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ОНЛАЙН-АРБИТРАЖ: ПОНЯТТЯ, ОЗНАКИ ТА ПЕРСПЕКТИВИ ВПРОВАДЖЕННЯ В УКРАЇНІ

Анотація. *Стаття присвячена дослідженню онлайн-арбітражу – його поняттю, ознакам та перспективам впровадження в Україні. Онлайн-арбітраж визначається повноцінним способом незалежного, неупередженого та ефективного вирішення спорів, що виникають з договірних та недоговірних відносин, шляхом використання електронних засобів передачі та зберігання інформації. Метою його застосування визначено швидке та економічне вирішення спору без врахування формальних процедурних правил. Правова природа онлайн-арбітражу визначається похідною від природи класичного арбітражу (як і в класичному арбітражі, в онлайн-арбітражі увага приділяється забезпеченню незалежності та неупередженості осіб, залучених до врегулювання спорів). Однією з основних особливостей онлайн-арбітражу визначена його делокалізація. Означена особливість обумовлена транскордонною природою електронної комерції. Доволі складно пов'язати онлайн-арбітраж з будь-яким правопорядком. Онлайн-арбітраж не може розглядатися як явище кіберпростору, цілком виключене з правової сфери, і вимагає відповідного правового регулювання як на міжнародному, так і на національному рівні. Окрема увага приділена розвитку Lex electronica – транснаціональному праву електронної торгівлі, системі норм міжнародно-правового характеру, які регулюють відносини, підставою виникнення яких є транснаціональні правочини в електронному середовищі. Визначено переваги та недоліки застосування онлайн-арбітражу.*

Ключові слова: альтернативне вирішення спорів, lex electronica, делокалізація, електронна комерція.

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ОНЛАЙН-АРБИТРАЖ: ПОНЯТИЕ, ПРИЗНАКИ И ПЕРСПЕКТИВЫ ВНЕДРЕНИЯ В УКРАИНЕ

Аннотация. *Статья посвящена исследованию онлайн-арбитража – его понятию, признакам и перспективам внедрения в Украине. Онлайн-арбитраж определяется полноценным способом независимого, непредвзятого и эффективного решения споров, возникающих из договорных и недоговорных отношений, путем использования электронных средств передачи и хранения информации. Целью его применения определено быстрое и экономичное решение спора без учета формальных процедурных правил. Правовая природа онлайн-арбитража определяется производной от природы классического арбитра-*

жа (как и в классическом арбитраже, в онлайн-арбитраже внимание уделено обеспечению независимости и непредвзятости лиц, привлеченных к урегулированию споров). Одной из основных особенностей онлайн-арбитража определена его деллокализация. Данная особенность обусловлена трансграничной природой электронной коммерции. Довольно сложно связать онлайн-арбитраж с конкретным правом порядком. Онлайн-арбитраж не может рассматриваться как явление киберпространства, полностью исключенное из правовой сферы, и требует соответствующего правового регулирования как на международном, так и на национальном уровне. Отдельное внимание уделено развитию *lex electronica* – транснациональному праву электронной торговли, системе норм международно-правового характера, регулирующих отношения, основанием возникновения которых являются транснациональные сделки в электронной среде. Определены преимущества и недостатки применения онлайн-арбитража.

Ключевые слова: альтернативное решение споров, *lex electronica*, деллокализация, электронная коммерция.

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ONLINE-ARBITRATION: THE CONCEPT, SIGNS AND PERSPECTIVES OF IMPLEMENTATION IN UKRAINE

Abstract. *The paper analyses the issue of Online arbitration, including its concept, indications and prospects for implementing under the legislation of Ukraine. Online arbitration is defined as a high-grade independent, impartial and efficient mean of resolving disputes posed by treaty and non-treaty relations through the use of the digital transmission and preservation data methods. The aim of its application is defined as rapid and cost-effective resolution of a dispute without necessity of compliance with procedural rules pro forma. The legal nature of Online arbitration is identified as a derivative from the legal nature of classic arbitration (as with the classic arbitration, attention is being given to the provision of independence and impartiality of persons involved in dispute resolution). Delocalization of Online arbitration is considered as one of its key features. The specified feature resulted from the e-commerce cross-border nature. It is difficult enough to link Online arbitration and any national law. Online arbitration cannot be considered as a cyberspace phenomenon which is excluded from the legal scope and there is a need for its legal settlement under both international and national levels. Special attention is given to the development of *Lex electronica* – transnational e-commerce law which is an international system of rules to regulate relations in transnational deals in an electronic environment. Advantages and weaknesses of Online arbitration are defined.*

Keywords: Alternative Dispute Resolution, *lex electronica*, delocalization, e-commerce.

