IDENTIFYING E-ARBITRATION ISSUES IN THE DIGITAL LABYRINTH

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Introduction

Legal technology in the process of delivering legal services is usually viewed as the use of software and technology. This disrupts the approach used by traditional legal services and extends to the domain of international business arbitration by the buzz phrase "e-arbitration". The objective of this article is to discuss the most relevant topics of e-arbitration. The article first defines e-arbitration, along with an overview of some of its service providers. It further addresses the use of information technology ["**IT**"] in international arbitration. The authors conclude with an analysis of key legal issues arising when various aspects of the arbitral process are commenced, conducted or concluded in digital form.

What is E-arbitration?

The influence of technological advances on legal practice is still impossible to anticipate. Including various digital solutions under the aggregate name "Legal Tech", they join the legal market and serve the usual goals of the competence of a lawyer. Although their level of ambitiousness and sophistication varies, these methods are usually considered to cause disturbances in the legal sector.[1] In the field of arbitration, this includes a picture of a future in which conflicts are resolved exclusively by artificial intelligence,[2] which is a striking scene for a large number of dispute practitioners. However, this ought not to dissuade the adoption of modern aspects into the arbitral practice as well.

[1] Kai Jacob/Dierk Schindler/Roger Strathausen, 'Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry' (2017) <https://link.springer.com/book/10.1007%2F978-3-319-45868-7> accessed 28 August 2021.

[2] Paul Cohen/Sophie Nappert, 'The March of the Robots' (2017) (12) (1) Global Arbitration Review <https://shop.globalarbitrationreview.com/products/gar-volume-12-issue-1> accessed 19 June 2021.

In contrast to national courts, arbitration provides extraordinary procedural flexibility and is thus able to adapt to technological advancement considerably sooner.[3] Besides a few high-tech national judicial systems, South Korea arguably has the most apparent influence of technology.[4]

Form of arbitration which largely rely on IT have been used is recent terminologies, such as electronic arbitration, or e arbitration.[5] When the advent of e-commerce produced a need for the settlement of disputes through electronic communications, e-arbitration had its beginnings in the early 90s. While a definition of e-arbitration remains as elusive as predicting the form of technological progress, in light of the above considerations, it may be attempted as follows: "E-arbitration can be understood as the predominant use of IT for the arbitral process, whereby particularly the conduct of evidentiary hearings, but also the formation of the arbitration agreement and the rendering of arbitral awards in electronic form constitute pertinent, but not constitutive, elements."

The purpose of this article is to provide an introduction to relevant matters arising in connection with e-arbitration (B2B) conflicts. It will describe the several methods in which IT is applied in contemporary arbitrary practice before considering possible legislative repercussions.[6]

Who Offers E-Arbitration?

In addition to the regulations on tailor-made arbitration, adequate technological infrastructure for online procedures and a technically skilled administration are required for electronic arbitration. Major international arbitration participants may best spend the subsequent costs. However, although most of the top arbitral institutions are the apparent options, they do not supply e-arbitration solutions, as stated above.[7] Instead, they use IT to assist conventional processes. The Online Dispute Resolution Center of the China International Economic and Trade Arbitration Commission ["**CIETAC**"] is one exception which concentrates on specific areas of law, such as the resolution of domain names and e-

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[3] Latham and Watkins International Arbitration Practice, 'Guide to International Arbitration' (2017) <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> accessed 28 August 2021.
[4] Amitav Mallik, 'SIPRI Research Report No. 20 Technology and Security In The 21st Century A Demand-Side Perspective' (2004) <https://www.sipri.org/sites/default/files/files/RR/SIPRIRR20.pdf> accessed 28 August 2021.
[5] Mohamed S. Abdel Wahab, 'ODR and e-Arbitration – Trends & Challenges' (2012) Online Dispute Resolution Theory and Practice, International Eleven Publishing <https://www.mediate.com/articles/ODRTheoryandPractice18.cfm> accessed 21 June 2021.
[6] Gabriele Kaufmann-Kohler/Thomas Schulz, 'The Use of Information Technology in Arbitration' (2005) Jus Letter <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed 22 June 2021.
[7] ibid.

