

Overview on Online Arbitration and Procedures (Jordan as an Example)

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Abstract

It is noteworthy to indicate the online arbitration is the natural evolution of the arbitration rules in their traditional form; since the increase in commercial and civil transactions and the slowness of litigation procedures along with the desire to expedite them in the dispute parties and to save effort and expenses led to the increased demand on arbitration in general and on online arbitration in particular, to face the requirements of transaction evolution from the traditional form into the online form, the matter that led transactors in ecommerce to thinking about and working on finding mechanisms alternative to the traditional in dispute settlement through the use of mechanisms based on the same technology used in entering into electronic transactions, rendering the settlement electronic as well, mainly based on the world communication network with no need for the dispute parties to be available at a single place, i.e. the development introduced in the commerce sector using electronic means has not been confined to the activation of this commerce and facilitate the dealings thereof, but it also has extended to the use of these civil vehicles in settling the disputes arising there from.

Key words: Arbitration; Online arbitration; Ecommerce; Uncitral; Dispute settlement

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INTRODUCTION

Once countries are expediting the enactment of legislations related to ecommerce¹, there is nothing preventing the innovation of an electronic judicial mechanism to complement the electronic triangle represented in the ecommerce and enactment of electronic legislations for this commerce, then comes the online arbitration to complement the legal system.

Under the ineffectiveness of the regular rules of arbitration in ecommerce disputes in most cases, the online arbitration emerged as a contemporary approach in settling electronic disputes arising from ecommerce in general, and in settling commercial and civil disputes in particular, the matter that doubled the burden on the legislator in most countries of the world in terms of working on developing regular traditional rules of arbitration, in addition to the attempt to drawing up rules and principles governing online arbitration processes with view to create a uniform legal organization for such type of arbitration which constitutes a rapid solution for several legal and material issues that may face ecommerce processes and in conformity with the requirements thereof in terms of rapidity, confidentiality, accuracy and effectiveness.

It is noteworthy to indicate that the online arbitration involves several features as it is deemed to be the most appropriate for electronic commerce disputes since that the traditional arbitration is not appropriate to the specificity of such disputes and to the nature of electronic documents and instruments thereof, the matter that renders the online arbitration more efficient in dealing with such instruments and in retrieving and exchanging them at a slight cost along with making the use of audiovisual means (multimedia) available during the online arbitration sessions which leads to decrease in charges and expenses.

¹Such as the UNCITRAL Model Law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signature issued by the same commission in 2001. Refer to the Commission's website: www.uncitral.org; as well as the Jordanian Electronic Transactions Law No. 85 of 2001

Furthermore, online arbitration is fast and easy in its procedures, and subsequently it results in fast resolution of disputes brought before courts, as we see that traditional litigation procedures delay the resolution of disputes due to the multiple formal and time restrictions imposed by the master of the litigation. In addition, the online arbitration involves high flexibility allowing the parties thereto to organize it according to the form they desire and meets the considerations of appropriateness as it is available 24/7 and subsequently referring to this arbitration has no time or place restrictions.

Therefore, online arbitration emerged as an effective and cutting-edge means to resolve disputes in general, and those transactions concluded via the internet in particular as a modern approach in settlement of disputes arising due to the use of internet in transactions, the online ones for the most part.

1. DEFINITION OF ONLINE ARBITRATION AND DISTINCTION THEREOF FROM TRADITIONAL ARBITRATION

Arbitration is firstly defined as a special judicial approach by which the parties select their judges and entrust them under a written agreement with the task of settling the disputes arising or that may arise between them with respect to a contractual legal relationship or a non-contractual relationship that the law permits the resolution thereof by such means and rendering a judicial ruling binding upon the parties².

Jordanian Law on Arbitration³ has not address the definition of arbitration but rather it has addressed the definition of (arbitration panel) in article 2 of the law to be “The panel composed of an arbitrator or more to settle the dispute referred to arbitration in accordance with the provisions of this law”.

In definition, online arbitration is not different from regular arbitration but in terms of the electronic means in use and the subject of disputes heard by the arbitrators which basically focus on disputes arising from ecommerce contracts. Subsequently, online arbitration is defined as: “A special electronic judicial system for settlement of disputes arising or that may electronically arise between parties dealing in ecommerce under an agreement between them on the same”.