INTRODUCTION

Speedy development of e-commerce and corresponding transformation of business turnover caused new category of economic disputes origination, settlement of which

requires not only the possession of relevant technical knowledge, but also their expeditious consideration [1]. International commercial relations in information sphere are considerably complicated by the provisions of the national legislation, inconsistency of conflicting regulations and unavailability of the established practice of disputes resolution [2]. In order to provide efficient resolution of the relevant category of disputes, intranetwork ("*online*") arbitrations have appeared, aimed to resolve disputes in e-commerce much more efficiently than using other forms of dispute resolution [3, 4]. "Online arbitration" term is featured with a number of meanings, however the most often it is to refer to arbitral proceedings being conducted using remote communication technologies between the parties in the process [5].

The main idea of online arbitration use is that the party to the dispute could do everything necessary to obtain a final arbitration award, without leaving the room:

- filing a statement of claim and providing evidence on the case is carried out electronically;

- entry for a claim obtaining with all annexes is done electronically;

- a case is considered by a sole arbitrator appointed by the relevant arbitral institution, only on the basis of documents and explanations provided by the parties, without holding hearings;

- submitted arbitral award is sent to the party electronically, certified by electronic digital signature of the arbitrator and arbitration institution (on a later time the party may also receive a paper copy of the arbitration award).

If the necessity to hold hearing arises during dispute consideration, it is essential that referee does so by video or audio conferencing (through Skype, etc.). After coming to conclusion that the circumstances of the case require more detailed consideration, including holding hearing with the participation of the parties, arbitrator would have the possibility, at his / her own discretion, to decide on the continuation of consideration in compliance with the UNCITRAL Rules of Arbitration regulations.

In disputes settlements conducted under the auspices of the leading world arbitral bodies, modern technologies providing for remote communication are used rather extensively [6]. In particular, correspondence between the participants of the process is carried out by e-mail, procedural documents and proofs are submitted in electronic form, organizational meetings and questioning of witnesses are conducted using telephone or Skype-conferences. Online arbitration is a fully-featured way of independent, impartial and effective resolution of disputes arising from contractual and non-contractual relationships through the use of electronic means of data transfer and storage [7]. The purpose of its application is a quick and saving dispute settlement without taking into account formal procedural rules.

MATERIALS AND METHODS

The major object of study in the article research is online arbitration. This is not software that formulates decisions, but virtual shell, actions within which are done

by people. Thus, this is the process of dispute resolution by arbitrators and the subsequent decision taken by the court of arbitration, binding on the parties, using sophisticated methods of data transfer and storage [8, p. 149]. The legal nature of online arbitration is a derivative from the nature of classical arbitration. In particular, same with classical arbitration, online arbitration focuses on ensuring the independence and impartiality of individuals involved in the settlement of disputes¹.

The paper studies global experience in resolving disputes through online arbitration and considers the prospects for this method implementation in Ukraine. Theoretical basis of the research are the works of leading foreign and national scholars on the outlines topics, along with normative legal documents regulating online arbitration procedure.

The paper establishes specific features of arbitration cases consideration in online mode, in particular, such its important feature as delocalization. This feature is conditioned by the trans-boundary nature of e-commerce. It is quite difficult to link online arbitration with any system of justice. Accordingly, there is a necessity to develop approaches to online arbitration place determination.

International experience in online arbitration introduction has become key source of information. Certain information platforms has been investigated, such as NetCase and RLL. Using the method of analysis, Major advantages and disadvantages of these systems have been established using analysis technique, forecasting method has allowed to outline the existing and potential issued which may arise during their application.

RESULTS AND DISCUSSION

A number of entities working in alternative dispute resolution field have taken steps to develop online arbitration projects. In particular, in 2004 the International Court of Arbitration affiliated with ICC introduced new information technology tool called NetCase. NetCase is a platform that allows parties and arbitrators to take advantage of privacy and provides for secure communications with the other trial participants through the Internet.

NetCase expedites communications between the parties and arbitrators, provides for instant and round-the-clock access to information and data exchange in secure environment, provides access to documents during the sitting, and eliminates the necessity to have dozens of paper documents. This does not preclude documents transfer in the usual way and does not provides for case trial exclusively in online mode or refusal to hold hearings in traditional way. This platform is just an option accessible to users and providing fast and convenient work with documents. Its benefits include speed and safety.

