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Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?

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Travel and other restrictions due the COVID-19 pandemic have meant that virtual hearings have become the "new normal" for international commercial arbitration, and even perhaps for investor-state arbitrations. But what are the longer-term prospects for virtual hearings or "e-arbitration" more generally, and even for the relative popularity of arbitral seats, in the wake of the pandemic?

Back in March, during the early phase of the pandemic, Gary Benton suggested that some arbitration filings and hearings would be delayed, with conferences or meetings often being cancelled. He also saw the shift already to remote hearings a "sea change" that could be a turning point in bringing online dispute resolution to international arbitration. Four months later, we can take stock and consider some further predictions.

Proliferating Webinars

Larger arbitration-related events have mostly indeed been cancelled or deferred, or occasionally moved completely online, but we have witnessed a plethora of webinars offered by arbitral institutions or associations. At least so it seems. It could be rather that we are more aware of such seminars ("availability bias") or want to join even online community events during our worrisome times, quite apart from the intrinsic importance of their subject matter. Many webinars have in fact focused on the logistical and legal aspects of virtual hearings. These all typically cover the common question of whether arbitrators can require a virtual hearing even if one party objects. Some also touch upon the interesting conceptual problem of whether they can do so even if all parties prefer to await a physical hearing.

Interestingly, such webinars, and sometimes other expert-led discussions or virtual networking opportunities, are almost always free of charge, thereby expanding accessibility for the younger generation or those from lower-income countries. This makes us wonder why pre-pandemic arbitration-related events were quite often charged for, especially the larger ones, directly or via annual fees for members. Was that to defray the costs of refreshments or physical venue space, and/or because participants pay more for the opportunity for networking in person? It is also intriguing to compare how active different institutions are in offering webinars, their scope, and diversity in the presenters. The Asian International Arbitration Centre in Malaysia has recorded remarkable numbers and breadth, out of 49 events over April-June, with videos also uploaded via

Facebook.

Another great benefit of the webinars is that many are recorded and then made publicly available. This provides a valuable and enduring resource not only for arbitration practitioners, but also for learners and researchers. Yet, will this endure beyond the pandemic, or will future webinar content start to disappear behind members-only paywalls? Arbitration institutions and organisations need to fund their activities. The Australian Centre for International Arbitration (ACICA) has reduced registration filing fees for arbitrations over May-October 2020. But the Australian government's comparatively large support package for pandemic-affected businesses is scheduled to be phased out from October.

Alongside the many webinars around virtual hearings, many organisations are issuing provisions or guidelines on how to manage "e-arbitrations". Many of those, and a brief overarching Joint Statement on "Arbitration and COVID-19" issued in April by major arbitral institutions to urge flexibility and collaboration, are listed (at pp. 4-5) in a Protocol for Online Case Management in International Arbitration. This Protocol was released for public consultation by consortium of large international law firms in July 2020, although an earlier draft pre-dated the pandemic.

Such documents are often more detailed than some early initiatives, which flew largely under the radar in the pre-COVID era. For example, the world-wide arbitration community seems to have been largely unaware of or uninterested in the ACICA draft Procedural Order for the Use of Online Dispute Resolution Technologies, finalised in 2016 and now being updated. There was some wider commentary (including on this Blog) around the Seoul Protocol on Video Conferencing in International Arbitration, unveiled in 2018 for discussion at the 7th Asia Pacific ADR Conference, but hardly any detailed analysis in the main refereed arbitration law journals.

Long-term Legacy from E-Arbitration Experiences

Nonetheless, if and when this pandemic passes and travel restrictions ease, what will the long-term impact of this dramatic shift towards holding virtual hearings and meetings in and around international arbitration be? The most optimistic view is that stakeholders will realise that it is possible to embrace new approaches that can dramatically reduce delays and especially costs – concerns that had re-emerged over the last decade – despite the growth of arbitration around Asia, which otherwise promises a lower cost base for services compared to Europe and North America. Parties may therefore push their lawyers, arbitrators and arbitral institutions to adopt other procedures to make arbitration more time- and cost-effective.

Some procedures are already found in most Rules, such as documents-only arbitrations, but perhaps only as an option after proceedings commence. Other innovations are only found in some or none, such as Arb-Med (allowing or even requiring arbitrators to actively promote settlement) or the 2018 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration as an alternative to the IBA Rules on evidence-taking. The JCAA's Interactive Arbitration Rules 2019 (Article 56) already go beyond the Prague Rules by requiring the tribunal to express preliminary views on key facts and legal issues before deciding on whether to hold hearings, rather than just trying to reduce challenges around the neutrality of arbitrators choosing to do so (Prague Rules Article 2.4).

