

# CERTAIN ASPECTS OF ONLINE ARBITRATION

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## **Abstrakt v rodném jazyce**

V 90. letech minulého století došlo k obrovskému vývoji internetu, což vedlo ke vzniku nových druhů právních sporů, ale také k vytvoření nových nástrojů, které zjednodušují mechanismy řešení těchto sporů. Cílem tohoto příspěvku je analyzovat nedostatečnost použití tradičních způsobů řešení sporů v kyberprostoru a vhodnost použití alternativních, popř. online způsobů řešení sporů, zvláště arbitráže, v této oblasti. Příspěvek se snaží identifikovat potenciální právní problémy a překážky týkající se online arbitráže a navrhnout možná řešení těchto problémů.

## **Klíčová slova v rodném jazyce**

Online arbitráž, online řešení sporů, New Yorská úmluva, online rozhodčí smlouva, online rozhodčí nález, vykonatelnost.

## **Abstract**

There has been a great evolution of internet in the 90's of the last century, which have given rise to new types of legal conflicts, but at the same time it has created new tools which can simplify the dispute resolution mechanisms. This contribution analyzes why the traditional dispute resolution mechanisms are not suitable for cyberspace and suggests that the alternative or online dispute resolution, especially arbitration, is better suited for these purposes. It is trying to identify legal problems concerning online arbitration and suggest possible solutions.

## **Key words**

Online arbitration, online dispute resolution, New York Convention, online arbitration agreement, online award, enforceability.

## **1. INTRODUCTION**

There has been a great evolution of internet and other communication technologies in the 90's of the last century. The abolition of borders in markets because of Internet led to an enormous development of e-commerce and had an influence on the legal world. The new technologies have given rise to new types of legal conflicts and increased the complexity of traditional conflicts. On the other hand, it has created new tools which have a potential to significantly simplify not only the transactions but also the dispute resolution arising therefrom. The use of these new tools may be a source of legal uncertainty. This contribution analyzes why the traditional dispute resolution mechanisms are not suitable for cyberspace and suggests that the alternative or online dispute resolution, especially arbitration, is better suited for these purposes. Nevertheless these new mechanisms cannot exist in vacuum and have to be reconciled with existing legal framework. The contribution is therefore trying to identify legal problems concerning the online arbitration and suggest possible solutions.

## 2. UNSUITABILITY OF STATE SYSTEM OF COURTS FOR ONLINE DISPUTES

The state system of courts is not a suitable system of online dispute resolution. Four main problems can be identified as regards the use of court dispute settlement in this area<sup>1</sup>. First problem is the inadequacy of current private international law when applied to delocalized online disputes, which are difficult to reconcile the concept of jurisdiction and the concept of choice of law. The second problem is the inability and unwillingness of judges to follow rapid technological and procedural changes and accordingly develop their skills. Third problem is connected with long delays in the court litigation and the fourth problem includes high costs thereof. To put it in other words, the court system of dispute resolution lacks the specialization, speed and flexibility necessary for resolution of online disputes.

According to the private international law the conflict rules lead to the application of national law to international problems. The national law has been developed for national, not international situations, and therefore it cannot always provide answers to international business problems. Moreover, the connecting factors of the private international law do not count with cyberspace realities<sup>2</sup>.

According to conflict rules the determination of jurisdiction and decision of law for a dispute is based on the localization of the dispute. In the e-commerce, nevertheless, places are practically unallocated. Therefore in e-business disputes even the preliminary issues, such as the assertion of the jurisdiction and choice of law, become very complicated and unpredictable.

Let us take the EU law as an example. The Brussels I regulation<sup>3</sup> sets the rules for determination of jurisdiction. The basic rule provided for in Article 2(1) is that the court of the Member State where the defendant is domiciled has jurisdiction. But what if the defendant is domiciled in one state, but the contract was entered into via Internet subsidiary registered in another state through a webpage with domain name www.co.uk or www.en.fr? What if the defendant is domiciled out of the EU, but has a subsidiary in the EU? The rule provided for in Art. 5 (1) of the Brussels I regulation is of no help either. Is the performance according to which the jurisdiction would be determined a sale of goods or provision of services? And how will the court determine the place of the specific performance, if the transaction took place on the internet? Art. 5(5) of the Brussels I regulation states that as regards a dispute arising out of the operations of the branch, agency or other establishment, the courts for the place in which the branch, agency or other establishment is situated has jurisdiction. How many branches can a defendant have? How many domain names does it have, co.uk/.it/.es/.fr? Do all of the courts in these Member States have jurisdiction?

