The Admissibility and Enforceability of Electronic Arbitration

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29MAY2023

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Abstract

Arbitration is a form of dispute resolution where parties agree to submit their disputes to a neutral third party, known as an arbitrator, who makes a binding decision. With the increasing use of technology in business and commerce, electronic arbitration, also known as online arbitration, has become more common. The admissibility and enforceability of electronic arbitration have been subject to much debate and controversy due to concerns surrounding the validity of electronic signatures, the reliability of electronic evidence, and the enforceability of awards in different jurisdictions.

This article provides an overview of the admissibility and enforceability of electronic arbitration. It begins by defining electronic arbitration and its key features, including electronic signatures, electronic evidence, and the use of technology to facilitate the arbitration process. It then discusses the legal framework governing electronic arbitration, including international conventions, national laws, and institutional rules. It highlights the challenges associated with the admissibility and enforceability of electronic arbitration agreements, arbitration proceedings, and the e-awards.

The article concludes by emphasizing the importance of ensuring the admissibility and enforceability of electronic arbitration to promote its wider use and acceptance as a viable alternative to traditional dispute resolution mechanisms. It argues that a clear legal framework, robust authentication mechanisms, and reliable technology are essential to ensure the validity and enforceability of electronic arbitration awards.

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Introduction

This Our world changed to online dispute resolution procedures throughout the pandemic era. Online dispute resolution platforms, such as arbitration, have greatly benefited from the growth of information technology. Worldwide, companies are utilizing new electronic contracting techniques. Although there is a growing amount of work discussing the use of Information and Communications Technology (ICT) in arbitration as the primary adjudicatory and adversarial scheme for the global business world, few have made an effort to identify or give "e-arbitration" a unique definition that makes its boundaries obvious.

In its strictest sense, e-arbitration refers to the incorporation of ICTs into arbitral procedures to the extent that those processes are performed entirely or largely online. Online submissions, hearings, filings, and awards would all fall under this category. However, since this idealistic view of e-arbitration is not shared by everyone, it is enough to point out that many institutions and ODR providers make varying attempts to incorporate ICTs into arbitral proceedings in an effort to portray the procedure as a quick, inexpensive, and effective e-arbitration scheme[2].

E-arbitration is thought to offer many benefits over offline traditional arbitration. To start, e-arbitration is typically a quick process. Second, it is significantly more economical. Thirdly, it provides continuous availability and accessibility. Fourthly, it provides a better case management system. Fifth, it is appropriate for high-value, extremely complex conflicts as well as modest claims.

This paperless procedure has raised numerous legal issues about the enforceability and admissibility of those documents. A similar problem occurs with the arbitration process. E-

[2] Mohamed S. Abdel Wahab, ODR and E-Arbitration, p 402.

arbitration poses a number of issues because it is frequently believed that the sufficient and established legislative structure that controls offline arbitration is not keeping up with e-arbitration. Technical and legal considerations are typically separated out as e-arbitration-related concerns. Therefore, this article aims to study the legal issues related to the admissibility and enforceability of E-Arbitration under national laws and international conventions. This article is divided into three sections, firstly we will study challenges relating to the enforcement and admissibility of arbitration agreements. Secondly, challenges related to e-arbitration processes will be analyzed. Thirdly and finally, we will discuss challenges related to the enforcement of e-arbitral awards.

E- Arbitration Agreement

International conventions and model laws[3] regulate the current legal framework for e-arbitration. Moreover, some institutional rules, like those of the AAA, ICC, WIPO, and HKIAC, provide for accelerated online processes.

The obstacle to the spread of e-arbitration with regard to arbitration agreements would be the writing requirement and whether it could be satisfied electronically by electronic writing and signatures in jurisdictions closely adhering to it. In addition, we will discuss in this section electronic consent to e-arbitration.

[3] See, for instance, the UN Convention on the Use of Electronic Communications in International Contracts (2005), which states in Article 20 that it applies to the 1958 New York Convention, the Model Law, the UNCITRAL Arbitration Rules (1976 as amended in 2010), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

The writing requirement under the NYC and the UNCITRAL Model Law

An arbitration agreement needs to be in "writing", according to the governing principle in arbitration law and practice. It seems necessary to clarify the scope of such requirement in reference to the landmark international arbitration instruments, particularly the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "NYC"), as the "writing" requirement continues to pose some challenges regarding the essence of such requirement and whether it includes electronic writing or not.

