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C O N T E N T S

ELECTRONIC COMMERCE AND DISPUTE RESOLUTION:
A UNITED KINDOM VIEW

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I. INTRODUCTION

This Paper seeks to look - from a UK point of view - at Electronic Commerce, the legal problems which it raises and dispute resolution processes in relation to E-Com.

Electronic Commerce by its very nature is trans-border. It is therefore unreal to look only at the UK. What happens in the rest of the world - and in particular through the intervention of international bodies such as the United Nations and the International Chamber of Commerce - obviously has an impact on what happens in the UK.

This Paper therefore looks in Section II at the development of E-Com generally and in one particular sphere: oil and gas.

Section III considers some of the legal problems raised by E-Com. Section IV looks at the UK's legislation on Electronic Commerce and at international initiatives by UNCITRAL and the ICC.

Section V looks at four traditional methods of dispute resolution; considers whether online dispute resolution processes have a role to play in Electronic Commerce; and raises the question of whether electronic processes can help to reduce costs and save time in traditional areas such as international commercial arbitration.

Finally, Section VI tries to draw some conclusions.

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II. THE DEVELOPMENT OF ELECTRONIC COMMERCE

(1) Generally

For the past few years the emergence and development of the Internet has made changes to the life of millions of people worldwide. The rate of development is extraordinary.

Even today no one can predict with certainty where the Internet will take us.

One of the areas where the Internet has had a particular impact is commerce.

Cross-border trading can take place on the Internet virtually without regard to national boundaries.

Broadly speaking there are two types of business being transacted on the Internet: that between business and the consumer and that between business and business.

The business-to-consumer electronic commerce in America has been put at some $8 billion. Many consumers in the UK are now becoming used to shopping on the Internet: not just supermarket shopping, but shopping in increasingly sophisticated areas. In the summer of 1999 Charles Schwab advertised in *The Times* telling UK private investors that they could trade online on the Dow Jones, NASDAQ, Amex and US regional exchanges.

The same newspaper carried an advertisement by *Icollector* offering online bidding facilities for millions of pounds worth of sales taking place world-wide by auction houses, antique dealers and art galleries:

"... browse through our extensive archives and reference guides to find out what you should be paying. Then you can bid online to your heart's content."

If the increase in consumer business on the Internet in Britain follows the trend in America, then the rate of growth will be staggering. The estimated business-to-consumer trading in America recently put at $8 billion is reckoned to increase to $108 billion over the next 5 years.

Other forecasts have put the business-to-consumer transactions in America at some $20 billion in 1999. This estimate, by Forrester Research, an Internet consulting firm, predicts that the figure will grow to $184 billion by 2004. A survey by Ernst & Young suggests that 39 million Americans, making up 17% of households, shopped online in 1999 and that nearly half of them spent $500 or more. Goldman Sachs

forecast that by 2010 Electronic Shopping could account for 15-20% of retail sales.[1]

The business-to-consumer (B2C) is small beer compared to the business-to-business trading (B2B). Recent American forecasts for inter-company trading put the figure at $43 billion increasing to $1.3 trillion in 2003. One factor which might affect those forecasts is the type of company which is presently trading on the Internet. Well known are the new Internet companies such as Amazon and Yahoo! More important may be established firms which have not yet taken full advantage of the benefits which the Internet can offer. The Chief Executive of IBM, Lou Gerstner, is reported as saying that *"the storm that's arriving is when the thousands and thousands of institutions that exist today seize the power of this global computing and communications infrastructure and use it to transform themselves. That's the real revolution*." [2]

(2) <u>In The Oil and Gas Industries[3]</u>

Petroleum Review, published by the Institute of Petroleum in London, has for the past year or so been running a series of articles on Electronic Commerce and the petroleum sector. Although there is interest in that sector in trading, the main interest to date seems to be concentrated on cost-saving: *"the main reason for the projective growth in E-Commerce is seductively simple: it purportedly saves money".* General Electric recently announced that it had trimmed $1 billion off its procurement by invoicing exclusively in the electronic domain.

"Oil companies are taking note. BP AMOCO Chairman John Browne has stated that he wants 50% electronic procurement by the end of 1999, and 95% by the end of 2000... supply chain management, also referred to as e-procurement, involves the coordination of a company's purchasing of goods and services. Generally, this entails whittling down suppliers to a core group, then negotiating savings in return for loyalty... Since IBM began to put e-procurement for its office equipment in place three years ago, it has saved an estimated $4 billion. `We'll have gone from six million invoices to nothing by the end of 1999', says Janet Wood, General Manager for e-business solutions at IBM".[4]

Shell and Commerce One "*a provider of global business-to-business e-commerce solutions"* announced a plan to form a joint venture to develop an Internet market place for procurement of *"a whole range of supplies and services in the oil, gas and chemicals industry. Shell*

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1 *The Economist*, February 26th 2000

2 *The Economist*, June 26th 1999

3 "Dispute Resolution in the Oil & Gas Industry - Recent Trends" by Anthony Connerty. This and other Papers presented at an IP Conference held in London in December 2000 are now published by the Institute of Petroleum, London: ISBN 085293 321 5.

4 *Petroleum Review* December 1999, page 14.

anticipates that the new system will `significantly' cut procurement cost".[5]

BP AMOCO is reported to have started using the Internet to purchase basic catalogue items: *"these represent only 15% of its $20 billion annual procurement budget, but 50% of all transactions, and it has targeted $200 million savings annually from these items alone. By the end of 2000, BP AMOCO aims to conduct 95% of all purchases electronically."*[6]

Another area where electronic commerce is seen as providing cost-cutting opportunities for the industry is in spares inventory management: *"If you can locate spare parts in a few minutes using the Internet, and call not just on the reserves of your own company's sites but also those of other operating companies who use much the same equipment, you can afford to hold fewer spares".*[7]

The provision of information is another area in which the Internet is seen as giving the opportunity to cut costs. DEAL ("Digital Energy Atlas & Library") is a website which provides a library of basic geo-scientific information on the UK Continental Shelf. *"Deal is expected to save the industry millions of pounds a year. By providing quick and simple access to reliable sources of information, costly duplication in data storage will be eliminated and search time reduced".*[8]

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5 *Petroleum Review* February 2000, page 15

6 *Supra page 14.*

7 *Petroleum Review* December 1999, page 16.

