

# **ELECTRONIC FORM OF ARBITRATION AGREEMENT**

By

Gabriela Kubicová

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Supervisor: Professor Tibor Várady

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## **ABSTRACT**

During the last decade, the information technology has penetrated into the world of arbitration. This phenomenon has brought also the issue that the concept of written requirement for an agreement to arbitrate could not be suddenly construed in the traditional way. As a result a huge number of national arbitration laws had to be updated in order to meet the needs of practice. These laws and acts were mostly modeled according to the UNCITRAL Model Law on International Commercial Arbitration of 1985 and 2006.

This thesis examines electronic arbitration agreements, in particular, agreements concluded via the internet. This main purpose of the research presented in this thesis is to examine whether the UNCITRAL Model Law on International Commercial Arbitration of 2006 is in compliance with the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 by taking into consideration various interpretative techniques. Furthermore, basic types of online contracts are being examined and nevertheless the thesis outlines the approaches regarding the form and the written requirement in selected national legislations.

## INTRODUCTION

*“It is a curious feature of international commercial arbitration that the formal validity of the very cornerstone of the whole process- the arbitration agreement- remains the subject of significant uncertainty.”<sup>1</sup>*

There is no doubt about the fact, that arbitration is nowadays a very preferable and significant method of dispute settlement, mostly in the international context. The rationale behind this is that arbitration presents a faster and more efficient way of dealing with disputes than traditional court litigation. However, the main incentive that leads parties to settle their present or future disputes through arbitration proceedings is an internationally unified system of recognition and enforcement of foreign arbitral awards due to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as “New York Convention”). Nevertheless, despite its significance and advantages, access to arbitrations is not a priori guaranteed such as access to court, since jurisdiction of the arbitration tribunal has purely a contractual basis. Thus, when parties to a contractual or non-contractual relationship decide to submit their dispute to arbitration, there has to be a mutual agreement, a so called meeting of minds of the parties. This agreement is simply referred to as arbitration agreement<sup>2</sup>.

Arbitration agreement is by its nature a contract and just like any other contract may be enforced by courts. Contracts may be, in general, concluded in writing, orally, or tacitly, by conduct. Despite of its contractual nature, arbitration is quite distinct to other types of

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<sup>1</sup> Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement When “Written” Means “Oral”*, the ICCA Congress Series no. 11, p.19

<sup>2</sup> Throughout this thesis the term “arbitration agreement” shall be used for both the arbitration clause in a contract and for the submission agreement.

contracts. It is due to its specific features like formal requirements, severability<sup>3</sup> from the main contract and even in some jurisdictions its public nature<sup>4</sup>. These special features are derived from its purpose and the consequences that an arbitration agreement may bring. As far as the form is concerned, most of the jurisdictions require an arbitration agreement to be in writing or even signatures are required in order to make the arbitration agreement valid, however some liberalization in this field is perceivable<sup>5</sup>.

Nevertheless, it seems that courts are sometimes not that sure what is meant by writing, since life can bring situations not envisaged by law and that might or must be subjects to different interpretation. Moreover, in the last decades we all have been witnesses of an enormous growth of information society that provides a more comfortable, faster and cost-efficient way of communication. Millions of people all over the world have adopted internet contracting and this number is on permanent rise. Therefore, it is not surprising that the technology has penetrated into the world of arbitration as well. In the last decade a considerable research has been devoted to how the new technology, in particular the internet affects or may affect the arbitral proceedings. However, all this previous research has tended

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<sup>3</sup> For instance, the Article 178 (3) of the Swiss Private International Law Act of 1987 states that the validity of an arbitration agreement cannot be contested on the ground that the principal contract is not valid. On the other hand the same presumption is adopted by the English Arbitration Act of 1996, but hereby the parties may agree otherwise (Part I, Sec. 7). In *Sam v. Perrin* the Court of Appeal in Paris held, that arbitration agreement is „an agreement on procedural issues, independent and separate from the main agreement. It must be then treated independently from the existence or the validity of the main contract as it results from the intention of the parties“. *Sam v. Perrin*, Court of Appeal, Paris, October 8, 1998, Rev. Arb. 1999, 2, 350, quoted in Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed., (Kluwer Law International, 2001), at 196

<sup>4</sup> For instance, under Swiss law, arbitration agreements are considered not as contracts between individuals but also as “procedural agreements which are subject to public law” (Rubino-Sammartano, supra note 2, at 196)

<sup>5</sup> See, for example the UNCITRAL Model Law on International Commercial Arbitration of 2006, Article 7 (option II) or *Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company)*, (1<sup>st</sup> civil division of Swiss Federal Tribunal, 16 January 1995) where the court held: “We must not however lose sight of the fact that, with the development of modern methods of communication, unsigned documents are increasingly numerous and widespread, that the signature requirement is inevitably becoming less of an issue, particularly in international trade, and that the different treatment given to signed and unsigned documents is being called into question. To this is added the fact that, in particular situations, a given form of conduct may, pursuant to the rules of good faith, take the place of the observation of a formal requirement.”, cited in Tibor Várady, John J.Barceló and Arthur T. von Mehren: *International Commercial Arbitration* (St. Paul:Thomson/West, 2006), 154

to focus on this issue either en bloc or with the centre of interest on virtual arbitration without any detailed attention to arbitration agreements concluded online, despite of the fact that arbitration agreements are being concluded via the internet in both B2B and B2C relationships.

The present thesis focuses on arbitration agreements concluded via the internet, outlines the written requirement for an arbitration agreement and examines whether an online arbitration agreement may be interpreted and understood as an arbitration agreement in writing and thus whether it is compatible with the relevant provisions of the New York Convention. While trying to answer this question the study takes into consideration the international, regional and national legal framework and related topics, such as digital signatures. The thesis also makes an overview of case law regarding online arbitration agreements, although, to date there is just a scant case law upon the topic. Nevertheless, this may be subject to changes in the future as e-contracting is constantly expanding and there is no doubt that this may lead to disputes as any other situation when people are interacting<sup>6</sup>. In the end a look will be taken at how electronic means of communications are dealt with in the legislations of certain jurisdictions, selected as examples of current legislation approaches as far as the written form of arbitration agreement is concerned. Nevertheless, the ultimate aim of the present work is thus to evaluate from a legal point of view whether online arbitration agreements present a viable solution for international and domestic e-commerce relationships in both B2B and B2C dimension.

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<sup>6</sup> Moreover, for instance the European Communities are supporting and enhancing out-of-court settlement of disputes that stem from e-commerce by ombudsman, mediation and arbitration as well even using electronic means of communication. See, Article 17 of the Directive 2000/31/EC on electronic commerce.

## Chapter 1: The requirement of writing

Nowadays contracts can be concluded in various forms: in writing, orally or even tacitly by conduct. However, when the law requires certain legal acts to be evidenced or concluded in writing, those are mainly acts or transactions that comprise substantial economic or significant social values, such as real estate transactions or wills<sup>7</sup>. Thus, the actual consent of the party or parties has to be recorded in order to provide evidence. The same incentive led the English Parliament to pass the Statute of Frauds in 1677, requiring certain types of contracts to be in writing and signed in order to make them valid and enforceable. However, in those days it was not difficult to determine what is meant by writing. Since the most influential civil codes have been drafted in this sense, nowadays in most of the jurisdictions the exact explanation of what is meant when writing is required, is missing. However, the French Code Civil was amended in 2000 and Article 1316 reads as follows:

Documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission may be.<sup>8</sup>

Another example is the Uniform Commercial Code which describes writing as follows:

‘written or writing’ includes printing, typewriting or any other intentional reduction to tangible form”<sup>9</sup>. Thus, nowadays there is no universal consensus on what constitutes writing.

For instance, Webster’s Dictionary defines ‘to write’ the following way:

1. To form or inscribe (letters, words, symbols, etc.) on a surface as by cutting, carving, embossing, or, esp., marking with a pen or pencil

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<sup>7</sup> The same was the reason for not to treat certain kinds of contracts as valid when concluded by electronic means under the Directive 2000/31/EC of the European Parliament and the Council on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market. See Article 9 (2) of the Directive.

<sup>8</sup> Article 1316 of the French Civil Code. English translation available on [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm) (accessed on March 17 2009)

<sup>9</sup> Section 1-201 (46) UCC

2. To form the words, letters or symbols with pencil, chalk, typewriter, etc.; put down in a form to be read  
(....)
3. to record (information) in a computer's memory or on tape, etc. for use by computer.<sup>10</sup>

The same seems to be true for arbitration agreements. The concept of *denegatio iustitiae* is an old principle of Roman law that was adopted by modern constitutions, meaning that the judge and the court cannot deny providing justice to the party that seeks legal protection before the court. Access to court is thus considered as a fundamental right of every citizen, guaranteed by constitutions and international or regional conventions.

