

MORRISON & FOERSTER LLP

**LEGAL OBSTACLES TO ADR
IN EUROPEAN BUSINESS-TO-CONSUMER
ELECTRONIC COMMERCE**

Prepared by the Brussels office of Morrison & Foerster LLP
On behalf of the Global Business Dialogue for Electronic Commerce (GBDe),
EU/Africa Region, Consumer Confidence - ADR Working Group

April, 2000

Executive Summary

This study is limited to an investigation of the extent to which there exist legal obstacles in Europe to the use of alternative dispute resolution mechanisms in electronic commerce between business and consumers. The legal framework for consumer ADR in Europe is fragmented between international conventions and legal instruments, Community law, and national law. Of particular importance for the legal status of ADR are several instruments of Community law, such as the Directive on Unfair Terms in Consumer Contracts, the Recommendation for out-of-court settlement of consumer disputes, and the proposed "E-Commerce Directive". There are already some examples of consumer ADR for electronic commerce in Europe, but less than in some other areas of the world.

In most forms of ADR, it is essential that there be a valid agreement to submit the dispute to ADR. Some Member States restrict consumers from submitting disputes to an ADR mechanism to the exclusion of their right to go to court. Based on the Brussels Convention and other legal instruments, it seems that valid ADR agreements by consumers would have to be entered into after the dispute has arisen, and would have to give the consumer at least the same basic procedural rights as would the court system. National laws may inhibit the conclusion of contracts online, which could effect the validity of dispute resolution clauses entered into electronically, and national laws and international conventions frequently require that forum selection or arbitration clauses be "in writing".

Government regulation or accreditation could unintentionally hinder the establishment and functioning of ADR systems. Principles in the Commission's Communication on the out-of-court settlement of consumer disputes are not all well-suited for use in electronic commerce. It is important that the place of arbitration be ascertainable also for online procedures. National laws on encryption and authentication could inhibit the proper level of confidentiality and security in online proceedings. Parties from different legal systems may have different ideas about whether arbitral decisions should be kept confidential, and excessive confidentiality may impede development of the law. National procedural laws and arbitral rules contain form requirements that could impede their use in the online context.

The two basic ways in which parties to an ADR procedure can obtain a legally-binding result are to embody the result in a contract or settlement agreement, or to have the decision-maker render a binding arbitral award. While settlement agreements are generally binding in all the Member States as contracts, enforcing judgments based on them across national borders under the Brussels Convention is costly and burdensome. Too many European countries have enacted the New York Convention with reservations, and too many African ones either with reservations or not at all. The provisions of the New York Convention present problems of interpretation in the online context which may interfere with the conduct of the arbitration. Defenses to the enforcement of foreign arbitral awards may be interpreted by national courts so as to inhibit the enforcement of ADR procedures for consumer electronic commerce.

Table of Contents

Executive Summary	2
Preface	4
Introduction	5
Definitions	5
Legal basis for ADR	7
Examples of existing ADR mechanisms for electronic commerce	9
Formation of the ADR Agreement	11
Permissibility of binding consumer ADR.....	11
Form Requirements	13
Structure of ADR Systems and Conduct of the Proceedings	14
Structure of ADR Systems.....	14
Minimum Standards for the Proceedings.....	14
Place of the Proceedings	16
Confidentiality and Security of the Proceedings.....	16
Form Requirements	17
Enforcement of the Decision	18
Limited enactment of the New York Convention.....	19
Interpretation of the New York Convention	20
Defenses to Enforcement	20
Conclusions	21

Preface

This overview of legal obstacles to non-binding alternative dispute resolution (ADR) in European business-to-consumer electronic commerce has been prepared by the Brussels office of Morrison & Foerster LLP on behalf of the Global Business Dialogue for Electronic Commerce (GBDe), EU/Africa Region, Consumer Confidence - ADR Working Group. This paper is not intended either as an exhaustive comparative study of the topic, nor as a study of all the legal aspects of setting up an ADR system for electronic commerce, but rather to highlight certain legal barriers to the development of further ADR mechanisms between businesses and consumers in Europe. Legal discussion and footnotes have been kept as concise as possible in order to ensure the readability and increase the practical utility of the study. Readers should keep in mind that there is presently very little legislation, case law or academic commentary¹ dealing directly with ADR issues in electronic commerce, so that much of the discussion herein represents the authors' best estimate of the present legal situation.

Conducting this study has only confirmed in the authors' mind the importance of developing additional ADR mechanisms for electronic commerce. As is becoming clearer every day as electronic commerce develops at a furious pace, traditional means of dispute resolution in Europe (such as the court system and classical arbitration) are not well-suited to the fast-paced and relentlessly globalized world of business-to-consumer electronic commerce. It is hoped that this study can help spur the development of further ADR mechanisms in Europe which will serve the interests of both business and consumers.

The authors are indebted in particular to the following persons for their input during the preparation of this study: Timothy Fenoulhet, Judy Freedberg, Christopher Gibson, Christiane Unland-Schlebes, Christiaan van der Valk, and Arnold Vahrenwald.

Comments may be sent to ckuner@mofo.com.

¹ See, e.g., Michael E. Schneider and Christopher Kuner, Dispute Resolution in International Electronic Commerce, *Journal of International Arbitration*, 1997, vol. 14, no. 3, pp. 5-37.

