

## Arbitration and Digital Transformation: A Perfect Match

### Flexibility, Tools and Diversity

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Arbitration and digital transformation seem to be a perfect match. Especially during the current challenges the legal world is facing, arbitration has proven to be a reliable method to continue ongoing and initiate new disputes, to stay connected virtually and to keep learning through a variety of webinars. The rising use of virtual hearing centers and the switch from physical to virtual hearings is only one of the few adaptations we have seen recently. But, why is it that arbitration goes hand in hand with digital transformation and what are some of the down- and upsides when the use of technology expands significantly?

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The following gives a brief response to these questions: Firstly, the flexibility and adaptability of arbitration is a key element of international arbitration and the parties' autonomy is inherent to the conduction of the arbitration (see section 1). However, when using new digital tools or new technologies, it is not the fanciest tool that wins. Rather, the one that provides a benefit to the practitioner and addresses the respective needs in each individual case (see section 2). Besides making the conduction of an arbitral proceeding (hopefully) more effective, digital transformation also supports diversity in international arbitration and plays a vital role in advocating for equality (see section 3).

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#### **I. Flexibility and adaptability of arbitration**

When choosing to arbitrate a current or future dispute instead of ordinary court proceedings, the parties' autonomy and procedural flexibility in conducting the arbitration are key factors why the parties favor arbitration over ordinary court proceedings.<sup>1</sup> The parties' autonomy is the pillar of every arbitration.<sup>2</sup> This holds true not only for arbitral proceedings under and/or administered by arbitral institutions but also,

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<sup>1</sup> <https://iclg.com/cdr/arbitration-and-adr/8477-flexibility-is-key-in-arbitration-proceedings>;  
<https://www.lexisnexis.co.uk/legal/guidance/arbitration-an-introduction-to-the-key-features-of-arbitration>.

<sup>2</sup> Dickson, M.O. (2018), "Party autonomy and justice in international commercial arbitration", International Journal of Law and Management, Vol. 60 No. 1, pp. 114-134. <https://doi.org/10.1108/IJLMA-12-2016-0184>.

and even more so, for ad hoc arbitrations. Based on this autonomy, the parties are free to decide – with certain restrictions – how the arbitration shall be conducted, how witnesses shall be heard, how oral arguments shall be presented, whether video-conferencing is an option, if hard-copies are necessary, what other tools can be used in the process, etc.<sup>3</sup>

In a majority of cases, the dispute has an international angle. The reasons for this manifold: sometimes the parties come from different countries; the underlying contractual law is that of a foreign country; the arbitrators have a different educational background, including the varieties that come up within civil law and common law jurisdictions. Just looking at some of the most relevant materials or guidelines the international framework in which arbitration practitioner work becomes even more apparent. For example, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") is "*one of the key instruments in international arbitration and applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration*".<sup>4</sup> Additionally, the UNCITRAL Model Law on International Commercial Arbitration, expressly applies to international commercial arbitration.<sup>5</sup>

It is the internationality of arbitration, that exposes the legal practitioner to a variety of technologies and digital tools that are not only used in the respective "home-jurisdiction" in the ordinary court proceedings but that are used in other parts of the world and in other jurisdictions.<sup>6</sup> This international setting combined with the parties' autonomy to conduct an arbitration allows the user of arbitration to learn from others and to pick the tools and procedures that are most helpful for the specific case.

One recent example of the adaptability to new situations by making use of digital tools is the conduction of online hearings. Questioning a witness via Skype or similar technical programs was already something that happened years ago in international arbitration proceedings. On the other hand, in ordinary court proceedings, for example in Germany, court proceedings are mandatorily public (with certain exceptions) according to sec. 169 Courts Constitution Act (Gerichtsverfassungsgesetz).<sup>7</sup> Whereas, the question whether and how to ensure that the public could participate via online hearings is highly relevant for

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<sup>3</sup> For example, Article 19 (1) UNCITRAL Model Law reads as follows: "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.* Similar: Article 22 (2) ICC Rules: "*In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreements of the parties.*".

<sup>4</sup> <http://www.newyorkconvention.org/>.

