ПРИКАЗИ

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Katia Fach Gómez,
The Technological Competence of Arbitrators: A Comparative and International Legal Study, Springer, 2023.

The COVID-19 pandemic had drastically changed the way we live and communicate, but it also changed the way we conduct business and resolve disputes.[1] The impact of the global health crisis was far-reaching, so it is not surprising that it imposed rapid changes on the arbitration as well. As a consequence, arbitration institutions, law firms, arbitration law associations, and other stakeholders have developed many guidelines, protocols, reports, checklists, commentaries, and toolkits after the COVID-19 pandemic. However, until this book, there was no comprehensive study dealing with the technological competence of arbitrators. Anyway, this book is not the authors' first one analysing the arbitrators' competences, but it represents a sort of upgrade to the author's previously published book by Springer in 2019 – 'Key duties of international investment arbitrators: A Transnational Study of Legal and Ethical Dilemmas'.

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1 See Matthew Saunders, "Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration", *Stockholm Arbitration Yearbook 2020* (eds. Axel Calissendorff, Patrik Schöldström), Stockholm Arbitration Yearbook Series, Vol. 2, 2020, 99–114.

Katia Fach Gómez is a distinguished professor of international law at the University of Zaragoza in Spain. She has lectured international investment and commercial arbitration, ADR, global law, international litigation at universities across the U.S., Europe, and Latin America. Her extensive academic career includes being a recipient of a Humboldt scholarship for senior scientists, participation in numerous European, national, and regional research projects, and authoring several books and articles published in international peer-reviewed law reviews. Prof. Gómez has been involved in various international litigation and arbitration cases in the United States and Europe and has also chaired several arbitral panels, making her highly competent and well-suited to write from her perspective and experience on the chosen topic of this book.

The topic chosen for the Special Issue of the Series European Yearbook of International Economic Law – 'The Technological Competence of Arbitrators: A Comparative and International Legal Study' – is a highly trending and up-to-date topic. In an era marked by the rapid advancement of modern technologies and artificial intelligence, where people increasingly use them for both personal and professional purposes, the importance of arbitrators' technological competence comes into focus. This book is a valuable contribution to the existing literature in the field, as it deals with the technological competence of arbitrators, enhancing the importance of digital literacy in the era of digitalisation. This book is an essential read for studying the impact of modern technologies on the arbitration proceeding.

Merely by glancing at the table of contents and the list of cited references, a reader can understand that this book is a contemporary work. First of all, prof. Gómez comprehensively explains the impact of technology on arbitration, providing insights into all stages of the process, the possibilities that technology brings, but also addressing the problems that may arise from the use of modern technologies in arbitration proceedings. Secondly, the list of references encompasses books, chapters, and scholarly papers, but also legal webs and blogs, an extensive case law review, analysis of recent surveys, recommendations for legal podcasts and webinars. Podcasts and webinars as a new form of multimedia materials are rarely cited in traditional legal textbooks and scholarly articles, so the fact that they are included in the reference list can also appeal to a younger population, for whom audio and video formats are very engaging. New generations, especially students, have a high level of technological competences, so they have already developed different research habits and are used to different ways for acquiring new information, so this book could be particularly attractive to them.

Moreover, what makes this monograph very relevant to today's practice is the choice of up-to-date literature that the author of the book refers to.

Most of the cited sources are published within the last five years with a focus on sources from the period published after 2020, when the peak of interest among academia and legal practitioners regarding these topics is reached. It is incredible that some of the analysed cases date even back to 2023, indicating the timeliness and relevance of the sources in the monograph.

The book is divided into seven chapters, and each of them will be described in more detail below.

The first chapter gives us the context and sets the structure and goals of the book. At the beginning, prof. Gómez indicates that the arbitration community had already shown interest in embracing the benefits of technology even before the COVID-19 pandemic, but that the pandemic has dramatically accelerated technology adoption in arbitration.[2] Arbitration as an alternative dispute resolution mechanism is very flexible and thus able to easily adapt to new circumstances on the market and parties' needs. In the new setting, it is increasingly appreciated in the labour market, but also hard to find a hybrid lawyer profile with both a law degree and a technical background that.