However, when there is a valid arbitration agreement, according to the New York Convention, a court of a contracting state to the Convention is obliged to reject jurisdiction and to refer the dispute to arbitration if one of the parties requests arbitration. The issue got before the European Court of Human Rights in Strasbourg which subsequently developed the theory of waiver, meaning that the party by concluding an arbitration agreement waives his right to go to court<sup>11</sup>. By this the party gives up rights such as public hearings, subpoenas or right to appeal (since most of the arbitral awards cannot be appealed) and thus this is deemed to be a substantial step that needs to be supported by some evidence. Most of the jurisdictions and international conventions on arbitration follow this approach because the purpose of the written form is to ensure that the party is aware that he is agreeing to arbitration<sup>12</sup>. Thus, it is actually a matter of evidence that makes legislators pass laws requiring written arbitration

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<sup>10</sup> Victorica Neufeldt and David B. Guralnik, eds., Webster's New World College Dictionary, 3<sup>rd</sup> ed. (Macmillan, 1996)

<sup>11</sup> However, by developing the doctrine of waiver the European Court of Human Rights held that private arbitrations does not violate Article 6 of the European Convention on Human Rights, signed in Rome (1950). In *Bramelid and Malmström v. Sweden* (8588/79, 8589/79, judgment from 12 December 1983, available at [www.echr.coe.int](http://www.echr.coe.int), visited on 21 March, 2009) the Court held, that if there is a dispute that involves civil rights and obligations, the person can waive certain rights which are protected by Article 6 of the European Convention on Human Rights provided that the person's decision is taken freely and without any duress or coercion.

<sup>12</sup> Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1994) p. 171



agreements: “As evidence of the parties’ consent to arbitration, the agreement is a fundamental expression of justice and proof of legitimacy”<sup>13</sup> .

More concretely, as Toby Landau puts it, the essential functions and justifications for a written form of arbitration agreement is to prove the initial consent of the parties and furthermore to prove the terms of the agreement itself<sup>14</sup> . Another function which was identified by the Working Group II<sup>15</sup> has stated that the written form identifies the parties of the agreement. The most important legislative texts on international level the United Nations Commission on International Trade Law (hereafter referred to as “UNCITRAL”) Model Law (“Model Law”) and the New York Convention have been drafted in this spirit and thus written form of arbitration agreement is necessary for enforcement of the arbitral award (as adopted by the New York Convention and in cases where the Convention is applicable), which is certainly the final and ultimate aim for the party in whose favor the award has been rendered.

However, the emergence of technology and modern means of communication are to be blamed for the fact, that nowadays contracts are concluded not only in a so called paper-based form (or some contracts even orally) but also via the internet. By development of international commerce it is understood that parties will prefer to do business the most efficient way, often concluding contracts without even meeting each other. Thus, it was only natural, that these contracts often contained arbitration clauses (for the reasons listed above), which unfortunately were in some cases refused to be recognized by courts as valid arbitration agreements<sup>16</sup> . The reason behind this is that ”modern technology has simply outgrown each

<sup>13</sup> Mohamed Wahab, The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution, *Journal of International Arbitration*. Vol. 21 No 2 (2004), p 153

<sup>14</sup> Landau, *supra* note 1 at 20-24

<sup>15</sup> The UNCITRAL Working Group worked on international sale of goods in 1968-1978, international contract practices in 1981-2000 and since 2000 has been working on international arbitration and conciliation.

<sup>16</sup> See for instance the decision of the Hålogaland Court of Appeal, 16<sup>th</sup> August 1999 : “it is doubtful whether e-mail transcripts can be held to meet the requirements under Article II.2 of the New York Convention (agreement in writing)”. Shipowner (Russian Federation) v. Charterer (Norway), Hålogaland Court of Appeal, 16<sup>th</sup> August 1999, 27 Yearbk Comm. Arb’n 519 (2002)

of the texts”<sup>17</sup>. Therefore, in order to answer the question, whether arbitration agreements concluded electronically present a viable solution for current and future state of e-commerce and electronic business contracting, their compliance with article II (2) and IV (1) (b) of the New York Convention have to be confirmed.

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<sup>17</sup> Landau, *supra* note 1 at p. 25

## Chapter 2: Electronic arbitration agreement

An electronic arbitration agreement may be defined as an arbitration agreement concluded by electronic (means of) communication. The United Nations Convention on the Use of Electronic Communications in International Contracts of 2005 describes what is understood by “communication”, “electronic communication” and some other relevant terms in e-commerce:

“Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract<sup>18</sup>

“Electronic communication” means any communication that the parties make by means of data messages<sup>19</sup>

“Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy<sup>20</sup>.

It is apparent that by penetration of the modern means of communication, in particular of the internet to the legal world, the legal language has been broadened and lawyers, mostly thought of as conservative, in order to interpret the legal rules, shall be obliged to get familiar, to some extent with the technical terms as well. It is because, electronic means of communication offer more efficient way of creating legal relationships and it is only natural that persons will seek and use the opportunity to enter into legal relationships this way. The internet certainly presents an environment and a proper channel that enables to minimize expenses of business and contracting. Since these contracts are concluded in cyberspace, which presents a special environment, certain special legal rules were needed in order to make

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<sup>18</sup> United Nations Convention on Use of Electronic Communications in International Contracts of 2005, Article (4) (a), available on [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf) (accessed on 2 March, 2009)

<sup>19</sup> Ibid., Article (4) (b)

<sup>20</sup> Ibid., Article (4) (c)

these contracts enforceable. There is, for instance, the United Nations Convention on the Use of Electronic Communications in International Contracts of 2005 which creates legal equivalence between traditional paper-based and electronic communications and special rules regarding time and space of dispatch and receipt of electronic communications. The offer and acceptance is, however, regulated by underlying national laws. Significant on this field is also the Model Law on Electronic Commerce of 1996 prepared by UNCITRAL and adopted by the General Assembly. A number of states have already also passed laws upon electronic commerce by its adoption, implementation of provisions or by its sole influence.

As previously mentioned, the conclusion of an arbitration agreement means that a party may be obliged to enter into arbitral proceedings which place him into a very different procedural environment. Actually, arbitration agreement has a contractual character, so for its formation there are similar rules as for the formation of contracts. First of all, there must be a meeting of minds of the parties to arbitrate, meaning that at the time the arbitration agreement has been concluded the parties must have had the intention to be bound by the agreement in the future. Thus, the issues of offer, acceptance and mutual consent are just as important as in traditional contract law. Moreover, since parties to the electronic contracts are absent (in some cases the party is even substituted by an automated computer system that is dealing on his behalf) when concluding the contract, further problems such as identification of the other contracting party or forgery may arise.

In general, a person making an offer is actually expressing a wish to conclude a contract and to be bound by it, in case the acceptance occurs. What is important regarding electronic arbitration agreements are actually the issues pertaining, as the United Nations Conference on Trade and Development puts it<sup>21</sup>, to both, the drafter and the party that is accepting the

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<sup>21</sup> United Nations Conference on Trade and Development. Dispute Settlement 41 modules of Courses on Dispute Settlement. One of them was devoted to electronic arbitration: International Commercial Arbitration. 5.9.

electronic contract and the arbitration clause, since in cyberspace the parties to the contract are distant in both space and time, thus requiring special treatment of expression of the will to arbitrate.

The formation of an electronic arbitration agreement is overly linked to the formation of contracts in cyberspace. An arbitration agreement may be included in an e-mail containing the underlying contract itself, or may be the sole content of the e-mail, thus making a reference to the contract between the parties concluded by whatever means. Furthermore, an arbitration agreement may be a part of the terms and conditions posted on the website in the form of a click-wrap or browse-wrap contract. In all of the cases the circumstances must be taken into account and the traditional interpretations of invitation to treat, offer and acceptance must be transferred and translated to the language of the virtual world.

## 2.1 The UNCITRAL Model Law 2006

In 1985 the New York Convention has been in force for almost three decades and more than 50 states were contracting parties to it<sup>22</sup>. In order to enhance international trade and international economic development, the United Nations Commission on International Trade Law after due deliberation and extensive consultation with arbitral institutions and individual experts adopted the UNCITRAL Model Law on International Commercial Arbitration of 1985<sup>23</sup>. The main purpose was (and still is) to create a uniform or at least a harmonized legal

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Electronic Arbitration, New York and Geneva 2003, available on [http://www.unctad.org/en/docs/edmmisc232add20\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add20_en.pdf) (accessed 15 February 2009)

<sup>22</sup> Up til now the New York Convention is in force in 143 countries ([http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), ( visited 4 March 2009)

<sup>23</sup> 40/72: Resolution of the General Assembly, 112th plenary meeting, 11 December 1985/72, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (accessed on 4 March 2009)

background for international commercial arbitration on the national level<sup>24</sup>. As David J.A. Cairns notes, one of the most significant features of the Model Law, since it is only a model law, is its flexibility meaning that “each jurisdiction can decide whether to take the model law in its entirety, substantially, or simply to pick and choose among its terms”<sup>25</sup>. As he further notes, the level of unification of national laws is not as likely as by an international convention, but indeed it does encourage states to get engaged with the model law<sup>26</sup>.

Article 7(2) of the Model Law of 1985 reads as follows:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or *other means of communication* which provide a record of agreement...<sup>27</sup> (emphasis added)

On 10 June 1998 the thirty-first session of the Commission commemorated the 40<sup>th</sup> anniversary of the adoption of the New York Convention. During this session various reports were given by, *inter alia*, leading arbitration experts on matters related to the enactment, application and interaction of the Convention with other legislative texts. The reports pointed out practical difficulties encountered in practice that were not addressed in any legislative or non-legislative texts on arbitration<sup>28</sup>.

