



HOW TECHNOLOGY CAN ENHANCE INTERNATIONAL ARBITRATION TO BE MORE INCLUSIVE

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INTRODUCTION

Besides fairness, international arbitration should embrace diversity and inclusiveness as core values, hence efforts should be made in order to guarantee access to all these attributes in the same measure. Fairness may include the right to be heard, having both an independent and impartial panel, etc. however, when scholars discuss the underpinning aspects of diversity, it is often reviewed under different groups, such as gender and age diversity, or geographic, and ethnic diversity, when in reality it encompasses more than cultural points.

Diversity means having many different types of people being included in something. In this research that *something* refers to arbitration and will discuss how can we ensure inclusion and equal opportunities for all arbitration users particularly, the deaf and hard-of-hearing community due to the lack of appropriate available mechanisms to achieve that goal. This paper thus seeks to chart progress of the use of technology in arbitration on this scope.

I. Tipping the balance – inclusion and technology in international arbitration

Technology may not be hundred percent present within all stages of the arbitration process. Within the selection of arbitrators for example, arbitrators might still be selected

¹ In this paper, the term inclusion refers to the provision of participative rights to individuals or group of individuals that, as a result of having a hearing loss cannot take part or serve in arbitration processes, and excludes other types of inclusion such as age, gender, or sexual orientation.



through basic web search, arbitral institutions lists, or even through phone calls, as technology cannot impact arbitration, specifically the selection of arbitrators, to the same extent it does to other legal activities (i.e. document review). Yet, a lot has been proposed recently about the use of technology in the arbitrator-appointment process² which is a positive input.

Several positive aspects regarding the use of artificial intelligence in this process may be identified; gathering information on a potential arbitrator – including the ones disclosed by the arbitral institutions in their attempt to increase transparency in the arbitration system – and analysing it, in particular, would be much easier and less time consuming³. But, how is that different from existing database of arbitrators? ICSID for example, maintains a list of current designees to the ICSID Panels of Arbitrators. The document contains a table of contents, explanatory notes and a list of Member States which have designated Panel members, available in three different languages, *curricula vitae* and the cases where these arbitrators have served are available. Although some profiles are not available within ICSID webpage, it is possible to obtain them from other sources as they are generally well known arbitrators.

The Panels are also available as a searchable database.

Letting technology select arbitrators from a directory may remove one of the most important features of international arbitration which is the freedom parties have to nominate and select the people of their choice to act as arbitrators. Creating databases to

² See The GAR Arbitration Research Tool where arbitrators of can be searched by specialist area, gender, experience or expertise.

³ Daniel Becker and Ricardo Dalmaso Marques, ‘Why the use of technology in arbitrators’ selection process – although fostered – must still be handled carefully’ (CBAr, *Comité Brasileiro de Arbitragem Blog*, 23 July 2020) <http://www.cbar.org.br/blog/artigos/why-the-use-of-technology-in-arbitrators-selection-process-although-fostered-must-still-be-handled-carefully> accessed 14 August 2020.



gather professional information about arbitrators, awards and experiences may not be revolutionary. There are existing websites with this aim⁴. Attempting to automatize existing procedures may not be the answer. The widespread misconception that human beings will soon be replaced by robot lawyer look-alike is still far from being feasible thus, there is no need to re-invent the wheel here.

This paper is not aimed to dampen technological advances, but on the contrary, to raise awareness about how technology, a powerful toolbox can enhance arbitration. Diversity in international arbitration can be classified under different groups, such as gender and age or geography, culture and ethnicity.⁵ It means arbitrators come in all sizes, but what about inclusion? Does having friendly/inclusive centres for the deaf community count as diversity? The answer is yes. People who are deaf encounter significant communication barriers when attempting to obtain legal services if they are not offered appropriate mechanisms. The international arbitration community has enthusiastically embraced the overwhelming empirical evidence supporting the conclusion that diverse groups produce better outcomes⁶.

What can ‘we’ do about this? Sign language is a language and is clearly not the deaf community’s fault, people are unable to communicate with them, it is ours. Around 466

⁴ Regarding international investment arbitration, ICSID Database shows up to date case registered for all cases it has operated with a full description of each. PITAD (PluriCourts Investment Treaty Arbitration Database) provides a comprehensive, regularly-updated and networked overview of all-known international investment arbitration cases.

⁵ Payel Chatterje and Vyapak Desai, ‘Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?’ (*Kluwer Arbitration Blog*, 1 March 2020) http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/?doing_wp_cron=1597027435.3959119319915771484375#:~:text=Diversity%20in%20international%20arbitration%20can,or%20geography%2C%20culture%20and%20ethnicity.&text=The%20arbitral%20community%20has%20somehow,developed%20as%20a%20valid%20concern. accessed 9 August 2020.

⁶ For further discussion see Lucy Greenwood and C Mark Baker, ‘Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration’ (2015) 31 *Arb Intl* 413.



million people worldwide have disabling hearing loss.⁷ Not having auxiliary aids or services for hearing loss disabled may restrain bright professionals of not pursuing a career in arbitration or feel neglected for not being granted accessibility to serve in arbitration panels which is the business' premier choice of dispute resolution in the 21st century.⁸ The proposal: create accessibility services centres on international arbitral institutions. Such centres shall have: a pool of qualified sign language interpreters, real-time captioning systems, assistive listening systems/devices, *inter alia*. The best ally to achieve this goal will be technology.

