

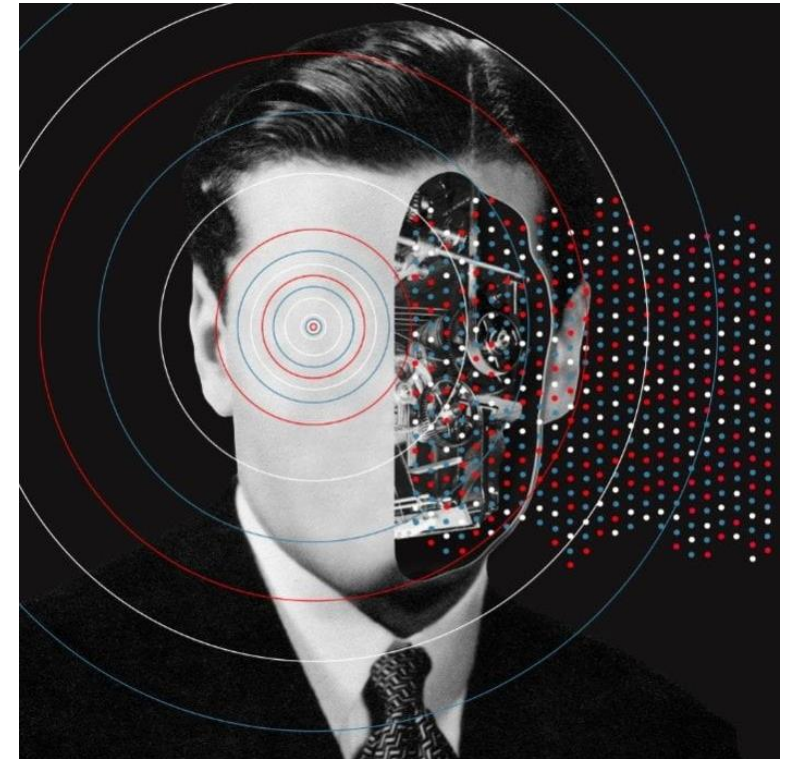
The Use of Technology in Arbitration Proceedings

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The Question

What are the technologies used in arbitration, such as for the presentation of submissions and evidence, that requires legal attention and are there any safeguards needed?



Overview

- Post COVID: Rise of Online Dispute Resolution
- Current use of technology in arbitration proceedings
- Legal issues in use of these technologies
- Are safeguards needed? UNCITRAL's Contributions
- Conclusions