The result was that 13 problematic issues were identified by the UNCITRAL Secretariat as cases for further study and work, including the form of the arbitration agreement.

The actual outcome of the study was the actual need for amendment of certain provisions of the Model Law, which would be in compliance with the current practices in international

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<sup>24</sup> More than 62 countries and territories have passed national legislation based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 and so far 5 countries upon the UNCITRAL Model Law on International Commercial Arbitration of 2006 ([http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (visited 4 March 2009)).

<sup>25</sup> David J.A. Cairns., “The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration”., *Arbitration International*, Vol.22 No.4 (2006), at 572

<sup>26</sup> *Ibid.*, p. 573

<sup>27</sup> Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985

<sup>28</sup> A/CN.9/WG.II/WP.110: Report of the Secretary General, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html#33rdsession](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html#33rdsession) (visited on 3 March 2009)

commerce and the modern means of contracting considering the form of arbitration agreement. The Working Group II has come to the conclusion that the amendment of the Model Law of 1985 would significantly contribute to the enhancement of trade and harmonized legal framework for a fair and efficient settlement of international commercial disputes<sup>29</sup>. The resolution of the General Assembly upon the amendment of the Model Law was passed on 4 December 2006<sup>30</sup>.

The original Article 7 has been substituted by two optional articles, and the state wishing to adopt the Model Law may choose which of the options is more suitable. As far as Option I is concerned, the Model Law adopts the traditional view that the arbitration agreement shall be in writing<sup>31</sup>. The novelty actually brought by the 2006 amendment is, however, the expanded interpretation of what writing actually means:

An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means<sup>32</sup>.

Therefore, contrary to the previous version of the Model Law, it is clearly stated, that the agreement of the parties to submit their present or future disputes to arbitration may be concluded in the way such as ordinary contracts. However, the arbitration agreement is, under the Model Law of 2006, plausible only, under the condition, that its content is recorded.

Webster's New World College Dictionary defines record as anything that is written down and preserved as evidence of an event for future use<sup>33</sup>. This record may be made in any form.

Therefore it seems, that for instance a video or audio tape records are as acceptable as a record of the agreement written on the wall as long as they provide the record of the conclusion of the arbitration agreement. The recorded content must show that there has been a

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<sup>29</sup> See, *supra* note 23

<sup>30</sup> See General Assembly resolution no. 61/33 available on <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf>

<sup>31</sup> UNCITRAL Model Law on International Commercial Arbitration of 2006, Article. 7(2): "*The arbitration agreement shall be in writing*".

<sup>32</sup> *Ibid.*, Art. 7 (3)

<sup>33</sup> Webster's New World College Dictionary, *supra* note 9

meeting of minds between the parties regarding intention to arbitrate their actual or potential disputes.

The 1985 version of the Model Law did not, however, mention electronic means of communication. Rather it made a reference to arbitration agreements contained in a document that is signed by the parties or in an exchange of letters, telex and telegrams. Indeed, electronic means of communications could have been included into expression “or by other means of communication”. However, in order to avoid misinterpretations, the present version of the Model Law explicitly makes reference to the relation of written form of arbitration agreements and to arbitration agreements contained in data messages:

The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy<sup>34</sup>.

The paragraph follows the general trend presented by UNICTRAL while adopting the United Nations Convention on the Use of Electronic Communications of 2005<sup>35</sup>, creating legal recognition of electronic communications in legal relationships and their legal and functional equivalence in relation to other, traditional forms of communications. This paragraph starts with a general statement recognizing electronic means of communication as equivalent to any other form of record in which an arbitration agreement may be contained under a condition that the information contained therein is accessible. In order to be accessible, the arbitration agreement must be retrievable in a perceivable form. What is also notable and important is that the Model Law of 2006 does not require the arbitration agreement to be signed by the parties anymore.

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<sup>34</sup> Ibid., Art. 7 (4)

<sup>35</sup> See definitions in United Nations Convention on the Use of Electronic Communications in International Contracts of 2005, Articles 4, 8 and 9



“The formal requirement is however for evidentiary purpose only and not to establish the validity of the agreement. This is also true because article 7(2) provides for the existence of an arbitration agreement when one of the parties alleges its existence in the complaint and the other party does not deny it in its reply.”<sup>36</sup> Nevertheless, the formal requirement is still an issue in international arbitration as an arbitration agreement that is not in writing according to the New York Convention cannot be enforced by the courts.

## **2.2 Certain types of contracts concluded by electronic means**

The basic feature of every contract is its enforceability. This makes them different from other types of agreements. In the process of creation of a contract various means can be adopted: spoken language, exchange of letters, conduct etc. The legal regulation of these means of contract conclusion is well known for every law dealing with the law of obligations. However by development of e-commerce an electronic medium is used for the communication of the parties who wish to conclude a contract. Therefore, this subchapter deals with three essential types of online contracts.

### **2.2.1 EDI (Electronic Data Interchange)**

EDI is a form of exchange of data that existed prior to the Internet and was designed to connect suppliers and retailers in order to ease their communication whenever the inventory decreased below a certain limit<sup>37</sup>. Its legal definition can be found in the UNCITRAL Model

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<sup>36</sup> Alejandro López Ortiz, “Arbitration and IT”, *Arbitration International*, Vol. 21 No.3 (2005), p. 351

<sup>37</sup> Michael Chissick and Alistair Kelman, *Electronic Commerce: Law and Practice*, 2<sup>nd</sup> ed. (London: Sweet & Maxwell, 2000), p. 61

Law on Electronic Commerce: “an electronic transfer from computer to computer of information using an agreed standard to structure the information”<sup>38</sup>

The data exchange between the trading partners was automated and assumed a previous framework contract and long-lasting relationship between the traders, thus making of EDI a closed system that is available only for that certain and limited number of parties which are already in a contractual relationship. EDI however not practically used for conclusion of an arbitration agreement is theoretically recognized by the UNCITRAL Model Law on International Commercial Arbitration as a means of communication that meets the requirements of written form for an arbitration agreement<sup>39</sup>.

### 2.2.3 Electronic mail

E-mails are nowadays a common way of contracting between traders. However, serious issues may arise in contracting via e-mails. “The problems with the use of e-mail may be separated into two main categories: admissibility and authenticity,”<sup>40</sup> meaning to what extent should be e-mails accepted as evidence in court proceedings. The courts were in the beginning rather reluctant to assign evidentiary power to e-mails<sup>41</sup>. An additional problem may be the identification of the sender and the recipient. This issue is partly solved by using electronic signatures, which will be discussed later in this thesis. Furthermore, as Chissick and Kelman put it, e-mails, though mails in electronic forms, are not as reliable as the traditional post<sup>42</sup>. “In cyberspace, e-mails can get lost, become garbled, and are often rejected by corporate

<sup>38</sup> Article 2 of UNCITRAL Model Law on Electronic Commerce of 1996, available at [http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf) (accessed on 25 February 2009)

<sup>39</sup> Article 7 of Model Law on International Commercial Arbitration of 2006, available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (visited 25 February 2009)

<sup>40</sup> Tim Kevan and Paul McGrath, *E-mail, the Internet and the Law: Essential knowledge for safer surfing.* (EMIS Professional Publishing, 2001), p. 27

<sup>41</sup> See for instance *R v Governor of Brixton Prison and Another, ex parte Levin* (1997) 3 WLR 117, where the e-mail as an evidence was compared to a photocopy of a forged cheque or the case from Norway, that held, that an arbitration clause contained in e-mails cannot be enforced since it does not meet the requirements for writing.

<sup>42</sup> Chissick, Kelman, *supra* note 33 at p. 81

firewalls.”<sup>43</sup> The other issue arising of e-mail contracting is that it does not present an instantaneous and simultaneous method of communication between the parties. This is although also the issue with classic letters. However, regarding e-mails, the sender is not in most of the times aware of the fact whether the recipient has indeed received or read it since an e-mail is not a hard-copy material and it may happen that the computer will not be able to “read and translate the message”, the message thus becomes incoherent and not complete.

However, times have changed and by laws adopted on several levels<sup>44</sup>, the electronic communications have been granted the same legal effect as of any other traditional means of communication. And since merchants in international trade prefer arbitration to litigation, it is only natural that arbitration clauses were mostly parts of these contracts. On the other hand, the legal regulation of arbitration agreements has always been more stringent than of commercial contracts, and therefore, regulation on this field was necessary, too.

The question therefore is whether exchange of e-mails can create an arbitration agreement that can be enforced on the basis of the New York Convention. Article II (2) of the Convention does not require letters and telegrams that contain arbitration agreements to be signed by the parties. Some scholars<sup>45</sup> argue that the exchange of e-mails can be assimilated to the exchange of telegrams. Richard Hill, however, identifies certain issues, such as differences in the identification of the sender, protection against changes during the transmission and problems related to the delivery of e-mails<sup>46</sup>. Nevertheless, these difficulties can be nowadays easily overcome by encryption methods, maintaining printed copies and requesting the recipient to confirm the reception of the e-mail<sup>47</sup>.

