Out-of-court dispute settlement systems for e-commerce

Report on legal issues
Part IV: Arbitration

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Abstract: This is the report of the exploratory study that focuses on the legal issues.

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We invite readers of this report to send comments or suggestions to:

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1. Introduction

Arbitration is the most developed type of out-of-court dispute settlement. The parties may choose the body responsible for arbitration, select a specialist arbitrator and choose the law to be applied within the arbitration. The parties may thus 'tailor' the dispute settlement to serve their particular needs. The enforceability of international awards is ensured by the New York Convention on an almost global level. The arbitration of cross-border disputes thus offers many advantages over dispute settlement by the courts.

The legal framework within which voluntary arbitration in electronic commerce takes place consists of the autonomy of the parties and their agreement to arbitrate, mandatory rules of the national and international arbitration law, the rules of the institutions dealing with the arbitration and the rules selected by the arbitrator and non-mandatory rules of the national and international arbitration law.[1]

The necessity to make use of out-of-court dispute settlement in electronic commerce is evident:[2]

Rather than rely on an uncertain and unpredictable body of law which in several ways has not yet adapted to technological developments, effective dispute resolution may be found in arbitration (...)*, with a neutral party versed in the subject and familiar with the customs of the cyberspace commercial community. Such a tribunal would be particularly useful in situations where traditional law calls for a determination of 'reasonableness'. As the development of digital communication – and custom – continues to challenge the adaptability of law, the need for a more flexible method of dispute resolution will increase. In addition to being a system of dispute resolution flexible enough to accommodate an extremely dynamic area, a primary strength of ADR here is its recent acceptance into commercial disputes generally. A strong incentive for the use of ADR in commercial disputes, with obvious relevance to cyberspace, is the opportunity to avoid potential jurisdiction problems. Parties can develop arbitration agreements which stipulate their choice of law, eliminating potential delays which may result from a dispute over jurisdiction.*

1.1 Arbitration by Means of Electronic Commerce

Rules of arbitration law of interest to electronic commerce relate in particular to the arbitration procedure and to the enforceability of arbitral awards. Only if the arbitration procedure results in a decision which can be enforced by the succeeding party against the loosing party, the arbitration has a useful effect. In the case of a 'national' arbitration, the enforceability follows from the relevant national arbitration law. Within the Internal Market the national arbitration laws of Member States differ. There is no particular legal instrument according to which awards rendered in one Member States would be enforceable in another Member State. In the case of 'international' arbitration, different legal layers may become relevant. In international arbitration the enforceability of foreign awards is regulated by the New York Convention which has met with a high degree of acceptance. According to this Convention the Contracting State in the territory of which the award shall be recognised and enforced may exercise a certain control over the award.

International arbitration is 'delocalised' to a certain degree. However, application of the principle of territoriality continues to play an important role. But where is the place or seat of arbitration in cyberspace? Which provisions of international and national arbitration laws have should be observed by the parties resorting to arbitration in electronic commerce and by the organisations and institutions operating it? The subsequent analysis aims at the verification of the conditions of effective arbitration as a means of out-of-court dispute settlement for electronic commerce.

Article 17 of the Directive on Electronic Commerce envisages the use of out-of-court dispute settlement with the aim to facilitate cross-border electronic commerce within the Internal Market.

Information Society services which operate in many countries are thus likely to prefer the international arbitration of their disputes with recipients provided that the institutions responsible for arbitration offer rules adapted to electronic commerce. In electronic commerce these concerns may be aggravated through the unknown environment.

1.2 Advantages of International Arbitration

What are the advantages of international arbitration in electronic commerce and how can they be made clear to the parties? Particularly in cross-border electronic commerce international arbitration is likely to develop as a preferable alternative to dispute settlement by different national courts. Court litigation in some states may be a very cumbersome and lengthy procedure. Also the enforcement of judgements abroad may be very difficult, taking into account of the absence of international agreements on jurisdiction and enforcement of court decisions on a global level. Additionally, *the lack of international courts makes it relatively easy to accept arbitration as a preferable means to national courts.*[3]

The advantage of international arbitration are obvious:

1. a 'neutral' body responsible for arbitration instead of national courts;
2. a chosen specialist arbitrator instead of a judge on the selection of which the parties have no influence;
3. a choice of the law applicable to the arbitration made by the parties, possibly by reference through the choice of the institution responsible for arbitration which may offer a set of laws adapted to electronic commerce in its rules;
4. the choice of a 'neutral' or non-national law as the law applicable to the arbitration;
5. a speedy decision within generally six months in ordinary arbitration[4] or three months in expedited arbitration,[5] and even shorter periods in consumer arbitration;
6. the development of a coherent adjudication by the institution responsible for arbitration in disputes between Information Society services and recipients, no matter in which state the parties are established or domiciled;
7. correspondence with the convenience of the parties through the choice of an appropriate place of arbitration;
8. the avoidance of protracted jurisdictional litigation with inconsistent judgements and a multiplication of courts' and lawyers' fees;
9. an increase of predictability within contractual relations through the choice of an institution responsible for arbitration offering a coherent set of legal rules suitable for electronic commerce;
10. the adaptability of the arbitration procedure to the needs of the parties concerning, for example, encryption and digital signatures or audio- and videoconferencing;
11. the enforceability of foreign arbitral awards on the basis of the New York Convention with 121 Contracting States, when the enforceability of foreign judgements cannot be based on an equivalent international instrument which would meet with a comparable degree of acceptance.

The psychological barriers of the parties to resort to arbitration may be overcome with the support of measures of e-confidence. E-confidence should create an improved knowledge on the part of Information Society services and their recipients, leading to a comprehensive

information about the working of international arbitration by means of electronic commerce, to improved and adapted arbitration agreements by the parties and to adapted rules for arbitration by the institutions for arbitration.

2 International Arbitration in Electronic Commerce

The conclusion of an (international) arbitration agreement is based on the freedom of contract and on the autonomy of the will of the parties.[6] In particular, the parties have the freedoms to:[7]

1. determine the place of arbitration;[8]
2. determine the procedural law to be followed by the arbitral tribunal;[9]
3. choose the substantive law of the contract,[10] respectively the law applicable to the arbitration;
4. choose different laws for the contract,[11] respectively the law applicable to the arbitration.

Most states permit their citizens and the organisations which are established in their territories to choose a system for adjudication which is different from the national court system adopted by legislation. If the parties opt for this possibility, this does not free them and the arbitrator from state control. The recognition and enforcement of international awards is subject to state control which is regulated in an important international instrument, the New York Convention.

2.1 Legal Framework and Efficiency of International Arbitration

The legal background of international arbitration consists of international conventions, national arbitration laws, the rules of arbitration issued by the relevant arbitral institution or drafted by the parties and the arbitration agreement concluded by the parties. Whereas the arbitration of national disputes is subject to national arbitration laws, international instruments, in particular the New York Convention, are applicable if the dispute is international.

2.1.1 The Internationality of the Dispute

The internationality of disputes may be regulated differently by international instruments and the international private law of states.

a.-) Internationality According to the New York Convention and the Geneva Convention

Article II(1) of the New York Convention relates to a broad concept of arbitration agreement concerning internationality: *Each Contracting State shall recognise 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.* Article II(1) of the New York Convention thus seems to imply that the Convention concerns only arbitration agreements within an international relation which are exclusively dealt with by a national law.[12] The concept of internationality under the New York Convention would thus have to be considered as broad. The concept of internationality according to the Geneva Convention is more limited. The Convention refers in Article I(1)(a) *to arbitration agreements concluded for the purpose of settling 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 States*.

b.-) Places of Business in Different States

The UNCITRAL Model Law on International Commercial Arbitration establishes in Article 1(3) that the arbitration is international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States or (b) 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 (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The Model Law establishes in Article 1(4) that in the case where a party has several businesses, the place of business is that which has the closest relationship to the arbitration agreement. The assumption of the internationality of a dispute between an Information Society service and a recipient could be based on a similar reasoning, provided that, in the case where a party is a natural person, its place of domicile should be decisive. However, *the relationship between a place of business and an arbitration agreement is not a very clear concept. It should probably be understood as meaning, or at least including, the implementation of the agreement and the subject matter of the dispute.*[13]

With regard to the establishment of the internationality of the dispute in cyberspace, no other considerations will be applicable. In order to provide legal security, it should be clear that in the absence of particular stipulations by the parties, an address indicated on the Information Society's website respectively the address used by the recipient at the time of the conclusion of the arbitration agreement should be decisive.

c.-) Internationality by Declaration

Concerning the 'internationality' of the dispute by declaration of the parties the UNCITRAL Model Law on International Commercial Arbitration approved of the principle of autonomy which should extend to the question of internationality.[14] Thus the parties may, by their simple declaration, declare that the subject-matter of the arbitration relates to more than one country and thus subject their dispute to the legal rules applicable to international arbitration. During the preparation of the Model Law there was agreement that the term 'international' should be given a broad interpretation.[15]

d.-) Internationality of Consumer Arbitration

In a conflict between national laws which may provide for different types of dispute settlement and particular procedures in the case of consumer disputes (see for example the consumer arbitration systems of Portugal and Spain), it may be recommendable to adapt the national laws concerning consumer arbitration to international arbitration in the case of cross-border disputes. Taking into account of the fact that the obligations imposed upon Member States according to Article 17 of the Directive on Electronic Commerce do not oblige them to create a particular system for dispute settlement, the interoperability of the systems should be ensured. Thus even if the Directive does not oblige Member States to create particular dispute settlement systems, they should, on the basis of the Directive, permit the parties to international disputes to opt for international consumer arbitration. Accordingly, it should be made clear that national out-of-court dispute settlement systems for consumers do not affect the parties' right to resort to international arbitration.

Concerning the limitation of the Geneva Convention to disputes arising from international trade the present negotiations for a new version of the text might expressly include consumer arbitration into the scope of the Convention, taking into account of the recent developments in particular with regard to the agreement between Portuguese and Spanish authorities relating to the international consumer arbitration.[16]

2.1.2 International Commercial Arbitration as the Most Effective Means for the Settlement of Cross-Border Disputes in Electronic Commerce

Due to the general acceptance of the New York Convention an arbitral award rendered in a Contracting State may be recognised and enforced in all other of the 121 Contracting States. Foreign judgements or court decisions are, on the international level, much more difficult to enforce, because there is no corresponding international instrument on the recognition and enforcement of court decisions which would have met with a similar acceptance.[17] Thus cross-border electronic commerce may even have to resort to arbitration if the parties wanted to obtain an enforceable settlement. If an Information Society service is established in a non-Member State and if this non-Member State is not a Contracting State or a party to an international or bilateral instrument providing for the enforcement of judgements to which the Member State is a Contracting State, arbitration is likely to be the only means for an effective dispute settlement.

With regard to the global nature of electronic commerce the significance of regional Conventions such as the Geneva Convention is limited. This might be different, if this Convention would have been ratified by all Member States so that there would be a unitary system for the recognition and enforcement within the Internal Market. But this is not the case, and since all Member States adhere to the New York Convention, the latter instrument assumes decisive importance, not only within the Internal Market but also on the global level.

2.1.3 Costs of Arbitration

Disadvantages of international arbitration may arise from costs related to administrative fees.[18] However, due to the fact that arbitration proceedings last generally only a few months,[19] the costs may be lower than in court litigation, in particular if time is considered as a cost factor. The calculation of costs of arbitration may be facilitated by means of electronic commerce, for example through the use of an online cost calculator.[20] The adaptation of arbitration to disputes involving smaller claims has induced arbitral institutions to offer rules on expedited arbitrations or small claim arbitration. The costs for such proceedings are lower than in traditional arbitration.[21]

2.2 International Instruments Regulating Arbitration

International instruments relating to arbitration, in particular the New York Convention, ensure the efficient working of arbitration on the international level. Apart from the New York Convention there are other international conventions which regulate international arbitration and which found more or less acceptance. However, taking into account of the often regional purpose which these other conventions fulfil, their relevance for the cross-border electronic commerce is limited.

2.2.1 New York Convention

The New York Convention is the most important international instrument relating to arbitration. It ensures the recognition and enforcement of foreign arbitral awards. The New York Convention applies to foreign awards, which includes awards rendered abroad as well as awards rendered within the state in which enforcement is sought if the state chooses to characterise them as 'non-domestic'.[22] The New York Convention which is ratified by 121 parties,[23] including all EU Member States, provides an instrument for the settlement of disputes between Information Society services and recipients. Its role may be identified as follows:[24] The New York Convention provides for the validity of arbitration agreements, the recognition of their jurisdictional impact, and the presumptive enforceability of foreign arbitral awards. The Convention emphasises the importance of the integrity of the national legal order by allowing the courts of a requested state to deny enforcement to an award on the basis of the non-arbitrability defence and the public policy exception. The content of both grounds is defined by national law.

According to Article I(3) of the New York Convention Contracting States may limit the effect of the Convention to awards which have been rendered in other Contracting States. Corresponding reservations were made in the following Member States: Belgium, Denmark, France, Greece, Ireland, Luxembourg, Monaco, Netherlands, Portugal and the UK.[25] These States may apply the Convention only to the recognition and enforcement of awards which were made in the territory of another Contracting State. Thus in any of these states an award which has not been rendered in another Contracting State may possibly not be enforceable according to the New York Convention but according to the provisions of the relevant national law. Accordingly, these Member States may apply their national laws to the recognition and enforcement of awards in international commercial arbitration which takes place, inter alia, within their states.

On the global level there is no international convention on the enforcement of foreign court decisions which met with a similar degree of acceptance as the New York Convention relating to foreign awards resulting from arbitration. The Brussels Convention which envisages the enforcement of foreign judgements is applicable between EU Member States, and the Lugano Convention which endorses similar principles, by a broader circle including also former EFTA States.[26] On a global level the Future Hague Convention on International Jurisdiction and the Effects of Judgements in Civil and Commercial Matters[27] aims at the establishment of a worldwide system for the recognition and enforcement of judgements, however, it cannot be foreseen whether and when this work will be achieved. There may be bilateral agreements between states directed towards the mutual enforceability of court decisions issued in their territories. However, in cases where such a bilateral agreement or an international convention cannot be relied upon, the enforceability of court decisions abroad is doubtful.

The value of the New York Convention does not only lie in the providing of a tool for the international enforceability of arbitral awards but in the fact that often it may provide the only means for the enforcement of a decision rendered within a foreign adjudicational system. Thus in the absence of an international instrument which facilitates the enforcement of foreign court decisions on a global basis, arbitration based on the New York Convention remains the only viable instrument for the enforcement of decisions by adjudication in the global electronic commerce. The role of arbitration for the dispute settlement between Information Society services and recipients on the international level is thus tantamount: *Globalisation and the impracticability of traditional justice are the forces driving the law of arbitration. Arbitration, in effect, has become the vehicle of the rebirth of justice (and of itself) in the next modern world*[28]…

2.2.2 **Geneva Convention**

The European Convention on International Commercial Arbitration ('Geneva Convention')[29] done at Geneva in 1961 entered into force in 1964. It was ratified by some Member States only, namely Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg and Spain.[30] The purpose of the Convention was to facilitate the East-west trade in Europe.[31] The Geneva Convention is applicable *(a) to arbitration agreements concluded for the purpose of settling 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 States* and *(b) to arbitral procedures and awards based on agreements referred to in paragraph 1 (a) above*.[32] The international acceptance of the New York Convention rendered the impact of the Geneva Convention less notable. The Geneva Convention is basically concerned with issues of the arbitration agreement. The arbitration procedure and the arbitral awards whereas the New York Convention deals mainly with the recognition and enforcement of arbitral awards.

a.-) Relations Between New York Convention and Geneva Convention

If the Geneva Convention entered into force between the Parties before the New York Convention, the requirements of form of the Geneva Convention may suffice, but concerning the question whether the award should be reasoned the less strict New York Convention will prevail, based on the principle of 'lex posterior derogat legi priori' and on the principle of the preferential treatment according to Article VII of the New York Convention and Article X(7) of the Geneva Convention.[33] Also the form requirements according to the New York Convention remain irrelevant if both States are Contracting States of the Geneva Convention, provided that this Convention entered into force subsequently to the New York Convention: In such a case the less strict form requirements contained in Article I(2)(a) of the Geneva Convention will prevail. (Article I(2)(a) of the Geneva Convention contains the definition: *(a) the term 'arbitration agreement' shall mean 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 and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.*

Which 'States' are meant by Article I(1)(a) of the Geneva Contention? This subsection provides for the application of the Convention *(a) to arbitration agreements concluded for the purpose of settling 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 States*. With reference to Article I(1)(a) of the Convention meant are those Contracting States where the parties are established or domiciled at the time of the conclusion of the contract.

b.-) Revision of Geneva Convention

Presently, the Geneva Convention is under revision by the Working Party on International Contract Practices in Industry of the United Nations Economic Commission for Europe.[34] This opens the possibility to adapt the Convention to the needs of dispute settlement by means of electronic commerce. With regard to Article 293 clause 4 of the EC Treaty[35] it may be argued that Member States should ratify the Geneva Convention, because in consequence, the system for the recognition and enforcement of arbitral awards will be facilitated, within the Internal Market, in particular with regard to the less strict form requirements relating to the arbitration agreement.

2.2.3 **Panama Convention**

The Inter-American Convention on International Commercial Arbitration (Panama Convention, 1975) entered into force in 1976.[36] According to Article 1 of the Convention an agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications. Article 3 of the Convention states that in the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

2.2.4 **Montevideo Convention**

The Inter American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention, 1979) entered into force in 1980.[37] It is applicable to judgements and arbitral awards rendered in civil, commercial or labour proceedings in one of the State Parties, Article 1(1) of the Convention. The relation between the Montevideo Convention and the Panama Convention is explained in Article 1(2) of the Montevideo Convention. According to this provision the Convention is applicable to arbitral awards in all matters not

covered by the Inter-American Convention on International Commercial Arbitration. The scope of application of the Montevideo Convention is broader. Without indulging into the discussion whether the concept of 'commercial' transactions in the sense of the Panama Convention includes consumer contracts, there is no doubt that the scope of application of the Montevideo Convention covers the settlement of consumer disputes.

The Montevideo Convention provides for an interesting model concerning the enforceability of foreign awards. According to Article 2 of the Convention the Contracting States apply a 'state of origin' principle, with the exception that the decision should be compatible with the public order in the state where it shall be enforced.[38]

2.2.5 Council of Europe's Convention Providing a Uniform Law on Arbitration

The European Convention Providing a Uniform Law on Arbitration of 1966[39] contains in Annex I a Uniform Law which the parties undertook to incorporate in their national legal systems within six months of the date of the entry into force of the Convention. However, the Convention was signed only by Austria and Belgium. The entry into force requires the ratification by three states, but only Belgium ratified the Convention.[40] The Uniform Law contains provisions concerning the arbitration agreement, the arbitral tribunal the request for arbitration, the proceedings of arbitration the selection of arbitrators, the conduct of the proceedings, the arbitral award and the enforcement of the arbitral award. The Uniform Law is based on various legislations and practical experience. Adopted were the solutions most favourable to arbitration.[41]

2.3 United Nations Committee on International Trade Law (UNCITRAL)

UNCITRAL plays an important role for the development of international trade including electronic commerce.

2.3.1 UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration[42] has met with a high degree of acceptance. It was transformed into national law by many countries.[43] However states with a particular tradition in arbitration, including many Member States, adopted often special solutions. In the international arbitration the proposals offered by the Model Law are often referred to, taking into account that most provisions of national arbitration laws are non-mandatory and that in international arbitration arbitrators often adjust the selection of the rules and of the laws applicable to the procedure on international standards which are reflected by the UNCITRAL Model Law. Legislation based on the UNCITRAL Model Law has been enacted in Germany, Ireland and Scotland.[44] The differences in the arbitration laws of Member States are not the subject of this study. Accordingly, it may suffice to explain relevant issues which concern the national arbitration law by reference to the UNCITRAL Model Law on International Commercial Arbitration and to refer to national arbitration laws only where necessary.

The UNCITRAL Model Law on International Commercial Arbitration contains, inter alia, the following regulations:

a.-) International Arbitration

The UNCITRAL Model Law on International Commercial Arbitration defines the term 'arbitration' as meaning *any arbitration whether or not administered by a permanent arbitral institution.* The definition of this term did not give rise to discussion during the drafting of the Model Law.[45]

The Model Law relates to international arbitration, that is to say that the parties to the arbitration agreement must have their places of business in different States or have declared their dispute as 'international', Article 1(3) of the Model Law.

b.-) Arbitration Agreement

Chapter II of the Model Law is concerned with the arbitration agreement. The arbitration agreement is defined as the agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The Model Law contains the formal requirement that the agreement shall be in writing. This will be the case if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the document. In the case where the parties resort to court action where the contract concerned contains an arbitration clause, the Model Law envisages that shall refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed. However, parties may apply to courts for interim measures.

c.-) Requirement of Writing

Article 7(2) of the Model Law requires that the arbitration agreement be 'in writing'. Whereas Article II(2) of the New York Convention defines this requirement as calling for an agreement 'signed by the parties or contained in an exchange of letters or telegrams', the drafters of the Model Law have improved on this language, adapting it both to developments in communications technology such as the use of facsimile transmission and to the requirements of international commercial practice.[46]

Article 7(2) of the Model Law states: *An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.*

According to the Model Law an agreement is in writing if it is contained in an exchange of any means of communication providing a record of the agreement. The drafter of the text *added (at the plenary Commission stage) the further provision that an agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. It was pointed out in the discussion that awards rendered pursuant to agreements evidenced in that manner might be denied enforcement under the New York Convention for failure to meet the literal requirements of its Article II(2) – a possibility that would be relevant if the enforcement State had not adopted the model law – but that conceivably the very adoption of the extended language would eventually lead to a broader interpretation of that article. (…) a strong argument can be made that to interpret the prorogated jurisdiction described in the extended language as meeting the requirement of Article II(1) would be entirely in accordance with its object and purpose.*[47] Accordingly, it must be assumed that the definition of the term 'writing' in the Model Law on International Commercial Arbitration is compatible with the requirements of form in the sense of Article II of the New York Convention.

(1) Report of the Working Group on Arbitration of March 2000: Requirement of Written Form

From the discussion about the requirement of the written form for the arbitration agreement by the UNCITRAL Working Group in 2000[48] it emanated that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the

expectations of parties in international trade. But, *nevertheless, some doubts remained or views differed as to their proper interpretation. The existence of those doubts and a lack of uniformity of interpretation was a problem in international trade in that it reduced the predictability and certainty of international contractual commitments. It was further noted that current arbitration practice was different from what it was in 1958 in that arbitration was now widely accepted for resolution of international commercial disputes and could be regarded as usual rather than as an exception that required careful consideration by the parties before choosing something other than litigation before the courts*. The Working Group identified several functions of the requirement of writing in states, namely the providing of evidence as to the conclusion of the agreement, the enabling of the identification of the parties and the providing of a warning as to the importance of renouncing rights of recourse to the courts.

With regard to these functions some States expressed the view that the requirement of form ('writing') should be maintained, even though the laws of some States did not even require any form as a condition for the effectiveness of an arbitration agreement. Concerning possible solutions of the problem the Working Group discussed, based on Article 7 of the UNCITRAL Model Law on International Commercial Arbitration:

- whether an updated model legislation provision should be defined, similar, for example, to Article 178(1) of the Swiss Federal Act of Private International Law;

- whether the UNCITRAL Model Law on Electronic Commerce should be promoted so that, within time, international uniformity would be achieved;

Concerning the clarification of Article II(2) of the New York Convention it was suggested that:

- a protocol to Article II(2) of the New York Convention should clarify the issue:

- Article II(2) of the New York Convention should be amended.

However, it was also feared that an amendment might not easily be achieved, because in such a case also other provisions would be subject to discussion.

Another alternative could be:

- a declaration, resolution or statement addressing the interpretation of the Convention in Article II(2) of the New York Convention.

However, concern was expressed with regard to States not accepting such an instrument and the status of reciprocity:

- a liberal interpretation of the New York Convention should be based on an approach of jurisprudence developed by courts according to which the 'writing' requirement of the New York Convention should be interpreted in the light of the subsequent UNCITRAL Model Law on International Commercial Arbitration *whose authors wished to adapt the regime of the Convention to current needs without modifying the Convention*.

The Working Group was informed that court practice tended to apply a more liberal approach, for example, interpreting the words *the term 'agreement in writing' shall include* in Article II(2) of the New York Convention as indicating a non exhaustive list of circumstances, a view which allegedly obtained support from national laws such as the English Arbitration Act of 1996. However, *the question of whether Article II(2) established a uniform rule or a minimum standard remained controversial*.

There were different views on how the uniform interpretation of the form requirement should be achieved:

- a model legislative provision defining the scope of application of Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration;
- preparation of a guide explaining the background and scope of the model provision;
- adoption of a declaration, resolution or statement addressing the interpretation of the form requirement of the New York Convention.

It was noted that the issue of how best to achieve uniform interpretation of the New York Convention through a declaration, resolution or statement should be further studied, including the public international law implications, to determine which was the optimal approach.

The work of the UNCITRAL Working Group on a satisfactory uniform interpretation of Article II(2) of the New York Convention will thus continue. For the Member States this means that the most convenient way to circumvent problems deriving from a differentiated interpretation of Article II(2) of the New York Convention by national courts would be the ratification of the Geneva Convention with its broad definition of the term 'arbitration agreement' in Article I, because in cases of a conflict between both Conventions the more generous definition of the term 'arbitration agreement' in the sense of Article I(2)(a) of the Geneva Convention will prevail.[49]

(2) Report of the Working Group on Arbitration of March 2000: Arbitration Agreement 'in Writing' and Electronic Commerce

The UNCITRAL Working Group on Arbitration discussed the requirements of the arbitration agreement 'in writing' and electronic commerce during its meeting in 2000.[50] Because of the direct relevance to the study, the text of the first para.s of the Report is reproduced literally:

The Working Group considered the question of whether Article II(2) of the New York Convention should be interpreted broadly to include communications by electronic means as defined by the UNCITRAL Model Law on Electronic Commerce in Article 2. It was recalled that the Guide to Enactment to the Model Law, an instrument adopted by the Commission, was drafted with a view to clarifying the relationship between the Model Law on Electronic Commerce and international instruments such as the New York Convention and other trade law instruments. The Guide, at paragraph 6, suggested that the Model Law on Electronic Commerce "may be useful in certain cases as a tool of interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in the written form". It was also noted that Article 7(2) of the Model Law on International Commercial Arbitration expressly validated the use of any means of telecommunication "which provides a record of the agreement", a wording which would cover telecopy or facsimile messages as well as most common uses of electronic mail or electronic data interchange (EDI) messaging.

There was general agreement in the Working Group that, in order to promote the use of electronic commerce for international trade and leave the parties free to agree to the use of arbitration in the electronic commerce sphere, Article II(2) of the New York Convention should be interpreted to cover the use of electronic means of communication as defined in Article 2 of the Model Law on Electronic Commerce and that it required no amendment to do that. It was also considered that, in addition to the New York Convention, other conventions relevant to international arbitration such as the European Convention on International Commercial Arbitration (Geneva 1961) and the Inter-American Convention on International Commercial Arbitration (Panama, 1975), should also be interpreted in the same way. As doubts were raised as to whether UNCITRAL was the appropriate forum, to address that issue in respect of all those

Conventions, it was agreed that the issue should be studied and the optimal solution found in consultation with the organisations that sponsored the preparation of those Conventions.

The UNCITRAL Working Group on Arbitration thus clearly asserted the view that arbitration agreements in the sense of the New York Convention comply with form requirements if they are concluded by means of electronic commerce within the sense of Article 2 of the UNCITRAL Model Law on Electronic Commerce. However, since the UNCITRAL Model Law on Electronic Commerce is not universally adopted, the Working Group considered that the use of the Model Law on Electronic Commerce as an interpretative instrument might be limited. For this reason, the Working Group considered also whether a declaration confirming the desired interpretation should be adopted by UNCITRAL or by the Contracting States of the relevant Conventions and whether such a declaration could be linked to the declaration proposed with regard to form requirements according to Article II(2) of the New York Convention. Concluding, the Secretariat was requested, *to prepare a draft instrument that would confirm that Article II(2) of the New York Convention should be interpreted to include electronic communications as defined by Article 2 of the Model Law on Electronic Commerce. In drafting that instrument, the Secretariat should study the other form requirements in the New York Convention and prepare appropriate drafts to facilitate discussion in the Working Group as to the treatment of other writing requirements.* Such other form requirements related, for example, to the requirement to provide 'originals' of the arbitration agreement and the award according to Article IV of the New York Convention.

(3) Working Group on Arbitration and Possible Uniform Rules: Report of September 2000

The Working Group's Secretary General indicated in the Report on Settlement of Commercial Disputes[51] that the existence of doubts concerning the liberal interpretation of the form requirements of Article II(2) of the New York Convention and the lack of uniformity of interpretation caused a problem in international trade *in that it reduced the predictability and certainty of international contractual commitments*. The secretariat prepared a model legislative text revising Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. According to the draft, subsection (1) of Article 7 would remain unchanged. The draft subsection (2) states:

> *(2) The arbitration agreement shall be in writing. For the purposes of this Law, 'writing' includes any form [alternative 1:] provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties [alternative 2:] which [provides] [preserves] a record of the agreement, whether or not is signed by the parties.*

Both alternatives would include the use of means of electronic commerce for the conclusion of the arbitration agreement.

The Report considered also that an interpretative instrument relating to Article II(2) of the New York Convention could be based on Article 31(3)(b) of the New York Convention, taking into account that the need for clarity in the interpretation arose from changes in communication technologies and business practices as well as the increased use and acceptance of commercial arbitration in international trade.

The preliminary draft for a possible declaration and recommendation suggests:[52]

> …*Noting also that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, and that those technologies in international commerce have developed along with the development of*

electronic commerce… Convinced that uniformity in the interpretation of the term 'agreement in writing' is necessary for advancing predictability in international commercial arbitration…

Recommends to Governments that the definition of 'agreement in writing' contained in Article II(2) of the Convention should be interpreted to include […] [It suggested that the operative part of the text to be inserted at this point should be substantially modelled on the revised text of Article 7(2) of the Model Law on International Commercial Arbitration as discussed above…].

d.-) Arbitral Tribunal

The composition of the arbitral tribunal is dealt with by Chapter III of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law regulates the number of arbitrators - normally three - their appointment, grounds for the challenge of arbitrators, the challenge procedure, the arbitrator's failure or impossibility to act and the appointment of a substitute arbitrator.

e.-) Jurisdiction of the Arbitral Tribunal

Chapter IV of the UNCITRAL Model Law on International Commercial Arbitration concerns the jurisdiction of the arbitral tribunal. The regulation envisages that the arbitral tribunal may rule on its own jurisdiction. The arbitration clause in a contract will be treated as an agreement independent of the other terms of the contract so that the voidness of the contract does not affect the validity of the arbitration clause. According to the Model Law pleas which challenge the tribunal's jurisdiction must be raised at an early time. The tribunal has also power to order interim measures.

f.-) Conduct of Proceedings

The conduct of the arbitral proceedings is regulated in Chapter V of the UNCITRAL Model Law on International Commercial Arbitration. Principles established within this chapter are:

1. the parties shall be treated with equality;
2. the parties are free to agree on the procedure to be followed by the arbitral tribunal;
3. the parties are free to agree on the place of arbitration;
4. the commencement of arbitral proceedings is the date when the respondent is served the writ;
5. the parties are free to determine the language of the proceedings;
6. the statements of claim and of defence shall be filed within the time agreed by the parties or determined by the tribunal;
7. the hearings and relevant dates are fixed by the tribunal;
8. the documents, statements and other information supplied to the tribunal by a party shall also be communicated to the other party;
9. the tribunal may appoint an expert to report to it on specific issues to be determined by the arbitral tribunal;
10. the tribunal or a party may request from a competent court assistance in taking evidence.

g.-) Making of Award

Chapter VI of the Model Law relates to the rules applicable to the substance of the dispute. It is established that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Failing any

designation by the parties, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Decisions must be made by a majority of members. If the parties settle the dispute during the proceedings, the tribunal will record the settlement in the form of an arbitral award. The award shall be made in writing, and it has to be signed by the arbitrators. It shall state the reasons upon which it is based. Finally, the award shall indicate the date and place of arbitration. A copy of the award will be delivered to each party. The award may be corrected upon the application of a party within 30 days of the receipt of the award.

h.-) Recourse against Award

On the basis of Article 43 of the Model Law on International Commercial Arbitration the arbitral award may be set aside by a court if:[53]

1. a party was under some incapacity or the arbitration agreement was not valid;
2. a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case;
3. the award is not correct, dealing with a dispute not contemplated or not falling within the terms of the submission to arbitration;
4. the arbitral tribunal was not in accordance with the agreement of the parties;
5. a court finds that the subject-matter of the dispute is not capable of settlement by arbitration or the award conflicts with the public policy of this state.

The application for the setting aside of the award must generally be made within three months after the award.

i.-) Enforcement of Award

Foreign arbitral awards shall be recognised as binding. The enforcement will be made by the competent court upon application in writing. Chapter VIII of the Model Law deals with the recognition and enforcement of awards. The recognition and enforcement of arbitral awards may be refused if the party furnishes to the court proof or if the court finds that:

1. the party was under some incapacity;
2. the agreement was not valid under the law to which the parties subjected it;
3. the party was not given proper notice of the appointment of an arbitrator or of the proceedings;
4. the party was otherwise unable to present his case;
5. the award does not deal with the dispute contemplated or fell without the dispute submitted to arbitration;
6. the composition of the tribunal or the arbitral procedure did not correspond with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
7. the award is not yet binding or has been set aside by a court in the country where or under the law of which it was made;
8. the dispute is not arbitrable under the laws of that State;
9. the recognition and enforcement would be contrary to the public policy of that State.

2.3.2 **UNCITRAL Arbitration Rules**

The UNCITRAL Arbitration Rules[54] play an important role for international arbitration. If the parties cannot decide on an institutional arbitration, they may agree on an 'ad hoc' arbitration by an institution according to the UNCITRAL Arbitration Rules. The UNCITRAL Rules constitute

one universally acceptable set of rules available for use by parties of different legal systems and preferences and they can be administered by local organisations that best fit the requirements and customs of different parts of the world.[55]

2.3.3 UNCITRAL Notes on Organising Arbitral Proceedings

The UNCITRAL Notes on Organising Arbitral Proceedings[56] facilitate the organisation of the procedures of arbitration by institutions responsible for out-of-court dispute settlement. However, the solutions will have to be adapted to electronic commerce.

2.3.4 UNCITRAL Model Law on Electronic Commerce

The UNCITRAL Model Law on Electronic Commerce[57] is not of direct relevance to arbitration in electronic commerce, but it may provide a satisfactory tool for the choice of law by the parties concerning the merits of the dispute and the arbitration procedure. By envisaging the validity of contracts concluded by electronic means and regulating the effect of data messages the UINCITRAL Model Law on Electronic Commerce assumes importance for the parties who, in the search for a non-national legal regulation, choose the Model Law as the law applicable to their contract.

a.-) Definitions

Article 2 of the Model Law states:

Article 2. Definitions

For the purposes of this Law:

(a) 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) 'Electronic data interchange (EDI)' means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) 'Originator' of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) 'Addressee' of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) 'Intermediary', with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;

(f) 'Information system' means a system for generating, sending, receiving, storing or otherwise processing data messages.

b.-) Variation by Agreement

According to Article 4 of the UNCITRAL Model Law on Electronic Commerce the provisions of chapter III of the Law which concern the communication of data messages may be varied by an agreement of the parties. The other provisions of the Model Law are considered as mandatory.[58]

c.-) Recognition of Data Messages

Article 5 of the Model Law states:

Article 5. Legal recognition of data messages

Information shall not be denied legal effect, validity or enforce- ability solely on the grounds that it is in the form of a data message.

d.-) Incorporation by Reference

Article 5bis of the Model Law states:

Article 5 bis. Incorporation by reference (as adopted by the Commission at its thirty-first session, in June 1998)

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.

e.-) Writing

Article 6 of the Model Law states:

Article 6. Writing

(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

(3) ...

The explanation of 'writings' permits a broad interpretation of the term, covering a large variety of data in digital form, provided that the data is accessible (computer data should be readable and interpretable) and usable (for human use including computer processing).[59]

f.-) Signature

Article 7 of the Model Law states:

Article 7. Signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

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

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) The provisions of this article do not apply to the following: [...].

g.-) Original

Article 8 of the Model Law states:

Article 8. Original

(1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

(a) there exists 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; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of subparagraph (a) of paragraph (1):

(a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

(4) ...

h.-) Communication of Data Messages

Chapter 3 of the UNCITRAL Model Law on Electronic Commerce deals with the formation and validity of contracts (Article 11), the recognition by parties of data messages, (Article 12), the attribution of data messages (Article 13), the acknowledgement of receipt (Article 14) and the time and place of dispatch and receipt of data messages (Article 15). Within the context of this study, the proposed rules for arbitration by means of electronic commerce will largely be based on these provisions insofar as the communication between the parties and the arbitrator, the arbitral institution or experts and witnesses are concerned.

i.-) Compatibility of the Model Law with EU Law

In the Guide to Enactment of the Model Law, § 80, it is explained that the Model Law should not be in conflict with provisions of national law *which might prescribe specific formalities for the formation of certain contracts*, including requirements for 'writings' in response to considerations of public policy *such as the need to protect certain parties or to warn them against specific risks.* With regard to EU law no particular problems should arise. The EU Directive on Electronic Commerce provides in Article 9(1) that Member States shall ensure that their legal system allows contracts to be concluded by electronic means. According to subsection (2) of this provision Member States may exempt only certain types of contracts from the application of this provision to which belong only a small sector of consumer contracts referred to in lit. (c): *contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession.* All other consumer contracts, including arbitration agreements, may validly be concluded by data messages. The application of the Model Law would thus not be in conflict with EU law.

2.3.5 UNCITRAL Work on Dispute Settlement on the Internet

The UNCITRAL is also working on the issue of dispute settlement on the Internet, however, the work has not yet produced results.[60]

2.4 Institutions for Arbitration in Member States

Within Member States different institutions offer their services for domestic and non-domestic arbitration.

2.4.1 Institutions in Member States

The organisations of the institutional arbitration and well known national organisations responsible for out-of-court dispute settlement developed a highly respected 'case law' which reflects the importance of international arbitration for the development of the traditional global commerce. There are the traditional centres for international arbitration, which may be found, inter alia, in the capitals or economic centres of Member States.

With limitation to an Internet presence those institutions established within the Internal Market are:

a.-) Austria

International Arbitral Centre of the Austrian Federal Economic Chamber;[61]
Schiedsgerichtsbarkeit der Internationalen Handelskammer;[62]

b.-) Belgium

Instituut voor Arbitrage;[63]
Centre Belge pour l'Etude et la Pratique de l'Arbitrage National et International CEPANI;[64]

c.-) Denmark

The Danish Institute of Arbitration (Copenhagen Arbitration);[65]

d.-) Finland

Central Chamber of Commerce of Finland;[66]

e.-) France

Cour d'Arbitrage de l'Europe du Nord;[67]
Chambre National de l'Arbitrage et de la Mediation;[68]
Cour d'Arbitrage Europeenne de Versailles;[69]

f.-) Germany

German Institution for Arbitration;[70]

g.-) Greece

National Office of the International Chamber of Commerce;[71]

h.-) Ireland

National Office of the International Chamber of Commerce;[72]

i.-) Italy

Chamber of National and International Arbitration of Milan;[73]
Venice Court of National and International Arbitration;[74]

j.-) Luxembourg

Luxembourg Centre, d'Arbitrage de la Chambre de Commerce;[75]

k.-) Netherlands

Netherlands Arbitration Institute (NAI);[76]

l.-) Portugal

Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry;[77]

m.-) Spain

National Office of the International Chamber of Commerce;[78]

n.-) Sweden

Arbitration Institute of the Stockholm Chamber of Commerce;[79]

o.-) United Kingdom

London Court of International Arbitration LCIA;[80]
The Chartered Institute of Arbitrators;[81]

2.4.2 International Institutions in Europe

a.-) International Chamber of Commerce, International Court of Arbitration[82]

b.-) Chartered Institute of Arbitrators, European Branch[83]

c.-) European Network for Dispute Resolution[84]

d.-) European Court of Arbitration[85]

e.-) Centre Europeen de la Negotiation[86]

2.5 Institutions Using Means of Electronic Commerce

The number of institutions which offer online arbitration is increasing. However, taking into account of the risks involved with the recognition and enforcement of arbitral awards made by technological means of electronic commerce, many organisations have adopted a careful approach. Since an amendment of the New York Convention to adapt international arbitration expressly to electronic commerce is unlikely, the recognition and enforceability of electronic awards depends on the jurisprudence of national courts. In particular established institutions for arbitration are unlikely to risk their reputation through the refusal of the recognition and enforcement by a court which might consider that an electronic arbitration agreement or an electronic award respectively the conduct of arbitration proceedings by electronic means do not correspond with the standards established by the New York Convention.

a.-) E-Global ADR Tribunal

b.-) Cybercourt

c.-) Disputes.org/eResolution

d.-) I-courthouse

e.-) Virtual Magistrate

2.6 EU Law Relating to Arbitration

EU law relating to arbitration may concern several issues: the obligation of Member States to ensure the recognition and enforceability of arbitral awards in the Internal Market, the duty of arbitrators to apply EU law, the possibility of arbitrators to refer issues before the European

Court of Justice and the compatibility of arbitration agreements with the core of EU law which is part of the public policy.

2.6.1 **Arbitration and the EC Treaty**

The EC Treaty requires in Article 293 clause 4[87] Member States, so far as necessary, to enter into negotiations with a view to securing the reciprocal recognition and enforcement of arbitration awards as well as of judgements of courts and tribunals. Also secondary EU law addresses arbitration, for example Article 17 of the Directive on Electronic Commerce which concerns out-of-court dispute settlement systems for electronic commerce.

a.-) The Recognition and Enforcement of Arbitral Awards in the Internal Market

Article 293 of the EC Treaty provides that: *Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals (...) the simplification of formalities governing the reciprocal recognition and enforcement of (...) arbitral awards*. This provision establishes the framework for the enforcement of arbitral awards within the Internal Market. Since all Member States are Contracting States of the New York Convention, which provides for an effective mechanism concerning the recognition and enforcement of foreign arbitral awards, it may be argued that additional instruments on the EU level would not be required so that Member States would have fulfilled their obligations according to Article 293 of the Treaty.[88] However, taking into account of the fact that the requirements of form according to Article II(2) of the New York Convention are more strict than those contained in Article I(2)(a) of the Geneva Convention it appears that Article 293 of the Treaty would obligate Member States to ratify also the Geneva Convention, because this would facilitate the enforcement according to the New York Convention by lowering the requirements of form to be made with regard to arbitration agreements.[89]

With regard to Article 17 of the Directive on Electronic Commerce which imposes on Member States the duty to establish arbitration as an effective means for dispute settlement, it may well be suggested that Member States should adopt a policy which relies on a 'state of origin' principle. Accordingly, arbitral awards rendered in a Member State should be recognised and enforceable in other Member States without additional control.

b.-) Definition of Term 'Arbitration'

With regard to the definition of the term 'arbitration' in the sense of the Brussels Convention the European Court of Justice uses a broad concept according to which also a dispute concerning the nomination of an arbitrator falls within the scope of this term.[90] **It appears justifiable to consider that a similarly broad concept is applicable to the term in the sense of Article 293 of the EC Treaty.**

c.-) Non-Applicability of International Conventions on Jurisdiction and Conflict of Laws

Arbitration is generally excluded from the scope of international conventions which contain regulations on jurisdictional matters and conflict of laws.

(1) Brussels Convention

Article 1 clause 4 of the Brussels Convention states that the Convention shall not apply to arbitration. Due to the fact that all Member States were parties to the New York Convention, the issue of arbitrability did not have to be dealt with by the Brussels Convention,[91] and also other issues relating to arbitration such as the annulment, modification, recognition and execution of the award.[92] During the drafting of the Brussels Convention it was then considered that the Council of Europe had prepared a European Convention providing a uniform law on arbitration

which would probably be accompanied by a Protocol facilitating the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention.[93] The inclusion of arbitral awards in the Brussels Convention was thus considered unnecessary.

Concerning the broad definition of the term 'arbitration' the European Court of Justice held:[94] *The international agreements, and in particular, the ... New York Convention on the recognition and enforcement of foreign arbitral awards ... lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by the international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.*

(2) Rome Convention

Article 1(2)(d) of the Rome Convention provides that the rules of the Convention shall not apply to arbitration agreements and agreements on the choice of court. Taking into account that the Rome Convention provides for general rules, it has been asserted that exceptions should be given a narrow interpretation so that the scope of the term 'arbitration' should be defined narrowly. However, with regard to the European Court of Justice's broad definition of the term in connection with the Brussels Convention it may be appropriate to consider that the term should have a broad meaning.

(3) Future Hague Convention on International Jurisdiction

During the discussion of the Special Commission in March 1998 there was agreement that arbitration as a particular dispute-settlement mechanism should be excluded from the scope of the future Hague Convention on International Jurisdiction.[95] But some experts considered that the exclusion should be more specific in wording than in the Brussels Convention. It was suggested that particularly court decisions relating to the establishment of the arbitral tribunal should be specifically excluded. It was also discussed whether court decisions on the enforceability of the arbitration agreement (as different from decisions on the enforceability of the arbitral award) should fall within the scope of the future Convention, in particular if they refused the enforceability of the arbitration agreement. Concerning the possible global impact of the future Convention, it would be helpful if the delimitation between those judgements which would be recognisable under the Convention and those which fell under the 'arbitration' exception could be clearly defined.

d.-) Remedies Against the Award

May the parties in their contract, exclude the possibility of an appeal against the award? According to the EU Commission's view the validity of such a clause is doubtful:[96] *The courts will uphold this agreement and thus in these cases the arbitrator's decision (…) would be final. This difficulty is, as yet, unresolved. On the one hand parties have a right by means of contract, to obtain a speedy, private and most effective decision without having recourse to the courts. On the other hand, Community law must be observed throughout the Member States and, on that basis, it is at least arguable that the exclusion of appeal from an arbitrator's award is itself incompatible with the Treaty of Rome. In the absence of guidance (…) courts or the European Court of Justice resolving these conflicting principles, parties would be well advised to exercise caution in opting for arbitration as a means for resolving disputes where points of Community law are likely to be relevant. The courts would, of course, have a duty to apply Community law in the event that they were called upon to enforce an arbitration award but the circumstances which*

would afford the courts this opportunity may not arise.[97] Yet the possibility that the award can be challenged by a party does not guarantee that the appeal will be successful, because it is not excluded that also the court or tribunal concerned with the appeal may commit a mistake.

According to Article VI of the New York Convention an authority before which the recognition and enforcement of an award is sought may adjourn its decision if an application for the setting aside of the award has been made. In application of Articles VI and V(1)(e) of the New York Convention an application can be made to the authority in the country in which or under the law of which the award has been made. The setting aside procedure is also referred to as an appeal against the award.[98] Yet the New York Convention does not regulate the setting aside procedure. Contracting States may have different regulations, and their arbitration laws may not even provide for such a possibility. The basic reason for the regulation in the New York Convention is that an award which is set aside in its country of origin, loses the benefit of the New York Convention.[99]

The practice of arbitration has shown that the unrestricted right of appeal from arbitral awards may have serious disadvantages.[100] These disadvantages derive from the fact that national judges who will deal with such an appeal may often not be specialists in the matter, different from the arbitrator chosen by the parties, that the procedure before the courts will conflict with the advantages of the arbitration procedure and that a main purpose of international arbitration, namely a speedy resolution to the dispute, is defeated.

The possibilities for the reasons of a remedy against an arbitral award are thus limited. The grounds for a challenge are indicated in Article 34 of the UNCITRAL Model Law on International Economic Arbitration, and they are the same as those on which the recognition and enforcement of an award may be refused according to Article V of the New York Convention. But many rules for arbitration provide that an award shall be binding and final, and it may expressly be provided that the parties irrevocably waive their right to any form of appeal, review or recourse to any state court insofar as such waiver may be validly made.[101] With regard to EU law, the exclusion of such remedies might possibly be in conflict with the procedural guarantees which have to be provided according to Article 17(2) of the Directive on Electronic Commerce and it would certainly conflict with Article 3 and lit. (q) of the Annex of the Directive on Unfair Terms in Consumer Contracts if the exclusion was based on an electronic arbitration clause offered by an Information Society service on its website.

e.-) Application of Rules of Mandatory EU Law

Concerning the application of EU law by the arbitrator, it was stated that if EU law confers a right on one of the parties but if the party does not claim this right, the arbitrator does not have to raise this issue.[102] But if a clause or contractual obligation is void, because it violates EU law, the arbitrator has to apply EU law and, accordingly, make use of the relevant sanction which may, for example, render the clause without effect.

2.6.2 EU Law Relating to the Use of Electronic Means for Arbitration

The EU Directive on Electronic Commerce provides for the use of electronic means to be used for out-of-court dispute settlement in Article 17. It also establishes rules on electronic contracting. The EU Directive on a Community Framework for Electronic Signatures[103] permits the safe use of electronic data communication. Both Directives thus envisage the use of technological means of electronic commerce for the conclusion of arbitration agreements and for the arbitration procedure, without, however, direct reference to arbitration or arbitration agreements and arbitration procedures.

2.6.3 **Settlement of Disputes in the Sense of Article 17 of the Directive on Electronic Commerce**

Article 17 of the Directive on Electronic Commerce addresses out-of-court dispute settlements between Information Society services and recipients. Initially it may have been the view of the Commission that the regulation of settlements should only cover consumer disputes. In the Commercial Communications Newsletter of January 1999, 'Electronic Commerce in the Internal Market - a Proposal Presented by the Commission of a European Parliament and Council Directive on Certain Legal Aspects', it was stated with regard to the relevant provision of Article 17:[104] *This Article establishes an obligation to allow effective recourse to these remedies, in particular by electronic means, where they comply with the principles set out in para. 2* [the draft of the Directive to which the quotation relates referred to the Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998[105]]. *This type of mechanism would appear particularly useful for some disputes on the Internet, because of their low transactional value and the size of the parties, who might otherwise be deterred from using legal proceedings because of their cost. The legal framework of these dispute settlement mechanisms in the Member States should not be such that it limits the use of these mechanisms or makes them unduly complicated. For example, in the case of specific mechanisms for disputes on the Internet, these could take place electronically*. But since many recipients of Information Society services will be businesses it does not appear justifiable to limit the scope of out-of-court settlement in the sense of Article 17 of the Directive to consumer disputes. Accordingly, a regulation of dispute settlements between Information Society services and recipients by arbitration should comprise disputes in the business-to-business sector as well as in the business-to-consumer sector.

a.-) Scope of Out-of-Court Dispute Settlement

From the text of Article 17(2) of the Directive on Electronic Commerce it results that the Directive envisages any types of out-of-court dispute settlement between Information Society services and recipients. Recital 51 of the Directive recalls that *Member States should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders*. There is no limitation of schemes used for out-of-court dispute settlement and no limitation concerning different types of Information Society services and recipients. Accordingly, all types of out-of-court dispute settlement, including arbitration, should be available for dispute settlement between Information Society services and recipients, whether businesses or consumers.

b.-) Recognition of Arbitration Agreements Concluded by Electronic Means

Recital 60 of the Directive on Electronic Commerce recalls that, in order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple. Could it be inferred that Member States should allow for the recognition of electronic arbitration agreements?

(1) Conclusion of Arbitration Agreements by Electronic Means

Article 9(1) of the Directive states expressly that Member States shall ensure that their legal system allows contracts to be concluded by electronic means. In particular, they shall ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effect and validity on account of their having been made by electronic means. According to Article 9(2) of the Directive Member States may make exemptions from the general rule that contracts may be

concluded by electronic means. However, these exemptions relate to certain contractual types mentioned in this provision which do not include arbitration agreements. It may be inferred that according to the Directive on Electronic Commerce arbitration agreements may validly be concluded by electronic means. Such electronic arbitration agreements must be enforceable within other Member States according to Article 293 of the EC Treaty.

(2) Use of Electronic Signatures

The Directive on a Community Framework for Electronic Signatures[106] deals with the legal effects of electronic signatures in Article 5. According to subsection (1) advanced electronic signatures (which are based on a qualified certificate and created by a secure-signature creation device satisfy the legal requirements of a signature in relation to data in electronic form as a handwritten signature satisfies those requirements in relation to paper-based data. Such advanced electronic signatures are admissible as evidence in legal proceedings. According to subsection (2) of this provision an electronic signature shall not be denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that, inter alia, it is in electronic form. In consequence, arbitration agreements in digital form provided with an advanced electronic signature should qualify as a signed written document.

(3) Application of National Arbitration Laws of Member States within the Framework of the New York Convention

According to Article VII(1) of the New York Convention the provisions of the Convention do 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 of the country where such award is sought to be relied upon. Thus Member States may particularly provide for a broad definition of the requirement of 'writing' in the sense of the New York Convention. For example, Section 100(2)(b) second sentence of the Arbitration Act of England 1996 states that *in this subsection 'agreements in writing'* has *the same meaning as in Part I.* Accordingly, the broad definition of the term 'writing' in Section 5 of the Act is also applicable to arbitration agreements which will be enforced in the UK according to the New York Convention.

Since Member States will have to recognise and enforce electronic arbitration agreements according to the Directive on Electronic Commerce and the Directive on a Community Framework for Electronic Signatures insofar as their laws require that the agreement should be in writing or signed, one might consider that the EU law would provide a satisfactory basis for the operation of arbitration by electronic means. However, the relevant national laws do not affect the interpretation of the New York Convention which should be made in a uniform way. Additionally, it has to be observed that the national arbitration laws of Member States concerning international arbitration agreements may differ considerably, so that the recognition and enforcement of arbitral awards according to the rules of the New York Convention cannot be replaced by the recognition and enforcement in application of the relevant national laws of Member States if a satisfactory unitary solution of dispute settlement by arbitration should be achieved for the Internal Market and on a global basis.

2.6.4 **European Model EDI Agreement**

The European Model EDI Agreement, based on a Recommendation by the Commission,[107] provides for arbitration as an alternative of dispute settlement. The arbitration clause of its Article 12 states: *Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by the arbitration of a (or three) person(s) to be agreed by the parties or failing agreement, to be nominated by (...), in accordance with and subject to the rules of procedure of (...).*

The commentary to the European Model EDI Agreement explains the advantages of arbitration and also some particularities of the procedure, but it does not refer to any particular problems. The commentary observes: *Many countries still require a written and clear statement on arbitration when this is the choice of dispute resolution and parties are therefore advised to include such clause in this Agreement.* The Commission seems to proceed on the assumption that an EDI Agreement concluded by electronic means may satisfy requirements of form, since Article 3.1 of the European EDI Agreement states: *The parties, intending to be legally bound by the Agreement, expressly waive any rights to contest the validity of a contract effected by the use of EDI in accordance with the terms and conditions of the Agreement on the sole ground that it was effected by EDI.* However, from Article 14(2) of the European EDI Agreement it results that the signature of the agreement is required, since *the agreement shall be effective from the date on which it is signed by the parties.* Taking into account of the fact that the European EDI Agreement dates of 1994 when electronic signatures were not regulated by law, this requirement would make the arbitration clause compatible with the form requirements of the international arbitration law.

2.6.5 Dispute Resolution According to the UN Economic Commission for Europe: Proposal Concerning Dispute Resolution for EDI

The UN Economic Commission for Europe in its Recommendation on the Commercial Use of Interchange Agreements for Electronic Data Interchange of 1995[108] provides for dispute resolution in clause 7.7.:

Dispute Resolution. Alternative 1: Arbitration clause. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by the arbitration of a (or three) person(s) to be agreed by the parties, or failing agreement, to be nominated by … in accordance with and subject to the rules of procedure of …

Alternative 2: Jurisdiction clause. Any disputes arising out of or in conjunction with this Agreement shall be referred to the Courts of …, which shall have sole jurisdiction.

The Economic Commission explains, concerning clause 7.7., Dispute Resolution:

Since those seeking to use electronic communications are most likely attracted to the benefits of speed and efficiency which the technology provides, they may also favour adopting a similar method of dispute resolution, i.e. arbitration (Alternative 1). This Alternative requires additional decisions by the parties with regard to the procedures to be employed, such as the location of the procedure, the panel of arbitrators, the method for their selection and applicable governing rules. For those desiring a more traditional forum, Alternative 2 permits the parties to specify the court to have jurisdiction over any possible dispute. Since certainty on this matter is strongly favoured, the Agreement provides for exclusive jurisdiction. In addition, trading partners may wish to consider specifying the use of alternative dispute resolution facilities which are emerging in various markets or industries.

2.6.6 EU Parliament Resolution on the Promotion of Recourse to Arbitration

The European Parliament's Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts of 1994[109] indicates that arbitration does not fall within the scope of the Brussels Convention and the Rome Convention. The Resolution indicates that the choice of the law applicable to the dispute is not related to the national law of the court concerned (lex fori). With regard to consumer arbitration the Parliament stresses in para. 7 that the EU Commission should take into account of the fact that the establishment of the Internal Market gives any business the possibility to address consumers in any Member State and to conclude contracts with them on the providing of goods and services. The Parliament considers that this possibility placed consumers who wanted to litigate against a business in another Member State

in a weaker position. The regulation of such types of litigation involved some problems in the view of the Parliament, amongst others concerning the determination of the applicable procedural law, the difficulty for the consumer to litigate out of the country where he is domiciled and the problems of the enforcement of judgements which may discourage consumers to assert legitimate claims. The Parliament alleges that this discouragement would be detrimental to the effective working of the Internal Market, and it asserted in clause 7(e) that in such circumstances the defence of the interests of consumers but also of businesses demanded the establishment of a unitary procedure applicable within the whole EU concerning the regulation of disputes between consumers and businesses by means of arbitration through the creation and operation of decentralised institutions of arbitration which should be easily accessible for consumers. The rise of electronic commerce strengthens the relevance of the Resolution. Due to the almost global enforceability of awards on the basis of the New York Convention arbitration is the most effective means for dispute settlement in cross-border electronic commerce.

2.6.7 **EU Public Policy**

An arbitral award which shall be enforceable within the Internal Market according to the New York Convention must comply with the EU public policy. Concerning the scope of the EU public policy, it may be justified to consider not only the five freedoms established in the EC Treaty as subject-matter of the public policy, namely the freedoms of international trade, of the providing of services, of the movement of capital, of the movement of workers and of the freedom of establishment, but also EU competition law and, possibly, EU consumer protection law. A Directive may become part of European public policy from the moment when it had to be implemented into the legal system of Member States, regardless of whether one State or some States did not implement the Directive in time. Should an arbitral tribunal apply national law which would have become obsolete by a timely implementation of the Directive, such a decision may violate European public policy should the very essence of the rules provided for in the Directive be disregarded.[110] Yet only fundamental rules of EU law establish the public policy.[111] The fundamental nature of such a rule might follow from the regard of the interests involved: only if the observance of the rule is essential for the Common Market it could belong to the EU public policy. The mere mandatory character of the rule might thus not suffice for the assumption that it appertains to the public policy. This means a considerable uncertainty for the verification of the EU public policy, because the suggestion lacks the provision of reliable standards for the verification of the fundamentality of the rule.

a.-) Jurisprudence of the European Court of Justice

The European Court of Justice held in the case ECO Swiss China Time / Benetton International:[112] *It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances ... However, according to Article 3(g) of the EC Treaty (now, after an amendment, Article 3(1)(g) EC), Article 81 EC (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the Internal Market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) EC (ex Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void ... the provisions of Article 81 EC (ex-Art. 85) may be regarded as a matter of public policy within the meaning of the New York Convention.*

The Court held that *it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances*. The question may arise whether national courts, applying the 'public policy' test to an arbitral award, will have to apply a broader

concept of public policy including aspects of 'transnational' public policy. In the ECO Swiss / Benetton judgement the European Court of Justice stated that *the provisions of Article 82 EC* Treaty *may be regarded as a matter of public policy within the meaning of the New York Convention*. In the words of the Court this Convention *provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention)*.

b.-) Application of EU Law by the Arbitrator

The Information Society service and the recipient are free to choose the law applicable to the dispute. If they choose a non-national law or a law of a non-Member State – does the arbitrator have to apply principles of EU law, for example concerning consumer protection or antitrust law? In cases concerning arbitration clauses where the parties had chosen laws of non-Member States (namely 'principles of equity and justice' or Swiss law), the arbitrators nevertheless applied EU law, assuming that it constituted a 'supranational law', and, in the other case, considered its application.[113] But, on the other hand, in a case where arbitrators were asked to decide as 'amiable compositeurs' in Switzerland, they stated that the Community law *did not belong to the transnational public order*.[114] It has been held that an arbitrator has to consider the application of the EU Competition law 'ex officio': *In view of the public policy character of Article 85* [now Article 81]*, the arbitral tribunal does however, have to examine ex officio whether Article 1.6 of the Agreement is not caught by the prohibition of restrictive agreements*.[115]

But it is clear that the arbitrator may only apply the EU law to a contract, if the EU law belongs to the lex contractus. With regard to EU competition law it has been said:[116] *If the European competition law does not belong to the lex contractus it may be inferred a priori that the arbitrator has to declare its inapplicability. In fact, the arbitrator is not a keeper of the national public order, and it would be excessive to assume that the principles of the competition law would belong to the transnational public order... This means that the arbitrator has the duty to apply the Community competition law whenever this application corresponds with a legitimate interest whether the lex contractus be or be not the law of a EU Member State.*

c.-) Enforcement of Agreements to Arbitrate and Public Policy

Can an arbitration clause be enforced if the public policy would exclude that the dispute could be settled by arbitration? There is a clear tendency in international law in favour of arbitration, and it is even asserted that the EU's public policy favours arbitration:[117] *The legal order of the European Community, in particular Article 17 of the Brussels Convention, gives some support to favour arbitration and to avoid narrow concerns that arbitrators might come to conclusions inconsistent with European or domestic international public policy. Generally approached, one may also propose, that the recourse to arbitration is included in the contractual freedom of the participants in the European market and that the five great market freedoms include the freedom to use non-oppressive contractual provisions of any kind.*

d.-) EU Public Policy and Consumer Arbitration

The compatibility of consumer arbitration with EU public policy can be based, inter alia, on the support which the EU Commission grants to the Portuguese consumer arbitration system and on the European Parliament's Resolution on the Promotion of Recourse to Arbitration. But the parties cannot avoid the application of the EU public policy if an award shall be enforced in a Member State. Thus the choice of a non-Member State law as the law applicable to the contract

does not prevent that the competent court in a Member State which is concerned with the recognition and enforcement of the award, will refuse the enforcement if the award violates that State's public policy. Taking into account that the EU public policy forms part of the public policy of a Member State[118] it will be necessary to define the content of the public policy with regard to consumer protection.

To give an example, according to Article 53 of the German Banking Act a futures contract is without effect, if one of the parties is not a merchant.[119] This provision is even applicable if the parties have chosen a different law as the law of the contract if the non-merchant is domiciled in Germany. But the offering of commodity swap contracts is part of the freedom of the providing of services within the EU, and the restriction of the commercial freedom which is directed towards the protection of the weaker party must not be disproportionate:[120] *The protection of consumers, or the weaker party in general, by no means justifies the incapacitation of the weaker party.*

Whereas the direct applicability of EU law does not cause the rule to belong to the public policy, this may be the case if EU law provides that Member States are obliged to ensure that a party may not by an agreement deviate from such a rule. In this case it could be justified to assume that the rule belongs to the (national) public policy of a Member State. But with regard to the jurisprudence of the European Court of Justice the scope of the public policy will not necessarily be identical with those rules establishing the minimum content of consumer protection. Only those rules may be considered as belonging to the public policy which, by reason of their importance, can be considered as necessary for the achievement of the Internal Market.

e.-) Mandatory Rules of Law and Public Policy

It is necessary to distinguish between rules of mandatory law and public policy. Rules of mandatory law are, within a national legal system, those rules of law which the parties cannot derogate from. The rules have the particular purpose of protecting a weaker party. They concern therefore certain types of parties to a contract such as consumers.[121] In the case of international arbitration the parties may derogate from those rules, for example by the choice of a foreign law. However, the public policy of the state, where the arbitral award applying the foreign law shall be enforced, limits this freedom in order to avoid that rules of law are executed in a national territory where such rules are considered as not acceptable.[122] The protection of the consumer is not absolute, in particular it is limited by the freedom of the providing of services. For this reason, the legitimate interests of consumers which may be considered as belonging to the EU public policy may not exceed the minimum protection afforded by secondary EU law. But are they identical with it? If yes, a violation of the protection afforded by the Directive on Distance Contracts or the Directive on Unfair Terms in Consumer Contracts would always lead to a violation of the EU's transnational public policy. However, in the light of the European Court of Justice's jurisprudence such a conclusion would only be compelling if these rules constituted fundamental provisions which were essential for the functioning of the Internal Market. It is asserted that the minimum standards of consumer protection which Member States have to provide according to EU law constitute the basis of the relevant public policy of the EU.[123] An arbitral award which violated those provisions of national law which implement the minimum content of a Directive on consumer protection could thus violate the public policy.[124]

3 Voluntary International Arbitration in Electronic Commerce

Voluntary international arbitration is regulated by international instruments and national laws. Both precede on the assumption of the autonomy of the parties which is limited only in the public interest. Voluntary arbitration has to be differed from other forms of dispute settlement which do

not fall within the scope of voluntary arbitration, for example mandatory consumer arbitration, mediation and conciliation.

There is no general definition of the term of arbitration. The international instruments and national laws concerning arbitration generally refer to 'contractual' arbitration, because the arbitration is based on an agreement between the parties. Also in the online environment different types of arbitration may be used. But in order to ensure the international enforceability of the arbitration, the resulting decisions would have to comply with the requirements of the New York Convention, respectively other international instruments.

3.1 Definition of 'Arbitration' and 'Arbitration Agreement'

The 'arbitration' is hardly defined in other international instruments. The Geneva Convention defines the term 'arbitration' in Article I(2)(b). Accordingly, the term *shall mean settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions*. Article I(2)(a) of this Convention defines the term 'arbitration agreement' as meaning *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 teleprinters and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws*.

The drafters of the UNCITRAL Model Law on International Commercial Arbitration considered:[125] *There was agreement among the members of the working group that arbitrations not based on a voluntary agreement of the parties should fall outside the scope of the model law*. The basis for the unanimity was based on the fact that the Model Law and also the New York Convention focus on the term 'arbitration agreement'. A definition of the term is contained in Article 2(a) of the UNCITRAL Model Law. Accordingly, *'arbitration' means any arbitration whether or not administered by a permanent arbitral institution*. The Model Law defines the term 'arbitration agreement' in Article 7(1): an *'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement*.

The concept of international voluntary arbitration does not include mandatory arbitration. This follows from the use of the words 'arbitration agreement' in international instruments such as the New York Convention. Thus arbitration by referral or mandatory consumer arbitration do not fall within the concept of international voluntary arbitration. With regard to the consumer arbitration systems of Portugal and Spain it has been argued that because of their mandatory nature these types of arbitration would not fall within the concept of voluntary arbitration.[126] However, insofar as these types of arbitration are regulated by national legislation relating to voluntary arbitration, it seems that also consumer arbitration may fall within the concept of voluntary arbitration. There is no doubt that types of out-of-court dispute settlement such as mediation, conciliation and other procedures which do not envisage a binding decision are excluded from the definition of the term.[127] But the delimitation between such types and voluntary arbitration may not always be easy to draw.

3.2 Validity of Arbitration Agreements According to the New York Convention and the Geneva Convention

Article II(1) of the New York Convention obliges Contracting States to *recognise 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 arbitration. Article II(2) of the New York Convention states: *the term 'agreement in writing' shall include an arbitral clause in a contract or arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

3.2.1 **Requirements for Validity**

The validity of the arbitration agreement in the sense of the New York Convention presupposes:[128]

1. the capacity and the power to conclude an arbitration agreement;
2. the definition of the subject of the arbitration agreement;
3. the arbitrability of the dispute;
4. the form of the arbitration agreement.

3.2.2 **Applicable Law**

By reason of the autonomy of the arbitration agreement from the contract, the law applicable to the arbitration agreement may differ from the law applicable to the contract.[129] But which law is applicable concerning the validity of the arbitration agreement if the parties have not made a choice? Based on Article V(1)(a) of the New York Convention will be decisive which refers to the possibility of the arbitration agreement being void 'under the law to which the parties have subjected it'. It appears to be appropriate to take Article V(1)(a) of the New York Convention into consideration when assessing the validity of the arbitration agreement according to Article II of the Convention.[130] Accordingly, the law of the potential place where the future award will be made should be relevant. If this place is not yet determined, it may be appropriate to identify the applicable law on the basis of the principle established by Article VI(2)(c) of the Geneva Convention.

According to Article VI(2) of the Geneva Convention courts of Contracting States, in taking a decision concerning the existence or the validity of an arbitration agreement, *shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.*

(a) under the law to which the parties have subjected their arbitration agreement;

(b) failing any indication thereon, under the law of the country in which the award is to be made;

(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute. The solution adopted by Article VI(2)(c) of the Geneva Convention will only become relevant *only when there is no choice expressed or clearly inferable at all.*[131] Thus if the choice of law by the parties can be implied, there is no room for the application of lit. (c) of Article VI(2) of the Geneva Convention.

3.3 Content of Arbitration Agreement

Based on their autonomy the parties may determine the content of the arbitration agreement. Whether it is recommendable for the parties to establish in detail the content of the arbitration agreement for disputes in electronic commerce may be doubted. The increase of the number of cross-border contracts in electronic commerce and the development of mass contracts concluded online require a certain standardisation of arbitration agreements. It may be cumbersome for the parties to draft in individual negotiations the content of the arbitration agreement providing in detail for the use of means of electronic commerce. The law in the sector of electronic commerce is only in its infancy so that it could be expected that the parties would be looking for guidance in these matters to rules for arbitration of arbitral institutions.

Many arbitral institutions suggest model arbitration agreements in the form of arbitration clauses.[132] Such a model agreement may state that any disputes in relation with the contract shall be referred to arbitration: Any disputes arising out of or in connection with this contract including any question regarding its existence, validity or termination, shall be finally settled under the Rules of Arbitration of the (... Institution) which Rules are deemed to be incorporated by reference into this clause.

In order to avoid controversies after the commencement of the arbitration, and if the rules of arbitration of the arbitral institution do not contain a regulation or if this regulation does not correspond with the interests of the parties it could be advisable if the parties regulated some issues of the procedure expressly, for example:

1. the number of arbitrators;
2. the place of the arbitration;
3. the language of the arbitration.

Additionally, items of electronic commerce could be individually determined by the parties, if the rules of the institution contained regulations which would not correspond with the interests of the parties.

3.4 Arbitration Agreement and Its Form

The compliance with form requirements is a condition for the enforceability of an arbitration agreement.

3.4.1 Enforceability of the Arbitration Agreement According to the New York Convention

Article II of the New York Convention states: *(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.* The possibilities of the parties which aim at the circumvention of national laws by means of regulating controversies by arbitration are limited with regard to requirements of form. An international arbitration agreement must comply with the form requirements of the New York Convention if it shall be enforced according to this Convention. Thus the parties' choice of a law which uses lower standards of form does not make the arbitration agreement enforceable under the New York Convention. But if the parties have agreed on a valid arbitration agreement according to the New York Convention, a national court in a Contracting State, when seized in an action, shall, at the request of either party, refer the parties to arbitration.[133]

3.4.2 Electronic Signatures and the Clause in a Contract or the Agreement 'Signed by the Parties'

Do data messages with electronic signatures qualify with the requirements of a signature and of writing in the sense of the New York Convention?

a.-) EU Law

Does an advanced electronic signature in the sense of Article 2 No. 2 of the Directive on a Community Framework for Electronic Signatures[134] (Directive on Electronic Signatures) satisfy these requirements in the sense of the Convention? An advanced electronic signature means an electronic signature (that is data in electronic form which are attached to or logically associated

with other electronic data and which serve as a method for authentication) which meets the following requirements: (a) it is uniquely linked to the signatory, (b) it is capable of identifying the signatory, (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

According to Article 15 No. (1) of the Directive on Electronic Signatures *Member States shall ensure that advanced electronic signatures which are based on a qualified electronic certificate and which are created by a secure-signature-creation device used for signature generation can practically occur only once, and that their secrecy is reasonable assured; (b) the signature-creation-data used for signature-generation cannot, with reasonable assurance, be derived and the signature is protected against forgery using currently available technology; (c) the signature-creation-data used for signature generation can be reliably protected by the legitimate signatory against the use of others.* Article 15 No. (2) of the Directive states: *Secure signature-creation devices must not alter the data to be signed or prevent such data from being presented to the signatory prior to the signature process.*

Accordingly, there is no doubt that an electronic signature in the sense of Article 15 No. 1 of the Directive should qualify as a signature in the sense of Article II(1) of the New York Convention, and at least insofar as international arbitration relating to Member States are concerned, the national laws of a Member State should permit for such an interpretation of the New York Convention.

b.-) UNCITRAL Draft of Uniform Rules on Electronic Signatures

The UNCITRAL Working Group on Electronic Commerce, dealing with a draft of Uniform Rules on Electronic Signatures referred to requirements for liability in Article 6:[135] *Compliance with a requirement for a signature. (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement. (2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature. (3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if: (a) the means of creating the electronic signature is, within the context in which it is used, linked to the signatory and no other person; (b) the means of creating the electronic signature was, at the time of signing, under the control of the signatory and of no other person; (c) any alteration to the electronic signature, made after the time of signing, is detectable, and (d) where a purpose of a legal requirement for a signature is to provide assurance as the integrity of the information to which it relates, any alteration made to that information, is detectable. (4) Paragraph (3) does not limit the ability of any person: (a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature. Or (b) to adduce evidence of the non-reliability of an electronic signature. (5)…*

The relation of Article 6 of the Uniform Rules on Electronic Signatures to Article 7 of the UNCITRAL Model Law on Electronic Commerce was addressed by the Report:[136] *It was felt, however, that repetition of the entire text of Article 7 was not necessary in draft Article 6, principally on the basis that the resulting text would be unnecessarily long and complex, and that the substance of Article 7(1)(a) could be retained in the definition of 'electronic signature' in the Uniform Rules.* In fact, that definition is contained in Article 2 of the Rules.

With regard to the definition of the term 'electronic signature' in Article 2(a) of the Rules, para. 57 of the Report stresses that, subject to a possible reconsideration, the Working Group adopted the following definition: *'Electronic signature' means any method that is used to identify the signature of a holder in relation to the data message and indicate the signature holder in relation to the data message and indicate the signature holder's approval of the information contained in the data message*.

3.4.3 **Requirement of an Exchange of Letters or Telegrams**

Article II of the New York Convention does not necessarily require a signature. Letters or telegrams from which the arbitration agreement emanates do not have to be signed by the parties. According to subsection (2) of Article II of the Convention a signature would only be needed if the arbitration agreement was contained in a single document but not, if it was contained in an exchange of letters or telegrams. Thus the requirements of an arbitration agreement will be fulfilled if it results from an exchange of letters which are not signed.[137] Assuming that a broad interpretation of Article II of the Convention permits also the extension of the concept of writing to the exchange of electronic data messages, there is no reason to allege that the exchange of emails or computerfaxes could not establish an 'agreement in writing'. However, since an individual party cannot rely on the wording of Article II of the New York Convention, but only on the relevant provisions of his national private international law, he can make use of this interpretation of the New York Convention with regard to the provisions of his national law.[138]

a.-) UNCITRAL Model Law on International Commercial Arbitration

Article 7(2) sentences 1 and 2 of the UNCITRAL Model Law on International Commercial Arbitration states: *The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another*.

A reason for the requirement of writing is that the Model Law should not conflict with the New York Convention. Based on a study on the application of the New York Convention the Working Group concerned with the drafting of the UNCITRAL Model Law on International Commercial Arbitration decided to clarify that the writing requirement is satisfied by use of modern means of telecommunications:[139] *The intention of the Model Law is to cover modern and future means of communications. The requirement of a 'record' is to ensure that there is some writing involved. Thus, for example, an ordinary telephone conversation would not suffice. It is submitted, however, that a written record is provided even if no paper copy was produced; data appearing on a computer screen, or in its memory disks, should be sufficient. It should be noted that the 'exchange' of letters, telexes etc. does not require that both mention the arbitration agreement, or even that one or both letters be signed. What is sought is a written form of assent from both parties*:

Article 7(2) 3rd sentence of the UNCITRAL Model Law on International Commercial Arbitration states: *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.* Accordingly, it may suffice if the arbitration clause referred to is contained in general terms of contract which are published on the Information Society service's website provided that the contract referring to the business terms is either signed or contained in an exchange of letters, telexes telegrams or other means of telecommunication, providing a record of the agreement or in an exchange of statements of claim and defence in

which the existence of an agreement is alleged by one party and not denied by another.[140] An electronic order form in which reference is made to dispute settlement by arbitration according to the Information Society service's general terms of contract and which is filled in and emailed to the service by the recipient may thus suffice, provided that the consumer's order constitutes the acceptance of the Information Society service's offer.

b.-) UN/CEFACT Recommendation to UNCITRAL

The comparison between the different methods of sending data messages effects the conclusion that the equation between an email and a telegraph is not necessarily compelling. Even if Article II(2) of the New York Convention is read in the light of Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration according to which the concept of the exchange of *telex, telegrams or other means of telecommunication which provides a record*, it remains doubtful whether the exchange of emails is susceptible to establish this result. The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) dealt with the question whether the form requirement in Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration would cover electronic communications. It stated in the recommendation to UNCITRAL:[141] *The Model Law provides that an arbitration agreement may be contained in a communication transmitted by EDI which provides a record of the agreement (Article 7). It is probably intended that an arbitration agreement referred to in a contract made by EDI means shall also be effective, but the wording employed in Article 7 is very unclear. 'Agreements' are stated to be capable of being made by EDI means, but 'contracts' are stated to require 'writing', giving the possibly absurd outcome that a contract including an arbitration clause can be made by EDI but a contract referring to a separate arbitration clause or agreement would only effectively incorporate that clause if made in writing.* However, this seemingly puzzling result may be cleared by reference to the work done by UNCITRAL during the drafting of the Model Law on International Commercial Arbitration and on the basis of Article 7(2) 3rd sentence of the Model Law. The enigma may be cleared if the purpose of the drafters of the Model Law is taken into consideration: if the agreement is contained in one document, the signature of the parties is required. If it emanates from an exchange documents it suffices that a record is provided.

c.-) UNCITRAL Model Law on Electronic Commerce

Can the form requirements contained in the New York Convention be read in the light of the definition of the term 'writing' adopted by the UNCITRAL Model Law on Electronic Commerce? Article 6(1) of the Model Law on Electronic Commerce states: *Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference*. Concerning signatures the Model Law on Electronic Commerce establishes in Article 7(1): *Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approach of the information contained in the data message; and (b) that message is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*

Taking into account of the different functions which the requirement of 'writing' may fulfil, the New York Convention seems to focus on the mere notion that the information should be reproducible and readable. Whether the requirement of a signature cases a different light on this interpretation can be doubted. The Guide to enactment of the UNCITRAL Model Law on Electronic Commerce identifies in para. 48 ten different reasons why national laws require 'writings'. The reason for the requirement of a signature under a single document (contract) in the New York Convention merely serves the avoidance of evidentiary problems which cannot arise if the parties conclude the agreement by an exchange of documents from which the

consent can be inferred. Accordingly, the requirements which have to be made to a 'signature' in the sense of the New York Convention should be low.

d.-) Electronic Signatures

Concerning electronic signatures para. 59 of the Guide to enactment of the UNCITRAL Model Law on Electronic Commerce states that Article 7 may be regarded as requiring a minimum standard of authenticity for an individual document which permit the inference of the consent of both parties. The requirement of a signature is thus little more than a functional element which provides an additional layer of certainty. That such a requirement can be met by an electronic signature appears to be evident, however, whether the literary interpretation of the New York Convention by national courts will permit the enforcement of electronically signed contracts has not been tested.

e.-) National Laws

National laws may provide for the recognition of arbitration agreements applying a broad concept of 'writing'. For example, the Arbitration Act (England) of 1996 recognises an expanded meaning of 'agreement in writing'.[142] According to Section 5(2) of this Act *there is an agreement in writing – (a) if the agreement is made in writing (whether or not it is signed by the parties); (b) if the agreement is made by exchange of communications in writing; or (c) if the agreement is evidenced in writing, (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing. (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement. (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged. (6) Reference (in Part I of the Law) … to anything being written or in writing include its being recorded by any means.* The Act provides in Section 6 (2) *The reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement*.

