

Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce

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As electronic commerce develops at a furious pace in Europe, it is becoming clearer that traditional means of dispute resolution (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. However, the use of alternative methods of dispute resolution in Europe is presently encumbered with a number of legal obstacles.

In investigating such legal obstacles, it is important at the outset to define several key terms:

□ **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”¹ (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 article 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.

□ **Non-binding.** Terms such as “non-binding” or “voluntary” could have a variety of meanings; for example, one could interpret them 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

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¹ http://europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just02_en.html.

gradations along a continuum. This article 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, 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.

I. Legal basis for ADR in Europe

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”² 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

² See <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm>.

commerce disputes, has been approved by the Member States and the Commission, and is presently awaiting entry into force.³

□ **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":

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.⁴

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.⁵

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

³ 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.

⁴ 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".

⁵ 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."

Directive”), the “Common Position” of which was approved by the European Parliament on May 4, 2000.⁶ Article 17 of the E-Commerce Directive is designed to remove barriers to ADR in e-commerce, such as by requiring Member States to ensure that their national law “does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means”. It also directs Member States to “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”, and to “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.”

□ 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

II. 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,⁸ 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

⁶ Available at http://europa.eu.int/eur-lex/en/dat/2000/c_128/c_12820000508en00320050.pdf

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

⁸ For example, in Denmark all financial services regulated in that country must participate in a compulsory ADR scheme.

of consumers to go to court is excluded.⁹ 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.¹⁰

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.

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.¹¹ If these conditions are not complied with, the terms and conditions will be disregarded and the entire contract will be governed by statutory law.¹² 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.¹³

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",¹⁴ and the Italian Civil Procedure Law also requires "a writing", in which context, oddly enough, only

⁹ 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.

¹⁰ See Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999), pp. 38, 347-48.

¹¹ AGB-Gesetz, Art. 2.

¹² AGB-Gesetz, Art. 6.

¹³ See generally Oliver Spieker, *Schiedsvereinbarungen in Allgemeinen Geschäftsbedingungen im Bereich des nicht kaufmännischen Verkehrs*, 1999 *Zeitschrift für Zivilprozeß* 2138.

¹⁴ Dutch Civil Procedure Law, Art. 1021.

telegrams and telexes are mentioned.¹⁵ 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.¹⁶ By contrast, in Switzerland an international arbitral agreement may take any form which permits it to be evidenced by a text,¹⁷ 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..."¹⁸

The New York Convention's requirement that an arbitral agreement be "in writing"¹⁹ has also been the subject of numerous court decisions. In one case,²⁰ 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.

Once the E-Commerce Directive has been implemented into Member State law, 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.

III. Conduct of the Proceedings

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.

¹⁵ Italian Civil Procedure Law, Art. 807.

¹⁶ German Civil Procedure Law, Art. 1031(5).

¹⁷ The 1987 Swiss Federal Private International Law Act (PIL Act), Art. 178 para. 1.

¹⁸ Art. 7(2).

¹⁹ New York Convention, Art. II(1).

²⁰ BGE 121 (1995) III 38 at 44.

- **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.
- **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.²¹

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,²² 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,

²¹ See § 1042 of the German Code of Civil Procedure (ZPO).

²² According to the Commission’s Communication on the out-of-court settlement of consumer disputes, “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.”

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 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,²³ 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. 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.²⁴

Confidentiality and Security

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.²⁵

²³ See Peter Jung, *Rechtsfragen der Online-Schiedsgerichtsbarkeit*, 1999 *Kommunikation und Recht* 63, 67.

²⁴ Sections 3 and 53.

²⁵ 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

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 now being published. In the EU, most civil law legal systems do not publish all court decisions routinely, while in the common law systems they are generally 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 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”,²⁶ without clarifying whether this would also include evidence in electronic form. In the context of Member State laws, the 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.

IV. Enforcement of the Decision

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

shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.”

²⁶ LCIA Rules of January 1 1998, Art. 20.3

the Member States as contracts, which can then be sued upon under national law if they are not complied with,²⁷ and the resulting judgment could then be enforced in other EU Member States under the provisions of the Brussels Convention.²⁸ 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;²⁹ 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”,³⁰ 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.³¹ However, a number of countries have ratified it with the so-called “commerce limitation”,³² 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”.³³ 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.³⁴ Still other countries have ratified the Convention with the so-called “reciprocity limitation”,³⁵ meaning that they will apply the Convention “to the recognition and enforcement of awards made only in the territory of

²⁷ 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.

²⁸ See Brussels Convention, Art. 26.

²⁹ 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...”

³⁰ New York Convention, Article I(1).

³¹ 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.

³² For example, Denmark and Greece.

³³ New York Convention, Article I(3).

³⁴ France seems to be an example.

³⁵ For example, Belgium, Ireland, and Luxembourg.

another Contracting State”,³⁶ 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.³⁷ 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”.³⁸ 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”.³⁹ There are also requirements in national law that require the issuance of a “hard copy” version of the arbitral award.⁴⁰

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.⁴¹

³⁶ New York Convention, Article I(3).

³⁷ 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”.

³⁸ Article V(1)(d).

³⁹ Under Article V(1)(e) enforcement may be refused if “the award has not yet become binding on the parties....”

⁴⁰ See § 1054 of the German Civil Procedure Law.

⁴¹ 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.