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Virtuous Intelligence in Virtual World – A Short Shift on Cyber Arbitration

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Abstract:

In its most comprehensive sense, information technology encompasses any use one can make of computers, because every time one uses a computer, one handles information through technology. This paper studies the relationship between information technology and the law, which follows from the effects IT on Cyber arbitration procedures.

1. Introduction

Every society is based upon communication and every major development in a society may be measured by the changes in those means of communication. From the spreading of the gospel by mendicant preachers, to fifteenth century explorers of the high seas, information was dispersed to all corners of the globe.

At first used only by the military and academia, it was not until 1990 that the World Wide Web came into being, thanks to Englishman Tim Berners-Lee who, whilst working at CERN in Geneva, implemented a hypertext system to provide efficient information access to the members of the international high-energy physics community.

2. Perplexing Complexities

“JUDEX NON CALCULAT”, goes the saying; lawyers are not at home in mathematics. The same, unfortunately, often holds true in relation to the machines that calculate for us: computers. For many very diverse reasons, the use of information technology in the legal context is still very much below its potential. It is misunderstood, mistrusted, misused, and generally considered to be someone else’s problem—with the obvious exception of specific E-commerce law and related matters. Nevertheless, technological changes have already profoundly affected legal practice. They have changed how legal information is created, how it is spread, and how it is accessed. Simple technologies like e-mail have also transformed the way people interact, and thus what people expect from each other—including what clients expect from their counsel and what parties expect from the arbitrators appointed to their case. Consequently, whatever the reason not to gain serious insight into information technology (lack of time, lack of interest, traditions, general delegation of tasks, past successes without computers, etc.), most members of the legal community would be well-advised to take the necessary steps to enter the information age.

The first aspect of enquiry is to consider the effects computers have on the law: to inquire how independent or unconnected computers changed our relationship to legal materials. The second relationship between information technology and the law that became the subject of interest dealt with the effects of networked computers, and in particular the Internet, on the circulation of information. IT caused legal information to flow differently, the most obvious example being online legal databases such as Lexis or Westlaw.

This largely unrestrained, instantaneous, and global movement of information is of course not restricted to legal information, with the consequence that the Internet is often considered to be one of the main driving factors of economic globalization.ⁱ This form of globalization in turn increased the globalization of the law (e.g. the harmonization of legal regimes and extra-territorial effects) and of dispute resolution processes.

Online dispute resolution (ODR) probably the epitome of a globalized dispute resolution process, is itself a product of computers and networks.ⁱⁱ ODR represents the third main relationship between IT and the law. In fact, it probably embodies the heaviest reliance of legal processes on IT. The main advantage of ODR is the ease of its access, which is ubiquitous, and consequently the relatively low costs generated by the procedures. However, an important finding in the ODR field is that it is almost exclusively usable for small and medium size disputes raising factually simple issues. Large international disputes are still solved essentially by offline processes of dispute resolution. More precisely, the evolution of the ODR movement has gone through a series of phases that testify to the importance of the approach chosen for the present work; promoting the use of information technology in traditional arbitration procedures is a simple extension of the ODR movement

The first reason for the ODR movement was the lack of confidence that characterizes e-commerce. Internet shoppers are in need of a dispute resolution system that relies on the same communication means that were used to conclude the transaction in the first place:

electronic means of communication. The electronic accessibility of the procedures allows these consumers to constitute points of reference, landmarks of justice in cyberspace: they may return to the place where the transaction was concluded—and thus where the dispute arose—and find a link to a dispute resolution process specifically adapted to their dispute.ⁱⁱⁱ

After this first impulse, which corresponded (and still does) to a concern of consumer protection, it was soon realized that the advantages of ODR could be used to facilitate—and sometimes actually permit—access to justice not only for e-commerce disputes, but also for all small disputes, especially when they involve rather large distances between the parties, or even different countries of residence. It was then clearly recognized that ODR is not merely a by-product of e-commerce, or even a set of tools that belongs to the broader field of cyberspace law, but a change with potentially profound implications for the entire field of dispute resolution. Indeed, electronic communications means, and information technology in general, if used correctly, facilitate almost any form of resolution of almost any dispute.