Within the Working Group I there was discussed the possibility to use new forms of telecommunication which had been recognised by national legislators for the interpretation of Article II(2) of the New York Convention, for example by reference to Article 178(1) of the Swiss Private International Law which states:[143] *'As regards its form, the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.'* National arbitration laws which comply with the requirements of form in the sense of the New York Convention thus use a phraseology which includes modern means of telecommunications in the definition of the term 'writing': *Concerning the form, the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*[144] The requirement of a signature in the case where the consent of both parties emanates from a single document is thus no longer required according to the laws of many States, since modern means of telecommunications provide a sufficient degree of certainty.

3.4.4 'Agreement in Writing' and Electronic Messages

The stipulation of an arbitration clause presupposes an agreement in writing in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[145]

a.-) Requirement of Form and Electronic Means of Communication

Also new means of communication by electronic data interchange and online transmission of data are considered as an exchange of documents in the sense of the New York Convention.[146] However, the implementation of the requirement of formality in national laws produced differing results. It may be said that the more recent a national arbitration legislation is the more likely it is that the definition of 'writing' will include electronic documents. Taking into account of the fact that in the case of a telegraph the identity of the sender could be identified, that the authenticity of the telegram could hardly be challenged and that the delivery of a telegraph was certain, only encrypted email or an email provided with an electronic signature could be said to correspond with a telegraph in the sense of the New York Convention.[147]

b.-) UN/CEFACT Electronic Commerce Agreement

The Electronic Commerce Agreement of the United Nations Centre for Trade Facilitation and Electronic Business[148] explains in the objectives that it does not exclude the applicability of the Agreement in business-to-consumer relations. With this regard, the explanations of the reasons state: *Though the E-Agreement could be used in relationships between businesses and consumers, it does not incorporate any provisions relating to consumer protection. Consumer protection law is generally mandatory and in most cases the consumer's national and local consumer protection law will be applicable when a consumer concludes a transaction. Businesses wishing to use the E-Agreement for entering into contractual relationships with consumers must therefore recognise the need for compliance with national and local consumer protection laws.*

c.-) UNCITRAL Model Law on Electronic Commerce

The UNCITRAL Model Law on Electronic Commerce states in *Article 6. Writing*

> *(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.*
>
> *(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.*
>
> *(3) ...*

(1) Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce

The Guide to Enactment to the Model Law states:

> *Article 6. Writing*
>
> *47 . Article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement (which may result from statute, regulation or judge-made law) that information be retained or presented "in writing" (or that the information be contained in a "document" or other paper-based instrument). It may be noted that article 6 is part of a set of three articles (articles 6, 7 and 8), which share the same structure and should be read together.*
>
> *48 . In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of "writings" in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of "writings": (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that*

each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalise the intent of the author of the "writing" and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes.

49 . However, in the preparation of the Model Law, it was found that it would be inappropriate to adopt an overly comprehensive notion of the functions performed by writing. Existing requirements that data be presented in written form often combine the requirement of a "writing" with concepts distinct from writing, such as signature and original. Thus, when adopting a functional approach, attention should be given to the fact that the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability and unalterability with respect to paper documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would be regarded as a "writing" although it might be of little evidential weight in the absence of other evidence (e.g., testimony) regarding the authorship of the document. In addition, the notion of unalterability should not be considered as built into the concept of writing as an absolute requirement since a "writing" in pencil might still be considered a "writing" under certain existing legal definitions. Taking into account the way in which such issues as integrity of the data and protection against fraud are dealt with in a paper-based environment, a fraudulent document would nonetheless be regarded as a "writing". In general, notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

50 . The purpose of article 6 is not to establish a requirement that, in all instances, data messages should fulfil all conceivable functions of a writing. Rather than focusing upon specific functions of a "writing", for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, article 6 focuses upon the basic notion of the information being reproduced and read. That notion is expressed in article 6 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference. The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word "usable" is not intended to cover only human use but also computer processing. As to the notion of "subsequent reference", it was preferred to such notions as "durability" or "non-alterability", which would have established too harsh standards, and to such notions as "readability" or "intelligibility", which might constitute too subjective criteria.

51 . The principle embodied in paragraph (3) of articles 6 and 7, and in paragraph (4) of article 8, is that an enacting State may exclude from the application of those articles certain situations to be specified in the legislation enacting the Model Law. An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of

products. Another specific exclusion might be considered, for example, in the context of formalities required pursuant to international treaty obligations of the enacting State (e.g., the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931) and other kinds of situations and areas of law that are beyond the power of the enacting State to change by means of a statute.

52 . Paragraph (3) was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (3) were used to establish blanket exceptions, and the opportunity provided by paragraph (3) in that respect should be avoided. Numerous exclusions from the scope of articles 6 to 8 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

(2) Adaptability of the Model Law to Arbitration by Means of Electronic Commerce

It has been suggested that the UNCITRAL Model Law on Electronic Commerce and its definition of the term 'writing' would be of direct benefit for the interpretation of the term according to the New York Convention:[149] *After forty years, the world of letters and telex messages is being replaced by e-mail and paperless trades. All this is demonstrated, as Prof. Kassedjian told us, by the broad and practical definition of writing used in the new UNCITRAL Model Law on Electronic Commerce. The debate also showed us that courts were interpreting Article II in a purposive manner which does not require any amendment to unfreeze Article II from its 1958 glacier. … Of course, whatever the answer on Article II(2), Mr. Schwartz made us look also at Arts. IV(1) and VII(1) of the New York Convention. How can a party produce an arbitration agreement to enforce an award under Art. IV(1) if that arbitration agreement does not exist in writing, physically? But again the wording of the New York Convention is subtle. Art. IV requires the application to 'produce' the award the same word 'fournit' is used in the French version – whereas Art. V requires the defendant to 'prove' or 'fournit … la preuve' for grounds entitling the court to refuse enforcement. Is this not a clue? It must mean that Article IV does not require an enforcing party to prove the arbitration agreement. If the original and all copies have been destroyed in flood or war, Dr. Reiner argued that such loss could not mean that the award could never be enforced. The arbitration agreement can be produced in a different form from the original agreement; indeed the mechanics of a telex even in 1958 were such that the paper telex received was not the original document sent – so why is e-mail juridically different? And if evidence of a destroyed document can be supplied under Art. IV, then why not a physical reproduction of a deleted e-mail? Provided there can be produced a permanent record of the arbitration agreement, whatever that document may be and whether or not it is primary or secondary evidence of the parties' arbitration agreement, the view was expressed by several participants that the applicant had satisfied Art. IV and in many countries now, the applicant will in any event have satisfied it by virtue of Art. VII.*[150]

It may be alleged that the interpretation of the form requirements of the New York Convention can be made in a manner which is broader than similar form requirements in many national laws. The purpose of the form requirements in the sense of the New York Convention seems essentially to lie in the establishment of evidence, namely in the need to provide proof of the existence of an agreement between the parties. If the agreement is contained in a single document, Article II(2) envisages the signatures of the parties, but the signatures are not necessary if the existence of the agreement emanates from an exchange of documents. Other considerations which may condition the requirement of form, such as the public interest or the

interest in the protection of a weaker party, remain irrelevant with regard to Article II of the New York Convention. Accordingly, it should remain irrelevant whether 'writings' or 'signatures' are paper based or not, provided that the purpose of evidence can be fulfilled.

d.-) Requirement of Form and the UN Convention on the Law of Treaties

Can the form requirements of the New York Convention be interpreted in the light of subsequent instruments such as the UNCITRAL Model Law on Electronic Commerce of 1996 or the EU Directive on Electronic Signatures? There may be serious doubts on the extension of the term 'agreement in writing' in the sense of the New York Convention to cover every new method of communication, unless the text of the Convention itself would support such an interpretation. The United Nations Convention on the Law of Treaties of 1980[151] contains a 'general rule on interpretation' in Article 31: *(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (...) (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties*.

(1) Interpretation of the Requirement of Form on the Basis of the UNCITRAL Model Law on Electronic Commerce

A coherent practice in the sense of Article 31(3)(b) of the Convention on the Law of Treaties according to which electronic documents constitute an 'agreement in writing' did not yet develop. It is unlikely that the Model Law on Electronic Commerce qualifies as a rule of international law in the sense of Article 31(3)(c) of the Convention on the Law of Treaties – because if it was, its implementation by national legislators would not be necessary. Likewise the Model Law does not establish a subsequent practice in the application of the treaty or a subsequent agreement on the interpretation of the New York Convention. Additionally, the references to the terms 'writing' in Article 6 and 'signature' in Article 7 of the Model Law on Electronic Commerce are not likely to qualify as comprising the ordinary meaning of the terms as used in the sense of the New York Convention. This would be different if one could assert that the interpretation of the much used legal terms 'writing' and 'signature' would generally comprise electronic messages and signatures, but since in all Member States legislative activities seem to be necessary to achieve the adaptation of these terms to the technological development, it can hardly be asserted that the form requirements in the sense of the New York Convention could be interpreted with reference to the UNCITRAL Model Law on Electronic Commerce.

(2) Interpretation of the Form Requirement and EU Law

Could it be said that the Directive on Electronic Commerce and the Directive on Electronic Signatures contained rules of international law applicable to the relations between the parties, that is to say the States which have consented to be bound by the treaty (here the New York Convention) and for which the treaty is in force, Article 2(1)(g) of the Convention on the Law of Treaties? The Convention on the Law of Treaties contains basic principles according to which States have to fulfil their obligations which derive from treaties. Article 31(3) of the Convention on the Law of Treaties provides that there shall be taken into account, together with the context, inter alia, (c) any relevant rules of international law applicable in the relations between the parties. If thus Member States are obliged to recognise electronic signatures on the basis of Article 5 of the Directive on Electronic Signatures this could mean that rules of international law, namely the EU law, obliges Member States to consider electronic signatures as responding to the form requirement of Article II(2) of the New York Convention.

The principle contained in Article 31(3)(c) of the Convention on the Law of Treaties was an element of subsection (1) of the draft of the text of 1964 according to which the ordinary meaning to be given to the terms of a treaty were to be determined 'in the light of the general rules of international law in force at the time of its conclusion'. The text of the Convention omitted the temporal limitation, because it was considered that the formula used in the 1964 text was unsatisfactory, since it covered only partially the question of the so-called intertemporal law in its application to the interpretation of treaties.[152] Thus the text of the Convention permits that also subsequent developments have to be taken into consideration. This coincides with Article VII(1) of the New York Convention according to which the New York Convention does not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States. Even if the regulation of the electronic signature in the Directive on Electronic Signatures does not address arbitration agreements, it may be considered that the resulting rules constitute a minus to a multilateral or bilateral agreement which directly addressed the recognition and enforcement of arbitral awards so that its application should not be contested.

(3) Modification of the Form Requirement by EU Law

Concerning the requirements of form relating to the arbitration agreement in the sense of the New York Convention one may consider whether the relevant provisions on 'writing' contained in the Directive on Electronic Signature constitute a successive treaty relating to the same subject-matter according to Article 30 of the Convention on the Law of Treaties. Subsection (4) of this provision states that *when the parties to the later treaty do not include all the parties to the earlier one:*

(a) as between State parties to both treaties the same rule applies as in paragraph (3);

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. Article 30(3) of the Convention on the Law of Treaties states: *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.* Certainly, the Directive on Electronic Signatures does not qualify as a Treaty in the sense of Article 2(1)(a) of the Convention on the Law of Treaties according to which *'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.*

However, according to Article 3 of the Convention on the Law of Treaties the fact that the Convention does not apply to international agreements concluded between States and other subjects of international law does not affect the legal force of such agreements and the application to them of any of the rules set forth in the Convention to which they would be subject under international law independently of the Convention. But according to Article 5 of the Convention on the Law of Treaties also international organisations and treaties adopted within an international organisation are subject to the application of the Convention so that the application of the Convention to the EC Treaty and the obligations deriving from it may be considered. Accordingly, it appears that in application of the Directive on Electronic Signatures the requirement of form of the New York Convention could be given an interpretation based on the content of the Directive insofar as Member States are concerned. However, with regard to non-Member States only the text of the New York Convention would be relevant.

One may also consider whether Article 30 of the Convention on the Law of Treaties which concerns the application of successive treaties relating to the same subject matter would be applicable at all, since the overlap between both instruments is only minimal. However, according to the preparatory work leading to the Convention on the Law of Treaties it is clear that Article 30 addresses the problem of successive treaties with incompatible provisions,[153] so that also a possible conflict relating to the requirement of form between the New York Convention and the Directive on Electronic Signatures could be solved by reference to the principles established by the Convention on the Law of Treaties.

(4) Requirement of Form and National Law of Member States

Addressees of the Directive are only some of the Contracting States of the New York Convention. The Directive on Electronic Signatures could not be conceived as an agreement to modify the New York Convention between certain of the Contracting States only, Article 41 of the UN Convention on the Law of Treaties. Even though such a modification of the New York Convention would not prohibited in the sense of Article 41(1)(b) of the UN Convention on the Law of Treaties, the Directive cannot be conceived of as an agreement to modify the New York Convention.[154] But the Directive can have the effect of modifying the form requirement of the New York Convention through the modification of the national laws of Member States. For these reasons it may be concluded that the Directive on Electronic Signatures does not have a direct impact on the interpretation of the form requirement of the New York Convention in Member States, but Member States should regulate in their national arbitration laws that their courts are bound to consider arbitration agreements concluded by means of electronic commerce in the sense of Article 5 of the Directive as corresponding with the form requirement of Article II(2) of the New York Convention. This duty may be inferred from the necessity to implement the Directive into national law.[155]

3.4.5 **Particular Means of Communication**

Particular means of communication referred to by the UNCITRAL Model Law on International Commercial Arbitration are telex, telegram or other means of telecommunication.

a.-) Telegram

Such a declaration or communication may be differed from a mere draft which would not have been signed. In spite of the fact that telegrams are not signed, they may nevertheless qualify as signed writings, even if it cannot be personally signed for technical reasons. What matters is that the document of the telegram provides circumstances which justify the inference that its text is based on the sender's original which was created at the place of transmission (sending) and signed by the sender.

b.-) Telex

These principles may also be applied to telexes which, for technical reasons, cannot be transmitted with the sender's signature. It is required, however, that the sender makes use of a machine written document which will be transmitted by electronical means and which indicates his name as the sender.

c.-) Fax

When such means of communication are sufficient to satisfy requirements of form, there is no reason why a telecopy (fax) should not fulfil the form requirements, no matter whether the telecopy is made with the support of a postal service or privately. Whereas in this case the sender can sign the telecopied document, he is not in the position to do so in the case of a computerfax which is communicated from a data file which is stored in the memory of a

computer. If the arbitration agreement is thus based on an exchange of computerfaxes, it appears to satisfy the form requirement of 'writing' in the sense of Article II(2) of the New York Convention.

d.-) Email

Likewise there is no reason why the transmission of data files by email should not be able to establish an arbitration agreement for the same reasons. The sender of the fax has no possibility to control whether his message is received by a fax machine and printed on paper or stored in a particular memory of a computer from where it may be read and stored or printed on paper by the addressee.

e.-) Computerfax

The communication of a message sent by email is very similar to that of a computer fax sent by a computer. Accordingly, both means of communication should be treated similarly from the legal point of view and an exchange of computer faxes or emails should, therefore, satisfy the form requirements of an arbitration agreement. Some legislations differ between a fax and a computerfax. Whereas the former is considered as equivalent to a writing, in particular because the signature of the signatory establishes a sufficient degree of authenticity, this element is considered lacking in the case of a computerfax. But since the method of communicating a text by a computerfax is very similar to communicating it by email, a differentiation in the treatment of both methods of communication cannot be justified. Again, the reasons for the requirement of form may differ. In the case in which the requirements of form focus on the function of authenticity, the signature on the paper establishes the veritable fact that the declaration or communication was made by a particular person. A similar degree of authenticity may be achieved by an advanced signature according to the Directive on Electronic Signatures but hardly by a computerfax or a mere email message.

f.-) Scanning of Handwritten Signature

It appears doubtful whether an arbitration agreement can constitute a contract in the sense of Article II(2) of the New York Convention, 'signed' by the parties if the handwritten signatures are scanned and copied into the electronic data file of the contract. The admissibility of the electronic means of communication for the establishment of the arbitration agreement in the sense of Article II(2) of the Convention is applicable only in cases in which the arbitration agreement is based on an exchange of documents, but not if it should be based on a contract contained in a single document. In this case the scanning of the signatures is not likely to satisfy the function of authenticity, because it could be done by everybody who copies handwritten signatures from existing documents or letters without that any prohibition or technological measures of safety would restrain him from doing so. The requirement of a signature has the purpose of the authentication of a particular person who authorises the signed text.

g.-) Scanning of Signatures as Signature of the Contract by the Parties

In the case in which a text is communicated by modern means of telecommunication, the recipient obtains through the use of the means of communication an additional security concerning the authenticity of the electronic message which is absent if a single document is generated. Accordingly, it appears reasonable to refuse the assumption that scanned signatures, copied under an electronic document, could create an 'arbitration agreement signed by the parties' in the sense of the New York Convention.

3.5 Form of Arbitration Agreements in International and National Laws

The requirements of form relating to arbitration agreements differ in international and national law.

3.5.1 Form Requirements of the New York Convention and the Geneva Convention

Requirements of form may be based on international instruments such as, for example, Article II of the New York Convention which defines the agreement in writing as to *include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.*[156] According to Article I(2)(a) of the Geneva Convention *the term 'arbitration agreement' shall mean 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 and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws.*[157]

The effectiveness of an arbitration agreement in the sense of the New York Convention depends exclusively on the fact whether the agreement complies with the form requirements established in the Convention. Formal requirements for the arbitration agreement must not be assessed on the basis of national laws but exclusively by reference to Article II(2) of the New York Convention if the enforcement is claimed on the basis of the New York Convention.[158] In the case where national arbitration law requires that an arbitration agreement be in writing, but not expressly requiring that it be signed by the parties, national courts may enforce an arbitration clause (printed) on the purchase order but not signed by the parties, but they may refuse the enforcement of the arbitration clause under the New York Convention against a foreign seller/manufacturer based on the text of the Convention.[159] Additionally, a party may attempt to claim the enforcement according to the relevant national law of the Contracting State concerned. If this law does not impose requirements of form this does not affect the form requirement of the New York Convention: the enforcement has to be sought either according to the New York Convention or according to national law.[160]

3.5.2 Necessity of an Amendment of the New York Convention?

Whether the New York Convention should be expressly modified in order to allow for the effectiveness of arbitration agreements concluded online may be doubtful. In the light of the interpretation of the New York Convention by the experts who drafted the UNCITRAL Model Law on International Commercial Arbitration, an amendment would not seem to be necessary. Their draft which permits for the conclusion of arbitration agreements by modern means of telecommunication allegedly corresponds with the requirements of the New York Convention. However, there are other voices which consider an amendment of the New York Convention as necessary:[161] *It can be envisaged that the out-of-court dispute settlement between businesses less worthy of protection operating internationally will in the future be possible online. But this requires also a modification of the (…)* [New York Convention] *the Article II of which precludes the application of national provisions and which requires a written arbitration agreement which is signed by the parties or contained in letters or telegrams which they have exchanged.* However, an amendment of the New York Convention with its 121 Contracting States may be difficult to achieve. A workable solution might be the accession of all EU Member States to the Geneva Convention. This would have the consequence that between Contracting States of both Conventions the less strict requirements of form concerning arbitration agreements would be applicable.[162]

a.-) Alternative: Adaptation of National Laws

It should not be overlooked that the New York Convention permits in Article VII(1) the recognition and enforcement of arbitral awards according to the national laws of the Contracting State where recognition and enforcement is sought for. If thus the national law of a Contracting State imposes lower requirements of form it may be recommendable to seek recognition and enforcement according to these laws.

b.-) Alternative: Revision of the Geneva Convention

In the case in which Contracting States of the New York Convention are also Contracting States of the Geneva Convention, the less strict form requirement of Article I(2)(b) of the Geneva Convention may prevail in application of Article VII(1) of the New York Convention. According to this provision of the Geneva Convention *the term 'arbitration agreement' shall either mean an arbitral clause in a contract or an arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws*.

Concerning the revision of the Geneva Convention it would be recommendable either to include in the definition of the term 'arbitration agreement' expressly a reference to electronic documents and electronic signatures to achieve that modern means of communication qualify for the formation of arbitration agreements.

3.5.3 **Form Requirements in National Laws**

Generally, the national laws relating to international arbitration establish form requirements with regard to arbitration agreements. But even if such agreements should have be made in writing or signed by the parties, the Directive on Electronic Commerce and the Directive on Electronic Signatures obligate Member States to adapt the relevant laws in order to permit the use of means of electronic commerce for the purpose of the conclusion of arbitration agreements.

a.-) Some National Laws

National laws of States may provide for different requirements of form. Below only some national laws of Member States and Swiss law are referred to. Since it is not the subject of this study to provide an overview concerning the form requirements of arbitration agreements of the laws of Member States, these references may suffice to explain basic differences. Concerning arbitration agreements concluded by means of electronic commerce, only the Italian legal situation is briefly referred to. If the laws of Member States have not yet been adapted to recognise electronic arbitration agreements, they will have to do so, based on the Directive on Electronic Commerce and the Directive on Electronic Signatures.

(1) Austrian Law

The Austrian Code of Civil Procedure retains the necessity of the written form in Article 577(3) of the Code which permits expressly that the arbitration agreement may be contained in the exchange of letters by telegram or telegraph, in correspondence with the language of Article II(2) of the New York Convention. However, it is not yet clear whether the formal requirement will be fulfilled if the agreement was concluded by telefax of electronic data exchange.[163] It appears however, that Austrian legal literature accepts that the electronic exchange of data will suffice to establish an arbitration agreement in the sense of the law, provided that the safety of the communication and the authenticity of the content are ensured.[164]

(2) Belgian Law

Belgian law establishes as a rule of evidence that the arbitration agreement should be in a written document or in any other document binding on the parties which shows their intention to have recourse to arbitration, Article 1677 of the Belgian Code of Jurisdiction (Code Juridiciaire). *The document referred to in Article 1677 needs not necessarily be signed by the parties. An exchange of letters, fax messages or general (sales) conditions suffice. General conditions, however, must be clear and their acceptance must result from the circumstances of the case.*[165]

(3) French Law

French law relating to international arbitration does not require any form for agreements to arbitrate, it suffices that the consent of the parties is proved.[166]

(4) German Law

According to the German international private law, Article 11 of the Introductory Code to the Civil Code, the law applicable to the transaction (lex causae) or the law applicable at the place where the contract was concluded (lex loci contractus) will be decisive concerning any requirements of form applicable to the arbitration agreement. The law which imposes the lesser demands will be applicable.[167] *If German law is applicable, Article 1027 of the German Code of Civil Procedure differs between the conclusion of the arbitration agreement as a business contract concluded between merchants or not. In the first case there is no binding form requirement according to Article 1027(2) of the Code of Civil Procedure, whereby in international cases the quality of the merchant is decided on the basis of the law in application of which also the requirements of form are decided. If the parties are not merchants, the arbitration agreement has to be expressly agreed upon, fixed in writing and limited to the institution and procedure of the arbitration. Apart of the signature on the arbitration clause in the written form (according to Article 126 of the German Civil Code) it has to be observed that a particular document concerning the arbitration agreement is necessary, and for this purpose it may suffice if the parties establish a document which is separate of the main contract, particularly signed on the document itself. If the form requirement was not observed, it will suffice if the defendant does not object the lack of form during the arbitration proceedings (Article 1027(1) sentence 1 of the German Code of Civil Procedure).*

The German amendment of the Code of Civil Procedure of 1996 which re-wrote the law of arbitration, provides that an arbitration agreement with consumers has to be in a particular written agreement, signed by the consumer, Article 1031(5) of the Code. In the case of arbitration agreements which consumers a consumer's signature is required.[168] (The term 'consumer' is defined on the basis of the EU Directive on Unfair Terms in Consumer Contracts according to which a consumer is a physical person, acting for his personal aims which do not belong to his professional activities.)

In all other cases the arbitration agreement must be in an agreement, signed by the parties or in other documents either written, telegram or fax exchanged by the parties, Article 1031(1) of the Code. Accordingly, it is no longer possible to agree on arbitration orally or implicitly or on the basis of trade usages.[169] It has been observed that the enumeration of the new means of communications which may be used for the conclusion of the arbitration agreement is only exemplary, and not limiting. Therefore, it may comprise all new means of telecommunications, for example email, provided that the document can be retrieved.[170] The opposite view is based on the argument that from the omission of the inclusion of electronic communication into the legislation it must be inferred that such types of communication cannot create an arbitration agreement. Whereas an exchange of telefax, telegrams or letters from which the intent to conclude an arbitration agreement can be inferred may be sufficient (Article 1031(1) to (4) of the

German Code of Civil Procedure), the law allegedly does not permit such a conclusion in the case of electronically signed data messages. *These provisions on formal requirements do not contain a reference according to which the conclusion of the agreement would also be possible by an authenticated (digitally signed) declaration of intent via the Internet. Since at the time of the passing of the law on the procedure of the arbitration within the German Code of Civil Procedure the German Act on Electronic Signatures had been in force, a reference to the electronic signature would have been possible (…) However, with reference to Article 17 of the Directive on Electronic Commerce Member States have to ensure that a dispute between an Information Society service and a recipient should be carried out with ADR by electronic means. In the case of the adoption of the Directive the legislator will have to amend the legal provisions concerning the conclusion of arbitration agreements and the procedure of arbitration agreements.*[171] This latter view may disregard the fact that the written form is not necessary to evidence the arbitration agreement in the sense of the law, because an arbitration agreement may also be based on telegrams or faxes which are not signed. Since the enumeration of telegram and fax is only exemplary, an exchange of declarations of intent by new means of communications such as email should suffice to establish evidence. However, the value of the proposed evidence may be contested, and for this reason it would be appropriate, if the parties made either use of encryption or electronic signatures.

(5) Italian Law

The Italian Code of Civil Procedure requires in Article 807(1) the written form of the arbitration agreement. A reason for this requirement is that the Italian State favours jurisdiction by the courts.[172] The written form does not necessarily have to relate to one document, but the other document has to relate clearly to the first one.[173] According to Article 807(2) of the Italian Code of Civil Procedure the written form will be complied with by an exchange of documents by telegraph or telex. The law does not refer to other modern means of communication such as telefax, and it is controversial amongst Italian authors whether the communication by such other means of communication can be considered as 'writings' in the sense of the law.[174]

Based on the 'Law Bassanini', the Italian Law of 15/03/97, No. 59, Article 15(2),[175] any documents established by private persons with means of informatics or telematics and contracts stipulated by such means, have full legal effects, also if archived or transmitted by such means. The Decree of the President of the Italian Republic of 10/11/97, No. 513,[176] concerns the written form in Article 4. It states in subsection (1): *The document of informatics which complies with the requirements of this Regulation satisfies the legal requirements of the written form*. Concerning the effect of the private signature in the sense of Article 2702 of the Italian Civil Code Article 5(1) of the Regulation states: *The document of informatics, provided with the digital signature in the sense of Article 10, has the effect of a private signature in the sense of Article 2702 of the Civil Code*. The Decree of the President of the Council of Ministers of 08/02/99[177] regulates in particular the technical requirements of digital signatures. According to Italian law an arbitration agreement concluded by means of electronic commerce, provided with a digital signature in the sense of the 'Law Bassanini' would comply with the form requirements of the national Italian arbitration law.

(6) Swiss Law

According to Swiss law the requirement of writing may be complied with if an arbitral agreement is made electronically.[178] Article 178(1) of the Swiss Federal Act of Private International Law states: *The arbitration agreement has to be made in writing, by telegram, telex, fax or in another method of communication which renders possible the proof of the agreement by text*. Swiss commentators consider that this provision which corresponds with Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration and that Article II(2) of the New York

Convention has to be understood in the sense of Article 7(2) of the Model Law:[179] *Accordingly, there is no divergence between the relevant regulation in the Swiss Federal Act of Private International Law and the New York Convention.*

(7) UK Law

Section 5(2) to (6) of the UK Arbitration Act of 1996 states:

(2) There is an agreement in writing - if the agreement is made in writing (whether or not it is signed by the parties); if the agreement is made by exchange of communications in writing, or if the agreement is evidenced in writing.

(3) Where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

Accordingly, a signature is not necessary but useful. According to the UK Act, Section 5(3), even an oral agreement to arbitrate will be regarded as being 'in writing' if it is made 'by reference to terms which are in writing', or, according to Section 5(4) of the Act if an oral agreement 'is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement'. It has been observed:[180] *In these modern arbitration laws, there has in effect been a triumph of substance over form. As long as there is some written evidence of an agreement to arbitration, the form in which that agreement is recorded is immaterial.*

b.-) Proof of the Arbitration Agreement by Means of Electronic Commerce

The brief excursion into the laws concerning requirements of form in national legislation shows that generally, arbitration agreements do not necessarily have to be in writing, but that an exchange of communication in a certain form is necessary in order to evidence the existence of the intent of the parties. The legislation infers such a proof from the exchange of traditional letters, from telexes or telefaxes in a non exclusive enumeration of means of communication. Accordingly, also new means of electronic communication should be included. Insofar it seems that national laws just as the UNCITRAL Model Law on International Commercial Arbitration would not exclude the proof of an arbitration agreement by an exchange of emails.

3.5.4 **Electronic Signatures**

The duty of the implementation of the Directive on Electronic Commerce and of the Directive on a Community Framework for Electronic Signatures[181] obligates Member States to conceive of electronic documents as complying with the standard of 'writing'. Thus electronic messages may qualify as documents 'in writing'. However, even if national laws consider arbitration agreements concluded by email as effective, this does not exclude the risk that the enforceability of the resulting award could be refused according to the New York Convention if the arbitration agreement does not comply with the form requirements of this Convention, namely Article II(2).

Legal provisions on electronic signatures according to which such signatures have the same effect as a 'writing' remain without effect on the text of the provisions of the New York

Convention. Accordingly, national legislations equating in law an electronic signature with a 'writing' cannot modify the text of the Convention. But the national legislator may oblige national courts to enforce foreign arbitration agreements concluded by electronic means as agreements fulfilling any form requirements according to the New York Convention. The obligation to provide for such legislation at least insofar as international arbitration between Member States is concerned may also be based on Article 17 of the Directive on Electronic Commerce.

3.6 Susceptibility of International Arbitration for Dispute Settlement Between Information Society Services and Recipients

The legal insecurity which derives from the discussion about the applicability of formal requirements concerning international arbitration agreements concluded by means of electronic commerce may pose a main obstacle for the general availability of arbitration as an effective tool of out-of-court dispute settlement in electronic commerce.[182] It may be assumed that institutions for arbitration will only offer their services adapted to electronic commerce if there is legal security about the recognition and enforceability of awards. The negative publicity which a refusal to recognise and enforce such an arbitral award may engender could deter such institutions from making the necessary investments for the creation of the infrastructure. Taking into account of the public interest which electronic commerce attracts in the media, traditional arbitral institutions which depend on their seriosity cannot be expected to encounter the risk to appear in the press with negative headlines. However, this risk can be reduced through the initiative of legislators directed towards the express inclusion of means of electronic commerce as complying with the form requirements of international arbitration according to the New York Convention. An example of such a type of legislation is to be found in the UK Arbitration Act (England) 1996. Article 5(6) of the Act which belongs to Part I of the Act, states:

> *References in this Part to anything being written or in writing include its being recorded by any means.*

Article 100 of the Act states:

> *New York Convention Awards. ...*
>
> *(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards – (a) 'arbitration agreement' means an arbitration agreement in writing and (b) ... In this subsection 'agreement in writing' ... have the same meaning as in Part I.*

3.6.1 Measures to Be Taken by Member States

As elaborated above, there is good reason for the assumption that an arbitration agreement concluded by means of electronic commerce should be enforceable according to the New York Convention. However, as long as it cannot be excluded that national courts of Contracting States may decide otherwise, there remains a risk for institutions and arbitrators to accept electronic arbitration agreements.

a.-) Risk for Institution for Arbitration Deriving from Non-Compliance of Means of Electronic Commerce with Requirements of International Arbitration

Taking into account of the considerable public interest which electronic commerce attracts, the organisation and its arbitrators will hardly take a risk for their reputation through the publication of a court decision refusing the enforcement of an arbitral award which relates to an arbitration agreement concluded by means of electronic commerce. From a mere economic point of view such a risk may cause a disincentive to incur the investments required for the operation of an arbitration system by means of electronic commerce. Therefore, with reference to Article 17 of the Directive on Electronic Commerce, it may be argued that Member States are obliged to eliminate such risks for the efficiency of dispute settlement by arbitration through means of electronic commerce. The easiest way for the elimination of such risks would lie in requiring national courts to enforce arbitration agreements concluded by such means.

b.-) Measures to Avoid Risks from an Incoherent Interpretation of the New York Convention

Since enforceability of arbitration agreements based on the New York Convention ensures the availability of arbitration in electronic commerce on a global level, the applicability of the New York Convention to arbitration by means of electronic commerce is essential. In order to achieve this goal the New York Convention or laws of Contracting States may be necessary. There may be several possibilities to ensure the effectiveness of electronic arbitration agreements on a global basis there are:

1. An express amendment of the New York Convention which would avoid any insecurities about the availability of means of electronic commerce for the formation of an arbitration agreement in the sense of the Convention;
2. The obligation of national courts to recognise and enforce foreign awards based on an electronic arbitration agreement by an amendment of the national law.
3. The establishment of a European Court for Arbitration which would have competence to deal with the issue of the enforceability of arbitration agreements in the sense of the New York Convention.

(1) Amendment of the New York Convention?

An amendment of the New York Convention in order to adapt its provisions expressly to the needs of electronic commerce would have the advantage of providing definite clearness to the legal controversy about the enforceability of electronic arbitration agreements. However, the procedure to achieve such an amendment might be extremely time consuming, taking into account of the fact that an amendment would require the consent of the 121 Contracting States.

According to Article VII(1) of the New York Convention *the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States*. Accordingly, if an international agreement contains more generous provisions on form requirements, these provisions will prevail, if the international agreement became effective subsequently to the New York Convention between Contracting States. Particularly, on the European level this rule may permit the application of more favourable requirements of form based, for example, on the Geneva Convention. For this reason, an amendment of other conventions may have an impact on the application of the New York Convention between the relevant Contracting States.

Article VII(1) of the New York Convention allows also the recognition and enforcement of awards according to the national law of the Contracting State where recognition and enforcement is sought. In such a case, however, the recognition and enforcement cannot be made on the basis of an interchange of provisions of the New York Convention and the relevant national law – the procedure has to follow either the rules of the New York Convention or of the national law. Accordingly, amendments of national arbitration laws will not affect the New York Convention, but an amendment of the New York Convention is not necessary, since Member States as Contracting States of the New York Convention may apply more generous provisions on the basis of Article VII(1) of the Convention.

(2) Amendment of the Geneva Convention?

During the meeting of the ad hoc Group of Experts established to Review the Geneva Convention[183] which discussed the revision of the Geneva Convention it was confirmed that the Convention needed to be updated. It seems that the scope of the revision is not yet definite so

that it may well be expected that a revision of the term 'arbitration agreement' could well include references to means of electronic commerce.

(3) National Legislation

A further alternative may to be more viable with regard to the need to provide a speedy solution of the problem deriving from the application of the requirement of form concerning arbitration agreements. Based on Article 17 of the Directive on Electronic Commerce the Commission could, as a most subsidiary means, issue a Recommendation directed towards Member States with the purpose of the alignment of their laws concerning the enforceability foreign arbitral awards based on electronic arbitration agreements as arbitration agreements in the sense of the New York Convention. Such an extended interpretation of the New York Convention should not give rise to assertions of a breach of the Convention by any other Contracting State or a party to an arbitration agreement, because this interpretation is based on the work undertaken by the competent bodies concerned with the drafting of the UNCITRAL Model Law on International Commercial Arbitration.

(4) Court for Arbitration in Europe

Another possibility would be that Member States referred the jurisdiction of disputes concerning the enforcement of arbitration agreements in the sense of the New York Convention to a Court for Arbitration in Europe[184] which would have exclusive jurisdiction to deal with this matter. This court would then provide a coherent jurisprudence within the Internal Market based on the interpretation of the New York Convention which corresponded with the ideas developed by the drafters of the UNCITRAL Model Law on International Commercial Arbitration.

3.6.2 Choice of a Transnational Law for Electronic Commerce

There is no doubt that the rules applicable to international arbitration can also be applied in arbitration with consumers. Accordingly, an Information Society service and its recipient, whether a consumer or a business, should be able to stipulate as the law applicable to the arbitration a transnational law, in particular, the UNCITRAL Model Law on Electronic Commerce. According to Article 11 of the UNCITRAL Model Law on Electronic Commerce an offer and the acceptance of an offer may be expressed by means of data messages. Article 6 of the Model Law concerns the requirement of 'writing'. According to subsection (1) of the provision: *Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.*

In principle, the UNCITRAL Model Law on Electronic Commerce will prevail over any rules of national law which may be applicable supplementarily. If thus a national consumer protection law should require the written form for a certain transaction, this form requirement has to be interpreted by reference to the UNCITRAL Model Law on Electronic Commerce. Para. 48 of the Guide to the Enactment of the Model Law on Electronic Commerce stresses that in the preparation of the Model Law particular attention was paid to the functions traditionally performed by various kinds of 'writings' in a paper-based environment. Concerning electronic signatures para. 53 of the Guide indicates that Article 7 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered:

1. the identification of a person;
2. the providing of certainty relating to the personal involvement of the person in the acto of signing;
3. the association of the signatory with the content of a document.

The broad concept of the electronic signature according to the Model Law permits a large variety of facts to be considered as sufficient in the sense of the Law.[185]

3.6.3 **Conclusion of Arbitration Agreements by Means of Electronic Commerce**

The conclusion of the arbitration agreement by electronic means involves the same legal aspects as those concerning the conclusion of any other contracts by such means. The formation of a contract requires an offer and an acceptance. If an Information Society service communicates information about its services on its website with general terms of contract and possibly a form for online commissioning, this may already constitute an offer.[186] However, in electronic commerce international instruments hardly regulate the place of the conclusion of the contract or the time. The following time and place for the conclusion of contracts by email have been suggested: [187]

1. the time and place when the recipient expresses his will of acceptation in a clear manner;
2. the time and place where the offeree communicates his acceptance vial email or after the filling in of the form posted on the offeror's website;
3. the time and place where the offeror receives the acceptance in the determined computer system;
4. the time and place when the acceptance enters into the addressee's sphere of influence in a manner that he can take notice of it;[188]
5. the time and place where the offeror notices the acceptance and downloads it to his computer's memory;
6. the time and place determined on the basis of principles applicable as if the contract was concluded by persons via telephone communications.[189]

a.-) Solution Adopted by the Directive on Electronic Commerce

The Directive on Electronic Commerce regulates contractual issues in Articles 9 to 12.

(1) Placing of Orders

Concerning the placing of the order Article 11 of the Directive on Electronic Commerce states: *(1) Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:*

- *The service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means;*
- *The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them ...*

According to subsection (3) of Article 11 of the Directive *para. (1) first indent ... shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.* Article 11(1) of the Directive is thus applicable in the case of a contract concluded on the basis of an offer contained on a website and based on general terms of contract published on this site. Such terms may appropriately contain an arbitration clause constituting an arbitration agreement.

Article 11(1) of the Directive determines the time of the conclusion of the contract.[190] A contract between an Information Society service and its recipient which is based on the Information Society's terms of contract published on the website, may be concluded at the moment when the Information Society service receives the recipient's order in a manner which enables it to access it. The necessary confirmation is not a constitutive element, but serves to provide the recipient with clarity, inter alia, about the time of the conclusion of the contract. The contract is thus

concluded at the moment when the recipient's order enters the computer system of the service so that the latter may download it, the confirmation assuming a mere declarative nature. This will require that the Information Society's online offer is already definite and that the Information Society service will be bound by it so that it can be accepted by the recipient's order. It may be assumed that this will be the case where the Information Society service can perform its contractual obligations from the order without that further negotiations would be necessary.[191]

With regard to the UNCITRAL Model Law on Electronic Commerce the Guide to Enactment states expressly that the acknowledgement of receipt according to Article 14 of the Model Law has a mere declarative effect[192]*: Article 14 is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For example, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the Model Law but by contract law outside the Model Law*. Taking into account of the objectives of the Guide to Enactment, inter alia, to serve as a tool for the interpretation of (existing) international instruments and for the facilitation of the use of electronic commerce,[193] it may well be argued that the acknowledgement of a receipt will generally not constitute a constitutive but only a declaratory character.

(2) Public Offer through a Website

Does the website of an Information Society service which contains information about the products and services and which permits for the interactive ordering constitute an offer for the conclusion of a contract? It may be appropriate to consider the website similar to a catalogue, as a videocatalogue, so that the information published online would merely constitute a proposal to make offers.[194] The UNITED NATIONS Convention on Contracts for the International Sale of Goods[195] (CISG) provides in Article 14 a regulation concerning offers:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

The CISG does not refer to services and it does not apply to sales 'of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use',[196] but it contains a solution in the last half sentence of Article 14(2) by means of which any Information Society service could establish legal security about the effect of orders by recipients: If the Information Society service creates its website in a manner that the goods or services described and the particulars required for the conclusion of a contract, for example a definite description of the relevant good or service and its price, and if the service indicates expressly on the website that it will be bound by orders, there is no reason to assume that the contract could not be formed by a recipient's order.

(3) Conclusion of Contract Including Arbitration Agreement

Article 9 of the Directive on Electronic Commerce deals with the treatment of contracts. According to subsection (1) sentence 1 of this provision Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Also arbitration agreements may be concluded by means of electronic commerce. However, whereas the relevant laws of

Member States will have to be amended in order to give such electronic agreements legal effect, possibly in consequence of the Directive on Electronic Signatures,[197] such a legislation would not affect the New York Convention the text of which has to be interpreted independently of any national law. Even though it is here asserted that electronic arbitration agreements comply with the formal requirements of the New York Convention, it may be appropriate to include expressly new forms of electronic communication in the definition of the term 'writing' relating to arbitration agreements. This could, with regard to the Geneva Convention, appropriately be done during the present revision of the Geneva Convention by the United Nations Economic Commission for Europe.

b.-) UNCITRAL Model Law on Electronic Commerce

The conclusion of the electronic arbitration agreement according to the UNCITRAL Model Law on Electronic Commerce may typically be made by the use of data messages. The UNCITRAL Model Law on Electronic Commerce deals with the communication of data messages in Chapter III, Articles 11 to 15. In the case of the choice of the Model Law on Electronic Commerce as the law applicable to the arbitration, the conclusion of the arbitration agreement has to be analysed on the basis of the following rules.

(1) Formation of Contract

Article 11 of the Model Law which deals with the formation and validity of contracts, states in subsection (1): *In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.* Article 12 of the Model Law concerns the recognition by parties of data messages. It states in subsection (1): *As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.*

(2) Form Requirements

The Model Law does not deal with requirements of form. Articles 6 relates to 'writings' and Article 7 to electronic signatures. According to both provisions rules of national law which require the written form or a signature and which are applicable supplementarily would have to be interpreted in the light of the provisions of Article 6 or 7 of the Model Law as the Law chosen by the parties.

(3) Attribution of Data Messages

Article 13 of the Model Law deals with the attribution of data messages. According to para. 83 of the Guide to Enactment this provision envisages a solution in the case in which, in an electronic environment, an unauthorised person may have sent the message but the authentication by code, encryption or the like would be accurate. A typical example in which a controversy concerning the attribution of a data message may arise relates to the case in which the data message has been forwarded by an employee who had no power to do so. Para. 83 of the Guide to Enactment states: *The purpose of article 13 is not to assign responsibility. It deals rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.*

Article 13. Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

> *(a) by a person who had the authority to act on behalf of the originator in respect of that data message; or*
>
> *(b) by an information system programmed by, or on behalf of, the originator to operate automatically.*

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

> *(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or*
>
> *(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.*

(4) Paragraph (3) does not apply:

> *(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or*
>
> *(b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.*

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

This provision which contains a comprehensive regulation of the facts or circumstances in the presence of which a recipient of a data message may consider the message to be that of the originator may not only be relevant with regard to the conclusion of the arbitration agreement, but it may assume greatest importance for data messages exchanged within the arbitration procedure.

(4) Acknowledgement of Receipt

The regulation on the acknowledgement of receipt in the UNCITRAL Model Law on Electronic Commerce is applicable only if the parties have either agreed to the acknowledgement or if a party has requested the acknowledgement before or on the sending of the data message. In the case in which the law requires that the receipt should be acknowledged (see, for example, Article 11 of the EU Directive on Electronic Commerce) it may be appropriate to consider that the rules relating to an agreement between the parties on the acknowledgement of receipt should be applicable. The regulation of the acknowledgement of receipt in the UNCITRAL Model Law on Electronic Commerce may also be of interest for application to the arbitration procedure.

According to para 93 of the Guide to Enactment of the Model Law[198] *Article 14 is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For example, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the Model Law but by contract law outside the Model Law*. The Model Law thus does not establish any 'constitutive' effect of the acknowledgement of receipt with regard to the formation of contracts.

Article 14. Acknowledgement of receipt

(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.

(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by

(a) any communication by the addressee, automated or otherwise, or

(b) any conduct of the addressee,

sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:

(a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.

(5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.

(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

(7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

(5) Time and Place of Dispatch and Receipt of Data Messages

The regulation of the time and place of dispatch and receipt of data messages in the UNCITRAL Model Law on Electronic Commerce is not intended to establish a conflict of laws rule, according to the Guide to Enactment the Model Law is intended to reflect the fact that the location of information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties.[199]

Article 15. Time and place of dispatch and receipt of data messages

(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

(5) The provisions of this article do not apply to the following: [...].

c.-) Electronic Commerce Agreement ('E-Agreement')

The Electronic Commerce Agreement proposed by the United Nations Centre for Trade Facilitation and Electronic Business[200] regulates the effect of electronic messages between the parties. The aim of the E-Agreement is to provide a model for a contractual approach of electronic commerce operations. The E-Agreement may also be used by Information Society services and recipients with regard to the conclusion of agreements to arbitrate. Its use may be of particular importance insofar as the enforceability of the arbitration agreement and of the resulting arbitral award according to the New York Convention necessitates the proof of the agreement. Therefore it is recommended that the Information Society service which offers the conclusion of contracts online with appropriate clauses on dispute settlement by arbitration provides in the contract with the recipient for the application of the E-Agreement within the contractual relations. Taking into account of the general nature of the E-Agreement which is presented by the United Nations, and the limitation of the E-Agreement to regulate the electronic communications between the parties, the inclusion of terms based on the E-Agreement in general terms of contract is likely to meet any requirements imposed by laws concerning unfair terms in business or consumer contracts,[201] including consumer protection.

(1) A Framework for Electronic Transactions

The E-Agreement establishes a framework for the conclusion of electronic transactions. Concerning terms incorporated by reference, the objectives of the E-Agreement indicate that many jurisdictions require a strict proof that terms incorporated by reference have been agreed by both parties. In order to minimise the resulting evidentiary problems the document suggests

that the parties should agree to a method of referring to the E-Agreement when concluding electronic transactions and to include such reference in all communications which shall be subject to the terms of the E-Agreement. The E-Agreement contains in particular a regulation of the following issues: the method of communication, the communication standards, the receipt and acknowledgement of receipt, errors in communication and the validity and conclusion of electronic transactions. For the purpose of the conclusion of the arbitration agreement the regulation of the validity and conclusion of electronic transaction may be limited with regard to the individual arbitration agreement unless the parties wanted to regulate also other or subsequent transactions by means of the E-Agreement.

(2) E-Agreement Relates to Offer and Acceptance by Individual Email

Concerning the conclusion of the arbitration agreement by means on the basis of the E-Agreement it should be considered that the E-Agreement proceeds upon the assumption of the conclusion of the contract by emails. According to the definition contained in clause 3.2.1. of the E-Agreement the term 'offer' is unlikely to include an offer on a website, unless, as it derives from subsection (2) of this provision, the Information Society service would expressly indicate on the website that the services presented constituted an offer:

- *(1) A message constitutes an offer if it includes a proposal for concluding a contract addressed to one or more specific persons which is sufficiently definite and indicates the intention of the sender of the offer to be bound in case of acceptance.*
- *(2) A message made available electronically at large shall, unless otherwise stated therein, not constitute an offer.*

There is an acceptance according to clause 3.2.4. of the E-Agreement, *when the sender of such offer has received an unconditional acceptance of the offer within the time limit specified.*

Clause 2.3. of the E-Agreement concerns the receipt and acknowledgement of receipt. Clause 2.3.1. of the E-Agreement defines the receipt:

> *Receipt occurs at the time when a message (is made available to the receiving party at the electronic address used by the receiving party/other definition of receipt).*

The proposed definition of the receipt thus focuses at the place where and at the time when the data message is made available to the receiving party. However, concerning the time of receipt, the proposed definition does not solve the problem whether the receipt will be deemed to have occurred when the computer system was not operated or when the message entered the computer system during the night or on public holidays. It may be alleged that the receipt in the sense of the proposed definition will be deemed to have occurred at the time when the message entered the recipients computer system at his electronic address in a manner which permits the sender to obtain a confirmation of the receipt of the message. This means that the time when the recipient actually downloads the email in order to open it – an act which could also cause a message to be communicated to the sender - will not qualify as the 'receipt'. From the fact that the suggested definition of the term 'receipt' in the E-Agreement offers space for alternative

d.-) EDI-Agreement

The European Model EDI-Agreement[202] states in Article 3.3: *A contract effected by the use of EDI shall be concluded at the time and place where the EDI message constituting acceptance of an offer reaches the computer system of the offeror.* The commentary to this provision states: *the determination of the moment and time of formation of a contract is important with regard to the legal consequences it involves. Rules have been defined as regards contracts concluded by mail or telephone, but uncertainty still exists on the kind of rule which might be applicable to*

contracts concluded by EDI. A clear provision regarding the applicable rule would, as a consequence, ensue more security. A majority of Member States approve, for contracts concluded where the parties are not in the presence of each other, the application of the 'reception rule' which ensures that acceptance takes place at the place and at the time of receipt of such acceptance by the offeror. The Vienna Convention on the International Sale of Goods provides for this rule to be applicable to contracts concluded at a distance. The Commission favors the application of this rule in EDI contracts, because it avoids to a large extent the risks of conflicts of laws in connection with the use of EDI, and it states in the comment: *These elements justify the endorsement of that rule in the EDI Agreement. The reception rule, in the case of the European Model EDI Agreement, is to be understood as the rule whereby an EDI message is received at the time and the place where the message reaches the computer of the information system of the offerer.*

3.6.4 Non-Negotiated 'Click-wrap' Arbitration Agreement

It is questionable whether the parties can conclude a legally binding arbitration agreement by means of a click-wrap clause. It is already questionable, whether an arbitration agreement can be based on general terms of contract which are used by a party. Such a non-negotiated arbitration clause is not expressly accepted by the other party on the basis of a particular signature, but by reference only. However, *there exists an evolution in this subject-matter, particularly in the relations of the international trade which takes into account of the fact that, first, an arbitration clause is no longer an unusual term in the relation between businesses, and that, second, on the international level the requirement of the protection of the so-called weaker party appears to be much less necessary, given the increase in dynamism of the relevant market*.[203] According to US jurisprudence a click-wrap clause seems to be enforceable with regard to the choice of forum and choice of law.[204] In particular, a click-wrap clause may be permissible as a mass-market licence in the sense of the US Act on Computer Information Transactions.[205] Particularly in the cross-border electronic commerce the parties will increasingly rely on arbitration clauses based on general terms of contract which are offered online.

3.7 Arbitration Not Falling Within the Scope of the New York Convention

Voluntary arbitration as regulated by the New York Convention and the Geneva Convention has to be differed from other types of international arbitration which, nevertheless, may assume importance with regard to the verification of the facts relating to a dispute. For example, the parties may, in order to settle their dispute, refer only a certain question relating to an expert asking for his opinion or a decision. Such a dispute may concern the possible falsification of a data message, or the time when it was sent or received. In such a case it may not be appropriate to make use of arbitration proceedings, but to have the issue decided by an expert. The proceedings according to which the expert decides may be similar to arbitration proceedings. If he also decided a pecuniary question, for example concerning the amount of damages, would his decision be enforceable as an arbitral award according to the New York Convention? For this reason it may be necessary to delimit arbitration procedures resulting in a recognisable and enforceable award in the sense of the New York Convention from other types of arbitration.

In international arbitration the enforceability of awards depends essentially on the applicability of the New York Convention. Awards which do not correspond with the requirements of the New York Convention cannot be enforced according to the Convention. Such awards, even when they are enforceable in the state where they have been rendered, will hardly be enforceable in foreign countries, because apart from the New York Convention there are no international instruments on the recognition and enforcement of awards which met with a similar degree of acceptance. Thus international arbitration between Information Society services and recipients

should comply with the requirements of the New York Convention in order to ensure the effectiveness of the arbitration.

3.7.1 **Delimitation of Arbitration from other Types of Dispute Settlement**

In the sector of electronic commerce the new technological means and the facilitation of communication may render possible the availability of an increasing number of different types of dispute settlement. These new types, even if they are called 'arbitration' may not fall within the scope of the international conventions providing for the recognition and enforcement of foreign arbitral awards. Article 7(1) of the UNCITRAL Model Law on International Commercial Arbitration which is modelled after Article II(1) of the New York Convention only relates to voluntary arbitration which excludes mediation, conciliation and other procedures which do not envisage a binding decision. Whether particular types of dispute settlement such as the Netherlands' binding advice, the German arbitral opinion or the Italian non procedural award are covered by the New York Convention respectively the Model Law can only be answered on the basis of an analysis of the relevant national laws concerned which regulate these types.[206]

a.-) Decisions as Contracts

Decisions rendered in types of arbitration which do not fall within the scope of the New York Convention or other international instruments regulating the enforcement of awards may possibly be enforceable as a contract, and the non-compliance with the terms of such a contract might render a party liable for breach of contract. If this were the case, the other party might have to institute court proceedings in order to obtain damages or other relief.

b.-) Decisions as Judgements

In the case where a decision constituted a court judgement in the sense of the Brussels Convention, a decision could be enforced on the basis of Article 25 of the Brussels Convention. However, the application of this Convention would require that the institution concerned with decision making qualified as a public court. Such an affinity has been asserted with regard to the bodies operating consumer arbitration, for example on the basis of Portuguese and Spanish Consumer legislation where the arbitrator is, in fact, a civil court judge, ordered to exercise his functions as an arbitrator on the basis of public laws.[207]

The decision would have to constitute a 'judgement' in the sense of Article 25 of the Brussels Convention. A judgement in the sense of this provision *means any judgement given by a court or tribunal of a Contracting State, whatever the judgement may be called, including a decree order, decision or writ of execution*... The term 'judgement' has to be interpreted broadly, covering whatever decision issued by a jurisdictional body of a Contracting State.[208] The express exclusion of arbitration from the scope of applicability of the Brussels Convention thus covers a wide variety of facts, including also decisions or national courts on the execution of arbitral awards. The fact that the institution responsible for arbitration or the arbitral tribunal would be established on the basis of public laws and with the financial support by public authorities and manned with the staff of public authorities or courts does not necessarily make the consumer arbitration system to an element of the national jurisdiction. The differentiation between consumer arbitration in the sense of the New York Convention and jurisdiction by courts in the sense of the Brussels Convention cannot be established in the basis of the decision itself. Arbitration is generally excluded from the scope of the Brussels Convention. Thus if the parties have concluded an enforceable arbitration agreement in the sense of the New York Convention, the resort to jurisdiction by the courts will be excluded within Contracting States. Accordingly, an award rendered in consumer arbitration which is based on an enforceable arbitration agreement cannot be enforced by means of the Brussels Convention.

c.-) Mandatory Consumer Arbitration

It is asserted that mandatory consumer arbitration such as those provided for by Portuguese and Spanish legislation, would not relate to the international law of voluntary arbitration which is based on the freedom of contract.[209] Accordingly, the rules of the international voluntary arbitration, including the enforceability of foreign arbitral awards according to the New York Convention, could not be applicable to awards rendered within such an arbitration. However, both the Portuguese and the Spanish consumer arbitration systems rely on voluntary arbitration according to the relevant national laws.[210] Accordingly, the awards rendered within the consumer arbitration systems may be enforceable according to the New York Convention, provided that they relate to international arbitration.

The concept of arbitration does not cover mandatory arbitration such as mandatory consumer arbitration: The Geneva Convention defines the term 'arbitration agreement' in Article I(2)(a) as follows:[211] *a) the term 'arbitration agreement' shall mean 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 and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws.*[212]

A practical problem may consist in the presentation of the arbitration agreement which is required for the recognition and enforcement according to the New York Convention. Information Society services which declare in a general manner their acceptance of arbitration in disputes with consumers do not conclude an individual arbitration agreement with a recipient who requests arbitration. In such an arbitration the agreement will derive from the business's general acceptance to settle disputes with consumers with the help of the consumer arbitration system and the consumer's request for arbitration. Yet the need to provide an arbitration agreement for the foreign enforcement of the award may be limited. Consumer disputes often relate to a relatively small value so that it will be sufficient if the consumer can enforce the award in the State where the Information Society service is established. However, bodies for arbitration which offer consumer arbitration in electronic commerce at an international level which wanted to offer their international clients legal security about the enforceability of the awards according to the New York Convention should provide for the possibility of the conclusion of an individual arbitration agreement.

Concluding, in cross border electronic commerce the parties which want to solve potential disputes by means of arbitration, because this offers, on the global level, the most effective means for the enforcement of decisions in adjudication and settlements, have to take care that the system for the dispute settlement they have chosen corresponds with the requirements of the international conventions regulating the recognition and enforcement of arbitral awards, in particular the New York Convention.

3.7.2 **Uniform Domain-Name Dispute-Resolution Policy**

The uniform domain-name dispute-resolution policy of the Internet Corporation for Assigned Names and Numbers (ICANN)[213] establishes mandatory administrative proceedings to be conducted before approved dispute resolution providers. These are the CPR Institute, New York,[214] the Disputes.org/Eresolution, Montreal,[215] the National Arbitration Forum, Minneapolis,[216] and the World Intellectual Property Organisation (WIPO), Geneva.[217]

The scope of disputes which are settled under the policy is limited to disputes concerning a domain name which is identical or confusingly similar to a trademark in which the complainant

has rights, in which the holder has no legal rights and in which the domain name has been registered and used in bad faith. The dispute between the parties must be referred to one of the dispute resolution service providers. The panel of the dispute resolution service provider shall decide the dispute on the basis of statements and documents submitted to the provider, in accordance with the policy rules of procedure and with the principles of law which the panel considers applicable. Amongst others, the panel shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case; that the panel shall determine the admissibility, relevance, materiality and weight of the evidence.[218] According to the Rules the decision shall be made in writing, signed by the members of the panel.

But even though the similarities of the procedure induced the general public to speak of 'arbitration' with regard to the dispute settlement system,[219] the procedure lacks the finality which is typical for arbitration. This concerns particularly the regard to the enforceability of the award. The 'mandatory' administrative proceedings do not prevent the parties *from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded.*[220] The 'mandatory' proceedings thus are, in fact, voluntary. But ICANN will implement the decision unless it receives within 10 days after being informed about the decision official documentation that the respondent (defendant) *commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure.*

According to this provision the complainant has to indicate in his complaint that he will submit, with respect to any challenges to a decision in the administrative proceedings cancelling or transferring the domain name, to the jurisdiction of the courts in at least one specified mutual jurisdiction. In application of Paragraph 1 of the Rules a mutual jurisdiction is a court jurisdiction of either the principal office of the Registrar or the domain name holder's address. Such court proceedings are not related to the decision rendered in the dispute settlement, they do not constitute an appeal against the decision or an application for its setting aside. The decision-making procedure thus is not binding on the parties. Whether the decision constitutes a contract like a settlement based on a mediation or conciliation[221] is also doubtful, because the parties never considered to be bound by the decision, retaining the right to institute legal proceedings and ICANN retaining the right to refrain from implementing the decision if it received the notice on court procedures within the delay of 10 days.[222] After the institution of legal proceedings ICANN will not implement the decision unless it has obtained evidence of a solution between the parties, that the lawsuit has been dismissed or withdrawn or a copy of an order of the court dismissing the lawsuit or ordering that the respondent has no right to use the domain name. Accordingly, the decision cannot be enforced like an arbitral award, neither on the basis of a national law nor on the basis of the New York Convention.

3.7.3 **Adjudication**

According to a much used definition *adjudication is a process in which disputants present proofs and arguments to a neutral third party who has the power to hand down a binding decision, generally based on objective standards.*[223] Both, court litigation and arbitration, would fall within this definition. Arbitration and adjudication are not incompatible concepts. However, the concept of adjudication according to the UK Housing Grants, Construction and Regeneration Act (England and Wales) of 1999 uses the term in a particular sense in Section 108: Right to refer disputes to adjudication.[224] According to the Act the adjudication procedure is mandatory. The decision by the adjudicator is binding according to Section 108 of the Act. However, the bindingness will last only until one of the parties institutes court litigation or arbitration proceedings or both parties agree on the final settlement of the decision. However, according to Section 23 of the Act the adjudicator may, if he considers it appropriate, issue a peremptory

order on the basis of which the competent court may issue an order for the execution. The court will apply Section 42 of the Arbitration Act 1996 by way of analogy. But it seems that the adjudication with the resulting decision cannot be considered as falling within the concept of voluntary arbitration. The adjudication procedure according to the UK Act does not oblige to the regard of a minimum of procedural rules or balanced right to be heard for each party, establishing a due process of law. Differently, the adjudication procedure demands from the adjudicator to play the role of an active manager of the litigation.

Based on a case management questionnaire the adjudicator develops the proceeding with case management direction forms and, before the commencement of the proceedings, a time schedule which is established in a case management conference. The adjudicator determines the schedule for the scope of information to be provided by the parties the evidence to be taken and particular issues of the proceedings including an estimation of costs.[225] Since the law regulates only basic procedural issues professional associations have drafted more explicit Rules for Adjudication.[226] According to Section 108(2)a9d) of the Act the adjudicator has to make a decision within 28 days after the beginning of the procedure. After the request for adjudication the party has to file the statement of claims within 7 days and within the same delay the parties have to agree on an adjudicator, Section 108(2)b of the Act. The Rules released by a professional association may contain a regulation of the commencement of the adjudication procedure, model clauses, the scope of proceedings, tasks of the adjudicator, the content of procedure, fees and costs, the decision and its form, enforcement, set-off of claims etc.

Adjudication has been used in order to settle disputes on the international level concerning considerable projects.[227] In particular due to the mandatory nature and the lacking finality of the adjudicator's decision this type of procedure cannot be considered as falling within the scope of arbitration. It remains nevertheless an interesting and obviously efficient means for the settlement of disputes, inter alia, thanks to its highly qualified decision makers.

3.7.4 **Expert Opinion and Referee Decision**

An arbitration tribunal may, like a national court, ask an expert to provide an opinion on a controversial matter. Also the parties may, if their dispute relates to a particular issue, ask an expert to provide his opinion. In electronic commerce the parties may develop a controversy concerning the technical functioning of the system they use for the exchange of data messages, or about the authenticity of a message. In such a case, it may correspond with their interests to bring the technical issues before an expert instead of instituting more time consuming and expensive arbitration procedures.

a.-) Expert Opinion

An expert opinion does not have the quality of an award, it does not even bind the arbitration tribunal or the court.[228] However, the borderline to arbitration may not be easy to draw if the expert decides on the dispute, for example if he makes a decision on the amount of damages payable, which, according to the agreement between the parties, shall be binding and final, his decision may well be qualified as an arbitral award, provided that the procedure which led to the decision assumes a jurisdictional nature.[229]

Rules on expertise[230] may provide a framework for the conduct of such proceedings.[231] A Centre for Expertise may appoint or propose experts in connection with international business transactions. According to such rules it may be provided that the expert must submit a declaration confirming his independence with regard to the parties.[232] Such rules may also relate to the expert's tasks:[233]

(1)(a) The expert is empowered to make findings within the limits set by the request for expertise, after giving the parties an opportunity to make submissions.

(b) The expert may also be empowered by express agreement between the parties either in a prior agreement or in their request for the appointment of an expert, to:

- *recommend, as needed, those measures which he deems most appropriate for the performance of the contract and/or those which would be necessary in order to safeguard the subject matter;*
- *supervise the carrying out of the contractual operations.*

(2) In agreeing to the application of these Rules the parties undertake to provide the expert with all facilities in order to implement his brief and, in particular, to make available all documents he may consider necessary and also to grant him free access to any place where the expertise operations are being carried out. The information given to the expert will be used only for the purpose of the expertise and shall remain confidential.

(3) Unless otherwise agreed the findings or recommendations of the expert shall not be binding upon the parties.

Even if the parties decided that the findings and recommendations should be binding on them so that their agreement on the expert opinion might possibly qualify as an arbitration agreement, the expert's decision would generally not qualify as an arbitral award in the sense of the New York Convention or Geneva Convention. Thus should the expert conclude that a party would have to make a certain payment to the other party, this decision would, in principle, not be enforceable as an arbitral award. If the party refused to make the payment the other party very likely has only the possibility to institute litigation on the basis of a breach of contract or to start arbitration proceedings if there is an arbitration agreement.

The resort to an expert opinion may be recommendable in electronic commerce if the dispute relates to technological issues and if there is a risk that the facts to be identified or analysed will be modified or changed or evidence be obliterated. Thus Information Society services should agree with recipients on expert opinions in the first place if the quality of the services or goods supplied by the service is controversial and if there is a risk that the facts which are disputed may be destroyed.

b.-) Referee Decision

The parties may agree to have their dispute settled with the assistance of a referee. The corresponding rules for a pre-arbitral referee procedure[234] may authorise the referee to release a variety of orders. Such orders may be of particular use if the parties to the dispute wanted to continue their contractual relation or if the dispute affected only a part their relation. It is the purpose of the Rules to *enable the parties which have so agreed to have rapid recourse to a person (called a 'Referee') empowered to make an order designed to meet the urgent problem in issue, including the power to order the preservation or recording of evidence. The order should therefore provide a temporary resolution of the dispute and may lay the foundations for its final settlement either by agreement or otherwise.*[235] Article 6 of the Rules deals with the Referee's order. Its subsection (3) states that the order shall not *bind any competent jurisdiction which may hear any question, issue or dispute in respect of which the order has been made. The order of the Referee shall however remain in force unless and until the Referee or the competent jurisdiction has decided otherwise.* Particularly in cross-border electronic commerce it may be useful if the parties agreed already in their contract on a referee procedure. This may avoid the necessity to resort to court procedures in the different countries where the parties are domiciled or established in order to obtain a preliminary injunction.

The rules on expertise[236] may provide that *the parties agree to carry out the Referee's order without delay and waive their right to all means of appeal or recourse or opposition to a request to a Court or to any other authority to implement the order, insofar as such waiver can validly be made.* But even if the parties agree on the bindingness of the order, this does not settle the problem how the order can be enforced if a party refuses to obey to it. In such a case the rules may possibly state[237] that the *competent jurisdiction may determine whether any party who refuses or fails to carry out an order of the Referee is liable to any other party for loss or damage caused by such refusal or failure.* The question whether the non-compliance with the order constitutes, for example, a breach of contract rendering the party liable for damages, has to be answered by the 'competent jurisdiction'. Whether this is a court or an institution responsible for arbitration will largely depend on the agreement between the parties. Supposing that the pre-arbitral referee procedure was supplementary to an arbitration agreement,[238] it would appear likely that the dispute concerning the non-compliance with the Referee's order would be covered by the agreement to arbitrate. Accordingly, the institution responsible for arbitration would be competent to decide the issue. But if the agreement on the pre-arbitral referee procedure was not embedded in an arbitration agreement, only a national court would have the competence to decide this issue.

3.7.5 **'Non-Procedural' Arbitration**

Italian law differs between two forms of voluntary arbitration, the 'arbitrato rituale' and the 'arbitrato irrituale' – the procedural arbitration and the non-procedural arbitration. The latter is also called 'free' or 'contractual' arbitration.[239] The development of the 'non-procedural' arbitration was due to the relatively rigid regulation of arbitration by statute. The regulation of the arbitration provided for by the Italian Code of Civil Procedure envisaged restrictive rules, so that practice escaped to the 'non-procedural' arbitration which offered even the possibility of the rectification of contracts in order to take account of changed circumstances or to correct 'lacunae'. The award rendered in this type of arbitration had to be enforced as a matter of contract in the court. The modification of the Italian Code of Civil Procedure of 1994, however, freed the Italian arbitration law of many restrictive provisions so that the type of 'contractual' arbitration will become less relevant,[240] however, whether it will disappear remains doubtful.[241] Concerning cross-border electronic commerce it is important for the parties to know whether an award is enforceable according to the New York Convention.

In Italian law and abroad it was controversial whether the 'arbitrato irrituale' could be enforced as an arbitral award in the sense of the New York Convention:[242] *Suffice it to recall that the lodo (award) irrituale, contractual in nature, can never acquire executory force. On the contrary, the legal validity of the lodo rituale is strictly contingent upon the same being granted executory force by means of the Decree by a monocratic judge called 'Pretore'.* However, the Italian Supreme Court of Cassation[243] held that the procedure known as 'arbitrato irrituale' (contractual arbitration) falls under the New York Convention.

By applying the Convention only to arbitrato rituale one would unduly limit its ambit… This opinion is also supported by the law implementing the New York Convention in Italy. The opposite conclusions (…) have been guided by an assumption not necessarily correct under Italian Law: that is to say that the 'arbitrato irrituale' can be fully equated with the Dutch 'bindend advies', the German 'Schiedsgutachten' and the English valuation.(…) Under the applicable rules of national law these decisions cannot be enforced as a contract.'[244] *However, it seems unquestionable (…) that even 'bindend advies', 'Schiedsgutachten' and valuation rest upon a contracting basis, although they are aimed at solving factual rather than legal issues. As a consequence, if not complied with they can be taken before the ordinary courts.*[245] *Be that as it*

may, one thing is clear: under Italian law a 'lodo irrituale' is indeed enforceable as a contract, and no marginal control on the merits of the decision can be exercised by the Court [… as in the case of] *the bindend advies.*[246] Jurisprudence between states may differ. For example, German courts[247] considered that an Italian 'arbitrato irrituale' does not fall within the concept of an arbitral award in the sense of the New York Convention whereas Italian courts assert[248] the opposite view.

3.7.6 **Binding Advice**

The regulation of the Netherlands' 'bindend advies' (binding advice) is provided for in Articles 900 et seq. of the Dutch Civil Code. According to this provision an agreement on dispute settlement will be considered concluded if a business which, by reason of its membership in an association relating to a certain branch of the trade and industry and also by its business terms, will be bound to accept the decision of an institution responsible for out-of-court dispute settlement ('commission for conflict settlement') and if the consumer, by reason of his signature, agrees with and accepts these terms. Once the conflict settlement is accepted, a party cannot by its own decision terminate the proceedings.[249] The decision of the commission for conflict settlement tries the case in a comprehensive manner. Nevertheless, the decision may be subjected to the examination by a court. But in fact, however, the court will only in rare cases repeal a binding advice.[250]

Due to the fact that the commission for conflict settlement may consider the whole circumstances of the case and settle the dispute comprehensively by its decision, there is a close similarity between a binding advice and an arbitral award. But whereas the arbitration procedure and court litigation exclude each other, the procedures of the binding advice and court litigation can be interrelated.[251] It is not possible to lodge an appeal against a binding device: *The only way to have a decision tested is to submit it to an ordinary court within two months after it was sent. A judge can, however, only marginally test the decision, as provided for in section 904, book 7 of the Dutch Civil Code. This means that a judge will only declare the binding decision to be null and void if the decision, according to reasonable and fair standards, is unacceptable in view of its contents or the way in which it was reached under given circumstances.* [252] A binding advice according to the Dutch Civil Code can only be rejected by the courts if the commission for conflict settlement has ignored fundamental principles of procedural law, such the right of both parties to be heard.[253] The binding advice is not enforceable. If it is not complied with, it can be taken before the ordinary courts, and there its validity will be examined. The binding advice is thus not enforceable as an arbitral award or as a contract.[254] For these reasons, procedures relating to a binding advice are of limited use for the parties in cross-border electronic commerce.

3.7.7 **Office for Settlements**

There are no generally accepted terms to be used for the denomination of the institutions responsible for out-of-court dispute settlement in international arbitration law. For example, German bodies responsible for arbitration may be called court of arbitration ('Schiedsgericht') but also office for settlements or arbitral office ('Schiedsstelle'). A mediation office is likely to be named 'Schlichtungsstelle'. Whereas the activities of a 'Schiedsgericht' will certainly relate to arbitration, this, however, may be doubtful in the case of the 'Schiedsstelle'. It has to be evaluated on the basis of their operations, not on the basis of the term used for its name whether the activities of such a body relate to arbitration. The characteristic element of an arbitration procedure is the exclusivity with regard to any litigation before the courts. Thus it has to be differed between the generally non-binding settlement proposal resulting from the activities of a settlement office ('Schlichtungsstelle') and types of dispute settlement which follow the rules of arbitration (contained in Articles 1025 et seq. of the German Code of Civil Procedure) leading to an arbitral award which constitutes a final settlement of the dispute.

German terminology uses the words 'Schiedsgericht' and 'Schlichtungsstelle' but also the term 'Schiedsstelle' when referring to an institution responsible for out-of-court dispute settlement. This latter term could be translated as an office for the settlement of disputes. But by reason of the proximity of the term 'Schiedsstelle' (office for settlements or arbitral office) to the term 'Schiedsgericht', which means 'court of arbitration', it is not excluded that also a 'Schiedsstelle' exercises arbitration.[255] Neither the law nor jurisprudence or legal writers offer a definition of the term 'Schiedsstelle' or a delimitation of this term to the term 'Schlichtungsstelle'.[256] Yet the term 'Schiedsstelle' may also be used to indicate a body dealing with out-of-court dispute settlement which operates different systems for out-of-court dispute settlement, which are not arbitration, for example mediation services, or the provision of private expert opinions. The latter may be the case, for example, if the 'Schiedsstelle', established by a certain branch of the industry or trade, has a list of experts which supply a binding estimation or evaluation of damages.

To give an example, the German Association of Car Repairing Handcraft offers customers in its general terms of contracts the possibility to bring a dispute before a body dealing with the settlement of disputes (Schiedsstelle). The establishment of the facts by the body responsible for dispute settlement shall be binding also in any subsequent litigation before courts. But since the customer does not loose the possibility to bring the dispute before the courts the proceedings cannot be considered as arbitration but as a contractually binding valuation (Schiedsgutachten) in the sense of Article 317 of the German Civil Code.[257] In order to avoid any doubts, it has been suggested that the German practice should give up the term 'Schiedsstelle' and, instead, use the term 'Schlichtungsstelle'.[258] Generalising, it may be asserted that 'Schiedsstellen' do not operate arbitration in spite of the proximity of the term 'Schiedsstelle' (centre for decision making on disputes) to the term 'Schiedsgericht' which means 'court of arbitration'. Concerning the contractually binding valuation German jurisprudence differs between the functions by reference to a standard of exclusivity: if the parties intend to exclude any control of the expert through the public courts, the agreement may constitute an agreement relating to the making of a 'Schiedsgutachten', an expert opinion which establishes facts with binding effect according to Article 317 of the German Civil Code; but if, according to the interpretation of the will of the parties, the verifications of the expert can be subjected to the control by the courts, the expert opinion will only have the quality of a mere recommendation.[259]

3.8 Necessity to Interpret International Instruments in a Uniform Manner

The unitary interpretation of the New York Convention or of the Geneva Convention by Contracting States is of great importance for the development of the international trade.

3.8.1 Role of Jurisdiction of National Courts

Even if the parties are given the most extensive scope of freedom, national laws will continue to play an important role in international arbitration. For example the issue of a party's competence will be decided on the basis of the national law applicable to the party.[260] But with reference to the autonomy of the parties, emphasised by Article IV of the Geneva Convention, also the freedom of the parties to decide on the law relating to the arbitration is unfettered, and only limited by the control of the state during the recognition and enforcement of the award.[261] Accordingly, based on the autonomy of the parties and their freedom of contract, international arbitration is a viable means for dispute settlement in electronic commerce. The New York Convention and the Geneva Convention permit the delocalisation of the arbitration. According to both Conventions the parties have the utmost freedom to determine the laws applicable to the arbitration. However, national courts can exercise the control over awards rendered in international arbitration, inter alia within enforcement procedures concerning arbitration agreements and arbitral awards.

