



EFFICIENCY IN INTERNATIONAL ARBITRATION: A MATTER OF TECHNOLOGY

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INTRODUCTION

The evolution of technology throughout the years has directly impacted international arbitration. Its use is not new. As early as 2005,¹ technology was seen and used as a means to improve international arbitration's efficiency, efficacy and convenience. Now, outstanding legal professionals² continue to affirm that technology enhances efficiency and advocacy in international arbitration.

The advent of Artificial Intelligence ("AI") also introduces the possibility that, in the near future, technology may help or replace arbitrators in their role of decision-making.³

Worldwide restrictions due to the COVID-19 outbreak forced international arbitration practitioners and institutions to adapt to a new reality. Multiple arbitral institutions took a stance and released a joint statement⁴ declaring, among other things, that their purpose was to collaborate and ensure the hearing of cases without delay, ensuring fairness and efficiency of the proceedings.

Different views remain in place regarding the use of technology in international arbitration. Some accede to the means offered by technology, while others remain in

¹ THOMAS SCHULTZ, *The Use of Information Technology in Arbitration* (2005), <https://papers.ssrn.com/abstract=924878> (last visited Aug 15, 2020).

² STEPHEN JAGUSCH, PHILIPPE PINSOLLE & ALEXANDER G LEVENTHAL, *THE GUIDE TO ADVOCACY* (Fourth Edition ed. 2019).

³ Maxi Scherer, *Artificial Intelligence and Legal Decision-Making: The Wide Open?*, *JOURNAL OF INTERNATIONAL ARBITRATION* 539–573 (2019).

⁴ Arbitral institutions COVID-19 joint statement, , ICC - INTERNATIONAL CHAMBER OF COMMERCE , <https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/> (last visited Aug 16, 2020).



doubt, wondering whether to move international arbitration to online or virtual platforms.⁵

This essay analyses how technology enhances efficiency in international arbitration. For this purpose, the first section explains the concept of efficiency with regards to international arbitration and its relation to technology (I). Then, the second section explains how the use technological tools have substantially increased due to the current situation in the world, and how they have helped improving efficiency in international arbitration (II). Finally, the third section presents the conclusions and final remarks (III).

I. “Efficiency” in International Arbitration and Technology

In order to explain how international arbitration’s efficiency is improved by technology, it is first necessary to define the meaning and scope of “efficiency” in international arbitration. This section provides two approaches to the concept of efficiency. The first part details a relativist approach to efficiency (A). The second part explains efficiency through the “Iron Triangle” metaphor (B).

A. Efficiency as a relative concept

The concept of “efficiency” in international arbitration may be considered as relative, varying subject to diverse factors⁶.

⁵ Mirèze Phillipe, *Offline or Online? Virtual Hearings or ODR?*, KLUWER ARBITRATION BLOG (2020), <http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/> (last visited Aug 15, 2020).

⁶ LOUKAS A. MISTELIS, *Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy* (2019), <https://papers.ssrn.com/abstract=3372341> (last visited Aug 16, 2020).



Determining the concept would depend on the relation between the specific actors to the dispute (*e.g.* arbitrator’s concept of efficiency in contrast to the parties’ concept), to the specific factors (*e.g.* time, value of the dispute or value of the award).⁷

For example, depending on the perspective, the concept of efficiency could be related to both (a) the specific issue in dispute and the duration of the arbitration, or (b) the value of the dispute in contrast to the cost of the proceedings, or even (c) the value of the arbitral award itself.⁸

In conclusion, under this approach the definition of efficiency would vary on a case-by-case basis, depending on the parties and their interests.

B. Efficiency and the “Iron Triangle” metaphor

One other author explains efficiency in international arbitration through the metaphor of the “Iron Triangle”.⁹ This principle applied to international arbitration states that there are three options to choose from:¹⁰ cheap, good and fast. “Cheap” and “fast”, for arbitration, refer to the procedure costs and time. While “good” refers not only to the procedure but also to the end-result: the arbitral award. One may only choose two and the third automatically becomes inapplicable. Under this principle, when time and costs of the arbitral procedure are cut without measure, the arbitral award will consequently not be satisfactory.

Therefore, an “efficient” arbitration would not only be one that is both fast and inexpensive, but also one where the result, both in the procedure and the arbitral award,

⁷ *Id.* at 12.

⁸ *Id.* at 37.

⁹ Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, 32 JOURNAL OF INTERNATIONAL ARBITRATION 12, 690–691 (2015) (When the author refers to the “Iron Triangle” principle, applicable not only in international arbitration).

¹⁰ *Id.* at 691.



is enough to satisfy parties' interests and expectations. This is the definition of efficiency used in this essay.

In conclusion, under the Iron Triangle principle, technology's purpose for improving efficiency in an international arbitration procedure is to help to lessen both costs and time expenditure while maintaining a quality arbitral award.

