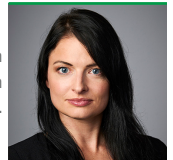


Welcome to the fifth edition of “Digital Coffee Break - International Arbitration”. Throughout this series, Svenja Wachtel talks to various people working in international arbitration to discuss the latest trends in the field, covering topics such as the use of technology, digital transformation, and digitalization. Published quarterly, our Digital Coffee Break invites you to grab a drink, sit back and enjoy first-hand insights from General Counsel, arbitrators, legal scholars and other practitioners from all over the world of international arbitration.

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Svenja is counsel in the Litigation/Arbitration Department of the Munich office. Her practice concentrates on arbitration and complex commercial litigation with a particular focus on multi-jurisdictional legal actions. She is especially passionate about the changes and challenges digitalization and digital transformation mean for the legal industry and she regularly speaks about arbitration matters, in particular with respect to digitalization and digital transformation.



Dr. Nadine Lederer, LL.M. (MIDS)

Nadine Lederer is an accomplished practitioner in the field of international dispute settlement (in particular commercial and investment arbitration), with a strong background in technology, media and telecom, and public international law. She is a member of the German Bar, and holds an LL.M. from the Graduate Institute Geneva (IHEID) and the University of Geneva.

Nadine has represented and advised clients in major international arbitration proceedings as counsel under DIS, ICC and LCIA Rules, among others. She also acts as arbitrator and tribunal secretary.

Nadine has authored and co-authored numerous publications on Online Dispute Resolution (ODR) and will be speaking with us today about the place of ODR in the arbitration spectrum.

Welcome Nadine, and thanks for joining us today to talk about Online Dispute Resolution (“ODR”). Over the last ten months, ODR has been a widely-discussed practical solution to ensuring the continuance of arbitration proceedings, increasing its popularity and ubiquity as a method of dispute resolution. Could you give us a quick overview of ODR in general?

Although ODR has gained much attention since the outbreak of the COVID-19 pandemic, it is not a new phenomenon. The idea of using alternative dispute resolution mechanisms “online” already emerged in the mid-1990s when e-commerce started to evolve. It was developed as a natural progression, a logical conclusion that disputes related to online transactions should also be resolved online.

In a nutshell, ODR refers to mechanisms for resolving conflicts through the use of information and communication technology.

How is “online” defined in ODR?

Opinions differ to what extent the procedure needs to take place online in order to be qualified as ODR:

- In the first scenario, information and communication technology is merely used as a

means of support in the context of traditional dispute resolution proceedings. For example, in arbitral proceedings, it is common practice nowadays that most communication between the parties and arbitrators takes place electronically and that the parties exchange their submissions via email (however, many arbitrators still prefer to receive additional hard copies of the submissions).

- In the second scenario, the dispute settlement process takes place completely online, thereby replacing traditional elements of face-to-face dispute resolution proceedings, in particular with regard to in-person hearings.

ODR is gaining much more attention since the outbreak of the COVID-19 pandemic. What has changed in the last months?

The COVID-19 crisis and the consequent disruptions have definitely led to an increased interest in, and need for, virtual hearings and electronic filings. But, even before the outbreak of the pandemic, it was common practice to have case management conferences by telephone and to examine individual witnesses or experts remotely if they could not reasonably appear in person.

Advances in (video) technology during the last few years have made it possible to conduct arbitration hearings on an entirely remote basis. As long as lockdowns, travel restrictions and distancing rules apply, virtual hearings are particularly useful in order to efficiently proceed with cases instead of postponing hearings to dates in the distant future.

Did COVID-19 play a role in changing the attitude of parties, counsel and arbitrators towards the use of technology in arbitration?

The events surrounding the COVID-19 pandemic and the ensuing travel disruptions have led to a greater acceptance of virtual hearings, thus creating a new reality for dispute resolution. The new challenges and the reinforced use of technological

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It is yet to be seen whether the present reality of a shift to virtual hearings will become the “new normal” in the long term
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solutions have shown the demand for effective, reliable technological infrastructures. Moreover, it is important for arbitrators, counsel and parties to be conversant with technology in order to ensure the smooth conduct of virtual hearings. It is yet to be seen whether the present reality of a shift to virtual hearings will become the “new normal” in the long term. I doubt this will be the end of physical hearings. Technology, despite having many advantages, also has its pitfalls and virtual hearings might not provide a suitable option in all cases. In a post-COVID-19 world, hybrid solutions might provide a good option especially for medium and large cases, with some participants taking part remotely and others attending the hearing in a physical room.

What do you recommend parties and/or arbitral tribunals should do, to address the restrictions currently in place?

The potential to use technology and to conduct a virtual hearing should be discussed early on by the parties and the arbitral tribunal in their respective proceedings. Most arbitral institutions have reacted very quickly to the new situation caused and provide guidelines and technical support to the parties and arbitral tribunals as well as (online) trainings.

Is there an agreed international set of procedural rules including guidelines and minimum standards for ODR platform admins, neutrals and users?

There is no international set of procedural rules including guidelines and minimum standards for ODR platform providers and neutrals (yet).

In 2016, the United Nations Commission on International Trade Law (UNCITRAL) adopted the ‘Technical Notes on Online Dispute Resolution’. The working group started its mandate in 2010 with the goal of developing an international set of procedural rules, including guidelines and minimum standards for ODR platform providers and neutrals, as well as substantive legal principles for resolving disputes and a cross-border enforcement mechanism. However, the adopted Technical Rules fall far short. They are of a non-binding and descriptive nature only, laying down the basic concepts and elements of ODR proceedings. They may, however, serve as useful guidance for ODR platform administrators, neutrals and the parties to ODR proceedings, especially now in the wake of the COVID-19 pandemic.