Post COVID: Rise of Online Dispute Resolution



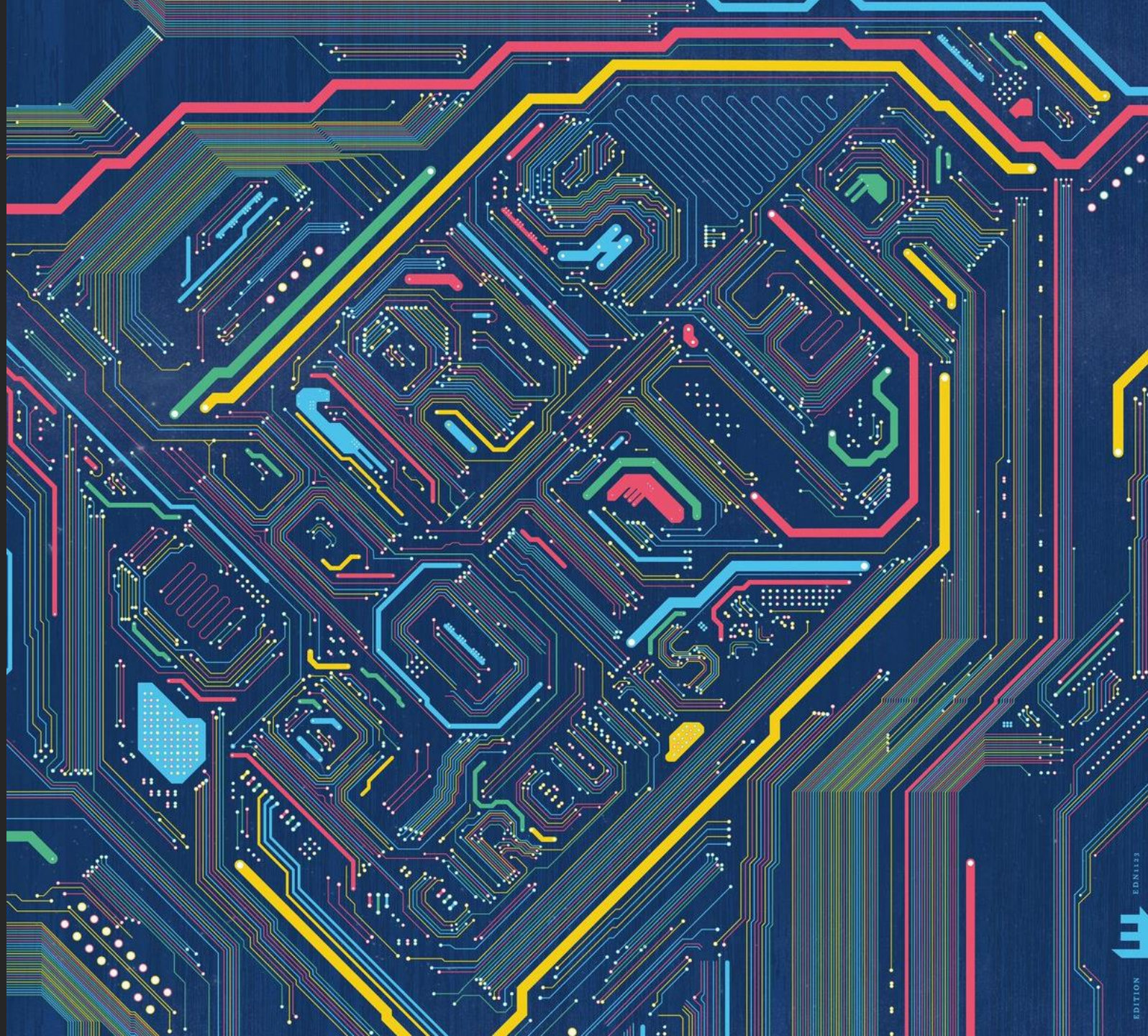
Online Dispute Resolution

- Increased internet and cellular connectivity has naturally led to the increased use of technology in legal proceedings.
- This has opened discourse on Online Dispute Resolution (ODR).
- ODR has captured the interest of policy-makers and practitioners. The UK judiciary set up an ODR Advisory Group in 2014 and China's Ministry of Justice issued guidelines in March 2020 calling for the accelerated development of China's "internet arbitration systems."

Effects of the Pandemic

- The pandemic only hastened the use of technology in legal proceedings including arbitration.
- With lockdowns in place, access to courts and physical locations was mostly restricted.
- According to figures collated by the International Bar Association, during the pandemic, filings at many arbitration centres including the SIAC (125%), HKIAC (6%) and ICC (8.86%) increased.

Current use of technology in arbitration proceedings



Current use of technology in arbitration proceedings

- Prevalent use of technology in arbitration proceedings.
- Some examples from HKIAC of video conferencing softwares used include Zoom, Webex, Blue Jeans, Microsoft Teams.
- SIAC Secretariat's guide "Taking Your Arbitration Remote" guides parties' through various considerations in deciding whether to make use of technology in their arbitration proceedings.

Guidance from UNCITRAL

- In determining what technology to use in arbitration proceedings, UNCITRAL's Technical Notes on Online Dispute Resolution can provide helpful guidance.
- According to the Technical Notes, “fairness, transparency, due process and accountability” are cardinal principles in any online dispute resolution proceeding.
- As seen from the following cases, the use of technology in a manner that leads to compromise of these principles is problematic.

Legal issues in use of these technologies



Fairness of the Proceedings

- One of the biggest challenges in using technology in arbitration proceedings is ensuring fairness of the proceedings.
- What does fairness entail?
 - Both the parties given an opportunity to present their evidence.
 - The arbitrator is fair, impartial, and independent in his handling of the proceedings.
- An example of the use of technology in circumstances that compromised fairness of the proceedings is *Song Lihua v Lee Chee Hon* [2023] HKCFI 2540

Song Lihua v Lee Chee Hon

- Hong Kong Court of First Instance dealt with an application to set aside an award granted by the Chengdu Arbitration Commission.
- During the proceedings by way of video-conferencing, the arbitrator wandered between rooms, appeared without his earphones sometimes, and at times, was talking to others.
- Mimmie Chan J made clear that under the Arbitration Ordinance's section 46, parties have to be treated equally.

