
Out-of-court dispute settlement systems for e-commerce

*Report on legal issues
Part III: Types of Out-of-court Dispute Settlement*

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We invite readers of this report to send comments or suggestions to:

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Types of Out-of-court Dispute Settlement in Electronic Commerce

1 The Concept of Out-of-Court Dispute Settlement and the Directive on Electronic Commerce

The European Parliament stressed in its Resolution of 13/04/99¹ the importance to facilitate the life of the individual citizen through the settlement of cross-border disputes. In the electronic commerce the situation is accentuated, since here the geographical distance between the parties or concepts of territoriality become nearly irrelevant.

1.1 Out-of-Court Dispute Settlement Systems

Out-of-court Dispute Settlement Systems

<p><u>Arbitration</u></p> <p>The decision maker makes a decision on the dispute which can be enforced by the parties</p>	<p><u>Mediation/Conciliation</u></p> <p>The decision maker facilitates or proposes a settlement to be achieved by the parties themselves</p>	<p><u>Consumer Schemes</u></p> <p>The decision maker organises the settlement on the basis of a (national) consumer protection system</p>
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In the sector of out-of-court dispute settlement many different types were developed. From the functional approach it may be differed between 'adjudicational' types and 'contractual' types. To the first types belongs arbitration, because here a third person will make a decision on the basis of legal reasonings which is imposed on the parties. To the second types belong mediation and conciliation. Here the settlement is made by the parties themselves, however with the support of a third person. In the sector of consumer complaints and ombudsman proceedings mixed types may be employed, often based on consumer protection laws and industry self-regulation.

1.2 Different Types of Out-of-court Dispute Settlement

It has been stated:² *The forms of dispute settlement are many. The theories behind the forms and classifications are also diverse. In addition to judicial verdicts the other forms of dispute resolution are:*

- arbitration;
- summary arbitration proceeding;
- binding advice;
- intercession;
- mediation;
- conciliation;
- med-arb (mediation-arbitration);
- advising arbitration;
- fact-finding;
- rent-a-judge;
- summary trial;

- *executive tribunal (mini-trial)*.

These different types of out-of-court dispute settlement systems were developed to serve particular needs, often in referral systems in close relation to court litigation on the basis of national laws or, additional to the court system, in order to serve needs which the court system did not satisfy. For example, fact-finding is a procedure which was developed to avoid the costly taking of evidence in the discovery procedure before US American courts. For the purpose of out-of-court dispute settlement systems for electronic commerce the value of these special types of out-of-court dispute settlement is limited. Accordingly, only those types shall subsequently be referred to which are of direct interest for the purpose of the study.

On the international level, arbitration served a particular function, because it permitted the parties from different states to select a 'neutral' specialist decision maker whom they could ask to base his decision on legal rules particularly chosen by the parties. Due to this 'neutrality' of the arbitrator the international arbitration system could provide advantages over national court systems in international disputes. The international operation of the arbitration system was ensured by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the sector of mediation and conciliation, the mediator or arbitrator aims at the achievement of a settlement by the parties themselves. He may propose a settlement or work towards the conclusion of a settlement agreement. However, such an agreement is generally only enforceable as a contract. Accordingly, in cross-border disputes the achievement of a settlement agreement may not avoid the resort to court litigation. A party may have to institute legal proceedings based on a breach of contract in the country where the other party is domiciled or established if this party refuses to fulfil its commitments under the settlement agreement.

In the sector of consumer complaints or ombudsman proceedings the out-of-court dispute settlement systems available are generally based on a national legal framework. These frameworks are very different in Member States, providing for consumer arbitration, mediation, conciliation or complaint and ombudsman schemes in cooperation with consumer organisations, chambers of commerce and trade associations. These schemes aim at an expeditious and speedy treatment of disputes. They achieve this by means of the expertise of their decision makers who are often specialists in the relevant sector of the trade to which the dispute relates. However, since such systems operate often to serve the needs of consumers and the trade or industry on a national, regional or provincial basis, their availability to settle cross-border disputes is generally limited to the operation of the own system.

2 Out-of-court Dispute Settlement Systems

Out-of-court dispute settlement relates to all types of dispute settlement which are not litigated before a court. Depending on the binding character of the final decision³, there are different types of out-of-court dispute settlement available. They include arbitration, mediation or conciliation and consumer complaint or ombudsman schemes.

2.1 Arbitration

In arbitration, the parties choose one or more neutral persons (arbitrators) to whom they present their dispute for a final and legally binding decision (the award).

The most important legal instrument regulating international arbitration is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958,⁴

which regulates, amongst others, the enforceability of foreign arbitral awards. The development of law and specialised rules for international arbitration have been extensively developed, in particular by the UNCITRAL and bodies responsible for International arbitration.

Arbitration is the type of out-of-court dispute settlement which resembles most closely the adjudication system by courts. Like a judge the arbitrator will make a decision which is imposed on the parties. But different from the court system the parties may select the decision maker (the arbitrator or arbitrators) and the rules of the arbitration procedure.

2.1.1 International Instruments Relating to Arbitration

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958;⁵
- Council of Europe European Convention Providing a Uniform Law on Arbitration, Strasbourg 1966;⁶
- UNCITRAL Arbitration Rules, 1980;⁷
- UNCITRAL Model Law on International Commercial Arbitration, 1985;⁸
- European Convention on International Commercial Arbitration, Geneva 1961;⁹

2.1.2 Reasons which May Favour Arbitration

- speedy proceedings;
- framework for international arbitration and recognition and enforcement of foreign arbitral awards;
- bindingness and enforceability of the award;
- selection of body responsible for arbitration and of the arbitrator by the parties;
- choice of law applicable to the dispute by the parties;
- choice of law applicable to the procedure by the parties;
- in small claims arbitration relatively low costs.

2.1.3 Reasons which May Require the Adaptation of the Arbitration System

- traditional business-to-business arbitration may need adaptation to small claims or consumer arbitration;
- the regard of public policies of states in recognition and enforcement procedures, particularly in international consumer disputes, may create problems for arbitrators to make an award which will be sanctioned by national courts (recognition and enforcement);
- the need to correspond with formal requirements of international instruments in electronic commerce (arbitral agreement in writing, online hearings, use of audio- and videoconferencing technologies);
- procedural provisions which ensure the use of online technologies, particularly in international arbitration.

2.2 Mediation/Conciliation

By mediation or conciliation the parties to a dispute try to reach a voluntary settlement with the help of a third party. Mediation/conciliation is increasingly offered by bodies responsible for institutional arbitration, but also by other bodies such as trade associations.

International mediation and/or conciliation is hardly regulated, taking into account that it does not follow a strict legal procedure and remains under the control of the parties. In principle, the parties may, at any time, terminate the mediation or conciliation procedure. If they agree on a settlement, no international instrument will assist them in the enforcement of this settlement

abroad. Such a settlement will, in general, be analysed as a contract, so that a party which wants to enforce the settlement against the other party, might have to institute legal proceedings based on a breach of contract.

Other practical considerations make render the value of mediation or conciliation doubtful. First, even if the mediator does not merely facilitate a settlement but makes a proposal for it, he will make this proposal generally without giving the reasons. If he gives the reasons, he would be requested to work similar to a judge or arbitrator. Accordingly, he would have to ask for higher fees so that the cost advantages of mediation could be eroded.

Second, the supposition to resort to mediation implies that a party would have a negotiable position. If a party is convinced of the soundness of its position, it would be unreasonable to request it to use mediation for dispute settlement. A lawyer who would recommend to his client to resort to mediation under these circumstances would risk his professional standing.

Third, for a lawyer it is difficult to recommend to his party the conclusion of a settlement achieved by mediation if the settlement differs substantially from the position which has been assumed by the lawyer during the initial phase of the dispute. To recommend the conclusion of such a settlement might involve the lawyer's concession that his earlier position was not serious.

There are other psychological barriers which the parties and their lawyers may have to overcome if they should be asked to resort to mediation or conciliation in order to solve their disputes. In particular, it may be difficult for a party to assess the value of a settlement if a proposed settlement is unjustified in his view. The typical environment which recommends itself for mediation may be a complex contractual situation in which dispute settlement by other means that mediation would be very time consuming and expensive.

Typical mediation procedures include:

- mini trial (an information exchange between the parties before a team of senior managers of both parties in an objective role);
- semi-binding mediation - the parties agree from the beginning that they will, at least in part, accept the proposed settlement as binding, or that a party, if it does not accept the settlement but proceeds to arbitration/litigation, has to bear the costs of the proceedings if it does not achieve an improvement of the mediator's proposed settlement;
- fact finding – if the solution of the dispute depends on issues concerning technology, for example relating to the authenticity of data, it may be appropriate to appoint a neutral expert who may inspect evidence such as documents, computers, or other equipment;
- conflict management or negotiation – the contract between the Information Society service provider and the recipient may envisage for early mediation in the case of disputes, for negotiation in good faith, cooling-off periods, contract reviews (however, conflict management seems to be reasonable in the case of valuable long term contracts);
- high-low arbitration (a scheme by means of which the mediator aims at a settlement by arriving at a compromise between the sum claimed by the plaintiff and the sum which the defendant is willing to pay);
- final-offer arbitration (a scheme according to which the parties declare their 'final offers' for a settlement to the mediator who then aims at the proposal of a settlement by balancing the interests of the parties).