As for determination of substantive law the Rome Convention<sup>4</sup>, and since December 2009 the Rome I regulation<sup>5</sup>, is applicable in the EU. The Rome Convention allows the parties to a

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<sup>1</sup> López, J.E.M., Vindobona Journal of International Commercial Law and Arbitration, 2006, No. 10/53, p. 2

<sup>2</sup> Strout, J.R., Online Arbitration: a Viable Solution for Resolving Disputes that Arise from Online Transactions, 1 Journal of American Arbitration, 2001, No. 75, p. 3-5

<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>4</sup> Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC). Available at: [http://www.rome-convention.org/instruments/i\\_conv\\_orig\\_en.htm](http://www.rome-convention.org/instruments/i_conv_orig_en.htm)

dispute to choose the law applicable to their contract. In the absence of this choice, the law most closely connected is applicable. To put it simply, it is presumed that the law most closely connected is the law of habitual residence of the party which effects characteristic performance. But again, how does the court establish the habitual residence of the characteristic performer, if it can be accessed through different domain names registered in many jurisdictions and accessible worldwide?

For legal certainty of the parties the jurisdiction and the law applicable to the dispute has to be clearly determined. But the determination of these questions is very difficult in transactions entered into via Internet. The cyberspace transactions are in tension with the private international law rules, which are territorial and national in nature. The private international law links the determination of these two questions with the territory of a certain country<sup>6</sup>.

### **3. ONLINE DISPUTE RESOLUTION MECHANISMS**

Alternative dispute resolution mechanisms, and especially arbitration, seem to be better suited for resolution of e-business disputes. It is more flexible, specialized and expeditious. Not only can the parties agree that their potential dispute will be settled in arbitration in a particular state, but by their agreement they can effectively avoid using the conflict rules and agree on both the procedural and the substantive law applicable to the dispute. The problems of jurisdiction and choice of law are thus entirely solved and legal certainty of the parties is achieved. As for a substantive law the parties may refer either to national law of a particular state, or to *lex mercatoria*, equity or good conscience.

Arbitrators enjoy more freedom than the courts as they are not bound by *lex fori* in determination of procedural and substantive law. In the absence of choice by the parties to the dispute it is up to the arbitrator to determine the place of arbitration, procedural and substantive law. In most countries, unless there is an agreement of the parties on applicable substantive law, the arbitrator may apply the rules of law, which it considers appropriate. E.g. according to the European Convention on International Commercial Arbitration<sup>7</sup> and its Article VII(1) “the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable“. Doing this, the arbitrators shall take account of the terms of the contract and trade usages“. Similarly, Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration<sup>8</sup> states that “failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of rules which it considers applicable.“ What is more, within arbitration parties are more willing to comply with the award than with the court judgment. The widespread acceptance of the New York Convention<sup>9</sup> distinctively simplifies recognition and enforcement of arbitral awards in foreign jurisdictions.

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<sup>5</sup> Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations, applicable since 17 December 2009 (with the exception of Article 26 which shall be applicable since 17 June 2009)

<sup>6</sup> Alvaro, J.A.G., Online dispute resolution - Uncharted Territory, *Vindobona Journal of International Commercial Law and Arbitration*, 2003, No. 7/187, p. 1-5

<sup>7</sup> Available at: <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04011.html>

<sup>8</sup> Available at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

<sup>9</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention 1958. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

Since the enormous development of Internet in last two decades, the ways to simplify the arbitration by the new computer technology have been examined. So called Online Dispute Resolution (ODR) has been developed as a new form of alternative dispute resolution mechanisms adapted to unique nature of cyberspace. The ODR can be defined as a dispute resolution method that makes use of Internet advantages and web and computer technologies. Many providers have started to provide online mediation or online arbitration, such as Nova Forum, Private Judge or Word&Bond<sup>10</sup>, most of them originate from the USA and Europe<sup>11</sup>. In most online arbitrations a sole arbitrator is appointed<sup>12</sup> and an award issued within five days after the close of hearings and submission of all evidence. Generally, it is expected that the online disputes should be resolved within maximum period of ten to thirty days<sup>13</sup>.