¹ Online-arbitration has features of so called *documents-only arbitration*, in the process of which writtem evidences only are subject to consideration.

We cannot consider online arbitration cyberspace phenomenon, completely out of the legal area, and it requires appropriate legal regulation both at the international and national levels. The place of arbitration is of fundamental importance to selection the law to be applied, to appeal the final arbitration award, to recognize and enforce it. In the absence of the consent of the parties, the legal place of online arbitration is considered to be the server location place, or the place where the arbitrator sits at the time of electronic communications sending and receiving.

Proposals are expressed to grant arbitrator the right to establish the appropriate place and to indicate this in the arbitral award in the absence of the consent between the parties on the place of online arbitration. Complete delocalisation of online arbitration quites often becomes the basis for conclusions of its exclusively international character. Usually online arbitration is seen as a supranational phenomenon, since the cyberspace physically covers all states. At the same time, specific technical features, do not change the nature of the relations that arise. It is believed that online arbitration between the parties operating in the same country should be considered as internal arbitration, and if the parties are acting in different jurisdictions, arbitration can be considered international.

The position based on which online arbitration between the parties located in the same country should be considered as internal arbitration seems to be justified. If the parties are in different jurisdictions, arbitration may be considered international. Rapid development has conditioned formalization of the basic principles of online dispute resolution at the legislative level in the US and the EU. Thus, in the USA, in 2001 has been adopted Uniformed Mediation Act [9], which combined 2,500 various laws regulating mediation procedures in different states. In the European Union, online arbitration application possibility has been originally intended to be "soft law" – in the Green Book [10] and in the European Commission's recommendations [11].

Nowadays, an alternative online disputes resolution has been reflected at communitarian law level of the European Union. In particular, 2013/11/EC Directive on alternative dispute resolution in the field of consumer rights protection [12] and No 524/2013 Regulation (EU) [13] are the main regulatory framework for online arbitration activities in the European¹. No 524/2013 Regulation provides for RLL-platform² creation (*fr. "Règlement en ligne des litiges"*). RLL platform is Internet site providing for consumer and business entity possibility to solve the disputed arise in e-commerce sphere. This platform contains information related to pre-trial settlement of disputes in e-commerce sphere. Thus consumers can fill-in electronic form and

¹ 2013/11/EC Directive defines "transborder dispute" concept as any dispute arising from the purchase and sale contract or service provision agreement the participant of which is consumer-resident of another EU member state than member state of the seller (service supplier).

² ODR abbreviation ("*Online Dispute Resolution*") is used in the English version.

attach all necessary documents to it. Such claims are transferred to the person empowered to settle the dispute¹.

The platform started to function in February 2016. In accordance with the general rules dispute examination procedure cannot last over 120 days, however in 85% of cases the dispute is resolved within 30 days period [14].

Four types of RLL (ODR) systems are allocated in science:

- *online settlement* – expert systems for automatic settlement of financial claims;
- *online arbitration* – sites for disputes settlement by qualified arbitrators;
- *consumer claims on-line resolution*, using e-mail to process certain types of consumer claims;
- *online mediation* [15, p. 262].

Legislative nature of online arbitration does not prevent arbitrators from taking into consideration not only the requirements of the law to be applied, but also to use principle of justice while taking the decisions. For online arbitration as a tool for commercial disputes resolving, the *amicable compositeur* concept, which focuses on finding a balance between law and justice, seems to be more efficient².

lex electronica development has made significant impact on international commercial arbitration improvement in the field of its electronic forms application [16].

Lex electronica is the transnational law of e-commerce, system of the norms of international-legal nature regulating relations the basis for which are transnational transactions in electronic environment. *Lex electronica* arose in the result of the attempt to harmonize *lex mercatoria*³ norms [17]. *Lex electronica* concept authors are considered to be Karim Benvekhlef and Fabien Zhelinaze. Major provision of *lex electronica* concept is the necessity of self-regulation of the relationships of commercial character arising in Internet which allows their participants independently decide upon the law subject to exercising.

Lex electronica sources are as follows:

- basic principles of *lex mercatoria*;
- international acts (for example, UNICITRAL Model Law on Electronic Commerce [18], UNICITRAL Model Law on Electronic Signature [19] etc.);
- national and transnational laws;
- current commercial practices in e-commerce field;
- model contracts and agreements;
- disputes resolution practice.

