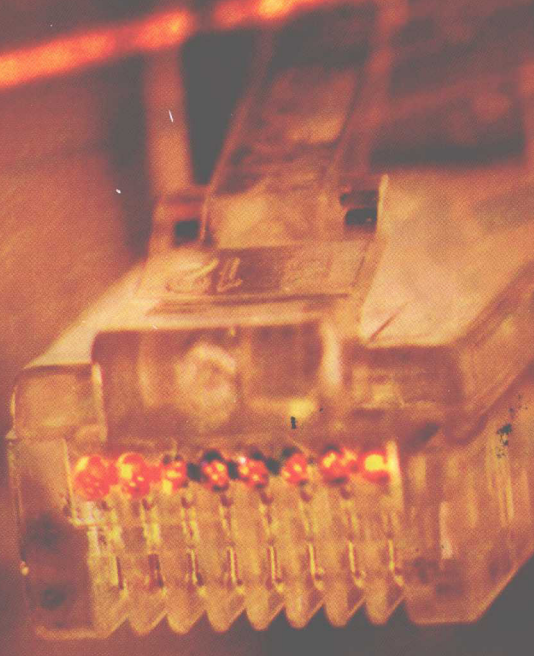
INFORMATION TECHNOLOGY AND ARBITRATION

A PRACTITIONER'S GUIDE

Thomas Schultz

Foreword by
Gabrielle Kaufmann-Kohler



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ABBREVIATIONS

AAA	American Arbitration Association
ACJ	America's Cup Jury
ADR	Alternative Dispute Resolution
AIBA	International Boxing Association
ALR	Australian Law Reports
Am Rev Int'l Arb	American Review of International Arbitration
Am U Int'l L Rev	American University International Law Review
AmLaw Tech	The American Lawyer's supplement on IT and the law
App	Application
ASA	Association Suisse d'Arbitrage
ASA Bull	Bulletin of the Swiss Arbitration Association
ascii	American Standard Code for Information Interchange
B U J Sci & Tech L	Boston University Journal of Science and Technology Law
bcc	Blind carbon copy
bmp	Bitmap format
Bus Law	Business Lawyer
CA	Court of Appeal or Certification authority
CAS	Court of Arbitration for Sports
cc	Carbon copy
CEPANI	Belgian Center for Arbitration and Mediation
CIETAC	China International Economic and Trade Arbitration Commission
Chi J Int'l L	Chicago Journal of International Law
Cir.	US Circuit Court
Com Ct	Commercial Court within the Queen's Bench Division
CPU	Central processing unit
Croat Arbit Yearb	Croatian Arbitration Yearbook
DDC	District of D.C.
D Del	District of Delaware
doc	Microsoft Word document format
EC	European Communities
ECAF	Electronic Case Facility (WIPO)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1953
ed, eds	Editor, Editors
edn	Edition
EHRR	European Human Rights Reports
EWHC	England & Wales High Court (reporter)
Fed Cir	Federal Circuit
FISA	International Rowing Federation

FRD	US Federal Rules Decisions
ftp	File Transfer Protocol
gif	Graphics Interchange Format
GnuPG	Gnu's Not Unix Privacy Guard
GPRS	General Packet Radio Service
html	Hypertext Markup Language
http	Hypertext Transmission Protocol
https	Hypertext Transmission Protocol secure
HUP	Harvard University Press
ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICC Bull	ICC International Court of Arbitration Bulletin
ID	Identity
Int A L R	International Arbitration Law Review
Int'l Arb Rep	Mealey's International Arbitration Report
IOC	International Olympic Committee
IP	Internet Protocol
IRC	Internet Relay Chat
ISDN	Integrated Services Digital Network
ISP	Internet Service Provider
IT	Information Technology
J Disp Resol	Journal of Dispute Resolution
J Int Arb	Journal of International Arbitration
J Int'l Econ L	Journal of International Economic Law
J Marshall J Computer & Info L	John Marshall Journal of Computer & Information Law
JCAA	Japan Commercial Arbitration Association
jpg / jpeg	Joint Picture Group / Joint Picture Expert Group format
Kbps	Kilobits per second
LCIA	London Court of International Arbitration
LGDJ	Librairie Générale de Droit et Jurisprudence
Lloyd's Rep	Lloyd's Report
MHz	Megahertz
MIT	Massachusetts Institute for Technology
N Ky L Rev	Northern Kentucky University Law Review
N M L Rev	New Mexico Law Review
NAFTA	North American Free Trade Agreement
NC J L & Tech	North Carolina Journal of Law & Technology
NCAIR	National Center for Automated Information Research
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
ODR	Online Dispute Resolution
Ohio St J on Disp Resol	Ohio State Journal on Dispute Resolution
pdf	Portable Document Format
Personnel J	Personnel Journal
PGP	Pretty Good Privacy protocol
PIL	Private International Law