Song Lihua v Lee Chee Hon (Cont.)

- Apart from treating the parties equally, it is a cardinal principle that an arbitration award can be set aside if enforcing it would be contrary to public policy.
- Looking at the evidence, Mimmie Chan J agreed with the applicant that the evidence was sufficient that the arbitrator's conduct had vitiated the fairness of the proceedings.
- Hence, the award was set aside.

“Fully-virtual”: not a problem in itself

- However, what *Song Lihua* illustrates is the use of technology in an unfair manner.
- That does not mean that there is anything inherently legally problematic in “fully-virtual” proceedings.

Sky Power Construction Engineering Ltd v Iraero Airlines JSC

- In *Sky Power Construction Engineering Ltd v Iraero Airlines JSC*, [2023] HKCFI 1558, the Court of First Instance refused an application to set aside an award simply because the proceedings were held fully online.
- The court made a number of observations:
 - There was nothing wrong with online proceedings if the legislative or procedural framework of that arbitration centre allowed for it.
 - Remote proceedings do not impact fairness in themselves. Even if there were difficulties, they were suffered equally by the parties.

Sky Power Construction Engineering Ltd v Iraero Airlines JSC (Cont.)

- Remote hearings were commonplace in court proceedings as well as arbitrations even before the pandemic and are more so after it.
- Whether it is appropriate in any particular case to permit factual witnesses to give evidence at the hearing remotely, whether the effectiveness of cross-examination can be or was undermined, whether appropriate measures are required or were put in place to ensure the security of the process, are all matters for the consideration and final decision of the tribunal.

Other issues
and
safeguards
needed



Issues in the technology

- Although previous cases show that legal issues with the use of technology are more likely to arise from the unfair use of technology by human actors, issues in the technology itself can raise issues as well.
- Concerns such as access to internet, privacy and confidentiality, and technical limitations are genuine concerns.
- The UK ODR Advisory Group's 2015 report highlighted internet connectivity as an issue for use of technology in legal proceedings.
- Newer issues are highlighted by UNCITRAL's "**Stocktaking of Developments in Dispute Resolution in the Digital Economy**".

Stocktaking of Developments in Dispute Resolution in the Digital Economy

Some examples of use of technologies in proceedings	Issues	
Video-conferencing	Need for necessary technology and internet connectivity	Safeguards to ensure confidentiality and privacy
Information search functions in documentary evidence	Unreliable search results	Costs of the appropriate softwares

Stocktaking of Developments in Dispute Resolution in the Digital Economy (Cont.): Use of AI