We do not agree with this definition that limits the online arbitration to the disputes arising in ecommerce contracts, since that there is nothing impeding resorting to online arbitration to settle traditional commercial and civil disputes, as the difference is merely procedural in the manner of hearing the dispute by an arbitrator while we admit that this type of arbitration is more suitable for disputes of bigger importance than the ecommerce disputes since it is envisaged to refer to online arbitration to settle a dispute on the title to a disputed trademark. On the other hand, there is nothing preventing the online arbitration, in whole or part, to be electronic in some stages and to be traditional in other stages which can be represented in the physical presence of the arbitration parties.

This means that in its essence, online arbitration⁴ does not differ from traditional arbitration. Since both are alternative means of dispute settlement that is resorted to instead of referring to judiciary as the usual means of dispute settlement. Arbitration, whether traditional or online, is a special approach to settle disputes; as it is based on the volition of the litigants because it cannot take place but upon the agreement of both parties on opting to it as a means for resolving the dispute thereof⁵. Accordingly, there is no inherent difference in the result of both types of arbitration yet the difference lays in the adopted means in the arbitration process itself; it is traditional in traditional arbitration and electronic in online arbitration⁶ as there are no papers, traditional writing nor physical appearance of persons under this arbitration, and even the awards that the parties may procure are electronically signed and made available.

The question one may have in mind at this stage is as follows: is the online arbitration constitutes an evolution of the traditional arbitration or is an alternative to it?⁷

In our opinion, online arbitration is a mixture of rules and conditions for dispute solution which, even built on the traditional arbitral environment, yet they are undoubtedly had created new customs and norms that form a kind of independency of the new type of arbitration; however, what characterizes the online arbitration and gives it the description thereof is that it is an arbitration made using modern means of communication relying on information and communication technology, that is particularly represented in the internet.

Arbitration, in its online form, poses several legal and practical problems, such as the lack of the handwriting

²See Jurisprudential Definitions of Arbitration; Dr. Mohammed Abdel Khaleq Al-Zoubi, Explanation of Jordanian Law on Arbitration, Al-Yaraa Publishers & Distributors, Amman 2009, p. 48.

³New Jordanian Law on Arbitration of 2001 that came into force on 15/08/2001 and was published in the Official Gazette Issue 4496; this Law replaced the old Law No. 18 of 1953. Most provisions of the new law are derived from the Egyptian Law on Arbitration which is generally derived from the Model Law on Arbitration of 1958.

⁴Ismaeel, Mohammad Saeed, Legal Protection for Electronic Online Arbitration, Ph.D Thesis, Ein Shams University, 2005, p. 372

⁵Shafee, Mohsen, International Commercial Arbitration(A Study in International Trade Law) Cairo, Dar Al Nahda Al Arabia, 1997.

⁶Abo Saleh, Sami, Commercial Online Arbitration, Dar Al Nahda Al Arabia, Cairo, p. 2

⁷www.arablawnfo.com

condition, method of holding arbitral session, place of arbitration, manner of maintaining confidentiality therein, and extent of acknowledgement of the award therein along with the other matters to which suitable solutions can be found depending on the point of view of such type of arbitration and considering it as the natural evolution and expansion of the provisions of arbitration. It is also possible for an arbitration to be based on electronic means without holding on to traditional means, such as paper or otherwise, to have recourse to international and domestic e-commerce, and to depend on the regulations of online arbitration centers and the established organizational and procedural rules thereof in this regards.

It is necessary to clarify the electronic nature of this type of arbitration; thus, is it possible to say that the online arbitration acquires its nature and characteristics thereof in terms of the nature of electronic means used in it which vary and range from using the email, chat, video conference or other means, or whether the online arbitration is that type of arbitration competent in e-commerce contracts for which this type of arbitration had emerged to face the requirements thereof and to settle the disputes arising from it in principle.

Confining online arbitration to e-commerce contracts in which various transactions and dealings are electronically made so that to be solely competent in e-commerce dispute would render the interest of each party that desires to make use of the online arbitration benefits lost, even if the dispute is related to a contractual or non contractual difference which is traditional in subject in which such electronic means have not been used in entering into or giving effect to it. Subsequently, online arbitration, in this regards, does not vary from the traditional arbitration but in terms of the means by which arbitration procedures are made and the electronic means used in this arbitration, which may be used as a whole or in part. Since that the use of electronic means, even in part, in arbitration, such as the stage of entering into the arbitration agreement or the stage of litigation in the physical presence of both parties gives the flexibility necessary for this type of arbitration in dealing with developments and variables according to the circumstances of each dispute⁸.

It is necessary here to distinguish between the online arbitration and the online mediation, as the UNCITRAL Law⁹ indicated, with respect to international commercial conciliation, in clause 3 of Article 1 that "it is a process in which both parties request a third party (the mediator) to help them in the attempt to reach an amicable settlement for the dispute arising between them about or in relation

to a contract or other legal relations; the mediator has no right to impose his/ her authority upon the parties to settle the dispute."

