

## ARTICLE

# THE GOVERNING PRINCIPLES OF ARBITRATION USING ONLINE TECHNIQUES

**Elahe Parsa**

*Ph.D. Student, Private Law, Islamic Azad University, Yazd Branch, IRAN*

## ABSTRACT

Today, people tend to conduct their transactions in online environment due to multiple advantages. Therefore, like conventional transactions, the parties might face dispute while conducting the transactions. Online transactions need to be resolved in online environment. Online arbitration is one of dispute settlement practices in cyber space. Based upon the previous studies, it is concluded that traditional arbitration rules need to be followed in online arbitration by parties and arbitrator. Written arbitration agreement is one of principles to follow. Impartiality and equality need to be respected. Like traditional arbitration, issued judgments resulting from online arbitration are valid and irrevocable. To this end, some factors need to be prepared for individuals' tendencies although they resolve their disputes online. Trust to arbitration is one of important factors in this regard. Other factors are authentication and establishment of security in exchanging information and privacy supplied by digital signature or encryption in order to smooth the path for online arbitration using online techniques. Appropriate rules need to be developed in this regard.

## KEY WORDS

Cyber Space, Settlement of Disputes, Alternative Methods, Arbitration, Online

## INTRODUCTION

With the growing use of the Internet, disputed arising from e-commerce is also rising. Most traditional mechanisms of settling disputes, including traditional arbitration are inappropriate to resolve such disputes. This mechanism is time taking and costly and creates serious issues concerning the jurisdiction and enforcement of judgment. In other words, cyber space with a large volume of technological facilities, as a new phenomenon in law literature, has challenged the traditional international commercial arbitration. Therefore, arbitration can start with the statement that e-conflicts that occur in cyberspace must be electronically resolved. Electronic arbitration is a dispute settlement procedure whereby all arbitration process including the presentation of bill to the Court of Arbitration and the whole process of arbitration process is carried out through online networks, e-mail, and chat or video conference rooms. Today, some arbitration institutions with a long history in arbitration provide electronic services to resolve disputes. For example, arbitration is electronically performed in World Intellectual Property Organization, International Chamber of Commerce, and Arbitration Association of America. The emergence of this new institution of proceedings creates legal questions regarding the authenticity of electronic agreements, the entry into force of the issued judgment, identifying them, and numerous questions. Responding all of these questions is undoubtedly impossible without adoption of the law or code. Since one article cannot eliminate all ambiguities, this article aims to explain the online arbitration so that arbitration agreements are described. Then, the processes of arbitration and effective factors in online arbitration development are discussed.

## ONLINE ARBITRATION AGREEMENT

The first step to establish online arbitration is to sign agreement between parties and arbitrator. Considering the presence in the Age of Communication, arbitration agreement is signed by electronic devices such as Internet instead of conventional forms with prints and hand-made signature, while legal frameworks related to such agreements including the 1958 New York Convention was passed and popularized in the years before the adoption of the Internet. Similar to traditional arbitration, written agreement is one of online arbitration credibility requirements pointed out in Article 72 of the UNCITRAL Model Law, stating that arbitration agreements must be written. Concerning written agreement, Paragraph 2 of Article 9 of the 2005 Convention states that whenever a law necessitates the written condition of a contract or considers consequences for lack of written agreement, such necessity is met through electronic procedures. If the information in agreement is accessible which can be used for future reference, all contents concerning the credibility of various e-documents cover all topics and smooth the path for technology in modern law. Such information is set in a way to be adaptable with future progress concerning commercial relations [1]. The term "written" is a contractual concept in which the most important objective is to prevent the denial of parties' obligations by recording and preserving its provisions. Recording and maintaining an agreement is far more accurate and safer by an electronic device than paper systems. Written agreement in an online arbitration is far stronger than paper systems. Parties to a commercial transaction tend to use e-mail and clicking on mouse rather than letters, telegrams, and faxes. This way, they are able to sign an arbitration agreement. Exchanging emails is similar to telegram and letter concerning the concept and performance. It is, in fact, an advanced mechanism similar to telegram and letter with the same consequences [2]