8 *Petroleum Review* November 2000, page 7.

III. LEGAL PROBLEMS RAISED BY ELECTRONIC COMMERCE

Trading on the Internet - Cybertrade - will raise legal problems the like of which have never been faced before[9]. Processes used in paper-based trading may not assist in the resolution of difficulties arising in cross-border trading on the world-wide web. A contract concluded online may involve problems not encountered in a written contract executed with the pen and ink signatures of the parties.

Trading on the Internet is likely to create problems which will include the following:

- formation of a contract;
- digital signatures, encryption and authentication;
- governing law and jurisdiction;

(1) Formation of a Contract

Take a simple example. A in Manchester is purchasing a book on the Internet from B Limited in London. What form will this contract take? When and where will it be made? What will be its terms? If disputes develop, how can the existence of that contract be established in litigation or arbitration proceedings?

English law, for example, has complex rules dealing with the formation of a contract. One basic rule is that there must be an offer and an acceptance. Does B Limited's Website contain an invitation to treat? Or is there an offer which can be accepted? And how is the acceptance of the offer to be communicated? Does A's click on an icon bring the contract into existence?

And if it does, are there terms to be implied into that contract? English law implies terms through Statute: terms as to fitness for purpose and the like are implied by the Sale of Goods Act. The Unfair Contract Terms Act may strike down clauses in a seller's standard conditions of sale.

(2) Digital signatures: encryption, decryption and authentication digital signatures

What is the situation if the relevant national law requires that the contract be in writing? How will Cybertrade deal with that?

Not only may the national laws require the contract to be in written form, but there may be the further requirement that the written document bear the written –pen and ink – signatures of the parties. English law – starting with the Statute of Frauds in 1677, and more recently in the Law of Property (Miscellaneous Provisions) Act 1989 - requires certain types of contract to be signed.

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[9] A series of articles on this topic by Robert Bond and others is published in the *ICC United Kingdom Members Handbook, 1999*: "E-Commerce 1999: The Legal Issues", pp.112-120.

How will E-Commerce handle this? The answer being advanced is the Digital Signature: public key encryption can verify the identity of the sender.

(3) The Particular Problems of Governing Law and Jurisdiction

Again, take a simple example: when the contract for the purchase and sale of a vehicle is made between A in London and the B Corporation in Germany, which country's law governs that contract and which country's courts have jurisdiction? The country of the buyer or the country of the seller?

In the UK (and most of the European Union) the Rome Convention applies to identify the governing law: it will be the law of the country which is "most closely connected" with the transaction. Likewise, the Brussels Convention deals with the question of which country's courts have jurisdiction over that contract. But what is the position under a trans-border contract entered into between an EU and a non-EU party? Say the contract is between A in Tunis and the B Corporation in London. Does the law of the seller's country apply? Do the Courts of the seller's country have jurisdiction? Or in one or both cases is it the buyer's country?

The particular legal problems of governing law and jurisdiction have always existed in cross-border trading.

But because Electronic Commerce is by its very nature a system of trading without national boundaries, problems relating to governing law and jurisdiction are likely to increase.

IV. LEGAL DEVELOPMENTS: NATIONAL AND INTERNATIONAL

A UK LEGISLATION ON ELECTRONIC COMMERCE

In England, two Statutes are likely to have an impact on the development of Electronic Commerce: The Electronic Communications Act 2000 and The Regulation of Investigatory Powers Act 2000.

The Electronics Communications Act 2000

This Act is intended to encourage confidence in the development of electronic commerce and the technology which underlies that development. The provisions of the Statute provide for the legal recognition of electronic signatures and the processes under which such signatures are to be verified. The Statute also removes obstacles contained in other UK legislation which might hamper the use and development of electronic communications and the storage of information in place of the use of paper.

The Act contains a scheme aimed at dealing with the provision of cryptography support services.

Part I of the Act contains detailed provisions dealing with "cryptography service providers". The Secretary of State is to establish and maintain a Register of approved providers of such services. The Act sets out the information which is to be contained in the Register. The statutory provisions oblige the Secretary of State to ensure that there are adequate arrangements allowing the public access to the information on the Register.

Part II is concerned with the "*facilitation of electronic commerce, data storage, etc".* Section 7 deals with electronic signatures and related certificates and provides that in any legal proceedings*:*

"(a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and

(b) the certification by any person of such a signature,

shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data."

Section 7(2) of the Act states that an electronic signature is so much of anything in electronic form as -

"*incorporated into or otherwise logically associated with any electronic communication or electronic data; and purports to be or associated for the purpose of being used in establishing the authenticy of the*

communication or data, the authenticity of the information or data, the integrity of the communication or both."

Section 8 of the Act then contains sweeping powers enabling Government Ministers to make orders by Statutory Instrument to modify the provisions of existing legislation so as to deal with electronic communications and electronic storage.

The effect of this approach is that the law relating to Electronic Commerce in the UK will have to be found in different sources, some of those sources being the "secondary legislation" of Statutory Instruments.

Further legislation will presumably be required when the E.C. Council Directive on Electronic Commerce takes effect in the UK.

This piecemeal approach can be compared with the legislation enacted in Singapore. The Singapore Electronic Transactions Act, 1998, deals in great detail - in 64 Sections divided into 12 Parts - with such matters as the formation of electronic contracts.

The Regulation and Investigatory Powers Act 2000

This Act deals with the regulation of six regulatory powers: the interception of communications; the acquisition of communication data; intrusive surveillance on residential premises and in private vehicles; the covert surveillance in the course of specific operations; the use of covert human intelligence sources; and access to encrypted data.

Some of these powers already existed in earlier legislation: for example, the Interception of Communications Act 1985, the Intelligence Services Act 1994 and The Police Act 1997.

However, the power to access encypted data is a government response to recent developments in technology.