Introduction

Definitions

This paper has been commissioned to investigate the extent to which there exist legal obstacles in Europe to the use of alternative dispute resolution mechanisms in electronic commerce between business and consumers. It is important from the beginning to define several key terms used throughout:

- **Business to consumer electronic commerce:** Terms such as “business to consumer” and “electronic commerce” are not always easy to define precisely, but are used here in the broadest sense, i.e., the sale of goods and services over electronic computer networks (primarily the Internet) from business entities to individuals acting in their personal capacity.
- **European:** This overview is intended to be geographically diverse in the sense that it draws examples from the major European legal systems, but does not cover European law in a systematic or comprehensive way. While the Working Group’s geographic reach also covers Africa, the narrow mandate of this study and the difficulty of obtaining materials on African legal systems has meant that the legal situation in Africa could only be taken into account peripherally, if at all. However, the fact that many African legal systems are heavily influenced by European systems means that many of the legal considerations described here with respect to Europe will also be relevant for Africa.
- **ADR:** The term “alternative dispute resolution” can include a wide variety of dispute resolution mechanisms outside the court system, including arbitration, mediation, consumer complaint systems, etc., so that it can be difficult to define exactly what is meant by the term. In its “Recommendation No 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes”² (hereinafter referred to as the “Recommendation for out-of-court settlement of consumer disputes”), the European Commission has provided a useful criterion for dealing with this problem:

Whereas this Recommendation must be limited to procedures which, no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution; whereas, therefore, it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent...

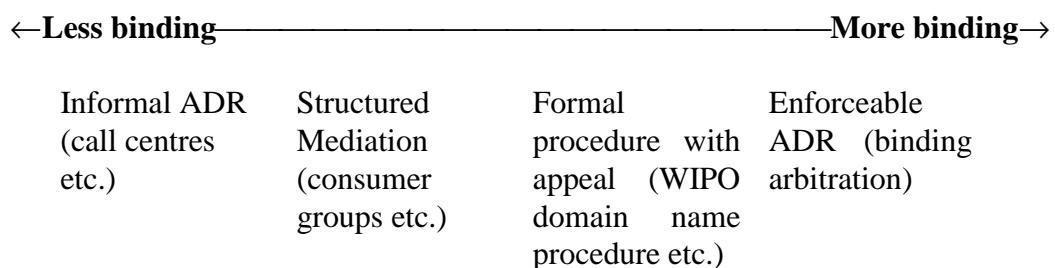
This study will thus cover only ADR procedures such mediation, arbitration, or others which involve a third-party who issues a decision (whether it be a recommendation, arbitral award, or some other decision, whether binding or non-binding), but will not cover call centres, complaint handling procedures, or other procedures which involve negotiation between the parties without the intervention of a third party. This is not because such “informal” ADR procedures are not valid and important; indeed, at present such procedures (like the “chargeback” system

² http://europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just02_en.html.

for credit cards) constitute by far the most extensive variety of ADR available for electronic commerce. Rather, informal ADR presents legal questions which are both simpler and fundamentally different than those involving a third-party decision-maker, so that it was decided not to examine them here.

The definition of “ADR” also raises the question of to what extent the Internet is used in resolution of the dispute itself. A broad spectrum of approaches is conceivable, none of which is totally exclusive of the others: for example, disputes between companies and consumers engaged in online transactions may be resolved by a conventional method such as a national court or a conventional arbitration proceeding. Farther out on the continuum, such a proceeding might itself make use of the Internet, such by allowing certain documents to be submitted by e-mail in order to improve cost efficiency. At the end of the continuum would be a proceeding which itself took place wholly online, in the sense of the parties submitting evidence and their arguments to the decision-maker over the Internet. The present study concentrates on ADR mechanisms which make use of electronic networks, either partially or entirely, to resolve disputes.

- **Non-binding.** As described above, the mandate of this study extends only to examining legal obstacles in the context of “non-binding” or “voluntary” business-to-consumer electronic commerce. Such terms could have a variety of meanings; for example, one could interpret “voluntary” or “non-binding” to mean that the consumer has an initial choice either to litigate in court or to submit a dispute to an ADR system, or one could interpret it to refer to ADR systems which do not lead to a legally-binding decision that would foreclose the consumer from submitting the dispute to the court system, if he is dissatisfied with the results of the ADR procedure. Thus, the binding nature of an ADR proceeding is not a black-or-white question, but rather one that has a wide variety of gradations along a continuum:



In keeping with the political and legal realities in Europe, this study assumes that ADR should always be “non-binding” and “voluntary” with respect to the consumer’s decision to agree to it, so that a consumer should not be forced to engage in an ADR procedure unless he has agreed to do so in a fully informed and transparent manner. As to the enforceability of the final result, there are both advantages and disadvantages, from both the business and the consumer side, to having the decision maker render a legally-binding decision. It is assumed here that the ideal situation for both consumers and business would be to have a multiplicity of ADR mechanisms available, some of which would lead to a binding decision and some which would not, depending on the type of dispute involved, the size of the dispute, etc. Thus, this study will examine legal issues

relating to the entire spectrum of decisions, from binding arbitral awards to non-binding recommendations.

Legal basis for ADR

There are a wide variety of legal instruments and bodies of law in Europe relevant to business-to-consumer ADR in electronic commerce:

- First of all, there are number of **international conventions and legal instruments** relevant to ADR. These include, in particular:
 - The “New York Convention” (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958), which ensures the recognition and enforcement of foreign arbitral awards, and is the most important international legal instrument relevant to arbitration. It is in force in all EU Member States, though some Member States have adopted it only with important reservations (see below under “Enforcement of the Decision”).
 - On December 9, 1999, the OECD finalized “Guidelines for Consumer Protection in the Context of Electronic Commerce”³ which contain general principles for ADR systems in electronic commerce.
 - The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters provides default jurisdictional rules for disputes, including those involving consumers. For example, the Convention (Article 13) generally gives consumers the right to bring suit in the Contracting State in which they are domiciled, and provides that this right may not be derogated from except under certain narrowly-defined conditions, such as by an agreement “which is entered into after the dispute has arisen” (Article 15(1)).
 - The Convention on the law applicable to contractual obligations (the “Rome Convention” of 19 June 1980) similarly provides default choice-of-law rules for contracts, including consumer contracts. The Convention generally provides for application of the law of the country of the consumer’s habitual residence (Article 4), and also provides that the parties may generally not derogate from the mandatory rules of law of such country (Article 5).

