

## **Challenges of Electronic Arbitration in Electronic Commerce transactions**

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### **Abstract**

Electronic arbitration is inseparable from the advancement of electronic commerce besides cross-border trade transactions. Merchants in such transactions require an efficient, cost effective, and swift dispute resolution mechanism. Therefore, online arbitration is gaining prominence as it is deemed to be a private and a faster means of solving e-commerce disputes. Research indicates that an increasing number of both domestic and international regulations are adhering to the rules governing electronic arbitration. However, just like e-commerce, e-arbitration is also encountering certain challenges that may hinder its efficient operation. This paper will discuss exhaustively the challenges of electronic arbitration e-commerce.

*Keywords:* Electronic arbitration, transactions, challenges, disputes, e-commerce, resolution.

## **Introduction**

Electronic Commerce (e-commerce) is the buying and selling of goods and services over the internet. Berti &Ponti (2007) emphasize that advancements in Information Communication and Technology has led to the possibility of business transactions being carried out virtually. There are three main areas of electronic commerce. These include online retailing, virtual market, and online auctions. Millions of online business transactions are carried out every year. It is no longer a necessity for customers to visit the brick and mortar shops. Similarly, traders no longer have to sign solid copies of contracts. Lew & Kröll (2003) claim that electronic commerce has led to new challenges in various aspects. These challenges require fast and efficient response, and have necessitated the establishment of Electronic arbitration (E-arbitration). Arbitration is a process where an arbitrator, who is a neutral third party, delivers a decision that is final and binding on both parties in a dispute. Electronic arbitration is a method that is used to settle disputes by use of online platforms that provide arbitration services. This is a recent mechanism of dispute resolution that helps the disputing parties to solve their wrangles online.

## **Electronic Arbitration Institutions**

Electronic arbitration has been adopted mostly in Business-2-Business relations. Today, there are various services that provide e-arbitration in different forms. Kaufmann & Schultz (2004) asserts that the key aspects of carrying out electronic arbitration are to improve the speed of solving disputes, reduce costs, and the notion that disputing parties do not have to be available at the same place. Discussed below are some of the providers of electronic arbitration. Founded in 1985, Hong Kong International Arbitration Centre is an institution that provides dispute resolution services. It has established the Electronic Transaction Arbitration Rules that resolves consumer disputes. It has options that conduct hearings in person, by telephone, by video link, by mail, or by any other electronic communication. Since the rules of operation are from 2002, they are mostly dated in shape and language.



Chinese International Economic and Trade Arbitration Commission is a renowned institution that has developed electronic arbitration rules. The institution aims at resolving electronic commerce disputes. Its rules were effective from 2015, and have a more visibly online-based focus. The institution also has an online dispute resolution center where cases can be submitted and are effectively resolved. Raghebi & Omid (2016) affirms that the claimant has the authority to decide on the way of communication, and can also opt to use regular mail for various communications. Research indicates that there is a clear preference for online communication in regard to submission of evidence, communication, as well as witness testimonies (Ramokanate, 2014). Also available are different procedures that have shorter time limits in regard to the value of the claim.

Headquartered in New York, the American Arbitration Association (AAA) is a non-profit organization that resolves disputes between suppliers and manufacturers. It does this at a fast and fairly inexpensive way. The whole process is electronic via the AAA web file platform. Razmi & Afras (2014) emphasize that the process has got two stages that include negotiation and arbitration. The whole process is supposed to be concluded in 66 days. In the arbitration stage, there is no evidentiary hearing other than through the AAA web-file platform. Moreover, only documents are used in the whole process. The arbitration award is to be given on the AAA web-file platform in 30 days.

Swiftcourt is a Swedish digital court that has been instrumental in providing binding electronic arbitration. The court offer services both on a standalone basis or when incorporated into a contract. Their main focus is to provide quick and cost efficient services, as it promises a resolution within six weeks from the date of application. Swiftcourt claims that their services are efficient and cheaper as compared to the offline courts.

## **Challenges facing Electronic Arbitration in electronic commerce transactions**

### **1. Technology infrastructure**

Electronic arbitration depends massively on the availability of technology. Technology plays an important part in order for electronic arbitration to succeed. Without easy access to internet connections and computers, the ability of parties to utilize electronic arbitration tools is extremely limited. Electronic arbitration would inevitably appeal more to individuals who are essentially experienced in the online environment.