In Chapter 2, prof. Gómez explains what digital literacy and technological competence are and lists the benefits of using technology in arbitration. As the term digital literacy used in the legal context varies and the digital or technological competence are frequently used, she opted for the term technological competence defining it as 'the ability to do something well or effectively' and 'possession of required skill, knowledge, qualification or capacity'. Throughout the book, prof. Gómez argues why arbitrators are required to be technologically competent having a considerable level of technical proficiency.

The third chapter of the book deals with technological competence in arbitration from a legal and financial point of view. It describes the benefits of technologically competent legal actors in arbitration, arguing that technology improves legal productivity, efficiency, and minimises potential mistakes, prevents overbilling, fosters transparency, and provides better and fairer client service. There is a consensus that the use of technology reduces costs in legal practice. Moreover, a recent statistic shows that lawyers spend a third of their workday (2.3 hours) on billable tasks and that the rest goes to less intellectual tasks, such as office administration, communication, collections, generating and sending bills, etc.[3] It is pointed out that those tasks could be delegated to someone else or to be assisted by technology or be fully automated.

2 See Al-Karim Makhani, Sophie Nappert, Ji En Lee, Sarah Chojecki, "Chapter 3: Technology in International Arbitration: Yesterday, Today and Tomorrow", *International Arbitration: Quo Vadis?* (eds. Ben Beaumont, Alexis Foucard, *Fahira Brodlija*), 2022, 23–50.

3 See Clio, 2017 Legal Trends Report, available at: *https://www.clio.com/resources/legal-trends/2017-report/#download*, 31. 3. 2024.

In an extremely competitive arbitration community, it is less likely for arbitrators to be appointed or reappointed if they do not possess a high level of technological competence. Thus, tech savvy arbitrators can enhance their reputation on the market by being technologically competent. Further, technology can overcome a potential culture of arbitrator isolation and enhance diversity among arbitrators, opening a market for experts in less developed countries to involve in the arbitration irrespective of their place of residence.

Prof. Gómez addresses the highly trending issue regarding the impact on the environment. Namely, she argues that the use of technology in arbitration protects the environment. It is claimed that around 20,000 trees may be required to offset the total carbon emissions that a major international arbitration generates, so many initiatives, leading with „Green Pledge" were developed in order to minimise the impact of arbitration practice on the environment.[4] Those initiatives support electronic correspondence, encourage the use of videoconferencing facilities as an alternative to travel, the use of electronic rather than hard copies of documents, promoting the use of electronic bundles at hearings, etc.

In Chapter 3, prof. Gómez introduces artificial intelligence (AI). Its definition is neither unanimous nor uniform, so the author presents relevant definitions and key principles of artificial intelligence and describes it so that even a complete novice can easily follow. Prof. Gómez argues that it is beneficial when technology assists arbitrators, while it is generally viewed as dangerous and even harmful when technology replaces arbitrators. She starts the debate posing the question: "will 'pale, male and stale' become 'electronic, modern and machine'",[5] so she further deals with the possibility that arbitration disputes will be resolved by robot arbitrators.[6] The chapter is finalised with the elaboration on threats dealing with the trending issue of automated decision-making. The list of possible general risks of the use of AI is being listed, setting them into the arbitration context, including the risk of AI errors, AI bias, confidentiality risk, lack of flexibility and empathy, non-explainability, problems with award enforcement, and even the possible increased unemployment in the arbitration market. Prof. Gómez emphasises

4 See The Campaign for Greener Arbitrations, available at: *https://www.greenerarbitrations.com/sign-green-pledge*, 31. 3. 2024.

5 Veronika Pavlovskaya, "Machine arbitrators change the rules of the game", *Arbitration Journal*, 2020, available at: *https://journal.arbitration.ru/analytics/machine-arbitrators-change-the-rules-of-the-game/*, 31. 3. 2024.

6 See also Mohamed S. Abdel Wahab, "Chapter 28: Welcome to the Future: The AI Arbitrator – An Unwelcomed Reality or Science Fiction?", *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (eds. Stavros Brekoulakis, Romesh Weeramantry, Lilit Nagapetyan), Alphen aan den Rijn, 2023, 305–316.

that in order to have legitimate automated decision-making there are few steps to be made. The first one is the arbitration community's approval, then adequate regulatory changes should occur, in order to finally be able to mitigate the negative aspects that are currently attributed to non-human decision-making.