It should be noted that a proposal to amend the Brussels Convention, which would firmly anchor the place of the consumer’s domicile as the default jurisdictional rule in electronic commerce disputes, has been approved by the Member States and the Commission, and is presently awaiting entry into force.⁴

- **Community law** (including the Brussels and Rome Conventions as described above) sets certain minimum standards for consumer dispute resolution procedures, which are described as follows in the Commission’s “Recommendation for out-of-court settlement of consumer disputes”:

³ See <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm>.

⁴ Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 final, 14 July 1999.

Whereas the out-of-court bodies may decide not only on the basis of legal rules but also in equity and on the basis of codes of conduct; whereas, however, this flexibility as regards the grounds for their decisions should not lead to a reduction in the level of consumer protection by comparison with the protection consumers would enjoy, under Community law, through the application of the law by the courts...

This suggests that certain basic procedural safeguards that apply in the court system (such as independence of the decision-maker, transparency of the process, etc.) must also be respected in ADR procedures. Furthermore, the Recommendation strongly suggests that there are legal limits on the ability of any ADR system to foreclose access to the court system by consumers.⁵

The “Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts” also contains important restrictions on the use of ADR with consumers. In particular, under Art. 3 of the Directive, Member States may provide that contract clauses are presumptively unfair which exclude or hinder “the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.” It is unclear what is meant by “arbitration not covered by legal provisions”, but presumably this means that any ADR system which forecloses a consumer’s ability to go to court must provide legal safeguards similar to those applicable in the court system. The “Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997” (the “Distance Selling Directive”) also grants the consumer certain non-derogable rights which could limit the use of standard contracts containing ADR clauses in electronic commerce, such as the right to withdraw from distance contracts within seven working days of their conclusion.⁶

Of fundamental importance for the legal status of ADR in Europe will be the “Directive of the European Parliament and of the Council on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market” (the “E-Commerce Directive”), the “Common Position” of which was published on February 28, 2000. Article 17 of the E-Commerce Directive (entitled “Out-of-court dispute settlement”) contains the following provisions:

1. Member States shall ensure that, in the event of disagreement between an Information Society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

⁵ The Recommendation states that “use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised”.

⁶ Distance Selling Directive, Art. 6. Under Art. 12(1) of the Directive, “the consumer may not waive the rights conferred on him by the transposition of this Directive into national law.”

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.
3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding Information Society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

As it is still subject to final approval and implementation into national law, it is unclear if the E-Commerce Directive will significantly improve the legal status of ADR mechanisms for electronic commerce in Europe.

□ Finally, **national law** plays an important role in the legal framework for ADR, in particular in areas such as contract law, the law concerning general terms and conditions of contract, and evidentiary rules. There have also been initiatives to study the use of Internet technologies to resolve disputes on the national level; an example is the “Consultation Paper” entitled “Resolving and Avoiding Disputes in the Information Age” and published in September 1998 by the Lord Chancellor’s Department in the UK.⁷

Examples of existing ADR mechanisms for electronic commerce

In **Europe**, there have traditionally been three main legal forms of ADR for consumer disputes:⁸

- Arbitration, meaning a formalized procedure before a third-party who reaches a legally-binding and enforceable decision;
- Mediation, meaning a process of negotiation and conciliation between the parties, with a third-party facilitator, which does not necessarily result in a fully-enforceable result;
- Consumer complaint or ombudsman systems, which may be implemented in a variety of ways, from government regulation to voluntary industry bodies.

However, the greatest role in practice has traditionally been played by informal ADR systems. Thus, consumers faced with a dispute will generally turn first to such a system, which usually means engaging in direct negotiations with the merchant about the dispute or calling a complaint or help center, before resorting to more legalistic methods of ADR. There is considerable evidence that such informal ADR systems have worked quite well in practice; however, there is no doubt that the inherently transnational aspects of electronic commerce are putting increasing stress on existing informal ADR systems, and that they will need to evolve in order to give consumers in one country more effective recourse against a supplier in another country.

The number of existing ADR mechanisms for electronic commerce is considerably less in Europe than in North America, but efforts are underway to increase both the

⁷ Available at <http://www.open.gov.uk/lcd/consult/itstrat/civindex.htm>.

⁸ See the report “Out-of-Court dispute settlement systems for e-commerce” of the EU Commission’s Joint Research Centre (JRC), draft of 16 March 2000, available online at <http://dsa-isis.jrc.it/ADR/>.

number of such mechanisms and their transparency for consumers. One such project is the effort by the European Commission to develop a pan-EU network of “Out-of-court bodies responsible for the settlement of consumer disputes”.⁹ On March 20, 2000, the Commission published a working paper to “provide a framework for national initiatives to create a European Extra-Judicial Network for settling consumer disputes out of court.”¹⁰ Already there is a network of ten “European Consumer Centres” (Euroguichets) spread around the Member States, which can assist consumers with problems having transnational aspects, including those involving electronic commerce.

In addition, there are a number of projects already underway in Europe for the online resolution of disputes involving electronic commerce:

- The **World Intellectual Property Organization (WIPO)**, based in Geneva but offering its services on a global scale, has established an online “domain name dispute resolution service” (<http://arbiter.wipo.int/domains/index.html>). According to news reports, the service had received nearly 90 case submissions in the first three months of its existence.¹¹
- The **“Cybercourt”** project (www.cybercourt.org), which is run by the “Gesellschaft für Computerrecht” in Munich, is establishing both online mediation and online arbitration for use in all types of online disputes. The Cybercourt’s online mediation service was to begin a pilot phase from March 1, 2000 to September 1, 2000, while establishment of the online arbitration service is intended to be a longer-term goal.
- The **“Complaint Centre” (Beschwerdestelle) of the Freiwillige Selbstkontrolle Multimedia Diensteanbieter e. V. (FSM)**, which is a self-regulatory organization of German Internet service providers (ISPs) (<http://www.fsm.de/bes/index.html>), deals with complaints by Internet users against German providers of Internet content, and, when appropriate, can inform the legal authorities in cases involving content that is illegal in Germany.

