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NOTE & COMMENT: Online International **Arbitration:** Nine Issues Crucial to Its Success

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SUMMARY:
... With the dawning of the Internet Age, another era has dawned as well -- that of online **arbitration,** and more particularly, because Internet transactions frequently transcend national boundaries, that of online international **arbitration.** ... Online international **arbitration** cannot truly come into its own as a recognized method of resolving disputes unless the international community can resolve nine major legal issues that online **arbitration** participants will face. ... First, the definition itself of "electronic signature" may vary from one country to another. ... Therefore, the mere use of a password to identify a consumer should suffice to validate an **arbitration** agreement in international online consumer transactions under the **UNCITRAL** Model Law. ... Third, in connection with online practices, the working group adopted a provision that would allow parties to a contract to incorporate by reference an **arbitration** clause not contained in the contract. ... CIArb has established a set of rules to resolve online disputes between Ford and its customers ("CIArb - Ford Rules") governed under the principle of a single arbitrator procedure. ...

TEXT:

[*441] With the dawning of the Internet Age, another era has dawned as well -- that of online **arbitration,** and more particularly, because Internet transactions frequently transcend national boundaries, that of online international **arbitration.**

During the Internet boom, the number of Online Dispute Resolution ("ODR") providers grew dramatically. Such companies generally provided for both online mediation and online **arbitration** as tools for the resolution of e-commerce disputes. While the number of ODR private providers has been significantly reduced, with many websites inactive or companies ceasing to do business, online litigation has developed with the launching of public cyber courts around the world, giving great hope to a new start for online **arbitration.**

Cyber courts came into existence in 2002. In the United Kingdom, for instance, consumers, small businesses and solicitors can now make claims to recover money owed to them by logging onto a new court service website. n1 In Michigan, by statute, a cyber court can now handle hearings and proceedings online. n2 Both of these online public services are operated by local courts and benefit from governmental support.

Similarly, online **arbitration,** which is still in its infancy, requires greater institutional support. n3 It also awaits greater education, awareness and legal maturity.

[*442] Online international **arbitration** cannot truly come into its own as a recognized method of resolving disputes unless the international community can resolve nine major legal issues that online **arbitration** participants will face. This article describes those issues and the best international approaches for tackling each.

Existing rules already govern traditional **arbitration.** n4 But will these rules permit online international **arbitration** to achieve the standard benefits of any Internet transaction: speed, economy and efficiency? We have divided our analysis into nine crucial issues, whose meaningful and uniform standards will have to be agreed upon by the global community to ensure the success of online international **arbitration.** These issues include:

1. What form must an online **arbitration** agreement take?
2. Who should hear the dispute?
3. Where will **arbitration** occur?
4. What law will govern the online international **arbitration?**
5. Who will pay online **arbitration** costs and what will they consist of?
6. What time limits will govern online **arbitration?**
7. What evidentiary rules will govern online **arbitration?**
8. What form will the award take and how will it be enforced?
9. Is confidentiality feasible and advisable in online international **arbitration?**

The following discussion analyzes each of these questions in turn. Viable guidelines to resolve each of these issues sometimes exist in various rules governing traditional international **arbitration** and, even when those rules do not offer a solution, other rules promulgated by private **arbitration** organizations may provide answers.

I. FORM OF THE **ARBITRATION** AGREEMENT

One of the conditions necessary for online **arbitration** to perform satisfactorily will be the acceptance that **arbitration** agreements, either as a part of the main transaction or as a separate contract once the dispute arises, may be executed electronically. Traditionally, however, in order to be enforced, **arbitration** agreements have been required to be "in writing." What are the legal issues [*443] regarding the form of cross-border online **arbitration** agreements and what solutions are currently offered to deal with these issues?

A. *Legal Issues*

For an arbitral award to be enforceable under the New York Convention, the **arbitration** agreement must be "in writing," which is defined to include arbitral clauses that have been (i) "signed by the parties" or (ii) "contained in an exchange of letters or telegrams." n5

By clicking on a "submit" button, does a party thereby accept a contract, and is such a contract "signed by the parties" and therefore "in writing" as required by the New York Convention? Is an exchange of e-mails agreeing on the terms of a contract forwarded electronically deemed to be "an exchange of letters or telegrams"? These are among the uncertainties that the current language of the New York Convention leaves to the new world of online **arbitration.**

1. *Electronic Signatures*

The most technically advanced countries have tried to define legally the term "electronic signature." n6 However, in international disputes, two sub-issues on the nature and validity of the electronic signature remain unresolved.

First, the definition itself of "electronic signature" may vary from one country to another. For instance, in the U.S., Congress inserted a provision specifically addressed to consumer protection, which provides that if a statute or other rule requires the agreement to be "in writing" (New York Convention, for instance), an electronic record may suffice if certain criteria to protect the consumer have been met. n7

Second, some countries have not yet adopted a statute on electronic signatures or one that requires different conditions. Under Irish law, for example, it appears that the use of an authenticated electronic signature in a contract will be required for legal recognition. n8 Germany has special protections for consumer contracts, requiring a separate **arbitration** agreement that until recently had to be either [*444] signed by both parties or certified by a notary. n9 Let us assume then, that an **arbitration** agreement had been entered into electronically by a consumer domiciled in Germany and a U.S. e-commerce service provider. Which law would have applied with regard to the issues of electronic signature? Is it a substantive issue or a procedural one? Should it be considered as a matter of public policy?

2. *Exchange of E-mails or other Electronic or Digital Exchange*

Some authors have argued convincingly that an exchange of e-mails containing an **arbitration** clause satisfies the formal requirement of the New York Convention because it should be deemed "an exchange of telegrams." n10 They believe that telegrams and e-mails have the same essential features (mainly the ability to keep a record and the possibility of verifying the identity of the sender through the use of encryption technologies).

Interestingly, Article 7(2) of the **UNCITRAL** Model Law extends the exchange of telegrams requirement to an exchange of telexes or "other means of telecommunications, which provide a record." Some authors believe that this definition certainly includes e-mails and other electronic communications. n11

Nevertheless, in 2000, the Working Group on **Arbitration** for the United Nations, which believed that possible improvement would have to be made in the area of international **arbitration,** stated that Articles II(2) of the New York Convention and 7(2) of the **UNCITRAL** Model Law "did not conform to current practices and expectations of the parties if they were interpreted narrowly." n12 It also added that although national jurisdictions increasingly were adopting a liberal interpretation of those provisions, views differed as to their proper interpretation, thus reducing predictability and certainty in international trade.

These differences in interpretation and uncertainties have led the United Nations to propose an amendment to Article 7(2) of the Model law and an interpretative guidance of Article II(2) of the New York Convention that would reflect a broad and liberal understanding of the form requirement.