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<sup>43</sup> Ibid., p. 81

<sup>44</sup> See, for instance, Directive 2000/31/EC of the European Parliament and of the Council on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market, United Nations Convention on the Use of Electronic Communication in International Contracts of 2005, United Kingdom: Electronic Communications Act 2000

<sup>45</sup> Such as Richard Hill see *infra* note 46 and Mohamed Wahab, see *supra* note 13

<sup>46</sup> Richard Hill, “On-line Arbitration: Issues and solutions“, *Arbitration International*, Vol. 15 No. 2 (1999), p. 199

<sup>47</sup> Ibid., p. 199

Furthermore, when adopting the teleological interpretation of the Convention the requirements set in Article II (2) of the Convention are met by exchange of e-mails. However, there must be indeed an exchange, thus the other party has to respond and agree with the proposal to arbitrate.

### 2.2.3 Web-based contracts

Some websites do have arbitration clauses in their terms of use or in their terms and conditions which may remain absolutely disregarded by users although some of them require before using or buying a product the user or consumer to agree with them. The reason behind is the deterring effect of arbitration clauses, meaning that in most of the cases a consumer will not be the one who will initiate arbitration proceedings<sup>48</sup>. How can an arbitration agreement be formed while contained in a so called web-based contract can be easily understood when the traditional issues of offer and acceptance are translated from the real world to the virtual one. These contracts are usually present on the World Wide Web in the form of standard terms and conditions of one of the parties or license agreements. The most frequent types are the so called “click-wrap” and “browse-wrap” contracts. The difference between them is the extent of an explicit or implicit consent of the user to the terms of the contract.

Click-wrap contract is in fact a virtual kind of a shrink-wrap<sup>49</sup> contract and is used mostly in connection with license agreements, when downloading or buying software. The nature of the click-wrap contract is such that the user or the customer cannot proceed further to

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<sup>48</sup> At least in this was the argument of the consumers in *Kanitz and others v. Rogers Cable Inc.* and *Green Tree Financial Corp. – Alabama v. Randolph* before the court when trying to avoid arbitration proceedings by declaring the arbitration clause unconscionable. However, the court rejected the argument in both cases. See *Kanitz and others v. Rogers Cable Inc. Ontario Superior Court of Justice (2002)*, *O.J. No. 665*, Sigvard Jarvin, Annette Magnuson (ed.): *International Arbitration Court Decisions* (New York: JurisNet, LLC, 2008) 29 and *Green Tree Financial Corp. – Alabama v. Randolph* 531 U.S. 79 (2000)

<sup>49</sup> Shrink wrapped goods are wrapped in a transparent plastic very tightly. The term refers to terms and conditions, or agreement that is printed on the box or is wrapped in the box, thus the consumer can get know the terms of the contract just after unwrapping or opening the box. Shrink-wrap contracts usually but not necessarily give the consumer some period of time in which the consumer is allowed to return the product and obtain a refund. Failing to do that constitutes consent to the terms of the contract.

download the software without accepting the terms of the license agreement by clicking on the “I agree” or “Yes” box or just by ticking a box containing the acceptance of the terms<sup>50</sup>.

Hill describes how can an exchange of communication be understood in a virtual context: “the bits comprising the offer are stored on the seller’s computer, transmitted through a telecommunications network to the buyer’s computer and stored (at least temporarily) on the buyer’s computer.”<sup>51</sup> The stream of bits thus altered is sent back via the telecommunications network to the offeror.

Arbitration agreements contained in click-wrap contracts have been upheld by courts. For instance, in *Michael Lieschke, et al. v. RealNetworks*<sup>52</sup>, Inc. the US district court held that an arbitration clause contained in a click-wrap license agreement is an agreement in writing under the Federal Arbitration Act<sup>53</sup> and the Washington Arbitration Act.

However, when discussing click-wrap contracts, one cannot bypass the issue of identification of the user. Certainly, even if all the requirements are met, the arbitration cannot be binding when the other party cannot be identified. The situation is different when the user has to provide his personal details, such as credit card information when buying and downloading the software. In the end, the way the other party is supposed to accept the terms of the contract determines whether it is a click-wrap or a browse-wrap type of contract. The logical conclusion is that when an arbitration agreement is to be concluded by a click-wrap contract, the consent must be explicit and the user must be sufficiently aware of the existence

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<sup>50</sup> Specht et. al. v. Netscape, Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXVIII (2003), p. 217-230

<sup>51</sup> Hill, *supra*, note 46

<sup>52</sup> Michael Lieschke, et al. v. RealNetworks, United States District Court, Northern District of Illinois, Eastern Division, 11 May 2000 25 Yearbk. Comm. Arb’n 530 (2000)

<sup>53</sup> Section 2 of the U.S. Federal Arbitration Act of 1925 reads as follows: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. “

of the arbitration agreement<sup>54</sup>. The same outcome was reached in *Specht et al. v. Netscape Communications Corporation and America Online, Inc*<sup>55</sup>.

On the other hand it is harder to determine whether actual acceptance of the terms of the agreement has occurred when the contract is of a browse-click type. Here the circumstances of every single case, such as visibility of the terms and conditions, their location (hypertext, above or below the fold)<sup>56</sup> have to be taken into account. In *Rudder v. Microsoft*<sup>57</sup> Corp. the plaintiff argued that provisions of an electronic contract that were not visible without scrolling were not enforceable. The court held that this “was not materially different from a multi-page written document which requires the party to turn the page”<sup>58</sup>. In *Dell Computer Corporation v. Union des Consommateurs and Dumoulin*<sup>59</sup>, the Quebec Court of Appeal cancelled the arbitration clause in Dell’s terms and conditions which were available online, since the acceptance of the terms of sale was not a crucial step in order to complete the online transaction, and at the time of the formation of the contract the existence of the arbitration agreement was not expressly brought to the attention of the consumer.

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<sup>54</sup> The same is contended by Haitham A. Haloush: “(...) there is little doubt that consent to arbitrate, if sufficiently explicit, can be expressed entirely through electronic means, i.e., through the clicking of a button indicating consent, or if the e-arbitration agreement concluded with a statement, such as, “Please type your first and last name in the space provided if you intend to submit your dispute to final and binding arbitration.” In both situations, it would be a clear indication of parties’ consent to arbitrate” “. (Haitham A. Haloush, “The Authenticity of Online Alternative Dispute Resolution Proceedings”, *Journal of International Arbitration*, Vol. 25 No. 3 (2008), at 360

<sup>55</sup> The court hereby held that „when products are ‘free’ and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to a contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm’s length bargaining.” *Specht v. Netscape*, *supra* note 50, p. 224

<sup>56</sup> See, for instance, *Specht v. Netscape Communications Corp.*, *supra* note 41

<sup>57</sup> *Rudder v. Microsoft Corp.* 47 C.C.L.T. (2d) 168, 2 C.P.R. (4th) 474, 40 C.P.C. (4th) 394, [1999] O.J. No. 3778

<sup>58</sup> *Rudder v. Microsoft Corp.*, *supra* note 57

<sup>59</sup> *Dell Computer Corporation v. Union des Consommateurs and Dumoulin* rendered on 30 May 2005 - Quebec Court of Appeal [2005] R.J.Q. 1148. Case published in Sigvard Jarvin and Annette Magnusson, eds., *International Arbitration Court Decisions* (New York: JurisNet, 2008) 53-64. or Report of the case: Jean-François Nadon, “Arbitration Clause in the Dell Terms and Conditions of Sale Cancelled by the Quebec Court of Appeal”, available at <http://www.robic.ca/publications/Pdf/274.025E-JFN.pdf> (accessed March 12, 2009).

Although it is true that these types of contracts are used in B2C relationships rather than in a B2B relationships, click-wrap and browse-wrap contracts are types of contracts that can be ordinarily found throughout the World Wide Web and it might be said that some of them truly contain (electronic) arbitration clauses<sup>60</sup>, these types of arbitration clauses are sometimes also incorporated by reference into contracts between merchants. Here the question arises whether such an arbitration clause is validly incorporated in the contract. This was also the case between claimant (seller) and respondent (buyer) in Germany<sup>61</sup>, where the arbitration clause included in claimant's general terms and conditions that were available on the internet and reference was made to them in the counteroffer and acceptance. The arbitral tribunal rendered an interim award pursuant to Section 1031(3) of the German Code of Civil Procedure, confirming jurisdiction by concluding that the arbitration clause was valid, since though the respondent was not aware of the arbitration clause, he was given a fair and reasonable opportunity to get familiar with it. Pursuant to article 7 (6) of the UNCITRAL Model Law, this clause could be considered valid if the general terms and conditions available online were thought of as of a document and further that the reference is such as to make the clause a part of the contract. The arbitral tribunal found in this case that the arbitration clause was considered as a part of the contract.