The number of such ADR mechanisms in Europe is likely to increase dramatically in the near future.

Regarding **Africa**, a search of African web sites has turned up no online ADR mechanisms presently in operation. There are a handful of African arbitration institutions with web sites,¹² but very few African electronic commerce web sites even address the topic of dispute resolution.

⁹ See http://europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html.

¹⁰ Commission Press Release IP/00/274 of March 20, 2000.

¹¹ Financial Times, February 23, 2000, p. 1.

¹² For example, the Cour d’Arbitrage de Côte d’Ivoire, <http://www.caci.or.ci/>.

Formation of the ADR Agreement

The legal basis for any ADR mechanism, whether it be mediation, arbitration, negotiation, or some other one, is the agreement of the parties. While there are examples of mandatory consumer ADR in Europe,¹³ generally speaking, any ADR system is only workable on a mass scale if the parties have agreed to submit their dispute to it. Final decisions meant to be legally enforceable can only be based on a valid agreement of the parties to submit the dispute to ADR, while even when the consumer has not waived his right to go to court, it is important for the stability of the system that the participants have legal security that their ADR agreement would not be regarded as invalid by the courts.

Permissibility of binding consumer ADR

In most EU countries, there is no hindrance *per se* to a consumer agreeing to submit a dispute in electronic commerce to ADR; indeed, Article II(1) of the New York Convention (which, admittedly, applies only to “foreign” arbitral awards) requires 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, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” It seems that in some Member States (e.g., France), consumer disputes can be found non-arbitrable, at least to the extent that the right of consumers to go to court is excluded.¹⁴ However, such restrictions apply mainly in the case of domestic arbitrations, and may not apply with regard to international arbitrations involving consumers, such as those falling under the New York Convention.¹⁵

However, there are instances in which it may be legally impossible for a consumer to agree to submit a dispute to ADR; as mentioned earlier, legal instruments such as the Brussels Convention and the EU Directive on Unfair Terms in Consumer Contracts place stringent restrictions on the ability of consumers to waive their right to go to court. Based on the above, it seems that any agreement by a consumer to submit a dispute to ADR and waive the right to go to court would have to, at a minimum, fulfill the following conditions:

- The agreement would have to be entered into after the dispute has arisen;
- The consumer would have to enter into such an agreement with full awareness of the consequences; and
- ADR would have to ensure at least the same degree of procedural fairness for the consumer as would litigation in court.

¹³ For example, in Denmark all financial services regulated in that country must participate in a compulsory ADR scheme.

¹⁴ See Vincent Tilman, Arbitrage et nouvelles technologies: Alternative Cyberdispute Resolution, *Revue Ubiquité*, 1999, no. 2, pp. 47-64, citing as support Art. 2061 of the French Civil Code, Art. 631 of the Code de commerce, and case law of the Cour de Cassation.

See also *Brower v. Gateway 2000, Inc.*, 246 A.2d 246 (N.Y. App. 1998), a New York case in which the court found that the high cost of ICC arbitration made the designation of the ICC as the arbitral body in a standard contract unconscionable in a consumer context.

¹⁵ See Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999), pp. 38, 347-48.

Other national laws may inhibit the conclusion of contracts online, which could effect the validity of dispute resolution clauses entered into electronically. In electronic commerce many ADR agreements will be concluded electronically, sometimes separately, but often as part of a contract for the sale of goods or services. For example, the German "Standard Terms and Conditions of Contract Act" ("Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen" or "AGB-Gesetz") generally provides that contract terms which one party has unilaterally established in advance with the intent of using them in a number of future transactions must be clearly identified to the other party, who must be given a reasonable opportunity to review these terms and approve them in advance.¹⁶ If these conditions are not complied with, the terms and conditions will be disregarded and the entire contract will be governed by statutory law.¹⁷ Under the AGB-Gesetz, courts may be hesitant to allow parties offering goods or services on the Internet to bind consumers to standard contract terms which take up many computer screens, and which may contain dispute resolution clauses.¹⁸

Another legal issue relates to requirements that may be built into ADR systems that the consumer exhaust his remedies through informal channels (e.g., such as by complaining to the company through a call centre) before filing an ADR complaint. While it would likely be problematic to build in an absolute requirement that the consumer first exhaust informal remedies, there should be no problem with a flexible requirement, such as that the consumer make "reasonable efforts" to resolve any problems with the company informally before resorting to a formal ADR procedure. Indeed, this would be in the consumer's interest as being more likely to lead to a swift resolution of his problem, and in helping to keep the costs of the ADR procedure down.

Of course, the above restrictions could be relaxed somewhat in the case of ADR which did not produce a binding decision, but they do show the difficulties in ensuring that an agreement to submit disputes to ADR entered into by a consumer be recognized as legally valid by the courts. For example, a requirement such as that in the Commission's Recommendation on out-of-court settlement of consumer disputes (described above) that the ADR agreement be entered into only after the dispute has arisen could in effect make large-scale ADR with consumers impossible in electronic commerce, since an agreement to submit a dispute to ADR entered into after it has arisen would be difficult to implement on a mass scale in electronic commerce and would greatly reduce the number of disputes submitted to ADR. Such a rule would also seem to contradict the spirit of Article II(1) of the New York Convention, which requires recognition of arbitral agreements, including those concerning "any differences...which may arise..." (emphasis added).

¹⁶ AGB-Gesetz, Art. 2.

¹⁷ AGB-Gesetz, Art. 6.

¹⁸ See generally Oliver Spieker, Schiedsvereinbarungen in Allgemeinen Geschäftsbedingungen im Bereich des nicht kaufmännischen Verkehrs, 1999 Zeitschrift für Zivilprozeß 2138.