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QB	Queen's Bench (Law reports)
RDTI	Revue du droit des technologies de l'information
Rev Arb	Revue de l'Arbitrage
RO	Official Reporter of the Swiss Supreme Court
rtf	Rich Text Format
RTMP(T)(S)	Real-Time Message Protocol, and variants
Rutgers Computer & Tech L J	Rutgers Computer and Technology Law Journal
RWS	Recht Wirtschaft Steuern Verlag
SC L Rev	South Carolina Law Review
SCC	Stockholm Chamber of Commerce
Series A	Publications of the European Court of Human Rights; Judgments and Decisions
smtp	Simple Mail Transfer Protocol
SSL	Secure Sockets Layer
Stan L Rev	Stanford Law Review
Stetson L Rev	Stetson Law Review
Swiss PIL Act	Swiss Private International Law Act
TCP/IP	Transmission Control Protocol/Internet Protocol
Tex Int'l L J	Texas International Law Journal
Tiff	Tag Image File Format
U Mich JL Ref	University of Michigan Journal of Law Reform
UCITA	US Uniform Computer Information Transaction Act
UCLA L Rev	UCLA Law Review
UDRP	Uniform Domain Name Dispute Resolution Policy
UETA	US Uniform Electronic Transactions Act
UMass	University of Massachusetts
UMTS	Universal Mobile Telecommunications System
UNCC	United Nations Compensation Commission (Iraq compensation program)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
url	Uniform Resource Locator (Internet address)
USB	Universal Serial Bus
VoIP	Voice over IP
VPN	Virtual Private Network
WBR	Dutch Wetboek van Burgerlijke Rechtsvordering
WiFi	Wireless Fidelity
WIPO	World Intellectual Property Organization
WL	WestLaw
WLR	Weekly Law Reports
xml	Extensible Mark-up Language
Yale J of L & Tech	Yale Journal of Law and Technology
Yearbook Comm. Arb'n	ICCA Yearbook Commercial Arbitration
ZPO	German Zivilprozessordnung

FOREWORD

by

Gabrielle KAUFMANN-KOHLER
Professor at Geneva University Law School

Richard Susskind, one of the earliest and most visionary scholars in the field of information technology (IT) and the law, predicted some ten years ago that lawyers would regularly use e-mails to communicate with clients.[1] Time proved him right, but, according to his own recollection, at the time the legal community thought he was 'nuts' and simply dismissed the idea.[2] Ten years later, the author's opinion on the influence of IT on legal practice has become even stronger. He writes:[3]

> The next ten years should [...] bring more rapid and far-reaching change for lawyers than the last. [...] Technology will alter the very fabric of legal life. [...] The foundations of dispute resolution will be rocked by a combination of electronic disclosure, e-filing in the courts and online dispute resolution. [T]he working relationships between lawyers and their clients will mutate beyond recognition, as they come under the one virtual roof and operate under a new order of online collaboration and communication.

The present book, authored by a recognized expert in online dispute resolution, explores a field where the impact of technology on 'the foundations of dispute resolution' is widely expected. With a resolutely practical approach, it examines the main applications of technology in arbitration, a field in which progress is likely to take place particularly rapidly due to the flexibility of the legal framework that governs arbitration.

This work fills a gap: it is the first handbook on what is likely to become one of tomorrow's incontrovertible topics in the field of arbitration, namely, increasing the efficiency of arbitral procedures with IT solutions. The evolution towards a better integration of technology in arbitral procedures is unstoppable. The extensive use of computers already permeates every aspect of contemporary business life, and arbitration is no exception to this trend. Nevertheless, arbitration practitioners frequently appear to be struggling with IT tools, either refusing to use them to any significant extent or facing technical and organizational problems, thereby missing significant opportunities to reduce costs and accelerate the arbitral process or at least their own work. Surprisingly, but maybe for reasons similar to those that triggered the legal community's contempt for e-mail ten years

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1 R. Susskind, *The Future of Law* (Oxford, OUP, 1996).
2 R. Susskind, 'Hold on to your seats, change is getting faster', *The Times*, 24 January 2006.
3 Ibid.

ago, the topic of IT in arbitration has received limited attention so far. To date, the most important work on the use of technological tools in arbitral procedures is the 2004 guidelines of the International Chamber of Commerce Task Force on IT in Arbitration.[4] However, many practitioners find them too technical and complex to be really helpful in practice. This book thus comes as a welcome contribution to the relationship between IT and arbitration.

