ARBITRATION GOING ONLINE – NEW CHALLENGES IN 21ST CENTURY?

by

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Accessibility of data via Internet allowed for an immense growth of international commerce. Millions of transactions are done every year by means of electronic communication. Customers no longer need to go to solid shops; merchants no longer need to sign solid copies of orders and contracts. Virtual reality has stepped in.

Not everything has changed – disputes do still arise, and they are solved in front of national courts (by definition solid institutions) or by alternative means. A great deal of disputes in international commerce is settled through arbitration proceeding. Arbitration is (again by definition) more informal and flexible mean of dispute settlement. Therefore, it is not surprising that the arbitration community is also following the latest trends, and that recently on-line arbitration has come to an existence.

However, once again we might encounter problems peculiar to cyberspace. Legal framework for arbitration on international level was created before the digital society was created. Thus, on-line arbitration is encountering problems of its own. To name a few: How should a written form requirement of arbitration agreement be interpreted? What is the seat of arbitration in on-line arbitration? Is an award enforceable? And of course are we still speaking about arbitration? This article will try to point several of these difficulties out, and if possible to suggest solutions.

KEYWORDS

Online arbitration, virtual arbitration, electronic means of communication, New York Convention of 1958, UNCITRAL Model Law on International Commercial Arbitration, seat of arbitration, agreement in writing

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1. INTRODUCTION

Accessibility of data via Internet allowed for an immense growth of international commerce. Millions of transactions are done every year by means of electronic communication. Customers no longer need to go to solid shops; merchants no longer need to sign solid copies of orders and contracts. Virtual reality has stepped in.

Not everything has changed though – disputes do still arise, and they are solved in front of national courts (by definition solid institutions) or by alternative means. A great deal of disputes in international commerce is settled through arbitration proceeding. Arbitration is (again by definition) more informal and flexible mean of dispute settlement. Therefore, it is not surprising that the arbitration community is also following the latest trends and that in the recent years on-line arbitration has come to an existence.

2. GOING ONLINE

Carrington[1] in his short contemplation on virtual arbitration some years ago presented us with an experience of his San Francisco colleague who was involved in international arbitration case with the seat in Asia. He reported he made more than 20 trips from US to Asia to hear witnesses who themselves came from various places in Asia and North America. As we can easily imagine, the costs of such proceedings must have been astronomical. Experienced arbitrators may confirm that though this is extreme, it happens more often than one would guess. Yet, the witness hearings could have been easily accommodated by means of teleconferencing. Undoubtedly, contemporary arbitration practice makes good use of modern means of communication. On the other hand, new technologies come with new problems along the way of their implementation. That is also the case for international arbitration.[2] Once again we might encounter problems peculiar to cyberspace. Legal framework for arbitration on international level was created before the digital society was created. Thus, on-line arbitration is encountering problems of its own.

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[1] Carrington, P. D. 1995, 'Virtual Arbitration' Ohio State Journal on Dispute Resolution, vol. 15, no. 3, pp. 669-690.

[2] For exhaustive study on technical aspects and problems of online arbitration see e.g. Kaufman-Kohler, G., Schultz, T. 2005, The Use of Information Technology in Arbitration, Justletter, viewed January 3, 2011. <http://www.lk-k.com/data/document/the-use-information-technology-arbitration-jusletter-5-december-2005-available-http-www.pdf>

Online arbitration may refer to more scenarios and we may definitely agree with Morek who concludes that "*the major legal challenges faced by arbitration in online settings do not depend on the "origin" of a dispute*", i.e. it is not important whether the substantial dispute involves issues of the internet or e-commerce. What is important is whether the proceedings itself contains sufficiently important element which moves arbitration from its classical "real world" basis to the sphere of "virtual world". Basically, we think of two basic models.

Firstly, when parties conclude transaction in a traditional paper form, and include an arbitration clause calling for virtual arbitration of their disputes attempting to manage cost control and to secure expedient procedure. Major arbitration institutions over the world offer special online tools for the parties to file and administer their cases online.[3] Thus any dispute originated from "real world" shall be settled fully or partially through means of "virtual world".