The formal writing requirements of the provisions of the New York Convention are raised in some ways by the electronic conclusion of arbitration agreements. The wording "in writing" shall include an arbitration clause in an arbitration agreement that has been signed by the parties or that is "*included in an exchange of letters or telegrams*," as defined in Article II of the NYC[4]. The 1985 UNCITRAL Model Law (before the 2006 amendments) contains a similar provision regarding the necessity of a written agreement in Article 7(2)[5].

Naturally, today's reality does not align with these enduring necessities. The New York Convention's authors in 1958 failed to foresee the widespread adoption of electronic exchanges in day-to-day business activities. However, more methods than those expressly stated in the New York Convention may be available under current legal systems to establish consent.

The NYC itself has not provided guidance on the scope of the "writing requirement" since the 2006 amendment to the Model Law explicitly accorded "e-writing" the same weight as paper-based writing insofar as the e-communication provided an authentic record of the

[4] Article (II) of the NYC.

[5] Article 7(2) of the Model Law.

parties' agreement to arbitrate that is incontrovertibly attributable to parties[6]. This is totally appropriate given that the Model Law was altered in 2006, a year in which the development of ICT applications was manifested as an undeniable reality.

On a related subject, the NYC was concluded in 1958, long before the ICT had attained its full potential and destiny. As a result, it is quite an ancient project[7]. Determining how to interpret Article (II) of the NYC required UNCITRAL to publish a recommendation and advisory note in 2006. Although the situations described in paragraph (2) of Article (II) are not all-inclusive, the recommendation invites member states to interpret it widely.

In essence, the UN is encouraging States to provide legal force to electronic writing, particularly if their domestic legal systems recognize and govern electronic communications, whether through e-signatures, e-evidence, or e-commerce legislation. Yet, the recognition and validity of e-arbitration agreements must be carefully considered in the context of the relevant national legislation, which must be interpreted in the context of guiding and informing international instruments[8].

Article (10.2) of the Egyptian Arbitration Law, Article (1316.1) of the French Civil Code[9], Article 1031(5) of the German Code of Civil Procedure, Section 5(6) of the English Arbitration Act, and Article 6(a) of the Federal Uniform Arbitration Act are but a few examples of the worldwide tidal wave recognizing electronic communications, documents, and

[6] Article (7) of the Model Law as adopted by the UN in 2006

[7] See R. Hill, 'Online Arbitration: Issues and Solutions', (1999) 15 *Arbitration International*, p. 199. Available at www.umass.edu/dis-pute/hill.html

[8] See S. Abdel Wahab, supra note 2 p 406.

[9] Introduced by the Law of 13 May 2000 relating to E-Evidence (*Loi sur la preuve électronique*). See the English version of the French Civil Code. Available at www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm , last accessed on 4 March 2023.

signatures, which undoubtedly affects the recognition of electronic arbitration agreements to the extent that specific requirements are met.

Electronic Consent in E-Arbitration

Another concern that may arise in an e-arbitration and is worth mentioning is how can the parties to the agreement accept the electronic offer. In other meaning, how consent can be expressed electronically?

An electronic commerce operator's customer places an online order for material. He has access to the general terms, which contain the arbitration clause, thanks to the website operator. According to American case law, simply clicking the "I accept" button constitutes a binding contract. As a result, on January 2, 2002, an American judge ruled in *I.Lan Systems, Inc. v. Netscout Service Level Corp*[10] that the user of a software program who had downloaded it and clicked the "I accept" button at the bottom of the licensing contract was obligated by the terms of the contract. The judge in this case used traditional contract law, which allows the accepter to consent through the performance of predetermined activities by the offeror[11]. The offeror's preferred manner of acceptance was reflected in this case by the button click. In American case law, this idea is well-established, especially in relation to online software sales.

Nonetheless, to begin the download, the "I accept" button must be required to be clicked and must be clearly visible. Similarly, in a ruling in *Specht v. Netscape Communications Corp*[12], the Court concluded that general terms incorporating an arbitration clause could not be invoked against a user who had downloaded a piece of software. In this case, the user didn't need to

[10] I.Lan Systems, Inc. v. Netscout Service Level Corp, Civ. Act No. 00-11489-WGY (D. Mass., January 2, 2002)

[11] Section 2-204 of the Uniform Commercial Code (UCC)

[12] Specht v. Netscape Communications Corp., 2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001).

click the "I accept" button; instead, he or she may download the software immediately by clicking the "download" link.

In conclusion, a click does not constitute approval unless it is specifically related to the general terms and shows clearly the arbitration clause. Hence, a click that merely initiates the download without any further context is regarded as inoperative.