By the subjection of arbitral awards to the control of the state where enforcement is sought it is avoided that awards which violate interests protected by measures of control are enforced. However, it is not excluded that national courts develop different views on the requirements of enforceability. Thus national courts may view the issues of requirements of form, of arbitrability and public policy in different ways and develop incoherent concepts. Such tendencies could be detrimental to the establishment of the Internal Market, in particular concerning electronic commerce. Taking into account of the problem to conclude effective international arbitration agreements relating to consumer contracts which comply with the New York Convention's requirements of arbitrability or, public policy, it would be recommendable if a unitary jurisprudence would develop in order to facilitate the creation of legal security for the settlement of cross-border consumer disputes in electronic commerce, at least within the Internal Market. Legal security is a condition for the unfettered development of electronic commerce in the Internal Market. Thus Information Society services and recipients in cross-border electronic commerce should be able to know under which circumstances and to which conditions they may effectively conclude arbitration agreements.

3.8.2 **Arbitrability and Applicable Law**

The dispute to which the arbitral award relates must be arbitrable. An arbitration agreement or an award which relates to a non-arbitrable dispute is not enforceable according to the New York Convention. There is no doubt that disputes between Information Society services and recipients in electronic commerce are principally arbitrable.

Which law decides on the arbitrability of the dispute? There are basically four possibilities, namely the law applicable:[262]

1. at the place where the court action has been brought (not common);
2. at the place or seat of arbitration;
3. to the enforceability of the arbitration agreement;
4. to the substance of the dispute.

Generally, the arbitrability may be decided on the basis of the law applicable at the seat of the arbitration. Thus in France the national rules on arbitrability are applicable to all arbitrations which take place in this country.[263] With regard to arbitration in cyberspace the seat of the arbitration, that is to say the place of establishment of the institution responsible for the arbitration will be decisive, unless the parties have determined another place in their arbitration agreement.

3.8.3 **Legal Security for Electronic Commerce through Efficient Arbitration**

International arbitration operates on the basis of five crucial elements. *These are:*[264]

1. *effective arbitration clauses;*
2. *efficient procedural rules;*
3. *experienced arbitral institutions;*
4. *national laws that facilitate arbitration;*
5. *international treaties which assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.*

In the sector of electronic commerce a unitary treatment concerning the enforceability of arbitration agreements and arbitral awards should be assured within the Internal Market. The insecurity which would arise from different national concepts relating to the enforceability of arbitration agreements and the recognition and enforceability of awards may not only cause

problems for lawyers but also create barriers for Information Society services and recipients to rely on arbitration as an effective means of out-of-court dispute settlement in the sense of Article 17 of the Directive on Electronic Commerce. This could negatively affect the competitiveness of European Information Society services which would have to make higher reserves for court litigation, if disputes with recipients could not be settled by arbitration in a speedy and efficient manner but, instead, would have to be dealt with by national courts in application of traditional conflict of laws rules according to the Brussels Convention and Rome Convention. The reserves to encounter the corresponding risks are likely to be higher, because court litigation may occur in different states and according to different national laws so that the expenses arising from the loss of time, courts' and lawyers' fees will exceed the costs arising from international arbitration which makes use of a non-national law which is adapted to the conditions of electronic commerce and to the needs of the parties in the whole Internal Market.

a.-) Establishment of E-Confidence in International Arbitration by Means of Electronic Commerce

With regard to the following issues a unitary approach is needed in the arbitration of cross-border disputes between Information Society services and recipients:

1. enforceability of arbitration agreements:
1.1. concluded online, including arbitration clauses based on general terms of contracts;
1.2. concluded with consumers;
2. effectiveness of procedural rules permitting the use of electronic means of communication and data storage;
3. arbitration laws which facilitate the use of online arbitration, in particular in international arbitration;
4. a system of state control within the Internal Market of arbitral awards rendered in electronic commerce which does not produce contradictory decisions.

b.-) Adherence to Geneva Convention

The establishment of a unitary jurisprudence within the Internal Market concerning the enforceability of arbitration agreements would seem to be necessary in order to facilitate electronic commerce and to avoid the creation of barriers for the freedom of the providing of goods and services in the Internal Market. There are basically three possibilities by means of which such barriers could be avoided. First, an initial step could be achieved through the adherence to the Geneva Convention provided that the text of this Convention, based on its present revision, would make clear beyond doubt that the term 'arbitration agreement' covers agreements concluded by means of electronic commerce.

But since the Geneva Convention aimed at the facilitation of the European east-west trade and since the effect towards the introduction of a 'state of origin' principle would only be minimal, the adherence to the Geneva Convention would provide only a partial solution, establishing legal security with regard to the fact that electronic arbitration agreements, in application of Article VII(1) of the New York Convention and Article X(7) of the Geneva Convention, would qualify as arbitration agreements in the sense of Article II(2) of the New York Convention.

c.-) State of Origin Principle and Application to Awards Rendered in the Internal Market

A second possibility for the facilitation of the enforcement of arbitral awards in cross border electronic commerce may lie in the application of the principle of the 'state of origin' within the

Internal Market. According to this principle arbitral awards which have been made in a Member State and which are recognised and enforceable in that Member State should, automatically, be recognised and enforceable in other Member States. The legal basis for the implementation of this principle may be found in Article 293 of the EC Treaty. But taking into account of the fact that the enforcement of court decisions within the Internal Market has to be based on Article 25 of the Brussels Convention, the attempt to base the recognition and enforcement of awards on Article 293 of the EC Treaty appears rather weak.

d.-) Establishment of a Court for Arbitration in Europe

A third alternative lies in the creation of a joint court which would be competent to deal with issues of the recognition and enforceability of awards which have been rendered within Member States. Such a court has already been proposed on the international level for the dealing with any issues of Article V of the New York Convention such as concerning the enforceability and setting aside of awards.[265] Within the Internal Market such a court could have jurisdiction in the following fields of international arbitration:

1. the validity of the agreement to arbitrate;
2. the recognition, enforcement and setting aside of an award according to the New York Convention and Geneva Convention;
3. the interpretation of the provisions of the New York Convention and Geneva Convention;
4. the definition and interpretation of mandatory rules of law of the Member State where the award has been rendered;
5. the definition of the customary law of the international arbitration and of trade usages;
6. the decision on the arbitrator's jurisdiction and on his decision on this issue;
7. the nomination and challenge of arbitrators.

The three alternatives should be seen as progressively ensuring a higher level of confidence in the dispute settlement of cross-border disputes within the Internal Market.

4 Arbitration Procedure in Cyberspace

It is difficult for the parties to draft individual rules for arbitration in electronic commerce concerning potential disputes. Most contracts which have arbitration clauses and which are concluded between Information Society services and recipients do not permit the individual negotiation of such rules at least for economic reasons, in particular the consumption of time. But even in the case where the value of the contract justified such negotiations, the technological progress can make it recommendable if the parties relied on the regulation of the arbitration procedure established by rules of arbitral institutions. It can be expected that those institutions which apply means of electronic commerce for dispute settlement will adapt their rules to the progress of the technology so that, in general, the parties would not have to draft their individual rules for arbitration in cyberspace.

4.1 Place or Seat of Arbitration

The terms 'place of arbitration' or 'seat of arbitration' refers to the place which has been selected by the parties or the arbitrator as the legal domicile of arbitration the task of which it is to serve as point of contact in the case of a conflict of laws with the aim to determine, inter alia, the law applicable to the procedure. The seat of the arbitration gives access to the courts if that is required during the process of constituting the arbitral tribunal*, and it sometimes leads to the application of mandatory procedural rules of the country where the seat is located. It also has an impact on the jurisdiction of the courts to hear actions to set an award aside, and on compliance*

with any reciprocity condition that sometimes affects the application of conventions concerning the recognition and enforcement of awards.[266] The seat of arbitration plays another important role for the determination of the material law on the arbitration agreement, for example on an application for the stay of the proceedings; if the parties did not make a choice of law, it will generally be that of the seat of arbitration.[267]

Which factors are decisive for the verification of the seat of arbitration? It is not the place where the arbitrators meet or where they organise hearings.[268] It is rather the place which the parties indicated as 'seat of arbitration' or 'place of arbitration' in the arbitration agreement or, failing such an indication, where the proceedings were intended to take place and where the arbitral award should be rendered.[269] But this place may not be easy to identify.

4.1.1 **Territoriality of International Arbitration**

The principle of territoriality is of a tantamount importance concerning the determination of the jurisdiction of the arbitration. Article 1(2) of the UNCITRAL Model Law on International Commercial Arbitration states that *the provisions of this Law (...) apply only, if the place of arbitration is in the territory of this State*. But also any international arbitration is considered bound up or connected with a national legal system. The international arbitration uses nearly exclusively as point of contact the seat of the arbitration, after the principle of territoriality was generally accepted.[270] National arbitration laws may even have extraterritorial extension, for example concerning the regulation of the stay of proceedings or the enforcement of awards.[271] The terminology relating to the establishment of the territoriality of the arbitration is not uniform. The New York Convention uses the term 'where the arbitration took place' in Article V(1) lit. (d) and in Article V(1) lit. (a) the term 'where the award was made'. However, both terms have an identical meaning,[272] and they do not differ from the definition concerning the seat of arbitration. Thus the meaning of the terms 'seat of the arbitration' and 'the place of arbitration' are, in principle, identical.

The Geneva Convention states in Article I(2)(c) that *the term 'seat' shall mean the place of the situation of the establishment that has made the arbitration agreement*. This definition focuses on the place where the institution responsible for arbitration is established. The UNCITRAL Model Law on International Commercial Arbitration deals in Article 20 with the place of arbitration. The Model Law does not give a definition of the term. Subsection (1) of the provision establishes that the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. The Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards refers in Article 1 merely to 'arbitral awards rendered in civil, commercial or labour proceedings in one of the States Parties' without reference to the seat of arbitration. The Inter-American Convention on International Commercial Arbitration refers in Article 5(1)(a) to the 'law of the State in which the decision was made', when establishing the criteria for the law applicable to the arbitration agreement for the purpose of the assessment whether the recognition and execution of an award may be refused, provided that the law is not specified in the agreement. If the parties select an institution for out-of-court dispute settlement which has its seat in a determined place, it appears that the parties implicitly agree on the arbitration at that place. But if the arbitrator signs the award at a different place, for this formal reason, national courts concerned with the recognition and enforcement of the award may consider that the award was made at the place indicated in the award, in spite of the fact that the arbitration agreement indicates a different place and that the arbitration in fact occurred at that place.[273]

4.1.2 **Legal Consequences of the Place or Seat of Arbitration**

The place or seat of arbitration will, in general, decide on the 'nationality' of the arbitration. This 'nationality' of the arbitration may assume a considerable importance, taking into account of the fact that the recognition and enforcement of awards according to the New York Convention requires that the award is 'foreign'. The *law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs the validity of the submission, the creation and composition of the tribunal, the rules of the conflict of laws to be followed by it, its procedure, the making and publication of its award.*[274] In international arbitration the seat of arbitration may determine the applicable national law of the arbitration procedure.[275] Next, It determines the competence of national courts to regulate procedural issues, for example, the rejection of arbitrators or injunctions.

Does arbitration have a forum and, in the affirmative case, does this mean that the arbitrators have to apply the law applicable at this place? There are different opinions. The traditional view was *that the arbitration has a forum, like any national court, and that is the situs of arbitration.*[276] However, this view is not necessarily supported by international instruments: *International conventions such as the New York Convention and the UNCITRAL Model Law on Arbitration, support the proposition that the seat is not necessarily the starting point, in other words, that a degree of 'delocalisation' is envisaged. (...) the New York Convention in Article II.3 imposing an obligation to enforce an agreement for arbitration, makes an exception if the court 'finds that the said agreement is null and void, inoperative and incapable of being performed'. Id does not state by what law that test is to be applied. Article V.1 setting out the conditions in which recognition of award may be refused, in para. (a) supplies at least part of the answer: the law chosen by the parties and, in default, the law of the country in which the award is to be made which normally will be the seat of arbitration.*[277] Thus in spite of the fact that the parties may 'delocalise' the arbitration from the seat of the tribunal by choosing a different law of procedure,[278] and that arbitration laws in many countries have been liberalised, the possibilities of the choice has increased considerably.[279] Particularly in electronic commerce the parties may benefit from these possibilities.

4.1.3 **Law of Procedure in the State of the Place or Seat of Arbitration**

The place or seat of arbitration may have important consequences for the law applicable to the procedure of the arbitration. for example, Section 24 of the DIS Arbitration Rules,[280] concerned with the rules of procedure, establishes in subsection (1): *Statutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate, the Arbitration rules set forth herein, and, if any, additional rules agreed upon by the parties shall apply to the arbitral proceedings. Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure*. The state jurisdiction applicable at the place or seat of arbitration continues to plays an important role for arbitration in cyberspace: first, in the sense that in the case of a disagreement between the parties, the rules on the arbitral proceedings may ensure the continuing arbitration proceedings, second, that it provides mandatory rules such as those on the power of the arbitrator or the content of the arbitral award.

a.-) Recognition and Enforcement of the Award

If the parties did not make a choice of law the recognition and enforcement of an award or decision may be refused should the arbitration procedure violate the laws of the State:

(1) 'where the award was made'[281] or
(2) 'where the arbitration took place'.[282]

If the competent authority of the State where the award or decision was made or according to the law of which it has been made annuls or suspends the award or decision[283] the recognition and enforcement of the award may be refused in other Contracting States.[284]

b.-) Setting Aside of the Award

The place or seat of arbitration generally determines the law applicable to the procedure for the setting aside of the arbitration agreement.[285] Article VI of the New York Convention states that *if an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award*... Article V(I)(e) of the Convention envisages that recognition and enforcement of the award may be refused if, inter alia, the award has been set aside by a competent authority of the country in which or under the law of which the award was made.

According to the New York Convention any State where recognition and enforcement of the award is claimed may exercise its control over the award. But this possibility is narrower in the case of the Geneva Convention which allows the refusal of recognition and enforcement of an award rendered in another Contracting State on the basis of reasons which led to the setting aside only, if the setting aside took place in the State where the award was made or according to the laws of which the award was made, if the award is not valid according to the law of the State where it was made unless the parties had subjected it to the law of another State, Article IX(1)(a). However, the Geneva Convention, dealing in Article IX with the setting aside of an award, does not regulate the legal control which Contracting States may apply to awards rendered in the State itself. The Convention relates only to awards rendered in other Contracting States.

c.-) Enforcement of 'Foreign' Awards in the State where the Award Was Made

The identification of the place of arbitration is of particular importance, because many EU Member States have made a reservation to the New York Convention, Article I(3), according to which they recognise as 'foreign' arbitral awards only those awards which were made in other Contracting States. Thus if an international arbitration took place in Belgium, Denmark, France, Greece, Ireland, Luxembourg, Monaco, Netherlands, Portugal or the UK[286] which have made this reservation, the New York Convention would not be applicable to the award, even if the parties were foreigners. In such a case the parties to the arbitration have to rely on the national laws on arbitration if they want to enforce an award. This may not necessarily be a disadvantage for the parties. For example, Belgian law before its modification in 1998 did not subject such awards to any control, provided that no party was domiciled or established in Belgium.[287] But in many cases the non-applicability of the New York Convention would mean that the arbitration even by non-national parties, would exclusively be subject to the national arbitration laws of the (Member) State concerned. This may have consequences, for example if the national arbitration law contained particular requirements of form concerning arbitration agreements with consumers. In order to avoid that the recognition and enforcement of an international award would exclusively be subject to the national law of the state where the arbitration took place, parties in cyberspace might select institutions for arbitration which are situated in states which did not make a reservation to Article I(3) of the New York Convention or stipulate in their arbitration agreement that the place or seat of arbitration shall be in an appropriate State. For the arbitral institution and the arbitrator the operation by means of electronic commerce facilitates the 'transfer' of the place or seat of arbitration to any geographical point chosen by the parties.

4.1.4 **Choice of the Institution for Arbitration**

What consequences has the choice of an institution for dispute settlement in electronic commerce on the applicable law? The decision by the parties in electronic commerce to refer the dispute to a body for arbitration, does not in itself solve jurisdictional issues which involve questions on the applicable law. Such questions may arise with regard to the following issues:

1. The capacity of the parties to enter into an arbitration agreement;
2. The law applicable at the place or seat of arbitration;
3. The law applicable to the arbitration agreement;
4. The law applicable to the arbitration procedure;
5. The law applicable to the substance of the dispute;
6. The law of the state where provisional remedies are sought;
7. The law of the state where assistance with the taking of evidence is requested;
8. The law of the state where the setting aside of the award is sought;
9. The law of the state where competing judicial proceedings are initiated;
10. The law of the state where recognition and enforcement of the arbitral award is sought.

Often the rules of arbitration of the institution may contain a regulation of some of these issues, and since the choice of an institution generally implies the acceptance of its rules by the parties the parties would only have to make an express regulation of those issues in which they would like to complement the rules or deviate from them provided that this is permissible according to the rules.

4.1.5 **Delocalisation of Arbitration**

How is the territoriality of the place of arbitration defined in online arbitration? What is the seat of the arbitration in the case of a virtual system? Is it the office where the arbitrator performs his work or the office from where the institution responsible for arbitration is established? How has to be decided if the online-work of the arbitral institution is partitioned between persons in several states and if the arbitrators operate from different states? Generally, the same considerations are applicable which are relevant for the identification of the place or seat of arbitration in the traditional commerce. Accordingly, the place of the establishment of the virtual institution responsible for arbitration will be decisive. If the parties in traditional arbitration indicate that the dispute should be settled by the ICC without indicating a place for arbitration, Paris will be the place for arbitration.[288] In the case in which an online arbitration service is established in one State, the parties' decision to charge this organisation with the settlement of the dispute implies that the seat of arbitration will be at its place of establishment. However, if the institution is established in several states, it will be justified to assume that the institution is authorised to decide on the seat of arbitration. Should a virtual institution responsible for arbitration indicates its place of establishment on its website, it may be assumed that the parties agree on this place as the place of arbitration if they refer the dispute settlement to this institution unless they stipulate a different place.

4.1.6 **Online Technologies and the Seat of Arbitration**

If the parties have not made a choice of the place or seat of arbitration, the use of online technologies remains without influence on the determination of this locality.[289] The criterion for the determination of the seat of the arbitration and, accordingly, its 'nationality' may be procedural or geographical. In the second case, it may be decisive, where the institution responsible for out-of-court dispute settlement is established. However, in the case of a hypothetical virtual ad hoc arbitration with the use of videoconferencing and email for the communication of electronic messages, it may be difficult to establish this place or seat if the parties have not made an express choice.

It has been suggested that in such a case the place where the computer is based which supports the videoconferencing might assume relevance or the place from where the emails of the arbitrator are sent and where they are collected; however, the regard of such factors which are connected with the stream of data and digital bits establishing a 'virtual' place of arbitration is not supported by the law.[290]

4.1.7 **Electronic Forum Shopping**

In international arbitration the place or seat of the arbitration, individualised by the parties, constitutes a criteria, which connects the arbitral proceedings with a certain jurisdiction - with the limited effect of subjecting only certain issues to this jurisdiction.[291] One may consider that the notion of an arbitral forum, represented by the seat of arbitration, would be arbitrary and, in fact, in the case of electronic commerce the choice of the place or seat of the arbitration – where the parties may not even take into account of national territories, does have little to do with the dispute between the parties. An attempt to 'localise' a dispute relating to electronic commerce at the place of the arbitration must thus appear to be artificial. The technological means of dispute settlement in electronic commerce permit the 'localisation' of the place or seat of arbitration at any 'place'. But the determination of the place based on considerations of convenience in electronic commerce is, in principle, not different from a decision in traditional commerce. With regard to the long-term effect of such choices it may be assumed that the competition between national legal systems could lead to an approximation of those laws which are taken into consideration when choosing the place of arbitration.

The New York Convention provides for the annulment of an award by a competent authority of the country in which or under the law of which the award was made. With the regard to the geographical delocalisation it has been stated:[292] *Nonetheless, upon deeper reflection, one realises that geographical delocalisation of court control is not consistent with modern views on proceedings conducted without reference to any state law. When an award has been made in such a manner, there is simply no country 'under the law of which' it has been made, and as a consequence, no court would have jurisdiction.*

Concerning the legal delocalisation national laws may provide for the exclusion of a challenge of awards. Thus arbitration laws may offer the parties the option to adopt an 'exclusion agreement'.[293] The concept of the de-nationalisation of the arbitration seems to be a desirable goal for the international arbitration in cyberspace. Therefore, it appears recommendable if the parties in their arbitration agreement stipulated the application of the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration,[294] unless the rules of arbitration of the arbitral institution provide for the application of satisfactory rules concerning the arbitration.

The easiness of electronic forum shopping in arbitration within the Internal Market and the increasing disputability of the application of the principle of territoriality in order to 'localise' an international arbitration in cyberspace within one of the Member States of the Internal Market may, additionally, justify the call for a European Court for Arbitration[295] which could deal with certain issues of international arbitration within the Internal Market. In particular the application of differing jurisdictions of Member States relating to state control over international arbitration taking place within the Internal Market appears hardly justifiable when electronic commerce achieves identical conditions for the participants in the market, and since, from the legal point of view, the autonomy of the parties allows the choice of a non-national or transnational law as the law applicable to the arbitration, no matter in which Member State the Information Society service and the recipient are established or domiciled. Such a European Court would facilitate

the dispute settlement by means of electronic commerce within Member States, permitting a step towards the establishment of the Internal Market in electronic commerce.

4.1.8 **Considerations for the Choice of the Place or Seat of Arbitration**

In the case of traditional arbitration, the parties often based their decision on the place of arbitration on geographical considerations. Thus if the parties were domiciled or established in Italy and Germany, it may have been appropriate to determine Vienna or Zurich as the place or seat of arbitration. However, in electronic commerce geographical factors should no longer determine the place of arbitration. *In fact, it can be foreseen that the delocalisation of the arbitrator with regard to the place or seat of arbitration with regard to the law applicable to the proceedings will increase the more new technologies for the communication of messages will be utilised including the use for the management of certain elements of the proceedings of international arbitration*.[296]

a.-) Factors for Determining the Place or Seat of Arbitration

When fixing the place of arbitration, the following factors should be considered:[297]

1. the extent of local court intervention in arbitration, whether concerning the enforceability of the agreement to arbitrate, in particular concerning an electronic agreement, remedies against the selected arbitrator or against his decisions, recourse against an award or rules of mandatory law which, if violated, cause the award being set aside or unenforceable;
2. the procedural aspects, in particular, whether the State is a party to an international convention on the recognition and enforcement of arbitral awards (for example the New York Convention), whether the State guarantees the right to a fair trial including the independence of the judiciary;
3. arbitrability, in particular, whether consumer disputes are accepted as arbitrable;
4. national restrictions, in particular whether the State has made a reservation to Article I(3) of the New York Convention, rules of mandatory national arbitration law;
5. neutrality of the place with regard to both parties.

With regard to the scarce jurisdiction on arbitration by means of electronic commerce it is hardly possible to make secure recommendations. Based on experience with arbitration by traditional means it is evident that national jurisdictions with liberal arbitration laws may cause a smaller risk of interference by national authorities with arbitration by means of electronic commerce. In the sector of consumer arbitration, it may be safer to have the 'virtual' place or seat of arbitration in one of the Member States where this type of arbitration is already successfully established in the traditional arbitration.

b.-) Legal Factors of Particular Importance

Concerning the choice of the situs for an international arbitration different factors may have to be taken into account:[298] *There are, first of all, a number of legal factors that need to be weighed in this connection. For example,*

1. *the local law regarding recourse against arbitral awards must be considered, as well as*
2. *any mandatory local rules that, if violated, could cause an award to be set aside*;
3. *the extent to which courts may be likely either to assist or interfere with the arbitration process should also be assessed*;
4. *perhaps most importantly, it must be determined whether the country under consideration is a party to any international conventions on the recognition and enforcement of arbitral awards (e.g. the New York Convention) that are also adhered to by the country or countries in which execution of the award may be sought. Finally*,

5. *political factors such as the independence of the judiciary, freedom of access to the country and the risk of political unrest may also need to be evaluated.*

c.-) Convenience within the Internal Market

Since all Member States are Contracting States of the New York Convention, there is no doubt about the possibility to have foreign arbitral awards recognised and enforced in any Member State. However, concerning issues such as the enforceability of arbitration agreements relating to consumer disputes in application of the European Parliament's Resolution on the Promotion on the Recourse to Arbitration it appears to be preferable, presently, to choose a place of arbitration where there is no doubt about the arbitrability of such disputes, for example, by the choice of a seat of arbitration in a Member State on the Iberian peninsula. With regard to other aspects of relevance in the different national legal systems which 'compete' for the place or seat of arbitration within the Internal Market those jurisdictions should be preferred which have the most liberal laws concerning international dispute settlement.

4.1.9 Determination of the Place or Seat of Arbitration in the Absence of an Express Choice by the Parties

If the parties have not determined the seat of the arbitration in their agreement, it is up to the institution responsible for arbitration to fix such a seat.[299] For example, the Rules of Arbitration of the International Chamber of Commerce state in Article 14(1):[300] *The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.*

When determining the seat of arbitration in cyberspace the arbitrator is likely to apply the following criteria:[301]

1. the enforceability of an electronic arbitration agreement according to the national laws;
2. whether the state is a party to international conventions (New York Convention, Geneva Convention;
3. local laws regulating international arbitration;
4. neutrality of the place if parties are of different nationality (In cases where the arbitrator or the institution for arbitration fixes the place of arbitration it may be recommendable to fix this place at a neutral site.[302]);
5. convenience - if the arbitral proceedings cannot be limited to 'document only' or electronic proceedings, a hearing may be required; the place of the hearing should be convenient for the arbitrator and the parties, including potential costs arising from travelling;
6. other factors such as the availability of support services, the need for the arbitrator or the parties to obtain visas should oral hearings and meetings become necessary.

4.2 Procedural Guarantees

Article 17(2) of the Directive on Electronic Commerce calls on Member States to encourage the bodies responsible for out-of-court dispute settlement to provide through their operation adequate procedural guarantees to the parties. Accordingly the operation of such systems should be such that the parties which make use of arbitration services can rely on procedures which take into account of their legitimate interests.

4.2.1 Basic Requirements for Procedures in the Sense of Article 17(2) of the Directive on Electronic Commerce

Article 17(2) of the Directive on Electronic Commerce requires that *Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes, to operate in a way which provides adequate procedural guarantees for the parties concerned.* This obligation of Member States is not further explained in the Recitals, and it was not discussed on the basis of earlier drafts of the Directive, because in these drafts Article 17(2)

of the Directive contained a reference to the Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998.[303]

The 'encouragement' of bodies responsible for arbitration could be based on a recommendation by the EU Commission, but it could also be based on a framework legislation by Member States:

1. the issuing of recommendations by the EU Commission, for example based on Article 211 of the EC Treaty,[304] addressed to Member States asking them to require from institutions responsible for arbitration the observance of certain procedural guarantees;
2. the passing of framework legislation by Member States concerning the accreditation of such institutions with the imposition of the obligation to deposit the rules concerning their operation which should provide for procedural guarantees.

a.-) Ensuring Procedural Guarantees According to Article 17(2) of the Directive on Electronic Commerce

There are clear reasons why bodies responsible for arbitration in electronic commerce should be encouraged to operate in a way which provides procedural guarantees for the parties concerned. The following principles may be established concerning the regulation of procedural guarantees in Article 17(2) of the Directive on Electronic Commerce:

1. it may be assumed that independent institutions responsible for arbitration will do their best to provide the parties with an optimum of procedural guarantees. This assumption can be based on the free working of competition in the field of voluntary arbitration which excludes that institutions which do not operate according to satisfactory conditions which have no chance in the market of arbitration services;
2. from the replacement of the earlier text which contained the reference to the Commission Recommendation applicable to bodies responsible for consumer disputes it can be inferred that the Directive aims at a more general approach for the regulation of arbitration services;
3. the Directive addresses issues concerning out-of-court dispute settlement for electronic commerce, because these services, if operating online and in cross-border disputes, may encounter particular problems when aiming at the ensuring of procedural guarantees for their clients;
4. the Directive addresses particularly out-of-court dispute settlement in the consumer sector, where the financial support given to the institution responsible for dispute settlement by third persons may constitute a risk for the procedural position of the 'weaker' party.

b.-) Increase of State Control of Arbitration through More Procedural Guarantees?

A particular problem deriving from the duties of Member States in the sense of Article 17(2) of the Directive on Electronic Commerce consists in the fact that their possibilities of the control of international arbitration may be limited.

(1) State Control According to the New York Convention

According to the New York Convention state control of the arbitration procedure extends to certain issues only. In particular, the recognition and enforcement of an award may only be refused on the basis of the reasons mentioned in Article V of the Convention. Concerning the violation of procedural guarantees, Article V(1)(b)(d) and (e) and (2)(b) of the Convention are of specific importance. For example, according to Article V(1) of the Convention the recognition and enforcement of an award may be refused only if the requesting party furnishes to the competent authority where the recognition and enforcement is sought proof that, inter alia:

- lit. (b), *the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*; and
- lit. (d), *the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*.

A violation of the right to be heard or the adversarial principle in the sense of Article V(1)(b) of the Convention may thus be complained about by a party, however, a violation of other procedural rights afforded by the national arbitration laws of a Member States will generally only cause a reason for the refusal of the recognition or enforcement of an award, if the relevant national law was chosen by the parties or, failing such agreement, if the arbitration 'took place' in this Member State.

Can Article 17(2) of the Directive on Electronic Commerce be understood to oblige Member States to a more severe control of arbitration concerning a violation of procedural rights than the control envisaged by Article V of the New York Convention? All Member States are Contracting States of this Convention. Accordingly, they are obliged to ensure that the recognition and enforcement of an arbitral award within their territories comply with the terms of the Convention. Additional requirements which a Contracting State would establish, for example on the basis of its national arbitration laws, cannot bind those parties which rely on the recognition and enforcement according to the New York Convention.

(2) 'More-Favourable-Rights' Rule

Insofar as Member States 'encouraged' the observance of procedural guarantees different from those safeguarded by the New York Convention, could they might commit a breach of their international obligations? Article VII of the Convention states in subsection (1) that *the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States*... Thus Contracting States of the New York Convention are free to provide in international instruments for rules which differ from those of the Convention. However, Article VII(1) constitutes a 'more-favourable-rights' rule. *It ensures that whenever the New York Convention proves to be less favorable to the recognition and enforcement of a foreign award than the treatment provided for in another treaty, or in the law of the host country, the more favorable treatment shall prevail over the rules of the New York Convention.*[305] It does not prevent Contracting States from adopting more restrictive solutions for their national or international arbitration law than those contained in the New York Convention. But such stricter laws cannot affect the recognition and enforcement of awards according to the New York Convention.

(3) Rule of Maximum Effectiveness

Even if Member States concluded an international instrument which contained procedural rules which were more limited than those which a party would be able to invoke on the basis of the New York Convention, it was held[306] that by reason of *the so-called rule of maximum effectiveness (...) in case of discrepancies between provisions in international conventions regarding the recognition and enforcement of arbitral awards, preference will be given to the provision allowing or making easier such recognition and enforcement, either because of a more liberal substantive conditions or because of a simpler procedure*. Thus if Member States adopted a canon of more comprehensive measures of control relating to the recognition and enforcement of 'foreign' awards in an international instrument, such rules would not affect the recognition and enforcement of awards according to the New York Convention.

4.2.2 Means of Electronic Commerce for Arbitration Procedures

The employment of means of electronic commerce facilitates the arbitration procedure. What are such procedures? Inter alia, online or electronic procedures:

1. concern the regulation of the request for arbitration and its commencement (these may be rules established by the institution on the information to be provided by a party on the existence of the dispute; in the case of consumer disputes this may be an online complaint form, in the case of business disputes an online form relating to the request for arbitration including provisions on the providing of the arbitration agreement);
2. establish the manner in which the arbitrator(s) will be selected, accept their office or may be rejected;
3. concern the conduct of the proceedings as such (procedural rules may regulate the presentations by the parties, the establishment of terms of reference, the (online) filing and copying of statements and documents, and possible time delays);
4. concern the use of electronic messages, for example establishing 'electronic documents only' procedures, or the use of videoconferencing and audioconferencing, including the taking of evidence in the case of witnesses and experts;
5. concern the making of the online award and requirements of form with regard to recognition and enforcement;
6. concern the possibility of a remedy against the award;
7. concern the storage of data, in particular with a view to defend possible challenges of the procedure as violating a party's rights;
8. concern the confidentiality of the proceedings by providing, inter alia, for encryption and/or electronic signatures.

4.2.3 Procedural Guarantees for Online Arbitration Procedures

The rules for arbitration of arbitral institutions do not substitute the rules emanating from national laws or international instruments such as the New York Convention. They are based on the parties' autonomy and the freedom of contract. by means of which they are generally deemed to become a part of the arbitration agreement if the parties choose a certain arbitral institution.[307] The question whether an electronic award on the basis of an electronic arbitration agreement can be recognised and enforced in a Contracting State depends on the interpretation of the relevant texts of the international Conventions relating to the recognition and enforcement of awards or on the national arbitration law. Insofar as the relevant rules are non-mandatory, the content of the procedural guarantees may also be determined by the parties or the arbitral institutions in the rules for arbitration.

a.-) Procedural Guarantees Based on Mandatory Laws, International Conventions and Public Policy

Rules of arbitral institutions and procedures based on such rules are unlikely to violate rules of the mandatory national law if they are based on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. But the principles emanating from these instruments hardly permit conclusions on the content of such rules adapted to the arbitration by means of electronic commerce. The establishment of rules of 'online' procedures should be compatible with the requirements of rules of mandatory law applicable at the place or seat of arbitration. These rules of mandatory law may be different from state to state. With regard to the UNCITRAL Model Law on International Commercial Arbitration it has been asserted that certain regulations, namely those contained in Articles 18, 24(2) and (3) and 27, belong to the 'mandatory' content.[308] Additionally, online procedures must be compatible with the transnational public policy to which may belong the right to a fair trial. Rules on online

procedures should thus carefully be drafted in order to safeguard that the resulting awards will be accepted by state control.

The online environment is likely to intensify the problems which derive from the 'delocalisation' of international arbitration. This means that the connection between the arbitration and a certain national jurisdictional system will be even more loose than in the existing arbitration concerning the traditional commerce. As a consequence the justification for the application of those rules of mandatory law applicable at the 'virtual' place or seat of arbitration as the rules of the arbitration procedure, particularly in the absence of a choice of law by the parties, appears to be the more questionable.

b.-) Applicable Law and Procedural Guarantees

Rules establishing procedural guarantees may be contained in different instruments, for example international conventions, arbitration laws of states and rules of institutions responsible for arbitration. Generally, international conventions and arbitration laws establish basic principles with regard to procedural guarantees. Up to now such instruments hardly envisage the use of means of electronic commerce. However, there are emerging recommendations such as those by the Global Business Dialogue (GBDe) on ADR which may receive general acceptance. These 'Recommendations to ADR Service Providers'[309] relate to:

- Impartiality;
- Qualification of ADR officers;
- Accessibility and convenience;
- Speed;
- Low cost for the consumer;
- Transparency;
- Adversarial procedure;
- Principle of representation;
- Applicable rules;
- Consumer awareness.

Also the Trans Atlantic Consumer Dialogue (TACD) was concerned with the establishment of Recommendations on Electronic Commerce which related to Alternative Dispute Resolution in the Context of Electronic Commerce[310] and which focused on:

- Accessibility and convenience;
- Speedy resolution;
- Full airing of grievances;
- Creative solutions;
- Fairness;
- Low costs;
- Non-traditional sales;
- Reduce strain on the formal legal system.

The parties may have chosen the law for the (online) arbitration procedure in the arbitration agreement or the rules of the arbitral institution may relate to online procedures. However, which of those rules may safeguard that a body responsible for arbitration operates *in a way which*

provides adequate procedural guarantees for the parties concerned? The analysis whether the individual rule relating to the arbitration procedure satisfies the requirements of ensuring procedural guarantees has to be made on a case by case basis.

By reason of their autonomy, the parties may freely choose the law applicable to the arbitration procedure.[311] They may also ask the arbitrator to determine the rules or rely on the rules proposed by the institution responsible for arbitration. The choice by reference in an arbitration agreement may expressly be provided for by national arbitration laws.[312] Only if the parties make no choice with regard to the rules applicable to the procedure, the rules contained in national arbitration laws may become relevant. For example, the French New Code of Civil Procedure establishes in Article 1494(2) that the arbitrator has the right to determine the procedure insofar as necessary. Accordingly, the French law does not request the arbitrator to determine the law of procedure if there is no reason to do so. But such a reason may lie in the parties' desire to have the arbitrator decide on this issue. The European Uniform Law on Arbitration authorises the arbitrator to decide on the applicable law concerning the procedure if the parties did not make a decision up to time when the arbitrator accepted his office.[313] The rules which must ensure procedural guarantees may thus be based on a variety of different legal frameworks. They may emanate from international instruments, national laws regulating the international and domestic arbitration, rules for arbitration of arbitral institutions and the choice of law by the parties.

c.-) Control of the Arbitration Procedure

International commercial arbitration has a tendency towards an increase of the autonomy of the parties which freed the arbitration procedure more and more from rules established by states.[314] However, state control attaches at last when arbitral awards shall be recognised and enforced. It would not be sensible to institute a comprehensive control of arbitration if this could have the effect of reducing its advantages. This might occur, for example, if awards were controlled in lengthy proceedings before state courts, obliterating any confidentiality about the dispute.

(1) Internal Control of Awards by the Arbitral Institute

The solution of the International Court of Arbitration (ICC) which subjects draft awards by arbitrators to the internal control of the ICC's Court of Arbitration avoids such disadvantages to a large degree. Article 6 of the Statutes of the International Court of Arbitration of the ICC provides:[315] *Scrutiny of Arbitral Awards. When the Court scrutinises draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.* The rules of some arbitral institutions provide for an internal appeal procedure against the award. Such rules may relate to the procedure for claiming appeal and time limits, to the procedure for appointment of boards of appeal, to the procedure at appeals, to the withdrawal of appeals or general provisions for appeals.[316]

(2) Control of Decisions of the Arbitrator

Article 5 of the UNCITRAL Model Law on International Commercial Arbitration provides that in matters governed by the Model Law national courts may intervene only insofar as provided for by the Model Law. These possibilities are limited. They relate particularly to the functions of supervision which are numbered in Article 6 of the Model Law, namely to the appointment of arbitrators, the challenge procedure of arbitrators, the arbitrator's failure or impossibility to act, the competence of the arbitrator to rule on his jurisdiction and the application for the setting aside of the award. Finally, the award is subject to state control during the recognition and enforcement procedures as provided for by international instruments such as the New York Convention or by national arbitration laws.

(3) Setting Aside of the Award

International Instruments such as the New York Convention or the Geneva Convention provide for the setting aside of an award. According to this procedure the award is subjected to a limited state control for reasons which are more or less identical with those which may be brought in the case of an enforcement of the award. The UNCITRAL Model Law on International Commercial Arbitration provides for the recourse against the award in Article 34. The reasons for the setting aside of the award according to Article 34(2) of the Model Law correspond with those which may be brought by a party against the recognition and enforcement of an award according to Article V of the New York Convention. Article 34(3) limits the period during which the setting aside may be claimed to generally three months after the award has been received by a party. The rules for arbitration of some arbitral institutions exclude the possibility of a party to institute proceedings for the setting aside of the award.[317]

(4) Appeal Against the Award

International instruments such as the New York Convention or the Geneva Convention do not provide for an appeal against the award to the courts. If the parties, in their arbitration agreement, provide for such a possibility in arbitration according to the New York Convention or the Geneva Convention, a national court might hold that the provisions on the recourse against awards, in particular those permitting the setting aside of the award, belong to the public policy so that the stipulations of the parties on the possibility of an appeal are void.[318]

But national laws may also provide that an appeal against an award is possible if the parties so decide.[319] However, the possibility of an appeal to the national courts might destroy the advantages of arbitration: *It would be meaningless to recognise the effectiveness of arbitration agreements if, in the absence of an agreement to the contrary, the final outcome of the dispute were necessarily to be determined by the courts*.[320] It may be inferred that the possibility of appeal against an arbitral award does not constitute a basic procedural guarantee the ensuring of which would be required according to Article 17(2) of the Directive on Electronic Commerce.

4.2.4 Earlier Drafts of the Proposal of a Directive on Electronic Commerce

Earlier drafts of the proposal for a Directive on Electronic Commerce had contained in Article 17(2) of the Directive a reference to the basic principles applicable to bodies responsible for the settlement of consumer disputes established by the Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998.[321] The scope of applicability of the Recommendation was limited to procedures which led to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution. In this sense the Recommendation would have been applicable to consumer arbitration, but not to consumer mediation where the mediator aimed at bringing the parties together to convince them to find a solution by common consent. But if the decision maker had the power to make a binding conclusion, the Recommendation would be applicable.

a.-) Principles Based on the Commission Recommendation Concerning Bodies for Consumer Disputes

Earlier drafts of the proposed Directive referred expressly to the Commission Recommendation Concerning Bodies for Consumer Disputes which endorsed the following principles:[322]

(1) Principle of Independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions.

The independence of the arbitrator is ensured by his professional competence; if an arbitrator is employed, he shall have the post for a sufficient duration and shall not be liable to be relieved of his duties without just cause. In voluntary international commercial arbitration there is no doubt that the observation of the principle of independence is a 'sine qua non' for the successful operation of an arbitration service. The disregard of this principle would disqualify the institution, because the parties would loose the confidence. In consumer arbitration, where the economic operation of the institution is likely to need support from third persons, it may be wise to regulate expressly the independence of the institution and the arbitrators with regard to any supporting organisations in order to establish the consumer's confidence in the operation of the arbitration system.[323]

(2) Principle of Transparency

Appropriate measures are taken to ensure the transparency of the procedure. These include:

1. *Provision of the following information, in writing or any other suitable form, to any persons requesting it:*
    1. *a precise description of the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute;*
    2. *the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet, as well as other procedural rules, notably those concerning the written or oral nature of the procedure, attendance in person and the languages of the procedure;*
    3. *the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure;*
    4. *the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.);*
    5. *the decision-making arrangements within the body;*
    6. *the legal force of the decision taken, whereby it shall be stated clearly whether it is binding on the professional or on both parties. If the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated, as shall the means of obtaining redress available to the losing party.*
2. *Publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.*

The principle of transparency may relatively effortless be complied with by means of electronic commerce. With regard to the individual requirements of the principle of transparency the obligation of information may be fulfilled posting the relevant information on the Information Society service's website or the website of the arbitration institution to which the Information Society service's website may link. Information about the requirements contained in No.s 1.1 to 1.6 can thus easily be made electronically. Concerning the Recommendation No. 2.2 the obligation of publication concerns only general information about the arbitral institution's activities. In the case of the existing system of consumer arbitration in Spain some 95 % of the awards are based on equity without a reasoned award. Accordingly, only very few cases would have a publishable decision. But the annual reports issued by the competent Spanish authorities permit a comprehensive overview concerning the activities of the relevant institutions for consumer arbitration.

(3) Adversarial Principle

The procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements.

The adversarial principle is based on fundamental rights of the parties, in particular the right to be heard and the right to a fair procedure. Accordingly, its observance is an essential element for the operation of the arbitral institution dealing with consumer disputes and it can be expected that it will be implemented in its rules for arbitration. The right to be heard is of particular importance within this context. It may possibly be violated if a party did not fully participate in the session of a videoconference or audioconference, even if though its participation was indicated on the screen or announced at the beginning of the conference. Other reasons for a violation of the principle may lie in technical defects, for example if a party was unable to communicate with the arbitrator or the other party when this defect remained undiscovered.

(4) Principle of Effectiveness

The effectiveness of the procedure is ensured through measures guaranteeing:

that the consumer has access to the procedure without being obliged to use a legal representative;

that the procedure is free of charges or of moderate costs;

that only short periods elapse between the referral of a matter and the decision;

that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

It may be assumed that any institution operating voluntary arbitration will observe the principle of effectiveness. In fact, it may be excluded that any such organisation would offer ineffective arbitration services. The competition between the relevant institutions is very likely to exclude ineffective services from the market. Whereas in the traditional consumer arbitration such a competition may not be common, taking into account of the fact that the operation of consumer arbitration systems are likely to depend on financial support by public organisations or associations of the trade and industry, the online environment makes such services easily accessible, no matter in which territory the parties are domiciled or established. In the traditional arbitration the parties are generally free to have themselves represented by third parties or not. The cost of the procedures may be relatively high in the traditional arbitration, but international arbitration hardly dealt with small claims. There are already arbitration systems for expedited arbitrations or the arbitration for small claims which may cover sums up to € 12,500.[324] But even in the case of expedited arbitrations the registration fee may be € 500 and the minimum fee payable to the arbitrator € 2,500.[325]

Consumer arbitration will concern cases with a low value, the bulk of the disputes possibly having a value not in excess of the minimum fee which may be payable to an arbitrator in procedures of expedited arbitrations. The costs related to the settlement of such disputes can only be kept low if the following conditions are met:

1. Operation of a highly automated system for the filing of the request for arbitration, the exchange of messages and the organisation of the arbitration;
2. Simple rules concerning the law applicable to the procedure;
3. Simple rules concerning the law applicable to the dispute;
4. Specialised staff and arbitrators dealing with the disputes.

In the case where national consumer arbitration systems such as those of Portugal or Spain extended their activities to arbitration by means of electronic commerce, it is likely that the costs

would at least partially be borne by the relevant states in application of the relevant national laws regulating this type of arbitration. Private organisations which wanted to venture into the business of arbitration of disputes with very low values might be in competition with the publicly supported consumer arbitration services. Accordingly, this particular service does not seem to offer many opportunities for commercial dispute settlement services. To the contrary, the risks concerning the effectiveness of consumer arbitration clauses by reason of the mandatory rules of consumer protection and the risks deriving from the compatibility of very simple procedures with international instruments such as the New York Convention but also with basic rights such as the right to a fair procedure might deter privately organised arbitration services from entering this market segment.

(5) Principle of Legality

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

All decisions are communicated to the parties concerned as soon as possible, in writing or any other suitable form, stating the grounds on which they are based.

The observance of the principle of legality in consumer arbitration by means of electronic commerce would impose high demands on the arbitral institution when flexible and simple procedures are expected. This is particularly the case in the settlement of cross-border disputes when international arbitration is not so much determined by national interests and national laws but by international conventions. In particular the application of the principle of legality would impose impracticable solutions, taking into account of the fact that, first, the application of the Rome Convention is excluded in arbitration and, second, the indications of the reasons of the award is not even required by to the Spanish national consumer arbitration laws according to which the vast majority of cases is decided on the basis of equity without that the reasons have to be given.

(6) Principle of Liberty

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.

According to this principle the consumer's recourse to the arbitration procedure should not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the national courts. This principle should seen in context with the EU Directive on Unfair Terms in Consumer Contracts which refers to an unfair arbitration clause in lit. (q) of the Annex.[326] An arbitration clause may be effective which offers the consumer arbitration based on procedures not excluding other means of legal redress. This may, in particular, be the case if the arbitration procedure follows arbitration rules established by an internationally operating arbitration system with expert arbitrators and if additional means for legal redress are available such as, alternatively, mediation or conciliation and if a remedy is available against the award. The requirement that a consumer should expressly accept the binding nature of the arbitration may be excessive, taking into account of the nature of the arbitration agreement. The reference of a dispute to arbitration implies that the parties agree to have the dispute settled by a binding decision. If the dispute settlement agreement envisages, additionally to arbitration, the

alternative of mediation, as has been recommended in order to avoid that an arbitration clause might be unfair in the sense of lit. (q) of the Annex of the Directive on Unfair Terms in Consumer Contracts, the binding nature of the outcome of the arbitration procedure should be clear to any recipient who is a consumer. In order to provide the consumer with more information on the bindingness of the arbitration, it may be recommendable if the Information Society service provided for the relevant information in the dispute settlement agreement. It may be possible, for example, to permit the online ordering by the recipient only after he clicked on the 'I agree' icon according to which he would have taken notice of the binding nature of the arbitration procedure. Additionally, the information about the relevant systems which will be made available through the Information Society service's website, containing appropriate links to the proposed institutions responsible for out-of-court dispute settlement and their rules will provide satisfactory sources of information by means of which even uninformed consumers may obtain security about the relevance of the contractual arbitration clause.

The judgement of the European Court of Justice in the case Océano Grupo Editorial vs. Rocio Murciano Quintero[327] which refers to Article 3(1) of the Directive and lit. (q) of the Annex does not permit a differing conclusion. In § 24 of the judgement the Court indicates that in the case in which *a jurisdiction clause is concluded, without being individually negotiated, in a contract between a consumer and a seller ... and where it confers exclusive jurisdiction on a court ..., it must be regarded as unfair within the meaning of Article 3 of the Directive insofar as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*. But such an unfairness is not 'automatically' indicated by any pre-formulated business clause. In § 25 of the judgement the Court indicates that according to the ideas underlying the Directive the conceptual weakness of the consumer is seen inn a lack of bargaining power and knowledge: *This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms*. In electronic commerce additional circumstances have to be considered. Pre-formulated clauses may rationalise the negotiation procedure and improve the transparency with regard to jurisdictional issues and the applicable law. In cross-border electronic commerce, the consumer would often not know which courts were competent and which law would apply if a cross-border dispute arose. This is due to the fact that the existing legal framework is complicated, also for lawyers. Thus simple arbitration clauses in electronic commerce might benefit not only Information Society services but also consumers. It should be borne in mind that the Directive in its Recitals recalls that *only contractual terms which have not been individually negotiated are covered by this Directive*. Accordingly, the typically unfair clause referred to by lit. (q) can only be a pre-formulated clause. This means that pre-formulated clauses which are not *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract* may be fair in the sense of the Directive.

(7) Principle of Representation

The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

The principle of representation is of little relevance for the arbitration of consumer disputes by means of electronic commerce, since there is no reason why third parties like professional lawyers should not be able to assist a party during the proceedings. Also in the traditional consumer arbitration systems of Portugal and Spain the parties are free to ask for the assistance by professional lawyers or associations of consumers. Thus there is no reason why such third parties should not also assist Information Society services or recipients.

b.-) Economic Operation of Consumer Arbitration with Regard to the Principles of the Commission's Recommendation

Any increase of costs for the arbitration system through obligations imposed by the Principles of the Commission Recommendation may be prohibitive for the operation of consumer arbitration to market conditions. Taking into account of the fact that the traditional arbitration system is likely to be economic in cases where the dispute relates to claims exceeding the sum of € 5,000,[328] the additional costs deriving from the observation of the principle of transparency are likely to prevent that an institution for arbitration could offer the arbitration of consumer disputes unless the Information Society service itself or a third person would contribute to the costs of its operation. If the increase of costs would have to be paid by the parties the fees would render the system factually not accessible for most disputes with consumers.

4.2.5 **Adequate Procedural Guarantees Based on the European Convention on Human Rights**

There have been attempts to draw from the provisions of the Strasbourg Human Rights Convention[329] basic rules which guarantee the observance of procedural guarantee. It is generally understood that the principle of equity must be observed in any procedure of adjudication.[330] A preliminary observation may be made: The necessity of the regard of human rights, in particular of the right to a fair trial in the sense of Article 6(1) of the European Convention on Human Rights, is a basic principle in a system of conflict of laws.[331] Even if it is controversial whether the European Convention on Human Rights is applicable to arbitration, this basic principle should be observed by institutions responsible for arbitration, insofar as such a rule has to be considered as belonging to the transnational public policy.[332]

a.-) Jurisprudence of the European Court of Human Rights

The jurisprudence of the European Court of Human Rights does not permit a clear answer to the question whether Article 6(1) of the European Convention on Human Rights is applicable to arbitration proceedings. Article 6 of the Convention concerns the 'Right to a fair trial': *(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* (…)

(1) Deweer Case

Can a person waive the right to a fair trial by an arbitration clause? The European Court of Human Rights observed in the Deweer Case[333] that the 'right to a court' which is a constituent element of the right to a fair trial, is not absolute but subject to implied limitations. The Court observed that *it is not the Court's function, though, to elaborate a general theory of such limitations.* In § 49 of the decision the Court stated: *The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; (…) Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' (see § 44 above) for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (ordre public) of the Member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 (art. 6) calls for particularly careful review (…).*

(2) Beer and Regan v. Germany

In the case of Beer and Regan v. Germany[334] the European Court of Human Rights was concerned with a decision of the European Space Agency's Appeals Board which is independent of the Agency and has jurisdiction to hear disputes relating to any explicit or implicit

decision taken by the Agency and arising between it and a staff member. Considering whether Germany violated the right of legal access in the sense of Article 6(1) of the Convention through the decision of German courts not to accept jurisdiction in the case of a dispute between staff members and the Agency, the Court held that *where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial…* In § 58 of the decision the Court held, that *a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.*

(3) Lithgow Case

In the Lithgow case[335] the European Court of Human Rights, concerned with the alleged breach of requirements of Article 6(1) of the European Convention on Human Rights, applied the Convention to arbitral proceedings. Considering in § 201 that the arbitral tribunal was 'established by law', in that it comprised a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees, the Court recalled *that the word 'tribunal' in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (…); thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees.* The Court continued to note *that, under the statutory instruments governing the matter, the proceedings before the Arbitration Tribunal were similar to those before a court and that due provision was made for appeals…*

b.-) The Right to a Fair Trial According to the European Court of Justice

From the Deweer case of the European Court of Human Rights it may be inferred that an enforceable arbitration clause should not deprive a person from the right to a fair trial. In particular when the arbitration agreement excludes a person from the resort to the ordinary courts, the organisation of a state representing a democratic society may demand that adjudication by private arbitration which belongs to the public order be organised in a manner which corresponds with the right to a fair trial. However, whereas in the Deweer case the arbitration procedure was ancillary to the court proceedings, this is not the case in most types of voluntary arbitration. Accordingly, it may be questioned whether this principle is also applicable if the arbitration is detached from any litigation before the courts. But since the offering of voluntary arbitration, based on arbitration laws and international instruments, can be said to constitute an element of the public order of a democratic society, one may argue that also the right to a fair trial should be reflected within the organisation of its proceedings.

The Court's reference to the 'public order' was based on the translated French term 'ordre public'. This term means also 'public policy'. Could it be argued that an arbitral award which violated the right to a fair trial would not be enforceable as contravening the public policy in the sense of Article V(2)(b) of the New York Convention? This may be confirmed in the case where an enforcement according to the New York Convention is sought in Contracting States of the Human Rights Convention. Assuming that exclusive voluntary arbitration constitutes an element of the organisation of a democratic society, as may be inferred from the Court's reference, one

may well argue that Contracting States are obliged to refuse the recognition and enforcement of awards which violate the right to a fair trial.

In the case Beer and Regan the Court questioned whether the opening of the possibility to resort to exclusive dispute settlement freed Contracting States from ensuring the observance of the right to a fair trial. May a similar argument be forwarded in the case where the parties of a dispute agree to settle it exclusively by arbitration? If Contracting States provide expressly for dispute settlement of private-law disputes through arbitration, can this deprive them from ensuring that principles of a fair trial should protect the parties of arbitration proceedings which do not have access to the public courts? One may have to differ between cases in which the parties agree on the dispute settlement after the concrete dispute has arisen and general arbitration agreements covering any dispute within the relation between the parties. It appears that in the former case a person would merit less protection, because he accepts the limitations of the right to a fair trial knowingly. In the second case, it may be justified to apply a different standard, taking into account of the fact that the person waived his rights without knowing about the content of the disputes. Admittedly, it may not be satisfactory to differentiate between several types of arbitration agreements when assessing whether the right to a fair trial was violated. But the verification of a violation of the human rights in the sense of Article 6(1) of the European Convention on Human Rights requires an evaluation of the circumstances of the case, so that in each individual case the particular circumstances must be considered. A duty relating to the observance of basic procedural principles contained in Article 6(1) of the European Convention on Human Rights by institutions responsible for arbitration cannot be said to be disproportionate with regard to the professional duties of an arbitrator. Also the Lithgow case seems to support the view that, upon a careful analysis, the observance of the right to a fair trial should be reflected in the rules concerning the procedure of voluntary arbitration.

c.-) The Right to a Fair Trial

Arbitration laws and rules refer to the right to a fair trial. However, from the different references it is difficult to establish a definite content of this basic right. The right to a fair trial will generally be applicable in arbitration proceedings. In some cases the aggrieved party may no longer claim a violation of the right to a fair trial if the dispute has arisen and the party, knowing about the potential violation of the right, accepts nevertheless the arbitration to such conditions. But, generally, the right to a fair trial is a fundamental condition for the arbitration procedure. *As breach of the fundamental rule of the right to a fair trial results in the award being set aside by the court of the country where the seat of arbitration is located and in refusal by the authorities abroad to enforce the award.*[336]

(1) The UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law deals in Chapter IV with the conduct of arbitral proceedings (Articles 18 to 27). These provisions deal with the equal treatment of parties (Article 18), the determination of rules of procedure (Article 19), the place of arbitration (Article 20), commencement of arbitral proceedings (Article 21), language (Article 22), statements of claim and defence (Article 23), hearings and written proceedings (Article 24), default of a party (Article 25), expert appointed by arbitral tribunal (Article 26) and court assistance in taking evidence (Article 27). According to Article 18 of the Model Law *the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*. The working group which had prepared the draft of the Model Law decided that the requirements of equal treatment and opportunity of presenting one's case should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure.[337] The relevant commission even considered that the provision on equal treatment of the parties *constituted a fundamental principle which was applicable to the entire arbitral proceedings and that, therefore, the provision*

shall form a separate Article... [338] Accordingly, the failure to observe the principle of equal treatment may constitute a procedural injustice which may be a ground for the refusal of the recognition or enforcement of an award or for setting it aside.

During the discussions leading to the draft of the Model Law it was considered that the following provisions of the Law had a mandatory character which could not be derogated from by the parties:

1. Article 18: *Equal treatment of the parties. The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*
2. The first part of the first sentence of Article 23(1): *Statements of claim and defence. (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements...*
3. Article 24(2): *The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of the inspection of goods, or property or documents.*
4. Article 24(3): *All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the party.*
5. Article 27: *Court assistance in taking evidence. The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.*

If the parties did not make a choice on the procedural law in the sense of Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration, subsection (1) provides that the arbitral tribunal may, subject to the provisions of the Law, conduct the arbitration in such a manner as it considers appropriate. The discretion conferred on the arbitral tribunal supersedes conflicting national law, but the arbitral tribunal remains bound by the mandatory provisions of the law applicable to the arbitration. The parties may not derogate from the regulation contained in the first part of Article 23(1) of the Model Law, whereas the specific rules of procedure in respect of the content of the statements of claim and defence are subject to the agreement of the parties. This is made clear through the words *unless the parties have otherwise agreed* at the end of the last sentence.

(2) Arbitration Rules

Article 15 of the UNCITRAL Arbitration Rules deals with general provisions. It states: *(I) Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.* The right to a fair trial is also expressly referred to in other rules of arbitration. For example, Article 15(2) of the Rules of Arbitration of the International Chamber of Commerce states:[339] *In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.* According to these Rules the Arbitral Tribunal shall have the power to *decide when it has heard enough and whether it would be unreasonable to permit the continued exchange of either memorials or evidence that may no longer be of use to the arbitration.*[340]

The rules for arbitration of arbitral institutions generally contain rules which establish the right to a fair trial. A typical provision may establish:[341] *Conduct of the Proceedings. (1) The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute. Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties. (2) Unless otherwise agreed by the parties under Article ...(1), the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration. (3) In the case of a three-member Arbitral Tribunal the Chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone*.

(3) Geneva Convention

The Geneva Convention which deals with the organisation of the arbitration, provides in subsection (1)(a) that the parties are free to submit their disputes to a permanent arbitral institution: *In this case the arbitration procedure shall be held in conformity with the rules of the said institution.* If the parties submit the dispute to ad hoc arbitration, they are free, inter alia, to according to Article IV(1)(b) of the Convention*, (i) to appoint arbitrators …; (ii) to determine the place of arbitration; and (iii) to lay down the procedure to be followed by the arbitrators.* According to Article IV(2) the Convention provides for the nomination of the arbitrator through the President of the competent Chamber of Commerce if the parties failed to appoint an arbitrator themselves. The arbitrator may then decide on the organisation of the arbitration if the parties failed to do so, Article IV(3) sentence 1 of the Geneva Convention. The nomination of the arbitrator through the President of the competent Chamber of Commerce and the arbitrator's power to decide on the organisation of the proceedings thus assure also in the case of ad hoc arbitration according to the Geneva Convention that procedural standards applied in international arbitration will be observed. Since also ad hoc arbitration belongs to the types of out-of-court dispute settlement systems of electronic commerce, Article 17(2) of the Directive on Electronic Commerce would oblige Member States to ensure that also bodies concerned with ad hoc arbitration should provide procedural guarantees. Taking into account of the fact that ad hoc arbitration does not involve institutional bodies, the need to ensure procedural guarantees may be doubtful. Bearing in mind that as a consequence of the need to necessary adherence to the Geneva Convention Member States should ratify the Geneva Convention, it may be argued that in ad hoc arbitration the nomination of the arbitrator through the President of the Chamber of Commerce, failing a nomination by the parties, will safeguard the observance of procedural guaranties.

(4) Right to a Fair Trial and Arbitration Clauses in General Terms of Contract

In electronic commerce the employment of online general terms and conditions, for example available via a link on the Website, may facilitate the conclusion of a contract online. The Directive on Unfair Terms in Consumer Contracts[342] does not address the issue of general terms and conditions relating to out-of-court settlement systems. However, in the Annex the Directive gives examples of unfair terms, including, in lit. (q) a term:

- *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on*

him a burden of proof which, according to the applicable law, should lie with another party to the contract.

General terms which would require the consumer to necessarily resort to a sole system of out-of-court dispute settlement in electronic commerce, excluding the resort to the courts, thus must be drafted carefully in order to comply with the requirements of protection. However, it seems that a clause by means of which the consumer agrees to confer any disputes to out-of-court settlement would be acceptable according to EU law, if such a scheme is

- non-exclusive, for example by offering alternatively mediation as a means of legal redress, and setting aside procedures as a remedy against the arbitral award
- governed by legal rules which do:
    - not limit the consumer in his possibilities to provide evidence or
    - not contain a change in the burden of proof according to the applicable law.

The enforceability of ad hoc consumer arbitration clauses appears thus doubtful, unless the arbitration agreement provided for the application of adequate procedural rules. The regulation of ad hoc arbitration by the Geneva Convention may also explain the European Parliament's concern with the regard of the interests of the weaker party in its Resolution of 1994, and it may justify the concern of the Directive on Unfair Contract Terms with exclusive arbitration clauses not providing for adequate legal procedures.

At present the US Supreme Court is concerned with the validity of a pre-dispute exclusive arbitration clause in a consumer contract which related to the purchase of a mobile home.[343] The lawsuit concerns an arbitration clause with no disclosure of the fees and no guarantee that the arbitral institution would set fees low enough to make the arbitration forum affordable. The court of the lower instance held that if arbitration does not guarantee a meaningful process, since arbitrators are not required to follow the law, they have discretion with regard to rules of evidence and are not required to issue written opinions stating facts or conclusions of law, and fees are so high that this would make it impossible for consumers to avail themselves of statutory rights, the arbitration clause would be invalid.[344] Before the 11th US Circuit Court of Appeals panes, Green Tree Financial Corp. admitted that the arbitrators set their own fees, that no filing fees were required and that they did not use the rules for arbitration established by the American Arbitration Association which offer guidelines concerning the arbitration procedures and fees. Differently, the arbitration procedures were not subject to determined rules. The Court held that the arbitration clause was unenforceable *because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or high costs of arbitration.* Admittedly, this the effect of this dispute is limited to US law, but in international arbitration according to the New York Convention it may well be controversial whether an arbitration clause envisaging arbitration without procedural guarantees or an arbitral award which was made according to such procedures will be enforceable. Yet the standards applicable to international arbitration according to the New York Convention may differ from those applicable by reason of national arbitration laws. There is no doubt that ad hoc arbitration clauses are enforceable according to the New York Convention and that the parties may agree on arbitration ex aequo et bono or on the basis of 'composition amiable', and likewise on the application of the law of procedure of a non-Member State, even though the scope of the procedural rights of such types of arbitration may not be defined at the time of the making of the arbitration agreement. It appears therefore that standards establishing procedural guarantees must be based on public policy if they should be observed in the arbitration procedure.

(5) Global Application of the Right to a Fair Trial

The right to a fair trial is not only applicable and enforceable within Contracting States of the European Convention on Human Rights, but on a more global basis. The Universal Declaration on Human Rights[345] establishes the right to a fair trial in Article 10: *Everybody is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations…* The International Convent on Civil and Political Rights[346] establishes the right to a fair trial in Article 14(1) sentence 1: *Right to Fair Trial. All persons shall be equal before the courts and tribunals…* States Party to the Covenant are obliged to respect the rights of individuals. Article 2 of the Covenant states:

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised by the present Covenant (...)

(2) (...)

(3) Each State Party to the present Covenant undertakes

(a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy (...)

(a) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

In the case of a violation of the right to a fair trial State Parties have to permit the violated person the possibility of legal redress. In the case of a violation of such a right the procedures leading to the setting aside of the award may satisfy this requirement.

4.2.6 **Procedural Guarantees in the Sense of Article 17(2) of the Directive on Electronic Commerce**

The organisation of the arbitration proceedings has to exclude any violation of the right to a fair trial. Whereas it seems to be recommendable to establish the principles clearly in the arbitration rules of the bodies of institutional arbitration, the observation of the rules derived from the principle can be safeguarded to a lesser degree in ad hoc arbitration where neither the parties to the arbitration agreement nor the arbitrator when accepting to arbitrate can be expected to draw up corresponding rules. With this regard it is of interest that Article IV of the Geneva Convention establishes comprehensive rules on ad hoc arbitration. Accordingly, the demands which have to be made in order to ensure procedural guarantees for the parties in arbitration based on Article 17(2) of the Directive on Electronic Commerce should not so much be confined to formal rules but to the spirit of the provision.

In the sector of consumer arbitration, for example in the Portuguese of Spanish consumer arbitration, the procedural rules are reduced to make the procedures simple and efficient. However, this increases the risk that the simplification might lead to a diminishing of fundamental procedural guarantees. In order to encounter this risk, for example the relevant Spanish legislation refers to the principles of audience, contradiction and egality.[347]

a.-) Principle of Egality of the Parties

The parties to the dispute must be treated without discrimination.[348] In international or cross-border electronic commerce the principle of the egality of the parties may assume a particular content in cases in which one party is weaker. In general, this means that whereas the person aggrieved must have access to justice, the other person must be able to defend the case before a forum which is fair and equitable.[349] Taking into account of the possibilities of the parties of a dispute in cross-border electronic commerce, the consumer as a category of the weaker party has to be protected by particular provisions ensuring fairness.[350] The observation of the principle

of egality means also that the use of particular means of electronic commerce must not place one party at a disadvantage.

b.-) Principle of Independence and Impartiality of the Arbitrator

The principle of the independence and impartiality of the arbitrator means that the arbitrator must observe the distance between the parties and, within the contacts to both parties, observe a duty of loyalty.[351] Taking into account of the fact that the parties will generally select the arbitrator, the principle of independence and impartiality may have a different connotation in arbitration than in court proceedings where the judge will often be less familiar with the subject-matter of the dispute and unknown to the parties. But if the arbitrator's independence and impartiality are compromised, the arbitrator must refuse or hand back the appointment.[352] In the case of arbitration by means of electronic commerce this principle requires that no party or anyone acting on its behalf should have a unilateral communication with the arbitrator.[353]

c.-) Principle of Contradictory Proceedings (Adversary System)

The principle of contradictory proceedings relates basically to the right of defence of the party against which the claims are directed.[354] The principle is also an inherent element of court litigation. It implies that a party has a right to be heard with its arguments against the claims of the plaintiff. A violation of the principle of contradictory proceedings may lead to a violation of the right to be heard which is an element of the right to a fair trial. The adversary system *can nowadays be seen as a common fundament of the civil procedure in different states of the European Union. This principle means a right for the parties to be heard by the court, to get information about all important elements of the civil proceeding (evidence that the other party has submitted to the court preliminary investigation ordered by the court...) and to participate in the operations of the expertise.*[355]

In a case which, however, did not concern arbitration but administrative proceedings, the European Court of Justice considered that a violation of the right of defence caused by the failure to supply the full documentation relating to antitrust proceedings led to a violation of Article 6(1) of the Human Rights Convention,[356] which establishes the right to a fair trial. However, upon the analysis of the European Court of Human Rights' jurisprudence it may be asserted that the principle enshrined in Article 6(1) of the Convention on Human Rights is of such a tantamount importance that it has also to be observed in arbitration procedures.[357]

(1) Exclusion of Manipulation of Technological Systems

In particular technological means of communication, by assuring the safety of electronic messaging, will have to exclude that basic or constitutional rights of the parties are violated. In online proceedings it must be excluded that a party could successfully assert the violation of basic procedural rights such as the right to be heard with the argument that it personally did not participate in a chatbox communication organised by the online arbitration tribunal or that a failure of the communications system excluded it from the possibility of exercising its rights or that the arbitrator had the possibility to perceive the communications of the parties.[358] Accordingly, it should be excluded that doubts may arise whether the parties took part in the proceedings during the full time. Even if videoconferencing technologies were applied, a manipulation of the connection should be excluded, including a defect of the screen.

(2) Recording and Storage of Electronic Data

In order to avoid any doubts about technological deficiencies, it may be recommendable to record and store the electronic proceedings and any documents, whether traditional or electronic. In many national courts computer assisted transcription (CAT) has been introduced.

Also court reporting firms offer their services by providing additionally the option of video tape recording of depositions to computer assisted transcripts so that lawyers may present such evidence before the courts. Also in arbitration proceedings relating to electronic commerce such proceedings should be available.

(3) Electronic Protocols

The communications during the arbitration procedure should be stored electronically and be accessible to the parties, preferably by the electronic transmission of a copy of the recording. It would be fair to allege the correctness of the documentation unless a party objected to it by stating the reasons for any such objection within seven working days after the receipt of the documentation.

(4) Online Declarations

Declarations made by a person orally during audio- or videoconferences should have evidentiary weight, just as declarations made by such persons during traditional hearings. The principle of the adversary system may require, for example, that parties have the opportunity to put questions to a witness or to comment on their declarations. The parties should be able to exercise these rights by means of electronic commerce. Accordingly, they should be able to put questions to a witness or expert when the witness or expert is heard during a videoconference.

The electronic means of communication may not always provide a satisfactory degree of safety. Thus the US Electronic Signatures in Global and National commerce Act provides on oral communications in the Section on 'General Rule of Validity', 101(c)(6): *Oral Communications. – An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.* This subsection deals inter alia with consumer disclosures concerning the consumer's consent to electronic records and other rights such as the preservation of consumer protections, the effect of the failure to obtain the electronic consent or the confirmation of the consent. According to Section 101(c)(1) of this Act the form requirement of writing which protects the consumer as the weaker party may be satisfied by an electronic record provided that the consumer has previously consented to its use.

d.-) Principle of a Fair Procedure

In arbitration the principle of fair procedure means that the arbitrator must conduct the procedure in a manner which is intermediary between the maxims of interrogation and determination by the parties.[359] Article 15(2) of the Rules of Arbitration of the International Chamber of Commerce states:[360] *In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.* Whether the content of the principle of a fair procedure can be outlined by reference to the right to a fair trial seems doubtful. Only serious violations of this principle are likely to constitute an infringement of the right to fair trial in the sense of Article 6(1) of the European Convention on Human Rights.

(1) Oral Hearings and Videoconferencing

Does the principle of a fair procedure oblige the arbitrator to hold oral hearings, at least if required to do so by a party? Article 24(1) of the UNCITRAL Model Law on International Commercial Arbitration gives a party the right to request an oral hearing, and during the discussions of the draft *the prevailing view was that the right of a party to request a hearing was of such importance that the parties should not be allowed to exclude it by agreement.*[361]

However, according to the final version of Article 24(1) sentence 2 of the Model Law the parties may freely agree that no hearings shall be held. Yet the Commission Report relating to the UNCITRAL Model Law on International Commercial Arbitration stated that[362] *it was understood that parties who had earlier agreed that no hearings should be held were not precluded from later modifying their agreement, and thus to allow a party to request oral hearings.* This reference seems to allude that a party may not unilaterally demand an oral hearing if both parties had agreed before that no oral hearings should take place. Thus if parties refer the dispute settlement to an institution for arbitration, thereby agreeing on the application of certain rules for arbitration used by this institution which envisage 'documents only' procedures, a party waives its rights to request an oral hearing. The same considerations are applicable if the rules provide for electronic procedures only.

(2) Deliberations of the Arbitrator in Ordering Hearings or Videoconferencing

May an arbitrator order a hearing on the request of a party if both parties had previously agreed on the exclusion of hearings? There may be a risk that the arbitrator encounters a challenge that a refusal of the request for a hearing constituted a violation of the duty of equal treatment of the parties (for example in the sense of right according to Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which may be understood as belonging to the broad principle of a fair procedure). If thus procedures for the setting aside of the future award could be instituted with the argument that the party was not able to present his case (see, for example, Article 34(2)(a)(ii) of the Model Law) or if the recognition and enforcement of the future award may be refused for this reason (see, for example, Article 36(1)(a)(ii) of the Model Law), it could well be argued that the arbitrator would have the power to order a hearing in spite of the fact that the parties had expressly excluded such hearings in an earlier agreement.[363] Similar arguments may be used in the case of other means of communications. For example if both parties excluded in their arbitration agreement the possibility of videoconferencing, the arbitrator may nevertheless order such a videoconference on the request of one party if the refusal would expose his award to the risk that it might be set aside or not recognised and enforced by state control.

May a party, asserting the right to be heard as an element of the principle of a fair procedure, request the organisation of a videoconference if the arbitration agreement is silent on this point? Different from an oral hearing the organisation of a videoconference involves additional considerations concerning, inter alia, the availability of technological means and requirements of confidentiality. For this reason, the rules of arbitration of the institution for arbitration should deal with this issue and give the arbitrator discretion to order the organisation of videoconferences with due regard to the interests of the parties and the circumstances of the individual case. Concerning the carrying out of the videoconference it would be recommendable if all participants were seen on all screens simultaneously and if a recording of the videoconference documented the integral procedure including the sound. The resulting electronic data should be stored and communicated to the parties with a possibility for comments within a limited time (possibly seven calendar days). This would ensure that any objections by the parties which would be contemplated by the arbitrator who could, by taking appropriate measures, including the ordering of a new videoconference, avoid any risk that his award might be set aside or not enforced for the reason that it violated the principle of a fair procedure.

(3) Default of a Party and the Use of Email

Which measures are adequate if a party does not fulfil its duties to respond within the time limits set by the arbitrator? Article 25 of the UNCITRAL Model Law on International Commercial Arbitration states that *unless otherwise agreed by the parties, if without showing sufficient case (a) the claimant fails to communicate his statement of defence in accordance with Article 23(1)*

the arbitral tribunal shall terminate the proceedings; (b) the respondent fails to communicate his statement of defence in accordance with Article 23(1) (period agreed by the parties or determined by the arbitration tribunal) the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. The introductory sentence is based on the intention that the arbitrator should be able to exercise a degree of discretion and flexibility.[364]

(4) Communication of Data Messages

Concerning the observance with requirements of the communication of data messages sent by email and the related liability it would appear appropriate if the rules of the arbitral institution or the stipulations of the parties in their arbitration agreement would align the content of the regulation with the provisions contained in the UNCITRAL Model Law on Electronic Commerce. The provisions of this Model Law regulate the time and date of the sending and the receipt of data messages. Additionally, the rules, the arbitration agreement, or based on one or the other, a decision by the arbitrator may establish that a communication is made within time if it is received by the addressee's computer system on the last day of the relevant period. In order to avoid disputes about the fact whether a data message was sent it may be provided that the receipt of a data message must be confirmed by the recipient on the following day (such as, for example, by providing for an automatic reply which is sent when data message is downloaded).

(5) Errors in Communication

Errors in communication based on defective technologies should be make known to the arbitrator or the other party as soon as possible. The Electronic Commerce Agreement of the UN/CEFACT states in Para. 2.4:

> *Errors in Communication.*
>
> *A party [must/need not] give notice to the other party of circumstances, including technical errors in a received transmission, which prevent a further processing of a message. Such notice shall be given [as soon as reasonably possible/specify time period].*
>
> *The receiver is entitled to regard each message received as a separate message and to act on that assumption, except to the extent that it duplicates another message and the receiver knew or should have known, had it exercised reasonable care or used any agreed procedure, that the message was a duplicate.*
>
> *The receiver is entitled to regard the message as received as being what the sender intended to send, and to act on that assumption. The receiver is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in an error or delay.*

An appropriate procedural rule of the arbitral institution, possibly using the principles established in the quoted clause of the Electronic Commerce Agreement, could provide a satisfactory treatment of errors in communication within the arbitral procedure.

(6) Taking of Evidence

The taking of evidence, in particular the taking of evidence abroad, should not pose any problems concerning the observation of the principle of a fair procedure. Since the parties may agree on 'documents only' procedures, communications by witnesses and experts may exclusively be made in writing, respectively by electronic messages, possibly by using electronic signatures or encryption, depending on the individual case and the interests involved.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18/03/1970 does *not constitute any bar to taking evidence by electronic means*.[365] With regard to measures of security to be engendered by new communication techniques the Commission of the Hague Convention on Private International Law noted with interest the progress made in securing systems, whichever technique is used. *The Commission also noted that the use of the Internet may be dangerous, this being a means of communication which in principle is not made secure. It was therefore recognised that whenever a degree of authenticity, confidentiality and integrity of documents or communications transmitted is necessary, the use of crypted sites should be encouraged*. The Commission considered also *the possibility of using the new means of communication, including videoconferencing and similar methods, to question witnesses at a distance. It did not see any particular objection to using these techniques*.

