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ARBITRATION RESILIENCE IN COVID-19 TIME AND BEYOND

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We have heard the word 'resilience' thousands of times in the past year. Resilience is the ability to cope with disruption and rebound. As our world has faced a global health crisis, leaders have called on individuals, families, organisations and all kinds of institutions to be resilient and advisors have identified ways to build resilience.

The onset of the COVID-19 pandemic has had repercussions for governments and industries around the globe. Domestic and international systems of justice have not been immune, with lawyers and clients alike questioning and seeking dispute resolution mechanisms that can continue to deliver justice efficiently and effectively. Following the implementation of social distancing directions and remote working policies, some judiciaries and courts around the world have taken steps to adapt their approach and alter their *modus operandi* to continue functioning amid the pandemic. These steps have included the holding of hearings virtually. However, in most jurisdictions, courts have remained shut or their service has been limited to emergencies for many months. As a result, the pandemic has caused significant disruptions and delays to not just criminal, but civil and commercial court processes as well.

In contrast, international arbitration as a practice and community has demonstrated a high level of resilience in the past year. International arbitral proceedings have not only continued throughout the pandemic but have also thrived in terms of quantity and possibly quality as well. Parties, tribunals and institutions have coped with complications due to travel bans and other restrictions to limit the impact of the pandemic on pending and new proceedings, while ensuring compliance with due process. Further, as it strived to leverage the flexibility of the process to overcome new constraints, the community as a whole has identified measures that have transformed the practice of international arbitration. Some of the solutions or new approaches that have emerged from

the pandemic are likely to remain in use in the post-pandemic era and could well make the process of international arbitration even more efficient and attractive to organisations involved in cross-border transactions in the future.

Flexibility as a cornerstone of arbitration resilience

There are many well-known advantages for arbitration as a dispute resolution mechanism. These include the neutrality of the arbitral tribunal, as opposed to the perceived advantage of hearing a dispute in the 'home' court of one of the parties. Another well-expounded advantage of arbitration is in the ease of enforcing arbitral awards in the over one hundred and sixty countries that have ratified the New York Convention 1958. Furthermore, arbitration offers the possibility of selecting individuals deemed suitable to act as arbitrators for the dispute at hand, for example, arbitrators with specific experience or expertise within certain sectors or industries. Arbitration also allows parties to resolve their disputes privately, and to have confidentiality provisions in place to preserve trade secrets and protect other confidential information from being released to the public or competitors.

Another feature and benefit of arbitration that is sometimes over-looked is the flexibility of the arbitral process. Flexibility in this context means that parties can tailor the arbitral process to meet their specific needs. They can do this at two stages. Firstly, the parties can adapt the process to their needs when they agree to arbitrate by way of an arbitration agreement. At this stage, parties can tailor the process by agreeing the framework of the arbitration, for example by agreeing the seat, the arbitral institution, the rules, the number (and potentially the expertise) of arbitrators, the procedure and the timeframe. Secondly, parties can adapt the process to specific circumstances while the arbitration is ongoing, by seeking to agree procedural matters with the other party. They can also do this by communicating to the tribunal about what the process should look like in light of the issues in the case, the arguments and the evidence.

The ability to adapt the arbitral process to any circumstance and type of case is at least true in theory. In practice, however, it is not always necessarily the case. The fact that arbitration has experienced such fast and considerable growth since the turn of the millennium has sometimes resulted in arbitration procedure becoming standardised. As a result, arbitration users have raised the criticism that arbitral tribunals and counsel have made arbitration more rigid than it should be.

Historically, it may have been less easy to depart from the standard arbitration procedure without the agreement of the counterparty. In recent years, however, institutions have introduced a number of procedural tools in their rules to reduce the costs of arbitration and time within which awards are rendered. These tools include expedited procedures, summary determination and pro-active case management powers on the part of arbitrators. As a result, some arbitrators have become more willing to tailor procedures without being hamstrung by due process paranoia.

COVID19 disruption

As a result of the COVID19 pandemic, counsel, arbitrators and arbitral institutions have been forced to take advantage of the flexibility of arbitration in unprecedented ways. Due to travel bans and the remote working environment, an array of solutions has emerged through innovation and strong collaboration between key stakeholders and members of the international arbitration community.