The Act regulates the use of the investigatory powers and aims to ensure that the powers given are consistent with the duties imposed on public authorities by the European Convention on Human Rights and the Human Rights Act 1998: "*human rights considerations dominated the drafting of this Act and it is intended to reflect a change in the United Kingdom's stance on human rights. It seems to strike a balance between protecting individuals' convention rights and recognising the necessity of investigatory powers to the protection of society as a whole.*[10]

Provisions dealing with electronic signatures and their certification, etc. and with the investigatory powers of the intelligence services, police, and Customs and Excise were originally all contained in the Electronic Communications Bill. In some quarters there was considerable disquiet at

10. See generally on these two Statutes: Halsbury Statutes (4th Edition) Current Statute Service, Volume 45

the intention to include provisions as to Electronic Commerce and provisions as to investigatory powers in one and the same piece of legislation. For example "the tipping-off" provisions now contained in Section 54 of the Regulation of Investigatory Powers Act provide for a criminal offence carrying a penalty on conviction of five years' imprisonment.

B INTERNATIONAL DEVELOPMENTS

1. UNCITRAL

It is perhaps also interesting to compare the approach of the UK government with that adopted by UNCITRAL.

In December 1996 the United Nations General Assembly adopted by resolution a Model Law on Electronic Commerce completed by the United Nations Commission on International Trade Law (UNCITRAL) The General Assembly noted that an increasing number of transactions in international trade are carried out by means of electronic data interchange "*and other means of communication commonly referred to as 'electronic commerce' which involved the use of alternatives to paper-based methods of communication and storage of information*". The Model Law on Electronic Commerce *"will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists ..."*.

The Model Law is in two parts. Part 1 deals with electronic commerce in general and Part 2 with electronic commerce in two specific areas.

Part 1 contains 15 articles and is divided into three chapters: general provisions, the application of legal requirements to data messages and the communication of such messages.

Definitions

Article 2 contains definitions including "data message" (information generated, sent, received or stored by electronic optical or similar means); "originator" (the sender of a data message); "addressee" (the recipient); and "intermediary" (a person who, on behalf of another sends, receives or stores data messages).

Validity

Article 5 deals with the legal recognition of data messages: information is not to be denied legal effect solely on the grounds that it is in the form of a data message. Article 5 bis, adopted by the Commission in June 1998, deals with incorporation by reference.

Signature and writing

The Model Law deals with the important matters of writing and signature. Where the law requires information to be in writing, that requirement is deemed to be met by a data message, and where the law requires the signature of a person, such requirement is deemed to be met if a method is used to identify that person "*and to indicate that person's approval of the information contained in the data message*". There is the additional requirement that the method is reliable. Provision is made for the admissibility and evidential weight of data messages in legal proceedings.[11]

Electronic contracts

Article 11 is concerned with one of the most crucial areas of Electronic Commerce legislation: the formation and validity of contracts. Article 11(1) provides that, unless otherwise agreed by the parties, *"... an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the ground that a data message was used for that purpose."* Article 11(2) can be used by individual States to set out those areas which are to be excluded from the provisions of Article 11(1).

Provision is made for the recognition and attribution of data messages, acknowledgement of receipt, and for the time and place of dispatch and receipt of data messages.[12]

Articles 16 and 17 are concerned with carriage of goods and transport documents.[13]

2. The ICC

For more than 80 years the International Chamber of Commerce in Paris has been making voluntary rules governing paper-based trade. The ICC is now dealing with matters concerned with online trading. This area is the responsibility of the ICC's Commission on Telecommunications and Information Technology (CTIT) and its Electronic Commerce Project (ECP).

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11 Articles 6,7 and 9

12 Articles 12-15

13 For a discussion of the difficulties in using transport documents such as Bills of Lading in an electronic environment see the article by Jenny Clift in *International Business Lawyer*, July/August 1999 at page 331: "Electronic Commerce: the UNCITRAL Model Law and Electronic Equivalents to Traditional Bills of Lading".

Amongst the current ICC activities are:

Alternative Dispute Resolution in B2C e-commerce

The ICC is facilitating cross-border online dispute resolution services "*that could guarantee effective redress mechanisms in business-to-consumer e-commerce disputes*."

Model Electronic Sale Contract

The ICC is currently engaged in the production of an online model sale contract which can be used by traders to build a "balanced yet customised sale contracts through a simple-online question-and-answer routine."

E-Terms

This service from the ICC is a repository of contract terms used by parties to build contract online. A prototype of the repository has been tested and is currently undergoing commercial evaluation.

Guidec

The ICC's General Usage for International Digitally Ensured Commerce is a set of guidelines for ensuring trustworthy digital transactions over the Internet.

Electronic Signatures

The ICC is working with the United Nations Commission on International Trade Law (UNCITRAL)on an international uniform legal instrument "*enabling the recognition of electronic signatures across borders*".

Jurisdiction and Applicable Law in Electronic Commerce

A task force of various groups within the ICC, including groups dealing with dispute settlement, intellectual property and international commercial practice, is currently revising a paper relating to jurisdiction, applicable law and enforcement in electronic commerce.

This is perhaps one of the more complex and potentially difficult areas of trading on the Internet.

The scale of the involvement of international organisations such as UNICTRAL and the International Chamber of Commerce demonstrates the extraordinary importance of the development of Electronic Commerce and illustrates the complexity of the problems involved in conducting commercial transactions over the Internet.

V. DISPUTE RESOLUTION AND ELECTRONIC COMMERCE

A. TRADITIONAL METHODS OF DISPUTE RESOLUTION

Introduction

The contractual provisions dealing with dispute resolution in commercial contracts are of vital importance. Provision will normally be made as a minimum for the following:

1. Forum: in what country should the dispute resolution process take place?

2. Choice of Law: which country's law is to govern the contract? It is, of course, always open to the parties to provide for a choice of laws rather than a choice of law and to provide that disputes will be resolved by way of reference to general principles of international law or *lex mercatoria*[14]. However, the choice of a national law is likely to be the norm.

