

INTERNATIONAL ARBITRATION

Expert Analysis

International Arbitration in the Midst of COVID-19: One Year Later

Last March—shortly after the world went into lockdown—I published an article in this column titled, “*International Arbitration in the Midst of COVID-19*” (March 25, 2020), in which I tried to anticipate what the future might bring. Here we are a year later, still effectively under lockdown, and I thought it time to take stock of where we are.

I ended my piece last year with the hope that “we will face the best-case rather than the worst case predictions of what lies ahead.” Sadly, that hope was misplaced. In May 2020, Dr. Anthony Fauci predicted between 100,000 and 200,000 deaths in the United States as a result of COVID—a heartbreaking number in itself. Yet, as of the time of writing, the United States has suffered over 500,000 COVID-related deaths, the highest of any country in the world. And the United States is not alone—many countries have faced staggering devastation; massive loss of life; enduring health consequences; lost jobs; businesses shuttered.

For many lawyers, this past year—which, if we ever doubted it, has brought home to us starkly that

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we are non-essential workers—has been characterized by a strange combination of calamity and normality. Despite the dark shadow of devastation and tragedy cast by the pandemic, despite the unrelieved monotony of day-to-day life, and despite our having learned to tune out the phrase that supposedly captures the zeitgeist of the moment—“now more than ever ...”—for many lawyers, work just goes on. Unlike the many essential workers who put their lives at risk to keep our countries running, most of us can work from home. And many of us have remained as busy as we were prior to the pandemic. In some ways, we lawyers resemble the proverbial cockroach that supposedly (although experts say not really) can survive a nuclear blast: In an economic downturn, lawyers can rely on an uptick in insolvency work; in a global pandemic, which inevitably impacts the ability of many companies to meet

their contractual obligations, disputes abound.

We adapted. In international arbitration, we all learned to shift quickly from in-person to virtual merits hearings. To be sure, the change didn’t happen immediately. When the world went into lockdown last March, there was a strong sense (woefully misplaced in retrospect) that hearings scheduled for the spring and summer could take place in person in the fall. Maybe we all relied too much on

In his International Arbitration column, John Fellas recalls the ways in which dispute resolution practitioners adapted over the last year to continue to resolve matters despite the COVID-19 pandemic.

what someone (I forget who) said early in the pandemic: “It’s going to disappear. One day—it’s like a miracle—it will disappear”; it “goes away in April with the heat.”

I suspect my experience was fairly typical. Last March, arbitration hearings scheduled for the spring and summer were postponed by the agreement of all participants to the fall. Of course, by early summer, it was readily apparent that we

couldn't go forward in person in the fall after all, but no one wanted to postpone again.

And so we learned how to do virtual hearings, not because we wanted to, but because we had to.

In early summer last year, we faced the choice between, on the one hand, the indefinite postponement of the resolution of a dispute until the uncertain time when we could hold in-person hearings again and, on the other, its resolution in relatively short order through the holding of virtual hearings now. For most parties the choice was easy—a virtual hearing *now*.

And so even though virtual merits hearings were never anyone's first choice—they were always plan B—we learned how to do them. We learned to deal with Zoom fatigue, something a recent Stanford study tells us is real. We learned to sit at odd hours to accommodate participants from different time-zones. We learned the relative virtues of Microsoft Teams, Zoom and Webex, and each of us had our favorite. We learned to load the exhibits onto a device (laptop or iPad) separate from the one on which we appeared virtually. We learned to draft or review protocols to govern hearings on a virtual platform. We learned about the companies that could host virtual arbitrations. We learned, to our surprise, that simultaneous translation of witness testimony into the language of the arbitration was possible even in a virtual environment. We learned about the changes to rules and guidelines made by arbitral institutions (like the ICC) and professional bodies (like the IBA) to address virtual hearings. We learned to remember to unmute ourselves when we were speaking, to screen-share, and how to select the "raise hand" icon on the various platforms. And, more recently, we raced to be the first one to quip that we weren't really cats.

Many are asking whether, now that we've learned how to do them, virtual merits hearings will become the "new normal"—another worn out phrase supposedly expressive of the mood of our times—whether we will continue to do virtual hearings even when we don't have to. I do not believe that virtual merits hearings will replace in-person ones as the norm for international arbitration proceedings. However, I do think that our practices will change for the better in some respects.

The virtual hearing stands in relation to the in-person hearing the way the Zoom cocktail party—all the rage early in the pandemic—stands in relation to the real thing. When you can't see your friends in person, seeing them on Zoom is the next best thing. But, other than in unusual circumstances, few of us would prefer to meet our friends for a cocktail over Zoom once we are finally able to see them in person. It's just not the same.

And that's true for virtual hearings. When we had to choose between an in-person hearing at some uncertain point in the future and a virtual hearing *now*, the choice for most parties was obvious. But, hopefully, with an increasing number of vaccines and a growing number of people getting jabs, we are getting closer to a point when we won't have to make that choice. In the more recently filed arbitration proceedings in which I'm currently involved, where we are starting to schedule hearings in late 2021 and the first half of 2022, not a single participant has expressed a preference for virtual hearings over in person ones. To be sure, the procedural orders of all cases in which I'm currently involved, even the recently-issued ones, continue to contemplate the possibility that merits hearings might take place virtually, because while there's reason to hope for the best, we have to prepare for the worst.

