Use of modern technology in arbitration: evolution through necessity

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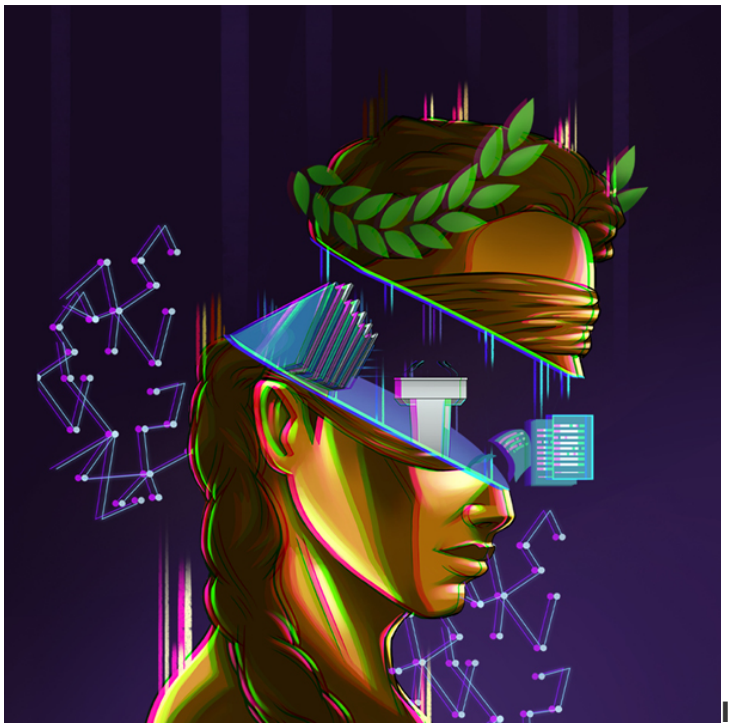

Introduction

The COVID-19 global pandemic has affected all industries around the world. The legal industry and, in particular, international arbitration are no exception. Yet, while state courts, including in the Middle East, have suspended operations and shut their doors until the crisis abates, international arbitration has confirmed its status as a flexible and adaptable alternative dispute resolution method. In the face of the ever-increasing restrictions on the movement of people and institutional shutdowns in Spring 2020, arbitration practitioners demonstrated the resilience and flexibility of international arbitration by continuing to resolve disputes remotely with the assistance of various technological means.

This article will touch upon a number of legal and practical considerations associated with the use of technology in international arbitration with a post-COVID-19 outlook.

Certain Legal Considerations

Counsel, arbitrators, and institutions had already introduced, implemented and used new technologies in international arbitration before the emergence of the COVID-19 pandemic. Unfortunately, despite the overwhelming benefits and for a variety of reasons, introduction of technology has been happening only at a piecemeal pace. However, as a result of the necessity brought about by the sudden resurgence of the COVID-19, it should come as no surprise to the arbitral community that the utilisation of technology at all

levels of the international arbitration system has rocketed in the past few months. In this regard, and in order to ensure the legitimacy of the arbitral process and the subsequent successful recognition and enforcement of arbitral awardss, it is essential to ascertain the basis on which the use of technology in international arbitration, including the use of electronic documents, online platforms, and, of course, virtual hearings may be permitted.

1. *Explicit reference to the use of modern technology in the parties' arbitration agreement*

While the matter of referring to the use of modern technology may be expressly prescribed in the parties' arbitration agreements, such reference was, in practice, relatively rare before COVID-19. In pursuance of the consensual nature of arbitration, parties could also agree on such use prior to or during the arbitral proceedings. Subject to mandatory provisions of the applicable legislation, such discretionary agreements may take the form of a general consent to use technology or a detailed framework identifying use of certain technology and programmes and/or prohibiting the use of others, which one or all parties consider, for example, unreliable or insecure.

The authors have noted an unsurprising increase in the explicit reference to the use of modern technology as part of the parties' arbitration agreement, often in anticipation of the protracted effects of the current health crisis. In this regard, the authors draw the users' attention to the importance of having such references carefully drafted in order to avoid any conflict with or inhibition of the effect of arbitration rules, in circumstances where the parties have agreed to refer their current or prospective dispute to institutional arbitration.

2. *Reference to the use of modern technology in arbitration rules*

Prior to the COVID-19 pandemic, a large number of arbitration rules issued by the world's leading international institutions contained provisions expressly allowing the use of technology in arbitral proceedings, primarily due to consideration of time and cost efficiency. For example, the International Chamber of Commerce ('ICC') Arbitration Rules of 2017, which are regularly used in disputes pertaining to the Middle East, grant arbitral tribunals discretion to decide, in the absence of a parties' agreement, on "*using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court*" (see Appendix IV – Case Management Techniques).