Some international instruments propose rules for bodies responsible for mediation or conciliation.

2.2.1 International Instruments Relating to Mediation/Conciliation

- the UNCITRAL Conciliation Rules (1980);¹⁰
- the Mediation/Conciliation Rules of the Centre of the Americas (1996).¹¹

2.2.2 Reasons which May Favour Mediation

- relatively simple procedural rules;
- a speedy procedure;
- relatively low costs;
- the control of the proceedings by the parties;
- the adaptability of the proceedings to cover a wide variety of disputes in the commercial and non-commercial sectors.

2.2.3 Reasons which May Require the Adaptation of the Mediation System

- the lack of a legal framework, particularly in cross-border disputes;
- the non-bindingness (a party may, in principle, terminate the mediation procedure at any moment, and it is free to accept the proposed settlement or not);
- the non-enforceability (if the parties accept the proposed settlement, their consent may constitute a contract. If a party subsequently refuses to execute the settlement, the other party may have to institute court proceedings asserting a breach of contract);
- whereas mediation techniques are practised in many common law countries with a long tradition, often due to rising costs of traditional litigation and arbitration, in many civil law countries litigation before the courts is less expensive so that there was a lesser need for the development of mediation techniques;
- the use of technologies which ensure the confidentiality of the mediation proceedings, particularly in cross-border mediation.

2.3 Consumer Complaint Boards/Ombudsmen

Consumer organisations, trade and industry associations, public administrations or other 'neutral' organisations may, jointly or independently organise schemes which offer out-of-court dispute settlement of consumer complaints. The most common are often referred to as consumer complaint or ombudsman schemes. Important legal issues include:

2.3.1 Regulation of the Schemes on the Basis of National Laws

Consumer complaint and ombudsman systems are generally instituted on the basis of national legislation or on the initiative of industry as a measure of self regulation. In the case where a complaint system is regulated by a legislator on the national level, for example in the Scandinavian countries, Greece, Italy or Spain it appears that Information Society service providers of those countries should be able to rely on an online complaint system which will be offered by the competent national consumer complaint boards.

2.3.2 National Consumer Complaint Systems and International Contracts

In the case of international contracts between Information Society services and recipients the national consumer complaint system in the Member State where the Information Society service is established should be able to deal with complaints. However, national consumer complaint systems are directed to assist consumers within the national territory. Thus in cross-border relations it may be unclear whether the national consumer complaint system at the place where the Information Society service is established or at the place where the recipient is domiciled should deal with the complaint. The situation may be even more uncertain if the dispute between

the parties does not relate to a contract but is based, for example, on pre-contractual obligations or tort.

Member States may have to observe the conflict of laws rules according to their international obligations. Such obligations derive from the Brussels and Rome Conventions but also from rules contained in secondary EU law. Concerning the relations between the Brussels¹² and Rome¹³ Conventions and EU law it is important to observe that both Conventions provide for the precedence of Community acts.

2.3.3 'Mixed' Regulation or no Regulation by National Law

If a consumer complaint system is only partially regulated by public laws or not regulated at all, the establishment of a consumer complaint system may be based on the initiative of the Information Society service providers. Such a system may be appropriately drafted to respond to the needs of the particular economic sector concerning Information Society services and their clients.

2.3.4 Privately Organised Consumer Complaint Systems

The Information Society service provider may use the services of a body responsible for out-of-court dispute settlement on a long term contractual basis. Such a relation may be based on a licence agreement with a body responsible for out-of-court dispute settlement which offers its services together with the offer to use its trustmark. In such a case the Information Society service will inform recipients on its website that complaints can be made to the body. The Information Society service may declare that it will be bound by the body's decision.

2.3.5 Selection of Out-of-court Dispute Settlement by the Parties

The Information Society service provider and the recipient may, in an individual agreement or a clause in their contract, select a body responsible for out-of-court dispute settlement. If the Information Society service uses general terms of contracts, the validity of such a clause may be controversial, particularly if the recipient is a consumer. Accordingly, such clauses should be carefully drafted. The issue of the validity of these clauses will be discussed in the subsequent parts dealing with the particular types of out-of-court dispute settlement. The Information Society service provider and the recipient may also decide ad hoc on a body responsible for out-of-court dispute settlement.

2.3.6 Regulation of Cross-border Consumer Complaints

Cross-border consumer complaints are hardly regulated, taking into account of the fact that in the non-e-commerce sector the consumer usually bought locally or regionally. Generally speaking, the question does not seem to be clarified whether the complaint boards in the state where the Information Society service is established or in the state where the recipient is resident should deal with the complaint and up to which extent a board should observe the laws of a foreign state if such laws would be applicable according to the principles of the international private law. A regulation at the EU level should also take into account a balancing of the interests of the parties to the contract with due regard to the expectations which they fairly might have had. In those countries where consumer complaints are regulated by law, the laws might specifically be extended to regulate cross-border complaints.

Complaint systems generally use mediation or conciliation techniques. These methods permit the rendering of a relatively quick proposal at modest costs.

2.3.7 Reasons which May Favour Consumer Complaint Systems

- a simple and speedy procedure;
- low costs for the complaining party.

2.3.8 Reasons which May Require the Adaptation of the Consumer Complaint System

- the lack of a legal framework in cross-border issues;
- the generally non-binding nature of the decision for the consumer (complemented, occasionally, by a bindingness for the business);
- the non-regard of the consumer protection laws in a country other than this where the body responsible for consumer complaints is established;
- support by automatic translation;
- standardisation of technologies used for electronic commerce in cross-border consumer complaints.

3 Functions of Out-of-court Dispute Settlement

Out-of-court dispute settlement systems compete with each other. The bodies responsible for out-of-court dispute settlement are eager to develop attractive models which ensure that the parties are satisfied by the procedures and their result. Apart from certain bodies dealing with consumer disputes out-of-court dispute settlement systems are, unlike courts, not supported by public means. Those bodies which operate the most attractive systems will succeed. The market of the services of out-of-court dispute settlement will thus approve of those systems the functions of which serve best the needs of the parties to the disputes. Since this market is not yet developed in the sector of electronic commerce much depends on the available legal framework which should not create obstacles to the rendering of services, particularly in cross-border disputes.

3.1 Advantages of Out-of-court Dispute Settlement Systems

It has been stated with regard to the possibilities of out-of-court dispute settlement that it is difficult to evaluate the advantages of the different systems:¹⁴ *The various legal options compete with each other in a way which is rather unclear. It is not easy to decide which option will be the best. The general arguments either for or against certain options which we have found in the available literature are not sufficiently decisive. A few examples. An important advantage of arbitration as opposed to judicial verdict is often stated to be the speed of the procedure. Since summary proceedings are very popular nowadays, it is doubtful whether this argument is tenable.* However, the resort to such procedures is also involved with risks which derive particularly from limitations concerning the taking of evidence. Additionally, arbitration may provide for small claims procedures which offers less formal and even more speedy results.

The competition between court and out-of-court dispute settlement should not be exaggerated. It appears unlikely that courts would easily respond to 'challenges' from the out-of-court dispute settlement environment. This is basically due to the important tasks which national legislators imposed on the court systems so that any change would require an adaptation of the legal procedure. *Alternative forms of dispute settlement emphasise, however, the advantages of the flexible nature of their procedure. Judicial court, in turn, are not insensitive to this 'gap in the market' and are adopting a more flexible approach, in particular when discussing the possibilities offered by summary proceedings. Arbitration is also not averse to trying to attract a greater market potential by being double-sided. It stresses the advantage of greater flexibility, while, compared to other forms of ADR, it emphasises the advantage of the more significant guarantees of the arbitration procedure. So what appears to be a disadvantage from one side can appear to be an advantage from the other side.*¹⁵

It may also be controversial whether the costs of the system constitute an advantage of out-of-court dispute settlement. A generalising reply will be difficult: *A fast arbitration procedure may*

*well be cheaper than a lengthy conflict to be heard by a court, despite the sometimes enormous fees demanded by arbitrators. However, when a conflict can be solved quickly by a court, the arbitration procedure is then relatively a lot more expensive. The problem is that it is difficult to predict the length of the proceedings in advance.*¹⁶ However, when comparing court systems with systems for out-of-court dispute settlement in a general way, an empirical study, concerned with the results of studies and evaluations relating to the benefits of out-of-court dispute settlement, stated:¹⁷ *There are numerous studies that suggest that there are significant benefits in the use of alternative dispute resolution processes for many types of disputes. The Federal Court evaluation of their mediation program has also suggested that the process of mediation is beneficial and worthy of expansion.*

3.2 Competition between Bodies Responsible for Out-of-court Dispute Settlement

Between the bodies responsible for out-of-court dispute settlement there is competition, taking into account that such systems are operating according to market principles. However, some types of dispute settlement, in particular those relating to consumer protection, are particularly regulated by national laws and exempt from competition, for example according to the Portuguese or Spanish laws establishing consumer arbitration.

3.2.1 Competition between Bodies Responsible for Out-of-court Dispute Settlement in the Traditional Commerce

The choice between the different bodies responsible for out-of-court dispute settlement does not only provide an advantage, it may also constitute a problem for the parties. Not only the bodies responsible for out-of-court dispute settlement are in competition, but also the fori, the legal markets. Thus international arbitration in Belgium may be of interest for the mere reason that national arbitration law has lowered the control of international awards substantially – nearly any award will be recognised and enforceable according to the Belgian laws.