According to Tao (2004), there are a lot of individuals in various countries across the worlds who utilize eBay as a market place where they are able to buy and sell goods at a distance. e-Bay users are some of the people who have taken advantage of online arbitration. Their use of e-arbitration has been promoted by their ability to have computers as well as their ability to access internet. The merchants in eBay already have online arbitration options available to them for settlement of disputes.

Increase in the number of transactions has led to the increase of online transactions. In several countries, electronic arbitration has been promoted through government initiatives that accelerate individuals' access to the internet. Such initiatives include electronic government projects. However, it is important to note that certain electronic applications and platforms require to be developed to fit specific contexts in different countries.

### **2. Legal challenges.**

There are various issues that have been raised at the platforms where parties conclude electronic arbitrations. One of the issues has been the integrity of the websites. All of the legal description and details of electronic arbitration are communicated online. They are conducted between two parties that are at a distance from one another. The parties do not have an opportunity to meet physically and mostly never get to see one another. This has always raised a



lot of concerns. Torres & Arias (2009) affirms that one of the parties may not be serious enough in the arbitration process.

As a result, the admission to the online arbitration site may be risky on one of the parties to the deal, if the website is merely a fraudulent platform that aims to cheat. In order to curb such problems, recent legislations in various countries have resorted to the introduction of electronic authentication and ratification bodies. These bodies have been instrumental in tracking and revealing the identification of various websites. Moreover, they record, store, and carry out approval of electronic transactions that have been concluded between the parties. If a particular site is found to be unsafe, the parties are warned and notified of the credibility of the site. These bodies have been entrusted to issue certificates of services.

### 3. Enforceability of electronic arbitration.

The subject of enforceability in the context of electronic arbitration encompasses various elements. One of the main concerns of e-arbitration has always been the enforceability of resolutions that are obtained through online arbitration (Tao, 2004). In most instances, parties X and Y do enter into contractual agreements that bind them to comply with the resolutions that are reached through online arbitration. The ability of both parties in dispute to ensure that the other party would definitely comply with the resolution depends on the effectiveness of online arbitration.

According to Ruhl (2011), issues of submission to online arbitration as well as the enforceability of electronic arbitral awards have attracted the operation of the New York Convention. There has been certain doubts being raised as to whether agreements that are submitted to electronic arbitration, to be considered as being in writing. However, article 2(1) of the New York Convention requires that any agreement being submitted to arbitration must be in writing. This implies that an agreement in writing consist of an agreement contained in an exchange of telegrams or letters (Zacks, 2015). Modern scholars claim that online arbitration is definitely influenced by the operation of the New York convention, as its submissions fall within the scope of the phrase “exchange of telegrams”. The New York convention provides increased



confidence to parties in regard to the enforceability of agreements to engage in electronic arbitration, as well as the enforceability of arbitral awards that are obtained from electronic arbitration.

However, there are certain inconveniences that are linked to initiating court action in order to implement the provisions of the New York convention. Such inconveniences would arise when a party to an online dispute deliberately refuses to comply with an arbitral award. The creation of cyber-courts is one of the solutions that have been proposed to curb this dilemma. The cyber-courts would enable a party to obtain an online court order, so as to enforce a binding resolution that is obtained from online arbitration.

#### 4. Security in electronic arbitration.

Parties to a dispute often exchange a lot of information during the course of online arbitration process. Keeping the contents of proceedings as confidential as possible is usually a relatively simple matter, in case of offline disputes. However, a lot of protocols that are used to communicate online have not been inherently formed with security concerns in mind. According to Brunet (2006), the need to ensure that deliberations are kept confidential is vital in developing public confidence in online arbitration as a legitimate way of resolving disputes that arise from online transactions. For such reasons, it is important that appropriate security measures are implemented during online arbitration processes.

Schlossberger (2015) asserts that there are various elements of security in the context of electronic arbitration. For instance, parties to an electronic dispute need to be certain that communications done during the process is confidential and can never be accessed by third parties without proper authorization. This can be attained by providing the participants involved with authentication credentials, as well as encrypting data by using public key cryptography. Second, the integrity of all transmitted data should be guaranteed. This is somehow achieved by the use of encryption techniques. Digital signatures by individuals involved in an online dispute can further help in verifying the integrity of all communications.