[*445] B. ***UNCITRAL's** Proposals*

In July 2001, **UNCITRAL** took a major step by adopting the Model Law on Electronic Signatures. At the same time, at its session held in June/July 2001, the working group on **arbitration** made some progress on the amended version of Article 7(2) of the **UNCITRAL** Model Law and on the draft of an interpretative declaration regarding Article II(2) of the New York Convention and the definition of "in writing." Regrettably, on that last topic, the working group has not yet been able to reach a final consensus. n13

1. ***UNCITRAL** Model Law on Electronic Signatures*

UNCITRAL adopted a broad definition of "electronic signature," which, if approved by those countries still lacking such a definition, should enhance the liberal interpretation of the "in writing" requirement under Article II(2) of the New York Convention in those countries. Under the Model Law on Electronic Signatures, "electronic signature" now includes any "data in electronic form, ... which may be used to identify the signatory ... and to indicate the signatory's approval of the information contained in the data message." n14 Therefore, the mere use of a password to identify a consumer should suffice to validate an **arbitration** agreement in international online consumer transactions under the **UNCITRAL** Model Law.

2. *Article 7(2) of the **UNCITRAL** Model Law*

With regard to Article 7(2) of the **UNCITRAL** Model Law, the working group first agreed that "in writing" should include any form that provides a record of the agreement, including "electronic, optical or other data messages." The working group adopted the suggestion that such a list be merely illustrative and serve an educational purpose, in particular because such notions might run the risk of becoming obsolete, thus raising the same difficulties as references to "telegrams" or "telex." n15

Second, the working group agreed that the **UNCITRAL** Model Law should recognize the existence of various contract practices by which oral **arbitration** agreements were concluded (generally over the phone) with reference to written terms of an agreement to arbitrate, or to written terms and conditions for **arbitration** (even if those terms and conditions did not actually express the [*446] agreements to arbitrate). In those cases, the parties have a legitimate expectation of a binding agreement to arbitrate. Even if some courts might require that the existence of an oral agreement to arbitrate must be proven, which could lead to increased uncertainty, this new provision reflects such common and broad practices that it should therefore help the resolution of any disputes which may arise from such agreements. n16

Third, in connection with online practices, the working group adopted a provision that would allow parties to a contract to incorporate by reference an **arbitration** clause not contained in the contract. This provision would facilitate electronic commerce, which relies heavily on incorporation by reference. n17

3. *Interpretative Instrument Regarding Article II(2) of the New York Convention*

As mentioned above, some countries now accept a liberal interpretation of Article II(2) of the New York Convention, whereas in others, a narrower one still prevails, leading the working group to reach a uniform and liberal interpretation of such provision.

The first issue encountered by the working group was whether to amend the New York Convention or to use a declaratory instrument that would recommend a uniform interpretation of Article II(2) of the New York Convention. The prevailing view was that the New York Convention should not be amended because it would take a number of years to be accepted and signed by all the countries involved and in the interim would create more uncertainty. n18 The working group stated that "the interpretative declaration was regarded as the most appropriate vehicle for achieving this [uniformity of] purpose without amending the Convention." n19

The second issue, which remains unresolved, relates to the appropriate language to be used to interpret the definition of "in writing" under the New York Convention. It appears that the Convention should logically conform to the proposed amendment to the **UNCITRAL** Model Law, but the working group on **arbitration** has not deliberated on such operative provision, which was not even [*447] discussed at the latest sessions of the United Nations Commission on International Trade Law.

In conclusion, even though important progress has been made in the area of "electronic signatures," work still needs to be done on both the **UNCITRAL** Model Law and the New York Convention before a final rule can be reached regarding the appropriate form of **arbitration** agreement.

II. ARBITRATORS

Some of the main issues relating to the selection of the online arbitrators include: (a) How many arbitrators should decide an online international dispute? (b) Who should appoint the arbitrator(s)? (c) What should be the nationality of the arbitrator(s)? (d) How should the arbitrator(s) be challenged and (e) shall the arbitrator(s) be liable to any party?

A. *Sole Arbitrator or Panel?*

In the absence of an agreement, the **UNCITRAL Arbitration** Rules provide for a mandatory panel of three arbitrators. n20 Even though some authors have discussed the possibility of conducting deliberations among three arbitrators by electronic means, this solution does not appear to be very practical with regard to online **arbitration,** which is supposed to deal with small claims and non-complex disputes.

On the other hand, prominent international organizations such as the ICC, the AAA, the LCIA or the Internet Corporation for Assigned Names and Numbers ("ICANN") provide that, if the parties have not agreed upon the number of arbitrators, the panel should be limited to one arbitrator only. This rule, certainly more appropriate to online **arbitration,** still simultaneously provides for an exception when the institution believes the **arbitration** requires a panel of three arbitrators.

One issue in online **arbitration** is that the costs of **arbitration** generally depend on the number of arbitrators. Thus, some e-commerce service providers could be tempted to provide in their **arbitration** agreement for a panel of arbitrators in order to deter some claimants from commencing a dispute.

To that effect, some institutions perhaps have realized the gains of efficiency that the implementation of a single arbitrator procedure could produce in some specific claims. The National Association of Securities Dealers ("NASD"), n21 for [*448] example, which already had a "simplified **arbitration** procedure" in place for claims under $ 25,000, n22 implemented a "Single Arbitrator Pilot Program" in May 2000, which was effective for two years, until May 15, 2002, for claims under $ 200,000. n23

Along the same lines, the Chartered Institute of Arbitrators ("CIArb"), a U.K. non-profit organization, was founded in 1915 to provide an organization for practicing arbitrators. It now approaches 10,000 members in 86 countries and has been facilitating the determination of disputes by online **arbitration** since the end of the 1990s. CIArb has established a set of rules to resolve online disputes between Ford and its customers ("CIArb - Ford Rules") governed under the principle of a single arbitrator procedure. n24

For the reasons discussed above, it appears that for small online claims a sole arbitrator should be the rule. What constitutes a "small" claim? If NASD believed that a claim for up to $ 200,000 could be settled by a sole arbitrator and the CIArb -- Ford Rules have established their cap at £ 30,000 (*i.e.* around $ 69,000 as of June 2003), these two figures

show that there is still a gap to be filled. In any event, it appears that a limit to the amount in controversy should be fixed for more predictability and certainty.

