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Online International Arbitration

Armağan Ebru Bozkurt YÜKSEL*

ABSTRACT

This article is about international arbitration that takes place on the Internet. The Internet is developing further day-by-day and becoming more important in our lives. Since technology affects everything, arbitration has also received benefits from technological developments. This article examines the general issues and the advantages of online arbitration. It concludes that online arbitration is a valid and effective method of dispute resolution and the arbitral awards given by online arbitration are enforceable under the rules of New York Convention.

ÖZET

Bu makale Internet ortamında cereyan eden elektronik tahkim ile ilgilidir. Internet, her geçen gün gelişmekte ve hayatımızda daha önemli bir yer edinmektedir. Teknoloji herşeyi etkilemektedir. Nitekim tahkim de teknolojik gelişmelerden payını almıştır. Bu makale elektronik tahkimin genel meseleleri ve avantajları üzerinde durmaktadır. Elektronik tahkimin geçerli ve etkin bir uyuşmazlık çözüm yöntemi olduğu ve New York Konvansiyonu uyarınca elektronik tahkim sonucunda alınan hakem kararlarının tenfiz edilebilir olduğu sonucuna varılmıştır.

KEYWORDS: *Arbitration, Internet, online arbitration, dispute resolution, online arbitral awards.*

ANAHTAR KELİMELER: *Tahkim, Internet, elektronik tahkim, uyuşmazlık çözümü, elektronik hakem kararı.*

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INTRODUCTION

It is well known that international arbitration is a mechanism for the final and binding determination of disputes concerning contractual or other relationships that have an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.[1] Online arbitration is a new form of arbitration which has developed with the increase of uses of the Internet.[2] Some of the arbitration institutions with long traditions are providing dispute resolution services online. For example, the World Intellectual Property Organization, the International Chamber of Commerce and the American Arbitration Association conduct arbitration procedures online.[3]

The expansion of the Internet affects many parts of our lives. We use the Internet in our daily lives in many areas like banking, shopping, communicating, and research. The Internet has many advantages in international transactions – saving money and accounting for time differences to name a couple. However, as the number of international transactions increase, we can expect more disputes to arise. Since the transactions occurred online, why shouldn't the arbitration occur online?

Online arbitration is defined as a method of dispute resolution that has all activities of the arbitration, including submissions to the arbitral tribunal and all proceedings, take place over the Internet via networks, e-mail, chat groups, or online conferencing.[4]

In Section II, this paper discusses the arbitration agreement and Section III discusses the conduct of the proceedings. Section IV deals with the seat of arbitration while Section V talks about the selection of arbitrators. Sections VI, VII, and VII handle the procedures for the award, confidentiality of the award

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[1] Julian D.M. Lew, *et al*, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 1 (Kluwer Law International, 2003).

[2] Hong-lin Yu and Motassem Nasir, "*Can Online Arbitration Exist Within the Traditional Arbitration Framework*?," 20 JOURNAL OF INTERNATIONAL ARBITRATION 455, 455 (2003).

[3] *WIPO provides online arbitration for domain name disputes. WIPO has an adapted version of the Expedited Arbitration Rules to online arbitration. Rafal Morek, Online Arbitration: Admissibility within the Current Legal Framework,* at *http://www.odr.info/Re%20greetings.doc, (last visited Dec. 10, 2007); Erik Wilbers, "*On-Line Arbitration of Electronic Commerce Disputes," 27 INTERNATIONAL BUSINESS LAWYER 273, 273 (1999).

[4] *See* Jasna Arsic, *"International Commercial Arbitration on the Internet: Has the Future Come Too Early ?,"* 14 JOURNAL OF INTERNATIONAL ARBITRATION 209, 209 (1997).

and the advantages of online arbitration, respectively. Section IX summarizes and concludes the paper.

I. Arbitration Agreement Formed by Electronic Means

In traditional arbitrations, the arbitration agreement should be in writing. Article II(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention[5]) states that "the term, agreement in writing, shall include an arbitral clause in a contract or arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Another important regulation about international arbitration is the European Convention on International Commercial Arbitration (European Convention[6]). According to Article I (2)(a) of the European Convention, an arbitration agreement shall mean either an arbitral clause in a contract or an arbitration agreement being signed by parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws.

