Kluwer Arbitration Blog

Arbitration Tech Toolbox: Interview with Dr. Gordon Blanke on the New CIArb Technology Guideline

Arie C. Eernisse (Associate Editor) (Shin & Kim) · Monday, January 3rd, 2022

The Chartered Institute of Arbitrators ("CIArb") has just issued its fifteenth Guideline, the CIArb Framework Guideline on the Use of Technology in International Arbitration ("CIArb Technology Guideline" or "Guideline"). To enhance our readers' Arbitration Tech Toolbox,* Kluwer Arbitration Blog *has taken the opportunity to interview Dr. Gordon Blanke, who is one of the seven members of the Drafting Group for the Guideline.[1)]

Dr. Blanke is Founding Partner of Blanke Arbitration, Dubai/London/Paris, and acts as counsel and arbitrator. Prior to establishing his own firm, Dr. Blanke was a partner in DWF (Middle East) LLP in the DIFC, Dubai. Qualified in England & Wales, he has extensive experience in both commercial and investment arbitration.

1. ***First of all, Dr. Blanke, can you please explain for our readers what a CIArb Guideline is? What other CIArb Guidelines exist and where can they be found?***

A CIArb Guideline is a soft law instrument that seeks to provide non-binding, procedural guidance to the international arbitral profession, including both arbitration counsel and arbitrators, as well as to arbitrating parties on particular areas of the arbitration process that are usually not addressed in arbitration rules. Since 2016, apart from the CIArb Technology Guideline, the CIArb has issued a total of fourteen Guidelines (each of which can be accessed here https://www.ciarb.org/resources/guidelines-ethics/international-arbitration/) in relation to topics as diverse as the interviewing of prospective arbitrators, the terms of a tribunal's appointment, how to deal with jurisdictional challenges, applications for interim relief (including a separate Guideline on security for costs), witness conferencing, the use of expert witnesses, how to deal with situations of default and party non-participation, how to manage an arbitration process (with a focus on the issuance of procedural orders), documents-only arbitration, the use of mediation in arbitration, and the drafting of arbitral awards. These Guidelines have been drafted by arbitration specialists from both common and civil law backgrounds and codify what the CIArb considers to be international best practice in the areas they address.

2. ***Obviously, in the past two years, there have been numerous guidelines on the use of***

technology in arbitration issued by various arbitration-related entities. What is the main distinguishing feature of the CIArb Technology Guideline in comparison to the other pre-existing technology guidelines?

The CIArb Technology Guideline is a *framework* document which seeks to introduce a number of general principles of guidance on the use of technology in arbitration. As such, the Guideline is intended to serve as a stepping stone for more detailed guidelines on the use of *specific* technologies in arbitration both now and in the future. In this sense, the Guideline provides context to the practice of arbitration as an increasingly technology-driven activity and aims to initiate an ongoing discussion on the use of new technologies to serve the arbitration process.

To that end, Part I of the Guideline proposes a total of four main, overarching principles, each of which is accompanied by practical guidance on how it might best be implemented in practice. These principles include:

- the arbitrator's powers and duties with respect to the use of technology;
- the proportionate use of technology;
- the fair and transparent use of technology; and
- the secure use of technology,

which is followed by more specific guidance on the role of cybersecurity in international arbitration in Part II of the Guideline.

3. ***How did the idea of creating the Guideline come about and what was the process that led to its creation? Were there any surprising parts for you about the process of working on this Guideline or unexpected developments?***

The idea of the Guideline originated in what the CIArb perceived to be an urgent need to formalise the role of technology, both old and new, in the world of international arbitration. The CIArb recognizes the increasing use of technology in the conduct of arbitrations over the past decade, not to mention the surge that the use of technology, including in particular video-conferencing and remote document management, has experienced in international arbitration as a result of the pending pandemic over the past couple of years.

In order to explore the relationship between technology and arbitration in a new virtual environment, which has given rise to the creation of a specialist legaltech sector, the CIArb decided in August 2020 to set up an *ad hoc* Technology Committee to work on and produce specialist guidelines for the use of technology in arbitration. The initial work of the Committee has shown the complexity of the task at hand and that more time will be needed to curate a suite of guidelines that will do justice to the pervasive role that technology has come to play in the field of arbitration of late. The work of the Technology Committee is thus ongoing and likely to continue for some time to come. It has further become evident that to produce guidelines with the relevant level of detail, it will be indispensable to consolidate the involvement of legaltech specialists in the continuing work of the Committee.

4. ***Focusing more now on the substance of the Guideline, in section 3, the point is made that,***

while arbitrators generally have the power to conduct the arbitration in the manner they see fit in relation to the use of technology, they may be constrained in this regard by relevant laws applicable to the arbitration. Can you please explain what the Guideline has to say on this important issue, providing an example or two?

It is important to emphasise that the Guideline does not apply in a legal vacuum: Its application is strictly subject to the provisions of the relevant laws applicable to the arbitration, including in particular the laws of the seat. As a result, the proper determination of the scope of a tribunal's powers and duties to use technology in an individual reference will be informed by the constraints placed upon it by the laws of the seat. By way of example, data protection laws that apply at the seat readily come to mind; so do the requirements for the e-signature of arbitral awards provided, of course, that electronically-signed awards are admissible under the law of the seat in the first place.

Arbitral jurisdictions differ widely in their degree of arbitration-friendliness and what might be permitted in some might be forbidden in others. As a golden rule, arbitrators should avoid any use of technology in circumstances that might jeopardise the safeguard of due process in the arbitration. One way to do so is to hear the arbitrating parties on the use of a particular technology and not to proceed unless there is party agreement and in the event of disagreement, to proceed only if neither party is procedurally disadvantaged by the use of the technology concerned.