<sup>5</sup> See Article 1 (1) of the UNCITRAL Model Law on International Commercial Arbitration.

<sup>6</sup> Whereas, in Estonia e-filing (electronic submission of documents to courts) is possible since 2008, German practitioners still struggle to work with a functioning beA (*besonderes elektronische Anwaltspostfach* - special electronic attorney mailbox).

<sup>7</sup> Art. 169 (1) Courts Constitution Act (Gerichtsverfassungsgesetz): "*Hearings before the adjudicating court, including the pronouncement of judgments and rulings, shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible. [...]*".

ordinary court proceedings in Germany (and supposedly in other jurisdictions) this does not hold true in the case of arbitration. Apart from the above-mentioned legal questions that arise, also practical issues come up, when conducting online hearings. It seems as if many courts in Germany are not yet sufficiently equipped to conduct a hearing via videoconference (although undoubtedly this is changing).<sup>8</sup> In international arbitration – based on the agreement by the parties – the hearing can be held online and the parties can choose if they use a professional hearing center or if there are other options not to waste time. It is the parties' will that allows for quick adjustments and adaptations, which opens the door to use technology and to keep the digital transformation moving forward.

## II. Digital tools in arbitration

When deciding which search engine to subscribe to, which database to search and which software to buy we have to bear in mind, that although it might be fun to try out new digital tools, the purpose of such a tool is to conduct an arbitral proceeding in a more time- and cost-efficient way. 7

*"Clients will not be interested in digitalization for the sake of it".*<sup>9</sup> Indeed, when looking at new tools and fancy digital devices, the tools that are used are most of the times not groundbreaking new developments. Instead, they are built on what is needed by the tribunal, the parties or its advisor and keep addressing this need by developing and evolving the products on the market (and sometimes of course inventing a complete new product). When asking the user of digital tools, what they want, very often, the response is to optimize already existing processes. This includes tasks as finding the right arbitration clause or going through an extensive amount of documents and filtering the information that are relevant for the case at hand as well as choosing the arbitrator with the required specific knowledge for the matter. 8

Looking for example at the communication between the parties and the arbitral tribunal: starting with the exchange of actual paper and binders, one could observe a shift to e-mails, followed by a further shift to the use of clouds or similar. The development of communication tools that address the needs of arbitration practitioners was simply an evolution of the communication via e-mail that already existed. Nowadays, most of the arbitration practitioners use document bundling solutions to automate time-consuming activities. These solutions automatically create a hyperlinked index that is bookmarked, paginated etc., based on the request by the client. 9

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<sup>8</sup> <https://rsw.beck.de/aktuell/daily/meldung/detail/wegen-corona-gerichte-setzen-auf-video-verhandlungen>; <https://www.juve.de/nachrichten/namenundnachrichten/2020/03/verhandlungen-per-video-die-krise-beschleunigt-die-digitalisierung-der-justiz>; <https://www.zpoblog.de/gerichtsverhandlung-skype-erfahrungsbericht-muendliche-verhandlung-im-wege-der-bild-und-tonuebertragung-%C2%A7-128a-zpo/>.

<sup>9</sup> Dr. Dr. Markus P. Beham, in: [https://www.linkedin.com/posts/digital-coffee-break-in-arbitration\\_dcb-edition-1-markus-p-beham-activity-6651063293131673600-vpAv/](https://www.linkedin.com/posts/digital-coffee-break-in-arbitration_dcb-edition-1-markus-p-beham-activity-6651063293131673600-vpAv/).

Additionally, online hearing center<sup>10</sup> are tailor-made to the specific needs that come up when conducting a hearing. This includes the required number of breakout rooms or the availability of certain technological equipment (such as the number of screens, video and audio conferencing facilities, encrypted wireless networks etc.). If the hearing center can offer what the different parties need, than the parties will use the center including the technology available. 10

### III. Digital transformation and diversity

Furthermore, digital transformation not only helps ensuring the efficiency of the arbitration but also supports diversity: 11

It became increasingly apparent over the last few years, that international arbitration lacks a certain diversity.<sup>11</sup> The information that is accessible and available shows that the vast majority of arbitrators is male.<sup>12</sup> Because of the confidential nature of arbitration, especially in commercial arbitration, information on the case, the dispute, the counsel and the arbitrator is rarely made public. 12