Secondly, businessmen over the world use modern means not only to communicate but also to conclude contracts. Therefore, it is not uncommon that the contract is concluded over exchange of emails. Similarly, arbitration clause or agreement may be included within such communication calling for arbitration. Though, this option is not used widely in large value, complex international contracts, it is however quite common for law value, but large volume ones.

Both models bring several questions which must be answered. These questions aim as to the validity of such arbitration clauses (Is arbitration clause valid if contained in email exchange, or even in standard terms of "click-wrap" contracts?), or to the nature of the procedure itself (How could one determine international or domestic character of arbitration with consequences arising there from; Are the requirements of due process and equal treatment secured by the usage of various online methods of communication?). Finally, doubts as to the enforceability of awards rendered in "online arbitration" can be asked, with regards to the wording of current legal framework.

This paper will focus on two main issues which are discussed in the arbitration community with regards to online world and current legal framework. Firstly, we will survey the issue of the seat of arbitration. Secondly,

[3] From the most know we may mention AAA Webfile, ICC NetCase and Virtual Magistrate Project.

we will focus on the formal requirements current legal framework imposes on the arbitration agreement in order to recognize and enforce subsequent awards.

The basic thesis of the article is that though contemporary legal framework was enacted long before new means of communication became standard; it is still possible to apply them to these contemporary issues without compromising the arbitration proceedings.

3. VENUE OF ONLINE ARBITRATION

Even though international arbitrators are deemed not to have (national) forum, the question is whether they must have the forum at all?

In most jurisdictions, venue of international arbitration plays a very significant role regarding e.g. applicability of mandatory rules and principles of *lex fori*, including issues of arbitrability and validity of arbitration agreement, extent of intervention and support by state courts.[4] For the purpose of various national arbitration laws setting the requirements for recognition and enforcement of awards, venue of arbitration is the determinative element in deciding whether the award is national or foreign.

If we consider online arbitration and look for the answer what the venue is, it seems to be difficult to properly determine. If we take the example mentioned by Carrington and enable arbitrators to conduct whole proceedings remotely, without arbitrators meeting elsewhere than e.g. at the online platform provided by the institution, arbitration in such case as Hörnle concludes, "[would not be] *pertaining to any particular geographical territory*."[5,6] The online arbitration once again revived the discussion on "delocalised arbitration"[7,8] or the necessity of arbitration being conducted on the background of a valid local lex arbitri. However, for the moment, it seems that

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[4] Rubino-Sammartano, M. 2001, *International Arbitration. Law and Practice*. 2nd edition, Kluwer Law International, The Hague, the Netherland, pp. 563-564.

[5] Hörnle, J. 2003, *Online Dispute Resolution – More Than The Emperor's New Clothes,* Proceedings of the UNECE Forum on ODR 2003, viewed December 31, 2010, pp. 9. <http://www.odr.info/unece2003/pdf/Hornle.pdf>

[6] For more detailed analysis of the issue see e.g. Lanier, T.J. 2000, 'Where on earth does cyber-arbitration occur? International review of arbitral awards rendered online' *ILSA Journal of International and Comparative Law*, volume 7, no. 1. pp 1-14.

[7] Hong-lin, Y., Motassem, N. 2003 'Can Online Arbitration Exist Within the Traditional Arbitration Framework' *Journal of international arbitration,* volume 20, no. 5, p. 471.

[8] Herboczkova, J. 2008, Certain aspects of online arbitration, Days of Law Conference Paper, viewed November 31, 2010, no page indicated <http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf>

any cconclusion as to the delocalised nature of online arbitration would encounter several legal problems as indicated above. As UNCTAD points out the seat of arbitration overcomes the problem of multiple locations of procedural acts and more importantly, it still has essential character with regards to the law applicable to the procedure, competence of national courts and ensuring the lawfulness of any rendered award.[9]

The strong connection with the seat of arbitration may be spotted in current international legal framework, which is essential element of the success of modern international arbitration.

Firstly, we may look on UNCITRAL Model law on International Commercial Arbitration[10] where venue of arbitration is used in connection:

- to determine the applicability of the Model law itself – Article 1 section 2,
- as a leading element to determine the international nature of the dispute – Article 1 section 3,
- to determine where the award was made – Article 31 section 3,
- to determine basic rules of procedure for conduct of arbitration if no agreement is reached by the parties – Article 36 section 1 subsection a) (iv),
- to determine the binding character of the awards - Article 36 section 1 subsection a) (v).