Similarly, the Turkish International Arbitration Law[7] does not exclude technological developments. Under Article 4 of Turkish International Arbitration Law, arbitration agreements shall be in writing. In order to fulfill this condition, an arbitration agreement shall be a written document signed by the parties or contained in an exchange of letters, telegrams, telex, fax or an electronic medium. Therefore under Article 4, an arbitration agreement by electronic means will be accepted as valid under Turkish Law.[8]

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[5] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited Dec. 10, 200/).

[6] European Convention on International Commercial Arbitration of 1961, *available at* http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04011.html (last visited Dec. 10, 2007).

[7] International Arbitration Law, No. 4686, promulgated in Official Gazette Nr. 24453, dated Jul. 5, 2001.

[8] Ziya Akıncı, "*Tahkim Giderlerinin Azaltılması ve Elektronik Tahkim*" (*Reduction of Arbitration Costs and Electronic Arbitration*), Milletlerarası Tahkim Semineri (Seminar on International Arbitration)(Ankara, 2003); Ziya Akıncı, MİLLETLERARASI TAHKİM (INTERNATIONAL ARBITRATION) 82 (Ankara, 2003); according to the Turkish Civil Procedure Law provisions which have been applied to domestic arbitration, arbitration agreements should be in writing. Yargitay Decision 4336-627, Feb., 7, 1949; Erol Ertekin and İzzet Karataş, UYGULAMADA

If we look at Article 7(2) of the Turkish International Arbitration, which is based on the model law that has been prepared by United Nations Commission of International Trade Law (UNCITRAL),[9] it provides that "[a]n agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, means of telecommunication which provide a record of the agreement… ." Therefore, the UNCITRAL Model Law, the New York Convention, the European Convention and the Turkish International Arbitration Law all do not have a restriction as to the form of arbitration agreement.

E-mail is a way of document transfer which increases flexibility and efficiency, similar to fax transmission.[10] In fact, it can be argued that technically the exchange of e-mails is equal to the exchange of telegrams. Exchange of e-mails containing an arbitration clause satisfies the formal requirements of Article II(2) of the New York Convention.[11] Clicking a button on a Website that contains an offer, which refers to terms and conditions, including an arbitration clause, would be valid as well because "there has been an exchange of information entirely analogous to the exchange that takes place when e-mails or faxes are exchanged."[12]

Using electronic signatures[13] in an arbitration agreement will help protect the parties. Turkey has had an electronic signature law since 2004.[14] According

İHTİYARİ TAHKİM VE YABANCI HAKEM KARARLARININ TANINMASI VE TENFİZİ (ARBITRATION ARBITRATION PREFERENCE AND RECOGNITION AND EXECUTION OF FOREIGN JUDICIAL DECISIONS) 207 (Ankara, 1997).

[9]Text *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-only-rev06-e.pdf (last visited Dec. 10, 2007).

[10] Arsiç, *supra* note 4, at 211.

[11] Richard Hill, "On-line Arbitration: Issues and Solutions", 15 ARBITRATION INTERNATIONAL 199, 202 (1999); Ziya Akıncı, *Elektronik Tahkim (Electronic Arbitration*), Uluslararası İnternet Hukuku Sempozyumu (International Internet Law Symposium), 429, 430 (Izmir, 2002).

[12] Hill, *supra* note 11, at 202-203 (indicating that it is about the flow of bits). A bit is an indivisible unit of information stored or transmitted by electronic means. For example, if the seller's offer contains an arbitration clause and the buyer clicks on submit button on the computer screen, then the bit stream comprising the offer and resident in buyer's computer, is modified by buyer and the modified version is transmitted back to seller. *Id*.

[13] Electronic signature is a paperless way to sign a document using an electronic symbol or process attached or associated with the document. Electronic signature and digital signature may be used interchangeably. In fact, digital signature is a subset of electronic signature. http://en.wikipedia.org/wiki/Electronic_signature (last visited Dec. 10, 2007).

to this law, it has been accepted that a secure electronic signature is the equivalent of a manual signature; therefore a document signed with an electronic signature would have the same legal effects as one signed manually.[15] There is one exception, though; legal affairs or contracts of guarantee that are subject to a required form or private formality by law cannot be completed with an electronic signature (Article 5 of the Electronic Signature Law). Since a secure electronic signature[16] has the same probative value as a manual signature (Article 5 of the Electronic Signature Law), an electronic signature could be used in arbitration agreements and be completely valid under the Electronic Signature Law.

