

ON-LINE ARBITRATION¹

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Introduction

1. Arbitration is a method of dispute resolution, whereby parties to a dispute select their judges – who are called arbitrators – and, to some extent, the rules of procedure under which the arbitrators and counsel will operate.
2. On-line arbitration is a method whereby fact-finding and adjudication are all made in line², through the use of written memorials, affidavits, deposition of witnesses and deliberation by the panel of arbitrators.
3. What are the main features of arbitration ? Of course, it would be prudent to distinguish between commercial arbitration and arbitration between States – for example the World Trade Organization Dispute Resolution Board, or the arbitrations on delimitation of borders between countries, or other disputes (the sinking of the Greenpeace ship gave rise to an arbitration between the two states involved; the sinking of the Alabama during the blocus of the Confederacy during the Secession War gave rise to a world famous one in Geneva, etc.). However, the interests at stake in interstate arbitration are too high for the on-line dispute resolution to apply there. Therefore, I shall concentrate on commercial arbitration, including dispute resolution with consumers.

I. Arbitration Clause

4. In the area of commercial and consumers arbitration, the first and foremost questions are linked to the Arbitration Clause.
5. a) In commercial and consumers arbitration, there is of necessity a contract between parties to the dispute. In that contract, there may be a provision on dispute resolution.
6. b) The provision may decide upon the specific features on the arbitration or it may be expressed in general terms, for example: "ICC arbitration in Geneva." The reference to the International Chamber of Commerce gives a regulatory framework to the arbitral proceedings. The arbitration provision may also tend to ad hoc arbitral proceedings. "Ad hoc" means outside the influence of any institution of arbitration.
7. c) For an on-line arbitration to take place, the provision in the agreement must necessarily refer to an institution allowing for on-line arbitration, or to an ad hoc arbitral proceedings for which the parties have allowed the exclusive use of electronic

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² For further characteristics, see Michael SCHNEIDER and Christopher KUNER, *Dispute Resolution in International Electronic Commerce*, in *Journal of International Arbitration*, vol. 14 n° 3, September 1997.

transmission in both fact finding and deliberation of the panel. If, on the other hand, the parties have not mentioned on-line arbitration, they will not get it under the traditional rules of arbitral institutions. For example, the International Chamber of Commerce still requires the Terms of Reference to be signed on paper; and the awards which are to be approved by the ICC have to be sent to the members of the Court of Arbitration in a paper copy – which may delay the approval.

8. If it is an international ad hoc arbitration, most generally the UNCITRAL Rules on International Arbitration will be found applicable. Those rules have been established in 1976 by the United Nations Commission for International Trade Law. They do not take into account on-line possibilities but, if the parties are willing to waive some rights (for example their right to a hearing and to have the award signed by the arbitrators), those rules may accommodate on-line arbitration. As a matter of experience, few parties ever wish to take the risk of written proceedings only, without hearing for the presentation of evidence, although oral pleadings are now often replaced by post hearings memorials.
9. Unless they specifically provide otherwise in the arbitration agreement, the parties and the ad hoc arbitral tribunal are free to decide upon the features of a partially on-line dispute resolution when the need advises. This usually is made through exchange of comments on a draft procedural order presented by the panel to the parties at the onset of the proceedings. The on-line technology is now quite commonly used for the exchange of mails between the parties and the arbitral tribunal, as well as among parties and among members of the arbitral tribunal. However, many lawyers and arbitrators insist that the sending of an e-mail be signaled by a telecopy – for there are so many e-mails and so much spam going around that an important communication has to be flagged as such!
10. Now, this is only a partial on-line arbitration process, including some exchange of memorials, then preparatory texts for the deliberation of the arbitral tribunal. Is there space however for exclusive on-line arbitration ?