Secondly, European Convention on International Commercial Arbitration[11] chooses seat[12] as determinative element regarding appointment of arbitrators in an ad hoc arbitration. Moreover, it similarly connects seat and setting aside procedure. The same is true for Inter-American Convention on International Commercial Arbitration[13] and Convention on the recognition and enforcement of foreign arbitral awards.[14]

Of course, this problem is far from being unsurpassable. First of all, modern arbitration laws, either international or national, give the parties

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[9] *Course on Dispute Settlement: International Commercial Arbitration,* UN Conference on Trade and Development, New York and Geneva, viewed on November 31, 2010, p. 47 <http://www.unctad.org/en/docs/edmmisc232add20_en.pdf>

[10] In the version with the 2006 amendments, accessible at the www.uncitral.org.

[11] Accessible from UN Treaties archive website at <http://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf>

[12] In the Convention referred to as "place of arbitration".

[13] Accessible from the Organisation of American states website <http://www.adr.org/sp.asp?id=31620>

freedom to determine the seat of arbitration, and such determination is standard and frequent supplement to the arbitration agreement.[15] If parties fail to provide the seat, the failsafe are still in place. Either, the rules of institution call for a specific seat, usually the seat of the arbitration institution itself,[16] or the in jurisdiction based on the model law, arbitrators shall designate such place themselves.[17]

The seat of arbitration is a legal concept creating connection of the arbitration proceedings and subsequent award with a specific legal background. Tribunal may decide on the seat of arbitration based on all circumstances of the case, including the convenience of the parties.[18] Thus, it may be argued that if the seat may be determined based on the free will of the parties, arbitrators or institution, which is basically unlimited in regard to the choice, and no sanctions are available for "incorrect" pick, that the problem is almost nonexistent. It would be advisable if the arbitrators considered the suitability of national legal framework regarding the usage of electronic means, when considering the option for the seat. By doing so, they will most definitely fulfil the obligation to choose seat convenient to parties, or

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[14] So called New York Convention of 1958 accessible from the website of UN Commission on International Trade Law <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.> See especially Article I section 1 which defines the scope of convention which shall apply to the recognition and enforcement of arbitral awards, "… *made in the territory of a State other than the State where recognition and enforcement of such awards are sought,…"* As the convention test the international element of the arbitration by the seat of arbitration question whether purely domestic dispute may be recognized as international by "displacing" arbitration to the cyberspace may occur. However, as was showed such consideration do not differ from those of "real" arbitration and the possibility of seat displacement.

[15] See for example ICC <http://www.iccwbo.org/court/arbitration/id4090/index.html,> LCIA <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx>, DIS <http://www.dis-arb.de/en/17/clause/dis-arbitration-clause-98-id3>.

[16] E.g. LCIA rules stipulate London as the seat of arbitration if not stated otherwise. In this context it is also interesting to state that recent global research conducted by White & Case, LCIA rules are second mostly used by the parties in international arbitration (chosen regularly by 14% of respondents) and London is the most often picked seat of arbitration (chosen regularly by 30% of respondents). *See* 2010 International Arbitration Survey: Choices in International Arbitration, White & Case, London, viewed December 31, 2010, p. 23, <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf>

[17] See Article 20 section 1 of the UNCITRAL Model law on international commercial arbitration.

[18] Ibid.

better to say to the convenience of the parties' choice to undergo online arbitration proceedings.

The question of the seat in online arbitration is therefore no different than the discussion on delocalised arbitration. In both cases, the basic question is whether international arbitration may be performed outside any specific local law – based on the free will of the parties as recognized in international conventions, limited only by factual limits of autonomy and international arbitral policies. Accepting the arguments of proponents of delocalisation, there is absolutely no need for the parties to the online arbitration to artificially chain them to a specific geographical location. However, in the contemporary situation and with regards to both national and international legal framework, it seems the parties have to bear such a burden for the moment being.[19]

4. FORMAL REQUIREMENTS AND RECOGNITION OF AWARDS

Today electronic commerce involves the use of alternatives to paper-based methods of communication; there is no doubt about that. But legal framework which created the system of international arbitration was created in 1950s with the conclusion of New York Convention of 1958. At that time, the Internet was non-existent, and the most-up-to date method of long distance communication was the telex. However, this "modern" device was probably too modern for the drafters of those days and they "only" stuck with a well established telegraph.[20] Yet, in the years to come, framework of international arbitration proved to be quite flexible and it recognized most recent development in the area of long distance communication.[21] However, though recent means of communication are generally recognized in the arbitration community, the backbone remains still the same.