commerce issues.[8] As a result, smaller providers of full-scale e-arbitration services currently dominate the market.[9] These are frequently run by corporations, organisations, or private persons who are only marginally known in the arbitration community.[10] It cannot be assured that experienced users can all have the confidence to deal with trade disputes equally, particularly as sites range from highly professional designs and explanatory videos with well-known arbitrators to somewhat more confusing installations that feature on the welcome page payment methods and defenses against scam reports.[11]

At present, e-arbitration appears to be primarily directed at arbitral proceedings where the sum at issue is small, at least as compared to those of the arbitral institutions in question.[12] Whilst one factor may be that parties and arbitrators still prefer to have face-to-face meetings and at least several papers for more complicated cases, the lack of infrastructure needed to manage such huge cases could be another explanation. At the same time, significant arbitrations are more dependent on technology facilitation. The arbitral practice appears to be in the phase of steadily raising its technical support levels and, in turn, may lead in the future to greater use of e-arbitration for broader disputes.[13] It is useful to give you a brief review of the usage of IT in the current arbitration practice.

How is Technology used in Arbitration?

As part of the general process of digitalization, different services based on IT are more influential in international arbitration in the overall process of digitization,[14] making it probably the most efficient, economical and convenient. With the scope of current trend, the gradual absorption of current technologies should not be misconstrued as a pioneering action in the avant-garde business industry. The growth of the internet and electronic technology has redefined standards in business and law, and the increasing intolerance of users to sluggish proceedings and delays is a matter of arbitral practice.[15]

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[8] ibid.
[9] China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2014.
[10] cf Wahab (n 5).
[11] ibid.
[12] Pradeep Nayak/Sulabh Rewari/Vikas Mahendra/Keystone Partners , 'Arbitration procedures and practice in India' (2021) Thomson Reuters <https://uk.practicallaw.thomsonreuters.com/9-502 0625?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 24 June 2021
[13] Michael Reuter, 'CodeLegit Conducts First Blockchain-based Smart Contract Arbitration Proceeding' (2017) Datarella < https://datarella.com/codelegit-conducts-first-blockchain-based-smart-contract-arbitration-proceeding/> accessed 24 June 2021.
[14] United Nations, 'Digital Economy Report 2019: Value Creation And Capture: Implications For Developing Countries' (2019) < https://unctad.org/system/files/official-document/der2019_en.pdf> accessed 28 August 2021.
[15] Lars Markert/Jan Burghardt, 'Navigating the Digital Maze - Pertinent Issues in E-Arbitration' (2017) (27) (3) Journal of Arbitration Studies <https://www.koreascience.or.kr/article/JAKO201728642462610.page> accessed 25 June 2021.

To remain in demand, counsel, arbitrators and arbitral institutions are therefore required to continue technical progress.

This article does not aim to present a thorough list of the variants in the arbitration using IT. However, to analyse the specific legal concerns that arise from it, it is necessary to present a brief, basic concept of the technical context available in the arbitral procedures. Three types of variants shall therefore be referred to.

First and most obvious, information technology is used for written communication. According to an International Chamber of Commerce ["**ICC**"] Commission Report published in 2017, regarding *"Information Technology in International Arbitration"* ["**ICC Commission Report 2017**"], once the arbitral tribunal is constituted, written communication between and among the parties, the arbitrator(s) and the administering body often takes place exclusively in electronic form, with e-mail being the means of choice.[16] Despite this fact, it is unlikely that many people in arbitration circles would consider this to fall under the notion of e-arbitration.

Secondly, arbitral participants may transmit or store papers utilizing cloud-based services for file storage. Several case-management systems by major arbitral institutions to meet the needs of arbitral practice have been created and made available. These include the old "Net Case," the former web-based case-management tool for the ICC, and the "Web File" service of the American Arbitration Association ["**AAA**"] and the World Intellectual Property Organization ["**WIPO**"].[17] A wide range of files may be forwarded, regardless of size, through such services; this can only be performed in a restricted way by e-mail.