\*Corresponding Author  
 Email:  
 elaheparsa@live.com

Published: 12 Sept 2016

Electronic devices such as e-mail and website are somewhat considered equal to traditional communication tools such as telegrams and letters. The concept of electronic devices will improve in the future by the advancement of technology. Article 2 New York Convention, Article 72 of the UNCITRAL Model Law, and 1449 and 1677 Belgium Arbitration Act have pointed out to this issue. Article 72 of the UNCITRAL Model Law provides a wider understanding of "written" word. A treaty is written in case providing signed document, letters, telex, telegram, or other communication tool which provide a recorded report is mentioned in the treaty.

The definition of written involves any communication method which can act as a recorded report. UNCITRAL Model Law and the New York Convention are not designed in a way to typically validate the electronic arbitration. Electronic devices, however, are considered equal to traditional communication tools such as telegram and letters. Therefore, considering the objective and function, we can generalize this interpretation in accordance with contemporary technology and New York Convention [3].

### ONLINE ARBITRATION PROCESS

Here, we review the arbitration proceedings in online arbitration. Then, notifying the arbitration and sentencing are then reviewed.

### HOW TO ISSUE THE VERDICT AND ITS VALIDITY

Concerning the verdict, online arbitration might be performed in different ways. One method is to use current regulations for conventional arbitration such as UNCITRAL Arbitration Rules. Another method is to consider appropriate communication tools in online arbitration. It is important to know that arbitration rules cannot be ignored and some parts of traditional arbitration needs to be taken into account even if all the procedures are online. Otherwise, fair trial or the government's commitment to the court verdict cannot be guaranteed [4]. According to the principle of autonomy, both parties are free to agree to conduct a part or all parts of online arbitration using electronic devices, or ignore electronic devices [5]. We need to emphasize that any type of arbitration including online arbitration needs to be performed in line with general principles of arbitration and mandatory norms. Such rules must not be ignored by both parties because the principle of autonomy cannot underestimate the existing mandatory norms. The principles of neutrality and equal treatment of the parties, expressed in articles 12 and 18 of the Model Law, are among important mandatory rules. If such rules are not respected, similar to that of traditional arbitration, online arbitration is challenged concerning the validity [2]. In order to ensure the justice and respect for the principles of mandatory arbitration procedures, the use of electronic devices, regardless of its scope of function, need to be appropriately applied in the process of arbitration by the court or arbitrator. It must not violate the mandatory principle in order to validate and formalize it. Therefore, both parties are to some extent free to whether or not choose electronic devices in the process of arbitration. Such agreement must not violate the mandatory rules. The court or arbitrator can make decision to use electronic devices. Online arbitration might have some unsolved problems such as subpoena witness and interrogation. Providing the reasons and hearing require the presence of both parties. Arbitrators need to make decisions regarding when and where to follow arbitration formalities. The objective of online arbitration is to reduce costs and accelerate the process of arbitration. Procedures which guarantee the correct and fair arbitration must not be ignored [6]. Some procedures which cannot be performed online are physically performed such as when the arbitration is performed online but a paper document is required for the verdict. In such circumstances, the arbitrator or court needs to physically perform it and no online procedure is required. Such problems are gradually disappearing since most arbitration institutes fill out the form based upon the online rules and regulations [7]. In an online process, one party can ask for arbitration through e-mail. Informing the party can be performed through e-mail. Interestingly, most people are able to use electronic documents in the international business environment. In most cases, they convert paper documents into electronic ones. Concerning the validity, electronic requests are equal to paper ones. In terms of the function, they are equal to printed papers. In other cases, both parties can agree to follow the arbitration based upon online technology without oral hearing. In online arbitration, both parties might decide to continue online hearings. Witnesses, experts' opinions, and many other issues might be performed online using teleconferencing or video conferencing, if possible. Online arbitration can alone be enough to record the events of a given document [8]. It, however, faces two main limitations: technology and law. Concerning the former, there are some intricate issues which need to be taken into account. For example, quality technology is not accessible everywhere and impeccable communication cannot always be established. On the other hand, non-verbal cues, tone of speech, and physical behavior of parties cannot be sensed which are one of the most effective factors in arbitrator's decision [9]. The latter is associated with legal nature of some procedures in online arbitration. For example, can oath be taken online? In such cases, arbitrators are advised to perform the process of online oath as a respected observer or similar mechanism that would do credit to provide the oath (ibid). Another important issue is the place of arbitration. As it is known, place of arbitration is a determinant in conventional arbitration. If arbitration is fully performed online and both parties and/or arbitrator are in different location, then determining the place of arbitration seems impossible. Some researchers have concluded that cyber arbitration has no location [10] because it is not related to geographical territory [9]. Some other authors also believe that online arbitration has no place based upon the theory of lack of spatial settlement [6]. Such interpretation is problematic, challenging the online arbitration. Determining the place of arbitration is very difficult in online arbitration [1]. In international arbitration, the place of arbitration is geographically clear with multiple legal consequences