II. The Proper Use of On-line Arbitration

11. The exclusively on-line arbitration is possible in dispute where all evidence is on writing and no doubt exists as to the authenticity of those writings. For example, where trademarks certificates are filed with a WIPO Panel concerning an alleged cyber-squatting, the Panel usually has to see the original certificates as issued by the authorities of countries in which the public administration does not issue electronic certificates. However, if there is no contestation about the alleged trademark rights, an electronic format may serve as a preliminary basis for the first step of the proceedings. To some extent, the agreement of the parties on given facts and circumstances may replace a procedure for fact-finding. My first indication today for the use of electronic arbitration is therefore that **it is appropriate in disputes where no public interest is at stake, so that the facts as put forward by both parties can be accepted by the arbitral tribunal without further inquiry.**
12. The second indication would be that **on-line dispute resolution is possible where the arbitrator deems it possible to ascertain disputed facts through electronic communication.** This usually boils down to the question whether the issues of fact are simple enough for a detailed set of questions to be asked by the panel and convincingly

answered by the concerned party. The other party always has a right to check these answers. In credit card disputes, for example, written explanations on the transactions at the basis of the debit on an account may suffice by and large. Therefore, consumers are sometimes litigating on-line with their bank in the U.S.A.

To the contrary, most commercial transactions leading to business disputes appear to require the appearance of witnesses, who alone can say why the relationship broke down. Letters, teletypes and mails are of course produced by the parties, but few arbitrators would give up the personal appearance of the main actors which will explain their story as seen through their eyes – and not only through the glasses of their lawyers, which may be magnifying or distorting glasses. The weight of evidence is essential; and for that, arbitrators have to weigh testimonies.

13. The third indication for an on-line arbitration would be that **adjudication is requested, without any hope for a settlement out of court or for a mediation starting after the onset of the litigation**. Adjudication may be had, once findings of fact have been made, and where the law is simple enough for the arbitrators to apply it, with the help of learned lawyers on both sides.

On the other hand, the whole maturing process of hearings, with varying expectations by the parties as to the outcome of the procedure, is absent from on-line arbitration; the uncertainty fosters the settlement by the parties themselves. Nowhere is this uncertainty better *nurtured* as in a courtroom or conference with personal appearance of all interested persons. On-line arbitration works fine for cyber-squatting precisely because there is little room for uncertainty, and almost no room for compromise. In usual commercial arbitration, however, there is usually ample room for compromise on figures, and more uncertainty as to the outcome of the procedure.

14. Finally, the fourth case where on-line arbitration may be endeavored concerns the requirement that arbitrators may reach a **clear-cut solution on the basis of legal considerations without need for an internal negotiation**. Usually, this means that there are few interrelated issues to adjudicate. If a damage award has to be calculated on the basis of one or two counts, it is simpler to reach a solution that if the calculation should take into account the answers given by an expert to 18 different questions, 10 of which there is uncertainty. In such a case, the arbitrators will have to weigh the margin of error on those issues against each other, and they certainly will find a just and equitable solution after a protracted deliberation. On-line deliberation does not appear practicable then.

III. Conclusion

15. Now, I happen to believe that justice, equity and good conscience are the key factors in any arbitration procedure. To sum up, in many simple cases, on-line arbitration will be possible : because the facts are susceptible to be proven by documents which are capable to be transmitted on-line; or because the facts are susceptible to agreement between the parties; or because written inquiries by the arbitrators may suffice; or because the legal and factual issues are few or not interrelated.

However, as soon as complex cases involving difficult human issues such as a strategic alliance failing, or a consortium being dismantled before completion of the work, or a

dealership agreement being terminated, or a licence agreement being violated, it will be difficult to by-pass hearings with participants.

Justice has to be done; but it also has to be seen to be done. On-line arbitration, as all adjudication, aims at resolving a dispute in order to promote social peace and to suppress a cause of unrest. Therefore, it should be used best where parties with experience agree to it. It should be avoided where click-wrap agreements providing for on-line arbitration may surprise the weaker party or the less sophisticated one. And it should never be imposed for complex cases.

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Summary

On-line arbitration is important for consumer litigation, because it keeps low the costs of proceedings and ensures swift adjudication of the case. For business-to-business transactions, on-line arbitration should not be generalized, because many prerequisites have to be met for on-line arbitration to be successfully applied.