

# Online Arbitration Definition and Its Distinctive Features

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**Abstract.** Online arbitration is different from traditional arbitration not only because the process may be held online, but also because the core elements of its definition may be different. The differences may change online arbitration definition, however, they do not, hamper the validity of online arbitration. Online arbitration can be defined and used in a very flexible approach because of its core advantages such as speed, accessibility and cost-effectiveness. In an attempt to provide a precise and inclusive definition of online arbitration, in this article different elements of traditional arbitration definition have been considered. Mutual consent to arbitration, due process and binding decision are some of the elements that may not exist in online arbitration or may be formed in a different manner.

**Keywords:** Arbitration, online arbitration, mutual consent, choice of arbitrators, due process, binding decision.

## 1 Introduction

Online arbitration is different from traditional arbitration. The common thought that online arbitration is just the combination of online mechanisms and traditional arbitration is not true. The main thesis of this article is that online arbitration is different from traditional arbitration not only because it is held online or partly online but also because its definition elements may vary from those of traditional arbitration definition. The article aims to provide an inclusive and precise definition of online arbitration and extract different types of online arbitration from the definition accordingly.

In order to define online arbitration accurately, it is helpful to look closely at the component elements of traditional arbitration from which it evolved. Naturally, there is much commonality across the two forms, but also relevant differences in the detail of component elements of both. Moreover, some component elements may not be shared at all, belonging uniquely to just one form of arbitration. A study of the component elements of both forms is therefore necessary to provide a definition of online arbitration.

## 2 Online Arbitration and Elements of Traditional Arbitration

Arbitration elements often vary in different legal systems and thus hamper attempts to provide an accurate and singular definition which applies everywhere [1]. Nonetheless, some elements of arbitration are broadly similar in the majority of legal systems.

By considering the varying definitions of arbitration, the common elements of arbitration may be revealed. Numerous definitions exist but perhaps the following are of most use to us:

“Two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course... it will not be settled by a compromise, but by a decision.” [2]

“Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons - the arbitrator or arbitrators- who derive their power from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.” [1]

Born presents a definition of arbitration which draws from the definitions above. He defines arbitration as: “a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard.” [3]

From the foregoing definitions it may be concluded that, for a process to be recognized as arbitration, it should comprise the elements below:

- Mutual consent to submit to arbitration
- Choice of arbitrators
- Due process
- A binding decision

### 2.1 Mutual Consent to Submit to Arbitration

Mutual consent is considered one of the fundamental principles of traditional arbitration and is crucial to the legitimisation of the arbitration process [4]. In arbitration agreements, due consideration, valid offer and acceptance, and intention to create legal obligations should exist [5]. It is a well-established ruling that the parties should not be forced to arbitrate unless they have freely agreed to that particular mode of dispute settlement [6].

Nevertheless, entering into an online (or non-traditional) arbitration agreement may not be always consensual. In some circumstances, the participants may not have truly consented to the arbitration clause and entering into an arbitration agreement may have been forced indirectly. Some commentators have gone even further and stated that in many situations, the freely consenting party is a legal fiction [7].

For example, lack of genuine choice may lead to non-existence of consent to arbitrate online or offline. Such lack of choice may be evident where there is a monopoly of power or where there is a pre-dispute arbitration clause in Business to Consumers (B2C) agreement. In such cases, the weaker party has to choose between entering into an arbitration agreement or forgo contracting<sup>1</sup> [8]. Due to power imbalance in such cases, the parties may be considered to have been indirectly forced to enter into an arbitration agreement.

The question here is whether non-existence of consent to arbitrate would invalidate the arbitration clause.

Some academics argue that, where there is lack of choice to enter an arbitration agreement, it is more desirable to accept that consent to arbitrate does not exist, but that other requirements such as fairness may reasonably have replaced consent [8]. Thus it may not be very productive to place emphasis on the existence of true consent in arbitration agreements. Rather than focus on contract formation, the fairness of the process should be insisted upon<sup>2</sup>.

In conclusion, where there is a power imbalance between parties, the weaker party may not truly have consented to arbitrate, however the non-existence of consent may not invalidate the online arbitration agreement if some other requirements such as inexpensive arbitral procedure and fairness of such procedure have replaced consent.

