ARBITRATION IN THE DIGITAL AGE

Arbitration in the Digital Age analyzes how technology can be efficiently and legitimately used to further sound arbitration proceedings. The contributions from a variety of arbitration scholars report on current developments, predict future trends and assess their impact from a practical, legal, and technical point of view. The book also discusses the relationship between arbitration and the Internet and analyzes how social media can affect arbitrators and counsel's behaviour. Furthermore, it analyzes the validity of electronic arbitration agreements and awards, as well as Online Arbitration (OArb). The volume establishes, on a very practical level, how technology could be used by arbitration institutions, arbitrators, parties to an arbitration and counsel. This book will be of special interest to arbitrators and lawyers involved in international commercial arbitration.

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ARBITRATION IN THE DIGITAL AGE

The Brave New World of Arbitration

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CONTENTS

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FOREWORD

Welcome to the 'Brave New World of Arbitration'

The interaction between technology and arbitration is not something for the future – it is happening right now. The challenge that lies before us is how to integrate technology in an orderly fashion and use it in order to improve arbitration. Technology will change the way we arbitrate. It is up to the arbitration community to decide on how this happens, not when.

The international arbitration community has always been focused on improving the efficiency and overall quality of arbitration. The different stakeholders in arbitration seek to optimize such factors as the duration and costs of arbitration, as well as the transparency and predictability of these factors. The key question is now how technology can (continue to) play a role in achieving these goals.

Three ways of interaction between arbitration and technology are distinguished here.

The first one is the most comprehensible, i.e. whereby parties and arbitrators make use of technology, e.g. online and electronic tools, in support of the procedure. Costs and time are saved by communicating solely by way of email and filing submissions and exhibits on an online platform or 'drop box', the access to which is provided by the arbitral institution or the arbitrator. Moreover, over the last few years, procedural hearings have been increasingly held by telephone or video-conference. In contrast, witness hearings or hearings on the merits today largely remain physical encounters which have to be planned well in advance and which have an important impact on the arbitration costs. How much longer will it take before an arbitrator, counsel and parties, all in the comfort of their own office, log in to a virtual hearing room wearing their virtual reality glasses, instead of flying out to some major capital for a weeklong witness hearing. There can be little doubt that this evolution adds to the efficiency of the arbitral process. The question is of course whether this does not pose a threat to the principles of fairness and due process. We believe that this should not be the case, provided that the tools are available to cover the issue of security.

The second interaction is in full development: the creation and use of platforms for Online Dispute Resolution (ODR) to facilitate dispute resolution. ODR platforms exist in all shapes and sizes and can serve different purposes, but they all aim at resolving a dispute in a simple, fast, flexible and efficient way. The main question surrounding ODR is how to guarantee that the fundamental principles of dispute resolution are preserved. An ODR system should meet the principles of fairness, due process, transparency, accountability, independence, impartiality, efficiency and effectiveness. Until now, the main focus of ODR is to get disputes regarding low-value transactions away from traditional judicial systems. To that end, an ODR system will try not to impose costs, delays or burdens that are disproportionate to the economic value at stake. ODR can also be a relevant solution when traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes. The ODR platform created by the European Union in 2015 tries to meet that goal, although it would appear it is primarily a way for consumers to (try to) interact with traders when a dispute has arisen.

One of the most interesting features of ODR platforms is that they usually offer different ways or levels to resolve a dispute. In general, an ODR process will have three stages: negotiation, facilitated settlement and a third/final stage with some kind of adjudication. An ODR process will start up with a notice of claim through an ODR platform, whereby the ODR administrator will notify the respondent. After that, a technology-enabled negotiation stage will start. Known forms are, e.g. double-blind bidding or visual-blind bidding, whereby an algorithm will either generate suggestions or automatically settle a monetary claim if the parties' proposals/offers fall within the range (zone of agreement) set or accepted by them. One could state that it is an automated, and perhaps more precise, form of baseball arbitration, whereby parties are encouraged to be reasonable.

In any case, a result should be obtained within a certain timeframe after which the ODR system will move to the next stage, the facilitated settlement. Here, the ODR administrator will appoint a neutral intermediary who will communicate with the parties in an attempt to reach a settlement. If that fails, the parties will move to the third and final stage which is a dispute resolution through arbitration, third-party binding decision, expert determination, etc. Therefore, in the end, it all comes back to classic adjudication by a judge, an arbitrator or an expert, who – as a human – will weigh the elements of the dispute at hand and make a final decision.

This brings us to the third way that technology will interact with arbitration, i.e. the ever-growing science of artificial intelligence. Data mining is gradually finding its way into the field of law. Systems exist whereby case law and doctrine are selected out of huge databases in order to generate a first opinion on a question of law. And just around the corner are systems which learn and therefore create such opinions themselves in order to solve legal issues.

We no longer ask ourselves the question how can bolts most efficiently be screwed into a car: by a robot or by a human being? Soon we may not even reflect anymore upon the question who is more efficient at coming up with relevant case law and doctrine for a certain legal issue: a paralegal or a computer? How far are we from asking the same question when it comes to suggesting a solution for a legal issue, i.e. whether it is more efficient to hire an associate at the firm or to order some form of advanced computer software? And finally, at what point in time will we rely on the decision taken by such a software as opposed to an arbitrator or state judge? When drafting an arbitral clause, will we soon make the distinction between artificial intelligence (AI) arbitration and human arbitration, instead of the choice between institutional and ad hoc arbitration as we do today?

The opportunity to ask ourselves the question whether we want this evolution to take place is long gone. The remaining question is how we want it, in order to avoid a society strictly run by logic, by ways of formulas and equations, as described in the 1921 dystopian novel *We* by Yevgeny Zamyatin. So it is time to get to work. It is time to think or rethink any and all aspects of arbitration, from the appointment of an arbitrator right up to the final award, and identify how the process can be made more efficient through interaction with technology. The field lays wide open and the academic world, the arbitral institutions and the users of arbitration all have a role to play. Undoubtedly it will be a step-by-step process, in which this book forms an important part, but we should heighten our pace.

Technology is not a menace to arbitration. It can and should be used to enhance the aspects for which arbitration is criticized today. Our strength is that dispute resolution in commercial disputes, in many jurisdictions around the world, is not and has never been the monopoly of State judicial systems. To the contrary, in international commercial relationships, alternative ways to resolve disputes remain increasingly popular. The international arbitration community has grown and is still growing in strength at a very high pace. We should use this strength to stay on top of our game

and applaud any initiative taken in the direction of further increasing it, whatever angle taken.

Dispute resolution is a very serious matter and it has been so ever since the first dispute arose. Over centuries, mankind has identified the standards for fair adjudication. Technology, on the other hand, is an equally serious matter. The staggering pace of technological development causes last year's inventions to be outdated today. Justice and technology have now met; they have started to interact; and they will interact more and more, faster than we can all believe or even imagine.

This remarkable book not only identifies the different challenges before us, it also directs us to (find) the answers.

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