This is not to say that my experience of virtual hearings was all negative. I was surprised at how animated I found myself getting when delivering an opening statement to a computer screen; I thought the private chat feature a better way for my colleagues to suggest questions to me during a cross-examination than by handing me a post-it note with an illegible scrawl; and I found it helpful to be able to focus on the face of the witness under examination, in a way you couldn't in real life without being stuck with that worst of epithets—being a close-talker. But, just as with a virtual cocktail party, something is lost in virtual hearings, even though it's not always easy to put your finger on precisely what that something is.

But here's one thing. While Zoom allows you to focus on the minutest changes of expression on the faces of the arbitrators, it is much harder to read the room, to get a feel for whether the point you are making or a witness's testimony is resonating. With a virtual hearing, you see discrete pieces of the action close up—a lawyer's smirk, an arbitrator's frown, a PowerPoint slide—but you can't stand back and view the whole. And, as we all know, there are aspects of a mountain range that you can make out clearly from a distance, but that you miss altogether when you are too close.

And here's another thing. For arbitrators on a three-person tribunal who don't already know each other, it is much harder to bond over Zoom than in-person. When hearings are conducted in person, arbitrators talk to each other regularly, whether about the case or not, in the morning before hearings, in the breaks, over lunch and, often, in the evenings. And this bonding, this sense that you are working together as a unit to reach the right decision, is essential to the deliberative process. You can't bond in the same way virtually.

And here's one more. Miles Davis, quoting Claude Debussy, once said that "music is the silence between the notes." And the power of cross-examination sometimes stems from the silence between a question and an answer. Sometimes that silence—a witness's delay in responding—has more impact than an ill-advised answer. Yet, on Zoom, it is hard to deploy silence as an effective tool on cross-examination. I recently cross-examined a witness via Zoom who claimed to have been intimately involved in the negotiation of a particular contract. Yet his name appeared nowhere on an over 40-page email string reflecting the negotiation of that very contract from start to finish over a period of several weeks. In an in-person hearing, I would have given the witness and the arbitrators a hard copy of that lengthy email, established that it reflected the negotiation of the contract in question and then asked the witness to point the arbitrators to where that email reflected any communication to or from him. And I would have sat back as he flipped through page after page, in silence. It is almost impossible to conduct that type of examination in an effective way over Zoom.

But while I do not believe that virtual merits hearings will replace in-person ones as the norm for international arbitration proceedings, I do think that we will see some changes in our practices.

First, consider the various conferences convened by arbitrators that, pre-pandemic, typically would have taken place over the phone, such as the one-to-two hour preliminary conference convened early in the life of a case to establish the procedures and the schedule for the arbitration, or the short conference to address a discrete issue that has arisen during the course of a proceeding. These typically took place by phone because any reasonable cost-benefit

analysis weighed overwhelmingly against holding them in person, the only alternative we could imagine; there was rarely any justification for incurring the cost and inconvenience of bringing several people from different locations to one place all for the sake of attending a one-to-two hour meeting, when little was lost in conducting that meeting by phone. But the pandemic has taught us how easy it is to conduct that meeting virtually, and I suspect that will become the norm. When you compare a short telephonic meeting to its virtual counterpart, the latter is obviously superior; a telephonic meeting is a pale form of the virtual.

Second, consider a case which has one or more specific witnesses whose testimony is less significant to a case than that of others and who would have to travel a long distance to testify in person. Prior to the pandemic, it was not unusual for an exception to be made to permit such a witness to appear via video-conference, even though the rest of the hearing was conducted in person. After the pandemic, I believe it will become the presumption that such a witness should appear virtually.

Third, consider lengthy meetings convened by arbitrators that do not involve witnesses testifying—such as a one-day hearing devoted to the lawyer's closing arguments scheduled at some point after the submission of post-hearing memorials or half-a-day of argument devoted to a particular application. Prior to the pandemic it was not unusual for lawyers and arbitrators to travel for such arguments. After the pandemic, unless most of the participants are based in the same city, I believe it will become common for such arguments to be conducted virtually.

Finally, consider arbitrations involving a relatively short (one-or-two day) merits hearing, to which some of the arbitrators or lawyers or witnesses would have to travel halfway

across the world to attend (e.g., from London to Singapore). Because those hearings can be scheduled more quickly and conveniently if those participants are permitted to attend virtually, I believe it will become more acceptable in such situations to adopt a hybrid approach, allowing some participants to attend virtually, while others appear in person.

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We have reason to be cautiously optimistic now, and it does seem possible to begin to think about life in a post-pandemic world. And when it comes to the legal profession, we should not forget that the pandemic has been particularly hard on lawyers in the early stages of their careers: the lawyers who had to start their first job virtually, and couldn't form the relationships with senior lawyers they would have formed had they worked together in person; the lawyers who struggled to work because they had young kids at home; and the students who had to attend part of law school virtually. Once we are past this devastating pandemic, it is incumbent on all of us to focus on the young members of our profession, to ensure that this strange interruption has not derailed their professional development, and, if it has, to help them get back on track.