B. *Who Will Appoint the Arbitrator?*

Generally, international **arbitration** institutions allow parties to agree on the appointment of their sole arbitrator with some degrees of difference. The AAA tries not to interfere with the parties' **decision,** n25 whereas, the ICC explicitly reserves the right to confirm or reject any prospective arbitrator. n26 The LCIA will appoint the sole arbitrator "with due regard" to the methods set forth by the parties. n27

In most private **arbitration** organizations and unless otherwise agreed by the parties, the power to appoint arbitrators is reserved exclusively to the institution. However, the level of discretion may differ. NASD, for example, has set forth an [*449] original procedure to appoint its arbitrators. n28 First, a neutral list of arbitrators generated by a software program is sent to the parties. The program maintains the roster of arbitrators out of a database, on a rotating basis within geographic areas, and excludes arbitrators who may have a conflict of interest. The parties then rank all of the arbitrators on the list they receive according to the additional information furnished by NASD (including employment history of each listed arbitrator for the past ten years and other background information). Finally, NASD ranks the arbitrators by adding the parties' ranking numbers in order to produce a single consolidated classification. NASD then appoints the arbitrator based on its order of ranking in the final consolidated list.

In addition, arbitrators in international cases must be expert and neutral. For instance, arbitrators who are recommended or listed by an institution or a private **arbitration** organization could fulfill certain criteria set forth explicitly by the organization, such as having the requisite legal knowledge and technological skills. Second, in order to increase neutrality, the appointing person or entity could even be replaced by a software program, which would randomly choose the sole arbitrator from a list or pursuant to open criteria, such as skills, availability, languages spoken, similar case history, etc.

In online **arbitration,** we suggest avoiding any type of court intervention in the appointment of the arbitrator and we favor the election of an institution or organization that has a proven record of selecting its arbitrators in a professional, neutral, transparent and even automatic and non-discretionary manner. n29

C. *Nationality of the Arbitrator?*

Neutrality generally indicates a likelihood of impartiality. It generally assumes non-group affiliation, such as nationality. Some international institutions include a clear rule stating that the sole arbitrator shall be chosen from a country other than those of which the parties are nationals. n30 The **UNCITRAL** Model Law took an opposite approach by allowing arbitrators to have the same nationality as that of one of the parties. n31 Should the same rule apply to online international **arbitration?** Will an arbitrator be biased by his own nationality in a series of "small cases" to be handled quickly? As we further suggest, the arbitrator in these cases will have to decide the case using his own discretion and generally without the help of the parties' legal advisors. Therefore, assuming that the applicable law [*450] has been agreed upon by the parties or could be determined easily, n32 should not an arbitrator be chosen according to his knowledge of the applicable law rather than according to the nationalities of the parties? Accordingly, the provisions of the **UNCITRAL** Model Law appear to be the most appropriate and could even be further improved in online **arbitration** by stating that, unless the parties disagree, "the arbitrator shall have a law degree or be admitted to practice law in the jurisdiction of the applicable law."

D. *Challenge of the Arbitrator?*

Impartiality and neutrality are fundamental to international **arbitration.** As a corollary, parties in an online **arbitration** should have a right to challenge the sole arbitrator who is supposed to settle their disputes. Most **arbitration** laws provide that a party can challenge an **arbitration** agreement in the courts. n33 All the major international institutions provide that a challenge to the **arbitration** procedure is to be settled by the institution itself. However, there are reasons, inherent to online **arbitration,** to avoid the process of challenging an arbitrator. Online **arbitration** must be expeditious and economical. Any means to delay the process, making it more onerous, should be avoided. In Sweden, for example, the impartiality or independence of the arbitrator can only be questioned before the court after the award has been made. n34 This minimizes delays in the **arbitration** proceedings. Challenge of the arbitrator, if provided, should be exceptional. One could even imagine a rule giving each party in an online **arbitration**

the right to challenge the appointed arbitrator one time only and at its own expense. Consequently, the institution could immediately replace the arbitrator, hence minimizing delay in the **arbitration.** Another idea would be to encourage arbitrators to disqualify themselves through the implementation of a policy of complete transparency of the awards. n35

E. *Exclusion of Liability?*

Current rules generally protect the arbitrator from any kind of liability, except for fraud or deliberate wrongdoing. n36 If speedy resolution is a priority for online [*451] **arbitration** users, n37 could the arbitrators be held responsible for not rendering an award on time? Obviously, imposing liability for failure to comply with a strict time limit in online **arbitration** would deter a certain number of competent arbitrators from entering such a new industry at their own risk. But along the same lines, shouldn't the arbitrators still be encouraged to comply with the specific requirements of online **arbitration?** Or, said differently and as a practical matter, how can the arbitrators be sanctioned for not complying with these requirements? One possibility, discussed *infra*, is to make the awards available to the public, thus allowing parties to choose the most competent arbitrators according to their "track records."

III. THE SEAT OF **ARBITRATION**

What constitutes the seat of an online **arbitration** is an important issue. It first determines the law applicable to the procedural aspects of the **arbitration,** the *lex arbitri*, which can come into play when the arbitral tribunal seeks the assistance of local courts. It also determines the local courts that will have jurisdiction for setting aside the award. But most importantly, it defines the nationality of the award in the context of the New York Convention. To that effect, the country chosen to be the place of **arbitration** should be one that is a party to the New York Convention. Secondly, courts may vacate the award if its enforcement is contrary to the public policy of that country. n38

In online **arbitration,** the seat of the **arbitration** will just be an invisible legal link to a certain jurisdiction. Most sophisticated parties, who are aware of the implications of the place of **arbitration,** will include an adequate provision in their agreement to arbitrate. They may also engage in some "forum shopping," choosing a place without burdensome public policy. The problem remains for public consumers who may too easily forget that the place of **arbitration** is more than the virtual location where the arbitral procedure should occur and forego the bother of negotiating a suitable jurisdiction to root their eventual future dispute.

In the absence of an agreement among the parties, traditional **arbitration** rules usually contain provisions giving broad powers to the tribunal to establish the place of **arbitration.** n39 The LCIA, however, provides that, unless the parties have otherwise agreed, the place of **arbitration** shall be London. n40 Along the same [*452] lines, private **arbitration** organizations sometimes impose their own seat of **arbitration.** n41

Interestingly, the Council of the European Union enacted in 2000 a regulation on the recognition and enforcement of judicial **decisions** within the European Union. The Council distinguished contracts entered into with consumers. On the one hand, the regulation provides that consumers are given the option to bring their action either in the country where they have their domicile or in the country where the defendant is domiciled. n42 On the other hand, if the consumer is a defendant, the plaintiff can only bring an action in the country where the consumer has his/her domicile. n43

If this rule were to be adopted and deemed mandatory in the field of online **arbitration,** n44 it would protect consumers fairly against e-commerce online service providers' "cherry picking." It would also protect those who do not understand the importance of venue in **arbitration** and would alleviate the arbitrator's task of deciding upon the seat of **arbitration,** in the absence of an agreement.

IV. APPLICABLE LAW

The choice of law can be a serious issue in traditional **arbitration.** Even though most problems are solved through party autonomy or the pragmatism of the arbitrators, some difficulties may arise when the contract itself is attacked as invalid or if substantial issues have to be settled under different rules of law. n45

Online international **arbitration** cannot bear the costs of protracted argument on the issue of applicable law, allowing practices such as "*depecage*" or any other complex doctrine of private international law. The applicable law issue in online disputes should be solved *prima facie* and according to simple and automatic rules.

