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THE LEGAL CAPACITY OF INTERNATIONAL CONVENTIONS AND LAWS TO LEGALISE E-ARBITRATION

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ABSTRACT

Traditional arbitration is not seen as exhaustive anymore and faces several shortcomings in dealing with international commercial disputes. Therefore, the need for a more effective arbitration method to complement the existing traditional method of arbitration in handling domestic and international commercial disputes becomes a pressing necessity. Electronic arbitration (hereinafter referred to as "e-arbitration") might be the initial step to accomplish this aspired goal. However, e-arbitration has not been regulated yet at the international level. By using doctrinal legal research methodology, this contribution endeavours to examine the legal capacity of international conventions and laws to legalise e-arbitration. Both primary and secondary data are analytically and critically evaluated using content analysis method. It is discovered that the New York

Convention 1958 is not legally sufficient to recognise e-arbitration because it was enacted before the emergence of current modern technologies and communication. However, the UNCITRAL Model Laws, such as Electronic Commerce 1996, Electronic Signatures 2001, Model Law on International Commercial Arbitration 1985, and the United Nations Convention on the Use of Electronic Communications in International Contracts 2005, may play a considerable role in recognising e-arbitration in the context of New York Convention 1958. To summarise, several legal gaps need to be addressed; therefore, the study recommends that the international arbitration communities, such as UNCITRAL, should develop an international legal framework to directly and precisely regulate e-arbitration to enhance legal validity of e-arbitration and to provide international harmonisation and uniformity.

Keywords: Traditional Arbitration; E-Arbitration; Online Dispute Resolution; New York Convention 1958; UNCITRAL Model Laws.

INTRODUCTION

Cyberspace has become a favoured and powerful medium to transact international business. Specifically, e-commerce has allowed an extensive growth of international trade. Countless international and domestic electronic transactions are annually performed. Customers no longer need to physically go to shops, and augmented reality (AR) and virtual reality (VR) are already in place. Nevertheless, the way of resolving disputes arising from e-commerce has not changed yetbecause they are still settled by litigation or alternative dispute resolution (ADR) mechanisms such as traditional arbitration.

The aforementioned mechanisms might not be convenient to resolve disputes arising from e-commerce and cannot ensure access to justice in a reasonable time. This is because, in reality, traditional arbitration was not as appealing as it should have been due to its inherent challenges (Labanieh et al., 2019b); for example, traditional arbitration is a time-consuming and expensive mechanism. The same applies to litigation that tends to be sluggish and complex. To address the perpetual problems of traditional arbitration, the international arbitration community is moving towards adopting online dispute resolution (ODR) mechanisms.

According to Nenstiel (2006), ODR refers "to a wide class of alternate dispute resolution processes that take advantage of the availability and increasing development of internet technology" (Nenstiel, 2006: 313). The most popular ODR mechanisms include electronic mediation (e-mediation), electronic negotiation (e-negotiation), and e-arbitration. Compared with other ODR mechanisms, e-arbitration is based on asynchronous communication (Rule, 2002). Moreover, compared with e-negotiation and e-mediation, the arbitrator in e-arbitration has the legal power to decide the dispute and render a binding e-arbitral award on the parties (only in the case of binding e-arbitration). Consequently, e-arbitration could end the dispute without a need to resubmit it to other ODR mechanisms.

E-arbitration refers to any type of arbitration that combines technology with traditional arbitration (Badiei, 2010). Similarly, e-arbitration is described as a resolution mechanism where all of its procedures are made in an online environment by using electronic and modern technologies (Labanieh et al., 2020a). Therefore, e-arbitration differs from traditional arbitration only in the way in which it operates and works. Besides, e-arbitration is a suitable mechanism to settle small claims disputes (Markert & Burghardt, 2017) and *complex and high-claims disputes (Wahab, 2011).*

Fortunately, e-arbitration promises a bright new future for the international arbitration industry and has gained popularity for a variety of reasons. For instance, it is cost-efficient, paperless, and fast (Labanieh et al., 2019a). It also allows the disputing parties to resolve their international disputes without travelling to different places. At the domestic level, several arbitration centres such as the China International Economic and Trade Arbitration Commission (CIETAC), *Guangzhou Arbitration Commission (GZAC),* Economic Chamber and the Agricultural Chamber of the Czech Republic (ECACCR), and the Russian Arbitration Association (RAA) cover e-arbitration. However, the potentials of e-arbitration at international level is still hazy for two reasons. Firstly, e-arbitration procedures are not precisely and directly regulated by any globally accepted framework (Schwarzenbacher, 2018). Secondly, the use of traditional arbitration conventions such as the New York Convention 1958 (hereinafter referred to as "NY Convention 1958") to e-arbitration might cause legal uncertainty and inconsistency. This is because "The New York Convention has proved itself to be unreliable, unpredictable and inconsistent because there is wiggle room in the New York Convention" (Paulsson, 2017, 23-24).

