

*"In the Name of God"*

*"To All, Who Are Thinking of Justice for All"*

1.7.14

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## Abbreviations

AAA : American Arbitration Association

ABA : American Bar Association

ADR: Alternative Dispute Resolution

AMS: Automated Message System

B-to-B: Business –to-Business

B-to-C: Business-to-Consumer

CEDR: Centre for Dispute Resolution, founded in 1992

CMAP : De Médiation et d' Arbitrage de Paris

C.C.Q: Code Civil du Québec

EA: Electronic Arbitration

G-to-B: Government-to-Business

G-to-C: Government-to- Consumer

IM: Instant Message

Model Law on ICA: UNCITRAL Model Law on International  
Commercial Arbitration

NYC: New York Convention

OA: Online Arbitration

OADR: Online Alternative Dispute Resolution

ODR: Online Dispute Resolution

Québec: Le Centre d'arbitrage international et national de Québec

SMEs: Small and Medium Enterprises

VMAG: Virtual Magistrate Project, Founded in 1996

VC: Video Conferencing

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## Abstract

Historically, as Internet usage began to expand especially from the early years of 1990<sup>th</sup>, it became increasingly necessary to design efficient mechanisms for resolving electronic disputes; because traditional mechanisms such as court proceedings were often time consuming, expensive and disproportionate to the initial transaction. It led afterwards to the emergence of a process called “Online Dispute Resolution” which included online arbitration. It should be noted here that, although online dispute resolution emerged pursuant to the Internet and e-commerce related disputes, as it will be explained further in part one, nowadays, it covers both offline and online disputes.

The use of online arbitration raises interesting legal issues that need to be resolved before it becomes a realistic possibility. The changes related to the development of new information technologies have generated new legal problems, especially as regards to issues of confidentiality, electronic signature, conclusion of arbitration agreement through Internet and formal requirements referred to in 1958 New York Convention and some national laws. Particular obstacles to arbitration in cyberspace have been classified into three major categories, namely:<sup>1</sup>

- Obstacles associated with the technical aspects of Online Arbitration (existence and authentication of an online arbitration agreement, and confidentiality issues);
- Obstacles related to the procedural framework (How set up an Online tribunal and the issue of applicable law in Online Arbitration), and
- Obstacles related to the arbitral award (the role of the seat of arbitration in

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<sup>1</sup> - Muhammad Wahab, *The Global Information Society and Online Dispute Resolution*. Journal of International Arbitration, 2004, p 153.



recognition and enforcement of foreign electronic awards, formal requirement, binding nature,).

These categories of obstacles will be discussed respectfully in part two, three and four. This dissertation argues generally that Online Arbitration is still in its early stages of development; nevertheless, it will likely become an increasingly effective mechanism for resolving disputes as technology advances, especially in the context of Business-to-Customer disputes and the disputes which do not involve much security and confidentiality problems such as insurance disputes and e-commerce related disputes.

In sum, this dissertation tries to prove that in most countries, it would be possible to use general rules of arbitration and e-commerce in conducting Online Arbitration through Internet. However, some specialists in this area of law for the reason of lack of sufficient acts and regulations in both national and international level in this respect, emphasize on the advantages of self-regulation of online tribunals. They believe that, it is the time that some developing countries or international organizations or commission like UNCITRAL begin to provide some kinds of model laws as the first stage to regulate the rules and principles of online arbitration and after that try to encourage the States to come to an binding convention.

In Iran, the situation is similar. We can at the moment use Online Arbitration for settlement of disputes in Iran for national and international disputes and as we will see in parts two and three, there would be some general rules of arbitration for off-line arbitrations to be used for conducting arbitration through Internet and there are also some specific rules in Electronic Commerce Act 2003 which recognize the legal value of e-documents and e-signature, however, definitely, we will encounter some gaps in this regards in near future which demand the governmental interference or indeed provision of some acts and regulations for this purpose.