To conclude this section, we notice that the admissibility and enforceability of e-arbitration agreements are met and considered valid under many national laws and international conventions. However, we should note that under NYC, challenges related to the writing requirements and e-signatures still persist in waiting for an amendment to keep up with the technological evolutions.

E-Arbitration Proceedings

Arbitral processes, in general, relate to the steps and methods used by an arbitral tribunal or by an institution to administer the arbitration. In general, e-proceedings begin with the filing of an e-request for arbitration and include e-hearings, e-submissions and e-production of evidence and documents, e-deliberations, e-communications, and finally e-awards. However, in this article, we will only cover two important aspects of the e-arbitration proceedings which are the e-arbitrator selection and the e-seat and place of proceedings.

Before discussing the issue related to the selection of e-arbitrators, it is worth mentioning that in e-arbitral procedures, the essential standards of due process should be upheld. To guarantee the impartiality and fairness of decisions, due process is necessary. The ability to present evidence and counterclaims, as well as the right to be informed of the other party's comments, should be granted to all parties. However, lengthy submission deadlines and rigid formal

procedural norms are not necessary for online arbitration specifically because they will delay making judgments. Fairness is achieved and due process is followed insofar as the parties are treated fairly and given equal opportunities to make their cases[13].

Selection of E-Arbitrators

The nature of e-arbitrators and the possible use of ICTs and AI to replace the human factor are other aspects of e-arbitration that are relevant to arbitral procedures. The most recurring question is whether AI and non-human intelligence can provide a replacement for human arbitrators. This is a crucial subject that has not been adequately addressed in the context of electronic arbitration.

In theory, it is essential to remember that nearly all current laws and rules assume that arbitrators should be physical persons and have the requisite independence, impartiality, capacity, and ability to resolve a dispute.

This condition and the general presumption that an arbitrator must be human are clearly supported by the most recent French Law on Arbitration, published as a result of Decree No. 2011-48 of January 13, 2011. "*Only a natural person with full capacity to execute his or her rights may act as an arbitrator"*, reads Article (1450) of the French Arbitration Law. This is further supported by Egyptian Arbitration Law No. 27 of 1994's Article (16), which states that an arbitrator cannot be a minor, be insolvent, or be disabled in any way. In a similar manner, Article (26) of the English Arbitration Act 1996, which addresses what happens in the event of an arbitrator's passing, unquestionably assumes that an arbitrator is a human being by nature and by default.

[13] See for example Section 33 of the English Arbitration Act 1996); Article 18 of the Model Law.

While other States worldwide undoubtedly share this criterion[14], as demonstrated by English, French, and Egyptian laws, the question of whether an arbitrator can be an artificial person or non-human based intellect merits serious examination.

In short, it is said that human interaction is crucial to the arbitration process' success and that human arbitrators are an unquestionable necessity. The socio-humane print, which only humans are capable of autonomously displaying, must be distinguished from rational and logical judgment, which both natural and artificial intelligence are capable of doing[15]. Yet, since AI is a big debate that falls outside the scope of this article, we can conclude by saying that it is still unclear how national courts and laws will change in response to such possibilities of incorporating AI into arbitration proceedings.

Place of proceedings and E-Seat

Choosing the seat or venue of arbitration is in fact significant to the arbitration process. The nationality of an arbitral award is typically determined by the seat or location of the arbitration, which in turn determines which courts have primary jurisdiction over any potential appeals or challenges to the arbitral award; and can determine in some cases the applicable law.

In e-arbitration, since the proceedings typically take place in a virtual setting between parties and arbitrators who may be virtually dispersed, determining the seat of arbitration may pose certain problems and challenges in the event that the parties are unable to agree on a specific seat or place of arbitration. Some academics support the idea that the location of the

[14] See for example Article 180(2) of the Swiss Private International Law; section (5) of the US Federal Arbitration Act.

[15] See S. Abdel Wahab, supra note 2 p 421.

servers[16], the computer, or the location where the arbitrator's emails are sent and received should serve as the seat in the event that one cannot be determined or agreed upon[17].

However, it is argued that the aforementioned standards could be hard to detect or may be unclear, and they might not accurately reflect the parties' expectations or intentions. As a result, it is proposed that, in the absence of a seat in the arbitration agreement between the parties, the following considerations shall apply: (1) the arbitral tribunal will decide such seat of arbitration[18]; (2) the provider of e-arbitration shall determine the seat[19]; (3) the seat will be the e-platform utilized for the conduct of the e-arbitral proceedings[20].

The aforementioned requirements would apply only in the case that the parties cannot agree on the seat. It is important to note in this context that e-arbitration providers, in contrast to traditional offline arbitration providers, rarely, if ever, include in their rules provisions regarding the determination of the seat in the event that the parties are unable to agree, which could be very problematic in cases of cross-border disputes[21].

