this point, if there is a regulation, it is at the national level, or at the regional level in the case of the European Union whose laws are applicable to all fifteen member states. Thus, the when an arbitration agreement is concluded with the simple exchange of documents bearing no signatures of both parties, problem is the same as in off-line international commercial arbitration. No solution has been found in the off-line context, except through national courts' interpretations of the New York Convention.

(b) Problems with E-Awards

If arbitrators have agreed to the use of electronic means of communication and all parties have access to the use of such means and agree to use them, there are no obstacles to the exchange of information (textual or visual) online. It is possible that some documents or evidence might have to be examined physically, but in those cases off-line communication can be used in addition to online communication. The problem may arise with respect to the requirement set out in Article IV(1)(a) of the New York Convention, which requires a party seeking recognition and enforcement of foreign arbitral award to submit an authenticated original award or duly certified copy. Is an e-award an acceptable equivalent to such an award?

One possible answer to the above question is offered by UNCITRAL and its Model Law on Electronic Commerce. Article 8(1)(a) of the Model Law explains that "where the law requires information to be presented or retained in its original form, that requirement is met by a data message [electronic message] if there exist a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise." Along the same lines are the Uniform Electronic Transfer Act, section 12\(^\text{90}\) and the Canadian Uniform Electronic Commerce Act, section 7.\(^\text{91}\) In sum, new laws on electronic transactions

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\(^\text{89}\) UNCITRAL MODEL LAW, supra note 71, art. (1)(a)

\(^\text{90}\) UNIFORM ELECTRONIC TRANSFER ACT (2001), [hereinafter UETA] §12: Retention of Electronic Records; Originals:

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which: (1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and (2) remains accessible for later reference. (d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).


(1) A requirement under [enacting jurisdiction] law that requires a person to present or provide a
will provide for the validation of electronic messages including e-awards if the parties explicitly agreed on the electronic transaction and, accordingly, on conducting online arbitration. Until states modernize their laws on electronic transactions and electronic commerce, electronic awards cannot meet the requirement set out in Article IV(1)(a) of the New York Convention.

As already mentioned, national laws on international commercial arbitration are not identical. Some authors focus on the Swiss Private International Law Act and explain that in Switzerland, unless otherwise agreed by the parties, an arbitration award must be written on paper and be signed in the hand of the arbitrators themselves. The British Columbia International Commercial Arbitration Act provides in section 31(1)(5) that an award must be made in writing and must be signed by the members of the arbitral tribunal and that a signed copy must be delivered to each party. Since this Act does not refer to hand signature, it could be argued that electronic signature as defined in the British Columbia Electronic Transaction Act might qualify as appropriate and that the electronic version of a written arbitration award rendered in British Columbia might meet the requirements of the New York Convention.

Many authors advise that even though e-awards might qualify under the New York Convention, arbitrators should send a hard copy of the signed award to the parties in order to avoid the uncertainties caused by the possibility of a different interpretation by some national courts of the written-form requirement. When this author participated at the Conference on Regulating the Internet in the European Union and the United States (University of Washington, Seattle, April 2000), one of the participants, Geraint Howells, a leading consumer protection lawyer in the European Union and law professor at the University of Sheffield, said that he always advises his clients to make a hard copy of every communication they make online and, especially, of every contract they conclude online. In other words, play it safe.

92 Article 189.2. of the Swiss Private International Law in conjunction with Art. 14.1 of the Code of Obligations, which defines "signature" is examined in Hill, Online Arbitration: Issues and Solutions, supra note 5.

93 See Commercial Arbitration Act, supra note 52, § 31(5).


95 Arsic, supra note 4; Hill, Online Arbitration: Issues and Solutions, supra note 5; Schneider &-Kuner, supra note 5.

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IV. CONCLUSIONS

International commercial arbitration is not simply a facilitator of international business—it is international business. The industry quickly took up the opportunity to use the World Wide Web, primarily to promote their off-line facilities and services. All major international arbitration centers have web sites and maintain complex data online. Many have changed their rules of procedure to allow the submission of written documents by electronic means upon the condition that some record of delivery must be available. With their rules, service fee schedules and lists of arbitrators posted online, international commercial arbitration centers have become more accessible and more transparent. In addition, new virtual centers have emerged to resolve both off-line and online international commercial disputes, eResolution being the one with the most ambitious plan.

This article started from the premise that international commercial arbitration, a mechanism appropriate for the resolution of off-line international disputes, is also appropriate for the resolution of online international commercial disputes. It emphasizes the fact that in the same way that national and international rules regulating off-line arbitration allow the parties to be in total control of the arbitration proceedings and enable them to enforce arbitration agreements and awards, those rules may facilitate online arbitration and protect the autonomy of parties to an online arbitration. However, careful drafting of the arbitration clause is a must and certain traditional off-line activities, such as sending a signed hard copy of the award to all the parties, should be carried out in order to overcome possible difficulties in satisfying the written form requirement established in 1958 by the New York Convention.

Finally, the article argues that, with the development of software and technology to support the practice of online dispute resolution, online arbitration may significantly accelerate proceedings and reduce costs. The suggestion was also made that online arbitration should be viewed as a supplement to off-line arbitration, an alternative made available to those parties, who are comfortable with the use of new technology and who have adequate access to it. Moreover, traditional off-line international commercial arbitration is changing. The online filing of a claim and e-mail communication are not novel to otherwise off-line arbitration proceedings and this author hypothesizes that future developments will rely on a combination of off-line and online communication.

96 British Columbia International Commercial Arbitration Centre Rules of January 1, 2000, art. 2(2), available at http://www.bcicac.com/cfm/index.cfm?L=133&P=212#article2. ("Any written communication required or permitted under these Rules may be delivered personally, by registered mail, by facsimile, or by electronic or other means of telecommunication which provide a record of delivery [emphasis added].")
In closing, this article calls attention to some societal aspects of the current development of e-commerce. It is fashionable to talk about e-commerce as being yet another manifestation of globalization. Predictions abound as to unprecedented growth in the volume and value of online trade. Emphasis is invariably placed on the unlimited potential for small and medium-sized businesses to develop international markets by stepping into virtual reality. However, current reality, both on- and off-line, shows another perspective. Currently, 1.9 billion people in this world live on less than less US$2.00 per day. The Internet and e-commerce have emerged as American inventions, with other Western developed countries struggling from far behind to close the gap. Russia, for example, a country with more than 145 million people, has only over a million Internet users and more than 18,000 registered web sites. In other words, e-commerce is still the Western countries' new big thing. Virtual dispute resolution centers are first being established in the West, notwithstanding the argument that they are in cyberspace and cyberspace is everywhere. Asia and Africa are being left behind despite the fact that they have off-line international commercial arbitration centers operating.

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97 The facts presented in Davos, Switzerland, by Mr. Vicente Fox, President of Mexico (http://www.cnn.com report on file with the author).