5. ***If someone is sitting as an arbitrator, what essential steps should they take to ensure "proportionate use of technology" and "fair and transparent use of technology"? How does the Guideline help an arbitrator address dilemmas that may be faced in this regard?***

The Guideline seeks to provide some initial guidance on the proportionate use of technology by distinguishing between smaller cases that, due to their lack of complexity, may be run entirely online as documents-only arbitrations and those cases that warrant the use of more sophisticated and as such costly technology. In order to promote efficiency, arbitrators will be well advised to consider the involvement of specialist third-party service providers, e.g. to assist in the management of the presentation of documents in real time in a remote hearing.

The fair and transparent use of technology requires the use of technology in an arbitration to comply with the overarching principle of the right to be heard and equality of treatment as well as requirements of transparency. Failure to comply might give rise to considerations of undue process and expose a resultant arbitral award to a challenge or a successful defense to enforcement.

As regards the transparent use of technology in an arbitration more specifically, the Guideline encourages arbitrators to discuss the use of a particular technology with the parties as early as possible, e.g., at the first case management conference. This will allow the arbitrators to address any concerns that the parties may have with respect to the use of a particular technology and allow the parties to veto the use of that technology if there is good reason to believe that such use might cause procedural unfairness.

Last but not least, under the same head, the Guideline invites arbitrators to disclose any technology that they might be using and that might adversely affect their autonomous decision-making process, such as certain analytical software.

6. ***The ICC Commission Report (2017) stated, "The tribunal should strive to ensure that the use of IT during the arbitration does not interfere with the parties' rights to equal treatment and a full presentation of their respective cases." One can imagine a situation in which parties to an arbitration face (even strikingly) unequal access to technology. In such a situation, does an arbitrator have a duty to the parties to ensure equal treatment in relation to access to technology? If so, what are the contours of this duty? Does the Guideline provide any assistance to answer this?***

The Guideline addresses the requirement for the arbitrating parties' equality of treatment and procedural fairness from two complementary angles.

Firstly, from the angle of the arbitrating parties' accessibility to the relevant technology. Doing so, the Guideline identifies concerns that parties might encounter barriers to access to a particular technology more generally. Such barriers would typically include:

- A lack of party-specific resources, i.e., a party might not have the hard- or software (that is the IT tools) available to it to make use of a particular technology: This might be a question of physical inaccessibility only, but possibly also one of financial affordability;
- a lack of knowledge or IT literacy on part of a party, i.e., a party simply does not have the know-how or skill to use a particular technology;
- a language barrier, whereby some software might not be operable in a language spoken and understood by a party; or
- a lack of *key infrastructure* in a party's country, such that there is insufficient power supply, internet access (or internet bandwidth) or data transmission to operate a particular technology.

Secondly, apart from the accessibility angle, the Guideline identifies the way and manner in which a particular technology is being used in an arbitration as a potential source of procedural unfairness. The bottomline is that the proposed technology must not be used in a way and manner that would create procedural inequality between the parties: an example would be where in a virtual hearing, due to a difference in the parties' time zones, one party's witnesses might end up testifying at nighttime, which might, in turn, affect the quality of their oral testimony.

7. ***Part II of the Guideline ("Guidance on Cybersecurity in International Arbitration") provides specific advice on a range of cybersecurity best practices. However, it seems that while arbitrators will strive to ensure proper cybersecurity measures are in place in practice, they may face obstacles to achieving this, whether due to the cybersecurity environment they find themselves in (i.e., large firm v. independent practice) or their own relative lack of technical competence. For those arbitrators operating without the benefit of a dedicated IT team, do you think arbitral institutions or other service providers can play a bigger role to ensure that arbitrators are following the best practices set out in the Guideline? Are you aware of any such service providers?***

Arbitral institutions and other service providers are in an ideal position to assist with the provision of a cybersecure environment within which an arbitration may be conducted. As the Guideline underlines, a number of arbitral institutions provide bespoke, highly secure and efficient digital case management platforms, which allow all participants in the arbitration to communicate, share

and store data, such as the parties' submissions, procedural orders and all other documents relevant to the arbitration. Such platforms also facilitate the holding of procedural meetings and formal hearings. In addition, there are a number of third-party service providers that have started specialising in this space, such as the Abu Dhabi Global Market (ADGM) Arbitration Centre, which is a state-of-the-art hearing facility designed, *inter alia*, to offer parties in arbitrations seated anywhere in the world a digital framework for the conduct of their arbitration.

8. ***Do you consider that the Drafting Group achieved its priorities with the final version of the Guideline? Were there any areas that you or other drafters were not able to come to consensus on or topics you felt should be addressed but had to be left out for now because the best practice has not yet solidified or other reasons?***

As stated previously, the Guideline is a framework document only, designed to initiate an ongoing discussion on the use of technology in arbitration now and in the future. As such, it is anticipated to be followed by other guidelines addressing the use of *specific* technologies going forward. For the avoidance of doubt, the future work of the Committee will see an increase in the involvement of contributors from a legaltech background to ensure the provision of technologically relevant guidance.

Thank you, Dr. Blanke, for answering our questions. We appreciate your time and wish you the best.

Further posts on our Arbitration Tech Toolbox series can be found here.

References

?1 The other members of the Drafting Group are Ben Giaretta (Chair of Drafting Group) (Partner, Fox Williams), Kateryna Honcharenko (Research Executive, CIArb), Paul Kinninmont (Partner, Candey LLP), Mercy McBrayer (Research and Academic Affairs Manager, CIArb), Tunde Ogunseitan (Arbitrator, Ogunseitan Arbitration) and Clare Weaver (Solicitor and Director, Putney Consulting Ltd.).

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