Several conventions are regulating international commercial arbitration such as the Inter-American Convention on International Commercial Arbitration 1975 (IACICA 1975) and the European Convention on International Commercial Arbitration 1961 (ECICA 1961). These conventions only apply to specific countries and at regional levels. For instance, only nineteen (19) members of the Organization of American States (OAS) have ratified the IACICA 1975 (The International Arbitration Law Firm, 2021) so far. This article is focused on examining the e-arbitration from a global perspective. It particularly analyses the legal capacity of international conventions and laws to legalise e-arbitration. To achieve the objective of this study, a direct reference to the New York Convention 1958 (hereinafter referred to as "NY Convention 1958") has been made for two main reasons. Firstly, the NY Convention 1958 is described as "the single most important pillar on which the edifice of international arbitration rests, and perhaps it is the most effective instance of international legislation in the entire history of commercial law" (Redfern & Hunter, 2010, 133). Secondly, more than a hundred and fifty (150) countries from different legal systems have ratified the NY Convention 1958 (New York Arbitration Convention, 2021). Additionally, some provisions from the Model Laws have been taken as guidance in this article.

The significance of this research stems from the lack of comprehensive and up-to-date studies on the subject under consideration. Specifically, Sari (2019) discussed the legal aspect of e-arbitration in European Union and China with particular reference to CIETAC-Online Arbitration Rules and the Directive and Regulation on Consumer ODR. The author found that the Chinese Government is not directly involved in regulating e-arbitration, unlike the EU. In a similar vein, Chakraborty (2020) addressed the legitimacy of e-arbitration according to the UNCITRAL laws and Indian law. However, the author's study was limited in scope because several issues such as the recognition and enforcement of the e-arbitral award were left unaddressed. Besides, Schwarzenbacher (2018) conducted a comparative study between U.S. and Austrian systems regarding their ability to legalise e-arbitration proceedings. In addition, Wolff (2018) discussed the role of UNCITRAL laws to validate e-arbitration in the context of the NY Convention 1958. He concluded that although MLICA 1985 has played a vital role in unifying the applicable arbitration laws around the world, its acceptance is still slow compared to the NY Convention

1958. However, his study does not include several issues such as the procedural and substantive laws applied in e-arbitration.

Therefore, the current paper aims to fill in the gaps identified in the previous studies by covering the following important topics: the legitimacy of the e-arbitration agreement according to the NY Convention 1958; the legitimacy of the e-arbitration award according to the NY Convention 1958; the place of e-arbitration and the e-delivery of the e-arbitration award according to the NY Convention 1958; the procedural law that is applied in e-arbitration; the substantive law that is applied in e-arbitration; the recognition and enforcement of the e-arbitral award in e-arbitration; and finally, a way forward to sustain the legal coherency and enhance the international trade between the countries: the need for international regulation on e-arbitration.

METHODOLOGY

This article employed doctrinal legal research methodology. A library-based approach was used to collect data. The primary data was acquired from Acts, Laws, Conventions, and Court Cases. For instance, the article analysed relevant legislation relating to international commercial arbitration such as-the NY Convention 1958, United Nations Convention on the Use of Electronic Communications in International Contracts 2005, Model Law on Electronic Commerce 1996, Model Law on Electronic Signatures 2001, Model Law on International Commercial Arbitration 1985, and European Union Directive on Electronic Signatures 1999/93/EC.

Moreover, the secondary data was gathered from relevant sources such as textbooks, journal articles, and reputable websites. Both primary and secondary data was critically and analytically analysed in this study using content analysis approach.

THE LEGITIMACY OF THE E-ARBITRATION AGREEMENT ACCORDING TO THE NY CONVENTION 1958

The e-arbitral agreement is the most important element in e-arbitration, and it is an e-contract. The main difference between an e-arbitral

agreement and a traditional arbitral agreement is that the parties in traditional arbitration conclude and enter into their arbitral agreement physically (in-person), instead of electronically as used in the e-arbitration (Amro, 2019). For this reason, the e-arbitral agreement may be defined as an arbitral agreement that is formed through electronic and modern communications, like e-mail.

Before discussing the legitimacy of e-arbitration agreement under the NY Convention 1958, it is important to highlight the types of traditional arbitral agreements and the formal requirements of a valid traditional arbitral agreement. There are two types of traditional arbitral agreements, namely, the submission agreement "*acte de compromise*" and the arbitral clause "*clause compromissoire*" (Dutson et al., 2012). The main difference between the two is that the submission agreement takes place after a dispute has arisen, while the arbitral clause takes place before any dispute occurs.