Form Requirements

National laws and international conventions frequently require that forum selection or arbitration clauses be "in writing". For instance, Dutch law requires "a writing",¹⁹ and the Italian Civil Procedure Law also requires "a writing", in which context, oddly enough, only telegrams and telexes are mentioned.²⁰ In contracts with consumers, German law requires that the arbitral agreement be contained in a notarial deed (*Urkunde*) signed by both the parties, and which must not contain any terms beyond those of the arbitration agreement.²¹ By contrast, in Switzerland an international arbitral agreement may take any form which permits it to be evidenced by a text,²² so that electronically-transmitted arbitral agreements are valid under Swiss law. The UNCITRAL Model Law on International Commercial Arbitration states that the requirement of written form is fulfilled if the arbitration agreement is contained in a "document signed by the parties...or in...other means of telecommunications which provide a record of the agreement..."²³

The New York Convention's requirement that an arbitral agreement be "in writing"²⁴ has also been the subject of numerous court decisions. In one case,²⁵ the Swiss Supreme Court decided that the provisions of the New York Convention are to be broadly interpreted within the meaning of the UNCITRAL Model Law, and thus the form requirements of the New York Convention are substantially equivalent to (the liberally-construed) Art. 178 (1) of the Swiss Private International Law Act referred to earlier. Nevertheless, some commentators interpret Art. 2 of the Convention more restrictively, so that this point is not fully settled even in Switzerland.

Once the E-Commerce Directive has been enacted and implemented, the requirements contained in Article 17(1) that Member States law shall not "hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means" may result in changes to Member State law removing legal uncertainties on electronically-concluded ADR agreements, though the implementation process is likely to take some time.

¹⁹ Dutch Civil Procedure Law, Art. 1021.

²⁰ Italian Civil Procedure Law, Art. 807.

²¹ German Civil Procedure Law, Art. 1031(5).

²² The 1987 Swiss Federal Private International Law Act (PIL Act), Art. 178 para. 1.

²³ Art. 7(2).

²⁴ New York Convention, Art. II(1).

²⁵ BGE 121 (1995) III 38 at 44.

Structure of ADR Systems and Conduct of the Proceedings

Structure of ADR Systems

- **Competition Law:** ADR systems used for consumer disputes would have to be structured in a pro-competitive manner under Community law. For example, if all the companies in one particular sector formed a single ADR system for consumer disputes and acted to restrict the establishment of competing systems, there could be an issue under Articles 85 and 86 of the Treaty of Rome.
- **Government Licensing/Accreditation:** There have been suggestions that “The necessary framework and standards for ADR systems should be set by legislation”.²⁶ Such legislation could in itself result in hindrances to the use of ADR, for example, if government (either at the Member State or the EU level) restricted the quantity or variety of ADR services available, or if permitted its use only in certain instances. Such restrictions would also seem to be legally problematic, for several reasons:
 - They would seem to go against at least the spirit of recent EU legislative measures (such as the proposed E-Commerce Directive and the German “Teleservices Act” (TDG)), which expressly prohibit government authorization of information society services.²⁷
 - Private-sector initiatives in ADR have a long tradition of success (for example, ICC arbitration), and it is not apparent why there is a need for government regulation in this area.
 - As described throughout this study, the use of ADR in the consumer context is already subject to stringent regulation under both EU and Member State law, so there is no apparent need for additional regulation or accreditation.

Minimum Standards for the Proceedings

In its “Communication on the out-of-court settlement of consumer disputes”, the Commission has made it clear that ADR systems for use in the consumer context have to satisfy stringent requirements as to legality and transparency, including the following:

- **Independence of the decision-making body.** The decision-maker must be qualified, must have sufficient independence while in office (including sufficient security of tenure), and must be independent from any professional association or enterprise that appointed him.
- **Transparency of the process.** This must be ensured through provision of suitable information to consumers, including publication of an annual report about decisions taken.
- **Adversarial principle.** All parties must be allowed to present their arguments to the decision-maker, and must have equal access to evidence.
- **Effectiveness principle.** The consumer must be able to represent himself in the procedure, which must be free or of moderate cost. The decision must be rendered rapidly, and the decision-maker must have an active role in the proceedings.

²⁶ Recommendation Ecom-12-00 on ADR of the “Trans Atlantic Consumer Dialogue”, <http://www.tacd.org/ecommercef.html#adr>.

²⁷ See E-Commerce Directive, Article 4(1); TDG, Article 4.

- **Legality principle.** The consumer must not be deprived of mandatory provisions of law of the place where the decision-making body is established, and of the Member State where he is normally resident.
- **Liberty principle.** If the decision is to be binding and further recourse to the court system will be excluded, the consumer must have been informed of this in advance and have accepted it.
- **Principle of representation.** The consumer must be able to be represented or assisted by a third party at all stages.

As an example of these principles, it seems that national law in some Member States would require that an ADR procedure give the consumer the right to be represented by a lawyer in the proceedings.²⁸

It is clear that some of these principles (e.g., the liberty principle) only need be observed if the ADR procedure is binding in the sense that the consumer has waived further access to the court system. Nevertheless, they represent a kind of minimum standard for business-to-consumer ADR in Europe, and most of them will likely be perceived by courts and regulators as applicable to voluntary or non-binding systems as well. Some of them may unintentionally create difficulties for the design and functioning of ADR systems, for example:

- Principle I (Independence Principle, stating that “if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned”) seems overly restrictive and may effectively prevent the parties from using the decision-maker they want.
- Principle V (Principle of Legality) would mean in effect that the decision-maker would have to apply mandatory rules of law of both the place where it is established, and of the consumer’s country of residence, which seems both overly complicated and unnecessary.

Cost could also be a hindrance to the establishment and use of ADR systems for electronic commerce. It is widely recognized that the high cost of court proceedings and of enforcing a judgment from one Member State in another Member State is a particular hindrance to use of the court system for consumer disputes,²⁹ and it may also be a hindrance in the area of electronic commerce, given that most consumer disputes relating to electronic commerce are of a relatively small amount. Any ADR system would thus have to be set up and run in a cost-effective way, and be delivered at a reasonable cost for consumers. At the same time, any ADR system which was totally free-of-charge for consumers would have to incorporate some sort of incentive to deter the bringing of frivolous claims. Given that there will likely be a wide variety of ADR systems developed by businesses, the most likely result is that some systems

²⁸ See § 1042 of the German Code of Civil Procedure (ZPO).

