

E-Arbitration and International Commercial Dispute Resolution

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ABSTRACT

The nature of disputes rising at a far greater rate than ever before as people began to travel longer distances and communicate from further away meant that disputes developed as they grew in number and complexity. Alternative dispute resolution (ADR) measures were employed. However, the rapid rise in B2C electronic transactions produced a number of concerns for businesses and consumers. The traditional dispute resolution through court proceedings is unsuitable for problems that arise in e-commerce. Therefore, the global arena is witnessing a departure from the traditional process of dispute resolution to online dispute resolution (ODR) in its various forms. This article analyses all the alternative dispute resolution methods, especially e-arbitration used to settle disputes. And what is the Distinguish between e- arbitration and other alternatives.

Keywords: internet, e-commerce, commercial disputes, alternative dispute resolution, e-arbitration.

1. INTRODUCTION

The nature of disputes rising at a far greater rate than ever before¹ as people began to travel longer

distances and communicate from further away meant that disputes developed as they grew in number and complexity. Alternative dispute resolution measures were employed. For example, by employing ADR, the number of United States federal civil cases resolved by trial as well as state courts decreased by 84% between 1966 and 2002, a dramatic decrease referred to as “The Vanishing Trial”.² However, the rapid rise in B2C electronic transactions over the past few years has produced a number of concerns for businesses and consumers. One of the major issues is that traditional dispute resolution through court proceedings is unsuitable for the many problems that arise in e-commerce due to the nature of the internet. Cross-border online shopping is confronted with issues (including misrepresentation, non-delivery of goods, and the difficulty of receiving refunds), and such internet-based transactions cause legal uncertainty over which jurisdiction is competent. The lack of effective consumer redress when the parties are located in different countries is a major barrier to consumer confidence in dealing with all but the most well-known and trusted brands. Therefore, in order to develop e-commerce, all parties (businesses, consumers, and governments) should recognize that consumer confidence must be strengthened. Thus, the problem of cross-border

¹ LawTeacher, 'Cyber Arbitration and Effective Dispute Resolution' (*LawTeacher*, 2019) <[https://www.lawteacher.net/free-law-essays/commercial-law/cyber-arbitration-and-](https://www.lawteacher.net/free-law-essays/commercial-law/cyber-arbitration-and-effective-dispute-resolution-commercial-law-essay.php?vref=1)

[effective-dispute-resolution-commercial-law-essay.php?vref=1](https://www.lawteacher.net/free-law-essays/commercial-law/cyber-arbitration-and-effective-dispute-resolution-commercial-law-essay.php?vref=1)> accessed 20 August 2019.

² Stipanowich Thomas J, 'Arbitration: The new litigation' (2010) U Ill L Rev 1,4

disputes must be resolved.³ In these circumstances, the global arena is witnessing a departure from the traditional process of dispute resolution to online dispute resolution (ODR) in its various forms.⁴

This section of the article is divided into two parts: the first part focuses on ADR and the second on ODR.

2. Alternative dispute resolution

According to Article 6 of the European Convention on Human Rights, “everyone should have effective access to the courts”. This is not to say that parties involved in a dispute cannot opt to resolve their dispute in a non-judicial manner in an alternative way if they both agree and there is some form of legal control.⁵ On this matter, former United States Supreme Court Chief Justice Warren E. Burger stated:

“The notion that most people want black-robed judges, well-dressed lawyers, and fine panelled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible”.⁶

Alternative dispute resolution encompasses all the procedures for settling legal disputes outside the courtroom, such as mediation and arbitration.⁷ The leading English text on “Range of procedures that serve as alternative to litigation through the courts for resolution of disputes, generally involving the intercession and assistance of neutral and impartial third”.⁸

The OECD published a draft on consumer protection in the context of electronic commerce

³ Bruno and Yannick Gabuthy Deffains, 'Efficiency of online dispute resolution: a case study' (2005) 60 Communications and Strategies 201,202

⁴ LawTeacher (n1)

⁵ Esther Van den Heuvel, 'Online Dispute Resolution as a solution to cross-border e-disputes' (MSc, University of Utrecht 2000)5

⁶ Pablo Cortes, 'Does the proposed European procedure enhance the resolution of small claims?' (2008) 27 Civil Justice Quarterly 83,83

⁷ Heuvel (n5) p5

⁸ Haitham AHalous, 'Online alternative dispute resolution as a solution to cross-border electronic commercial disputes', University of Leeds 2003)1

guidelines. It encourages businesses, consumer representatives, and government officials

“To work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost of burden to the consumer”.⁹

