



Sarwat A. Shahid

L a w F i r m

## Responsibility of Arbitrators in E-Arbitration

Sharm El Sheikh International Arbitration Centre  
November 19, 2009

**Dr. Reinhard Klarmann, LL.M.**



### Sources of Arbitrators' Responsibility

---

➤ **Contract**

- Mandate/quasi-mandate with service elements in exchange for remuneration.
- Obligation to perform a service with "necessary diligence" and "required knowledge"

➤ **Torts, i.e. Delictual liability**

- English case law: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of skill and care"

➤ **Lack of international harmonization**

---

Sarwat A. Shahid Law Firm



## Types of Misconduct

---

- **Misfeasance**
  - Fraud
  - Inappropriate withdrawal
  - Corruption
  - Bad-faith actions, etc.
- **Nonfeasance**
  - Failure to disclose conflicts of interest
  - Failure to abide by party arbitration agreement or institutional rules
  - Failure to take part in the deliberation process
  - Failure to render an award, etc.

---

Sarwat A. Shahid Law Firm



## Is E-Arbitration true Arbitration?

---

- **Arbitration:** The resolution of a dispute between two or more parties, by a third person (arbitrator) who derives his power from an agreement (arbitration agreement) of the parties, and whose decision is binding on them
- **Three types of Online Dispute Resolution (ODR)**
  - Negotiation, Mediation and Arbitration - Only Arbitration is binding.
- **For award to be binding, it must be enforceable and the decision-making power must be exclusive of that of courts**
  - Ironically, many of the online “arbitration” procedures are non-binding
  - Non-Binding can refer to the award or to the agreement to arbitrate
- **In such case, parties may (or must) have recourse to national courts**

---

Sarwat A. Shahid Law Firm



## Example - Uniform Domain Name Dispute Resolution Policy

---

- Policy adopted by the Internet Corporation for Assigned Names and Numbers (ICANN)
- **Art. 4 lit. (k) UDRP Policy:** “The Mandatory Administrative Proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded [...]”.
- **Out of 16'409 cases since 1999, only 58 (or 0.353%) were brought before a national court**
- **WIPO has no knowledge of any cases concerning arbitrators' liability**

---

Sarwat A. Shahid Law Firm



## Consequences of non-binding Nature of Arbitration

---

- **No fundamental guarantees provided by the relevant national *lex arbitri***
- **No judicial enforcement of awards**
- **Almost all online arbitration is institutional**
  - Benefit of arbitration under an institution => rules become an implied term of arbitrator's appointment
- **Arbitrator's function is more that of an expert**
  - Parties act on an award that is not actually binding. See UDRP statistics

---

Sarwat A. Shahid Law Firm



## Does non-binding E-Arbitration reduce Arbitrator Responsibility?

- **Does possible recourse to national courts reduce the need for procedural safeguards?**
  - In absence of workable alternatives, it may be argued that the substance of the parties consent is weak. => Requires high procedural standards
  - Parties accept a degree of “arbitral risk”, compromising high procedural standards for less complexity, cost and increased user friendliness
- **Certain minimal requirements remain:**
  - Transparency
  - Independence
  - Fairness

---

Sarwat A. Shahid Law Firm



## Price for Benefits of ODR?

- **Speed**
  - Summary procedures
- **Low Cost**
  - Limited resources
- **Simplicity**
  - Limited evidence and review
- **User-friendliness**
  - No personal hearings
  - No sophisticated technical safeguards (Is anyone else in the room?)
- **But:**
  - Frequently non-binding nature
  - Amounts involved are relatively small
  - ODR only exists due to the confidence of its users

---

Sarwat A. Shahid Law Firm



## Due Process in an Online World

- **Excessive expediency and simplicity jeopardize due process**
- **Minimum procedural standards vs Denial of justice ?**
- **Opportunity to be heard**
  - Sufficient time to present arguments
  - Proper and proportionate means for the receipt of evidence (Max. number of characters)
  - Availability of hearings
- **Impartiality**
- **Technical challenges upon parties and arbitrator**
  - Deliberation (technological limits and risks)
  - Certainty as to documents (electronic signatures)
  - Confidentiality
  - Safeguarding of received documents
  - Safety vs accessibility
  - Computer literacy

Sarwat A. Shahid Law Firm



## Computer Literacy as a Criterion for Arbitrators in E-Arbitration?

© Original Artist  
Reproduction rights obtainable from  
www.CartoonStock.com



"You have seven phone messages telling you to check your e-mail, and thirteen e-mails telling you to answer your phone."

Sarwat A. Shahid Law Firm



## Immunity of Arbitrators

---

### ➤ Exclusion or Limitation of Liability ?

- Common law jurisdictions widely favour total immunity, while civil law jurisdictions commonly adopt a more restrictive approach
- Justified analogy between arbitrators and judges?
- Implied arbitral risk has limits

### ➤ Why is immunity important?

- Absence of protection may make arbitrators reluctant to reach a decision, and delay the rendering of an award
- Few arbitrators would agree to accept an appointment if liability not limited
- Total immunity may lead to negligence

---

Sarwat A. Shahid Law Firm



## Practical Approaches

---

### ➤ Article 34 ICC Rules

- “Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration”

### ➤ Article 44 Swiss Rules

- “None of the Chambers or their staff, arbitrators, tribunal-appointed experts or the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, save where the act or omission is shown to constitute deliberate wrongdoing or extremely serious negligence”

### ➤ Article 20 UDRP

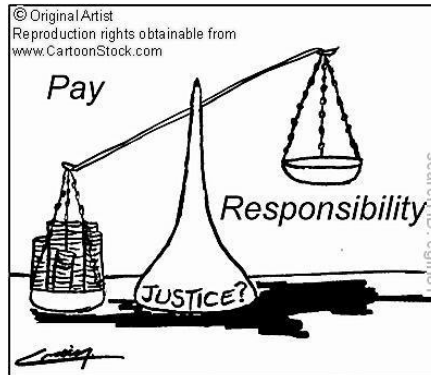
- “Except in the case of deliberate wrongdoing, neither the Provider nor a Panelist shall be liable to a Party for any act or omission in connection with any administrative proceeding under these Rules”

---

Sarwat A. Shahid Law Firm



## Risks versus Rewards?



### Executive Lifestyle

Sarwat A. Shahid Law Firm



## Should Remuneration play a Role?

### ➤ Comparison of Arbitrators' Fees

UDRP (Sole Panelist)			ICC	
Minimum (1-5 domain names)	(6-10 domain names)	More than 10 domain names	Minimum	Maximum
USD 1'000	USD 1'300	To be decided in consultation with WIPO (Exceptional)	USD 2'500	USD 285'500 + 0.058% of amount over USD 100'000'000

Sarwat A. Shahid Law Firm



## Future Perspectives

---

- **Pierre Lalive, 1999:** “There was a time when an arbitrator’s activity was not only much simpler than what it is in most international cases today, but rather in the nature of an honour and of a public service rendered to the community. And if fees were provided at all, they were more or less symbolic, as a partial compensation for the time devoted. Moreover, many if not all members of the arbitral community were successful men or lawyers, enjoying private resources of their own and far from imagining that arbitral activity might become a profession. *Tempi passati?*”
- **Analogies to ODR ?**

---

Sarwat A. Shahid Law Firm



---

# Thank you.

**Dr. Reinhard Klarmann, LL.M.**  
[reinhard.klarmann@shahidlaw.com](mailto:reinhard.klarmann@shahidlaw.com)

---

Sarwat A. Shahid Law Firm