Kluwer Arbitration Blog

Pandemic Arbitration: A Time to Sow?

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The impact of the pandemic on arbitration has been the subject of several posts on this Blog (see here and here). Rightly so, this is a seismic event in history that certainly has shaken the dispute resolution process, both state sponsored judiciaries as well as arbitration tribunals and practice generally. Entities which fall victim during this time may need to pivot from court proceedings to get their cases heard as courts are struggling with their dockets and may not be equipped with the flexibility arbitration or other ADR can offer to bring their matters to resolution quicker and hopefully less expensively.

It is also a time to give arbitration a new think and stakeholders should consider to devise creative ways to accelerate the pace of improvement of the process; to push new streamlined measures not only to quicken the arbitration timeline from filing to award, but also make arbitration such that it is even more user friendly and far less expensive. This is likely an (ironically) opportune moment, a historical transition time from pandemic to immunity of some sort. In the dispute resolution market, one would hope that arbitration stakeholders would use this time to innovate and indeed capture a larger share through the appeal of arbitration which by definition can more easily absorb new technologies and new protocols and other rules about speed and expense. Indeed, the pandemic can be the very catalyst for exploring and implementing new ways to attack trouble points and issues in dispute resolution in general and, perhaps, in arbitration or ADR deal with "issues that need fixing" more quickly than in disputes in the public state courts which have built-in conflicts with social distancing. And it seems the economics of the arbitration process should begin to tilt more to the consumers of arbitration, the parties.

Starting Basics

The obvious starting point is embracing the best technology and adapting it such that it brings ADR to its laudable goals of being a real, genuine alternative to the court process by being truly faster, less expensive, and conducted by those with at least some modicum of expertise. This process should welcome in depth consideration of introducing new technologies such as artificial intelligence, ledger technology, smart contracts, in addition to the latest video and remote technology, allowing arbitration

to be both travel free and print free. The merits hearing, considered to be the most difficult to change from the physical and in person, has already evolved during this time by going "virtual" today in many disputes. This has proved to be a solid substitute if not an improvement in many situations, where the tribunal can see the witnesses up close, no need to twist your neck to decipher a demonstrative exhibit, and actually there is more straight forward cross examination. Virtual hearings may indeed prove to be a major significant improvement, saving time, expense, and travel and be here to stay in many situations, and perhaps become the default choice.

The US Supreme Court: Arbitration Is Flexibility and Innovation

Thirty-five years ago, the US Supreme Court delivered perhaps its most famous arbitration decision to date, and certainly its most groundbreaking at that time in the sense of it being a call to innovation. In Mitsubishi v Soler, 473 US 614 (1985), discussed here, a case decided at the very dawn of modern international arbitration as we know it today, the US Supreme Court was presented with the issue as to whether international antitrust or competition cases were even arbitrable under the New York Convention and the U.S.'s corollary legislation, the Federal Arbitration Act. Many may not grasp the importance of that decision and prescience of Justice Blackmun writing for the majority, as arbitration had little track record and the Court was somewhat writing on a blank tablet. Yet the Court, in holding these cases arbitrable, was willing to take the chance in some respects to give the discipline the jump start to move where it is today. The Court stated "the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration." 473 US at 638 (emphasis supplied). In response to the argument that competition cases are too complex for arbitration, the Court said that argument actually proves the point, that because the cases may be complex, that they are the perfect candidates for arbitration as "adaptability and access to expertise are hallmarks of arbitration." And "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." 473 US at 633.

Thus, none other than the US Supreme Court has stated to the arbitration world that arbitration, as opposed to the courts, may be a smart alternative, with its built-in flexibility for innovation and informality, to develop a product that evolves with conditions for a simplified, less expensive process to streamline the resolution of disputes. The green light for this creative adaptation came when the Court said the parties really trade up in having their complex disputes arbitrated by "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 US at 628. The opportunity during this bleak pandemic should be seized by arbitration stakeholders to put in place a new improved process that consumers will see is as "faster, smarter, and cheaper."

There is already some movement in this direction, but the stakeholders and other

individuals and organizations should not lose this opportunity to take this farther. Many of the major arbitral institutions and organizations have issued "guidance notes" or other protocols to provide their suggested best practices to counsel and arbitrators as to how best resolve disputes that come before them during these days when social distancing is the most effective health strategy. The point is these guidance notes can be the very springboard to make long lasting streamlined improvements in arbitration. (e.g., The Seoul Protocol on Video Conferencing in International Arbitration).

The Crisis as a Time to Sow

The most widely pushed development is the concept of virtual arbitration via a video conferencing platform which in fact has been used is some form in arbitration for decades; video conferencing, even telephonic proceedings, have been prevalent for years and serve to make the process cheaper, more expeditious. Moreover, today videoconferencing and telephones will also significantly serve to avoid the heavy carbon footprint in travel and print and in addition save time and expense. That we see daily webinars and the guidance notes from institutions and protocols on virtual arbitration is a welcome development as this will keep the arbitration process moving seamlessly, as opposed to stop/starts in many court proceedings, during times when distancing is recommended.

Although arbitration has been virtual in part for a long time and has utilized the technologies in place at the time, one should not forget Justice Blackmun's message, that the process has as its very foundation a flexible and nimble form of dispute resolution that is less expensive and quicker, and done by persons of the parties' choosing, not by elected or appointed state officials, yet enforceable by the state. Arbitral institutions and stakeholders should use this time to craft an even better virtual proceeding as live in person proceedings are less of an option, parties' legal spend budgets are even less during this time, and perhaps most of all, as noted above, the virtual proceeding is proving in many respects to be equal to or superior to the live proceeding (just like the recent literature that a video bench trial is more robust than a live one). Of course, the important environmental and cost savings in avoiding travel, printing, and the like must always be a key driver as well.

Examples abound in ways the stakeholders can use this crisis as a jump start to a higher, more efficient, quicker, and cost saving plateau, including the overall digitalization of arbitration. Online dispute resolution has been around for years and has evolved its technological bandwidth perhaps up to now more than traditional ADR process. Additionally, already many arbitral rules allow summary disposition of certain defenses and claims, allowing the process to be shorter, simplified, and less expensive. Likewise, rules can be amplified to allow for the consolidation of arbitrations with common issues and common parties, such as seen in SIAC Rules. Arbitration rules should consider affording flexibility in allowing arbitrators, especially in the complex case, to deal with issues in phases if to do so will lead to a faster resolution and even enhance the chances of settlement. SIAC itself has just announced it will use this time to update and improve its rules "to consider revisions dealing with multiple contracts, consolidation of claims and joinder; expedited procedures and emergency arbitration;

appointment and challenge of arbitrators; tribunal powers including early dismissal; new technology and new procedures; and general trends in international arbitration rules."

Conclusion

Consider using this time as a time to quicken the process and develop default "presumptions" to that end; in that way, hopefully, the economics in arbitration will greatly improve to favor the consumer of the service. Develop a process that presumptively calls for virtual proceedings and that incentivizes a mandate for page limitations on submissions to moderate counsel and arbitrator time. Consider a process that incentivizes restrictions on far reaching discovery, number of witnesses and experts, perhaps a default to a sole arbitrator, and encourage page limits on awards, which many times can run to encyclopedic proportions. These "presumptions" or incentives, to be sure can be overcome in a certain case with a proper showing, but the time is ripe to develop an even more streamlined, simplified process to cut expense, cut the carbon footprint, and cut the time from start to finish.

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