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Viral Changes in ADR During the Pandemic

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Predicting the Future: International Arbitration in the Wake of COVID-19

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The COVID-19 pandemic has had a profound impact on all of us. Most tragically, it has already resulted in the deaths of more than 400,000 people around the world,[1] including more than 100,000 Americans,[2] of whom more than 30,000 were our fellow New Yorkers.[3] The pandemic—and the global stay-at-home orders put in place to control it—have also caused widespread economic destruction, with businesses failing and millions in America and around the world out of work on a scale not seen since the 1930s.[4] In addition to this devastating human and economic toll, the pandemic has fundamentally changed, in countless ways, the manner in which we live our lives: the way we socialize, the way we educate our children, and, of course, the way we work.

For those of us who practice in the field of international arbitration, the pandemic has accelerated certain trends that began before its arrival—particularly with respect to the use of technology to conduct aspects of the arbitration process remotely, via videoconference or telephone. Like lawyers in many other fields, international arbitration practitioners are fortunate to be able to conduct much of their work armed only with a computer and a telephone. Indeed, by virtue of the global nature of the practice, international arbitration practitioners have always been a step ahead of their litigator colleagues when it comes to working remotely and using video technology to conduct witness examinations and other aspects of the arbitral process.

Nevertheless, the COVID-19 pandemic has changed the way in which international arbitrations are conducted in fundamental ways. By necessity, international arbitrations in the age of COVID-19 are being conducted entirely (or almost entirely) virtually.[5] This "virtualization" of arbitration proceedings in the age of COVID implicates a host of legal and practical issues that are the subject of other articles in this publication and elsewhere.[6] But what about the future of international arbitration in a post-COVID world? Assuming an effective coronavirus vaccine is developed, and made widely available, will the practice of international arbitration then revert to its pre-pandemic ways? Or has the pandemic—and the arbitration community's responses to it—changed the practice of international arbitration in ways that are durable and that will persist after the pandemic is behind us?

There is obviously no way to know with certainty what the future will bring, but a reflection on the ways in which international arbitration, and the arbitration community, already have changed in the age of COVID-19 permits some predictions.

The Use of Video Technology for Some Aspects of the Arbitration Process Is Here to Stay

As noted, the use of video- or teleconference technology for certain aspects of the arbitral process is not a new phenomenon. Prior to COVID-19, certain pre-hearing steps in the arbitral process—such as initial case management conferences and pre-hearing conferences with the tribunal—were often held by teleconference or videoconference, particularly when the parties and their counsel were in different jurisdictions. In addition, it was not unusual, pre-COVID-19, for certain witnesses to appear at hearings via video in instances where physical attendance was not possible due to health or visa issues, or other circumstances. Indeed, the IBA Rules on the Taking of Evidence in International Arbitration expressly provide for such virtual appearances of witnesses at evidentiary hearings at the discretion of the tribunal,[7] as do various institutional arbitration rules.[8]

What is new in the post-COVID-19 world is that parties, counsel and arbitrators are now accustomed to, and generally skilled at, using Zoom, Webex and other video platforms to conduct meetings, conferences and even hearings in a virtual format. By necessity, the "barriers to entry" for these technologies in the international arbitration world appear largely to have been overcome. Whereas, before COVID-19, there was often a resistance by some counsel and arbitrators to the use of videoconference technology—due to concerns about whether it would

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function properly and a general reluctance to spend the time necessary to learn how to use it—counsel and arbitrators have now been forced to adopt and become familiar with these technologies. Although it is difficult to generalize, most counsel and arbitrators appear comfortable that these technologies may be used effectively in lieu of in-person meetings, at least for some aspects of the arbitral process. This growing comfort and competence in using video technology likely means that the trend toward virtual meetings and hearings will persist, and continue to grow, even after the COVID-19 pandemic has passed.[9]

One of the drivers for this continuing trend will likely be the ultimate users of the arbitration process—our clients. Having lived through a period, during COVID-19, in which all aspects of the arbitral process, including witness hearings, were conducted virtually (to the extent they were not simply postponed), clients are likely to ask, once the pandemic has passed, why counsel and arbitrators cannot continue using video technologies like Zoom or Webex for at least certain aspects—or even the entirety—of the arbitration process. Doing so would save the substantial sums that otherwise would be spent on airfare and hotels, and associated travel-related time and costs.[10] It may also mean that certain kinds of meetings and hearings may be scheduled more expeditiously, since they would not require that all arbitrators and counsel be physically present in the same place.