Having a database of language interpreters seems likely, and it may work the same way regular selection of arbitrators work, therefore the freedom of selecting designees will still be honoured. Information such as language, industry of expertise, skills, and ultimately, testimonies from previous users, would be essential. On this regard, very few institutions that have a database with interpreters were found. One of them is the National Registers of Communication Professionals working with Deaf and Deafblind people ("NRCPD"), which hold registers of interpreters for deafblind people, lip-speakers, sign language interpreters, sign language translators and speech to text reporters⁹.

Although NRCPD solely encompasses UK jurisdiction, their database serves as an example. Filters can be added to the research (language or post code) and it is mandatory to have successfully completed a course just like some arbitration centres mandate.

⁷ World Health Organization, 'Deafness and Hearing Loss' (1 March 2020), <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> accessed 11 August 2020.

⁸ Sophie Nappert and Avani Agarwal, 'Twenty-First Century Arbitration: Who Do You Trust?' (*Kluwer Arbitration Blog*, 2 March 2020) http://arbitrationblog.kluwerarbitration.com/2020/03/02/twenty-first-century-arbitration-who-do-you-trust/?doing_wp_cron=1597209931.3144569396972656250000 accessed 11 August 2020.

⁹ NRCPD, National Registers of Communication Professionals working with Deaf and Deafblind people <https://www.nrcpd.org/#:~:text=NRCPD%20exists%20to%20protect%20the.and%20speech%20to%20text%20reporters.> accessed 13 August 2020.



Technology would be essential in order to promote transparency regarding the selection of interpreters. Having a database providing not only names of interpreters and experience, but also feedbacks from previous users would be the differentiation on how arbitrators are traditionally selected. These opinions coupled with their expertise may provide a more reasoned source for participants when selecting interpreters. Such information should be of public domain.

Real-time captioning systems are also a useful tool to achieve inclusion of deaf or hard of hearing people. Conducting a hearing in-person when one of the participants is deaf, and no mechanisms are provided for them may not resonate with one of international arbitration core values; fairness. Parties should decide whether to conduct hearings virtually or physically based on not only efficiency but also equality.

For live-on hearings, real-time captioning software would mean for deaf arbitration users the possibility to have words displayed on a screen, providing the speech or sound portion of the meeting via text. Captions can provide not only text, but also information about who is speaking or any sound effects that might be important to understand. For people with hearing loss, captions seems a reliable option as words would appear in sync with the audio. Although these systems are not hundred percent accurate¹⁰ it will allow users to follow the course of the hearing.

¹⁰ Real-time captioning strives to reach 98 percent accuracy, ‘Captioning and CART’, <https://www.hearingloss.org/hearing-help/technology/cartcaptioning/#:~:text=Although%20real%2Dtime%20captioning%20strives,the%20audience%20will%20see%20errors.&text=Real%2Dtime%20captioning%20can%20be,national%20meetings%20of%20professional%20associations>, accessed 15 August 2020.



Alternatively, if due to reasonable circumstances it is not possible to hold an in-person hearing, videoconferencing is adequate. Many arbitral Institutions have started to report on the increased usage of such in face of the current pandemic.¹¹

As part of the agreement on the method for conducting the arbitration process, parties may adopt any workable method that suits their needs and the use of technology may be one of such methods. Most videoconferencing platforms are free of usage and allow up to 300 participants per meeting. In such scenario, users can virtually participate in meetings and the appointed interpreter can still be part of it by translating in sign language and other tactual communication forms, what is being said. In this case, the interpreter will have his/her camera on, and must ensure that the spoken language message reaches the deaf consumer in a language or communication form that he or she can understand.

Some users find videoconferencing not a perfect substitute for in-person interactions¹² despite it can represent reasonable reduction in travel expenses or documents handling.

Technology cannot act hundred percent accurately due to many reasons; technological failures, participants not having access to sufficiently high-quality internet, etc. however, it improves efficiency in the arbitration process by providing particularly useful advantages especially for low cost procedures or unforeseen circumstances that preclude the possibility of vis-à-vis meetings.

¹¹ Herbert Smith Freehills, 'Necessity in the Mother of Invention' (10 July 2020) <https://hsfnotes.com/arbitration/2020/07/10/update-8-necessity-is-the-mother-of-invention-covid-19-dramatically-accelerates-digitalisation-of-arbitration-processes/> accessed 13 August 2020.

¹² Gabrielle Kaufmann-Köhler and Thomas Schultz, 'The Use of Information Technology in Arbitration', (5 December 2005) https://jusletter.weblaw.ch/juslissues/2005/354/4410.html_ONCE&login=false accessed 9 August 2020.

CONCLUSION

Considering the current scenario, setting a new norm/standard that integrates deaf people on international arbitration seems plausible. To achieve learning for all, is imperative to create inclusive systems for people with disabilities and make sure arbitration community involvement on it. This proposal seems very ambitious and may increase the cost of the process but is certainly progressive.

Efforts towards its implementation would go a long way in encouraging diversity in international arbitration. Various scholars and arbitration experts have raised a valid issue concerning gender and ethnic diversity, however few to none have discussed how deaf, hard of hearing individuals, or disabled professionals in general deserve participative rights on international arbitration. Levelling the playing field and increasing diversity, holds the key to growth and success of international arbitration with the support of technology.

The availability of new tools within the arbitration process would remove a significant barrier for deaf people seeking to be part of arbitration therefore, it is essential to grant access to the deaf community which will certainly be an additional asset on international arbitration.