However, if a proper electronic signature has not been used and one of the parties claims that he did not send the e-mail, an evidentiary problem will occur. Nevertheless, this kind of problems is not unique to electronic signatures because a similar situation may occur with fax, telex or telegram transmissions.

In summary, under Turkish law, an arbitration agreement concluded by electronic communications is admissible and can be fully effective.[17]

II. Arbitration Proceedings Conducted by Electronic Means

It is universally accepted that party autonomy has a significant role in determining the conduct of proceedings.[18] In addition to this concept, parties have the right to change the rules of procedure whenever they want.[19] This rule is in the New York Convention as well – according to Article V(1)(d) of New York Convention, recognition and enforcement of the award may be refused if the procedure was not in accordance with the agreement of the parties. Similar to this, under Article IV of the European Convention, the parties to an arbitration agreement shall be free to organize the arbitration by agreement.

[14] Electronic Signature Law, No. 5070, promulgated in Official Gazete Nr. 25355, dated Jan. 23, 2004.

[15] http://www.e-imza.gen.tr/index.php?Page=EImzaNedir&YaziNo=8 (last visited Dec. 10, 2007).

[16] Documents with a digital signature present a high quality of evidence under Turkish law.. *See* Mine Erturgut, MEDENİ USUL HUKUKUNDA ELEKTRONİK İMZALI BELGELERİN DELİL OLARAK DEĞERLENDİRİLMESİ (EVALUATION OF DOCUMENTS WITH ELECTRONIC SIGNATURES AS EVIDENCE IN CIVIL PROCEDURE LAW**)** 210 (Ankara, 2004).

[17] Morek, *supra* note 3 at 24; Hill, *supra* note 11, at 203; Akıncı (Izmir Seminar), *supra* note 11, at 432.

[18] Lew, *supra* note 1, at 523.

[19] Yavuz Kaplan, MİLLETLERARASI TAHKİMDE USULE AYKIRILIK **(**INTERNATIONAL ARBITRATION**)** 37 (Ankara, 2002).

According to Article 8 of the Turkish International Arbitration Law, the parties may freely agree on rules of procedure as well.

The New York Convention, the European Convention and the Turkish International Arbitration Law do not present any obstacles if the parties agree to use electronic means to conduct the arbitration proceedings.[20] If the parties have not specifically agreed to do so, the arbitral tribunal itself may agree on the use of electronic means, such as hearing witnesses via video conferences[21] or transmitting documents electronically. The central principle is equal treatment of the parties. According to this principle, the parties have the right of equal access to the information, so they must also have the ability to have equal access. For example, if one of the parties does not have the facilities to read CD-ROMs, it would not be acceptable to impose transmission of documents via CD-ROM.[22]

If the applicable arbitration rules require written proceedings, the parties should explicitly state in their agreement that they accept electronic means for the proceedings. Violation of these rules would then be a violation of the arbitration agreement, which could result in a refusal to enforce the award in accordance with Article V(1)(d) of New York Convention.[23]

III. Seat of Arbitration

The place of arbitration constitutes the seat of arbitration.[24] The seat of the arbitration is important because it determines the nationality of the award, (which plays a role when the arbitral tribunal seeks the assistance of local courts) and the jurisdiction of local courts for setting aside the award.[25] When the parties decide the seat of arbitration, they should consider geographic location, facilities and, most importantly, they should choose a state where the

[20] Akıncı (Izmir Seminar) *supra* note 11, at 432; Akıncı (Ankara Seminar), *supra* note 8, at 110.

[21] Video conferencing is a communications method where each participant sits before sound and video camera equipment. On the screen the faces of the other participants appear. Arsic, *supra* note 4 at 212.

[22] Hill, *supra* note 11, at 203-204.

[23] *Id.;* Akıncı (Ankara Seminar), *supra* note 11, at 433.

[24] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 159 (Sweet & Maxwell, 2004).