ADR attempts have been particularly visible in Europe, where cross-border disputes are widespread. ADR has the power to transcend trade boundaries and offer equal access to justice for consumers and businesses alike, so the idea of creating a single or internal market without borders in Europe has pushed the adoption of ADR solutions.¹⁰ However, it is argued that ADR itself is a low-governance field due to the fact that, in most countries, ADR practitioners are regularly unlicensed and the ADR field is, in most cases, unregulated. In order to induce trust and promote its use, ADR is regularly embedded in courts where ADR divisions are monitored and regulated by the courts. It is also a frequent practice that ADR is implanted in other wider frameworks (organizations, communities, professional organizations) that are trying to hold their members to assured standards. In the US, the joint promulgation of Model Standards of Conduct for Mediators by way of the capacity of the American Arbitration Association (AAA), American Bar Association (ABA) and Association for Conflict Resolution (ACR) in 2005 is a good example.¹¹

2.1 Types of alternative dispute resolution

2.1.1 Negotiation

Negotiation is the most common method of resolving conflicts.¹² It is one of the oldest ways of

⁹ OECD, *DRAFT RECOMMENDATION OF THE COUNCIL CONCERNING GUIDELINES FOR CONSUMER PROTECTION IN [THE CONTEXT OF ELECTRONIC COMMERCE] DSTI/CP(98)4*, 1998)

¹⁰ European Commission, 'Working Document on the Creation of a European Extra Judicial Network (EEJ-NET)', SEC (2000) 405

¹¹ Faye Fangfei Wang, *Online Arbitration* (Taylor & Francis 2017)51

¹² Cornell Law School, 'Alternative Dispute Resolution' (*Cornell Law School*, 2012)

traditional conflict resolution.¹³ It allows the parties to meet to resolve a dispute. The fundamental benefit of this method of dispute resolution is that it gives the parties authority over the process and the outcome.¹⁴ Negotiation is a procedure in which two or more parties work together to reach an agreement on their issues without the involvement of a third party.¹⁵ For example, in the United States, negotiation processes between insurance companies succeed in finding solutions, whereby “(only one-third of claims become lawsuits and only 2% of these lawsuits are decided by a court verdict).”¹⁶ Negotiation is a voluntary and non-binding procedure. It helps to maintain long-term partnerships.¹⁷ Therefore, the outcome of a negotiation is largely dependent on the disputants’ efforts to reach an agreement. In some circumstances, the resolution process may fail because the parties have different levels of power and knowledge.¹⁸ For instance, in *NVAR v. NVI*, the Belgian seller and the French buyer entered into “negotiations regarding the production and supply of papers. The parties executed a letter of intent, which expressly stipulated that the final agreement was still to be reached after subsequent negotiations”. Mainly, because it is a non-binding procedure, the buyer and the seller ended up before the Belgian Court of First Instance to settle the dispute between them.¹⁹

Negotiation has been accomplished in a number of ways. As a result, it can occur in forums on a wide range of subjects between two or more parties. The outcome of the negotiations could have an impact

on the countries, the global order, and the people who are involved in them.²⁰

2.1.2 Mediation

Mediation is a non-binding, informal process. It is a type of ADR in which the parties resolve their dispute with the assistance of a neutral mediator.²¹ The mediator does not make a decision; instead, he or she assists the opposing parties in reaching a solution that is acceptable to all parties. One of the most significant advantages of mediation is that the relationship between the disputing parties is not harmed unnecessarily. Mediation is always done on a voluntary basis; no one can be forced to participate in the process. Mediation is also voluntary in the sense that either party can withdraw from the process at any time before signing a settlement agreement. The idea behind mediation is that parties work out their differences on their own. They come up with a deal that both of them can agree on and that will be kept without having to write down any legally binding agreements.²² Parties must ensure the confidentiality of the process in divulging their positions and other sensitive information. Therefore, the parties to the dispute and the mediator sign a mediation confidentiality agreement.²³ Sharing information and taking into account each party’s concerns is a common way for parties to reach an agreement. The exchange of information could be regarded as part of the mediation process. In this procedure, the mediator exchanges information with all parties or with one or more parties. To put it another way, a process might be private or public. The format for information communication may be preferred by mediators.²⁴

In the EU Member States, the legal grounds for using mediation refer to regulations governing ADR in civil and commercial law. The most important are Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 and Directive 2013/11/EU. For example, in the Italian case *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare—Società*

<https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 24 June 2020

¹³ Clement J. Mashamba, *Alternative Dispute Resolution in Tanzania: Law and Practice* (Mkuki na Nyoka Publisher Limited 2014)59

¹⁴ Cornell Law School (n12)

¹⁵ Emine Nur Öztürk, 'Alternative dispute resolution mechanisms and compliance in international financial institutions', Bilkent University 2019)23

¹⁶ Gabuthy Deffains (n3) p207

¹⁷ Ozturk (n15) p23

¹⁸ Ozturk (n17)

¹⁹ *N.V. A.R. v. N.V. I.* (Hof van Beroep, Gent, 2001/AR/0180 Belgium)

²⁰ Ozturk (n18)