Those factors are likely to lead to more widespread use of video technology to conduct at least certain aspects of the arbitration process virtually, even after the pandemic has passed. The most likely candidates for such virtual treatment include initial case management conferences, pre-hearing conferences, and oral argument on discrete procedural or legal issues. To the extent arbitral tribunals are hesitant to adopt such virtual measures wholesale, the experience of arbitrators during the COVID-19 pandemic is likely to lead—at the very least—to more creative and flexible thinking by tribunals about ways that the arbitral process may be structured more efficiently, taking into account the broader availability of, and familiarity with, various video platforms, which can be used on their own or in combination with more traditional, in-person approaches.[11]

Arbitration practitioners are also likely to continue making use of video technology outside of the presence of the tribunal—in the preparation of their cases. For example, while there may be occasions on which fact witness interviews must take place in person, it will often be the case that fact witness interviews, including for purposes of preparing witness statements, can take place via videoconference. This will depend on the number and location of witnesses, and other circumstances. The same holds true for expert witness and client meetings, all of which, if organized and prepared properly, may be good candidates for a virtual, rather than in-person, format, thereby leading, in many cases, to substantial savings of time and cost.

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Many Arbitrators and Counsel Will Seek to Conduct Other Aspects of the Arbitration Process, Such as Evidentiary Hearings, in Person Whenever Feasible

While arbitration in the age of COVID-19 has demonstrated that many aspects of the arbitral process may effectively be conducted virtually, it is likely to remain the case that some arbitrators and counsel will want to conduct other aspects of the process in person whenever feasible and justified in the circumstances. For example, many counsel and arbitrators are likely to seek a return to in-person evidentiary hearings as soon as it is safe and practical to do so.

While examination of witnesses over video may be acceptable for particular witnesses whose in-person participation is not possible, many counsel and arbitrators—particularly those from common law traditions—are likely to prefer that witness examination take place in person. While there is a debate in the arbitration community about the real evidentiary value of live witness testimony, some counsel and arbitrators will take the view that, no matter how well designed the video system, it will never be able to fully replace the dynamic of a hearing room in

which counsel and arbitrators sit face-to-face with a witness being cross-examined.

Counsel are well aware of the challenges of controlling a witness on cross-examination when the examination is conducted virtually, and most would strongly prefer to conduct such examinations in person. Many arbitrators, too, are likely to favor in-person hearings for the purposes of witness examination. For those arbitrators, seeing the reactions of a witness first-hand is perceived as essential to assessing the witness's credibility. That perception is particularly strong in cases where different cultures and languages are implicated, and where a witness's body language during examination may speak as loudly as her testimony.

There are other aspects of in-person hearings that are difficult, if not impossible, to replicate virtually. For example, the consensus-building process among arbitrators is often advanced through informal caucusing at the hearing site, comparing notes during breaks about the evidence just elicited, and conferring with one another about the evolution of the case. Although virtual hearings offer the possibility of offline texts, chats and calls, it is difficult for those formats to replace the personal interaction available at an in-person hearing. It is also more difficult for counsel and parties to get a "read" of the tribunal, and the opposing side, when hearings are conducted virtually. Such informal observations can often be helpful in determining strategy or even driving parties toward settlement.[12] All of these factors are likely to push many arbitrators and counsel toward the resumption of in-person evidentiary hearings once the pandemic has passed.

Arbitral Institutions Are Likely to Develop, Refine and Formalize Provisions on the Virtual Conduct of Proceedings

After the emergence of the COVID-19 pandemic and the measures put in place by governments across the world to restrict travel and enforce stay-at-home orders, some arbitral institutions issued guidelines to assist parties and tribunals in the management of virtual arbitrations. For example, in April 2020, the ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.[13] The note was aimed at reminding parties and arbitrators of the procedural tools available to them under the current ICC Rules to mitigate pandemic-created delays, and also to provide guidance on the organization of virtual hearings and conferences. Similarly, the ICDR has produced a Model Order and Procedures for a Virtual Hearing via Videoconference, which includes detailed proposed provisions on best practices for conducting virtual hearings.[14] Other arbitral institutions have issued similar guidance for the conduct of virtual hearings.[15]

There is no reason to think that such protocols will disappear once the COVID-19 pandemic is behind us. On the contrary, one can expect that, as virtual meetings and hearings become more widespread and more deeply ingrained in arbitration practice, such protocols will be further developed, refined and formalized. It is likely that such protocols will ultimately become permanent fixtures of institutional rules or guidelines, to be used whenever the parties and/or the tribunal determine that virtual proceedings should be undertaken.

There Will Likely Be a Wave of COVID-Related Commercial and Investor-State Arbitration

Finally, in addition to these procedural features of international arbitration post-COVID-19, it is reasonable to expect that the pandemic will give rise to a wave of pandemic-related commercial and investor-state arbitration. Although it is difficult to predict whether this will really be a wave—or more of a ripple—there is every reason to expect an uptick in such cases. For example, on the commercial arbitration side, one can expect to see disputes brought to arbitration in which one party has sought to rely on *force majeure*, hardship or similar clauses and/or legal doctrines such as impossibility, impracticability, frustration, imprévision, or *clausula rebus sic stantibus* to escape contractual obligations of performance. Whether such claims will be successful will of course depend heavily on the contractual language at issue, the governing law and the surrounding circumstances.[16]

On the investor-state side, international investors have already begun to threaten claims against various states arising from domestic measures assertedly put in place in response to the pandemic. This is the case, for example, in Peru, which passed a law suspending the collection of tolls in response to the COVID-19 outbreak.[17] Similarly, investors have threatened claims against Mexico, which placed restrictions on renewable energy production, purportedly on the basis of a drop in demand caused by the pandemic.[18] One can expect to see claims in arbitration brought by investors in these and similar circumstances, where claimants will likely argue that the costs of such measures should be placed on the society as a whole and not forced upon international investors to bear alone.