[16] M.H.M. Schellekens, 'Online Arbitration and E-commerce', (2002), 9 *Electronic Communication Law Review*, p. 122.

[17] A. Vahrenwald, 'Out-of-Court Dispute Settlement Systems for E-Commerce', (2000), *Report on Legal Issues Part IV: Arbitration*, p. 87. Available at: http://tbplaw.com/data/part4.pdf , last accessed 8 March 2023.

[18] See for example Article 18(1) of the UNCITRAL Arbitration Rules; Article 20(1) of the Model Law; Article 18(1) of the CRCICA Arbitration Rules.

[19] See for example Article (16.1) of the LCIA Arbitration Rules; Rule (10) of the AAA Arbitration Rules; Article (18.1) of the ICC Arbitration Rules

[20] See S. Abdel Wahab, supra note 2 p 422.

[21] The following organizations have adopted arbitration rules without mentioning the venue or location of the arbitration: eCourt www.ecourt.co.uk/arbitration.php ; arbitration.in www.arbitration.in ; the Czech Arbitration Online Platform ADR.eu www.adr.eu/ .

E-Arbitral Awards

In general, e-writing, e-signatures, e-notifications, and enforceability are general concerns related to e-awards. However, in this paper, we will only cover the enforceability of e-awards as all of the other issues falls outside the scope of this article.

The final and binding nature of e-awards and the application of the NYC to them both give rise to questions about the enforceability of e-awards.

It is important to keep in mind that not all e-awards are final and binding while discussing their finality and bindingness. The decision of the administrative panel, for instance, is neither conclusive nor legally binding under the online arbitration procedures of ADR.eu, which govern domain name disputes through electronic proceedings[22]. As a result, an e-award rendered does not meet the criteria for a final, enforceable award that can be enforced in accordance with NYC.

On the other hand, other e-arbitration service providers affirm the finality and binding character of their awards[23], therefore necessitating the need to clarify the enforceability of e-awards under the NYC since it is most usually invoked to enforce foreign arbitral decisions, especially that more than 160 States have acceded to the Convention[24].

It is important to keep in mind that e-awards can be domestic or international in nature while discussing the enforceability of e-awards. The state of enforcement and whether its laws recognize and/or enforce e-awards will determine whether an e-award is enforceable if it is

[22] ADR.eu website and rules available at http://eu.adr.eu/arbitration_platform/overview/index.php last accessed on 6 March 2023.

[23] See for example: ZipCourt.com available at www.zipcourt.com last accessed 5 March 2023; and net-arb.com.

[24] New York Arbitration Convention available at https://www.newyorkconvention.org/in+brief#:~:text=The%20Convention%20on%20the%20Recognition,by%20more%20than%20160%20nations. Last accessed on 7 March 2023.

rendered domestically. This determination will be made in line with the procedures and applicable law currently in effect and enforced by national courts.

However, if an e-award is classified as a foreign award, which is typically the situation when an award is sought enforced in a different State, then it may be qualified for enforcement under the NYC in cases of cross-border disputes[25]. Nonetheless, due to the fact that other national laws demand that an award should be written in order to be recognized, the institution rendering the E-award must still issue a sealed printed copy of the E-award that is signed by the arbitrators and transmit it to the parties through ordinary mail[26].

Accepting the award in its electronic form is acceptable since a number of national rules governing arbitration do not specify a specific form before courts or declare that the form of the arbitral award will be in accordance with what the parties agree upon.

Nevertheless, an e-award is typically assumed to meet the requirements for recognition and/or enforcement outlined in Article V of the Convention in order to be eligible for enforcement and/or recognition under the NYC[27]. Although these conditions apply to both traditional and electronic arbitration equally, this section is not meant to provide an overview or analysis of these many different conditions, three brief remarks in connection to them deserve to be mentioned in the context of electronic arbitration:

- Initially, the e-award must be final and binding in order to be eligible for enforcement and/or recognition.

[25] For example, Section 52 of the Arbitration Act of 1996; Article 189(1) of the Swiss Code on Private International Law.

[26] For example, Section 52 of the Arbitration Act of 1996; Article 189(1) of the Swiss Code on Private International Law.

[27] Article V of the New York Convention

- A second condition for an e-award is that it must adhere to procedural public policy norms. In an electronic setting, the use of ICTs may affect a party's ability to submit its case. It bears emphasizing that each party must be given an equal and reasonable opportunity to make its case. On this basis, e-awards may be deemed to be against the forum's public policy if a party was hindered or constrained from presenting its case due to unavoidable technical issues[28].
- A third expectation of an e-award is that it will engage with disputes that can be arbitrated electronically.