Regarding the formal requirements of a valid traditional arbitral agreement, the NY Convention 1958 was adopted on 10th June 1958 by the UN Diplomatic Conference and came into effect on 7th June 1959. It comprises two conventions. The first convention governs the conclusion and recognition of the traditional arbitration agreements (The NY Convention 1958, article II), which was the last-minute addition to the convention's text (Mistelis, 2015). The second convention governs the recognition and enforcement of the foreign and non-domestic arbitral awards (The NY Convention 1958, article I).

In light of this article, article II (1) of the NY Convention 1958 states that "Each contracting state shall recognise an agreement in writing" (NY Convention 1958, article II (1)). Article II (2) of this convention further illuminates the meaning of "in writing" by providing two (2) options for fulfilling this requirement; firstly, the arbitral clause/agreement signed by the disputing parties (option I); and secondly, the arbitral clause/agreement was contained in an exchange of telegrams or letters (option II) (NY Convention 1958, article II (2)). Moreover, it is also essential to note that article II (2) of the NY Convention 1958 sets the maximum requirements (Lew et al., 2003) for a valid traditional arbitral agreement. This means that if the traditional arbitral agreement fulfils the requirements mentioned in Article II of

the NY Convention 1958, it should be enforced by the contracting states, regardless of any strict requirements imposed by the states' national arbitration law (Lew et al., 2003).

According to option II, a traditional arbitral clause/agreement made through an exchange of letters or telegrams is valid and legal, even without the signatures of the parties (Amro, 2014; Mistelis, 2015), because the content of the correspondence between them is enough to demonstrate their intentions and achieve the purpose of using a signature.

Regarding the validity of the traditional arbitral agreement that is signed electronically (option I) according to NY Convention 1958, it is vital to note that the arbitral agreement mentioned in article II (2) of this convention only covers arbitral agreements that come in traditional "paper form" and contain the traditional "hand-written" signatures of the parties. However, it does not cover arbitral agreements that come in electronic/digital form and contain the parties' e-signatures because the NY Convention 1958 was enacted before the emergence of electronic technologies such as the e-signature. For this reason, several international laws and conventions may provide solutions to legitimise arbitral agreements that come in electronic/digital form and carries the parties' e-signature (UNCITRAL Model Law on Electronic Commerce 1996, article 7; UNCITRAL Model Law on Electronic Signatures 2001, article 6; European Union Directive on Electronic Signatures 1999/93/EC, Article 5).

Regardless of the above, this article focuses on one significant convention, known as the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (hereinafter referred to as "UECIC 2005"). This convention may legalise e-writing and e-signatures in the context of Article II because it can be directly applied to the NY Convention 1958. UECIC 2005 aims "to facilitate the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents" (Adukia, 2021, p.5). Moreover, it describes the term "electronic communication" as "any communication that the parties make by means of data messages" (UECIC 2005, article 4 (b)). It also defines data message as "information generated, sent,

received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy" (UECIC 2005, Article 4 (c)).

Regarding the validity of e-writing, Article 9 of UECIC 2005 provides legal recognition, where Article 9 (2) of UECIC 2005 states that;

> Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. (UECIC 2005, article 9 (2))

In addition, article 9 determines the conditions to establish the functional equivalence between e-signatures and traditional (hand-written) signatures by analysing how the e-signature can fulfil the functions and purposes of the traditional signature. Specifically, Article 9 (3) states that;

> Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if: (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and (b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence. ((UECIC 2005, article 9 (3)))

Pursuant to Article 9 (3) of the UECIC 2005, it is evident that digital/electronic files (such as an e-arbitral agreement), which contains the e-signatures of the parties, is valid; provided that the e-signature can identify and determine the signatory and indicate his/her intention regarding the information included in the electronic/digital file (such as e-arbitral agreement).

More importantly, UECIC 2005 provides that the utilised e-signature is not required to pass or go through the "reliability test" if the party's identity and intention are proven in fact (article 9 (3) (b) (ii)). In this regard, under the UECIC 2005, either party cannot invoke the reliability test to revoke or repudiate his/her e-signature if his/her actual identity and intention can be proved (UECIC 2005, paragraph 164). Further, UECIC 2005 enables the NY Convention 1958 and other conventions to operate in an online environment. Article 20 (1) of the UECIC 2005 states that;

> The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10th June 1958). ((UECIC 2005, article 20 (1))

Based on the above, the UECIC 2005 has indirectly recognised e-arbitration because it legalises the e-arbitral agreement without direct reference to e-arbitration. In other words, it treats the electronic signature as a legal equivalent to the traditional "hand-written" signature. Furthermore, article 20 (1) of the UECIC 2005 makes it clear that the e-arbitral agreement is valid and enforceable according to the NY Convention 1958. Thus, the Contracting States to the NY Convention 1958 should examine the possibility of entering into the UECIC 2005.