(7) Safety Measures

The identification of the parties in electronic commerce is an unsolved problem from the technical point of view.[366] In online communications it may, therefore, recommendable to make use of electronic authentication insofar as possible. The Global Action Plan for Electronic Commerce, prepared by Business with Recommendations for Governments of 1999[367] observed that the business continues to develop technology for ensuring security in order to build trust in electronic commerce. Governments should support private sector research and development relating to security technology. Concerning the use of such means for online arbitration this means that the arbitral institution's rules for procedure should be flexible enough to permit the use of adequate safety technologies, dependent on the interests of the parties involved and the state of the technological development.

e.-) Principle of the Absence of Discretion

The principle of the absence of discretion means that in arbitration the arbitrator must respect formal rules, in particular concerning the right of defence or the right of reply.[368] Even though the necessity to observe formalities will often be less stringent than in court litigation, the arbitrator must observe this principle in order to respond to the right to a fair trial.

f.-) Principle of a Reasoned Decision

It may be controversial whether the arbitrator has to give a reasoned decision, but in the absence of reasons the arbitrator risks that the recognition and enforcement of the award may be refused on the basis of the argument that the awards violates the rights of defence and therefore contravenes public policy.[369] The UNCITRAL Model Law on International Commercial Arbitration provides in Article 26(2) that the award shall state the reasons on which it is based unless the parties have agreed that no reasons are to be given. The UNCITRAL Working Group *adopted a solution which accommodates a variety of national legal requirements and practices by requiring that reasons be stated but allowing parties to agree that no reasons are to be given.*[370] But national arbitration laws may require that an award should indicate the reasons. For example Article 25(2)(i) of the Council of Europe's Convention Providing a Uniform Law on Arbitration states that an award may be set aside *if the reasons for the award have not been stated*. But in certain circumstances, for example in small claims arbitration or in consumer arbitration, it may be expected that the arbitrator would not reason his decision. The Geneva Convention states in Article VIII:

> *Reasons for the Award. The parties shall be presumed to have agreed that reasons shall be given for the award unless they*
>
> *(a) either expressly declare that reasons shall not be given; or*

(b) have assented to an arbitral procedure under which it is customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

According to Article VIII(b) of the Convention there will be no presumption according to which the parties are deemed to have agreed that reasons shall be given if an arbitral institution provides in its rules for arbitration that an award will be rendered without reasons unless the parties requested reasons. This provision has been criticised, because it is asserted that it limits without justification the autonomy of the parties to choose freely an arbitral institution which provides in its rules for the rendering of awards without reasons.[371] It should be noted with this regard that according to Article 16(2) of the Spanish Royal Decree on the Regulation of the Consumer Arbitration System[372] the decision must be reasoned if the arbitral board decides on the basis of the law. But since some 95% of the cases are decided on the basis of equity, only a minority of awards will be reasoned.

(1) Content of Award

According to Article 22(5) of the Uniform Law on Arbitration the award shall state *(a) the names and permanent addresses of the arbitrators; (b) the names and permanent addresses of the parties; (c) the subject-matter of the dispute; (d) the date on which the award was made (e) the place of arbitration and the place where the award was made.* With regard to lit. (e) there could be a risk for the enforcement of the award according to the New York Convention if the place of the arbitration differed from the place of the making of the award. It would be recommendable to follow Article 31(3) of the UNCITRAL Model Law on International Commercial Arbitration according to which the award shall state its place of arbitration which may be agreed on by the parties or, failing such agreement be determined by the arbitral tribunal, having regard to the circumstances of the case including the convenience of the parties. *The award shall be deemed to have been made at that place.*[373]

(2) 'Electronic' Awards

Concerning the form of the award in electronic commerce it would appear that within the Internal Market the electronic award could be made as an electronic document provided with the electronic signature(s) of the arbitrator(s). However, the enforceability of the award according to the New York Convention may be doubtful under such circumstances. According to Article IV(1)(a) of the New York Convention the obtaining of the recognition and enforcement of the award presupposes the supply of the *duly authenticated original award or a duly certified copy thereof*. Concerning requirements of form the UNCITRAL Working Group which dealt with the drafting of the text of the Model Law on International Commercial Arbitration had achieved consensus *that the award should for the sake of certainty be made in writing and that it should be signed by all members of the arbitral tribunal.*[374] Concerning the requirement of writing, similar considerations are applicable which have been forwarded above with regard to the requirement of writing concerning arbitration agreements.[375] Thus there is no doubt that an 'electronic' award may comply with the national laws of Member States which have implemented the Directive on Electronic Signatures. However, this does not solve the problem of the enforceability of the 'electronic' award according to the New York Convention. Yet different from the case of the arbitration agreement made by means of electronic commerce, it will generally not cause a problem for a party to obtain a document on paper, because an arbitral institution will have an interest in the efficiency of its services and keep a sufficient number of copies of the award on paper, signed by the arbitrator(s).

4.2.7 Adequate Procedural Guarantees in the Online Environment

Those procedural guarantees which institutions responsible for arbitration should offer the parties to the dispute cannot easily be defined. Particular rules may be necessary which concern the degree of familiarity of the arbitrators with the online environment, the seat of the arbitration and the modalities of the online communication, the confidentiality of the proceedings and the publication of the award. Also the interests of the parties and the public interests, particularly in the protection of the consumer as a weaker party, should be taken into consideration.

a.-) The Regard of the Interests of the Parties

It would be appropriate if the rules of the institution responsible for arbitration contained satisfactory provisions enabling the arbitrator to make use of the technological means of electronic commerce for the arbitration procedure. But these rules cannot be drafted within a legal vacuum. For example, they would particularly have to agree with the rules of the mandatory law applicable at the seat of the arbitration so that an arbitrator, if he operated according to the rules, would not have to face the risk that a party would initiate proceedings in order to challenge decisions of the arbitrator or that his award would be set aside or not recognised and enforced.

The regulation of arbitration is largely based on the autonomy of the parties. Accordingly, it is up to the parties to choose the rules applicable to the arbitration procedure. But arbitration institutions were ill-advised if they drafted rules of procedure which would not provide for adequate procedural guarantees. Since arbitration in the business sector takes place in a competitive environment, only those bodies which ensure the regard of adequate procedural guarantees are likely to survive. But in certain sectors of arbitration such as consumer arbitration in which the operation of the bodies for arbitration are not sufficiently covered by fees charged to the parties on equitable principles, but where the operation of the institution may depend on support by third persons or public funding, the regard of procedural guarantees becomes more important. For this reason, the public interest in the establishment of procedural guarantees in the case of consumer arbitration may be accentuated.[376]

b.-) Establishment of Terms of Reference by the Arbitrator

The Rules of Arbitration may provide for the establishment of 'terms of reference'. The establishment of such terms may be useful in any arbitration of electronic commerce. The arbitrator should establish in the document containing such terms of reference:[377]

1. the full names and descriptions of the parties;
2. the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;
3. a confirmation of the parties' consent to have the dispute settled by arbitration;
4. a summary of the parties' respective claims and of the relief sought by each party with an indication to the extent possible of the amounts claimed or counterclaimed;
5. unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined;
6. the full names, descriptions and addresses of the arbitrator(s);
7. the place of the arbitration;
8. particulars of the applicable procedural rules, especially the means of electronic commerce to be used such as email, whether encrypted and/or electronically signed or audio- and videoconferencing;
9. reference to the power conferred upon the arbitrator decide on the basis of the law, to act as amiable compositeur or to decide ex aequo et bono;

10. a provisional schedule for the arbitration proceedings.

This document should be sent to the parties and signed by them and the arbitrator.

c.-) 'Electronic Documents Only' Procedures

Since the parties to international arbitration are free to establish the rules of procedure of the arbitration, they may, for example, agree on 'documents only' procedures. But also the arbitrator may decide on 'documents only' proceedings if the rules of arbitration authorise him to do so.[378] In expedited proceedings, 'documents only' proceedings are common.[379]

(1) Rules for Arbitration

In the case of arbitration by means of electronic commerce it would be recommendable if the institutions concerned established in their rules for arbitration as a general principle the use of 'electronic documents only'. Such a rule should be complemented by provisions ensuring safety in the communications if this is necessary, in particular by reason of the sums claimed or the interests at stake.

(2) Use of Email for the Exchange of Documents

By reason of their autonomy the parties may themselves determine the rules of procedure in international arbitration. Accordingly, the parties may decide on the availability of digital means of communication for the exchange of statements, whether encrypted or not. If the rules for arbitration provide for confidentiality of the arbitration proceedings without regulating whether emails may be sent with or without encryption, the arbitrator, depending on the circumstances of the individual case and the interests of the parties involved, should require that the communication be encrypted. Even though the omission of such a requirement may not cause the liability of the arbitrator, any leakages of information relating to the arbitration can affect his reputation or the reputation of the institution responsible for the arbitration. Accordingly, it would be recommendable if the body referred in its arbitration rules to the possibility to make use of encryption according to available standards if the parties agreed on the use of appropriate technologies. With regard to the development of the technology and the different equipment and software used by the parties the providing of strict rules on the technology for encryption in the institution's rules for arbitration does not seem to be recommendable.

d.-) Duration of Arbitration

Article 24 of the Rules of Arbitration of the International Chamber of Commerce envisages a duration of the arbitration proceedings until the rendering of the final award of six months.[380] In expedited proceedings this period may be three months.[381] The time factor is thus an essential advantage of arbitration which makes is particularly suitable for dispute settlement in electronic commerce for which the reduction of time and costs for transactions is characteristic. In consumer arbitration this period may even be shorter, but with regard to the right to a fair trial and the right to contradictory proceedings it may be difficult to comply with shorter periods, particularly if the case demands the involvement of representatives who cannot be expected to formulate statements without the consultation of their clients.

e.-) Confidentiality of the Proceedings

Within arbitration proceedings the principle of the public proceedings is not applicable, because this principle does not correspond with the principle of the confidentiality of the proceedings. This latter principle is determined by the particularity of the arbitration and its aims.[382] Provisions concerning confidentiality of the arbitration are contained in many arbitration rules of the

institutional arbitration. Neither the UNCITRAL Model Law on Arbitration nor the UNCITRAL Arbitration Rules contain a regulation on confidentiality. Yet rules of institutions responsible for arbitration generally provide for confidentiality.[383] *Nonetheless, there is no clear duty of confidentiality in most international arbitrations, and arbitral awards are sometimes made public, either in enforcement actions or otherwise.*[384] International commercial arbitration *is essentially a private process and this is seen as a considerable advantage by those who do not want discussion in open court with the possibility of further publication elsewhere, of the kind of allegations which can and do arise in commercial disputes – allegations of bad faith, of misrepresentation, of technical or managerial incompetence, of lack of adequate financial resources, or whatever the case may be.*[385] With regard to the cross-border dispute settlement in electronic commerce, the rules of the institution responsible for arbitration should provide for a basic regulation of the issue which takes into account of the importance which confidential information may have as an asset in competition.[386]

(1) Confidentiality and Electronic Communications

In the digital age the observance of confidentiality is of particular importance, taking into account of the fact that data can easily be copied and communicated online. Rules relating to confidentiality may regulate the confidentiality of the existence of the arbitration, of disclosures made during the arbitration, of the award and, finally, the maintenance of confidentiality by the arbitral institution and the arbitrator. First, it may be provided that, except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body.[387] Even in such a case the disclosure should only concern this what is legally required.

(2) Confidentiality in Rules for Arbitration

The obligation of confidentiality may be considered an implied duty which arises with the consent to the use of arbitration and which binds all persons who receive information and documentation within the arbitration procedure.[388] Accordingly, arbitration rules often do not deal in an exhaustive manner with the issue of confidentiality, taking into account of the fact that the interests of the parties in the degree and maintenance of the confidentiality may differ according to the circumstances of the individual case.[389] However, in arbitration relating to electronic commerce it seems appropriate if the rules of the relevant institutions established a basic regulation of the duty of confidence which would bind not only the parties but also the arbitrator, the body responsible for arbitration and witnesses or experts.

It may be regulated that any documentary or other evidence given by a party or witness in the arbitration shall be treated as confidential. If such information is not in the public domain, it shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.[390] If a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness' testimony, the party calling the witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.[391] Also an award has to be treated as confidential by the parties.[392] It may only be disclosed to a third party with the consent of the parties or, if it falls into the public domain as a result of an action before a national court or other competent authority. Finally, it may be disclosed to a third party if this must happen in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

Also arbitral institutions and the arbitrator should be obliged to maintain the confidentiality of the arbitration. This duty relates also to the award and to the documentary or other evidence disclosed during the arbitration, provided that it is not in the public domain. The duty of confidentiality has to be maintained unless to the extent necessary in connection with a court action relating to the award or as otherwise required by law. However, the arbitral institution may reveal information concerning the arbitration in any statistical data which it publishes provided that such information does not enable the parties of the dispute to be identified. The attempt to maintain the confidentiality of the arbitration proceedings coincides with the general concern of data protection and it appears to be consistent with the natural interests of the parties.

(3) Technological Measures to Safeguard Confidentiality

Concerning the technological means ensuring confidentiality it may be advisable if the arbitral institution provided for the use of encryption technologies in its rules for arbitration. For electronic commerce it is crucial that the parties involved are able to choose the cryptographic systems which best suit their needs, and this standard should also be applicable in arbitration by means of electronic commerce. Taken into account of the interests of the parties involved and of the technologies available it would appear most appropriate if the rules for arbitration of the arbitral institution concerned provided for the possibility of encryption, leaving it to the parties or the arbitrator to make a choice of the adequate system.

Technological measures in virtual arbitration will have to ensure the confidentiality of the proceedings and the authenticity of any electronic communications.[393] However, depending on the Rules of the Institution for Arbitration or the interests of the parties the award may be published. For example, the Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers (ICANN) provides that except if the decision maker determines otherwise *the provider shall publish the full decision and the date of its implementation on a publicly accessible website. In any event, the portion of any decision determining a complaint to have been brought in bad faith shall be published.*[394] It should be observed, however, that these Rules do not provide for an arbitration procedure in the sense of voluntary international commercial arbitration and that the interest of parties in having disputes related to publicly registered trademarks and domain names may not demand the observance of any degree of confidentiality.

4.3 Arbitration Rules Adapted to Electronic Commerce

The parties may, based on their autonomy, choose the law applicable to the procedure. However, their freedom is limited. *The procedure they establish must comply with any mandatory rules and public policy requirements of the law of the place of arbitration; and it must also take into account those provisions of the international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly.*[395] In the absence of an agreement by the parties which would determine the law applicable to the procedure, the procedure should be in accordance with the law of the country where the arbitration takes place, because otherwise the recognition and enforcement of the award risks to be refused according to Article V(1)(d) of the New York Convention. The arbitration rules thus assume the function of a 'mini code of civil procedure'.[396]

4.3.1 Submission of Arbitration to Arbitral Institution

If the parties agree on arbitration by a certain institution, the rules on arbitration of that institution are generally applicable to the dispute settlement. Concerned with the effect of the arbitration agreement between the parties such rules may state:[397] *Where the parties have agreed to submit to arbitration under the Rules they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings unless they have*

agreed to submit to the Rules in effect on the date of their arbitration agreement. Such rules may also refer to the rules of procedure:[398] *The proceedings before the arbitral tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties, or failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration...* A provision of another arbitral institution states:[399] *The arbitral procedure laid down in these rules shall apply where the parties have concluded an arbitration agreement referring to the Chamber of Commerce of Milan (...) or its Rules.* Thus if parties to the contract agree on arbitration by a certain institution, they generally agree at least impliedly on the application of the rules of arbitration of this institution.

The risks deriving from a violation of procedural rights of a party if no express choice has been made by them concerning the law applicable to the proceedings[400] appears limited, since according to most rules of arbitration the relevant rules of the institution responsible for arbitration will be deemed to become a part of the arbitration agreement. The arbitral institution's rules of procedure and the law applicable at the place of arbitration determined according to these rules are decisive for the content of the rules applicable to the procedure failing any particular stipulation with this regard by the parties.

Generally, the arbitration rules confer much authority on the arbitrator to determine their rules of the arbitral procedure. Article 15(1) of the UNCITRAL Arbitration Rules states that *subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case*.

a.-) Establishment of Rules by the Parties

Some arbitral rules such as those of the London Court of International Arbitration even encourage the parties to establish their own rules: Article 14.1 of the Rules encourages the parties: *(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense so as to provide a fair and efficient means for the final resolution of the parties' dispute*...

Where the parties have adopted rules for the conduct of an arbitration between them, whether the rules are for ad hoc or institutional arbitration, the arbitration proceedings should be conducted pursuant to these rules notwithstanding provisions to the contrary in municipal laws and the award rendered should be recognised and enforced by all Contracting States, was considered by a Legal Consultative Committee of the UN which proposed an amendment to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (‘New York Convention’).[401] Since Model Laws concerning arbitration provided for the harmonisation of national arbitration laws, it was, however, not considered necessary to insist on the necessity to establish arbitration rules with binding force for states.

But with regard to the developing technology concerning software and hardware which may be used for the conduct of the arbitration procedure, it may be difficult for the parties to establish the rules for on the arbitral procedure with regard to the use of means of electronic commerce. For this reason it may be more appropriate if the agreed on the use of means of electronic commerce in a general manner, regulating possibly only individual issues such as the use of encryption or confidentiality of the proceedings, or if they referred the dispute settlement to an arbitral institution which makes use of means of electronic commerce the rules of procedure of which provide for the use of means of electronic commerce.

b.-) Rules Permitting the Use of Means of Electronic Commerce

Since most arbitration rules are not yet adapted to arbitration in a virtual environment it may be of interest for the parties to provide for the application of online procedures. In addition to the need for certainty as to procedures for commencing a case and interposing a *defence, it is vital that rules set forth specific procedures so that parties will know in advance how to form a tribunal and to challenge arbitrators. Effective arbitral procedures must not permit doubt or delay in these areas.*[402] For example, they may stipulate the applicability of the UNCITRAL Model Law on Electronic Commerce to the arbitral procedure which settles issues such as the time of the sending and receipt of data messages.[403]

4.3.2 **Request for Arbitration**

The rules for arbitration of the institutions responsible for arbitration generally require that the arbitration agreement should be attached to the request for arbitration. The relevant provision of the ICC Rules for Arbitration states: – Request for Arbitration – subsection (3):[404] *The request shall, inter alia, contain the following information: ... d) the relevant agreements and, in particular, the arbitration agreement.* According to Article 1(iv) of the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce[405] the request for arbitration must be accompanied by a copy of the arbitration agreement or clause under which the dispute is to be settled. Generally, there is no reference according to which the relevant documentation may be supplied by using means of electronic commerce.

In the case of the Uniform Domain-Name Dispute-Resolution Policy the dispute settlement procedure is initiated by the filing of a complaint which is to be submitted in hard copy and (except to the extent this is not available for annexes) in electronic form.[406] The complaint must contain, inter alia, the contact details for the complainant, including email and the preferred method of communication for the complainant for electronic only material, and the respondent's contact details. But these rules do not require the conclusion of an agreement on dispute settlement between the parties which should be attached to the complaint.

Since the enforcement of the arbitral award is a matter for the parties the institution for arbitration, in principle, does not necessarily have to be concerned with the fact whether the arbitration agreement between the parties corresponds with the requirements of the New York Convention. However, it may be negative for the reputation of the institution for arbitration if its awards cannot be enforced, because the national court concerned with the recognition and enforcement of the award according to the New York Convention finds that the arbitration agreement lacks the requirements of form. For this reason the institution for arbitration should require the communication of a copy of the hardcopy of the arbitration agreement or, if the arbitration agreement was concluded by means of electronic commerce, the copy of the data file(s) which constitute the arbitration agreement.

4.3.3 **Preparation for Procedure**

Within international arbitration there has been an increasing use of checklists. The use of such means facilitates not only the cooperation between arbitrators from different legal backgrounds but provides also security to the parties. For example, the checklists on the preparation for an international arbitration in electronic commerce[407] may deal with the following issues:

1. possibility of settlement (request of parties for information on the possibility of a settlement, or of mediation/conciliation);
2. issues and order of decisions (identification of issues and relief sought, issues to be decided first);
3. stipulations (willingness of the parties to agree on uncontested facts);

4. arrangements concerning documentary evidence (exchange of documents between parties and arbitral tribunal, agreement by parties on the authenticity of document(s), time limit within which documents have to be contested, should complicated data be presented by experts or specialists, discovery of documents from the other party and ground rules upon which discovery may be ordered, determination of the language of the documentary evidence, determination of the number of copies to be supplied by the parties;
5. exceptionally, arrangements concerning physical evidence;
6. arrangements concerning witnesses (written statement of witness before any hearing, relation between party and witness, possibility to interview witnesses through parties before a hearing, submission of affidavits;
7. arrangements concerning expert testimony (names and number of experts to be appointed, possibility of parties to question the experts and present counter-experts);
8. rules of mandatory law governing the proceedings (views of parties on mandatory rules, written statements by the parties, necessity to register the arbitral award);
9. arrangements concerning written submission (the parties should be given deadlines for submissions, either consecutively or simultaneous, including post-hearing briefs, possibility of a schedule for submissions, addressees of submissions and copies, determination of languages);
10. procedures for audio- or videoconferences (fixing of dates, length of conferences, consecutive days or separation, order of presentations by parties, time limits, presentation by witnesses, cross-examination of witnesses, oath and affirmation by witnesses, interpretation, recording of conferences), exceptionally, procedures for hearings;
11. practical requirements (form of documentation, method for identifying exhibits, referencing to documents by indication, translations);
12. possibility of the appointment of a secretary;
13. possibility of facilitating arrangements;
14. schedule for other prehearing conferences;
15. provision on data protection measures and confidentiality.

4.3.4 **Digital Arbitration Agreement**

Many laws relating to arbitration provide that the arbitration agreement must be in writing.

a.-) Arbitration Laws of Member States

Insofar as the arbitration laws of Member States are concerned and the law of Member States do not yet give legal effect to the conclusion of electronic arbitration agreements,[408] the implementation of the Directive on Electronic Commerce and of the Directive on Electronic Signatures will make electronic arbitration agreements effective in law. According to Recital 34 of the Directive *each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means ... the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC ... on a Community framework for electronic signatures;*[409]*...*

The Directive on Electronic Signatures deals with the legal effect of electronic signatures in Article 5. According to subsection (1) of this provision *Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device: (a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and (b) are admissible as evidence in legal*

proceedings. Thus arbitration laws of Member States, insofar as requiring the written form or the signatures of the parties will have to be adapted to permit the use of means of electronic commerce for the conclusion of the arbitration agreement.

b.-) International Arbitration According to the New York Convention

The New York Convention and the UNCITRAL Model Law on International Commercial Arbitration which focuses on the form requirements of the New York Convention demand the written form. If the arbitration agreement is contained in a single document it must be signed by the parties, but if it emanates from an exchange of communications it must be reproducible.[410]

(1) Regulation of the Electronic Exchange of Communications by Model Provisions

The exchange of the declarations of will in electronic commerce are addressed in different instruments, for example in the European Model EDI Agreement or in the UNCITRAL Model Law on Electronic Commerce. On the basis of national laws the situation is not yet cleared, and the regulation of the conclusion of electronic contracts, as envisaged by Articles 9 of the Directive on Electronic Commerce leaves Member States a certain discretion. According to Article 9(1) sentence 1 of the Directive *Member States shall ensure that their legal system allows contracts to be concluded by electronic means* which includes arbitration agreements.

(2) Choice of Law of the UNCITRAL Model Law on Electronic Commerce

The requirement of the written form *calls for reflection on what may constitute a written document, so as to determine whether or not an agreement made in electronic corm may be considered a written document. The 1961 Geneva European Convention on International Commercial Arbitration (Article I(2)(a)) and the UNCITRAL Model Law on Arbitration (Article 7(2)) both seem to admit that an arbitration agreement may be made electronically, on condition, however, that evidence on the existence of such an agreement can be provided. In order to avoid evidential problems regarding the question whether or not parties have consented to arbitration online it will be in the interest of the parties to provide for confirmation of acceptance by a second click on an icon or by some other procedure.*[411]

In the case of cross-border contracts, which rules of law will the parties have to observe when concluding a contract? According to the principles of the private international law, the parties are free to choose the law applicable to the contract. The content of the regulation of electronic contracting in Article 9 of the Directive is relatively general so that Member States may regulate this issue within a broad framework. For this reason, it appears recommendable, if parties to international contracts which have the aim of regulating their disputes by arbitration would stipulate the application of the UNCITRAL Model Law on Electronic Commerce to regulate the use and effect of electronic data messages.

4.3.5 **Use of Electronic Signatures**

The argument that the requirements of form of the arbitration agreement according to the New York Convention are met by electronic records may be based on the definition of the term 'in writing' which it received in recent international instruments.

a.-) Directive on a Community Framework for Electronic Signatures

In order to avoid doubts about the fulfilment of the requirement 'in writing' it would be recommendable if the parties, wanting to make use of the exchange of data messages for the creation of the arbitration agreement, used an advanced electronic signature in the sense of Article 5(1)(a) of the Electronic Signature Directive.[412]

(1) Advanced Electronic Signatures

Electronic Signatures are, generally, admissible as evidence according to Article 5(2) of the Directive. According to subsection (1) of this provision *Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device: (a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and (b) are admissible as evidence in legal proceedings*.

Insofar as the signature has the task of providing evidence, it may be admissible as evidence in legal proceedings even if it is not based on a qualified certificate. Article 5(2) of the Directive on Electronic Signatures states: *Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is: - in electronic form; or – not based upon a qualified certificate; or – not based upon a qualified certificate issued by an accredited certification-service-provider, or – not created by a secure signature-creation device*. According to Article 7(1) of the Directive on Electronic Signatures also certificates which are issued to the public by a certification-service-provider established in a third country may be recognised as legally equivalent to certificates issued by a certification-service-provider established within the Internal Market. Annex I of the Directive on Electronic Signatures lists the requirements for qualified certificates and Annex II of the Directive the requirements for certification-service-providers issuing qualified certificates and Annex III of the Directive the requirements for secure signature-creation devices. Concerning the relation between Article 7(1) and subsection (2) of the Directive on Electronic Signatures it should be borne in mind that *a regulatory framework is not needed for electronic signatures exclusively used within systems which are based on voluntary agreements under private law between a specified number of participants; the freedom of the parties to agree themselves the terms and conditions under which they accept electronically signed data should be respected to the extent allowed by national law*.[413] For such systems Article 7(2) of the Directive provides that, however, their legal effectiveness and their admissibility as evidence should be recognised.

(2) Interpretation of the New York Convention in the Light of the Directive on Electronic Signatures

Would it be excessive to consider that the form requirement of a signature in the sense of Article II(2) of the New York Convention would be met by electronic signatures in the sense of Article 5 of the Directive on Electronic Signatures? Insofar as the Convention is directly applied in a Member State without particular regulations contained in the national arbitration laws, it appears unlikely that the courts of this Member State would consider that the acceptance of the electronic signature and the implementation of the Directive on Electronic Signatures would have an impact on the requirement of writing in the sense of the New York Convention. It may be doubted that the Convention would have to be interpreted on the basis of the Directive, but it may be argued that on the basis of the Directive Member States are obliged to legislate that the form requirements should be interpreted in the sense of the Directive, at least insofar as the international arbitration concerns Member States.[414]

b.-) International Transactions and US Law

Section 101(a)(1) of the US Electronic Signatures in Global and National Commerce Act provides as a general rule that a signature, contract or other record relating to a transaction in or affecting interstate or foreign commerce transaction shall not be denied legal effect, validity, or enforceability solely because it is in electronic form. According to subsection (2) a contract relating to such transaction shall not be denied legal effect, validity, or enforceability solely

because an electronic signature or electronic record was used in its formation. However, in the case of transactions with consumers which require the written form the consumer's consent to electronic records may be necessary according to Section 101(c) of the Act.

c.-) UNCITRAL Model Law on Electronic Commerce

The relevant provision of the UNCITRAL Model Law on Electronic Commerce states:

Article 7. Signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

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

(2) ...

The Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce states:[415]

The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques. Such an approach is used in a number of existing legal instruments, e.g., article 7 of the UNCITRAL Model Law on International Commercial Arbitration (...). It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.

Article 7(1) of the UNCITRAL Model Law on Electronic Commerce establishes a basic standard for the authentication of data messages. It provides guidance as to what might constitute an appropriate substitute for a signature if the parties used electronic communications in the context of a communication agreement. According to the Guide to Enactment[416] the following factors may, inter alia, be taken into account when determining whether the method is appropriate:

1. the sophistication of the equipment used by each party;
2. the nature of their trade activity;
3. the frequency at which commercial transactions take place between the parties;
4. the kind and size of the transaction;
5. the function of signature requirements in a given statutory and regulatory environment;
6. the capability of communications systems;
7. compliance with authentication procedures set forth by intermediaries;
8. the range of authentication procedures made available by any intermediary;
9. compliance with trade customs and practice;
10. the existence of insurance coverage mechanisms against unauthorised messages;
11. the importance and the value of the information contained in the data message;

12. the availability of alternative methods of identification and the cost of implementation;
13. the degree of acceptance and non-acceptance of the method of identification in the relevant industry upon and the time when the data message was communicated;
14. any other relevant factor.

This leads to the conclusion that the Model Law's provision on electronic signatures in Article 7(1) would require additional regulations on the sufficiency of the method used. It establishes the consequences of an electronic signature without indicating the circumstances in the presence of which the method used will be considered as satisfactory. Different from the EU Directive on Electronic Signatures Article 7 of the UNCITRAL Model Law does not even define the term 'electronic signature', and it contains a reference to this term only in the headline. However, since the Model Law dates from 1996 it would have been difficult for the drafters to envisage the technological development which induced the drafters of the EU Directive to differentiate between 'advanced' and other electronic signatures.

For these reasons it is difficult to assert that Article 7(1) of the UNCITRAL Model Law on Electronic Commerce could provide guidance on the interpretation of the term 'signature' as used by Article II(2) of the New York Convention or Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. This means that in the case of electronic commerce, the parties wanting to make use of means of electronic commerce for the conclusion of an arbitration agreement should be able to rely on such methods if the agreement will be based on an exchange of documents, for example the exchange of emails. In the case of the conclusion of an arbitration agreement based on an Information Society's offer contained on its website, the recipient's order which might be made online by incorporating the Information Society service's business terms including an arbitration clause, would constitute the acceptance of the offer, leading to the formation of contract, if the website contains a binding offer. This contract may then include the arbitration agreement if the offer contains an arbitration clause. The other messages will lie in the communication which the Information Society service offers online on the Internet and also in the Information Society's confirmation of the recipient's email.

4.3.6 **Contractual and Non-Contractual Disputes in Electronic Commerce**

Generally, arbitration which is based on arbitration agreements based on arbitration clauses in contracts between Information Society services and recipients concern disputes arising from the contractual relation. The dispute between the parties can relate to contractual or non-contractual issues. The law applicable to the arbitration will generally cover both types of disputes, and if the parties did not make an express choice with this regard their choice of the law applicable to the contract may assume a decisive importance. Contractual disputes will be of most concern, however, there may also be disputes outside of the contractual relation. Disputes which may not be covered by the scope of the contract can arise in the following fields:

Technical problems such as those of transmission and encryption;

Data protection;

Unjust enrichment;

Tort;

False advertising;

Intellectual property rights.

A contractual clause according to which the parties agree to settle disputes out-of-court should also cover non-contractual disputes. This appears useful in particular from the point of view of procedural economy.[417] According to many arbitration clauses suggested by institutions for arbitration also non-contractual disputes would be covered if they relate to the contract. In

principle, such clauses are interpreted broadly,[418] so that arbitration rules should not be drafted in a narrow manner which would exclude the settlement of non-contractual disputes between Information Society services and recipients.

a.-) Disputes Relating to Electronic Contracting Practices

Unless clear legal rules will be developed for cross-border electronic commerce, practices relating to electronic commerce may be controversial. In order to overcome these difficulties it has been suggested to rely on general codes of conduct, formal (bilateral) trading partner agreements, published terms and conditions (for example posted on the Internet). Also the Directive on Electronic Commerce obliges Member States and the Commission to encourage the drawing up of codes of conduct at Community level. The contractual practice and also the dispute settlement could relate to such codes of conduct. *A formal, bilateral trading partner agreement, which fully sets out all terms, would be ideal because it leaves the least room for misunderstanding. But the negotiation of a formal agreement can be time-consuming and difficult.*[419] In the absence of such codes it appears recommendable if the parties agreed on the application of rules of law which are adapted to their needs in electronic commerce. For example, the parties may by reference agree on the application of the UNCITRAL Model Law on Electronic Commerce, possibly modified or complemented by specially drafted rules which serve their individual needs. Of interest may also be EDI Model Agreements or Electronic Commerce Agreements. In the future it may be expected that particularly the institutions responsible for dispute settlement will suggest a set of legal rules, adapted to cross-border electronic commerce, via their rules for arbitration. The parties, by referring their dispute to the institution, would subject the arbitration to the proposed set of rules, unless they chose a particular law applicable to the arbitration.

b.-) The Online Environment

Jurisprudence is closely related to the concept of territoriality. To the contrary, the Internet does not depend on such concepts. This is particularly obvious in the case of Websites which use generic Top Level Domains (gTLDs) such as '.com' or '.org'. If the Information Society service does not indicate the address of its offices, the recipient is unable to establish the location of the service. This may be different, if the Information Society service uses a national Top Level Domain such as '.at' for Austria, '.fr' for France of '.uk' for the United Kingdom. But likewise, the Information Society service may not be in the position to identify the place where the recipient is established or domiciled.

(1) The 'Delocalisation' of Electronic Commerce

The justification for the application of certain legal rules which focus on the concept of territoriality is less obvious in Cyberspace. The application of principles of the private international law which regulate the conflicts of law with reference to traditional territorial concepts, for example by focusing on the place where the parties are domiciled or, in the case of legal persons, established, seem questionable in the case of ubiquitous computer networks such as the Internet and global electronic commerce. *Private international law was seen as a branch of public international law, sharing a common concern with the values of comity and common commitment to preserving the co-equal territorial sovereignty of countries and States. In the intervening years, this way of thinking has fallen into decline in common law jurisdictions. There is no 'superlaw' vesting exclusive prescriptive authority in particular States over particular classes of interjurisdictional activities or events.*[420] The discussion about the lex mercatoria (lex electronica, lex informatica, cyberlaw or netiquette) and the need to develop transnational legal principles applicable to mass cross-border contracts in electronic commerce evidence the difficulty to apply the traditional conflicts of law principles in electronic commerce.

(2) Insufficiency of the Principle of Territoriality

In a virtual environment the use of the principle of territoriality does not necessarily provide a connecting factor which may justify the application of the law of a certain state. Whereas it is true that states are free to regulate the legal order within their territories and, accordingly, provide also a solution in the case of a conflict between laws, the solutions adopted (for example the Brussels Convention of 1968 and the Rome Convention of 1980) concerning procedural and private law focus on the place where the parties are domiciled or established and where performances are made. In the case of electronic commerce the place from where a computer is operated or where a party is established or domiciled is of much less importance, because electronic commerce is 'delocalised'. For a party to a contract the place of establishment of the other party remains generally irrelevant, unless the place implies certain inconveniences which are often not related to the contractual performance, but derive from the application of traditional principles of conflicts of law. Within the Internal Market the national territory from which an Information Society service operates should generally be irrelevant. That it may not be relevant may have to be attributed, inter alia, to questions concerning the jurisdiction applicable in the case of disputes. In order to overcome such disadvantages efficient systems for cross-border arbitration should provide their services with two aims: first, the establishment of legal security in electronic commerce by providing rules on the law to be applied to the arbitration which the parties could implement into their cross-border contracts by reference, and, secondly, the offering of arbitration services for cross-border disputes which offer a simple and efficient means of dispute settlement, also in the case of disputes relating to mass contracts or consumer contracts.

(3) Establishment of a Set of Legal Rules Applicable to Cross-Border Disputes in Electronic Commerce

It might be appropriate, instead of applying the law of a particular state to the dispute, to establish a set of rules which would, in any international dispute of a similar nature, be applicable within the Internal Market. Such a solution would not interfere with Member States' rights to regulate their national legal system according to political considerations, but it would give effect to the thought that within a particular environment, namely within the relations between Information Society providers and recipients, national laws do not necessitate a differentiated treatment whereas the need for an unfettered growth of the Internal Market's electronic commerce calls for a unitary set of rules applicable to all disputes. The autonomy of the parties permits the choice of a non-national law as the law applicable to the arbitration. Such a choice may be performed through the selection of an arbitral institution which offers a set of law in its rules for arbitration, providing, for example, that the rules for arbitration shall be deemed to be a part of the parties' arbitration agreement if they charge the institution with the settlement of the dispute.

In the case of international arbitration there is no doubt that such a set of rules could effectively established by institutions responsible for arbitration in their rules for arbitration which would, by reference, be applicable to disputes referred to these institutions by the parties. The parties themselves would thus be deprived of the difficult task of establishing such rules of law for their individual contract in their contractual negotiations and the arbitrators with the task of applying in each case a different law to the arbitration, depending on the individual arbitration agreement. However, this does not mean that the parties should not do this if their interests justified such efforts, for example in the case in which the contract involves a considerable financial consideration.

c.-) Expedited Arbitrations and Small Claims Arbitration

Expedited arbitrations or small claims arbitration are a particular means of arbitration accommodated to serve the needs of the parties in a speedy and inexpensive procedure.[421] Generally, the rules for expedited arbitrations will indicate the limits for claims which may be pursued according to such procedures, for example up to some € 50,000,[422] and, likewise, the rules for small claims arbitration may define the scope of such claims.[423] The claims which may be pursued by expedited arbitrations. The period within which the procedure of expedited arbitrations should be terminated may be three months from the date on which the case was referred to the arbitrator[424] so that the arbitrator and the parties may have to speed up the operations in order to comply with such a requirement. Without a time limit for the duration of the whole arbitration procedure, in small claims arbitration the period within which the arbitral tribunal may have to render its decision, calculated from the receipt of the last statement or a reply of a party or, if there is no 'documents only' procedure, from the last hearing of the parties by the arbitral tribunal, may be fixed at three weeks.[425] In the traditional arbitration which may have a duration of up to six months or more it may have been reasonable if the arbitrator would have asked the parties to prepare for a one-day hearing, giving each side three hours to present their case, the witnesses being present, and relying insofar as possible on written statements.[426] The resort to 'documents only' proceedings is not always useful, because in complicated cases the parties may present thousands of pages of documentation so that a hearing may be useful in order to facilitate the weighing of statements, assertions and facts.

Expedited arbitrations (and also small claims arbitration) rely on rules with shorter deadlines and more extensive powers for the arbitrator to curb delays.[427] The abandoning of oral hearings and the resort to 'documents only' proceedings may accommodate online arbitration. The rational use of digital communications may even facilitate expedited arbitrations. However, it should not be overseen that expedited arbitrations mean a different style of work for the arbitrator, the parties and their lawyers. The parties have to prepare their statements in a very short time. Their communication with lawyers which may be necessary for the drafting of such statements, including the discussion of possibilities to offer evidence, is limited. Parties and their lawyers will have to dedicate within a limited period much of their time to the arbitration proceedings so that expedited arbitrations may be recommended for minor disputes. Expedited arbitrations online may thus be particularly apt to serve the needs of the parties of disputes concerning mass contracts or consumer contracts. But the arbitrator and the arbitral institution should be aware of the risk that a party may attempt to argue a violation of its right to a fair procedure if short deadlines prevent it from supplying a statement or reply. For this reason it may be wise for the arbitrator to apply a generous policy with regard to requests for extensions of delays.

4.4 Acceptance of Rules of the Institution Responsible for Arbitration by the Parties

The parties are free to select in their arbitration agreement rules which differ from the rules of the institution chosen. Thus the ICC standard arbitration clauses provide a clause for appointments under the UNCITRAL Rules:[428] *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination of invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the International Chamber of Commerce (ICC) acting in accordance with the Rules adopted by the ICC for this purpose.* By the choice of the institution responsible for arbitration, the parties generally agree on the rules of this institution. For example, the corresponding Article 6 of the Rules for Arbitration of the International Chamber of Commerce states: *(1) Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration*

proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

4.4.1 **Law Applicable to the Arbitration Procedure: Rules for Arbitration of the Arbitral Institution and/or National Arbitration Law?**

Institutions offering arbitration services generally have adopted arbitration rules which govern the arbitration procedure. In consequence of the parties' choice of the law applicable to the arbitration procedure the national law applicable at the place where the parties are domiciled or established or the law applicable at the place or seat of the arbitration may no longer be relevant: *...international commercial arbitration may be entirely 'detached' or separated from the 'national' laws of the parties: it shall only be governed by the rules of arbitration chosen by the parties or referred to by the parties in their agreement... One thing is clear beyond all question: once the parties have chosen a law to govern the arbitration proceedings, there is no room for the laws of the country of the parties. In other words, once the parties have agreed to submit to international arbitration under the Rules of the International Chamber of Commerce, there is no possibility to rely, against the ICC rules, upon any provision of the (... national laws of the parties). I must find that the ICC Rules, expressly accepted by the parties, constitute the law governing the objection raised by the defendant.*[429] These principles are of considerable importance in the case of cross-border arbitration in electronic commerce.

4.4.2 **Arbitration Rules and Mandatory Rules of National Law**

The effect of the choice of arbitration rules is that national arbitration laws are not applicable unless the latter contains rules of mandatory law. The parties cannot exclude the application of mandatory provisions. With this regard Section 4 of the Arbitration Act (England) 1996 contains a straightforward regulation by listing any mandatory provisions in a schedule.[430] These provisions relate to, inter alia, the application of the Limitations Acts, the liability of the parties for fees and expenses for arbitration, the immunity of the arbitrator, the determination of a preliminary point of jurisdiction, the enforcement of the award or the immunity of arbitral institutions. These provisions have effect, notwithstanding any agreement to the contrary. According to Section 4(2) of the Act all other provisions allow the parties to make their own arrangements by agreement but in the absence of such an agreement the rules contained in the Act will be applicable. The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.[431]

Apart from mandatory rules of law which may be expressly identified in national arbitration laws,[432] those rules are mandatory which reflect the 'public' interests of states and which have been enacted as part of the substantive law. Such mandatory norms which reflect public policy may be export and import control laws, exchange control regulation, price laws, antitrust, labour, customs, tax laws and similar rules.[433] Even though the Rome Convention is not applicable to arbitration, its balancing of interests of states and private persons in the private international law may be inspiring: With regard to mandatory norms Article 7(1) of the Rome Convention states *that effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*' In application of this principle arbitrators may have to consider the relevant mandatory norms of those countries where the enforcement of the arbitral decision is likely. However, the express exclusion of arbitration from the scope of the Rome Convention in Article 1(2)(d) would be frustrated if the principles of the Convention should be applicable to arbitration. Accordingly, arbitrators will only have to take into account those mandatory rules of the law which may constitute public policy.

4.4.3 Adaptation of Arbitration Rules to the Use of Means of Electronic Commerce

The Rules of institutions concerned with arbitration should be adapted to the use of means of electronic commerce.

a.-) Notice of Arbitration

If a party wants to resort to arbitration, it has to notify the other party (notice of arbitration). The notice of arbitration and other communications concerning the arbitration are deemed transmitted when they are sent to the other party by telex, telecopier or other electronic communication system, by registered letter or courier or other comparable method of delivery, depending on the arbitration agreement between the parties.

The notice of arbitration should contain:

1. the demand that the dispute be referred to arbitration;
2. the names and addresses of the parties, of the claimant's representative;
3. copies of the arbitration clause and the contract;
4. statement of the nature of the dispute and the amount involved;
5. the relief or remedy sought.

b.-) Commencement of Arbitration Proceedings

The rules may provide that the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by he respondent. If the notice is communicated by means of electronic commerce, the date of the receipt may be identified by using an automatic reply system, supplemented by the provisions of the UNCITRAL Model Law on Electronic Commerce which could be implemented into the rules.

c.-) Arbitral Institution

The arbitral institution will generally operate the arbitration through its secretariat. It acts through its organs or determines a supervising representative for the arbitration, keeps the official record of the arbitration, and receives copies of all communications exchanged between the parties and the arbitrator. Before the arbitrator is appointed, the arbitral institution may act through its organs as arbitration authority. The secretariat administers the documentation exchanged between the parties and the arbitral tribunal or the arbitrator, respectively witnesses and experts, any other persons and organisations involved in the arbitration procedure. It organises the archive and assists the chairman of the institution in the representation of the institution with regard to the parties.

d.-) Arbitrator

The parties which may be represented by a lawyer may appoint an arbitrator from the panel of arbitrators which are registered with the institution or also another qualified person, depending on the rules for arbitration of the relevant arbitral institution. Such rules may also provide for the establishment of an arbitral tribunal with three arbitrators, whereby each party names one arbitrator and the two select a third and presiding arbitrator.

e.-) Place or Seat of Arbitration

The arbitration shall take place at the place where the institution responsible for the arbitration is established unless the parties determine another place. The arbitrator exercises the powers of a commercial arbitrator under the laws of the State at the seat of the arbitration.

f.-) Law Applicable to the Arbitration

By referring the dispute to the institutions the parties are generally deemed to have subjected to the rules for arbitration. Unless the parties agree otherwise, the arbitration will be subject to and enforceable by the laws of the State of the place or seat of the arbitration. In the case of international arbitration according to the New York Convention the law applicable to the procedure will be the law of the place or seat of arbitration, unless the parties chose a different law.[434]

g.-) Online Procedures

The arbitration procedure will be carried out online. The communication shall be made by encrypted email with electronic signature, as available and agreed upon by the parties. Hearings shall take place in the form of audio- and videoconferencing or other electronic means including telephone conferencing. The taking of evidence by experts and witnesses shall be made in electronic form, unless given in writing. Unless the use of online proceedings is based on the arbitrator's initiative, the costs for the use of such technologies shall be borne by the party who requests it, in the absence of agreement by both parties based on equitable principles.

(1) Discretion of Arbitrator

The date, time and use of technological means for audio- and videoconferences are fixed by the arbitrator. The arbitrator determines the rules of procedure for the arbitration in accordance with the rules for arbitration. He establishes the rules of evidence and determines the admissibility, relevance and materiality. The arbitrator determines the language of the arbitration with reasonable provision for the translations of testimony. Preference shall be given to the language of the contract. The arbitrator shall give each party an opportunity of substantiating his claims and of presenting his case. Within the period of time determined by the arbitrator the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars; the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit. Either party may amend or supplement his claim or defence during the course of the arbitral proceedings unless the arbitrator considers it inappropriate to allow such amendment having regard to the delay in making it. The parties, and failing their agreement, the arbitrator determine the time for the making of statements of facts supporting his claim, the points at issue and the remedy sought, whereas the respondent shall state his defence in respect of these particulars.

(2) Critical Sectors of Online Procedures

It appears appropriate to identify critical areas where a regulation may be needed. These are, in particular, the determination of the time of receipt of data messages (which may be achieved by reference to the UNCITRAL Model Law on Electronic Commerce)

1. determination of sending and receipt of data messages;
2. allocation of risks for the malfunctioning of the communication systems;
3. measures ensuring the confidentiality and data safety;
4. regulation on access and storage of electronic data by the institution responsible for arbitration.

h.-) Measures and Awards

Upon the request of a party the arbitrator may take interim measures in the form of an interim award. But the parties may also apply to a court in order to obtain interim measures prior to the arbitration proceedings. Should a party not comply with the arbitrator's demand for documents or

fail to conform to the provisions of the Rules of Arbitration the arbitrator may make the appropriate orders, interim awards or a final award based upon the evidence before him. Time periods or procedural requirements of the Rules may be waived or extended by the arbitrator.

The final award shall be made in writing, signed and indicating date and place within a period of 45 days after the matter has been submitted for decision. The electronic copy of the award shall be provided with an advanced electronic signature. The award shall contain the reasons, unless the parties agreed that no reasons shall be given. Within a period of twenty days the parties may request the arbitrator to correct any errors in the award. A party may obtain the confirmation of the arbitrator's award with a court of competent jurisdiction 'in order to effectuate the enforcement of the award in any and all courts throughout the world'. Concerning the applicable law the Rules state that the arbitrator shall apply the laws of the State of California unless the parties agree that the arbitrator shall apply the law of some other jurisdiction.

4.4.4 **Rules on Law Applicable to the Substance of Dispute, the Arbitration and the Arbitration Agreement**

The rules for arbitration of arbitral institutions generally provide that the arbitrator shall decide on the substance of the dispute in accordance with the law chosen by the parties. If the parties designate the law of a particular state as the law applicable to the contract, this reference shall be construed as directly referring to the substantive law of that state and not to its conflict of laws rules.

If the parties did not make a choice of the law the arbitrator may decide with due regard to the terms of the relevant contract and taking into account applicable trade usages. Further, the arbitrator may also decide as amiable compositeur or ex aequo et bono, provided that the parties have expressly authorised him to do so.[435] The rules for arbitration may provide that the law applicable to the arbitration procedure shall be the arbitration law of the place or seat of arbitration, unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration.

4.4.5 **Data Security**

Arbitration by means of electronic commerce involves the communication of data via computer networks. This creates particular risks for the parties of the arbitration, the arbitrator and the arbitral institution.

a.-) Data Protection

International arbitration by electronic means may involve the processing of personal data. The EU Commission's Data Protection Working Party issued an Opinion on certain data protection aspects of electronic commerce.[436] According to Article 6 of the Data Protection Directive[437] personal data must be collected fairly, for specified, explicit and legitimate purposes, and processed in a fair and lawful manner in line with those stated purposes. Processing of data, if done for purposes of an electronic arbitration system, takes place on legitimate grounds, since it may be considered to take place with the party's consent, based on the request for arbitration and thus on contract, including considerations based on the balancing of interest in the sense of Article 7 of the Data Protection Directive. Insofar as the processing takes place for purposes related to the operation of the electronic arbitration system, for example in the case where a consumer fills in an electronic complaint form with his personal data, including private telephone numbers, and emails it to the electronic arbitration system where the personal data are collected, copied and stored and also communicated to the arbitrator, the other party and possibly experts and witnesses, would be covered by the purpose. According to Article 4 of the Data Protection Directive the electronic arbitration service will be subject to the national data

protection law of the Member State where it is established. In the case where such data are communicated out of the territories of Member States, particular rules may have to be applied.[438]

b.-) Data Security and Confidentiality

It has been recognised that the protection of personal data in the online environment of arbitration may constitute a problem:[439] *While it is easy to imagine how ADR will work, in the general sense, to resolve disputes related to consumer protection like failure to deliver a good or delivery of a non-confirming good, it is more difficult to grasp how ADR will work for disputes related to protection of personal data, as privacy is more intangible. This is why it is very important for data protection commissioners and other privacy experts to provide their expertise and experience on dealing with privacy disputes arising online or more generally, as international organisations examine these issues.* If the communication of personal data out of Member States will become necessary, the arbitral institutions established in Member States will have to observe the relevant rules on data transfer.

The rules for arbitration should provide on data security and confidentiality. Basic 'model' rules for individual agreements are contained in the European Model EDI Agreement which obliges the parties in Article 6(1) and (2) to implement and maintain security procedures and measures in order to protect messages against the risks of unauthorised access, alteration, delay, destruction or loss. The scope of this obligation includes the verification or origin and integrity in order to identify the sender of the message and to ascertain that the message received is complete and has not been corrupted. According to Article 7(1) of the Agreement the parties shall ensure that messages which contains confidential information be maintained in confidence and are not disclosed or transmitted to any unauthorised person nor used for any purposes other than those intended by the parties.

c.-) Encryption

An effective approach to maintain fair information practices should combine data protection principles with technical arrangements which allow the most efficient and least intrusive compliance. Thus:[440]

1. *sensitive data must be encrypted;*
2. *information and communication technologies must enable users to control and give feedback with regard to his personal data;*
3. *anonymous access to online services should be available;*
4. *secure encryption methods must be a legitimate option for Internet users;*
5. *quality stamps certification should be explored to improve transparency for users*.

Encryption may thus appear as a necessary tool for the maintenance of confidentiality. By reason of the different degrees of confidentiality which has to be achieved, the technical means and the legal rules may vary. the optimum approach may be to adapt the level of degree of confidentiality to the circumstances of the individual case. thus unless the parties have particularly agreed ion this issue, it may be appropriate for the arbitral institution or the arbitrator to make a decision. Concerning the availability of encryption methods digitally based technologies provide *robust security for conventional and cellular telephone conversations, facsimile transmission, local and wide area networks, communications transmitter over the Internet (email etc.), personal computers, wireless communication systems, electronically stored information, remote keyless entry systems, advanced messaging systems, and radio frequency communications systems*.[441] Simple to use technical encryption methods may even be available through common software for the word processing operations of computers.[442] Encrypted file

systems may provide the individual computer user with an easy to use 'point and click' encryption, enabling even relatively inexperienced parties to arbitration procedures to encrypt data without much technological effort.

4.4.6 **Arbitration Clause Based on General Terms of Contract**

The New York Convention does not establish particular rules for the conclusion of the arbitration agreement. Accordingly, an arbitration agreement may well be based on general terms and conditions of contracts employed by one of the parties to the contract, provided that the requirements of form are met. Thus also arbitration agreements based on general clauses with consumers appear to be enforceable on the basis of the New York Convention. Only with regard to the enforceability of the arbitral awards problems may occur in those countries where rules of mandatory consumer protection law which established particular requirements in excess of the form requirement of the New York Convention are also establishing the public policy.

Many national arbitration laws require that the effectiveness of the arbitration agreement presupposes the written form. According to Article 807 of the Italian Code of Civil Procedure also an electronic document may qualify with this respect provided that it has a digital signature.[443] This includes also digital contracts containing arbitration clauses with consumers in the sense of Article 1469-bis of the Italian Civil Code. According to this provision, subsection (3) No. 18, a contractual clause in a consumer contract will be without effect if it contains a derogation from the jurisdiction of the courts and this rule is also applicable in the case of consumer arbitration.[444]

In comparison with EU law, in particular with regard to the provision of letter 'q' of the Annex of the Directive on Unfair Terms in Consumer Contracts, according to which clauses are unfair by means of which the dispute is referred to exclusive arbitration, not regulated by legal rules, Italian law establishes a stricter standard. However, it has not yet been decided whether a violation of this rule would mean that a foreign award could not be enforced in Italy on the basis of the New York Convention by reason of a violation of Italian public policy. Yet is seems that there should be no problem arising from consumer arbitration if the parties agreed independently of the consumer contract in a separate electronic document, digitally signed, on the out-of-court dispute settlement by arbitration.[445]

a.-) Online Arbitration Clauses

In their contracts the parties may stipulate that any questions relating to the interpretation of the contract and any legal disputes arising from the contract shall be referred to arbitration. The parties may agree on arbitration in an ‘Ad Hoc Clause’ or they may refer to arbitration by the institutions for arbitration. The standard ICC Arbitration Clause states, for example:[446] *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*

The Electronic Commerce Agreement of the United Nations Centre for Trade Facilitation and Electronic Business[447] refers in the objectives to the emerging legal framework of the global marketplace for electronic commerce. It intends to serve the commercial requirements of business-to-business electronic commerce partners. In relation to EDI Agreements, the Electronic Commerce Agreement is more general, so that commercial partners engaged in contractual relations exclusively based on EDI are recommended to continue to use the EDI Interchange Agreement. Chapter 1, Article 4.5 of the Electronic Commerce Agreement deals with *Choice of Forum*. Alternative 2, suggesting an arbitration clause, states: *Any dispute arising out of or in connection with this E-Agreement, including any question regarding the existence*

validity or termination hereof, shall be referred to and finally resolved by the arbitrator of one/or three person(s) nominated by ... in accordance with and subject to the rules of procedure of ...

The online arbitration clause should be drafted carefully, because it may possibly encounter two major challenges. First, the clause may have to answer the requirement of form according to Article II of the New York Convention. Second, it may have to comply with mandatory rules of consumer protection law. For these reasons, it may be recommendable to draft the clause independently of the other clauses of the contract and to provide a particular interactive tool so that the clause can be considered as an arbitration agreement which was signed by the parties independently of the contract.

b.-) Ad Hoc Clauses

Parties do not have to rely on established institutions responsible for arbitration if they want to have their dispute decided by arbitration. They may agree on 'ad hoc' arbitration. *In such an event parties themselves have to organise an ad hoc arbitration. This presumes that they – or the arbitrators later – set their own rules for their arbitration proceedings. However, to draw up detailed rules in an arbitration clause is not only laborious but in fact unfeasible, when the nature of the dispute is yet unknown, and once a conflict has arisen it is often difficult for parties to agree on procedural rules. Parties should therefore restrict themselves to some general guidelines in the arbitration clause.*[448]

A typical ad hoc clause relating to arbitration is as follows:

1. *Any difference, dispute or claim arising out of or in connection with this contract concerning its validity, scope, meaning, interpretation, application or termination including all agreements to modify or supplement the contract and all acts of the parties which are based on it shall be finally settled by arbitration.*
2. *The seat of arbitration shall be in ...*
3. *The Arbitral Tribunal shall consist of three members [alternatively, and please modify the subsequent text correspondingly] a sole arbitrator.*
4. *The party which desires to refer a dispute to arbitration shall notify the other party by a formal demand in writing to this effect which shall be duly served upon the respondent party by registered letter. The demand shall include the name and address of the appointed arbitrator, who may be a citizen of any country, as well as the subject of the dispute and the claim...*
5. *The respondent party shall, within one month after service of such communication appoint its arbitrator and notify the first party about it by registered letter stating the name and address of the arbitrator.*
6. *Should the party which has received the notification of the dispute being referred to arbitration fail to appoint the second arbitrator within the indicated period, the latter, at the request of the other party shall be appointed by...*
7. *If the two arbitrators, selected in accordance with the above provisions, within one month after the appointment of the second arbitrator, fail to agree on the appointment of the third arbitrator, who shall act as chairman of the Arbitral Tribunal, the latter, at the request of either party shall be appointed by...*
8. *If an arbitrator is unable to perform his task due to death, resignation or any other reason which renders participation in the proceedings impossible, he shall be replaced by an arbitrator to be appointed according to the rules applicable to the appointment of the replaced arbitrator.*

9. *After consultation with the parties, the Arbitrators shall select a time, date and place at which each session of the arbitration shall take place. The parties and their counsel shall be notified in writing by the Chairman of such times, dates and places.*
10. *The parties shall extend to the Arbitral Tribunal (Arbitrator) all facilities for obtaining any information required for the proper determination of the dispute. The absence or default of either party shall not prevent or hinder the arbitration procedure in any or all of its stages.*
11. *The language of the arbitration shall be English. Parties may use French... for their pleadings and written statements, but each party must furnish an English translation thereof if the other party so requests. Parties may be accompanied at their expense by their own interpreters.*
12. *The arbitrators shall apply the law of [State...] to the substance of the dispute, the Private International Law Rules being excluded.*
13. *The award shall be issued within 12 months from the election of the Chairman and no later than forty five (45) days following the last hearing in the matter. Failure to comply with this deadline shall not ipso iure terminate the mandate of the Arbitral Tribunal (Arbitrator).*
14. *The award which shall set out the reasons for the decision, shall include a direction concerning the allocation of costs and expenses of and incidental to the arbitration, including arbitration fees.*
15. *The parties shall comply in good faith with any provisional measures indicated by the Tribunal. If a party does not comply, or complies insufficiently, with any such measure, the Tribunal (Arbitrator) may draw therefrom the conclusion it deems appropriate.*

Ad hoc arbitration clauses without indicating the possible rules of the institutions responsible for arbitration may violate consumer protection laws.[449]

c.-) Arbitration Clauses

Arbitration clauses are offered by international instruments relating to international arbitration, but particularly by arbitral institutions and in general business terms.

(1) UNCITRAL-Arbitration Clause

The clause recommended by the UNCITRAL-Arbitration Rules is as follows:

Any dispute or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The Appointing Authority shall be...

The number of arbitrators shall be...

The place of arbitration shall be...

The language(s) to be used in the arbitral proceedings shall be...

(2) Typical Arbitration Clause

The International Chamber of Commerce in Paris suggests the following clause:[450]

All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

(3) Typical Arbitration Clause Including Pre-arbitral Referee Procedure

For parties which want to include ICC pre-arbitral referee procedures the ICC recommends the following clause:[451]

Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules. All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in accordance with the said Rules.

(4) Typical Expertise Clause

The ICC suggests the following model expertise clause for parties wanting to resort to ICC expertise:[452]

The parties to this agreement agree to have recourse, if the need arises, to the International Centre for Expertise of the International Chamber of Commerce in accordance with the ICC's Rules for Expertise.

(5) Multi-Party-Arbitration Clause

In the case of a chain of contracts it may be recommendable to assure that all parties involved in such a project agree on arbitration. A clause which involves such a multi-party-arbitration could state:[453]

Additional Parties.

No additional party shall become a party to any project document or a contract referred to in below, unless such a party becomes a subscribing party to this Agreement by executing a counterpart hereof.

Additional Contracts.

No two or more parties shall enter into a contract with one another relating to the project document and no party shall enter into a contract relating to the project document with a person not a party to this Agreement which alters or amends in any material respect any of the rights or obligations of any party under any project, unless (i) such contract is first added to Schedule A hereof and thereby becomes a project document and (ii) a clause is included in such contract stating that any dispute arising thereunder shall be exclusively and finally resolved pursuant to the provisions of this Agreement and that all parties to any such contract expressly consent to be bound by this Agreement as if signatories hereto.

4.5 Organisation of the Arbitration in Cyberspace

The organisation of the arbitration in cyberspace could be based on the existing framework for voluntary international arbitration. However, neither the rules contained in the international conventions not those establishing procedural rules for arbitration contain references to electronic commerce. Accordingly, the parties may, in their arbitration agreement, establish particular rules for the arbitration procedure by means of electronic commerce. But since it can hardly be expected from most parties to draft such rules, it would be more appropriate if the arbitral institutions adapted their rules to arbitration by means of electronic commerce.

Article 19 of the UNCITRAL Model Law on International Commercial Arbitration deals with 'determination of Rules of Procedure'. Subsection (1) gives the parties the power to agree freely on the procedure to be followed by the arbitral tribunal. However, if the parties failed to make such an agreement, *the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate*. If the parties submit their arbitration to a permanent arbitral institution, *the arbitration proceedings shall be held in conformity with the rules of the said institution.*[454]

4.5.1 **Ad Hoc Arbitration**

The Geneva Convention contains in Article IV detailed rules for the organisation of an ad hoc arbitral procedure. This is particularly useful, because in ad hoc arbitration the arbitrator cannot rely on arbitration rules which determine the framework for the arbitration. The Convention refers to 'ad hoc' arbitration as 'settlement by arbitrators appointed for each case', from which it differs arbitration by permanent arbitral institutions in Article I(2)(b). In the case of arbitration by means of electronic commerce it is less likely that the parties will rely on 'ad hoc' arbitration, taking into account of the fact that generally only established institutions responsible for arbitration will be able to offer the use of satisfactory technological means for arbitration which are employed in electronic commerce.

4.5.2 **Means of Electronic Commerce**

The rules of procedure applicable to the arbitration may be chosen by the parties. The parties may expressly provide for the use of online technologies, but they may also charge an institution responsible for arbitration which makes use of online technologies. If such an institution conducts the arbitration proceedings by means of online technologies and refers to such a use in its rules, the party's selection of the institution generally implies the consent with the use of such means.

Since the choice of the procedural rules is up to the parties, the arbitration proceedings can much easier be adapted to the new technologies of electronic commerce than court proceedings which are based on laws.[455] However, the need to have the resulting arbitral award recognised and enforced according to the New York Convention establishes limits for parties and institutions responsible for arbitration in the use of such technologies.

a.-) Videoconferencing

Some national arbitration laws refer expressly to the use of new technologies.

(1) Regulation of Videophone Conference According to Italian Arbitration Law

The Italian Law No. 25 of 1994 which amended Article 837 of the Italian Code of Civil Procedure permits the use of videophone conference as a basis for awards in international arbitration.[456] The provision authorises an arbitral tribunal to make the award, meeting in personal conference or videophone conference, unless the parties have decided otherwise.

The notion of the personal meeting on which the deliberation of an award made by an arbitral tribunal must be based is broad. It does not depend on the physical presence of the arbitrators, a videophone conference is sufficient ('conferenza videotelefonica'). A videophone is a telephone with a screen according to the definition of Annex I of the Directive on Distance Contracts.[457] But a mere telephone conference is not sufficient, because it does not permit the arbitral board the necessary element of dialectics.[458] Since the provision is not a rule of mandatory law the parties may also indicate a particular method for the deliberation, for example a telephone conference.[459] However, even if the parties excluded expressly the possibility of a videophone conference, the arbitral award based on such a conference would not be without effect according to the Italian law, it would merely be in breach of the contract between the arbitrators and the parties.[460] It is controversial whether the agreements between the parties concerning a general permission for the use of videoconferencing should be in the written form. According to one view the consent of the parties establishes a rule for the arbitration procedure which would have to be regulated in the arbitration agreement and, accordingly, the written form would be required. But the adherents of the other view assert that no particular form would be

required, because the legislator would have provided for it had it considered that a particular form was necessary.[461]

(2) Rules of Milan Chamber of National and International Arbitration

It was the aim of the Italian legislator to adapt the procedure of international arbitration to the use of new technologies permitting a reduction of costs and of time through the permission of videophone conferencing.[462] The International Arbitration Rules of the Milan Chamber of National and International Arbitration provide in Article 18(1): *Where an arbitral tribunal has been appointed, the award shall be deliberated by the arbitrators meeting in personal conference or videoconference, also at a place other than the seat of the arbitration, and shall be set down in writing*... The English version of the Rules uses the term 'videoconference' without referring to the concept of 'videophone conference' as used in Article 837 of the Italian Code of Civil Procedure. It is the only reference contained in the Rules which relate to videoconferencing.

(3) Applicability of Regulation Concerning Videophone Conference to Videoconference

Italian authors discussed whether the use of videoconferencing by telephone, which is envisaged by Article 837 of the Code of Civil Procedure, would also be applicable to other technological means of videoconferencing, for example to videoconferencing via the Internet.[463] This appears questionable, because the qualities which telematic networks offer are different from those of telephone connections, not at least concerning the safety of the communications. It may also be questioned whether, according to the Italian law, use may be made of email, and other telematic means of communication, for example chats. According to a narrow interpretation of the law it appears that even the use of data messages for international arbitration would not be possible. However, the non-mandatory provisions of the Italian law regulate the international arbitration only insofar as the parties have not made use of their autonomy to choose the law applicable to the arbitration. Thus the Italian law which permits the use of videophone conferencing could limit the arbitrator in the use of other digital means in international arbitration only if the parties did not make a choice of the law of procedure which could certainly include a comprehensive use of digital means for the arbitration procedure.

(4) Regulation of Videoconference and Webconference by ICANN's Policy

The Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers provides that the arbitrator may determine, in his sole discretion and as an exceptional matter that there shall be no in-person hearings *including hearings by teleconference, videoconference and webconference* unless the arbitrator determines in his sole discretion and as an exceptional matter that such a conference is necessary for deciding the dispute.[464] However, the Policy does not implement rules for arbitration, so that the arbitrator, when using his discretion, does not encounter risks deriving from a violation of procedural guarantees which an arbitrator in international commercial arbitration would have to face.

(5) Replacement of Traditional Hearings by Videoconference

Traditional rules for arbitration do not provide for hearings as a mandatory element of the arbitration procedure. For example, Article 14(1) sentence 2 of the Vienna Rules[465] provides that such hearings may take place at the request of either party or if the arbitrator(s) consider(s) it necessary.

Could a rule which replaces the term 'hearing' by the term 'videoconference' conflict with basic rights of a party which requests a traditional hearing to take place even if the party participated in a videoconference? If according to the law of the state where the ensuing award shall be

enforced a videoconference does not ensure that the parties can be heard in a manner which is similar to a traditional hearing, there may be a risk that the national authority concerned with the recognition and enforcement of the award may hold that it does not comply with the public policy of that state. However, this risk appears to be limited, particularly if the rules for arbitration provide for the storing of the audio- and videofiles and for their communication to the parties with a possibility for comments.

b.-) Email

Rules for arbitration of institutions for arbitration may permit for the use of email. However, up to now such rules often offer the use of email only as an alternative to other means of communication:[466] *Any notice or other communication shall be delivered by courier or registered mail, facsimile transmission, email or by other means of communication that provides a record of the sending thereof.* The rules may establish that the request for arbitration should include the email address of the parties and their counsel.[467]

If the parties decide on ad hoc arbitration, it may be recommendable to provide expressly on the use of emails for communication. In electronic commerce the use of emails for arbitration may be considered impliedly agreed upon. Concerning the time of the sending and the receipt of data messages it may be appropriate to rely on appropriate provisions of the rules contained in the UNCITRAL Model Law on Electronic Commerce or in the Electronic Commerce Agreement of UN/CEFACT.

(1) Regulation of Emails by ICANN's Policy

Concerning liability for the safe receipt of messages the Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers (ICANN) envisages in Article 2 that *when forwarding a complaint, it is the* [dispute settlement] *provider's responsibility to employ reasonably available means calculated to achieve actual notice to respondent.* The dispute settlement provider may discharge this liability, inter alia, by *sending the complaint in electronic form (including annexes to the extent available in the form) by email to (a) the email addresses for those technical, administrative and billing contacts, and (b) 'postmaster@(the contested domain name)', and (c) if the domain name (or*www.followed *by the domain name) 1resolves to an active webpage (other than an Internet Service provider's generic webpage used for parking domain names registered for multiple domain name holders), any email address shown or email links on that webpage*;... or by *sending the complaint to any address the respondent has notified the provider it prefers and, to the extent possible, to all other addresses provided to the provider by complainant. Except as provided above, or in the absence of specification, any written communication is to be done by telecopy (...) or electronically via the Internet, provided a record of its transmission is available.*[468] According to Article 5 of the Policy the response which has to be filed within 20 days after the commencement of the proceedings should contain, inter alia, the contact details of the respondent including his email and the preferred method of communication concerning electronic only material (and material including hard copy).

These rules on emails thus remain limited in scope. The use of emails remains accessory to the use of traditional means of communication. due to the limited need to provide confidentiality of the dispute which relates to names and trademarks which are used publicly the parties' interests in the provision of safety measures in the ICANN procedures are low.

4.6 Bindingness of International Arbitration

International arbitration according to the New York Convention or the Geneva Convention is binding. However, there may be other schemes which offer non-binding or partially binding arbitration, particularly in consumer arbitration.[469] But whereas awards rendered in such types of arbitration may be followed by the parties on the basis of national codes of conduct or similar arrangements, the non-binding arbitration remains of limited interests in the cross-border electronic commerce, unless such arrangements would affect the parties within the states concerned.

4.6.1 Chances for the Establishment of a New International System of Non-Binding Arbitration

Particularly in the Internal Market types of legally non-binding arbitration could be developed, possibly on the basis of codes of conduct referred to in Article 16 of the Directive on Electronic Commerce. However, the value of the establishment of regional systems for the settlement of disputes may be doubted when electronic commerce is global.

a.-) Lacking Legal Framework for the Enforceability of Decisions Abroad

Thus even though the establishment of rules for a system of non-binding arbitration within the Member States may have advantages, the interest in the establishment of such a system must be limited insofar as the 'enforceability' of the decisions would be limited to the observance of rules or codes of conduct which were applicable within a few states.

b.-) Competition Between Different International Systems

Additionally, the establishment of a regional system of non-binding arbitration by means of electronic commerce would have to compete with the international arbitration by means of electronic commerce according to the New York Convention which could offer the parties the enforceability of awards on a global basis. Thus there are good reasons why arbitral institutions should concentrate their efforts towards the establishment of rules for arbitration by means of electronic commerce which envisage the application of the New York Convention. Arbitration based on the New York Convention and also the Geneva Convention offers considerable advantages. By reason of the autonomy of the parties they may freely choose the law applicable to the arbitration. Few rules limit the work of the arbitral institutions and arbitrators in the operation of the arbitration system.

c.-) Risks for a System of Non-Binding Arbitration in the Internal Market

This does not exclude that in certain sectors, for example consumer arbitration, systems providing for non-binding or partially binding arbitration may be created. But in the cross-border commerce these systems may encounter problems. First, they may not fall within the definition of the term 'arbitration' in the sense of the Brussels Convention or Rome Convention.[470] As a consequence, these Conventions would be applicable and limit the possibility of the body operating such a system and the parties to agree on dispute settlement and the law applicable to such dispute settlement. Second, the bodies responsible for the operation of such a system would have to rely on a yet non-existing legal framework by means of which the parties or at least the Information Society services would declare to be bound by the decision rendered within the system. Third, the costs for the establishment and maintenance of a system may require the funding by a third person or the general public, taking into account of the fact that particularly in the cross-border dispute settlement specialist arbitrators may be needed who are acquainted with the use of foreign legal systems and languages, and this may affect the independence of the arbitrators.

4.6.2 Challenge of the Validity of the Arbitration Clause in Cyberspace

The validity of an arbitration clause can be challenged, depending on the place of arbitration.[471] A party may apply to a court ruling on the arbitrator's jurisdiction, depending on the relevant national laws applicable at the place of arbitration. A party may also apply for a court ruling on the arbitrator's decision on this issue. The other way, most countries permit an order for the stay of court proceedings if such proceedings were instituted in breach of an agreement to arbitrate.[472] Generally, a stay of arbitration proceedings or an injunction to stop arbitral proceedings may be sought from courts at the place where the arbitral procedure takes place, but occasionally also from courts which have personal jurisdiction over the respondent.[473] Concerning disputes about the nomination of arbitrators, most national laws, in particular laws of major arbitration centres, give jurisdiction to the courts at the place or seat of arbitration.[474]

4.6.3 Remedies Against an Award

The New York Convention does not regulate the issue of the challenge of the award by the parties in detail.[475] Under certain circumstances the Geneva Convention limits the reasons which may be advanced in an application for the setting aside of an award.[476] The UNCITRAL Model Law on International Commercial Arbitration envisages in Article 34 that a party may bring an application for the setting aside of an award. The reasons which can support the claim are the same which may be brought in proceedings for the recognition and enforcement of the award. According to Article 34(3) of the Model Law the application may be brought within a period of three months after the award has been notified to a party. National laws differ considerably concerning the possibility of remedies against awards. With regard to the settlement of disputes concerning electronic commerce no particular procedural rules are required to settle this issue. In particular the procedural guarantees envisaged by Article 17(2) of the Directive on Electronic Commerce do not seem to necessitate the admission of a remedy. State control of awards envisaged in connection with the recognition and enforcement of awards operates as a filter sufficient to prevent that awards containing wrong decisions may be executed. However, in the case of arbitration clauses based on general terms of consumer contracts it is strongly recommended to refer to the possibility of a remedy and to the rules of procedure in order to avoid any doubts that the clause might be unfair in the sense of lit. (q) of the Annex to the Directive on Unfair Terms in Consumer Contracts.

4.7 Necessity for the Amendment of National Laws to Facilitate Online Arbitration

The use of electronic means for dispute settlement may necessitate a modification of the relevant national laws or regulations concerning traditional out-of-court dispute settlement systems.[477] In order to permit an effective scheme for online arbitration a Member State may have to amend its national arbitration laws in order to extend the definition of the terms 'arbitration agreement', 'writing' or 'signature' in relation to an arbitration agreement and an arbitral award to cover also electronic data exchange. But taking into account that the Directive on Electronic Commerce does not oblige Member States to introduce new systems for dispute settlement, and that existing procedural regulations of court systems should remain unaffected by the proposed Directive,[478] the scope for legislative activities based on Article 17 of the Directive appears to be limited. Amendments including the regard of electronic data or messages in the definition of the terms have to be made by Member States on the basis of the Directive on Electronic Commerce and the Directive on Electronic Signatures. The parties should be able to conclude an arbitration agreement like any other contract in the sense of Article 9 of the Directive on Electronic Commerce by the use of means of electronic commerce and the requirement of a handwritten signature will be satisfied if the electronic document is provided with an electronic signature in the sense of Article 5 of the Directive on Electronic Signatures. Yet these amendments of national arbitration laws will not affect the enforceability of awards according to the New York Convention the text of which remains unaltered by the

amendments. But the national legislator may provide in the national arbitration law that the term 'arbitration agreement' in the sense of the New York Convention should be interpreted broadly which might include electronic messages.[479]

As has been explained above,[480] the UNCITRAL Model Law on International Commercial Arbitration which only seemingly uses a broader concept of 'agreement in writing' in fact bases the relevant text on the interpretation of the New York Convention. Based on this authority it may well be argued that the definition of the term 'arbitration agreement' in the New York Convention includes electronic documents so that Member States which expressly legislate that arbitration agreements and awards for which enforcement is sought according to the New York Convention should be recognisable and enforceable if they make use of means of electronic commerce, are unlikely to be in breach of the New York Convention. Considering the content of such national legislation, it is obvious that it should comply with the implementation of the Directive on Electronic Commerce and the Directive on Electronic Signatures. However, in order to achieve a unitary interpretation of the New York Convention, a unilateral step by EU Member States may not be recommendable with particular regard to the achievements of the UNCITRAL Working Group on Arbitration which has already been referred to.[481]

4.7.1 Consumer Arbitration

A variety of different schemes for the 'out-of-court dispute settlement' in the case of consumer contracts is used within the legal systems of Member States. Whereas contractual clauses based on general terms according to which disputes should be solved by arbitration would be permissible in some Member States,[482] such clauses might be without effect in other Member States.[483] Additionally, national consumer protection laws may apply different standards concerning the effectiveness of choice of law clauses and of general terms of contract which are published online, for example relating to the choice of law.

4.7.2 State of Origin and Consumer Protection in the Directive on Electronic Commerce

The principle of the state of origin is applicable to Information Society services according to Article 3(1) and (2) of the Directive on Electronic Commerce. Accordingly, a Member State shall ensure that Information Society services provided by a service provider established in its territory comply with the national provisions applicable in the Member State. These national provisions are those which fall within the scope of the issues regulated by the Directive. In this coordinated field Member States may not restrict the freedom to provide information society services from another Member State.

a.-) Information Society Services, State of Origin and Measures by Member States in Derogation of the 'State of Origin' Principle

Additionally, according to Article 3(4) of the Directive, Member States may take measures to derogate from subsection (2) in respect of a given Information Society service if the following conditions are fulfilled:

- the measure is necessary for the protection of consumers, including investors, taken against a given Information Society service which prejudiced the protection of consumers including investors, and proportionate to those objective,
- provided that the Member State has asked the Member State of origin to take measures if the latter did not take such measures or if the measures taken were inadequate and if the Member State has notified the Commission and the Member State of origin of its intention to take such measures.

There may be a conflict between, on the one hand, the requirement that Member States, where necessary, should amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels with the result that the amendment makes possible in law and in practice, even across borders, the functioning of such schemes genuinely and effectively,[484] and, on the other hand, Member States' power to regulate consumer protection. Recital 11 of the Directive on Electronic Commerce addresses the relation between the freedom of providing information society services and consumer protection. It recalls that the Directive is without prejudice to the level of protection for consumer interests as established by Community acts, such as the Directive on Unfair Terms in Consumer Contracts[485] or the Directive on the Protection of Consumers in Respect of Distance Contracts[486] and other secondary EU law establishing the 'Community acquis'. But the relation of the Directive with national consumer protection law is only marginally referred to in the Recitals. Recital 22 of the Directive refers to the aim that Information Society services should be supervised at the source of the activity, and Recital 23 indicates that the Directive does not establish additional rules on private international law relating to conflicts of law. Somewhat cryptic Recital 23 indicates that *provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society Services as established in this Directive*.

b.-) Observation of Mandatory Rules of Consumer Protection Law of the 'State of Reception'

In application of Article 3(3) of the Directive on Electronic Commerce and the provisions of the Annex, the 'state of origin' principle according to Article 3(1) and (2) of the Directive are not applicable 'to the freedom of the parties to choose the law applicable to their contract' and 'to contractual obligations concerning consumer contracts'. In particular, Recital 55 of the Directive recalls: *This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence*. Recital 56 of the Directive explains: *As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.* This means that the non-applicability of the 'state of origin' principle extends also to activities of the Information Society service which precede the contract, for example advertising, provided that these activities have a 'determining influence on the decision to contract'.