IT, if used correctly, improves the effectiveness of dispute resolution processes by simplifying information transmission and generally accelerating the proceedings. IT also improves efficiency, i.e. it reduces the costs of dispute resolution processes, in particular by limiting the need for travel. The fourth—and probably the most important—relationship between information technology and the law was also triggered by the ODR movement: this time, the focus was on the effects which IT can have on the work of mediators and negotiators. It all started during the final period of the war in Yugoslavia. As the difficult negotiations between Bosnian Serb, Croat, and Muslim ethnic factions seemed to have stalled, the United States brought in a clever and innovative IT solution to help the negotiators and the mediator reach an agreement.^{iv} They simply gathered the different factions around a digital map of the territories at stake in the negotiations.

This very detailed analysis of construction feasibility, minefield clearance operations, and boundary marking. Other typical examples are computer-assisted negotiation systems from afar, where the computer automatically carries out some of the tasks a human third party would usually have to do—such as sending reminders, proposing action plans, and suggesting standard settlement terms.^v Drawing on this example, Ethan Katsh and Janet Rifkin cast the concept of the «fourth party»,^{vi} which stands for «something that is an influence on the process of communication and negotiation, something that adds value to the third party [i.e. the mediator or the arbitrator], something that typically does not replace the third party but can displace her, in the sense that the third party operates with an ally or assistant alongside.^{vii}

This fourth party further takes the form of «applications that enhance the expertise of the third party and thus do more than simply deliver the expertise of the human third party across the network.^{viii} In other words, the third party, be it the mediator or the arbitrator, is there to help the parties solve their dispute^{ix} and the fourth party does exactly the same: it is not only an ally to the third party, but also an assistant—next to the third party—to the two disputing parties. The technology that the fourth party represents is globally developing along two main lines.^x First, very simple tools are being developed, such as red flags, emoticons, images or sounds whose goal may be compared to that of pens and flipcharts in traditional offline dispute resolution methods, i.e. to help clearly convey a message or to attract attention. Such tools also serve other, though similar functions by virtue of their automation: e.g., they may help automatically remind participants of deadlines.^{xi}

On the other hand, very complex and sophisticated technological tools and platforms are being experimented with and sometimes implemented. This use of high technology aims at a much more intense exploitation of the tools that electronic communication technology offers. Virtual workspace is one example—and in many respects an extreme one—of such complex and sophisticated tools.^{xiii} In between these two extremes of simplicity and complexity, a whole range of technologies exist, the best known being extranets and virtual case-rooms, case management websites, and videoconferencing. At this stage, it must be remembered that the fourth party is not limited to ODR or to processes that take places essentially online; ^{xiii} it can also be used in all types of dispute resolution processes.^{xiv} Much of the experience gathered in ODR is actually being exploited in the context of off-line arbitration.

The fifth and last relationship between information technology and the law, which follows from all the above, is the effects IT can have on arbitration procedures. The most prestigious arbitration institutions are currently experimenting with IT tools: the International Chamber of Commerce (ICC) with its Net Case program,^{xv} the American Arbitration Association (AAA) with its Web File scheme,^{xvi} and the World Intellectual Property Organization (WIPO) with EFAC.^{xvii} Private ventures are developing hardware and software and trying to sell them to the arbitration world,^{xviii} not to mention the various online arbitration programs developed by the Chartered Institute of Arbitrators.

3. Functions of I.T. for Arbitration

In its most comprehensive sense, information technology encompasses any use one can make of computers, because every time one uses a computer, one handles information through technology. Hence, speaking of «the use of IT in arbitration» may in fact cover a large variety of radically different actions, which collectively cover—and go beyond—the daily work of most lawyers. Such recourse to technology ranges from the use of handheld devices (such as personal digital assistants or smart phones), to simple word processing, online legal research, billing software, shared calendaring, automated interest calculation, automated conflict of interest checking, e-mailing, videoconferencing, and more exotic technologies like 3D virtual reality. But now the focus will be on issues that involve data transmission, i.e. electronic communication means that can be used in the context of arbitral procedures. The following list provides a general overview of some of the basic types of IT use in arbitration; most other IT functions (legal research aside) are derivatives or combinations of these uses:

3.1. Transmitting Messages and Files

One of the most obvious uses of information technology—beyond text editing—is the transmission of messages and documents using electronic networks. Usual technologies for this purpose are e-mails and web-based means such as web interfaces and bulletin boards.