A further issue to be examined here is whether this arbitration clause would have been enforceable under the New York Convention had the case been an international commercial arbitration case. Since article II of the Convention is silent upon arbitration agreements

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<sup>60</sup> See, e.g. terms of use on [www.facebook.com](http://www.facebook.com), [www.pg.com](http://www.pg.com), [www.powells.com](http://www.powells.com) or [www.arbitration-icca.org](http://www.arbitration-icca.org). However, at least in European Union in line with the Council Directive 93/13/ECC of 5 April 1993 on Unfair Terms in Consumer Contracts a consumer cannot be forced into arbitration in B2C disputes. Different rules apply towards contracting parties that are defined as consumers. In contrast, in United States, arbitration clauses are generally enforceable even in business to consumer contracts. For more detailed view, see article by Julia Hörnle, *infra* note 64.

<sup>61</sup> In this case claimant's initial offer did not refer to the general terms and conditions however both the counteroffer and the acceptance contained the reference to the claimant's general terms and conditions available online. The contract came into existence even through the acceptance of the claimant's counteroffer and even without any additional signature of the respondent. Report from the case is available at <http://www.internationallawoffice.com/Newsletters/detail.aspx?g=7e9b8a24-8406-4fa8-8e9e-a6fa12917010>

concluded by reference, when the enforcement of an arbitration clause like this is sought circumstances of the case must be heeded to. As Jan van den Berg puts it:

The test appears to be that the other party is able to check the existence of an arbitration clause. ...standard conditions in a separate document require a reference clause in which a specific attention is called for the arbitration clause in the standard conditions (for example. "This contract is governed by General Conditions of Sale, including the arbitration clause contained therein...").<sup>62</sup>

To the author's knowledge, the existence of the arbitration agreement was not specially mentioned in the reference to the general terms and conditions. Therefore, had the court adopted van den Berg's view, the arbitration agreement would not have been granted enforcement under the New York Convention.

However, in the stage of the recognition and enforcement of the arbitral award the Convention makes reference to the law applicable to the arbitration agreement and thus article V (1) subsection a) would have been applicable and had the country of enforcement of the award been Germany and had the clause been subject to German law, this arbitration clause would have been valid pursuant to Section 1031(3) of the German Code of Civil Procedure.

As far as B2C disputes are concerned in the European Communities, enforceability of arbitrations agreements (and not only those concluded electronically) is somewhat more complicated, since Council Directive 93/13/EEC on unfair terms in consumer contracts lists in Annex paragraph 1, *inter alia*, as a term that is regarded to be unfair the following:

"excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes *exclusively* to arbitration not covered by legal provisions..."<sup>63</sup> (emphasis added)

Nevertheless, Article 6 (1) of the Directive states that although an unfair term is not binding on the consumer such a term may still be binding on the seller or supplier. Thus it is on the

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<sup>62</sup> Albert Jan van den Berg, "An Overview of the The New York Convention of 1958." (2008). [http://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf) . (accessed on 7 March 2009)

<sup>63</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Annex (1) (q), available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML> (accessed 7 March 2009)



discretion of the consumer whether he or she wants arbitration. In addition, the Directive further provides that the consumer protection granted by the Directive cannot be avoided by stipulation of the parties that the law applicable to their contract shall be a law of non-Member state.

Conversely, in United States, arbitration clauses are generally enforceable even in business to consumer contracts: “This has been shown in cases concerning specific state consumer protection legislation providing for mandatory, non-waivable rights, where the courts have validated the arbitration clause, even if it had the effect of depriving the consumer of these rights”<sup>64</sup>.

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<sup>64</sup> Julia Hörnle, “Legal Controls on the Use of Arbitration Clause in B2C E-Commerce Contrats“, *Masaryk University Journal of Law and Technology*, 1/2008 , <http://mujlt.law.muni.cz/view.php?cisloclanku=2009020010> (accessed March 1, 2009).

### Chapter 3: Is the UNCITRAL Model Law of 2006 in compliance with the New York Convention of 1958?

Since the UNCITRAL Model Law on International Commercial Arbitration is the basis for many jurisdictions when adopting legislation upon arbitration, it is necessary for it to be in compliance with the New York Convention. Without any doubt the New York Convention of 1958 adopted by UNCITRAL and its subsequent ratification, accession or succession by states was the most relevant impetus why parties to various international commercial contracts choose to settle their disputes by arbitration. However, as noted above, arbitration agreements, as far as their form is concerned, have undergone a development which is not *prima facie* in compliance with the New York Convention when literally interpreted. Requirement of written form of the arbitration agreement is an undisputed fact. However, the main question regarding e-mail and web-based arbitration agreements is whether these arbitration agreements are covered by the writing requirements of article II (2) of the New York Convention. In order to answer this question various forms and methods of interpretation and legislative steps taken by UNCITRAL should be taken into account.

Article II (1) of the New York Convention clearly states that the arbitration agreement shall be in writing and further defines what is meant by writing:

- (1) Each contracting state *shall recognize* an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. (emphasis added)
- (2) The term “agreement in writing” *shall include* an arbitral clause in a contract or an arbitration agreement, signed by parties or contained in an exchange of letters or telegrams.<sup>65</sup> (emphasis added)

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<sup>65</sup> Article II (1) and Article II (2) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958

The importance of arbitration agreement in the sense of the Convention is its enforcement<sup>66</sup> in cases where the Convention is applicable (thus domestic arbitration agreements are not concerned<sup>67</sup>) and in cases when it meets the requirement of written form as set in paragraph (2) and in the same time one of the parties to the agreement requests arbitration and that certain enumerated circumstances are not present:

- (3) The court of a Contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>68</sup>

There is also the so called uniform rule which explains that Article II (2) of the Convention supersedes municipal law in matters concerning written form of arbitration agreements in those cases where the Convention is applicable. Thus, if the arbitration agreement falls under the Convention and enforcement is sought, the enforcement cannot be realized on the basis of the Convention if the agreement does not meet the requirements of the written form as set in Article II (2).<sup>69</sup> However, the arbitration agreement may be still enforced on other basis, such as article VII (1) (the so called more-favourable-provision) of the Convention, which gives the contracting states a leeway to apply their own law in case it is favourable and also to honour their obligations that stem from their other bilateral and multilateral agreements. Nevertheless, this provision needs to be construed broadly to include arbitration agreements as well since it addresses to the recognition and enforcement of arbitral awards only<sup>70</sup>.

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<sup>66</sup> The title of the New York Convention speaks about the enforcement of foreign arbitral awards only, but there is no doubt, that the Convention ensures the enforcement of arbitration agreements as well. See Article II (3) of the New York Convention.

<sup>67</sup> Although the Convention does not explicitly make a reference to its application as far as arbitration agreements are concerned (unlike arbitral awards, see article I(1) of the New York Convention)

<sup>68</sup> Article II (3) of the New York Convention of 1958

<sup>69</sup> Albert Jan van den Berg, *supra* note 12 at p. 173

<sup>70</sup> Article VII (1) of the Convention reads as follows: „The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon“. By application of the argument mentioned in notes 66 and 67, *supra*, this article can indeed be interpreted as including arbitration agreements as well.

Whether e-arbitration agreements are covered by the New York Convention is also a matter falling under some of the consequences of the previously mentioned uniform rule. As van den Berg puts it, one of the consequences of the uniform rule are issues concerning the limits of Article II meaning whether the Article II (2) sets the maximum and the minimum requirement or the maximum requirement only.<sup>71</sup>

To determine whether Article II (2) defines the maximum or both the maximum and minimum requirements is mostly because of the puzzling wording “*shall include*”. These words may be understood by as not giving the exhaustive list of possibilities mentioned there, in particular in comparison with the wording of the European (Geneva) Convention on International Commercial Arbitration, which in Article I (2) (a) uses the words “*shall mean*”, which certainly give an impression of the exhaustiveness of the means of communication. Nevertheless, van den Berg says that “include” should be construed as “mean”<sup>72</sup>. Therefore, the rule set in Article II (2) of the Convention should be interpreted as the minimum requirement but in the same time the maximum that a court of the contracting state may require. The minimum requirement is then personified by words “*shall recognize*” in Article II (1), meaning that such an agreement will be regarded as an existent arbitration agreement under the New York Convention.

Another outcome is taking advantage of the historical method of interpretation of the New York Convention. Thus, the circumstances of the time when the New York Convention has been drafted and adopted, in 1958, must be taken into account. It is clear from the language of the Convention, that all the means of communication it mentions are more or less paper based. However, those days there were no electronic means used in contracting and thus electronic formation of arbitration agreements was not envisaged by the drafters at all. Therefore, electronic means of contracting were not intentionally omitted when drafting the Convention

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<sup>71</sup> Albert Jan van den Berg, *supra* note 12, p. 178

<sup>72</sup> *Ibid.*, at p.179

and since they present a modern way of contracting, logically, they should be included. The advocate of this view is, for instance, Mohamed Wahab, who says that in the times of drafting the New York Convention, letters and telegrams were actually the most modern way of communication<sup>73</sup> and furthermore “in our global information society and with the frequent utilization of technology to conduct business and communicate, one could confidently say that an electronic document is the functional equivalent of a paper document”<sup>74</sup> or that telegrams, telexes, facsimile and emails do not really differ from each other technically and therefore should be taken into account when interpreting the Convention<sup>75</sup>. The same is suggested by Fouchard: “Nowadays, a court could usefully refer to the generic phrases adopted in Article 7, paragraph 2 of the UNCITRAL Model Law, or Article 178, paragraph 1 of the Swiss Private International Law Statute”<sup>76</sup>.