Chapter 4 gives the answer to the question of who has to be technologically competent in arbitration. The discussion starts with addressing the grey area between arbitration's organisational and administrative tasks and substantive decision-making tasks. The first ones are usually accepted as the ones which the tribunal's secretary or other sort of assistant could handle beside the arbitrators, while the substantive tasks are the ones that should be made solely by appointed arbitrators.[7] Although the previously stated generally applies, prof. Gómez cites the recent Belgian Supreme Court decision rendered in 2023 that upheld a Belgian court ruling by not annulling an award that had been partly drafted by a tribunal secretary. Further, she refers to other regulations and sources, proving that it is not forbidden for the arbitration tribunal to have an assistant, but that the level of the assistance can differ, thus justifying the assistants' help or prohibiting it.

Digital literacy became an increasingly essential skill in any profession; therefore, all legal work today requires a certain level of technological competence. The same rules that are applicable to the arbitrators should be applicable to legal assistants as well, so digital skills level should be stated in both arbitrators' and tribunal secretaries' CVs that are available to parties prior to the appointment. In this chapter, the question also arises as to whether legal assistants really need to be human, so Prof. Gómez argues the statement. Finally, she points out that the term 'fourth arbitrator' has been applied to legal secretaries in recent years, but that it is increasingly used to refer to the use of technology in arbitration today.

While Chapter 4 addresses the issue of the technological competence of legal assistants and non-legal professionals, Chapter 5 deals with the technological competence referring to the express regulation of the matter and the other duties out of which the technological competence could be derived. The digital competence of judges and lawyers in general is also discussed, so the author goes beyond the analysis of arbitrators' technological competence in this book and presents a tripartite distinction between lawyers, judges and arbitrators in order to demonstrate that they have different legal tasks and are subject to different legal regimes.

The increasing use of information and communications technology has led national legislations, as well as other stakeholders such as international

7 Katia Fach Gómez, *Key duties of international investment arbitrators: A Transnational Study of Legal and Ethical Dilemmas*, Cham, 2019.

organisations, to consider options for regulating the use of modern technologies. For example, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe has also recently developed useful guidelines on the digitalisation of justice, and other organisations such as the Hague Conference on Private International Law have also shown an interest in promoting the use of technology in the judicial context, which it further explained in the book. Different types of regulation are applicable to this matter, including soft law, hard law, and other ethical norms, which are all compared in the book.

Prof. Gómez starts her analysis with the scrutiny about the express references to judges' technological competence and possibility to derive judges' technological competence from other expressly regulated judges' duties. She refers to the obligations existing in many judges' ethical codes that judges should be persons of high moral character, integrity, and conscience who possess the appropriate professional qualifications, competence, and experience required for the court. concerned. This provision is very wide, but it could include qualifications required for the efficient conduct of the process – the efficient and cost-effective use of technology. As prof. Gómez concludes that the use of readily available technology is part of the basic skillset required of civil litigators and courts, she recommends that we should embrace technology in the current environment, i.e. doing things through technology that are outside our comfort zone.

The next topic on which the whole new book could be written is the issue of the use of social media by judges, which prof. Gómez covers in the book as well. The idea is that judges are not automatically precluded from using social media, but that they should be extremely cautious when using social media, same as arbitrators.

Furthermore, after a comparative analysis of the relevant regulation applicable to judges, Prof. Gómez diligently analysed the arbitration rules and classified them whether they possess the express references to technology as a means of achieving the arbitrations' ultimate goals – to efficiently conduct the arbitration proceedings and to eventually render an enforceable arbitration award. Again, the profound comparative analysis is given highlighting the arbitrator's duties. She starts the analysis with arbitration rules that possess provisions prescribing 'the effective use of technology', 'making use of information technology', 'optimising the use of technology', such as the 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre, 2018 DIS Arbitration Rules, 2016 Lagos Chamber of Commerce Arbitration Rules 2016. On the other hand, she argues that the arbitrator's duty of technological competence could be derived from other general principles, such as the principle of party autonomy and the discretion of the arbitral

tribunal to conduct the arbitration proceeding in a manner as it considers appropriate. Some of the provisions dealing with the broad procedural powers to conduct arbitrations confirm that these powers now have a technological component. Finally, although many arbitration rules do not encompass the duty to optimise the use of technology, it could be argued that the arbitrators should have technological competences in order to conduct the arbitration proceedings in a manner to avoid unnecessary delay and expenses and to provide a fair and efficient process for resolving the parties' dispute.