Also, in regards to hearings, Article 28(4) of the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules of 2010, that are typically used for administration of proceedings in *ad hoc* arbitrations, grant arbitral tribunals the power to direct that fact and expert witnesses "*be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).*" A similar provision is found in Article 29.4 of the Qatar International Centre for Conciliation and Arbitration ('QICCA') Arbitration Rules of 2012.

Similarly, many arbitration centres located in the Middle East have already prescribed in their arbitration rules the possibility of technology assisted arbitral proceedings, for example:

- Article 19.2 of the Dubai International Financial Centre – London Court of International Arbitration ('DIFC-LCIA') Arbitration Rules of 2016:

"[…] *As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three). […]"*

- Article 16.3 of the Bahrain Chamber for Dispute Resolution – American Arbitration Association ('BCDR-

AAA') Arbitration Rules of 2017:

"[…] In establishing procedures for the case, the arbitral tribunal and the parties may consider how technology, including electronic communications, might be used to increase the efficiency and economy of the proceedings."

- Article 20(2) of the Saudi Centre for Commercial Arbitration ('SCCA') Arbitration Rules of 2018:

"[…] In establishing procedures for the case, the Tribunal and the parties may consider how technology, including electronic communication could be used."

Where the arbitration rules are silent on the use of technology and in the absence of parties' agreement, arbitral tribunals may be able to rely on the rules' general provisions. Such provisions typically grant the arbitral tribunal discretion on how to administer the arbitral proceedings, which should include decisions on how to implement and utilise modern technology, provided the parties are treated fairly and have an opportunity to present their case.

In this regard, Article 17 of Dubai International Arbitration Centre ('DIAC') Arbitration Rules of 2007 provides as follows:

"17*.1 The proceedings before the Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Tribunal may determine.*

17.2 In all cases, the Tribunal shall act fairly and impartially and ensure that each party is given a full opportunity to present its case."

It is important to highlight that, pre-COVID-19, certain arbitration centres in the Middle East have even been offering online arbitration services. For example, the SCCA based in Riyadh, is offering an Online Dispute Resolution ('ODR') Protocol for disputes with a minimum amount of SAR 200,000 (approximately US$53,000).

It should also be mentioned that during the COVID-19 pandemic, several arbitration institutions, for example, the ICC, the SCCA and the Cairo Centre for International Commercial Arbitration ('CRCICA') published recommendations and guidance notes aimed at assisting arbitral tribunals and the parties with a view to mitigating the effects of COVID-19 by reminding them of the already available tools and methods and providing guidance on the existing technology available for remote handling of arbitral proceedings, including the conduct of "virtual" hearings.

3. *Arbitration Laws*

Many modern arbitration laws, applicable procedural laws that contain default provisions for the arbitral process in which the arbitration has its seat or legal place and which provides a framework for dispute resolution through arbitration in a jurisdiction, contain provisions and references allowing and encouraging the use of modern technology. In the Middle East, for example, the United Arab Emirates (the 'UAE') and Jordanian arbitration laws contain the following clauses expressly granting authority for Arbitral Tribunal to employ technology in arbitral proceedings:

- Article 28(2)(b) of UAE Federal Law No. 6 of 2018 On Arbitration which came into force in June 2018 (the UAE Arbitration Law) provides:

"The Arbitral Tribunal may, unless otherwise agreed by the Parties: […] hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. […]"

- Articles 17(b) and 21 of Jordanian Law No. 16 of 2018 on Amending the Arbitration Law which came into

force in May 2018 provide:

"*The Arbitral Tribunal may employ the modern means of communication for taking any arbitration-related action. […]*

The Arbitral Tribunal may admit to hear the testimony of the witnesses using the various means of technological communications, including the televised or closed circuit based communications. […]"

The majority of arbitration laws in the world and, specifically, in the Middle East do not expressly provide for arbitral tribunals' authority to utilise technology. In such cases, the arbitral tribunal may: (i) take comfort in relying on provisions of a relevant arbitration law that grants it general discretion and wide powers with respect to administering arbitral proceedings and/or, depending on the jurisdiction where the arbitration has its seat or legal place; (ii) conclude that the implementation of technology in the proceedings is allowed by implication because it is not expressly prohibited.

One of the reasons for such an omission is, of course, the fact that certain arbitration laws have not been updated for a long time, in certain instances, for several decades. Another reason may be the absence of the relevant provision(s) in the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 ('UNCITRAL Model Law'), a model law effectively adopted with various degrees of adjustment by more than 83 jurisdictions around the world, including Egypt, Bahrain and the UAE.

One caveat to the above is an increasing use of provisions in arbitration laws prescribing entry into arbitration agreement by "*electronic communication*" as satisfying the writing requirement as, for example, in Article 7(4) of the UNCITRAL Model Law or Article 9(3) of the Kingdom of Saudi Arabia Royal Decree No. M/34 of 2012 Concerning the Approval of the Law of Arbitration (the 'KSA Arbitration Law').

