

Mr. Abdelrahman Mahdy

PhD Candidate at the École Doctorale de Droit de la Sorbonne,
Comparative Law Department

Digital Transformation and Due Process in the Alternative Dispute Resolution:

A balance to bear or an illusion to fear

■ Correspondence:

Mr. Abdelrahman Mahdy, Associate at Badran Law Office for
Arbitration and Legal Consultation

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■ E-mail: abdelrahman.mahdy@badranlegal.com

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Abstract

COVID-19 pandemic increased the fear from the inefficiency of the national courts' proceedings which was alienated during the pandemic. This is not caused only by the usual prolonged procedures, but also by the suspension of hearings during this crisis. Thus, it is predicted that contracting parties would tend to opt to the Alternative Dispute Resolution mechanisms ("ADR") to resolve their disputes. ADR possess some qualities and competitive advantages would make them more efficient than normal litigation's course of action. Thus supports such prediction. Amongst such qualities are their pace and benefits, namely for their flexibility to be virtually conducted.

Despite that multiple arbitration centres were encouraged to amend their rules during the pandemic to englobe the digital transformation of arbitration, the efficiency of such digital transformation is questionable. In fact, being an expedited mechanism by its virtuality would have no value if the product issued by the mechanism is invalid or non-enforceable for lack of due process requirements.

Many constitutions and conventions provided that due process is a condition for any award/court's decision to be valid / enforceable. De facto, ADR's virtuality would be an efficient way to conduct ADR, but de jure, it may hinder the due process requirement needed for the validity of the outcome of ADR. Besides, some ADR mechanisms would require a physical interaction, not for its validity but even preliminarily, for its proceedings to ensue, e.g., Dispute Boards.

Motivated by such premises, this paper would examine, by utilizing doctrinal legal analytical methodology, the possibility of embedding the digital transformation in the ADR proceedings, but most importantly its efficiency, and how due process can hinder such transformation.

Key Words: Digital Transformation, Due Process, Alternative Dispute Resolution Mechanisms

التحول الرقمي والعدالة الإجرائية في الوسائل البديلة لتسوية المنازعات: بين عبئ إقامة التوازن والخوف من استحالاته

أ. عبد الرحمن مهدي

الملخص

أحدثت جائحة كوفيد-19 الخوف من انعدام فعالية الإجراءات أمام المحاكم الوطنية التي ازدادت تأثراً بالسلب خلال فترة الجائحة، ليس فقط بسبب إطالة أمد الإجراءات، وإنما بسبب تعليق جلسات المرافعة خلال الجائحة. فكان من المتوقع أن أطراف العقد سيتجهون لتسوية نزاعاتهم عن طريق الوسائل البديلة لتسوية المنازعات، التي تحوي عدد من المميزات المبلورة لفعالية أكثر من اللجوء لإجراءات التقاضي العادية. ويعد من أهم هذه المميزات مرونة الإجراءات التي تسمح لإتمامها عن بعد (إلكترونياً).

رغم كثرة مراكز التحكيم التي دفعتها الجائحة لتعديل قواعدها لاحتواء التحول الرقمي، فإن فعالية هذا التحول الرقمي ما تزال قيد البحث. في الواقع، سرعة إجراءات وسيلة تسوية النزاع لتتمامها عن بعد لا قيمة لها إن أصبح منتج هذه الإجراءات باطل أو غير نافذ لعدم احترام متطلبات العدالة الإجرائية.

الكثير من الدساتير والاتفاقيات الدولية جعلت من احترام العدالة الإجرائية شرطاً لصحة وتنفيذ أحكام التحكيم والمحاكم الوطنية. فعلياً، قد يكون تسوية النزاع عن بعد طريقة فعالة لإتمام إجراءات الوسائل البديلة لتسوية المنازعات، ومع ذلك فإنه من المنظور القانوني قد يعرقل ذلك التيقن من احترام متطلبات العدالة الإجرائية اللازمة لصحة أي ما كان ما تنتهي إليه إجراءات الوسائل البديلة لتسوية المنازعات. بالإضافة إلى ذلك، فإن بعض الوسائل البديلة لتسوية المنازعات قد تستلزم تواصل فعلي وشخصي، ليس لصحة اتمامها، ولكن، ابتداءً، من أجل إتمامها، مثل ذلك مجالس تسوية المنازعات.

ومن هنا تبدو أهمية الورقة البحثية التي تهدف - من خلال دراسة تحليلية - إلى النظر في إمكانية إدخال التحول الرقمي على إجراءات الوسائل البديلة لتسوية المنازعات، ومدى فعاليته، وكيف يمكن للعدالة الإجرائية تقييد هذا التحول.

الكلمات الرئيسية: التحول الرقمي - العدالة الإجرائية - وسائل تسوية المنازعات

البديلة

1. Introduction

Arbitration presents today the most important Alternative Dispute Resolution (“ADR”) mechanism in terms of recognition by different national,⁽¹⁾ and international,⁽²⁾ legal provisions. Its importance is mostly absorbed from its closeness to the national courts’ proceedings, in a developed version in terms of proceedings’ administration, flexibility and efficiency. It differs from other mechanisms by the possible issuance of exequatur (enforcement order issued by courts on courts’ decisions and/or arbitral awards) on its award,⁽³⁾ by application to the international recognition of any award, hardly depending on their seat.⁽⁴⁾ This mechanism was thus the first escape-door from national courts. However, with the development of national courts’ proceedings around the world,⁽⁵⁾ and the technology invasion in the legal field. Arbitration might need, in order to compete with national courts and to keep its importance shining, to open its arms to embed the digital transformation in its proceedings.