Current ethical regulations that deal with arbitrator duties are absent from an express duty of technological competence. Code of conduct for arbitrators address the main ethical challenges that arbitrators may face. However, ethical rules are very generic, so they could be widely interpreted. Arbitrators' qualifications could be divided on general qualifications meaning that arbitrators must demonstrate ability to exercise their personal qualities faithfully and with good judgement, both in procedural matters and in substantive decisions, while qualifications for special cases include arbitrators' ability to decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence.

Prof. Gómez expands the list of arbitrators' duties that can justify the existence of a technological duty for arbitrators, including new duties that are closely related to modern technologies, of which arbitrators must be aware. Among the unconventional arbitrators' tasks, prof. Gómez lists duty of confidentiality, duty to maintain cyber-security, duty to report cyber-attacks, duty to automate certain legal tasks. Finally, she divides the duties into those that can be labelled classic duties and the others that she calls next-generation duties, which are associated with the use of information and communication technology in arbitration, such as the duty to foster technological cooperation, and other duties previously mentioned.

Chapter 6 of the book is the 'heart' of the book, representing its key part addressing the most intriguing issues related to remote hearings, which are currently one of the main topics in arbitration, but other relevant issues as well that justify setting the requirement for arbitrators to be technologically competent. As an introductory part of the chapter, prof. Gómez examines various phases in arbitration procedures in which some degree of arbitrator technological competence is necessary. Further, this chapter also addresses cybersecurity and data protection, which generate a sort of transversal obligation for arbitrators.

Arbitrators increasingly come into direct contact with technology in current arbitration practice, even in the pre-appointment phase. It is undisputed that a remote hearing in arbitration cannot be held without

solid technological support and without all the participants' involvement.[8] Nowadays, there are many video-conferencing platforms available that could be used for conducting the remote hearing and serving as a useful assisting tool, while it is always advisable to have some sort of help from technical professionals during the hearing. However, the author proves that the arbitrators themselves should possess relevant knowledge and skills regarding the use of technology.

Prof. Gómez analysed and compared provisions of numerous arbitration rules, aiming to extract patterns and standards concerning the use of modern technologies during the arbitration proceedings. A detailed analysis on arbitration rules enacted even before the COVID-19 pandemic that mentioned 'modern means of communication', 'electronic means', 'video conference' was conducted. For example, prof. Gómez has analysed the 2018 DIS Arbitration Rules[9] which states prior to appointment arbitrators need to sign a declaration in which they confirm that they have all of the relevant qualifications and the ones that have been agreed upon by the parties. This provision could also include the technological qualifications, as sometimes parties would agree to conduct certain arbitration stages online. For example, case management is usually done online, so it requires both arbitrators and parties, as well as their representatives to be tech-savvy.[10] Furthermore, many arbitration institutions use their own filing platform or other kind of platforms to exchange documents, communicate with arbitrators and parties, etc, that also justify the technological competence requirement. That is even more true, as some results show 36% of respondents had participated in fully remote hearings in the first quarter of 2020 and that the percentage rose to 71% in the final quarter of 2020,[11] while another study done in 2021 shows that 72% of respondents sometimes, frequently, or always use virtual hearing rooms.[12] That is a significant difference compared to 2018 when the numbers were considerably lower, as 64% of respondents stated that they had never used virtual hearing rooms.

8 See Laura R. Zimmerman, "International Arbitration 2.0: Strategies for Tech-Savvy Proceedings", *40 under 40 International Arbitration* (ed. Carlos González-Bueno), Dykinson, 2021, 185–200.

9 See Article 9.4 of the 2018 DIS Arbitration Rules.

10 David W. Rivkin, "Chapter 2: Technology and arbitration: revisiting the paradigms of case management", *ICC Dossier No. 20: Rethinking the Paradigms of International Arbitration* (eds. Bernardo M. Cremades Román, Patricia Peterson), Dossiers of the ICC Institute of World Business Law, Vol. 20, 2023, 36–56.

11 See 2020 ICC survey, available at: *https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/*, 31. 3. 2024.

12 See 2021 Queen Mary University of London and White & Case International Arbitration Survey, available at: *https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf*, 31. 3. 2024.

