Kluwer Arbitration Blog

Advocacy in Transnational Disputes: Seizing Opportunities the Pandemic has Revealed

Joseph Matthews · Tuesday, April 12th, 2022

One of the leading scholars in international dispute resolution today is Sundaresh Menon, the Chief Justice of the Supreme Court of Singapore. In March of 2021, he delivered the opening address at the Singapore International Commercial Court Symposium. As part of his welcome delivered virtually, he made some interesting observations:

> History informs us that while pandemics of the past have largely been harbingers of destruction, they have also been agents of much-needed change. The Black Death, for example, swept through Europe in the 14th century and wiped out as much as a third of the world's population. Yet, out of the ashes of that tragedy came the emancipation of millions of indentured labourers from serfdom as the sudden and severe depopulation caused by the plague dramatically raised the demand and wages for labour. The point is that some good can, and often does come out of the destruction and disruption wrought by crises. And there is one crucial difference between the situation then and now. Unlike our forebears, who were the unwitting victims or beneficiaries of forces beyond their comprehension and control, we enjoy an unprecedented level of access to data, information and technical know-how which affords us an unmatched ability to identify and seize the opportunities uncovered as the dust settles.

The Chief Justice then presented the following challenge:

> If international dispute resolution were likened to a sturdy tree, then the long winter which the pandemic has ushered in seems the perfect time for the work of pruning it, discarding the dead branches of outmoded processes and procedures, so that we might make way for the growth of new and more productive sprouts in the coming spring.

His challenge is the theme for this post. It is, of course, premature to fully evaluate the impact of the pandemic on the institutions of international commercial arbitration or to propose major changes to its functioning parts. But one significant and obvious impact that can and should be

analyzed now is the forced transition from live, in person evidentiary proceedings, to their virtual counterpart.

How well have we performed so far employing virtual meeting room technology in response to the pandemic? From my personal observations, commentary in the blogosphere, and information I have been able to obtain from colleagues, arbitral societies, and arbitral institutions, I would give us interim grades ranging from “A” to “F” with a very unscientific average grade of between C and C+.

There has been no shortage of analysis related to the legal and practical issues arising from use of remote procedures since the pandemic began in March 2020. I count more than forty articles on the Kluwer Arbitration Blog alone, since April 2020. This does not include the dozens of articles published by practitioners on firm websites and the arbitral forums and credentialing organizations have contributed new rules and guidelines.

Kluwer responded with remarkable speed by compiling and publishing a series of articles edited by Professor Doctor Maxi Scherer, Niuscha Bassiri, and Mohamed Abdel Wahab, into a book entitled *International Arbitration and the COVID-19 Revolution*. The Authors address a wide range of issues, from the mechanics of secure electronic filing to the legal framework for conducting virtual hearings that assures the fundamental fairness required of all dispute resolution processes. Chapter 7 surveys the experiences of users with virtual technologies.

Chapter 7 is authored by Gary Born, Annaliese Day QC, and Hafez Virjee. 201 participants in international arbitration were surveyed and 106 responded to the survey questions between June 10 and July 6, 2020. Thus, the survey responses ended just 5 months after the World Health Organization first declared the pandemic. The results of this early survey reinforced the preference of existing users for live evidentiary hearings over virtual evidentiary hearings, while acknowledging the significant increase in the number of preliminary scheduling conferences conducted virtually in the months immediately following the declaration of the pandemic.

Just recently the College of Commercial Arbitrators published the results of a survey it conducted among its 250 members, all of them experienced arbitrators engaged full time in service as neutrals. 137 Fellows responded and their responses were based on actual experiences in more than 500 remote video arbitrations, of which the majority were fully virtual. The results were preliminarily summarized as follows:

> Overall, virtual proceedings were viewed very positively. The reasons for and benefits of virtual proceedings go well beyond avoiding pandemic related risks and problems and include efficiency, cost savings, and more expeditious scheduling. In general, there were few if any major negative impacts on the process or participants of conducting virtual proceedings with the exception of a minority but consistent view that virtual hearings impacted the assessment of witnesses. It is a reasonable inference from the survey that arbitration clause, institutional rules and laws should be revised where necessary to explicitly authorize virtual hearings where the parties agree or where the arbitrators order them.[1)]

The major commercial arbitration institutions are not yet tracking and releasing data to indicate

how many cases under their administration are being conducted virtually, but I hope they will. My own experience since March 2020 was probably not unique. I was serving either as sole or one of three arbitrators in eleven active arbitration cases. Five of those cases had been scheduled for live hearings between March 2020 and March 2021. We held status conferences in all cases and by summer 2020, the parties in two of those cases agreed to reschedule final evidentiary hearings to be conducted virtually. Eventually all but one of the cases where I was serving as an arbitrator were reset for virtual evidentiary hearings by agreement, or the tribunal entered orders requiring it. To my knowledge, no such order has resulted in a court challenge to an award.

The first of these cases is illustrative. It went to virtual hearing on Zoom in November 2020. It was a complicated construction case with thousands of exhibits and involved testimony from 15 witnesses, most located in the Caribbean since the project was in Jamaica. The proceeding consumed ten full evidentiary hearing days, followed by a day of closing arguments in early December. I entered my Award before year-end. The parties reached a resolution based on the Award and it was not necessary to submit cost applications. The quality of the advocacy was exceptional. The technical Zoom hosting services were provided by a transcription firm that also provided software for receipt and organization of exhibits. Counsel and the transcription firm would receive an A from me for their work. They were excellent. Between November 2020 and November 2021, I participated in forty-five days of virtual evidentiary hearings in five separate arbitration proceedings. I also conducted several mediations by Zoom. There were some difficulties but they were not significant.