[11]. Article 20 of the UNCITRAL Model Law, taken by modern and advanced arbitration rules, gives the freedom to select their place of arbitration [6]. In cases where the location of arbitration cannot be agreed, the place needs to be determined by the court considering the circumstances such as the comfort of parties. Therefore, determining the place of arbitration can be obtained through the both parties and arbitrators. Another question worth mentioning is the validity of issued verdicts. Are they valid or not as that of conventional verdicts? Undoubtedly, the basis of verdict's validity concerning the electronic arbitration is the New York Convention. Despite written nature of verdict, the convention emphasizes that both parties must follow a signed verdict. It is, however, implied that it means the traditional verdicts mainly issued through paper formalities. The uncertainty here causes us to interpret the convention in favor of online arbitration. Some national rules are, however, inconsistent with formal requirements applicable for online arbitration. Some scattered rules have caused the researchers to hesitate the fact that e-verdict is applicable or not. Some researchers have recommended that New York Convention review can be beneficial for more legal safety of e-verdicts. Therefore, it is claimed that secure e-document, considering the ultimate objective of New York Convention, can be considered the main document. It seems that passing rules concerning the validity of e-documents and internet documents can certainly be an important issue in online arbitration [2].

### Notification and enforcement of arbitration issued online

Notifying arbitration is important because it dramatically affects the procedure of online arbitration. This allows the parties to know the verdict and then take the next steps because the verdict in arbitration is judged immediately after notifying [12]. Therefore, notifying is very important and effective. Notifying through electronic devices is very easy and exact using the current rules notifying a verdict by a safe e-mail can record concerns regarding this issue such as date of notifying, time of reception, and even time of studying. Undoubtedly, 1996 English Arbitration Act is one of the freest and best national rules in this regard which can be considered an appropriate model. Article 1 Section 55 states that both parties are free to agree on the condition of notifying the verdict. In such cases, both parties can easily agree on being notified by e-mail, or accessed by any safe operating system [9]. It seems that using e-devices for notifying the verdict is correct and valid considering the principle of autonomy because Article 458 Code of Civil Procedure argues that if both parties have not predicted a special method for notification, this will be performed by the court based upon the Code of Civil Procedure. It means that if a certain method is considered for notification, the principle of autonomy requires that the same certain method is validated [13]. In organizational arbitration, if both parties have not agreed on the notification of arbitration, it is preformed based upon rules, meaning that it can be done by e-mail, too provided that e-mail is able to clarify the time and date of notification and all security procedures have been met [12]. Arbitrator can determine how to notify the verdict. Therefore, it seems that sending and notifying the arbitration and even warnings are expectable by e-devices such as fax and e-mail. In developed countries, Internet, post, telephone, etc. are used to notify the verdicts [14]. Online notification does not meet the legal requirement of written notification. In order to meet the safety procedure, the verdict needs to be archived, too (ibid). Enforcement of arbitration happens after the notification. International enforcement is one of the most attractive and distinguished features of international business arbitration. Online arbitration has the same features of conventional verdicts and they are final and ultimate. 1958 New York Convention is an acceptable document by most countries worldwide, providing sufficient guarantee to recognize and enforce arbitration. Based upon the Article 5, the winning party can ensure the formalities of enforcement. This convention along with the principle of neutrality and independence has caused practically easier enforcement of verdicts than public ones. In online arbitration, real world rules are applicable to identify and enforce the arbitration. Concerning the enforcement, all parties are not expected to follow the verdict after notification. Likewise, it does not happen in conventional and traditional arbitration. Undoubtedly, no difference is found between the conventional and electronic verdict. Therefore, it seems that the executive mechanism of New York Convention necessitates the consideration of New York Convention as the spinal cord of international online business arbitration [2].