Many advantages have been observed as regards ODR. The use of computer technologies has influenced and simplified the arbitration procedure. For instance simultaneous translation software has been developed to facilitate participation of multilingual parties in real-time video conferences. Special software exists to secure storage, access and distribution of information. Nevertheless, it is essential that the software is designed so that it does not make the participation of the parties more difficult and ensures the equality of the parties, i.e. it has to ensure that the parties have equal communication powers and users skills. This way, the ODR can empower weaker parties, e.g. small companies, who are usually deterred from seeking dispute resolution due to high costs, geographic distances and related travel expenses. By avoiding such obstacles, these small companies may easily enter into dispute resolution with large multinational companies.

At the same time, various problems have been identified as regards the application of traditional principles of international commercial arbitration to online arbitration. Some scholars argue that online arbitration is indeed an improvement of traditional arbitration method and the traditional rules and principles cannot be simply translated to cyberspace situations<sup>14</sup>. According to other scholars, online arbitration cannot retain its validity without traditional principles and requirements, such as tangible writing and face-to-face meetings between the parties. It can be admitted that currently there is a rather hybrid form of online arbitration which combines the elements of traditional concept of arbitration as well as new set of rules that make this form of dispute resolution more independent<sup>15</sup>.

Let us make an example which would help us describe the above mentioned problems: an Australian buyer has made an online order of agricultural vehicles from a Japanese seller. Now there is a dispute over whether these vehicles are in accordance with the contract or are defective. In accordance with the emailed arbitration agreement the parties have submitted their dispute to online arbitration through an institution in Geneva. They have appointed Romanian, Italian and Turkish arbitrators. The hearings are conducted by email and

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<sup>10</sup> Tyler C.M., Seventy –six and Counting: An Analysis of ODR Sites, in Katch E., Choi, D., Proceedings of the UNECE Second Forum on Online Dispute Resolution, Center for Information Technology and Dispute Resolution, Univeristy of Massachusetts, 2003, available at: [www.odr.info/unece2003/pdf/Tyler.pdf](http://www.odr.info/unece2003/pdf/Tyler.pdf).

<sup>11</sup> There are also some providers for Canada, Australia and few from other parts of the world

<sup>12</sup> See [www.eresolution.ca/services/general/arbitration.html](http://www.eresolution.ca/services/general/arbitration.html)

<sup>13</sup> See [www.intellicourt.com/procedures.html](http://www.intellicourt.com/procedures.html)

<sup>14</sup> de Sylva, M. O., Effective Means of Resolving Distance Selling Disputes, 2001, 67 Arbitration, p. 230- 239

<sup>15</sup> Berger, K.P., Lex Mercatoria Online: The CENTRAL Transntional Law Database at [www.tldb.de](http://www.tldb.de), 2002, Arbitration International, No. 1, p. 83-94

videoconferences. After the arbitrators exchange several emails, they reach their final decision and issue an electronic award, which they email to the parties from the presiding arbitrator's vacation resort in Florida.

It is evident on this place that a great advantage of online arbitration is that there can be communication between various people of the world and that arbitrators can be chosen from different countries.

Pursuant to the above example we can pose several questions: is the arbitration agreement valid, if it has been done by emails? Where is the place of arbitration? What about applicable procedural and substantive law? In which jurisdiction was the award made? Can such award be recognized and enforced?

#### **4. THE ONLINE ARBITRATION AGREEMENT**

In this contribution the "online arbitration agreement" is referred to as an agreement, in which parties agree to settle their dispute in arbitration, which would be held through medium of technology (i.e. internet). Such an agreement can be made either in paper form or electronically<sup>16</sup>.

The general rule in both national and international law is that for an arbitration agreement to be valid it has to be in writing and has to be signed. The question is whether these requirements are satisfied if the arbitration agreement is entered into electronically?

The Article II of the New York Convention<sup>17</sup> provides that "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". "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"<sup>18</sup>. In other words, the New York Convention does not state anything about the electronic transmission as a possible means of conclusion of an arbitration agreement.

Nevertheless, over last decade both international and national laws have started to address the development in e-commerce and facilitate electronic contracts. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law on Arbitration")<sup>19</sup> states that any method of communication can serve as a record of the agreement<sup>20</sup>. The UNCITRAL Model Law on E-Commerce ("the Model Law on E-

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<sup>16</sup> Another possible explanation of arbitration agreement is concluded by electronic transmission, but the arbitration procedure itself will be conducted in a traditional form.