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[19] In such a context, interesting debate is underway in connection with applicability of "lex informatica" a legal concept not dissimilar to "lex mercatoria". Lex informatica may be deemed as semiautonomous system of legal rules that is peculiar to cyberspace. If we arbitration is considered to be a good platform for application of "lex mercatoria" – law of international merchants, it may be interesting to see what outcome may come out of virtual arbitration, where lex mercatoria may meet lex informatica.

[20] See Article II section 2 of New York Convention of 1958 which defines the arbitral agreement "made in writing".

[21] Already mentioned European Convention on International Commercial Arbitration of 1961 recognized teleprinter and Inter-American Convention on International Commercial Arbitration of 1975 finally recognized the telex.

The main problem of online arbitration with regards to the enforcement issues are mainly formal requirements in conventions. For the purpose of this article we shall analyze whether agreement contained in the exchange of emails or other present or future means of communication is sufficient regarding the form?

As mentioned above, New York Convention of 1958 anticipates arbitration agreement to be in writing, but in a wider scope as provided in a separate definition. Therefore, arbitration agreement may be concluded even by the "*exchange of letters or telegrams*". As was showed before, this requirement must be looked into in the historic perspective of its origin. Hill shows that such comparison may lead to the acceptance of email based on liberal interpretation of this provision and internal similarity between telegram and email.[22] Liberal interpretation would be fully in line with the original intent of the drafters.[23] Subsequent history of the international legal framework certainly proves so.

In year 1985, UNCITRAL Model law on international commercial arbitration was approved. Once again, the flexibility of international arbitration was demonstrated. In Article 7 section 2 the requirement for the written form remained, however it was sufficiently wide to include even "*other means of telecommunication which provide a record of the agreement".* The test was put simple, if the mean of communication may be recorded as to provide compelling evidence of parties' will, such mean shall be acceptable as the arbitration and international trade are to some extent formless environments.

In year 2006, when emails and online contracts were common part of our lives, UNCITRAL came with a major redrafting of the model law. Article 7 was one which underwent major changes. Today, Article 7 provides national legislators with two options.

Option I still calls for a written form of the agreement, however, in the section 2 it expressly stipulates that the agreement may have been done even orally or by conduct, as far as its content may be identified. Moreover, section 3 stipulates that written form of agreement is fulfilled if parties use means of electronic communication, if such mean enables accessibility for

[22] See Hill, R. 1998, On-line Arbitration: Issues and Solutions, viewed January 3, 2011. <http://www.umass.edu/dispute/hill.htm.>

[23] The intent of maximum effective regarding recognition and enforcement may be implied from the provision of Article VII of the convention, which enables parties to avail themselves of more lenient provisions of international or national character.

future reference.[24] Therefore, Option I requires on one hand a written form, but on the other it enlarges the boundaries of that definition by large. The underlying principle and test for any arbitrator shall still be whether parties assented to arbitration – and parties must thus think above the means they use, whether they can record and later mirror their will with sufficient clarity and persuasions. Additionally, if we look into Option II of Article 7 we discover, that the model law "resigns" from the form requirements. Therefore, any state which adopts model law in this version will not require a specific form of the arbitration agreement.[25,26]

As one can easily see, the progress in this field was quite intensive, however basic legal instrument, New York Convention of 1958, remains unaltered. Although several discussions took place as to the amendment of the Convention,[27] they did not finish in passing amendment as to the formal requirements.[28] However, the argument against such a positive change was

[24] This wording was inspired by another UNCITRAL work, namely Model law on electronic commerce of 1996.

[25] Today, more than 70 jurisdictions have adopted Model law on international commercial arbitration or amended its own national law to resemble it. Most up to date reconfirmation of non-formality of the arbitration agreement can be find in the revised French (though not a model law jurisdiction) international arbitration law in the Article 1507 which states, "*La convention d'arbitrage n'est soumise à aucune condition de forme*."