²⁹ According to the Communication, “The average cost (court fees plus lawyer’s fees) of the judicial settlement of an intra-Community dispute concerning an amount of ECU 2 000 is approximately ECU 2 500 for the plaintiff even in the best of circumstances.”

will be cost-free, while others may require an advance on costs or reimbursement of certain costs by consumers, depending on the type of system and the dispute involved.

There may also be constitutional problems in some Member States with using a purely online ADR procedure. For instance, under Art. 103(1) of the German “Basic Law” (Grundgesetz) and § 1042 of the German Civil Procedure Law, parties in arbitrations have certain fundamental procedural rights which may not be waived. It is arguable that certain security risks inherent in the nature of the Internet (such as the difficulty of ensuring with complete certainty that a participant in an online procedure is who he says he is) could be interpreted by a court as violating the basic procedural rights of the consumer. However, some authorities are more optimistic about the legality of online arbitral proceedings under German law,³⁰ and the better view seems to be that the security risks of online communication can be adequately overcome through technological means, so that they should not present insurmountable legal barriers.

Place of the Proceedings

In an arbitration-like ADR procedure, difficulties might arise with respect to the determination of the place of arbitration if the proceedings were conducted online and the applicable law relies on physical location as did, at least with respect to the signature of the award, English arbitration law prior to the 1996 Act.³¹ This could in turn lead to a so-called “floating arbitration” or “floating award”, which would have legal repercussions for important matters ranging from interference by local courts in the proceedings to enforcement of an eventual award. In legal systems which have adopted the Swiss concept of the “seat” of the arbitration, these difficulties are not likely to arise, since the seat refers to the factor connecting the arbitration to a specific legal system and is independent of the place where the proceedings physically take place. This concept has now also been adopted in the 1996 Arbitration Act in the UK.³²

Confidentiality and Security of the Proceedings

Significant practical problems may arise in an online ADR proceeding with regard to confidentiality and security of the proceedings, particularly those conducted over open computer networks. The Internet is an inherently insecure medium, so that steps would have to be taken to protect the security of any messages or documents transmitted over it. Particularly in the case of high-value disputes, it is arguable that EU data protection law would require the use of appropriate technical mechanisms, such as encryption, to protect the security of the proceedings.³³ Thus, it is essential that EU governments relax existing restrictions on the use, export, and import of encryption technologies (such as those on the intra-EU transfer of encryption

³⁰ See Peter Jung, *Rechtsfragen der Online-Schiedsgerichtsbarkeit*, 1999 *Kommunikation und Recht* 63, 67.

³¹ See the judgement of the House of Lords in *Hiscox v. Outhwaite*, [1991] 1 W.L.R. 279.

³² Sections 3 and 53.

³³ See EU Data Protection Directive, Art. 17(1), providing that data controllers “must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.”

technologies under the EU Dual Use Ordinance), since encryption may prove essential to the development of secure ADR systems. Since in many cases ADR systems may also want to use appropriate methods of electronic authentication in the proceedings, it is essential that the EU Member States implement the recently-enacted EU Directive on Electronic Signatures³⁴ in a timely and liberal fashion, so that electronic signatures may have full legal effect in all Member States.³⁵

Basic issues also arise in relation to whether the proceedings, and the results thereof, should remain confidential. In classical arbitration, the parties usually agree to keep the proceedings and the decision confidential, although more and more arbitral awards are being published. In the EU, most civil law legal systems do not publish court decisions routinely, while in the common law systems they are published. In an ADR system, the parties should be able to agree on the degree of confidentiality to be given to the proceedings and the result, which agreement should be broadly recognized by national legal systems. However, it is possible that the wholesale transfer of dispute resolution to confidential ADR systems might hinder development of the law in a particular area, since the decision-makers may not have the opportunity to appropriately consider the ramifications of the dispute beyond the particular case, and court systems would be deprived of the opportunity to examine applicable precedent. Thus, thought should be given to ways in which the decision could be placed in a broader context, such as publishing decisions in redacted form, or publishing statistics about them. A legal basis for this is provided by Article 17(3) of the proposed E-Commerce Directive (providing that “Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding Information Society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.”)

Form Requirements

Many sets of arbitral rules and national procedural laws contain requirements of form which would have to be modified in the context of online arbitration. For example, the Rules of the London Court of International Arbitration refer to the presentation of testimony "in written form",³⁶ without clarifying whether this would also include evidence in electronic form.³⁷ In the context of Member State laws, the proposed E-Commerce Directive and the Electronic Signature Directive (discussed above) should cause the Member States to remove such formalistic barriers to the use of electronic contracting and electronic evidence, but it will be crucial that they be implemented rapidly.

³⁴ 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 13/12 of 19.1.2000.

³⁵ See Article 5 of the Directive, which obligates the Member States not to deny legal effectiveness and admissibility into evidence of electronic signatures.

³⁶ LCIA Rules of January 1 1998, Art. 20.3

³⁷ On the other hand, the revised ICC Rules expressly authorize transmission by “any other means of telecommunications that provide a record of the sending thereof”. Rules of Arbitration of the International Chamber of Commerce, January 1 1998, Article 3(2).

Enforcement of the Decision

As stated in the Commission's "Communication on "the out-of-court settlement of consumer disputes", the status of decisions adopted by ADR bodies in Europe differs greatly:

Some are mere recommendations (as in the case of the Scandinavian Consumer Complaints Boards and most of the private ombudsmen), while others are binding only on the professional (as in the case of most of the bank ombudsmen); others still are binding on both parties (arbitration).

Such diversity is natural, and it can be expected that ADR mechanisms for electronic commerce will similarly demonstrate differences in their degree of enforceability, depending on whether the decision-maker is supposed to counsel the parties to reach a settlement, issue recommendations or issue a binding decision.