Especially in the smaller Member States with their territorially limited markets attempts are made to provide consumers with an overview concerning different foreign national laws. For example, the Austrian Consumer Complaints Board informs consumers online on the right to cancel contracts in Austria, Italy and Germany. These attempts to provide consumers with an overview are certainly appreciable, however, applied to the whole Internal Market this would mean that consumers in the EU might have to become acquainted with 15 different national legal systems and the possibilities for the cancellation of contracts. In the case of cross-border dispute settlement the relevant national laws of the Member State where the recipient is domiciled may be applicable, even if the parties have chosen the law of the Member States where the service provider is established, provided that the rule on the cancellation constitutes a rule of the mandatory consumer protection law.

Does Article 3(3) of the Directive which exempts the choice of the law from the 'state of origin' principle introduce the consumer protection mechanism provided for by Article 5 the Rome

Convention to arbitration in spite of the fact that this Convention excludes in Article 1(2)(d) arbitration agreements from the scope of its application? Unlike the Convention which calls in Article 5 for the application of the mandatory rules of protection of the Member State where the 'passive' consumer is domiciled, the Directive does not make an exemption from this rule for arbitration agreements. The wording in Article 5(2) of the Rome Convention (...*a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence*...) is not similar to the wording contained in the Annex of the Directive which relates to the derogations from the 'state of origin' principle (...*the freedom of the parties to choose the law applicable to their contract ... contractual obligations concerning consumer contracts*...). The fact that the Directive exempts those fields indicated by the Annex of the Directive from those fields which are coordinated by the Directive does not mean that it establishes a regime for the not coordinated fields. This means that in spite of the wording of Recital 55 which might suggest that, inspired by Article 5 of the Rome Convention, the Directive adopted a general system of consumer protection which would oblige Information Society services to observe the rules of the mandatory consumer protection law of the Member State where the consumer is domiciled, the Directive refrains from regulating this field. Accordingly, Information Society services and recipients should be able to rely on the exemption of arbitration agreements from the application of the Rome Convention.

c.-) Observation of Contractual Obligations Relating to Consumer Contracts of the 'State of Reception'

Obligations based on clauses regulating the dispute settlement may be considered as belonging to 'contractual obligations relating to consumer contracts'. Accordingly, rules of mandatory consumer protection law which regulate consumer arbitration in the Member State of the recipient may be applicable to the arbitration clause even if the clause was posted as a general business clause on the Information Society service's website in the Member State where the service provider is established and even if the clauses provide for the application of the law of that State. Such rules may, in particular, relate to requirements of the form of arbitration agreements and of arbitration clauses in terms of contracts used with consumers. The regulation of the consumer arbitration differs considerably between Member States. For an Information Society service which directs its activities to all Member States it would imply considerable work if it should envisage the application of rules of mandatory consumer protection law in contracts with recipients from other Member States which are consumers. In cross-border arbitration this could not only place a burden on the Information Society service but also on the arbitrator or decision maker who might have to apply the law chosen by the parties complemented by rules of mandatory consumer protection law of the Member States where the consumer is domiciled.

This might be a very difficult task, assuming that the place or seat of the arbitration is not in this State so that it would be complicated to obtain the necessary information about the relevant consumer protection law. If courts were concerned with such a case they would very likely ask for an expert opinion of a lawyer from that state, but in consumer arbitration the costs and time required for such an advice, including possible translations, would simply exceed the framework of the procedure which shall be speedy and of no or low costs. For this reason, the resort to international arbitration according to the New York Convention is strongly recommended. In such a case the parties, by reason of their autonomy, may freely select the arbitral institution and the law applicable to the arbitration, respectively, they may rely on the proposed set of rules concerning the applicable law in the institution's rules for arbitration.

d.-) Consumer Arbitration According to the New York Convention

For the parties of the consumer arbitration in the cross-border environment: it is of essential importance whether they will be able to rely on their arbitration agreement concluded according to the requirements of the New York Convention. The risks which they would have to take into consideration are that national courts, concerned with the enforcement of the arbitration agreement or the resulting award, would refuse the enforcement based on the argument that the subject-matter is not arbitrable according to the New York Convention or that the agreement or the award violate public policy. However, it appears that with regard to the favourable policy of the EU concerning arbitration of consumer disputes, in particular the European Parliament's Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts of 1994,[487] and the favourable policy of many Member States towards consumer arbitration,[488] including jurisprudence which recognises the arbitrability of international consumer disputes,[489]

In application of Article 17(1) and (2) of the Directive on Electronic Commerce Member States should ensure that Information Society services and recipients will be provided with legal security about the effectiveness of arbitration agreements including consumer arbitration, and the choice of the applicable law. The term 'out-of-court dispute settlement systems, available under national law' in the sense of Article 17(1) of the Directive includes international arbitration, because all Member States are Contracting States of the New York Convention and other international instruments relating to international arbitration. Thus international voluntary arbitration is included in the term. For this reason, international voluntary arbitration, including consumer arbitration, by means of electronic commerce and based on the New York Convention, should not be hampered by the legislation of Member States.

e.-) Consumer Arbitration and the Draft 'Brussels Regulation'

Also the EU Commission's amended proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Brussels Regulation) exempts arbitration from the scope of its applicability, similar to the Brussels Convention and the Rome Convention.[490] Taking into account of the broad scope of the exemption, not only international arbitration according to the New York Convention but also national arbitration should be excluded. Concerning the purpose of the exclusion of arbitration from the scope of the Regulation it may be useful to recall that the Report to the Rome Convention,[491] dealt with the exemption from the scope of application of the Convention in Article 1 § 5:

> *There was a lively debate in the Group on whether or not to exclude agreements on the choice of court. (...) As regards arbitration agreements, certain delegations, notably the United Kingdom delegation, had proposed that these should not be excluded from the Convention. It was emphasized that an arbitration agreement does not differ from other agreements as regards the contractual aspects, and that certain international Conventions do not regulate the law applicable to arbitration agreements, while others are inadequate in this respect. Moreover the international Conventions have not been ratified by all the Member States of the Community and, even if they had been, the problem would not be solved because these Conventions are not of universal applications. It was added that there would not be unification within the Community on this important matter in international commerce. Other delegations, notably the German and French delegations, opposed the United Kingdom proposal, emphasizing particularly that any increase in the number of conventions in this area should be avoided, that severability is accepted in principle in the draft and the arbitration clause is independent, that the concept of "closest ties" difficult to apply to arbitration agreements, that procedural and contractual aspects are difficult to separate, that the matter is complex and the experts' proposals show great divergences ; that since procedural matters*

and those relating to the question whether a dispute was arbitrable would in any case be excluded, the only matter to be regulated would be consent; that the International Chamber of Commerce - which, as everyone knows, has great experience in this matter - has not felt the need for further regulation. Having regard to the fact that the solutions which can and have been considered generally for arbitration are very complex and show great disparity, a delegate proposed that this matter should be studied separately and any results embodied in a Protocol. The Group adopted this proposal and consequently excluded arbitration agreements from the scope of the uniform rules, subject to returning to an examination of these problems and of agreements on the choice of court once the Convention has been finally drawn up. The exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent such clauses being taken into consideration for the purposes of Article 3 (1).

Nowadays, since all Member States are Contracting States of the New York Convention, it appears that the reasons which might be forwarded against the exemption of arbitration from the scope of application are even weaker, since it can be argued that, in particular, international arbitration is regulated by particular international instruments which are applicable in all Member States.

During the parliamentary debate on the amendments of the proposed Brussels Regulation, the Parliament intended to introduce a particular scheme for out-of-court dispute settlement in analogy to arbitration. The European Parliament proposed the adoption of a new Article 17a which permitted a derogation from the general rules applicable in the case of consumer contracts, by referring to 'a clause analogous to an arbitration clause':

(1) Notwithstanding the provisions of Article 15 and 16, where a contract has been concluded by electronic means over the Internet by a consumer with a person pursuing commercial or professional activities, the contract may contain a clause, analogous to an arbitration clause in a commercial contract, under which the consumer and the trader agree that any dispute is to be referred in the first instance to an extrajudicial dispute resolution system accredited under a scheme approved by the Commission of the European Communities ("an accredited EDR system") which is indicated on the trader's Internet site, provided that the following conditions are satisfied:

- *the consumer is informed in plain language that, in the event of a dispute, consumers have the right under Community law to sue and to be sued in the courts of their domicile;*
- *the consumer is informed of the advantages to himself and the trader of electring to refer any disputes to an accredited EDR system;*
- *the consumer is provided with a link to the website(s) of the accredited EDR system(s) offered by the trader;*
- *the consumer positively acquiesces to the inclusion of the clause and the trader and the consumer agree to be bound by the outcome of the extrajudicial dispute resolution and not to sue in the courts of the consumer's domicile except in order to resolve a point or points of law or in order to enforce any award made or settlement reached under the EDR system;*
- *the consumer cannot proceed with the transaction unless he has positively accepted or rejected the clause.*

(3) The trader may refuse to proceed with the transaction if the consumer refuses to accept the clause.

(4) A clause satisfying the requirements of this provision shall be presumed to be fair within the meaning of Council Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts."

Without going into details, it seems that the schemes of a European Dispute Resolution as envisaged by the European Parliament, even though based on experiences with arbitration clauses, would be more similar to mediation so that it could be excluded that they would fall under the concept of international arbitration in the sense of the New York Convention. Anyway, the Commission rejected the proposed amendment[492] with the argument that amendments relating to the addition of a new Article 17a (authorisation of clauses referring consumer disputes to a non-judicial dispute-settlement body) should possibly be referred to in Article 16 of the proposed Regulation. In such a case also Article 16, laying down rules as to jurisdiction in consumer-protection matters, should be amended. The Commission also did not wish to authorise contract clauses allowing consumer contracts to refer consumer disputes to courts other than those for the place where the consumer is domiciled, thus derogating from the protection principle of Article 16 (jurisdiction at the place where the consumer is domiciled). On this point the Commission indicated that it would be attentive to the debates which took place in Parliament and review the system as soon as the Regulation had come into force on the basis of a stock-taking of alternative dispute-settlement schemes. The Commission inserted a new Recital 14a to that effect. But Parliament proposed a provision that the consumer and the supplier could agree a contractual clause whereby disputes are referred, prior to any court action, to a non-judicial dispute-settlement scheme. A number of conditions are provided for, including prior approval of the scheme by the Commission. The Commission indicated:

> *The Commission shares the concerns underlying this amendment and Parliament's desire to consider the proposed Regulation as one component of a package of legislative and non-legislative measures, including the establishment of non-judicial dispute-settlement schemes. It acknowledges that it is desirable for parties to be able to settle their disputes on an amicable basis rather than going straight to the courts and that reference to the courts should be the last resort. It also observes that in practice the consumer will tend to prefer non-judicial solutions where they are available. To this end, a large number of projects are in hand, both by operators and by institutions, to promote the establishment of such alternative dispute-settlement schemes.*

The Commission referred to the document and the Council Resolution on the creation of the European Extra-Judicial Network for the settlement of consumer disputes (EEJ-Net) and continued:

> *But in the current state of progress it is not possible to make the options available to the consumer under the Regulation in terms of international jurisdiction subject to an obligation to go first to a non-judicial dispute-settlement scheme. For one thing, this solution could raise constitutional difficulties in certain Member States. For another, the schemes that this obligation would presuppose are not yet in operation. And thirdly, the procedural relationships between alternative dispute-settlement schemes and the courts (regarding limitation periods, for example) are highly complex and need further study. In any event the Commission is planning to pursue current initiatives on alternative consumer dispute-settlement schemes. In the report that it is to make five years after the entry into force of the Regulation under Article 65, it will take stock of the situation and review the relevant provisions of the Regulation.*

Taking into account of the difficulties with the enforcement of cross-border settlements abroad the Parliament took up the idea which had been proposed in Part II of this study ('The Protection

of the Recipient', Chapter 1.2.3., 'Recognition and Enforcement of Foreign Consumer Settlements') namely that those settlements, achieved by bodies responsible for out-of-court dispute settlements which had been accredited by public authorities within the Internal Market, should be enforceable in other Member States. The Parliament did not focus on the accreditation of the bodies by Member States but considered that the compliance of the bodies with systems approved by the Commission should suffice and suggested a new Article 55a which stated:

> *A settlement which has been reached pursuant to an alternative dispute-resolution system approved by the Commission of the European Communities shall be enforceable under the same conditions as authentic documents.*

In the justification the Parliament stressed that Article 55 would cover settlements only insofar as they have been reached by a court whereas the amendment aimed at the making enforceable of those ADR settlements which had been achieved by approved systems. However, the Commission refused in its amended proposal for a Regulation[493] the Parliament's proposal with the reasoning that it could not accept *that such settlements should be enforceable in the same way as authentic instruments. The Commission cannot accept this assimilation, which is radically contrary to the philosophy underlying the Regulation. A settlement obtained in an alternative dispute-settlement scheme is by definition neither ordered nor recorded by a person exercising public authority and cannot, therefore, be treated in the same way as an enforceable authentic instrument*. A decisive element for the enforceability of settlements achieved by out-of-court dispute settlement is public control. Whether a satisfactory control is exercised by the compliance of the body responsible for out-of-court dispute settlement with an scheme approved by the Commission appears doubtful, taking into consideration of the control mechanisms which are provided for by the New York Convention in international arbitration. But since the Regulation is not applicable to arbitration, the proposals concerning out-of-court dispute settlement should not affect consumer arbitration, unless one considers that the arbitral awards rendered in consumer arbitration could constitute a 'judgement' as meaning *any judgement given by a court or tribunal of a Member State, whatever the judgement may be called*, in the sense of Article 32 of the proposed Regulation.

4.7.3 Directive on Unfair Terms in Consumer Contracts

The Directive obliges Member States to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms, Article 6(1). According to subsection (2) of this Article Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. According to Article 3(1) of the Directive a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Article 3 of the Directive provides that *a contractual term which has not been individually negotiated shall be regarded as unfair if ... it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.* According to a non-exclusive list of ineffective clauses given in the Annex, *terms which have the effect of ... (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.* The Directive thus restricts significantly the effectiveness of

arbitration clauses in consumer contracts insofar as such clauses concern the national arbitration law.[494] However, the impact of the Directive on the international arbitration according to the New York Convention may be limited, taking into account of the fact that the autonomy of the parties permits them to choose a non-national law so that the EU law would only become relevant insofar as it constituted public policy of the state where the recognition or enforcement of the award is sought.

Arbitration is exempted from the scope of application of the Brussels Convention and the Rome Convention. Accordingly, arbitration agreements with consumers, if effective according to the New York Convention, might be enforceable even if they violated rules of the mandatory EU law or of the law of Member States, unless these rules constituted public policy. There are hardly indications which would permit the delimitation between those rules of mandatory consumer protection law which belong to public policy and those which do not. Based on existing jurisprudence on public policy it appears that consumer protection has not played a major role in decisions on the recognition and enforcement of arbitral awards,[495] but that the public policy is established only by the hard core of rules of mandatory law so that it would be very unlikely that an award settling an international consumer dispute would violate the public policy for the reason that the arbitration agreement was based on a pre-formulated arbitration clause.[496]

a.-) Judgement Océano vs. Quintero of the European Court of Justice

The judgement of the European Court of Justice in the case Océano Grupo Editorial vs. Rocio Murciano Quintero[497] of 27/06/00 concerned an exclusive jurisdiction clause according to which disputes should be brought before the courts in a city where the seller, the business, had its principal place of business. The Court held:

(§ 21) First, it should be noted that, where a term of the kind at issue in the main proceedings has been included in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive without being individually negotiated, it satisfied all the criteria enabling it to be classed as unfair for the purposes of the Directive.

(§ 22) A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

(§ 23) By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.

The jurisdiction clause did not relate to arbitration but to the jurisdiction of a court. The European Court of Justice evaluated the unfairness of the clause with regard to the particular circumstances of the case. The reasons why the Court considered the clause unfair are indicated in §§ 22 and 23: in the Court's view the litigation at a court which is a long way from the consumer's home, making it difficult to appear in hearings and the related costs which are out of proportion with the money at stake ensued the unfairness of the clause, taking into account that the other party would have gained considerable advantages from the clause. In the case of an arbitration clause providing for arbitration by means of electronic commerce these

reasons relating to geographical considerations are not relevant. Due to the 'ubiquity' of online arbitration the places from where the parties participate in the procedure does not matter. Accordingly, an exclusive online arbitration clause may reduce for both parties the costs for the consumer to take legal action.

Concerning the interpretation of the Directive on Unfair Terms in Consumer Contracts the Court held:

> *The national court is obliged, when it applies national law provisions predating or post-dating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive.*

It seems that national courts which have to analyse the unfairness of a particular arbitration clause in a consumer contract would have to base their reasoning 'so far as possible' on the basis of the text of the Directive. Concerning such clauses in electronic commerce this means that lit. (q) of the Annex of the Directive assumes a considerable importance, because it provides guidance with regard to the establishment of a harmonised approach towards such clauses within the Internal Market.

b.-) Exclusive Arbitration not Covered by Legal Provisions

What is meant by the words 'arbitration not covered by legal provisions' in the sense of lit. (q) of the Annex of the Directive on Unfair Terms in Consumer Contracts? Does it exclude arbitration ex aequo et bono or amiable composition? Does it exclude ad hoc arbitration? The European Court of Justice held that also arbitral tribunals may fulfil some of the requirements imposed on bodies which may refer a substantial question for preliminary ruling to the European Court of Justice in application of Article 234 of the EC Treaty. According to one of these elements it is required that the court must be deciding according to the law. In agreement with the Court's jurisprudence the term 'deciding according to law' has to be interpreted broadly. The Court observed that *even for 'amiable compositeurs' the limits of the law (public policy) exist and a court may want clarification notwithstanding the fact that the arbitrator need not motivate*.[498]

With regard to the legitimate interests of consumers it may be concluded that the Directive, when referring to 'arbitration not covered by legal provisions', does not exclude types of arbitration in which the arbitrator may decide 'ex aequo et bono' or as an 'amiable compositeur'. According to the Spanish consumer arbitration system the arbitrators apply successfully equitable principles in the vast majority of cases, but not the law. It thus appears that lit. (q) excludes particularly arbitration which would be performed without determined rules applicable to the procedure. The law applicable to the procedure provides a tool which permits the verification whether the conditions for the protection of the consumer as the weaker party of the contract were met. It may be concluded that the Directive does not exclude arbitration clauses by means of which a dispute will be settled 'ex aequo et bono' or where the arbitrator acts as 'amiable compositeur', but, very likely, where the arbitration will take place ad hoc, unless the parties provide for a satisfactory procedural framework.

c.-) Satisfactory Procedural Guarantees

Satisfactory procedural rules ensuring an arbitration which is covered by legal provisions and which would stand the test of fairness with regard to lit. (1) of the Annex of the Directive on Unfair Terms in Consumer Contracts may be provided by different legal frameworks.

(1) Ad Hoc Arbitration Clause

It may be considered that the requirements of satisfactory procedural guarantees are met if an ad hoc arbitration clause is subject to the regulation of the organisation of ad hoc arbitration by Article IV of the Geneva Convention. According to this regulation, the parties shall appoint arbitrators within 30 days after the notification of the request for the arbitration. If a party fails to appoint its arbitrator, he shall be named by the President of the competent Chamber of Commerce of the State in which the party in default has is established or domiciled. This President may also be competent to decide if the parties cannot agree on the selection of a sole arbitrator or on the measures to be taken concerning the organisation of the arbitration. If the arbitration agreement does not indicate the organisation of the ad hoc arbitration, the arbitrator(s) shall take the necessary steps. If the President of the competent Chamber of Commerce is concerned with the measures to be taken concerning the organisation of the arbitration, he may refer *to the rules and statutes of a permanent arbitral institution*.[499] Thus ad hoc arbitration might satisfy the procedural guarantees required by lit. (q) of the Annex to the Directive on Unfair Terms in Consumer Contracts if either the parties themselves establish corresponding rules for procedure or if the Geneva Convention is applicable to the arbitration agreement.

(2) Procedural Guarantees in the Sense of Article 17(2) of the Directive on Electronic Commerce

With regard to the 'procedural guarantees' in the sense of Article 17(2) of the Directive on Electronic Commerce it has been mentioned above that the rules for arbitration should provide for a remedy against the arbitral award and that such a remedy could be provided by the procedure for the setting aside of the award mentioned by the New York Convention and the Geneva Convention.[500] Concluding, exclusive arbitration clauses are unlikely to constitute unfair terms in the sense of the Directive if they refer to arbitration based on satisfactory procedural rules and permitting a remedy against the award.

d.-) Implementation: Online General Terms and Conditions concerning Out-of-Court Dispute Settlement

The use of online general terms and conditions, for example available via a link on a website, facilitates the communication of such terms to the recipient. The Directive on Unfair Terms in Consumer Contracts does not address the issue of general terms and conditions relating to out-of-court settlement systems. However, in the Annex the Directive gives examples of unfair terms, including, in lit. (q) a term *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract*.

General terms which would require the consumer to necessarily resort to a mandatory system of out-of-court dispute settlement in electronic commerce, excluding any court action, thus must be drafted carefully in order to be effective. It seems that a clause by means of which the consumer agrees to confer any disputes to arbitration by means of electronic commerce would be acceptable according to EU law, if such a scheme is governed by legal rules which do:

1. not limit the consumer in his possibilities to provide evidence; or
2. not contain a change in the burden of proof according to the applicable law;
3. provide for alternative remedies such as mediation;
4. provide for recourse against an award by means of procedures for the setting aside of the award;

5. provide for satisfactory procedural guarantees in the sense of Article 17(2) of the Directive on Electronic Commerce and the European Parliament's Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts; and
6. are based on procedural rules of established arbitral institutions or, in the case of ad hoc arbitration, provide for the application of procedural rules contained in the Geneva Convention.

e.-) Arbitration Clauses for Businesses and Consumers

Within contractual relations arbitration clauses are often used, in particular in certain branches of the trade and in international contracts. Particularly in the case of EDI contracts arbitration clauses are recommended.[501] However, in the case of consumer contracts such clauses have to meet stricter legal standards. If necessary it may be appropriate to develop separate sets of general business terms on websites, one for businesses, the other for consumers. The arbitration clauses should differ accordingly.

f.-) Law of a non-Member State and the Protection Afforded by the Directive

Article 6(2) of the Directive on Unfair Terms in Consumer Contracts obliges Member States to ensure that the consumer does not lose the protection afforded by the Directive through the choice of law of a non-Member State if the contract has a close connection with the territories of Member States. The Directive does not indicate the circumstances in the presence of which such a close connection may be assumed, and it does not indicate which (national) law should be applied by a judge when assessing whether or not the consumer is protected according to the standards of the Directive. It has been suggested that in the case where Article 5(2) of the Rome Convention is applicable simultaneously, the close connection may be defined on the basis of the ordinary place of domicile of the consumer, including additional circumstances such as the initiative leading to the conclusion of the contract, advertising and the general foreseeability of the foreign connection for the consumer.[502] However, in the case of arbitration the Rome Convention is not applicable and in electronic commerce the use of traditional concepts based on territoriality have become questionable.

g.-) Close Connection through the Place of the Conclusion of the Contract

The traditional elements establishing the close connection in the sense of the private law such as the place of the conclusion of the contract or of the place of the performance are taken into consideration with the aim to provide clearance in situations in which uncertainty exists concerning the applicable law. The place of the conclusion of the contract may be decisive, if the consumer concludes a contract with an Information Society service in a non-Member State during his holidays in this State. But this is not a typical situation for electronic commerce. Yet where is the place of the conclusion of the contract in the case of contracts concluded by means of electronic commerce in the cross-border environment? It has been asserted that on the international level attempts for the establishment of basic principles relating to Internet contracts failed which would have regulated the place of the conclusion of the contract. There are several possibilities concerning the establishment of this place:[503]

1. generally, the place where the person accepts the offer of another person, this principle may directly be applicable if the contract is concluded during a video-, web- or audioconference;
2. if the contract is concluded by email on the basis of an offer contained on the Information Society server's website, the place where the offeree communicates his acceptance vial email or after the filling in of the form posted on the offeror's website;
3. if the contract is concluded by email, the place where the offeror receives the acceptance in the determined computer system;

4. if the contract is concluded by email, the place where the offeror notices the acceptance and downloads it to his computer's memory.

In international electronic commerce no guiding principles have been developed to identify the place of the conclusion of the contract. Accordingly, it may be difficult to establish a close connection with the territories of Member States on the basis of this 'place'.

h.-) Close Connection with the Territories of Member States Based on Good Faith

The requirement of the 'close connection with the territories of Member States' is based on considerations applicable to the traditional commerce. However, in electronic commerce the justification of many regulations which are based on the principle of territoriality have become questionable.[504] The traditional principles of the conflicts of law aim at the achievement of a satisfactory solution by focusing on elements which are common to both parties involved in the dispute. The private international law necessitates a certain foreseeability, it requires a certitude. This requirement, it has been asserted, could be served if, for the purpose of the identification of the 'close connection', reference was made to the place of establishment of the supplier, because it is the supplier who allegedly performs the obligation which is characteristic of the contract.[505] This factor is well established in the traditional economy as determining the law applicable to the contract, for example according to Article IV(2) of the Rome Convention. Insofar it may correspond with the principle of good faith if the 'close connection' was identified on the basis of the supplier's place of establishment, because it may be assumed that both parties could expect the application of this rule.

In contracts which consumers domiciled in Member States conclude with Information Society services established in non-Member States, the application of this principle may be doubtful, because the place of residence or establishment of the party which performs the characteristic obligation. The operation of this principle may lead to a workable solution, when national laws are harmonised to a certain degree – which is the case in the laws of Member States. However, in cross-continental relations, the application of this principle may

It might be preferable if the close connection between the contract and the territories of Member States would not be based so much on 'mechanical' rules which focus on the locality of the performance or on the locality of the establishment or domicile of the parties but on the duty to be of good faith. This principle is rooted in Article 1.7 of the UNIDROIT Principles of International Commercial Contracts. Accordingly, there will be a 'close connection with the territories of Member States' if the evaluating assessment of these individual circumstances lead to the conclusion that the consumer could reasonably expect to be protected by the standards of Community law and if the business should fairly be obliged to take this into consideration. Article 6(2) of the Directive thus follows from the general duty of good faith.[506] Accordingly, the application of the principle of good faith may lead to foreseeable results even if this principle demands the regard of the circumstances of the individual case. Accordingly, an arbitrator does not need to base his decision on the principles of the private international law by attempting to draw a parallel to the Rome Convention, but he should fairly rely on the duty of good faith which protects the consumer. The standard of protection would be the protection which could reasonably be expected to be applicable.[507]

i.-) Measures to Be Taken by Member States

Do the measures which Member States have to take in order to ensure that consumers will not lose the protection according to Article 6(2) of the Directive include the refusal of the recognition and enforcement of arbitral awards which disregarded the consumer's protection? According to the New York Convention the recognition and enforcement of foreign arbitral awards may only

be refused for a limited number of reasons. Two may be relevant within this context, namely the lack of arbitrability and the offence of the public policy. However, since consumer disputes are arbitrable according to the prevailing view[508] and since a violation of the consumer protection afforded by the Directive will generally not conflict with public policy[509] it cannot be assumed that Member States will be obliged to provide that their courts refuse the recognition and enforcement of foreign arbitral awards according to the New York Convention if the corresponding dispute involves a consumer domiciled in a Member State and an Information Society service in a non-Member State if the arbitrator applied the law of a non-Member State so that the consumer lost the protection afforded by the Directive even if the contract had a close connection with the territories of Member States.

4.7.4 **Choice of Law Clauses and their Limitations**

Information Society services which offer the conclusion of contracts on their websites will generally offer the conclusion of a contract subject to general terms of contract which are contained either on this website or on another one, connected via a link. By a choice of law clause the Information Society service could suggest the choice of a national law, for example the law applicable at the place where it is established. In the case where the Information Society service offers the conclusion of cross-border contracts to recipients in a multitude of states it could hardly be expected that the Information Society service would offer a different choice, unless it offered the choice of a non-national law.

a.-) Non-National Choice of Law

In the interest of both parties it may be recommendable to offer a non-national or transnational law which provides an appropriate 'neutral' solution. For the Information Society service this solution may offer the additional advantage that this may increase its competitiveness on foreign markets, whether in other Member States or in non-Member States. But the elaboration of a set of laws may be cumbersome for the individual Information Society service, and it may cause a feeling of uncertainty in recipients. Taking into account of the fact that the aim of the arbitral institutions to provide in their rules for a simple and neutral law applicable to the arbitration and its procedure coincides with the interests of the parties, in particular in electronic commerce, where cross-border disputes are likely to increase in parallel with the growth of the number of cross-border contracts, Information Society services and their recipients should benefit from any neutral or transnational legal rules which may be offered as the law applicable to the arbitration in the institution's rules for arbitration. Thus Information Society services which intend to offer choice of law clauses in the general terms of contract on their websites should align these clauses with the proposed choice of law applicable to the arbitration. This may be done by a reference in the choice of law clause to the content of the relevant rules for arbitration of the institution for arbitration or by the taking over of the set of laws offered in the rules for arbitration as the law to be applied to the substance of the dispute.[510] For this reason, it would be appropriate to connect the choice of law clause with the arbitration clause.

Even if the parties choose a non-national law, there will always be a national law which supplements the parties' choice. It is suggested that this should be the law of the Member State where the Information Society service is established, because it could hardly be expected that such a service should offer on its website the application of the law of the states where its recipients are domiciled or established. The latter solution would not be impossible, but it would require from the Information Society service a substantial investment for the obtaining of legal advice relating to all those countries, whether Member States or not, to the markets of which it wanted to direct its marketing activities. Whether such an investment can be justified when the service has not yet established contacts with recipients from these countries may be doubtful. To require the acquisition of such legal information relating to the laws applicable in the (Member)

States where the recipients are domiciled is thus likely to raise the cost price for products or services of Information Society services established in the Internal Market. On the other hand, the offering of the choice of law clause, referring to the (consumer protection) law applicable in a particular foreign state to which the Information Society purposefully directs its activities, may have a positive impact on the Information Society service's competitive position in this market. Accordingly, it would appear appropriate if the parties could to the fullest extent possible make use of their freedom to choose the applicable law.

Focusing on the consumer protection laws applicable at the place of the arbitration would be another alternative, however, in such a case neither the Information Society service nor the recipient would probably be acquainted with the relevant law. On the other hand, the relative harmonisation of consumer protection laws of Member States might favour such a choice, because the Information Society service and the recipient would be able to rely on the 'Community acquis'. But taking into account of the difficulties arising from the use of different languages and the need to delimit the scope of the consumer protection law from general rules of civil law or common law, it may be more appropriate to rely on a non-national law which could be propagated not only by the Information Society service and the institution for arbitration, but also by other participants in electronic commerce which wanted to benefit from an efficient and simple solution.

b.-) Choice of Law and Rules of Mandatory Consumer Protection Law

Faced with the problem that the recipient-consumer may attempt to challenge the validity of the choice of law clause in international arbitration, there are two possibilities. First, the consumer may attack the material validity of the clause. Second, he could accept that the contract is governed by the chosen law but attempt to retain the protection by the rules of mandatory consumer protection law of the state where he is domiciled.[511]

(1) Rules of Mandatory Law Are Binding if Constituting Public Policy

A choice of law clause in a consumer contract which is referred to arbitration benefits from the autonomy of the parties which is less limited than the inroads on the freedom of contract according to Article 5 of the Rome Convention. Thus rules of mandatory consumer protection law of Member States or of the EU will not be applied by an arbitrator if the parties have chosen the law of a non-Member State, unless such rules of mandatory law belong to the transnational public policy or are taken into consideration by the arbitrator, because they constitute the public policy of the Member State where the arbitration takes place or where the enforcement of the award is likely. *The application of mandatory rules foreign to the lex contractus depends primarily on whether the parties intended to exclude the application of foreign mandatory rules. If they do exclude such rules, the only way of resolving this question is by recourse to the theory of 'truly international public policy'.*[512]

(2) Public Policy Where Arbitration Takes Place and Where Enforcement of the Award Is Likely

In the case of an international arbitration with the choice of a transnational or non-national law *there are in principle no laws binding on the arbitral tribunal which have a mandatory character. However, the arbitral tribunal may be bound by general principles of international public policy which may be reflected in national mandatory rules*[513]*...* Thus an arbitral tribunal should consider those rules of mandatory law which constitute the public policy of the States where the place or seat of the arbitration is located and in which the enforcement of the arbitral award is likely.

(3) Choice of Law and Enforcement

The UK law provides in the Contracts Applicable Law Act 1990 for the application of the consumer protection law of the country in which the consumer is domiciled. If a resident of the UK is involved in a transaction which provides for the application of a jurisdiction foreign to the UK, the foreign law will only be applicable to the extent that it does not deprive the consumer of the protection which he would receive according to the law of the country in which the consumer has his habitual residence, Section 5 of the Act, and if the parties did not make a choice of law, the contract will be governed by the law of the country in which the consumer is habitually resident. It is not clear, whether a UK court would consider an arbitral award rendered abroad against a consumer as violating UK public policy if the arbitrator applied a non-UK law which afforded the consumer a lesser protection than the national UK law. Within the Internal Market the particular freedoms established by the EC Treaty might have to be taken into consideration when assessing the role of public policy. Accordingly, it would appear that an arbitral award based on the foreign law should principally be enforceable in the UK according to the New York Convention if it was recognised in the EU Member 'State of origin'.

The freedom of choice of law in the US is qualified with regard to two limitations:[514] *Firstly, the chosen law must bear a substantial relationship to the parties or to the transaction or there must be another reasonable basis for the parties' choice. In a sales contract, this means that the law chosen must ordinarily be that of a jurisdiction where a significant enough portion of the making or performance of the contract occurs. A choice-of-law clause in a consumer contract selecting a law which does not bear any relationship with the contract, a situation which scarcely occurs in practice outside an online environment, is likely to be held void by American courts. … Secondly, the law chosen by the parties will not be applied if that would be contrary to a fundamental policy of the forum's law or the law which would apply in the absence of the choice-of-law clause, provided that the respective state has a materially greater interest than the chosen state in the determination of the particular issue*. But whether a violation of these rules by an award rendered in international arbitration would cause the refusal of the enforcement remains doubtful.

c.-) Choice of Transnational Law and the 'Community Acquis'

The parties are free to choose the application of a non-national law to their contract. Accordingly, such contracts are not subjected to the national law of the States where the parties are established or domiciled, nor to a truly international law based on international instruments, but to 'transnational' law which allegedly assumes an intermediate position.[515] It has been said: *Transnational law is not a branch or part of international law or as it may be described more correctly, public international law. It derives its authority from the sovereign power of national lawgivers*.[516]

(1) Acceptance of Transnational Law

The possibility of the parties to make a non-national choice of law (for example the UNIDROIT Principles of International Commercial Contracts or the Principles of the European Contract Law, the lex mercatoria, lex electronica or netiquette) has been controversial for a long time,[517] but it has been accepted during the last decade of the 20th century, not at least on the basis of the UNCITRAL Model Law on International Commercial Arbitration, Article 28(1). The New York Convention does not deal with the law applicable to the substance of the dispute; the reference in Article V(1)(a) of the Convention to the law to which the parties subjected the dispute in order to determine the validity of the arbitration agreement justifies the assumption that a non-national arbitration was not contemplated in 1958 but not excluded.[518]

(2) Transnational Law and Consumer Protection

The choice of a transnational law by the parties does not exclude the application of rules protecting consumers even if the parties opted for the lex mercatoria: *The forum should also be entitled to override the choice of the lex mercatoria as the governing law in whole or in part by reference to its choice of law rules that seek to protect the economically weaker party.*[519] It has even been asserted that *a choice of the lex mercatoria does not exclude the operation of choice of law rules that seek to protect the economically weaker party through the application of national laws.*[520] But it appears that such a protection can only be afforded through laws which constitute the public policy of the relevant state.

(3) Development of Rules of Transnational Consumer Protection Law within the Internal Market

It may be of a particular interest to develop principles of a non-national consumer protection law within the Internal Market. Such a transnational consumer protection law could appropriately be based on the content of the relevant EU law and the 'Community acquis'. For practical reasons it may be useful to implement these principles in codes of conduct developed for electronic commerce. The may also be implemented into an already existing transnational code such as the Principles of the European Contract Law.[521] Electronic commerce offers the advantage that the Information Society service and the institutions for arbitration may easily refer to these principles of law on their websites and promote them and provide the general public with information and legal security. Even if consumers do not read through all of such a comprehensive information, the publication of these principles would increase the legal security of the parties involved in cross-border electronic commerce, because they would know which rules applied in to their contracts, but also the arbitrators, when dealing with any disputes in cross-border electronic commerce, could base their decisions on such principles which were agreed upon by the parties to become the law applicable to the substance of the dispute.

(4) The 'Acquis Consommateur' in Cross-Border Electronic Commerce

It has also been argued that Article I(3) of the Directive on Electronic Commerce would justify the assumption of an 'acquis consommateur' within the internal market, independently of any choice of law.[522] According to this view, the EU consumer protection law should be regarded as 'mandatory rules of the forum' which should be applied uniformly within the Internal Market so that an Information Society service, instead of possibly having to observe the consumer protection laws of 15 Member States would only be bound by the 'acquis consommateur', but not necessarily by the law of the Member State where the consumer is domiciled. Yet the application of this principle should be limited to cross-border electronic commerce in the Internal Market, whereas the national consumer protection law would be applicable if the activities were limited to the national territory. For example, whereas the consumer has a right of withdrawal according to the Directive on Distance Selling in cross-border electronic commerce, he would not be able to invoke his national consumer protection law against an Information Society service established in another Member State. However, it should be considered whether such a concept according to which an 'acquis consommateur' would be applicable to cross-border electronic commerce with consumers might conflict with the Rome Convention. Member States are obliged to observe the provisions on consumer protection applicable according to the Convention. Thus it may not be easy to justify that the mere difficulty to localise the place of the conclusion of the contract in electronic commerce would permit the conclusion that a regulation which is based on conflicts of law would not sufficient to solve problems for the protection of the weaker party in electronic commerce and to replace the conflicts of law rules of the Rome Convention by the concept of the 'acquis consommateur'. It seems, however, that the application of such a principle could be achieved in international arbitration where the parties are not bound by the provisions of the Rome Convention and where the autonomy of the parties permits them a choice of law which

could integrate the 'acquis consommateur' within transnational legal principles such as the Principles of the European Contract Law.

4.7.5 **Mandatory Consumer Protection Law and Public Policy**

On the basis of the considerations with regard to the law of international commercial arbitration it may be assumed that consumer disputes between Information Society services and recipients in electronic commerce may effectively be settled. First, the requirement of 'commerciality' of the dispute does not pose an obstacle to the arbitrability of the dispute. Second, national legal systems of Member States do not seem to exclude the arbitrability of consumer disputes in a general manner.[523] Third, the public policy of Member States does not generally prevent the recognition or enforcement of foreign arbitral awards relating to consumer disputes. But to which degree may rules of mandatory consumer protection law constitute elements of the public policy?

Concerning rules of mandatory law it has to be distinguished between two types:[524] *Firstly, there are mandatory rules in a domestic sense. This means they cannot, according to the definition, be avoided by contract within their own legal system, however, they do not claim effect if the law of which they are part of is not the applicable law to the contract. Thus, mandatory rules in a domestic sense allow themselves to be contracted out of by virtue of a choice-of-law clause. The second type of mandatory rules are those in a conflict sense. Like the first type of mandatory rules they cannot be avoided by a domestic contract, but they cannot be avoided by choice of law either, because they themselves purport to be applicable even though the parties have chosen another law*. Are rules of the second type identical with the public policy? It does not seem to be so, taking into account that the conflicts of law rules of the Brussels Convention and the Rome Convention, which provide for the protection of the consumer on the basis of the place of his domicile, are not applicable in arbitration.

4.7.6 **International (Commercial) Arbitration and Consumer Arbitration**

The system of the international commercial arbitration may easier adaptable to the needs of the settlement of cross-border consumer disputes in electronic commerce than the traditional court system. In recent years the institutional arbitration has been flexible enough to respond to the needs of the market by offering expedited arbitrations or small claims arbitration with a minimum of procedural rules for the settlement of disputes with a smaller financial interest. It may be expected that institutions operating international arbitration may also be able to offer their services in the sector of the settlement of consumer disputes between Information Society services and recipients. It is thus conceivable that for the settlement of consumer disputes in electronic commerce faster and less formal types of arbitration could be developed, which would make use of transnational law in order to replace the traditional conflicts of law rules which provide for the parties hardly foreseeable results and which offer solutions based on the concept of territoriality which are increasingly questioned in electronic commerce. Information Society services and their recipients would operate in a secure legal environment where they can easily calculate risks. Additionally, the enforceability of ensuing arbitral awards would have the advantage to provide the parties with a definitive settlement which, according to the rules of the private international law, is easily enforceable in other states.[525]

4.8 Liability of Arbitrators and Institutions Responsible for Arbitration

The liability of arbitrators in cyberspace has to be assessed according to general legal principles. First, there may be the contractual liability with regard to the parties and the institution responsible for arbitration. Second, the may be liability based on the violation of the professional duty of care. Third, there may be the liability based on tort. The scope of these duties assumes a particular content in virtual arbitration. The simplification of the communication in virtual arbitration is bound up with the necessity of the mastering of digital communication technologies.

In particular leakages of the communication system leading to the loss of confidentiality could give rise to claims against arbitrators and institutions responsible for arbitration.

4.8.1 Scope of Obligations

The nature of the contractual relationship between the arbitrator and the parties will depend on various factors, including: *whether there be one arbitrator or three; the form of arbitration; the nature of the issues in dispute; and the applicable arbitration rules. Parties submit to arbitration intentionally as an alternative to the court system; they may do so because of industry customs and rules, or because, in the particular circumstances of their transaction, they choose to exclude the courts and select rather a particular form of arbitration This is reflected in the arbitration clause in a contract or the submission to arbitration of a specific existing dispute, i.e., the arbitration agreement.*[526]

The general duties of an arbitrator are the duties to:

1. take care;
2. proceed diligently;
3. act impartially.

The exact scope of an arbitrator's duties is hardly defined. Likewise, an express exclusion of liability from certain duties is not often provided for. *There are some cases where arbitrators have a formal contract of appointment which they send out, setting down the terms on which they will act (in which they may exclude liability for any acts performed as arbitrator), and which must be signed before they accept appointment.*[527]

4.8.2 Implied Obligation to Exercise Skill and Experience and Exclusion of Liability

Arbitration by means of electronic commerce creates new risks for the institution for arbitration and for arbitrators.

a.-) Implied Obligations

In the absence of an express exclusion of liability from certain duties, there must be certain fundamental obligations implied into the contract between arbitrators and arbitrants. After all, arbitrators hold themselves out (some arbitrators canvass and seek appointments) as able to undertake certain types of arbitration and as having the requisite skill and expertise necessary for such disputes. Accordingly, it is an implied term of the contract that they in fact possess and will exercise such skills and expertise.[528] In arbitration by means of electronic commerce this means that the arbitrator should not only make use of his professional skills for the dispute settlement but also be able to manage or operate either himself or through his staff the technical equipment necessary for the performing of arbitration by means of electronic commerce.

b.-) Exclusion of Liability

Arbitrators and institutions responsible for arbitration may exclude the liability for the malfunctioning of the communication system. It appears to be difficult to regulate this issue in the arbitration rules in a detailed manner, taking into account of the developing technology and the changes of circumstances in the use of the technologies. National laws of a mandatory nature may provide for the immunity of arbitrators and arbitral institutions.[529] Accordingly, the arbitrator may not be liable for anything done or omitted in the discharge of his function unless the act or omission is shown to have been in bad faith. The need to establish confidence of the parties in the safe operation of the electronic arbitration system is unlikely to be promoted through rules excluding liability. It appears to be recommendable, if the institution established a duty of care in the contracts with those persons who offer their services as arbitrators and who are placed in the institution's list of arbitrators. In these contracts it might be provided that the arbitrator declares

that he is acquainted with the communication technologies used and that he undertakes to make the necessary steps in order to adapt this knowledge to any new technologies used for this purpose within a certain deadline.

c.-) Immunity of Arbitrators

The immunity of arbitrators is traditionally established on the basis of national laws[530] and may be mandatory. Accordingly, a virtual arbitration which had its place or seat in the UK could not impose a degree of liability inferior to bad faith in application of Section 74 and Schedule I of the UK Arbitration Act 1996.

d.-) Codes of Ethics

the liability of arbitrators may also be regulated in rules of ethics by which arbitrators may have to abide. The International bar Association (IBA) Rules of Ethics for International Arbitrators make clear in the Introductory Note that *international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or wreckless disregard of their obligations*. the rules may thus not create an opportunity for an aggrieved party to sue international arbitrators in national courts: *The normal sanction for breach of an ethical duty is removal from office with consequent loss of entitlement to remuneration*.

4.9 Languages

The language of the arbitration is important not only for the parties but also for the choice of the arbitrator and the lawyers. Considerable costs may arise for translation and interpretation.

4.9.1 **Choice by the Parties**

Taking into account the importance of the choice of the language for the arbitration, it is recommendable if the parties agreed on this issue expressly in order to avoid uncertainties.

4.9.2 **Regulation by Institutions Responsible for Arbitration or Arbitrator**

Article 22 of the UNCITRAL Model Law on International Commercial Arbitration states in subsection (1) that *the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award decision or other communication by the arbitral tribunal*.

According to subsection (2) of this provision *the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal*. The principle of a fair procedure thus does not mean that the language of each party must be adopted as a procedural language, nor permit, that a party would be denied the right to use his own language when required to give him a full opportunity to present his case. *However, if his language was not agreed or determined to be a procedural language, for example, because the parties has used only one language in their business dealings, he would have to pay for the translation or interpretation into the language of the proceedings.*[531] During the preparation of the text of Article 22 of the Model Law it had been discussed whether the costs for the translation of documents into the other party's language should be included into the overall costs of the proceedings, if the arbitral tribunal had chosen the language of the other party as the language of the proceedings, or whether the arbitral tribunal, if it used two procedural languages could order the translation of documents into only one of both languages.

Article 17 of the UNCITRAL Arbitration Rules states: *Language – (1) Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearing take place, to the language or languages to be used in such hearings.* The Rules of Arbitration of the International Chamber of Commerce provide in Article 16:[532] *Language of the Arbitration. In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.* In practice, the arbitrator will give consideration not only to the language he speaks but also to the languages spoken by the parties, possibly those spoken by their lawyers, the witnesses, the languages in which the contract is drafted or other relevant documents.[533] The regard of the relevant circumstances of the individual case seems also to be appropriate for the arbitrator when fixing the language of arbitration procedure in electronic commerce.

4.9.3 Regional and Minority Languages

Some useful principles for the dealing with languages in arbitration relating to disputes concerning electronic commerce may be gained from the European Charter for Regional or Minority Languages.[534] It addresses in its Article 9 judicial authorities. Subsection 1(b) of this provision concerns regional or minority languages in civil proceedings. According to this provision courts shall conduct the proceedings in such a language at the request of one of the parties and they shall allow, whenever a litigant has to appear in person before a court that he may use his regional or minority language without thereby incurring additional expense. Courts shall also allow documents and evidence to be produced in the regional or minority languages, if necessary by the use of interpreters and translations. According to Article 9(1)(d) the Parties to the Charter shall take steps to ensure that the application of these regulations and any necessary use of interpreters and translations does not involve extra expense for the persons concerned. Article 9(2) of the Charter provides that the parties undertake not to deny the validity of legal documents drawn up within the State solely because they are drafted in a regional or minority language or not to deny the validity, as between the parties, of legal documents drawn up within the country solely because they are drafted in a regional or minority language.

According to the Principles used by the Charter the Parties to the Charter must ensure that additional costs which arise from the application of the Charter shall not be borne by the persons concerned. This means that the public administration would have to pay for expenses incurred for translations and interpretations in the sense of the Charter. For these reasons, unless the costs for additional translations are borne by public authorities, it appears that the rules or principles established by the Charter could hardly be practised in international arbitration insofar as they would create additional costs, which, according to the Charter, have to be borne by public authorities.

4.9.4 National Laws

According to the German jurisprudence the general and conditions must be published in the language of the contractual negotiations, at least in a language used for global trade.[535]

5 Law Applicable to the Arbitration

The issue of the applicable law concerns different factual circumstances. Different issues may be identified:

1. the law applicable to the contract;
2. the law applicable to the dispute;

3. the law applicable to the ascertainment of the validity of the arbitration clause;
4. the law applicable to the procedure.

5.1 Law Applicable to the Contract

Based on the freedom of contract the parties may determine the law applicable to the contract. The parties may nominate the law of a particular country as the law applicable to the contract, but they may also decide on a multiple choice of law clause.[536] They may, for example, stipulate that the contract shall be governed by Italian law whereas the arbitration clause shall be governed by English law. Such a multiple choice of law clause may constitute a compromise if the parties originate from different countries. However, the individual negotiation of choice of law clauses is time consuming. For mass contracts of electronic commerce it appears more appropriate to provide for choice of law clauses in general terms of contract which may be published on an Information Society service's website. Since the Information Society service's website may be directed towards potential recipients from a large variety of states, the suggestion of a national law may have a negative impact on the competitiveness of the service, because such a choice may not be easily acceptable for recipients domiciled or established in states with a different legal order. For this reason it may be more appropriate to suggest in the choice of law clause the application of a transnational law. Such a choice should coincide with the law applicable to the arbitration, possibly through a reference to the regulation contained in the rules for arbitration of the arbitral institution which, based on the arbitration clause, deals with the dispute settlement. By means of such a reference in the arbitration clause the provisions of the rules for arbitration become terms of the contract, even if they are subsequently repealed or amended.[537] The choice of the law applicable to the contract would thus be in agreement with the law applicable to the arbitration.

Even if the parties should opt for arbitration based on equitable principles which is, for example, the rule in the Spanish consumer arbitration system,[538] the orientation of the choice of law clause on the law suggested for international arbitration by the institution responsible for out-of-court dispute settlement for electronic commerce is likely to facilitate the establishment of e-confidence, because the development of a transnational law for electronic commerce is also in the interest of the parties to the contract and facilitating the work of arbitrators. In particular in cross-border consumer contracts or mass contracts it is economical to apply a transnational law which would be applicable to any contract, no matter in which state recipients are domiciled or established, taking into account of the fact that the application of conflicts of law rules to an individual case may be more time consuming and require a high degree of specialisation of the arbitrators and increase costs, in particular for expert opinions on foreign laws and translations. The application of a transnational law, instead, facilitates the work of the Information Society service which, in its relations with recipients from abroad, could rely on a single legal framework for its contractual relations. The consequential reduction of costs of the service and its increase in the attractiveness for foreign recipients will improve the competitiveness of the service. At the same time recipients, whether consumers or businesses, will benefit from legal security in cross-border transactions.

5.1.1 Autonomy of the Parties in International Arbitration

The autonomy of the parties is the foundation upon which international agreements to arbitrate are enforced in private international law. In private international law a choice of law is possible only within the context of public international law. *A basic postulate of public international law is that every territorial community may organise itself as a state and, within certain basic limits prescribed by international law, organise its social and economic affairs in ways consistent with its own national values.*[539] According to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the UNITED NATIONS *each State has the right freely to choose and develop its political, social,*

economic and cultural systems. Article 1 of the Charter of Economic Rights and Duties of States provides that *every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever*. The autonomy of the parties is thus based on the friendly cooperation between states.

5.1.2 **Global Recognition of the Autonomy of the Parties**

The rule of the parties' autonomy has been adopted in the laws of many states but also in the rules of arbitration of the principal arbitration institutes, and it has been widely implemented by international arbitration tribunals.[540] *As an expression of and implementation of the basic right expressed in the Declaration on Principles of International Law Concerning Friendly Relations, the content of the various legal codes of each state may be expected to vary, quite legitimately, reflecting the diversity of national political, economic, social, and cultural values which the international system permits and even encourages. As a reflection of those different values and social preferences, the various parts of the law of each community will vary with regard to the distribution of benefits and burdens in economic and social relationships and, in particular, in the allocation of risk*.[541] The autonomy of the parties in international arbitration is thus widely recognised. It is not up to the arbitrator to decide whether the choice of the parties was well founded or if the law chosen related to the contract.[542]

5.1.3 **Governing Law of Transactions**

The choice of law made by the parties is not made in a legal vacuum. The system of law which makes this choice possible is generally referred to as the law which governs the transaction. This law may impose certain requirements or limitations on which the validity of the choice depends. *Governing law thus authorises a choice of law and then recedes into the background. But it may reappear, especially if matters of important public policy would be compromised by the norms of a particular choice of law*.[543] This governing law is determined in application of principles of the private international law, in particular by use of conflicts of law rules. Criteria which determine the governing law are contacts with the transaction, the identity of the parties to the transaction, comparative interests of the territorial authorities involved or the effects of the transaction. Accordingly, it may be difficult to determine the governing law in the particular case. However, parties which base their choice of law on the rules for arbitration of institutions for arbitration should not encounter difficulties, taking into account that the resulting choice will be the outcome of considerable legal thought.

5.1.4 **Awards Based on a Non-National Law**

According to an increasing tendency that arbitrators may apply a non-national law (such as the lex mercatoria) in cases of international arbitration if the partied did not make a choice of a national law. In the case of arbitration between parties established or resident in different Member States it may be argued that *international legal principles come into effect through the mandate of the parties originating in national law*.[544] It is beyond question that courts will enforce arbitral awards which are based on the express choice of law made by the parties so that so that *the opportunity for choosing the lex mercatoria in the arbitral process has arrived*.[545]

5.2 The Law Applicable to the Dispute

The law applicable to the dispute can be chosen by the parties, but it may also be determined by the arbitrator with reference to the rules of the arbitral institution and the arbitration agreement between the parties.

5.2.1 **Regulation in International Instruments and Rules for Arbitration**

The choice of the law by the parties is based on their autonomy, which is recognised by international instruments. Article VII of the Geneva Convention concerns the applicable law. According to subsection (1) *the parties shall be free to determine, by agreement, the law to be*

applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages. The Geneva Convention thus gives the parties the utmost freedom concerning the choice of law.[546]

Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration states: *The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute...* The term 'rules of law' makes clear that the parties can *choose not only the body of law in force in a particular jurisdiction but also parts of other legal codes or part or all of sets of rules not in force as such anywhere*.[547] This freedom is expressed in other instruments relating to international arbitration. For example Article 17(1) of the Rules of Arbitration of the International Chamber of Commerce states:[548] *The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*

It has been asserted that the law applicable to the 'merits of the dispute' would be identical with the law applicable to the contract.[549] However, if the dispute relates to obligations not covered by the contract, it may be questioned whether the parties' choice of law in the contract is also decisive for the settlement of the dispute relating to non-contractual issues. Much will depend on the wording of the clause containing the choice of law. In order to avoid insecurities it may be recommendable to refer to the law applicable to the substance of the dispute.

a.-) Rules of Law to Be Applied by Arbitrator

First, the reference to the 'rules of law' to be applied by the arbitrator does not refer to the application of a (national) legal system, but to a broader concept which is not only contained in Article 28 of the UNCITRAL Model Law on International Commercial Arbitration which dates of 1985 but also more recent versions of Rules of Arbitration of other institutions responsible for arbitration.[550] Thus the term 'rules of law' may be understood to relate to the national law of any state, the national laws of different states, a national law excluding a certain sector or rules contained in a convention or similar legal text elaborated on the international level, even if not yet in force.[551] The concept of 'rules of law' is also understood to refer to include legal rules such as contained in a transnational law, the lex mercatoria or the UNIDROIT Principles of International Commercial Contracts.[552] Now, *the reference to 'rules of law', rather than to 'law' or 'a system of law' is seen as a coded reference to the applicability of appropriate legal rules, even though these may fall short of being an established and autonomous system of law*.[553]

b.-) Selection of Law by Arbitrator

If the parties did not make a choice of the law applicable to the arbitration, the arbitrator will select the law. The New York Convention does not contain a provision on the law applicable to the substance of the dispute. The Geneva Convention provides in Article VII(1): *The parties are free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbirators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages*. Thus if the parties did not make a choice of the applicable law, Article VII(1) of the Geneva Convention frees the arbitrator from the need to apply the conflict of law rules applicable at the place or seat of arbitration – he may apply those rules which correspond with the nature of the dispute and which can be expected to lead to a reasonable result.[554]

Whereas earlier texts of instruments authorised arbitrators to select the law on the basis of the rules of conflict deemed applicable, more recent formulas do no longer require an arbitrator to select the applicable law by reference to rules of conflict considered appropriate. The arbitrator may directly apply the rules of law which he determines to be appropriate. Article 28 of the UNCITRAL Model Law on International Commercial Arbitration corresponds with this provision whereas rules for arbitration of arbitral institutions tend to give arbitrators the right to select the appropriate law without reference to conflict of law rules, see, for example, Article 28(1) of the International Arbitration Rules of the American Arbitration Association (1997): *(1) The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of* law as it determines to be appropriate. Generally, by the submission of the dispute to an arbitral institution the parties are taken to have agreed on writing that the arbitration shall be conducted in accordance with the rules of the relevant arbitral institution to which the refer the dispute.[555]

5.2.2 **Choice of a Transnational Law**

Whereas earlier instruments relating to international arbitration approved of the parties' choice of a national law which would otherwise not be applicable to the contract, recent international instruments relating to arbitration also refer to the parties' right to choose a non-national law.[556] The choice concerning a particular set of legal rules, which do not represent the rules of a national legal system is possible, inter alia, on the basis of the consideration 'de maiore ad minus', taking into account that the parties may even ask the arbitrator to decide the case on equitable principles.[557] Rules of a non-national law are, for example, contained in the UNIDROIT Principles of International Commercial Contracts or the Principles of the European Law of Contract. Within recent years the UNIDROIT Principles have provided international arbitrators with a recommendable practical tool for decision making, and the awards published show that the Principles have been accepted not only in cases brought before international arbitration but also as principles of international trade law by national courts.[558]

a.-) UNIDROIT Principles of International Commercial Contracts

It is the objective of the UNIDROIT Principles to establish a neutral and balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.[559] The UNIDROIT Principles *are beginning to attract considerable attention throughout the world and are an important part of the search for the nature of contract. In effect, the 'Principles' constitute a new 'International Restatement of Contract Law'.*[560] The orientation of international arbitration thus coincides with the aims of the drafters of the UNIDROIT-Principles.

(1) Broad Scope of Principles

The choice on the UNIDROIT Principles as the law applicable to the contract has the advantage that the parties do no longer have to establish the whole framework for their contractual relation within a bilateral relation, but that they can rely on the 'implication by law' of the terms which they did not expressly agree on. Another advantage deriving from the application of the Principles lies in the fact that particularly in cross-border relations the parties would be deprived from the need to find a 'neutral' national law to be applied to their contractual relation. The choice of law of the state where one of the parties is domiciled or established might operate to the disadvantage of the other party which very likely will be less familiar with the relevant rules. Choosing a 'neutral' national law of a third state might not present an optimum solution, if such a choice is conditioned by the mere intent to avoid the application of the national laws of one of the parties, when the parties are not well acquainted with this law.

The UNIDROIT Principles thus offer advantages, namely:[561]

1. authority;
2. completeness in the sense of a codification which is:
   - exclusive;
   - gapless;
   - comprehensive code;
3. system;
4. reform;
5. national legal unification;
6. simplicity.

(2) Principles Based on a Broad Consensus

There is no doubt that the Principles will have to be applied by the arbitrator if the choice of law clause contains an express reference, and there is an increasing number of cases in which the parties expressly agreed on the application of the Principles.[562] Recent international arbitration applied the UNIDROIT Principles even if the parties in their choice of law clause had referred merely to 'Anglo-Saxon principles of law' or 'principles of natural justice',[563] or in a clause referring to the application of 'the principles common to both English law and French law, and in the absence of such common principles, such general principles of international trade law as have been applied by national and international tribunals'.[564]

The Preamble of the Principles confirms the broad scope of application of the Principles: *They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like*. Thus choice of law clauses do not necessarily have to contain an express reference to the UNIDROIT Principles. An arbitrator who applies the Principles on the basis of such a general clause, referring to either general principles of law or the lex mercatoria, will not risk that for this reason the award could be unenforceable according to Article V of the New York Convention. In practice, arbitral tribunals refer to the Principles *as an aid to the interpretation of contract terms and conditions or even as a standard to be observed, for instance, in the negotiation of a contract*.[565]

b.-) UNCITRAL Model Law on Electronic Commerce and Other International Instruments Related to Electronic Commerce

The parties may supplement the application of the more general UNIDROIT Principles of International Commercial Contracts by more specific instruments relating to electronic commerce such as:

- UNCITRAL Model Law on Electronic Commerce;
- EDI Model Agreement;
- Electronic Commerce Agreement.

c.-) United Nations Convention on the International Sale of Goods

The United Nations Convention on the International Sale of Goods (UN CISG) impliedly provides for contracts of sale to be concluded by electronic data interchange means in Article 11. *Similarly, electronic data interchange produced records should satisfy any evidential requirements*.[566] The Convention, which is applicable in the case of a sale of goods (which may include goods transferred via digital data networks)[567] between parties which have their establishments in different Contracting States, may be contracted out according to Article 6 of

the Convention, also by means of general terms of contract. Yet there is no doubt that the Convention is not applicable to consumer contracts according to its Article 2a).

d.-) Validity of the Choice of Law Clause

It may be controversial whether the validity of the choice of law has to be assessed on the basis of rules of mandatory provisions of a domestic national law or independently of such a law. National laws may not envisage that the parties to a contract choose international principles of law as the law applicable to their contract. It has been argued that the choice of the Principles would constitute a 'genuine' choice of law, not a material one.[568] Accordingly, the validity of the choice does not depend upon the admissibility of the choice according to a particular national law, but on the admissibility according to the private international law on international arbitration.

e.-) Mandatory National Law and Choice of a non-National Law

According to the rules of conflict of law of some states this choice of law may not be validated which aims at the evasion of mandatory rules of law which would be applicable in the absence of an agreement between the parties. However, it may be doubted that such a rule is applicable to international arbitration. One important motive for the choice of law lies in the wish of the parties to apply a neutral law which is not connected with or subject to the influence of one of the parties.[569] Yet the UNIDROIT Principles invite the arbitrator to observe rules of the mandatory law. The choice of the Principles is not made within a *legal vacuum, freed of all constraints of mandatory laws*[570] because the mandatory rules of a national law remain applicable on the basis of the rules of the private international law. Article 1.4 of the Principles expressly provides that mandatory rules take precedence over inconsistent provisions of the Principles.[571] The comment to Article 1.4 of the Principles refers in No. 1 to the particular nature of the Principles according to which they cannot be expected to prevail over applicable mandatory rules whether of a national, international or supranational origin. Accordingly, mandatory provisions, whether enacted by states autonomously or to implement international conventions, or adopted by supranational organisations, cannot be overruled by the Principles. But this observation has to be qualified: *Yet, even where, as may be the case if the dispute is brought before an arbitral tribunal, the Principles are applied as the law governing the contract they cannot prejudice the application of those mandatory rules which claim application irrespective of which law is applicable to the contract (lois d'application nécessaire). Examples of such mandatory rules, the application of which cannot be excluded simply by choosing another law, are to be found in the filed of foreign exchange regulations (...), import-export licences (...), regulations pertaining to restrictive trade practices, etc.*[572] Accordingly, if the UNIDROIT Principles[573] are chosen as the law governing the contract, the arbitrator has to observe those rules of the mandatory law which are applicable independent of any choice of law by the parties and which establish public policy. If the rules of the mandatory law constitute the public policy applicable at the place or seat of arbitration, the arbitrator has to take these rules into consideration. Based on the argument that a state organisation or an organisation of states has interests which are vital to its existence or social order and moral values, the arbitrator should disregard the provisions of the chosen law in favour of the basic values recognised by the public policy.

5.2.3 **Arbitration 'Ex Aequo et Bono' and 'Amiable Compositeur'**

The parties may agree that the arbitrator shall decide the dispute 'ex aequo et bono', that is to say with regard to the principles of equity or also as 'amiable compositeur'. In such a case the arbitrator may disregard non-mandatory rules of law which the parties may themselves disregard in their contract.[574] Subsection (2) of Article VII of the Geneva Convention states that *the arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration.*

The arbitration ex 'aequo et bono', the arbitration as 'amiable compositeur' or the decision on equitable principles is admissible in international arbitration according to the arbitration laws of many states and international instruments.[575] In the case of the Spanish consumer arbitration the arbitration on the basis of equity is the rule, and a decision on the basis the law will only be made if the parties insist on it. The parties which authorise the arbitrator to decide the dispute 'ex aequo et bono', or to make an amicable settlement, incur the risk that the arbitration which is not bound on legal principles, may decide discretionary and that a party may loose its rights to recover any losses from an insurance. It is criticised that a decision 'ex aequo et bono' lacks any foreseeability.[576] However, under certain circumstances such a type of settlement can be recommendable, for example where an adaptation of contracts with a long duration is needed or where the assessment of damages of a factual and not contested position or rights is needed. The parties may agree on an amicable settlement (or ex aequo et bono) within an arbitration agreement or independently of it. The decision rendered within such proceedings is an arbitral award and enforceable under the New York Convention.[577]

5.2.4 Selection of Law by the Arbitrator

Generally, the rules of arbitration of arbitral institutions give the arbitrator discretion in the determination of the law applicable to the arbitration. A typical rule may state:[578] - *Applicable Rules of Law - (1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate. (2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages. (3) The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.* The arbitrator thus has a very broad discretion to determine the applicable law.

The arbitrator may select a non-national law if he considers it appropriate. Even if national arbitration laws limit the possibility of an arbitrator in the selection of the law applicable to the substance of the dispute, these limits will not restrict the arbitrator who operates on the basis of rules for arbitration which envisage such a choice and which have been endorsed by the parties, either expressly or through the choice of the relevant arbitral institution.[579]

Concerning mass contracts or contracts with a low value or typical contracts between Information Society services and recipients in the cross-border environment it may be recommendable if the rules for arbitration would provide some guidance on the applicable law in order to assist not only the parties but also the arbitrator. Electronic commerce would be ill-served if in mass contracts the applicable law should be determined ex post. The parties need legal security about the applicable law before and latest at the time of the conclusion of the contract. In cases in which it would not be economical to negotiate these issues individually the Information Society service should be able to offer an attractive choice of law in its online terms of contract. Such a choice could be combined with the arbitration clause. The clause could contain a reference to the rules of an arbitral institution specialised in electronic commerce. The rules for arbitration of this institution might offer an appropriate set of laws, and the rules should contain a reference according to which this 'choice of law' would be deemed agreed upon by the parties when they refer their dispute to this institution.

5.2.5 Good Faith and Fair Dealing in Electronic Commerce

What consequences has the contractual implication of terms such as good faith or 'business ethics' in electronic commerce? According to Article 1.7 of the UNIDROIT Principles of International Commercial Contracts each party must act in accordance with good faith and fair dealing in international trade. This principle is applicable during the whole contractual relation, including the negotiation process, and it is mandatory, that is to say that it cannot be contracted

out.[580] Should in the trade practice of electronic data interchange or general electronic commerce certain practices be considered as unfair, the corresponding conduct may also be considered as a violation of contractual duties in application of Article 1.7 of the UNIDROIT Principles.

The commentary to the UNIDROIT Principles states in Article 1.7 (Good faith and fair dealing) *(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty*. In the UNIDROIT Principles, the good faith and fair dealing is one of the fundamental ideas. The duty of good faith and fair dealing comprises the whole contractual relation, including the negotiation process.[581] Also during the pre-contractual phase the parties have to observe this principle before the conclusion of the contract. However, any violation of such an obligation can only be ascertained ex post, that is to say after the parties have effectively concluded the contract, stipulating the application of the UNIDROIT Principles by choice of law. On the basis of the Principles violations of the pre-contractual duty of information may be conceived of as breach of the contractual duty of good faith.

The content of the duty to be of good faith and of fair dealing in the sense of the UNIDROIT Principles has to be established with regard to the individual circumstances, and with regard to the contents which these principles obtained in national law. *In other words, such domestic standards may be taken into account only to the extent that they are shown to be generally accepted among the various legal systems*.[582] Good faith and fair dealing must be construed in the light of the special conditions of international trade.[583] This means that in the sector of electronic commerce these concepts may assume a particular content, but that the standards of business practice in electronic commerce can at present hardly be defined, or at least not with more certainty than the other developing legal concepts of Netiquette or lex electronica.

a.-) Adaptability in E-commerce

There is no doubt that the UNIDROIT Principles are susceptible to apply in conditions of electronic commerce. However, there is no direct reference in the Articles to data messages. Article 1.10 of the Principles states that the term *'writing' means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form*. This modern definition would include e-mail or electronic data exchange. But this reference does not permit an inference to the solution of problems which derive from the nature of the communication of messages by means of electronic commerce. Therefore it may be necessary to complement or supplement the Principles by the UNCITRAL Model Law on Electronic Commerce.

b.-) Offer and Acceptance in Electronic Commerce

According to Article 2.1 of the UNIDROIT Principles on International Commercial Contracts a contract is concluded by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. Article 2.2 of the Principles states that *a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicated the intention of the offeror to be bound in case of acceptance.* Concerning the offer there is no single term which would have to be expressly stated. It is sufficient if there is intent to be bound.

Can the content of a website constitute an offer? If a website contains information posted by an Information Society service concerning a description of the goods and services which may be ordered, including the conditions for transactions it may be doubtful whether such information may constitute an offer. It would probably be appropriate to assume that it merely invites to the making of offers. However, if the website contains an online form for the commissioning by

means of which the recipient can select interactively from the choice of goods and services indicated on the website into his 'virtual basket', or if the online forms are available through a link placed beside each different type of goods or services described on the website, it appears that the goods and services are 'offered' on the website. The offer would be 'sufficiently definite' so that the website 'indicates the intention of the offeror to be bound in the case of acceptance' in the sense of Article 2.2 of the Principles. But if the content of the website cannot be considered as establishing an offer, there should be no doubt that an email sent by a person, for example a recipient, can constitute an offer.[584] The Information Society service may attempt to avoid such doubts if it indicated on its website clearly that the goods or services published on the website should be understood as definite offers which a recipient may accept online.

c.-) Effectiveness of Offer

According to Article 2.3(1) of the Principles an offer becomes effective when it reaches the offeree. Assuming that the posting of a website constitutes an offer in the sense described above – does the offer become effective by the mere posting of a website, is it effective only when downloaded by the offeree or does it have to be stored in the offeree's computer or is it even required that the data are printed? It may be considered that the offer has reached the recipient if he downloads it so that he may take notice of its content. If a website was emailed to the recipient one might consider that it 'reached' him at the time when the email entered into his computer system. It cannot be expected that the UNIDROIT Principles would solve detailed problems relating to the communications of the parties by means of electronic commerce. In order to find an appropriate solution in this sector it may be recommendable if the parties agreed supplementarily on the application of the UNCITRAL Model Law on Electronic Commerce.

Once an offer has reached the offeree, it can no longer be withdrawn, Article 2.3 of the Principles. In application of Article 2.4 of the Principles an offer can be freely revoked if notice of revocation reaches the offeree prior to the dispatch of an acceptance. When is an electronic offer communicated, when does the offeree's electronic acceptance reach the offeror? Assuming that the posting of conditions for sale or services combined with information on the quality and price on a website constitutes an offer in the sense of Article 2(2) of the Principles, the contract might be concluded, if the Information Society service received the recipient's acceptance in the electronic form of an order. In such a case the Information Society could not reject the order if the order relates to the terms contained on the website which constituted the offer, because the acceptance has become effective at the time when the indication of assent reached the offeror, Article 2.6(2) of the Principles. Article 1.9(3) of the Principles states that a notice reaches a person when given to that person orally or delivered at that person's place of business or mailing address. In the case of email this delivery may be considered to occur when he email enters the recipient's server. Yet due to the generality of the Principles it may be appropriate to complement the choice of the UNIDROIT Principles by the supplementation of legal rules which take into consideration of the particular nature of electronic messages, in particular the UNCITRAL Model Law on Electronic Commerce.

5.2.6 Supplementation of UNIDROIT Principles

The UNIDROIT Principles do not offer a comprehensive regulation for the contractual relation between the parties. Accordingly, it may be necessary to complement the Principles with other legal rules. Article 1.6 of the UNIDROIT Principles deals with the interpretation and supplementation of the Principles. The Comment to Article 1.6 of the Principles observes in No. 4 that *a number of issues which would fall within the scope of the Principles are not settled expressly by them.* Accordingly, the parties are free to substitute the Principles. They may do this with other international or national instruments, but also by reference to a national law.

a.-) Supplementation Clause

The Comment to the UNIDROIT Principles on International Commercial Contracts suggests the following supplementation clauses:

1. *This contract is governed by the UNIDROIT Principles supplemented by the law of country X*, or:
2. *This contract shall be interpreted and executed in accordance with the UNIDROIT Principles. Questions not expressly settled therein shall be settled in accordance with the law of country X*.

The supplementation of the UNIDROIT Principles or of other particular laws chosen by the parties for their contract in the sector of electronic commerce fits well within the legal relations between Information Society services and recipients in a cross-border relation, where the need for global principles is sought for.

b.-) Arbitration Clause and UNIDROIT Principles

A proposed clause for arbitration states:[585]

1. Any dispute or claim that shall arise out of or in connection with this contract shall be referred to arbitration;
2. The UNIDROIT Principles of International Commercial Contracts shall be incorporated in and govern this contract, its interpretation and performance, on all matters coming expressly within the scope of the Principles (except as to Articles ... of the Principles – here specify any exclusion or modification of the Articles);
3. In all other respects, the laws of (country X) shall apply to and govern the contract. This refers to the substantive laws of (country X) and not to its conflict of law rules.

5.2.7 **Principles of European Contract Law**

The Principles of European Contract Law constitute, like the UNIDROIT Principles, a restatement of the law of contract, however, addressed to general principles not of commercial but civil law. The Principles are intended to be applied as general rules of contract law in the European Communities, Article 1.101(1). Accordingly, their application recommends itself in any contracts including those between non-merchants or where one party is a consumer. The choice of law clause in the contract does not expressly have to refer to the Principles of European Contract Law. According to Article 1.101(3)(a) of the Principles it is sufficient if the parties agreed on the application of the lex mercatoria or other general principles of law. According to their Article 1.101(3)(b) the Principles may claim application 'when the parties have not chosen any system or rules of law to govern their contract'. The Principles thus constitute a non-national law containing transnational legal rules which may be applied if chosen by the parties but also in the absence of a choice on the basis of considerations similar to those upon which an arbitrator may apply the UNIDROIT Principles. Also the European Principles are, without doubt, applicable in conditions of electronic commerce. Article 1.103(6) of the Principles states expressly that a 'written' statement includes communications made by *electronic mail and other means of communication capable of providing a readable record of the statement on both sides*.

a.-) Integration of Consumer Protection Law into the Principles

The EU consumer protection law may easily be integrated into the Principles of European Contract Law.[586] The rights and obligations which relate to consumer protection concern in particular:

1. advertising practices;
2. right of information;
3. particular contractual practices, for example use of means of electronic commerce;

4. right of withdrawal;
5. control of general terms of contract;
6. product liability;
7. guarantees;
8. damages including particular cases, relating, for example, to product liability, guarantees, false advertising.

b.-) Transposition of EU Directives into the European Principles

The transposition of the EU Directives on consumer protection into the Principles could be achieved by extending certain concepts into general concepts such as the right of withdrawal or the claim to damages, For example, the right of information could be integrated within the concept of withdrawal. This duty of information may possibly be based on transnational legal rules such as those contained in the Directive on Electronic Commerce and in the Directive on Distance Contracts which should complement the European Principles. The concept of damages could be adapted to cover the rights of consumers emanating from the Directive concerning product liability and the concept of liability to comprise rights based on the Directives relating to advertising and guarantees. The regard of the EU law could lead to the establishment of unitary concepts such as those relating to the breach of contract and liability (without fault), the concept of objective fault, the regard of circumstances in the individual case and the integration of the relation between the producers and the chain of suppliers.

5.2.8 **Limitations of the Choice of Law**

A limitation of the freedom to choose the applicable law is based on the provisions on state control according to the New York Convention, Article V(1)(b) and (d) or Article V(2)(b). The freedom of the parties to choose the applicable law is limited insofar as the arbitral award is subject to control by national courts. The scope of this control which concerns here, first, the arbitrability of the dispute and, second, the compatibility of the award with (the relevant state's) public policy, may limit the parties' possibility in the choice. The Possibility of the parties to choose the law applicable to the dispute is regulated differently in the laws of Member States in their private international laws, relating to arbitration.

a.-) Contract without a Law

Can the parties free their contractual relation from any national law and create an environment of a 'contract without a law'? Certainly, the establishment of a contractual relation does not only depend on the parties' will to conclude a contract. *The mere will of the parties is insufficient to create a legally efficient transaction.*[587] The law chosen by the parties will always have to be based on a legal system permitting such a choice.

b.-) Choice of a Law

The parties may choose a non-national law with the purpose to avoid the application of a national law the rules of which would render the contract unlawful or without effect. The proposal of such a choice in the general terms of contract on an Information Society service's website with reference to coinciding rules of an arbitral institution may facilitate the competitiveness of the business within the Internal Market and on a global basis. Potential customers from abroad will know that they do not have to count with the application of a foreign national legal system which would possibly favour the business's position as the stronger party of the contract. At the same time the Information Society service would be able to rely on one and the same rules of law in its non-domestic contractual relations, no matter in which states its recipients are established or domiciled.

c.-) Rules of Mandatory Law

The analysis of decisions rendered within international arbitration reveals a broad acceptance of the principle of the autonomy of the will according to which in a general manner the awards respect the parties' choice of the law, displacing them only occasionally with regard to mandatory rules whether these are rules of the 'forum', of the place of execution or any other restrictive legal order.[588] The choice of the UNIDROIT Principles or of the Principles of the European Law of Contract does not affect the application of the rules of mandatory law which are applicable irrespective of the law governing the contract, see, for example, Article 1.4 of the UNIDROIT Principles or Article 1.103(2) of the European Principles.[589] Likewise, the choice of the UNCITRAL Model Law on Electronic Commerce or of the Vienna Convention on the International Sale of Goods does not affect rules of the mandatory law of Member States insofar as they constitute public policy.

