
Kluwer Arbitration Blog

Paris Arbitration Week: Is There an App for That? Arbitration of Smaller Commercial Disputes in the Technology Sector

Gonzalo Salazar (Freshfields Bruckhaus Deringer LLP) · Thursday, September 23rd, 2021

On 20 September 2021, a panel of arbitration and dispute resolution experts discussed the topic of technological disruption in commercial arbitration and online dispute resolution (ODR) with a specific focus on smaller disputes. Moderated by [Ms Myriam Seers](#) (Partner, Savoie Laporte), the panel included [Ms Sophie Nappert](#) (Independent Arbitrator, 3 Verulam Buildings, and Co-Founder, ArbTech), [Prof Amy Schmitz](#) (Professor of Law, Centre for Dispute Resolution, University of Missouri), and [Mr Colin Rule](#) (CEO of Arbitrate.com and former director of ODR at PayPal and eBay).

With the advent of the COVID-19 pandemic, arbitration experienced an unprecedented degree of digitalisation. However, this has been limited so far to using tools that replicate offline arbitration in an online setting, with the most common example being virtual hearings. But could technology become instrumental to adjudicating commercial disputes beyond only aiding practitioners to carry out their business as usual? According to the speakers, only then will we begin experiencing a true technological disruption of arbitration.

Disruption of arbitration

The discussion kickstarted with a conversation on whether and to what extent arbitration could be disrupted by technology, similar to other industries. Ms Nappert pointed out that arbitration has already become a target for disruption without realising it. Thus far, arbitration has offered many benefits for large, international claims that need tailored proceedings and expert arbitrators. However, e-commerce, exacerbated by the current state of the world, became a source of instantaneous, albeit smaller, disputes that nevertheless need instantaneous resolution. The panel agreed that arbitration at this point has not offered much to address this new demand.

The current state of arbitration may be acceptable for claimants with enough resources to endure long proceedings, but now that everyone can take part in immediate cross-jurisdictional transactions, a need for faster dispute resolution will need to be addressed. Mr Rule noted that the “incumbent players” of the dispute

resolution ecosystem, *i.e.* arbitral institutions, practitioners, and overall stakeholders, may need to reformulate basic notions of arbitration and procedure or otherwise risk that new players overtake this untapped market. Ultimately, disruption means making a service much cheaper, faster, and simpler. The redesigning of cross-border dispute resolution by new players, as Mr Rule warned, can only be ignored at each own's peril.

One key notion that may need rethinking is due process. Ms Nappert stressed the fact that as long as offline enforcement and court oversight are present, due process will continue to be interpreted as we know it, *i.e.* having your day in court and being able to ventilate every detail of the dispute. However, as a more confident view on technology consolidates, the notion of due process may change. Although human oversight will continue to be important, novel ways of partnering with technology will optimise dispute resolution.

A forum for high volume, low value disputes

The digital economy has revolutionised commerce, and in the process, it has exacerbated the number of disputes over commercial transactions. Although online disputes tend to be of lower economic value, they still need an adequate forum where users can resolve them. This is even more evident, considering that these disputes often refer to cross-jurisdictional transactions between different business cultures and jurisdictions that have different expectations about commercial transactions, which radically expands their complexity.

ODR services aim to provide access to justice to millions of users of e-commerce through user friendly platforms. Prof Schmitz highlighted that consumers usually give up on online disputes as they find that there is no adequate forum where they can bring their claims. To address this issue, mechanisms that allow to honour commitments agreed upon on an online business-to-business basis and to amicably settle disputes arising thereof are necessary, and ODR may become that adequate forum.

However, to design an adequate forum it is also necessary to delineate the disputes apt to be settled therein. In this sense, it was noted that "small disputes" is a relative term. What may be a small claim for some may not be for others. In the current arbitration *status quo*, disputes as high as USD 10 million may still be too uneconomic to pursue, or too time consuming, so the market for these claims remains untapped.

As smaller disputes will often arise from almost immediate transactions, the panel suggested that only through almost immediate dispute resolution can we keep up with the pace. Luckily for practitioners, this will not mean the end of arbitration practice as we know it. Mr Rule reassured attendees that fears of losing jobs are not warranted. To the contrary, the development of new ODR techniques will prove beneficial for all stakeholders, as technology will continue to assist practitioners, who will also develop new skills to adapt and perform their jobs in novel ways. Overall, the panel encouraged the community to embrace these ideas with a sense of creativity and

entrepreneurship.

The widths of ODR

Although ODR is sometimes regarded simply as “arbitration over Zoom”, or as using tech tools to make practitioners’ work lives easier, this is not exactly the case. ODR indeed started by replicating offline dispute resolution features in an online environment, but nowadays it creates a much broader range of opportunities for the untapped market of smaller claims.