II. Improving efficiency in international arbitration with technology

This section is divided in two parts. The first part aims to detail the use of technological tools in the near past for international arbitration, through a survey conducted in 2018 by the School of International Arbitration – Queen Mary University of London (A). The second part explains the accelerated change and increase in use of technological tools caused by the changed circumstances due to the global pandemic (B).

A. The use of technological tools within the School of International Arbitration – Queen Mary University of London's 2018 survey

Technology helps improving efficiency in international arbitration. The School of International Arbitration - Queen Mary University of London conducted a survey in 2018,¹¹ to private practitioners, arbitrators, in-house counsel, academics, experts and other stakeholders ("Respondents"). It found that 60% of the Respondents believed that

¹¹ School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* | White & Case LLP, <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration> (last visited Aug 15, 2020) (With the support of White & Case LLP).



increased efficiency, including through technology, was one of the factors that would have the most significant impact on the future evolution of international arbitration.¹²

The survey identified and queried on the use of five forms of information technology:¹³ (a) hearing room technologies, (b) cloud-based storage, (c) videoconferencing, (d) AI, and (e) virtual hearing rooms. 73% of Respondents claimed that they either always or frequently used hearing room technologies. For videoconferencing the percentage was 60%, and for cloud-based storage, 54%. As for AI and virtual hearing rooms, 68% and 78% respectively answered that they never or rarely had used them.

Lack of familiarity was one of the main issues when explaining why technological tools were not used as often.¹⁴ However, Respondent's reaction was affirmative when questioned whether these five forms of technology should be used more. 98% were in favour of more usage of hearing room technologies, 91% for cloud-based storage, 89% for videoconferencing, 78% for AI and 66% for virtual hearing rooms.¹⁵

In conclusion, the survey's results reveal that, even when some technological tools were not used at the time (such as virtual hearing rooms and videoconferencing), Respondents were of the opinion that they should be. In practice the advances were minimal.

B. Efficiency through accelerated change and the global pandemic

¹² *Id.* at 38. (See Chart 40).

¹³ *Id.* at 32. (See Chart 35).

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 33. (See Chart 36).



The “new reality” caused by the COVID-19 pandemic put international arbitration proceedings in an either-or situation. Travel bans¹⁶ affected the parties, lawyers, arbitrators and others (such as expert witnesses), making it impossible for them to attend to hearings held in other countries. Many countries also imposed local quarantines that caused the need for teleworking.¹⁷

It was either to adapt to the changes or to see a massive amount of disputes without resolution, for an undetermined amount of time. International arbitration’s flexibility makes it resilient. And as explained below, thanks to technology, efficiency remained.

Delos Dispute Resolution has identified 26 guidance documents and checklists relevant for remote or virtual arbitration and mediation hearings, issued from March 2020 to July 2020.¹⁸ Of the total, at least 15 documents refer specifically to international arbitration.

It also has identified¹⁹ at least 35 webinars on online advocacy, virtual and online hearings for international arbitration. In a matter of five months, awareness and practical application of technological tools has substantially increased in international arbitration.

Furthermore, the Working Group on LegalTech Adoption in International Arbitration, a group composed of six law firms, released the first draft “Protocol for Online Case Management in International Arbitration” on 01 July 2020 (the “Protocol”).²⁰ This

¹⁶ Andrea Salcedo, Sanam Yar & Gina Chereus, *Coronavirus Travel Restrictions, Across the Globe*, THE NEW YORK TIMES, July 16, 2020, <https://www.nytimes.com/article/coronavirus-travel-restrictions.html> (last visited Aug 17, 2020).

¹⁷ INTERNATIONAL LABOUR ORGANIZATION, TELEWORKING DURING THE COVID-19 PANDEMIC AND BEYOND: A PRACTICAL GUIDE (First ed. 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_751232.pdf (last visited Aug 17, 2020).

¹⁸ Delos Dispute Resolution, Mihaela Apostol & Hafez Virjee, *RESOURCES ON HOLDING REMOTE OR VIRTUAL ARBITRATION AND MEDIATION HEARINGS* | Delos Dispute Resolution (2020), https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/#_ftn1 (last visited Aug 17, 2020) (The list includes guidance documents and checklists by arbitral institutions, associations, law firms and eminent arbitration practitioners, such as the AAA-ICDR, ICC, CIArb, among others).

¹⁹ *Id.* See point 4. on the webpage.