3. Dispute Resolution Process: broadly speaking, there are four dispute resolution processes in common use: litigation, arbitration, ADR and expert determination.

   - If litigation, which country's courts are to have jurisdiction?
   - If arbitration: is this to be institutional or *ad hoc*? If institutional, which institution? LCIA, ICC, etc.?
   - If ADR, should some form of ADR filter mechanism be inserted in the contract, arbitration then only being triggered off in the event that the ADR process fails?
   - Or is expert determination the appropriate way to resolve disputes?

14. Harold Hestnes of the Boston law firm of Hale & Dorr writes of the need for a common body of law to which international commerce can turn. He says that there is some hope ".. which is encouraged by the European Common Market that perhaps a uniform international commercial code might emerge and bear some of the attributes of the (Uniform Commercial Code) as found in the United States": "Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR", at Page 20 from one of a number of short essays published by the *CPR Institute for Dispute Resolution*, 366 Madison Avenue, New York, NY10017-3122.

This Section looks at those four dispute resolution processes.

1. Litigation

Litigation in the national courts is probably - despite the increasing use of international commercial arbitration backed up by the New York Convention - still the major international dispute resolution process in use.

In the context of international contracts the major problem in relation to litigation is the prospect for one of the parties of that litigation taking place in the courts of a foreign country, conducted in a foreign language and under a foreign system of law.

However, litigation may be the dispute resolution process used for a variety of reasons:

- No contractual provision is made for dispute resolution.

- The bargaining power of one party is such that it is able to insist that litigation takes place in the Courts of a country chosen by that party.

- A deliberate, consensual, choice of the parties. For example, more than 80% of the cases heard in the Commercial Court in London have no connection with England in the sense that either the subject-matter of the contract has no connection with England or one or more of the parties is not English.

Such parties may choose the English courts as the forum for resolution of any disputes which may arise under the contract and additionally may choose English law as the law to govern that contract.

- Litigation in the national courts may, on the particular facts of the case, be the only realistic option open to the parties: say in the case of jurisdiction disputes, claims for injunctions, challenges to arbitral awards, and so on.

2. Arbitration [15]

(1) Generally

There is no international court to deal with international disputes. Therefore if no provision whatever is made in a contract for dispute resolution, any disputes arising out of that contract (which cannot be resolved by negotiation between the parties) are likely to have to be dealt with by litigation in the national courts.

15. Based in part on "Resolving Trade Disputes with China" by Anthony Connerty, *Amicus Curiae*, the Journal of the Society for Advanced Legal Studies, Issue 30, September 2000.

If the contract is between, say, a UK party and a non-UK party, then that may mean litigation in a "foreign" court. That may not appeal to the UK party. Equally, the non-UK party may be obliged to sue in the UK courts. In each case, one party will be faced with having to resolve disputes in a foreign country under a foreign legal system and in a foreign language.

The way to avoid the problem is to make provision for some other method of resolving disputes.

One obvious dispute resolution process to include in an international contract is arbitration. The parties can agree that, instead of their disputes being dealt with in the national courts, any disputes will be heard by an arbitral tribunal. Because arbitration is a consensual process, the parties can decide who will resolve their disputes, in which country the arbitration should take place, what law should be applied to the resolution of that dispute and which language shall be used for the purposes of the dispute hearing.

The parties can also choose the rules to be applied for resolving the dispute. Additionally, arbitration being a *private* dispute resolution process, the parties will know that the proceedings will be confidential.

Arbitration may - indeed in many cases should - prove to be a quicker and cheaper means of resolving disputes than the national courts: particularly now that many arbitral institutions have introduced fast-track procedures.

Many commercial contracts in which the parties have agreed to have their disputes resolved by arbitration will specify one of the well- known international arbitral bodies such as the International Chamber of Commerce in Paris or the London Court of International Arbitration.

(2) Arbitration and national laws

Arbitrations conducted under, say, the Rules of the ICC or the LCIA, must be conducted in accordance with the relevant national laws, and on an international basis, with an eye to the New York Convention.

As to national laws, it is clear that arbitration - as a private dispute resolution system separate from the litigation systems of the national courts - can only operate with the agreement of national governments. Broadly speaking, national governments support arbitration as a private system principally in two ways. First, by staying litigation in the national courts in circumstances where the parties have agreed to arbitrate. Secondly, by enforcing in the national courts the awards made by arbitral tribunals. In addition, the State courts may aid the arbitral process by, say, granting injunctions. But in return the State expects to exercise a degree of control over the arbitral process by, for example, allowing appeals in certain circumstances to the State courts against arbitration awards.

ICC and LCIA arbitrations taking place in England are subject to the mandatory provisions of the English Arbitration Act of 1996.

(3) Institutional Arbitration: the ICC and the LCIA

ICC Arbitration

As an arbitral body, the ICC is amongst the world's foremost arbitral institutions. Its revised arbitration Rules came into force in 1998. The Rules deal with the commencement of the arbitration; the appointment of and challenge to arbitrators; the service of the Claimant's Request and the Respondent's Answer; provisions as to the place of the arbitration, the language of the arbitration and the procedures to be followed at the arbitration hearing; and the provisions relating to the Award and scrutiny of that Award by the ICC Court in Paris.

LCIA Arbitration

Like the ICC, the LCIA is a truly international organisation. It will arrange and administer arbitrations under any system of law in any part of the world. It will do so either under its own Rules or under the UNCITRAL Rules. There is no more need for an LCIA arbitration to be conducted in London than there is for an ICC arbitration to be conducted in Paris. The LCIA's own Rules have been translated into many languages.

The LCIA Rules have been revised from time to time, the most recent revision taking account of the new English Arbitration Act which came into force in January 1997. The Rules, which follow a recognisable international pattern, took effect from January 1998.

(4) The New York Convention

The ultimate object of referring a dispute to international commercial arbitration is the enforcement of the award made by the Tribunal. The United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is intended to provide for the mutual recognition and enforcement of arbitral awards made in countries which are parties to the Convention.