The onset of the pandemic spurred major institutions and arbitration organisations to collaborate and share best practices and technology to allow the continued smooth functioning of hearings and proceedings generally. The COVID-19 pandemic has not only added impetus to institutions' sharing best practices and adapting their procedures to changing events, it has brought institutions together. In April 2020, the International Federation of Commercial Arbitration Institutes along with twelve arbitral institutions including the SIAC, LCIA, ICC and ICSID together published a joint statement on 'Arbitration and COVID-19'. In this statement, members expressed their ambition to "support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay".[1]

Individually, arbitral institutions have demonstrated a great deal of reactivity and innovation but also of empathy vis-a-vis their clients and also their business partners.

For example, ICSID had been using a technology service 'BOX' for the sharing of documents between parties and arbitrators even before the start of the pandemic. On 13 March 2020 after the onset of the pandemic, ICSID announced that electronic filings would be the default procedure in ICSID arbitrations.[2]

On 13 March 2020, the ICC Secretariat issued an urgent communication to users, arbitrators and other neutrals requiring that new requests for arbitration, supporting exhibits and applications for emergency arbitrators be filed with the Secretariat by email only and advising that in-person hearings due to take place at the ICC Hearing Centre in Paris had been postponed or cancelled. A few weeks later, on 9 April 2020, the ICC published a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. The Note included helpful guidance on various aspects of the remote conduct of arbitral proceedings as well as checklists, template clauses and procedural orders.

On 18 March 2020, the LCIA informed its users that the LCIA Secretariat would be working remotely from the following day. From that day, all requests for arbitration were to be filed online using the LCIA online filing system or via email. Further, except from exceptional cases, the LCIA would notify awards to parties electronically, with originals and certified copies to follow after the reopening of the LCIA office.

In May 2020, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) offered online case management services to *ad hoc* arbitrations to support online administration of proceedings amidst the challenging times. The SCC and Thompson Reuters made the SCC Platform available to any *ad hoc* arbitration commenced during the COVID-19 outbreak without charge. The SCC Platform, a secure digital platform for communications and file sharing between the parties and the tribunal, had been used in all SCC arbitrations since September 2019.

Even smaller arbitral institutions such as the Arbitration Institute of the Finland Chamber of Commerce (FAI), which did not have an existing digital package for parties and arbitrators, were able to nimbly adapt their internal IT infrastructure and systems for the use of parties and arbitrators, ensuring that the arbitrations could continue as smoothly as possible.[3]

Thanks to the support of arbitral institutions, new and ongoing disputes have been handled and resolved without significant complications or interruption.

Furthermore, institutions, tribunals and parties have driven the arbitration community to embrace change and offer guidance to rise to the challenges posed by COVID-19. As a result of the rapid shift to virtual hearing, the most prominent issue that arose following the implementation of travel bans, the arbitration community came together and held many seminars and talks to share expertise, experiences and knowledge to discuss how best the community could collaborate and innovate to overcome the restrictions and complications brought on by COVID-19.

This further demonstrates not just the flexibility and resilience of arbitration as a method of resolving disputes, but resilience of the arbitration community as well to adapt to uncertain and constantly changing times. This willingness to collaborate and innovate has in turn highlighted how the flexibility of the process might have previously been underestimated and arbitration users may be able to harness a lot more from it going forward.

The ability to conduct hearings virtually, for example, has underlined the advantage that arbitration has over litigation in respect of procedural flexibility and continuity. Although courts in some jurisdictions have adapted reasonably quickly, this has not been the case everywhere.[4] The consequence of some courts shutting down completely has led to uncertainty on certain major issues, and many disputes continuing to remain unresolved and justice delayed as a result. The fact that international arbitral proceedings have for the most part continued their course and that new proceedings, including emergency applications and claims, were processed goes a long way in demonstrating that the process is certain and reliable.