## Introduction

Due to the immense rise in the area of e-commerce, we have faced a distinct increase in the number of Internet related disputes.<sup>2</sup> It was predicted that over 600 million people would have Internet access and spend over US\$1 trillion online in 2003.<sup>3</sup> In 1990, only ten countries had access to the Internet while, at the end of 2001 this number increased up to two hundred and forty.<sup>4</sup> As of July 2004, there had been around 115 Web sites set up to provide “Online Dispute Resolution” services, covering every region of the world, which are mainly managed and controlled in Europe and America.<sup>5</sup>

However, in the context of Online Arbitration, although many scholars have bestowed much effort on providing some solutions to potential obstacles, the main legal problem facing Online Arbitration is still the lack of sufficient legal support from States. The rapid development and spread of telecommunications utilization firstly prompted research into the subject of e-commerce<sup>7</sup>. Then some national and international regulations and laws emerged

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<sup>2</sup> - Until June 2002, almost 3.700 cases had been submitted to WIPO, and more than 2.400 to the National Arbitration Forum, statistics are available in ( in sequence): <http://arbitrator.wipo.int/domains/statistics>, <http://www.arb-forum.com/domains/domain-decisions.asp> (Last visited, Feb. 12, 2006)

<sup>3</sup> - Jennifer E. Hill, “The Future of Electronic Contracts in International Sales”  
Retrieved January 21, 2006 from: <http://www.law.northwestern.edu/journals/njtip/v2/n1/1>

<sup>4</sup> - Navid Rahbar, *Conclusion of Electronic Contract*, L.L.M. Dissertation, Shahid Beheshti University, 2003, p. 21

<sup>5</sup> - Joseph W. Goodman, Advantages and Disadvantages of Online Dispute Resolution, *Journal of Internet Law*, No 11, (2006), PP 10-17

<sup>7</sup> - Hong-lin Yu & Motassem Nasir. Can Online Arbitration Exist within The Traditional Arbitration Framework, *Journal of International Arbitration*, 20, (2003,) pp. 455-473

to regulate e-commerce.

Therefore, in this dissertation, we are going to examine what basic legal rules and principles are available to online arbitration providers and the parties as well as to consider if it is possible to rely on the current acts and regulations have been enacted for e-commerce and traditional arbitration in order to adopt them (but definitely with some minor adaptations) for arbitration in cyberspace, e.g., the rules governing the “Data Message” and “E-signature” which have been regulated by e-commerce and e-signature acts. Indeed, the hypothesis in this dissertation is that, generally in most cases, it would be possible to resort to such rules and regulations and to adapt them to arbitration which is conducted mostly through Internet.

Another purpose of this dissertation is, in deed, to provide satisfactory answers and proposals to the potential obstacles facing users of Online Arbitration. However, before the particularities of Online Arbitration can be discussed, I found it necessary to overview the history of online arbitration and to identify the definition, scope and types of Online Arbitration. Thus, the first part presents a brief history of Online Arbitration, then, it clarifies its relationship with the similar concepts such as “Electronic Arbitration, Online Dispute Resolution, and Alternative Dispute Resolution.” After that, we will try to deliver a reliable and quite comprehensive definition of online arbitration in last Chapter. As a matter of fact, there is not any difference between online arbitration and electronic arbitration and both of them refer to conduct of arbitration mostly through Internet but, for some reasons, which will be delivered in this part, I decided to choose the term “Online Arbitration” instead of “Electronic Arbitration”.

The lack of security on the Internet poses some specific problems as to the issues of security and confidentiality of Online Arbitration procedure; although,

to some extent these problems can be resolved through sophisticated encryption systems and digital signature.<sup>8</sup> These issues are the subjects of part two. In this part we will also have a glance at national and international related documents; among them, the UNCITRAL Model law on Electronic Commerce 1996, and the 1958 New York Convention and The European Directive on the Electronic Commerce 2000.

Moreover, since the Internet with its global character is not tied to notions of territory or nations, difficult questions may arise with regard to the examination of applicable law and determination of the seat of arbitration. The third part explains online arbitration procedure and the methods used by some cyber tribunals. In the meanwhile, it evaluates a few Web sites that use online arbitration techniques to help resolve disputes. The remarkable difference between these Web sites is in their level of automation and accordingly, the level of confidentiality. Some Web sites are more automated and require little human intervention, while others involve a neutral third party as a designer, in addition to an arbitrator or arbitrators. At the end of this part, we will deal with the troublesome issue of online arbitration, that is, the issue of determination of applicable law to “arbitrability of disputes” and to procedural and substantive issues.