Most of the world's trading nations have ratified the New York Convention[16]. Take the example of a dispute between UK and German companies. An award made against the UK company could be enforced by the German company in the United Kingdom through the UK courts. And if the UK company had assets in, say, France and Italy, the German company could likewise enforce the award through the French and Italian courts since both France and Italy have ratified the Convention.

[16] Tunisia ratified the New York Convention in 1967

The New York Convention has been described as *"... the most important international treaty relating to international commercial arbitration. Indeed, it may be regarded as one of the major contributing factors to the rapid development of arbitration as a means of resolving international trade disputes"*.[17]

3. ADR

(1) ADR: development

There is nothing new in the concept of ADR: mediation and conciliation have been used in the East for centuries. What is new is the kind of techniques which have been developed in the United States. America, particularly the CPR Institute for Dispute Resolution in New York, has led the way in developing new methods of dispute resolution other than by way of litigation and arbitration.

To a great extent those developments were driven by concern at the delays and excessive costs of both litigation and arbitration. That concern was not restricted to the United States; hence the increasing interest in ADR in England (particularly by the English Courts) and the emphasis now laid upon Alternative Dispute Resolution in the Civil Procedure Rules of the English Courts.

ADR is generally taken to cover all forms of dispute resolution other than litigation and arbitration. The reason for this is clear: both litigation and arbitration operate regardless of the will of the parties and result in a binding and enforceable outcome. The Defendant/Respondent against whom litigation/arbitration proceedings are launched has no choice as to whether to participate and may be faced with a judgment/award which can be enforced in the national courts. In litigation the process is imposed by the State. In arbitration the result follows from the parties' agreement to arbitrate, coupled with the State's support of the arbitral system.

But ADR in its various forms - the most familiar being mediation and conciliation - is a consensual process: the parties do not have to take part in it. And if they do, they do not have to abide by the outcome. Generally speaking, national Courts will not enforce ADR agreements and the ADR process - unlike arbitration - is not subject to any statutory code. Whatever the particular form, the basic aim of all ADR processes is the same: the use of a third party neutral, within a consensual process, to bring the parties to an agreed settlement. It is a "problem-solving", "win-win" process, as opposed to the "winner/loser" outcome of both litigation and arbitration.

[17] Redfern and Hunter "Law and Practice of International Commercial Arbitration".

(2) Types of ADR

Conciliation and mediation

The two words tend to be used interchangeably. Both involve the use of a third party neutral who will seek to bring the parties to a settlement. The extent to which the neutral takes an active part in seeking to bring about a settlement may attract the label of "mediator" or "conciliator".

The process of *"caucusing"* is probably the most significant aspect of mediation. The mediator holds a series of separate meetings with the parties in dispute: this process is aimed at seeking to bring the parties to a settlement through the identification of any hidden agendas and the exploration of problem-solving proposals. The mediator may only divulge what has been said to him by one party in a caucus session if express permission is given.

Mini-trial

This process is often used in disputes between corporations. A *"hearing"* takes place before a neutral third party and senior executives of the business organisations involved. Those executives will not have been concerned in the dispute itself. Each side presents its case. It is open to the third party neutral to indicate the consequences in terms of time and money should the mini-trial process fail. This system has enjoyed considerable success in the United States.

Neutral evaluation

Here, the third party neutral may be a lawyer or retired Judge who can deliver a non-binding evaluation of the dispute should the ADR procedure fail and the matter proceed to litigation or arbitration.

"Neutral Listener Agreement"

This is a system offered by the American CPR. Under this process each party submits its best settlement offer to a third party known as *"the neutral listener"* who indicates to the parties whether he considers the offers to be such as to be negotiable. If so, the *"neutral listener*" will offer to help to negotiate so as to bring the parties to a possible settlement.

(3) ADR in an international context

Although ADR in its present form developed in the United States, it is now in use worldwide.

Mr Tjaco T. van den Hout, the new Secretary-General of the Permanent Court of Arbitration in The Hague, has stated that the PCA has 100 years of experience in the field of dispute settlement between States "…*and in*

the last decade has broadened its jurisdiction to accommodate more categories of disputes and parties … We will continue to concentrate our efforts on promoting the use of and facilitating arbitration and ADR in the resolution of international disputes while carrying out, when called upon to do so, our role of protecting the integrity of the arbitral process."[18]

Many of the international arbitration institutions, such as the ICC, the LCIA, the China International Economic & Trade Arbitration Commission in Beijing (CIETAC) and the Tunis Center for Conciliation and Arbitration, offer a range of dispute resolution processes which include both arbitration and ADR in its various forms.

The ICC's Commission on International Arbitration has set-up a working party to consider the ICC's ADR services: the ADR Forum is under the leadership of Jean-Claude Goldsmith.

Other bodies, such as the Beijing Conciliation Centre and the London-based Centre for Dispute Resolution (CEDR), are purely ADR bodies.

Then there are specialist bodies, such as the ICC's International Centre for Expertise in Paris and the U.N.'s World Intellectual Property Organisation (WIPO). The ICC offers highly specialist dispute resolution procedures in the area of documentary credits.

WIPO is now operating a scheme aimed at resolving Domain Name dispute.

Reference is made later in this Paper to the WIPO Scheme and to the ICC's DOCDEX Scheme.

(4) <u>ADR as a pre-arbitral dispute mechanism</u>

ADR has been used with considerable success as a pre-arbitral dispute mechanism in major construction projects around the world.

In this context ADR is of particular use in contracts involving a considerable number of parties. Disputes on such projects require to be settled swiftly in order to avoid disrupting the progress of the works.

The kind of contractual provision which is likely to be found in connection with such projects will require disputes to go through some form ADR *"filter"* before proceeding to arbitration. The obvious hope is that the ADR process will in fact render arbitration unnecessary. The type of ADR mechanisms which are used as *"filters"* are likely to comprise such processes as adjudication by a panel of experts or by a Dispute Review Board. It was this kind of procedure which was used in

[18] Pages xv-xvii, "International Alternative Dispute Resolution: Past, Present and Future": *The Permanent Court of Arbitration Centennial Papers*, Published by Kluwer Law International (200). ISBN 90-411-1476-9.

the *Channel Tunnel Group Limited v. Balfour Beattie Construction Limited and Others*[19].