Moreover, the principle of the *more-favourable-right provision*, which is included in the Article VII (1) of the NY Convention 1958, can also provide a solution to legalise the digital/electronic file (such as e-arbitral agreements) that carries the e-signatures of the parties. Particularly, this principle gives the party striving to recognise and enforce his/her arbitral award the right to take advantage of the domestic law or treaties of the enforcing state when its domestic law or treaties impose less stringent form requirements than the requirements stated in the Article IV of the NY Convention 1958.

Additionally, it is important to note that although the application of this principle is limited to the recognition and enforcement of

the foreign arbitral award under Article IV, it can be applied in the context of Article II of the NY Convention 1958. The reason is that several national courts have upheld the legality of the traditional arbitral agreements following their national laws, although they cannot be enforced according to article II of the NY Convention 1958. Particularly, in the case of *Petrasol BV v. Stolt Spur Inc*., the Court of First Instance Rotterdam argued that "Article II of the NY Convention 1958 does not prevent the use of article 1074 CCP, because the more-favourable-right provision mentioned in article VII of the NY Convention 1958, is applied by the application of analogy" ([1995] XXII YBCA 1997, pp. 11).

Similarly, in 2006, the UNCITRAL suggested applying the principle of the *more-favourable-right provision* to article II of the NY Convention 1958. It states that;

> Article VII (1) of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement (UNCITRAL-No. 17, A/61/17, 2006, p. 62).

Based on the above-mentioned facts and arguments, there is no doubt that the principle of the *more-favourable-right provision* ("the enforcing national court is unfettered and free to apply a legal regime and law more liberal than the one endowed in the NY Convention 1958") provides a practical approach to legalise e-arbitral agreements, especially if the law of the enforcing national court is more modernised than article II of the NY Convention 1958. For example, the law of the enforcing national court, such as Malaysia, recognises e-arbitral agreements (section 9 (4A) of the Arbitration Act 2005 (Act 646)). However, if the law of the enforcing national court is not legally modern to recognise e-arbitral agreements, there is no advantage in relying on the principle of the *more-favourable-right provision*.

As for option II in the NY Convention 1958, the arbitral agreement is considered to be in writing if the arbitral clause/agreement is included in an exchange of letters or telegrams (The NY Convention 1958, article II (2)). Indeed, the literal interpretation of option II would

lead to the refusal of an arbitral agreement included in an exchange of e-mails because e-mail is not included in Article II (2) of the NY Convention 1958 (option II).

For this reason, two solutions are presented to legalise arbitral agreements contained in an exchange of e-mails. The first solution is by applying the principle of the *more-favourable-right provision* (this solution was highlighted in the previous discussion). The second solution can be seen by following the recommendation mentioned in the UNCITRAL in 2006. It recommends the contracting states to apply Article II (2) of the NY Convention 1958, recognising that the circumstances described therein are not exhaustive (UNCITRAL-No. 17, A/61/17, 2006). This means that Article II (2) can cover other types of electronic communications, such as e-mails, along with letters or telegrams.

From a practical perspective, in the case of the *Lombard-Knight v. Rainstorm Pictures Inc*., [2014] EWCA Civ 356, the English Court of Appeal stated that, "the exchange of e-mails is similar to the exchange of telexes and faxes and legitimises the arbitral agreement." Similarly, in the case of *Compagnie de Navigation et Transport SA v. MSC Mediterranean Shipping Company*, the Swiss Federal Tribunal stated that, "In the statement of the Swiss Supreme Court, arbitration clauses are legitimate under the NY Convention, in which they are either in an exchange of letters, telexes, telegrams and other means of communication or contained in a signed contract." ([1996] XXI YBCA 690, p.21)

From the perspective of the UNCITRAL, it is worth noting that Article 7 of the Model Law on International Commercial Arbitration 1985, which was amended in 2006 (hereinafter referred to as "MLICA 2006"), is in line with technological developments and the current arbitration practise. Particularly, Article 7 (4) of the MLICA 2006 states that;

> The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the

> parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. (MLICA 2006, Article 7 (4))

The significance of the above-mentioned articles should not be underestimated. They enable the conclusion of the arbitral agreement by using any type of electronic means that is presently accessible and might be developed in the future, subject to one specific criterion. For example, the information included therein needs to be accessible for consequent reference. Moreover, it is argued that Article 7 (4) of MLICA 2006 might play a vital role in developing a proper environment for regulating e-arbitration on a full-scale.

Finally, it is important to mention that when the NY Convention 1958 was enacted, its drafters' implicit intention was to catch up with technological developments that existed at that time (Wahab, 2004). Hence, enforcing national courts in the contracting states should strive to recognise e-arbitral agreements by following the recommendations of the UNCITRAL or interpreting Article II (2) of the NY Convention 1958 in line with international laws and conventions, such as MLICA 2006 or UECIC 2005.