²¹ *ibid*

²² Heuvel (n7)p7

²³ Ozturk (n20) p23

²⁴ *ibid*

Cooperativa, the judgment of the Court (First Chamber) was referenced for a preliminary ruling: Consumer protection—Alternative dispute resolution (ADR) procedures—Directive 2008/52/EC—Directive 2013/11/EU—Article 3(2).²⁵

2.1.3 Arbitration

Arbitration is a form of ADR that is a way of resolving disputes outside of the court system. One or more people (the “arbitrators”, “arbiters” or “arbitral tribunal”) will decide the dispute and issue an “arbitration award”. Legally, an arbitration decision or award can be enforced in court by both parties unless all of them agree that it is not binding, at which point it cannot be enforced in court.²⁶ Arbitration is most commonly employed in business disputes, and it has significant advantages over court trials. The disputing parties can obtain a fast decision and resolution of their dispute for a lot less money than if they went to court.²⁷ Cost savings, faster resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality make arbitration a versatile substitute for civil trial, with arbitration provisions appearing in all types of contracts.²⁸

Arbitration hearings are often closed to the public, whereas court procedures are typically open to the public and the news media. The parties have the option of selecting an arbitrator with considerable legal and practical experience in the factual and legal problems at hand. The arbitration rules can be as informal or as complex as the parties agree.²⁹ The arbitration hearing can also take place at a time and location agreed upon by the parties.³⁰

²⁵ *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare—Società Cooperativa*, C-75/16:2017 (The Court (First Chamber)/Italy)

²⁶ Steven M. Sheffrin Arthur O'Sullivan, *Economics: Principles in Action* (Pearson/Prentice Hall 2007)324

²⁷ Heuvel (n22) p5

²⁸ Thomas J (n2)

²⁹ Heuvel (n27) p5

³⁰ American Arbitration Association, 'Commercial Arbitration Rules and Mediation Procedures: Including Procedures for Large, Complex Commercial Disputes

Many states have signed a 1958 treaty called the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This means that arbitral awards are more likely to be enforced than court decisions from other countries.³¹ For instance, see the case of *Misr Foreign Trade Co. v. R.D Harboties (Mercantile)*. The Misr Foreign Trade Co. and R.D Harboties concluded a contract for the supply of fertilizers which provided in its Article 13 for arbitration in London. Harboties claimed that one of the conditions of the contract was breached. Harboties initiated arbitration proceedings which led to an arbitral award against the Misr Foreign Trade Co. Misr Foreign Trade then filed a claim before the South Cairo Court of First Instance, but the Court rejected its claim because “it had already been settled by the arbitral award”, which was confirmed by the Court of Cassation.³²

In another case, *Brothers for Import, Export, and Supply Company v. Hano Acorporish*, 10 July 2000, the Brothers for Import, Export, and Supply Company (“Brothers”) signed a contract with Hano Acorporish (“Hano”) that stipulated that any disputes arising from the transaction would be resolved by arbitration in Seoul. An arbitral award was granted on 23 December 2004, ordering Brothers to pay Hano damages. Brothers filed a lawsuit in the Cairo Court of Appeal on 19 March 2008. The Court of Appeal held that “it lacked jurisdiction to rule on the challenge”.³³

3. Online Dispute Resolution

One can observe that there has been a rise in interest in ODR. Soon after goods and services began to be sold online, it became clear that online transactions required the same level of support as face-to-face transactions. It was recognized that the expanding cyberspace required institutions similar

³¹ (AAA, 2013)

<<https://adr.org/sites/default/files/Commercial%20Rules.pdf>> accessed 21 June 2020

³² Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis 2010)68-69

³³ *Misr Foreign Trade Co. v. R.D Harboties (Mercantile) / 2010/64 Egypt / 22 January 2008* (Court of Cassation)

³³ *Brothers for Import, Export and Supply Company (Egypt) v. Hano Acorporish (South Korea) / 23/125 Egypt / 02 July 2008* (Cairo Court of Appeal)

to those found in the offline world. Here, the consumer can go back to the retailer and have a defective product replaced. If the retailer refuses to replace it, the consumer may pursue legal action. Online, there are no such institutions to resolve disputes. ODR represents an attempt to fill this gap.³⁴

ODR is known as the settling of disputes through online communication and interaction between the disputing parties. ODR deals with disputes that are partially or completely resolved over the internet after being started in cyberspace but with a source outside of it (offline).³⁵ ODR is also known in the literature and in practice as ADR or internet dispute resolution, and these terms are interchangeable.³⁶ ODR can be defined as “the deployment of applications and computer networks for resolving disputes with ADR methods”.³⁷ This means that ODR is no longer an isolated phenomenon of recent times, but a result of the evolution of disputes and dispute resolution. Initially, disputes were between people who lived close to each other and who used traditional courts to solve them.³⁸ Both online and offline disputes can be resolved using ODR.³⁹

ODR is an alternative to the traditional legal system, which involves filing lawsuits in court and seeking justice through legal proceedings. A courtroom, lawyers, and judges are used in the traditional legal system to register and resolve disputes. Disputed parties can use the internet and web-based technology in a variety of ways. ODR can be completed wholly via the internet using email, chat, and videoconferencing, with parties meeting in person for face-to-face engagement if necessary. In ODR, a mix of online and offline

(such as meeting face to face) methods is often used.⁴⁰

However, disputes evolved once more when the world entered the digital era. Not only did disputes grow, but again, increasingly cross-border, but new disputes arose completely in cyberspace. In order to meet the needs of the digital age, dispute resolution came up with the idea of ODR.