3.2.2 Competition and Arbitration

With regard to arbitration the problem may be summarised as follows:¹⁸ *International practitioners encounter increasing difficulties in finding their way through the flood of new laws. Legislative competition in an ideal market for international economic arbitration could lead to an optimised allocation of resources, that is to say an improved choice of arbitration venues and drafting techniques. However efficient competition always presumes knowledge of the offered services which relates to both the available arbitration laws and the centres which administer international arbitrations. It is above all the place of the arbitration in a third, neutral country which influences the contractual symmetry. The efficient use of the parties' respective bargaining positions and the resulting optimised choice of the arbitral venue in the arbitration agreement presupposes that the parties' negotiations are based on legal and factual considerations which coincide with the status of the legal environment and the factual infrastructure at the place of arbitration agreed by them. Frequently, however, misconceptions exist as to the perceived attractiveness of arbitration centres and arbitration laws.*

3.2.3 Competition and Consumer Disputes

In the sector of consumer disputes, national laws provide different environments for the settlement of claims. Some Member States envisage a unitary concept for dispute settlement, for example based on consumer arbitration established by the Portuguese or Spanish legislators, whereas others leave the matter basically to the self-regulation by the trade and industry, for example in Germany. Between these bodies generally no competition exists, since each is responsible for consumer complaints in a certain sector of the economy. The bodies are established with the aim to provide an easy tool for dispute resolution to the consumer at preferential costs. But these consumer complaint systems were not developed to assist cross-border consumers in electronic commerce. Generally, the rules of such bodies do not consider

the application of a foreign law relating to consumer protection, if the consumer is domiciled abroad. In order to help consumers in finding the appropriate body responsible for cross-border complaints, the EU established the European Extra-Juridical Network (EEJ-NET) which will process consumer complaints through a national centre in the Member State where the consumer is domiciled to the Member State where the business is established.

3.3 The Schemes of Out-of-court Dispute Settlement in Referral Systems

Different criteria may be been for the evaluation which type of an out-of-court dispute settlement system should be used. Such criteria could be helpful in the case where the resort to such systems was mandatory on the advice by the court. In some States out-of-court dispute settlement procedures have to be followed on the advice of a court.¹⁹ With regard to a referral system, that is to say if court action required the preliminary resort to out-of-court dispute settlement on the advice of the court, it has been stated:²⁰ *The decision to specifically advise parties of alternative dispute resolution options and to recommend options could be positively exercised after reference to the following:*

FACTORS FAVOURING NON BINDING EVALUATION:-

- 1. Whether the matter involves technical or legal issues.*
- 2. Whether liability is not an issue.*
- 3. Whether an expert opinion has previously been sought.*
- 4. Whether parties have a desire to keep a matter private or confidential.*

FACTORS FAVOURING MEDIATION:

- 1. Whether the matter is complex or likely to be lengthy.*
- 2. Whether the matter involves more than one plaintiff or defendant*
- 3. Whether there are any cross claims.*
- 4. Whether the parties have a continuing relationship.*
- 5. Whether either party could be characterised as a frequent litigator or there is evidence that the subject matter is related to a large number of other matters.*
- 6. Whether the possible outcome of the matter may be flexible and where differing contractual or other arrangements can be canvassed. Poor compliance rates in similar types of matters could be considered in respect of this factor.*
- 7. Whether the parties have a desire to keep a matter private or confidential.*
- 8. Whether a party is a litigant in person.*
- 9. Whether it is an appropriate time for referral.*
- 10. Whether the dispute has a number of facets that may be litigated separately at some time.*
- 11. Whether the dispute has facets that may be the subject of proceedings other jurisdictions.*

FACTORS FAVOURING ARBITRATION:-

- 1. Whether either party wishes to refer the matter.*
- 2. Whether it is an appropriate time for referral.*
- 3. Whether an insurance company is liable in full or part.*
- 4. Where speed of resolution is important.*
- 5. Where receiving a binding opinion is relevant.*
- 6. Where parties wish to avoid negotiations with the other side.*

7. Where a matter involves the quantification of a dispute.

3.4 The Schemes of Out-of-court Dispute Settlement According to the Directive on Electronic Commerce

The Directive on Electronic Commerce does not define the term out-of-court dispute settlement. Neither in Article 17 nor in the Recitals of the Directive the concept is explained. There are no indications that certain types of dispute settlement should be excluded.

3.4.1 The Complete Range of Systems for Out-of-court Dispute Settlement

The Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market',²¹ stressed the advantages of out-of-court dispute settlement systems for ordinary people. It pointed out that such systems offered easier proceedings than litigation before the courts and considered that out-of-court dispute settlement formed an ideal complement to the legal protection via the court system. Thus the out-of-court dispute settlement system should thus not replace the traditional system for the taking of legal redress by means of court litigation.

However, in the view of the Economic and Social Committee an efficient out-of-court dispute settlement system should guarantee:²²

- a minimum level of quality and
- the complete range of available options.

These two functional requirements can be fulfilled if Member States permit cross-border arbitration, mediation or conciliation and consumer complaint or ombudsman schemes in order to solve international disputes between Information Society services and recipients.

Concerning cross-border disputes the Economic and Social Committee considered that the existing consumer protection agencies and ombudsmen established in Member States should play an essential role.²³ Accordingly, the existing schemes which are used for the settlement of national disputes should not be replaced and no new institutions would have to be created in order to deal with cross-border disputes.

3.4.2 The Schemes of Out-of-court Dispute Settlement

Article 17 of the draft Directive refers to 'out-of-court dispute settlement systems' without differentiating between the differing possibilities of arbitration, mediation or ombudsman like systems. The Economic and Social Committee did not recommend a particular system. Concerned with small claims and consumer protection it indicated that within the existing schemes the full range of services concerning out-of-court dispute settlement should be offered. As an example it indicated that *consumer protection agencies or ombudsmen* should act "as conduits and possibly arbitrators in the event of disputes between consumers in one country and service suppliers based in another.

a.-) Requirements Concerning Out-of court Dispute Settlement Services

Thus it appears that the full range of out-of-court dispute settlement systems should be used within the framework of the systems of out-of-court dispute settlement systems envisaged by Article 17 of the proposed Directive, namely:

- arbitration;
- mediation/conciliation;
- consumer complaint/ombudsman schemes.

A limitation of the number of different systems to be employed is not indicated by the qualification that the disputes should relate to Information Society services and recipients, because such relations may relate to transactions between business-to-business as well as between business-to-consumer.

b.-) Requirements Relating to Legal Functionality

Dispute settlement mechanisms must be genuinely and effectively possible in law and in practice.²⁴ This means that dispute settlement systems should:

- be based on a legal framework which permits the operation of arbitration, mediation/conciliation and consumer complaint or ombudsman schemes in cross-border electronic commerce;
- allow for the recognition and enforcement of the settlement in the Member States concerned;
- correspond with the international law relating to out-of-court dispute settlement.

c.-) Requirements Relating to Technical Functionality

Dispute settlement mechanisms should be offered and made available:

- through electronic channels;²⁵
- by appropriate electronic means.²⁶

d.-) Requirements Relating to Information

The bodies involved in 'out-of-court dispute settlement systems' should, on the initiative of Member States, submit their significant decisions relating Information Society services to the Commission.²⁷ Likewise, such bodies shall inform the Commission about practices, usages or customs relating to electronic commerce.²⁸

4 The Adaptation of Out-of-court Dispute Settlement Systems to the Online Environment

The traditional out-of-court dispute settlement systems depend essentially on the exchange of letters and oral hearings. The online environment adds a new dimension by data messaging, audio- and videoconferencing, data protection and electronic storage of data.

4.1 EDI

With regard to electronic data interchange it has been suggested, that since the use of such communications requires already specific legal arrangements, it would be easy to include conditions on the settlement of disputes resulting from agreements made by using such technology. With this regard, it was suggested that the value added network service providers, *being an independent third party involved with the storage and transmission of the data of the transaction, seemed to be the obvious body to take on the role of mediator and, finally, to make the decision.*²⁹

Taking into account of the technical implications of the contractual relation between an Information Society service and a recipient, it may be appropriate to consider likewise that technical experts could act within the framework of out-of-court dispute settlements. However, it has been observed that for non-lawyers it may not be easy to draw up an arbitral award, so that, accordingly, arbitration should be provided by one lawyer and two automation experts.³⁰ It has been observed that drafters of dispute settlement clauses in standard EDI contracts, *while they make allowance for the possibility that disputes may arise, seem to have given little thought to*

*the particularities and complexities of such disputes, and even less to solutions which are adapted to the electronic medium. This seems to reflect the situation as it prevails generally in the practice of EDI networks and other closed systems of electronic communication.*³¹

4.2 New Types of Dispute Settlement in Electronic Commerce

With the rise of electronic commerce new schemes for the settlement of disputes were developed. Such schemes are often bound up with the need of Information Society services which are SMEs to establish confidence with recipients particularly abroad. Accordingly, schemes may be employed which propagate simple schemes ensuring the satisfaction of the consumer in the case of a non-delivery or defectiveness of the product or service.