### EFFECTIVE FACTORS TO DEVELOP ONLINE ARBITRATION

Most people imagine that a good relationship is required between parties and arbitrator for a successful arbitration. However, this is not enough for a correct arbitration. The arbitrator needs to learn the fair and neutral arbitration. To achieve such goal, other factors are essential to develop arbitration as follows:

#### Building Trust

Trust is one of features of arbitration. It is essential to have trust between parties and arbitrator. In online arbitration, building trust is a little more complex than conventional arbitration because parties do not know each other. The fact that the parties do not know each other and the communication is performed through cyberspace makes the arbitration more difficult in order to manage the actions and reactions, or use the skills to realize the cyberspace and reactions [15]. It is also more difficult to maintain and strengthen the trust. Therefore, online arbitration must have a special strategy in this regard.

## Parties` Identities and Digital Signature

Lack of clear identity is another important issue discussed in arbitration. The identity needs to be authenticated. One of the best strategies is encryption performed through the digital signature. Digital signature can play a key role in guaranteeing the accuracy and correctness, and ultimately building trust. Fortunately, in Iran, positive measures have been taken in this regard after the adoption of the Electronic Commerce Act and requirement of public state organizations to use e-government instead of paper procedures including e-identity and signature in banking system. In Europe, e-signatures are considered an appropriate alternative for conventional signature. Authentication and witnesses introduced by both parties is performed by the arbitrator and the arbitrator can take advantage of IT specialist in order to ensure the correct procedure [4].

### Information security

The security of information is another important factor worth mentioning in Internet exchange. In most online arbitrations, one or both parties tend to confidentiality of all process. Internet is an open network which might have a lower level of security compared to fax, letter, or telephone. Hackers are a threat to disclose the information. Encryption is therefore an important factor in the security of information. Encryption enables both parties to communicate safely. Confidentiality is an essential element for a successful online arbitration. All communications is performed in unsafe forms online. There are multiple temporary versions to transfer information online which is the nature of Internet [2]. Therefore, encryption is the best method to maintain the security of information. Encryption is automatic process of making information inaccessible to unauthorized persons performed by an algorithm and code. Decryption is the reverse procedure. It is a good method to guarantee the confidentiality of an asymmetric system. There are two keys for encryption and decryption. It means that no one is able to read the message without the code. The code is separately sent to the receivers. When the confidentiality is ensured by encryption, both parties and arbitrators are allowed to check the process of arbitration any time. It is not necessary to write any document since everything is digital

### Privacy

Privacy is another important issue in online arbitration. Parties need to be aware of places where the secured information is used and saved. This is possible using a strategy to guarantee the maintenance of privacy of all people involved in online arbitration. Encryption plays a key role to maintain the privacy. It is necessary to know that HTTP technology is used for online arbitration because is a beneficial technology in the security of network. Meanwhile, it can be dangerous and abused.