By doing so, Arbitrators shall be highly vigilant to keep a balance protecting the due process requirements, along with embedding the digital transformation without being reluctant due to a due process paranoia. With such basis, and as per the French maxim “qui peut le plus, peut le moins”,⁽⁶⁾ if it is possible to conduct arbitration proceedings virtually, for example, it would be complicated to plead otherwise for other ADR mechanisms not issuing an award that could obtain an exequatur. Noting that being complicated keeps the

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- (1) French Civil and Commercial Procedural code, Book 4, The Arbitration, Articles 1442 to 1527
Saudian arbitration law, Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD) concerning the approval of the Law of Arbitration
Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters
English Arbitration Act [1996]
- (2) UNICITRAL Model Law on International Commercial Arbitration [1985] (amended in 2006)
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) [1958]
Riyadh Convention on the Recognition and Enforcement of Foreign Judgements and Arbitral Awards [1983]
- (3) Supra. Note 5 and 6
- (4) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) [1958], Article V.1.(e)
- (5) E.g. Dubai International Financial Centre (DIFC) courts (<https://www.difccourts.ae/>)
- (6) Could be translated in English to: who can do the more, can do the less.

possibility door open, some ADR mechanisms could, by its nature different from Arbitration, underline different obstacles to digital transformation.⁽¹⁾

Consequent to the above introduction ⁽¹⁾, and after presenting an overview on the digital transformation, due process requirements, and ADR mechanisms ⁽²⁾, it seems to be pertinent to study the possibility of embedding digital transformation in the ADR mechanisms ⁽³⁾, prior to discussing the due process' scope of application ⁽⁴⁾, in order to finally be able to analyse the potential balance between the two rivals ⁽⁵⁾, preparing to conclude with the papers' recommendations ⁽⁶⁾.

2- Overview and Background

By its binding effect emphasized by the possibility of receiving an exequatur on its award, Arbitration is considered as one of the most important ADR mechanisms, chosen, as all other ADR mechanisms, directly and consensually by the parties, in order to escape national jurisdiction's disadvantages,⁽²⁾ notably delays and inflexibility. It gives the opportunity to litigants to resolve their dispute(s) via more flexible and parties' chosen proceedings. Once both parties agree, even sky is not a limit; only public order would constitute an obstacle to parties' autonomy.⁽³⁾

That said, two main queries appear to be legitimately highlighted. First, once the dispute arises, parties to the dispute rarely achieve an agreement regarding the arbitration proceedings. Second, due process requirements are considered as public order requirements in most of the jurisdictions.⁽⁴⁾

Due process, as a public order requirement, is highlighted by international

(1) *Infra*. Para. 3.1 and 3.3

(2) Gilles Cuniberti, *Rethinking International Commercial Arbitration: Towards Default Arbitration Relié* (Edward Elgar Publishing Ltd, 2017), Chap 1. [I (A)]

(3) UNICITRAL Model Law on International Commercial Arbitration [1985] (amended in 2006), Article 36.1.(b.ii) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) [1958], Article V.2.(b)

(4) French Civil and Commercial Procedural code, Articles 14 and 15

conventions,⁽¹⁾ and national laws in order to grant procedural rights to the dispute's parties,⁽²⁾ and, thus, binding on the arbitral tribunal, failure of which, the arbitral award shall thus be null and void.

Fearing due process requirements, in addition to malevolence of at least one of the disputing parties, arbitrators of the arbitral tribunals usually take all the necessary and, unfortunately, unnecessary procedural precautions. To avoid any probability the arbitral award turns into an inefficient null and void document, and thus likely unenforceable, arbitrators started therefore behaving on a basis that has been called "Due Process Paranoia".⁽³⁾

Malevolent parties will thus abuse due process paranoia in order to cause unnecessary delays to the process and, inopportunately, limits any facilitating or efficient manner of conducting the proceedings, i.e., conducting procedures virtually.

Nevertheless, virtuality and digitalisation are today, notably during and after Covid-19 crisis, already established in dispute resolution mechanisms, to an extent making questionable its limits rather than its existence. The wildness of such limits would depend on the possibility of digitalisation of some proceedings of ADR mechanisms, on its accordance with due process requirements, but also on the dispute's Parties bona fide / malevolence.

Digital transformation in arbitration highlights the unnecessary of physical transportation and meetings between parties & arbitrators to the same place, but makes sufficient for each party to present its case by electronic methods and the arbitration tribunal communicates its award to the parties equally electronically, and hearings might be conducted by videoconference.⁽⁴⁾ In fact,

(1) European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Article 6.1

(2) José Luis Mandujano Rubín, 'DUE PROCESS IN ARBITRATION' [2022] Vol. 6, No.2, Journal of Positive Psychology & Wellbeing of Universidad Nacional Hermilio Valdizán - Huánuco – Perú, 2022, 1276 – 1282

(3) Remy Gerbay, 'Due Process Paranoia', [2016], Kluwer Arbitration Blog. <https://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>

(4) <https://plaintiffmagazine.com/recent-issues/item/the-digital-future-of-arbitration>

it is clear that Artificial Intelligence (“AI”) is much faster than arbitrators in legal research as well as award Drafting so an expected expansion in the use of AI in arbitration, moreover, it there are voices that want an IA Arbitrator to guarantee more efficiency,⁽¹⁾ however, within the actual legislative framework, an IA Arbitrator is an impossible idea to be realized, notably in countries like France and Egypt in which national laws require the arbitrator to be a natural, so physical, person.⁽²⁾⁻⁽³⁾

Such legislations underline limitations in arbitration, with all its typologies, e.g., final offer arbitration,⁽⁴⁾ but not other ADR mechanisms. Taking Mediation and Dispute Board (“DB”) as main examples of ADR mechanisms for the distinguished characteristics limiting digitalisation, respectively, the human emotional interaction in mediation,⁽⁵⁾ and the sites’ visits requirements in DB.