Similar ADR mechanisms have been used in the Boston Central Artery/Tunnel Project and in the Hong Kong Airport Core Program.[20]

James F. Henry, the founder and outgoing President of the CPR Institute for Dispute Resolution, has said that most commercial contracts … "*should have a step clause requiring negotiation, then mediation, before pursuing litigation or arbitration, unless specific circumstances suggest otherwise*."[21]

Thomas Stipanowich, the new President of the CPR Institute, states that there is now an unprecedented use of tailored dispute resolution provisions which include … "*multi step conflict management programs designed to 'filter' disputes through a progression of discrete processes (such as face-to-face negotiation, mediation, and binding arbitration) …*".[22]

(5) Med-Arb, etc.

In addition to ADR being used as a filter mechanism, it is possible to use a mixture of arbitration and mediation or mediation and arbitration. Indeed, whatever combination of mechanisms the parties choose. Mr P.J.H. Jonkman, the former Secretary-General of the Permanent Court of Arbitration in The Hague, makes the point that arbitration has the advantage …"*of being flexible, discrete and relatively fair. It keeps the door open to conciliation throughout the proceedings*."[23]

The notion of switching from, say, arbitration to mediation may be difficult for Western lawyers and arbitrators to accept since this must always involve the prospect of a mediator having to revert to the role of arbitrator.

But such a course, whilst perhaps strange to the Westerner, would be regarded as perfectly natural in, say, China. For example, provision is made in the CIETAC arbitration rules for an arbitral tribunal to switch to acting as conciliator.[24]

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19 [1993] *2 W.L.R. 262, House of Lords*

20 See further on the topic of ADR Filter Mechanisms: "The Role of ADR in the Resolution of International Disputes" by Anthony Connerty, *Arbitration International* (1996) Volume 12 page 47.

21 "Into the 21st Century", supra, at Page 51

22 "Into the 21st Century, supra, at Page 33

23 The Permanent Court of Arbitration Centennial Papers, supra, at Page 123.

24 The author acted as Counsel in an ICC arbitration in which one of the hearings took place in China. The parties, their lawyers and the arbitrator agreed that the arbitrator should switch to acting as a mediator part way through the hearing. See further on this "A Foreign Arbitration held in China", Arbitration, the Journal of the Chartered Institute of Arbitrators, August 1999, Vol. 65 at page 203.

ADR in its various forms has much to offer as a dispute resolution process. But it has to be used sensibly. It is not the answer to every dispute. The client whose products are being counterfeited is unlikely to be impressed by the lawyer who suggests that he try ADR. There will always be situations where an application to a national Court for an order or declaration is the only realistic option available.

4. Expert determination

(1) Expert determination and arbitration

The use of experts to determine technical or valuation matters has been known to English law for hundreds of years. The parties agree to instruct a third party to determine a specific matter.

The system has been used in the Energy Industry for redetermination and for the resolution of specific matters identified in the relevant contract.

It may be at times difficult to distinguish between expert determination and arbitration. But the differences between the two are significant.

An expert is appointed to obtain the benefits of his expert opinion. It is that expert opinion which will be used to arrive at the determination. Very often the matters to be decided will involve the expert in a valuation exercise. "Due process" may be conspicuously absent from the system of expert determination: the parties may not necessarily present their case or submit evidence. In England, at any rate, there are no statutory provisions governing expert determination.

Arbitration, on the other hand, is governed by the provisions of the 1996 Arbitration Act. Due process is very much part and parcel of the arbitral process. Leaving aside documents only arbitrations, the parties will in all probability present their cases to the arbitral tribunal and the decision of that tribunal is based upon the evidence and submissions put forward by the parties and their professional advisers. The arbitral tribunal must, in arriving at its decision, apply the relevant law. The expert on the other hand uses his own expertise and decides the issue in dispute on the basis of his expert opinion.

The assistance of the Courts is available to aid the arbitral process. For example, under the English Arbitration Act the Court can appoint arbitrators. There is no such provision in relation to experts. Similarly, the English Courts can assist the arbitral tribunal by enforcing peremptory awards of that tribunal, by securing the attendance of witnesses and by making orders in relation to the taking of evidence, the preservation of evidence and the making of orders relating to any property which is the subject-matter of the proceedings: for example in relation to the preservation and custody of such property. The Court also

has powers to grant interim injunctions and appoint receivers in support of the arbitral proceedings.[25]

An arbitral award can be challenged on the grounds of "serious irregularity" and there is a limited right of appeal in relation to points of law. No such safeguards apply in the case of expert determination. Any challenge to the determination of an expert can only be on fairly limited grounds relating, for example, to fraud or collusion, or an allegation that the expert had departed from his instructions to a material extent.[26]

But perhaps one of the most significant differences between expert determination and arbitration lies in the area of enforcement.

On the domestic level, an arbitral award is normally enforced through the national courts. That is the case in England, where an award is enforceable as if it were a judgment of the Court.[27]

No such assistance is available in relation to the determination of an expert. Such determination is enforceable, if it is enforceable at all, purely as a matter of contract.

The problem of enforcement on the international level is perhaps even more significant. The determination of an expert is not an arbitral award and therefore cannot be enforced under the New York Convention.

(2) Some institutions offering expert determination

LCIA

Expert determination is one of the dispute resolution services offered by the LCIA, London.

ICC

The ICC International Centre for Expertise in Paris provides a set of Rules for Expertise. The International Centre will arrange for the appointment of experts in connection with "international business transactions". The parties may provide in their contract for resort to the Centre. The standard clause recommended by the ICC is:

"*The parties to this agreement agree to have recourse, if necessary, to the ICC International Centre for Expertise of the International Chamber of Commerce in accordance with the ICC's Rules for Expertise".*

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25 Sections 42-44 of the Arbitration Act 1996

26 On challenge on departure from instructions see for example Shell UK v. Enterprise Oil [1999] 2 Lloyds 456.

27 1996 Arbitration Act, Section 66.