In contrast to e-mail services, case management instruments also make it easier for content related to a certain case to be organized and searched. Documents may be filed, marked by origin or substantive aspects systematically. The material can then be accessed whole or in part, regardless of where it is located, by a select number of people. Transmissions and exchanges can also be followed, and a comprehensive history of the procedure can be established. When a resourceful user applies those instruments, they exceed the benefits in terms of ease and efficiency of e-mail and offline document

[16] ibid.
[17] cf Kohler (n 6).

submission; not to mention the more nostalgic paper-based case-management tactics. These platforms often use default encryption techniques, which allow for greater privacy and data integrity than e-mail.

Apart from the offers furnished by arbitrators, companies, and business service providers, products have also been developed to transmit and host vast amounts of data electronically. The use of File Transfer Protocol ["**FTP**"] links to deliver documents and the use of cloud services to upload documents are not specific to arbitration.[18] Although FTP links are produced by secure servers, the cloud services typically give a provider ample right to submitted content, as provided by its terms.[19] This suggests that users are either uninformed of the legal consequences of using such software or, unwittingly, choose ease of use over secrecy.

Specialized litigation support providers, in addition to general service providers, provide cloud services with specific annotation and display choices for the documents kept throughout the evidentiary hearing.[20]

Thirdly, if an in-person hearing is not possible, video conferencing provides an option that permits hearings to take place across long distances without incurring the price of travel. Most professional legal firms and arbitral institutions now have sophisticated video conferencing gear and software, and, as with cloud storage, there is a variety of dependable commercial solutions. Despite the promise for increased efficacy and convenience, video conferencing remains a relatively uncommon replacement for in-person evidence hearings in arbitral procedures.[21] There may be some uncertainty about whether video conferencing can capture the instant and delicate impressions of a witness replying to questioning or the arbitral tribunal's reaction to petitions. Furthermore, having everyone in the same room may make it simpler for the arbitral panel to retain control over a highly contentious session.

Finally, technology has not yet evolved sufficiently to eliminate the potential of technical difficulties unexpectedly disrupting the proceedings, especially if the parties, witnesses, and three arbitrators are all participating in the video conference from different places. As a result, e-arbitration, as understood without an in-person hearing, remained the exception, except in minor situations. However, given that

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[18] WIPO, 'WIPO Online Case Administration Tools' <http://www.wipo.int/amc/en/ecaf/> accessed 26 June 2021.
[19] ibid.
[20] Andrew Haslam, 'In Conjunction with Complex Discovery E- Disclosure Systems- Buyers Guide 2021 Edition' (2021) (9) (1) <https://complexdiscovery.com/wp-content/uploads/2021/01/eDisclosure-Systems-Buyers-Guide-2021.pdf> accessed 27 June 2021.
[21] Sharon Miki, 'Video Conferencing for Lawyers: How to Video Conference Like a Pro' (2020) *Clio* < https://www.clio.com/blog/video-conferencing-for-lawyers/> accessed 28 June 2021.

video conferencing, at least for the questioning of individual witnesses or experts, is becoming more frequent, if not always without complications, this may alter in the coming years.[22]

To summarize, IT has altered parts of arbitral practice and has the potential to further simplify and make arbitral practitioners' tasks more efficient. The ICC Commission's thorough guideline on IT in international arbitration emphasizes the rising relevance of incorporating technology into arbitral procedures. However, as will be demonstrated under, e-arbitration presents several legal concerns that must be addressed to secure the legality of the arbitral procedures and their conclusion.

What are the key legal issues in e-arbitration?

The use of IT in arbitration necessitates a **(i)** reconsideration of due process, **(ii)** confidentiality, and **(iii)** the use of IT when issuing awards.

i. Can due process be observed?