When ADR and ICT were combined in the digital era, ODR was born out of the mix,⁴¹ and developed by the private and public sectors.⁴² Alternative means of dispute resolution were transferred to the digital world and gave birth to online dispute resolution.⁴³

In practice, private companies (such as Cybersettle and SquareTrade) were formed specifically to provide ODR services. For example, Cybersettle claims to have enabled 100,000 transactions totalling over \$750 million in settlements. However, Electronic Consumer Dispute Resolution (ECODIR), the ICC, the Internet Corporation for Assigned Names and Numbers (ICANN), and the North American Free Trade Agreement (NAFTA) are just a few examples of public and private groups that also set standards for how e-commerce companies should use ODR in their business.⁴⁴ It is important to mention that since 2010 the general ODR procedure has been developed by the EU Regulation on Consumer ODR and the UNCITRAL Draft ODR Procedural Rules.⁴⁵

3.1 Types of online dispute resolution

ODR enables dispute resolution using online negotiation, online mediation, and e-arbitration.

3.1.1 Online negotiation

ODR systems provide aid for negotiations by simplifying online communication and, in some cases, even providing solutions to the dispute. If the outcome of an ODR process is the same or

³⁴ Deffains,(n16) p202

³⁵ Mohamed S. Abdel Wshab, M. Ethan Kats and Danil Rainey, *Online Dispute Resolution: Theory and Practice : a Treatise on Technology and Dispute Resolution* (Eleven International Pub. 2012)357

³⁶ Deepak Verma, Anshu Banwari and Neerja Pande, 'Online dispute resolution' (2018) *Digital communication management* 140,140

³⁷ Heuvel (n29) p8

³⁸ Zissis Lekkas, 'Disputes in the Digital era: the evolution of dispute resolution and the model ODR system' (PhD dissertation, Toulouse 1 2015)1,4

³⁹ Heuvel (n37) p8

⁴⁰ Verma,Banwari and Pande(n36) p 140

⁴¹ Mostafa Al Ateyat and AK Al Dhahir, 'Overview on Online Arbitration and Procedures (Jordan as an Example)' (2013) 9 *Canadian Social Science* 77,86.

⁴² Deffains(n3) 202

⁴³ Ateyat and Dhahir (n41) p77-86

⁴⁴ Deffains(n42)202

⁴⁵ Wang(n11)51

better than the outcome of an ADR process, it is a success. This implies that ODR processes should be like face-to-face negotiations.⁴⁶

Negotiation through ODR is called “assisted negotiation”. Assisted negotiation is simply two parties negotiating without the involvement of a third party, neutral but with the assistance of a computer. The ODR provider provides a web-based communication platform, as well as guidelines, advice on how to proceed, standard forms, and other resources. Assisted negotiation is widely used. Since mid-2000, the most active centre, SquareTrade, has handled over two million disputes. The number has increased dramatically, with more than 800,000 cases handled in 2004. More than 75% came to an agreement with the help of an expert negotiator. This usually happened in less than two weeks, and the outcome was 75%. There for it is widely used.⁴⁷

3.1.2 Online mediation

Mediation is used to begin a broad-based consultation between parties involved in a conflict.⁴⁸ The mediation is carried out by a mediator, who is a neutral third-party individual. Mediation can be conducted wholly online using internet technology, face-to-face interaction, and parties can also meet in person in the presence of the mediator if required. The mediator's role in the mediation process is limited to that of a facilitator;

he or she does not have the authority to make decisions. Mediation is a method of resolving disputes that is both consensual and non-binding.⁴⁹

⁴⁶ Emilia Bellucci, 'The future of ODR: what are the benefits and drawbacks of F2F negotiation, and its applicability to future ODR design?' (*Resolution Institute*, 2005)

<<https://www.resolution.institute/resources/webinars/the-future-of-odr-what-are-the-benefits-and-drawbacks-of-f2f-negotiation-and-its-applicability-to-future-odr-design>> accessed 26 November 2021

⁴⁷ Gabrielle Kaufmann-Kohler, 'Online dispute resolution and its significance for international commercial arbitration' (2005) *International Chamber of Commerce* 437,439

⁴⁸ Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1, *International Comparative Jurisprudence*, 76, 79.