#### 5. Language barriers and culture.

Culture and language are deemed as being amongst the crucial challenges that hamper the interaction between individuals and various electronic arbitration websites. As noted by Ramokanate (2014), there is an urgent necessity to develop software's that will make a significant progress in the translation of all texts into languages that can be understood by everyone. There is also a need to consider cultural barriers, traditions, values, and customs, so as to avoid being a hindrance towards the use of commercial sites.

#### 6. Seat of arbitration

The seat of arbitration is crucial in regard to various aspects. The seat of arbitration is in charge of determining the applicable law in arbitrations. Moreover, based on the New York Convention, enforcement and recognition of the award may be rejected if the award had been set aside by an incompetent authority of the state in which the award was made. In electronic arbitration, the issue of multiple locations has been an obstacle in determining the place of arbitration. In this kind of arbitration, the disputing parties are not the only ones who may be located in different states. The arbitrators in attendance during a deliberation may also be from different countries. In comparative law there is often a tendency of not using the arbitrator's electronic presence or ones technical equipment to determine location. Therefore, the determination of the seat of arbitration must rest on legal criteria. According to Whitley & Kjaergaard (2014), this issue has led certain scholars to conclude that electronic arbitration has no identifiable seats.

However, current views about determination of the seat of online arbitration have significantly solved this concern. Today, the seat of arbitration is determined based on the new



codes and not on geographical notion. The choice of the seat of arbitration is initially determined by the parties, either directly or by referring to the arbitration rules. If this fails, then the seat is determined by the arbitrators.

The idea that hearings and procedural acts are conducted elsewhere is irrelevant. Lynch (2003) argues that it is the task of the disputing parties in electronic arbitration deliberations to determine the seat of arbitration. The admissibility of determining the seat of arbitration by the parties as well as the arbitrators has resulted in the conclusion that lack of a physical place is irrelevant.

7. Lack of physical/personal appearance of the parties.

A notable challenge of electronic arbitration has always been the lack of personal appearance of the disputing parties, witness, as well as experts in front of the arbitrators. According to Howell (2008), physical appearance has got crucial importance for the arbitration, in regard to its adjudicatory nature. For instance, sometimes arbitrators often need to understand the emotional situation that the witness is testifying in. This would help the arbitrator in making an assessment according to the credibility of the testimony.

8. Determination of the place of arbitration.

Electronic arbitration is deemed as being placeless, implying that it lacks a fixed location. It is claimed that the concept of place, in arbitration, has become more abstract. The concern of determination of the place of arbitration often become important in instances when the arbitration agreement fail to cover this matter, and the disputing parties fail to agree on this issue after the dispute arises (Wissam, 2013). Since electronic arbitration is carried out in cyberspace, this can undermine the more traditional territorial approach the links that place of arbitration to the place where the involved parties have a domicile.

9. Issues concerning the law to be applied.





Despite the disputes being handled out of court, the issue of applicable law usually emerges in electronic arbitration. In a global perspective, the law that should be applied has always been a great concern. There are still various differences relating to the level of consumer protection. Existing consumer protective legislation often provide for the consumers' residence to determine the applicable law.

Brunet (2006) claims that it is not an easy task for businesses to know all applicable consumer protective legislation in the world. In order to avoid issues for businesses in their compliance with the consumer protective legislation across the world, it is necessary to create an equal level of applicable consumer protection. The UNCITRALs already has a vision of adopting a global framework on applicable legal principles.

## **Conclusion**

Electronic commerce is perceived to be the modern means that involves the trade of goods and services by use of electronic mechanisms. Since its inception, electronic commerce transactions have seen the emergence of various disputes. Such wrangles have led to the establishment of electronic arbitration, which has been useful in trying to solve the disputes that arise between the traders. Online arbitration is gaining prominence as it is deemed to be a private and a faster means of solving e-commerce disputes. However, electronic arbitration is also encountering certain challenges. Some of the notable challenges include technology infrastructure, legal challenges, enforceability issues, security concerns, language barriers and culture, lack of physical/personal appearance of the parties, determination of the place of arbitration, as well as issues concerning the law to be applied. If these challenges are resolved, electronic arbitration will be best suited mechanism to resolve e-commerce disputes.



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