It is noteworthy to refer to the Jordanian Law on Mediation in Civil Disputes¹⁰ which provided for the creation of the Mediation Department at the premises of courts of first instance, which hears the disputes referred to it at the request of the litigants or following to the amicable settlement of the dispute, and the law has defined the procedures made before the mediation judge as well as the principles of dispute settlement.

Mediation, in its online form, is made using electronic means in terms of prior agreement and in terms of the mediation procedure up to reaching an amicable settlement for the dispute.

The material difference between the online mediation and arbitration is manifested in the authority of the arbitrator and its ability to render awards and decisions binding upon both parties while the mediator does not have such authority, rather he/ she has the power to suggest solutions to the parties where the dispute parties are entitled in the mediation are entitled to withdraw from mediation at any stage while they do not have such a possibility in arbitration; thus, arbitration entails a compulsory nature that varies from the non- compulsory nature of the mediation¹¹.

2. THE ONLINE ARBITRATION AGREEMENT

Arbitration agreement is defined as: "The agreement under which the parties undertake to settle the disputes arising or that may arise between them through arbitration."¹²

Thus, referring to arbitration takes place by certain vehicle (the arbitration agreement) by which the parties agree on referring to arbitration to settle all or some of the disputes arising between them regarding a contractual or non contractual legal relationship, i.e. the arbitration agreement, to be more accurate, is the arbitration constitution and serves as the source for the authority of arbitrators.

Based on the aforesaid, does the online arbitration agreement vary from the traditional arbitration agreement and what are the conditions of such arbitral agreement in its online form and the extent of its compulsory ability and what are its most prominent forms?

Online arbitration is defined as: "the contract in which the proposal and acceptance meet through the world communication network using electronic exchange of data

⁸For these opinions, see Zeid Nabeel: Online Arbitration, available at: www.arab-elaw.com/showsimilar.aspx?id=81; Bani Shamsa Rajaa: Legal Framework of Online Arbitration, available at: www1.najah.edu/thesis/517825.pdf.

⁹UNCITRAL Model Law on International Commercial Conciliation

¹⁰Law No. 12 of 2006

¹¹Refer to Articles (2-12) of the Law on Mediation in Settlement of Civil Disputes in Jordan, published on Jordanian Legislation Website: www.ldb.gov.jo/ui/laws/search-no.jsp?no=128&years=2006

¹²Al-Haddad Hafithah, Modern Trends in Arbitration Agreement, Al-Fikr Al-Jam'ie Publishers, Alexandria, 1998, p. 13

with view to refer to arbitration all or some of the disputes arising or which may arise between them concerning a contractual or non contractual specific legal relation.”¹³

Others define it as: “The agreement of the parties on settling the dispute constituted between them or which may be constituted in the future by referring to arbitration using the internet.”¹⁴

We note here that the first definition has focused in defining the online arbitration agreement on the online aspect used in entering into the agreement and considered it to fall within the scope of the remote contracts; therefore, this type of agreement is characterized by the lack of the physical existence of the parties thereto and is made using electronic means since entering into such an agreement is based on electronic elements and adds the use of electronic argumentation means to this type of arbitration.

However, is the online arbitration agreement is that in which electronic means only are used for entering into it or is the viewpoint to such an agreement extends to cover the subject rather than the form in which it is made, since its envisaged that the parties which reach a traditional paper arbitration agreement can agree in referring the dispute arising between them to online arbitration, thus, can we consider the arbitration agreement as online in such a case? And is it possible to say that the use of electronic means in an arbitration agreement and referring the dispute which is traditionally arbitrated renders the arbitration agreement online one?

To answer both questions, we say that the online arbitration agreement acquires the online natures from two aspects in our point of view; the first of which if an electronic means is used in entering into the agreement while the other is to be traditionally made on papers yet involves, substantively, the reference to the online arbitration rules in settling the arising dispute.

The question which poses itself in this regards is whether the online arbitration requires a special agreement on reference thereto or is the traditional paper online agreement between the parties thereto is sufficient to refer the dispute to an online arbitration center?

To answer this question under the Jordanian legislation, it is necessary to refer to the provisions of the Jordanian Electronic Transactions Law No. 85 of 2001 which defines the electronic contract in Article 2 thereof as: “The agreement which is entered into, in full or part, using electronic means”, while article 5 of the same law provides for:

- a. Provisions of the Law shall apply to the transactions whose parties agree on executing the transactions thereof using electronic means unless an express provision implying otherwise is stated therein;
- b. For the purposes of this article. The agreement between certain parties on conducting specific transactions using electronic means shall be binding in conducting other transactions using the same means.