It must be distinguished from publications on online dispute resolution (ODR). ODR is a topic that has already been the subject of much scholarly and practice-oriented writing. As the author explains, there are significant differences between ODR and what this book refers to as 'the use of IT in arbitration'. The differences are primarily the types of disputes resolved (small ones in the former, larger ones in the latter), the contexts (niche contexts in the first case, ordinary commercial arbitrations in the second), the practitioners and academics composing the field, and their understanding of the role of technology in dispute resolution and of the way IT operates. In this book, the author bring his knowledge and experience of ODR to 'the use of IT in arbitration', thereby allowing the reader to understand a set of reflections which have become relatively common in ODR but remain largely ignored in the field of arbitration. As this book shows, arbitration can undoubtedly learn from ODR.

One of the main advantages of this work is that it is accessible to persons with a limited knowledge of technology. Thomas Schultz made a deliberate effort to take the reader by the hand and lead him or her on a journey starting with simple explanations of the reasons to use IT and its practicalities, the choices made by the prevalent arbitration institutions in this regard, and the legal limits to the use of such technologies. The journey ends with a summary of these findings in the form of practice guidelines, drafting suggestions for arbitrators or parties wishing to use IT, as well as checklists and reminders to be used in practice.

The author has drafted this handbook in a style that avoids the pitfall of the dry language affecting most practitioners' guides. Anecdotes, vividly depicted examples, and interesting background information make this book an astonishingly pleasant read for a rather arduous topic.

Some may deplore the relatively narrow scope of the book. It encompasses only a specific number of technologies and a limited set of issues related to their use. The reader will not find a comprehensive guide on how to equip a law office with IT solutions for arbitration, or a manual on the use of the IT platforms of, for example, the International Chamber of Commerce or the American Arbitration Association. This limitation is a logical consequence of the approach chosen for this book, which has its own advantages. As much as possible, the approach seeks to avoid giving advice on ways to use technology that are eminently dependent on each practitioner's conception of his or her work and the ways of organizing it. The book thus largely steers clear of recommendations that

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[4] 'Operating Standards for Using IT in Arbitration' [2004] ICC Bull, special supplement on 'Using Technology to Resolve Business Disputes'.

merely reflect personal preferences and opinions and are of limited general interest. The author is mindful that there are no rules about how to use IT in arbitration, so rather than attempting to articulate any rules, he provides a *focused* insight into the IT toolbox available for arbitration. In the toolbox, the reader will find descriptions and recommendations on case management websites, videoconferencing, live notes, ODR platforms as ready-to-use solutions, and e-mail. The recommendations are remarkably accessible and easy to understand.

In sum, Thomas Schultz does an outstanding job of providing the arbitration practitioner with good reasons to resort to IT solutions, while offering sufficient advice for everyone to make up his or her own mind about which type of technology to use in a given situation and providing useful considerations on the way to use them.

This book is the product of a research project conducted at Geneva University Law School that I had the pleasure of directing in collaboration with Professor Nadia Magnenat-Thalmann, Director of MIRALab, the University of Geneva's center for virtual reality and computer science. Thomas Schultz's contribution to this project, and to this book in particular, was significant enough for him to appear as the sole author of this publication. It must be acknowledged, however, that an entire team contributed to the research.

This book is mainly for arbitration practitioners, be they arbitrators or counsel. But the well informed general public with an interest in how technology continues to shape the practice of law should also greet it with acclaim, for they will enjoy it and learn much. And there is little doubt that time, as it did for Richard Susskind, will prove the author right about the importance of the matters addressed here.

PREFACE

Since the publication of my first book, authored with Gabrielle Kaufmann-Kohler, *Online Dispute Resolution: Challenges for Contemporary Justice*, in 2004, many arbitration practitioners have contacted me to request advice on whether resorting to 'online dispute resolution' would be useful for some major upcoming arbitration in which they were going to be involved. They ask, in other words, if they should give technology a real try – and usually they also wish to know whether the effort of reading the book would be rewarded with a definite answer to their question. *Online Dispute Resolution*, the book, is not an answer to this question, but the present book hopefully is.

One may wonder what the difference is between online dispute resolution (ODR) and what forms the substance of this book. ODR refers to dispute resolution processes which take place exclusively or at least essentially online; such processes are in principle reserved for small and medium size disputes, most of which originate in e-commerce transactions. Moreover, ODR usually takes the form of computer-assisted negotiation, online mediation, and online non-binding arbitration. True arbitration, in the context of ODR, is infrequent. It is even more infrequent when large disputes are involved. This does not mean, however, that information technology (IT) is not used for large arbitrations, but it is used differently there. Such use of IT for large arbitrations is what forms the substance of the present book; it addresses various IT solutions which may be put to use in traditional arbitral proceedings. ODR and the use of IT in traditional arbitral proceedings are two different fields, which differ (up to now at least) with respect to the main types of disputes resolved, the dominant methods of dispute resolution, the principal institutional actors, the people who make up the field, and, to a certain extent, the demands made on technology.

In other words, this book is not meant for specific niches of dispute resolution, but for standard procedures. It is not about ODR, but about how various IT solutions may be put to good use in traditional arbitral proceedings. It seeks to chart progress not of online arbitration, but of the use of IT in offline arbitration.