Recently, the ‘Seoul Protocol on Video Conferencing in International Arbitration’ was published as best-practice guidelines, addressing in particular technical requirements and preparatory arrangements for virtual hearings. Like UNCITRAL’s Technical Notes, the Seoul Protocol may provide useful guidance for parties wishing to move their proceedings online. The same applies with regard to guidelines, checklists and protocols published by the various arbitral institutions.

What kind of technology is required to effectively carry out a dispute resolution proceeding online?

For virtual hearings, arbitrators, counsel and parties require the following basic equipment:

- a computer/laptop, ideally with a monitor of sufficient size and high-definition resolution;
- a webcam;
- audio technology, like a headset with an integrated microphone or speakers; and
- a stable wired or wireless internet connection.

Additionally, the parties and the tribunal will have to choose a videoconferencing platform to conduct their virtual hearing. Some arbitral institutions offer such platforms or provide support in finding a suitable one. For example, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) offers a platform not only for arbitrations administered under the SCC rules, but also for ad hoc arbitrations. Other platforms offered by third-party providers that are currently used for online hearings include: WebEx, Zoom, Skype, Microsoft Teams and Blue Jeans.

While most law firms and offices are technologically well equipped, many people were - and still are - working from home during the lockdown which leads to additional challenges for those with no proper equipment. However, some service providers offer to lend equipment where needed (such as monitors, cameras, etc.) which has to be returned after the hearing.

What are the pros and cons of resolving a dispute in an “online” environment, compared to “traditional” dispute resolution? Let’s start with the positives.

ODR, as a concept, has been developed with the idea of creating a faster, cheaper and more accessible method of dispute resolution in mind. It is made even more attractive by the very nature of international arbitration: parties, counsel, witnesses, experts and arbitrators are often spread around the world. The use of technology, and ability to conduct virtual hearings, can result in significant time and cost savings, thus making proceedings more efficient. The COVID-19 pandemic, although being an exceptional situation, has highlighted the benefits of technology, resulting in the increased acceptance of videoconferencing over the last few months.

And what are the potential downsides?

Virtual hearings might not be suitable for all cases. Especially in complex or multi-party arbitrations with many witnesses and experts, online hearings may have an impact on the quality of the oral testimony. During the questioning of witnesses and experts, it might be much more difficult to assess their credibility through videoconferencing without getting a real, face-to-face impression of them.

Could you give us a few examples?

Of course: While facial expressions might be easier to recognize if you can only see the face of the

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AI might eventually provide a well-suited solution with its further advance in the future
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respective witness on a (large) screen, other changes in the witnesses' posture and nervous reactions, like wiggling their feet, might be harder to notice or not be visible at all. You might also not be able to observe the reactions of the tribunal or opposing counsel to the answers of a witness.

Similarly, although certain precautions can be taken (such as using a 360 degree camera), it may be difficult to indubitably rule out the possibility that another person might be behind the camera in the same room with the witness, giving secret signals on how to answer questions.

Apart from that, technology is, unfortunately, not perfect. Disruptions and delays can be caused when the parties use different equipment or if there are any IT issues, such as temporarily broken or poor internet connectivity or other technical errors. Privacy concerns and the risk of cyber-attacks also play a role. Therefore it is important to:

- choose a reliable provider with a well secured, encrypted platform;
- to check the terms of and security measures implemented by the respective provider;
- to keep software updated; and
- to take care of additional precautions, such as the use of strong passwords for different virtual meeting rooms or a controlled entry to the hearing and breakout rooms.

What does an online dispute resolution tribunal look like? Is it comparable to a traditional arbitration tribunal?

Currently, tribunals still consist of human neutrals who are responsible for the decision making process. Technology and artificial intelligence (AI) are merely used as an auxiliary tool to support proceedings, but not yet as a substitute for the advice and guidance of a human arbitrator.

Talking about AI, do you believe that human arbitrators will be replaced by automated judges?

The extent to which advanced computer programs will potentially be able to offer solutions completely autonomously and thereby supplant human arbitrators one day has yet to be seen. There is currently no indication that “robot arbitrators” will be able to resolve complex cases anytime soon, with many disputed facts, difficult legal issues, potentially different applicable laws, and in which the credibility of witnesses and experts needs to be assessed. However, at least for the resolution of simple, straightforward cases with a high level of repetition and standardization, such as small, low-value e-commerce disputes, AI might eventually provide a well-suited solution with its further advance in the future.

In your opinion, is ODR a game changer in the field of dispute resolution?

As set out in the beginning, the concept of ODR and the use of technology in arbitration are not new but, there has always been some skepticism. The COVID-19 pandemic has created considerable challenges for the judiciary. While court rooms are not always equipped with the necessary technology and many judges are reluctant to use such technology – often due to a lack of practical experience – modern communication technologies have been used in arbitral case management conferences and oral hearings already for some time. This experience is now brought to bear in virtual hearings in arbitration proceedings.

Many courts worldwide are currently struggling with a back-log of pending cases and, in some countries, it is still not foreseeable if and when the ordinary courts will fully resume their work without restrictions. If the parties whose case has been suspended are interested in a quick yet binding solution, they might wish to agree on arbitration (with the option to conduct a virtual hearing). Such an agreement is possible at any time – after the underlying contract has been concluded, after the dispute has arisen, and even after legal proceedings have been instituted before courts.

Our international arbitration and dispute resolution teams are available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.

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