Another argument is the actual interpretation of the New York Convention. International treaties are traditionally interpreted with the help of an internationally recognized instrument, which is nothing else but an international treaty again: the United Nations Convention on the Law of Treaties, which provides guidelines pertaining to interpretation of international treaties, such as the New York Convention in Article 31:

- (1) A Treaty shall be interpreted in a good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.
- (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law application the relation between the parties.

Paragraph (1) of Article 31 of the Treaty clearly refers us that the words used by the New York Convention should be construed in good faith meaning, that the person or authority interpreting the Convention should not be biased when interpreting and applying the

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<sup>73</sup> Wahab, *supra* note 13

<sup>74</sup> Ibid. , p. 153

<sup>75</sup> See for instance, Hill, *supra* note 46 and Wahab, *supra* note 13

<sup>76</sup> Emmanuel Gaillard and John Savage, eds., Fouchard Gaillard Goldman on International Commercial Arbitration (The Hague: Kluwer Law International (1999), p 377

Convention and it should construe the Convention in the same way in all the cases. However, ordinary meaning given to the terms used may seem a bit confusing, since what is ordinary may mean different things to different persons. Finally, the whole previous interpretation is to be done taking into account the object and the purpose of the Convention, thus a person construing the Convention should always bear in mind that the main purpose and object of the Convention is to facilitate the recognition and enforcement of foreign arbitral awards.

Another way of interpreting the New York Convention is to adopt the teleological interpretation of the Convention. The same attitude was taken by the Secretariat in its note:

As to the New York Convention, it is generally accepted that the expression in article II(2) “contained in an exchange of letters and telegrams” should be interpreted broadly to include other means of communication, particularly telex (to which facsimile could nowadays be added). The same teleological interpretation could be extended to cover electronic commerce. Such an extension would also be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce together with its Guide to Enactment in 1996. However, further study might be needed to determine whether interpretation of article II (2) of the New York Convention by reference to either the UNCITRAL Model Law on Arbitration or the UNCITRAL Model Law on Electronic Commerce would be likely to gain wide international consensus and should be recommended by the Commission as a workable solution in respect of this issue and also for dealing with the more general issues of form requirements.<sup>77</sup>

Mohamed Wahab has the similar opinion but supports it also with the Article 5<sup>78</sup> of the Vienna Convention on the Law of Treaties in conjunction with the enactment of the above mentioned UNCITRAL Model laws and the European (Geneva) Convention on International Commercial Arbitration of 1961.

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<sup>77</sup> A/CN.9/460: Note by the Secretariat of the Possible Future Work in the Area of International Commercial Arbitration. from 6th April 1999, Para 23 available at <http://www.uncitral.org/uncitral/en/commission/sessions/32nd.html> (visited on 6 March 2009)

<sup>78</sup> Article 5 of the Vienna Convention on the Law of Treaties of 1969 reads as follows: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”

### 3.1 Towards harmonization of the UNCITRAL Model Law 2006 and the New York Convention

As previously mentioned, the narrow interpretation of the New York Convention does not validate arbitration agreements recorded by electronic means of communication. When adopting the amendments to the UNCITRAL Model Law in 2006, this issue was discussed and several suggestions were made regarding methods of interpretation and solutions of compliance of the Model Law 2006 with the New York Convention. The Working Group on Arbitration which was in charge to prepare and decide how the issues previously addressed by the Commission should be dealt with, pointed out that it is the actual agreement of the parties to arbitrate that should be respected in whatever form is made but on the other hand the form has to be apt to facilitate subsequent evidence of the intent of the parties.

One of the suggestions was to pass a declaration, resolution or a statement which would facilitate a more flexible interpretation of the New York Convention. The incentive to adopt this option was that a similar approach was taken up with regard to other conventions<sup>79</sup>. The opponents of this however argued that this kind of instrument would not be legally binding but would have only a persuasive power.

Another proposal regarding this matter was to adopt an amending Protocol to the New York Convention, since the previously mentioned non-binding legal instrument would unlikely be followed. Nevertheless, this solution has been found not to be practical at all, since it would have taken a long period of time to amend the New York Convention and furthermore it would have disrupted the liberal interpretation of Article II (2) that had already existed in some jurisdictions. In addition, it was noted, that adopting an amending Protocol to

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<sup>79</sup> E.g Vienna Convention on the Law of Treaties of 1969

the New York Convention would have meant and inappropriate recognition of the fact that there had been different probable interpretations of the New York Convention. However, it may seem from the arguments of certain scholars that in fact no amending protocol or other solution is necessary, since by legal and logical reasoning it should be clear that the Convention truly covers e-arbitration agreements<sup>80</sup>.

The other option is to amend or to redraft the New York Convention itself. The advocate of this is As Albert Jan van den Berg puts it is in need for modernization and needs to be updated<sup>81</sup>. On the other hand Toby Landau is strictly against any amendment or modification of the Convention<sup>82</sup>.

A different proposal introduced an indirect revision of Article II (2) by adopting a model legislation that would prevail over this Article by reliance on the more favorable law provision of Article VII (1). This would have been a plausible solution but the obstacle to adopt it was the above mentioned uniform rule and its interpretation of Article II (2) as a minimum requirement of form.

Certain support was expressed also in favor of drafting a very new convention that would deal with questions not covered by the New York Convention. The opponents of this proposal, however, pointed out the fact that the process of adopting and securing widespread ratification of the new convention could take many years and that, meanwhile, there would be an undesirable lack of uniformity<sup>83</sup>. This however might be avoided by leaving the New York Convention in force while states decide to adopt the new convention.

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<sup>80</sup> See arguments by Wahab, *supra* note 13

<sup>81</sup> Prof. Albert Jan van den Berg in June 2008 at the Plenary Session of the International Council for Commercial Arbitration a proposal for a new New York Convention 1958. The text of the Hypothetical Draft Convention is available at

[http://www.arbitration-icca.org/media/0/12133674097980/hypothetical\\_draft\\_convention\\_ajbrev06.pdf](http://www.arbitration-icca.org/media/0/12133674097980/hypothetical_draft_convention_ajbrev06.pdf)

<sup>82</sup> „The New York Convention is an older instrument. It has become one of the most successful commercial conventions of all time, as well the very foundation for the international arbitration system“ (Landau, *supra* note 1 at.6)

<sup>83</sup> Official Records of the General Assembly, Fifty-fourth Session Supplement No. 17, A/54/17, para 344



Nevertheless, the UNCITRAL chose the way of a non-binding interpretative instrument and issued in 2006 a recommendation regarding the interpretation of Article II (2) of the New York Convention which reads as follows:

„...*recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive“<sup>84</sup>

The conclusion drawn from all of these arguments is that e-mail and web-based arbitration agreements should be covered by Article II (2) of the New York Convention and thus may be the basis for arbitration, a subsequent award and further for the award's recognition and enforcement.

### **3.2 (Electronic) Arbitration agreements in a contract or an agreement signed by the parties.**

There is however another way how to comply with Article II (2) of the New York Convention due to modern technologies and legislation sanctioning the use of these technologies in contracting. Contracting via e-mails may create an arbitration agreement also in the sense of Article II (2) of the Convention when the arbitration agreement is contained in a contract or is concluded as a separate agreement to arbitrate.

First of all, the language and the wording of the New York Convention do not mention the material or surface on which the contract must be written and signed. Therefore it was a good step to draft the UNCITRAL Model Law 2006 with an emphasis on the record of the consent of the parties to arbitrate. In order to create an enforceable arbitration agreement in cases

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<sup>84</sup> The full text of the A/6/17 Recommendation is available on [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2006recommendation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html) (visited on 5th March 2009)

envisaged by the first part of Article II (2) the contract or the submission to arbitrate has to be signed by the parties.

The basic functions of the signature are authentication of the signer and authentication of the document however this is was established by jurisprudence since legislations all around the world do not in fact give any definitions of signature. The French Code Civil is an exception which states that a signature identifies the person doing the legal transaction and makes clear his consent with the transaction.<sup>85</sup>

Nevertheless, the New York Convention does not define what is meant by “signature”<sup>86</sup> however it might be supposed that the drafters meant a classic handwritten signature. In order to fulfill the identification and the authentication functions of handwritten signatures in cyberspace, digital signatures have been developed. The digital signature mechanism works with two “keys”. One of the keys, the private key, that is known to the signer only and which transforms the message into an apparently meaningless form. The other key, known as a public key is sent to the receiver and its function is to verify (and to transform the encrypted message into its original readable form) the digital signature which is the case, when the digital signature was created by the signer’s private key and when the message has not been altered during the transmission<sup>87</sup>. However, to make the other contracting party sure, that the one who digitally signed the message is the person who he claims to be there are certification

<sup>85</sup> Article 1316-4 of the French Civil Code

<sup>86</sup> The same has been pointed out by the court in *Chloe Z Fishing Co., Inc. (US) and others (US) v. Odyssey Re (London) Limited, formerly known as Sphere Drake Insurance, PLC (UK) and another (UK)*: “Likewise, the Convention does not explain whether a ‘seal’ or the ‘X’ or ‘thumb print’ of an illiterate principal constitutes a ‘signature’ for the purposes of Art. II(2). As the term ‘signature’ is construed with respect to the customary practices, so is the phrase ‘exchange of letters or telegrams’ construed in light of prevalent and accepted practices, and without regard for technical objections.” See *Chloe Z Fishing Co., Inc. (US) and others (US) v. Odyssey Re (London) Limited, formerly known as Sphere Drake Insurance, PLC (UK) and another (UK)*, published in 109 Federal Supplement, Second Series (S.D. Cal. 2000) p. 1236 et seq.; 2000 American Maritime

Cases, pp. 2409-2442; 2000 US Dist. LEXIS 12645

<sup>87</sup> For detailed reading: M. Scott Donahey: Dispute resolution in Cyberspace or Digital Signatures Tutorial, available on <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html> (visited on 10 March 2009)

authorities or certification-service-providers which issue certificates that vouch for the identity of the private key holders.