The parties may agree to submit an existing dispute to the International Centre.

The Rules for Expertise provide that the expert may be nominated by the parties by mutual consent and confirmed by the Centre, failing which the Centre will appoint an expert.

The expert is *"empowered to make findings within the limits set by the request for expertise, after giving the parties an opportunity to make submissions"*. The parties are to provide the expert with all necessary facilities and in particular to make available documents and grant him access *"to any place where the expertise operations are being carried out*."

The Rules provide that "*Unless otherwise agreed the findings or recommendations of the expert shall not be binding upon the parties"*.

CEDR

CEDR - Centre for Dispute Resolution, London - offers a *"Model Expert Determination Agreement"*. That agreement explains that expert determination differs from arbitration in its greater informality and says that there is *"no need for a trial-type hearing. Unless the parties agree otherwise, the Expert may conduct investigations independently of the Parties, and make the Decision based on those investigations without reference to the Parties."*

The provisions of the Model Agreement state that the Expert will act as expert and not as an arbitrator and state that unless the parties agree otherwise *"This Expert Determination leads to a decision.... being issued by the Expert. The decision will be final and binding on the Parties"*. The agreement provides that the expert is to conduct the Determination *"in accordance with procedural directions which the Expert will seek to agree with the Parties. If they cannot be agreed, the Expert's Directions will prevail"*.

The agreement enables the parties to provide whether or not the decision of the Expert is to include reasons and whether or not the parties are to be permitted to challenge the decision "in any legal proceedings or otherwise".

There is provision for the process to switch to mediation: if successful, the Expert Determination terminates.

It is interesting to compare the CEDR Model Agreement with the specimen clause used by Shell International Limited which provides as follows:

"Where, pursuant to any provision of this agreement a matter is required to be determined by an Expert, the Expert shall be a reputable person fitted by the possession of expert knowledge and experience for the

determination of the matter in question. The Expert shall be appointed by agreement between the Parties or, in default of such agreement, within 30 days after a party has requested the appointment of an Expert, by the President of the Institute of Petroleum of the United Kingdom. Such expert shall determine the matter in question within 60 days after his appointment on the basis of terms of reference agreed between the Parties or otherwise as the Expert shall himself determine, as an Expert and not as an arbitrator and such determination shall be final and binding on the parties..."

B. ONLINE DISPUTE RESOLUTION FOR ELECTRONIC COMMERCE

When disputes arise in E-Commerce transactions, the traditional dispute resolution processes will be available: litigation, international commercial arbitration, ADR and Expert Determination. But will the advent of E-Commerce bring with it new mechanisms for dispute resolution? Will online trading bring online dispute resolution?

Is it possible that electronic commerce will bring about the development of dispute resolution processes which make use of the Internet? Could the costly and time-consuming processes involving physical arbitration hearings be replaced by online electronic dispute resolution processes? Will we see the emergence of the Cyber Arbitrator?

A number of major international organisations are already looking at the problem: the ICC in Paris in relation to Documentary Credit Dispute; WIPO in Geneva in relation to Domain Name Disputes; the LCIA in London; and the CPR in New York.

(1) The ICC : Documentary Credit Disputes

The ICC may already have shown the way to resolve cross-border disputes swiftly and cost-effectively without the necessity for physical meetings.

In October 1997 the ICC published the DOCDEX Rules, the *"Rules for Documentary Credit Dispute Resolution Expertise"*. The system is made available through the ICC's International Centre for Expertise in Paris and can be used to resolve Letter of Credit disputes where the Credit is subject to the ICC's Uniform Customs and Practice for Documentary Credits (the UCP) or the Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits (URR).

The Rules provide for a swift, non-binding determination by a panel of three Experts. There is no hearing. The party seeking a DOCDEX decision submits a Request which must identify the issues. The Request must be accompanied by the Letter of Credit in question and other relevant documents. The Respondent submits an Answer to which is annexed any relevant documents. Three "Appointed Experts" are to draft

a decision which is to be submitted to the Centre within 30 days. That decision is based on documents only. The Rules state that the parties may not seek an oral hearing in front of the appointed experts.

In all probability the three Experts will be from three different countries. There is no requirement in the DOCDEX Rules that the Experts should physically meet. The communications between the Experts for the purposes of arriving at their decision can therefore be by telephone, fax or E-mail. The way is obviously open for online communication between the experts.[28] Parties involved in DOCDEX cases dealt with so far have come from more than 20 countries including Belgium, France, Italy, Spain, Switzerland, Turkey, Bulgaria, Hungary, China, India, USA and Australia.

Experts appointed to the DOCDEX Panel in those cases have come from over 25 countries.

(2) WIPO: Domain Name Disputes

The World Intellectual Property Organisation is one of a number of specialised agencies operated by the United Nations. For sometime WIPO had been working on an online dispute resolution system aimed at dealing with Domain Name disputes.[29] Draft Rules issued in 1997 contained provisions dealing with hearings. These were defined as including telephone or video conferencing and the "*simultaneous, authenticated exchange of electronic communications on the same channel in a manner that enables all Parties authorised to use the channel to receive any communications sent and to send communications*".

Although intended specifically to deal with Domain name disputes the draft Rules could be adapted to deal with online Electronic Commerce disputes generally.

Erik Wilbers of the WIPO Arbitration and Mediation Center in Geneva has suggested that the expansion of Electronic Commerce on the Internet *"may soon lead parties to settle disputes in the same manner as their commerce is conducted".*

The WIPO Domain Name Dispute Resolution Procedure is now operational with effect from December 1999. By mid-2000 WIPO was dealing with more than 700 cases.

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28 See further on DOCDEX two articles by the author: "DOCDEX: the ICC's Rules for Documentary Credit Dispute Resolution Expertise", Butterworths *Journal of International Banking and Financial Law*, November and December 1998 and "Documentary Credits: a Dispute Resolution System from the ICC", Sweet and Maxwell's *Journal of International Banking Law, March 1999.*

29. One of the legal problems identified for the Oil Industry as it moves to "paperless procurement (e-commerce) on the Internet" is the problem of domain names and cybersquatting: *Petroleum Review* December 1999, page 24.