[25] Nicolas De Witt, "*Online International Arbitration: Nine Issues Crucial To Its Success*", 12 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 441, 451 (2001).

laws have a modern perception of international arbitration and which is a member of the New York Convention.[26]

In online arbitration, the parties and arbitrators can interact from different places.[27] Whether it is an electronic arbitration or not, it is possible that arbitrators can solve the dispute without any hearings unless the parties have decided otherwise. The arbitrators do not have to actually physically meet and decide at the seat of arbitration. Once the parties have determined the seat of arbitration, all proceedings and hearings could be held electronically and the arbitrators need only state the seat of arbitration in the award itself, as the parties determined, and sign the award. There need not be any relationship between the award decision and the seat of arbitration. If the parties have not stated the seat of arbitration, then the arbitral tribunal or the arbitration institution would determine the seat of arbitration.[28] Article 20 of the UNCITRAL Model Law stipulates that if the parties have not decided the place of arbitration, then the place of arbitration shall be determined by the arbitral tribunal based on the circumstances of the case. Article 9 of the Turkish International Arbitration Law is very similar and stipulates that the seat of arbitration shall be determined freely by the parties or by the appointed institution. Failing such an agreement, the seat of arbitration shall be determined by the arbitrator or the arbitral tribunal in accordance with the characteristics of the case.[29]

IV. Selection of Arbitrators

Usually the parties determine the arbitrators. However the parties may allow a person or an institution to select the arbitrator. According to the

[26] Redfern *et al*, *supra* note 24, at.159.

[27] U.N. Conference on Trade and Development. *Dispute Settlement Module 4.1*, COURSE ON DISPUTE SETTLEMENT 48 (World Intellectual Property Organization, 2003) *available at* http://www.unctad.org/Templates/Page.asp?intItemID=2102&lang=1, last visited Dec. 11, 2007).

[28] Isabelle Manevy, Online Dispute Resolution: What Future? 42 (June 2001, unpublished Ph.D. thesis, University of Paris) *available at* http://www.juriscom.net/uni/mem/17/odr01.pdf (last visited Dec. 17, 2007); Akıncı (Izmir Seminar), *supra* note 11, at 434**;** Akıncı (Ankara Seminar), *supra* note 8, at 111**.**

[29] For the full translated text of the Turkish International Arbitration Law into English, *see* Kemal Dayınlarlı, MİLLETLERARASI TAHKİM KANUNU (THE INTERNATIONAL ARBITRATION LAW) (Ankara, 2002).

UNCITRAL Model Law,[30] the parties are free to determine the number of arbitrators. Failing such a determination, the number of arbitrators shall be three (Article 10). The parties are also free to agree on a procedure of appointing the arbitrator (Article 11). A very similar system is contained in the Turkish International Arbitration Law. According to Article 7 of this law, the parties are free to determine the number of arbitrators with the condition that number shall be an odd number. If the number of the arbitrators has not been determined by the parties, three arbitrators shall be appointed.[31] In this context, it is possible to say that the arbitrators may let an electronic arbitration institution choose the arbitrators. Electronic selection of arbitrators may be via computer selection or computer drawing.[32] The doctrine suggests that in online arbitration, any type of court intervention in the appointment of the arbitrators should be avoided. The election of an institution or organization that selects its arbitrators in a professional, neutral, transparent and even automatic and non-discretionary manner should be favored.[33]

V. Award and Enforcement

It is easier to enforce international arbitration awards in foreign courts than it is to enforce foreign court judgments. If an arbitral award fulfills the requirements of the New York Convention and is issued in a country which is a party to the New York Convention, the award should be enforceable in any other member state of New York Convention.[34]

In online arbitration, the winning party would most likely want to enforce the arbitral award in a national court. At that time, the online arbitration would probably be examined by that national court. Since the Internet does not have any boundaries, the first point considered will be affirming the location of the

[30] The UNCITRAL Model Law attaches great importance to the disputants' freedom of determination. Ergin Nomer, *et al*, MİLLETLERARASI TAHKİM (INTERNATIONAL ARBITRATION) 43 (İstanbul, 2000).

[31] One arbitrator adjudication would be cheaper than a group of arbitrators. However, experiments in the international arena prove that a three arbitrator tribunal is needed for complex cases. *See* Deren Yıldırım, Nevhis, UNCITRAL Model Kanunu ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları (THE UNCITRAL MODEL LAW AND NATIONAL ARBITRATION LAW ENVIRONMENT FUNDAMENTAL PROBLEMS) 57 (Istanbul, 2004).

[32] Manevy, *supra* note 28, at 2001, 40; Akıncı (Izmir Seminar) *supra* note 11, at 434; Akıncı (Ankara Seminar), *supra* note 8, at 112.

[33] De Witt, *supra* note 26 at, 449.

[34] Yu and Nasır, *supra* note 2, at 470.

award. According to the New York Convention, an award is deemed to be made at the seat of arbitration. The place of hearings or the place where the award signed and delivered by the tribunal is not dispositive.[35] So in online arbitration, the place which is indicated in the award should be affirmed as the seat of arbitration under the explanation in the preceding paragraph.