Mediation, defined as “a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute”,⁽⁶⁾ is usually selected by disputing parties as an amical non-decisive dispute resolution mechanism, giving them the impression of resolving their disputes by their own absolute consent, and thus is easier to be voluntarily executed, notably as it gives them the chance to find a balanced solution between their different positions,⁽⁷⁾ which thus makes Mediation, in

(1) <https://www.tamimi.com/law-update-articles/artificial-intelligence-and-international-arbitration-going-beyond-e-mail/>

(2) Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Article 16 (it is worth noting that article 16 doesn’t literally require an arbitrator to be a physical person, however, the preventions highlighted in this article legitimately allows such interpretation)

(3) The French Civil and Commercial Procedural code, Article 1450

(4) Gary B. Born, International Commercial Arbitration, (3rd edition, Kluwer Law International B.V., 2021), Chap. 2, para. 2.02 [C.2.h.]

(5) *Infra*. Para. 3.1

(6) United Nation Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 2018, art 2.3

(7) McCorkle, Suzanne., Reese, Melanie J., Mediation Theory and Practice, (US: SAGE Publications, 2018) Chap 1, benefits for the disputants

the last few years, notably during Covid-19 crises, more frequently chosen by litigants than before.⁽¹⁾

However, in construction industry, contracts usually present a long-standing relation between their parties, with numerous disputes arising, requiring thus a more comfortable ADR mechanism, which gives birth to DB. Considered a preliminary step to avoid the creation of disagreements between the contracting parties in a project, DB members are required to be experts who ensures the execution of the project subject of contract, by avoiding disputes. They are extremely familiar with the project by the conduction of visits to the fields,⁽²⁾ to the extent making the DB members able to decide of any dispute without delays.

In sum, the embeddability of digital transformation in the ADR mechanisms might not only depend on the legal framework but, even priorly, by the possibility of its integration.

3- Embeddability of Digital transformation in the ADR mechanisms

3.1 Consensus on online mediation

Digital transformation doesn't appear to be reluctant from being a fundamental method of mediation conduction. The possibility of conducting online mediation is even mentioned in multiple mediation rules.⁽³⁾ Nevertheless, it shall be noted that conducting online mediation would not be effective or even possible in all disputes. Aware of the casuistic character of mediation, institutional rules usually, in different drafts but quite close meaning, provide that:

“The proceedings may be conducted in person or by other means. Having

(1) Browne Jacobson, The future of mediation; <https://www.lexology.com/library/detail.aspx?g=0d30d29e-e505-426e-80a1-447c72df7065>

(2) The Dispute Resolution Board Foundation, Dispute Board Manual: A Guide of Best Practices and Procedures, SPARK Publications [2019]

(3) Mediation Rules of the London Court of International Arbitration (LCIA) Singapore International Mediation Centre (SIMC)

due regard to the circumstances of the case and after consultation with the parties, the mediator may decide to utilize any technological means as it considers appropriate to conduct proceedings remotely. In any case, the mediator shall seek to maintain fair treatment of the parties.”⁽¹⁾

“In conducting the mediation, the mediator may, in consultation with the parties and taking into account the circumstances of the dispute, utilize any technological means as he or she considers appropriate, including to communicate with the parties and to hold meetings remotely.”⁽²⁾

That said, the remote conduction of the mediation would depend on the circumstances of the dispute, probably the parties’ representations, counsels, or even the mediator, the institution, or the cost of the proceedings. Despite that one would prima facie think that the need of personal interaction would limit digital transformation from being embedded in mediation, which is an in toto casuistic limitation, different obstacles could be furtherly alarming, in particular: the confidentiality.

Two different scales of confidentiality would affect the trust in an online mediation proceeding. First, the confidentiality of the whole process vis-à-vis and third party to the mediation proceedings.⁽³⁾ In fact, numerous sensitive information could be declared during the proceedings, and thus, without proper protections, could be used by an unauthorised person who illegally listened to the video / audio-conference. Such situation could cause a serious problematic situation to parties of the dispute, but also the mediator who shall then justify the leak and prove his/her non participation in such failure.

Second, it shall be noted also that confidentiality of mediation proceedings interferes also between the proceedings’ actors. In fact, where mediation is not

(1) Rules of Mediation of Vienna International Arbitration Centre (VIAC) [2021], Part II Article 9.3

(2) UNCITRAL Mediation Rules [2021], Article 4.4

(3) Singapore International Mediation Centre (SIMC), Rule 9

Mediation Rules of the International Chamber of Commerce (ICC), Article 9

limited to general hearings in which all parties participate together, but equally, or even more, relies on different meetings conducted individually between the mediator and each of the parties in order to achieve the goal of mediation (resolving the dispute), it is thus highly advised to use virtual breakout rooms,⁽¹⁾ where, in each, all discussions are confidential vis-à-vis the uninvited party to the breakout room. It would, if preparations are not rightfully conducted, however, happen that an uninvited party mistakenly enters to a different room in which the party could access unauthorised information related to the other parties which ruins the whole mediation process and aims. Unfortunately, in reply to such risk, the Chartered Institute of Arbitrators, in its Guidance Note on Remote Dispute Resolution Proceedings, in point 3, after focusing on the importance of the virtual breakout rooms, highlighted an obligation of leaving and reporting on the party who mistakenly accessed an unauthorised breakout room.⁽²⁾ This party, or even the mediator, shall thus directly leave the breakout room and report his entrance evidently with presenting what it heard exactly. Such response could not be sufficient as it is firstly curative, not preventive, and secondly based on the parties and mediators' bona fide, which shall not always be the case.