⁴⁹ Anshu Banwari and Neerja Pande Deepak Verma, 'Online Dispute Resolution' (*intechopen*,

A typical approach to online mediation begins with the parties receiving an email giving basic information about the proceedings. Virtual meetings take place in so-called “chat rooms”, which are essentially virtual meeting rooms. This can be done independently with each party or with all of them at the same time.⁵⁰

A mediator works with the disputants to establish common ground for the resolution process, as well as to aid them in discovering and pointing out potential areas of agreement or solution and it is up to the parties to agree or disagree at the end of the process. The mediator may examine the parties' rights and interests and recommend possible settlements after obtaining the parties' approval. Only the parties concerned have the option of resolving the disagreement, and they must reach an agreement or settlement. If the parties are able to achieve an agreement, they must complete a written document that provides the entire settlement specification. In many cases, parties go to court to have their agreements enforced.⁵¹

Online mediation is currently being provided by several organizations. In the US, Online Mediators is a website that offers online mediation, either directly through their website or through an affiliate program. SquareTrade, a company born out of a University of Massachusetts research project, provides online mediation to individuals and companies who visit their website through an affiliate program.⁵²

To analyse the legal foundations for using online mediation, it is necessary to look at the regulations governing ADR.⁵³ When the EU Commission published its Green Paper on Alternative Dispute Resolution in Civil and Commercial Law in 2002, it was called the Green Paper on Alternative Dispute Resolution.⁵⁴ The major objective of this was to “initiate a broad-based consultation of those

2018)

<<https://www.intechopen.com/chapters/61440>> accessed 21 June 2020

⁵⁰ Mania(n48) p79

⁵¹ Verma,Banwari and Pande(n40) p141

⁵² Heuvel (n39) p12

⁵³ Mania (n50) p79

⁵⁴ European Commission,Green paper on alternative dispute resolution in civil and commercial law /* COM/2002/0196 final */

involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law".⁵⁵

In a positive response to the Green Paper, the European Commission accelerated the work on new regulations with regard to ADR, such as Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, which, together with Directive 2013/11/EU on alternative dispute resolution and regulation (EU) No. 524/2013 on online dispute resolution, is one of the European legal acts on ADR mechanisms.⁵⁶ However, the first two legal acts do not refer to electronic solutions, so the legal basis for their use comes from an interpretation of the rules that are in place at the time.

3.1.3 *Electronic (Online) –Arbitration*

E- arbitration is also known as online arbitration, cyber arbitration, cyberspace arbitration, virtual arbitration, and arbitration using online techniques. There is no doubt that e-arbitration is one of the signs and results of the IT revolution. There is a change in the behaviour of consumers via cyberspace. It is clear that the world revolves around technology. Technology has had an enormous impact on legal practice over the last few years.⁵⁷ Various digital solutions have begun to enter the legal industry under the umbrella term "legal tech"; traditionally, at least from a lawyer's perspective, these have been functions that belonged within the scope of a lawyer's field of expertise.⁵⁸

For instance, LexisNexis' purchase of Ravel Law, a California-based legal-tech start-up, drew market interest in June 2017. Ravel Law offers services

that use modern machine learning technologies to process US case law and extract relevant information based on the user's needs.⁵⁹ Nonetheless, beginning in 2018, all German lawyers must set up a "special electronic attorney's mailbox" to which documents can be formally served. It will also enable encrypted communications between lawyers, courts, and public authorities.⁶⁰ Other companies are working on similar technologies that will allow lawyers to assign contract evaluations to computers. Some companies are even trying to make contracts that can change based on new information.⁶¹ While these approaches differ in their degree of ambition and sophistication, they are commonly considered to be inflicting disruption on the legal industry. In the field of arbitration, this helps to spread the idea that, in the future, all disputes will be decided by artificial intelligence.⁶² Modern opportunities must be embraced while keeping practical and legal realities in mind.

Unlike state court procedures, arbitration allows for a great deal of procedural flexibility, allowing it to adapt to technological advancements considerably more quickly than other domestic dispute resolution methods. Apart from a few technologically advanced national court systems, such as China⁶³ or Canada, there are not many.⁶⁴

⁵⁹ LexisNexis, 'LexisNexis Announces Acquisition of Ravel Law' (*LexisNexis*, 2017) <<https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-announces-acquisition-of-ravel-law>> accessed 19 November 2019

⁶⁰ Tim Hinkes, 'German lawyers are now required to install a crypto backdoor' (*TimmeeY*, 2017) <<https://blog.timmeey.de/2017-12-27-German-lawyers-are-required-to-install-a-crypto-backdoor/>> accessed 27 July 2018

⁶¹ J.D.(n57)

⁶² Paul Cohen and Sophie Nappert, 'The march of the robots' (*Global Arbitration Review*, 2017) <<https://nyiac.org/wp-content/uploads/2021/11/GAR-The-march-of-the-robots.pdf>> accessed 8 February 2019.

⁶³ mallory locklear, 'China's online court heard its first case today' (*engadget*, 2017) <<https://www.engadget.com/2017-08-18-chinas-online-court-first-case.html>> accessed 8 February 2019.