Lastly, in enforcing an electronic award, one may encounter some particular constraints. First, there have been cases in which the enforcement of an award was refused for the reason of violating one of the general principles of online arbitration procedure. Second, the 1958 New York Convention<sup>9</sup> and some

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<sup>8</sup> - Indera Carr. *International Trade Law*, 3th ed, London: Covendish, 2005, P 636. For more information on this issue refer to: Todd, Paul, *E-Commerce Law*, London: Covendish, 2005, PP 103-161

<sup>9</sup> - Article 4(a) of the Convention, available at [http://www.hartwell.demon.co.uk/nyc\\_text.htm](http://www.hartwell.demon.co.uk/nyc_text.htm) (Last visited on December 07, 2007)- Also See the discussion of this issue in Peter Gillies. “Enforcement of International Arbitration Awards”, *In International Trade and Business Law Review*, London, Covendisah, Vol 4, 2005, p 26

national laws require the compliance of arbitration with the mandatory rules of the country in which the arbitration has its place or seat, but it is strongly debatable whether online arbitration has any identifiable seat. Third, when an award is made in paperless form, it is also disputable if it can be regarded as an authenticated original award as required by the 1958 New York Convention and some national laws. The last part will tackle these issues. This will be followed by a detailed discussion of the “Binding or Not-binding Nature of an Arbitral Award”.

# Part One: General Overview of Online Arbitration

Online arbitration is a new form of Alternative Dispute Resolution (ADR) which has been developed over the past ten years.<sup>10</sup> Among Online Dispute Resolution mechanisms, online arbitration is the most famous methods used frequently to settle commercial disputes. However, before get into the specific issues of online arbitration, it is necessary to identify what is meant by the term ‘Online Arbitration’, what similar phrases there are in this respect and what the scope and categories of Online Arbitration are. Thus, in the first chapter of this part, the relationship of online arbitration with Alternative Dispute resolution and online dispute resolution will be clarified. In the second chapter, a brief historical background of online arbitration will be delivered and, finally in the third chapter, we will identify the definition, scope and types of Online Arbitration.

## Chapter One: The Relevance of Online Arbitration to Alternative Dispute Resolution and Online Dispute Resolution

The phrase Alternative Dispute Resolution encompasses a range of procedures other than court proceedings which design to resolve conflicts, in other words, it only offers alternatives to court litigation. This process includes negotiation,

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<sup>10</sup> - The first well known writing specifically on *online arbitration* was authorized by Jasna Arsic and published by Journal of International Arbitration in 1997 – J. Arsic, “International Commercial Arbitration on the Internet: Has the Future Come Too Early?” 14 J. Int’l Arb. p 209. 1997

conciliation, mediation expert determination, and finally arbitration.<sup>11</sup> Notwithstanding, there are a large number of areas like constitutional law and criminal law where Alternative Dispute Resolution cannot substitute courts. In those situations one has to take recourse of the existing traditional modes of dispute resolution.<sup>12</sup>

In United Kingdom, the move towards Alternative Dispute Resolution has gathered pace since mid-1980s, fostered by developments by other jurisdictions. This has been promoted by lawyers specialising in Alternative Dispute Resolution in particular classes of dispute and, latterly, by judges but the greatest impetus has come from the formation of bodies offering Alternative Dispute Resolution services. The most important has proved to be the Centre for Dispute Resolution, founded in 1992, which publishes information on Alternative Dispute Resolution and runs numerous training courses for mediators.<sup>13</sup>

Arbitration as a kind of Alternative Dispute Resolution (out-of-Court Settlement) offers the best solution in respect of commercial disputes. It has been defined as a process used to settle a dispute in a non-judicial setting by referring the disputes to one or several mutually agreed arbitrators<sup>14</sup>. This is a simple process that is usually governed according to the rules of a neutral arbitration organization which has often been selected by means of a clause inserted into the settlement agreement or contract.