In this area, it has been stated by Dr. Sherif Elnegahy (Mediator of the Global Mediation Panel of the Office of the Ombudsman for UN Funds and Programmes at United Nations) that:

“An essential element for achieving success in mediation is for the mediator to build rapport with the parties and to enhance the communication level between them. Many tools' mediators can deploy to achieve that such as; reading the body language, the art of asking the right questions, caucus, and assuring confidentiality. Such tools can be much easier and more effective

(1) Kateryna Honcharenko – Mercy McBrayer, 'Guidance Note on Remote Dispute Resolution', [2020], the Chartered Instituted of Arbitrators, Pt. 3

(2) Kateryna Honcharenko – Mercy McBrayer, 'Guidance Note on Remote Dispute Resolution', [2020], the Chartered Instituted of Arbitrators, Pt. 3.3

to be deployed in person. It can be a challenge to effectively use such tools in virtual settings.

Yet, the Pandemic have forced mediators to engage with such challenge, having the field, adapting and sharpen new skills specially with the use of all the new features of online platforms such Zoom. All have resulted that virtual mediation settings can be successful especially with commercial cases.

I have conducted many successful virtual mediations myself but I shall always prefer in person settings”.⁽¹⁾

In addition to the possible usage of virtual meetings, AI could also simplify the mediator’s duties with regards to the settlement agreement drafting for example. Within this research preparation Chat GPT 3.5 was asked to “Draft a settlement agreement to be concluded between two companies for a dispute, where company A did not pay to company B the required amount of USD 1 Million on the agreed upon date April 25 2022”,⁽²⁾ and it replied with a basic, but valid, settlement agreement template which could be found roughly on internet websites, and shall indubitable be enhanced by the mediator to be adequate to each case.

In sum, virtual mediation proceedings are indubitably applicable and applied when the circumstances of the case allow it, but most importantly where preparations and protections are adequately ensured.

3.2.1 The digital transformation of Commercial Arbitration: hearings as limited limitation

Till Covid-19 pandemic, the embedment of digital transformation in Arbitration was a goal, added value, and a want. This pandemic reversed the want to a need, notably in the relations between merchants in Commercial

(1) Lecture on Mediation delivered Dr. Sherif Elnegahy during the visit of the British University in Egypt by London South Bank University’s delegation on 6 May 2023

(2) Question asked by the author to Chat GPT 3.5 on 13 May 2023

Arbitration.

As complicated as it appears to criticise the digitalisation of documentary arbitral proceedings (3.1.1.) notably for its acceptance and applicability by the international arbitration community, it is equally complicated not to fear the virtual hearings (3.1.2.).

3.2 The digitalisation of documentary arbitral proceedings

In lights of digitalisation, a *summa divisio* in the arbitral proceedings shall be highlighted as they usually englobe both documentary and hearing phases. Where the digitalisation of the latter is till nowadays discussable, the documentary phase has been digitalised in most of the institutional arbitration rules,⁽¹⁾ some even prior to the Covid-19 pandemic.⁽²⁾

There is a consensus in the arbitration literature to digitalise documentary phase, it is thus agreed that with regards to the mode of communication of any document, “email is increasingly utilized, rather than registered mail or hand delivery, for almost all correspondence and submissions in international arbitration” even if “the most significant formal documents (e.g. request for arbitration, statements of case or memorials, awards) generally continue to be delivered by hand delivery or registered mail”.⁽³⁾ This said, even such significant documents, are sometimes spared from being communicated in hard copies, e.g. the arbitration case held under the auspice of Swiss Arbitration Centre (Swiss Rules of Arbitration 2021, seated in Geneva Switzerland, English Law) was successfully conducted in a digital manner, even for the main submissions, with reserve for the award, without any physical implications, ensuring the possibility of embedding a full digital transformation in the documentary phase.⁽⁴⁾

(1) Arbitration Rules of London Centre of International Arbitration (LCIA) 2020, Articles 1.4 & 4.1

(2) Arbitration Rules of the International Chamber of Commerce of Paris (ICC) 2021, Article 3.2

(3) Gary B. Born, *International Commercial Arbitration*, (3rd edition, Kluwer Law International B.V., 2021), Chap. 15, para. 15.08 [G.1.]

(4) Case No. 300549-2021 Swiss Arbitration Centre (Swiss Rules of Arbitration 2021, seated in Geneva Switzer-

It is however not the case in all institutional rules; i.e., the Arbitration rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) requires any submission filed by any party to be filed in hard copies in the following manner:

“Any notice, pleadings or other communication sent or filed by a party, as well as all documents annexed thereto, shall be submitted in a number of copies equal to the number required to provide one copy for each arbitrator, one copy for each of the remaining parties and two copies for the Centre”.⁽¹⁾

Noting that CRCICA Arbitration Rules is in force as from March 2011, and that several institutions amended their rules subsequent to Covid-19 crises, Dr. Ismail Selim, the president of the CRCICA, during his presentation on the evolving role of the CRCICA, highlighted the potential amendment of the CRCICA Arbitration Rules, notably to support green transformation & digital transformation by stating that:

“Despite that CRCICA arbitration rules of March 2011 requires the submission of multiple hard copies of memorandums filed by the parties, the prospective amendment of CRCICA rules would aim to ensure green environment friendly procedures by removing such requirement from CRCICA rules, for all document communications to be, in principle, digitalized”.⁽²⁾

It is thus a clear note that even institutional arbitration rules that might block the full digital transformation of the documentary phase, are aiming to be amended to ensure the full digitalization of such proceedings.

Consequent to highlighting the possibility of digitalizing all documentary proceedings in arbitration, it would appear important to note if such

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- (1) Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) 2011, Article 17.4
- (2) Dr. Ismail Selim, Presentation of the evolving role of the Cairo Regional Centre for International Commercial Arbitration [CRCICA] in *VDMA e.V.*, on 24 May 2023

proceedings are potentially sufficient to conduct arbitration case-file. In other words, is the conduct of hearings an unescapable phase to conclude valid arbitration proceedings?