²⁰ Working Group on LegalTech Adoption in International Arbitration, *Protocol for Online Case Management in International Arbitration* 1, <https://protocol.techinarbitration.com/> (last visited Aug 17, 2020) (First published on 1 July 2020 and available for public consultation until 31 August 2020;



document has the purpose of helping to address the lack of a consistent approach on the use of online case management tools in international arbitration²¹. It succinctly explains what online case management tools are, what types of online case management tools exist, why they are necessary and even more relevant considering the current situation, how to apply them and other important issues to consider when applying them²². The main factors identified in the Protocol as weighting in favour of using online case management tools include,²³ efficiency and effectiveness, accountability and transparency, cybersecurity, confidentiality, data protection, environment and sustainability, resilience and accessibility.

Arbitral institutions have also begun to adapt to the circumstances and technological developments. The London Court of International Arbitration (“LCIA”) recently released²⁴ an update to their Arbitration Rules from 2014. The new Rules are effective on 01 October 2020 (“LCIA Rules 2020”). Many of the introduced modifications are with regards to the use of technological tools in LCIA arbitration procedures.

For instance, the filling of the request for arbitration is now to be done electronically, as does the response.²⁵ Written communications are now mainly done by electronic means,²⁶ as are applications for expedited formation of Arbitral Tribunal, emergency

Member firms are Herbert Smith Freehills, Ashurst, CMS, DLA Piper, Hogan Lovells and Latham & Watkins.).

²¹ Working Group on LegalTech Adoption in International Arbitration, *Protocol for Online Case Management in International Arbitration* 5 (2020), <https://sites-herbertsmithfreehills.vuturevx.com/20/21553/landing-pages/platforms-protocol-consultation-draft-01072020.pdf> (last visited Aug 17, 2020) See ¶16 and ¶17.

²² Working Group on LegalTech Adoption in International Arbitration, *supra* note 21.

²³ *Id.* at 6–9.

²⁴ London Court of International Arbitration - LCIA, *LCIA Arbitration Rules (effective 1 October 2020)*, https://lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2014 (last visited Aug 18, 2020).

²⁵ *Id.* (See Article 1.3 of LCIA Arbitration Rules 2020 and compare to Articles 1.2 and 1.3 of the LCIA Arbitration Rules 2014).

²⁶ *Id.* See Article 4 of LCIA Arbitration Rules 2020 and compare to Article 4 of LCIA Arbitration Rules 2014.



arbitrators and the replacement of arbitrators²⁷. Arbitral Tribunals now have specific powers for making procedural orders to employ technology giving support to arbitration's efficiency, including any hearing.²⁸ Finally, subject to parties' agreement or LCIA Court directions, awards may be signed electronically and/or in counterparts, and, in case of disparities between paper and electronic forms, the electronic prevails.²⁹ Considering the current situation, the changes introduced by LCIA are the first for arbitral institutions, but most likely not the last ones to occur.

In conclusion, the change of paradigm towards an international arbitration with more technological tools has accelerated. Its acceptance has increased due to the many movement restrictions imposed globally. The use of these tools has allowed arbitration proceedings to advance without as many delays as there would have been if no technological tools were used or existed.

CONCLUSION

This essay analysed how technology enhances and helps improving efficiency in international arbitration. On the first section, this essay explained the need to define efficiency, and provided two approaches worth to consider: the relative approach to efficiency and efficiency under the iron triangle principle. For explanatory purposes, this essay used the concept as derived from the latter. Nevertheless, efficiency, as a concept and principle of international arbitration deserves further academic analysis.

²⁷ *Id.* (See Articles 9.2, 9.5 and 9.18 of the LCIA Arbitration Rules 2020, and compare to Arts. 9.2, 9.5 and 9.1 respectively in LCIA Arbitration Rules 2014, which only stated “preferably by electronic means”).

²⁸ *Id.* (See Article 14.6[iii] of LCIA Arbitration Rules 2020 and compare to the whole Article 14 of LCIA Arbitration Rules 2014).

²⁹ *Id.* (See Articles 26.2 and 26.7 of LCIA Arbitration Rules 2020 and compare to Article 26 of LCIA Arbitration Rules 2014).

The second section explained how technology helps to improve efficiency in international arbitration. For this purpose, the first part of the section explains the approach towards the use of technology in international arbitration through a survey that demonstrated at the time, the percentage of use of technological tools in international arbitration and the views that the respondents had towards the future use of such tools. The second part explains how the global pandemic accelerated the changes and acceptance to the use of technology in international arbitration by providing examples of developments that occurred in a few months' time.

There is no doubt that technological tools provide the means necessary to reach a more efficient international arbitration. The response to the global pandemic by most of the international arbitration actors has both reinforced technology's presence and expedited its generalised inclusion and acceptance in the proceedings.

Future changes, such as increased use of Artificial Intelligence –not analysed in this essay-, more institutional acceptance by arbitral institutions and parties themselves requesting the use of technological tools are likely to continue on the rise. And, as the days go by and the world goes back to “normal”, the use of technology for a more efficient international arbitration has already demonstrated its worth.