Furthermore, in many jurisdictions in particular digital signatures are de jure equal to handwritten signature<sup>88</sup> and are admissible as evidence in court proceedings<sup>89</sup> meaning if the digital signature is considered as authentic and the opposite have to be proved. Taking these facts into consideration it is more than likely that an arbitration agreement contained in a contract electronically (or in particular, digitally) signed by the parties will be enforceable by courts on the basis of the New York Convention.

### 3.3 Electronic arbitration agreements concluded by exchange of data

As noted above, arbitration agreements contained in an exchange of letters and telegrams do not need to be signed. The requirement of signatures is simply not needed because the exchange of corresponding intentions to be bound by the content of the correspondence itself fulfills the function of the signature<sup>90</sup>.

As previously mentioned, by construing Article II (2) broadly, as suggested by scholars and as recommended by UNCITRAL's Recommendation<sup>91</sup>, the exchange of data by electronic means of communication can indeed create an existent arbitration agreement. Furthermore, the purpose of this alternative in Article II (2) was to facilitate international trade by recognizing conclusion of contracts by correspondence<sup>92</sup>.

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<sup>88</sup> For example, Article 5 of Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures, Section 2-211 on Legal Recognition of Electronic Contracts and Signatures of the Uniform Commercial Code .

<sup>90</sup> Jasna Arsic. International Commercial Arbitration-Has the Future Come too Early? Journal of International Arbitration, Vol. 14, No. 3 (1997), p. 216

<sup>91</sup> A/6/17, *supra* note 84

<sup>92</sup> Arsic, *supra* note 90, at 220

In addition, the extensive interpretation of Article II (2) was also upheld by court decisions when expanding the application of the article to telexes<sup>93</sup> and facsimiles. For instance, in *Carbomin SA v. Ekton Corp.* the parties concluded a charter party containing an arbitration clause by exchange of telexes. Carbomin challenged the validity of the arbitration clause. Both the Geneva Canton Court of first instance and Court of Appeal held that the arbitration clause was valid on the ground that “it is clear that by treating an arbitration clause contained in an exchange of telegrams as an 'agreement in writing', Art. II of the New York Convention contemplates in a general way the transmission by telecommunication of messages which are reproduced in a lasting format. In this respect a telex produces messages whose senders and receivers can be identified in a better manner than it is the case for the traditional telegrams”<sup>94</sup> and further that “the use of telex is nowadays common to such an extent that it practically has eclipsed the use of telegrams which were previously traditional”<sup>95</sup>. Using such arguments, one could argue that e-mails and exchange of data meet these conditions and thus should fall under the New York Convention.

### **3.4 Can an electronic arbitration agreement also satisfy the requirements of article IV (1) of the New York Convention?**

In order to obtain recognition of the arbitral award in international arbitration in contracting state to the New York Convention that is other than the state where the award has been rendered, the party seeking recognition and enforcement has to supply the court with the original arbitration agreement that meets the requirements of Article II or a duly certified

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<sup>93</sup> See, e.g. *Dimitrios Varverakis v. Companis de Navigacion Artico SA*, Court of First Instance, Savona (Italy), Tribunale [Court of First Instance] of Savona March 26 1981, Kluwer Arbitration 26 March 1981

<sup>94</sup> *Carbomin SA v. Ekton Corp.*, (Court of Appeal, Geneva, April 14, 1983), 12 Yearbk Comm.l Arb'n., 502 (1987)

<sup>95</sup> Ibid.

copy thereof. The question here arises, whether an electronic arbitration agreement is capable to meet these requirements. The main purpose for this requirement is to prove the existence of an agreement of the parties to arbitrate. As Professor van den Berg explains "the authentication of a document is the formality by which the signature thereon is attested to be genuine. The certification of a copy is the formality by which the copy is attested to be a true copy of the original"<sup>96</sup>.

In *Jassica SA v. Ditta Giocchino Polojaz* the Corte di Cassazione held that commencement of the enforcement proceedings is barred when the party seeking enforcement and recognition fails to submit the original or the certified copy of the arbitration agreement as required by Article IV (1) of the New York Convention. Moreover, this failure is raised by the court *ex officio*<sup>97</sup>.

Ortiz thinks that words 'original' or 'certified copy' Article IV (1) (b) of the New York Convention loses its meaning in the context of electronic arbitration agreements since every copy or duplicate of such an agreement is identical to the 'original'<sup>98</sup>. A comparable attitude might be observed in the explanatory notes to the United Nations Convention on the Use of Electronic Communications in International Contracts<sup>99</sup>. Moreover, digital signatures that prove the authenticity of the electronic document are admissible as evidence at the courts in most of the jurisdictions. Nevertheless, the Hålogaland Court of Appeals held that submission of e-mails did not satisfy the requirements of article IV (1) (b)<sup>100</sup>.

In the end, one could always escape the provisions of the New York Convention via the more favorable law provision of Article VII (1), because arbitration acts of some countries do

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<sup>96</sup> Berg, *supra* note 12, at 251

<sup>97</sup> *Jassica SA v. Ditta Giocchino Polojaz* Corte di Cassazione [Supreme Court], 17 Yearbk Comm. Arb'n 525 (1992)

<sup>98</sup> Ortiz, *supra* note 36, p. 352.

<sup>99</sup> Para 148 of explanatory notes to the United Nations Convention on the Use of Electronic Communications in International Contracts of 2005: "In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper."

<sup>100</sup> *Charterer (Norway) v. Shipowner (Russian Federation)*, Hålogaland Court of Appeal, 16 August 1999, see *supra* note 16

not require the original or an authenticated copy of the arbitration agreement in recognition and enforcement proceedings, however, some legislations state that these provisions are superseded by treaties such as the New York Convention<sup>101</sup>.

To conclude, it is nevertheless relevant to note that even in this stage of the proceedings certain level of liberalization of the formal requirements may be detected. First of all, the UNCITRAL Model Law<sup>102</sup> as amended in 2006 does not require the submission of the arbitration agreement when applying for recognition and enforcement proceeding and secondly even the Hypothetical draft convention presented by Prof. van den Berg proposes to dispense the submission of the arbitration agreement in any form in the enforcement proceedings<sup>103</sup>.

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<sup>101</sup>Section 1064 of the German Arbitration Act reads in relevant part:

(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied.

(....)

(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards.

<sup>102</sup> Article 35(2) of the UNCITRAL Model Law on International Commercial Arbitration of 2006

<sup>103</sup> Para. 66-69 of the Hypothetical Draft Convention by A. Jan van den Berg. See *supra* note 81

## Chapter 4: Electronic arbitration agreements in selected jurisdictions

During the last decade arbitration has undergone a “refresh” in most of the legislation, meaning that in most of the jurisdictions new acts and laws on arbitration have been passed in order to comply with the current development and practice in both domestic and international arbitration. As previously mentioned, certain jurisdictions have already passed law regulating electronic arbitration agreements either influenced by the UNCITRAL Model Law of 2006 or even prior to its enactment. So far it has been, e.g. Greece, Germany, Chile, Singapore, Spain, Mexico, Finland, Slovak republic and Japan. The UNCITRAL Model Law of 2006 was used as a model for arbitration laws in Slovenia, New Zealand, Peru, Ireland and Mauritius.

This chapter deals with three categories of jurisdictions listed from the most liberal to those most stringent, which to date do not recognize arbitration agreements concluded electronically.

### 4.1 Jurisdictions with most liberal formal requirements

Despite the importance of writing as previously mentioned, some jurisdictions has chosen to liberalize the requirement of writing for an arbitration agreement by omission of any formal requirements for agreements to arbitrate. Thus, in these jurisdictions electronic form of arbitration agreements is recognized and enforceable. The examples of this approach are, for instance, France<sup>104</sup>, Denmark and Norway, the last two briefly explored below.

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<sup>104</sup> However only in the context of an international arbitration. Cf., Articles 1493, 1494 and Article 1443 of the Code of Civil Procedure of 1981.