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<sup>11</sup> - Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes*, Oxford, 2005, p 3

<sup>12</sup> - *Online dispute resolution mechanism (ODRM) in India*, Available at: [www.odr.info/ONLINE%20DISPUTE%20RESOLUTION%20IN%20INDIA.doc](http://www.odr.info/ONLINE%20DISPUTE%20RESOLUTION%20IN%20INDIA.doc). (Last visited on Jun. 30, 2007).

In the context of online arbitration there are also some kinds of disputes which have not been allowed to be referred to Online Arbitration Tribunals such as Pre-dispute arbitration clauses inserted in an electronic contract between a consumer and a business, especially in European countries. For finding more on this issue: See, part three, Section three of this paper.

<sup>13</sup> - *The Electronic Arbitration Law Library [CD-Rom]*, V 1.0, 1999, LLP Professional, at 12.17

<sup>14</sup> - Nabil.Z. Moghabela, *Electronic Arbitration*, [http://www.arab-elaw.com/show\\_similar.aspx?id=81](http://www.arab-elaw.com/show_similar.aspx?id=81), (last visited on March 12, 2007)

It has been claimed that Online Dispute Resolution is essentially an offspring of Alternative Dispute Resolution,<sup>15</sup> which applies information and communication Technology to the traditional out of court processes. In other words, Online Dispute Resolution applies IT and distance communication to the traditional Online Alternative Dispute Resolution processes such as conciliation, mediation and arbitration (including the various mutants thereof).<sup>16</sup>

This definition has been accepted by many of online dispute resolution providers; nevertheless, it seems by referring to online Dispute Resolution they meant "Online Alternative Dispute Resolution". We choose the latter as a proper phrase in this regard, because firstly, from terminological point of view, Online Dispute Resolution can cover any kind of dispute resolution that taken place online. Additionally, such a view can be supported by taking into account the definition introduced by authors like Kaufmann, M. Conley Tyler and D. Bretherton<sup>17</sup>. Kaufmann argues that Online Dispute Resolution has only one overarching feature, it takes place online, but he immediately raises this question that how much communication must take place online for a dispute resolution process to be classified as Online Dispute Resolution.<sup>18</sup> Then, he follows the definition provided by the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution, and expands it to include Cybercourts. The definition thus offered in his book is the following:

"Online Dispute Resolution is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the Internet, websites, e-mail

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<sup>15</sup> - Julia Ho Rnle, "Online Dispute Resolution-The Emperor's new cloths?", *International Review of Law Computers*, Vol. 17, NO. 1, 2003. Available also at: [www.taylorandfrancis.metapress.com/index/XQW02MBCDYD91H14.pdf](http://www.taylorandfrancis.metapress.com/index/XQW02MBCDYD91H14.pdf). ( Last vsited Nov. 26, 2006)

<sup>16</sup> - Loc. Cit.

<sup>17</sup> - M. Conley Tyler and D. Bretherton in "Research into Online ADR, Exploration Report. Available at: [http://www.agimo.gov.au/data/assets/pdf\\_file/0017/38222/041107mct.pdf](http://www.agimo.gov.au/data/assets/pdf_file/0017/38222/041107mct.pdf) (last visited, Oct. 09, 2007)

<sup>18</sup> - Kaufmann Gabrielle & Schultz Thomas, "Online Dispute Resolution- Challenges for Contemporary Justice" Kluwer Law International, 2004, p 7



communications, streaming media, and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in Online Dispute Resolution. Rather, they might communicate solely online.”

Therefore, one must distinguish between “Online Dispute Resolution” and “Online Alternative Dispute Resolution”; notwithstanding, in this dissertation, we will also use the first phrase mentioned above, for the reasons that it is more common and what is usually understood by Online Dispute Resolution is Online Alternative Dispute Resolution.