Despite that hearings are indispensable under the request of any party, unless agreed otherwise by all the parties, in most of the institutional arbitration rules,⁽¹⁾ it has been suggested that:

“In order to reduce costs and save time, tribunals should dispense with oral hearings, even when requested by one party. The theory is that “[h]earings are expensive and time-consuming,” and arbitrators should save time and money by refusing to conduct hearings even when requested by a party”⁽²⁾

In the author’s view, this suggestion is prospered to affect rules to be amended in a way that prevents hearings from being conducted unless required by all parties, for its absence to be the principle and its presence to be the exception. Such has been already the case in some arbitration rules providing for “documents-only basis” proceedings.⁽³⁾ Yet, such amendments would never suffice unless the same is accorded by the national laws,⁽⁴⁾ notably to ensure the validity of the issued award vis-à-vis due process requirements.⁽⁵⁾

Nevertheless, it is equally prosper that practitioners in the arbitration community, consulted during the process of drafting arbitration agreements, to draft a documents-only basis arbitration agreement; by which parties, in the arbitration agreement, accepts all not to conduct hearings in the

(1) Arbitration Rules of the International Chambre of Commerce of Paris (ICC) 2021, Article 25.5
Arbitration Rules of Dubai International Arbitration Centre (DIAC) 2022, Article 26.1

Administered Arbitration Rules of Hong Kong International Arbitration Centre (HKIAC) 2018, Article. 22.4

(2) Gary B. Born, *International Commercial Arbitration*, (3rd edition, Kluwer Law International B.V., 2021), Chap. 15, para. 15.08 [Z.1.]

(3) Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018, art 8-1.

(4) Saudian arbitration law, Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD) concerning the approval of the Law of Arbitration, Article 33.1

Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Article 33.1

(5) *Infra*. Para 4.1

arbitration proceedings,⁽¹⁾ or even if the arbitration agreement doesn't figure a documents-only basis proceedings, parties, directed/represented by their practitioner counsels, could agree during the proceedings on conducting them without hearings.⁽²⁾

On a side note, digitalization could prospectively also affect the documents, not just in their submission phase, but also in the preparations. Where AI platforms today are able to adjust footnotes, grammar and vocabulary of the Memorandums submissions, and prepare dockets, and probably prepare some standard forms, it still figures obstacles in preparing an assessment of cases and furtherly to draft statements or Memorandums. In this extent, despite that forecasting the future would not be the aim of this paper, it is however notable, despite the continuous trials of social AI learning, that social science has always been a dark area in AI for its indispensable need of human interaction.⁽³⁾

In sum, noting that it is possible today, and probably the principle in the future, that a whole arbitration procedure wouldn't encompass any oral hearing, and to be conducted on a documents-only basis, digital transformation is already embedded in the documentary phase of the arbitration proceedings. Yet still the principle, hearings are one step away from their digitalization. A step empowered by the fears from virtual hearings.

3.2.2 Virtual hearings prospectivity

Opposite to documentary phases, not facing reasonable opposing opinion to its digitalisation, “[T]he onset of virtual hearings has, however, not been met with unanimous optimism”,⁽⁴⁾ as multiple fears surround virtual hearings. One should thus analyse whether “virtual hearings” sufficiently serves what

(1) Arbitral award issued in the case No. 300549-2021 – Swiss Arbitration Centre

(2) Arbitral award issued in the case No. 1317/2019 – Cairo Regional Centre for International Commercial Arbitration (CRCICA)

(3) Samuele Bolotta – and Guillaume Dumas, Social Neuro AI: Social Interaction as the “Dark Matter” of AI, [2021]

(4) Pratyush Panjwani, The Impact of Covid on International Disputes, Chap. 2: The Impact of the covid-19 Pandemic on International Arbitration Practices: Greener Arbitrations with Reduced Due Process Paranoia?, Koninklijke Brill NV, [2022], para. 2.2

“hearings” are required to serve.

Replying to such query, it has been confirmed by doctrine that “[i]n principle, there is nothing from a technical perspective that prevents entire evidentiary hearings from being conducted remotely: modern technology permits interactions during remote hearings which, if properly prepared and managed, can often be as focused and constructive as in a physical meeting”.⁽¹⁾

Such response is as disturbing as comforting. Where it ensures the technical possibility of virtual hearings to be as beneficial as in-person hearings, it also highlights an intense condition. De facto, in order to ensure a “properly prepared and managed” virtual hearing, two main different area of preparation and management shall be settled: technical and personal queries.

First, concerning the technical queries, virtual hearing would require before all a well-established internet connection. Such requirement would be hardly, or sometimes impossibly achieved in some area of the world. In addition to, virtual hearings could be a good meal for hackers to gather confidential information, unless conducted on high-tech reliable platforms, which is not the usual case. The usual choice of less protected platforms could be justifiable by the high cost of conducting them on high-tech reliable platforms. The same issue would also affect the equipment required to hold a “focused and constructive” virtual hearings, as professional microphones and headphones notably containing noise cancelation...etc, which would increase the above said cost.

That highlighted, it is worth noting that the abovementioned costs would be proportional with the travel costs in in-person hearings held in disputes arising between parties established and/or arbitrator residing in different countries from the place of hearing, but a lot higher than hearings held in

(1) Gary B. Born, *International Commercial Arbitration*, (3rd edition, Kluwer Law International B.V., 2021), Chap. 15, para. 15.08 [Z.2.], Emphasise added

disputes where all parties and tribunal members are residing in the same country.

