



THE FORMATION OF THE E-ARBITRATION AGREEMENT IN THE DIGITAL WORLD

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Abstract

To start with, the Internet and information technology have a practical influence on conflict resolution procedures: papers are instantly transferred to arbitrators at a low cost, and parties avoid paying travel expenditures. Electronic papers provide substantial benefits to arbitrators, particularly when the parties' submissions are voluminous, because they may do a keyword search without having to study the full file. Furthermore, arbitrators are already making extensive use of modern technologies. Aside from the regular usage of information technology (IT) equipment, the Internet has had a significant influence on dispute resolution methods. Although conventional alternative dispute resolution depended on interviews and meetings between plaintiffs and the arbitrator or mediator, the Internet increasingly facilitates distant conflict settlement.

Keywords: information technology (IT), Alternative Dispute Resolution (ADR), arbitral clause, French case law, co-contractor, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Civil Procedure Code.

Introduction

The arbitration process frequently appears in general conditions submitted and approved by electronic means in electronic commerce activities. In order to determine the legitimacy of the arbitral provision, two questions need to be answered: Does the computerized contractual procedure truly provide for the parties' informed consent? Does an arbitral clause show on a computer screen in the absence of a hard-copy contract satisfy the legal formalities of a written contract?



Generally, the formulation and adoption of arbitral clauses have been subject to legal constraints aimed to preserve the co-contractors' assent. Indeed, with an arbitral provision, the parties agree in advance to refer any disagreement to an arbitral tribunal. In doing so, they waive their right to refer the case to state courts. As a result, the commitment should not be taken lightly, nor should it be imposed by the contract drafter. Given this, each arbitral decision must meet two requirements. Initially, the agreement of the party against whom the provision is applied must be confirmed. In general, when the clause exists in the general provisions, assent to arbitration is frequently questioned. Secondly, it should be guaranteed that the form ad validates standards imposed by state legislation and that certain international treaties have been followed correctly. This second criterion so pertains to the structure of the arbitral proceedings.

An issue arises when the co-contractor is a customer because the consumer is protected by a specific law, the application of which is overseen by a court. Acceptance of an arbitral provision, because it removes the dispute from the jurisdiction of state courts, may be seen as a resignation of the consumer's rights prior to the occurrence of the dispute. That explains why the arbitrability of consumer complaints and the legality of arbitration agreements are sometimes challenged.

The addition of an arbitration clause in an electronic contract poses two sets of difficulties. The first concerns the party who prepared the electronic contract: to what degree must that party provide the accessibility of the arbitral provision, and how should the electronic contractual procedure be organized? The second set of difficulties pertains to the party accepting the electronic offer: How can it express its consent electronically?

On the Web, the communication system permits file navigation, notably via hypertext links. Electronic documents are no longer presented sequentially; alternatively, the user takes the initiative to go from one file to the next. This way of organizing navigation by site designers fosters what is known as incorporation by reference in legal terms. Incorporation of contractual requirements in the contract by reference on the Internet necessitates special safeguards regarding information accessibility.

Usually, integration by reference is done to avoid lengthening the primary contract. Rather than repeating pre-existing papers, the parties refer to a document that is available elsewhere. The general conditions, for example, are not mentioned in the contract but are available upon request. Can an arbitration agreement that exists in



a document to which only a reference is made be used against a co-contractor? Shouldn't the arbitral provision be included in the main contract because it denies the co-contractor access to the state courts? In international commerce law, incorporation by reference is now permitted. According to French case law, the only thing required is proof that the primary contract contains a reference to the arbitral provision. The receiving party's silence on this reference shows acceptance. In France, the Court of Cassation currently accepts a purely consensual approach, requiring no reference to the arbitral clause to be made "in writing".

It is therefore sufficient to notify the accepting party of the arbitration provision, such that acceptance of the original contract also entails agreement of the arbitral clause. This case law is fully applicable to electronic commerce activities, especially those performed on a web page because the general terms including the arbitral provision are frequently available via a hypertext link on a separate Web page. Furthermore, the UNCITRAL Model Law on Electronic Commerce includes incorporation by reference in its Article 5 bis, which is summarized as follows:

“Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.”

Incorporation by mention is dependent on the arbitral clause's real accessibility: the co-contractor should have been able to obtain this external information, failing which he cannot have provided his approval. The general conditions may be accessible on the Internet or electronic networks due to technical reasons (e.g., the hypertext connection may have been broken or the computer language may be illegible on the co-machine). contractor's As a result, there is a global legislative trend toward measures that explicitly require the availability of general conditions in electronic contracts.

In the United States, the Uniform Computer Transactions Act mandates that contractual terms be available both before and after the contract's electronic completion. Failure to comply with these criteria results in the inability to activate the inaccessible contractual clauses.

On a website, a purchaser of an electronic commerce operator orders a corporeal or incorporeal asset. The website operator has given him access to the public terms and conditions, which include the arbitration provision. How does the customer indicate his agreement to the electronic transaction? Does clicking the "I agree" button, in particular, indicate approval of the agreement and the arbitration clause?