Non-binding forms of ADR, such as mediation, do not lead to enforcement problems, as long as the parties know and accept from the outset that the result is not intended to be binding. Moreover, if the proceedings lead to a binding decision, the parties may well comply with it voluntarily in most cases (which already largely happens in the case of international commercial arbitration), so that the real need for enforcement of the decision may be limited in practice. Indeed, there is a tension between the views often expressed that the consumer should not have to waive his right to go to court in agreeing to submit a dispute to ADR, and the desire that the ultimate decision be binding on both parties.³⁸ Nevertheless, there is no doubt that in many cases, both parties may have a strong interest in resolving the dispute finally through the ADR procedure, so that there is a real need for ensuring that the ultimate decision be legally-binding if both parties so desire.

There are two basic ways in which parties to an ADR procedure can obtain a legally-binding result:

- By enforcing the agreement to comply with the decision-maker's award or recommendation as a contract, or
- By participating in a proceeding which results in the decision-maker rendering a binding arbitral award.

The first type of enforcement mechanism (a binding settlement agreement) could be implemented either bilaterally or unilaterally (e.g., only the merchant could agree to be bound by the result of the ADR procedure). Generally speaking, such agreements are binding in all the Member States as contracts, which can then be sued upon under

³⁸ See, e.g., Recommendation Ecom-12-00 on ADR of the "Trans Atlantic Consumer Dialogue", <http://www.tacd.org/ecommercef.html#adr>, which sees as one of the disadvantages for consumer ADR in e-commerce that "if one or both parties are bound by the decision, their ability to seek legal redress if they are not satisfied may be restricted or blocked altogether", while at the same time complaining that "if parties fail to comply with decisions and there is no practical means of enforcement, the ADR process may be an exercise in futility".

national law if they are not complied with,³⁹ and the resulting judgment could then be enforced in other EU Member States under the provisions of the Brussels Convention.⁴⁰ However, cross-border enforceability of judgments in Europe has often been criticized as being too costly and burdensome to be of much help to consumers;⁴¹ indeed, this is one of the main reasons often advanced for the need to develop ADR mechanisms for electronic commerce. Thus, simplifying the process for the enforcement of national court judgments throughout the EU would go a long way to improving the effectiveness of ADR systems as well.

With regard to the second type of enforcement mechanism (having the decision-maker issue an arbitral award which has the binding effect of a court judgment), the basic legal instrument for enforcement in Europe is the New York Convention, which, however, only applies to “foreign arbitral awards”,⁴² i.e., does not apply either to domestic arbitral awards or to decisions taken in non-binding forms of ADR, such as mediation. Thus, application of the New York Convention will remain limited to “foreign” awards and to ADR proceedings that from the outset were intended to lead to a binding arbitral award. There are also legal barriers to enforcement of arbitral awards against consumers in electronic commerce, which arise mainly from national law applicable to interpretation of the New York Convention’s provisions on enforcement:

Limited enactment of the New York Convention

At present, every EU Member State has enacted the New York Convention.⁴³ However, a number of countries in eastern Europe and Africa have not ratified the Convention,⁴⁴ or have ratified it with the so-called “commerce limitation”,⁴⁵ meaning that they will apply the Convention only to “differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.⁴⁶ While this is far from certain, it appears that, under the national law of some Member States, disputes with consumers would *per se* not be considered “commercial”, so that arbitral awards rendered in consumer ADR may not be enforceable under the New York Convention in such countries.⁴⁷ Still other countries have ratified the Convention with the so-called “reciprocity limitation”,⁴⁸ meaning that they will apply the Convention “to the recognition and enforcement of awards made only in the territory of another

³⁹ In addition to an action under contract law, the failure to fulfill an agreement to comply with the decision-maker’s decision or recommendation could possibly also be actionable under national law of unfair competition.

⁴⁰ See Brussels Convention, Art. 26.

⁴¹ See the Commission’s Communication on the out-of-court settlement of consumer disputes, stating “[I]t is fair to say that, in most consumer disputes - both national and cross-border - the proceedings are too long drawn out and their cost excessive...”

⁴² New York Convention, Article I(1).

⁴³ In the Commission’s Communication on the out-of-court-settlement of consumer disputes, it is stated that “the New York Convention...does not apply in all Member States of the European Union (Portugal, for example, has not subscribed to this Convention)...” Based on discussions with the Treaty Section of UNCITRAL, this statement appears to be in error.

⁴⁴ For example, Albania, Macedonia, Libya, and Palestine.

⁴⁵ For example, Algeria, Denmark, Greece, Hungary, Poland, Romania, and Tunisia.

⁴⁶ New York Convention, Article I(3).

⁴⁷ France seems to be an example.

⁴⁸ For example, Belgium, Bulgaria, Ireland, Luxembourg, and Morocco.

Contracting State”,⁴⁹ which would further limit the possibility of enforcing arbitral awards.

Interpretation of the New York Convention

Certain provisions of the New York Convention may create difficulties of interpretation in the context of electronic commerce. For example, it is conceivable that the courts of the enforcing State may consider that the notice requirements of the New York Convention have not been complied with if notice of the proceedings was given online.⁵⁰ Difficulties may also arise in online ADR when it has to be determined whether the arbitral procedure was “in accordance with the law of the country where the arbitration took place”.⁵¹ Arbitral awards in electronic commerce could also be difficult, if not impossible, to enforce, unless a hard copy of the award has been issued, since Article IV of the New York Convention requires that a party applying for enforcement of an award must present “the duly authenticated original award or a duly certified copy thereof”. Thus, the parties to an online ADR procedure would have to ensure that the arbitrators issued a hard copy of the award, in order to comply with the requirements of form to make it “binding on the parties”.⁵² There are also requirements in national law that require the issuance of a “hard copy” version of the arbitral award.⁵³

Defenses to Enforcement

Article V of the New York Convention provides for defenses to enforcement of foreign arbitral awards, which may be particularly relevant in the context of consumer cases. Examples of this could be defects in the validity of the arbitration clause (such as those caused by restrictions in national law with respect to arbitration agreements in consumer contracts) under Article V(1)(a), or if arbitration of disputes with consumers was found to violate the public policy of the State where enforcement was sought under Article V(2)(b). However, it seems that the use of such defenses to enforcement under the New York Convention in cases involving consumers should be strictly limited, since in most Member States, restrictions on arbitrability are limited to a very small number of cases.⁵⁴

Finally, new and innovative enforcement schemes (such as insurance policies that would compensate the consumer if an ADR decision was not complied with) may be

⁴⁹ New York Convention, Article I(3).