Moreover, equipment with noise cancelation would highlight one of the biggest fears of virtual hearings notably including witness examination, as it would not be easily detected if there is a different person helping the witness in replying to the arbitral tribunal's questions.

If technical queries are the sea, personal queries would be the ocean hiding a paramount of detectable and undetectable queries. Issues are to be divided into two main categories. The highest issue would be parties bona fide. Parties, usually the Respondent, are able to ruin the oral hearing, for example, by alleging the existence of technical issues, notably when this party requests a physical hearing and the tribunal rejects his request. Such behaviour would ruin the hearing process, which if continued despite these allegations, would result to a high important reason of challenge of the award.

Second, which ensures a properly managed hearing, arbitral tribunal, notably the presiding arbitrator, and the institution, if any, shall have a sufficient experience in managing virtual hearings, as it requires a totally different expertise and skills from physical hearings. Interruptions and social interactions are never in the same scale.

Notwithstanding the notable mention of virtual hearings in multiple institutional rules, even prior to Covid-19 crises, and thus their technical, as previously highlighted, and legal, prima facie, possibility of conducting virtual hearings, such shall not blind us from the fears of cost, but more importantly due process requirements practically hardly respected, unless future technology solves the above queries, for example by ensuring that the witness is not receiving any aid, or the parties' bad faith behaviours are detectable.

3.3 The limited reach of digital transformation in Dispute Board

Despite its consideration as an ADR Mechanism, DB, and notably the standing DB, helps the dispute avoidance rather than dispute resolution, it proved its efficiency in this role. It has been highlighted in the introduction of the DB Rules of the Chartered Institute of Arbitrators that:

“The dispute avoidance role of the standing board should be emphasised: the dispute board encourages the parties to solve their own problems, creating an atmosphere where the parties communicate and recourse to the advisory role of the board. Resolving conflicts at an early stage, or even before they arise, is an obvious benefit that greatly minimises costs such as legal fees, and reduces loss of productive time and goodwill between the parties.”⁽¹⁾

Such role has heavily contributed to consider DB one of the most important ADR Mechanism to be resorted to during Covid-19 crises by multiple practitioners.⁽²⁾ In their papers issued during the invasion period of Covid-19 crises, they (Authors of the two papers mentioned in supra. Note 61) held that the dispute avoidance role of DB ensures an incredibly decreased quantity of arbitral procedures, which thus prevents several costs indubitably unbearable during the pandemic.

The importance of the dispute avoidance role, enhanced by the possibility of conducting meetings and solve disputes totally by video-conferences, depends on the Parties’ trust in the DB’s members. If such trust is perturbed, DB’s conclusions, whether decisions or recommendations, could be subject to a notice of dissatisfaction nuancing its efficiency. This trust is usually grounded by the familiarisation of the DB’s members to the project due to the periodical site visits, notably in construction projects where DB is usually

(1) Dispute Board Rules of the Chartered Institute of Arbitrators [2014], Introduction drafted by Nicholas Gould and Christina Lockwood

(2) Arif H. Ali – Philip Dunham – Christophe Garcia – Michelle Bradfield – Erica Franzetti – Mark Mangan, ‘Dispute Boards: Another Potential Means of Resolving COVID-19 Disputes’, Lexology, [2020]
Roberto Hernández-Garda, ‘Why Dispute Boards Are An Excellent Dispute Resolution Tool During The COVID-19 Crisis’, American Bar Association, [2020]

penetrating the Parties dispute resolution agreement.

That said, the possibility of conducting meetings, hearings, and submissions virtually, and resolving/avoiding some disputes remotely in toto, shall not blind practitioners from the periodical site visits' requirement emphasised by DB different rules.⁽¹⁾ The abovementioned papers discussing the importance of DB during Covid-19, and in particular the possibility of resolving disputes remotely, seems to cover an eye on this requirement, and never discussed the possibility of its digitalisation despite the recognition of its importance.

In sum, it is undebatable whether the DB procedures, excluding the periodical site visits, could or not, technically, be subject to digital transformation. The affirmative answer of this question has been part of the doctrinal consensus. Nevertheless, noting the limited efficiency of ad hoc DB compared to the standing DB mechanism, appointing a standing DB deprived of the periodical site visit feature appears to be as unimaginable as digitalising such visits. It would probably be solved by new future technologies, probably related to holograms, but today's technology is still hand-tied.

4. Scope of applicability of Due Process requirements

For due process requirements to be unequivocally inherent to any procedure, “[t]he result of [such] proceedings must be directly decisive for the right in question (see, for example, *Ulyanov v. Ukraine* (dec.), 2010 and *Alminovich v. Russia* (dec.), 2019, §§ 31-32)”.⁽²⁾ Such limitation of the scope of application of due process requirements excludes its application on several ADR mechanisms.

Contrary to arbitration and DB proceedings in which due process principles

(1) Dispute Board Rules of the International Chamber of Commerce (ICC)'s International Centre for ADR [2015] (with appendices in 2018), Article 12
Dispute Board Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) [2021], Article 10

(2) Registry of the council of Europe, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial [2022], para. 10

are directly applicable in toto (4.1.), such principle would be limited in Mediation proceedings based on the different nature of the ADR mechanism (4.2.).