The underrepresentation of women in the field has been addressed in several conferences<sup>13</sup> and articles<sup>14</sup>. One can say that the arbitral community is aware of the situation and is figuring out how to correct the status quo. 13

The starting point is to analyze the numbers. Basically, all major arbitral institutions publish statistics and data on their website. The numbers are available for everyone who is interested. According to most recent statistics, the data shows the actual discrepancy between male and female appointed arbitrators: 14

Looking for example to the London Court of International Arbitration ("**LCIA**"), in 2019, "*the overall number of female arbitrator appointments in LCIA arbitrations (162 out of 566) –* 15

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<sup>10</sup> Global Arbitration Review offers a list of hearing centers of which some are capable to conduct entire online hearings, see <https://globalarbitrationreview.com/category/hearing-centres>.

<sup>11</sup> Whereas, diversity is not restricted to gender but also includes other factors such as age, ethnicity, educational background etc., this section will be subject to the question of gender diversity in arbitration.

<sup>12</sup> LCIA - 2019 Annual Casework Report, p. 16; <https://www.lcia.org/News/annual-casework-report-2019-the-lcia-records-its-highest-numbe.aspx>; DIS Verfahrensstatistik 2018, <http://www.disarb.org/upload/statistics/DIS-Verfahrensstatistik%202018.pdf>.

<sup>13</sup> <https://www.asil.org/event/15th-annual-ita-asil-conference-diversity-and-inclusion-international-arbitration>; <https://bviarbitrationconference.com/>.

<sup>14</sup> Anderson, Gemma, / Jerman, Richard/ Tarrant, Sampaguita: "Diversity in international arbitration" [https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-019-5028?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1); Sabharwal, Dipen/Wright, Monica: "The Diversity Dilemma in Arbitrator Appointments"; <http://arbitrationblog.kluwarbitration.com/2018/07/30/the-diversity-dilemma-in-arbitrator-appointments/>.

*representing 29% of all arbitrator appointments, compared with 23% in 2018*".<sup>15</sup> It is to be noted, that the appointment of female arbitrators is mostly driven by the LCIA. Another example is the Deutsche Institution für Schiedsgerichtsbarkeit e.V. ("**DIS**"). In 2018, only 12.4% of arbitrator appointments were female.<sup>16</sup> At the International Chamber of Commerce ("**ICC**") the number of female arbitrators increased to 273 in 2018, which corresponds to 18.4% of the arbitrators.<sup>17</sup> In all of the above-named institutions, LCIA, DIS and ICC, it was the constitution that was the driving factor in enhancing equality. Looking at these figures reinforce the need for all arbitration stakeholders to play their part in promoting gender diversity.

A second relevant point is to enhance the visibility of female arbitrators. Databases and research tools such as the ArbitralWomen database<sup>18</sup>, Arbitrator Intelligence<sup>19</sup> or the ERA Search Committee<sup>20</sup> aim to support the counsel/party/co-arbitrators when researching an arbitrator. Without these digital tools, qualified female counsel and arbitrators might not have been known to the person picking the arbitrator. As client and as counsel, when deciding which arbitrator to choose for the case at hand, the most important quality that matters is whether the arbitrator is capable of understanding the factual and legal implications of case and whether the arbitrator has experience in the respective field an (leaving aside obvious points like impartiality, availability etc.).

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Digital transformation helps making female arbitrators visible and allowing an easy access to a database, which includes several qualified women.

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<sup>15</sup> LCIA - 2019 Annual Casework Report, p. 16; <https://www.lcia.org/News/annual-casework-report-2019-the-lcia-records-its-highest-numbe.aspx>.

<sup>16</sup> DIS Verfahrensstatistik 2018; <http://www.disarb.org/upload/statistics/DIS-Verfahrensstatistik%202018.pdf>.

<sup>17</sup> <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>.

<sup>18</sup> <https://www.arbitralwomen.org/find-practitioners/>.

<sup>19</sup> <https://arbitratorintelligence.com/>.

<sup>20</sup> <http://www.arbitrationpledge.com/arbitration-search>.