Although, these settlement mechanisms were primarily designed to resolve any disputes born from e-commerce, either Business-to-Business or Business-to-Consumer; for example, dispute over guarantee of a sold product through the Internet,<sup>19</sup> it have rapidly became usual, to employ online arbitration for resolving conflicts encountered through the electronic commerce or any other dispute where parties value the efficiency and cost savings associated with an innovative dispute resolution facility.<sup>20</sup>

It should be mentioned here that, in principle, Online Dispute Resolution can be used for both disputes arising from e-commerce interactions and transactions and for disputes arising off-line. Online Dispute Resolution is particularly apt for e-commerce disputes, where it is logical to use the same medium, i.e. the Internet, for the resolution of disputes and where the parties are frequently located far from each other.<sup>21</sup> However there is no reason why Online Dispute Resolution cannot also be used to solve disputes between parties located in the

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<sup>19</sup> - Xavier Linant de Bellefonds, Catherine Tasca & Boutros Boutros-Ghali, *Le droit de l'informatique à l'aube du 3ème millénaire*, Publibook ,2004, p 242

<sup>20</sup> - Online Dispute Resolution, ADR Group ,Available at: <http://www.adrgroup.co.uk/online-dispute/online-dispute-res.htm> (Last visited on August, 16 2006)

<sup>21</sup> - Julia Hörnle, “Online Dispute Resolution (ODR) - JISC Legal Briefing Paper”, , CCLS, University of London, October 2004, retrieved Nov. 10, 2006 from: [www.jisclegal.ac.uk/publications/hornleODR.htm](http://www.jisclegal.ac.uk/publications/hornleODR.htm) Available also at: <http://www.oecd.org/dataoecd/63/57/1878940.pdf>

same location such as a University campus.<sup>22</sup>

## Chapter Two: Global Trend in Online Dispute Resolution and Online Arbitration:

As of July 2004, there had been at least 115 Web sites launched to provide Online Dispute Resolution services, covering every region of the world, which are mainly managed and controlled in Europe and America.<sup>23</sup> The available methods of Online Dispute Resolution range from negotiation support to modified arbitration to modified jury proceedings.

At present, there are some institutions which try to develop a regulatory and dynamic infrastructure needed to allow simple, efficient and effective distributed processes in electronic out-of-court dispute settlement systems. In this part, we are going to introduce some of them while analyzing the value of the services they offer.

### Section One: Arbitration in Developed Countries

In the first Online Dispute Resolution case, *Tierney v. America On-Line*, which was considered by the Virtual Magistrate at Villanova University, America Online was ordered to remove an advertisement offering to provide mailing lists of thousands of e-mail addresses.<sup>24</sup> Although the parties were located in disparate

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<sup>22</sup> - Loc. cit.

<sup>23</sup> - Joseph W. Goodman, Advantages and Disadvantages of Online Dispute Resolution, *Journal of Internet Law*, No 11, (2006), pp. 10-17

<sup>24</sup> - Cited in Zavaletta, Joseph & Sandoval, Rodolpho. "Using the Internet to Facilitate the Resolution of Private International Commercial Disputes Under NAFTA", Retrieved from:

geographical regions, the dispute was resolved in a few days. The VMAG project continues today at the Chicago-Kent College of Law.<sup>25</sup>

The most popular and diligent institutions offering Online Arbitration are “iCourthouse”, “Virtual Magistrate”, “eResolution”, “the United Kingdom Chartered Institute of Arbitrators”, “BBBOnline”, and WIPO.<sup>26</sup>

eResolution has been managed by the Research center in public law of the University of Montreal., which is the successor of late “the CyberTribunal”, pioneer of the Alternative Dispute Resolution.<sup>27</sup> The procedure of eResolution is entirely on line. The Center of international and national arbitration of Quebec (Le Centre d’arbitrage international et national de Quebec), operated in Canada also offers a service of online mediation and online arbitration on civil and commercial cases with the technology inspired from “Cybertribunal”.<sup>28</sup>

In 1998, the United States government agreed to allow a new organization, the Internet Corporation for Assigned Names and Numbers (ICANN) to manage

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<<http://www.salsb.org/slj/vol-xi/zavalettafinal1.pdf>> on March 10th, 2008.