However, a second possibility is that lawyers in particular will resist such further innovations. This may be because lawyers become very risk-averse when it comes to their own clients, and carry over such conservatism when serving on Rules drafting committees or boards of arbitral institutions. They (and some arbitrators) may also suffer from "change fatigue", after being forced to move to virtual arbitrations during the pandemic this year, and even be worried about associated declines in fee revenues. Nonetheless, especially if the travel restrictions continue for many more months or even years, so many (including users) gain knowledge and experience concerning virtual hearings, these may indeed become the norm rather than exception – at least for smaller and mid-sized international arbitration proceedings.

A third scenario, also quite possible, is a partial but significant "reversion to them mean" – to physical hearings and even some paper-based arbitrations. There may be similar supply-side pressures and incentives pushing in that direction. On the demand side, at least some users (perhaps more risk averse and/or occasional parties to arbitrations) may also be willing to pay again a premium for that more traditional style of arbitration.

A fourth and most pessimistic outcome would be a complete reversion to the (current) norm, with virtual hearings becoming again an exception. This seems improbable, given so much "show and tell" already regarding e-arbitrations. Yet it is not completely inconceivable. Many disaster studies show how communities do largely go back to the comfort of old ways. International arbitration also retains a built-in advantage over litigation as a potential competitor, given the enforceability of arbitration agreements and awards under the New York Convention – with little uptake yet of the 2005 Hague Choice of Courts Convention, despite the recent establishment of various international commercial courts. The 2018 Singapore Convention on Mediation will only come into force from 12 September 2020, for a few smaller economies, and anyway does not cover enforcement of agreements for cross-border mediation. In addition, the confidentiality still often associated with arbitration, but with variants for example around the Asia-Pacific region, is a double-edged sword. It can encourage more robust decision-making in arbitration. Yet confidentiality can also make it harder for users to assess the quality of services provided by lawyers and (perhaps now less so) arbitrators, and thus reduce the incentive for them to maintain innovations.

Long-Term Legacy for Arbitral Seats

A related question is: what will be the impact on arbitral seats, including across the Asia-Pacific region? One possible scenario is a dramatic shift, because physical hearings often took place at the seat (although this was not required, and a different location could be agreed upon), but virtual hearings are essentially delocalised. More geographically remote seats, like Australia or even Japan, may become a more attractive choice.

However, a second outcome seems more likely: these seats will become more popular if their local courts are similarly capable of holding virtual hearings and generally managing proceedings remotely. This aspect will be crucial in the short-term, where for example parties may need to approach seat courts for assistance in their arbitrations (e.g., for interim measures or, more rarely, arbitrator challenges). But it will also be important if and when the pandemic passes so such approaches can be done again in person. In particular, the seat's court experience itself with virtual hearings (including for regular litigation) may colour its assessment of any challenges relating to due process during an e-arbitration, even at the award enforcement stage. This suggests that more

geographically challenged seats may gain in popularity in the subset of jurisdictions where courts are well-funded and/or organised for information and communication technology – including perhaps Australia, say compared to Japan.

A third scenario is an even more subdued relative rise in popularity or diversity in arbitral seats. Some emerging jurisdictions may even see a reversal in fortunes, if for example their courts are less open for virtual hearings. Broader political developments, perhaps related to the pandemic but not necessarily, may also dwarf much significant shift in arbitral seat popularity related to the current emergence of e-arbitrations. A case in point is the renewed upheaval in Hong Kong – a new version of "big trouble in little China".

The fourth possible scenario is also quite plausible: no significant change in relative popularity of seats. After all, arbitral institutions and practitioners across all credible arbitral seats are all busily presenting themselves as viable candidates in our brave new COVID-19 narrative world. Pandemic responses provide a new field for arbitral institutions to engage in a curious and evolving mixture of cooperation (to keep expanding the arbitration pie) and competition (trying to gain a bigger slice). Surveys and other research also tell us that many factors impact on the choice of seat, even path-dependence or "status quo bias". More broadly, entropy may be particularly common in legal environments.

In conclusion, the prognosis is further complicated because the long-term legacy for international arbitration from the two main questions raised above, each generating four possible scenarios, are clearly inter-connected. They are worth thinking about as the COVID-19 pandemic keeps unfolding, even though as various sages (including possibly Niels Bohr, Mark Twain and Yogi Berra) have warned us over the decades: "It's tough to make predictions, especially about the future".

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