⁵⁵ Mania(n53)p79

⁵⁶ European Parliament, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters 2008/52/EC

⁵⁷ Jacalyn Crecelius J.D., 'New Technology and Its Impact on the Practice of Law' (*Expert Institute*, 2017) <<https://www.expertinstitute.com/resources/insights/new-technology-and-its-impact-on-the-practice-of-law/>> accessed 6 July 2021

⁵⁸ Lars Markert and Jan Burghardt, 'Navigating the Digital Maze-Pertinent Issues in E-Arbitration' (2017) 27 J Arb Stud 1,2

The most significant has an effect on technological know-how and can be seen in arbitral proceedings.⁶⁵ Recently, established terms such as electronic arbitration or e-arbitration have been used to describe varieties of arbitration that entirely or at least heavily rely on IT.⁶⁶ Overall, due to the novelty of electronic arbitration, jurists have not yet determined the legal nature of e-arbitration: whether it is an integral part of the legal system or conducted on the terms of traditional arbitration, differing only in respect of means.⁶⁷ As IT, particularly e-communication, is widely used in arbitration, it might be difficult to define the concept. Any definition should, therefore, distinguish between what is currently called traditional arbitration, which includes the increasing use of technology, and genuine e-arbitration.⁶⁸

4. Distinguishing between electronic arbitration and other alternatives

The first distinguishing feature that necessitates e-arbitration is that, unlike other methods, arbitration is an adjudicative process. This means that the third neutral has the authority to make a decision.⁶⁹ Not just that, arbitration is required to ensure

procedural fairness between the parties in their proceedings. This procedural equity requires that the parties be handled equally and given a chance to be heard and dealt with as the case of their opponent.⁷⁰

In contrast, other methods try to establish an agreed settlement⁷¹ and neutral third-party specialists assist the parties in reaching a voluntary settlement of the issues between them.⁷² A contract might result from the settlement of the disputes. Such a contract will only be valid if legal action is taken against the party who broke the contract because of it.⁷³

Arbitration is fundamentally different in that it focuses on the rights and entitlements of each party. Although settlement is frequently beneficial, without the option of resorting to an adjudicative method at the end of the process, some of the most sacred values are jeopardized because settlement is a step away from the law.⁷⁴ CyberSettle has performed over 70,000 ODR processes, representing over \$400 million in settlements.⁷⁵ Settlement is not justice; rather, it seeks to make the most of a situation, regardless of each party's rights and entitlements, with the goal of moving a case forwards, regardless of whether justice has been served.

Arbitration, on the other hand, is a truth-seeking procedure that, in a sense, fulfils the parties' demand for a day in court. Furthermore, not all disputes can be resolved by settlement. In some

⁶⁴ Jane Bailey and Jacquelyn Burkell, 'Implementing technology in the justice sector: A Canadian perspective' (2013) 11 Canadian Journal of Law and Technology 253,253

⁶⁵ MIRKO OLMOS, 'Efficiency in International Arbitration: A Matter of Technology' (*ARBITRATOR INTELLIGENCE*, 2020)

<<https://arbitratorintelligence.com/efficiency-in-international-arbitration-a-matter-of-technology/>> accessed 15 February 2020

⁶⁶ Mohamed S. Abdel Wahab, 'ODR and e-Arbitration – Trends & Challenges' (*Mediate*, 2013) <<https://www.mediate.com/articles/ODRTheoryandPractice18.cfm>> accessed 5 May 2019.

⁶⁷ Wshab, Kats and Rainey (n35) p402

⁶⁸ Burghardt (n58)p6

⁶⁹ PON Staff, 'What are the Three Basic Types of Dispute Resolution? What to Know About Mediation, Arbitration, and Litigation' (*PROGRAM ON NEGOTIATION*, 2020)

<<https://www.pon.harvard.edu/daily/dispute-resolution/what-are-the-three-basic-types-of-dispute-resolution-what-to-know-about-mediation-arbitration-and-litigation/>> accessed 8 December 2020

⁷⁰ Mohammad A Aladaseen, *The arbitrability of international online consumer disputes* (Bangor University (United Kingdom) 2015) 103

⁷¹ CHEUNG Wai Man, *A Discussion on the Degree of Autonomy of Arbitration in View of the Involvement of Court System* (Red Publish 2013) 3

⁷² Michael Prescott, 'An Electronic Alternative to Alternative Dispute Resolution?' (2003) 5

⁷³ upcounsel, 'Settlement Agreement Breach of Contract' (*upcounsel*, 2020)

<<https://www.upcounsel.com/settlement-agreement-breach-of-contract>> accessed 2 February 2020

⁷⁴ Stacie I Strong, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure' (1998) 31 Vand J Transnat'l L 1,13.