Endnotes

1. *See Coronavirus disease (COVID-2019): Situation Report – 142*, World Health Organization, June 10, 2020, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports.
2. *See Coronavirus in the US: Latest Map and Case Count*, The New York Times (June 12, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html.
3. *See New York Coronavirus Map and Case Count*, The New York Times (June 12, 2020), https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.
4. *See generally* OECD Economic Outlook, Volume 2020 Issue 1: Preliminary Version, OECD (2020), https://doi.org/10.1787/0d1d1e2e-en, at 12.
5. Although the term "virtual" as applied to arbitration proceedings has been criticized by some as connoting "an artificial substitute for something real," *see* CPR's *Annotated Model Procedural Order for Remote Video Arbitration Proceedings* (2020), https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings, it is widely used in the arbitration community to refer to an event that is conducted in a manner—such as via video—in which the participants are not physically present in the same place.
6. *See generally* Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework* (May 13, 2020), 37(4) J. of Int'l Arb. (2020) (forthcoming), available at http://www.kluwerarbitration.com/document/kli-joia-370401; John Fellas, *International Arbitration in the Midst of COVID-19*, 37 Young Arb. Rev. (2020).
7. IBA Rules on the Taking of Evidence in International Arbitration, at Article 8(1) ("Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.").
8. *See, e.g.,* LCIA Arbitration Rules (2014), Article 19.2 ("As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three."); UNCITRAL Arbitration Rules (2013), Article 28(4) ("The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunications that do not require their physical presence at the hearing (such as videoconference)."). *See also* ICC Arbitration Rules (2017), Appendix IV(f) (listing use of "telephone or videoconferencing for procedural or other hearings where attendance in person is not essential" as a case management technique to control time and cost); ICDR International Arbitration Rules (2014), Article E-9 (International Expedited Procedures) (providing that "[h]earings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator").
9. Cybersecurity is also a growing concern in the international arbitration community, and the continued use of video formats to conduct arbitrations will require attention to these concerns in the context of virtual hearing technology. *See generally* ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (2020), available at https://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html.
10. In addition, the reduction in air travel resulting from more virtual arbitrations would have the benefit of lowering flight-generated environmental costs—a goal of the "flight shaming" movement that had begun to gain momentum well before the pandemic took hold. *See, e.g., Airlines scramble to overcome polluter stigma as 'flight shame' movement grows*, Reuters (June 3, 2019), https://www.reuters.com/article/us-airlines-iata-environment-analysis/airlines-scramble-to-overcome-polluter-stigma-as-flight-shame-movement-grows-idUSKCN1T4220.
11. Although parties may raise objections to virtual hearings on the basis of denial of the right to be heard or unequal treatment, such challenges to virtual hearings are unlikely to be successful in most cases. *See, e.g.,* Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework* (May 13, 2020), 37(4) J. of Int'l Arb. (2020) (forthcoming), available at http://www.kluwerarbitration.com/document/kli-joia-370401.
12. It is likely too that, after COVID-19, many settlement meetings and mediations will continue to be held in person, to the extent possible, given the importance of in-person dialogue in those contexts and the logistical challenges of organizing effective breakout rooms and facilitating the kind of "shuttle diplomacy" frequently employed in those settings.
13. *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, International Chamber of Commerce (April 9, 2020), https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.
14. *AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference*, Int'l Centre for Dispute Resolution (2020), https://go.adr.org/covid-19-virtual-hearings.html.
15. *See, e.g., HKIAC Guidelines for Virtual Hearings*, Hong Kong Int'l Arb. Centre (2020), https://www.hkiac.org/content/virtual-hearings; CPR's *Annotated Model Procedural Order for Remote Video Arbitration Proceedings* (2020), https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings; CIArb's Guidance Note on Remote Dispute Resolution Proceedings (2020), https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf. KCAB's Seoul Protocol on Video Conferencing in International Arbitration (available at http://www.kcabinternational.or.kr) which was produced in 2018, prior to the outbreak of COVID-19, is also frequently cited as a source for such guidance.
16. *See generally,* John A. Trenor and Hyun-Soo Lim, *Navigating Force Majeure Clauses and Related Doctrines in Light of the COVID-19 Pandemic*, 37 Young Arb. Rev. 13 (2020).
17. *See* Cosmo Sanderson, *Peru threatened over coronavirus emergency measure*, Global Arb. Rev. (June 5, 2020), https://globalarbitrationreview.com/article/1227546/peru-threatened-over-coronavirus-emergency-measure.
18. *See* Cosmo Sanderson, *Mexico faces potential claims over pandemic response*, Global Arb. Rev. (May 22, 2020), https://globalarbitrationreview.com/article/1227136/mexico-faces-potential-claims-over-pandemic-response.