<sup>25</sup> - “Using E-dispute Technology to Facilitate the Resolution of E-contract Disputes”, *Journal of technology, law and policy*. Vol 7, 2002, p. 2. Available also at : <http://grove.ufl.edu/~techlaw/vol7/issue1/zavaletta.html> ( Last Visited Dec. 22, 2007)

<sup>26</sup> - To see the list of current ODR projects and websites refer to: Current Projects and ODR Websites, [http://www.e-arbitration-t.com/papersadr/paper\\_international.pdf](http://www.e-arbitration-t.com/papersadr/paper_international.pdf)  
The following entities were found to be offering online arbitration : the American Arbitration Association, the Association of British Travel Agents (ABTA); BBBOnline; the Chartered Institute of Arbitrators, Ciber Peruvian Tribunal ; the Commercial Initiative for Dispute Resolution; Cyberarbitration, Cybercourt; eResolution.org; the Honk Kong International Arbitration Center; IntelliCourt; Icourthouse.com; Internet Ombudsman; MARS; NovaForum; ORD.NL; Online Resolution; the Resolution Forum; Settle TheCase; SmartSettle; SquareTrade; Trusted Shops; the Virtual Magistrate; Web Assured; Web Dispute Resolutions; WEBDispute.com; WebMediate; Word&Bond and the four ICANN, approved providers, WIPO; the National Arbitration Forum; the Asian Domain Name Dispute Resolution Center; and the CPR Institute for Dispute Resolution. Some of these tribunals are listed in: <http://www.camsantiago.com/html/archivos/espanol/articulos/Trabajo%20E1%20Arbitraje%20On%20line%20ENG.doc>

<sup>27</sup> - Thibault Verbiest & Étienne Wéry, *Le droit de l'internet et de la société de l'information: Droits européen, belge et français*, Larcier , 2001, p.43

<sup>28</sup> - Nadja Marie Alexander, “*Global Trend in Mediation*”, Otto Schmidt Verlag DE pub, 2003, p.115

the domain name system.<sup>29</sup> In October 1999, ICANN adopted the Uniform Dispute Resolution Policy (UDRP).<sup>30</sup> This procedure assists the resolution of disputes between a trademark owner and a registrant of a domain name.<sup>31</sup> The drafters of the Uniform Dispute Resolution Policy, which were mainly the World Intellectual Property Organization (WIPO) and ICANN thought that an arbitral process would make more sense for such kinds of disputes and would, concomitantly, serve the needs of the Internet for speed and low costs.<sup>32</sup> As of 2004, around 10,000 decisions, resolving approximately 13,500 domain names have been published.<sup>33</sup>

The Uniform Dispute Resolution Policy is not classic arbitration in that the decisions are not binding and enforceable in court. Uniform Dispute Resolution Policy arbitrators are referred to as panelists since the word arbitrator denotes someone who can make a decision that is enforceable in court.<sup>34</sup>

One of the most popular Online Tribunals is “E-Arbitration-T©” established in 1997 with the purpose of developing and validating the regulatory structure and the dynamic and intelligent infrastructure needed to allow simple and efficient distributed processes in electronic out of-court dispute settlement systems.<sup>35</sup>

In addition, the “Centre de Médiation et d’ Arbitrage de Paris” launched

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<sup>29</sup> - Ethan, Katsh. “*Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*”, *Lex Electronica*, vol.10 n. 3, 2006, p 6

<sup>30</sup> - Konstantinos, Komaitis , “Pandora’s Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration”, Retrieved March 17, 2007, from : [www.taylorandfrancis.metapress.com/index/G4314P6373J6771L.pdf](http://www.taylorandfrancis.metapress.com/index/G4314P6373J6771L.pdf)

<sup>31</sup> - Rafal, Morek. “Regulation of Online Dispute Resolution: Between Law and Technology” PhD, University of Warsaw, Available at : [odr.info/Re%20greetings1.doc](http://odr.info/Re%20greetings1.doc) , ( Last Visited July 22, 2007)

<sup>32</sup> - See *supra* note 32

<sup>33</sup> - For more information refer to: <http://www.icann.org/udrp/proceedings-stat.htm>, accessed 8 December 2005.

<sup>34</sup> - Ethan, Katsh. Op cit.

<sup>35</sup> - Jacques Goumenou, “E-Arbitration-T© : An Alternative Dispute Resolution for SMEs” TIGA Technologies, France, Available at: <http://www2.cirsfid.unibo.it/~agsw/lea02/pp/Goumenou.pdf>