4.2.1 Trust Mark Schemes

Trust mark schemes aim at the establishment of confidence by recipients or consumers in the trustworthiness of those organisations or Information Society services which support the system. Generally, a trust mark is used by a commercial body responsible for out-of-court dispute settlement which offers subscribing organisations its services against the payment of a subscription fee. The subscription may be coupled with a licence agreement which regulates the use of the body's trust mark by the subscribers. The enforcement of the body's decisions may be ensured by the threat of the withdrawal of the trust mark and the termination of the subscription.

The conclusion of the subscription agreement and the licence can be based on the freedom of contract. The use of trust marks may also be based on schemes of self-regulation within certain sectors of the industry and trade. Article 16 of the Directive on Electronic Commerce envisages the establishment of such schemes with particular regard of consumer protection.

a.-) Management of Trust Marks

Trust marks may be operated by different bodies. They may be offered by basically three different types of bodies, namely private organisations, trade associations and consumer organisations. As a fourth alternative, the operation on the basis of national or community wide schemes is possible, however, the need for the establishment of such schemes does not appear pressing.³²

b.-) Private Organisations

Private organisations may offer trustmarks on the basis of agreements which they conclude with their subscribers or members. A trustmark may consist in a logo combined with a contractual arrangement which obliges the Information Society service or trader to comply with the decisions rendered in the dispute settlement system which is operated by the private organisation or an associated body. The private organisation grants the right to use the trustmark on the basis of a licence contract. The obedience with decisions rendered in the out-of-court dispute settlement system may be secured by the threat of the withdrawal of the right to use the trustmark.

The contractual right of the private organisation which operates the trustmark scheme to withdraw the trustmark may be based on the freedom of contract. A registered trademark as the basis of the trustmark may be registered for legal services in class 42 of the classification according to the Nice Agreement concerning the International Classification of Goods and Services.³³

The licence would be non-exclusive and revocable at the discretion of the licensor. The legal conditions for such a licensing system seems less doubtful than the commercial viability of the operation of the trustmark scheme. The organisations most interested in the services of a

trustmark company are very likely small or medium sized companies which have not yet acquired a widely known brand. The use of a trustmark on their websites is very likely to increase the confidence of potential buyers in their reliability. The price which such a small or medium sized company is prepared to pay will depend on the advantage which the use of the trustmark offers. The costs which the trustmark company incurs by performing out-of-court dispute settlement may be considerable, taking into account of additional problems with cross-border settlements arising from the use of different languages and legal systems, long distance calls and postal communication should traditional communications may be necessary.

c.-) Trade Associations

Trustmarks may be offered by trade associations. Such associations may, for example on the basis of self-regulation, offer out-of-court dispute settlement. Whether the scheme needs the approval by national authorities depends on the national regulation of such schemes.³⁴

d.-) Consumer Organisations

A typical example for the operation of a trust mark by a consumer organisation is the US Better Business Bureau's BBBOnline Reliability Programme.³⁵ Also consumer complaint boards may offer trustmarks, possibly on a statutory basis in order to avoid that a conflict which may arise concerning the violation of Information Societies' protected interests in competition. A condition for the Information Society service's right to use the trustmark may be the adherence with the consumer organisation's out-of-court dispute settlement scheme.³⁶

e.-) Enforcement of Sanctions

The exclusion from the membership in a trust mark scheme or the publication of the Information Society service's name in a 'black list' may have a damaging effect on the Information Society service's business. In spite of the fact that the Information Society service may have agreed with such measures for the enforcement of sanctions when it signed the trustmark agreement, such sanctions may violate the Information Society service's rights. The measure may, in particular, constitute a breach of contract, a prohibited boycott or another act of unfair competition. The possibility of an Information Society service to challenge such a measure may depend on contractual rights, but also on non-contractual rights protected by the relevant legal order. The unjustified withdrawal of a trust mark may render the trust mark company liable for damages, and in order to avoid an imminent damage caused by the (unjustified) withdrawal of the trustmark the Information Society service may apply for a preliminary injunction.

4.2.2 Guarantee Schemes

Guarantee Schemes may offer the recipient security about the safe delivery of the product. A typical example of the implementation of a guarantee scheme lies in the chargeback system used by the credit card companies. *A chargeback is the return of a transaction from the issuer of the card used by a consumer to the financial institution that 'purchased' the transaction from the merchant.*³⁷ Chargebacks are contractual rights and obligations between the financial institutions that issue credit cards and the financial institutions which sign merchants to accept such cards. Accordingly, such rights do not give direct rights to consumers, because their exercise is optional for issuers. The credit card company may oblige the card issuing bank to guarantee the delivery of the product or service by the trader. However, the scope of the chargeback rights differs according to the contract and eventual national legislation.

The chargeback system may be established on the basis of legal regulation, such as in the UK or in the US. It may also be based on voluntary schemes offered by the credit card companies and based on their contractual relations with the card issuing banks. Insofar as the chargeback

system is voluntary, the banks may deal with the complaints on a case by case basis. The banks inform the credit card company about the complaints and the settlements. If the number of complaints increases with regard to a certain trader, the credit card company may take appropriate measures in order to safeguard that consumers are satisfied.

It may be recommendable if credit card companies required in their operating regulations the disclosure on information on chargeback rights on traders' websites.

4.3 Demands on the Parties

The use of online technologies for dispute settlement imposes high demands on the parties. In particular in those types of traditional dispute settlement where most issues are dealt with within a conference or hearing the need to rely on written communication may constitute a considerable hurdle. This concerns mediation and conciliation and likewise consumer complaint and ombudsman proceedings. Whereas in traditional consumer complaint systems the decision maker can obtain additional information which he may need from the parties through a (local) telephone call, the situation is already complicated and more expensive in cross border disputes relating to electronic commerce, apart from the possible use of foreign languages. The increased use of emails can hardly replace the personal contact which the parties and the decision maker obtain during a conference. The increased use of 'writing only' procedures may raise the pressure on the parties to use lawyers, taking into account of the fact that the parties' ability to subsume factual circumstances under legal concepts will be limited. Additionally, interpreters and translators may cause an increase of costs. Also technical equipment and software in order to carry out audio- and videoconferencing may be needed. Thus the use of online means for dispute settlement, particularly in the cross-border environment, may be more demanding for the parties than the use of traditional means.

4.4 Demands on the Body Responsible for Out-of-court Dispute Settlement

The use of means of electronic commerce requires the body responsible for out-of-court dispute settlement to establish a computer related system for the communication with the parties and the decision maker. The system should also permit the electronic filing. The system should also provide for the confidentiality of the communications and any stored data through the use of appropriate encryption technologies.

4.4.1 Filing Scheme for Body Responsible for Out-of-court Dispute Settlement

a.-) Reception of complaint form/statement of claims

Receipt of the complaint form/statement of claims to the plaintiff, information that the body will name a decision maker.

b.-) Registration of complaint form/statement of claims

The registration of the complaint form/statement of claims by the body, allocation of a file no., and information of the plaintiff.

Registration of arbitration agreement if any.

c.-) Communication of complaint form/statement of claims

The communication of complaint form/statement of claims including eventually the arbitration agreement to the defendant, the request for a reply within a certain time and the indication of the email address to be used should the present email address not be convenient.

If online communication of complaint form/statement to defendant is not possible: request of plaintiff for correct email address of defendant and/or whether communication shall be effected by traditional means.

d.-) Confidentiality

Evaluation of measures to safeguard confidentiality and proposal to parties with deadline for reply to both parties.

e.-) Naming of decision maker

Naming of the decision maker by the body with information of both parties.

f.-) Pre-hearing preparation by decision maker

Communication of a final deadline for subsequent statements by both parties.

Questions to parties with deadlines for reply.

Preliminary assessment of evidence, questions to parties, invitations of witnesses to audio- or videoconference, possibly at the premises of the relevant party, if expert opinion required naming of expert with deadline for reply.

Fixing of date for audio- or videoconference.

Technical preparation for performing and recording of online hearing.

g.-) Hearing

Communication of the facts so far as established and preliminary evaluation.

Plaintiff to be heard.

Defendant to be heard.

(Negotiation)

Evidence of the plaintiff.

Evidence of the defendant.

(Negotiation)

Decision or announcement of the date of a decision.

h.-) Final Decision

Final decision with reasons, including the place of arbitration. Communication to the parties with information on rights, whether binding or not, possibility of appeal.