Given the foregoing, it is clear that E-awards are equivalent to traditional awards; nonetheless, practical problems with such awards typically occur because not all courts have computerized systems in place and because not all states are at the same technological level. But, using such an electronic method of awarding has become necessary in these modern times.

Conclusion

In many countries around the world, electronic arbitration is now universally acknowledged as being admissible and enforceable. The use of electronic arbitration enables remote participation by the parties, which is advantageous in circumstances where in-person attendance may be challenging or impossible. A wider number of parties can participate in electronic arbitration since it can be more affordable than conventional in-person arbitration. As mentioned above, a number of factors, such as the parties' jurisdiction, the laws that apply, and the terms set forth in the arbitration agreement, affect whether or not electronic arbitration is admissible and enforceable. Generally speaking, as long as they adhere to certain

[28] T. Schultz, *Information Technology and Arbitration*, Kluwer Law International 2006, p. 141.

requirements, electronic arbitration agreements are recognized and enforceable under most legal systems.

From one country to the next, different legal systems govern electronic arbitration. While some nations have included electronic arbitration in their pre-existing arbitration rules, certain countries have passed unique legislation that recognizes and governs it. Overall, even though the majority of nations now accept that electronic arbitration awards are admissible and enforceable, several international treaties, like the NYC, still need to revise their provisions in order to comply with those criteria.

One of the key requirements for electronic arbitration to be admissible and enforceable is that the parties must have explicitly agreed to the use of electronic communication and arbitration. The agreement must be in writing, and the parties must have provided their consent in a manner that demonstrates their understanding and acceptance of the terms and conditions.

The accuracy and integrity of the electronic communication used for the arbitration processes are important additional considerations. The electronic communication technique must be safe, private, and capable of producing an accurate record of the proceedings, according to the parties.

In conclusion, electronic arbitration is a viable and effective alternative to traditional in-person arbitration, and its admissibility and enforceability have been widely recognized and accepted. As technology continues to advance, we can expect electronic arbitration to become even more prevalent in resolving disputes.

Bibliography

Legislative Sources

1. American Arbitration Association (AAA) Rules
2. Cairo Regional Center for International Commercial Arbitration Rules (CRCICA) 2011.
3. Egyptian Arbitration Law No. 27 of 1994
4. English Arbitration Act 1996
5. French Civil Code.
6. French Law of 13 May 2000 relating to E-Evidence
7. French Law on Arbitration, Decree No. 2011-48 of January 13, 2011
8. German Code of Civil Procedures.
9. International Commercial Chamber (ICC) Arbitration Rules 2021.
10. London Court of International Arbitration Rules (LCIA) 2014.
11. Swiss Private International Law Code (PILA) 1987
12. UNCITRAL Arbitration Rules (including all revisions)
13. UNCITRAL Model Law on International Commercial Arbitration June 211985, 24 I.L.M. 1302 (including amendments).
14. Uniform Commercial Code (UCC) 1952
15. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, June 10 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3

16. US Federal Arbitration Act 1926.

Court Decisions and Jurisprudence

1. List Lan Systems, Inc. v. Netscout Service Level Corp, Civ. Act No. 00-11489-WGY (D. Mass., January 2, 2002)

2. Specht v. Netscape Communications Corp., 2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001).

Secondary Sources

1. Mohamed S. Abdel Wahab, ODR and E-Arbitration, p 406.

2. A. Vahrenwald, 'Out-of-Court Dispute Settlement Systems for E-Commerce', (2000), *Report on Legal Issues Part IV: Arbitration*, p. 87. Available at: http://tbplaw.com/data/part4.pdf

3. M.H.M. Schellekens, 'Online Arbitration and E-commerce', (2002), 9 *Electronic Communication Law Review*, p. 122.

4. R. Hill, 'Online Arbitration: Issues and Solutions', (1999) 15 *Arbitration International*, p. 199. Available at www.umass.edu/dis-pute/hill.html

5. T. Schultz, *Information Technology and Arbitration*, Kluwer Law International 2006.

6. eCourt www.ecourt.co.uk/arbitration.php

7. arbitration.in www.arbitration.in

8. Czech Arbitration Online Platform ADR.eu www.adr.eu/ .

9. ADR.eu available at http://eu.adr.eu/arbitration_platform/overview/index.php last accessed on 6 March 2023.

10. ZipCourt.com available at www.zipcourt.com last accessed 5 March 2023