Traditional institutions do not offer adequate rules concerning choice-of-law issues. The **UNCITRAL Arbitration** Rules state that, unless agreed upon by the parties, the tribunal shall apply the law determined by "the conflicts of laws

rules, which it considers applicable." n46 Similarly, the ICC **Arbitration** Rules provide that [*453] the tribunal shall determine the "rules of law which it determines to be appropriate." n47

On the other hand, the LCIA provides an innovative and simple rule. This rule could be used for online **arbitration** because it states that, unless the parties have otherwise agreed and unless this agreement is not prohibited by the law of the arbitral seat, "the law applicable to the **arbitration** shall be the applicable law of the seat of **arbitration.**" n48

Another solution would be to impose on the parties in an online **arbitration,** or at least to suggest to them, that they give the arbitrator the powers of an "*amiable compositeur*," thus applying an international *lex mercatoria.* Traditional institutions generally provide for this form of settlement, upon the condition that the parties expressly agreed to it. This rule could even be mandatory in consumer **arbitration** agreements, allowing the arbitrator to settle the dispute in a fair and equitable manner rather than according to a law that might be very different from what the consumers would have expected.

Finally, the ICC recognized in 2001 that the issues of jurisdiction and choice of law had to be improved in order to avoid expansive and complex jurisdictional claims, particularly in Business to Consumer ("B2C") online disputes where the public policy rules may differ or be contradictory from one country to another. n49 Therefore, the following guidelines are recommended:

> 1. Governments should support the principle of "party autonomy" as a basis for all commercial law. Limits to the applicability of this principle, such as public policy rules that generally appear in B2C transactions, should be kept to a minimum.
> 2. The "country-of-origin" principle should be preferred over other solutions. Currently, some countries are governed by the "country of destination," which provides that the applicable law and the court with jurisdiction are those where the consumer resides in the event of a B2C cross-border dispute. The ICC, points out logically that first, this principle increases the costs on business to comply with the laws of each country of destination, thus increasing the final costs for consumers and second, exacerbates its complexity when the country of residence is difficult to locate due to interposing technologies or digital payment procedures. However, the ICC remains silent on the definition of "country of origin." Is it the country where the goods or services [*454] originate or the country where the e-commerce service provider is incorporated?
> 3. Finally, the ICC recommends that governments allow more self-regulation to demonstrate its efficacy. It believes that increased competition will result in a race to excellence as companies develop their online brands in order to ensure consumer confidence. According to the ICC, self-regulation means allowing companies to create their own dispute resolution mechanisms, such as Ford and its CIArb-Ford Rules, or through other institutions from the private sector, such as the ICC, which is currently undertaking to devise a mechanism to facilitate international B2C online dispute resolution.

In the areas of venue and applicable law in online international **arbitration,** one can sense that the solutions offered are numerous and diverse. However, most of them tend to simplify the rules traditionally used in international **arbitration.** It appears then difficult to predict what the most appropriate rule should be. But analyzing the results of self-regulatory mechanisms, such as the ones established by CIArb or soon, the ICC, should direct us towards the right solution.

V. **ARBITRATION** COSTS -- "PROHIBITIVELY EXPENSIVE" **ARBITRATION** SHOULD NOT BE ENFORCEABLE

In a case brought by a consumer against Gateway, the Appellate Division of the Supreme Court of New York found that the costs of an ICC **arbitration** were "excessive," n50 "unreasonable and surely served to deter individuals from invoking the process." Thus, the portion of this ICC **arbitration** clause was held "unconscionable" and the case was remanded to a lower court to provide the parties with "appropriate substitution" of an arbitrator pursuant to the FAA.

Even though the **decision** of the judge to order ad hoc **arbitration** under the FAA can be criticized, n51 the unreasonableness of the **arbitration** costs in a consumer dispute, as a ground for unenforceability of an **arbitration** agreement, appears to have been upheld by the Supreme Court in *Green Tree Financial Corp. v. Larketta.* n52 Defendants were individuals who had entered into an **arbitration** agreement providing for ad hoc **arbitration** under the FAA while remaining silent with regard to the costs of **arbitration.** The court ruled that "a party seeking to invalidate an **arbitration** agreement on the ground that **arbitration** would be [*455] prohibitively expensive...bears the burden

of showing the likelihood of incurring such costs." In that case, defendants did not meet that burden. Thus, a "mere risk" of incurring prohibitive costs is not sufficient ground for invalidating an **arbitration** clause.

Consequently, as **arbitration** costs may invalidate the **arbitration** agreement, we should first analyze the fees offered by the traditional institutions in the case of "small" claims before suggesting a scale of "reasonable" fees in online international **arbitration.**

The UNCITRAL Rules provide that the arbitral tribunal is free to decide upon its own fees, provided they are "reasonable" and pursuant to a schedule of fees set forth by the appointing authority. n53 Ad hoc **arbitration** also allows the tribunal to grant the relief it regards as appropriate and it can therefore include the costs of the victorious party. The ICC, on the contrary, supervises the **arbitration** fees. First, a registration fee of $ 2,500 is payable by the requesting party, then administrative expenses and arbitrator's expenses are calculated according to a scale starting for each of these two costs at $ 2,500. Arbitrator's fees and expenses are fixed exclusively by the institution. In any event, the registration fee cannot be recovered by the victorious party.

Conversely, NASD and CIArb, for instance, have set forth rules more appropriate to small claims **arbitration.** The NASD Code of **Arbitration** scale starts at $ 50 for a claim under $ 1,000. n54 The CIArb -- Ford Rules set forth a fixed registration fee of £ 100 per claim. The rest of the administrative expenses, including the maintenance of the service, is born by Ford, CIArb's main sponsor and party to the **arbitration** processes. n55

Supposedly, online international **arbitration** is meant to reduce a certain number of expenses (travel, telephones...). Its objectives are also to cut down the registration fee by virtue of its standardized and computerized process, and to reduce the arbitrator's fee, considering the lack of complexity of most of the cases that should be presented. Parties to an online **arbitration** should not have "unpleasant" surprises with regard to procedural expenses. A clear and reasonable schedule of fees should be easily available to the parties. Finally, we could also imagine a mandatory rule entitling public consumers to recover their expenses on set fees if they win an online **arbitration.**

[*456] VI. TIME LIMITS

The Internet's revolutionary feature is undoubtedly its rapidity. Internet users have become accustomed to concluding transactions in just a few seconds, without wasting time in transportation, or in long and sometimes useless polite presentations in person or even over the phone.