5.3 Transnational Law and Political Economy

The application of a single set of rules of law to the arbitration of disputes in cross-border electronic commerce within the Internal Market would have an impact on the political economy of Member States. However, *unlike the literature on competition among States in the market for statutory products, which is fairly well developed and has reached a certain state of maturity, the literature concerning the political economy of international harmonisation of legal norms is barely in its infancy.*[590] In the Internal Market for electronic commerce the application of such rules would mean that the discussion concerning the application of the 'state or origin' or 'state of reception' principle would become nugatory to a large degree. Complemented by rules of law based on transnational legal principles such as those of the UNIDROIT Principles of International Commercial Contracts or the Principles of the European Law of Contract the cross-border dispute settlement in electronic commerce could contribute to the lowering of the cost price of goods and services in electronic commerce. It is evident that international electronic commerce would benefit if the parties, by mere reference, could substitute national laws including mandatory and non mandatory rules with transnational rules, but up to now no such rules have been developed, and, taken into consideration of the potential risks or impediments, in particular relating to:

1. costs for development;
2. need of general acceptance;
3. lack of transparency of the market which is only in its infancy;
4. possibly incoherent national jurisprudences concerning the enforcement of arbitral awards;
5. the interfaces between the national law applicable to national disputes and the transnational rules of law in cross-border disputes;
6. the slow (but steady) development of transnational rules of law (for example the long time for the drafting of the UNIDROIT Principles and the Principles of European Law of Contract) makes it difficult for individual arbitral institutions or Information Society services and recipients (consumer groups) to develop such rules;
7. problems concerning the adaptation of such rules to changes in the economy and technology;

it may take time until such rules will be generally applied.

The e-confidence forum, operated by the EU Commission's Joint Research Centre,[591] serves as a basis for the discussion about the development of guidelines which may also influence or coincide with the development of transnational rules which are of particular importance with regard to the consumer protection.[592]

5.4 Law Applicable to the Arbitration Agreement

If the parties have not made a choice of law which relates to the law applicable to the arbitration agreement, Article V(1) of the New York Convention determines that the law applicable at the place or seat of the arbitration shall be applied. The Geneva Convention determines the law applicable at the place or seat of the arbitration, Article VI(2)(b), or if this cannot be foreseen, the law which the court concerned will have to apply, Article VI(2)(c), unless the parties made a choice of law. According to both Conventions the parties have the freedom to choose the applicable law. The parties to disputes relating to electronic commerce should benefit from this freedom by choosing a law according to which the lawfulness and enforceability of arbitration agreements concluded by means of electronic commerce is beyond doubt.

5.5 Law Applicable to the Procedure

According to Article V(1)(d) of the New York Convention the parties are free to determine the law applicable to the arbitration procedure; failing agreement the procedure must comply with the rules of the state of the place or seat of the procedure. Also the Geneva Convention provides for the freedom of contract but if the parties did not make use of it, it is up to the arbitrator to determine the place or seat of arbitration and the rules of procedure, Article IV(3) sentence 1 of the Geneva Convention.

5.5.1 Autonomy of the Parties

Generally, the parties are free to decide on the applicable procedural rules. They may, for example, provide for a documents-only arbitration,[593] or for the procedure by means of electronic commerce. The autonomy of the parties and the freedom of contract gives them the possibility to decide on the law applicable to the procedure to be applied by the arbitrator. With this regard it has been suggested[594] that the parties are well advised to choose the law applicable to the procedure and to refer to the approved rules for arbitration of the international commercial arbitration, adapted to the online dispute settlement by appropriate additional terms. But taking into account of the multitude of possibilities, it would be appreciable if the parties based their choice of the law applicable to the arbitration procedure by means of electronic commerce on the rules of the arbitral institution to which they refer the dispute.

5.5.2 Rules for Arbitration, Choice by Parties, Selection by Arbitrator

A strong opinion in legal theory favours the application of the law of the place or seat of the arbitration. This traditional concept was also contained in many rules of institutions responsible for arbitration. Thus the former Article 16 of the Rules of Arbitration of the ICC referred to the law of the country in which the arbitrator holds the proceedings. But since the 1975 revision of the Rules the arbitrators could decide procedural issues at their discretion.[595] Presently Article 15(1) of the Rules states: *The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, any rules which the parties or, failing them the arbitral tribunal may settle on whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration*. But the arbitrator must also have regard to mandatory rules of national law, in particular those rules a violation of which might cause the award to be set aside in the place of arbitration.[596]

In relations of electronic commerce, where geographical distances become less important, the number of contractual relations between parties who are domiciled or established in different countries will increase. In parallel the number of disputes between such parties will rise. These parties may have very different conceptions about legal procedures, pleading and the establishment of evidence in arbitral procedures. Therefore, the resort to procedures established by laws applicable at the place of arbitration may not be satisfactory, in particular since the national arbitration laws hardly contain provisions on arbitration procedures using means of electronic commerce. It would be more appropriate if the parties, when concluding the contract,

had the opportunity to know more about the rules of procedure applicable to the arbitration in cyberspace. For this reason it would be appreciable if the Information Society service which suggested the conclusion of an arbitration agreement on its website, would provide for links to the relevant websites of the arbitration institutions concerned which should contain the rules applicable to the arbitration procedure. Where such rules do not meet the interests of the parties, they may, in their arbitration agreement, make those amendments to the rules which they think fit.

5.6 Arbitration Rules and the Law Applicable to the Substance of the Dispute

By reason of their autonomy the parties may choose the law applicable to the substance of the dispute. The Geneva Convention contains a particular provision which confirms this freedom in Article VII(1). The law applicable to the substance of the dispute may be of considerable importance. A brief reference to the different periods of limitation concerning guarantees may suffice. Before the harmonisation providing for a minimum duration of two years according to Article 5(1) of the EU Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees[597] with regard to the lack of conformity of goods, such periods could be six months according to German law and one year according to Danish law. According to Swedish law the relevant period was two years, but up to ten years according to Finnish law. *Indeed, very often an arbitrator's decision is likely to be very different depending on which law he applies. This will be the case, to mention just a few examples, when he is called upon the determine the extent of the seller's liability for hidden defects, the effects of a set-off, the duration of he period of limitation, the validity of a guaranty or of a security interest or the bearing of the underlying transaction where the period of limitation for an action (…) has expired.*[598]

5.6.1 Connecting Factors for the Selection of Law by the Arbitrator

What are the connecting factors upon which arbitrators may base their selection of the law applicable to the substance of the dispute, in the absence of the choice of the parties?[599]

1. the arbitrator's country of origin;
2. the country of origin common to both parties;
3. the country the jurisdiction of whose courts is ousted by submission to arbitration;
4. the country where the award will most probably have to be enforced;
5. the country whose private international law system has been chosen by the parties;
6. the country to whose substantive law the parties have submitted the contract;
7. the country where the arbitration has its seat.

Theoretically, these possibilities may be considered, however, in arbitral practice the following principles have gained in importance:[600]

1. the law applicable at the seat of the arbitration;
2. the conflict of law rules applicable at the place of arbitration;
3. cumulative application of the conflict of law rules of those legal systems which have a connection with the contractual situation;
4. the conflict of law rules directly chosen by the arbitrator;
5. basic principles of the private international law.

a.-) Decision by the Arbitrator

With regard to international arbitration it should surprise if the parties would accept the legal insecurity deriving from uncertainties relating to the method for the selection of the law applicable to the substance of the dispute. National arbitration laws recently adhere that, in the absence of a choice by the parties, the arbitrator may decide according to the rules which he

considers appropriate.[601] This provision reflects international tendencies which have been recognised, for example, in Article VII(1) Sentence 2 of the Geneva Convention according to which, failing an indication by the parties, the arbitrator may apply the proper law under the conflict of law rule deemed applicable.[602] However, amongst jurisprudence it appears to be controversial up to which degree the arbitrator is free in his selection of the appropriate law. Whereas it is asserted that the freedom may only concern potentially relevant systems with due regard to the circumstances of the individual case,[603] others assert that the arbitrators should rely on the conflict of law rules of the states concerned,[604] but it is also stated that the Geneva Convention would authorise arbitrators to develop their own conflict of law rules without regard to national systems.[605] The wording of Article VII of the Geneva Convention has been taken over by many arbitration rules, for example UNCITRAL and the ICC. But with the increase of cross-border electronic commerce and international out-of-court dispute settlement it appears to be necessary to provide the arbitrators and the parties with simple and easily applicable rules concerning the law applicable to the dispute, taking into consideration that the individual cases will demand to a lesser degree a decision based on the particular circumstances but a general approach which facilitates cross-border contracts.

b.-) Appropriate Conflict of Law Rules

Article VII(1) of the Geneva Convention and some arbitration laws authorise the arbitrator expressly to select the law applicable to the dispute on the basis of the conflict of law rules which appear appropriate to him. The reason for this traditional approach vested in the principles of the private international law which *seeks to 'localise' a legal relationship which touches upon more than one state within a specific national legal order. The law of this legal system will then be declared applicable to the case. Private international law generally chooses the applicable law by applying conflict of law rules.*[606] But these conflict of law rules are not international in the sense that they would obligate all countries: *Every country draws up its own conflict of law rules. Although these rules run to a large extent parallel from country to country, there may be differences. Private international law is therefore not 'international' and uniform in the same way as international law is international.*[607]

5.6.2 **Selection of the Applicable Law by the Arbitrator**

According to Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration which is similar to Article VII(1) Sentence 2 of the Geneva Convention, failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Recent legislation and rules of arbitral institutions permit the arbitrator to apply directly the law considered most appropriate. Whereas former provisions of legal instruments had asked arbitrators to select the law on the basis of 'the rule of conflict' deemed appropriate, the direct choice of the appropriate applicable law corresponds with a *gradual evolution in international thinking on this subject* and *trends in international arbitration that are now widely accepted.*[608] The arbitrator's freedom to select the applicable law may be determined by the agreement between the parties, but if the parties did not make a choice of law, it appears as if they would have expressly authorised the arbitrator to select the law which appears most appropriate.[609]

a.-) Place or Seat of Arbitration

Since arbitration is an act of adjudication, it is submitted to the power of the State within which the arbitration takes place. Accordingly, it may be asserted that arbitrators have no greater freedom in the application of the substantive law than a judge would have. *Arbitrators would consequently have to apply the conflict rules of the State in which they are sitting and would be little better off than an ordinary court.*[610] In application of this doctrine the place or seat of the arbitration assumes, as in the concept of the jurisdictional doctrine, a decisive importance by

means of which the applicable law should be determined. But it may also be considered that the contractual and jurisdictional elements of arbitration establish a mixed juridical institution, sui generis, which has its origin in the parties' agreement and which draws its jurisdictional effects from the civil law so that the place or seat of arbitration should not assume such an important role. In the case of arbitration by means of electronic commerce the choice of the place or seat may be arbitrary. In any case, the virtual place or seat of arbitration has a much lesser 'connection' with the territory of a state so that the application of that state's conflict of law rules does not impose itself.

b.-) Enforcement of Award

Whereas it is asserted that the selection of the applicable law may be made without regard of the possible enforcement of the arbitral award, thus unfettered by possible judicial control,[611] it is also suggested that the arbitrator should not make his selection without regard of the chances concerning the enforcement of the arbitral award: *In the absence of an express choice, the parties' will must be interpreted... Unless some more convincing indication is available, in most cases one will have to have recourse to the law of the seat of the arbitral tribunal – to the extent, of course, that the choice of the seat was made by the parties themselves.*[612] But since the seat is often not chosen by the parties, it may be arbitrary to focus on the localisation of this place. It may be more appropriate to focus on the need to enforce the arbitral award. With due regard to the observance of the public policies of those states in which the arbitral award may be enforced, conflicts between the rules of national legal systems may arise. Thus it has been asserted that the arbitrator *should apply those laws which can reasonably claim application to the issue.*[613]

c.-) Public Policy

The arbitrator should make use of the freedom to select the appropriate law by regarding the public policies of all legal systems concerned, which would include the regard of the mandatory rules of those interested states which may not even enforce these rules in the particular case.[614] Different from a judge, an arbitrator should consider not only a single public policy but the public policies of those states which are directly concerned.[615] There is no control on the merits of the arbitral award by national authorities concerned with the enforcement. Accordingly, the arbitrators should be guided by a desire to satisfy the legitimate expectations of the parties.[616]

d.-) Legitimate Expectations of the Parties

With regard to the increasing number of international contracts concluded by means of electronic commerce the orientation of the arbitrator on the legitimate expectations of the parties will hardly justify the selection of a particular national law. Also the selection of the law applicable at the seat of the arbitration does not appear conclusive if the arbitration occurs in cyberspace. On the other hand the application of transnational laws such as the law of 'cyberspace', netiquette or lex informatica cannot be justified as long as the content of these 'laws' has neither a definite shape nor met with general acceptance in international trade.

(1) Reference to Set of Applicable Law in Rules for Arbitration

The possibilities which online technologies permit for the establishment of contractual relations without regard of national borders justifies the application of rules of law which are adapted to the virtual environment. In the public interest in an efficient use of electronic commerce, and in the interest of the parties in legal security and of the arbitrators and institutions responsible for arbitration in the establishment of confidence in their services, it appears appropriate if unitary rules would be developed. Such rules would facilitate the work of the arbitrator particularly in cases where it cannot reasonably expected that he would undertake much efforts in the

selection of the appropriate applicable law. Thus it appears recommendable if the institutions responsible for arbitration of cross-border disputes established in their rules a reference to the law to be applied by the arbitrator in the absence of a particular choice of the parties. This reference, for example, might relate to 'mass'-disputes, as which could be defined disputes with a low value at stake (such as below € 50,000) or where the dispute relates to typical situations involving a weaker party (such as a consumer. Accordingly, arbitral institutions could draft rules for expedited arbitration in electronic commerce which, with due regard of the expectations of the parties, established a simple regulation of the law to be applied to the substance of the dispute in the absence of an express choice by the parties.

(2) Differentiation According to Interests Involved

Whereas the selection of the applicable law by the arbitrator may be appropriate in cases where the interests at stake are considerable, the economy of low value arbitration imposes the need to settle a dispute without a less time consuming analysis of the legal systems and the public policies of the different States where the enforcement of the award is likely. In cross-border disputes in which minor sums are at stake, say below a value of € 50,000, the general interests of the parties in a speedy and cost efficient arbitration may outweigh their interest in a time consuming application of the rules given by the private international law. In comparison to a standardised application of 'equitable principles' or decisions 'ex aequo et bono' the use of standardised legal principles has the advantage that both parties, their lawyers and the general public obtain a higher degree of legal security which is particularly relevant for the establishment of confidence in the cross-border electronic commerce.

5.7 The Law Applicable to Non-Contractual Disputes

In the case of disputes not arising from contract but, for example, in relation to it such as in the case of product liability, jurisprudence asserts that a contractual choice of law clause will also determine the law applicable to tort. This may facilitate the assessment of risks of Information Society services in cross-border trade and their calculation of costs. In the case of a pre-contractual liability it may be controversial whether the disputed claim is based on a violation of a pre-contractual obligation (vesting on a blameworthy conduct before the making of the contract) or whether such a claim is based on tort. In both cases the law applicable to the contract may be decisive.[617]

5.8 Application of Trade Usages

No matter which law is chosen by the parties, rules for arbitration generally but also Article VII(1) Sentence 3 of the Geneva Convention and Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration provide that the arbitrator shall take account of the provisions of the contract and the relevant trade usages.[618] Such a rule prevents that arbitrators will be dependent on the choice of law made by the parties, in particular if the chosen law does not reflect developments of the international practice as contained in trade usages.

5.8.1 Lex Mercatoria

Trade usages should not be confused with the transnational law or the lex mercatoria. The latter concepts refer to comprehensive regulations of the legal relationship whereas trade usages concern punctual solutions to problems which arose in international trade. Trade usages are based, first, on the usage which was agreed upon by the parties and any practices which they have established between themselves.[619] Second, trade usages are usages which are widely known and regularly observed in international trade by parties in the particular trade, except where the application of such usage would be unreasonable.[620] According to the UNCITRAL Model Law on International Commercial Arbitration, Article 28(4), the trade usages are even applicable if the arbitrator decides 'ex aequo et bono' or as 'amiable compositeur'.

5.8.2 Law of Electronic Commerce

Did trade usages yet develop in electronic commerce? With regard to the law of the Internet attempts have been made to identify evolving trade usages:[621] *Just as merchants knew the customs and usages of the law merchant, so too should Internet users be charged with a knowledge of the customs and usages of the online world. When a forum state seeks to apply a set of rules to an Internet dispute, it would look to a Law Cyberspace, the collection of customs and accepted practices developed by courts with guidance from users, governments, and the Internet industry*. However, it seems that international trade has not yet developed coherent usages of which it could be said that they would have been generally accepted. There are model agreements on electronic data interchange (EDI) and there is the UNCITRAL Model Law on Electronic Commerce, however, it cannot be said that international trade usages based on these instruments would have developed.

5.9 Choice of Law Clauses Relating to Electronic Commerce

The use of choice of law clauses facilitates the conclusion of the contract and it reduces the time and costs for dispute settlement.

5.9.1 Reduction of Transaction Costs

Choice of law clauses can solve many of the problems that serve as arguments in favour of uniformity. First, contractually clarifying choice of law reduces the transaction costs of determining the applicable law at the time of the contract and at the time of trial.[622] Individual choices of law by the parties could have a negative effect, taking into account that the arbitrator may have to deal with different laws in each case. The time which an arbitrator would have to spend in order to become acquainted with the individually chosen law might be out of relation with the value of the case. It would be more appropriate if the Information Society services and recipients used a standard set of rules applicable to any cross-border dispute to be settled by arbitration.

a.-) Facilitation of Dispute Settlement

The standardisation of the choice of law may facilitate the work of arbitrators considerably. Standard clauses may be used in general contract terms published on the Information Society services' websites. The terms which may also be used within 'click-wrap' licences are particularly discussed in US law: *The arguments for inefficient contracting for the applicable law echo those relating to contracting generally, including those relating to enforceability of shrink-wrap licences discussed above. One potential problem is the presence of informational asymmetries in choice of law clauses in standard form contracts. With respect to software sales, the licensor responsible for drafting the term is arguably better informed about the effect of choosing the applicable law. The primary effect of a choice of law selection clause, however, will likely be to enforce literally the terms of the contract. Thus, a party arguing surprise would have to argue that she believed she could resist enforcement under the law of a jurisdiction different that the one agreed upon in the contract. This resistance is plausible only for the small category of clauses that are simultaneously regarded in most states as being against public policy and that are not banned under federal law. An example is waivers of a licensee's rights to use copyrighted material. Moreover the best way to eliminate surprise and clarify expectations would be a strong legal rule favouring enforceability.*[623]

b.-) Particular Advantages of Choice of Law Clauses in the Internal Market

However, the enforceability of choice of law clauses contained in online business terms remains doubtful within the Internal Market. The choice of law may have to be contained in a clause of the contract, but it may also be contained in the arbitration agreement. The effectiveness of the choice of law may thus depend on different factors. In relation of electronic commerce the

availability of the possibility to make use of online business terms will be essential for information Society services. In the case of contracts with recipients in the internal Market, the Directive on Unfair Contract Terms assumes essential importance.

Taking into consideration that in their online contract terms Information Society services are likely to offer as the chosen law a law they are familiar with it may be expected that such clauses are likely to refer to the law of the State where the service is established. Without regard to the effectiveness of such clauses, the mere fact that Information Society services established within the Internal Market may offer the choice of the law the Member State where they are established may have a negative impact on the competitiveness of the European industry. It is easily imaginable that the offering of a more unitary law as the applicable law by Information Society services established in the Internal Market is susceptible to create a higher degree in confidence in electronic commerce than the offering of the law of the relevant country where the Information Society service is established. The offering of a non-national law will have the advantage of providing:

1. neutrality;
2. regard of consumer interests in a cross-border environment by adapting the EU public policy as a minimum standard;
3. implementation of standards and usages developed in international electronic commerce;
4. adaptability to new developments, including technological aspects and trade usages.

c.-) Standardisation of Choice of Law Clause

The choice of law clauses would ensure an optimum of economic advantages if they were applied in a standardised manner. This can hardly be assured by agreement between the operators in the market, taking into account the negotiations which the achievement of such an agreement would require. It appears more economic if the institutions responsible for the arbitration in electronic commerce would, within their rules, refer to the law to be applied by the arbitrator. These institutions which are specialists in this matter, are not only well informed about the different national legal systems of Member States but also about the hazards or risks involved in cross-border relations between Information Society services and recipients. The simplicity of such a solution is supported by means of electronic commerce, because Information Society services could, from their website containing the offered clauses on the choice of law, create a link to the website of the institution for arbitration which contains the relevant rules on the proposed law to be applied. The choice of law applicable to the contract would thus coincide with the law applicable to the dispute. In order to avoid doubts about the sufficiency of an effective choice of law through a link to another website it would be recommendable if the Information Society service copied additionally the relevant passages of the choice of law contained in the rules of the institution responsible for arbitration on its own website.

d.-) Choice of Law Clauses and Consumer Protection

Are choice of law clauses in consumer contracts subject to judicial control? In arbitration the Rome Convention is not applicable and the relevant EU law, in particular the Directive on Unfair Terms in Consumer Contracts and other rules of mandatory law must be considered only insofar as such rules establish public policy.

5.9.2 International Law of Electronic Commerce

With regard to the freedom of the parties to choose the law applicable to the online dispute settlement it has been said[624] that *the arbitration agreement should contain a clause identifying the law applicable to the dispute which gives the arbitrator expressly the possibility to decide the dispute primarily on the basis of the law developed in international trade (lex mercatoria) and/or*

according to the usages and customary rules applicable to international computer networks (lex informatica, netiquette). The power which authorises the parties to such a choice is based on the inference 'de maiore ad minus', taking into consideration that since the parties may ask the arbitrator to decide the dispute 'ex aequo et bono' or as a 'compositeur amiable',[625] that is to say without consideration of non-mandatory legal rules, they should also be able to have the dispute decided on the basis of an a-national law or transnational rules. Such an express clause is said to ensure that the arbitrator will be able to rely on the rules of netiquette and that he can apply the principles underlying the corresponding usages even if they do not correspond with the national law which would be applicable in the absence of such a clause, taking into account that rules based on trade usages could only be applied if they related to the applicable national law.[626]

a.-) Lex Mercatoria

It is asserted that international commercial transactions are subject to their own rules, the lex mercatoria or the law merchant.[627] A basis for the lex mercatoria are usages developed in international trade, standard clauses, uniform laws or general principles of law including the contracts negotiated by the parties. In international trade usages developed depending on certain branches of the industry. These particular commercial usages are often included in standard contracts and clauses, drawn up by associations of the trade or industry. *Uniform laws are also important for the regulation of international trade. (...) General principles of law complement the above mentioned sources of the lex mercatoria.*[628]

(1) Insufficiency of Rules of Private International Law

The lex mercatoria allegedly consists of a body of transnational legal rules derived from commercial usages of international merchants and practitioners of law. In practice, the term 'lex mercatoria' is used interchangeably with terms 'transnational rules of law' or 'general principles of international commercial law'.[629] Rules of the lex mercatoria are applicable eo ipso in international commercial arbitration. *The exact content of this body of prescriptions is not clear. But the need for such a body of prescriptions is. In many cases the national laws that would ordinarily be applied to an international transaction may be inappropriate. In some cases the level of development of the national law is inadequate. It is tempting to propose that just as the international business community has developed its own parallel system of agencies of application through arbitration, that it should also develop a parallel system of legislation, largely to be accomplished by arbitrators themselves and to be referred to as lex mercatoria.*[630]

The development of the lex mercatoria can, in part, be attributed to the insufficiency of the system of the private international law to provide the participants of international trade with an easily applicable and foreseeable solution. In fact, the existence of the lex mercatoria proves *the inability of private international law to effectively function as the regulator of international economic transactions through the collisional method of law. In this sense, the lex mercatoria conception seriously challenges and acts as an alternative to private international law.*[631] The choice of the lex mercatoria offers certain advantages over the choice of a national law. Its principles of law are applicable on a global basis and do not depend on a national law. They are rather built on practice in international transactions which takes into account particular problems in individual cases.

(2) State Control Ensuring Social Usefulness

The main problem posed by the choice of the lex mercatoria lies in the substitution of precise legal rules by a system of uncertain principles.[632] But even if the choice of the parties determined the application of the lex mercatoria, the contract remains connected with a national law, at

least with the law according to which the parties could subject the contract to such a choice. *Lex mercatoria is a claim by certain members of the business community and arbitrators to break free of that process and to determine, for themselves and often on a case-by-case and sometimes ex post facto basis, what law and policy they will apply, without regard to the interests of the territorial communities which may hereby be affected.*[633]

Proponents of the lex mercatoria have been approached with neglecting systematic empirical legal comparison between different national laws which give effect to key cultural values of different civilisations. [634] However, as long as state control prevents the recognition and enforcement of awards which would violate public policy and as long as the autonomy of the parties authorises them to choose whatever law they consider appropriate, arbitrators may well base their awards on legal rules which are summarised as the lex mercatoria insofar as such awards comply with public policy of states and the choice made by the parties. There exists no risk that the arbitrators would violate the parties' wishes, as long as arbitral institutions compete with each other, and, accordingly, aim at the rendering of a dispute settlement which satisfies their clients.

(3) Lex Mercatoria as a Catalyst for Legal Rules

The reduction of the state's function towards the control, the evaluation and facilitation of private initiative supports the idea that the lex mercatoria assumes a legal quality. Accordingly, it may be justified to speak of a plurality of legal layers which justify that the lex mercatoria should not only be regarded from the point of view of the need of public recognition. It may be appropriate to assume the subsistence of a network of national, supra- and transnational forms of legal integration within the European Union: if one does not only ask for a distribution of legal competencies between the European Union and its Member States but includes also the infrastructure of the dogmatics within the 'private law societies' it may be conceivable to develop a 'third way' between the maintenance of the national legal orders and a supranational legal order within the third transnational component of a mutual coordination irritation and limited adaptation including an optional unified civil law.[635] Within this process the lex mercatoria operate as a catalyst through the elimination of those rules of law which proved to be not satisfactory for the economic execution of transactions with due regard to the interests of the parties.

(4) Lex Mercatoria of Electronic Commerce

It has been asserted that there is a strong parallelity between cyberspace and the lex mercatoria:[636] *The Law Merchant was a body of customary rules – the precursor to contemporary commercial law – that grew up in Medieval Europe as a response to the needs of international commerce. (…) It was simply an enforceable set of customary practices that inured to the benefit of merchants, and that was reasonably uniform across all the jurisdictions involved in the trade fairs. Two key elements of the Law Merchant for our purposes were first, that no statute or other authoritative pronouncement of law gave rise to its existence, and second, that the Law Merchant existed in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions. In other words, the Law Merchant made no attempt to displace existing rules promulgated by the jurisdiction in which a given trade fair might be held; it merely supplemented those rules with specific rules applicable to merchants' transactions. (…) The emphasis of these merchants courts and the law they applied was a speedy resolution of disputes, an important element when time is money. But another significant attribute of these courts was practicality and flexibility. Merchant practices were not static, and a reliance on local judges, taken from the merchants' own ranks and following the known customs of merchants, gave the Law Merchant an adaptability to changing times that statutory enactments would not have provided. (…) The parallels with cyberspace are strong.*

Whether the French Internet Charter and other practices would confirm the assumption of the existence of a 'lex mercatoria' on the Internet appears doubtful, in particular, since no standing rules can be said to have developed as trade custom. Concerning the content of the lex mercatoria, reference should be made to the UNIDROIT Principles of International Commercial Contracts and to the Principles of the European Law of Contract which may both be applied in cases in which the parties have chosen the lex mercatoria. Other relevant international legal instruments concern the United Nations Convention on the International Sale of Goods (CISG) and, with particular regard to electronic commerce the UNCITRAL Model Law on Electronic Commerce, the European Union's EDI Model Agreement[637] or the United Nations Centre for Trade Facilitation and Electronic Business' (UN/CEFACT) Electronic Commerce Agreement.[638]

The transnational nature of the lex mercatoria coincides with the ubiquitous nature of the Internet. For this reason the application of legal rules which are not related to a national legal system and which may be conceived of under the concept of the lex mercatoria suggests itself for parties participating in electronic commerce. These considerations are not only part of the western legal thinking but also of countries in Eastern Europe,[639] and for this reason the application of the rules of the lex mercatoria are recommendable, because their application does not result from the export of a national legal system but from a 'democratic' process which is justified by general acceptance through the participants in the international trade.

(5) Lex Electronica

The concept of the lex electronica[640] which is only in its infancy is not susceptible to replace the conflict of laws rule of the private international law with a system which, similar to the lex mercatoria, could claim universal application. It has been propagated that these rules would be provided by a 'lex electronica'.[641]

(6) Netiquette

If the arbitrator should apply the rules of law which may be defined as 'Netiquette' or 'Cyberlaw' he may have difficulties which derive from uncertainties about the content and scope of such concepts. This is even admitted by the proponents of these concepts.[642] However, it has been suggested that in such a case the arbitrator has to consider the principles, usages, practices and ethical codes which have been established with the growth of the global Internet and which are accepted by a large part of the users of the Internet without any state regulation (Netiquette). *But the online arbitration court may encounter problems insofar as there is no authorised source and no binding definition of the content of the Netiquette which is in permanent development*.[643] Since there is no binding version of the Netiquette, the arbitrator will have to make up the rules from generally accepted principles contained in the different versions of the content of the Netiquette which are accessible to him. Yet according to the proposed texts of Netiquette the emanating rules are hardly susceptible to serve the settlement of disputes between Information Society services and recipients. The rules which establish Netiquette may rather provide guidance for individuals which start using the Internet for communications.[644]

In situations which are, in the traditional economy, solved in application of established principles of conflict of laws it would be surprising, if in electronic commerce unitary principles could be applied which would substitute the complicated existing system of conflicts of law. It may also be doubtful whether Netiquette could assume the place of a lex mercatoria, because users do not rely on it as a 'opinio iuris sive necessitatis' which is the only way to transform a usage to custom.[645] It has been suggested that the netiquette would be based on internationally accepted

legal standards for communication over the Internet.[646] Accordingly, its relevance for dispute settlement by arbitration between Information Societies and recipients appear limited.

b.-) Custom

Existing customs may be verified by expert evidence. They may also be shown by reference to developments of the private international law with regard to business contracts as influenced by model codes and guidelines. With this respect the work of international institutions such as the Organisation for Economic Cooperation and Development (OECD) or the International Chamber of Commerce (ICC) assume importance. Business terms and codes established by the work of such organisations are widely accepted, for example the ICC Guidelines on Advertising and Marketing on the Internet or the GUIDEC, the General Usage for International Digitally Ensured Commerce. *Private commercial arbitration provided by the International Chamber of Commerce has been influential in developing a modern-day 'Law Merchant' so that precedent for cyberspace arbitration already exists*.[647] But it is doubtful whether in the international trade relating to electronic commerce generally accepted trade customs did already develop. *Like a reliance on contracts for control of cyberspace behaviour, a reliance on custom works well in some circumstances, less well in others. We must address two basic issues with regard to custom in cyberspace: how does a court know when a custom is well-established; and what are the circumstances that prompt a court to follow (or ignore) a concededly well established custom?*[648]

With regard to arbitration also the initiatives of the industry has been prolific, just to mention the Global Business Dialogue's documentation on alternative dispute resolution which calls upon Information Society service providers to:[649] *propose the possibility of ADR: Unless full customer satisfaction is guaranteed by in-house systems, customers of merchant websites used for business-to-consumer transactions should be notified that the merchant is ready to submit disputes resulting from online transactions to one or more specified ADF system. Information about dispute resolution via ADR system should be provided as a part of the overall information, perhaps in the framework of a reference to a code of conduct (Trustmark) or as part of the general sales conditions.* Even though there are no clear time schedules according to which the legal quality of a custom relating to international trade may be considered as established, the need for the adaptation of the legal rules to the permanent improvements of the technology render it difficult to assume that certain practices of electronic commerce matured into customary law.

(1) Deletion of Emails after 30-Days

Did a contractual custom yet develop? With regard to the obligation of BBS (Bulletin Board Systems) operators it has been asserted to retain email messages during a 30-day period for their customers it has been asserted that the automatic deletion of the message by a clean-up program is based on custom: *Here the parties are in a contractual relationship, there are no significant externalities, and no strong public policy cutting in either direction. There is every reason for a court to use the industry custom to fill in the contract gaps between user and system administrator with an implied thirty-day-delete term*.[650]

(2) (Unauthorised) Copying via the Internet

It has been rejected that the habit to copy unauthorisedly protected material via the Internet could have grown into a custom. Here there is no contractual relation between the rightholder and the infringer. Accordingly, it could not be presumed that a custom would have developed which is mutually beneficial to all affected parties.[651]

(3) Liability of Intermediaries

Due to the variant circumstances and conditions of international contracts in electronic commerce the establishment of a custom cannot easily be assumed. Thus attempts have failed to establish rules on liability of intermediaries on custom.[652] The regulation on liability of intermediaries in the Directive on Electronic Commerce but also in the US Digital Copyright Millennium Act show that regulation by statute was required in order to provide clear rules in a legal field in which, due to the different interests involved and the progress of the technology which created a multi-faceted environment with layers of spheres of influence concerning the communication of content.

(4) Model EDI Agreements

Within contractual relations arbitration clauses are often used, in particular in certain branches of the trade and in international contracts. In electronic commerce this may especially concern EDI contracts.[653] However, whereas the Recommendation of the UN Economic Commission for Europe on the Commercial Use of Interchange Agreements for Electronic Data Interchange of 1995[654] and the EU Model EDI Agreement of 1994[655] seem to highlight the relevance of the issue, they also evidence that customary law has not yet developed. Particular guidance may be derived from the GUIDEC, the General Usage for International Digitally Ensured Commerce of the International Chamber of Commerce, the aim of which it is to facilitate and promote the global electronic trading system.[656]

(5) ICANN's Uniform Domain-Name Dispute-Settlement Policy

It has been asserted that the Uniform Domain-Name Dispute-Settlement Policy of the Internet Corporation for Assigned Names and Numbers (ICANN)[657] might establish a new addition to the lex mercatoria.[658] The violation of the rights of a person in a domain name or a violation of another person's rights through the use of a domain name are seen as a kind of cybertort where the contractual representations and warranties present a duty owed to the third party complainant: *Is this a type of 'cyberlexcontractus', 'lexinternetica' or 'cyberlexmercatoria'? Whatever the solution, it appears that this development merits being the subject of reflection in those instances seeking to harmonise intellectual property law across the world and working on issues related to the lex mercatoria (such as UNIDROIT).* Presently it appears that the ICANN's offer of an out-of-court dispute settlement of legal issues concerning rights in a domain name is not by itself susceptible to establish an element of the lex mercatoria. The parties to the dispute remain free to resort to the jurisdiction of the courts. The fact that under certain circumstances ICANN will accept a decision rendered according to its policy does not make this policy to a part of the lex mercatoria in electronic commerce. Whether arbitral tribunals dealing with international disputes concerning domain names and trademarks could apply similar principles seems to be doubtful, in particular since the registration of trademarks is an issue involving the public interests of the state of registry. Thus presently ICANN's policy cannot be said to have established a new element of the lex mercatoria relating to the electronic commerce.

(6) Future Developments

It may be expected that in the sector of electronic signatures, requirements of form, the formation of contracts, data and place of the sending and receipt of data messages, possibly also consumer protection rules will develop in electronic commerce which assume global applicability. A problem for the creation of such rules is the constant change of methods and equipment as a consequence of the technological progress. For this reason it is not easy to foresee which rules may assume the nature of a kind of 'lex mercatoria' of the Internet. Taking into account of the need which the global electronic commerce has in the elaboration of such rules it may be that provisions contained in the UNCITRAL Model Law on Electronic Commerce

will assume decisive importance. Additionally, the contractual agreement between the parties will remain of essential importance.

In cross-border electronic commerce the effectiveness of online business terms of Information Society services may be tested, particularly in the case of contracts with consumers. In order to achieve legal security for both parties it would clearly be preferable, if international standards could develop. But with this regard even the Directive on Electronic Commerce contains 'lacunae'. This is the case in those fields which are not regulated by the Directive such contractual obligations concerning consumer contracts according to the Annex and Article 3(3) of the Directive. An example for the problem to differ between fields which are regulated by the Directive and those which are not may be found in the implementation of the Directive concerning requirements of form in the interest of consumers. Thus the legal systems of Member States will have to recognise electronic signatures as corresponding with the requirement of 'writing', however, it seems that a Member States may be able to demand that an arbitration agreement, whether electronic or not, should be contained in a separate document, independent of the contract, because it could be argued that such a requirement relates to contractual obligations concerning consumer contracts. The mandatory nature of such a provision of national law may have to be observed by an arbitrator, however, it appears unlikely that such a rule would belong to a state's public policy. Thus the development of a lex mercatoria in electronic commerce which includes aspects of a 'lex consumatoria', that is to say rules based on transnational principles applicable to consumer protection may not easily be accepted. A possible solution may lie in the 'enlargement' of the Principles of the European Law of Contract by those rules on consumer protection which constitute the 'acquis comunautaire', that is to say those rules which Member States are obliged to implement concerning, for example, rules on unfair terms in consumer contracts, obligations of information, the right of withdrawal or guarantees.

6 Recognition and Enforcement of Foreign Arbitral Awards in Electronic Commerce

The New York Convention provides a framework for the recognition and enforcement of arbitral awards on an almost global basis which operates also in the case of arbitral awards rendered in electronic commerce.

6.1 Recognition of Arbitral Award

The Convention obligates Contracting States to recognise arbitral awards as binding:[659] The Convention regulates under which conditions an award shall be recognised and enforced: Article IV(1) of the New York Convention states:

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) a duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in Article II or a duly certified copy thereof.

The recognition and enforcement of the award may be refused at the request of the party against whom it is invoked. But only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof of certain circumstances. According to Article V(1) of the Convention to these circumstances belong facts proving that:[660]

- the parties to the arbitration agreement were under some incapacity;

- the arbitration agreement was not valid (according to the law to which the parties subjected it or, failing such an indication, according to the law of the State where the award was made);

- the party against which the award is invoked was not given proper notice:

  - of the arbitrator;

  - of the arbitration proceedings;

- the party against which the award is invoked was unable to present his case;

- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;

- the award contains decisions on matters beyond the scope of the submission to arbitration;

- the composition of the arbitral authority or of the arbitral procedure did not comply with the agreement of the parties or, failing agreement, with the law of the country where the arbitration took place;

- the award has not yet become binding.

The recognition and enforcement of the arbitral award may further be refused if the competent authority in the country where recognition and enforcement of the award is sought finds that:[661]

- the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

- the recognition or enforcement of the award would be contrary to the public policy of that country.

6.1.1 **Control of the Arbitration Agreement**

The arbitration agreement must be formally valid according to Article II of the New York Convention. Thus even if the arbitration agreement is valid according to the law of the place or seat of the arbitration, or, if a choice of law was made, according to the chosen law, it may nevertheless not be enforceable if the agreement did not fulfil the formal requirements according to Article II of the New York Convention.[662] *With regard to arbitration agreements meeting the requirements of Article I, the Convention obliges the courts of any Contracting State to compel arbitration if a party to a written agreement to arbitrate, which satisfies the personal and material requirements of the Convention, seeks instead to initiate court action in its territory and the would-be defendant, the other party to the arbitration agreement, insists upon its right to arbitration.*[663]

6.1.2 **Control of Award**

The grounds upon which an arbitral award can be annulled are basically:[664]

- the lack of a valid arbitration agreement;
- the violation of the principles of due process;
- the violation of the scope of authority;
- the incapacity of a party;
- the violation of the public policy;

Arbitration is a delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. ... Effective controls are the only assurance of limited government. In this sense controls are a sine qua non of liberty.[665] Even if the autonomy of the parties permits them to agree on dispute settlement by arbitration which is independent from procedural rules of a State, the State retains

a limited control which will be exercised in the procedure concerning the recognition and enforcement of awards

6.2 Operation of the Control System

The balance between the autonomy of the parties to determine the privately organised dispute settlement and the interests of the State in the operation of a system of justice necessitates a control of the enforcement of the agreement to arbitrate and of the result of the arbitration.

6.2.1 New York Convention

The control of arbitration is exercised by national courts.[666] *Because international arbitration is an event which, by definition, is subject to the simultaneous or sequential competencies of two or more states, the careful allocation of those competencies, as they relate to the regulation of arbitration, is also required. The convention establishes the conditions under which an arbitral event in one jurisdiction will be given full effect in another jurisdiction. But here, as well as in other areas, control of the system of allocation is important. That is the function of Article V.*[667]

Since the arbitration by means of electronic commerce does not add anything new to the operation of the control system, but since the operation of the control system remains nevertheless an important issue for the dispute settlement by means of electronic commerce, it may be permitted to explain the system briefly: The New York Convention differs between 'primary' (or venue) jurisdiction and 'secondary' (or enforcement) jurisdiction. *'Primary' jurisdiction will refer to those in which the arbitration was sited and the award was rendered or those whose law governed the award, or in other words the state where the arbitration took place, 'the arbitration state', or the state whose law governed the arbitration, the 'law state'. 'Secondary' or 'enforcement' jurisdictions will include any other jurisdiction, subject to the Convention, in which enforcement is sought.*[668] Whereas the primary jurisdiction, in particular the 'nullificatory' consequences with regard to the award has a universal effect, insofar as an award which has been set aside in a primary jurisdiction is not enforceable anywhere else, the secondary jurisdiction may only decide whether or not to enforce the award in the relevant territory.

6.2.2 Control by Primary and Secondary Jurisdiction

The exercise of the control of arbitration by the primary jurisdiction which nullifies the award engenders the nonenforceability of the award in the secondary jurisdiction, that is to say in other contracting states. But a positive decision by the primary jurisdiction does not render the award necessarily enforceable in the secondary jurisdiction. In the Contracting State of the secondary jurisdiction the recognition and enforcement may nevertheless be refused, for example on the grounds of a violation of the public policy. For the parties this means that they should choose the place or seat of arbitration with particular regard to the susceptibility of the relevant legal system to recognise means of electronic commerce for transactions and arbitration procedures.

6.3 Recognition and Enforcement of Awards Relating to Arbitration not Covered by International Instruments in the Internal Market

The enforcement of foreign arbitral awards is regulated by international instruments such as the New York Convention or, possibly, bilateral agreements. If the recognition and enforcement of arbitral award is not covered by such instruments, for example if the 'arbitration' is only partially binding, its enforceability abroad appears difficult. Since the parties have agreed to the dispute settlement, the award may possibly be enforceable as a contract, the content of which is determined by a third person. But this might require court action in the Member State where enforcement shall take place so that the advantages of out-of-court dispute settlement would be frustrated. Another possibility might be the application of principles which are similar to those of the New York Convention. An EU legal instrument could provide for the necessary framework.

However, it should be observed that in consumer arbitration, due to the simplified arbitration procedure and the relatively low sums at stake, a lower level of control could be applied.

6.3.1 **Recognition and Enforcement of National Awards Relating to Consumer Disputes in the Internal Market**

With regard to the European Parliament's proposal for the recognition of settlements reached pursuant to schemes approved by the Commission, it may be said that the verification whether such a scheme has been applied by the institution responsible for dispute settlement may not be easy.

a.-) Accreditation of Bodies Responsible for Arbitration of Consumer Disputes

For this reason it may be easier to focus on the fact whether the body is accredited by a Member State. The accreditation of such bodies should be made possible on the basis of compliance with instruments such as Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998.[669]

b.-) Factors of Relevance for the Assessment of the Public Interest in the Control of the Award

Different factors may become relevant in the case of the evaluation whether the public interest in the control of the settlement was met:

1. the consent of the parties to the out-of-court dispute settlement and the observance of requirements of form;
2. whether the award is reasoned or not;
3. whether the award is based on the law or equity;
4. the financial interests involved. If consumer disputes relate to considerable sums, for example the acquisition of a house, a boat or a luxury car, and obligations in the financial sector of banking and insurance, a higher degree of control may be justified or limits with regard to the availability of the arbitration services;
5. the bindingness of the award, for both parties, for one party or for none;
6. the content of the rules adopted by the institution for consumer;
7. the control of the institution responsible for arbitration by the Member State (in consumer arbitration);
8. the observance by the institution of schemes approved by consumer organisations and/or associations of businesses;
9. the observance of adequate procedural guarantees in the sense of Article 17(2) of the Directive on Electronic Commerce.

With regard to some of these factors the national arbitration laws relating to consumers may differ considerably, for example concerning requirements of form of the arbitration agreement or the requirements of schemes established in cooperation between national associations of consumers, the industry and the government. With regard to other factors, the national arbitration laws should be more harmonised, for example concerning the provision of adequate procedural guarantees by the arbitral institutions in the sense of Article 17(2) of the Directive on Electronic Commerce.

c.-) Recognition and Enforcement of National Awards Relating to Consumer Disputes in the Internal Market without Control by Secondary Jurisdiction

A Member State should ensure that awards issued by arbitral institutions in consumer disputes and based on the national arbitration law are recognisable and enforceable. An enforceable arbitral award which was rendered within the arbitration procedure for consumer disputes of an accredited arbitration institution, should also be enforceable in the Member States. If the Member State where the arbitral institution is accredited and where the award was rendered assures the observance of procedural guarantees in the sense of Article 17(2) of the Directive on Electronic Commerce, there is no reason why the award resulting from the arbitration should not be enforceable in other Member States. Under such circumstances the public interest in the control of the arbitration would be satisfied by a single control. Since the mechanisms for the protection of consumers developed on a national basis may contain many differences, in particular concerning requirements of form relating to arbitration clauses. For this reason it may be difficult to apply a secondary control by the Member State where the award shall be enforced without the establishment of new rules envisaging the avoidance of conflicts between the laws of Member States. For this reason a single control mechanism appears to be sufficient, in particular with regard to the observance of adequate procedural guarantees in the sense of Article 17(2) of the Directive on Electronic Commerce. The decision on the enforceability by the competent authorities of the Member State 'of origin' should thus have effect also with regard to the enforceability in other Member States. In cases of doubt the jurisdiction of the Member State 'of origin' should decide whether a dispute has been finally settled by an award.

The suggested solution differs from the rules on the enforceability of international awards according to the New York Convention. This Convention applies a control mechanism using a primary and secondary jurisdiction.[670] Whereas the control through the primary jurisdiction focuses on the state of the place or seat of arbitration, the secondary jurisdiction depends on the state where recognition and enforcement is sought. The application of a two tier system does not seem to be justifiable in consumer arbitration which is exclusively based on national laws of the Member States. In application of Article 17(2) of the Directive on Electronic Commerce this single state control which is based on national laws should also focus on the organisation of the institution. This control could be exercised through the requirement that only institutions accredited with a Member State may carry out consumer arbitration resulting in enforceable awards. Binding awards issued by arbitration procedures according to the rules for arbitration of such institutions should be enforceable and have the effect of a 'chose jugée'. If this is the case according to the national law, there is no reason, why such an award should not be enforceable in another Member State. If an accredited arbitral institution would publish the accreditation on its website, Information Society services or recipients, which are domiciled or established in other Member States, would know that arbitral awards rendered by this institution are enforceable in other Member States.

The framework for the cooperation between the different institutions and authorities may be provided by the Community-Wide Network of National Bodies for the Extra-Juridical Settlement of Consumer Disputes[671] (EEJ-NET) and the proposed European Judicial Network in Civil and Commercial Matters.[672] Concerning the development with non-Member States it may be useful to establish similar principles based on agreements between the States concerned, including the involvement of the Commission.

Recognition and Enforcement of National Awards Relating to Consumer Disputes in the Internal Market

6.3.2 Recognition and Enforcement of National Awards not Related to Consumer Disputes in the Internal Market

The establishment of a two level control by the primary and secondary jurisdiction which is provided for by the New York Convention is justified by the large number of Contracting States, namely 121, and the differences in legal cultures and conceptions of justice. The other international Convention, the Geneva Convention, was drafted to facilitate arbitration in the East-West international trade. Thus concepts derived from both Conventions are not necessarily useful for the regulation of the enforcement of arbitral awards which, for whatever reason, do not fall within the scope of the New York Convention.

Awards rendered in a Member States which are not covered by the New York Convention are hardly enforceable in other Member States which may create problems for cross-border electronic commerce within the Internal Market. To give an example, in the case of a national award resulting from a national arbitration with both parties being established or domiciled in one Member State and the place or seat of arbitration being in this State, should a party to the arbitration be able to enforce the award in other Member States?

a.-) Measures Required for the Recognition and Enforcement of National Arbitral Awards in the Internal Market

If one took the establishment of the Internal Market seriously, there should be no doubts about the necessity to enforce also national awards in other Member States. Particularly in electronic commerce there is no reason why an arbitral award rendered by national arbitration should not be enforceable in other Member States. Taking into account of the fact that the New York Convention has provided a satisfactory means for the recognition and enforcement of arbitral awards within the Internal Market, and that there are hardly voices which demanded the establishment of a particular European system, it may be satisfactory if Member States achieved clarity about the scope of application of the New York Convention. This could be achieved by different measures:

1. the achievement of a common position concerning requirements of form concerning arbitration agreements in electronic commerce (even though a unitary interpretation by all Contracting States appears appreciable);
2. the equation of national awards rendered in a Member State according to national arbitration schemes with awards rendered by international arbitration according to the New York Convention.
3. the establishment of a Court for Arbitration in Europe which ensures a unitary interpretation of the provisions of the New York Convention;[673]

b.-) Particular Measures for the Benefit of Electronic Commerce in the Internal Market

Additionally, the following measures might facilitate the arbitration by means of electronic commerce in the Internal Market:

1. the lifting of the reservation according to Article I(3) of the New York Convention by all Member States so that parties of electronic commerce may benefit from the 'delocalisation' of the arbitration in cyberspace even if recognition and enforcement is claimed in the arbitral award's 'state of origin';
2. the adherence to the Geneva Convention, which, inter alia, provides for procedural guarantees in the case of ad hoc arbitration.

Such measures would facilitate the arbitration of disputes relating to electronic commerce between Information Society services and recipients, in particular in the business-to-business

relation within the Internal Market, because they would render the international arbitration according to the New York Convention more accessible and the results more foreseeable.

The reason which led to the exclusion of arbitration from the Brussels Convention and the Rome Convention, namely the certainty that in international arbitration the issue of arbitration and in particular the enforceability of awards was already solved by the New York Convention, should not exclude the extension of the system applicable to international arbitration to arbitration on the national level. Member States could make use of the system developed on the basis of the New York Convention which has been very successful. This model could easily be adapted to the needs of electronic commerce in the Internal Market if Member States envisaged in their national arbitration laws that any arbitral awards rendered in another Member States would be recognisable and enforceable like foreign arbitral awards according to the New York Convention.

7 Arbitration of Consumer Disputes

Concerning the bodies involved in 'out-of-court dispute settlement' for consumers, Article 17(2) of the Directive on Electronic Commerce does no longer sustain the regard of the seven basic principles which such bodies were obliged to observe according to earlier proposals of the Directive. This is due to the fact that not all of these principles can easily be applied in conditions of electronic commerce. National legal systems provide for different types of the out-of-court settlement of consumer disputes.[674] There are, for example, comprehensive systems for the arbitration of consumer disputes in Spain and Portugal, there is a comprehensive mediation system according to Italian law and a system based on amicable settlement according to Greek law, there are systems for consumer complaints and ombudsman systems based on laws in the Scandinavian countries. Additionally, there are mixed systems, where consumer complaints are regulated by law only with regard to certain sectors of the economy, without aiming at a comprehensive regulation, for example in Austria, Benelux, France or Germany. Consumer complaint and ombudsman services may be provided on the basis of self-regulatory schemes or schemes based on legislation. There is a common aim of consumer dispute settlement schemes. According to the EU's Economic and Social Committee the 'out-of-court dispute settlement system' should be a simpler, cheaper and more effective means of redress for consumers.[675] In the arbitration sector this means that arbitration should provide legal security for the parties at low costs with satisfactory procedural guarantees.

The demands which are made with regard to the effectiveness of consumer arbitration and the providing of satisfactory procedural guarantees may increase the costs of such a system beyond the level which the parties may be willing to pay. Assuming that two lawyers and one arbitrator are concerned with an ordinary case involving one hour of online negotiations, there will already be costs of some € 450, assuming that each of the three persons earns € 150 per hour. Additionally, costs will arise for the administration of the arbitration, paperwork, the keeping of the file and similar office costs of both lawyers. Finally, both parties will incur costs deriving from the time and expenses necessary for the providing of information to their lawyers. The simplification of the arbitration procedure in consumer disputes would also have to comprise the law applicable to the substance of the dispute, in particular the choice of the law of the contract, and the law applicable to the procedure. Arbitration is not affected by the problems which would be posed by the conflicts of law rules of the Brussels Convention and the Rome Convention, and international arbitration according to the New York Convention and the Geneva Convention is freed from the application of many mandatory rules of national law. In order to gain the consumer's confidence in the cross-border dispute settlement by arbitration three basic problems will have to be solved:

First, the legal framework for cross-border dispute settlement should provide for procedural rules which allow for a bindingness of the award on both parties and for its enforceability. Whereas there are no global legal instruments providing for enforcement of judgements by courts - instruments such as the Brussels Convention are applicable only on a regional basis, and international efforts such as those of the Hague Conference on Private International Law, in particular on the future Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters[676] have not yet met with general acceptance - the New York Convention could provide an effective tool for the recognition and enforcement of international arbitration related to consumer disputes.

Second: the law applicable to the arbitration may pose particular problems in consumer disputes for both parties. It will be difficult for the consumer to assess according to which legal rules the Information Society service operates, but also for the Information Society service it may be difficult to appreciate the rules on consumer protection applicable in the state where its recipient is domiciled. For this reason it may be reasonable if the parties relied on a transnational law which they may choose either on the basis of their contract or through the arbitration agreement which may contain an appropriate reference to the rules for arbitration of the chosen institute for arbitration which may suggest the application of such a law. By reason of the autonomy of the parties in international arbitration the state control of the choice of the law is limited insofar as the arbitral award would violate the public policy.

Third, the costs of international arbitration are high, but this is similar in the case of international litigation before courts but it cannot be expected that private lawyers should agree on a remuneration which makes them dependent on social care. For these reasons consumer arbitration should operate at simple rules and possibly be supported by the State such as in the case of the consumer arbitration schemes of Portugal or Spain or by the industry such as in the case of certain schemes offered in the UK. Whether society is prepared to pay for the benefits of consumer protection is a political issue, however, there is no doubt that a consumer protection system which offers the settlement of disputes by arbitration will contribute to the consumer's confidence, possibly operate at lower costs than the dispute settlement by the courts and thus have a positive impact on the political economy.

7.1 National Consumer Arbitration Schemes

Spanish and Portuguese consumer protection and arbitration laws provide for arbitration as a type of dispute settlement.

7.1.1 Consumer Arbitration in Portugal

The Portuguese consumer arbitration system began in 1989 when in Lisbon a permanent Arbitration Centre was created.[677] By now there are more arbitration centres.[678] The Lisbon Centre for the Arbitration of Consumer Disputes operates as a non-profit private-law association. Its powers relate to any consumer disputes which does not exceed some € 2,500 provided that the goods or services were supplied or provided within the geographical coverage of the city of Lisbon. The Regulations of the Centres differ, for example the maximum limit of a sum in relation to which a consumer may bring a claim to the Arbitration Centre for Consumer Disputes of Coimbra and Figuera Da Foz is € 3,740.

The arbitrator will base his award on constitutional principles, and, if the parties authorise him to do so, he may decide 'ex aequo et bono'. *In consequence it may be concluded that in the Court of Arbitration it is not the principle of the formal truth which dominates the proceedings but the principle of material truth. Without loosing the view or ignoring the rights which are established by the law, it is a fact that the arbitrator-judge will well know the files. This keeps him close to the*

parties of the dispute, to the particularity of the analyses at the Court of Arbitration and to the socio-cultural factors which occur within the consuming, and the non-existence of procedures leading to an excessive formalism which would be susceptible to obscure the appreciation of the cases. At least the Courts of Arbitration (...) will rationalise the conduct of the parties to the dispute and contribute to the education of consumers and merchants.[679] *The speed of the procedure which does on average last some thirty days after the receipt of the consumer complaint by the Arbitration Centre to the settlement by means of mediation and a maximum of two months in the case of final awards...*

a.-) Lisbon Arbitration Centre

The Lisbon Arbitration Centre consists of the following bodies:

(1) the General Assembly, consisting of the Portuguese Association for the Defence of Consumers and the Federation of the Associations of Merchants of the District of Lisbon;[680]

(2) the Council of Administration which consists of a president and two councillors which are elected by the General Assembly;

(3) the Council of Finances which consists of a president and two councillors elected by the General Assembly;

(4) the Financial and Technical Council which is an advisory body and which consists of members which have been contracted.

b.-) Portuguese Law Concerning Voluntary Arbitration and the Regulation of the Court of Arbitration

The arbitration procedure is governed by the provisions of the Portuguese Law Concerning Voluntary Arbitration, Law 31/86 of 29/08/86. Not all consumer disputes can be referred to the Lisbon Arbitration Centre. It is required that the goods or services obtained by the consumer were acquired within the territorial limits of Lisbon, Article 5 clause 4 of the Regulation of the Court of Arbitration. However, from Article 4 of the Regulation it can be inferred that the limitation of the power of the Arbitration Centre does not impede it from dealing with disputes through mediation which concern acquisitions from outside of Lisbon.[681]

c.-) Arbitration Combined with Mediation

The role of the Arbitration Centre not only consists in the performance of mediation and arbitration, its function is also to give advice to consumers and merchants on consumer protection issues.[682] The Arbitration Centre comprises a Service of Legal Advice and of a Court of Arbitration. The Arbitration Centre is headed by a single arbitrator who must be a judge and who is named by the Superior Council of the Magistrate. Accordingly, it is guaranteed that the arbitrator, by reason of his professional qualification and independence, will be able to satisfy any requirements which may be made to a person exercising this post, and also with regard to the small value at stake.

The Regulations of the Court of Arbitration establish the procedural rules for the arbitration which are complemented by the Portuguese Code of Civil Procedure. But before proceeding to arbitration, the service initiates an attempt of mediation. According to the Regulations of the Lisbon Arbitration Centre the defendant will be contacted by telephone with the aim to achieve a settlement. If this attempt fails, the arbitrating judge will hear the case after the defendant has been given a chance to supply his defence. Again, the parties will be invited to settle the case, and if this attempt succeeds, the protocol will contain a settlement in the written form, presented to the arbitrating judge for signature.[683] The arbitration procedure will start only after this attempt

for mediation has failed and if both parties have signed an arbitration agreement indicating that they expressly agree to the decision of the Arbitration Tribunal. The Arbitration Tribunal can make use of the statements of the parties, in particular of the summary concerning the object of the dispute, and the evidence produced during the mediation phase of the proceedings according to Article 5 of the Regulation of the Court of Arbitration. According to Article 10 clause 5 of the Regulation the file should contain a synthesis of the object of the dispute, the facts asserted by both parties, the elements of the evidence supplied, the reasoning of the parties' statements and the arbitration agreement. The arbitrator thus benefits considerably from the result of the mediation procedure.

d.-) Few Formal Rules

Concerning the establishment of proof the arbitrator does not depend on the statements by the parties and their offers of evidence by the parties. He may himself request the supply of documents and hear experts. However, in the case of expert evidence the experts chosen by the Court of Arbitration have to be approved by the parties.[684] The arbitrator may render the award immediately based on the assessment of the facts presented to him, or he may render any other procedural decision. The arbitrator will take into account any offer concerning evidence admissible in civil proceedings.

The arbitral award is effective in law and final if it can no longer be appealed against. It is enforceable like decisions of the civil courts, Article 48(2) of the Portuguese Code on Civil Procedure. The enforcement of the award can be ordered by a court without any additional charges or costs, Portuguese Law 103/91 of 08/03/91.

e.-) Consumers not Domiciled in Lisbon

During the procedure, the parties are free to be presented by lawyers. If the consumer is not from Lisbon, he may ask to be represented by an association for the defence of consumers.[685] This may help particularly recipients of Information Society services who are not domiciled in Lisbon. Concerning international consumer disputes the competent councils of Lisbon an Madrid signed an agreement on 11/03/92 according to which the Portuguese consumer may file a complaint in Spain, respectively the Spanish in Portugal before an arbitration board of his own country. The board will transfer the request for arbitration to the competent arbitration board depending on the place of the acquisition. The consumer may then be represented by the consumer organisation of the other state.[686]

f.-) Affiliation of Businesses with the Arbitration Centre

According to Article 1 of the Portuguese Law on Voluntary Arbitration the parties may submit to arbitration any dispute which does not fall within the absolute competence of the jurisdiction of the courts and which does not concern rights which cannot be transferred. A business may also declare to the Arbitration Centre that it will be bound by any decisions rendered. In such a case a business may show the connection with the Arbitration Centre through the Centre's logo in his business, and its name will be published in a corresponding list of businesses by the Court of Arbitration. Thus Information Society services in Lisbon which declare to the Arbitration Centre that they will adhere to the system may, on their website, indicate to recipients their affiliation by using the Arbitration Centre's logo.

g.-) Costs

The system operates free of charges, due to support from the EU Commission, from the Portuguese Ministries of Justice and Commerce and the City of Lisbon.[687]

h.-) Enforceability of Awards

According to Article 26 of the Portuguese Act on Voluntary Arbitration the arbitral award has the same legal value as a judgement issued by a court once it cannot be appealed against. Accordingly, an award can be enforced in Portugal without any additional procedure, a new rational approach.[688]

7.1.2 **Consumer Arbitration in Spain**

The Spanish consumer protection laws refer in several special laws to consumer arbitration, for example concerning disputes between travel agencies, banking and insurance.[689] Based on Article 31 of the General Law on the Defence of Consumers and Users (Spanish Law No. 26/1984) the Spanish government established an arbitration system which deals with complaints by consumers, establishing a voluntary arbitration system aimed at the settlement of consumer complaints, binding for both parties.

The Spanish consumer arbitration scheme offers considerable advantages in comparison with the traditional court system.[690] It provides a speedy dispute settlement within a maximum duration of four months. Its efficiency lies in the avoidance of the resort to the ordinary court system. There are no limits for the claims which are brought before the consumer arbitration court. The arbitral award can be executed like a judgement by an ordinary court. Finally, the system is free of charges for both parties.

a.-) Voluntary Arbitration

Basic conditions for arbitration agreements are established by Article 5 of the Spanish Law 36/1988 of 05/12 on Arbitration[691] which states:

(1) The arbitration agreement must be in the written form, and may be contained in a clause either as a part of a contract or independently of it.

(2) The written form is not only complied with by a single document, signed by the parties, but also if it results from the exchange of letters or of any other means of communication which documents the circumstances of the will of the parties to resort to arbitration

The parties do not have to resort to consumer arbitration. If they want to make use of arbitration in order to settle their dispute, the parties are free to agree on ad hoc arbitration on another system of arbitration.[692]

(1) General Terms of Contracts

Article 10 of the Spanish General Law on the Defence of Consumers and Users which is concerned with abusive clauses may be applicable if the Information Society service makes use of general terms of contract in its contracts with recipients who are consumers. According to this provision an arbitration clause contained in general business terms is not effective unless it complies with all conditions established by the law and unless it is clear and explicit. According to Article 10(4) of the Law arbitration clauses based on general terms of contracts are effective if, apart from the need to correspond with the requirements of the law, they are 'clear and explicit'.

(2) Limitation of Consumer Arbitration to Claims of Consumers

The arbitration system according to the Spanish consumer protection legislation is only available for the benefit of consumers. The Information Society service may not assert claims against the consumer. Thus an Information Society service may only by way of defence assert claims or set off against the consumer's claim. Accordingly the arbitral tribunal can only reject the consumer's

claim, without giving the defendant (the Information Society service) a 'positive' award which it could enforce against the consumer. For Information Society services operating from other Member States this limitation may deprive the consumer arbitration system of some interest, because these speedy and simple proceedings are, in effect, a one-way-street so that foreign services which wanted to have their disputes with Spanish recipients settled by arbitration would have to rely on 'traditional' arbitration clauses in their terms of contract. But this limitation may be justified for political reasons, in particular taking into account that the consumer arbitration system is free of costs.

b.-) Procedural Guarantees

Article 10(1) of the Royal Decree 636/1993 on the Regulation of the Consumer Arbitration System provides for four conditions which must be met concerning the arbitration procedure:

1. audience;
2. contradiction;
3. egality;
4. free of charges.

Consumer arbitration according to Spanish law is based on a simplified procedure which liberates the arbitrator from the observance of complicated procedural rules: *The introduction of a simplified procedure constitutes one of the attractive elements of the arbitration system. However, the simplification may lead to a diminishing of fundamental procedural guarantees, and this is why the Royal Spanish Decree refers to the respect of the following basic principles: audience, contradiction and egality.*[693] Additionally, the Spanish law provides that consumer arbitration must be without charges. In arbitration using means of electronic commerce the second and third principle could also be applicable without much difficulties. However, the principle of audience may not correspond with the interests of the parties themselves. Particularly in cross-border disputes the organisation of public hearings might be counterproductive with regard to the advantages offered by arbitration by means of electronic commerce.

c.-) Arbitrability of Consumer Disputes

The Spanish Law 36/1988 of 05/12 on Arbitration[694] excludes in Article 2(1)(b) from the scope of arbitrability, inter alia in lit. (b) matters which are inseparably linked to those over which the parties have no power of disposition. To these matters do not belong matters relating to consumer protection, because the Law states in the First Additional Provision, subsection (1): *The present law is applicable to the arbitration regulated by the Law 26/1984 of 19/07, General on the Defence of Consumers and Users*. In practice less than 2% of all requests for consumer arbitration are rejected by the Consumer Arbitration Court on the basis of Article 2(1) of the Law 36/1988.[695] Excluded from the scope of arbitrability are, for example, labour disputes, Article 2(2) of the Law.

b.-) Binding and Enforceable Decision

The arbitral award is binding on the parties and can be enforced. According to the Royal Decree 636/1993, Article 2(1), the Decree has the aim to settle in a binding manner with an enforceable decision for both parties consumer complaints in relation to legally protected rights. According to subsection (2) of this Article the arbitration to which the preceding paragraph referred is without charges. According to Article 17(1) of the Decree the arbitral award is binding and produces effects identical to a judgement. Article 17(2) states that, inter alia, the notification, annulment and the execution of the award is made according to the Law on Arbitration. The award must be

in writing, Article 16(1) of the Decree. It must contain, inter alia, the place of arbitration, the facts relating to the dispute, the allegations of the parties, the result of the taking of evidence, if any, the decision, the date and the signature of the arbitrators. If the arbitral board decides on the basis of the law, the decision must be reasoned, Article 16(2) of the Decree. The Spanish Law 36/1988 of 05/12/1988 on Arbitration regulates also the consumer arbitration. The use of the consumer arbitration free of charges. The arbitration proceedings are monitored on a local basis.

c.-) Organisation of Consumer Arbitration

The National Arbitration Board was established on 29/11/93 with the participation of national associations of employers and consumers. Presently there are 62 Consumer Arbitration Boards.[696] The consumer arbitration system is supported by Spanish consumer protection associations[697] and Spanish businesses which adhere to the system.[698] The Royal Decree 636/1993 of 03/05 on the Regulation of the Consumer Arbitration System[699] describes inter alia the aims of the law, the request for arbitration, the procedure of consumer arbitration and the arbitral award.

(1) National Consumer Arbitration Court and Arbitration Boards

According to Article 3(1) of the Decree an Arbitration Consumer Court is established on the national level, the National Consumer Arbitration Court.[700] According to subsection (2) of this provision Arbitration Consumer Boards are established at the municipal,[701] provincial[702] and regional[703] level. Article 3(3) of the Decree provides that the competence of the Boards depends on the place where the consumer is domiciled, on the inferiority of the territory and on the freedom of the choice of the parties.

The arbitration boards are attached to a territorial public authority. In consumer disputes the Consumer Arbitration Boards are competent, applying the *rights as recognised by law*.[704] The competence of the boards coincides with the competencies of the territorial authorities. Accordingly, there are local, provincial and regional boards and a national arbitration boards. The proceedings are carried out basically orally, documents may be admitted. The consumer arbitration system is offered without costs, however, experts and tests may have to be paid by a party. The resulting award is binding on the parties, *its effects are the same as those of res judicata in the courts*.[705]

(2) Request for Arbitration

The request for arbitration to the Consumer Arbitration Court has to be supplied in writing or by electronic means, by means of informatics or telematics provided that the authenticity is guaranteed, Article 5 of the Decree. If the business has accepted to subject itself to the consumer arbitration system, the arbitration agreement is established with the presentation of the request for arbitration by the complainant, Article 6(1) of the Decree. The public subjection to the system may be declared in writing or any other means of communication mentioned in Article 5 of the Decree, directed to the Consumer Arbitration Court. According to Article 6(2) of the Decree the public subjection must contain the following information:

1. Scope of the subjection;
2. Express declaration of the acceptance of the Royal Decree of the consumer arbitration system;
3. Declaration of fulfilment/acceptance of the arbitral award;
4. Duration of the subjection (which will be considered of indefinite duration, if no definite time is indicated).

According to Article 9 of the Decree the business may accept or reject the request for arbitration within a delay of a fortnight in writing or any other means of communication mentioned in Article 5 of the Decree, unless the arbitration agreement is already concluded with the prior subjection to the arbitration by the business in the sense of Article 6(1) of the Decree.

(3) Organisation of Arbitration by the Arbitration Boards

There are three arbitrators in an arbitration board: the president is nominated by the Court of Arbitration, the representatives of the consumers and a representatives of the businesses, Article 11(1)(a) to (c) of the Decree. According to Article 12 of the Decree the arbitral board organises a private 'hearing' with the parties which may be oral or in writing. During the 'hearing' the arbitral board may undertake an effort of mediation, Articles 12(4) and 4(b)of the Decree. Whereas the award has the same effect as a judgement, the settlement achieved by mediation has a mere private law effect between the parties, but it is referred to in the award, Article 12(4).[706] Of the cases which were settled in 1999 73.55% were settled by arbitral awards, the remaining 26.45% by mediation.[707]

According to Article 10(2) of the Decree the parties may be represented. Article 10(3) of the Decree states:

> *(2) The inactivity of the parties in the arbitration procedure for consumers does not impede the issuing of an award, which is not deprived of efficacy.*

Concerning the Consumer Arbitration Boards they consist of 3 members, the president and the members. The president is a member of the public administration with a law degree. The two members consist of one representative of the consumer organisations, the other member is a representative of the businesses. If the parties opt expressly for the arbitration on the basis of the law, both members must be lawyers, Article 10(2) 2nd sentence of the Decree. Within three months after the constitution of the Board of Arbitration there shall be an audience in private, Article 13(1) of the Decree. The audience shall be carried out orally or by reference to texts (documents) so that the parties may present their documents and claims which they consider necessary for their best defence in their interest, Article 12(3) of the Decree. Concerning evidence Article 13 provides that the parties shall have the right to take part in the taking of evidence and to intervene, Article 13(1) of the Decree. The evidence ordered 'ex officio' will be paid by the administration; if evidence takes part on behalf of a party, it shall be paid by the relevant party. The Board of Arbitration may allocate the costs between the parties in the award, Article 13(3) of the Decree.

Article 14(1) of the Decree provides that the arbitral award has to be rendered within four months after the nomination of the arbitral board. According to the Annual Report on the Consumer Arbitration System of 1999 an arbitral award is rendered in less than a month in more than 47% of the cases, within less than two months some 28%.[708] According to Article 16(1) of the Decree the award shall be made in writing. It must contain at least:

- The place and date of the making of the award;
- Names and forenames of arbitrators and the parties or companies;
- The controversial issues which were the subject of the arbitration;
- The presentation of the parties' assertions;
- The decision on each of the controversial issues;
- The place where and the time when the decision in the award has to be complied with;
- The vote of the arbitrators (majority vote, dissident vote(s);

- The signature of the arbitrators.

d.-) Arbitration on the Basis of Equity or Law

The Spanish Law on Arbitration and the Royal Decree 636/93 provide for the possibility of the parties to opt for the arbitration on the basis of the law or on equity. If the parties did not expressly agree on the arbitration on the basis of the law, the arbitration will be made on equity without reasons, Article 16(2) of the Decree, No. IV.1 of the Annual Report on the Consumer Arbitration System of 1999.[709] Thus of the 8,395 awards rendered in 1999 only 0.77% were decided on the basis of the law, but 99,23% on the basis of equity. But if the parties opt for arbitration on the basis of the law, which has to be made by an express declaration, the award has to be reasoned.[710]

e.-) Logo of the Consumer Arbitration System and Businesses Adhering to the System

According to Article 7 of the Decree a business which has accepted the consumer arbitration system will be registered in a public file, and it may use the logo of the consumer arbitration system consisting of three 'V's, see the Annex to the Royal Decree. At present, more than 50,000 Spanish businesses can make use of the logo.[711] Like the other territorial bodies for consumer arbitration the National Consumer Arbitration Court maintains a register containing the names and addresses of businesses which adhere to the system.[712] The number of adherents to the system has constantly increased from 38,572 in 1997 to 46,747 in 1998 to 53,074 in 1999.[713] Also the number of requests for arbitration increased constantly from 1987 (600) to 17,676 in 1998 and 24,195 in 1999.[714] The public declaration to the National Consumer Arbitration Court or the Boards made by the businesses that they accept consumer arbitration may be limited in time and according to particular types of disputes, for example only claims not exceeding a certain sum. The business may also declare that it will accept consumer arbitration only according to the law instead of equity.

f.-) Foreign Arbitral Awards in Consumer Disputes

The Spanish Arbitration Law provides in Article 56(1) that foreign arbitral awards are executed in Spain in conformity with international treaties which form part of the internal legal system and, in their absence, on the basis of the provisions of the present Law. According to Article 56(2) of the Law a foreign arbitral award is an award which has not been rendered in Spain. This means that Article 56(2) of the Spanish Arbitration Law corresponds with the reservation which can be made according to Article I(3) of the New York Convention, namely to limit the effect of the Convention to awards which have been rendered in other Contracting States. Accordingly, awards which have been rendered in Spain may have to be enforced in Spain according to the rules applicable to the enforcement of national awards. Article 59 of the Law states that the competent court will refuse the enforcement only if the award is contrary to the public order or of the arbitrators have decided on issues which, according to the Spanish law, are not arbitrable.

7.1.3 **Consumer Arbitration in the UK**

Consumer arbitration agreements are particularly regulated in the UK Arbitration Act of 1996.[715] According to Section 89 of the Act the application of the unfair terms regulations in the Consumer Contracts Regulations of 1994 are extended to a term which constitutes an arbitration agreement. The Act establishes that the rules of the Unfair Terms in Consumer Contracts Regulations 1994 are applicable to arbitration agreements as which are defined agreements to submit to arbitration present or future disputes. These rules apply whatever the law applicable to the arbitration agreement. In particular, an arbitration clause is considered unfair according to Section 91 for the purposes of the Regulations if it relates to a claim which does not exceed the amount specified by an order. Section 90 of the Act states that the Regulations are applicable

even if the consumer is a legal person. According to Section 91(1) of the Act *a term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.*[716]

a.-) Consumer Arbitration Schemes of the Chartered Institute of Arbitrators

Consumer arbitration schemes are offered, for example, by the Chartered Institute of Arbitrators. The Institute operates more than 90 arbitration schemes for a variety of associations of the British trade and industry and larger companies. *These schemes generally take the form of 'documents only' arbitrations with the Institute collecting and organising the relevant paperwork such as statements of claim and defence and then appointing a suitable arbitrator from its panel in order to settle the dispute.* [717] The arbitration scheme is used by commercial and financial services, insurances, the glass and plastics industry, manufacturers of household products, miscellaneous consumer services, telecommunications, water supply and training and enterprises councils.

b.-) UK Industries Operating Consumer Arbitration Schemes

In the UK certain bodies responsible for dispute settlement with consumers provide for arbitration schemes. For example, the National Consumer Credit Federation scheme which is operated by the Chartered Institute of Arbitrators.[718] When resorting to arbitration, the consumer gives up his rights to resort to court litigation. The arbitrator makes his decision on the basis of procedures in 'documents only'. This means that both parties have to make written statements, providing copies of documents and evidence in writing. The costs of the arbitration are borne by the National Consumer Credit Federation or by its members. The parties have to pay a registration fee. In the award the arbitrator may decide that either party should reimburse the other party's registration fee. Also the UK Consumer Credit Trade Association offers consumers the resort to arbitration operated by the Chartered Institute of Arbitrators. The proceedings are in documents only. However, both parties share the costs of the arbitration equally.[719] The award is binding and final, subject to the right of appeal according to the relevant Arbitration Acts.

The UK Mail Order Traders' Association offers consumer arbitration through the Institute of Arbitrators based on 'documents only' proceedings.[720] The award is binding according to the UK Arbitration Act. Also the Association of British Travel Agents has an arbitration system for consumers which is operated by the Chartered Institute of Arbitrators:[721] *The procedure aims to be simple, quick, informal and inexpensive. Each party may present a written statement of its arguments in the dispute, together with supporting documents, and comment on the arguments and evidence of the other party. Photographs and/or videos are accepted as supporting documents. Evidence provided by the claimant is copied to the other party, as is the defence documents copied to the claimant. Both have an opportunity to respond. The arbitrator makes his decision without an oral hearing on documents only*. The maximum claim to be considered is some € 10,000. The registration fee (some € 90 to € 160, dependent on the sum claimed) may have to be refunded at the discretion of the arbitrator. Concerning the enforcement, the Association considers that that *where necessary, the decision is enforceable through the courts as a binding contract*. The Scottish Motor Trade Association offers an arbitration service which consumers may use if they are not satisfied with the recommendations of the complaint board. The board of arbitration is operated by an independent panel of qualified arbitrators.[722]

7.2 Consumer Disputes and International Arbitration

In practice, cross-border consumer protection litigation is not very common.[723] This is due to the often small sums at stake, the relatively high costs of court litigation and the relatively lengthy proceedings before courts. Therefore, it might be expected that in the cross-border electronic

commerce consumer protection litigation would hardly become relevant. However, practice relating to consumer complaint systems shows that such schemes are much in demand.[724] This is particularly due to the need of both business and consumers to establish a legal environment which ensures trust and confidence in cross-border electronic commerce on both sides.