Subsequently, the arbitration agreement must provide for reference to such type of arbitration by agreement of the parties thereto.

2.1 Conditions on Validity of Online Arbitration Agreement

Since the arbitration agreement is a contract between two parties, it does not department, exactly as other contracts, from general rules¹⁵ which require substantive conditions such as eligibility, consent and place and formal conditions such as writing.

2.1.1 General Substantive Conditions

Whether the arbitration agreement is online or traditional, necessary eligibility in each party must be available since Article 9 of the Online Arbitration Law provides for: “Agreement on arbitration may not be made but by a natural person or a juridical person that is entitled to dispose with the rights thereof”, and by referring to the provisions of the Jordanian Civil Code, article 43 thereof provides for:

Every person who is of legal age and of full mental faculty and has been subjected to interdiction shall have full eligibility to assume the civil rights thereof;

Legal age is eighteen full calendar years.

For a foreign national, eligibility is determined in accordance with the law of the state to which he/ she is a national¹⁶, where the eligibility is also established for both the public juridical person and the private juridical person.

It is also imperative to have the condition of consent available between the parties to an arbitration and to have the free volition thereof in expressing the intent thereof to enter into contract without having any consent defect, such as error, coercion, deception and prejudice.¹⁷

As for eligibility and consent in the online arbitration agreement, this agreement is similar to all other agreement where both parties to the arbitration agreement must be of full eligibility in order to render the agreement valid, the matter that has given rise to several issues about

¹³Al-Khaledi Inas, Online Arbitration, Al-Nahdha Al-Arabia Publishers, Cairo, p. 202

¹⁴Zamzam Abdul Menem, Law on Online Arbitration, Al-Nahdha Al-Arabia Publishers, Cairo, 2009, p. 53.

¹⁵See the provision of Article 87 of the Jordanian Civil Code No. 43 of 1976 in Title I thereof «The contract is the association of the proposal issued by a contractor with the acceptance of the other in a manner where the effect thereof is established in the contract and results in compliance of each with the obligation thereof to the other».

¹⁶See provision of Article 11 of the Jordanian Civil Code.

¹⁷See Articles 135- 156 of the Jordanian Civil Code, Title I which address the sources of personal rights and the defects of consent.

the mechanism of verifying the eligibility of the other party, particularly if the statements presented by either party are incorrect. Online environment has introduced several solutions to overcome this problem such as having recourse to accredited documentation entities where an approved third party (electron mediator) organizes the relations between the parties and authenticates the identity of each then issues a certificate related to the validity of signature of each party¹⁸, as well as issuing smart cards which stores the details of the holder thereof such as the age, domicile and name of the bank, and subsequently provides a mobile record on the identity of the holder there.

As for the consent condition which is required for the online arbitration agreement, it takes place by expressing specific and stated volition which is made through the electronic data message, which in turn is defined as: "The information created, sent, received or stored using electronic, photo, or any similar means, including without limitation, the exchange of electronic date, email, fax, telex or telegraph."¹⁹

The Jordanian legislator has clarified its stance by fully recognizing the data message and granting it the full legal determinative effect in Article 13 of the Electronic Transactions Law, which states:

"Data message is a means of expression of the legally accepted volition by proposal or acceptance with view to create a contractual obligation."

Information or data message by which volition (consent) on contracting is expressed is not confined to the email messages only, rather it takes a broader and more comprehensive meaning as it includes all exchanged, received or sent data or information via the internet. As for ascribing the information message to the senders thereof, Article 14 of the Electronic Transactions Law indicated that: "Information message is considered sent by the originator, whether it is issued by or for him/ her or through an electronic medium prepared for automatic operation by or for the originator."