THE LEGITIMACY OF E-ARBITRATION AWARD ACCORDING TO THE NY CONVENTION 1958

The primary focus of the NY Convention 1958, as can be deduced from its title, is the recognition and enforcement of foreign arbitral awards. The term "foreign arbitral award" is accurately defined in two (2) ways in Article I of the NY Convention1958 (Berg, 2009). The first definition is straightforward since it clearly states that the NY Convention 1958 applies to arbitral awards that are made in another contracting state. On the other hand, the second definition, which can be regarded as an extra element to the first definition, provides that the scope of the NY Convention's can also be applied to recognition and enforcement of arbitral awards that are not regarded as domestic at the enforcing state.

In light of this article, making the arbitral award is the last stage of traditional arbitral proceedings. The NY Convention 1958 does not contain a specific article that defines the traditional arbitral award. However, based on section 2 (1) of the Arbitration Act 2005 (Act 646), a traditional arbitral award refers to "a decision made by the arbitral tribunal on the substance of the dispute, including any final, partial or interim award, and any award on interest or costs, but it does not include interlocutory orders". According to this article, the authors define the e-arbitral award as any final, temporary, preliminary, or partial award rendered online by the arbitral members.

Regarding the formal requirements of a valid traditional arbitral award according to the NY Convention 1958, it is worth bearing in mind that Article 31 of the MLICA 2006 clearly states that the arbitral award should be "in writing". Moreover, the language used in article IV (1) of the NY Convention 1958 indicates that the arbitral award should be "in writing" and signed by the arbitral tribunal (Wahab, 2011) because the parties cannot submit a "duly authenticated original award or a duly certified copy thereof" as mentioned in Article IV (1) (a) of the NY Convention 1958, unless the arbitral award comes in traditional form (writing form). So, since the e-arbitral award comes in electronic/digital form, i.e. is "electronically written," and carries the e-signatures of the arbitrators, it is important to examine two legal issues.

- Firstly, whether the arbitral award, which comes in electronic/digital form, fulfils the requirement of "in writing" according to the NY Convention 1958.
- Secondly, whether the arbitral award, which carries the e-signatures of the arbitrators, fulfils the requirement of a "hand-written" signature according to the NY Convention 1958.

In order to examine the first issue mentioned earlier, it is essential to analyse other prevailing international laws and conventions, such as the UNCITRAL Model Law on Electronic Commerce 1996 (hereinafter referred to as "MLEC 1996"). Specifically, Article 6 (1) of MLEC 1996 recognises e-writing. It states that "Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible to be usable for subsequent reference." (MLEC 1996, article 6 (1))

There is no doubt that Article 6 (1) of the MLEC 1996 provides that the requirement of "in writing" will be satisfied if the information included in the data message (such as an e-arbitral award) is accessible for consequent reference. So, if the enforcing national court interprets the requirement of "in writing" to cover e-writing by invoking article 6 (1) of MLEC 1996, the arbitral award, which comes in electronic/ digital form, fulfils the requirement of "in writing" as set forth in the NY Convention 1958.

Regarding the second issue, it is essential to note that the international arbitration community is moving forward towards recognising the e-arbitral award without direct reference to e-arbitration. Article 7 of the MLEC 1996 recognises electronic signatures. It states that;

> Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement. (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature. (MLEC 1996, Article 7)

From the above, Article 7 of MLEC 1996 demonstrates that the "e-signature" should have the same legal power as a "hand-written signature", provided that some requirements are fulfilled. For example, the e-signature should identify and determine the signer and indicate his/her consent and approval on the information included in the data message. Based on the previous facts, it seems that there is no legal hindrance affecting the legitimacy of the arbitral award that is electronically signed by the arbitrators, especially when the e-signature meets the requirements mentioned in article 7 of the MLEC 1996. However, the remaining risk is that a judge at the enforcing national court may not invoke article 7 of the MLEC 1996 when he or decides on the legitimacy of a given e-arbitral agreement.

THE PLACE OF E-ARBITRATION AND THE E-DELIVERY OF E-ARBITRAL AWARDS ACCORDING TO THE NY CONVENTION 1958

The terms "seat of arbitration" and "the place of arbitration" are identical and used interchangeably. The term "place of arbitration" is used as a leading term in this article. The place of arbitration is a legal construct, not a geographical location (Born, 2012). It is a notion where arbitration has its juridical home or legal domicile (Born, 2012). Further, the place of arbitration has several purposes. Firstly, it determines the nationality of the traditional arbitral award. Secondly, it specifies which country's law governs the procedural aspects of arbitration. Thirdly, it determines which aspects of the arbitral proceedings the national court can assist or intervene in the arbitral proceedings as well as how far it can do so. It is also important to mention that the place of arbitration differs from the venue of hearings and meetings (ADR Institute of Canada, Arbitration Rules 2016, rule 1.2). The Arbitration Act 2005 (Act 646) differentiates between the place of arbitration and the venue of hearings and meetings. Specifically, section 22 (3) of Arbitration Act 2005 (Act 646) states that;