¹ Claim can be submitted through the following link: <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=FR>.

² Arbitrators in online-arbitration may act in the capacity of "amicable intermediaries" under condition that the parties by their agreement have directly granted them such authorities and it is allowed by the law of the country established by consent as arbitration place [8, p. 152–153].

³ The results of *lex mercatoria* "author's" norms adjustment is emerging of *lex petrolea* (oil transactions law), *lex constructionis* (construction law), *lex maritime* (marine law) and other special legal entities [17].

The advantages of *lex electronica* application in e-commerce field are as follows:

- possibility not to apply conflict of law rules;
- possibility not to apply national rules of substantive law;
- arbitrary dispute resolution cost optimization [20].

For the time being, online arbitration decisions relevance to the requirements of international public order are continued to be researched in the framework of doctrine, the doctrine raises the issue of *lex electronica*'s expediency and ability to regulate disputes consideration in online mode. Popularity of online arbitration is determined by the key characteristics of the Internet, more precisely: low barrier to any persons/entities entry to the legal relationship in the network and the transboundary nature of e-commerce. Accordingly, legal relations can be entered by the participants who under normal conditions (in the case of transactions outside the Internet) would have to fulfill certain formal requirements for this and would have certain jurisdictional restrictions for such transactions.

However, arbitration transfer to online mode may also create certain *issues*, including security, admissibility of evidence, etc. Strong majority of online arbitration issues are related to the trans-border nature of disputes being considered [21]. Until the moment of unified rules exteriorization at the international level, arbitration institutions are forced to resolve a number of issues independently, depending on the actual circumstances of the case. For example, will the arbitrator in the case between the parties from Italy and Singapore be entitled to "sign" an arbitration award electronically (if so, which standard of electronic signature may apply)?

To resolve disputes using online systems, the parties need to support their claims with evidence. To provide evidence, they must first be prepared, which requires appropriate temporal costs. As a result, the parties to the dispute can avoid filing of lawsuits, which are not supported by solid evidence base. In addition, online arbitration features "fastness effect". The parties to the dispute are aware that in the event of online arbitration initiation they will be obliged to provide relevant procedural documents – a statement of claim or an appeal, supported by evidence, within a few weeks. Accordingly, parties' response time to initiated process is reduced notably.

Among the pending issues of online arbitration, one can also distinguish the issue of recognition of an arbitration agreement concluded in electronic form; provision authenticity of the evidence used in online arbitration and confidentiality of information transmitted through the Internet and used in online arbitration. In addition, online arbitration, unlike traditional alternative solutions to legal conflicts, cannot be carried out on a one-time (ad hoc) basis, without an administrator, with the participation of only the parties to the dispute and a neutral arbitrator. Any online disputes settlement requires an intermediary with processing datum surface.

CONCLUSION

There are not any significant obstacles to using online arbitration – this requires solving the practical issues of identifying the parties to electronic communications and

their representatives, as well as electronic exchange systems creating. Modern information technology utilization within specific arbitration examination framework creates a number of undoubted advantages: convenience, consideration content quality enhancement and costs reduction. However, arbitration transfer to online mode may also create certain problems, including security, admissibility of evidence, etc. Preemptive majority of online arbitration issues are resulting from trans-border nature of the disputes that are being considered

Thus, it can be said that online arbitration is not conciliation procedure, but full-featured independent, impartial and effective resolution of disputes arising from contractual and non-contractual relationships through the use of electronic data transmission and storage means. The current Ukrainian legislation does not allow to use the alternative ways of disputes resolution in e-commerce field. For the most part, these restrictions are related to current wording of the paragraph 14 part 1 of Art. 6 of the Law of Ukraine "On Arbitration Courts" dated May 11, 2004, in compliance with which arbitration courts, in the manner provided for by this Law, may consider any cases arising out of civil and commercial relationships, except but cases in disputes connected with consumer rights protection, including bank (credit union) services consumers. At the same time, global practice goes different way and has significant experience in the issues of online arbitration activity, which are objectified both in the legislation of individual states, and at international treaties's level.

Considering the fact that alternative dispute resolution methods should ensure proportionate costs, easier access and dispute resolution efficiency, online arbitration use is rather promising. In this context, online arbitration can be defined as a universal mechanism available to a wide range of individuals/entities, regardless of their legal status and jurisdiction.

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