High value claimants have the time and resources to engage in long, mostly in-person arbitrations, but smaller parties do not. At the same time, Mr Rule predicts that at least half of dispute resolution procedures will be online even if the Covid-19 pandemic is fully controlled. Therefore, as part of creating an adequate forum for these left-out parties, ODR has developed technology-based mechanisms for faster, fully digital dispute resolution. Among them are dispute resolution software solutions that rely on blockchain technology, such as crowdsourced arbitration, or artificial intelligence and machine learning. A wide list of providers of ODR services was shared during the event and can be accessed [here](#).

As an example, the panel discussed [Kleros](#), an ODR platform where users can act as jurors and settle online disputes. The platform relies on blockchain technology, and jurors can stake their virtual currencies and be rewarded after the conclusion of a dispute. Interestingly, the legitimacy of these decisions arises from the trust that the virtual currency community share amongst themselves, which is not necessarily too different from the legitimacy traditional arbitrators receive from the parties to an arbitration agreement. Nevertheless, several doubts and concerns also arise. The panelists questioned whether and how this new notion of legitimacy can be scaled up to other less niche and more regulated, traditional fields. Furthermore, the danger of dishonest online jurors calls into question the alleged incorruptible nature of the blockchain technology.

UNCITRAL Working Group III

Efforts to promote ODR have not come only from private parties and potential service providers. The speakers noted that there has also been an interest from governmental and institutional platforms. The UNCITRAL Working Group III’s work on ODR is an example. However, this project ended in 2016 without consensus. Prof Schmitz, who took part in the initiative, pointed out that from a political perspective, ODR faces a few more challenges.

The first challenge is the different regulatory treatment that jurisdictions give to arbitration. The issue of enforcement of pre-dispute arbitration agreements in consumer transactions represented the main problem. These are not enforceable in most jurisdictions - notably the EU - but are a normal practice in others, such as the US. The disruptive nature of technology itself is also a challenge, considering that any

agreed-upon framework on ODR could be rendered insufficient as technology continues to evolve at a much faster pace than regulation.

The panel concluded that this, however, did not mean the end of institutional efforts to embrace ODR. To the contrary, as Prof Schmitz emphasised, institutional embracement is key for the development of ODR, and we are now seeing efforts migrating from global platforms as UNCITRAL to regional initiatives or projects focused solely on one economic sector of interest, which would allow to better fit the ODR forum to a specific context.

Takeaways

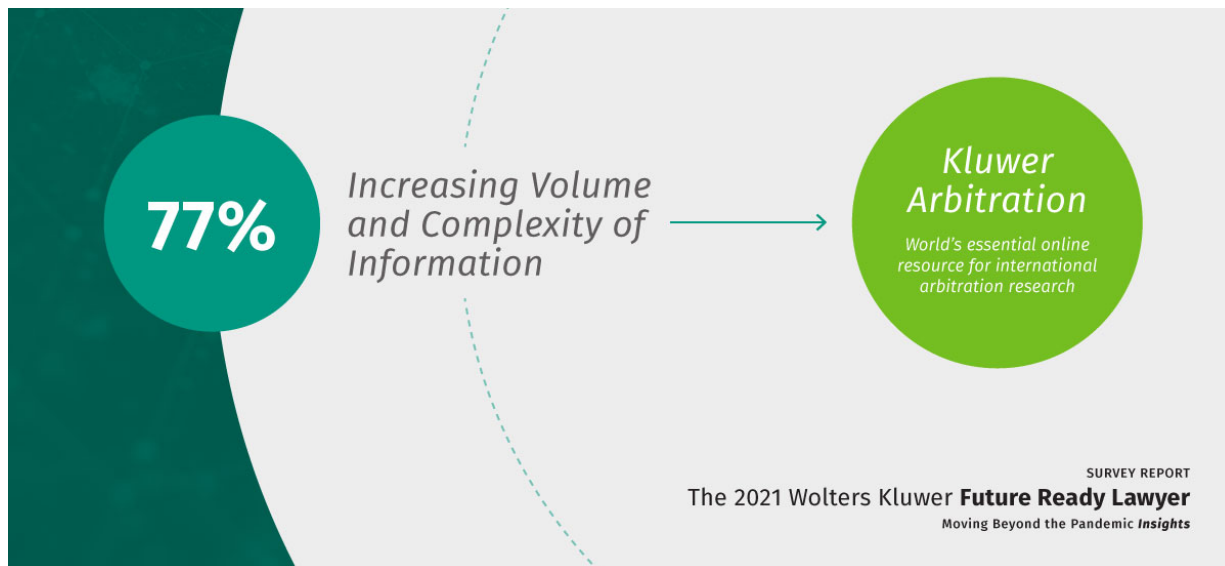
The fascinating discussion ended with each panelist issuing a call to action in line with their backgrounds. Ms Nappert encouraged young practitioners to get involved in the ODR universe and try out platforms to become arbitrators of online disputes. Prof Schmitz encouraged students to learn about ODR technology and stressed how this can help in improving their profile in the job market. Finally, Mr Rule encouraged attendees to enter the ODR world with an entrepreneurial mindset and to build businesses where the highway is going, not where it is right now.

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