## 2.2 Choice of Arbitrators

Arbitrators in traditional arbitration are not government representatives [9]. They are not state judges and they are funded by private means [10]. Decision makers in arbitration are usually chosen by the parties or on behalf of them<sup>3</sup> [11].

In arbitration the arbitrators chosen by, or on behalf of, the parties should be independent and impartial [9]. The term independence is defined as “one which measures the relationship between the arbitrator and the parties personal, social, and financial relation. The closer the relation in any of these spheres, the less “independent” the arbitrator is from the party [12].

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<sup>1</sup> An appropriate example of power monopolisation may be Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is the ultimate regulator of the domain-name, which has imposed a requirement on each domain-name registrar to incorporate the UDRP into their contracts with their customers. The UDRP is a Quasi Arbitration procedure, designed to solve disputes between a trade-mark owner and a domain name registrant. Since any domain-name registrar regardless of where it is based is regulated by ICANN, the domain-name demander is forced to accept the arbitration clause or forgo registering the domain-name.

<sup>2</sup> Alan Rau and Edward Sherman question “whether it is really productive to worry too much about the existence of true ‘consent’ to arbitration” they argue that rather than focusing on contract formation, the law should “place the highest priority on regulating the arbitration process itself.” Rau, A., E Sherman, E., *Arbitration in Contracts of Adhesion* 6 (1994) (unpublished manuscript, on file with the Hofstra Law Review), cited from Ware, S., *Employment Arbitration And Voluntary Consent* 25 Hofstra L. Rev. 83(1996)

<sup>3</sup> The power to choose the decision maker is one of the main differences between arbitration and litigation. In litigation the judges are imposed on the parties whilst in arbitration the arbitrators are chosen by or on behalf of the parties.

The independence of the arbitrator can be determined prior to holding arbitration and it is an objective test to establish whether or not the arbitrator can arbitrate between the parties independently and with courage to displease<sup>4</sup>.

Impartiality is a subjective notion referring to the absence of bias in the person of the arbitrator resulting from a privileged relationship with the matter to be decided [13].

Independence and impartiality are pivotal elements of any arbitration definition. This is due to the fact that arbitration is an adjudicatory process. Arbitrators cannot be parties' representatives, and they have to remain impartial and independent, otherwise they cannot adjudicate between the parties with "full legal authority" [14].

In a definition of online arbitration, independence and impartiality of the arbitrators should be considered as two of the main characteristics of such a definition. In any arbitration process, strict compliance with procedural principles is required<sup>5</sup>. Independence and impartiality is so central to the process that online arbitration cannot be characterized as true arbitration without the independence and impartiality of arbitrators - and such elements should not be compromised unless agreed to by both parties [2].

### 2.3 Due Process

Due process is necessarily a vital component of any arbitration definition since a procedure which lacks due process may not be recognized as arbitration [15]. Due process in arbitration relates to the right to be heard, the right to adversary proceedings and the right to be treated equally [16].

In online arbitration, however, full compliance with all requirements of due process may adversely impact upon the cost effectiveness and speed of the online arbitration process<sup>6</sup> [17]. Speed and cost effectiveness are two of the advantages

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<sup>4</sup> Lalive defines independence as follows: "Independence implies the courage to displease. The absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator" Lalive, *Conclusions in the Arbitral Process and the Independence of Arbitrators*, ICC publishing (1991) p.121. , cited in Binder, P., , *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3<sup>rd</sup> ed. Sweet and Maxwell, London (2010) 184, For more discussion on the matter of impartiality and independence refer to , A Redfern M Hunter, *Law and Practice of International Commercial Arbitration* ,4<sup>th</sup> ed. Sweet and Maxwell, London (2004) para 4-52 et seq, Donohay, S., *The Independence and the Neutrality Of Arbitrators*, 4 *Journal of International arbitration* (1992) 32

<sup>5</sup> One of the procedural principles of arbitration is to appoint independent and impartial arbitrators. Complying with such principle is very important when the parties' consent to online arbitration is affected. Kaufmann and Schultz argue that where there is no consent other requirements such as fairness may have replaced consent to arbitrate online. In such situations, it is paramount to strictly comply with procedural principles [9].