According to Article IV(1)(a) of the New York Convention, the authenticated original award, or certified copy, should be supplied to the court that will enforce the award. According to this Article, the electronic file would need to be printed for an online arbitration. The hard copy of the award should then be signed by the arbitrators. However if the arbitrators use their digital signatures will it fulfill this condition? A practical solution for this problem, as addressed by the doctrine, is to send the printed version of the award to the arbitrators to sign or use a trusted third party to confirm that the digital signatures belong to the arbitrators.[36]

Therefore, even if the arbitration agreement and proceedings take place totally in the electronic environment, the arbitral award should still be presented and signed by the arbitrators to be enforced without any difficulties.[37]

VI. Confidentiality in Online Arbitration

Confidentiality is known to be an advantage of traditional arbitration. In online arbitration as well, confidentiality is a desired feature. Since online arbitration takes place on the Internet, there may be problems like unauthorized access, identity verification, service denial, crash of the system and viruses. These problems can be minimized through technical solutions, but of course arbitration institutions and arbitrators should follow the developments of technology closely to enhance the security of the data. However, the doctrine already acknowledges that 100% confidentiality is not possible, either in online arbitration and traditional arbitration.[38]

There are different opinions regarding publication of online arbitral awards. Some believe awards should be published to allow for the development

[35] *Id*., at 471.

[36] Arsic, *supra* note 4 at 217; U. N. Conference on Trade and Development, *supra* note 27 at 52; Yu and Nasir, *supra* note 2 at 472.

[37] Akıncı (Ankara Seminar), *supra* note 8, at 112.

[38] De Witt, *supra* note 26 at 462.

of arbitral case law.[39] Transparency will also help develop trust in online arbitration.[40] However, the private information of the parties should be masked when publishing the awards.[41]

VII. Advantages of Online Arbitration

Both the Internet and online international arbitration transcend national boundaries.

- First, the Internet is a neutral place for the parties to a dispute.

- Second, the parties and arbitrators do not have to travel for the hearings in online arbitration; audio and video conferencing capability allows the parties to conduct meetings and hearings remotely to reduce the travel expenses and the costs of organizing the arbitration.

- Third, using online international arbitration for electronic commerce and other disputes will also save time and increase efficiency – parties will be enable to initiate and defend a claim by accessing a Website and complete forms electronically forms for the process. Online arbitration will increase the speed and efficiency of arbitration; web-based document filing systems will help parties to submit many documents instantly, over any distance, and at virtually no cost.

- Fourth, online arbitration will be convenient. Submissions can be archived by automated document management systems and could be reviewed from any location, at any time.[42]

Due to these advantages, online arbitration is a notable advancement in international arbitration and there are no insurmountable obstacles for online arbitration within the view of international commercial arbitration rules.

CONCLUSION

Since online arbitration is fast, economic and efficient, it should be a preferable way of dispute resolution. Even though it is a new method to conduct dispute resolution, online arbitration is still conducted by traditional arbitration rules. However, there may be some points of uncertainty, but to avoid these

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[39] Under Internet Corporation for Assigned Names and Numbers (ICANN), Rules for Uniform Domain Name Dispute Resolution Policy, all decisions are published on the ICANN website. See the Rules *at* http://www.icann.org/dndr/udrp/uniform-rules.htm (last visited Dec. 10, 2007).

[40] De Witt, *supra* note 26 at 464.

[41] Manevy, *supra* note 28 at 45.

[42] Wilbers, *supra* note 3, at 273; De Witt, *supra* note 26, at 441.

uncertainties, the New York Convention would need to be interpreted broadly.[43] Also, the parties and the arbitrators in an online arbitration should always consider the legality of the applicable arbitration agreements and procedures, choice of law, seat of arbitration and form of the awards. These precautions will assist online arbitration to work within the framework of existing national and international treaties.[44] However, online arbitration should develop its own rules over the course of time.

In conclusion, online arbitration is possible and online arbitral awards should therefore have the same effect of traditional arbitral awards. Online arbitral awards are binding and final, subject to set aside only for the same limited procedural grounds as traditional arbitral awards.[45]

[43] De Witt, *supra* note 26, at 464.

[44] Hill, *supra* note 11, at 207; Yu and Nasır, supra note 2, at 473.

[45] Morek, *supra* note 3, at 41.