<sup>17</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention 1958. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

<sup>18</sup> Article II (2) of the New York Convention

<sup>19</sup> Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)

<sup>20</sup> Article 7 of the UNCITRAL Model Law on International Commercial arbitration: "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 provides a record of the agreement".

Commerce”)<sup>21</sup> is going even further by modernizing the concepts of writing and signatures and thus facilitating the e-commerce. It uses the concept of “data messages”, which include electronic data interchange (EDI), email, telegram, telex and telecopy<sup>22</sup>. All of these forms of communication satisfy the requirement of “in writing” if the information contained therein is accessible so as to be usable for subsequent reference (Article 6). As regards the contract formation, an offer and the acceptance of an offer may be expressed by means of data messages, unless otherwise agreed by the parties (Article 11).

On the EU level, similar development can be observed. Article 9(1) of the Electronic Commerce Directive<sup>23</sup> requires Member States to ensure that their legal system allows contracts to be concluded by electronic means.

The legal certainty in e-commerce could not exist without electronic signature. A digital signature which serves to ensure that the electronic letter of statement cannot be sent by another person or by mistake, is widely used in e-commerce. The e-signature is provided for as valid signature of a person in Article 7(1) of the Model Law on E-Commerce and, on the EU level, in Directive on Electronic Signatures<sup>24</sup>, which provides that the EU 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<sup>25</sup>. As a result of the above stated efforts, most online contracts are legally binding. This implies that validity of online arbitration agreements shall be recognized accordingly<sup>26</sup>.

Nevertheless, there still exists a question, whether an online arbitration agreement and an award based thereupon will be recognized and enforced under the New York Convention. The answer to this question will depend on the attitude towards an electronic agreement within a particular state, party to the Convention. If such a state recognizes the existence of online arbitration agreements, it would usually recognize and enforce a foreign arbitral award based on an online arbitration agreement<sup>27</sup>.

## **5. SEAT OF ARBITRATION**

As already stated above, it is very difficult to determine a seat of online arbitration. Under present national and international law the arbitration award has a substantial link with the

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<sup>21</sup> Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html)

<sup>22</sup> Article 2 of UNCITRAL Model Law on Electronic Commerce

<sup>23</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ (L 178), p. 1-16.

<sup>24</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. OJ (L 013), p.12-20

<sup>25</sup> Unless it is based upon a qualified certificate issued by an accredited certification-service-provider, has not been created by a secure signature-creation device (Article 5(2)) and has not been subject to certification or prior authorization (Article 3(1)).

<sup>26</sup> Bordone, R.C., Electronic Online Dispute Resolution: A Systems Approach: Potential, Problems and a Proposal, 1998, Harvard Negot. Law Review, 3/178, p. 192

<sup>27</sup> Ortiz, A.L., Arbitration and IT, Arbitration International, 2005, No. 21/3, p. 352-355

jurisdiction in which it is made<sup>28</sup>. Many national jurisdictions have adopted the attitude, that the *lex arbitri* law is the only law which ensures complete and effective control over the arbitration procedure and thus prevents abuse of powers of the arbitrators and safeguards the due process requirement. Such an attitude nevertheless appears to be directly inconsistent with the purpose of online arbitration, where it is uncertain where the seat of arbitration is.

This question can be either considered from the point of view of the traditional territorial concept, i.e. that the parties are usually free to choose the seat of arbitration or they just involuntarily choose the seat of the online arbitration institution. In the absence of the choice by the parties, it is up to the arbitrators to do so. Such an obligation is provided for e.g. in Article 20(1) of the Model Law on Arbitration, which states that failing an agreement on the place of the arbitration by the parties, “the place of arbitration shall be determined by the arbitral tribunal....”.

On the other hand, this problem can be analyzed from the point of view of the concept of delocalization, whose proponents argue that the arbitration should be detached from the control imposed by law of the place of arbitration (*lex loci arbitri*)<sup>29</sup>. They argue that the national law is not well suited to the fast development and practice of international commercial arbitration and that jurisdiction should be exercised by the country where the enforcement of an award is sought. The arbitrator is not only allowed to disregard the substantive law of *lex arbitri*, but may also apply the procedural law which it deems appropriate.

However, this delocalization concept interferes with the current framework of the New York Convention, which states in its Article V(1)(e) that the court of the country where the enforcement of an award is sought has the right to reject such an enforcement if the award has not become binding under the law of the country in which the award was made.