More precisely, this work addresses the following basic questions: why use IT in arbitration? Which forms of IT (which tools or technologies) are available for use in arbitration? How should they be used? How can they be set up technically and legally? What are the main concerns related to their use, in terms of security and efficiency, but also in relation to the procedural rights of the parties?

This book is practice-oriented, and thus includes practice guidelines, provides standard forms for the use of IT, and presents the services currently offered by major arbitral institutions.

It is addressed to 'ordinary' lawyers, not to lawyers who are computer buffs in search of the latest trends in workflow technologies. It is not meant for particularly computer-literate counsel or arbitrators, but for practitioners with a standard understanding of IT. Hence, its subject matter is centered on a discussion of the more commonplace IT solutions – for example online filing, case management websites, videoconferencing, and even e-mails – and not on exotic, sophisticated and rarely used technologies. This book is not addressed either, a fortiori, to computer scientists. Therefore, the explanations and categories may not follow the traditional divisions used in computer science: rather, they seek to present the current technologies most commonly used in arbitration, addressed in a manner easily understandable to arbitration practitioners.

This work is one of the products on an interdisciplinary research project conducted at the Private International Law Department of Geneva University Law School, in collaboration with MIRALab, a center for computer science of the same university specialized in virtual reality. The project was financed by the Swiss National Research Fund, for a period lasting from late 2003 to late 2005. It gave rise, in addition to various articles,[5] to a work-in-progress publication of the present manuscript, released in a December 2005 issue of the Swiss law review JusLetter. The present text is a substantial revision of that earlier version.[6]

The project was directed by Gabrielle Kaufmann-Kohler, who practices international commercial arbitration and researches and teaches international dispute resolution at Geneva Law School and other universities. It was co-directed by Nadia Magnenat-Thalmann, Director of MIRALab and Vice-Rector of Geneva University. The research fellows associated with the project over the years were, in addition to the author, Victor Bonnin, Eleanor Loukass and Vanessa Manarin, of Geneva University Law School, and HyungSeok Kim and Dimitris Protopsaltou, of MIRALab.

A number of people have provided valuable guidance, information, and support, which proved indispensable for the completion of this book. First of all, it owes much to Gabrielle Kaufmann-Kohler, who has provided continuing support for this work and has enriched it through her academic knowledge as well as her seemingly limitless practical experience. (Nevertheless, as the formula goes, any errors remaining are unfortunately my own.) She is the most faithful and reliable director of research one may hope for and has thus naturally become a dear friend over the years. Gabrielle – thanks for your time, and thanks for providing me with the opportunity to write this book.

Many of the solutions recommended in this book were tested with arbitration practitioners, academics, and friends, who kindly offered their time and advice, agreed to share their experience, expressed their enthusiasm and doubts, and thereby helped to iron out

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5 For a list of these other publications, see <www.online-adr.org>.

6 G. Kaufmann-Kohler and T. Schultz, with the collaboration of E. Loukass, V. Bonnin, D. Protopsaltou, and H. Kim, 'The Use of Information Technology in Arbitration' [2005] *JusLetter* <www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4410&Language=1>.

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many practical inconsistencies; they included Christine Chappuis (Geneva University Law School), Pierre-Yves Gunter (Python Schifferli Peter), Laurent Hirsch (Hirsch Kobel), Brian Hutchinson (University College Dublin), Pierre Kobel (Hirsch Kobel), Juan-Carlos Landrove (Lausanne University Law School), Lorine Meylan (Lalive and Partners), Antonio Rigozzi (Schellenberg Wittmer and Neuchatel University), Silja Schaffstein (Queen Mary, University of London), Matthias Scherrer (Lalive and Partners), and Michael E. Schneider (Lalive and Partners). Their help is gratefully acknowledged here.

Among them, Pierre-Yves Gunter and Michael E. Schneider deserve special consideration, having agreed to review, and to provide insightful comments on, the drafting suggestions of the procedural order and other forms included in this book.

Many thanks also go to Eleanor Loukass for reviewing the English of this book; if it were not for her, there would be many more mistakes and stylistic infelicities in the English than in fact remain.

Further acknowledgements are addressed to the arbitration institutions that have granted copyright permission for screenshots reproduced in this book, and have provided occasional corrections of the descriptions of the services they provide. These institutions are: the International Chamber of Commerce Court of International Arbitration, in particular Ms Mirèze Philippe, for its NetCase system (Figures 24–26); the American Arbitration Association, in particular Ms Debi Miller-Moore, for its WebFile system (Figures 4–16); and the World Intellectual Property Organization, in particular Mr Erik Wilbers and Ms Eun-Joo Min, for its ECAF system (Figures 17–23).

Thomas Schultz
Cambridge
March 2006

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