With respect to the placer of the online arbitration agreement, what is of concern here is the subject or the substantive relationship where the dispute thereon is intended to be settled; the dispute may be existing at the time of entering into the arbitration agreement or it might be anticipated to arise in the future; we refer here to the provisions of Article 3 of the Jordanian Arbitration Law: "Provisions of this law shall apply to every arbitration made within the Kingdom with respect to a civil or commercial dispute between parties of public or private law persons regardless of the legal relationship nature between them on which the dispute is based, whether contractual or non contractual." It is sufficient to add to the above that the place must be lawful, i.e. the subject of

the dispute should not be in violation of the law, the public order, or the public morals. Article 9 of the same law also stated that no arbitration can take place in matters where no conciliation can be made, such as the criminal liability

2.1.2 Formal Conditions:

Writing and signature are the most important issues in online arbitration. Therefore, it is necessary to take into consideration, prior to agreement on online arbitration, the stance of the national laws of the parties to the agreement on arbitration in its online form in general, and the extent of acceptance thereof of the electronic writing and signature in particular; since some laws stipulate to have a prior agreement on conclusion of transactions using electronic means, in addition to the extent of realizing the condition on writing and validity of signature in an electronic form under the disparity of the stances of legislation in accepting the reflection of technology effect on contracting types.

What does the electronic writing and signature mean? And what are the most notable obstacle faced in arbitration process? We attempt to answer these questions by demonstrating the stances of some laws regulating the international commercial arbitration.

First: Writing

Jordanian Law on Arbitration stipulates that the arbitration law must be written, a matter confirmed by Article 10 of the Law: "Arbitration agreement shall be made in writing or it shall be invalid; the arbitration agreement shall be made in writing once it is contained in an instrument signed by both parties or if included in the exchanged messages or telegraphs, or by fax, telex or other written means of communication which serve as a record on the agreement."

Thus, arbitration agreement based on the above provision is a formal contract, i.e. the volitions of both parties is insufficient to conclude the contract where the formality required by the law, which is the writing of the arbitration agreement, has to be complied with or else the same shall be invalid.

The question here: Is the electronic writing used in the online arbitration agreement in conformity with the writing condition set forth in the law?

To answer this question, we indicate that the Jordanian legislator has equally dealt with the electronic and traditional writing in the legal determinative effect and value of substantiation in several occasion, such in the provisions of Article 13/3/a of the Jordanian Evidence Law: "Fax, telex and email message have the force of the regular instruments in substantiation." Regular instruments, according to Article 5 of the same law, have been stated directly after the official instruments in terms of the force in substantiation, where Article 10 of the law

¹⁸See Article 34 of the Jordanian Electronic Transactions Law

¹⁹See provision of Article 2/a of the UNCITRAL Model Law on Electronic Commerce and the Jordanian Electronic Transactions Law.

defines it as: "Regular instrument is that which contains the signature, seal or fingerprint of the originator thereof and does not have the capacity of the official instrument."

Electronic Transactions Law pointed in more than occasion to the legal determinative effect of the electronic data message as it referred in Article 2 to the definition of the information message as the information created, sent, received or stored using electronic means, while Article 7 of the law provides for:

"Electronic record, electronic contract, electronic message and electronic signature are considered of the same legal effects resulting from the written documents and instruments and the written signature under the provisions of the applicable laws in terms of compulsion to the parties thereof or validity in substantiation."

Thus, the Jordanian legislator has adopted the principle of "Functional Coefficient"²⁰ so that the electronic data have the same legal determinative effect established for the traditional data. We note that the Jordanian Law on Arbitration is in conformity with the Electronic Transactions Law when it provided for, in Article 10, considering the exchanged messages, telegraphs or fax, telex or other means of communication which serve as a record on the agreement. In summary, writing is not considered in terms of association to the means used therein, whether paper or electronic, but to the value is given here to the function in establishing evidence on the existence of the legal act and determining the content thereof. It is necessary to indicate that the Jordanian legislations are consistent with the UNICTRAL Model Law issued by the United Nations Committee on International Trade Law, Article 6/1;

It is noteworthy to indicate that for the electronic writing to be considered and to have its legal value, it should be legible, i.e. clear and understandable so to demonstrate the content of the legal act and to be perpetual where the legibility thereof continues and be referred to when necessary, along with the stability so that the electronic means to maintain a stable content without alteration or change.²¹ Electronic writing might raise several questions on the extent of reliability thereof since it can be subject to alteration and change. Such change and alteration is difficult to be detected since it is made using technical means. However, the answer for the same is by adopting means for protection of data set forth in the arbitration agreement, such data encryption and storage and other established means of authentication that ensure the validity of the data message and content thereof;

Second: Electronic Signature

Signature is a prerequisite for the conclusiveness of regular instruments in substantiation²² since the signature performs a double function in terms of establishing the identity of the signatory and the consent and approval thereof on the content of the agreement. The question that poses itself here is about the electronic signature which is associated with the online arbitration agreement and the conditions of conclusiveness thereof.

Article 2 of the Electronic Transactions Law defines the electronic signature as: "Data in the form of letters, digits, symbols, signs or otherwise, made in an electronic, digital, photic or audio form or any other similar means contained in, added to or associated with the information message, allowing for establishing the identity of the signatory and distinguishes it from others for the purpose of agreement on the content thereof."