⁷⁵ Michael Prescott, 'An Electronic Alternative to Alternative Dispute Resolution?' (2003) 5

circumstances,⁷⁶ “the underlying interests of the parties cannot be aligned”.⁷⁷ Nevertheless, Fick-Cooper outlined that “the reality is that everyone’s interests can’t always be met to the fullest. It isn’t just that I’m saying yes right now, but when I leave this room, I forget about it. It needs to be self-sustained or sustainable”.⁷⁸

Because these conflicts do not lend themselves to compromise, it is necessary to seek adjudication. Furthermore, the steps that lead to settlements are voluntary, and either party can stop them at any time. Therefore, adjudication, which cannot be abandoned, is necessary to provide an avenue of redress.

The preference for voluntary methods that result in agreements instead of decisions is not a consequence of the former’s superiority in achieving justice (on the contrary), but rather a simple “way out” of the complications of arbitration. These complications in traditional arbitration include procedural formality and increasing fees. In the online world, there are many factors that make it hard for people to think about legal and business issues in general.⁷⁹

As a result, the lack of an adjudicative method could make it more difficult to reach a settlement because the defendant might not be willing to settle at all, or it could make it more difficult to get redress and justice because unfair settlements could be made.⁸⁰ In circumstances in which there is a major power imbalance, such as B2C disagreements, an adjudicative procedure in which one party cannot apply pressure on the other “may be more adequate for correcting possible abuses of power”.⁸¹ For instance, the consumer is the weaker party in a dispute where the business has the

payment and the experience of dealing with comparable disputes.⁸² Finally, e-arbitration as an adjudicative process must be provided as the last step of the ODR process, in order for an ODR mechanism to work and give everyone access to justice.⁸³

4.1 E-arbitration vs. traditional arbitration and litigation

The majority of the benefits that set e-arbitration apart from traditional ADR and litigation may be found as characteristics of ODR procedures in general, as described in detail in the section on the benefits of ODR. In a nutshell, convenience, time, cost, travel, and even paper savings are among them. On the other hand, e-arbitration has some additional features that underline its importance. Litigation and traditional arbitration are adversarial processes that can increase people’s powerlessness, make them more defensive, cause them stress, and increase their level of frustration, all of which make it more difficult to solve a dispute.

Furthermore, the formality of these procedures forces parties to pay enormous sums of money for legal counsel, which sometimes leads to even higher expenditures as a result of the formalities and delays associated with the proceedings. In contrast, by relocating the procedure to the virtual world, e-arbitration minimizes the intimidating tone and formality of the procedures, as well as the cost of legal fees,⁸⁴ and reduces the hostility between the parties because the resolution takes place in the comfort and safety of their own homes, rather than at nerve-wracking formal meetings.

However, in comparison with litigation and traditional arbitration, the most significant advantage of e-arbitration is that the parties can resolve disputes significantly more quickly. E-arbitration does not require the parties to travel, coordinate their schedules, or wait months for a court date or hearing. It can make a final and legally binding decision in a matter of days or hours, and it does not need to go through all the

⁷⁶ Thomas Schultz, 'Online Dispute Resolution: an overview and selected issues' (2002) 7 Economic Commission for Europe 1,10

⁷⁷ Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009)55

⁷⁸ Lynn Fick-Cooper, 'Getting to “Yes”': Interest-Based Negotiations' (*Robert Wood Johnson Foundation*, 2015)

<<http://forces4quality.org/node/6524.html>> accessed 22 September 2019

⁷⁹ Thomas Schultz, 'The roles of dispute settlement and ODR' (2011) Kluwer 135,141

⁸⁰ Hornle (n77) p52-53

⁸¹ Cortes(n31) p105

⁸² *ibid* p139

⁸³ Thomas Schultz, 'The roles of dispute settlement and ODR' (2011) Kluwer 135,144

⁸⁴ Amy J Schmitz, 'Drive-thru arbitration in the digital age: Empowering consumers through binding ODR' (2010) 62 *Baylor L Rev* 178,203

extra steps that might slow things down even more.⁸⁵

4.2 E-arbitration vs. other forms of ODR

As one of the ODR methods, e-arbitration offers all the advantages of ODR, including convenience, flexibility, and time and cost savings. Some claim that ODR is “the only financially feasible settlement option”.⁸⁶ However, among the ODR methods, e-arbitration has some distinguishing characteristics that set it apart from the others. In comparison with other ODR, e-arbitration has significant benefits. Mechanisms relate to the third neutral's decision-making authority, the result's binding nature, and the procedure's dependence on recorded proof, such as “(eBay) with no or limited decision-making power”,⁸⁷ to the binding nature of the result and to the reliance of the process on documentary evidence.