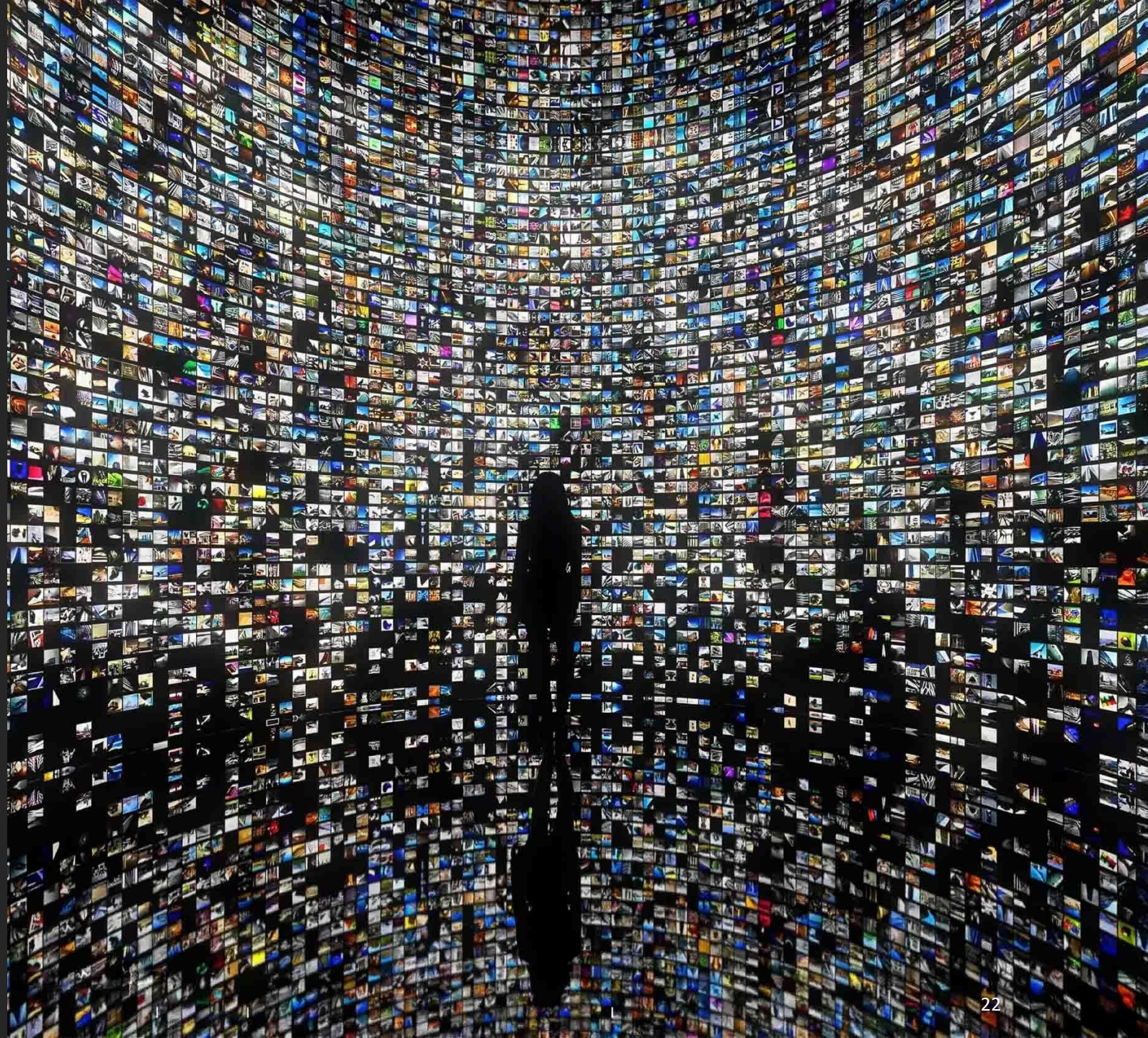
- The reports also highlight issues arising with increased use of artificial intelligence (AI).
- Regarding the assisting of arbitrators by AI softwares, UNCITRAL notes that *“Due to the confidential, complex, and non-repetitive nature of cases in international arbitration, data for AI tend to be insufficient to ensure that AI is able to deliver accurate outcomes and reasons on the disputed issues”*.
- Regarding the extremely novel situation of human arbitrators being replaced by AI software, the reports remarkably note that although UNCITRAL texts do not explicitly prohibit machines from becoming arbitrators, provisions in the UNCITRAL Model Law presupposes that arbitrators will be humans.
- However, some jurisdictions, such as the Netherlands, make it clear that arbitrators must be natural persons.

Stocktaking of Developments in Dispute Resolution in the Digital Economy (Cont.): Use of online platforms

- The reports also makes reference to increased use of online platforms including blockchain technology.
- For example, blockchain systems have been use in China to store evidence online.
- The use of online case management systems is being increased as well.
- However, for such online case management platforms to be trustworthy, accessibility, fairness, data protection and security are key.

Conclusions

- Even though the use of technology in arbitration has been increasing, the COVID-19 pandemic has hastened the process.
- Technologies such as video-conferencing have been used but use of these technologies in an unfair manner can be problematic.
- AI needs to be considered more critically in its interface with arbitration proceedings.
- The way forward requires addressing safeguards – such as those developed by UNCITRAL and ensuring technology use by human actors remains fair, impartial, transparent and accountable.



Questions