We have already indicated that Article 7 of the law had given the same legal conclusiveness which the written signature has.

From the definition of Article 2, the electronic signature should firmly identify the person who made it and to distinguish him from others. The objective of the signature is to establish the approval thereon on the content of the legal act²³.

Jordanian Electronic Transactions Law had added, in article (31) thereof, the conditions of the electronic signature:

- The electronic signature must be unique to the person using it in a manner distinguishing him/ her from others;
- The electronic signature must be sufficient to identify the holder thereof;
- The electronic signature must be closely correlated to the instrument so that not modification can be made to it thereafter;
- The signature must be generated by means under the control of the generator on the signature system.

Electronic signature should be documented in order to be of legal effect and perform its function, subsequently, it is necessary to complete the documentation procedures; Article 32/b of the Electronic Transaction Law provides for: "In the event that the electronic record or the electronic signature is not documented, it shall be of no conclusiveness." Documentation meant here is made through an approved authentication certificate during which validity the signature is issued. (Article 33 of the Electronic Transaction Law)

In article 34 of the law, the legislator has added the cases of approving the authentication certificate:

²⁰This principle has been mentioned in the Model Law on Electronic Commerce issued by the UNCITRAL

²¹See Article 7 of the Jordanian Electronic Transactions Law No. 85 of 2001.

²²See Article 10 of the Jordanian Evidence Law No. 30 of 1952 which provides for: «Regular instrument is that which contains the signature, seal or fingerprint of the originator thereof and does not have the capacity of the official instrument», and Article 11 «Any person against whom a regular instrument is produced as evidence which he/ she does not want to recognize shall have to expressly deny the handwriting, signature, seal or fingerprint ascribed to him/ her or else it shall serve as an evidence thereon with the content thereof».

²³Refer to the provisions of the Model Law on Electronic Signatures issued by the UNCITRAL 2001

- 1.If it is issued by a licensed or accredited entity;
- 2.If it is issued by an entity licensed by a competent authority in another state and is recognized;
- 3.if it is issued by a governmental department, institution or organization that is legally authorized to do so;
- 4.if it is issued by a body on which the parties to a transaction agree to approve.

2.2 Forms of Arbitration Agreement

Agreement on arbitration takes place by two forms; arbitration clause or arbitration agreement; the difference between both forms is manifested in the time during which the agreement on arbitration takes place; if the agreement is prior to the occurrence of the dispute, we have here an arbitration clause, but if the agreement is related to an actually existing dispute, we have in such case an arbitration agreement. In the Jordanian Law on Arbitration, we cannot find an apparent difference between both but as provided for in the said Article 10/b of the Law on Arbitration “Any reference in the contract to the provisions of a model contract, international agreement or any other document containing an arbitration clause shall be deemed as a written agreement unless the reference is clear on considering such a clause as part of the contract.”

Clause C thereof provides for: “In the event of agreeing on arbitration while hearing the dispute by a court, the court shall decide on referring the dispute to arbitration where such a decision serves as a written arbitration agreement.”

Online arbitration does not pose any issue related to entering into the agreement thereon, whether in the form of an arbitration clause or arbitration agreement, where both are electronically concluded; in case of referring to arbitration by means of arbitration agreement, such an agreement shall be concluded via the internet and shall use electronic means in exchanging the proposal and acceptance between the parties of such an agreement. The same applies if the online arbitration takes place by means of a clause in an electronic contract for example, since that the contract itself is electronically concluded with the conditions and terms contained therein.

It is of benefit to highlight the issue of severability of the arbitration clause as article 22 of the Jordanian Arbitration Law stated that: “Arbitration clause is an agreement independent from other conditions of the contract where the invalidation, revocation or termination of the contract shall be of no effect with respect to the arbitration clause it contains if the clause is valid per se”.

3. ONLINE ARBITRATION PROCEDURES:

There is no doubt that the procedural part of arbitration is of great importance in terms of the rules to be executed in order to proceed with the online arbitration litigation; what is meant here are the procedural rules that start from the formation of the arbitration panel in accordance with the provisions of Article 26 of the Jordanian Arbitration Law ((Arbitration proceedings start as of the day on which the formation of the arbitration panel takes place, unless both parties otherwise agree upon)); arbitration procedures raise many legal difficulties, particularly those related to the online arbitration in the absence of rules governing these procedures, different legal systems handling this issue and different arbitration centers within the procedural systems thereof, the matter that, in turn, poses several questions about the method of communication between litigants, communication with the arbitration panel, cross-examining witnesses and litigants and the method of document exchange along with the basic principles such as the principle of confrontation, right to defense, guarantees of fair trials, and respect of the rule of law.