The fact that the dispute is resolved by a third party leads to a faster resolution of the dispute because the parties do not have to spend countless hours exchanging proposals and counterproposals in order to reach a mutually acceptable solution, which may or may not be reached at all at the end of the procedure. In contrast with online negotiation and mediation, the parties in e-arbitration can be confident that their disagreements will be settled by a third party who will make a decision based on the merits of their claims.⁸⁸ Finally, because of its increased reliance on proof of documents, e-arbitration appears to be better suited for the online environment than voluntary and non-binding ODR techniques.⁸⁹

E-arbitration primarily involves the parties exchanging information, documents, exhibits, and

other evidence. Therefore, e-arbitration is best suited for asynchronous communication because the asynchronous interactions in e-arbitration allow the parties to publish and carefully study briefs, affidavits, documents, and other evidentiary submissions on their own schedules. It does not require the same level of interaction as non-binding dispute resolution alternatives.

The lack of face-to-face interaction, and thus the loss of body language and non-verbal clues, is one of the most commonly claimed arguments against ODR in general.⁹⁰ Firstly, today's advances in ICT tools make it easy and cheap to hold teleconferences with a wide range of software programs.⁹¹ Face-to-face engagement is particularly vital in consensual and non-binding procedures, such as negotiation and mediation, where face-to-face interaction can assist in building an atmosphere of collaboration and lead to the consensual settlement necessary for dispute resolution.⁹² In contrast, in e-arbitration, the dispute is resolved not via a voluntary agreement between the parties, but through a third-party decision based on the parties' claims presentations and not through their cooperation.⁹³ In most cases, e-arbitration is used. It is a far less sophisticated communication process than online mediation and, as a result, the equipment and software required for online arbitration will be less complicated.⁹⁴

Arbitration is better suited to the online environment than consensual methods since communication is usually less intensive, proceedings are primarily written, and there is

⁸⁵ Ibidp201

⁸⁶ Charlotte Austin, *Online dispute resolution: An introduction to online dispute resolution (ODR), and its benefits and drawbacks* (Wellington: Government Centre for Dispute Resolution 2017)32

⁸⁷ Fabrizio Cafaggi, *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar 2012)297

⁸⁸ Schmitz (n84) p201

⁸⁹ Farzaneh Badiie, 'Using online arbitration in e-commerce disputes: a study on B2B, B2C and C2C disputes' (2015) 2 IJODR 1,1

⁹⁰ Toyooki Nishida Takao Terano, Akira Namatame, Syrusaku Tsumoto, Yukio Ohsawa, Takashi Washio,, *New frontiers in artificial intelligence: joint JSAI 2001 workshop post-proceedings*, vol 2253 (Springer Science & Business Media 2001)125

⁹¹ Lawrence A. Tomei, *ICTs for Modern Educational and Instructional Advancement: New Approaches to Teaching: New Approaches to Teaching* (Information Science Reference 2009) xxviii

⁹² William L.D. Barrett, *Alternative Dispute Resolution: What the Business Lawyer Needs to Know, 1999* (Practising Law Institute 1999)623

⁹³ Joanne Cox, *Business Law* (Oxford University Press 2012)399

⁹⁴ Roberto M Rodriguez, 'ON-LINE ARBITRATION' (2011) World Mediation Centre 1,3

rarely a need for more than email and secure communications to use arbitration for dispute resolution.⁹⁵ Furthermore, the finality of the resolution of the dispute is ensured by the binding character of e-arbitration (binding online arbitration).⁹⁶ E-arbitration brings a dispute to an end without having to use other ODR procedures or spend a lot of time appealing.⁹⁷ This is especially crucial in e-commerce disputes, because the typically modest value of the dispute necessitates a quick and financially proportional resolution to avoid the issue dragging on.⁹⁸

In international arbitration dealing with cross-border disputes, the arbitral award frequently proves less difficult to enforce than court judgments, at least in the nations that have signed the 1958 (about 150 nations) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹⁹ This is also recognized as the New York Convention. However, because it was signed more than 50 years ago, the NYC may not be up to the task of supporting and enforcing e-arbitration and awards.

Because e-arbitration still operates under rules meant for traditional arbitration, the NYC, at the absolute least, would have to be broadly interpreted to avoid differences in interpretation, recognition, and enforcement arising in current practice¹⁰⁰ in

light of electronic communication.¹⁰¹ However, “while a broad interpretation of its provisions may be helpful, it is ideally required to modernize and change them in order to keep up with the advances of modern society”.¹⁰²

Conclusion

Since most websites function 24 hours a day throughout the year, alternative dispute resolution can be slowed down by a variety of issues, including travel time, meeting scheduling, and the large amount of paperwork that must be physically reviewed. Furthermore, procedures such as hearings, meetings, and document transmission can be completed more quickly with the use of appropriate technology. Using IT in e-arbitration also saves time that could have been spent on travelling and assists the parties involved in finding a convenient timeframe. This is especially true in cases in which there are multiple parties involved and it is nearly impossible for all of them to attend a meeting. Time that would have been wasted on delivering documents is saved, resulting in an increase in business productivity. As a result of the issues outlined above, e-arbitration has emerged as a viable option. The speed and convenience of ICT, which is ideally suited to the needs of e-commerce, contribute significantly to the time efficiency of e-arbitration

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