Due process in arbitration consists of procedural norms that assure the impartiality and fairness of arbitral decision-making.[23] Due process violations frequently result in setting aside arbitral awards in national courts or the absence of international enforceability.[24]

The core principle is that the parties must have an equal opportunity to state their case, which is a fundamental procedural requirement. When the IT used during arbitral proceedings cannot be accessed or mastered equally by both parties, problems ultimately develop.[25] Such "virtual inequality" can be generated by disparities in the parties' financial resources, particularly if the expenses of acquiring the requisite technical infrastructure would place one party in financial jeopardy.[26] Inequality can also be caused by technological constraints; services may not be accessible internationally or may

[22] Benjamin Button-Stephens, 'WeChat' App not for Hearing Evidence, Says Australian Court' Global Arbitration Review News (6 October 2016) < https://globalarbitrationreview.com/wechat-app-not-hearing-evidence-says-australian-court> accessed 30 June 2021.
[23] Matti Kurkela/Santtu Turunen, 'Due Process in International Commercial Arbitration' (2010) Oxford University Press <https://global.oup.com/academic/product/due-process-in-international-commercial-arbitration 9780195377132?cc=in&lang=en&> accessed 1 July 2021.
[24] Margaret Moses, 'The Principles and Practice of International Commercial Arbitration' (2017) Cambridge University Press < http://assets.cambridge.org/97805218/66668/frontmatter/9780521866668_frontmatter.pdf> accessed 1 July 2021
[25] Cf Wahab (n 5).
[26] cf Markert/Burghardt (n 15).

surpass a party's or its counsel's technological expertise. Having stated that, it is important to remember that inequity of means is nothing new in arbitral procedures.

A party may choose to engage a more costly law firm or undertake an expensive internal document review at the start of the litigation to be aware of potentially damaging content. Similarly, *"the use of information technology for internal reasons to prepare as best as possible does not need to be the opposing party's or the tribunal's concern."*[27] Equal treatment must be maintained primarily when IT is utilized to present the parties' case. The issue of equality is determined by the services used in each situation. Issues may be avoided once more by reaching a mutual agreement on the type of technology to be used in the arbitral proceedings, preferably during an early case management meeting and, if required, again before the evidentiary hearing. If required, the arbitral tribunal may need to assure equitable treatment by limiting the use of technology to the "lowest common denominator." The more technologically knowledgeable party can always raise the bar by instructing or educating the tribunal and the opposing party on how to utilize more sophisticated technology.

Another key procedural principle is the right to be heard in adversarial proceedings, meaning that parties must be given the opportunity to respond to submissions by their opponent and to instructions or comments by the arbitral tribunal.[28] This also entails that the arbitral tribunal is not to communicate with one party without the presence of the other. When arbitral hearings are conducted via online or video conferencing, technical failure can lead to the potentially unnoticed temporary exclusion of a party from the proceedings. To avoid such issues potentially affecting the enforceability of arbitral awards, technical safeguards need to be implemented that interrupt the arbitral proceedings as soon as one party is excluded or at least appropriately warn the arbitral tribunal about the issue. It will then be up to the arbitral tribunal, and less to the arbitral institution to take the appropriate steps and to also decide how to appropriately adjust the limited available hearing time.

The above shows that the principles of due process do not constitute an insurmountable obstacle to e-arbitration or electronically supported arbitration, as long as sufficient procedural and technical safeguards are implemented. Of course, these principles do not mean that the arbitral tribunal has to protect parties from their deliberate use of insufficient technology.

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[27] Gary B. Born, 'International Commercial Arbitration - Volume II: International Arbitral Procedures' (2014) Kluwer Law International <https://lrus.wolterskluwer.com/store/product/international-commercial-arbitration-volume-ii-international-arbitration-procedures/> accessed 3 July 2021.

[28] cf Markert/Burghardt (n 15).

ii. Can confidentiality be ensured?

