

Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries

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Ihab Amro (University of Athens)

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This post presents an overview of online arbitration (e-arbitration') as part of online dispute resolution ('ODR') techniques from both theoretical and practical perspectives.[fn]For a more detailed analysis of these issues see: Ihab Amro, *Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries*, Cambridge Scholars Publishing, UK, First Published 2019.[/fn]

E-arbitration is a major component of online dispute resolution ('ODR') in which parties can solve any dispute arising out of their contractual relationship online. E-arbitration is mainly used for the resolution of Business to Business ('B2B') cross-border e-commerce disputes, and partially used for the resolution of traditional cross-border commercial disputes.

The form requirement may not be as important in e-arbitration

In e-arbitration, the arbitration agreement is concluded, and the arbitral process is

conducted, online. In this regard, some commentators observe that *the form requirement in e-commerce contracts, including an arbitration agreement, is not as important if the electronic document is sufficiently definite, setting up clear signs which can be read in the future.*^[fn] See Van Cutsem, Jean-Pierre, Viggria, Arnaud, and Güth, Oliver, *E-Commerce in the World –Aspects of Comparative Law–*, Bruxelles, Bruylant, 2003, at p. 95.^[/fn]

National laws regulating arbitration in many civil law countries have broadened the form requirement of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('The New York Convention'), including Germany, France, Austria, Slovenia, Greece, The Netherlands, Ukraine, and Switzerland. Under the laws of these countries, the form requirement includes electronic communications such as e-mail communications.

In practice, for example, in *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*, the Swiss Supreme Court interpreted Article II (2) of the New York Convention broadly, considering that “exchange of letters or telegrams” includes any other means of communications. The Court further observed that the form requirement of the New York Convention was met since it was equivalent to the form provided by Article 178(1) of the Swiss Code on Private International Law.^[fn] This decision is cited as BGE 121 III 38, 44, E.2c.^[/fn]

The e-arbitration hearing can be different than traditional arbitration

In online arbitration, the e-arbitral process, including the hearing, is entirely conducted online. For the purposes of such process, an e-file for each e-commerce dispute is created and administered by the online service provider. This e-file includes all notifications and communications between the parties and the arbitrator(s), as well as the documents submitted by the parties. In traditional arbitration, parties may likewise agree to hold hearings online insofar that is permitted, either by national laws or by the rules of the arbitral institution. For instance, the 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (“ICAC”) provide under Article 30(6) that either party has the right to request to participate in the hearing by means of videoconferencing, i.e. e-hearing. The arbitral tribunal will

bear in mind the circumstances of the case, the parties' position, and its technical feasibility when ruling such request.

The e-arbitration award is recognized under some national arbitration laws

In online arbitration, an award is rendered online. An e-arbitral award should be binding unless otherwise agreed by the parties before the commencement of the arbitration. In case of non-binding arbitration, the parties retain the right to submit the dispute to a court or to a binding arbitration. The arbitrator(s) shall notify the parties of an arbitral award via digitally signed e-mail to the parties' e-mail addresses. The arbitrator(s) shall also notify the online arbitral institution of an e-award. Once an e-award is notified, the institution will close the e-file and will ask the parties to comply with the e-award. The institution may also publish an e-award on its website. Once an e-award has been rendered and notified, the losing party must comply with the award voluntarily or seek to set it aside while the winning party may seek to have the award recognised and enforced, like any other traditional arbitral award.

Some national laws regulating arbitration in both common law and civil law countries may not require an award to be in a specific form, and consequently an electronic form of an arbitral award will be recognised. In the UK, a common law jurisdiction, for example, Section 52 of the Arbitration Act of 1996 provides, *inter alia*, that the parties are free to agree on the form of an award. Similarly, in Switzerland, a civil law jurisdiction, Article 189(1) of the Swiss Code on Private International Law, entitled Arbitral Award, provides that the arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties. Apart from that, in The Netherlands, the Arbitration Act contained in the Code of Civil Procedure provides in Article 1072(b)(3) that an arbitral award may be made and signed electronically.

Practical thoughts on issuing an e-arbitration award when the award must be in writing

Other national laws may require that an arbitral award must be in writing. For avoiding this practical difficulty, it is desirable that arbitrators issue a signed and printed copy of an e-award. If online institutional arbitration is applicable, the ODR

provider “institution” must issue a printed copy signed by the arbitrator(s), sealed by the institution and send it to the parties through regular mail.

Making of online arbitral awards may face some challenges soon, including the use of a machine arbitrator, noting that most national arbitration laws of both common law and civil law countries provide that only natural persons can act as arbitrators. However, one may observe that “such cooperation between artificial intelligence and arbitration will be beneficial for all participants involved in arbitration because it will provide both parties and arbitrators with additional tools that help to make dispute resolution more effective”.^[fn] Pavlovskaya Veronika raised this issue in her presentation during the 10th ICC YAF-YAAP Joint Conference, entitled: “Young Approaches to Arbitration”, Vienna, March 24, 2018, unpublished yet.^[/fn]