Not surprisingly, promptness and speed are also among the main advantages offered by traditional **arbitration.** In other words, **arbitration** is much faster than a judicial process that can sometimes last several years. Similarly, online **arbitration** will be equally fast, if not faster. To date, well-known international institutions generally provide time limits to be followed by the parties or the arbitrator, but they basically lack coercive effect. Tribunals or institutions are generally free to extend these time periods and clients can see their case last several years. Time limits imposed on the parties to appoint or agree on their arbitrators may vary from 30 days to 45 days. n56 Communications between the parties should not last more than 45 days under the **UNCITRAL** Rules, n57 but parties are generally not limited in the number of replies they may submit, unless the tribunal has decided otherwise. Finally, time constraints on the rendering of an award may vary from six months under the ICC Rules to an unlimited period of time under the **UNCITRAL** Rules. n58

In online **arbitration,** parties should be able to rely on strict time limits imposed on the arbitrators, the institution and the parties themselves. These time limits must be reduced given the absence of a need for a visit of the tribunal to the territory in dispute, face-to-face hearings, and asynchronous communications. n59 Private online **arbitration** service providers tend to impose time limits throughout the procedure: response to the claim, number of subsequent responses between the parties, presentation of the parties' final statements and finally, a time limit on the arbitrator to render his/her award once the parties have submitted their final statements or final documentation. n60

[*457] Most of these new rules have reduced the traditional powers of the arbitrators to decide upon the time period they need to solve the dispute. However, such rules still lack two necessary features for online **arbitration** to be fully efficient: sanctions on the parties n61 and incentives for the arbitrators to comply with time limits. In practice, one solution to obtain suitable compliance by the arbitrator could be by allowing more transparency in the process, thus permitting the parties to reject one arbitrator should his "track record" not be satisfactory. n62

VII. EVIDENCE

Evidentiary rules in international online **arbitration** will drastically differ from those of traditional **arbitration** due to a higher technological component: hearings will not be held on a face-to-face basis and transmission of evidence will take place electronically or digitally. Finally, this section will examine the necessity of requiring a form of "Terms of Reference" in online **arbitration.**

A. *Hearings?*

Online international **arbitration** is meant to spare the parties the necessity of traveling or the bother of wasting time by being present throughout the procedure. Face-to-face hearings are one of the traditional elements that could slow down or increase the costs of an online **arbitration.** A question must be answered first: is a face-to-face hearing a basic concept of due process?

Shortly after the U.S. Supreme Court's **decision,** *Goldberg v. Kelly,* n63 holding that the due process clause of the U.S. Constitution prohibits termination of social benefits without a hearing, Judge Henry Friendly wrote an article suggesting eleven requirements of procedural due process that can be applied to adjucative procedures. n64 These elements were established in order of importance. As a result, the right to a face-to-face hearing appears to be included in the fourth element, *i.e.* the opportunity to present evidence, including witnesses, thus giving it a rather significant importance among the fundamental elements of due process.

[*458] However, some authors have noted that an increasing number of judicial and administrative proceedings allow witnesses to testify via videoconference or video recording. n65 And as the Internet provides the transfer of video and audio data, it appears feasible to include these technologies in online **arbitration.**

Traditional international institutions provide a mandatory hearing if one party requests it. n66 This provision could be fatal to online **arbitration** by allowing the stronger party, which probably also drafted the **arbitration** clause, to ask for a hearing, and hence increasing the costs as well as delays for the weaker plaintiff.

The LCIA revolutionized this area by providing that parties could agree to a documents-only procedure, hence prohibiting face-to-face hearings in that scenario. n67

NASD and ICANN went even further when the former provided that only public consumers are entitled to a hearing, provided that their claims are under $ 25,000. n68 ICANN specifically stated that "there shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the panel determines in its sole discretion and as an exceptional matter that such a hearing is necessary for deciding the complaint." n69

Face-to-face hearings, even though materially feasible in online **arbitration,** should be deemed exceptional. Every online **arbitration** organization should incorporate such a rule and their clients should be well aware of it.

B. *Transmission of Evidence?*

Some authors have suggested that online dispute resolution providers will use as a means of transmitting evidence and communicating, not only e-mails, but also more visual displays such as diagrams, graphs, charts, figures, pictures or audio and video information through software now available to the public. n70

Virtual private meeting rooms on the Internet should also be helpful in organizing exchanges and meetings and providing a certain security for the parties by allowing access only to persons with a password.

[*459] In this area, international **arbitration** rules are generally rather flexible. They either allow the tribunal to decide upon the means of communication to be used between the parties and the arbitrators, provided that the parties are treated equally, n71 or, specifically allow the use of electronic forms, provided that it can acknowledge the sending. n72

However, online **arbitration** service providers could go even further by providing in their own rules the mechanisms that the parties will have to use to transmit their evidence and statements, provided that the parties are treated equally and have equal access to the information sent. The CIArb, for instance, has chosen e-mail as the sole way to transmit evidence. However, its rules provide that if the claimant has no Internet access, he will be allowed to submit written documentation. n73

C. *Terms of Reference?*

Should the Terms of Reference be banned in online **arbitration** disputes? The Terms of Reference are a pure and unique product of the ICC. The document called "Terms of Reference" is filed prior to any hearing on the merits. It must include a summary of the parties' respective claims and the issues in dispute. It must be signed by the parties and the arbitrators and finally approved by the institution. n74 It is generally binding on the parties, who are not allowed any additional claims. n75 Although the Terms of Reference procedure as a prerequisite to **arbitration** is still a controversial issue, a broad drafting of its provisions should allow sufficient flexibility to the process. n76 In fact, the Terms of Reference could be a very suitable feature to online **arbitration.**

As NASD provides in its rules, one could imagine that a claimant files a form that contains a list of possible claims. n77 This list could establish certain categories of claims such as "breach of contract," "breach of fiduciary duties," "incorrect quantity delivered," "failure to execute" in order to facilitate the arbitrator's work and allow him to file the Terms of Reference limiting the dispute to the respective legal claims of the parties. This selection of claims could also be improved [*460] through the use of a software program that could characterize the claims as soon as the table has been filled out by the plaintiff. Finally and most importantly, in a quick settlement procedure, terms of reference will be binding on the parties, thus prohibiting them from bringing other claims in the course of the **arbitration.**

VIII. THE AWARD

Considering that all communications in online disputes will be allowed to take place electronically, what form should the award take? And as in traditional **arbitration,** should it be final and binding among the parties? These are the main issues relating to the award in international online **arbitration.**

A. *Form?*

As to the form of the award, two issues can be relevant to online international **arbitration:** should the requirements of the New York Convention be updated? And does the award have to be made at the place of **arbitration?**

As to the first issue, the New York Convention stipulates in Article IV that an award must be duly authenticated. If it is not made in the language of the country in which the award is relied upon, the party applying for its enforcement must produce a certified translation of the award. Obviously, these requirements may be burdensome and costly for the party wishing to enforce an award rendered in an online **arbitration.** However, awards constitute an essential element of the dispute and such requirements attempt to protect parties from any type of fraud or false documentation.