Whereas cross-border consumer litigation appears to be avoided by consumers if only for the high costs, the attraction of arbitration systems may lie in:

1. the informal nature of the proceedings;
2. low costs;
3. the competence of the body organising the system;
4. the efficiency of the implementation of the decisions;
5. the appropriateness of the legal framework on which decisions are based.

However, it should be observed that there are only few existing systems specialised in cross-border arbitration. It is characteristic that they concern a particular sector of the economy only and that they are based on the support by the relevant trade and industry.[725]

In fact, within many national legal systems particular procedures have been instituted in order to facilitate the legal redress of consumers, in particular within small claims courts. The elements of such a facilitation of the legal redress are:[726]

1. the adaptation of the laws of civil procedure or arbitral procedure adapted to litigation of small claims;
2. the establishment of a simplified procedure for consumer arbitration;
3. simplified requirements for the request for arbitration;
4. the representation of the interests with the help of consumer associations;
5. the attempt of mediation or conciliation before the commencement of the arbitration;
6. no or low costs.

7.2.1 Consumer Arbitration Schemes and International Voluntary Arbitration

It is asserted that mandatory consumer arbitration such as those provided for by Portuguese and Spanish legislation would not relate to the international law of voluntary arbitration which is based on the freedom of contract and the autonomy of the parties,[727] with the consequence that the rules of the international voluntary arbitration, including those concerning the enforceability of foreign arbitral awards according to the New York Convention, would not be applicable to awards rendered within such an arbitration. However, both the Portuguese and the Spanish consumer arbitration systems rely on voluntary arbitration according to the relevant national laws.[728] The awards rendered within the consumer arbitration systems may be enforceable according to the New York Convention, provided that they relate to international arbitration.

7.2.2 Consumer Protection and Cross-Border Legal Redress

Concerning traditional commerce it has been observed that for consumers, legal rights stop or at least change at the frontier, sometimes in a substantive sense and almost always in a procedural sense:[729] *The supply side has developed methods for dealing with such problems but consumers have not the means, individually or collectively, to do so. In terms of consumer rights, we do not have a single market. One of the factors which deters consumers from shopping cross border is uncertainty about their legal rights. Harmonisation or agreement on a certain common minimum set of rights may help to reduce that uncertainty, but it may not do much more than that. This is not a question of uneven implementation (...) but rather of a more fundamental and complicated question which might be posed as follows: Assuming a given directive is implemented in a consistent way within the national legal systems of all fifteen Member States,*

do we then have a single market as far as the provisions of that directive are concerned? Unfortunately, the answer is no, partly because legal mechanisms for redress and access to justice (and even substantive rights) tend to operate only within national legal systems and not between national legal systems.

a.-) The Lack of Cross-border Consumer Arbitration Systems

With regard to the facilitation of the consumer redress the solutions adopted in Member States are essentially national. The possibilities were developed with a purely national view so that aspects of cross-border consumer complaints hardly played a role.[730]

Generally, the consumer is alleged to be a person without legal knowledge and experience, and this justifies, in part, the protection as a weaker party in consumer contracts. Accordingly, it cannot be expected that he will be familiar with particular systems of legal redress. With regard to the traditional system of consumer protection in the private international and procedural law assured by the Brussels Convention and the Rome Convention it may be said that there is in most cases an economic disproportion between the damage caused and the expenses which have to be incurred for the defence of these rights which causes an obstacle for the defence of the consumer with regard to the business.[731] The ordinary litigation is too slow and its costs are too high for the dispute settlement of consumer claims.[732]

b.-) Advantages of International Consumer Arbitration

The advantage of the international arbitration of disputes between Information Society services and recipients in electronic commerce lies in the possibility to enforce a foreign award on an almost global level. This enforceability is ensured by the New York Convention with its 121 Contracting States.

c.-) Applicability of the New York Convention to International Consumer Arbitration

The applicability of this Convention with regard to consumer disputes raises three major problems:

- First, can the settlement of the consumer dispute be considered as 'commercial' arbitration in the sense of the Convention?
- Second, is the consumer dispute arbitrable?
- Third, does the award comply with public policy if it violates mandatory rules of consumer protection law?

Also the UNCITRAL is aware of the increasing involvement of consumers in electronic commerce. The problems relating to arbitration in an electronic commerce environment with the involvement of consumers have been summarised as follows:[733] *Whether electronic commerce disputes are referred to conventional arbitration fora, located in existing physical jurisdictions, or resolved online in a 'cyberspace jurisdiction', a number of procedural and substantive issues will need to be considered. One issue on which considerable attention has been focussed, both in UNCITRAL and elsewhere, and which related generally to electronic commerce, is that of the arbitration agreement and provisions in national laws and international conventions that require the arbitration agreement to be 'in writing' in order to be valid. Applicable law is also an issue, which online dispute resolution may raise questions of place of arbitration, conduct, language, confidentiality and security of the proceedings; admissibility of evidence; the making of an award; and the jurisdiction of courts providing legal support to the arbitration, as well as possible review and enforcement of the award, especially in the face of some of the jurisdictional issues mentioned above. While procedural and substantive issues are currently addressed by existing*

arbitration regimes of conventions, model laws and rules, whether or how these will apply to the changing shape of dispute resolution and, in particular, to online proceedings, remains largely uncertain. As with jurisdictional issues, increasing consumer participation in cross-border transactions on the Internet raises issues of facilitating cheap, convenient, accessible and effective dispute resolution mechanisms for consumers. Yet the discussions at the UNCITRAL level which centred on the question whether the New York Convention needed an adaptation with regard to the developments in electronic commerce, did not expressly concern those problems which derive from the applicability of the Convention to arbitration with consumers.

7.2.3 **Commerciality of the International Consumer Arbitration**

If a consumer is a party to a cross-border dispute, the arbitration will, in general, be subject to the rules of international arbitration. This means that, particularly, that the New York Convention will be applicable. Consumer contracts may be subjected to international 'commercial' arbitration, provided that they relate to the international trade. The presence of such conditions may be assumed if the subject matter of the contract involves a transfer of property and of goods or services from one Member State to the other.[734] In the case of international voluntary arbitration (as opposed to mandatory arbitration) the settlement of the dispute has to follow the rules established for the international commercial arbitration.

Does this mean, for example, that the provisions of a national consumer protection law according to which abusive arbitration clauses in consumer contracts are without effect, would not be applicable in international consumer arbitration? Would agreements to arbitrate contained in international arbitration agreements which constituted unfair terms of consumer contracts and which violated national consumer protection law be upheld by national courts on the basis of the New York Convention? Without indulging into the different jurisprudences of Member States with regard to the private international law concerning international arbitration of consumer disputes, in particular according to the New York Convention, there may be a case for the assumption that national courts may hold that a consumer deserves a lower degree of protection if he ventures into cross-border transactions.[735] If the principle of good faith was applied to such contracts, there may be a reason which justifies the application of a different level of protection, in particular, if the initiative for the conclusion of the contract originated from the recipient.

However, in the case of electronic commerce such a differentiation may not easily be applied, in particular, since the interactivity of the medium used may permit various degrees of involvement of the parties in the pre-contractual phase. Therefore the regard of the parties' activities and their initiatives which lead to the conclusion of the contract should not lead to a complication of the legal problem concerning the scope of protection which the consumer deserves. Since it may be difficult for lawyers to identify the party which makes an offer for the online conclusion of the contract it cannot be expected that the application of the principle of good faith, related to the 'initiatives' of the parties preliminary to the conclusion of the contract, would lead to a simple reply to the question which degree of protection should be available for the consumer. Yet the legal security and e-confidence require that this degree should be obvious for both parties before the conclusion of the contract.

a.-) Necessity to Operate at Economic Conditions

The limitation of the right to choose the applicable law in the case of consumer contracts proceeds on the assumption that the consumer is better protected if the rules of the mandatory consumer protection law of the Member State where he is domiciled are applicable to the contract. This concept is employed by Article 5 of the Rome Convention with regard to the 'passive' consumer. However, it may be questioned, whether the limitation of the freedom of contract is necessary in order to achieve a satisfactory degree of consumer protection, taking

into account that within Member States the consumer may be protected at an even better degree if the 'state of origin' principle was applicable. According to the Rome Convention even in such a case a consumer could rely on mandatory rules of consumer protection of the Member State where he is domiciled.[736] And yet it appears that the relevant rules of Article 5 of the Rome Convention would be applicable only with difficulty. If one imagines that a court of a Member State concerned with a consumer dispute with a value of € 500 would have to establish the content of the mandatory rules of the consumer protection law of the other Member State where the consumer, involved in the litigation, is domiciled, it emanates that the relevant provision of the Rome Convention might necessitate an expert opinion and translations the cost of which would easily exceed the interests at stake. But whereas the court system is supported by public means, the application of such principles to international arbitration might render the providing of such services unsound for economic reasons. Accordingly, it is obvious that both parties need to rely on foreseeable and simple rules applicable to their transaction including consumer protection, if cross-border electronic commerce should flourish.

b.-) International Instruments

Concerning the arbitrability of consumer disputes, it may be assumed that courts of Contracting States which, first, did not make the 'commercial' reservation of the New York Convention and, second, and did not expressly exclude consumer disputes from the scope of commercial disputes, are likely to validate international arbitration agreements with consumers. Thus it has been held that the fact that consumer protection legislation may apply to the dispute is not in itself sufficient to exclude arbitral jurisdiction.[737] There is no binding definition of the term 'commercial'. Neither the New York Convention nor the Geneva Convention contain a definition of the term. From the possibility of States to make a reservation according to Article I(3) of the New York Convention which authorises them to exclude disputes from the application of the Convention which are not regarded as commercial under their internal laws, it may be inferred that the concept of 'commerciality' may be interpreted in a broad manner. This argument is supported by the purpose of the term 'commercial' *to denote acts of sovereigns that are not covered by sovereign immunity and to distinguish between 'international commercial arbitration' (governed by private law) and 'international arbitration' of disputes between states under public international law*.[738] It may be inferred that, in principle, also consumer disputes can be considered as 'commercial' in the sense of the New York Convention, because here the term 'commerciality' is merely used to differ the arbitration which involves a private party from the arbitration between States.

The international conventions relating to arbitration concern generally 'commercial' arbitration, but the definition of this term is not unanimous. The reservation according to Article I(3) of the New York Convention was made by the Member States of Denmark, Greece and Monaco.[739] The Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards relates to arbitral awards rendered in 'civil, commercial or labour proceedings', thus expressly including non-commercial matters. Is consumer arbitration included in the concept of international commercial arbitration? The title of the Geneva Convention refers to international commercial arbitration. Article 1(1) of the Convention explains the scope of application by reference to the settlement of disputes concerning the international trade. Also consumer disputes may arise from the international trade. The Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards refers in Article 1 merely to 'arbitral awards rendered in civil, commercial or labour proceedings in one of the States Parties' without reference to the seat of arbitration. However, this omission means that the 'territorial' approach is of decisive importance. The Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards refers in Article 1 merely to 'arbitral awards rendered in civil, commercial or labour proceedings in one of the States Parties'. The UNCITRAL Model Law

on International Commercial Arbitration states in endnote 2: The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. 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; 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 cooperation; carriage of goods or passengers by air, sea, rail or road. Article 1(1) of the Model Law states: This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States. Accordingly, it is not excluded that consumer disputes are commercial.

c.-) Consequences of the 'Commerciality' of the Consumer Arbitration

Does the commerciality of consumer disputes engender the application of the rules of the international commercial arbitration to the dispute? It has been held that in the case of an international arbitration the requirements of form which may govern the validity of national arbitration agreements with consumers, would not be applicable, so that international arbitration agreements with consumers could effectively be concluded without the observance of such formal requirements, for example the signature of the agreement by the consumer.[740]

(1) Disregard of Rules Applicable to 'Commercial' Arbitration'

It has been suggested that in the case of international consumer arbitration the arbitrator should disregard those legal rules which relate to international commercial arbitration.[741] Accordingly, such rules which are based on international commercial customary law or on international commercial instruments such as the UN Convention on the International Sale of Goods will not be applicable. This might safeguard the protection of the consumer according to a standard which corresponds with the transnational public policy. But if the rules concerning the international commercial arbitration were not applied to international consumer arbitration which rules could fill this gap? It appears that it would be excessive to demand from the parties, in particular consumers, to make an appropriate choice of law from the different rules of competing national and other legal systems. Should the determination of the applicable law be left to the other party, the Information Society service, which, by reason of its terms of contract, is likely to suggest the application of a law he is familiar with?

(2) Reference to Consumer Arbitration and the Applicable Law in Arbitration Rules

It may be recommendable if the bodies responsible for out-of-court dispute settlement included in their rules for arbitration references to arbitration of business-to-consumer disputes which are directed to provide guidance in critical issues. Concerning the law applicable to the arbitration the rules could, for example provide: Rule on the Law Applicable to the Substance of the Dispute: 'The parties may choose the law applicable to the merits of the dispute. Failing such a choice, the arbitrator may apply the UNIDROIT Principles of International Commercial Contracts and in disputes with consumers the Principles of European Contract Law including Mandatory Rules of EU Consumer Protection Law or any other law which he considers appropriate.'

The bodies responsible for arbitration could make their Rules on Arbitration accessible via their websites and thus contribute to the establishment of confidence in cross-border electronic commerce through the offering of a 'neutral' law to be applied to the merits of the dispute: This would not only relieve the parties from the difficult task to choose the appropriate law on a case by case basis, and from negotiating in the case of an individual contract, but it might lead to the establishment of a simple legal system concerning the applicable law in cross border relations of electronic commerce.

(3) Applicability of UNIDROIT Principles of International Commercial Contracts?

According to the Comment to the UNIDROIT Principles[742] *the restriction to 'commercial' contracts is in no way intended to take over the distinction traditionally made in some legal systems between 'civil' and 'commercial' parties and/or transactions, that is to say to make the application of the Principles dependent on whether the parties have the formal status of 'merchants' and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called 'consumer transactions' which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, that is to say a party who enters into the contract otherwise than in the course of its trade or profession.* The Principles thus do not provide a definition, *but the assumption is that the concept of 'commercial' contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.* However, they do not cover consumer contracts.

7.2.4 **Transnational Law Applicable to Consumer Arbitration**

The parties may agree on the application of a transnational law to the arbitration. They may choose the applicable law directly in their contract, but they may also make an indirect choice, for example by reference to the rules of the arbitral institution charged with the settlement of disputes.

a.-) Principles of European Contract Law Including Aspects of Consumer Protection

Since consumer contracts are excluded from the scope of the UNIDROIT Principles it may be recommendable to suggest the application of the Principles of European Contract Law as the law applicable within consumer relations. On the basis of these Principles mandatory rules of EU consumer protection law which may belong to a Member State's public policy could be integrated into a comprehensive set of rules. As a result both parties would know from the beginning of the contractual relation which law governs their transaction. In order to provide the parties of cross-border contracts in the Business-to-Consumer sector of the electronic commerce with legal security about the applicable rules of consumer protection law, it would be recommendable if the Information Society and the institutions for arbitration provided on their websites information about the Principles of European Contract Law including consumer protection. In order to achieve this purpose, the Principles would have to be amended in order to comprehend the mandatory rules of EU consumer protection law. This amendment has already been suggested in order to provide a comprehensive body with the relevant legal rules[743] which could comprise rules on consumer protection law such as:

- Right of information;
- Right of withdrawal;
- Advertising practices;
- Marketing practices;
- Other provisions on the protection of the consumer as a weaker party to the contract.

For the purposes of international arbitration the resulting amended Principles should only integrate those mandatory rules of consumer protection law which are likely to constitute public policy of Member States. The amendment of the Principles could be aimed at by the work of the Commission's Joint Research Centre on the achievement of e-confidence.

b.-) A European Civil Code

The European Parliament is concerned with the work of the establishment of a European Civil Code which would be applicable in all Member States.[744] Already in the European Parliament's Working Paper on the Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code of June 2000 by a team led by von Bar[745] the 'pros and cons' of the unification of the law of obligations within the EU were discussed. Against the standardisation of the law of obligations the following arguments were forwarded:

(1) Advantages and Disadvantages of a European Civil Code

- The silence of the EC Treaty on the unification of the law of obligations which may have to following reasons:

1. The substantial differences between the civil law systems of Member States;
2. The Rome Convention already deals with the conflicts of laws;
3. In many states different civil law systems are applicable (e.g. Canada, U.S.);
4. The problem that differences in particular fields such as property law the differences between civil law systems of Member States are deeply rooted-

- In favour of the unification the following arguments may be brought:
    1. The differences between the national civil law systems create barriers to cross-border trade;
    2. The practice of the Rome Convention with regard to the application of foreign laws is costly and time consuming;
    3. The legal system of a State such as Canada or the U.S. is integrated within a national legal framework, even if aspects of civil law are regulated differently;
    4. Certain aspects of the commercial law were successfully unified on the international level.

In 1998 a Study Group on a European Civil Code constituted itself, comprising some 50 professors from the different Member States and prospective Member States.[746] With regard to the issue of consumer disputes in cross-border electronic commerce the outcome of the working group on the law of contract will be of particular interest. However, it cannot yet be foreseen when the work of the group will have achieved publishable results.

(2) EU Parliament's Call for a Single European Civil Code

In a hearing organised by the European Parliament which took place on 22/11/00 the different projects were referred to, inter alia the Resolutions of the European Parliament of 1989 and 1994 which called for preparatory work for the adoption of a Single European Civil Code and the European Council meeting in Tampere which called for an overall study in the filed of civil law on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. Apart from the works of the Lando Commission which resulted in the Principles of European Contract Law, there was referred to the UNIDROIT Principles[747] and the project coordinated by Professor Gandolfi on a 'Code européen de Contrats'.[748] There are also other projects such as this of the Common Core of European Private Law[749]

(3) Integration of Consumer Protection Law

In the Parliamentary report it was mentioned that particularly the following Directives should be integrated in a Single European Civil Code, namely:

The Directive to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises (85/577/EEC);

The Directive Concerning Liability for Defective Products (85/374/EEC);

The Directive on Unfair Terms in Consumer Contracts (93/13);

The Directive on Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Time Share Basis (94/47/EC);

The Directive on the Protection of Consumers in respect of Distance Contract (97/7/EC);

The Directive on the Sale of Consumer Goods and Associated Guarantees (1999/44/EC);

The Directive on Electronic Commerce (2000/31/EC);

The Directive on Combating Late Payment in Commercial Transactions (2000/35/EC).

Apart, also other Directives will have to be integrated, for example the Directive on a Community Framework for Electronic Signatures (1999/93/EC) or the Directive on Misleading Advertising so as to Include Comparative Advertising (97/55/EC).

(4) Availability of the Principles of European Contract Law

Yet it appears doubtful whether the work on the project of a European Civil Code could be quick enough to help the parties of cross-border electronic commerce out of the present confusion concerning the applicable consumer protection law in cross-border disputes. The preliminary conclusions of the rapporteur established: *Immediate action needs to be taken to ensure greater consistency between existing Directives in the field of civil law and to improve coordination between the Directives and national law. The Commission should implement future projects which have an impact on the civil law of the Member States only after thorough preparations in cooperation with legal institutions. In this way it should be possible to make European legislation more consistent and ensure better coordination with existing civil law in the Member States. A European Civil Code can only be created in stages, given the present jurisdiction situation. Its first components should be a codified and corrected edition of the law enshrined in existing Directives and further areas of civil law which have yet to be identified and have a particular impact on the internal market.*

Accordingly, it appears that at least for the foreseeable future none of the projects aiming at the establishment of a European Civil Code would obtain the support by the European Parliament. Whether the continuing competition between the European Parliament and Parliaments of Member States will generate a workable basis through the codification of legal rules which may serve the parties in cross-border electronic commerce in the Internal Market appears doubtful. For this reason the parties will have to rely on their autonomy and make use of those principles which appear to them the most appropriate. With regard to consumer protection, the easiest way to obtain a satisfactory solution seems to be the integration of mandatory rules of EU consumer protection law which may constitute the public policy of Member States into the Principles of European Contract Law and to propagate the application of these principles in consumer arbitration on the websites of institutions for arbitration which deal with such disputes and on the websites of those Information Society services which aim at the achievement of legal security in cross-border contracts with consumers from other Member and non-Member States.

c.-) Supplementary Application of Other Transnational Laws

The parties may agree on the supplementary application of other transnational laws such as the UNCITRAL Model Law on Electronic Commerce. The Model Law addresses the problems which derive from the application of consumer protection laws of states which want to implement the

Model Law. Article 1 of the UNCITRAL Model Law on Electronic Commerce states: *This Law does not override any rule of law intended for the protection of consumers.* The applicability of the UNCITRAL Model Law on Electronic Commerce to consumers was particularly discussed by the relevant Commission concerned with the drafting of the instrument:[750] *Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (...) it was felt that an indication should be given that the Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should be excluded from the scope of the Model Law by way of a general provision, particularly since the provisions of the Model Law might be found appropriate for consumer protection, depending on legislation in each enacting State.* Accordingly, there is no reason why the UNCITRAL Model Law on Electronic Commerce should not be applicable on the basis of a choice of law within relations between Information Society services and their recipients who are consumers. If there is an effective arbitration agreement, particularly by reason of the arbitrability of the consumer dispute, there is no reason to consider the parties to the contract bound by the rules of consumer protection according to the rules of the Brussels Convention and the Rome Convention. The Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce[751] states in para. 46-7 that Article 5bis of the Model Law which facilitates incorporation by reference in an electronic context, aims at the recognition *that consumer-protection or other national or international law of a mandatory nature (for example, rules protecting weaker parties in the context of contracts of adhesion) should not be interfered with.* The Model Law on Electronic Commerce is thus compatible with the regulation of consumer protection, and the parties may agree on its supplementary application to any transnational law chosen by them.

7.2.5 **International Consumer Arbitration in Member States**

According to a survey[752] many national laws of EU Member States exclude the possibility to resort to arbitration by means of a contractual clause in the case of consumer contracts,[753] the laws of other Member States provide for special dispute resolution systems in consumer affairs,[754] even though arbitration may be expressly prohibited in the case of consumer contracts,[755] the laws of other Member States leave the issue unsettled[756] whereas other Member States expressly provide in their laws for the arbitration of consumer disputes,[757] in some Member States within certain sectors of the economy, for example in the case of the acquisition of shares.[758] In the case of international arbitration the private international laws of Member States may, independently of the regulation of domestic arbitration, permit the dispute settlement of consumer disputes. Taking into account of the admissibility of consumer arbitration according to EU law,[759] it appears that Member States should permit the (international) arbitration of consumer disputes.[760]

a.-) Arbitration Agreements with Consumers

An arbitration agreement in order to be valid, must satisfy a number of conditions. Generally, there must be:[761] capacity of the parties, existence of consent, arbitrability of the dispute, form and proof of the arbitration agreement. In international consumer arbitration concerning electronic commerce the conclusion of the arbitration agreement may assume particular relevance. The first two conditions generally do not cause problems for the international arbitration of consumer disputes in electronic commerce. However, the conclusion of the arbitration agreement and the arbitrability of the dispute merit some observations.

b.-) Electronic Arbitration Agreements with Consumers

Legal insecurity with regard to the effectiveness of arbitration agreements with consumers may derive from formal requirements relating to the arbitration agreement according to national laws. Other problems may derive from the questionable arbitrability of consumer disputes and from the need of arbitrators to take into account the public policy applicable at the place or seat of the arbitration and in the states where the award may be enforced. Also costs are factor which may constitute a barrier for the availability of arbitration unless consumer arbitration is considered to be in the public interest and worthy of public support.

The jurisprudence concerning international arbitration of consumer disputes in the traditional commerce is not abundant. It is even more difficult to provide legal guidance with regard to the outcome of disputes concerning the recognition and enforcement of awards in the international arbitration of consumer disputes. Accordingly, in the absence of clear provisions in international instruments regulating arbitration with consumers reputable institutions for arbitration and arbitrators may not easily be prepared to encounter the risks which derive from the exercise of state control of electronic dispute settlement in international arbitration with consumers.

(1) Form Requirements

The form requirements of the New York Convention relating to arbitration agreements are applicable whether a party to an agreement is a consumer or not. Once the conditions of form are met, the arbitration agreement is enforceable.

(2) Choice of Law

The choice of the Principles of European Contract Law, possibly amended to incorporate rules of consumer protection law,[762] at least those rules which may constitute the 'community acquis' or public policy, and supplemented by transnational legal rules of relevance for electronic commerce, may establish a framework within which cross-border electronic commerce between Information Society services and recipients who are consumers can develop without legal uncertainties. A basic rule concerning the use of means of electronic commerce is contained in Article 1.301(6) of the Principles: the term *'written' statements include communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides*. The Principles may appropriately be supplemented by the Electronic Commerce Agreement of the UN/CEFACT.[763] This agreement explains in the objectives that it does not exclude the applicability of the Agreement in business-to-consumer relations. The explanations of the reasons state: *Though the E-Agreement could be used in relationships between businesses and consumers, it does not incorporate any provisions relating to consumer protection. Consumer protection law is generally mandatory and in most cases the consumer's national and local consumer protection law will be applicable when a consumer concludes a transaction. Businesses wishing to use the E-Agreement for entering into contractual relationships with consumers must therefore recognise the need for compliance with national and local consumer protection laws*. Another transnational legal instrument which may supplement the Principles is the UNCITRAL Model Law on Electronic Commerce. The parties may choose the applicable law in their individual contract. But taking into account of the often small values at stake in consumer contracts, the individual negotiation of the choice of law would not be economical. For these reasons it would certainly be preferable if the choice of law could be effected through the reference to the arbitration rules of the institution charged with the dispute settlement according to the arbitration agreement. As mentioned already, the propagation of such a coherent set of rules on the law applicable to the arbitration by the institution charged with the dispute settlement might be beneficial not only for the parties, but also for the development of cross-border electronic commerce with consumers. The consumers

and also the Information Society services would be assured about the applicable law in cross-border contracts. The choice of a transnational set of rules would thus contribute to the achievement of e-confidence and facilitate electronic commerce within the Internal Market.

7.3 Arbitrability of Consumer Disputes

The term 'arbitrability' refers to the legal power of the parties to settle the dispute between themselves in a binding manner: *Arbitration by a third party is only possible for disputes which the parties can also settle themselves. Disputes over rights for which the parties cannot contract are in principle outside the scope of arbitration.*[764]

7.3.1 Arbitrability of Consumer Disputes on the Basis of National Law

Due to the often small amount at issue and the fact that consumers in the traditional commerce bought locally, there are relatively few cases dealing with the international arbitration of consumer disputes. The concern of national legislators with consumer protection caused a careful approach by legal literature: *Whether disputes involving consumers are arbitrable is controversial and depends on the national law. For example, the Spanish Arbitration Act of 1988 is applicable to civil and commercial arbitrations, including arbitral procedures established in the General Act for the Defence of Consumers and Users as established in the Additional Provisions section of the Act of 1988. Differently, concerning French law, it has been argued that consumer disputes are not arbitrable at all.*[765]

a.-) Success of National Consumer Arbitration Schemes

Yet the success of the consumer arbitration systems in Portugal and Spain and the acceptance of the arbitrability of consumer disputes in other national legal systems has been described as *more of a sign of the irresistible progression of arbitration,*[766] and it has been observed:[767] *... French jurisprudence has accepted the validity of arbitration clauses, thus considering that the undertaking to have recourse to an arbitrator is less dangerous than that which is sometimes agreed to by a simple purchaser or tenant, and that no specific legal protection is justified. ... French law has not had a pioneering role in this matter, as Spain created a special system of arbitration for consumers in 1984. (...) Two recent Spanish decisions have confirmed the arbitrability of consumer law disputes, even in internal matters.*[768] *But, in reality, all this fits in with a very favourable European framework as the European Parliament itself has expressly encouraged the arbitrability of consumer disputes by a Resolution adopted on July 25, 1994.*[769] *The adoption of this Resolution by the highest European representative body demonstrates well the collective awareness of the necessity to encourage recourse to arbitration.*

b.-) Harmonisation of National Laws of Member States in Support of Consumer Arbitration May Be Necessary

Nevertheless, any remaining uncertainties about the arbitrability of consumer disputes in Member States necessitate the harmonisation of their laws, or even their unification with this respect. Otherwise the arbitration of cross-border consumer disputes would remain illusory with negative consequences for the establishment of the Internal Market. If international consumer disputes were arbitrable in other large regional markets or in the rest of the global market, Information Society services on those countries where the arbitrability of such disputes is denied would suffer higher costs from the settlement of international disputes. They could not offer to their foreign recipients who are consumers the arbitration of disputes according to internationally established standards but would have to find types of dispute settlement compatible with the national system. For this reason, their competitiveness on foreign markets might suffer.

An institution for arbitration, established in the Internal Market and operating on an international level, cannot be expected to extend its activities to consumer disputes between Information

Society services and recipients who are consumers unless the arbitrability of these disputes is generally accepted within Member States. Differences in the laws of Member States would negatively affect the business strategy of institutions for dispute settlement and arbitration, because in the developing market of electronic commerce the refusal of the recognition and enforcement of arbitral awards by courts of Member States, based on the lack of arbitrability of the dispute, might attract the public interest with a risk to cause damage to the reputation of the institution and its arbitrators and to create confusion amongst potential clients.

7.3.2 The Law Applicable to the Determination of the Arbitrability

The arbitrability of the dispute is determined in relation to the law the violation of which is asserted,[770] but with regard to transnational arbitration *it is generally accepted that the arbitrability depends in the first place on the law applicable to the arbitration agreement. In the case of an arbitration clause, the arbitrability is thus governed by the proper law of the contract of which this clause is a part. Others, however, contend that each court must examine whether a dispute is arbitrable according to its own law. Only if the dispute is arbitrable according to the law of the forum shall the court recognise the validity of the arbitration clause and decline jurisdiction. It is clear that the second approach considerably limits the chance of a definite settlement of a dispute by arbitration.*[771] Accordingly, arbitrability may not only be analysed by reference to the law applicable to the contract or to the arbitration but also by reference to the law applicable at the seat of the arbitration. For these reasons it may be recommendable to choose the place or seat of the consumer arbitration in a State according to the laws of which such disputes are arbitrable. Taking into account of the EU's positive policy towards consumer arbitration, there is no reason why the arbitration of consumer disputes should not be lawful.

7.3.3 Arbitrability of Consumer Disputes and Mandatory Arbitration of Consumer Disputes

Whether disputes involving consumers are arbitrable is controversial and depends on the national law. For example, the Spanish Arbitration Act of 1988 is applicable to civil and commercial arbitrations, including arbitral procedures established by the General Act for the Defence of Consumers and Users as based on the Additional Provisions section of the Act of 1988. But it appears difficult to conceive of mandatory arbitration systems as voluntary 'arbitration' in the sense of the private international law. With this regard, it might be asserted that the Brussels Convention should be applicable to the so-called 'consumer arbitration' in Portugal or Spain, because these system constituted in reality mandatory systems, in particular because the 'arbitrator' is not independent but a judge of the civil law system who is charged with the task of exercising the function of an 'arbitrator'.[772] Thus even if the Brussels Convention exempts arbitration from the scope of application, it could be applicable to arbitration systems which constitute disguised mechanisms for dispute settlement of consumer disputes which make use of the term 'arbitration' without fulfilling the requirements of this method which are based on the private international law. Likewise, also the Rome Convention might be applicable, so that within the system of the mandatory consumer arbitration Member States would have to ensure the applicability of the conflict of laws rules emanating from this Convention. However, since neither the Portuguese nor the Spanish consumer arbitration system has a mandatory character, it seems that with regard to these schemes neither the Brussels Convention nor the Rome Convention would be applicable.

7.3.4 Arbitrability of International Consumer Disputes

The arbitrability of the dispute is a condition for the validity of the arbitration agreement, and, in consequence, of the competence of the arbitrator.[773] The arbitrability of international consumer disputes is not expressly regulated. The issue may be controversial. It is asserted that, by way of an analogy to the non-arbitrability of labour disputes, also international consumer disputes could not be subjected to arbitration.[774] This argument is based on the allegation that the rights

protecting a consumer are not at the disposition of the parties to a dispute, since the protection of the consumer belongs to the national public policy ('ordre public').

a.-) Arbitrability of Consumer Disputes and National Law

In many European States consumer protection laws are considered as mandatory and in the public interest so that it may be questionable whether a consumer should be able to subject these rights to arbitration. *What are the objective reasons for the inarbitrability of the dispute? For example, if an arbitration clause does not relate to commercial disputes (...). A limitation on the arbitrability which exists in many countries is imposed by the public policy (a concept which is not always easy to interpret) with regard to which the legislator considers that the position of the weaker party should be protected in a particular manner, for example consumers, savers or employees.*[775] *Every national legal system recognises the bar of public policy (ordre public ...) to the contractual autonomy of the parties' will. In the domestic sphere of civil and commercial contracts there exists, in fact, a growing tendency to impose mandatory restrictions on the freedom of the parties to contract as they like. These restrictions are required by the social and economic conditions of modern life. They serve, for example, the protection of the consumer*[776]*...* However, the relevant EU law which favours the arbitration of consumer disputes and the successful examples of the Portuguese and Spanish consumer arbitration systems show that there is no reason why the arbitrability of consumer disputes should be denied.

b.-) In Case of Doubt the Arbitration Agreement will be Considered Valid

The New York Convention, Article II(1) requires the arbitrability of the dispute, but it does not say more. In the Geneva Convention there is no provision on arbitrability. Which law has to be applied in order to ascertain the arbitrability of an international (consumer) dispute? *Jurisprudence is not unanimous – in question come the law of the place where the award is likely to be recognised and enforced in the sense of Article V of the New York Convention, the second alternative is the law applicable to the contract and the third view aims not so much at the application of a national law but at the application of a material rule of law which can claim general application in the Contracting States of the New York Convention, thus avoiding local views which 'would diminish the mutually binding nature of the agreements'.*[777] *In substance, the prevailing view seems to be that in case of doubt the validity of the arbitration agreement should be confirmed.*[778] The arbitrability of cross-border or international consumer disputes has to be decided on the basis of the law applicable to international arbitration. Accordingly, the arbitrator would have to decide on the validity of the arbitration clause, and, in particular, on the arbitrability of the dispute. Concluding, international consumer disputes are arbitrable, and the corresponding arbitration clauses should be considered as lawful.[779]

7.3.5 **Enforceability of Awards Relating to Consumer Arbitration**

In international arbitration, in particular concerning consumers, the enforceability of an award depends essentially on the applicability of the New York Convention. Thus awards rendered by types of 'arbitration' which do not fulfil the requirements of voluntary international arbitration according to the New York Convention may be difficult to enforce. This concerns in particular forms of arbitration which were developed to settle consumer disputes. Before such awards are tested before national courts it is difficult to foresee how these issues will be dealt with by courts which apply tests on the basis of national laws, in particular concerning public policy relating to consumer protection. The enforceability of awards is essential, because without such a possibility the dispute settlement by arbitration between parties established in different (Member) States will be without interest. If the winning party cannot enforce an award in the state where the loosing party is domiciled or established the Internal Market for electronic commerce will remain an illusion.[780]

7.4 Public Policy and Consumer Arbitration

It may be argued that a consumer dispute which affects the public policy concerning consumer protection remains nevertheless arbitrable, taking into account that the non-arbitrability of international disputes may only result from the incompetence of the arbitrator to decide on issues which appertain to the transnational public policy. If thus the arbitration agreement would relate to rules of law which appertain to the international public policy, the competence of the arbitrators would be excluded, taking into account of the non-arbitrability of the subject-matter to which the arbitration agreement relates and which renders the arbitration agreement without effect.[781] However, the verification of the arbitrator's incompetence can be made by the arbitrator himself ('Kompetenz-Kompetenz'). In such a case, depending upon the findings, it may be reasonable to expect that the arbitrator would declare himself incompetent to deal with the case if the dispute related to the international public policy.[782] Concerning the applicable law the arbitrator will have to respect the requirements of the transnational public policy relating to consumer disputes which aim at the establishment of equality for the benefit of the weaker party, and which have to be applied, no matter what choice of law the parties made.

7.4.1 Enforceability of Foreign Awards Relating to Consumer Disputes

If it may be difficult to identify those rules which represent the mandatory consumer protection law it may even be more difficult to find out which of these rules constitute public policy. In the absence of jurisprudence on this issue and guidance from legal writers it cannot easily be assessed whether any of these rules could establish public policy. Only those rules which may not be derogated from by the parties could belong to the public policy, and even those rules which are mandatory without doubt may establish public policy only if additional conditions are met.

7.4.2 Transnational Public Policy and the Protection of the Weaker Party in International Commercial Arbitration

The notion of a 'transnational' public policy refers to a situation where the arbitrator in the absence of a clear relation with a national law, applies not a 'national' but a 'transnational' public policy.[783] It has been suggested that in international arbitration a principle of public transnational order according to which the arbitrator should protect the weaker party would be developing.[784] This principle, which is based on the idea of a public transnational order in the legal field of competition, where common traits of the relevant national competition laws would establish this core of rules. Likewise it may be said that the obligation to protect the weaker party may be an element of the transnational public policy. It has proposed that such an obligation could be based on the prohibition of the abuse of a dominant position. The need to protect the weaker party is thus considered as the maintenance of the balance of the powers which, without this intervention, would be violated through economic force. But whereas the contractual imbalance is inherent in most contracts, only in the presence of particular circumstances the arbitrator is asked to intervene. This may be the case in international consumer contracts.[785] The abuse of the dominant position may thus be sanctioned, however, limited to those cases where the facts establish an evident abuse. With regard to the content of the transnational public policy with regard to consumer protection one may think of codes of conduct established by international organisations like the United Nations or the Organisation for Economic Cooperation and Development (OECD), insofar as they have received general acceptance or consensus.[786]

The arbitrator may deduce common principles of the transnational public policy from different national legal systems which have a relation to the dispute. With this regard the transnational public policy does not have a global appeal but a regional importance. Article 3.10 of the UNIDROIT Principles of International Commercial Contracts may play an important role, according to which a party may avoid the contract or an individual term of it if the contract or term unjustifiably gave the other party an excessive advantage. In the sense of Article 3.10(a) of

the Principles regard is to be had, inter alia, to the fact that the other party has taken unfair advantage of the first party's improvidence, ignorance, inexperience or lack of bargaining skills. But the protection of the weaker party in the transnational public policy has not yet received a definite scope, and since the UNIDROIT Principles are not applicable to consumer contracts, no inference can be made with regard to the role of consumer protection in transnational public policy based on the UNIDROIT Principles. In international commercial arbitration the protection of the weaker party was of inferior importance due to the fact that merchants did generally not merit such protection. National laws grant protection to the weaker party only in the presence of particular circumstances, for example if one party was a consumer, employee or tenant.

7.4.3 EU Public Policy on the Basis of the Directives on Distance Contracts and Unfair Terms in Consumer Contracts?

Can Article 12(2) of the Directive on Distance Contracts and Article 6(2) of the Directive on Unfair Terms in Consumer Contracts establish the basis for a transnational public policy of the EU? Both provisions must be interpreted in the sense that Member States would be asked to refuse the enforcement of awards based on a choice of a law of a non-Member State or a non-national law, which did not afford the minimum protection granted by the Directive? Both provisions call upon Member States to ensure that the consumer protection, based on the Directives, must be available even if the parties chose the law of a non-Member State as the law applicable to the contract if the contract has a close connection with the territories of one or more Member States. This close connection may be based on two factors. Firstly, the place of domicile of the consumer may be of decisive importance, if the consumer commissions the services from this place. Second, the place of domicile of the consumer may be of decisive importance, if the supply of the service has to be made at this place. However, according to the jurisprudence of the European Court of Justice[787] on public policy it appears unlikely that national courts may consider that the rules on the maintenance of the protection afforded by the Directives would generally belong to the transnational policy of the EU, which is part of the public policy of a Member State. The content of the public policy vests in rules which appertain to the basic order of states so that even essential principles of consumer protection law may not easily qualify.

Taking into account of Member States' obligations to ensure that the consumer does not loose the protection afforded by the Directives through the choice of the law of a non-Member State as the law applicable to the contract, it may be considered that the protection afforded by the Directives constitutes not only rules of mandatory law but also the EU transnational public policy.

a.-) Directive on Distance Contracts

Article 12(1) of the Directive on Distance Contracts[788] provides that the consumer may not waive the rights conferred on him by the transposition of the Directive into national law. Recital 18 of the Directive provides for the supplementation of the minimum binding rules of the Directive by codes of practice for the protection of consumers, in line with Commission Recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance.[789] In Article 12(2) the Directive provides: *Member States shall take the measures needed to ensure that the consumer does not loose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of one or more Member States.*

Member States are free to issue rules which provide for a higher degree of protection, however, those rights which the Directive gives to consumers are not disposable. According to Article 12(1) of the Directive the consumer may not waive the rights conferred on him by the transposition of the Directive into national law. Recital 18 of the Directive provides for the

supplementation of the minimum binding rules of the Directive by codes of practice for the protection of consumers, in line with Commission Recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance.[790]

The consumer does not loose the protection afforded by the Directive if the parties to the contract choose the law of a non-Member State as the law applicable to the contract. By exempting the minimum standard of protection from the disposition by a consumer, the Directive indicates the borderlines between those rules which are mandatory and those which a consumer may derogate from. Can this obligation be interpreted in the sense that Member States would be obliged to refuse the enforcement of awards based on a choice of a law of a non-Member State or a non-national law which does not afford the protection granted by the Directive?

Is the protection necessary for the establishment of the Internal Market? It might be argued that the reference to the territories of the Member States in Article 12(2) of the Directive could be understood as an indication of the necessity to create a homogenous minimum legal protection of consumers within the Internal Market which must be available even if a foreign or non-national law was applicable to the contract. With this regard, it may be justifiable to assert that Article 12(2) of the Directive forms a legal basis for the content of a EU public policy relating to consumer protection in distance contracts.

b.-) Directive on Unfair Terms in Consumer Contracts

According to Article 6(2) of the Directive on Unfair Terms in Consumer Contracts[791] a court in a Member State will have to apply the rules established in the Directive even if the law of a non-Member State is applicable to the contract. Article 6(2) of the Directive states: *Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member country as the law applicable of the contract if the latter has a close connection with the territory of a Member State*. This provision is identical with the regulation contained in Article 12(2) of the Directive on Distance Contracts.

c.-) Choice of Law Clauses in Derogation from the Directives

In cases in which a contract does not have a close connection with the territory of a Member State a consumer may, by contractual stipulation, derogate from the protection afforded by the Directive. In Recitals 23 of the Directive on Distance Contracts - a similar provision is contained in the other Directive the Recitals of which are not numbered - the Directive refers to the risk *that, in certain cases, the consumer may be deprived of protection under this Directive by designating the law of a non-Member country as the law applicable to the contract,* and it indicates that *provisions should therefore be included in this Directive designed to avert this risk*. However, beyond the requirement that the degree of the connection between the contract and the territory of a Member State must be 'close' the Directive does not indicate any circumstances in the presence of which such a closeness can be assumed. Assuming that there would be no close connection, if the consumer contract was concluded in a non-Member State, the protection afforded by the Directive could be excluded through the choice of the law of a non-Member State, even if the consumer is domiciled in a Member State, but if the place of the conclusion of the contract was in a non-Member State.[792]

(1) Relevance of the Place of the Conclusion of the Contract in Distance Contracts

It may be doubtful whether in distance contracts the place of the conclusion of the contract may assume a relevance with regard to the establishment of a contact with the territories of Member States. Here the consumer is generally at the place of his domicile. Different from the 'active'

consumer who travels abroad and concludes his contract at the premises of the business the recipient of an Information Society service typically concludes the contract online from his place of domicile. Accordingly, proceeding upon the expectations of the parties themselves, it could be asserted that the Information Society service should have to take into account that the national legal system, applicable at the place of the recipient who is a consumer, may play a role with regard to the consumer protection. Thus it could be assumed that there is a close connection between a contract and the territory of the Member State where a consumer is domiciled and from where he concludes a contract with an Information Society service established in a non-Member State when the services or goods have to be supplied to the consumer in his state of domicile. But this criterion is different from that of the place of the conclusion of the contract.

The criterion of the place of the conclusion of the contract is of less relevance in the case of distance contracts than in the case of contracts concluded in the presence of both parties. This assumption is applicable in the case of cross-border consumer contracts which are concluded online. If a German consumer concludes a contract with a US company through that company's website, it may be controversial whether the conclusion of the contract was made in a Member State (Germany) or in a non-Member State (US). Does the online publication of a catalogue constitute a binding offer so that a contract is concluded if the business receives the consumer's commission in the US or does the catalogue contain a mere 'invitatio ad offerendum', so that the contract will be considered as concluded in Germany when the consumer receives the confirmation of the commission by the business? National laws may provide different answers so that according to one view the contract may be considered as having been concluded in Germany, according to the other as in a non-Member State.[793]

(2) Place of the Conclusion of the Contract and Article 11 of the Directive on Electronic Commerce

Article 11 of the Directive on Electronic Commerce which deals with the placing of the order establishes the rule that the receipt of the placing of an order by a recipient has to be acknowledged by the Information Society service without undue delay and by electronic means. The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them. The Directive does not deal with the issue whether the contract is concluded by the order or by its confirmation. However, it may be inferred that the confirmation will be merely declaratory in nature if the order constitutes the recipient's acceptance of the Information Society's offer. This conclusion is confirmed by Recital 34, last sentence of the Directive according to which *the acknowledgement of receipt by a service provider may take the form of the online provision of the service paid for*. The confirmation thus establishes merely the evidence the aim of which it is to provide the recipient with security about the fact that his order has been received without any further legal consequence. It has even been suggested that an Information Society service should indicate with this confirmation that the confirmation serves exclusively for the purposes of information and evidence.[794] The confirmation is considered as having no effect on the formation of the contract. If the website constitutes a mere 'invitatio ad offerendum', the contract is not concluded with the receipt by the Information Society service of the order, and the confirmation of the receipt as such by the Information Society service does not as such contain a declaration of intent according to which the Information Society service intends to accept the offer of the sender. Accordingly, only if it results from the text of the confirmation of the receipt or from the circumstances it may be justified to interpret the confirmation as constituting the acceptance of the offer so that the contract may be considered as concluded with the reception of the receipt.[795] However, it is also asserted that the confirmation of the offer by the Information Society service assumes a constitutive nature so that the contract would generally be concluded when the recipient receives the Information Society service's confirmation.[796] With regard to

Recital 23 of the Directive it may be inferred that the requirement of the confirmation is not constitutive of the contract, because the Directive does not envisage *to establish additional rules on private international law relating to conflicts of law* in cross-border contractual relations. Accordingly, it depends upon the applicable law whether the contract is concluded with the order, the confirmation or another additional declaration by the Information Society service. The place of the conclusion of the contract may vary accordingly.

(3) Place of the Conclusion of the Contract and Article 15 of the UNCITRAL Model Law on Electronic Commerce

The UNCITRAL Model Law on Electronic Commerce does not regulate the issue of the place of conclusion of cross-border contracts. In Article 15 it is concerned with the receipt of a data message. Such data messages may contain the online offer or acceptance relating to the conclusion of a contract. According to Article 15(4) of the Model Law it is assumed that a data message is received at the place where the addressee has its place of business or, if he has more than one place of business, the place of business which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business and, if the addressee has no place of business, its habitual residence. Insofar as the conclusion of the online contract depends on offer and acceptance it may thus be assumed that an offer is accepted if the relevant data message is received, and this reception will be deemed to have occurred at the place where the receiving party is established or domiciled.

7.4.4 **National Public Policy and Transnational Public Policy**

Generally, it may be differed between the internal public policy of a state and the international public policy. In the case of international arbitration the award may be subjected to a lower degree of control reflected by the international public policy whereas the national public policy may contain stricter rules.[797] Thus the French law applies an 'ordre public interne' and an 'ordre public international'.[798] The criterion for the application of the different public orders is the qualification of the arbitration and the arbitral award as national or international.

The concept of the public policy is used to indicate those rules which are imminent to the political organisation of a society and which are not at the disposition by the parties, either by contract or other transaction. This concept has been recognised by the New York Convention: In the case in which the recognition or enforcement of an arbitral award would be contrary to the public policy of a state, the recognition and enforcement of an arbitral award may be refused by that state's the competent authority where recognition and enforcement is sought.[799]

a.-) Public Policy of Member States and Transnational Public Policy

Traditionally, there are rules which concern the national public policy, for example mandatory provisions relating to consumer protection. A Member State's international public policy is reflected in a nation's laws concerning the international public policy. These are, for example, mandatory rules of the international civil law. The national court of a Member State may only apply rules of the transnational public policy insofar as these rules belong to the public policy of this Member State. The term 'transnational public policy', is understood to relate to those rules which establish the mandatory rules of the international public law. However, it there is not yet a comprehensive concept of transnational public policy, so that what is considered in one Member State as contrary to the transnational public policy may not necessarily be considered similarly in other Member States.[800] A second category of the transnational public policy may relate not to global but partial or regional orders. This is, for example, the international public policy established by the EU to which belong mandatory rules of consumer protection law. Such rules, if not directly emanating from the EC Treaty, may also be based on secondary EU law, for example on Directives. The doctrine of the 'transnational' public policy - which is only in its

infancy - aims at the establishment of a coherent and binding body of public policy which is gained from the common traits of national or international public policies reflecting basic values of the procedural or material law which are imposing themselves.[801] The analysis of the interests involved may lead to the identification of these basic values. But with regard to the favourable attitude of EU law towards consumer arbitration it seems excluded that consumer arbitration could violate the public policy of a Member State.

b.-) Mandatory Nature of Consumer Protection

Laws relating to consumer protection may provide that certain rules are mandatory. According to Article 6(2) of the Directive on Unfair Terms in Consumer Contracts[802] Member States are obliged to prevent that a consumer will be deprived of the protection according to the Directive by means of the choice of law of a non-Member State as the law applicable to the contract. Thus the Directive does not generally consider such a term as unfair which stipulated the law of a non-Member State as the law applicable to the contract. Such a clause, however, should be without effect insofar as it deprived the consumer of the protection under the Directive. Concerning the minimum standard of protection the Directive does not focus on the law of Member States, but on the standards established by the Directive.

(1) Close Connection with Territories of Member States and the Principle of Good Faith

But such a minimum standard of protection will only be available, if the contract has a *close connection with the territory of Member States*. The Directive does not define the facts which constitute such a close connection. In the online environment the subsistence of such a connection may be controversial, in particular, since the application of the principle of territoriality appears questionable in cyberspace. According to traditional concepts such a close connection with the territories of Member States may be established, if the place of the conclusion of the contract was in a Member State, but this concept is hardly of use in electronic commerce. It has been suggested above[803] that standards for the 'close connection' could be established by reference to the duty to be of good faith. Within such a principle the concept of 'targeting' may be of use: if the Information Society service specifically targets recipients in a particular State it might be justified to consider that a close connection with the territory of this State exists.[804], however, in cross-border electronic commerce international standards will only be developing by means of which the expectations of both parties which are domiciled or established in countries with different cultural and legal systems may be measured with a uniform legal concept relating to the duty of good faith.

(2) Definition of Unlawfulness of the Contract Term

The national laws of Member States concerning unfair terms in consumer contracts employ different methods when defining the scope of unlawful terms. Some national laws retain a general prohibition of unfair terms without giving a list of examples, others contain non exhaustive lists of unlawful terms, possibly complemented by a 'grey' list of clauses which are considered unlawful until their 'fairness' has been proven or which may be considered unlawful by a court.[805] But even if such circumstances could be asserted in the individual case it would appear difficult on the basis of the European Court of Justice's jurisprudence in the ECO Swiss / Benetton case[806] to assume that the relevant rule belonged to the public policy.

c.-) Application of the Public Policy by the Arbitrator

Even if the parties to a consumer contract have chosen a certain law as the law applicable to the contract, the arbitrator remains bound to apply the rules of the public policy which the parties cannot abrogate.[807] But what are these mandatory rules in the case of a consumer dispute? In

the case of an international arbitration the Rome Convention is not applicable. Thus an arbitrator would not be bound to apply the mandatory rules concerning the law of consumer protection of the Member State where the (passive) consumer is domiciled. The arbitrator has to take into consideration those rules of the public policy, which the parties themselves cannot derogate from. Whether the evaluation of the impact of public policy by the arbitrator was correct, is subject to the control of the State where the arbitral award will be enforced according to the New York Convention, because recognition and enforcement may be refused if the award is contrary to the public policy of that State.[808]

7.5 Consumers' Access to Jurisdiction

It should be observed that Information Society services present in itself only a sector of the Internal Market's industry, in particular involved in distribution. Accordingly, the establishment of an out-of-court dispute settlement system for this sector of the economy could affect/disturb the free working of competition between this sector of the trade and industry which uses electronic means for distribution and the sector which employs traditional means. With regard to issues of taxation and electronic commerce it should be borne in mind that in the past the Commission insisted on the 'neutrality' of taxation. This means that particular taxes on electronic commerce such as the 'bit tax' should be avoided insofar as they were introduced with the aim to take off the advantages in competition which the use of the new means of distribution offered. Inversely, it might possibly be argued that the offering by the Commission and Member States of an out-of-court dispute settlement system for electronic commerce at no or low costs could negatively affect the competitive position of those parts of industry and trade which do not rely on electronic means for distribution. However, taking into account of the fact that the implementation of out-of-court dispute settlement systems for electronic commerce is directed towards the establishment of the Internal Market for Information Society services, these initiatives can fully be based on the relevant provisions of the EC Treaty, in particular Articles 3(1)(c), 65a) and Article 293 last indent.

The provision of legal redress for consumers is a concern of the EU since 1984.[809] The system of protection which EU law ensures enables the consumer to take action against certain unlawful practices occurring in any Member State.[810] With regard to the problems resulting from cross-border consumer litigation it has been stated:[811] *…one also has to count with the possible psychological self-restraint of the consumer to resort to jurisdiction, in particular in the case of cross-border litigation, simply, because he would have to move to a territory which is not his own, facing a legal system which he does not know and possibly using a language of procedure which he does not necessarily master. With this regard, the absence of the augmentation of litigation before the courts … creates concern. It renders in particular questionable the effectiveness of the community action, and it seems that one may ask whether the activity of the Community in the matter of the legal protection of the consumer has brought to the latter a level of higher protection*.

7.5.1 Arbitration Clauses and the Protection of the Consumer

Information Society services may, in the general terms of contracts, provide for the settlement of disputes by arbitration.

a.-) Pre-contractual Obligations

According to Recital 56 of the Directive on Electronic Commerce the concept of contractual obligations concerning consumer contracts includes also pre-contractual obligations. The Recital indicates: *As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the contract, including consumer rights, which*

have a determining influence on the decision to contract. Accordingly, Information Society services which address their websites to recipients who are businesses and consumers may have to differentiate. If the recipients are businesses, they may be able to rely on the state of origin principle as established in Article 3 of the Directive,[812] but if they are consumers, they may have to take into account on their websites consumer protection laws of the states where the recipients are domiciled.

b.-) Online Negotiation of Terms in Consumer Contracts

The Directive on Unfair Terms in Consumer Contracts[813] affects clauses which are not individually negotiated, Article 3(1) of the Directive. This means, that its scope relates to terms which are pre-established without that the consumer had the possibility to influence the content of the terms. The content of the online-clauses may be difficult to prove, for example if the dispute arises with a delay after the conclusion of the contract during which the terms have been modified. According to the rules of evidence established in Article 3(2) of the Directive, the business has to prove that a term was individually negotiated if it wants to rely on such an assertion. However, concerning all other terms the consumer who relies on the protection by the Directive will have to prove that the term was not individually negotiated.[814]

c.-) Possibility to Take Notice of the Online-Terms in Consumer Contracts

According to the Directive on Unfair Terms in Consumer Contracts, Recital 20, the Information Society service has to give the consumer the possibility to take notice of all terms. In the Annex to the Directive, (i), it is stated that a clause according to which the consumer is deemed to have accepted the terms is unfair if the consumer did not have the possibility to actually take notice of the terms before the conclusion of the contract.

It may be questionable whether the link on a website through which access to the terms of contract is offered may suffice to satisfy the criteria of the providing of a possibility to take notice of the terms. However, in the evaluation of the sufficiency of such an offer also considerations based on the Information Service's duty to be of good faith should be included. Accordingly, taking into account of the ordinary online consumer's expectations, it should be considered as satisfactory, if he may obtain notice of the terms via a link on the website which is clearly identifiable as leading to the terms of contract. It would be recommendable, if such a link was contained on the homepage, however, it may also be sufficient, if the link was placed on the front page of the relevant websites containing the Information Society's offer. The terms should be downloadable and printable, also with regard to the possibility of providing evidence about their content. The mere granting of an access to view the terms will not be sufficient to constitute the possibility to take notice. In order to permit recipients who are consumers and those who are not consumers (businesses) a clear impression about the content of the terms, it is recommendable to separate between clauses for business-to-business and business-to-consumer contracts.

7.5.2 **Arbitration Clauses, Fair or Unfair**

From the Directive on Unfair Terms in Consumer Contracts which refers in the Annex, letter (q), to a term excluding or hindering the consumer's right to take legal action or exercise any other legal *remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract*, it emanates, that arbitration agreements which relate to consumer contracts are not necessarily without effect. It appears that a term, which requires the consumer to go to arbitration, could be lawful, provided that the arbitration procedure was based on rules which do not limit the consumer's right to establish evidence. The implementation of this rule into the

national law of a Member State could cause a problem if the law of the Member States would, in a general manner, consider consumer disputes non-arbitrable.

a.-) Online Consent to Terms

The Directive on Unfair Terms in Consumer Contracts affects clauses which are not individually negotiated, Article 3(1) of the Directive. This means, that its scope relates to terms which are pre-established without that the consumer had the possibility to influence the content of the terms. The content of the online-clauses may be difficult to prove, for example if the dispute arises with a delay after the conclusion of the contract during which the terms have been modified. According to the rules of evidence established in Article 3(2) of the Directive, the business has to prove that a term was individually negotiated if it wants to rely on such an assertion. However, concerning all other terms the consumer who relies on the protection by the Directive will have to prove that the term was not individually negotiated.[815]

(1) Possibility to Take Notice of the Terms

According to the Directive on Unfair Terms in Consumer Contracts, Recital 20, an Information Society service would have to give the consumer the possibility to take notice of all terms. In the Annex to the Directive, (i), it is stated that a clause according to which the consumer is deemed to have accepted the terms is unfair if the consumer did not have the possibility to actually take notice of the terms before the conclusion of the contract. It may be questionable whether the link on a website through which access to the terms of contract is offered may suffice to satisfy the criteria of the providing of a possibility to take notice of the terms. However, in the evaluation of the sufficiency of such an offer also considerations based on the Information Service's duty to be of good faith should be included. Accordingly, taking into account of the ordinary online consumer's expectations, it should be considered as satisfactory, if he may obtain notice of the terms via a link on the website which is clearly identifiable as leading to the terms of contract. It would be recommendable, if such a link was contained on the homepage, however, it may also be satisfactory, if the link was placed on the front page of the relevant websites containing the Information Society's offer.

(2) Interactivity as Evidence of Knowledge

The terms should be downloadable and printable, also with regard to the possibility of providing evidence about their content. The mere granting of an access to view the terms will not be sufficient to constitute the possibility to take notice. In order to permit the consumer a clear impression about the content of the terms, it is recommendable to separate between clauses for business-to-business and business-to-consumer contracts. It has been suggested that *in order to avoid evidential problems regarding the question of whether or not parties have consented to arbitration online, it will be in the interest of parties to provide for confirmation of acceptance by a second click on an icon or by some other procedure. More particularly, when one of the parties is a consumer, it is likely that the validity of consent to an agreement to arbitrate will be assessed more rigorously, especially, if the arbitration agreement is made by reference. When faced with consumers, sellers and suppliers would therefore be well advised to do their utmost to avert the risks of future disputes.*[816]

b.-) Unfairness of Arbitration Clauses

According to Article 3(1) of the Directive on Unfair Terms in Consumer Contracts[817] a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Directive on Unfair Terms in Consumer Contracts obliges Member States in Article 6(1) to lay down that unfair terms used in

a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. Accordingly, unfair arbitration clauses will generally not affect the other contractual obligations.

(1) Unfair Clauses in the Business-to-Business (SME) Sector

The scope of the Directive does not relate to clauses in the business-to-business sector. The EU law does not provide a basis for the assessment of the unfairness of such clauses. Accordingly, a careful approach is needed when drafting business clauses for contracts between Information Society services and recipients which are not consumers. However, taking into account of the need to establish an Internal Market for electronic commerce, it would appear to be necessary to provide Information Society services with guidance on business terms which they may use for cross-border contracts. Such terms may probably be established on the basis of existing schemes used in the traditional economy, taking into account of international instruments regulating the law of contract. It may be argued that a particular Directive would be needed to protect SMEs against the use of clauses established by powerful Information Society services, however, the discussion about the enlargement of the scope of the existing Directive so as to include SMEs showed, that the inclusion of SMEs in the scope of protection of consumers would require a particular political initiative.[818]

(2) Two Types of Arbitration Clauses on the Information Society Service's Website

Within contractual relations between businesses arbitration clauses are often used, in particular in certain branches of the trade and in international contracts. In the case of consumer contracts such clauses may have to meet stricter legal standards, in particular the standards of the Directive on Unfair Terms in Consumer Contracts. In consequence an Information Society service may have to offer on its website arbitration clauses for contracts in business-to-business electronic commerce and business-to-consumer electronic commerce. Taking into account of the fact that recipients who are not in a long-standing contractual relation with the Information Society service may opt for the 'consumer' version of the forms, provided that their address permits such a possibility, Information Society services may suffer from additional disadvantages through the increase of consumer contracts. Since the cost price of products or services rendered to recipients who are consumers is likely to be higher than the cost price in the case of business contracts, Information Society services which are established in the Internal Market may have to calculate higher prices for their products and services than those in third countries where the degree of consumer protection is lower. The regulation of an efficient out-of-court dispute settlement system for consumers is thus important not only in the interests of consumers but also in the interests of society.

c.-) Limitation of Choice of Law?

According to subsection (2) of Article 6 of the Directive on Unfair Terms in Consumer Contracts[819] Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. Thus the consumer may not be deprived of the protection granted by the Directive through the choice of a law of a non-Member State if the contract has a close relation with a Member State. The choice of law will be permissible insofar as the protection afforded by the Directive is guaranteed.[820] This allows the conclusion, that clauses providing for the choice of the law of a Member State may be effective. This appears reasonable, taking into account that Member States have to satisfy the minimum requirements established by secondary EU consumer protection law.

The purpose of the Directive is to re-establish the balance of power between consumers and those businesses who drafted the general terms, since the consumer has no possibility to influence the content of these terms.[821] The Directive thus creates harmonised conditions within a sector of consumer protection law. However, it does not even regulate all types of general terms in consumer contracts. Not covered are, for example, clauses which concern the subject of the contract or the relation between the price and the performance. However, on the basis of the Directive it should be possible to draft arbitration clauses which produce effects within the whole Internal Market.

d.-) Fair Arbitration Clauses

The Directive on Unfair Terms in Consumer Contracts does not address the issue of general terms and conditions relating to out-of-court dispute settlement. However, in the Annex the Directive gives examples of unfair terms, including, in letter (q) the term: *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.* Business terms which would require the consumer to necessarily resort to a mandatory system of out-of-court dispute settlement in electronic commerce, excluding any court action, thus must be drafted carefully in order to observe the standard of protection.

(1) Fair Clauses with Regard to Lit. (q) of the Annex to the Directive on Unfair Terms in Consumer Contracts

It seems that a clause by means of which the consumer agrees to confer any disputes to out-of-court settlement would be acceptable according to EU law, if such a scheme is:

- non-exclusive (permitting the consumer the resort to court litigation) or
- exclusive (not permitting the consumer the resort to court litigation) if:
  - the out-of-court dispute settlement system is not covered by legal provisions, and if the consumer's evidence is unduly restricted, or
  - imposing a burden of proof on him which lies with the other party to the contract.

(2) Exclusive Arbitration Clause

The mere exclusivity of an arbitration clause may be considered as unfair. The English Schedule 3 to the Unfair Terms in Consumer Contracts Regulation of 1994 reproduces in Paragraph 1(q) the text of lit. (q) of the Directive's Annex. The UK Office of Fair Trading held[822] that a clause by means of which the company attempted to restrict the legal remedies of consumers by referring all disputes to arbitration was potentially unfair according to this provision. However, this interpretation of the clause is not unanimous. For example, Italian jurisprudence did not consider as unfair an exclusive arbitration clause in a consumer contract concerning certain claims in the case of the purchase of a pre-fabricated house.[823] It may be inferred that exclusive arbitration clauses are permissible according to the Directive unless they contain further restrictions such as, for example, a lack of procedural rules or a limitation of the right to bring evidence. With this regard also US law developed similar principles.[824] Yet another issue is whether a violation of these mandatory rules of law will contravene the public policy with the consequence that an arbitral award may not be enforceable.

e.-) US Law on Arbitration Agreement and General Terms of Contracts

According to US law consumer arbitration clauses are lawful.

(1) Hill v. Gateway 2000

A flexible approach concerning arbitration agreements is used by US courts. In the case Hill v. Gateway 2000[825] an arbitration clause was contained in the general terms of contract on paper used by a computer vendor which were included in a computer box. When the plaintiffs bought the computer on the telephone, there was no mentioning of the arbitration clause. Business terms were not mentioned during the telephone conversation between the parties. The plaintiffs could only acquire the information about the business terms, after the goods had arrived. The general terms of contract contained a clause according to which any dispute or controversy arising out of or relating to the agreement or its interpretation should be settled exclusively and finally by arbitration. The arbitration should be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration should be conducted in Chicago, Illinois, USA, before a sole arbitrator, and the award should be final and binding on the parties.

On appeal the New York court held that the plaintiffs were bound by the arbitration clause, even if they did not assent to the terms before ordering. With reference to the US Federal Arbitration Act the Court held that there was no need for an arbitration clause to stand out of other clauses used in general terms of contract. It was sufficient, if the consumer noticed the clauses. The fact that he did not read them could not render the clause inefficient. With reference to trade practices the Court decided that it would be extremely impractical to expect a vendor to disclose to consumers all terms prior to the transaction. Accordingly, with reference to ProCD v. Zeidenberg[826] the Court held, that a consumer will be bound by the terms inside a box of the product if he had an opportunity to read the terms and to reject them by returning the product. With regard to the possibility to obtain knowledge of the general terms the Court, referring to the means of telecommunications explained: *If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anaesthetise rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. … Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return advice. Competent adults are bound by such documents, read or unread.*

(2) Day Brower v. Gateway 2000

In Day Brower v. Gateway 2000[827] the New York Supreme Court was concerned with a clause which was similar to the one of the Hill v. Gateway case. Concerning the validity of the arbitration clause contained in the general terms of the box the Court held: *The consumer has 30 days to make that decision. Within that time, the consumer can inspect the goods and examine and seek clarification of the terms of the agreement; until those 30 days have elapsed, the consumer has the unqualified right to return the merchandise, because the goods or terms are unsatisfactory or for no reason at all. While returning the goods to avoid the formation of the contract entails affirmative action on the part of the consumer, and even some expense, this may be seen as a trade-off for the convenience and savings for which the consumer presumably opted when he or she chose to make a purchase of such consequence by phone or mail as an alternative to on-site retail shopping. That a consumer does not read the agreement or thereafter claims he or she failed to understand or appreciate some term therein does not invalidate the contract any more than such claim would undo a contract formed under other circumstances...*

With respect to the substantive element, which entails an examination of the substance of the agreement in order to determine whether the terms unreasonably favour one party we do not

find that the possible inconvenience of the chosen site (Chicago) alone rises to the level of unconscionability. We do find, however, that the excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process. Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute. In this regard, we note that this particular claim is not mentioned in the Hill decision, which upheld the clause as part of an enforceable contract. But the Court did not consider that the arbitration clause was invalid and without any effects. It rather 'adapted' the contract to the individual circumstances. The Court held that the consumer was bound by the arbitration clause, however, it considered that dispute settlement should appropriately be conducted by the less expensive American Arbitration Association (AAA).

(3) Mass Market Licences (Click-Wrap) and the US Act on Computer Information Transactions

US Information Society services use increasingly mass market licences by means of which consumers are asked to 'agree' on the licence terms, and only after they have interactively clicked on the corresponding button the computer programme will continue. The US Act on Computer Information Transactions envisages the validity of such licences in Articles 101 and 209.[828] The term of the mass market licence involves transactions directed to the general public where the licensee is an end user. *'Mass market' refers to transactions that involve information aimed at the general public as a whole, including consumers ... The transactions covered are purchases of true mass-market information and do not include specialty software for business or professional uses, information for specially targeted limited audiences, commercial software distributed in non-retail transactions, or professional use software.*[829] However, it makes their enforceability dependent on fairness and unconscionability.[830] The concept of unconscionability may briefly be explained as meaning that a contract should be procedurally and substantively unconscionable when made. There must be a showing of an absence of meaningful choice on one part of the parties with contract terms which are unreasonable favourable to the other party. The purpose of this doctrine is to ensure that the more powerful party cannot 'surprise' the other party with some overly 'oppressive' term, but it is not the aim of the concept to redress the inequality between the parties.[831]

(4) International Contracts: Consent by Consumers and the US Electronic Signatures in Global and National Commerce Act

In the case of international contracts concluded by means of electronic commerce agreements or contracts with consumers may require the consumer's consent as a condition of validity. The consent is regulated by the US Electronic Signatures in Global and National Commerce Act. Section 101(a) and (c) of this Act establish a general rule on validity with regard to consumer contracts:

Section 101. General Rule on Validity.

(a) In General. – Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce –

(1) A signature, contract or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form; and

(2) A contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. ...

(c) Consumer disclosures. –

(1) Consent to Electronic Records. –

Notwithstanding subsection (a), if a statute, regulation or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if –

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent:

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement

(i)informing the consumer of

(I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and

(II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal...

The Section regulates, in particular, the effect of the withdrawal of consent, prior consent and oral communications. It specifies obligations with regard to the retention of contracts and records, the accuracy and ability to retain contracts and other records, or notarisation and acknowledgement. Electronic signatures and contracts concluded with consumers in cross-border electronic commerce are thus likely to be effective according to federal US law if the consumer prior to the electronic signature or the conclusion of the contract consented to the use of such means of electronic commerce.

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[1] See Peter JUNG: "Rechtsfragen der Online-Schiedsgerichtsbarkeit", Kommunikation & Recht1999/63-70 at 65.

[2] E. Casey LIDE: "The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", The Arbitration and Dispute Law Resolution Journal, 1998(?) 31-51 at 36.

[3] Ottoarndt GLOSSNER: "Sociological Aspects of International Commercial Arbitration", in: The Art of Arbitration, Essays on International Arbitration, ed. by Jan C. Schultsz and Albert Jan van den Berg, Kluwer, Deventer 1982, 143-152 at 147.

[4] Article 24(1) of the ICC Rules of Arbitration.

[5] See, for example, Article 28 of the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce.

[6] Piero BERNARDINI: "l'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 31; Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN; "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 34 et seq.

[7] Otto SANDROCK: "The Place of Arbitration and the Law Applicable to the Merits of the Dispute", in: The Place of Arbitration and the Conflict of Laws of International Commercial Arbitration, ed. by Filip de Ly, Mys & Breesch, Gent 1992, 89-111 at 91, 92.

[8] Article IV(1)(b)(ii) of the Geneva Convention.

[9] Article V(1) of the New York Convention; Article IV(1)(b)(iii) of the Geneva Convention.

[10] See Article VII(1) of the Geneva Convention.

[11] Article V(1)(a) and (d) of the New York Convention; see Article VII(1) of the Geneva Convention.

[12] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, Munich 2000 at 437.

[13] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer, 1990 at 8.

[14] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 10.

[15] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer, 1990 at 8.
[16] See below, Chapter 7.1.1.e.
[17] On the Future Hague Convention on International Jurisdiction and the Effects of Judgements in Civil and Commercial Matters see http://www.hcch.net/e/workprog/jdgm.html
[18] Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996, at 49.
[19] The ICC Rules of Arbitration provide for a duration of six months, the Rules of the Swedish Chamber of Commerce for Expedited Arbitrations for a duration of three months.
[20] See, for example, the electronic cost calculator of the ICC, http://www.iccwbo.org/court/english/cost_calculator/cost_calculator.asp
[21] See, for example, the Rules for Expedited Arbitrations of the Stockholm and the related fee schedules.
[22] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 109.
[23] See http://www.jus.uio.no/lm/un.conventions.memebership.status/00Arbitration.Recognition.and.Enforcement.Convention.New.York.html and http://www.uncitral.org/en-index.htm update of 08/06/00.
[24] See Thomas E. CARBONNEAU: "National Law and the Judicialisation of Arbitration: Manifest Destiny Manifest Disregard, or Manifest Error", in: International Arbitration in the 21st Century: Towards Judicialisation and Uniformity, Transnational Publishers, New York 1994, 115-132 at 120.
[25] See http://www.uncitral.org/en-index.htm
[26] See http://www.europa.eu.int/comm/dg24/library/pub/legalaid/c5-1-5.html
[27] See http://www.hcch.net/e/workprog/jdgm/html
[28] Thomas E. CARBONNEAU: "National Law and the Judicialisation of Arbitration: Manifest Destiny Manifest Disregard, or Manifest Error", in: International Arbitration in the 21st Century: Towards Judicialisation and Uniformity, Transnational Publishers, New York 1994, 115-132 at 116 et seq.
[29] The European Convention on International Commercial Arbitration ('Geneva Convention'), Geneva 1961, see http://www.asser.nl/ica/eur.htm
[30] The Geneva Convention was ratified by the following EU Member States: Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg and Spain; the Agreement Relating to Application of the Geneva Convention which contains an amendment to Article IV of the Convention by Austria, Belgium, Denmark, France, Germany, Italy and Luxembourg, see http://conventions.coe.int/treaty/EN/cadreprincipal.htm update of 23/06/00
[31] Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 81.
[32] Article I(1) of the Geneva Convention.
[33] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, Munich 2000 at 561.
[34] See United Nations Economic and Social Council, Economic Commission for Europe, Committee for Trade, Industry and Enterprise Development, document TRADE/WP.5/1998/10 of 06/10/98, http://www.unece.org/trade/tips/comarbit/prague.htm
[35] Article 293 of the EC Treaty states: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: (...) – the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards:"
[36] Inter-American Convention on International Commercial Arbitration, Panama 1975, see http://www.ftaa-alca.org/busfac/comarb/intl_conv/caicpae.asp#icat
[37] Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards, Montevideo 1979, see http://www.ftaa-alca.org/busfac/comarb/intl_conv/caicmoe.asp#fjaat
[38] Articles 2 and 3 of the Montevideo Convention state:
Article 2. The foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States Parties if they meet the following conditions:
a. They fulfill all the formal requirements necessary for them to be deemed authentic in the State of origin;
b. The judgment, award or decision and the documents attached thereto that are required under this Convention are duly translated into the official language of the State where they are to take effect;
c. They are presented duly legalized in accordance with the law of the State in which they are to take effect;
d. The judge or tribunal rendering the judgment is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the State in which the judgment, award or decision is to take effect;
e. The plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the State where the judgment, award or decision is to take effect;

f. The parties had an opportunity to present their defense;
g. They are final or, where appropriate have the force of res judicata in the State in which they were rendered;
h. They are not manifestly contrary to the principles and laws of the public policy (ordre public) of the State in which recognition of execution is sought.
Article 3. The documents of proof required to request execution of judgments, awards and decisions are as follows:
a. A certified copy of the judgment, award or decision;
b. A certified copy of the documents proving that the provisions of items (e) and (f) of the foregoing article have been compiled with; and
c. A certified copy of the document stating that the judgment, award or decision is final or has the force of res judicata.

[39] For the text of the Convention see http://conventions.coe.int/treaty/en/Treaties/Html/056.htm

[40] See http://conveentions.coe.int/treaty/EN/searchsig.asp?NT=056&CM=8&DF=10/07/00

[41] Explanatory Report to the European Convention providing a uniform law on arbitration, No. 6, see http://conventions.coe.int/treaty/en/Reports/Html/056.htm

[42] UNCITRAL Model Law on International Commercial Arbitration of 1985, see http://www.uncitral.org/en-index.htm

[43] Presently more than 20 States, including Australia, California, Canada, Finland, Hungary, India, the Russian Federation and Scotland.

[44] See http://www.uncitral.org/en-index.htm update 08/06/00.

[45] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990, at 21.

[46] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990, at 40/41.

[47] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990, at 40/41.

[48] Report of the UNCITRAL Working Group on Arbitration on the work of its 32nd session, Vienna, 20-31 March 2000, document A/CN.9/468, para.s 88 to 99, see A/CN.9/WG.II/WP.108/Add.1, para.s 1-40.

[49] See above, Chapter 2.2.2.(a)

[50] Report of the UNCITRAL Working Group on Arbitration on the work of its 32nd session, Vienna, 20-31 March 2000, document A/CN.9/468, para.s 100-106, see A/CN.9/WG.II/WP.108/Add.1, para.s 35-40.

[51] Report of the UNCITRAL Working Group on Arbitration, Secretary General, Settlement of Commercial Disputes, of 22/09/00, document A/CN/WG.II/WP.110, para. 10.

[52] Note above, at 18, para. 48.

[53] See also below, Chapter 4.6.3.

[54] UNCITRAL Arbitration Rules of 1976, see http://www.uncitral.org/en-index.htm

[55] Donald B. STRAUS: "Pieter Sanders and the UNCITRAL Rules", in: The Art of Arbitration, ed. by Jan C. Schultsz and Albert Jan van den Berg, Kluwer, Deventer 1982, 301-303 at 303.

[56] UNCITRAL Notes on Organising Arbitral Proceedings of 1996, see http://www.uncitral.org/en-index.htm

[57] See http://www.uncitral.org/en-index.htm

[58] § 44 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.

[59] See § 50 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.