> Notwithstanding subsections (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. (Arbitration Act 2005 (Act 646), section 22 (3))

In the context of this article, selecting and determining the place of e-arbitration is essential for the effectiveness of the e-arbitral proceedings. It is important to note that under the NY Convention 1958, there is no article that directly imposes on e-arbitration to have a specific place. Nevertheless, several articles within the NY Convention 1958 link e-arbitration to a specific place. For instance, Article I (1) of the NY Convention 1958 states that;

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of

> a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. (NY Convention 1958, Article I (1))

Another example can be seen under Article V (1) (e) of the NY Convention 1958. It states that;

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (NY Convention 1958, article V (1) (e)).

According to the previous articles, Halla (2011) argued that the NY Convention 1958 establishes the main criteria and conditions of its applicability pertaining to a certain place. On the other hand, Amro (2019) emphasised on the "substantial link" between the arbitral award and jurisdiction, where they maintained that it is definite evidence of the "territorial principle" stipulated in the NY Convention 1958. Therefore, it is argued that if e-arbitral procedures need to be acknowledged and considered under the NY Convention 1958, they have to be linked to a specific place.

Regarding the e-delivery of e-arbitral awards according to the NY Convention 1958, the traditional arbitral award is similar to a court judgment because it should be delivered to the parties to enable them to take all necessary steps if it is ambiguous (Arbitration Act 2005 (Act 646), section 35). In e-arbitration, the e-arbitral award is delivered electronically by e-mail or by publishing on the e-arbitration platform. For instance, article 13 (1) of Additional Procedures for On-Line Arbitration 2004 states that "The Arbitration Court shall render

the arbitral award by submitting it to the Case Site." (Additional Procedures for On-Line Arbitration 2004, article 13 (1))

In the context of this article, the NY Convention 1958 does not contain an article on the delivery of the arbitral award to the disputing parties. However, delivering the arbitral award to the disputing parties is an essential element. This is to ensure the binding effect of the arbitral award on the disputing parties. Improper delivery under the law of the place would establish a genuine ground and reason for refusing the recognition and enforcement of the arbitral award under Article V(1) (e) of the NY Convention 1958.

THE PROCEDURAL LAW APPLIED IN E-ARBITRATION

The concept of procedural law is also known as "*lex arbitri*", "curial law", or "*loi de l'arbitrage*" (Born, 2012). In fact, the procedural law of arbitration is the law of the place of arbitration (Born, 2012). In practice, arbitral procedures are governed and regulated by the procedural rules that the disputing parties agreed upon. These agreed procedural rules should not clash with the public policy and mandatory provisions of the law of the place of arbitration. However, if the parties disagree on the applicable procedural rule, the arbitral tribunal will be responsible for doing so (Wang, 2018), provided that the agreed procedural rules are consistent with the public policy and mandatory provisions of the law of the place of arbitration.

The procedural law of arbitration governs "internal procedural matters" and the "external" relations between the arbitration and national courts (Born, 2012). The internal procedural matters cover several matters, such as "the composition and appointment of the arbitral tribunal", "requirements for arbitral procedure and due process", and "the formal requirements for a valid arbitral award". The external relations between the arbitration and national courts, on the other hand, cover "the grant of interim measures", "obtaining evidence from the third party", and "setting aside the arbitral awards" (Henderson, 2014).

According to this article, the NY Convention 1958 comprises several articles that refer to applying the law of the place of arbitration if the

disputing parties fail to agree on the applicable procedural law, because e-arbitration still derives its validity from traditional arbitration laws and conventions. In other words, e-arbitration cannot entirely disregard the requirements stipulated in the traditional arbitration laws (Herboczková, 2001). Therefore, if the traditional arbitration laws require face to face (F2F) oral hearings, this requirement should be observed and respected. This is to ensure that the arbitral award will be enforced under the NY Convention 1958. In contrast, if the arbitral procedures are against either the agreement of the disputing parties or the law of the place of arbitration, the arbitral award will be null under Article V (1) (d) of NY Convention 1958.