## Denmark

The current Danish Arbitration Act was adopted in 2005 and its drafting was to some extent influenced by the Model Law. It is applicable to both domestic and international arbitrations in case the place of arbitration is in Denmark. As far as the arbitration agreements are concerned, the Arbitration Act does not require the arbitration agreement to be in writing<sup>105</sup> even for arbitration agreements where one of the parties is a consumer. This is in line with the fact that the Act does require the party seeking enforcement to supply the duly certified copy only in case the arbitration agreement has been concluded in writing.

## Norway

The Norwegian Arbitration Act has been passed in 2004, is in force since 2005 and is applicable for both domestic and international arbitration. The Norwegian Arbitration Act, just like the Danish Arbitration Act it omits any formal requirements and thus does not exclude electronic means of communication. However a written form with a signature is required only when a consumer is party to the agreement although an electronic format for this kind of arbitration agreement is not excluded as well but moreover it is explicitly allowed provided that secure method of authentication has been used for both the formation of the contract and for the contents of the agreement. Nevertheless, the Act does not define what is meant by “secure method”<sup>106</sup>.

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<sup>105</sup> See Chapter 2 of Danish Arbitration Act 2005, Act No. 553 of 24 June 2005 on Arbitration

<sup>106</sup> See §§ 9-10 of the Norwegian Arbitration Act of 14 May 2004



## 4.2 Liberalized requirements of writing

Most of the jurisdictions fall into this category. These jurisdictions preserved the written form requirement however they adopted an extended interpretation by including electronic means of communication as a recognized way of concluding an arbitration agreement. The common feature of these jurisdictions is that the written form is deemed to be preserved as long as some record of the agreement is provided. Jurisdictions such as Japan, Croatia, Belarus and Peru and belong to this category. Some of them are briefly described below.

### Austria

Austria does not have a separate act on arbitration, but arbitration is rather regulated in Part 6 Chapter 4 of the Code of Civil Procedure. The currently effective rules are in force since 2006 and are applicable when the place of the arbitration is in Austria.

As far as the arbitration agreement is concerned, the Austrian law is one of the few that explicitly state that an arbitration agreement can be concluded in the form of an e-mail or other means of communication that preserves evidence of the agreement<sup>107</sup>. However, Article 617 contains special rules applicable when an arbitration agreement is concluded between an entrepreneur and a consumer<sup>108</sup>. The requirements in this case are more stringent<sup>109</sup> and as far as the form is concerned arbitration agreement has to be in writing and personally signed by the consumer.

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<sup>107</sup> Article 583 (1) of the Code of Civil Procedure states that arbitration agreement must be contained either in a written document signed by the parties or in letters, telefaxes, E-mails or other forms of communication exchanged between the parties which preserve evidence of a contract.

<sup>108</sup> Ibid., Article 617

<sup>109</sup> For instance, prior to the conclusion of the arbitration agreement the consumer must obtain a written legal notice where the difference between arbitration and litigation are explained, the arbitration agreement may be validly concluded only after the dispute has arisen and the document must not contain any other agreements.

## **Slovak republic**

Slovakia passed a new statute on arbitration in 2002. The reason behind this was that the previous Arbitration Act of 1996 was too restrictive, in particular, in terms of arbitrability, freedom of the parties when shaping the arbitral proceeding and thus the law applied only to a limited number of arbitrations. And therefore in order to enhance arbitrations in Slovakia, a new law was needed.

As far as the form of arbitration agreement is concerned, the Arbitration Act of 2004 was modeled according to the UNCITRAL Model Law however taking into consideration modern means of communication:

The arbitration agreement must be in writing, otherwise it is not valid. The written form is preserved if the arbitration agreement is contained in the document signed by the parties or in an exchange of letters, telefaxes or other means of telecommunication which are capable to catch the contents of the arbitration agreement and the identity of the parties which have agreed on it. The validity of the arbitration agreement is explicitly conditioned by written form.<sup>110</sup>

In the Slovak Statute on Arbitration, contrary to the other jurisdictions indicated hereby the omission of written form of the arbitration agreement is penalized by invalidity. Moreover, although the provision does not enumerate any means of telecommunication, the statute explicitly makes a reference by a footnote to the Act on Electronic Signatures.

## **Spain**

The Spanish Arbitration Act of 2003 presents a modern legislative approach that takes into account recent and future development in the field of commercial arbitration in conjunction with the modern means of communication. The Act has been drafted in accordance with the UNCITRAL Model Law of 1985 however the development in

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<sup>110</sup> § 4 (2) of Statute no. 244/2002 Col. on Arbitration

international commercial practices as well as the proposals for the amendment of the Model Law were taken into account. Therefore, despite of its prior adoption to the Model Law of 2006, it has already explicitly incorporated the conclusion of the arbitration agreement by electronic means. However, the wording of the Spanish arbitration act pertaining to the form requirements is kind of different to that one in Article 7 (1) of the Model Law. Whereas, the Model Law requires the agreement to be in writing, Article 9 (3) of the Spanish arbitration agreement does insist on the written form, however using a different wording:

The arbitration agreement shall be *verifiable* in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement<sup>111</sup> (emphasis added).

By adopting this wording the Spanish 2003 Arbitration Act clearly does not require the arbitration agreements to be in a paper based or other hard-copy format. Thus for an arbitration agreement to be verifiable in writing it therefore suffices “when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical or other type of format”<sup>112</sup>.

### 4.3 Stringent written requirements

Not many jurisdictions fall into this category since most of the countries are trying to enhance arbitration by introducing an arbitration friendly legislation.

#### Libya

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<sup>111</sup> Article 9 (3) of Spanish Arbitration Act of 2003. Available <http://www.voldgiftsforeningen.dk/files/filer/spaniennat.pdf>

<sup>112</sup> Ibid., Article 37(3)

Libyan arbitration rules are contained in the Code of Commercial and Civil Procedure of 1953. Article 742 named “Proof of Arbitration Clauses” is very stringent, austere and simple since by saying that arbitration clauses can only be proved in writing<sup>113</sup> it leaves no space for arbitration agreements to be concluded by any other means. Moreover, Libya is not a contracting state to the New York Convention.

## **Romania**

The European example of the strict written requirement for an arbitration agreement is Romania. The Romanian Code of Civil Procedure of 1993 requires the arbitration agreement to be in writing under the sanction of nullity, meaning that an arbitration agreement concluded by other means is non-existent. However, Romania as in contrast to Libya is a contracting state to the New York Convention since 1961, thus enabling foreign arbitral agreements and awards to be enforceable in Romania.

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<sup>113</sup> Article 742 of the Code on Commercial and Civil Procedure.

## CONCLUSION

The basic function of law is to regulate relationships between person and thus providing certainty, stability and predictability. But life and conditions, the objects of its regulation are constantly changing the law itself cannot be stable and has to change as well, in order not to become obsolete. However, while drafting legal rules one has to predict, life can bring situations that could have been both predictable and unpredictable. Thus sometimes it may seem that law and its rules are always at least a step behind of its object.

This is also true about electronic arbitration agreements in its relation to the New York Convention: practice has developed something that was not predicted by the drafters of the New York Convention, but as this work has presented, to change or amend the New York Convention would not be practical at all. Nevertheless, the aim of the New York Convention can be achieved also by adopting various methods of interpretation thus creating certainty between parties which do use electronic arbitration agreements in international arbitration. However, there is no doubt about the fact that once the New York Convention will have to be amended and modernized or replaced by another convention that would reflect the practice in international arbitration more effectively.

The issue of jurisdiction in case of disputes that stem from online transactions can cause troubles and thus prolong the actual dispute settlement proceedings. Therefore choice of forum clauses in contracts, concluded online, provide certainty as the parties know where to submit their disputes in case they have arisen. Moreover, since parties in online transactions do not face each other, do not interact simultaneously there is a threat that the involvement in disputes from e-commerce will increase with the growth of internet society. As arbitration is an alternative method of disputes settlement that allows the disputes to be resolved faster than by litigation, it is only natural that online contracts will be drafted to refer disputes to

arbitration. However, as suggested by some authors this will necessarily lead to development of online dispute settlement devices.

As this thesis has shown, most of the jurisdictions are recognizing electronic arbitration agreements as agreements in writing and are willing to recognize them, at least in domestic arbitration and mostly in B2C disputes. This is understood due to the widespread use of internet by consumers for surfing, shopping and etc. However, it is apparent that though recognized, online arbitration agreements are constantly being shaped by courts' decisions. There is so far not that much case law upon international commercial arbitration based on an electronic arbitration agreement. This may be the result of parties being reluctant to conclude an arbitration agreement because of the blurry language and not uniformed interpretation of the New York Convention. Nevertheless, this situation might be subject to changes in the near future.

Nevertheless, since arbitration is a preferable method of dispute settlement in international business, arbitration-friendly legal rules are one of the cornerstones of enhancing trade in every jurisdiction. As the thesis have presented, the trade is moving on to the sphere of cyberspace and the international and the national legislative acts regarding the form of arbitration agreement are heading from the formal towards the informal approach. This also shows that jurisdictions are willing to accept electronic arbitration agreements and that indeed arbitration agreements concluded electronically are capable of being and thus should be recognized as a viable and plausible solution for both domestic and international and B2C and B2B relationships.

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