4.4.2 File of Body Responsible for Out-of-court Dispute Settlement (online)

a.-) Filing No. of the Dispute

b.-) Plaintiff

Name, forename / if legal person: company name and
name, forename of representative, including
name, forename of person for correspondence

File No. of plaintiff

Address (street, city, post code, country)

Telephone

Telefax

Email

URL

Name of legal representative, including

Name, forename of person concerned with the case

File No. of legal representative

Address (street, city, post code, country)

Telephone

Telefax

Email

URL

c.-) Defendant

Name, forename / if legal person: company name and
name, forename of representative, including
name, forename of person for correspondence

File No. of defendant

Address (street, city, post code, country)

Telephone

Telefax

Email

URL

Name of legal representative, including

Name, forename of person concerned with the case

File No. of legal representative

Address (street, city, post code, country)

Telephone

Telefax

Email

URL

d.-) Decision maker

Name, forename

Address (street, city, post code, country)

Telephone

Telefax

Email

URL

e.-) Complaint / Statements / Decisions

Arbitration agreement
Arbitral award / decision / settlement

Plaintiff
Statements of plaintiff
Orders concerning statements of plaintiff

Defendant
Statements of defendant
Orders concerning statements of defendant

Hearing
Orders concerning hearing
Statements of witnesses and/or experts
Copies of documentation of audio- and/or videoconference

Decision maker
Decisions and/or orders of decision maker on proceedings
Final decision of decision maker / proposal of a settlement
Settlement agreement by the parties

f.-) Costs (exclusively for the administration of the body)

Registration fee
Advance on out-of-court dispute settlement fees by plaintiff
Final invoice

4.4.3 **File of Decision Maker (Online)**

a.-) Filing No. of the Dispute

b.-) Plaintiff

Name, forename / if legal person: company name and
name, forename of representative, including
name, forename of person for correspondence

File No. of plaintiff
Address (street, city, post code, country)
Telephone
Telefax

Email
URL

Name of legal representative, including
Name, forename of person concerned with the case
File No. of legal representative
Address (street, city, post code, country)
Telephone
Telefax
Email
URL

c.-) Defendant

Name, forename / if legal person: company name and
name, forename of representative, including
name, forename of person for correspondence

File No. of defendant
Address (street, city, post code, country)
Telephone
Telefax
Email
URL

Name of legal representative, including
Name, forename of person concerned with the case
File No. of legal representative
Address (street, city, post code, country)
Telephone
Telefax
Email
URL

d.-) Body Responsible for Out-of-court Dispute Settlement

Secretariat of body
Name of legal representative, including
Name, forename of person concerned with the case
Address (street, city, post code, country)
Telephone
Telefax
Email
URL

e.-) Complaint / Statements by the Parties

Registration and filing no. of case
 Arbitration agreement
 Arbitral award / decision / settlement

Plaintiff
 Statements of plaintiff
 Orders concerning statements of plaintiff

Defendant
 Statements of defendant
 Orders concerning statements of defendants

Hearing
 Orders concerning the hearing
 Statements of witnesses and/or experts
 Copies of documentation of audio- and/or videoconference

Decision Maker
 Decisions and/or orders of decision maker on proceedings
 Final decision of decision maker / proposal of a settlement
 Settlement agreement by the parties

f.-) Assessment (Exclusively for the Decision Maker)

Notes concerning statements of plaintiff
 Notes concerning statements of defendant
 Notes concerning evidence
 Draft decisions/orders
 Draft settlement proposal
 Draft arbitral award

4.4.4 **File of Party (Online)**

a.-) Filing No. of the Dispute

b.-) Body Responsible for Out-of-court Dispute Settlement

Secretariat of body
 Name of legal representative, including
 Name, forename of person concerned with the case
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email

URL

c.-) Decision Maker

Name, forename
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email
 URL

d.-) Plaintiff

Name, forename / if legal person: company name and
 name, forename of representative, including
 name, forename of person for correspondence

File No. of plaintiff
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email
 URL

Name of legal representative, including
 Name, forename of person concerned with the case
 File No. of legal representative
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email
 URL

e.-) Defendant

Name, forename / if legal person: company name and
 name, forename of representative, including
 name, forename of person for correspondence

File No. of defendant
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email
 URL

Name of legal representative, including
 Name, forename of person concerned with the case
 File No. of legal representative
 Address (street, city, post code, country)
 Telephone
 Telefax
 Email
 URL

f.-) **Complaint / Statements by the Parties**

Registration and filing no. of case
 Arbitration agreement
 Arbitral award / decision / settlement

Plaintiff
 Statements of plaintiff
 Orders concerning statements of plaintiff

Defendant
 Statements of defendant
 Orders concerning statements of defendants

Hearing
 Orders concerning the hearing
 Statements of witnesses and/or experts
 Copies of documentation of audio- and/or videoconference

Decision Maker
 Decisions and/or orders of decision maker on proceedings
 Final decision of decision maker / proposal of a settlement
 Settlement agreement by the parties

5 Qualification of Decision Makers

If the out-of-court dispute settlement sector there are no particular requirements applicable to decision makers such as decision makers, mediators of ombudsmen.

5.1 Qualification of Decision Makers

Different from the judges of the court systems, the qualification of decision makers is generally not regulated by legislation. Arbitration laws may, however, provide that the qualification of decision makers should meet with certain requirements. Also in the case of consumer protection national laws may establish minimum requirements applicable to the qualification of decision makers. According to Article 11(1) of the UNCITRAL Model Law on Arbitration no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed

by the parties. The UNCITRAL Model Law on Conciliation provides in Article 4(2) that the parties to the dispute may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. According to subsection (a) of this provision a party may request the recommendation of names of suitable individuals to act as conciliator. The Model Law then states: *In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.* Other qualities are not required by the UNCITRAL Model Laws.

5.2 Business or Professional Experience of the Decision Maker

It is generally required that a decision maker should have gathered business or professional experience at a senior level during a certain time, for example during a minimum of years. This experience will mostly have to relate to the legal sector. However, in the case of bodies dealing with technical issues or with consumer issues it may also be conceivable that non-legal experience qualifies.

5.2.1 Education

The education should be proved by:

- academic degrees;
- professional careers;
- admissions to professional associations.

Additionally, it may be required:

- honours and awards;
- authorship of articles and literature;
- membership in professional associations;
- particular training in out-of-court dispute settlement methods

5.2.2 Neutrality

Neutrality means that the decision maker should be independent from the parties to the dispute. In cases where such a position is not guaranteed in the individual case, the rules of procedure of the board must give the decision maker the possibility to reject the nomination.

In certain types of disputes the national law or the rules of the body responsible for dispute settlement may envisage that a decision maker appertains to a certain professional sector. Thus in consumer disputes it may be envisaged that a board of three decision makers will be competent to decide, one of which shall belong to a consumer association, another to a trade association and the third being independent.

5.2.3 Judicial Experience

The judicial experience which may be required will depend on the function of the relevant body responsible for out-of-court dispute settlement. Accordingly, the requirements concerning his judicial experience may be different, depending on his role in an arbitration system or a system which operates mediation and conciliation. Again, a different judicial experience may be needed for the settlement of consumer disputes.

a.-) Ability to Manage Online Dispute Settlement

The decision maker should have the ability to manage the hearing process. It may be recommendable to require that the decision maker is acquainted with the taking of testimony and other evidence.

b.-) Particular Legal Sectors Relating to Cross-border Electronic Commerce

Disputes between Information Society services and recipients in electronic commerce will require the decision maker's familiarity with particular legal sectors. It is evident that their *legal competence must generally include the areas of conflicts of law and comparative law. In many cases, international contracts are influenced by factors such as practice in a particular industry, standard contracts, rules and recommendations of international institutions, and other factors which go beyond the applicable law and which can be of decisive importance in the interpretation of a contract. Moreover, the parties often come from different legal systems and have differing ideas about the proceedings. Thus, one of the main duties of the (... decision maker) is to bridge cultural differences and facilitate communication between the parties.*³⁸

c.-) Functional Requirements

Former drafts of the Directive on Electronic Commerce contained a reference to the EU Commission's Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes,³⁹ the text of the Directive mentions the need to provide adequate procedural guarantees for the parties concerned. However, the Recommendation may serve as a source for legal rules aiming at the implementation of Article 17(2) of the Directive. Accordingly, it appears appropriate if, in coincidence with the Recommendation's principle of independence, *the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function.*

5.2.4 Negotiation Techniques

A decision maker should be acquainted with negotiation techniques. The use of such techniques may be particularly required in the online sector, where audio- and videoconferencing demand an adaptation of existing technologies to the online environment.

5.2.5 Online Experience

In the sector of out-of-court dispute settlement for electronic commerce the experience of the decision maker and his familiarity with the relevant technologies used for the out-of-court dispute settlement system is essential. It has been said⁴⁰ that decision makers *who decide disputes in electronic commerce, indeed, must have at least some knowledge of information technology and the working of electronic commerce.*

5.2.6 Languages

The operation of cross-border dispute settlement systems in the Internal Market necessitates the familiarity of the decision maker with different languages.

5.2.7 Reputation

The decision maker should avail himself of a good reputation. Such a reputation should be proven by letters of recommendation. The decision maker should, in particular, comply with professional ethics applicable to decision makers, mediators or other types of decision makers which are developed by the relevant body responsible for out-of-court dispute settlement.

The letters of recommendation should be written by three persons with outstanding achievements in the sector where the decision maker is active.

5.3 Training of Decision Makers

In countries where out-of-court dispute settlement has a longer tradition, the issues of the training and the possible accreditation of decision makers is discussed. Thus it was stated:⁴¹ *Issues relating to the training of those involved in ADR processes have received consideration by courts, tribunals and peak industry groups in recent years. National criteria for accreditation have not yet been accepted, although bodies such as (...) have settled their own registration or*

accreditation schemes. There appears to be less debate about the accreditation of arbitrators. The major area of contention relates to accreditation criteria for mediators. At present, a number of training and education bodies provide training in mediation and other ADR processes. Training may take place in workshops that are conducted over a three or four day period (...) or, may be part of broader undergraduate and postgraduate University programs. There is no single body available to ensure the competence of mediators.

6 The Establishments of EU Standards and the Role of Bodies Responsible for Dispute Settlement

The role of decision makers in cross-border disputes and the different functions of the bodies responsible for out-of-court dispute settlement do not demand the establishment of unitary rules concerning the qualification, education and training of decision makers. It is rather the competition between the different bodies responsible for out-of-court dispute settlement which will ensure that only persons which are highly qualified will be appointed as decision makers. Accordingly, it should be left to the bodies themselves to decide which persons they would like to work as decision makers.