Integral direct applicability of all Due Process requirements on Arbitration proceedings and Dispute Boards

Preliminarily, it is indispensable to avoid “any misapprehension that parties are entitled to absolute equality rather than equality without arbitrary discrimination”.⁽¹⁾ That said, and within the above limits, it shall be noted that New York convention on the recognition and enforcement of foreign arbitral awards of 1958 deprives, from its protection sanctuary, arbitral awards “where the arbitral procedures have violated international standards of procedural fairness”.⁽²⁾ These international standards are mentioned in article V.1.b. of this convention as follows:

The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

The same principle is underlined in national arbitration laws. The violation of due process requirements is considered as a challenge ground of the arbitral awards.⁽³⁾ The latter will clearly be considered invalid, and thus inefficient, if the due process requirements violation is proved. De juris, the judicial mission ensured by arbitral tribunals,⁽⁴⁾ the possibility of issuance

(1) Teo Jim Yang, ‘THE SINGAPOREAN RESPONSE TO ABUSE OF DUE PROCESS IN INTERNATIONAL ARBITRATION China Machine New Energy Corp v Jaguar Energy Guatemala LLC’, [2021], Singapore Journal of Legal Studies 244

(2) Gary B. Born, International Commercial Arbitration, (3rd edition, Kluwer Law International B.V., 2021), Chap. 11, para. 11.04 [A.3.d]

(3) UNICITRAL Model Law on International Commercial Arbitration [1985] (amended in 2006), Article 36.1 (a) (ii)

The French Civil and Commercial Procedural Code, Article 1492.4

Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Article 53.1(c)

Saudian arbitration law, Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD) concerning the approval of the Law of Arbitration – Article 50.1.C

(4) Charles Jarosson, La notion d’arbitrage (LGDJ, 1987) p.372

of *exequatur* on arbitral awards⁽¹⁾ fairly demands the establishment of such examination insuring the respect of the judicial procedural rights.⁽²⁾

Parallely to arbitration, however without national, nor conventional, provisions, DB institutional rules provide due process requirements. The most important two, ICC and CRCICA DB rules respectively highlights that:

ICC Dispute Board rules, article 21.6.

The DB shall act fairly and impartially and ensure that each Party has a reasonable opportunity to present its case.⁽³⁾

CRCICA Dispute Board rules, article 15.4.

The DB shall: (a) be fully responsible for the conduct of the hearing(s); (b) at all times act fairly and impartially; and (c) ensure that each Party has a reasonable and fair opportunity to present its case. No express opinions concerning the merits shall be disclosed by the DB during the hearing(s).⁽⁴⁾

Such rules ensure the required respect of due process principle on DB proceedings, notably the hearings' conduct. The failure of the respect of this principle will result to conducting unconsented proceedings which would question the validity of the DB's decision / recommendation. Practically, other than an unneeded delay, such procedure would result to nothing but a decision / recommendation followed by a notice of dissatisfaction erasing all potential effect.⁽⁵⁾

4.2 Limited applicability of Due Process requirements on mediation

(1) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) [1958]

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Article 6.1

(3) Dispute Board Rules of the International Chamber of Commerce (ICC)'s International Centre for ADR [2015] (with appendices in 2018), Article 21.6

(4) Dispute Board Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) [2021], Article 15.4

(5) Dispute Board Rules of the International Chamber of Commerce (ICC)'s International Centre for ADR [2015] (with appendices in 2018), Articles 4 and 5

Dispute Board Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) [2021], Article 3 and 4

Prima facie, mediation procedures would be considered far from being bound by due process requirements. It has been clearly determined that due process requirements apply only on “decisive”, procedures.⁽¹⁾ The answer is not that evident. Mediation has its own due process requirements.

De jure, mediation, as all other ADR mechanisms requiring the intervention of a third party to resolve the party’s dispute, requires from this party to be impartial and independent. It has been noted in Singapore Convention on International Settlement Agreements Resulting from Mediation that it considers as a ground for refusing “to grant relief at the request of [a] party”,⁽²⁾ if:

There was a failure by the mediator to disclose to the parties’ circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.⁽³⁾

The same requirement has been highlighted by several institutional mediation rules.⁽⁴⁾ Noting that impartiality and independence are primer due process requirements,⁽⁵⁾ it shall be acknowledged that even mediation proceedings have some due process requirements to respect. Missing of which the whole process of mediation would be vacant of its purpose and thus efficiency. De facto, based on the party’s trust in the mediator, they would come clean to him/her with both their weaknesses and strengths. Such trust would

(1) Registry of the council of Europe, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial [2022], para. 10

(2) United Nation Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 2018, art 5.1 (f)

(3) Ibid.

(4) Mediation Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) [2013], Article 7

Mediation Rules of the Hong Kong International Arbitration Centre (HKIAC) [1999], Article 6

Swiss Rules of Mediation of the Swiss Arbitration Centre [2021], Article 9

(5) European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Article 6.1

be clearly misled if the mediator is not impartial / independent, contaminating, therefore, the whole mediation procedures and the settlement agreement by the invalidity. The latter could be based on, the specific mediation process requirements, or the basic contracts formation theories confirming that any contract concluded based on a vitiated consent shall be considered null and void.⁽¹⁾

In sum, the non-conformity with this specific principle of due process will result to an almost total inefficiency of the mediation sole potential product: the settlement agreement.

5. The balance required for Due Process to be respected without limiting the Digital Transformation

Despite that doctrines appear to be already highly aware of the due process paranoia negative effect on the arbitration proceedings causing tremendous costs and delays,⁽²⁾ one should never underrate the effect of non-respecting due process requirements, the annulment, and thus the pure inefficiency of the whole process. In parallel, digital transformation already invaded dispute resolution mechanisms, making the determination of a balance indispensable.