THE SUBSTANTIVE LAW APPLIED IN E-ARBITRATION

Substantive law refers to the law that governs the substance of the dispute. In Malaysia, the parties have the right to agree on the applicable substantive law (Arbitration Act 2005 (Act 646), section 30 (1)). However, "failing any designation by the parties, the arbitral tribunal shall apply the laws determined by the conflict of laws rules which it considers applicable" (Arbitration Act 2005 (Act 646), section 30 (4)). Moreover, under section 30 (5) of the Arbitration Act 2005 (Act 646), the arbitral tribunal should consider several factors in deciding disputing cases, including but not limited to the terms of the agreement. It states that "The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction." (Arbitration Act 2005 (Act 646), section 30 (5))

In the context of this study, the literature reveals two opposite opinions regarding the law applied to the substance of the dispute in e-arbitration, such as e-cross-border transactions. The first opinion encourages the application of traditional rules, such as the conflict of law rules. This is because the traders (sellers) in cyberspace still deal in tangible goods and services, and so the nature of the transactions and the possible disputes arising from there are similar to those that occur offline (Herboczková, 2011). However, the other opinion supports the idea of establishing a new set of substantive rules, known as *Lex Informatica* (Patrikios, 2006), because the traditional rules are no longer in line with new development in the online environment.

Simply put, they do not catch up with technological developments brought by the internet. Therefore, *Lex Informatica* has the ability to replace several national laws as a proper and suitable law of cross-border e-business transactions and help the online arbitrators in resolving the disputes (Patrikios, 2006). Finally, it should be noted that the idea of establishing *Lex Informatica* is in line with the autonomous theory. This is because the autonomous theory believes that the "international commercial community should create its own law to be applied to international commercial disputes." (Lin-Yu, 2008: p.280).

THE RECOGNITION AND ENFORCEMENT OF THE E-ARBITRAL AWARD IN E-ARBITRATION

Article IV (1) of the NY Convention 1958 sets forth the procedures for recognising and enforcing the foreign and non-domestic traditional arbitral award. It states that;

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. (NY Convention 1958, article IV (1))

In light of this article, the terms "copy" and "original" lose their meaning in the electronic context. This is because electronic/digital information, such as e-documents/files, can be reproduced in an unlimited number of indistinguishable copies. For this reason, it is essential to scrutinise whether the e-document/file, such as the e-arbitral award, fulfils the requirement of an "original". To achieve that, the authors decided to invoke article 8 of the MLEC 1996 because it is able to provide a legal solution to satisfy the requirement of an "original".

Indeed, article 2 (a) of the MLEC 1996 defined the data message as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic

data interchange (EDI), electronic mail, telegram, telex or telecopy". Moreover, under Article 8 of the MLEC 1996, the document in the form of a data message qualifies as an original. Article 8 (1) of the MLEC 1996 specifically stipulates that;

> Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented. (MLEC 1996, article 8 (1))

Furthermore, Article 8 (3) of the MLEC 1996 indicates that;

> For the purposes of subparagraph (a) of paragraph (1): (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances. (MLEC 1996, article 8 (3))

Based on the above article, it is apparent that the e-arbitral agreement or the e-arbitral award is considered as an "original" if it fulfils the requirements mentioned in rticle 8 of MLEC 1996. For example, the e-document/file, such as the e-arbitral award or e-arbitral agreement, has preserved the integrity of its information from unnecessary alteration or modification, and it is intelligible and accessible in order to be used for consequent reference.

Notwithstanding the preceding facts and arguments, it is argued that in order to facilitate the legal recognition of e-arbitration, the international arbitration community should provide an international legal framework to directly and precisely regulate e-arbitration. This will enhance the legal certainty of e-arbitration and avoid the unsupportive attitude of the national courts.

A WAY FORWARD TO SUSTAIN THE LEGAL COHERENCY AND ENHANCE THE INTERNATIONAL TRADE BETWEEN THE COUNTRIES: THE NEED FOR INTERNATIONAL REGULATION ON E-ARBITRATION

The resolution of international trade and commercial disputes in the era pre-NY Convention 1958 was mostly based on the international litigation regime. This regime was inadequate and disappointing because the principle of party autonomy was usually not available and the process of enforcement was not uniform as a result of applying the private international rules (PIR) of different legal regimes and systems. This in return had negatively affected the international trade between the countries. This situation has changed with the adoption of the NY Convention in 1958 along with UNCITRAL laws such as MLEC 1996. Regardless of the above, the question remains: is there really a necessity for an international regulation on e-arbitration when there are already several laws and conventions that support the practice of e-arbitration.