## **6. THE APPLICABLE PROCEDURAL LAW**

Three forms of arbitration procedure can be distinguished: traditional arbitration procedure, the use of Internet only for initial submissions, which are followed by traditional procedure, or running the process completely online, including an electronic arbitration agreement, digital signatures, video-conferences and an online award<sup>30</sup>.

Generally, it is acceptable to use new technologies in the arbitration proceedings. Subject to the parties' agreement, the arbitrators may collect online evidence and substitute an oral testimony by written evidence in order to shorten the proceedings<sup>31</sup>. Nevertheless, if certain national law requires face-to-face hearings, this requirement has to be observed in order to have an enforceable award (Article V(1)(d) of the New York Convention). It is thus obvious

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<sup>28</sup> See Article I (1) of the New York Convention: „This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal“.

<sup>29</sup> Yu, H., Nasir, M., Can Online Arbitration Exist Within the Traditional Arbitration Framework? *Journal of International Arbitration*, 2003, No. 20/5, p. 463

<sup>30</sup> e.g. Virtual Magistrate procedure, [www.vmag.org/docs](http://www.vmag.org/docs)

<sup>31</sup> Yu, H., Nasir, M., Can Online Arbitration Exist Within the Traditional Arbitration Framework? *Journal of International Arbitration*, 2003, No. 20/5, p. 465

that the online arbitration cannot completely ignore the requirements of traditional laws. I.e. if the arbitration procedure is not in accordance with the parties' agreement or in accordance with the law of the country where the arbitration took place, its enforcement can be refused.

In the absence of parties' agreement, the online arbitration clashes with the traditional laws. If the place of arbitration cannot be determined in case of online arbitration, how do we know what country's procedural law is applicable? The only escape is the parties' choice of procedural law or use of procedure of an online arbitration institution. Nevertheless in case such choice is missing, there is no institution (which might well happen in online arbitration) and the place of the arbitration is not known, the validity of an online arbitration will certainly be called into question under the New York Convention. One may consider the New York Convention to be out of date, but it is still valid and widely accepted Convention, which simply cannot be ignored.

## 7. THE APPLICABLE SUBSTANTIVE LAW

Currently, among scholars there is a discussion over whether to create an independent set of substantive rules applicable to the online arbitration or to simply apply traditional rules used in other types of dispute resolution<sup>32</sup>. There are two types of opinions: one group advocates the application of traditional rules. They claim that in the cyberspace the traders deal with the physical value of the goods or services and that the nature of the transactions and possible disputes resulting therefrom do not differ in purpose from real transactions and disputes. Therefore, according to them, it is not necessary to create a new body of substantive rules applicable to the e-commerce.

On the other hand, there is a group of those who propose a creation of separate set of rules adapted to the specifics of e-commerce. They claim that national rules determined according to traditional private international law are inadequate for international commerce. The less it is adequate to international e-commerce. These rules were created for national situations and their connecting factors do not count with e-commerce, which is, as stated above, to a large extent delocalized. Moreover, for e-commerce these rules are too rigid and cannot keep track with new and fast developments. In their view, the national rules hinder and are detrimental to possible development of international trade, especially the online one<sup>33</sup>.

It has thus been widely accepted that the traditional choice of law rules are inadequate for international business transactions. Therefore a new set of rules has been recognized that regulates the specifics of international business. This set of rules is usually referred to as *lex mercatoria*. The second group of scholars is of the opinion that currently, similarly to the gradual recognition and subsequent codification of *lex mercatoria*, the process of creation, recognition and creeping codification of specific set of substantive rules applicable to e-commerce transactions and disputes, so called *lex informatica*<sup>34</sup>, is under way. They admit

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<sup>32</sup> Patrikios, A., Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica, University of Toledo Law Review, 2006-2007, No. 38, p. 271 - 305

<sup>33</sup> Hardy, I.T., The Proper Legal Regime for „Cyberspace“, 1994, U.Pitt.Law Review, 55/993; Johnson D.R., The New Case law of Cyberspace, <http://www.cli.org/DRJ/case.html>

<sup>34</sup> Patrikios, A., Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica, University of Toledo Law Review, 2006-2007, No. 38, p. 271 - 305



that this set of rules is not yet mature, but it will gradually be formed and possibly codified. According to the advocates of this approach, the *lex informatica* forms a subgroup of *lex mercatoria*, but contains rules that reflect the specifics of cyberspace transactions. According to the advocates of *lex informatica*, there is a need for uniformity and predictability in e-commerce and thus the *lex informatica* meets these requirements as it is flexible and responsive to rapid changes in this area. The application of *lex informatica* not only to online disputes but also to online transactions as such will increase competitiveness of providers of e-business. The creation of such a set of rules is thus economically beneficial. Creation of a separate set of rules has also a psychological dimension, as a neutral transnational set of rules would be applied on delocalized international transactions and disputes. The *lex informatica* thus make a balance between freedom of business and need for regulation.