As this research is limited to discussing Arbitration, Mediation, and DB mechanisms, and that it priorly concluded that digital transformation, from a technical point of view, is possible to efficiently serve in several proceedings in these mechanisms, with some limitations, the balance between digital transformation and due process requirements shall be spotlighted only where digital transformation is technically possible. It shall thus be excluded from the discussion the DB proceedings related to the site visits as they are not, today, able to be digitalised, nor expelled from the DB proceedings,⁽³⁾ equally

(1) Egyptian Civil Code, Articles 120 to 128
French Civil Code, Article 1128

(2) Remy Gerbay, 'Due Process Paranoia', [2016], Kluwer Arbitration Blog. <https://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>

(3) Supra para 3.3

as shall be undiscussed mediation cases where the mediator understands that physical meetings are required to achieve the emotional keys of the parties,⁽¹⁾ and evidently arbitration cases where parties clearly agree on physical hearings.⁽²⁾

Starting by Arbitration, noting that, without prejudice to the right to a hearing shall be respected once one of the parties request it, it is clearly accorded in institutional rules and doctrines that a whole arbitration procedure is possible to be conducted on a documents-only basis, one should analyse whether the right to a hearing means a right to a physical hearing, or virtual hearings would suffice to fulfil this due process requirement.

Given that “the oral hearing is often the center-piece of the arbitral process and will have enormous importance in the parties’ respective presentations of their cases”,⁽³⁾ hearings are destined to be the place of examination of witnesses and experts by parties, and all examined by the arbitral tribunal having the right to question any of them during the whole process of the oral hearing. Prima facie, this aim could be achieved by virtual hearings. Due process paranoia, enhanced by the fear from the other party’s procedural bad faith could, however, limit such possibility.

That said, the control aiming to preventing assistance of the witnesses and experts would seem limited in virtual hearings, affecting thus the due process requirements. It could be then possible by malevolent parties, or their counsels to affect the wetness and experts and assist them during cross examination. Such possibility enriches the due process paranoia which, by fearing such possibility, fairly impetuses arbitrators to order a physical hearing to be conducted.

(1) Supra para 3.1

(2) Supra para 3.2

(3) Gary B. Born, International Commercial Arbitration, (3rd edition, Kluwer Law International B.V., 2021), Chap. 15, para. 15.08 [Z]

In institutional arbitration, institutions could insure the reservation of a venue full equipped without any accessibility to any assist by the neutral institutional case manager. Such solution would resolve part of the issue by limiting the physical placement to the mere witness and experts.

The above reasoning would a contrario give an almost full possibility to virtual hearings in disputes non-including cross-examination to neither witness nor experts, which appears to be mistaken. It shall be equally noted that hearings serve arbitral tribunal to hear the parties' arguments and position in a clearer way, which might not possible to be ensured by any of the parties if pushed into a virtual hearing against its will. A party could just ensure a weak internet accessibility followed by a letter highlighting its inability to present its case, bolding by which the due process requirements. Which would not be limited to conducting another physical hearing, but would also cause uncontrollable delays if the tribunal keeps requiring a virtual hearing.

It could be thus summed that the limit to the virtual hearings is not bound by the aim of the hearings, but more likely by the parties' behaviour, and notably their counsels. Parties shall thus find clear incentives for their behaviour to be more directed to requesting a virtual hearing. One of such incentives could be, for example, the cost. It could be incorporated in institutional rules that, for a hearing to be conducted physically, a higher cost shall be paid. A legitimate distinction in costs could be based on the venue reservations, services, and equipment. Such different in the cost might be the carrot for the parties to choose virtual hearings, but mostly to behave accordingly.

De jure, the conclusion of arbitration agreements shall include accepting virtual hearings, or, even more efficiently, institutional rules, agreed upon by the parties in arbitration agreements, should provide that virtual hearings are the principle unless all parties agree otherwise, not merely when it is requested from at least one party to conduct the hearing physically, and unless

a physical hearing is a public policy requirement in the jurisdiction of the seat of arbitration. This could cover the missing part of the puzzle, parties' consent.

Parallely, in DB, where virtuality is an option, and thus excluding site visits, the same aforementioned reasoning shall apply.

Finally, in mediation, whether virtual meetings with a party / the parties are required or not depends on the case merits, and shall thus be determined by the mediator discretion. It shall however be noted that, in mediation, the only serious due process requirement is the impartiality and independence of the mediator. If such is ensured by the appointing authority (the institution), the question shall not be asked. A mediator shall also immediately disclose any circumstances that questions his impartiality and independence.⁽¹⁾ Not doing so shall be socially sanctioned by a potentially ruined reputation, but also might engage the mediator's civil liability. Several factors already existent shall ensure that a mediator directly discloses any such circumstances.

6. Conclusion and Recommendations

A rejection to embed the digital transformation in ADR mechanisms is comparable to both rejecting death, and new-born. It is not a matter of existence or inexistence; it is a rather of an acceptance and renovation, being updated and not staying *démodé*.

It could be legitimately stated that the current state of both legal frameworks and technology accords digital transformation in multiple situations with clear limitations caused by three main factors. First, technological achievements are still limited in some proceedings, i.e., DB visits. Second, due process paranoia and parties' malevolence ensures a higher level of unneeded reluctance from arbitrators regarding the embeddable marge of digital transformation. Third,

(1) United Nation Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 2018, art 5.1 (f)

the legal framework limiting digitalisation in some situations, i.e., requiring arbitrators to be physical persons.

One could thus recommend:

from the arbitration counsels to, first, limit parties' malevolent acts during the arbitration proceedings,

from counsels consulted during the draft of the arbitration agreements to embed digital transformation in arbitration agreements / dispute resolution clauses,

noting that the provisions of institutional rules are considered as integrally consented once chosen in the dispute resolution agreements, institutions should start amending their rules in order to make digitalised methods of conducting the proceedings as the principle, and non-digitalised ones as the exception applicable only when both parties agree on it.

national legislations would also highlight such issue in their amendments of arbitration provisions, e.g., Egyptian arbitration law is in the amendment process at the moment.⁽¹⁾

The above recommendations are however subject to further researches conducting a risk-benefit analysis on the applicability of each of the last two recommendations and their effects, and incentives that would encourage counsels to work on the first two. Law & Economics methodology would better serve such researches.

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