First of all, we must indicate that the law applicable to online arbitration procedures is the law of will, similar to the law applicable to the subject matter of arbitration; will of the parties means the express will to have certain rules in place to regulate the procedures of the arbitration between them, which the Jordanian legislator had stipulated in Article²⁴ of the Arbitration Law ((Both parties to an arbitration may agree upon the procedures to be adopted by the arbitration panel, including the right thereof to subjugate these procedures to the rules established in any institution or arbitration center within the Kingdom of abroad; in the event that no such agreement is in place, the arbitration panel has the right to select the arbitration procedures it deems appropriate, subject to the provisions of this law²⁴)).

As provided for in the above provision, absence of a provision regarding the law applicable to arbitration procedures implies that the applicable law shall be the law on place of arbitration or the law to be established by the arbitration panel.

3.1 Initiation of and Proceeding with Arbitration Procedures

Arbitration procedures commence as of the day on which the formation of the arbitration panel is completed pursuant to Article 26 of the Jordanian Arbitration Law; thus, this provision assumes, for starting the arbitration procedures, that the arbitration panel is already formed, that the appointed umpire of arbitrators has/ have accepted the arbitration engagement, and that the dispute has been identified.

²⁴This provision is consistent with the provisions of the Jordanian Electronic Transactions Law No. 85 of 2001, Article 5 thereof which provides for “The provisions of this Law shall apply to transactions in which the parties thereto agree on performing the transactions thereof by electronic means, unless there is an express provision stipulating the same”.

The plaintiff shall, within the date agreed upon by both parties or as designated by the arbitration panel, to the respondent and to each arbitrator a pleading in writing containing the name and address thereof, name and address of the respondent, an exposition of the case, itemization of the issues subject of dispute and requests thereof; thereafter, the respondent shall, within the date agreed upon by both parties or as designated by the arbitration panel, to the plaintiff and to each arbitrator a plea in writing containing the defense and requests thereof, where each party has the right to enclose copies of the documents on which he/ she relies²⁵.

Application of the aforesaid to the procedures of online arbitration does not raise an issue since that the difference here is related to the means through which the plaintiff is to send the request thereof and the response of the respondent which takes places by an electronic data message. The way established at the arbitration centers is to fill an electronic form by the litigant parties and complete the required data with the name of the respondent along with the electronic address which shall be later used in service and in online arbitration procedures progress. It also involves filling the data related to the subject matter of the arbitration and issues subject of dispute along with the requests thereof and sending a list on evidence and documentation. By sending this request and reception thereof by the respondent, the online arbitration procedures are deemed to be actually initiated.

3.2 Online Arbitration Hearings

Online arbitration hearings are run via the internet and we found between the online arbitration and the rules related to the location of arbitration, as Article 27 of the Jordanian Arbitration Law states that:

((Both parties to arbitration may agree upon the place of arbitration, be it within the Kingdom or abroad; in the event there is no agreement in place, the arbitration panel shall, subject to the circumstances of the case and suitability of the place to the parties thereof, designate the place of arbitration; the same shall not prevent the arbitration panel from convening at any place it deems appropriate to perform any of the arbitration procedures, such as cross examining the dispute parties, the witnesses or the experts, to examine instruments, to inspect goods or properties, or to conduct deliberations between the members thereof or otherwise)). Subsequently, direction of the will of the parties, according to the above provision, to electing the internet to be the place through which the arbitration takes place serves as nothing but a right to the

parties to arbitration.

As for the language of arbitration, Article 28 of the Jordanian Arbitration Law states ((Arbitration shall be made in Arabic language unless the parties thereto otherwise agree upon or if the arbitration panel designates another language or other languages)). This can be applied to online arbitration in terms of using Arabic language. However, in case that technical issues appear on this regards related the technical aspect and extent of compatibility of Arabic language with the technologies and application used on the internet, there is nothing to prevent the arbitration panel from using English language, for example, due to the compatibility thereof with the internet and to save and retrieve data if it deems the use thereof would facilitate the online arbitration procedures, taking into consideration that the language which the arbitration panel decided to use shall apply to all evidence, memos and documents and to each and every decision to be taken by the panel, any letter it would furnish or award it would render. The arbitration panel may decide to have all or some written documents produced in the case translated into the language or languages used in the arbitration.

