Doing Justice in the Face of a Global Pandemic – Insights from a Leading Arbitrator

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A world of disruption

The global disruption caused by the novel Coronavirus COVID-19 has impacted all areas of life and all sectors of industry, including legal practice and dispute resolution. In the immediate wake of the wide disruptions and restrictions imposed in response to the pandemic, the difficulties faced by parties, counsel, arbitrators and arbitral institutions (not to mention the many other essential participants such as fact witnesses, experts, translators and transcribers) in resolving disputes efficiently and effectively at first glance seemed overwhelming. Dispute resolution – whether mediation, arbitration, litigation or other – has historically relied for good reason on bringing all participants together in one room to hash out a resolution. But that is no longer practical nor permitted in many instances (nor indeed wise). We have had to adapt, swiftly, our pre-conceived notions about how disputes can or should be resolved.

Leveraging resilience and adaptability

As Benjamin Franklin famously said, "out of adversity comes great opportunity" and that is certainly the case for international arbitration and other alternative dispute resolution mechanisms. I personally have been gratified by the response of our community to this adversity. Parties, counsel, arbitral institutions and adjudicators of all types have been proactively taking steps to ensure continued access to justice – fair, impartial and efficient justice. This has been helped by the inherently consensual and flexible nature of international arbitration. But the rapid pace of change in our community should not be underestimated – for many years, critics of international arbitration have noted that arbitration has too often tended to replicate traditional court proceedings rather than to embrace innovations that might drive efficiencies. The pandemic has been the impetus for change – and there has been wide-scale, rapid adoption of online or virtual dispute resolution technology and processes, in various forms.

Of course, some of these innovations are not new – most of us have been filing and serving documents in arbitration electronically for decades. Some of us have also been regularly dealing with pre-trial issues and motions by telephone or video hearings. The economics of doing so works – avoiding the costs of travel and/ or protracted written exchanges. Moreover, in my experience, there often can be real practical benefits of getting parties together virtually to agree early procedural issues rather than doing so in writing; one key benefit being that parties and counsel get to familiarise themselves with the tribunal and how they operate, as well as their opposing parties and counsel, which ultimately makes for a more efficient and indeed substantively better final hearing. I find it also provides impetus for all participants to be better prepared in advance of the final hearing, which can aid in narrowing issues and/or provide opportunities for settlement sooner in the process.

But what we are seeing now is greater collective attention on if and how best to deal with online or virtual dispute resolution processes. There has, as a result, been a significant amount of advice and guidance notes produced by the major arbitral institutions to support those coming fresh to these technologies. I have also been impressed at the amount of training courses and seminars on conducting virtual dispute resolution being made available by law firms, barristers, and arbitral

institutions and centres. There is now a large body of excellent resources available, and the community is also actively discussing some of the curlier issues.

There is no 'one-size fits all'

Of course, online dispute resolution will not be appropriate in all circumstances, for all parties nor for all disputes. Whilst embracing new technologies and processes, the parties, counsel and arbitrators must also be alive to the difficulties that can arise when replacing physical proceedings with virtual ones. Practical issues must be considered such as participants being based in different time zones (a hearing I participated in recently involved participants from 6 different continents), participants speaking different languages (I think it is fair to say that although there has been progress the difficulties with virtual simultaneous translation have not been completely ironed out yet), and differences in availability of technology including, importantly, functional internet speed and bandwidth. Advance consideration of and preparation for the potential issues is key. Arbitrators must be willing and able to offer confident and strong procedural case management. We must also be conscious of the need to address potential asymmetry between the parties – for example, experienced arbitration counsel from large law firms will likely have conducted some form of virtual proceedings and may feel on firmer ground with the process and the issues than, for example, some in-house or governmental agency lawyers.

Participants must also be willing to accept that there will be circumstances when it will not be appropriate for the final hearing to be conducted virtually – this may include, for example, some "bet the bank" cases, or those involving extensive complex or technical evidence, significant amounts of documentary or physical evidence to be tested, and/or requiring lengthy final hearings. This of course must be assessed on a case by case basis, and merely falling into one of the prior categories should not automatically disqualify the case from being determined virtually. The question must be considered in the round – including looking at whether in the circumstances some justice being done is more acceptable than a lengthy delay that might result in no justice being done at all. When coming to decisions as to whether (and which stages) should proceed virtually and how the process should play out, arbitrators need to remain on firm ground, bringing the parties and counsel along in the decision making process and documenting it as appropriate.

There have been concerns expressed by some about whether the use of virtual hearings and other novel technologies and processes might lead to a spate of challenges to awards on due process grounds. That is, of course, possible but I suspect this may be a little overhyped – as an example, I note that many courts (40 by one recent count) are themselves taking up virtual hearings and other online dispute resolution. That is not to dismiss questions of enforcement risk – these must be considered and dealt with where possible as part of the case management process. Parties, counsel and arbitrators will need to take into account regional variations of approach to due process and other relevant matters, at minimum considering the seat and likely places of enforcement. But challenges and risks to enforcement have always existed in one form or another. Sophisticated arbitrators are accustomed to dealing with such issues. The transition to virtual proceedings does throw up new factors to consider, and it is a matter of turning one's mind carefully to those, but I am leery of sliding into due process paranoia.

Concluding thoughts

I am gratified to witness and applaud the resilience and innovation shown by our international arbitration community during the pandemic. In the face of significant adversity, we have found improved and new ways to resolve disputes and maintain access to efficient and effective justice.

Notwithstanding the terrible circumstances that provided the impetus, recent months have served to shake up to the status quo and challenged normative beliefs around how disputes can and should be resolved. For many years, there have been discussions around how to drive greater time and cost efficiencies in the arbitration process – some of the solutions being utilised now have those benefits, but more importantly their rapid introduction has shown how adaptable and open to change parties, counsel, arbitrators and institutions really are. It clears the way for further progress. Innovation and flexibility in resolving disputes in a commercial and efficient manner are the cornerstones of international arbitration.

It is my hope that continued acceptance of technological and procedural innovations will be our new normal, and that even after the restrictions of the pandemic are lifted, we will continue this path of progress.

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