<sup>6</sup> A limited due process is in favour of the parties in some cases, especially when more process raises costs to the point that parties who deserve to win on the merits cannot get access to adjudication and thus lose. Therefore limited due process which may provide a full access to justice is better than a full adjudicatory process which may be a barrier for the parties to have access to justice

(according to [8] and [17]) which make online arbitration a more desirable means of dispute resolution than litigation or traditional arbitration.

While due process is an essential element in online arbitration, keeping the process affordable and speedy are also important factors. Thus, while due process is considered a vital element for any definition of online arbitration, the degree of compliance might be variable [8]. Some “short cuts” might be taken to keep the process from stalling and costs from rising. Some academics argue that due process is a flexible principle [18] and the degree of required due process may vary dependent upon the case or the category of cases, and that the arbitration tribunal or institution may adjust the degree of compliance commensurate with the nature of disputes [8].

## **2.4 Binding Decision**

Binding decision, in traditional arbitration, is one of the most important elements determining whether the proceedings constitute arbitration. By agreeing on arbitration, parties give arbitrators a judicial role [15] to adjudicate between them and to issue an award that is as effective as a court’s decision [13]. The binding decision distinguishes arbitration from other dispute resolution procedures, and it is the purpose of such process [2].

Decisions in online arbitration may not be always binding [8], in such process the arbitration award may be non-binding for either of the parties, or it may be unilaterally binding.

Where an online arbitration award does not bind either of the parties, the process cannot be recognized as true arbitration since the decision is unlike a judgement, and the arbitrator does not have a judicial role<sup>7</sup>.

Where the binding nature of arbitration depends upon one of the parties’ intention, the process may be true arbitration if the party admits that the award has a binding effect after the award’s issuance. Some legal systems explicitly allow the parties to agree that the arbitration awards have a different effect i.e. be conditionally binding<sup>8</sup> [19]. In other judicial systems, conditionally binding arbitration may be recognised as true arbitration if the procedural standards applicable to arbitration have been met [20].

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<sup>7</sup> Parisi v Netlering inc , 139 F. Supp. 2d 745-751 (E.D .Va .2001) , Dluhos v. Strasberg 321 F.3d 365 C.A.3 (N.J.2003) (in both cases it was established that non-binding arbitration does not constitute arbitration under the Federal Arbitration Act).

<sup>8</sup> Section 58 (1) of the UK arbitration law 1996 states that “unless otherwise agreed by the parties an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any person claiming through or under them.” As this is a non –mandatory provision, the parties may agree that an award should have a different effect.

### **3 Online Arbitration**

#### **3.1 The Exclusive Feature**

Online arbitration proceeding is either conducted totally online by online means of communication or partly online by a combination of online and offline means. In totally online arbitration the entire process is conducted online by the use of email, video conferencing and web based communications. Partly online arbitration is conducted using a combination of the above mentioned communication means and offline features such as live in-person hearings and use of fax and post for the submission of evidence, communication between the arbitrators, and deliberation of the award.

#### **3.2 The Definition**

Having given consideration to the elements as discussed above, online arbitration is defined as:

Online arbitration is a process by which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding, non-binding or unilaterally binding award, issuing a decision resolving a dispute in accordance with neutral procedure which includes due process in accordance with the parties' agreement or arbitration tribunal decision. The online arbitration process may be conducted entirely online or partly online by the use of internet technology.

Therefore online arbitration may be categorized as:

- Totally online binding arbitration
- Totally online non-binding arbitration
- Unilaterally binding online arbitration
- Partly online binding arbitration
- Partly online unilaterally binding arbitration
- Partly online non-binding arbitration

### **4 Conclusion**

Online arbitration is not merely the combination of traditional arbitration and online means of communication. There are major differences between the core elements of online arbitration and traditional arbitration. These differences have a direct affect on the definition of online arbitration and as it was seen, the definition of online arbitration is not the same as traditional arbitration.

It is important to emphasise on the existence of some elements in online arbitration such as impartiality and independence of arbitrators whilst it may not be necessary for other elements to exist in online arbitration, or the degree of compliance with such elements may be different.

This, however, may not hamper the effectiveness of such process in resolving the disputes. Online arbitration can provide a very flexible means of dispute resolution that can be tailor made in accordance with the parties needs and at the same time be recognized as a legally valid process.

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