Because of principle of party autonomy the parties to e-contract can choose in the arbitration agreement that their rights and obligations will be governed by the *lex informatica*. In the absence of such an express choice by the parties, this choice may be made by the arbitrators. Currently, the concept of *lex informatica* is not that widely accepted, therefore it would be safer for the parties to refer rather to *lex mercatoria*, which is widely accepted by international arbitration institutions<sup>35</sup>. But it is expected that the concept of *lex informatica* would undergo similar process of creation and codification as *lex mercatoria* and will be perfectly suited for international e-transactions. All of this depends on whether the concept of *lex informatica* will be accepted by the international commercial community. At the same time, an extensive research has to be conducted in order to recognize the content and scope of *lex informatica* and to identify particular rules (which would consequently lead to its codification).

Moreover, the contracts and disputes decided according to *lex mercatoria/lex informatica*, do not contradict the New York Convention and there are no obstacles for the awards based on it to be recognized and enforced. The awards based on *lex mercatoria* are widely recognized and confirmed by the 1992 Cairo Resolution of the International Law Association (providing that arbitration awards based on transnational rules are enforceable if they have been applied by the arbitrators pursuant to agreement of the parties or when the parties have remained silent regarding the applicable law)<sup>36</sup>, national court decisions<sup>37</sup> as well as writings by a honorable scholars<sup>38</sup>. As the *lex informatica* forms a part of *lex mercatoria*, there is no reason why there

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<sup>35</sup> e.g. the ICC. <http://www.iccwbo.org/id93/index.html>

<sup>36</sup> Transnational Rules in International Commercial Arbitration in Patrikios, A., Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the *Lex Informatica*, University of Toledo Law Review, 2006-2007, No. 38, p. 303

<sup>37</sup> Rivkin, D.W., Enforceability of Arbitral Awards based on *Lex Mercatoria*, 1993, Arbitration International, 9/67

<sup>38</sup> e.g. Patrikios, A., Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the *Lex Informatica*, University of Toledo Law Review, 2006-2007, No. 38; Berger, K.P., *Lex Mercatoria and Arbitration: The Discussion of the New Law Merchant*, 1998, Thomas E. Carbonneau ed.; Gaillard, E., Thirty Years of *Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 1995, ICSID Rev.-FILJ 10/208; Gaillard, E., Transnational Law: A Legal System or a Method of Decision Making 2001, Arbitration International, 17/59; Lando, O., The *Lex Mercatoria* in International Commercial Arbitration, 1985, ICLQ, 34/747; Paulsson, J., *La Lex Mercatoria Dans L'Arbitrage*, 1990, 55; Johnson, D.R., The New Case Law of Cyberspace, available at: <http://www.cli.org/DRJ/case.html> (in this article the author suggests that the new case law of cyberspace can be derived from custom and principles based on consensus); Johnson D.R., Post, D.G., Law and Borders-The Rise of Law in Cyberspace, 1996, Stan.L.Rev., 48/1367, Johnson, D.R., Post, D.G., And How shall the Net be

should be any differentiation between the enforceability of awards based on *lex mercatoria* and *lex informatica*.

## **8. THE ONLINE ARBITRATION AWARD<sup>39</sup>**

One of the reasons why the parties have recourse to arbitration as a means of resolution of their dispute is the finality and easy enforceability of the award, especially due to strong influence of the New York Convention. If the award fulfills the procedural requirements provided for in Article V and was issued in the territory of country signatory to the Convention, it is almost certain that the award will be enforced in other country.