The "I accept" button, on the other hand, must be visible and the Internet user must be compelled to click on it to begin the download. Thus, the Court ruled in *Specht v. Netscape Communications Corp.* that general conditions including an arbitration provision could not be enforced against a user who had downloaded software. In this case, the user was able to download the software without having to click on the "I accept" button by simply clicking on the "download" link. This button expressing acceptance to the general terms was even demoted to the bottom of the Web page, where the user might not discover it. To summarize, unless specifically related to the general criteria, a click does not indicate approval. A click that just initiates the download without any further reference is thus deemed ineffective.

Finally, we must decide if the arbitral paragraph should be underlined separately among the general circumstances. In one instance, *Lieschke, Jackson & Simon v. Realnetworks Inc* (*Lieschke, Jackson & Simon v. Realnetworks Inc*), the claimants claimed that they were unable to accede to an arbitral provision concealed within the general terms displayed on the computer screen. While the phrase was not clearly underlined under the term "arbitration agreement," the judge considered it to be perceptible. It was in the same typeface as the remainder of the agreement, in a prominent location. This judgment on software downloading was consistent with existing case law on general circumstances.

The ratio of case law allows for the formulation of the following guidelines on the formulation and presentation of general conditions in electronic channels:

- i. Before the contract is finalized, the website operator must ensure that the co-contractor is routed through the general conditions, or at the very least provides a very specific reference to them.
- ii. The general conditions must be freely available both before and after the contract is signed. It is preferable if the general conditions are automatically downloaded into the user's computer's hard disk so that they may be saved.
- iii. The arbitral provision shall not be buried within the general terms. On the contrary, it must be emphasized. Though not required, the addition of a heading and bold type is better.
- iv. The "I agree" button only binds the user once he or she has completed the contractual procedure and reviewed the general terms.

The party may request arbitration and must produce proof of its existence. The presence of a written document would almost probably persuade the arbitration that has been summoned to rule on his or her jurisdiction. However, the court or arbitrator who is requested to rule on the existence of the arbitration agreement may



accept other forms of proof. Aside from the issue of proof, it is critical to evaluate if the legitimacy of the arbitration agreement is contingent on the existence of a written document. In other words, is the punishment for failing to provide a written document the nullity of the arbitration agreement? Is it still feasible to stipulate an arbitration agreement electronically when a paper document is required by law?

The legitimacy of the digital arbitration agreement must first be evaluated in light of international accords outlining the material norms governing arbitration. It is far from certain that these international accords can be read as favoring electronic papers, given that they were formed over 50 years ago, at a moment when the drafters could not have imagined that a written document could take any other form than physical form. Some countries' legal systems still demand a written document ad validation. Arbitration law must thus be adapted to cyber trade by legislation or case law. Finally, the relationship between the New York Convention and national rules that favor electronic documents must be defined.

Over 100 countries have joined or signed up for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted on June 10, 1958. 28 It has a very broad range of applications since it only needs one Party to seek ratification of the award before the courts of a contracting State for the Convention to be relevant. The Convention's fundamental goal is to establish the criteria for awards to be recognized and enforced. Article II is especially concerned with the rules governing the structure of the arbitration agreement:

Article II of the New York Convention:

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Article II can be adapted to electronic exchanges in a number of ways, depending on the parties' contractual procedure. If the parties conclude the contract by electronic mail, Article II (2) can be read finely by analogy. When the agreement is "contained in an exchange of letters or telegrams," the parties' signatures are not necessary. Furthermore, case law has recognized that faxed copies and telexes are equivalent to letters and telegrams.



As a consequence, it is fair to argue that an arbitration agreement is a written agreement when it is incorporated inside an e-mail discussion. Of course, e-mails carry a higher risk of fraud than telegrams or telexes. However, the argument is not convincing because security processes (encryption, involvement of a third-party certification agency) can provide a comparable level of security to e-mail. Hard-copy papers, in general, are vulnerable to forgery. As a result, this danger cannot be used to argue against awarding the status of a written agreement to an arbitration agreement specified and accepted by e-mail.

Is the same true when the contract is finished on a website that asks the user to fill out an electronic form and click the "I accept" button? It might be claimed that if the clause exists in an electronic contract, it has not been signed by the parties, as required by the first choice in Article II (2). In reality, acceptance of the electronic signature in various legal systems through adoption of the UNCITRAL Model Law on Electronic Signatures or transposition of Directive 1999/93/EC on Electronic Signatures leads to the conclusion that the clause is valid as long as the signature processes are secure. In any case, considering the second possibility in Article II(2), namely that accepting an offer on a website comprises an exchange of data akin to the interchange of letters or telegrams, leads to the judgment that such a clause is permissible.

UNCITRAL considers two options for increasing legal protections and encouraging consistent interpretation of the New York Convention. The first is to submit an interpretive instrument related to the Convention, so avoid the necessity for a text modification. UNCITRAL recommends that the concept of "agreement in writing" be expanded to cover electronic procedures. The amended version of the UNCITRAL Model Law on International Commercial Arbitration would serve as the foundation for this interpretive instrument. Article 7 of this model legislation, which has influenced many national legislatures, will be updated soon to expressly encompass the electronic document, as described in the Model Law on Electronic Commerce.