One can also easily predict that local laws will increasingly permit the authentication of an electronic signature, hence allowing arbitrators to send their award electronically with a duly authenticated signature. But, until all countries have adopted this type of rule, arbitrators will still have to continue to sign their award manually in compliance with the New York Convention requirements. n78

Regarding the place where the award has to be made, the ICC Rules and the **UNCITRAL** Model Law, for instance, provide that the award "shall be deemed to be made at the place of the **arbitration.**" n79 In other words, it can be made anywhere as long as it states the place of **arbitration.** In the virtual world of online **arbitration,** this rule should be expressly set out in order to avoid any kind of [*461] confusion at the time of enforcement and pursuant to Art. V(1)(a) and (e) of the New York Convention. n80

B. *Final and Binding?*

Supposedly, in traditional international **arbitration,** an award is final and binding and parties will have waived their right to any type of recourse. n81 Nevertheless, in England, the **Arbitration** Act 1996 contains a surprising clause that allows parties to agree not to be bound by the award. n82 The CIArb, which decided to incorporate the **Arbitration** Act 1996 into its rules, adopted an innovative rule under which the award is binding on Ford, the defendant, whereas claimants have an absolute right to reject it. n83

Every consumer-merchant online **arbitration** claim should differentiate the effect of the award among the parties. Furthermore, it should take into account the fact that if the claim is small the consumer will be unlikely to reject the award, even though he may feel he has not gotten all he deserves through the **arbitration** process.

Interestingly, based on the ICANN Uniform Domain Name Dispute Resolution Policy, effective since December 1999, one author has suggested that an appellate panel should be able to review the **decisions** rendered. n84 Other authors are now expressing their views on applying this principle to online **arbitration.** n85

Finally, given the main objectives of online **arbitration** (speed, economy and efficiency), **judicial review** of the award should be very limited. Parties could waive their rights to judicial recourse (including setting aside and enforcement of the award). Evidently, the treatment of the waiver will depend mostly on the law [*462] of **arbitration** (setting aside procedure) or the law where enforcement of the award is sought.

IX. CONFIDENTIALITY

While traditionally **arbitration** has been confidential, does current technology allow confidentiality in online **arbitration?** And assuming that it is feasible, is it advisable?

A. *Technologically Feasible?*

The problems facing online **arbitration** are similar to the problems facing e-commerce. Online **arbitration** must be concerned with unauthorized access, confidentiality, identity verification, service denial, crash of the system, and viruses. In this area, e-commerce service providers are well aware of these problems and have already developed technological solutions such as encryption, n86 firewalls against viruses or systems for backing up of information. These techniques are also available in online **arbitration.** But, because of the rate at which technology changes, institutions or arbitrators if they are ad hoc, should stay attuned to the relevant changes and update their technology from time to time.

Regarding the strict confidentiality issue, no e-commerce service provider can guarantee 100% security. But one must keep in mind that in traditional **arbitration** proceedings, 100% confidentiality cannot be guaranteed either.

Additionally, one author n87 believes that at least two legal regimes may also protect the confidentiality of online **arbitration:** national public laws, which prohibit third-party interception of electronic communications n88 and private agreements between the parties.

B. *Advisable?*

Frequently, private corporations choose **arbitration** solely based on the notion that private facts will remain confidential. Confidentiality is generally the rule [*463] promulgated by most of the large international **arbitration** institutions, and if not explicitly stated, implicitly adopted. n89

Nevertheless, some authors believe that e-commerce disputes should not be treated in a similar manner, but should be made available to the public. n90 They suggest that awards, which should be reasoned, be posted on the institution's website or on the website of the arbitrator in the case of an ad hoc arbitrator. n91 The first reason is that the publication of reasoned awards will create precedents in areas where the law is sometimes non-existent, hence contributing to the evolution of a "customary Law of Cyberspace," a sort of "e-commerce *Lex Mercatoria.*" Second, by permitting the comparison of online arbitrators' reasoned awards and thus legitimizing the good e-arbitrators and rejecting the bad ones, disclosure of awards could help impose transparency on their work. Third, publishing online **arbitration** awards could help not only business institutions, but also consumers who would be able to decide with greater information whether to request **arbitration** or settle. n92

Interestingly, under the ICANN Rules for Uniform Domain Name Dispute Resolution Policy, all **decisions** rendered by the **arbitration** panels are published on the ICANN website. n93 Additionally, NASD has introduced in its Code of **Arbitration** a clause promoting transparency. This provision states that all the awards must be published. n94 In furtherance of this principle, NASD announced that since June 2001, it had made its vast library of **arbitration** awards available online. n95 Finally in 2002, the American Bar Association recommended that regular periodic statistics without any personal identifiable information be [*464] published online to permit a meaningful evaluation of the proceedings (at least in B2C disputes). n96

As a newborn activity, we also believe that both merchants and consumers will have to trust online **arbitration.** Therefore, transparency appears to be the key in reaching this objective.

X. CONCLUSION

As e-commerce grows, so will the number of online disputes. Consequently, we strongly believe that online **arbitration** will satisfy the need for settlement in this new type of dispute. The main objectives of online **arbitration** are speed, economy and efficiency. Its main characteristic is to allow the resolution to take place online, starting the

second the request is sent, followed by the communication of documents between the parties and the arbitrator and ending by the delivery of the award. As the internet is inherently global, any online **arbitration** system will have to include an international dimension. So far, the existing international rules of **arbitration** do not conform to current online trading practices and expectations of internet users. The New York Convention must be interpreted broadly in order to avoid the risk of uncertainty and contradictory interpretations by national jurisdictions of the expression "in writing" in relation to the electronic signature. A sole arbitrator should decide the dispute, provided that the rules provide for a limit on the amount of the claim. Party-appointed arbitrators should be avoided and the institution/organization should choose the arbitrator according to specific criteria and in a neutral manner. Concerning the seat of **arbitration** and applicable law, the rules should be simplified to enhance predictability and certainty. Costs of **arbitration** should be low in order to avoid the risks of invalidity of the **arbitration** agreement. Online **arbitration** users have to believe that the process will take place as quickly as possible in order to obtain a quick injunction or compensatory damages. Therefore, arbitrators should be encouraged to comply with time limits required by such a fast-track process. As for the evidence, face-to-face hearings should be the exception, because transmission of evidence will essentially be executed electronically. The award could be final and binding and parties may waive their rights to any other judicial recourse, hence minimizing the delays and the costs of the proceeding. Finally, reasoned awards should be published online in order to develop a "customary law of the Cyberspace" and to allow a transparent legitimization of this revolutionary form of dispute resolution.

