

Kluwer Arbitration Blog

UNCITRAL and ALARB Conference on “Dispute Resolution in the Digital Economy”

Daniel García Barragán (García Barragán Abogados) · Wednesday, April 26th, 2023 · Asociación Latinoamericana de Arbitraje (ALARB)

On March 7, 2023, the virtual conference organized by the United Nations Commission on International Trade Law (UNCITRAL), as well as the Latin American Arbitration Association (ALARB) titled “Dispute Resolution in the Digital Economy” took place, within the context of UNCITRAL’s Working Group II works on dispute resolution and digital economy.

During this conference, arbitration experts discussed several topics involving the changing landscape of dispute resolution in the digital economy, including the use of technology in arbitration and mediation. Some of the disruptive aspects that were analyzed dealt with the digital signature of awards and its implications for enforcement purposes, the evolution in the rendering of evidence and production of documents arising from technological advances, the benefits and disadvantages of virtual hearings, among others. The group of experts also included mediation practitioners which reflected on how technology has affected mediation proceedings, as well as shared some key takeaways from the boom of virtual mediations and the related technological aspects that have flourished, especially after the Covid-19 pandemic.

Use of Technology in Arbitration

The Conference’s first panel, “Use of Technology in Arbitration,” was moderated by Andrés Jana (partner, Jana & Gil Dispute Resolution). The panel began with Eduardo Zuleta’s (Arbitration Chambers) reference to the general rule in arbitration involving the use of electronic communications and documents through cloud systems. Specifically, regarding electronic awards, Mr. Zuleta referred that the matter is more complex as a consequence of the interaction of three normative bodies, the [New York Convention](#) (“NYC”), the [UNCITRAL Model Law](#) (“**Model Law**”), as well as the local applicable laws, and specifically the challenges of the text and interpretation of said local laws.

Mr Zuleta pointed out the problem of understanding what is considered as an original and an authenticated copy of an award under the NYC and the Model Law, considering that many local jurisdictions require the award to be apostilled in order to be understood as an original or authenticated copy and, in turn, apostille officers usually require a handwritten signature for such apostille process. The latter has generated a common practice where arbitrators usually provide a

courtesy copy of the award with electronic signature, but truly rely on the award with a handwritten signature to be sent to such parties for their annulment or enforcement efforts. Mr Zuleta also proposed that this misunderstanding in the application of the NYC and Model Law could be solved through local regulations that expressly interpreted the concepts of “original” and “authenticated copy” and included awards with electronic or digital signatures.

Liliana Sánchez (CeCAP/Panama Chamber of Commerce), highlighted the use of technology for case management by arbitral institutions as a consequence of the pandemic which even led to the preparation of guidelines for the use of technology by such institutions, as well as the incorporation of software and digital platforms for the upload, use and review of digital documents. According to Mrs. Sánchez, this represents a challenge involving the preservation and integrity of the arbitral docket considering that previously the institution always had a hard copy of all filings and pleadings and with the use of technology such institution and the parties should rely on the preservation by cloud services. Also, the ability and sophistication of the arbitral tribunal was pointed as key to having a good case management taking advantage of technology for the benefit of the parties and the environment and in such sophistication the use of soft law usually reflects such sophistication.

Marianela Ventura (Lima Chamber of Commerce) expressed the ability that parties have nowadays to have access to the digital docket of the arbitration with all the relevant documents, as well as the automated function of certain platforms to notify the arbitral tribunal as well as opposing counsel when a pleading or memorial has been filed. Also, the possibility of reviewing a hearing by means of accessing a link has substituted transcripts and minutes in a much expedite and cost-efficient manner for the parties and tribunal.

Regarding document production and technology, Héctor Flores Sentíes (Abascal, Flores y Segovia), added that the rule is that documents are now prepared or generated electronically, as opposed to handwritten or typed documents that are later digitalized. Considering the above, Mr. Flores highlighted the benefits of disclosing and/or receiving digital documents as part of document production, including cost reduction, the use of metadata to know the origin of a document, automatic classification of digitalized documents, automatic dismissal of repeated documents, among others. Also, Mr. Flores also made reference to how local litigation practice of the parties and its counsel permeates to their approach to document production in arbitration, which, in many cases, transfers certain local bad practices to international arbitration.

Julián Bordacahar (Permanent Court of Arbitration) dealt with the use of technologies in arbitration. Hearings nowadays may be held: in completely remote format, hybrid format and those which are completely in person. According to Mr. Bordacahar, the most common are those which are hybrid to a certain extent. Nevertheless, Mr. Bordacahar considered that there is an added value in in-person hearings, especially after three years from the COVID-19 pandemic. In his opinion, an example of such added value is shown in the interrogation of witnesses, whereby certain formalities followed when in presence of the arbitral tribunal usually reflects a more accurate declaration from witnesses.

Use of Technology in Mediation

The second panel discussed online mediation and was chaired by Mrs. Marianela Bruno Pollero

(UNCITRAL).

First, Ximena Bustamante (PACTUM Dispute Resolution Consulting) highlighted that mediators should have a clear online communication with parties that allow them to clearly receive the necessary information to propose the solution of conflicts. In this regard, connectivity and internet quality plays a pivotal role in the construction of solutions within the mediation process. Mrs. Bustamante also reflected on the use of share screen tools that allow parties to jointly participate in the preparation of solutions or proposals from the mediator where their input is needed, and they can digitally become a part of such solution.

Regarding the preparation for a mediation hearing, Mrs. Bustamante mentioned the importance of mediators to build a human connection with the parties and address the use of technology to allow them to become familiar with the process and not frustrate the intent of the parties to find solutions, specially when the parties are not technologically sophisticated.

Second, Alexandre Palermos Simoes (Ragazzo, Simoes, Lazzareschi, Montoro Advogados) mentioned that the use of technology should be explored with caution and ensuring that confidentiality is not breached. Mr. Palermos also reminded the audience of the importance of becoming familiar with the information of the dispute and its background, including any technological aspects.

Third, Rafael Lobo Niembro (Alinea Centro de Mediación y Solución de Controversias) made reference to the existence of the mediators' obligations to ensure that the employed technology works properly before a hearing and provide the parties with technology recommendations and even prepare in advance with alternatives in the event that the primary technological tools fail during the hearing.

Finally, Mr. Palermos Simoes discussed that while the use of a secretariat of an administering institution is more useful within an arbitration there are several advantages of administered mediations that allow mediators to focus on the core of its duties, primarily the finding of solutions and bridges between the parties, but mostly because of the institution's capabilities involving the preservation of information and use of certified technological tools.

Conclusion

The "Dispute Resolution in the Digital Economy" conference allowed participants to learn about some of the major developments in dispute resolution in the digital economy that Working Group II is working on for possible updates to UNCITRAL texts and development of new ones (if necessary), considering that the disruption of digitalization has changed the landscape of how business and disputes are conducted around the world, and thus, also of related legal instruments.

The group of experts also acknowledged that technology and the digitalization of business and disputes has come with challenges as well, where the use of technological tools do not translate immediately into a benefit for the parties, but instead, should be used and considered closely, especially considering that dispute resolution has an enormous element of human connection associated therein, necessary for deciding a case or bringing parties together to reach a mediation agreement.

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