In accordance with the provisions of Article 32 of the Arbitration Law, the parties to arbitration may suffice with sending their memos in electronic form without the need to held sessions and may hold sessions to enable each party from explaining the merits of the case and presenting the arguments and evidence thereof. The means used in online arbitration is the audiovisual means, the most famous of which is the video conference which allows the dispute parties to present as if they were physically present and to fully appear in the session and fully interact with the arbitrational session, which embodies a virtual presence enabling the parties from exercising their legitimate right to defense before the other party; a thing that can be applied to cases of hearing witnesses and use such applications in hearing their testimonies and cross examining them since that the revolution of the communication world has not rendered the same impractical, rather it made it easy to apply and to hear and cross examine the witness by audiovisual means (face to face).

It is necessary here to refer to the principle of secrecy of arbitration sessions and to the consistency of the online arbitration system with this principle once we take into consideration the risks related to information security, data hacking, violation of privacy and piracy. Most legislations stress on the confidentiality of data and incriminate²⁶ the infringement thereof. In technical terms, protection

²⁵Refer to Articles 29, 30 and 31 of the Jordanian Arbitration Law No. 31 of 2001

²⁶Refer to the provision of Article 38 of the Jordanian Electronic Transaction Law of 2001:

((Any persons who commits an act constituting a crime under the effective legislations using electronic means shall be subject to imprisonment for a term that is not less three months and not exceeding one year, a fine in an amount that is not less (3000) Dinars and not exceeding (10000) Dinars, or by both penalties)).

systems, such as data encryption²⁷, provide the necessary protection to the transactors in the field of online arbitration through changing the form of information into another so that the encrypted version cannot be retrieved into the original version but through special logarithmical technical means in communication and information systems and by specialist under the supervision of control devices and systems that maintain the confidentiality of data thereof within the concerned parties only.

As for the fees on online arbitration, they differ depending on the nature and scope of the dispute brought before the arbitration panel. Fees also differ from an arbitration center to another which determines the type of currency used in payment and the method of such payment whether it is to be made by a bank transfer, cheque or using a credit card²⁸.

4. CONCLUSION

The emergence of the electronic commerce in the late stage of the last century gave rise to the urgent need for creating legal means that are consistent with the nature thereof to settle the disputes that might rise within the framework thereof; therefore, the online arbitration has come as an appropriate means to resolve such disputes.

For the online arbitration to maintain its special standing as an important alternative means for settling electronic disputes, it must respect the natural limits thereof, so that it can be referred to only in the disputes that are consistent with the nature thereof and capabilities to execute the rendered awards, thus things would be balanced in a manner securing the effective role of the online arbitration in settling the disputes submitted to it.

For the purpose of having our study sufficient, we have concluded to certain findings and made certain recommendations that we summarize in the following.

FINDINGS

1. Online arbitration is a means for settlement of disputes that arise in an electronic setting, the volition to refer thereto and submittal of the dispute and progress of litigation are expressed until the issuance of the award and service of the same in an electronic form;
2. Online arbitration agreement is not significantly different from the traditional arbitration agreement with respect to the substantive conditions, while it significantly differs in the realization of formal conditions that are represented in the requirement of writing and signature which take electronic form;

3. Online arbitration is the best means to settle many disputes related to the intellectual property, domain names, and disputes resulting from electronic business in general and electronic commerce in particular;
4. Online arbitration fees are significantly lower than those of the regular arbitration, and they are calculated based on the disputed amount or the number of the disputed sites as each center deems appropriate;
5. Failure of national arbitration laws, especially the Arab, in going along with the developments of the communication revolution and the impacts thereof on the nature of contracting and the non-material mediums used therewith.

RECOMMENDATIONS

1. The necessity of holding legal seminars and sessions for the purpose of introducing the role and importance of online arbitration, at all academic and governmental levels;
2. The necessity of finding a mechanism that secures the legal security to the transactions made via the internet;
3. To find a legislative legal solution permitting the reference to online arbitration if the same is best solution for consumers;
4. To expand the concepts of signatures and writing in order to take in the results of the electronic virtual setting, such as the new data that enable the parties to tele- contract and subsequently resolve the disputes arising from such contract or those resulting from using the internet, web sites and the like.

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²⁷Dr. Abdul Fattah Hejazi: Legal System for Ecommerce Protection, First Book, Al-Fikr Al-Jame'ie Publishers/ Alexandria 2002, page 206

²⁸For more information, refer to, for example: WIPO Arbitration and Mediation Center, www.wipo.int/amc/en/process1/report/annex/annexos.html

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