The WIPO system is based on the ICANN System (Internet Corporation for Assigned Names and Numbers). WIPO was instrumental in the setting up of ICANN. Documents of particular importance in the WIPO scheme are the ICANN Rules and Policy Document and the WIPO Supplementary Rules and Policy Document.

How the system works can be explained by a simple example:

(1) Party A (to be the Respondent in the future dispute) registers a Domain Name with WIPO.

(2) The WIPO "Registration Agreement" for that registration incorporates by reference the ICANN/WIPO Rules.

(3) Party B (to be the Complainant in the proceedings) says that the registration was in "bad faith" (e.g. "marksandspencers.com").

(4) The Complainant makes a written complaint to the WIPO Center, setting out the grounds of complaint: the Domain Name is similar to the Complainant's trademark or service mark and the registration was made in bad faith: for example for the purpose of selling that Domain Name to the Complainant for more than mere "out of pocket expenses".

(5) The Respondent is to put in a Response.

(6) The procedure is online although communications can be by mail, fax, and e-mail. Hard copies are also to be provided.

(7) A panel is appointed (either one or three).

(8) There is no hearing.

(9) The panel makes its decision and can either order the transfer or the cancellation of the Domain Name.

(10) Within ten days of the issue of the Decision a dissatisfied party can institute proceedings in a national court.

(11) Subject to that, the Center notifies the parties, ICANN and the Domain Name Registrar who will, for example, cancel the Domain Name.

(3) <u>The LCIA</u>

The London Court of International Arbitration has stated that it intends to provide an online dispute resolution scheme.

(4) CPR

In April 2001 the CPR Institute for Dispute Resolution in New York announced that it had formed a strategic partnership with Online Resolution, a dispute resolution service provider.

The CPR was established in America in 1979. It is an alliance of 500 general counsel of global corporations, partners in major law firms and academics. It was formed to integrate ADR into the mainstream of law departments and corporations.

The new President of CPR, Thomas Stipanowich, has stated that online dispute resolution *"... is the new frontier. Corporations and consumer groups are starting to see a real need for redress in conflicts arising over the Internet, and they are calling for ethical and economic online dispute resolution services."* He stated that the partnership between CPR and Online Resolution complements the work that CPR had spearheaded last year in its B2B ADR Initiative: that offered four tools for management of disputes arising from online business-to-business transactions.

William K. Slate II, President and CEO of the American Arbitration Association, says that in the United States online dispute resolution services are already being used: " … *in the past year no fewer than 15 new entities have emerged to provide online dispute resolution options. For example, there are services available today through E-Commerce dot coms, online businesses with names such as Cybersettle.com, and ClickandSettle.com where a simple monetary dispute can be submitted to an algorithm-based computer program that offers the parties up to three opportunities for a "match" (each side offers a figure to the computer).*"[30]

C USE OF ELECTRONIC SYSTEMS IN TRADITIONAL DISPUTE RESOLUTION PROCEDURES

The distinction has to be made between (1) pure online dispute resolution systems such as the WIPO Domain Name Dispute Resolution System and (2) the use of electronic systems within existing dispute resolution procedures.

It is one thing to use online dispute resolution in a fairly self-contained area such as domain name disputes - or in the case of the simple monetary dispute of a kind mentioned by the AAA President. But use of such a system in a complex international trade case involving considerable documentation, witnesses as to fact and expert evidence would be quite a different matter. In such a case online dispute resolution is probably quite impractical: how can you effectively cross-examine a witness online? However, the use in such an arbitration of electronic means for document storage and retrieval, electronic means of communication and video conferencing, may well prove useful in

30 "*Into the 21st Century", supra, Page 26*

reducing both the time spent on the arbitral process and in reducing the costs of that process. The benefits are obvious if the mass of paper which tends to accumulate in an international arbitration - documents, pleadings, witness statements, expert reports, lawyers' submissions, and so on - can be transferred onto disk.

VI CONCLUSIONS

Trading relationships have always given rise to disputes. Very often such disputes are settled between the traders themselves. Failing that, the national courts and arbitration - both national and international - have provided the means of resolving differences. In addition, ADR in its various forms - particularly mediation/conciliation - is being increasingly used in Britain and elsewhere.

The growth of business on the Internet, both business-to-business and business-to-consumer, will inevitably add not only to the number of disputes which arise but will increase the complexity of such disputes. Trading on the Internet will add to the existing areas of commercial disputes new areas of potential differences such as problems relating to the formation of contracts, digital signatures, governing law and jurisdiction, and so on.

National courts and international arbitral bodies will have to deal with these disputes. In the B2B areas this should not create too much difficulty. After all, trans-border trading has taken place for centuries and traders and others involved in commerce have used the national courts and - increasingly - international commercial arbitration, to resolve their differences. In the B2C area, however, the problems raised by cross-border commerce may come as a shock to consumers.

In both the B2B and the B2C areas, it seems clear that electronic commerce will give rise to electronic methods of dispute resolution: a number of major organisations such as the ICC, LCIA, WIPO and the CPR seem likely to make use of online dispute resolution.

At least as significant may be the use, in traditional dispute resolution procedures such as arbitration, of electronic processes to speed up procedures and reduce costs.

Because Electronic Commerce knows no boundaries, there obviously may be limits to what individual national governments can do in relation to problems arising out of trading on the Internet. Any worldwide solution may have to come from an international body such as the United Nations.

It is difficult to foresee how the Internet and Electronic Commerce will develop. But it is possible to try to make two predictions.

First, the development of Electronic Commerce is likely to stay ahead of the politicians and lawyers who seek to grapple with the dispute resolution and other difficulties thrown up by commercial transactions carried out on the Internet.

Second, one of the most important developments in the 21st Century is likely to be the increasing use of ADR's problem-solving, "win-win" techniques in the context of both online and offline dispute resolution in commerce generally and Electronic Commerce in particular.

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