[60] See UN Official Records of the General Assembly, 51st Session, Supplement No. 17 (A/51/17) para.s 223-224, UNCITRAL 31st Session, 1-12 June 1998, document A/CN.9/446 of 11/02/98, Report of the WG on Electronioc Commerce, Vienna, 19-30 January 1998, http://www.uncitral.org/english/texts/electcom/index.htm and http://www.uncitral.org/english/session/unc/unc-31/acn9-446.htm

[61] International Arbitral Centre of the Austrian Federal Economic Chamber, see http://www.wk.or.at/arbitration/engl/Default.htm

[62] Schiedsgerichtsbarkeit der Internationalen Handelskammer, see http://www.icc-austria.org/index4.htm

[63] Instituut voor Arbitrage, see http://www.deus.org/arbitration/nl/frame.htm

[64] Arbitration Centre, see http://www.cepani.be/

[65] The Danish Institute of Arbitration (Copenhagen Arbitration), see http://www.denarbitra.dk/

[66] Central Chamber of Commerce of Finland, see http://www.keskuskauppakamari.fi/ccc/index.html

[67] Cour d'Arbitrage de l'Europe du Nord, see http://www.caren-adr.org

[68] Chambre Nationale d'Arbitrage et de Mediation, see http://www.mediation-cnam.org

[69] Cour Europeenne d'Arbitrage de Versailles, see http://versailles.cci.fr

[70] German Institution for Arbitration, see http://www.dis-arb.de/

[71] Greek National Office of the International Chamber of Commerce, see http://www.iccwbo.org
[72] Irish National Office of the International Chamber of Commerce, see http://www.iccwbo.org
[73] Chamber of National and International Arbitration of Milan, see http://www.mi.camcom.it/eng/arbitration.chamber
[74] Venice Court of National and International Arbitration, see http://www.venica.it/
[75] Luxembourg, Centre d'Arbitrage de la Chambre de Commerce, see http://www.cc.lu/service.htm
[76] Netherlands Arbitration Institute (NAI), see http://www.nai-nl.org
[77] Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry, see http://www.port-chambers.com
[78] Irish National Office of the International Chamber of Commerce, see http://www.iccwbo.org
[79] Arbitration Institute of the Stockholm Chamber of Commerce, see http://www.chamber.se/arbitration/english/index.html
[80] London Court of International Arbitration LCIA, see http://www.lcia-arbitration.com/lcia
[81] The Chartered Institute of Arbitrators, see http://www.arbitrators.org
[82] International Chamber of Commerce, Paris, see http://www.iccwbo.org
[83] Chartered Institute of Arbitrators, European Branch, see http://www.european-arbitrators.org
[84] European Network for Dispute Resolution, see http://www.cour-europa-arbitrage.org
[85] European Court of Arbitration, see http://www.cour-europe-arbitrage.org
[86] Centre Europeen de la Negotiation, see http://www.cenego.com
[87] Article 293 clause 4 of the EC Treaty (Amsterdam), ex-Article 220 clause 4.
[88] D. LASOK and P. STONE: "Conflict of Laws in the European Community", Exeter, Professional Books, 1987 at 724.
[89] See above, Chapter 2.2.2.
[90] See European Court of Justice, case C-190/89, 1991, Rich / Società Italiana Impianti (1991) ECR I, 3855.
[91] See Johan ERAUW: "Reference by Arbitrators to the European Court of Justice for Preliminary Rulings", in: L'Arbitrage et le Droit Européen, Bruylant, Brussels 1997, 101-140 at 109.
[92] Luigi MARI: "Il Diritto Processuale Civile della Conventione di Bruxelles", Cedam, Milan 1999 at 108.
[93] P. JENARD: "Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters", EU O.J. C 59/1 of 1979.
[94] European Court of Justice, case C-190/89, Marc Rich v. Societa Italiana Impianta (1991) ECR 3855 § 18.
[95] Special Commission, the future Hague Convention on International Jurisdiction, see http://www.hcch.net/
[96] DG IV: "Competition III. Proceedings in Arbitral Tribunals", see http://www.europa.eu.int/dg04/lawenten/natul/en/nlp28.htm
[97] DG IV: "Competition III. Proceedings in Arbitral Tribunals", see http://www.europa.eu.int/dg04/lawenten/natuk/en/ukpl2.htm
[98] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", Sweet & Maxwell, London 1999 at 416.
[99] FOUCHARD, GAILLARD, GOLDMAN: "On International Commercial Arbitration", Kluwer, The Hague 1999 at 978.
[100] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", Sweet & Maxwell, London 1999 at 434.
[101] See, for example, Articles 28-6 of the ICC Rules for Arbitration, Article 38 of the DIS Rules for Arbitration or Article 26-9 of the LCIA Rules.
[102] See, for example, Clive SCHMIDTHOFF: "Arbitration and EEC Law", Common Market Law Review, 1987/143 at 146.
[103] EU Directive 1999/93/EC on a Community Framework for Digital Signatures, O.J. L 013/12 of 19/01/00.
[104] Newsletter 16-17, at 12, 13, see http://europa.eu.int/comm/cinternal_market/comcom/newsletter/e…/page04-03_en.ht
[105] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998, see http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html
[106] EU Directive 1999/93/EC on a Community Framework for Digital Signatures, EU O.J. L 013/12 of 19/01/00.
[107] Commission Recommendation of 19/10/94 Relating to the Legal Aspects of Electronic Data Interchange, EU O.J. L 338/98 of 28/12/94.
[108] UN Economic Commission for Europe, Committee on the Development of Trade, Working Party on the Facilitation of International Trade Procedures, UN ECE Recommendation No. 26, The Commercial Use of Interchange Agreements for Electronic Data Interchange of September 1995, Document

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[109] European Parliament's Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts of 1994, EU O.J. C 205 of 2507/94, Revue de l'Arbitrage 1995/354.

[110] Peter SCHLOSSER: "Arbitration and the European Public Policy", in: L'Arbitrage et le Droit Européen", Bruylant 1997, 81-100 at 93, 94.

[111] Christoph LIEBSCHER: "European Public Policy. A Black Box?", Journal if International Arbitration 17(3), 2000/73-88 at 86.

[112] European Court of Justice of 01/06/99, ECO Swiss China Time / Benetton International, Case C-126/97, see http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en case no. C-126/97.

[113] Yves DERAINS: "L'Application du Droit Européen par les Arbitres – Analyse de la Jurisprudence", in: L'Arbitrage et le Droit Européen, Bruylant, Brussels 1997, 65-80 at 73.

[114] Yves DERAINS: "L'Application du Droit Européen par les Arbitres – Analyse de la Jurisprudence", in: L'Arbitrage et le Droit Européen, Bruylant, Brussels 1997, 65-80 at 74.

[115] ICC award of 1992, case ICC No. 7181, see also cases ICC No. 7315 of 1992 and No. 7539 of 1995.

[116] Yves DERAINS: "L'Application du Droit Européen par les Arbitres – Analyse de la Jurisprudence", in: L'Arbitrage et le Droit Européen, Bruylant, Brussels 1997, 65-80 at 77.

[117] Peter SCHLOSSER: "Arbitration and the European Public Policy", in: L'Arbitrage et le Droit Européen", Bruylant 1997, 81-100 at 96.

[118] European Court of Justice of 01/06/99, ECO Swiss China Time / Benetton International, Case C-126/97, see http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en case no. C-126/97.

[119] See Arnold VAHRENWALD: "Futures in Germany, the German Futures Exchange", Journal of International Banking Law, Part 1, 1994/101-110, and Part 2, 1994/143-149, at 107.

[120] Peter SCHLOSSER: "Arbitration and the European Public Policy", in: L'Arbitrage et le Droit Européen", Bruylant 1997, 81-100 at 88, 89.

[121] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 11.

[122] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 12.

[123] Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 121, 123, 124.

[124] See below Chapter 4.7.4.b)(1) and Chapter 7.4.

[125] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 38.

[126] See below, Chapter 7.2.1. and Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 380.

[127] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 38.

[128] Piero BERNARDINI: "L'Arbitrato Internazionale", Giuffrè, Milan 2000 at 96.

[129] FOUCHARD, GAILLARD, GOLDMAN: "On International Commercial Arbitration", Kluwer, The Hague 1999 at 212.

[130] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, Munich 2000 at 456.

[131] Peter NYGH: "Autonomy in International Contracts", Clarendon, 1999 at 77.

[132] See the LCIA recommended arbitration clause, http://www.lcia-arbitration.com/lcia/download/clauses.doc and the standard ICC Arbitration Clause, http://www.iccwbo.org/court/english/arbitration/model_clause.asp

[133] Article II(3) of the New York Convention.

[134] EU Directive 1999/93/EC on a Community Framework for Electronic Signatures, EU O.J. L 13/12 of 19/02/00.

[135] Report of the UNCITRAL Working Group on Electronic Commerce on the work of its 36th session, document A/CN.9/467 of 05/04/00, para. 49 at 11.

[136] Report, note above, para. 47.

[137] See Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Paris, Litec 1996 at 391.

[138] Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Paris, Litec 1996 at 388

[139] See Howard M. HOLTZMANN and Joseph E. NEUHAUS: "A Guide to the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, The Hague 1989 at 263.

[140] See Howard M. HOLTZMANN and Joseph E. NEUHAUS: "A Guide to the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, The Hague 1989 at 264.

[141] United Nations Centre for Trade Facilitation and Electronic Business, document TRADE/CEFACT/1999/CRP.2, no. 2.18.3, at 17, see http://unece.org/cefact/

[142] Albert Jan van den Berg, ed.: "International Council for Commercial Arbitration", Improving the Efficiency of Arbitration Agreements and Awards 40 Years of Application of the New York Convention, Working Group I, Arbitration Clauses – Achieving Effectiveness, summary by G. Aguilar ALVAREZ, 74, 75.

[143] Albert Jan van den Berg, ed.: "International Council for Commercial Arbitration", Improving the Efficiency of Arbitration Agreements and Awards 40 Years of Application of the New York Convention, Working Group I, Arbitration Clauses – Achieving Effectiveness, summary by G. Aguilar ALVAREZ, 74, 75.

[144] Article 178(1) of the Swiss Private International Law Act of 1989 (IPRG).

[145] Article II of the New York Convention states:

(1) Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration

(2) ...

[146] Klaus Peter BERGER: 'International Economic Arbitration', Kluwer, Deventer 1993 at 139 et seq.

[147] Richard HILL: "Online Arbitration: Issues and Solutions", Arbitration International 1999/199-207 at 200 referring to the need of the encryption of the data message.

[148] United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT): Electronic Commerce Agreement, document No. 31.

[149] See Albert Jan van den Berg, ed.: "International Council for Commercial Arbitration", Improving the Efficiency of Arbitration Agreements and Awards 40 Years of Application of the New York Convention, Working Group I, Arbitration Clauses – Achieving Effectiveness, summary V.V. Veeder, at 44.

[150] Albert Jan van den Berg, ed.: "International Council for Commercial Arbitration", Improving the Efficiency of Arbitration Agreements and Awards 40 Years of Application of the New York Convention, Working Group I, Arbitration Clauses – Achieving Effectiveness, summary V.V. Veeder, at 44.

[151] United Nations Convention on the Law of Treaties, Vienna 1969, see http://www.un.org/law/ilc/texts/treaties.htm#abstract

[152] Günter WETZEL and Dieter RAUSCHNING: "The Vienna Convention aon the Law of Treaties: Travaux Preparatoires", Metzner, Frankfurt 1978 at 254.

[153] Günter WETZEL and Dieter RAUSCHNING: "The Vienna Convention aon the Law of Treaties: Travaux Preparatoires", Metzner, Frankfurt 1978 at 232.

[154] According to Article 41(2) of the UN Convention on the Law of Treaties the EU Member States would have to notify the other parties of their intention to conclude an agreement on the modification of the New York Convention and of the modification itself.

[155] See, for example, the Arbitration Act of England 1996, Section 100(2), according to which the term 'agreement in writing' according to the New York Convention has the same broad meaning as in Section 5 which defines this term for the national arbitration law and which provides in subsection (4): "an agreement is evidenced in writing if an agreement made otherwise in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement", and in subsection (6): "references in this part to anything being written or in writing include its being recorded by any means".

[156] The New York Convention states in Article II(2) that "an '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'.

[157] Article I(2)(a) of the Geneva Convention states that "the term 'arbitration agreement' shall mean 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 and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws."

[158] See, for example, Austrian Supreme Court of 17/11/71, Yearbook of Commercial Arbitration 1976/I/183.

[159] Kahn Lucas Lancaster v. Lark International (2nd Cir. of 29/07/99), see Sidley & Austin: "Standards for Enforcement of Arbitration Agreement May Be Different under International Convention", August 1999, Find Law Library.

[160] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, Munich 2000 at 448.

[161] See, for example, Gerald SPINDLER: "Vertragsrecht der internet Provider", Otto Schmidt, Cologne 2000 at 652.

[162] See above, Chapter 2.2.2.

[163] Hans. W. FASCHING: "Internationals Schiedsgerichtsbarkeit in Österreich", in: Peter Gottwald, ed.: "Internationale Schiedsgerichtsbarkeit", Bielefeld, Gieseking 1997, 729-757 at736, 737.

[164] Hans W. FASCHING: "Die Form der Schiedsvereinbarung", ÖJZ 1989/289.

[165] Hans van HOUTTE and Michel LOOYENS: "Law and Practice of International Arbitration in Belgium", in: Internationale Schiedsgerichtsbarkeit, ed. by Peter Gottwald, Bielefeld, Gieseking 1997, 161-210 at 171.
[166] Philippe FOUCHARD: "International Arbitration en France", in: Internationale Schiedsgerichtsbarkeit, ed. by Peter Gottwald, Bielefeld, Gieseking 1997, 365-403 at 373, 374.
[167] Reinhard BORK: "Internationale Schiedsgerichtsbarkeit in Deutschland" in: Internationale Schiedsgerichtsbarkeit, ed. by Peter Gottwald, Bielefeld, Gieseking 1997, 283-313 at 290.
[168] Robert NIEDERMAIER, Maximilian DAMM and Andreas SPLITTGERBER: "Cybercourt: Schieds- und Schlichtungsverfahren im Internet", Kommunikation und Recht 2000/431-438 at 431.
[169] Valentina MAGLIO: "La Nuova Disciplina dell'Arbitrato in Germania", Contratto e Impresa/Europa1998/999-1016 at 1004.
[170] Valentina MAGLIO: "La Nuova Disciplina dell'Arbitrato in Germania", Contratto e Impresa/Europa1998/999-1016 at 1004.
[171] Gerald SPINDLER: "Vertragsrecht der internet Provider", Otto Schmidt, Cologne 2000 at 652.
[172] Daniela GIACOBBE and Elena D'ALESSANDRO, ed.s: "L'Arbitrato", Ipsoa, Milano 1999 at 19.
[173] See, for example, Italian Corte di Cassazione of 04/05/95, no. 4856, Società 1995/1432.
[174] Daniela GIACOBBE and Elena D'ALESSANDRO, ed.s: "L'Arbitrato", Ipsoa, Milano 1999 at 22 and 23.
[175] Italian Law of 15/03/97, No. 59, Italian O.J. No. 63 of 17/03/97 ('Law Bassanini').
[176] Decree of the President of the Italian Republic of 10/11/97, No. 513, Italian O.J. No. 60/I of 13/03/98, 'Regulation Concerning the Criteria and Modalities for the Establishment, the Archiving and the Transmission of Documents with Means of Informatics and Telematics, Based on Article 15(2) of the Law of 15/03/97, No. 59'.
[177] Decree of the President of the Italian Council of Ministers of 08/02/99, Italian O.J. No. 67 of 15/04/99, 'Technical Rules for the Establishment, the Transmission, the Conservation, Duplication, Reproduction and Effectiveness, also Temporal, of Documents of Informatics in the Sense of Article 3(1) of the Decree of the President of the Repuglic of 10/11/97, No. 513'.
[178] Pierre LALIVE, Jean-François POUDRET and Claude RAYMOND: "Le Droit de l'Arbitrage Interne et International en Suisse", LDIP 178, No. 9, 1989; Werner WENGER in: "Basler Kommentar, Internationales Privatrecht", H. HONSELL, N.P. VOGT and A. SCHNYDER, eds., IPRG, Art. 182, No. 12, 1996.
[179] VOLKEN in HEINI/KELLER/SIEHR/VISCHER/VOLKEN: "IPRG Kommentar", Schulthess, Zurich 1993 at 58 and 1512.
[180] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", 3rd ed., Sweet & Maxwell, London 1999at 142, 143.
[181] EU Directive 1999/93/EC on a Community Framework for Digital Signatures, O.J. L 013/12 of 19/01/00.
[182] Roland NIEDERMEIER, Maximilian DAMM and Andreas SPLITTGERBER: "Cybercourt: Schieds- und Schlichtungsverfahren im Internet", Kommunikation und Recht 2000/431-438 at 433.
[183] See United Nations Economic and Social Council, Economic Commission for Europe, Committee for Trade, Industry and Enterprise Development, Working Partz on International Contract Practices in Industry, 47th session, 26-27/10/98, Meeting of the ad hoc Group of Experts established to Review the European Convention on International Commercial Arbitration of 1961, document TRADE/WP.5/1998/10, para. 6, http://www.unece.org/trade/comarbit/prague.htm
[184] See below, Chapter 3.9.3.(a)(3).
[185] See below, Chapter 4.3.5.(c).
[186] Alberto GAMBINO: "Le Cadre Législatif et Réglementaire en Italie", in: Le Consentement Electronique, ed. by Benoît De Nayer and Jacques Laffineur, Bruylant, Brussels 1999/111-117 at 113.
[187] See, for example, Benoît DE NAYER and Jacques LAFFINEUR (eds.): "Le Consentement Electromoqie", Bruylant, Bruxelles 1999, with contributions by Michel VAN HUFFEL: "Le Droit Communautaire", 23-53 at 38; Benoît DE NAYER and Jacques LAFFINEUR: "Le Consentement Electronique: Le Cadre Législative Belge", 55-76 at 60, 61; Bernd SCHAUER: "E-commerce in der Europäischen Union", Manz, Vienna 1999 at 105.
[188] Jens KARSTEN: "The Legislative Framework for Electronic Commerce in Germany", in: Le Consentement Electronique, ed. by Benoît De Nayer and Jacques Laffineur, Bruylant, Brussels 1999/101-109 at 104.
[189] Dirk LANGER: "Le Cadre Législatif et Réglementaire en Suisse", in: Le Consentement Electronique, ed. by Benoît De Nayer and Jacques Laffineur, Bruylant, Brussels 1999/119-182 at 142.
[190] Michel Van HUFFEL: "Le Droit Communautaire", in: Le Consentement Electronique, ed. by Benoît De Nayer and Jacques Laffineur, Bruylant, Brussels 1999/23-53 at 37.
[191] See Article 11(1) last sentence of the Directive on Electronic Commerce.
[192] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996, para. 93.
[193] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996, para.s 5 and 6.

[194] Carlo SARZANA DI S. IPPOLITO and Fulvio SARZANA DI S. IPPOLITO: "Profili Giuridici di Commercio via Internet", Giuffrè, Milan 1999 at 84.
[195] UNITED NATIONS Convention on Contracts for the International Sale of Goods (1980) (CISG).
[196] Article 2(a) of the CISG.
[197] EU Directive 1999/93/EC on a Community Framework for Electronic Signatures of 13/12/99, EU O.J. L 13 of 12/01/00.
[198] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996, para. 93.
[199] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996, para. 100.
[200] United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT): Electronic Commerce Agreement, document No. 31; the following EU Member States attended the meeting in the sixth UN/CEFACT session in March 2000 where this recommendation was approved: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain, Sweden, United Kingdom; the European Union was represented.
[201] Concerning limitations the UN/CEFACT Recommendation states in the objectives that the E-Agreement "does not incorporate any provisions relating to consumer protection". However, since the effects of the E-Agreement are limited to the regulation of the legal consequences of data messages, their potential impact on consumer protection remains irrelevant. Thus it appears that the regulations contained in the E-Agreement would not conflict with the consumer protection established by the Directive on Unfair Terms in Consumer Contracts or the Directive on Distance Contracts.
[202] See EU Commission Recommendation of 19/19/94 relating to the legal aspects of electronic data interchange, EU O.J. L 338/98 of 28/12/94.
[203] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffrè, Milan 2000 at 108.
[204] Matthew BURNSTEIN: "A Global Network in a Compartmentalised Legal Environment", in: Internet – Which Court Decides? Which Law Applies? – Wuel Tribunal Décide? Quel Droit s'Applique?, ed by Katharina Boele-Woelki and Catherine Kessedjian, Kluwer, Tha Hague 1998, 23-34 at 32.
[205] See above, the Chapter on Mass Market Licences (click-wrap) and the US Act on Computer Information Transactions.
[206] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 38.
[207] See Guillermo CRESPO PARRA: "Quelques Reflexions sur les Solutions Extra-judiciaires de Reglement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation Transfrontalière", Revue Européenne de Droit de la Consommation 1996/273-289 at 285.
[208] Luigi MARI: "Il Diritto Processuale Civile della Convenzione di Bruxelles", Cedam, Padova 1999 at 49.
[209] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 380.
[210] See below, Chapter 7.2.1.
[211] Article I(2) of the Geneva Convention.
[212] Article I(2) of the Geneva Convention.
[213] See http://www.icann.org
[214] See http://www.cpradr.org
[215] See http://disputes.org and http://www.eresolution.ca
[216] See http://www.arb-forum.com
[217] See http://www.wipo.org
[218] See Article 10 of the Rules for Uniform Domain Name Dispute Resolution Policy, http://www.icann.org/udrp-rules-24oct99.htm
[219] See, for example, the Financial Times of 23/02/00 at 1.
[220] Article 4k of the Uniform Domain Name Dispute Resolution Policy.
[221] In this sense Benjamin G. DAVIS: "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers", Journal of International Arbitration 2000/115-140 at 138.
[222] See Arnold VAHRENWALD: "Recht in Online und Multimedia", Luchterhand, looseleaf, 1997, 4th supplement 1999, chapter 8.5.2.2.
[223] Stephen B. GOLDBERG, Frank E.A. SANDER and Nancy H. ROGERS: "Dispute Resolution", 2nd ed., Little Brown, Boston 1992 at 199.

[224] Christian WIEGAND: "Adjudication – beschleunigte aussergerichtliche Streiterledigungsverfahren im englischen Baurecht und im internationalen FIDIC-Standardvertragsrecht", Recht der Internationalen Wirtschaft 2000/197-202 at 197.
[225] Christian WIEGAND: "Adjudication – beschleunigte aussergerichtliche Streiterledigungsverfahren im englischen Baurecht und im internationalen FIDIC-Standardvertragsrecht", Recht der Internationalen Wirtschaft 2000/197-202 at 200.
[226] See, for example, UK Centre for Dispute Resolution: Rules for Adjudication.
[227] For example, concerning disputes relating to the construction of the Hong Kong international airport or the Channel Tunnel. The International Federation of Consulting Engineers ('FIDIC') has established standard forms concerning dispute review boards and adjudicators. Adjudication is dealt with as a particular form of dispute settlement. The forms provide for adjudication as preliminary to arbitration, see CORBETT: "FIDIC's new Rainbow, an Overview of the Red, Yellow, Silver and Green Test Editions", ICLR 1999, vol. 16 Part I at 42, see also Edward CORBETT: "A Practical Legal Guide", 4th ed., http://www.nhic-tt.com/intranet/fidic4_guide/; on FIDIC see http://www.fidic.com/federation/default.asp
[228] Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 22.
[229] Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 22.
[230] See, for example, the ICC Centre for Expertise and its Rules.
[231] See the ICC Rules for Expertise of 1993, Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 430.
[232] See Article 6 of the ICC Rules for Expertise.
[233] See Article 8 of the ICC Rules for Expertise.
[234] See, for example, the ICC Rules for a Pre-arbitral Referee Procedure, Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 435.
[235] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 436.
[236] ICC Rules for a Pre-arbitral Referee Procedure, Article 6.6.
[237] ICC Rules for a Pre-arbitral Referee Procedure, Article 6.8.1.
[238] The corresponding Standard Clause for an ICC Pre-arbitral Referee Procedure states: "(1)Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules. (2) All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."
[239] Gabriele MECARELLI: "La Spécificité de la Réforme Italienne de l'Arbitrage International", in: : Recherche sur l'Arbitrage en Droit International et Comparé, L.G.D.J., Paris 1997, 201-261 at 219.
[240] Buno OPPETIT, Hélène GAUDEMET-TALLON and Philippe FOUCHARD: "Preface", in: Recherche sur l'Arbitrage en Droit International et Comparé, L.G.D.J., Paris 1997, V-X at IX.
[241] Gabriele MECARELLI: "La Spécificité de la Réforme Italienne de l'Arbitrage International", in: : Recherche sur l'Arbitrage en Droit International et Comparé, L.G.D.J., Paris 1997, 201-261 at 220, 221.
[242] See , for example, Giorgio BERNINI: "National Report – Italy", Yearbook, vol. VI, 1981, p. 24 et seq.
[243] Italy, Supreme Court of Cassation, judgement no. 4167 of 18/09/78, in Yearbook, vol. IV, at 296.
[244] See Giorgio BERNINI: "The Enforcement of Foreign Arbitral Awards by National Judiciaries: a Trial of the New York Conventions Ambit and Workability", in: The Art of Arbitration, ed. By Jan C. SCHULTSZ and Albert Jan van den BERG, Kluwer 1982, 51-61 at 55, with reference to Yearbook, vol. IV, p. 233
[245] See Giorgio BERNINI: "The Enforcement of Foreign Arbitral Awards by National Judiciaries: a Trial of the New York Conventions Ambit and Workability", in: The Art of Arbitration, ed. By Jan C. SCHULTSZ and Albert Jan van den BERG, Kluwer 1982, 51-61 at 55 with reference to the national reports by Sanders, Glossner and Gill in Yearbook vol. IV, p. 61, vol. II, at 93.
[246] Giorgio BERNINI: "The Enforcement of Foreign Arbitral Awards by National Judiciaries: a Trial of the New York Conventions Ambit and Workability", in: The Art of Arbitration, ed. By Jan C. SCHULTSZ and Albert Jan van den BERG, Kluwer 1982, 51-61 at 55.
[247] German Federal Surpreme Court, YB Comm. Arb'n VIII (1983) at 366-370.
[248] Italy, Surpreme Court of Cassation, YB Comm. Arb'n IV (1979) at 296, 298.
[249] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 134.

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[250] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 134.
[251] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 134, 135.
[252] See http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_nl_ccb1_en.html
[253] See http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_nl_ccb1_en.html
[254] Giorgio BERNINI: "The Enforcement of Foreign Arbitral Awards by National Judiciaries: a Trial of the New York Conventions Ambit and Workability", in: The Art of Arbitration, ed. By Jan C. SCHULTSZ and Albert Jan van den BERG, Kluwer 1982, 51-61 at 55.
[255] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 7.
[256] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 7.
[257] F. NICKLISCH: "Gutachter-, Schieds- und Schlichtungsstellen – rechtliche Einordnung und erforderliche Verfahrensgarantien", in: Festschrift für Arthur Bülow, ed. by Karl Heinz Böckstiegel und Ottoarndt Glossner, Heymann, Cologne 1981 at 381.
[258] Dagmar von HOYNINGEN-HUENE: "Aussergerichtliche Konfliktbehandlung in den Niederlanden und Deutschland", Otto Schmidt, Cologne 2000 at 9.
[259] J. KURTH: "Zur Kompetenz von Schiedsrichtern und Schiedsgutachtern", Neue Juristische Wochenschrift 1990/2038.
[260] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffrè, Milan 2000 at 6.
[261] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffrè, Milan 2000 at 7.
[262] Adam SAMUEL: "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", in> The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration", ed. by Filip de Ly, Mys & Breesch, Gent 1992, 39-65 at 53, 54.
[263] Adam SAMUEL: "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", in> The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration", ed. by Filip de Ly, Mys & Breesch, Gent 1992, 39-65 at 51.
[264] Howard M. HOLTZMANN: "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", in: The Internationalisation of International Arbitration, Graham & Trotman/Martinus Nijhoff, London 1995, 109-114 at 110.
[265] Howard M. HOLTZMANN: "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", in: The Internationalisation of International Arbitration, Graham & Trotman/Martinus Nijhoff, London 1995, 109-114 at 112.
[266] FOUCHARD, GAILLARD, GOLDMAN: "On International Commercial Arbitration", Kluwer, The Hague 1999 at 674, 675.
[267] Adam SAMUEL: "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", in> The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration", ed. by Filip de Ly, Mys & Breesch, Gent 1992, 39-65 at 52.
[268] Generally, the arbitrator has the power to fix the place for a hearing at places different from the seat of the Arbitration, see, for example Article14(2) of the CCI Rules, Article 16(2)of the LCIA Rules or Article 16 of the UNCITRAL Rules which states: "Article 16 - Place of Arbitration
1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
2. The arbitral tribunal may determine the locale of the arbitration within the country agreed by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
4. The award shall be made at the place of arbitration."
[269] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 133.
[270] Klaus LIONNET: "Handbuch der Internationalen und nationalen Schiedsgerichtsbarkeit", Boorberg, Stuttgart 1996 at 94.
[271] See, for example, the relevant UK law. Concerned with the scope of application, Section 2 of the Arbitration Act (England) 1996 states: (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland. (2) The following sections apply even if the seat of the arbitration is outside England and Wales

or Northern Ireland or no seat has been designated or determined – (a) Sections 9-11 (stay of legal proceedings, etc.), and (b) Section 66 (enforcement of arbitral awards).
[272] Klaus LIONNET: "Handbuch der Internationalen und nationalen Schiedsgerichtsbarkeit", Boorberg, Stuttgart 1996 at 95.
[273] See, for example, UK, Hiscox v. Outwaite, C.A. of 11.03.91, confirmed by H.L. of 24/07/91.
[274] Mann, quoted by Peter NYGH: "Choice of Forum and Law in International Commercial Arbitration", forum Internationale, No. 24, June 1997, Kluwer, Deventer, at 3.
[275] Klaus LIONNET: "Handbuch der Internationalen und nationalen Schiedsgerichtsbarkeit", Boorberg, Stuttgart 1996 at 96.
[276] Peter NYGH: "Choice of Forum and Law in International Commercial Arbitration", forum Internationale, No. 24, June 1997, Kluwer, Deventer, at 3.
[277] Peter NYGH: "Choice of Forum and Law in International Commercial Arbitration", forum Internationale, No. 24, June 1997, Kluwer, Deventer, at 3.
[278] According to Article V(e) of the New York Convention the "recognition and enforcement of the award may be refused ... if ... (e) the award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".
[279] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 200.
[280] DIS Arbitration Rules, Rules for Arbitration of the German Institution for Arbitration (1998).
[281] Article V(1)(e) of the New York Convention
[282] Article 5(1)(d) of the Inter-American Convention on international Commercial Arbitration
[283] Article V(1)(e) of the New York Convention and Article 5(1)(e) of the Inter-American Convention on International Commercial Arbitration.
[284] Article VI of the New York Convention and, more limited, Article IX of the Geneva Convention.
[285] Adam SAMUEL: "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", in> The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration", ed. by Filip de Ly, Mys & Breesch, Gent 1992, 39-65 at 47.
[286] A reservation according to Article 1(3) of the New York Convention was made, inter alia, by Belgium, Denmark, France, Greece, Ireland, Luxembourg, Monaco, Netherlands, Portugal, the UK and the US.
[287] Article 1717(4) of the Belgian Code of Judicature was modified by the law of 19/05/98.
[288] Herman VERBIST: "The Place of Arbitration in the Negotiation Process and in Drafting the Negotiation Clause", in: The Place of Arbitration and the Conflict of Laws of International Commercial Arbitration, ed. by Fillip de Ly, Mys & Breesch, Gent 1992, 131-151 at 136.
[289] Fulvio SARZANA DI S. IOPPOLITO: "Profili Giuridici del Commercio via Internet", Giuffre, Milan 1999, 185-195 at 188.
[290] Fulvio SARZANA DI S. IPPOLITO: "Profili Giuridici del Commercio via Internet", Giuffre, Milan 1999, 185-195 at 189.
[291] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 134.
[292] Pierre MAYER: "The Trend Towards Delocalistion in the Last 100 Years", in: The Internationalisation of International Arbitration, ed. by Martin Hunter, Graham & Trotman/Martinus Nijhoff, London 1995, 37-46 at 44.
[293] See, with regard to the state of Belgian legislation before its modification by the law of 19/05/98, Pierre MAYER: "The Trend Towards Delocalisation in the Last 100 Years", in: The Internationalisation of International Arbitration, ed by Martin Hunter, Graham & Trotman/Martinus Nijhoff, London 1995, 37-46 at 45.
[294] See, for example, Joseph M. LOKOOFSKY: "Transnational Litigation and Commercial Arbitration", Transnational Juris Publications, Ardsley, New York, 1992 at 575.
[295] See above on the proposed Court for Arbitration in Europe, Chapter 3.6.1.b)(4).
[296] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 134.
[297] See Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 200; Herman VERBIST: "The Place of Arbitration in the Negotiation Process and in Drafting the Negotiation Clause", in: The Place of Arbitration and the Conflict of Laws of International Commercial Arbitration, ed. by Fillip de Ly, Mys & Breesch, Gent 1992, 131-151 at 140.
[298] According to Article 14 of the ICC Arbitration Rules the choice of the situs for an international arbitration is made by the ICC Court of Arbitration, see Yves DERAINS and Eric SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 200.
[299] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 135.

[300] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 403.
[301] See Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 204.
[302] Herman VERBIST: "The Place of Arbitration in the Negotiation Process and in Drafting the Negotiation Clause", in: The Place of Arbitration and the Conflict of Laws of International Commercial Arbitration, ed. by Fillip de Ly, Mys & Breesch, Gent 1992, 131-151 at 137.
[303] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998, see http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html
[304] Article 211 of the EC Treaty states: "In order to ensure the proper functioning and development of the common market, the Commission shall: (...) – formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;"...
[305] FOUCHARD, GAILLARD, GOLDMAN on "International Commercial Arbitration", Kluwer, The Hague 1999 at 133.
[306] Swiss Federal Tribunal of 14/03/84, 'Denysian v. Jassica', XI Y.B. Comm. Arb. 1986/536.
[307] See, for example, Article 1(1) of the International Arbitration Rules 1996 of the Milan Chamber of National and International Arbitration: "The arbitral procedure laid down in these Rules shall apply where the parties have concluded an arbitration agreement referring to the Chamber of Commerce of Milan or the Chamber of Arbitration of Milan or its Rules."
[308] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 95.
[309] See http://www.gbde.org/ie/2000/adr.html
[310] See http://www.tacd.org/ecommercef.html#consumer
[311] Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 663.
[312] The French New Code of Civil Procedure states in Article 1494(1): "The arbitration agreement may, directly or by reference to rules of arbitration, regulate the procedure to be followed by arbitration; it may also subject it to the law of procedure which it determines."
[313] Article 15 of the European Uniform Law on Arbitration.
[314] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 46 and 52.
[315] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 419.
[316] See, for example, the FOFSA (Federation of Oils, Seeds and Fats Associations Ltd.) Rules of Arbitration and Appeal of 1995, Articles 7 to 11.
[317] Article 26.9 of the LCIA Rules states: "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (...); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made."
[318] See FOUCHARD, GAILLARD, GOLDMAN on "International Commercial Arbitration", Kluwer, The Hague 1999 at 917 with further references.
[319] See Article 1703 of the Belgian Code of Judicature; according to Article 1482 of the French New Code of Civil Procedure "an arbitral award may be appealed unless the parties waived their right to appeal in the arbitration agreement. However, it may not be appealed where the arbitrator has been empowered to rule as amiable compositeur, unless the parties expressly reserved the right to do so in the arbitration agreement."
[320] FOUCHARD, GAILLARD, GOLDMAN on "International Commercial Arbitration", Kluwer, The Hague 1999 at 917.
[321] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998, see http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html
[322] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998, see http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html

[323] The Portuguese and Spanish consumer arbitration systems in the traditional commerce established this independence by reliance on bodies of the state jurisdiction. For example, in Portugal the arbitrator is a judge who is delegated for this particular job, but he continues to be paid by the State.
[324] See, for example, the "Arbitrage d'Importance Pecuniaire Limitée" of the Centre Belge d'Arbitrage et de Mediation (CEPANI), the Rules for Arbitration of Small Claims limit in Article 1(1) the arbitration to claims for sums up to € 12,500.
[325] Articles I and III of the Regulations for Arbitration Costs for Expedited Arbitrations of the Stokholm Chamber of Commerce.
[326] According to lit. (q) of the Annex of the Directive on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93, an unfair term is, amongst others a term "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."
[327] European Court of Justice of 27/06/00, Océano Grupo Editorial vs. Rocio Murciano Quintero, joined cases C-240/98 to C-244/98.
[328] See, for example, GRUBER: ZRP 1990/172.
[329] Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg Convention), in particular Article 6(1): "In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."...
[330] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 43 to 50.
[331] Gabrielle KAUFMANN-KOHLER: "Internet: Mondialisation de la Communication – Mondialisation de la Résolution des Litiges?", in: Internet – Which Court Decides? Which Law Applies – Quel Tribunal Décide? Quel Droit s'Applique?, ed. by Katharina Boele-Woelki and Catherine Kessedfian, Kluwer, The Hague 1998, 89-142 at 92, 96.
[332] See, with regard to French law, Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 44 and 46.
[333] European Court of Human Rights of 28/02/80, Deweer Case.
[334] European Court of Human Rights of 18/02/99, Beer and Regan v. Germany.
[335] European Court of Human Rights of 08/07/86, Lithgow Case.
[336] Hans van HOUTTE: "The Law of International Trade", Sweet & Maxwell, London 1995 at 405.
[337] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 95.
[338] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 95.
[339] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 213.
[340] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 213.
[341] Article 14 of the LCIA Rules (1998).
[342] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[343] US Supreme Court, No. 99-1235, Green Tree Financial v. Larketta Randolph, see amicus brief of the Consumers Union of 24/07/00, http://www.consumersunion.org/pdf/i-contracts.htm?randolph#first_hit
[344] US case Randolph v. Green Tree Financial, 178 F.3d 1149 (11th Cir. 1999).
[345] Universal Declaration on Human Rights (1948), see http://www.jus.uio.no/lm/humnan.rights/human.rights.html
[346] International Convent on Civil and Political Rights, adopted by the United Nations General Assembly on 16/12/66, see http://www.jus.uio.no/lm/humnan.rights/human.rights.html
[347] See Manuel-Angel LOPEZ-SANCHEZ and Marta ORERO-NUÑEZ: "Le Système Español d'Arbitrage des Litiges de Consommation", Revue Européenne de Droit de la Consommation 1996/120-132 at 124.
[348] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 43.
[349] Gabrielle KAUFMANN-KOHLER: "Internet: Mondialisation de la Communication – Mondialisation de la Résolution des Litiges?", in: Internet – Which Court Decides? Which Law Applies – Quel Tribunal Décide? Quel

Droit s'Applique?, ed. by Katharina Boele-Woelki and Catherine Kessedfian, Kluwer, The Hague 1998, 89-142 at 103.

[350] Gabrielle KAUFMANN-KOHLER: "Internet: Mondialisation de la Communication – Mondialisation de la Résolution des Litiges?", in: Internet – Which Court Decides? Which Law Applies – Quel Tribunal Décide? Quel Droit s'Applique?, ed. by Katharina Boele-Woelki and Catherine Kessedfian, Kluwer, The Hague 1998, 89-142 at 103.

[351] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 44.

[352] The impartiality of the proceedings is envisaged by Article 15(2) of the ICC Rules, see Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 399.

[353] Benjamin G. DAVIS: "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers, Journal of INTERNATIONAL Arbitration 2000/115-140 at 127.

[354] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 44, 45.

[355] Frédérique FERRAND: "Le Principe Contradictoire et l'Expertise en Droit", Revue internationale de Droit comparé 2000/345-369 at 345.

[356] European Court of Justice of 31/03/93 Ahlström Osakeyhtio / Commission (Pâtes de Bois), case C-89/85.

[357] See the Deweer case, Beer and Regan v. Germany and the Lithgow case, Chapter 4.2.5.a).

[358] See, for example, Law Offices of Heuking Kuehn Lueer Heussen Wojtek: "Das Pilotprojekt 'Cybercourt-Schiedsgericht'", http://www.cybercourt.org/vision.htm at 6, where it is indicated that by reason of the anonymity of online communication it may not always be sure that the parties themselves participate in a chatbox communication, and at 7, where reference is made to the technological risks involved with online communication such as a failure of the computer system or a breakdown of communication.

[359] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 45.

[360] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 404.

[361] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 124.

[362] Commission Report, UNCITRAL Model Law on International Commercial Arbitration, Doc.A/CN.9/SR.323, para. 205, referred to by Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 127.

[363] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 127.

[364] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 130.

[365] Commission of the Hague Convention on Private International Law, "Electronic Data Interchange, Internet and Electronic Commerce", preliminary document No. 7 of April 2000, drawn up by Catherine KESSEDJIAN, § 61.

[366] Marc PEARL, General Counsel and Senior Vice President of the Information Technology Association of America, Testimony before the House Judiciary Committee Subcommittee on Courts and Intellectual Property, Hearing on Internet and Federal Courts: Issues and Obstacles, 29/06/00, at 7.

[367] The Global Action Plan for Electronic Commerce, prepared by Business with Recommendations for Governemnts of 1999, 2nd ed., October 1999 at 25.

[368] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 45.

[369] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 46.

[370] Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 164.

[371] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", 6th ed., C.H. Beck, Munich 2000 at 530.

[372] Spanish Royal Decree 636/1993 of 03/05 on the Regulation of the Consumer Arbitration System, O.J. No. 121/1993 of 21/05.
[373] Article 31(3) last sentence of the UNCITRAL Model Law on International Commercial Arbitration.
[374] See Aron BROCHES: "Commentary on the UNCITRAL Model Law on International Commercial Arbitration", Kluwer, Deventer 1990 at 164.
[375] See above, Chapter 3.4. and Chapter 3.5.
[376] See, for example, the Spanish legislation which refers to the respect of the following basic principles in consumer arbitration: audience, contradiction and egality, Manuel-Angel LOPEZ-SANCHEZ and Marta ORERO-NUÑEZ: "Le Système Español d'Arbitrage des Litiges de Consommation", Revue Européenne de Droit de la Consommation 1996/120-132 at 124.
[377] See Article 18 of the Rules of Arbitration of the International Chamber of Commerce, Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 405.
[378] See, for example, Article 20(6) of the Rules of Arbitration of the International Chamber of Commerce, Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 406.
[379] However, for example the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce of 1999 do not expressly refer to 'documents only' proceedings. In Article 21 they state that that an oral hearing shall be arranged only if requested by either party and if the arbitrator deems it necessary.
[380] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 408.
[381] See, for example, Article 28 of the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce of 1999.
[382] Laurent GOUIFFES: "L'Arbitrage International Propose-t-il un Modele Original de Justice?", in: Recherche sur l'Arbitrage en Droit International et Comparé, ed by Laurent Gouiffes, Pascale Girard, Petri Taivalkoski and Gabriele Mecarelli, L.G.D.J., Paris 1997, 1-62 at 47.
[383] Article 27 of the International Arbitration Rules of the Chamber of Commerce of Milan state: "Obligation to preserve Confidentiality. (1) The Chamber of Arbitration, the arbitrator, the expert and the parties shall keep all information on the development and outcome of the arbitral proceedings confidential. (2) The parties may expressly authorise the Chamber of Arbitration to publish the award, either in its entirety or in a totally anonymous form as far as the parties and other persons in the proceedings are concerned."
[384] Gary B. BORN: "Planning for International Dispute Resolution", Journal of International Arbitration 2000/61-72 at 69.
[385] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", 3rd ed., Sweet & Maxwell, London 1999 at 27.
[386] Alexia ROUSSOS: "La Résolution des Différends", Lex Electronica, vol. VI, no. 1, 2000, No. II.A.5, see http://www.lex-electronica.org/articles/v6-1/roussos.htm
[387] Article 73(a) of the WIPO Arbitration Rules.
[388] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffrè, Milan 2000 at 175.
[389] Whereas the UNCITRAL Arbitration Rules or the ICC Rules of Arbitration (1998) do not contain an express provision on confidentiality (but the Statutes of the International Court of Arbitration of the ICC provide in Article 6 for confidentiality and likewise the Internal Rules of the International Court of Arbitration of the ICC in Article 1), the LCIA Rules contain a comprehensive provision on confidentiality in Article 30.
[390] Article 74(a) of the WIPO Arbitration Rules.
[391] Article 74(b) of the WIPO Arbitration Rules.
[392] Article 75 of the WIPO Arbitration Rules.
[393] Gabrielle KAUFMANN-KOHLER: "Internet: Mondialisation de la Communication – Mondialisation de la Résolution des Litiges?", in: Internet – Which Court Decides? Which Law Applies – Quel Tribunal Décide? Quel Droit s'Applique?, ed. by Katharina Boele-Woelki and Catherine Kessedfian, Kluwer, The Hague 1998, 89-142 at 119.
[394] Benjamin G. DAVIS: "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers", Journal of International Arbitration 2000/115-140 at 129.
[395] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", 3rd ed., Sweet & Maxwell, London 1999 at 277.
[396] Van den BERG/Van DELDEN/SNIJDERS: "Arbitragerecht", Zwolle 1988, at 14.
[397] Article 6(1) of the International Chamber of Commerce (ICC) Rules of Arbitration.
[398] Article 15(1) of the International Chamber of Commerce (ICC) Rules of Arbitration.

[399] Article 1(1) of the International Arbitration Rules of the Milan Chamber of Commerce (1996).
[400] For a discussion of such risks see, for example, Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Milan, Giuffrè 2000 at 168, or FOUCHARD, GAILLARD, GOLDMAN on "International Commercial Arbitration", Kluwer, The Hague 1999 at 639.
[401] Legal Consultative Committee of the UN which proposed an amendment to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, UN Doc. A/CN.9/127, Annex No. 3(a).
[402] Howard M. HOLTZMANN: "Balancing the Need for Certainty and Flexibility in International Arbitration Procedures", in: International Arbitration in the 21st Century", Transnational Publishers, New York 1994, 3-28 at 13.
[403] See above, Chapter 3.6.3.b).
[404] See Article 4 of the ICC Rules for Arbitration, Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 396.
[405] Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce of 1999.
[406] See ICANN Rules for Uniform Domain Name Dispute Resolution Policy, in particular Article 2(a)(ii) and (b)(iii) and (f)(iii).
[407] Based on a "Checklist of Topics for Discussion at a Prehearing Conference in an International Commercial Arbitration", suggested by Howard M. HOLTZMANN in: "Balancing the Need for Certainty and Flexibility in International Arbitration Procedures", in: International Arbitration in the 21st Century", Transnational Publishers, New York 1994, 3-28 at 20 et seq.
[408] See, for example, the Italian law where the conclusion of arbitration agreements by the use of emails and electronic signatures is possible according to the Law 'Bassanini'.
[409] EU Directive 1999/93/EC of 13/12/99 on a Community Framework for Electronic Signatures, EU O.J. L 13/12 of 19/01/00.
[410] See above, Chapter 3.4.
[411] Herman VERBIST and Christophe IMHOOS: "Arbitration, Telecommunications and Electronic Commerce", in ICC International Court of Arbitration Bulletin, vol. 10, fall 1999, pp. 20-25 at 22.
[412] EU Directive 1999/93/EC of 13/12/99 on a Community Framework for Electronic Signatures, EU O.J. L 13/12 of 19/01/00.
[413] Recital 16 of the EU Directive 1999/93/EC of 13/12/99 on a Community Framework for Electronic Signatures, EU O.J. L 13/12 of 19/01/00.
[414] See abovem Chapter 3.5.1.b(3).
[415] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Para.s 15 et seq.
[416] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Para 58.
[417] Benjamin WRIGHT and Jane K. WINN: "Law of Electronic Commerce", 3rd ed., Aspen Law & Business, New York, Supplement 1-1999, § 12.03. Overview.
[418] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, Munich, 2000 at 30.
[419] Benjamin WRIGHT and Jane K. WINN: "Law of Electronic Commerce", 3rd ed., Aspen Law & Business, New York, Supplement 1-1999, § 12.01 Overview.
[420] Catherine WALSH: "Territoriality and Choice of Law in the Supreme Court of Canada: "Applications in Products Liability Claims", in: New Developments in International Commercial and Consumer Law, Hart, Oxford 1998, 237-272 at 272.
[421] See, for example, the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce or the Arbitration Rules, Section II, of the Belgian Centre for Arbitration and Mediation (CEPANI).
[422] For example US$ 50,000 according to the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce.
[423] Article 1 of the Arbitration Rules, Section II, of the Belgian Centre for Arbitration and Mediation (CEPANI).
[424] See Article 28 of the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce.
[425] Article 18 of the Arbitration Rules, Section II, of the Belgian Centre for Arbitration and Mediation (CEPANI).
[426] See for example Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 111.
[427] See for example Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 111.
[428] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 359.
[429] ICC Award No. 1512 (Second Preliminary Award), Yearbook Commercial Arbitration 1980, at 174, 176.

[430] The Arbitration Act (England) of 1996, see http://www.hmso.gov.uk/acts/acts1996/1996023.htm regulates rules of mandatory law in Section 4: Mandatory and non-mandatory provisions:
(1) The mandatory provisions listed in this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
(2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.
(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.
(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.
(5) The choice of law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice shall be treated as chosen by the parties.
Schedule 1 to the Act contains a list of mandatory provisions Mandatory are, according to this Schedule, inter alia: Sections 13 (application of Limitation Acts, providing in subsection (1): The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings. ...); 28 (liability of parties for fees and expenses of arbitration); 29 (immunity of arbitrator); 32 (determination of preliminary point of jurisdiction); 66 (enforcement of award); 74 (immunity of arbitral institutions, etc.).
[431] Section 4(3) of the Arbitration Act of England 1996.
[432] See, for example, Section 4 of the Arbitration Act of England 1996.
[433] Klaus Peter BERGER: "International Economic Arbitration", Kluwer, Deventer 1993 at 688.
[434] See Article V(1)(d) of the New York Convention.
[435] Article 59(a) sentence 5 of the WIPO Arbitration Rules.
[436] See EU Commission, Article 29 Data Protection Working Party: Opinion 1/2000 on certain data protection aspects of electronic commerce of 03/02/2000, http://www.europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wp28en.htm
[437] EU Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal and on the Free Movement of Such Data, EU O.J. L 281/1 of 23/11/95.
[438] See, for example, EU Commission, Article 29 Data Protection Working Party: Opinion 1/2001 on the Draft Commission Decision on Standard Contractual Clauses for the Transfer of Personal Data to Third Countries under Article 26(4) of Directive 95/46; latest version of the draft Decision see http://europa.eu/int/comm/internal_market/en/media/dataprot/news/clauses.htm .
[439] Anne CARBLANC: "Privacy Protection and Redress in the Online Environment: Fostering Effective Alternative Dispute Resolution", contribution to the 22nd International Confernece on Privacy and Personal Data Protection, Venice, 28 to 30 September 2000, at 4; see http://www.oecd.org/dsti/sti/it/secur/prod/venice_paper.pdf
[440] Joel R. REIDENBERG and Paul M. SCHWARTZ: "Data Protection Law and Online Services: Regulatory Responses", study commissioned from ARETE by DG XV of the EU Commission , without date, at 149.
[441] US Federal Bureau of Investigation (FBI), Department of Justice: "Encryption: Impact on Law Enforcement", 03/06/99, Quantico, Virginia, at 3.
[442] For example including MICROSOFT's Windows 2000.
[443] Fulvio SARZANA DI S. IPPOLITO: "Profili Giuridici del Commercio via Internet", Giuffre, Milan 1999, 185-195 at 190.
[444] See Fulvio SARZANA DI S. IPPOLITO: "Profili Giuridici del Commercio via Internet", Giuffre, Milan 1999, 185-195 at 190.
[445] Fulvio SARZANA DI S. IPPOLITO: "Profili Giuridici del Commercio via Internet", Giuffre, Milan 1999, 185-195 at 190.
[446] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 393.
[447] United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT): Electronic Commerce Agreement, document No. 31; the following EU Member States attended the meeting in the sixth UN/CEFACT session in March 2000 where this recommendation was approved: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain, Sweden, United Kingdom; the European Union was represented.
[448] Hans van HOUTTE: "The Law of International Trade", Sweet & Maxwell, London 1995 at 394.

[449] Kahn Lucas Lancaster v. Lark International (2nd Cir. of 29/07/99), see Sidley & Austin: "Standards for Enforcement of Arbitration Agreement May Be Different under International Convention", August 1999, Find Law Library.
[450] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 393.
[451] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 359.
[452] Yves DERAINS and Eric A. SCHWARTZ: "A Guide to the New ICC Rules of Arbitration", Kluwer, The Hague 1998 at 360.
[453] Gillis J. WETTER: "A Multi-Party Arbitration Scheme for International Joint Ventures", 3 Arbitration International 1987 at 2 et seq.
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[480] See above, Chapter 2.3.1.c).
[481] On the work of the UNCITRAL Working Group on Arbitration and the interpretation of the term 'arbitration agreement' with regard to the use of modern means of communication see above, Chapter 2.3.1.
[482] See, for example, the Portuguese or Spanish laws on consumer arbitration, below, Chapter 7.1.1. and Chapter 7.1.2.
[483] Article 1d of Chapter 11 of the Finnish Consumer Protection Act of 1978 disallows arbitration of disputes arising out of consumer transactions.
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[635] Karl-Heinz LADEUR: "Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels, zugleich ein Beitrag zur ökonomischen Analyse des Rechts", Rabels Zeitschrift für ausländisches und internationales Privatrecht, 1999/60-103 at 98, 99.
[636] I. Trotter HARDY: "The Proper Legal Regime for 'Cyberspace'," 55 University of Pittsburgh Law Review 1994, 993 at 1009-1010.
[637] European Model EDI Agreement, Commission Recommendation of 19/10/94 relating to the Legal Aspects of Electronic Data Interchange, EU O.J. L 338/98 of 28/12/94.
[638] United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT): Electronic Commerce Agreement, document No. 31.
[639] See, for example: Oleksandr MERESHKO: "Lex Mercatoria – Theory and Principles of Transnational Trade Law", Takson, Kyiv 1999 at 101, 102.
[640] See on 'Lex Electronica' http://www.lex-electronica.org/en/current.htm
[641] V. GAUTRAIS, G. Lefebvre, K. BENYEKLEF: "Droit du Commerce International et Normes Applicables: l'Emergence de la Lex Electronica", Revue de Droit des Affaires Internationales, 1997/548
[642] Peter JUNG: "Rechtsfragen der Online-Schiedsgerichtsbarkeit", Kommunikation & Recht 1999/63-74 at 69.
[643] Peter JUNG: "Rechtsfragen der Online-Schiedsgerichtsbarkeit", Kommunikation & Recht 1999/63-74 at 69.
[644] See for example Arlene H. RINALDI: "The Net: User Guidelines and Netiquette-Index", http://www.fau.edu/netiquette/net/index.htm or Virginia SHEA: "Netiquette", http://www.albion.com/netiquette/book/TOC0693702513
[645] Stefania BARIATTI: "Internet Aspects Relatifs aux Conflits des Lois", Riv. dir. intern. priv. e proc. 1997/545-556 at 551.
[646] Stefania BARIATTI: "Internet Aspects Relatifs aux Conflits des Lois", Riv. dir. intern. priv. e proc. 1997/545-556 at 551.
[647] Trotter HARDY: "The Proper Legal Regime for "Cyberspace", University of Pittsburgh Law Review, 1994, 993-1055 at 1037.
[648] Trotter HARDY: "The Proper Legal Regime for "Cyberspace", University of Pittsburgh Law Review, 1994, 993-1055 at 1036.
[649] See http://www.gbde.org/ie/2000/adr.html
[650] Trotter HARDY: "The Proper Legal Regime for "Cyberspace", University of Pittsburgh Law Review, 1994, 993-1055 at 1039, 1040.
[651] Trotter HARDY: "The Proper Legal Regime for "Cyberspace", University of Pittsburgh Law Review, 1994, 993-1055 at 1040.
[652] For such an attempt see, for example, Trotter HARDY: "The Proper Legal Regime for "Cyberspace", University of Pittsburgh Law Review, 1994, 993-1055 at 1041 to 1051.
[653] Michael E. SCHNEIDER and Chrisopher KUNER: "Dispute Resolution in International Electronioc Commerce", Journal of International Arbitration, vol. 14, No. 3, Spept. 1997, 5-37 at 18-21.
[654] UN Economic Commission for Europe, Committee on the Development of Trade, Working Party on the Facilitation of International Trade Procedures, UN ECE Recommendation No. 26, The Commercial Use of Interchange Agreements for Electronic Data Interchange of September 1995, Document TRADE/WP.4/R.1133/Rev.1 of 23/06/95, clause 7.7.
[655] European Model EDI Agreement, Commission Recommendation of 19/10/94 relating to the Legal Aspects of Electronic Data Interchange, EU O.J. L 338/98 of 28/12/94.
[656] See http://www.iccwbo.org/home/guidec/asp
[657] See http://www.icann.org
[658] Benjamin G. DAVIS: "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers", Journal of International Arbitration 2000/115-140 at 137).
[659] Article III of the New York Convention states: "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or

higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.
[660] Article V(1) of the New York Convention."
[661] Article V(2) of the New York Convention.
[662] See Kahn Lucas Lancaster v. Lark International (2nd Cir. of 29/07/99), see Sidley & Austin: "Standards for Enforcement of Arbitration Agreement May Be Different under International Convention", August 1999, Find Law Library.
[663] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 109.
[664] Albert Jan van den BERG: "Annulment of Awards in International Arbitration", in: International Arbitration in the 21st Century: Towards Judicialisation and Uniformity, Transnational Publishers, New York 1994, 133-162 at 135.
[665] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 1.
[666] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 108.
[667] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 112.
[668] W. Michael REISMAN: "Systems of Control in International Adjudication and Arbitration", Duke University Press, Durham 1992 at 113, 114.
[669] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-court-settlement of Consumer Disputes of 1998, see http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html
[670] See above, Chapter 6.2.2.
[671] EU Council Resolution of 25/05/00 on a Community-Wide network of National Bodies for the Extra-Judicial Settlement of Consumer Disputes, EU O.J. C 155/1 of 06/06/00.
[672] EU Commission: Proposal for a Council Decision Establishing a European Judicial Network in Civil and Commercial Matters, document 500PC0592 of 09/10/00.
[673] See above, Chapter 3.9.3.(a)(3).
[674] See, for example, DG SANCO's national reports on Consumer Policy concerning different EU Member States, http://www.europa.eu.int/comm/dg24/library/reports/nat_reports/ and the country reports on DG SANCO's website on out-of-court bodies responsible for the settlement of consumer disputes, http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html
[675] The Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', O.J. C 169/36 of 16/06/99, No. 3.6.4.
[676] On the future Hague Convention on Jurisdiction anf Foreign Judgements in Civil and Commercial Matters see http://www.hcch.net/e/workprog/jdgm.html
[677] EU Commission Report: "Consumer Policy in Portugal", doc XXIV(00)P.3 of February 2000, No. 9.2., see http://www.europa.eu.int/comm/dg24/library/reports/nat_reports/rapppt_en.pdf
[678] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of Portugal, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_pt_ccb_en.html
[679] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 398.
[680] The General Assembly of the Arbitration Centre selects its members and allocates the posts within the different organs. The General Assembly votes also on the annual budget and on the annual programme. The Council of Administration plans the General Assembly. It ensures the operation of the Arbitration Centre and employs the staff.
[681] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 393.
[682] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 393.
[683] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of Portugal, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_pt_ccb_en.html at 7.
[684] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 397.

[685] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 397.
[686] Guillermo CRESPO PARRA: "Quelques Reflexions sur les Solutions Extra-judiciaires de Reglement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation Transfrontalière", Revue Européenne de Droit de la Consommation 1996/273-289 at 288.
[687] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 400.
[688] Isabel MENDES CABECADAS: "Le Centre d'Arbitrage des Litiges de Consommation de Lisbonne", Revue Europeenne de Droit de la Consommation, 1999/391-400 at 397.
[689] Jordi FAUS SANTASUSANA: "Spain", in: International Consumer Protection", ed. by Dennis Campbell, The Hague, Kluwer, looseleaf, 1999, at SPA-IX-2.
[690] See Spanish National Institute for Consumption: Consumer Arbitration – an extrajuridical procedure for the settlement of conflicts between consumers and businesses, http://www.consumo-inc.es/arbitraje/que.htm
[691] See http://www.simtec.es/nj/lec/Privado/136-1988.t1.html
[692] Manuel-Angel LOPEZ-SANCHEZ and Marta ORERO-NUÑEZ: "Le Système Español d'Arbitrage des Litiges de Consommation", Revue Européenne de Droit de la Consommation 1996/120-132 at 122.
[693] Manuel-Angel LOPEZ-SANCHEZ and Marta ORERO-NUÑEZ: "Le Système Español d'Arbitrage des Litiges de Consommation", Revue Européenne de Droit de la Consommation 1996/120-132 at 124.
[694] Spanish Law 36/1988 of 05/12 on Arbitration, O.J. No. 293/1988 of 07/12.
[695] See http://www.consumo-inc.es/Arbitraje/principal.htm
[696] EU Commission Report: "La Politica de los Consumidores en España", document XXIV(99)02 of May 2000, No. 9.2., see http://www.europa.eu.int/comm/dg24/library/reports/nat_reports/rappes_es.pdf
[697] See http://www.consumo-inc.es/Directorio/asco.htm
[698] See, http://www.consumo-inc.es/arbitraje/adhesion.htm
[699] Spanish Royal Decree 636/1993 of 03/05 on the Regulation of the Consumer Arbitration System, O.J. No. 121/1993 of 21/05.
[700] Spanish National Consumer Arbitration Court, http://www.consumo-inc.es/arbitraje/db/jjaa_n.htm
[701] See http://www.consumo-inc.es/arbitraje/db/jjaa_l.htm
[702] See , http://www.consumo-inc.es/arbitraje/db/jjaa_p.htm
[703] , http://www.consumo-inc.es/arbitraje/db/jjaa_r.htm
[704] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of Spain, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_es_ccb1_en.htm at 7.
[705] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of Spain, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_es_ccb1_en.htm at 8.
[706] Spanish National Institute for Consumption: Annual Report on the Consumer Arbitration System of 1999, see http://www.consumo-inc.es/Arbitraje/principal.htm
[707] Spanish National Institute for Consumption: Annual Report on the Consumer Arbitration System of 1999, No. IV.2, http://www.consumo-inc.es/Arbitraje/principal.htm
[708] Spanish National Institute for Consumption: Annual Report on the Consumer Arbitration System of 1999, No. IV.8, http://www.consumo-inc.es/Arbitraje/principal.htm
[709] Spanish National Institute for Consumption: Annual Report on the Consumer Arbitration System of 1999, http://www.consumo-inc.es/Arbitraje/principal.htm
[710] Manuel-Angel LOPEZ-SANCHEZ and Marta ORERO-NUÑEZ: "Le Système Español d'Arbitrage des Litiges de Consommation", Revue Européenne de Droit de la Consommation 1996/120-132 at 124.
[711] See Spanish National Institute for Consumption: The Logo of the Consumer Arbitration System, http://www.consumo-inc.es/arbitraje/distintivo.htm
[712] See , http://www.consumo-inc.es/arbitraje/db/ja_001.htm
[713] See http://www.consumo-inc.es/Arbitraje/principal.htm
[714] See http://www.consumo-inc.es/Arbitraje/principal.htm
[715] UK Arbitration Act 1996, Sections 89-91, see http://www.hmso.gov.uk/acts/acts1996/96023-l.htm
[716] According to Section 91(3)(a) of the UK Arbitration Act of 1996 the power to make such an order is exercisable for England and Wales by the Secretary of State with the concurrence of the Lord Chancellor.
[717] Consumer Schemes of the Chartered Institute of Arbitrators, see http://www.arbitrators.org/Services/consumerDet.htm
[718] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of the UK, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_uk_ccb_en.htm at 8.

[719] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of the UK, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_uk_ccb_en.htm at 6.
[720] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of the UK, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_uk_ccb_en.htm at 18.
[721] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of the UK, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_uk_ccb_en.htm at 21.
[722] See the report by DG SANCO on the bodies responsible for out-of-court dispute settlement of the UK, http://europa.eu.int/comm/.dg24/policy/developments/acce_just/acce_just04_uk_ccb_en.htm at 19.
[723] EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", Journal of Consumer Policy, Kluwer Academic Publ., 1998/315-337 at 317.
[724] See for example: EASA (European Advertising Standards Alliance): "Cross-border Complaints Report" (http://www.easa-alliance.org/xborder.html).
[725] See for example the cross-border complaint system established by the European Advertising Standards Alliance, http://www.easa-alliance.org/).
[726] See Guillermo CRESPO PARRA: "Quelques Refléxions sur les Solutions Extra-Judiciaires de Règlement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation", Revue Européenne de Droit et de la Consommation 1996/273-289 at 276 et seq.
[727] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 380.
[728] See above, Chapter 7.1.1. and 7.1.2.
[729] Jim MURRAY: "Consumer Protection in the EC and Contract Law - Some Reflections from the Perspective of Consumer Organisations", in: Neues europäisches Vertragsrecht und Verbraucherschutz, Bundesanzeiger, Cologne 1999, 57-59 at 57.
[730] Guillermo CRESPO PARRA: "Quelques Refléxions sur les Solutions Extra-Judiciaires de Règlement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation", Revue Européenne de Droit et de la Consommation 1996/273-289 at 280.
[731] Guillermo CRESPO PARRA: "Quelques Refléxions sur les Solutions Extra-Judiciaires de Règlement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation", Revue Européenne de Droit et de la Consommation 1996/273-289 at 274.
[732] Guillermo CRESPO PARRA: "Quelques Refléxions sur les Solutions Extra-Judiciaires de Règlement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation", Revue Européenne de Droit et de la Consommation 1996/273-289 at 277.
[733] Gerold HERRMANN: "Establishing a Legal Framework for Electronic Commerce: the Work of the UN Commission on International Trade Law (UNCITRAL)", WIPO document WIPO/EC/CONF/99 SPK/24-C of September 1999 at 12.
[734] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 372.
[735] (France) Cour d'Appel de Paris of 07/12/94, Revue trimestrielle du droit commercial 1995/401, which upheld the validity of an arbitration clause, forming part of the general conditions for sale, which was written on the back of a contract form, the contract relating to the purchase of a car by a French consumer from a British company, the contract being signed in France. The Court held that the clause was valid, since the clause concerned the function of an arbitration affecting the international trade (in the sense of Article 1492 of the French New Code of Civil Procedure) which it inferred from the fact that the contract concerned cross-border transfers of an article and the property.
[736] Luca G. RADICATI di BRONZOLO: "Libre Circulation dans la CE et Règles de Conflit", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 87-103 at 95.
[737] See French Court of Cassation, Cass. 21/05/97, Rev. Arb. 1997/537, affirming Paris 07/12/94, RTD Com. 1995/401.
[738] Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 44.
[739] See http://www.uncitral.org/en-index.htm update of 08/06/00.
[740] See (France) Cour d'Appel de Paris of 07/12/94, Revue trimestrielle du droit commercial 1995/401.

[741] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 378.
[742] UNIDROIT Principles of International Commercial Contracts (1994), Preamble, Comment No. 2.
[743] See Brigitta LURGER: "Prinzipien eines europäischen Vertragsrechts: liberal, marktfunktional, solidarisch, oder ...", Electronic Journal of Comparative Law, vol. 2.1, March 1998 at 4, http://law.kub.nl/ejcl/21/art21-2.html
[744] See working document and the agenda concerning the hearing on approximation of civil and commercial law in the Member States, Committee on legal affairs and the internal market of the European Parliament of 21 November 2000, http://www.europarl.eu.int/meetdocs/committee/juri/20001121-hearing/juri20001121-hearing.htm
[745] European Parliament's Working Paper on the Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, June 2000, authors Christian von BAR (head of team) and others, see http://www.europarl.eu.int/workingpapers/juri/pdf/103_en.pdf at 123 to 125.
[746] European Parliament's Working Paper on the Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, June 2000, authors Christian von BAR (head of team) and others, see http://www.europarl.eu.int/workingpapers/juri/pdf/103_en.pdf at 135.
[747] UNIDROIT Principles of International Commercial Contracts.
[748] Giuseppe GANDOLFI: "Pour un Code Européen des Contrats", Revue trimestrielle du droit civile 1992/707-732.
[749] The Common Core of a European Private Law, see http://www.jus.unitn.it/dsg/common-core/
[750] See United Nations: "UNCITRAL Model Law on Electronic Commerce with Guide to Enactment", New York 1999 at 24, para. 27.
[751] United Nations: "UNCITRAL Model Law on Electronic Commerce with Guide to Enactment", New York 1999 at 34.
[752] Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999.
[753] See Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: France, at 25, in Germany such a clause would very likely contravene the Act concerning Unfair Terms of Contracts, Luxembourg, at 60.
[754] See Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Belgium, at 11, Denmark, at 15, Finland, at 19, Great Britain, at 36, Greece, at 38, Ireland, at 42, Italy, at 56, Portugal, at 69, Netherlands, at 66, Sweden, at 83.
[755] The Finnish Consumer Protection Act of 1978 prohibited the arbitration of disputes arising out of consumer transactions in Article 1d, Chapter 11.
[756] Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Austria, at 5.
[757] Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Spain, at 78.
[758] On Italian law see Giovanni IUDICA: "Brevissimi Appunti sulla Tutela dell'Acquirente di Pacchetti Azionari", in: La Tutela del Consumatore tra Liberismo e Solidarismo", ed. by Pasquale Stanzione, Ed. Scientifiche Italiane, Napoli 1999, 187-193 at 193.
[759] See in particular the general admissibility of such clauses according to the Directive on Unfair Terms in Consumer Contracts, Annex, letter (q) and the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for such settlement of consumer disputes, O.J. 115/31 of 17/04/98.
[760] The German Code of Civil Procedure as revised in 1998, concerned with the form of the arbitration agreement, states in Article 1031(5): "Arbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties. No agreements other than those referring to the arbitral proceedings may be contained in such a document; this shall not apply in the case of a notarial certification. A consumer is a natural person who, in respect of the transaction in dispute, is acting for a purpose which can be regarded as being outside his trade or self-employed profession. (6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings."
[761] FOUCHARD, GAILLARD and GOLDMAN on "International Commercial Arbitration", Kluwer, The Hague 1999 at 241.
[762] See, for example, Brigitta LURGER: "Prinzipien eines europäischen Vertragsrechts: liberal, marktfunktional, solidarisch, oder ...", Electronic Journal of Comparative Law, vol. 2.1, March 1998 at 4.
[763] United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT): Electronic Commerce Agreement, document No. 31.

[764] Hans van HOUTTE: "The Law of International Trade", Sweet & Maxwell, London 1995 at 386.
[765] See Matthieu de BOISSESON: "Le Droit Français de l'Arbitrage: Interne et International", Morel et Corduant, Lille 1990 at 505.
[766] Matthieu de BOISSESON and Thomas CLAY: "Recent Developments in Arbitration in Civil Law Countries", Arbitration Law Journal 1998/150-156 at 151.
[767] Matthieu de BOISSESON and Thomas CLAY: "Recent Developments in Arbitration in Civil Law Countries", Arbitration Law Journal 1998/150-156 at 152.
[768] See Judgement of the Audencia Provincial de Madrid 18th Section, July 13, 1993, (1993) Revista de la Corte española de arbitraje, at 220; Judgement of the Audencia Provincial de Madrid 21st Section, July 13, 1993, (1994) Revista de la Corte española de arbitraje, at 236)
[769] European Parliament: Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts of 25/07/94, EU O.J. C 205/519, 1995.
[770] Koen LENAERTS and Marc PITIE: "Conclusions Générales", in: L'Arbitrage et le Droit Européen, Bruylant, Brussels 1997, 183-221 at 197.
[771] Hans van HOUTTE: "The Law of International Trade", Sweet & Maxwell, London 1995 at 388.
[772] See Guillermo CRESPO PARRA: "Quelques Reflexions sur les Solutions Extra-judiciaires de Reglement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation Transfrontalière", Revue Européenne de Droit de la Consommation 1996/273-289 at 285
[773] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 103.
[774] Matthieu de BOISSÉSON: "Le Droit Français de l'Arbitrage: National et International", 2nd ed., Morel et Corduant, Lille 1990 at 505.
[775] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 105.
[776] Clive M. SCHMITTHOFF: "Nature and Evolution of the Transnational Law of Commercial Transactions", in: The Transnational Law of International Commercial Transactions, ed. by Norbert Horn and Clive Schmitthoff, Kluwer, Deventer 1982, 19-31 at 20.
[777] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 104.
[778] Piero BERNARDINI: "L'Arbitrato Commerciale Internazionale", Giuffre, Milan 2000 at 105.
[779] Philippe FOUCHARD, Emmanuel GAILLARD and Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 362, in particular footnote 422.
[780] See Guillermo CRESPO PARRA: "Quelques Refléxions sur les Solutions Extra-Judiciaires de Règlement des Litiges de Consommation, et en Particulier sur l'Arbitrage de Consommation Transfrontalière", Revue Européenne de Droit et de la Consommation 1996/273-289 at 276.
[781] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 365.
[782] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 366, who considers that according to French national arbitration law clauses in contracts between merchants and non-merchants like in contracts of work would be lawful, however, they would be considered as 'not written' on the request of the professional or consumer.
[783] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 358.
[784] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 387.
[785] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 392.
[786] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 370 et seq.
[787] European Court of Justice of 01/06/99, ECO Swiss China Time / Benetton International, Case C-126/97, see http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en case no. C-126/97.
[788] EU Directive on the Protection of Consumers in Respect of Distance Contracts of 20/05/97, O.J. L 144 of 04/06/97.
[789] EU O.J. L 156/21 of 10/06/92.
[790] EU O.J. L 156/21 of 10/06/92.
[791] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[792] Opinion of François RIGAUX in "Diskussionsbericht zu dem Referat von Rolf Wägenbaur" by Alexandra Meerfeld in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 141-145 at 144.

[793] It appears that according to national German law the publication of an online catalogue constitutes a mere 'invitatio ad offerendum' whereas according to national English law the website of a business may well contain a binding offer so that a contract will be concluded if a consumer commissions an article.
[794] Manfred REHBINDER and Stefan SCHMAUS: "Rechtsprobleme beim Vertragsschluss im Internet", UFITA 2000/313-351 at 321.
[795] Manfred REHBINDER and Stefan SCHMAUS: "Rechtsprobleme beim Vertragsschluss im Internet", UFITA 2000/313-351 at 322.
[796] Annette-Tabea LAUKTIEN and Brigitta VARADINEK: "Der Vertragsschluß im Internet", ZUM 2000/466-472 at 467.
[797] SCHWAB/WALTER: "Schiedsgerichtsbarkeit", C.H. Beck, 6th ed., Munich 2000 at 316.
[798] See, for example, Philippe FOUCHARD, Emmanuel GAILLARD, Berthold GOLDMAN: "Traité de l'Arbitrage Commercial International", Litec, Paris 1996 at 968.
[799] Article V(2)(b) of the New York Convention.
[800] Alan REDFERN and Martin HUNTER: "Law and Practice of International Commercial Arbitration", Sweet & Maxwell, London 1986 at 333: ..."there are practices which some states will regard as contrary to the international public interest, and other states will not. Problems abound in formulating the concept of international public policy, but they do not vitiate the desire or need for a workable definition of it." See als 3rd ed., 1999 at 430, 431.
[801] Jean-Baptiste RACINE: "L'Arbitrage Commercial International et l'Ordre Public", L.G.D.J., Paris 1999 at 376.
[802] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[803] See above, Chapter 4.7.3.h.
[804] Catherine KESSEDJIAN: "Electronic Commerce and International Jurisdiction", Ottawa, 28 February to 01 March 2000, Preliminary Document No. 12, Summary of discussions, Section 2, Hague Conference on Private International Law, Electronic Commerce.
[805] Gilles PLAISANT: "La Lutte Contre les Clauses Abusives des Contrats dans l'Union Européenne", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 165-177 at 175.
[806] European Court of Justice of 01/06/99, ECO Swiss China Time / Benetton International, Case C-126/97, see http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en case no. C-126/97; see above, Chapter 2.6.7.a.
[807] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 374.
[808] Eric LOQUIN: "L'Arbitrage des Litiges du Droit de la Consommation", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998/357-381 at 374.
[809] EU Commission, Memorandum to the Council on Consumer Redress, EU document COM(84) 692 final.
[810] Bernadette LE BAUT-FERRARESE: "L'Emergence d'un Droit Communautaire de la Protection Juridictionnelle du Consommateur", in "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 287-304 at 288.
[811] Bernadette LE BAUT-FERRARESE: "L'Emergence d'un Droit Communautaire de la Protection Juridictionnelle du Consommateur", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 287-304 at 303, 304.
[812] The Annex of the Directive on Electronic Commerce states: "Derogations from Article 3: As provided for in Article 3(3), Article 3(1) and (2) do not apply to: (...) contractual obligations concerning consumer contracts;"...
[813] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[814] Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 94.
[815] Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 94.
[816] Herman VERBIST and Christophe IMHOOST: "Arbitration, Telecommunications and Electronic Commerce", ICC International Court of Arbitration Bulletin, vol. 10, No. 2, Fall 1999, pp. 20-25 at 22, 23.
[817] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[818] Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 83.
[819] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[820] Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 121.

[821] Communication of the Commission of 14/02/84 on Unfair Terms in Consumer Contracts, document COM (84)55 final.
[822] See http://europa.eu.int/clab/tmp/tmp/PdoA7b.htm
[823] See http://europa.eu.int/clab/tmp/tmp-klEPMb.htm, it has to be observed, however, that the decisions indicated in the Commission's database are not dated, so that it is not possible to indicate with security, whether it relates to the relevant law after the implementation of the Directive.
[824] US Supreme Court, No. 99-1235, Green Tree Financial v. Larketta Randolph, see amicus brief of the Consumers Union of 24/07/00, http://www.consumersunion.org/pdf/i-contracts.htm?randolph#first_hit
[825] Hill v. Gateway 2000, No. 96-3294, 105 F.3d 1147 (7th Cir. 1997), cert. Denied, 118 S. Ct. 47 (1997), see World Arbitration and Mediation Report, Vol. 7, No. 12, December 1997 at 295.
[826] ProCD vs. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), see also Arnold VAHRENWALD: "Recht in Online und Multimedia", Luchterhand, looseleaf, Neuwied, Chapter 10.5.
[827] Day Brower v. Gateway 2000, 246 A.2d 246 (N.Y.App. 1998), New York Law Journal 17/08/98.
[828] See Gerold HERRMANN: "Establishing a Legal Framework for Electronic Commerce: the Work of the UN Commission on International Trade Law (UNCITRAL)", WIPO document WIPO/EC/CONF/99 SPK/24-C of Sept. 99 at 10.
[829] John A. CHANIN: "The Uniform Computer Information Transactions Act – A Practitioner's View", The John Marshall Journal of Computer & Information Law, vol. XVIII, No. 2, Winter 1999/279-321 at 314.
[830] Section 110 of the US Computer Information Transactions Act. check
[831] Day Brower v. Gateway 2000, 246 A.2d 246 (N.Y.App. 1998), New York Law Journal 17/08/98.