An interesting part of the research was an analysis of whether arbitrators could decide to hold a remote hearing despite the parties' objections. There have also been recent examples in investment arbitration in which the holding of a virtual hearing has been supported despite one party's disagreement.[13] Also, the author points out the importance of considering the enforcement of the arbitration award when deciding to hold a virtual hearing.[14] Her recommendation is that parties consult with arbitrators before engaging in a virtual hearing to best ensure that the award is not challenged solely on the basis that the hearing being conducted remotely. Some good-practice examples, i.e. virtual hearing pre-agreement model clauses, are also provided.

As prof. Gómez concludes, many arbitrators 'fall into a large grey area between Luddite and tech-savvy', but the technological competence is excepted from every arbitrator in the digital age. She is even stating that upgraded technological competence is required, as the basic one could not be enough to manage all the possible technological aspects of arbitration proceedings.

With a recent trend of the increased number of cyberattacks, cybersecurity has become a topic of interest not only for IT professionals, but also professionals in other industries.[15] In arbitration, cybersecurity is very important as it could be closely connected to arbitrators' and lawyers' duty of confidentiality. Several law firms declared that they had experienced security breaches in the past.[16] In that sense, prof. Gómez recommends the possible measures to prevent and mitigate cyberattacks, covers the issue of the sensitive data on which other data protection regulations could be applied, etc. Nowadays, data protection is relevant to every person, regardless of what they do and in which field they operate. Thus, arbitration is not an exception.[17] The impact of the EU General Data Protection Regulation

13 See *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 and *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45.

14 See Erica Stein, "Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings", *International Arbitration and the COVID-19 Revolution* (eds. Maxi Scherer, Niuscha Bassiri, Mohamed S. Abdel Wahab), Alphen aan den Rijn, 2020, 167–178.

15 See Đorđe Krivokapić, Andrea Nikolić, "Legal Obligations and Liability in a Ransomware Attack", *Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović* (ur. Jelena Perović Vujačić), Tom III, Beograd, 2022, 173–196.

16 See the 2022 ABA Legal Technology Survey, available at: *https://www.americanbar.org/groups/law_practice/resources/legal-technology-resource-center/tech-survey/2022/*, 31. 3. 2024.

17 See Emily Hay, "Chapter 7: Data protection and international arbitration: never the twain shall meet?", *International Arbitration and Technology* (eds. Pietro Ortolani, André Janssen, Pieter Wolters), Nijmegen, 2022, 101–132.

commonly known as GDPR and other national and regional data protection laws and their influence on the arbitration proceedings are addressed in the book. As arbitrators are intensively processing data that could generate some legal consequences, it is highlighted that arbitrators should be mindful that data protection has evolved into one of arbitrators' mandatory obligations not just during the arbitration proceedings, but also after its conclusion. According to the GDPR, a controller should prepare the privacy policy containing all the relevant information regarding how data subjects' personal data are being processed and for what purpose. Also, any possible data breach should be communicated to the arbitral institution which may have its own internal policies and procedures that should be followed.

Finally, in the same section, the author provides an analysis of recent publicly known cyber-attacks in the arbitration field. These incidents show that some types of cyber incidents belong to a new generation of guerrilla tactics in arbitration.[18] Readers may also find intriguing the discussion regarding whether cybersecurity in arbitration is an administrative matter falling within the sphere of arbitral institutions' responsibility or a procedural matter falling within the sphere of arbitrators' responsibility.

Without delving into specific conclusions that author prof. Gómez addresses at the end of the book, I believe I have intrigued interested readers enough to include this book in their library. The aim of this book review was exactly to intrigue the reader's interest in the topics covered in the book, so that it can itself delve deeper into specific questions that are only briefly touched upon in this review. The book has covered a topic that is not only currently relevant, but a topic that will increasingly be of interest to all arbitrators, arbitration professors, students, and other stakeholders in arbitration in the digital age.

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18 See Edna Sussman, "Cyber Intrusion as the Guerrilla Tactic: An Appraisal of Historical Challenges in an Age of Technology and Big Data", *ICCA Congress Series No. 20: Evolution and Adaptation: The Future of International Arbitration* (eds. Jean Engelmayer Kalicki, Mohamed Abdel Raouf), ICCA Congress Series, Vol. 20, 2019, 849–868.

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