There are groups like the College of Commercial Arbitrators in the US and the Chartered Institute of Arbitrators in the UK that are constantly developing and revising best practices in arbitration generally and specifically virtual arbitration proceedings. But many in the international arbitration world are already beginning to argue it is essential for the international dispute resolution world to "get back to normal" as soon as possible. Some senior counsel and some arbitrators have only reluctantly participated in virtual proceedings and have no intention of seriously attempting to "re-tool" their skills for an arbitration process that facilitates greater use of virtual proceedings.

When data are collected that permit us to evaluate how virtual technologies performed, I predict users of international commercial arbitration will demand that providers and professionals make international arbitration services available virtually when the pandemic is in the rear-view mirror. There is already anecdotal evidence of this. For example, Lara Nicholls from Shell, is actively promoting within Shell and externally, a litigation virtual hearing pledge. She says it will be a simple (but hopefully effective) statement:

> We pledge where ever feasible to promote virtual rather than in person hearings.

Shell's commentary references many benefits that are being realized by the pandemic forced transition to online proceedings, but emphasizes the environmental benefits, the cost savings, and the positive impact on more diverse participation in arbitration and mediation. The commentary notes that although the Pledge is initially intended as an internal litigation Pledge, in time the expectation is that it will be adopted by Shell's panel Law Firms as part of Shell's "We Care" principles and, eventually, incorporated into the existing industry wide Campaign for Greener Arbitration pledge.

Freshfields Bruckhaus Deringer recently published its annual review, *International Arbitration 2022* and concluded as follows with respect to virtual proceedings:

> On the procedural front, the main question is whether remote hearings that have flourished during the pandemic will remain a more permanent fixture of the arbitration landscape in 2022 and beyond.
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> …
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> Overall, virtual hearings have worked well, while aligning with the ESG goals of companies and law firms. Some companies have even started to adopt policies requiring virtual hearings by default and law firms, such as Freshfields, have committed to further limit their carbon footprint by reducing travel and paper usage.
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> For these reasons, and due to persistent volatile travel and health restrictions, the trend towards remote hearings will likely continue in 2022 and outlast the pandemic. Remote procedural hearings will become the norm, with the cost of travelling for smaller hearings becoming increasingly harder to justify.
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> Remote merits hearings will also likely gain momentum for a wide range of cases as we continue to adapt to new skills and techniques and become more comfortable with the virtual environment. We also expect to see an increase of 'hybrid' hearings combining elements of in-person and virtual hearings in cases where parties are not comfortable with purely virtual hearings.

So, what are the reasons for resisting virtual proceedings? As we consider some of the most common objections to virtual evidentiary proceedings in international commercial arbitration, I am reminded of what in a 2013 presentation to the Bar of Ireland, I described as the four stages of disruptive technology in the legal profession. The first stage is resistance, the most stubborn and effective resistance coming from the most senior participants. The second stage is trial-and-error. During this stage, those who experiment with new technology and fail are criticized, often severely, by seniors opposed to the change. The third stage is acceptance and mainstreaming of the new technology. This is not uniformly good. Sometimes, people fall in love with technology that betrays them, or they adopt good technology but fail to properly implement it. The final stage is the smart application of good new technology. It is important to get from stage three to stage four quickly and it is important for older technologies that remain effective to be retained alongside newer technologies. Many transitions suffer reversal of hard-won gains during stages one and two because they take too long to smartly apply new technology and decide what will remain of the old.

The forced adoption of virtual technology during the pandemic demanded that we ignore the resistance stage and speed through the trial-and-error stage with lightning speed. When a few early users of Zoom were embarrassed by having a confidential hearing bombed by outsiders, Zoom turned off features that were previously controlled by default settings and the objections largely dissipated in the face of pandemic induced demand.

There is also the objection that it is not possible to provide the same quality of decision-making if arbitrators are not able to observe witnesses in a live setting while they are being cross-examined

and when advocates are not in the same room as arbitrators. I call this the “watch them sweat” fallacy. I find this objection particularly unpersuasive in international arbitration and was pleased to read the recent post on this blog by Danielle Gonzalez Reyes reporting on the successful virtual Inaugural Edition of the Cross-Examination Moot.

There are, of course, unfortunate consequences of virtual arbitration hearings. We humans are social animals. I believe that dispute resolution is performed best and most fairly when it takes place in a social setting. It is this admission that reminds me to mention one of the most important principles of dispute resolution based on an adversary process. It is messy. It is imperfect. It cannot innovate and will not thrive if the perfect is permitted to be the enemy of the good. And more importantly, what we tend to think of as the perfect, is often a false profit. It is simply what we have come to think of as essential for international arbitration. As Chief Justice Menon challenged us, we need not accept that international dispute resolution had reached its zenith before the pandemic.

I hope that we will come to view this moment as an opportunity to permit access to international arbitration for millions of people who were not able to resolve their disputes this way prior to the pandemic. I hope that we will embrace the use of virtual meeting room technology and related technologies as part of what CJ Menon encouraged as “discarding the dead branches of outmoded processes and procedures, so that we might make way for the growth of new and more productive sprouts in the coming spring.”

Joe Matthews is an arbitrator and mediator. He graduated from the University of Miami School of Law in 1977. He is a Fellow and Chartered Arbitrator, Chartered Institute of Arbitrators, and a Fellow of the College of Commercial Arbitrators. He teaches Advocacy in International Dispute Resolution at Florida International University Law School. This blog post is a condensed version of the guest lecture he delivered to the LLM students at University of Stockholm Law School, Master in International Commercial Arbitration Law (ICAL) – March 24, 2022.

References

?1 Readers who would like to see the CCA Survey results and summary may email the author of this blog post at joseph@jmatthews-pa.com

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