FOOTNOTES:

n1 The Government of the UK announced on February 4, 2002 the existence of a new cyber court for debt recovery, called "CourtService," *available at* www.courtservice.gov.uk/mcol (last visited March 14, 2003).

n2 The Michigan Cyber Court House Bill 4140 was passed in November 2001 and signed into law on January 9, 2002, *available at* http://198.109.173.11/documents/2001-2002/publicact/pdf/2001-PA-0262.pdf (last visited March 14, 2003).

n3 American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Final Report, Aug. 2002, *available at* http://www.law.washington.edu/ABA-eADR/documentation/docs/FinalReport102802.pdf (last visited March 19, 2003).

n4 *E.g.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958, 21 U.S.T. 2517 (1970) ("New York Convention"), the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law and **Arbitration** Rules (the "**UNCITRAL** Model Law"), the U.S. Federal **Arbitration** Act ("FAA"), the Rules of the International Chamber of Commerce ("ICC"), the Rules of the American **Arbitration** Association ("AAA") or the Rules of the London Court of International **Arbitration** ("LCIA").

n5 New York Convention, Art. II(2).

n6 *See, e.g.*, Electronic Signatures and Global and National Commerce Act (U.S.), 15 U.S.C.S. § 7001(a)(1): "a signature, contract or other record relating to such transaction may not be denied effect, validity, or enforceability solely because it is in electronic form"; Art. 1316-4 of the Civil Code and its decree No. 2001-272, dated March 30, 2001 (Fr.).

n7 15 U.S.C.S. § 7001(c)(1) (2001), *e.g.*, prior consent from the consumer to such use; providing information to the consumer of his right to have the record made available on paper; right of withdrawal of such consent; form of consent that demonstrates that the consumer can access information in electronic form.

n8 Electronic Commerce Act (2000) (Ir.).

n9 German Code of Civil Procedure (1998), Sec. 1031(5) (amended in 2001 to allow for electronic form).

n10 Jana Arsic, *International Commercial **Arbitration** on the Internet*, 14(3) J. INT'L ARB. 216 (1997); Richard Hill, *On-line **Arbitration:** Issues and Solutions*, 15 ARB. INT'L 199 (1999), *available at* http://www.umass.edu/dispute/hill.htm (last visited March 14, 2003).

n11 Hill, *supra* note 10 at 2.

n12 *Report of the Working Group on **Arbitration** on the Work of its Thirty-Third Session (Vienna, 20 November -- 1 December 2000),* **UNCITRAL,** A/CN.9/485 *available at* www.**uncitral.**org/english/workinggroups/wg_arb/485e.pdf (last visited June 17, 2003).

n13 *Report of the Working Group on **Arbitration** on the Work of its Thirty-Fourth Session, (Vienna, 25 June -- 13 July 2001),* **UNCITRAL,** A/CN.9/487 *available at* www.**uncitral.**org/english/sessions/unc/unc-34/487.pdf (last visited June 17, 2003).

n14 *Model Law on Electronic Signatures,* **UNCITRAL** (July 5, 2001), *available at* www.**uncitral.**org/english/texts/electcom/ml-elecsig-e.pdf (last visited June 17, 2003).

n15 *Report of the Working Group, supra* note 13.

n16 *Id.* Proposal for an Article 7(3) of the **UNCITRAL** Model Law: "For the avoidance of doubt, the writing requirement in paragraph (2) is met if the **arbitration** clause or **arbitration** terms and conditions and any **arbitration** rules referred to by the **arbitration** agreement are in writing, notwithstanding that the contract or the separate **arbitration** agreement has been concluded orally, by conduct or by other means not in writing."

n17 *Id.*

n18 *Report of the Working Group on **Arbitration** on the Work of its Thirty-Third Session (Vienna, 20 November -- 1 December 2000), supra,* note 12.

n19 *Report of the Working Group on **Arbitration** on the work of its Thirty-Fourth Session, (Vienna, 25 June -- 13 July 2001), supra,* note 13.

n20 **UNCITRAL ARBITRATION** RULES, Art. 7.

n21 The NASD does not provide for online **arbitration.** It is not meant to be an international **arbitration** institution, but is governed by the FAA, which includes in Chapter 2 the implementation of the New York Convention.

n22 NASD CODE OF **ARBITRATION,** Rule 10302, *available at* http://www.nasdadr.com/arb_code/arb_code.asp (last visited March 14, 2003).

n23 *Id.,* Rule 10036.

n24 The Rules of the Independent Dispute Resolution Service for Purchasers from Ford Journey, *available at* https://www.arbitrators.org/fordjourney/rules.htm (last visited March 14, 2003).

n25 AMERICAN **ARBITRATION** ASSOCIATION (AAA) INTERNATIONAL RULES OF 1997, ART. 6.

n26 INTERNATIONAL CHAMBER OF COMMERCE (ICC) **ARBITRATION** RULES, ART. 8.

N27 **ARBITRATION** RULES OF THE LONDON COURT OF INTERNATIONAL **ARBITRATION** OF 1998 (LCIA), ART. 6.

n28 NASD CODE OF **ARBITRATION,** Art. 10308.

n29 *See* **UNCITRAL** MODEL LAW, Arts. 6 and 11.

n30 ICC **ARBITRATION** RULES, Art. 9 (which provides an exception if neither party objects); LCIA, Art. 6.

n31 **UNCITRAL** MODEL LAW, Art. 11.

n32 *See infra.*

n33 Even in the U.S., although the Federal **Arbitration** Act (FAA) does not explicitly provide for a challenge procedure before the courts. *See* TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL **ARBITRATION** 380 (1999).

n34 *Id.* at 381.

n35 *See infra.*

n36 *See, e.g.,* ICC **ARBITRATION** RULES, Art. 35; LCIA, Art. 31.

n37 *See infra.*

n38 New York Convention, Art. V(2)(b).

n39 *See, e.g.,* **UNCITRAL ARBITRATION** RULES, Art. 12; ICC **ARBITRATION** RULES, Art. 14(1).

n40 LCIA, Art. 16(1).

n41 *See, e.g.,* CIARB -- FORD RULES, Art. 6(1).

n42 Council Directive No. 2000/31/EC defines the domicile of a company providing services via an Internet website as the "place where it pursues its economic activity" and not the place at which the technology support is located, nor the place at which its website is accessible.

n43 EU Council No. 44-2001, JOCE L 12, 1 (Jan. 16, 2001).

n44 Which is not the ICC's recent point of view. *See infra.*

n45 Technique known as "*depecage.*"

n46 **UNCITRAL ARBITRATION** RULES, Art. 33.

n47 ICC **ARBITRATION** RULES, Art. 17(1).

n48 LCIA, Art. 16(3).

