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DISPUTE SETTLEMENT

INTERNATIONAL COMMERCIAL ARBITRATION

5.9 Electronic Arbitration

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NOTE

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

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TABLE OF CONTENTS

WHAT YOU WILL LEARN

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

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

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

1. DISPUTE RESOLUTION METHODS IN ELECTRONIC COMMERCE

1.1 Introduction

Electronic commerce operations are based on contracts concluded electronically between "absent" co-contractors (i.e. those who do not physically meet). The conclusion of an electronic contract is often prolonged by the electronic execution of the contract, which consists of opening access to a database, downloading software and transmitting an item of information. These electronic operations can give rise to disputes, just as in traditional commerce. A co-contractor might complain of poor execution of the contract, stating that the goods that were ordered electronically, for delivery by traditional logistical means, arrived in a damaged condition or did not conform. Another complaint might be that, at the time when a contract was to be executed electronically, a transmission error occurred, impeding access to the information. The service was thus not provided or the non-physical object of the contract was not delivered.
The electronic network on which co-contractors "meet" may also give rise to more specific disputes relating to the use of computer resources. For example, a client might not have sent his/her electronic acceptance of a contract offer immediately, yet maintains that the contract exists, whereas the offerer might claim to have retracted the offer before it was accepted.

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

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

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

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[1] *UNCTAD,* E-Commerce and Development Report 2001*, New York, 2001, esp. p. 99*

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

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

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

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

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

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

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

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

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

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

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