6.1 Competition as a Factor for Ensuring the Optimum Performance of Bodies Responsible for Out-of-court Dispute Settlement

In the case where bodies operate on a national basis, parties from abroad may be disadvantaged when concerned with the selection of a decision maker. However, since the freedom of contract governs also the selection of the body responsible for decision making, it is up to the parties to select an appropriate body.

6.2 Consumer Disputes

Concerning consumer disputes decision makers operate generally on the basis of national laws. In this sector also cross-border disputes are generally settled only on the basis of the law of the state where the business is established. This concept is inherent in the creation of the EEJ-NET where consumer complaints are transferred from the Member State where the consumer is domiciled to the Member State where the business is established.⁴²

In the sector of the settlement of consumer disputes by traditional means the Commission has already achieved a harmonisation of rules applicable to certain bodies. The EU Commission Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes⁴³ enhanced in the case of cross-border conflicts the mutual confidence between out-of-court bodies in different Member States and strengthened consumer confidence in the existing national procedures.

According to the Directive on Electronic Commerce Member States should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels.⁴⁴ Article 17(2) of the Directive envisages that Member States should encourage the operation of bodies in a manner which provides adequate procedural guarantees for the parties concerned. These guarantees depend on the procedures used by the body responsible for out-of-court dispute settlement. Accordingly, they will be dealt with in the parts of the study which concern the different functional types of dispute settlement, in particular arbitration, mediation or conciliation and consumer complaints or ombudsman proceedings.

6.3 Accreditation of Bodies Responsible for Out-of-court Dispute Settlement

The freedom of contract includes also the parties' freedom to select a body responsible for out-of-court dispute settlement. Different from the traditional court system, national public laws relating to out-of-court dispute settlement generally do not impose any requirements on the establishment and operation of bodies responsible for out-of-court dispute settlement. Likewise, international treaties do not regulate this issue. Thus the parties are free to make a choice amongst the bodies responsible for out-of-court dispute settlement as they think fit.

The bodies in turn, in order to offer a reasonable service to the parties selecting out-of-court dispute settlement, establish their own requirements and procedures concerning the selection of decision makers. However, it may be said that, characteristically, there is no state control over such procedures, unless the particular system of out-of-court dispute settlement is regulated by law, for example, if it concerns a system operating by referral.

The essential element which underlies the decision by the parties to refer their dispute to a certain body responsible for out-of-court dispute settlement is trust. Therefore, such systems operating within the Internal Market must aim at the creation of confidence among users. Examples of the working of such a system is the arbitration system of the International Chamber of Commerce. Its International Court of Arbitration ((check)) examines the draft awards proposed by the arbitral tribunals, and roughly 10% of the awards will be corrected upon the intervention of the Court, mainly for reasons related to the enforceability.⁴⁵

In many cases national laws do not regulate the bodies responsible for out-of-court dispute settlement. The Spanish Arbitration Act of 1988 is more explicit in Article 10(1) which authorises the parties to a contract *to entrust the administration of the arbitration and the selection of the arbitrators, in accordance with their regulations, to:*

- (a) public law corporations empowered to act as arbitrators according to their internal rules, or
- (b) associations and non-profit organisations which have arbitral functions provided for in their by-laws.

Article 10(2) of the Spanish Act demands that *the arbitral rules of public law corporations and of arbitration associations, along with any modifications, must be evidenced in a notary deed.* However, whether international arbitration associations have to comply with this requirement is unsettled.⁴⁶

Other national laws leave the issue of the qualification of the decision maker to the freedom of contract of the parties. Thus Section 19 of the UK Arbitration Act of 1996 states that *in deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.* Concerning possible duties of bodies responsible for out-of-court dispute settlement the UK Arbitration Act of 1996 established the immunity of arbitral institutions.⁴⁷

6.3.1 The Ensuring of Adequate Procedural Guarantees

The Directive does not impose any obligation on Member States concerning the establishment and control of bodies responsible for out-of-court dispute settlement and of their decision makers. However, according to Article 17(2) of the Directive Member States are obliged 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.* This provision could be interpreted to oblige Member States to guarantee not only the

observance of certain procedural standards but also their observance, for example through ensuring that decision makers fulfil particular qualifications and undertake a particular training.

Bodies responsible for out-of-court dispute settlement could be requested to comply with such demands through the establishment of an accreditation scheme. Thus Member States may require that only those services may offer out-of-court dispute settlement services in electronic commerce which are accredited with a competent authority. In the conditions for the accreditation it may be provided that a body responsible for out-of-court dispute settlement in electronic commerce may only list decision makers who have obtained a special degree. Such a degree could, for example, be awarded after the successful passing of a course on out-of-court dispute settlement for electronic commerce to be established according to a EU Commission's programme.⁴⁸

6.3.2 The Enforcement of the Obligations of Information

According to Article 17(3) of the Directive on Electronic Commerce *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.*

7 Regulation of Out-of-Court Dispute Settlement Systems by Other Secondary EU Law

The provision on out-of-court dispute settlement in the Directive on Electronic Commerce in Article 17 is conceptually consistent with other rules of EU law relating to out-of-court dispute settlement. Particularly in the financial sector there are several rules on out-of-court dispute settlement which may provide guidance for the interpretation of Article 17 of the proposed Directive.

7.1 Rules Relating to the Financial Sector

Chapter III of the proposed Directive concerning the Distance Marketing of Consumer Financial Services⁴⁹ deals with disputes. It states:

Article 12: Settlement of Disputes

(1) Member States shall ensure that adequate and effective complaints and redress procedures for the settlement of disputes between suppliers and consumers are put in place, using existing procedures where appropriate.

(2) The procedures referred to in paragraph (1) shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

(3) Member States shall encourage the public or private bodies established for the out-of-court settlement of disputes to cooperate in the resolution of cross-border disputes.

(4) Member States shall take the measures necessary to ensure that operators and suppliers of means of distance communication put an end to practices that have been declared to be contrary to this Directive, on the basis of a judicial decision, an administrative decision or a

decision issued by a supervisory authority notified to them, where those Operators or suppliers are in a position to do so.

Article 13: Burden of Proof

The burden of proof in respect of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, shall lie with the supplier.

Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him pursuant to this Directive should lie with the consumer shall be an unfair term within the meaning of Council Directive 93/13/EEC.

According to the explanatory memorandum, section 5, Article 12 of the proposed Directive no particular schemes are envisaged for out-of-court dispute settlement. The procedures to be employed may rely on existing procedures. The proposed Directive envisages in Article 12(3) the cooperation between different out-of-court dispute settlement bodies. *One potential domain of cooperation concerns the consumer's freedom to seek redress before the out-of-court dispute settlement body in his country of residence, which would then contact its opposite number in the supplier's state, so that the consumer himself does not have to institute proceedings in another Member State.* Concerning Article 13 the explanatory memorandum states that the point of the burden of proof rule is that it is up to the party which is familiar with the selling technique to demonstrate that it has fulfilled its obligations.

7.2 Amended Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

The amended proposal of the Directive on Copyright in the Information Society⁵⁰ states in Article 29-ter:

Whereas recourse to mediation could help users and rightholders to settle disputes; whereas the Commission, in cooperation with the Member States within the contact committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights;...

7.3 Recommendation on Principles Applicable to Bodies Responsible for the Out-of-court Settlement of Consumer Disputes

Consumer protection issues in electronic commerce have been repeatedly addressed by the EU Commission.⁵¹ The Commission Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes,⁵² reiterated in the Commission's Comment of 21/04/99 to the US Perspectives on Consumer Protection in the Global Electronic Marketplace, Federal Trade Commission Notice, establishes basic requirements for bodies operating out-of-court dispute settlement systems for consumers. But whereas earlier drafts of the Directive on Electronic Commerce contained an express reference to the Recommendation in Article 17(2), the text of this provision in the Directive as adopted by the European Parliament merely imposes on Member States the obligation 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.* Nevertheless, the Recommendation remains an important instrument which provides guidance for certain types of bodies of dispute settlement.

According to the Recitals the Recommendation is *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, and, 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*. One might consider, accordingly, that the Recommendation would be applicable to bodies operating consumer arbitration but not mediation or conciliation. However, the Recitals indicate that the scope of application is broader, because *the decisions taken by out-of-court bodies may be binding on the parties, may be mere recommendations or may constitute settlement proposals which have to be accepted by the parties*. The relevance of the Recommendation for bodies responsible for out-of-court dispute settlement will be dealt with in the part on consumer complaint and ombudsman schemes.

8 Regulation of Out-of-Court Dispute Settlement for E-commerce by Other Organisations

Apart from the EU other organisations have suggested the use of out-of-court dispute settlement schemes for electronic commerce.

8.1 ICC

The International Chamber of Commerce (ICC) aims at facilitating electronic commerce for businesses and consumers.