n49 ICC, Policy Statement on Jurisdiction and Applicable Law in Electronic Commerce (June 6, 2001), *available at* http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp (last visited March 14, 2003).

n50 Brower v. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (1st Dept. 1998).

n51 *See* Hans Smit, *May an* ***Arbitration*** *Agreement Calling for Institutional* ***Arbitration*** *Be Denied Enforcement because of the Cost Involved?*, 8 AM. REV. INT'L ARB. 167, 169-70 (1997).

n52 531 U.S. 79, 92 (2000).

n53 **UNCITRAL ARBITRATION** RULES, Art. 40.

n54 NASD CODE OF **ARBITRATION,** Art. 10332 (including a $ 25 claim filing fee as a hearing session deposit).

n55 This solution could lead to serious conflicts of interest.

n56 ICC **ARBITRATION** RULES, Art. 8(3); LCIA, Art. 5(4) and **UNCITRAL ARBITRATION** RULES, Arts. 5 and 6.

n57 **UNCITRAL ARBITRATION** RULES, Art. 23.

n58 An ICC tribunal managed to impose a "fast track procedure" in 60 days through its terms of reference which were approved by the ICC with the draft of the award. *See* Hans Smit, *Fast-Track* ***Arbitration,*** 2 AM. REV. INT'L ARB' 138 (1991). However, this procedure requires a strict condition: it still needs to be mutually agreed by the parties and the arbitrators.

n59 *See infra.*

n60 The CIArb -- Ford Rules provides that the sole arbitrator should render his/her award in less than 15 days after delivery of all relevant documentation. *See* CIARB-FORD RULES, Art. 2. The whole procedure in that case should be limited to 60 days; the NASD Rules offer a simplified procedure that can last up to 55 days. *See* NASD CODE OF **ARBITRATION,** Art. 10302.

n61 *See* controversial ***UNCITRAL*** *Notes on Organizing Arbitral Proceedings,* Art. 13 (1996). A sanction for a party unwilling to comply with online **arbitration** could be the disclosure of its refusal on a webpage available to the public, hence hurting the dissenting party's reputation in its ability to defend him or herself.

n62 *See infra.*

n63 397 U.S. 254 (1970).

n64 Henry J. Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267 (1975).

n65 Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR,* 15 OHIO ST. J. ON DISP. RESOL. 675, 680 (1999).

n66 *See, e.g.,* ICC **ARBITRATION** RULES, Art. 20(6); **UNCITRAL ARBITRATION** RULES, Art. 15.

n67 LCIA, Art. 19.

n68 NASD CODE OF **ARBITRATION,** Art. 10304.

n69 Internet Corporation for Assigned Names and Numbers, Rules for Uniform Domain Name Dispute Resolution Policy, Art. 13, *available at* http://www.icann.org/udrp/udrp-rules-24oct99.htm (last visited March 14, 2003).

n70 Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of 'eBay Law,'"* 15 OHIO ST. J. ON DISP. RESOL. 705, 723 (2000).

n71 *See* **UNCITRAL ARBITRATION** RULES, Art. 15.

n72 *See* ICC **ARBITRATION** RULES, Art. 3(2).

n73 CIARB-FORD RULES, Art. 1(6).

n74 ICC **ARBITRATION** RULES, Art. 18.

n75 Except if it has been authorized by the tribunal, "which shall consider the nature of such claims or counterclaims, the stage of the **arbitration** and other relevant circumstances," ICC **ARBITRATION** RULES, Art. 19.

n76 *See* J. Gillis Wetter, *The Present Status of the International Court of **Arbitration** of the ICC: An Appraisal*, 1 AM REV. INT'L ARB 91, 101-2 (1990).

n77 NASD Uniform Forms Guide, Claim Information Sheet, *available at* http://www.nasdadr.com/pdf-text/uniform_forms_guide.pdf (last visited March 14, 2003).

n78 At least the parties to the New York Convention.

n79 ICC **ARBITRATION** RULES, Art. 25(3); **UNCITRAL** MODEL LAW, Art. 31(3).

n80 These provisions state that the law of the country "where the award was made" should apply. This could create some confusion for the judges in charge of enforcing the award if the place where the award was made was different from the seat of **arbitration.**

n81 *See* ICC **ARBITRATION** RULES, Art. 28(6); **UNCITRAL ARBITRATION** RULES, Art. 32(2).

n82 **Arbitration** Act 1996, Art. 58 (U.K.).

n83 *See* CIARB - FORD RULES, Art. 2(1); one must note that the award under the CIArb-Ford Rule is not final and that both parties are entitled to appeal it before the courts, CIARB - FORD RULES, Art. 2(10).

n84 Scott Donahey, *A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy*, 18(1) J. INT'L ARB. 131 (2001).

n85 *See* Philippe Mireze, *Where is Everyone Going with Online Dispute Resolution (ODR), available at* http://www.ombuds.org/cyberweek2002/library/ODR_MirezePhillipe.doc, then click on "Where is Everyone Going with Online Dispute Resolution (ODR)" (last visited March 14, 2003).

n86 Encryption technology provides a code which should render difficult any unauthorized interception.

n87 Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, **Arbitration** and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 775-777.

n88 *See, e.g.*, Electronic Communication Privacy Act § 18 U.S.C. § 2510 (1994 & Supp. IV 1993).

n89 *See* ICC **ARBITRATION** RULES, Art. 35; LCIA, Art. 30(3); **UNCITRAL ARBITRATION** RULES, Art. 32.

n90 *See also* Tricia A. Hoefling, *The (Draft) Wipo **Arbitration** Rules For Administrative Challenge Panel Procedures Concerning Internet Domain Names*, 8 AM. REV. INT'L ARB. 173 (1997); Julia Hornle, *Online Dispute Resolution in Business to Consumer E-Commerce Transactions*, JOURNAL OF INFORMATION LAW AND TECHNOLOGY (2002), *available at* www.icann.org/dndr/udrp/uniform-rules.htm (last visited March 14, 2003).

n91 *Supra*, note 87 at 791-92.

n92 *Id.* at 788.

n93 *See* ICANN Rules for Uniform Domain Name Resolution Policy, Art. 16(b), *also available at* http://www.icann.org/dndr/udrp/uniform-rules.htm (last visited March 14, 2003).

n94 NASD CODE OF **ARBITRATION,** Art. 10330.

n95 NASD Dispute Resolution To Provide **Arbitration** Awards Online, NASD Release (May 10, 2001), *available at* http://www.nasdadr.com/news/pr2001/ne_section01_019.html (last visited March 14, 2003).

n96 American Bar Association Task Force on ECommerce and ADR, Recommended Best Practices for Online Dispute Resolution Service Providers, *available at* http://www.law.washington.edu/ABAeADR/documentation/docs/BestPracticesFinal102802.pdf (last visited March 14, 2003).