[26] For interesting study on electronic form of the arbitration agreement and its validity under national law see e.g. especially Chapter 4 in Kubicová, G. 2009, Electronic form of Arbitration agreement, Central European University, viewed January 10, 2011. <http://www.etd.ceu.hu/2009/kubicova_gabriela.pdf>

[27] See Note by the UNCITRAL Secretariat, Settlement of commercial disputes: Preparation of uniform provisions on written form for arbitration agreements : Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), viewed January 10, 2011. <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V05/912/12/PDF/V0591212.pdf?OpenElement>

[28] However, situation today is once again different. With the rapid development of electronic commerce and need for its regulation, UNCITRAL has been appropriately active and besides the creation of special working group for electronic commerce and proposed model law, in 2007 it created UN Convention on the Use of Electronic Communications in International Contracts. For the purpose of online arbitration, in Article 8 it provides important principle that the validity of communication or contract shall not be denied validity solely for the use of electronic form. Article 9, section 2, stipulates that national law which calls for written form is satisfied if parties use an electronic communication and the information therein contained is accessible so as to be usable for subsequent reference. Finally, and most importantly, Article 20 contains special rules dealing with the relation of this convention to others as listed in section 1. First place on the list belong to New York Convention of 1958. Therefore, once the Electronic Convention becomes effective, the formation of arbitration agreement and requirement "in writing" shall be construed under minimum requirements of Electronic Convention.

not the fear from new methods, but the fear of paralyzing one of the most successful international treaties there is, even if the chances were small. Therefore, other solution was adopted by UNCITRAL.

In 2006, UNCITRAL adopted a recommendation regarding the interpretation of Article II, section 2.[29] Recommendation states that Article II, section 2 should be interpreted in such a way that would recognize "*the circumstances described therein are not exhaustive*". This simple phrase affirms the liberal position to the interpretation of the convention. In other words, "agreement in writing" shall not be limited only to arbitration agreement or clause in a contract, signed by both parties or contained in the exchange of letters or telegrams, because such interpretation would contradict the purpose of convention.

Therefore, from the academic point of view, parties should not be worried to use modern means of communication, as far as these means may provide sufficient evidence of their will for a possible future dispute. Practically speaking, in the UML jurisdiction the situation may still simply fall under Article 7 section 5 of UML, which provides that an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other. Therefore, if the parties do not challenge the arbitration clause itself, the mere exchange of memoranda in primary phase of the proceedings may be sufficient.

5. CONCLUSION

The occurrence and rising popularity of electronic commerce and online arbitration technique brings to attention several questions whether arbitration conducted by the use of electronic means may be valid under current international framework – framework which in its basics was created 50 years ago.

This article surveyed just two issues out of the many – seat of arbitration and formal requirement for the arbitration agreement. The paper tried to show that both issues may present arbitrators or parties to the dispute certain difficulties.

Firstly, the concept of arbitral seat is a crucial geographical element which cannot be simply omitted even if arbitration procedure has no reasonable connecting factor to any geographical area. However, as it is also a

[29] Accessible from <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>

legal concept based on the determination of the parties or failsafe decision of the arbitrators, it can hardly constitute a major setback for online arbitration.

Secondly, written requirement for arbitration agreement as requested in New York Convention of 1958 may prove to be more challenging. If we construe this requirement with strict plain language view, modern means of communication do not qualify for "agreement in writing" requirement. However, the underlying intention if the drafters should be also taken into account. Therefore, to promote constant effectiveness and usability of the convention, it is necessary to interpret it in accordance with latest technological development. Such view would enable us to interpret essential provision widely enough to cover modern communication by emails or concluding contracts in online browsers.

It is clear that we may conclude the same as Morek[30] "although not all of the legal difficulties arising with regard to *online arbitration* may be easily resolved, there are no insurmountable obstacles". However, we must also consent to Herboczkova's conclusion that "[a]lthough an extensive interpretation of provisions can be of some help, modernization and amendment is necessary in order to keep track with the developments of modern society."[31]

[30] Morek, R. 2007, Online Arbitration: Admissibility within the current legal framework, viewed on January 10, 2011, p. 45. <www.odr.info/Re%20greetings.doc>

[31] See supra Note 8.