### Developing electronic infrastructures

Access to Internet is a basic need for successful online arbitration worldwide. Internet is required prior to online arbitration. This is fortunately welcomed in Iran so that 7.5 million people have been using Internet in 2006. Iran scored the second in using Internet in the Middle East. The growth was, however, not similar in different parts of Iran. Most Internet users are residents in urban areas and teenagers and the young account for most of users. Quality Internet is another important factor. Positive steps have been taken in recent years to reach the international standards in this regard [2]

## CONCLUSION

By expanding the use of electronic devices for transactions in cyberspace, some methods need to be taken into account to resolve the disputes resulting from the electronic transactions. Online techniques are one of these methods. All measures in conventional arbitration need to be followed in online arbitration. Arbitration agreement is one of written arbitration rules pointed out in many rules. Neutrality and equality are two important principles which need to be respected otherwise they would violate the verdict. Online verdicts are valid similar to conventional ones so they need to be notified to both parties. The ground needs to be prepared to encourage people to use online arbitration. Building trust is one of them. Authentication, security of information exchange, and privacy need to be guaranteed through encryption and digital signature. Therefore, some rules are required in this regard.

### CONFLICT OF INTEREST

There is no conflict of interest.

### ACKNOWLEDGEMENTS

None

### FINANCIAL DISCLOSURE

None.

## REFERENCES

- [1] Hill R. [1997] The Internet, electronic commerce and dispute resolution: comments. *Journal of international arbitration* 14(4):103-110.
- [2] Masoudi R. [2014]. *Online Arbitration*, 1st Edition, Tehran: Behineh Press
- [3] Rule C. [2002] Online dispute resolution for business: e-commerce, consumer, employment, insurance and other commercial conflicts. *Journal of Dispute Resolution*, 3(4):67-76
- [4] Elsan M. [2006]. *Legal Aspects of Online Arbitration*. Qom News Letter 3(2):79-106
- [5] Katsh M. [1995] Law in digital world. *International Review of Law Computer and Technology* 17(1): 33-41
- [6] Yu Hong-lin & Motassem N. [2003] Canon line arbitration exist within the traditional arbitration framework?. *Journal of international arbitration*, 20(5):463-473.
- [7] Schellekenes M. [2002] Online arbitration and e-commerce. *Journal of E-Commerce* 2(4):43-54
- [8] Wang F. [2008] *Online dispute resolution: technology, management and legal practice from an international perspective* Oxford, England. 1-147.
- [9] Hornle Julia. [2003] Online dispute resolution: The emperor s new cloths? Benefits and pitfall of online dispute resolution and its application to commercial arbitration. *International review of law computer & technology* 17(1):1-17.
- [10] Carrington P. [2000] Virtual arbitration. *Journal of international arbitration*, 3(3):45-55
- [11] Girsberger, D, Schramm D. [2002] Cyber-arbitration. *European business organization law review* 3(3): 611-628.
- [12] Cachard O. [2003] International commercial arbitration-electronic arbitration. *Journal of international arbitration* 4(5):23-35
- [13] Tavasoli N, Badri Zadeh S. [2014]. *Business Arbitration in Cyberspace*. *Journal of Legal Studies* 6(1):61-85.
- [14] Aboutorabi M. [2008] *Online Arbitration and its Legal Affairs*, Master Thesis. Shahid Beheshti University
- [15] Katsh E, Rifkin J, Gaitenby A. [2002] E-commerce, e-disputes, and e-dispute resolution in the shadow of e-bay law. *Journal of E-Commerce* 3(4): 70-78.
- [16] Pournouri M. [2003]. Supporting the verdicts in Iran. *Journal of Arbitration*, 3(3): 209-215.
- [17] The New York Convention on the recognition and enforcement of foreign arbitral award done at New York, 10 June 1958.
- [18] UNCITRAL Model Law on Electronic Commerce in 1996.
- [19] UNCITRAL Model Law on international Commercial Arbitration.
- [20] Vahrenwald, A. [2000] Out of court dispute settlement systems for e-commerce. *Report on legal issues* 5(2):1-25

\*\*DISCLAIMER: This article is published as it is provided by author and approved by reviewer(s). Plagiarisms and references are not checked by IIOABJ.