Considering the recent dramatic increase in the use of modern means of telecommunication in international arbitration and, thus far, largely relative positive feedback within the arbitral community as to its viability, it seems reasonable to expect that post-COVID-19 arbitration agreements, institutional rules, and arbitration laws, particularly in the Middle East will increasingly encourage, allow, and/or require the utilisation of various means of technology. This would add certainty in regards to the validity of technology assisted arbitration proceedings and the recognition and enforcement of resulting arbitral awards.

Certain practical considerations

In addition to establishing the legal bases authorising technology's use in international arbitration, arbitration practitioners should also recall, research, and, if possible and appropriate, use as many electronic tools and online services that are readily available with the arbitral institutions and the multitude of technology services providers.

1. *Digital platforms*

One of the technological aspects that seems ripe for change in international arbitration is the method of exchanging correspondence, written submissions, and other documents between the arbitral institutions, arbitral tribunals, and the parties. It is no secret that the majority of such exchanges takes place via email communications, which are possible to intercept or forge. Furthermore, in cases of written submissions or document disclosure, large and/or multiple files are either split into batches and sent over several emails to the recipients or provided via a hyperlink using one of the online file sharing services. Moreover, in certain instances, the document exchanges occur without password protection or encryption.

In these circumstances, arbitral institutions and practitioners are increasingly recognising a need for

establishing online platforms that would make such exchanges more systematic, reliable, and secure. Possibly the biggest progress in this area, thus far, has been achieved by the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC'). In September 2019, the SCC introduced the SCC Platform; a secure digital platform for communication and file sharing between the SCC, the parties, and arbitral tribunal. Additionally, in May 2020, the SCC announced extending the use of its SCC Platform for ad hoc proceedings, including free of charge use during the COVID-19 crisis.

In the Middle East, for example, the DIFC-LCIA Online Filing system allows practitioners to *"[f]ile Requests for Arbitration, Responses, applications for expedited formation of the tribunal, applications for expedited appointment of a replacement arbitrator, and applications for the appointment of an Emergency Arbitrator*." Similarly, the BCDR-AAA offer practitioners the options for filing Online Forms for a Request for Arbitration, Response, Request for Joinder, Response to a Request for Joinder and Application for the appointment of an Emergency Arbitrator.

2. *Virtual Hearings*

Probably the most topical practical issue in international arbitration over the last several COVID-19-affected months was the carrying out of so-called virtual hearings, i.e. hearings held remotely over the internet with arbitrators, counsel, parties, fact and expert witnesses and transcription services providers participating over various online communication platforms. While the overall feedback of the participants in such hearings have been somewhat positive, it should be recognised that it has been ultimately a temporary, *ad hoc*, solution driven by the necessity of holding hearings in order to continue the arbitral proceedings and issue the partial or final award in a timely manner. Most of the participants were joining the virtual hearing from their homes, which may not necessarily be the most convenient, equipped, and/or confidential locations. In many instances, an effective hearing requires installation of a second or third internet channel to ensure availability of a high quality, stable, and back-up connection and several screens and/or laptops to allow unencumbered access to the hearing video, documents, live transcript, and internal communication between counsel and parties or members of the arbitral tribunal. Evidently, such a cumbersome and time consuming setup at home of each arbitration practitioner does not represent a scalable solution.

Nevertheless, recognising the potential for cost savings, resulting travel flexibilities, and the possibility of other extraordinary events, the number of virtual hearings to be held going forward will certainly increase. In this regard, it would be prudent for arbitral institutions, hearing venues specialising in dispute resolution, legal services' providers to consider investing in physical space, IT equipment, software solutions, and video and sound devices that streamline, facilitate, and improve participation at virtual hearings.

Conclusion

One of COVID-19's silver linings in regards to international arbitration lies in the dramatically increased use of technology by the arbitral community. Such use, of course, should always be carefully evaluated for compliance with the parties' arbitration agreement, the applicable arbitration rules, and/or arbitration laws, particularly in cases of parties' disagreements on the use of certain or any technology, when introducing innovative technological solutions into the process, and bearing in mind that not all jurisdictions in the Middle East have the same levels of development and sophistication when it comes to the internet and IT infrastructure.

This notwithstanding, as jurisdictions around the world and the Middle East are incrementally easing COVID-19-related restrictions on the movement on individuals, international arbitration institutions and users are slowly returning to their offices. Hopefully, having learned many valuable IT and technical skills

in the first part of 2020, they will not resume operating in the office ‘in the good old fashion way’, but will embrace new technology lobbying its introduction into arbitration agreements, draft arbitration laws and proposals for updating arbitration rules.

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