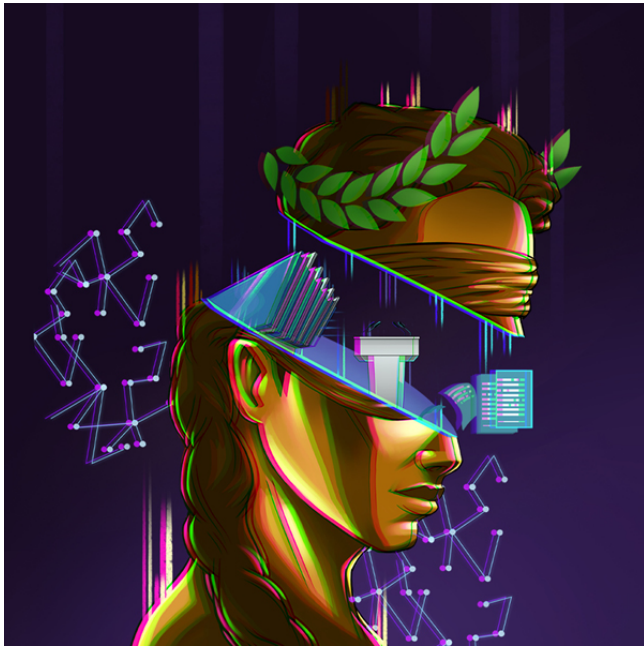


The use of technology to conduct ADGM arbitrations

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Introduction

When the ADGM Regulations ('Regulations') were issued in December 2015, we rightly welcomed them as *"one of the most modern and progressive arbitration laws in the Middle East"* (Global Arbitration Review, February 2017). That remains the position in many respects with one arguable exception: the use of technology in the conduct of hearings, on which the Regulations contain no express provisions.

The regulation of the use of technology in arbitration under the UAE Arbitration Law

In contrast, the UAE Federal Arbitration Law, which was passed almost three years later (in 2018), does expressly address the use of technology in the conduct of hearings. For instance, Article 28 (Place of Arbitration) provides:

"2. The Arbitral Tribunal may, unless otherwise agreed by the Parties:

[...] (b) hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the Parties."

While Article 33 (Hearings and Written Proceedings) states that:

"[...]3. Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing."

And Article 35 (Witness Testimony)

“The Arbitral Tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing.”

The absence of regulation of the use of technology in arbitration under the Regulations

While the Regulations recognise modern means of communication (such as email), they contain no equivalent provisions to the foregoing provisions of the UAE Arbitration Law.

The absence of express provisions in the Regulations does not necessarily mean that technology is not permitted under the Regulations to conduct arbitrations seated in the ADGM. For instance, Article 32 (Determination of rules of procedure) provides that:

“(1) The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) In the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

As may be seen, the Regulations confer on the arbitral tribunal a broad discretion relating to how the arbitration is conducted. Furthermore, the Regulations require the arbitral tribunal in “all cases” to “adopt procedures which are suitable to the circumstances of the particular case and which avoid unnecessary delay and expense” (Article 32(4) of the Regulations).

Arguably, these provisions would entitle the arbitral tribunal to conduct an evidentiary hearing using video conferencing or other technological means, if it were not possible to meet in person due to the current pandemic or other compelling reasons (to “avoid unnecessary delay”). Indeed, in its publication entitled, ‘Technical Notes on Online Dispute Resolution’, UNCITRAL has observed that “online dispute resolution can assist the parties in resolving disputes in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing”. Further, this argument would appear to be bolstered by Article 33 (2) (Seat of arbitration), which entitles the arbitral tribunal to, unless otherwise agreed by the parties, “meet at any place it considers appropriate for [...] hearing witnesses, experts or the parties.”

Having said that, Article 39 (Hearings and written proceedings) mandates the arbitral tribunal, subject to any contrary agreement by the parties, to decide “whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.” However, unless the parties have agreed that “no hearing shall be held”, the arbitral tribunal is required to “hold such hearings at an appropriate stage of the proceedings, if so requested by a party.” As may be seen, the tribunal is obliged to hold an oral hearing- subject to any contrary agreement between the parties, where one party requests it. Indeed, as one leading commentator has noted, “a tribunal’s refusal to conduct an oral hearing, where it has been requested, can be a classic instance of a denial of a party’s opportunity to be heard, leading to an annulment of the resulting award”. (Chapter 25: Annulment of Arbitral Awards’ in Gary B. Born, International Commercial Arbitration, (2nd Edition, Kluwer Law International, 2014), p.3235.)

That raises the question of whether the foregoing requirement for an oral hearing, where requested by one party in an ADGM arbitration, would be satisfied by a remote hearing conducted by technological means (absent any express legislative provision to that effect, e.g., Article 1072b (4) of the Dutch arbitration law (see below)). For instance, in Sweden, “a hearing held by conference is not to be regarded as oral within

the meaning of paragraph 1 (2) [of the Swedish Arbitration Act]. Therefore, if a party requests oral hearing under that provision, he does not have to settle for a video conference.” (S. Lindskog, Skiljeforfarande – en kommentar, Norstedts Juridik, 2005 (unofficial English translation)).

Commentary

The use of technology is not novel in international arbitration. Parties and arbitrators often use modern means of communication to, for example, hold case management conferences, submit parties’ submissions and supporting documents in electronic format, use e-storage for case files, and utilise hearing room technologies such as real time electronic transcripts. International arbitration has shifted into a more technologically-oriented culture, albeit maintaining for the large part traditional physical hearings. However, physical hearings have recently become potentially problematic for arbitrators, counsel and parties in light of the current pandemic and the resultant restrictions.

The social distancing measures and travel restrictions have challenged parties and arbitrators to adopt new measures in their proceedings, and to adapt to a new reality of conducting arbitrations. This includes the need to conduct evidentiary hearings using video conferencing or other technological means, instead of the more traditional hearings. The current pandemic could shift the way hearings in international arbitration are conducted, such that they become routine.

Considering the uncertainty around the permissibility of substituting a remote hearing for an oral hearing requested by one party in an ADGM arbitration (under Article 39 of the Regulations), it is suggested that in any future revisions of the Regulations, attention would be given to the permissibility of the use of technology in arbitrations seated in the ADGM. It would constitute a timely revision of a thoroughly modern arbitration law, thereby allowing it to keep pace with contemporaneous global changes.

There are examples in other jurisdictions. For instance, Article 1072b (4) of the Dutch arbitration law provides that:

instead of a personal appearance of a witness, an expert or a party, the arbitral tribunal may determine that the relevant person have direct contact with the arbitral tribunal and, insofar as applicable, with others, by electronic means. The arbitral tribunal shall determine, in consultation with those concerned, which electronic means shall be used to this end and in which manner this shall occur.

As noted earlier, one does not need to look too far afield, considering the regulation of this issue by the UAE Arbitration Law.

Conclusion

When we welcomed the advent of the Regulations a few years ago, we expressed the hope that they “*also may serve as a bellwether for other initiatives, including the long-awaited enactment of a UAE federal arbitration law.*” While the Regulations admirably served that function, it now appears that the UAE Arbitration Law may, in turn, serve as a bellwether for the regulation within the UAE of the use of technology in the conduct of arbitrations seated in onshore and offshore UAE.

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