3.2. Meeting from Afar

A thin line separates the idea of transmitting messages and files, which can be considered to take place in asynchronous fashion, from something closer to an actual meeting online. Such meetings are based on technologies such as chat rooms and videoconferences, which imply synchronous communications.

3.3. Handling Documents

Documents can be handled (in the sense that their content is interacted with) using IT with some notable benefits. For instance, the ability to rapidly search for occurrences of specific words largely increases access to the information contained in a document (and may consequently increase the probability that the point gets through to the recipient). The possibility of copying and pasting entire sections of documents is another obvious and often-used advantage. In addition, documents can be linked to each other through hyperlinks.

3.4. Creating Documents

IT facilitates the production of new documents. As suggested above, tools like «copy-paste» accelerate the process of production. Typically, in the context of arbitration, the drafting of an award involves many instances of «copy-pastes» from the parties' briefs and from documentary evidence. Moreover, IT has generated a new way of producing documents, since it is no longer uncommon that people in different parts of the world collaborate in the drafting of documents.

3.5. Managing Documents

Using documents in electronic form facilitates their management (in the sense that they are interacted with as files, i.e. as information containers), for instance because their storage is facilitated, and searching and finding a document can be significantly accelerated if the naming of the files follows a clear policy.

3.6. Managing Cases

information technology can also be used to improve the management of cases, for instance by using progress tracking software, which for instance shows at which stage a given case is, what the next expected actions are, and when the deadline is. It may also graphically show the relationships between the various actors of the case.

3.7. Visually Presenting Arguments and Facts

IT solutions such as digital slideshows, video depositions and video presentations are increasingly being used during arbitral hearings, because visual presentations, and especially graphic ones, are more memorable and clearer than purely oral presentations.

3.8. Tracking

IT has, to put it simply, an amazing memory. IT has given us the possibility to track everything that occurs on our (virtual) desktop and, with the collaboration of others, on their desktops. IT may indeed be used to record and store not only documents, but also presentations, oral statements, and videoconferencing exchanges. The advantage (and sometimes the danger) of this is that such data can be reproduced by anyone gaining access to it with perfect accuracy and at any time.

3.9. What Can IT Do For Arbitration?

The purposes of using IT in work environments are fundamentally always the same, regardless of the context in which it is used. Such technologies allow tasks to be accomplished more rapidly, cheaper, and more easily. In other words, they seek to render work processes more effective, more efficient, and more convenient. The question here is how IT can achieve these properties in the context of arbitration. The answer to this question forms the substance of the following paragraphs. It should be specified that the present section only provides a general introduction of the advantages IT can offer for arbitration.

3.9.1. Efficiency

The most obvious and acclaimed reason why IT should be used in arbitration is that it provides opportunities to reduce costs and time. The main types of costs that can be reduced relate to travel and document handling. Travel costs can of course only be reduced in the context of online meetings replacing face-to-face meetings, which is currently not very frequent. IT can provide significant cost savings in such situations. In addition to out of pocket expenses, the costs savings also include lost working time (including productivity diminution due to jetlag). Moreover, the travel-related costs of all the participants in the arbitration can be avoided, including those of arbitrators, parties and their counsel, witnesses and experts.

3.9.2. Effectiveness

In addition to such effects of acceleration of the proceedings, costs reduction and productivity gains of the various people involved in an arbitration, IT may also make certain aspects of an arbitral procedure more effective, in the sense that tasks can be undertaken—or goals can be reached—in a way that may not have been practicable without IT. For instance, in the absence of IT availability, costs and time constraints may lead to renouncing certain actions, like hearing a witness or experts who may not be quickly available, especially in fast-track procedures. This is for instance the reason why witnesses and experts were heard using videoconferences during arbitrations at the Olympics, where time constraints would have prevented their testimony if they had had to be physically present.