⁵⁰ See Catherine Kessedjian & Sandrine Cahn, *Dispute Resolution On-Line*, 32 *The International Lawyer* 977, 988 (1998). Article V(1)(b) of the Convention permits refusal of enforcement if “the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

⁵¹ Article V(1)(d).

⁵² Under Article V(1)(e) enforcement may be refused if “the award has not yet become binding on the parties....”

⁵³ See § 1054 of the German Civil Procedure Law.

⁵⁴ See, e.g., Georg Borges, *Die Anerkennung und Vollstreckung von Schiedssprüchen nach dem neuen Schiedsverfahrensrecht*, 1998 *Zeitschrift für Zivilprozeß* 487, 495, arguing that it is the clear intention of the new German arbitration law (enacted in 1998) that arbitrability be denied only for disputes for which the law provides a legal monopoly for the court system (meaning, in effect, only divorce cases); Fouchard Gaillard Goldman on *International Commercial Arbitration* (Kluwer Law International 1999), p. 338.

developed to fill in the gaps in enforcement caused by legal uncertainties and practical problems with the Brussels and New York Conventions.

Conclusions

There are presently a number of barriers to the use of consumer ADR in Europe in the context of electronic commerce, which can be summarized as follows:

Formation of the ADR Agreement

- **Problem:** Some Member States restrict consumers from submitting disputes to an ADR mechanism to the exclusion of their right to go to court, at least in domestic cases.
- **Solution:** National laws should be amended in the course of implementing the E-Commerce Directive to remove per se barriers to ADR agreements by consumers.

- **Problem:** Based on the Brussels Convention and other legal instruments, valid ADR agreements by consumers would have to be entered into after the dispute has arisen, and would have to give the consumer at least the same basic procedural rights as would the court system.
- **Solution:** National law should recognize the ability of consumers to enter into ADR agreements before the fact and to structure the proceedings as they desire, as long as there is full transparency and information about the consequences.

- **Problem:** National laws may inhibit the conclusion of contracts online, which could affect the validity of dispute resolution clauses entered into electronically.
- **Solution:** Such laws should be amended in the course of implementing the Directives on E-Commerce and Electronic Signatures.

- **Problem:** National laws and international conventions frequently require that forum selection or arbitration clauses be "in writing".
- **Solution:** Such laws and conventions require amendment, so that "writing" is defined more liberally.

Structure of ADR Systems and Conduct of the Proceedings

- **Problem:** Government regulation or accreditation could unintentionally hinder the establishment and functioning of ADR systems.
- **Solution:** Such regulation should be limited to what is strictly necessary, and should avoid setting up accreditation schemes.

- **Problem:** Principles in the Commission's Communication on the out-of-court settlement of consumer disputes are not all well-suited for use in electronic commerce, and could create problems.
- **Solution:** While providing a useful foundation, the principles were conceived before the explosion of electronic commerce, and need to be rethought for the Internet age.

- **Problem:** It is important that the place of arbitration be ascertainable also for online procedures.
- **Solution:** National laws should adopt the “seat of the arbitration” concept already in force in Switzerland and the UK.

- **Problem:** National laws on encryption and authentication could inhibit the proper level of confidentiality and security in online proceedings.
- **Solution:** Restrictions on the export and use of encryption technologies for the purpose of ADR should be eliminated, and the Electronic Signatures Directive should be implemented rapidly.

- **Problem:** Parties from different legal systems may have different ideas about whether arbitral decisions should be kept confidential, and excessive confidentiality may impede development of the law.
- **Solution:** Mechanisms should be established so that decisions are published at least in redacted form.

- **Problem:** National procedural laws and arbitral rules contain form requirements that would impede their use in the online context.
- **Solution:** Amendment of such laws and rules should continue.

Enforcement of the Decision

- **Problem:** Enforcement of settlement agreements as judgments is too lengthy and expensive in Europe, particularly in a cross-border context.
- **Solution:** The procedures for recognition and enforcement of court judgments under the Brussels Convention should be drastically improved.

- **Problem:** Too many European countries have enacted the New York Convention with reservations, and too many African ones either with reservations or not at all.
- **Solution:** All states should speedily ratify the New York Convention, or withdraw their existing reservations to it.

- **Problem:** The provisions of the New York Convention were drafted well before the Internet age, and present problems of interpretation in the online context which may interfere with the conduct of the arbitration.
- **Solution:** National courts should interpret the New York Convention in light of technological advances, and in a way that furthers the Convention’s goal of promoting the enforcement of foreign arbitral awards.

- **Problem:** Defenses to the enforcement of foreign arbitral awards may be interpreted in a way by national courts that inhibits the enforcement of ADR procedures for consumer electronic commerce.
- **Solution:** Courts should interpret Article V of the New York Convention narrowly in line with its purpose.

Finally, one of the greatest barriers to a firm legal foundation for consumer ADR in Europe is the great diversity of consumer protection laws. In particular, it would be much easier to ensure that agreements to submit disputes to binding ADR were enforceable, and to enforce decisions of such ADR mechanisms once they were rendered, if consumer protection laws were more harmonized. It would thus be beneficial for the growth of ADR in electronic commerce in Europe if further harmonization of consumer protection law was undertaken, perhaps within the scope of implementation of Article 17 of the proposed E-Commerce Directive.