8.1.1 Self-regulation and Protection of Consumers

In its Global Action Plan for Electronic Commerce the International Chamber of Commerce⁵³ the ICC established an action plan for legal issues in Chapter III.4. In subsection (1) the ICC stressed the importance of the establishment of legislation in support of self-regulatory schemes to be developed by the industry. Freedom of contract must prevail as the underlying principle of all efforts to create an appropriate legal environment for business-to-business transactions. Governments can support electronic commerce by enabling electronic contracting and by facilitating the legal recognition of digitally authenticated documents and contracts. Governments should avoid prescriptive and detailed legislation in these areas, but rather develop facilitating legislation, which may assist the private sector in developing self-regulatory solutions. In particular, it called upon States to implement the UNCITRAL Model Law on Electronic Commerce. It considered as necessary the establishment of a unitary legal framework for the facilitation of electronic commerce. The ICC stated:

Freedom of contract should be the guiding principle for business-to-business relationships. The international legal community has only just started reviewing the many complex legal issues surrounding applicable law and jurisdiction in cyberspace. Any premature regulation mandating the law and/or forum of the country of destination for consumer transactions could inhibit continued growth of electronic commerce. Governments should rely on voluntary business self-regulatory practices and market pressures to develop more flexible and balanced solutions. The use of out-of-court dispute settlement procedures for consumers should be encouraged while maintaining court proceedings as the ultimate solution in case of conflicts. Governments should continue work on basic international principles for legal validity of incorporation by reference for all kinds of transactions. These rules should aim to provide certainty for all parties to electronic commerce transactions. Governments are encouraged to promote such business-driven repositories and to contribute public legal terms and instruments to it. Governments should encourage the use of self-regulatory dispute settlement mechanisms as an effective way of resolving electronic commerce disputes. The ICC's concern with dispute settlement systems for electronic commerce is thus limited to consumer issues. Accordingly, it will further be dealt with in the part on consumer complaint and ombudsman schemes.

8.1.2 The Creation of a Set of Foundation Rules for Electronic Trade and Settlement

The ICC's Electronic Trade Practices Working Group⁵⁴ aims at the creation of a set of foundation rules for electronic trade and settlement. The envisaged rules' objective is to make trade more efficient by not only adapting rules to new technologies and media such as the Internet, but by taking advantage of these new tools to streamline trade transactions.

8.2 OECD

In its Declaration on consumer Protection in the Context of Electronic Commerce, made by OECD Ministers at the Conference "A Borderless World: Realising the Potential of Global Electronic Commerce, 7-9 October 1998, Ottawa, Canada (Annex 2 of the Conference Conclusions), the Governments of OECD Member Countries declared *their determination to ensure that consumers who participate in electronic commerce are afforded a transparent and effective level of electronic transactions by: ... supporting and encouraging the development of effective market-driven self-regulatory market-mechanisms that include input from consumer representatives, and contain specific, substantive rules for dispute resolution and compliance mechanisms; ... Furthermore, they affirm their determination: to develop effective guidelines whose purpose is to enhance consumer confidence in electronic commerce transactions while encouraging the development of the global marketplace; and to urge the OECD to complete its work to draft guidelines within 1999, more specifically as pertains to consumer protection issues including, for example, full and fair disclosure of essential information, advertising, complaint handling, dispute resolution, redress as well as other relevant issues in consumer protection*".

8.2.1 OECD Document on Consumer Protection in the Electronic Marketplace

The OECD's Directorate for Science, Technology and Industry, Committee on Consumer Policy, issued a document on Consumer protection in the Electronic Marketplace.⁵⁵ Under the headline 'Building Consumer Trust' the Committee dealt with the issue of 'Consumer Redress': *Just as they do in the real world, consumers in the electronic marketplace will face situations where products arrive broken, defective, or in some way simply do not meet expectations, and they will need to have access to effective complaint and redress mechanisms to help resolve disputes. However, the global nature of the online environment may make efforts to resolve disputes between consumers and businesses located in different parts of the world time-consuming, expensive and difficult. Responding to consumer problems and providing online information and effective means to resolve differences quickly, easily and fairly can reduce costs, increase productivity and help engender a feeling of confidence about an online business and its practices. In addition, just as in the real world, the development and promotion of voluntary alternative dispute resolution mechanisms can help to avoid more formal and costly legal options.* The OECD policy and the Guidelines for Consumer Protection in the Context of Electronic Commerce shall be dealt with in the part of the study concerning consumer complaint and ombudsman schemes.

8.3 ICANN

The Internet Corporation for Assigned Names and Numbers (ICANN) is a not-for-profit organisation formed by private sector Internet stakeholders to administer policy for the Internet name and address system. It is responsible for the technical management of the Domain Name System (DNS) and for the narrow issues of management and administration of Internet names and numbers on an ongoing basis.⁵⁶ ICANN's Uniform Domain-Name Dispute-Resolution Policy⁵⁷ (UDRP) is applicable to the registration of any generic Top Level Domains (gTLDs) such as *.org*, *.com* or *.net*. By applying for registration, the applicant has to declare his consent to the UDRP.

The ICANN has introduced a particular scheme of mandatory administrative proceedings which aim at the settlement of a dispute between the registrar of a gTLD and a complainant who asserts that the applicant's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights, that the applicant has no rights or legitimate interests in respect of the domain name and that the applicant's domain name has been registered and is being used in bad faith.⁵⁸ However, ICANN does not organise the out-of-court dispute settlement itself, it merely provides a list of organisations which serve as administrative-dispute-resolution service providers.⁵⁹

9 Artificial Intelligence, Legal Services and the Regulation of Competition in Out-of-court Dispute Settlement

In the future legal advice and assistance may be provided increasingly with the support by computers using artificial intelligence. In the legal sector, a first case was brought before the courts where it was held that the sale of a software to users, permitting them interactively to draft contracts may violate the regulations concerning legal services.⁶⁰ Artificial legal intelligence has been characterised as 'four dimensional',⁶¹ including, first, concepts of law, second, the arrangement of such legal concepts to suit the plaintiff, third, the arrangement of such legal concepts to suit the defendant and, fourth, the resulting legal outcome.

A computer program may indicate the amount of support which the user may have to pay to his wife and children upon a claim of money. It is conceivable that similar schemes may be developed to solve simple disputes concerning electronic commerce, for example consumer disputes relating to certain types of goods. However, it should be observed that according to the laws of many Member States only the legal professions may offer legal advice. With this regard also consumer redress schemes developed by the trade in some countries on the basis of self-control may conflict with the 'legal monopoly' granted to the legal professions in other countries should such schemes be applied there.

9.1 The Use of Artificial Intelligence in Cross-border Disputes

The use of artificial intelligence⁶² may support cross-border mechanisms for out-of-court settlement. It is conceivable that the creation of special computer software may assist decision makers in the finding of solutions to the disputes between Information Society services and recipients. There are already techniques for the automated drafting of judicial documents.⁶³ A software may possibly be based on an electronic database which contains the relevant laws and by-laws applicable within a certain field of the law. However, taking into account that for use in the Internal Market such a database may have to contain the provisions applicable in all Member States, the work involved in its making, including translations in the relevant languages and updating, can be considerable. For this reason it may be recommendable, to start such a project only with reference to a relatively small field of the law which, nevertheless is of considerable importance for the relation between Information Society services and recipients. Such a field could, for example, concern dispute settlement clauses and choice of law clauses in contracts of electronic commerce or the law to be applied by the board responsible for out-of-court dispute settlement.

9.2 Regulation of the Providing of Legal Services

Schemes which offer out-of-court dispute settlement thus must avoid to get into conflict with laws regulating the legal advice in Member States. In particular in the case of consumer disputes, such a conflict situation may arise, taking into account of the fact that dispute resolution at no or low costs, as envisaged by the Commission and according to the principle of efficacy according to Article 17(2) of the Directive on Electronic Commerce, would exclude practising lawyers from

the circle of persons involved in dispute settlement, unless the public would guarantee them minimum fees on the basis of legal aid schemes. However, such schemes are generally available only, if the person seeking legal aid cannot rely on own means. This will not be the case in most disputes between Information Society services and recipients, because it can be assumed that for the next future the electronic commerce will be available only for those who dispose of sufficient means for the acquisition of the relevant technological equipment and who have the necessary education to make use of these tools – in other words, not those persons who would be expected to claim legal aid.

Also if out-of-court settlement of consumer disputes is offered by consumer complaint boards or by schemes offered by the trade and industry, for example using quality seals, it must be observed that such practices do not conflict with laws regulating the giving of legal advice. If a consumer complains about the quality of a product which he bought online from an Information Society service, and if he looks for a remedy against the seller, he wants to obtain a legal support, no matter to which organisation he addresses his request. If this organisation informs him about the contractual situation with the Information Society service, it appears that this would imply the giving of legal advice. Taking into account of the fact that existing schemes in some Member States providing for consumer out-of-court dispute settlement are based on laws, for example the conciliation service provided by the Italian chambers of commerce in consumer disputes, it would appear that the relevant Member States' laws concerning the giving of legal advice could not be violated. However, in other Member States where no corresponding legal regulations providing for out-of-court dispute settlement exist, it may well be that the offering of out-of-court dispute settlement by consumer organisations or by associations of the trade and industry would conflict with those Member States' laws concerning the giving of legal advice.

¹ European Parliament, Resolution on the draft action plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, document 13844/98 – C4/0692/98 – 98/0923(CNS) A4-0133/99, minutes of 13/04/99.

² P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 26 with reference to R. van DELDEN: "Typen van conflictbeslechting in het privaatrecht door ander dan de overheidsrechten", Overheidsrechter gepasseerd, Gouda Quint, Arnhem 1988, w.f.r.

³ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 28.

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, (New York Convention), for the text of the Convention see <http://www.uncitral.org/en-index.htm>

⁵ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, (New York Convention), for the text of the Convention see <http://www.uncitral.org/en-index.htm>

⁶ See <http://www.coe.fr/eng/legaltxt/56e.htm> however, the Convention was signed only by Austria and Belgium and ratified only by Belgium.

⁷ See <http://www.uncitral.org/en-index.htm>

⁸ See <http://www.uncitral.org/en-index.htm>

⁹ See <http://www.law.berkeley.edu/faculty/ddcaron/courses/rp04011.html> and <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>

¹⁰ See <http://www.uncitral.org/en-index.htm>

¹¹ See <http://www.iamed.org>

¹² Article 57(3) of the Brussels Convention states: "This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts."

¹³ Article 20 of the Rome Convention states: "Precedence of Community Law. This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts."

¹⁴ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 28.

¹⁵ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 28.

¹⁶ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 28.

¹⁷ Australian Law Reform Commission: "Alternative or Assisted Dispute Resolution", Adversarial Background Paper, December 1996, No. 4.

¹⁸ Klaus Peter BERGER: 'International Economic Arbitration', Kluwer, Deventer 1993, 7.

¹⁹ For example in the UK, US or Australia.

²⁰ Australian Law Reform Commission: "Alternative or Assisted Dispute Resolution", Adversarial Background Paper, December 1996, No. 5 referring to the referral criteria used by the New South Wales Supreme Court of Australia.

²¹ Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', adopted on 15/04/99 (O.J. C 169/36 of 16/06/99).

²² Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', adopted on 15/04/99 (O.J. C 169/36 of 16/06/99). Special comments:

4.12. Article 17: *Out-of-Court Dispute Settlement*

4.12.1. *Access to legal redress in the event of dispute is crucial to people's acceptance of electronic commerce. For minor legal proceedings especially, alternative dispute settlement arrangements can be an ideal complement to legal protection via the courts. In taking account of out-of-court dispute settlement procedures, the draft directive addresses an issue which, given the courts' excessive workload, is becoming increasingly important everywhere.*

Part III- Types of Out-of-Court Dispute Settlement - Arnold Vahrenwald

Speeding up dispute settlement at moderate cost contributes significantly to ensuring that ordinary people have equal access to the law, but can only succeed if (i) a certain minimum level of quality is guaranteed and (ii) the complete range of available options is used to the full.

4.12.2. In this context, the Committee would also encourage a role for existing European consumer information offices.

²³ Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', adopted on 15/04/99 (O.J. C 169/36 of 16/06/99). Special comments:

In No. 3.6.4. of the Opinion (see above) the Committee related that "*consumer protection agencies or ombudsmen*" should act "*as conduits and possibly arbitrators in the event of disputes between consumers in one country and service suppliers based in another*".

²⁴ Recital 51 of the Directive on Electronic Commerce.

²⁵ Recital 51 of the Directive on Electronic Commerce.

²⁶ Article 17(1) and Recital 52 of the Directive on Electronic Commerce.

²⁷ Article 17(3) of the Directive on Electronic Commerce.

²⁸ Article 17(3) of the Directive on Electronic Commerce.

²⁹ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 29.

³⁰ P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", Law, Computers & Artificial Intelligence, vol. 4, no. 1, 1995/25-32 at 32 with reference to D.T.L. Oosterbaan, "Rechter, arbiter of mini-trial", 1988 at 81.

³¹ Michael E. SCHNEIDER and Christopher KUNER: "Dispute Resolution in International Electronic Commerce", Journal of International Arbitration, vol. 14, No. 3, Sept. 1997, 5-37 at 20, 21.

³² See, for example, on the European ECO label...

³³ Nice Classification according to the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 1957 (<http://classifications.wipo.int/fulltext/nice/enmain.htm>).

³⁴ See below, for example the system of the Netherlands...

³⁵ See <http://www.bbbonline.org/businesses/reliability/index.html>

³⁶ The clause used by the BBBOnline Reliability Dispute Resolution obliges BBBOnline Reliability participants "to agree to participate in binding arbitration under BBB Rules of Arbitration (Binding) if the consumer also agrees, or in non-binding informal dispute settlement (IDS) under the BBB Rules for IDS for unresolved consumer complaints involving Participant's products or services. Alternatively, a company may pre-commit to a dispute settlement process through a provider other than the BBB, if the BBB determines the dispute settlement process substantially complies with BBB consumer dispute resolution criteria." However, the procedure envisaged by the BBB does not use means of electronic commerce. Article 13 of the IDS Rules and also Article 13 of the BBB Arbitration envisage a hearing on person or by telephone or in writing.

³⁷ See for example Broox W. PETERSON: "US Perspectives on Consumer Protection in the Global Electronic Commerce Marketplace – Comment", P994312, <http://www.ftc.gov-bcp/icpw/comments/visa.htm>

³⁸ Michael E. SCHNEIDER and Christopher KUNER: "Dispute Resolution in International Electronic Commerce", Journal of International Arbitration, vol. 14, No. 3, Sept. 1997, 5-37 at 11 and 12.

³⁹ EU Commission Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, EU O.J. No. L 115/31 of 17/04/98 (http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html).

⁴⁰ Michael E. SCHNEIDER and Christopher KUNER: "Dispute Resolution in International Electronic Commerce", Journal of International Arbitration, vol. 14, No. 3, Sept. 1997, 5-37 at 11 and 12.

⁴¹ Australian Law Reform Commission: "Alternative or Assisted Dispute Resolution", Adversarial Background Paper, December 1996, No. 4.

⁴² European Extra-Judicial Network (EEJ-NET), see http://europa.eu.int/comm/dg24/policy/developments/acce_just/index_en.html

⁴³ EU Commission Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, EU O.J. No. L 115/31 of 17/04/98 (http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html).

⁴⁴ Recital 51 of the Directive on Electronic Commerce.

⁴⁵ See above/below...

⁴⁶ Ramon ITURRIAGAGOITIA: "Spain", in: *Provisional Remedies in International Commercial Arbitration*, de Gruyter, Berlin 1994, 647-674 at 651.

⁴⁷ The UK Arbitration Act of 1996 states in Section 74. Immunity of arbitral institutions, &c.

- (1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.
- (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.
- (3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.

⁴⁸ See EU Commission: Education, Training and Youth. A New Generation of Programmes (2000-2006), <http://www.europa.eu.int/comm/education/newprogr/index.html>

⁴⁹ EU Directive concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC of 14/10/98, document COM(1998) 468 final. O.J.?

⁵⁰ EU Commission, amended proposal of the Directive on copyright COM(1999)250 final 97/359/COD of 21/05/99 (<http://europa.eu.int/comm/dg15/en/intprop/intprop/copy2en.pdf>)

⁵¹ See the DG SANCO's relevant Website (http://www.eu.int/comm/dg24/library/legislation/index_en.html)

⁵² EU Commission Recommendation of 30/03/98 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, EU O.J. No. L 115/31 of 17/04/98 (http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html).

⁵³ International Chamber of Commerce: "Global Action Plan for Electronic Commerce", prepared by Business with Recommendations for Governments, 2nd ed. October 1999, see <http://www.iccwbo.org/>

⁵⁴ See http://www.iccwbo.org/home/electronic_commerce/electronic_commerce_project.asp

⁵⁵ OECD Directorate for Science, Technology and Industry, Committee on Consumer Policy, document on Consumer protection in the Electronic Marketplace (DSTI/CP(98)134/FINAL of 23/12/98.

⁵⁶ See <http://www.icannwatch.org/icann/>

⁵⁷ See <http://www.icann.org/udrp/udrp.htm>

⁵⁸ Article 4(a) of the Uniform Domain-Name Dispute-Resolution Policy (UDRP).

⁵⁹ Approved providers are the CPR Institute for Dispute Resolution, the Disputes.org/eResolution Consortium, the National Arbitration Forum and the World Intellectual Property Organisation, see <http://www.icann.org/udrp/approved-providers.htm>

⁶⁰ See the New York Times of 03/09/99: "Texas Legal Committee Fights Spread of Electronic Legal Advice", reporting that a Texas court had banned in February 1999 the sale of the 'Quicken Family Lawyer 1999'.

⁶¹ Pamela N. GRAY: "Artificial Legal Intelligence", Dartmouth Publishing, Brookfield VT 1997 at 223.

⁶² On artificial intelligence and the law see, for example: American Bar Association, Computer and Technology Division (<http://www.abanet.org/lpd/catdiv/es-res.html>), British and Irish Legal Education Technology Association, Artificial Intelligence and Law Group (<http://www.bileta.ac.uk/ailaw/ailaw.html>), Centro di Ricerca Nazionale (<http://www.idg.fi.cnr.it/errore.htm>), International Association for Artificial Intelligence and the Law (<http://nathan.gmd.de/iaail/iaail.html>), Kluwer Online, Artificial Intelligence (<http://www.wkap.nl/journalhome.htm/0924-8463>), Workshops and Conferences on Artificial Intelligence and the Law: <http://www.dur.ac.zuk/Law/centre/conferences.html>

⁶³ L. Karl BRANTING: "Techniques for Automated Drafting of Judicial Documents", *International Law and Information Technology*, 1998/214-229.