3.9.3. Convenience

Finally, IT may facilitate certain actions related to arbitral procedures in a way that does not concern speed, costs, or the quality of certain tasks, but that simply makes some processes more convenient. For instance, electronic documents can be searched easily using the «find» function available in all word processors. It should be noted, though, that this obviously requires the documents to be in a format where the text is recognized as such, which notably excludes documents that are scanned (for instance in PDF format) without recourse to a text recognition function and a subsequent check of the recognized text. (Although scanning briefs in image format for subsequent transmission to other participants in an arbitration obviously makes little sense, it is not unheard of). Other advantages on the front of convenience that were already mentioned above, are for instance the possibility of archiving documents easily and the ability to carry an enormous amount of files to a hearing without any consideration of their physical weight.

4. Conclusion

Document handling generates costs that can be reduced by resorting to IT:

Document reproduction: as opposed to photocopies, digital copies cost virtually nothing. This is especially beneficial for larger cases with numerous lengthy documents.

Document storage: digital copies of documents reduce the need for storage space, as a standard CD or DVD can contain thousands of files.

-Document shipment: transmitting files in electronic format, whether by e-mail or stored on a CD or DVD, rather than sending by mail or special courier (if not small van loads) of printed material around the globe can save significant courier costs.

In terms of time saving, IT-related benefits may concern the following areas:

Time for realization of tasks: specific tasks, such as hearings and other forms of meetings, but also transferring documents, can be undertaken more rapidly when appropriate technologies are used. Such technologies are for instance simple electronic communication means like e-mails for a limited number of relatively small files; more sophisticated tools such as case management websites with powerful en masse uploading and downloading facilities for larger or more numerous files; videoconferencing for hearings and other meetings such as deliberations.

Time between tasks: IT may also save time in between specific tasks, in the sense that if travel or shipping times can be reduced or suppressed entirely, more tasks can be carried out in a shorter time space and it also becomes easier for all participants to find common available periods. Consequently, the procedure will be accelerated. The same holds true for the waiting periods due to shipping, whose suppression allows more seamless workflows, thereby increasing productivity and potentially shortening procedures.

5. References

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- 6.E. Katsh and J. Rifkin, *Online Dispute Resolution. Resolving Conflicts in Cyberspace*, San Francisco 2001, p. 93 and E. Katsh, *Online Dispute Resolution: The Next Phase*, 7-2 *Lex Electronica* (2002), at www.lex-electronica.org/articles/v7-2/katsh.htm.
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- 8.Id., para. 18.

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11. See Katsh, *supra* note 6, para. 23.
12. See D. Protopsaltou, T. Schultz, and N. Magnenat-Thalmann, *Taking the Fourth Party Further? Considering a shared virtual workspace for arbitration*, *Information and Communication Technology Law*, 2005, publication forthcoming.
13. For definition of ODR, see for instance Kaufmann-Kohler and Schultz, *supra* note 2, p. 7 and American Bar Association Task Force on Electronic Commerce, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 *Bus. Law.* 415 (2002), p. 419.
14. For more developed discussion of this concept of a 'fourth party', see Protopsaltou/Schultz/Magnenat-Thalmann, *supra* note 12
15. See Section I.1 ICC – NetCase,
16. Section I.2 AAA – WebFile,
17. Section I.3 WIPO – ECAF,
18. Tools for offline arbitration are provided by the following ventures: the American Bar Association, see www.abanet.org/tech/ltrc/home.html and www.elawyering.org; NetTech, see www.nettechinc.com/lawtech.htm; Case Central, see www.casecentral.com/cc/home; Documentum, see www.documentum.com/erom; iManage, see www.imanage.com; LegalFiles, see www.legalfiles.com/main.htm, NetDocuments, see www.netdocuments.com; EliteManager, see www.eliteis.com/solutions/prod_casemanager.asp; CaseShare, see www.caseshare.com; Eversheds, see www.eversheds.com; and Allen & Overy, see www.newchange.com.