While there is disagreement as to whether there is a general duty of confidentiality governing international arbitrations, the level of confidentiality and privacy achieved in the practice of arbitral proceedings is an important factor in many parties' decisions to choose arbitration over state court proceedings.[29] In arbitral procedures, confidentiality has a broad reach, affecting both the arbitrators, the arbitral institutions, and in many circumstances, the parties as well. In most cases, the parties will have a strong incentive to keep the substance of the conflict, if not the issue itself, hidden from third parties. This will frequently include the arbitration agreement, the submissions in a dispute, and the final award's substance. However, confidentiality is not a new concern in arbitral procedures; paper-based correspondence and in-person sessions are not immune in this sense either.[30] It is a repeating theme, emerging in ever-changing forms as the digitization of arbitration progresses.[31] In order to maintain trust in the electronic arbitral process, law firms are beginning to address cyber security problems, such as by raising awareness of the issue and offering extensive guidelines.

iii. Can arbitral awards be validly issued in electronic form?

As previously said, while electronic versions of arbitration agreements may become more frequent in the future, electronic arbitral awards may remain science fiction for some time.

Arbitral verdicts must meet formal criteria set by national arbitration laws, which in most circumstances include written form and the signature of at least one arbitrator.[32] Failure to comply with these criteria may result in an invalid, and hence unenforceable award or cause the award to be set aside later.[33] As with arbitration agreements, the question to be answered is whether such form requirements may be met in electronic form.[34] Once again, some governments have tackled the issue through the law, either directly or indirectly. Where such regulations do not exist, the likelihood of a progressive interpretation of the in-writing requirement being recognized by competent courts is substantially lower than for arbitration agreements. In contrast to the latter, the arbitral award is a

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[29] Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/research/2015/> accessed 3 July 2021.
[30] cf Markert/Burghardt (n 15).
[31] International Court of Arbitration, 'Dispute Resolution Services' < https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> accessed 28 August 2021.
[32] Arbitration Act of Korea 2010, art. 32 (1).
[33] Reinmar Wolff/Christian Borris, 'New York Convention - Convention on the Recognition and Enforcement of Arbitral Awards of 10 June 1958 – Commentary' (2012) < https://www.worldcat.org/title/new-york-convention-convention-on-the-recognition-and-enforcement-of-foreign-arbitral-awards-of-10-june-1958-commentary/oclc/822653392> accessed 4 July 2021.
[34] cf Wahab (n 5).

document capable of triggering domestic legal enforcement. This appears to prevent the application of interpretive concepts derived from contract law and even calls for a restricted interpretation of applicable form requirements.

The structure of an arbitral award is also significant in terms of its foreign recognition and enforcement under the New York Convention. In the absence of specific restrictions, formal requirements are considered in the context of the Convention's underlying definition of arbitral decisions. Given that the Convention's openness to technical development is confined to arbitration agreements, a similarly progressive reading of the form requirements for arbitral judgments may be ruled out.[35]

Conclusion

The legal environment and the field of international arbitration are not exceptions to technological advancement. New developments should thus be taken into consideration and used in the arbitration procedure. E-arbitration is such a new development and may be regarded as electronically performed, especially in respect of evidence hearings, and arbitration of its essential elements. Currently, disagreements over modest sums of money under the aegis of specialist providers largely appear to be resolved. However, as technology is advancing and users are striving to make arbitral procedures more successful, this might soon be changing. The use of technology in international arbitrations of all sizes and complexity is rising, and the gap in what is now called specialist e-arbitration is being steadily broken. In the near future, e-arbitration services might become solid in the world of international business arbitration if trustworthy suppliers continue and grow their operations. As demonstrated by this research, the legal problems involved may be resolved. Arbitral practitioners must bear in mind, however, that conducting e-arbitral proceedings presents a number of particular issues to be addressed to maintain the validity and enforceability of the process. Effective consideration of the specific features and the exercise of its arbitral party autonomy in order for the procedure to be adapted to their demands is a good idea. They will be supported by a variety of studies and recommendations that provide valuable orientation on the use of technology in arbitration, cyber security and e-

[35] Olivier Cachard, 'United Nations Conference on Trade and Development - Course on Dispute Settlement in International Trade, Investment and Intellectual Property, module 5.9 - Electronic Arbitration' (2003) http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-DisputeSettlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx accessed 5 July 2021.

arbitration. The authors believe that this study of relevant topics will be another compass that guides readers through the digital labyrinth.