In online arbitration parties usually voluntarily fulfill the award without having to apply for enforcement by the national courts<sup>40</sup>. This is because the parties, who enter into online transactions and agree to resolve their dispute in an online arbitration, usually are driven by the intention to gain profits and to retain their commercial relationship. However in case of non-compliance of the losing party with the award, the winning party has to enforce the award through a national court, which will examine the whole procedure of the online arbitration before deciding to enforce the online award. In this point the online award will clash with the territorial principle embedded in Article I of the New York Convention. The question is where (in which state) was the award made? The problem is solved if the parties or the arbitrators (if not the parties) have chosen the place of arbitration. The New York Convention provides that an award is considered to be made at the seat of the arbitration. The Model Law on Arbitration provides in its Article 31(3) that an award “shall state its date and place. The award shall be deemed to have been made at that place”. This presumption applies regardless of where the hearings were held or where the award was signed and delivered by the tribunal.

In the absence of such a choice, under the traditional territorial approach, the online award will probably not be enforced because of the New York Convention. Nevertheless, this problem can be considered from the point of view of the delocalization theory, under which if the award is issued by electronic means, domestic laws governing the e-commerce will decide the validity of the award<sup>41</sup>.

Article 31 of the Model Law on Arbitration and Article 32(2) of the UNCITRAL Arbitration Rules<sup>42</sup> require “the award to be in writing”. Article IV of the New York Convention provides that “to obtain recognition and enforcement, the applicant party shall, at the time of the application, supply duly authenticated originals or duly certified copies of the award and the arbitration agreement. How can these requirements be reconciled with the online award?

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<sup>39</sup> Lanier, T.J., Where on Earth does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online, *ILSA Journal of International and Comparative Law*, 2000-2001, No. 7/2, p. 1 - 14

<sup>40</sup> Bordone, R.C., Electronic Online Dispute Resolution: A System Approach: Potential, Problems and a Proposal, 1998, *Harvard Negot. Law Review*, No. 3, p. 175, 178

<sup>41</sup> Yu, H., Nasir, M., Can Online Arbitration Exist Within the Traditional Arbitration Framework? *Journal of International Arbitration*, 2003, No. 20/5, p. 471

<sup>42</sup> Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)

Article IV has to be read together with the Article III of the New York Convention, which stipulates that “The Contracting State shall recognize and enforce arbitral awards in accordance with the procedural laws of the territory where the award is relied upon”. This means that if the state of enforcement accepts an electronic form of writing there should be no barrier to the enforcement of the electronic award<sup>43</sup>.

## 9. CONCLUSION

Pursuant to the above analysis, alternative dispute resolution methods, better to say online dispute resolution methods, particularly online arbitration, are better suited for resolving of online disputes than national court systems. They are better adapted to deal with technically complex matters, can more readily answer to rapid developments and create better conditions for delocalized transactions.

In last decade various initiatives have been developed to resolve e-commerce disputes, especially as regards consumers<sup>44</sup> and domain names<sup>45</sup>.

Although online dispute resolution mechanisms are being used more frequently, so far it does not seem very likely that international commercial arbitration will use fully electronic procedures. It is more likely that a combination of electronic systems and traditional procedures will be used.

Although many national legal systems as well as international instruments (such as the Model Law on Arbitration, Model Law on E-Commerce, EU Electronic Commerce Directive) support the electronization of commercial transactions and thus also a dispute resolution, it still has to be in accordance with the requirements of the New York Convention. Being as of the 50's of the last century, it has become to a large extent obsolete, which creates certain amount of uncertainty. Nevertheless the New York Convention is widely accepted and thus represents a very strong legal instrument. Its requirements for enforcement of the arbitral award are irreconcilable with the specifics of the online arbitration. Although an extensive interpretation of its provisions can be of some help, its modernization and amendment is necessary in order to keep track with the developments of modern society<sup>46</sup>.

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<sup>43</sup> See <http://vmag.vcl.ip.org/doksys/96-0001>

<sup>44</sup> e.g. “European Extra Judicial Network” (sponsored by European Commission’s Directorate General for Health and Consumer Protection), see [www.eejnet.org](http://www.eejnet.org); or “Online Confidence” (sponsored by European Union’s Directorate General for the Information Society and Eurochambers, see [www.eurochambers.be](http://www.eurochambers.be)

<sup>45</sup> Alternative system for resolving domain name online disputes is managed by ICANN and was designed by WIPO, which has created the Uniform Domain Name Dispute Resolution Policy of 26 August 1999.

<sup>46</sup> There is an UNCITRAL initiative to draw up an interpretative instrument or include a reference to the New York Convention on the use of electronic communications in international contracts. See Ortiz, A.L., Arbitration and IT, Arbitration International, 2005, No. 21/3, p. 360

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