The disadvantage of an interpretive instrument pertaining to the New York Convention, even if based on the amended version of the Model Law on International Commercial Arbitration, is that it is optional; hence, it would only be of advisory use to judges and arbitrators. That is why, in addition to the New York Convention, UNCITRAL envisions the ratification of a subsidiary protocol.

The Geneva Convention on April 21, 1961, is a regional treaty that mostly binds European countries. This convention is more comprehensive than the New York



Convention and is more favorable to arbitration. The arbitration agreement is defined in Article 1.2(a) as follows:

“either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter”

This material regulation concerning the form of the arbitration agreement is similar to that set out in the New York Convention, with the inclusion of teleprinter communications. Although the allusion relates to obsolete technology, the presence of the teleprinter undoubtedly promotes an interpretation favorable to electronic arbitration agreements. Furthermore, experts believe it "should be construed as generously as the New York Convention."

Different national legal systems have developed different rules on the structure of the arbitration agreement. Some systems use a consensual approach that is not subject to any form conditions. Other systems, on the other hand, take a more structured approach, requiring the specification of an agreement in writing. An electronic document is admissible to lawmakers and in case law in these systems (see below). In any case, the legitimacy of the arbitration agreement is not determined by the conflict-of-laws technique, but rather by the material regulations accessible to the court hearing the case.

The consensual approach to an arbitration agreement is well shown in French legislation on international business arbitration. The rules of the new Civil Procedure Code on foreign arbitration 36 include no mention of form or even evidence. According to French case law, the presence and enforceability of the provision "are examined according to the required norms of French law and of international public order, in line with the common will of the parties, without the need to resort to a State statute."

This is a fundamental rule under French international arbitration law, which implies that the judge is not required to decide the relevant law to the arbitration clause. The judge just needs to demonstrate the parties' consent, which does not have to be in writing. A click expressing approval of an electronic arbitration agreement is an adequate expression of consent in these circumstances. It is not essential to decide if the electronic document is a written document or not. This system is preferable to one that demands, under penalty of nullity, that the arbitration agreement is in writing.

French law is less permissive in terms of domestic arbitration since it requires the arbitral provision to be specified in writing, or it will be declared null. Article II of



the United States Federal Arbitration Act additionally requires that the arbitration agreement is in writing:

“an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”.

The legitimacy of electronic arbitration agreements is not obvious based on these materials, because the wording of the legislation does not specifically specify electronic methods of contact, as is sometimes the case. In Switzerland, however, Article 178 of the Federal Law on International Private Law uses language that specifically defines the mode of communication:

“As for the form, the arbitration agreement is valid if it is made in writing, by telegram, telex, teleprinter, or any other means of communication that can be proven by a written text.”

In the absence of such a clear definition, the legislator or court must alter legislation requiring the arbitration agreement to be expressed in writing.

The first method of adjusting the law to new technology is legislative involvement. An Information Society Bill in France will soon contain electronic written evidence ad validate “When a written document is required to confirm the validity of a legal act, it may be drawn up and preserved in electronic form as provided for in articles 1316-1 and 1316-4” An electronic document would thus fit the provisions of Article 1443 of the new Civil Procedure Code, making electronic arbitration agreements valid in domestic arbitration.

In the United States, each state's arbitration legislation should be revised in light of the reform of the model arbitration law, the Uniform Arbitration Act. The amendment of this model law, enacted on August 28, 2000⁴¹, should serve as a model for state lawmakers in the United States. Article VI of the Revised Uniform Arbitration Act establishes the legality of arbitration agreements as long as they are recorded in writing. Article I(6) permits electronic papers if the information saved is available in an understandable form:

“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

The court can also interpret legislative provisions on arbitration to adapt the legislation to modern technologies. This is desirable since it avoids a potentially protracted parliamentary procedure. Thus, in the United States, a federal judge can describe the criteria under which an electronic arbitration agreement becomes a



document under Article II of the Federal Arbitration Act by reading the language. The case of *Lieschke, Jackson, and Simon vs. Realnetworks*⁴² included a disagreement about the downloading of free software from the Internet. The software's users accused the publisher of violating their privacy and providing access to their personal data through a lack of security that made their electronic conversations susceptible.

However, the top federal court ruled on May 11, 2000, that an arbitration agreement negotiated electronically constituted an agreement "in writing" under Article II of the Federal Arbitration Act. On the one hand, because federal arbitration legislation lacks a definition of a document, the widely understood meaning of the word "in writing" must be employed, which does not prohibit electronic messaging. Even in 1925, a document did not have to be restricted to symbols imprinted on a tangible medium. The license contract, on the other hand, which was conveyed electronically when the program was downloaded, could be readily printed and instantly saved on the user's computer

Finally, whether through a consensual or structured process, national legal systems typically favor the legality of an arbitration agreement concluded online. In the latter case, the legislative tendency in favor of electronic documents, as well as the judge's authority, recommend that the law be adapted to electronic commerce.

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which defines international arbitration). In twin-track systems, arbitration would have to be designated as either domestic or international in order to determine the applicable regime.

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