First and foremost, the irregular and uneven legal interpretation of the NY Convention 1958 might pave the way for the need for international regulation on e-arbitration. To illustrate more, the contracting states to the NY Convention 1958 have followed different approaches in interpreting article II (2) of the NY Convention 1958. Specifically, several countries, such as Syria and Lebanon, have followed exactly the words used in article II (2) of the NY Convention 1958. They do not recognise the arbitral clause contained in an exchange of e-mail. Besides, they do not follow the UNCITRAL recommendations mentioned previously unlike China. For instance, in the case of *GS Global Corporation v. Shanghai Zhenxu Petroleum Co. Ltd*., the Shanghai No. 1 Intermediate People's held that;

> Since "writing" in the NY Convention 1958 is referred to as an exchange of letters or telegrams, the email, though not predicted at the time the NY Convention 1958 was adopted, should be regarded as a form of writing under the term "telegrams" for purposes of the Convention. (Zhang, 2018, p.34)

Additionally, the number of countries that adopted MLEC 1996, is somewhere around one hundred (100) (United Nations Commission

on International Trade Law, 2021), several of which do not interpret Article VI (1) of the NY Convention 1958 in the context of Article 8 of the MLEC 1996 (Amro, 2019). This could affect the international trade between the countries and cause legal uncertainty because interpreting Article VI (1) of the NY Convention 1958 in the context of article 8 of the MLEC 1996 would always be based on the discretionary power of the national courts at the contracting states (lack of uniform interpretation).

Based on the earlier discussion, there is a need for international regulation on e-arbitration. This would achieve two important results. Firstly it can help in overcoming most of the contemporary challenges faced by e-arbitration at the international level, especially in terms of following different interpretations of the NY Convention 1958 by the national courts at the contracting states. Secondly, it helps in pushing the economic wheel and international transactions among the countries because international investors will be equipped with uniform and universal regulation in case any potential dispute arises in the future.

CONCLUSION AND RECOMMENDATIONS

While the NY Convention 1958 celebrates its 63rd anniversary this year, it is argued that NY Convention 1958 has become outdated and is unable to adequately respond to matters emerging in the context of international commercial arbitration during the fourth industrial revolution (I.R 4). The credibility of the e-arbitral agreement and e-arbitral award is unclear under the NY Convention 1958 because this convention is not prepared to expressly and directly validate and legalise the use of information and communication technology (ICT) in the context of traditional arbitration. Particularly, the NY Convention 1958 only recognises the traditional (hand-written) arbitral award and agreement. On the other hand, UNCITRAL has developed several laws and conventions to regulate the use of information and communication technologies without direct reference to e-arbitration. For instance, MLICA 2006, MLEC 1996, and UECIC 2005. These laws and conventions could play an essential role in legalising arbitral agreement and arbitral award come in electronic form.

Furthermore, the place of e-arbitration is essential for the effectiveness of the e-arbitral proceedings. Moreover, several articles within the NY Convention 1958 link e-arbitration to a specific place. Therefore, if the e-arbitral procedures need to be acknowledged and considered under the NY Convention 1958, they have to be linked to a specific place.

Regarding the applicable procedural law, the NY Convention 1958 comprises several articles that refer to applying the law of the place of arbitration if the disputing parties fail to agree on the applicable procedural law, because e-arbitration still derives its validity from the traditional arbitration laws and conventions. Therefore, if the traditional arbitration laws require face-to-face (F2F) oral hearings, this requirement should be observed and respected. This is to ensure that the arbitral award is enforceable under the NY Convention 1958.

Moreover, there are two opposite opinions regarding the law applied to the substance of the dispute in e-arbitration. The first one encourages the application of traditional rules, such as the conflict of law rules, while the second one supports the idea of establishing a new set of substantive rules, known as *Lex Informatica*. The application of these new sets of substantive rules is in line with the autonomous theory that states that the "international commercial community should create its own law to be applied to international commercial disputes".

In addition, the terms "copy" and "original" lose their meaning in an electronic context, because electronic/digital information such as e-documents/files can be reproduced in an unlimited number of indistinguishable copies. However, it is discovered that the e-arbitral award fulfills the requirement of an "original", especially after invoking article 8 of the MLEC 1996. Furthermore, the NY Convention 1958 does not contain any articles on the delivery of the arbitral award to the disputing parties. Finally, improper delivery under the law of the place will establish a genuine ground and reason for refusing the recognition and enforcement of an arbitral award under Article V(1) (e) of the NY Convention 1958.

In conclusion, it is recommended that in order to facilitate the legal recognition of e-arbitration;

A) The international arbitration community, UNCITRAL, needs to develop an international legal framework to directly and precisely regulate e-arbitration. This framework can be titled as "E-Arbitration Model Law". This might bring several advantages.

- Firstly, it will be the first step towards the regulation of e-arbitration at the international level.
- Secondly, it can encourage the Model law countries to adopt it.
- Thirdly, it will provide international harmonisation and uniform application.

B) The international and regional arbitration institutions have to give more emphasis on the significance of e-arbitration because it can enhance the efficiency of offline and traditional dispute resolution mechanisms and complement them.

Lastly, it is important to remember that e-arbitration would provide a quick response to challenges brought on by the Covid-19 pandemic and those that will come in the future. Hence, e-arbitration would be in line with the "new era of justice delivery" based on modern and sophisticated technologies.

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