The fact that proceedings continued is not only down to the holding of virtual hearings. Parties and arbitrators have had to adapt in other respects as well. While a remote deliberation between the arbitral tribunal cannot fully replicate the informal interactions that the tribunal might otherwise have, particularly during in person hearings, tribunals have adapted their practices. They have deliberated remotely, possibility with more visibility by the parties over the timing of these deliberations, which is welcome. Arbitrators have also had to execute awards remotely or sign them electronically, while ensuring that any new methods would not compromise the validity of their awards. In a survey conducted recently of several hundred participants in remote arbitral hearings, only one respondent suggested that they had challenged an award "because the hearing was held remotely", however not because either party had opposed the remote hearing in the first instance.[5] This further reinforces the arbitration community's resilience to adapt to new and unfamiliar working arrangements brought on by the COVID-19 pandemic, and ensuring that the work of justice is continued despite external challenges.

Enduring takeaways from the COVID-19 pandemic

The end of World War I is said to have been a catalyst for change within the practice of international arbitration. The Great War created a lacuna in the way international trade and commerce was regulated. In response, the ICC was formed and in 1920, a year after its creation, it launched the ICC Commission on Arbitration that created a framework for the resolution of disputes between commercial parties located in different jurisdictions.[6]

Some commentators are sceptical about whether the developments brought by COVID-19 will be just as transformational, or if they would even endure at all. It has been suggested that the changes brought to the practice of arbitration by COVID-19 were largely already in place before, but would now merely be extended for other related purposes. For example, remote hearings once used mainly for procedural matters would now be used for substantive proceedings in an arbitration as well.

Yet, there seem to be early signs that COVID-19 could actually herald transformational change to the practice of international arbitration. With the shift to virtual substantive hearings has come new ways to conduct proceedings and new considerations when it comes to the practice of international arbitration.

For example, arbitral proceedings have traditionally been held synchronously, where the hearing proceeds in a single, continuous and consecutive setting. An alternative to such linear proceedings has emerged as a result of the flexibility that virtual hearings bring to the arbitral process. This alternative way of structuring hearings is an asynchronous hearing timetable where the hearing takes place in separate segments.[7] In such proceedings, the delivery of some segments could also differ, for example, opening and closing statements could be delivered via video recording instead of a live hearing, adding further flexibility to the process and allowing all parties, tribunals, arbitrators, experts and clients to focus on specific and discrete phases of the dispute at a time.

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Another potential long-term positive development relates to the arbitration community's vision in mitigating its impact on the environment. Although of course climate change issues date from far before the pandemic, the disruptions that unfolded following the initial lockdown resulted in the realisation by many arbitration practitioners that remote or virtual interactions can be as effective as in person interactions.

A study in 2019 found that a medium-sized arbitration required the planting of about twenty thousand trees in order to offset the environmental impact caused by the arbitration.[8] The Campaign for Greener Arbitrations recently launched a consultation paper on Green Protocols with the aim of creating a Framework and Protocols to guide environmentally conscious practices within the arbitration community.[9] The pandemic has sparked discussions on the necessity and convenience of an in-person hearing where a remote hearing might suffice, and how this can have a positive impact on the environment. Additionally, the advent of virtual meetings also contributes to the arbitration community's climate change efforts in other ways. Pre-COVID19 habits of flying hours to proof witnesses, meet with experts and clients may not completely disappear completely but one would hope that decision makers would give more careful consideration as to the most adequate and effective way to hold such meetings. The pandemic has added momentum towards a more climate conscious means of working and also demonstrated that such interactions can be done effectively, while maintaining the integrity of the arbitral process.

Virtual hearings and practicing international arbitration in the 'new normal' have also given rise to new issues, such as consideration of equality of arms with respect to digital infrastructure and connectivity. A due process right generally recognised in arbitration regimes around the world is that all parties to an arbitration must be treated equally and fairly and must be afforded a reasonable opportunity to present their case. When proceedings held remotely and hearings virtually, the parties' ability to present their case and witnesses' credibility might be impacted by the resources available to them including with respect to their information technology equipment and internet connection. With the digitisation of arbitration and the development of online dispute resolution more generally, these issues are likely to remain live post-pandemic.

Whether these developments are epochal or incremental remains to be seen, but is seems difficult to imagine that these new procedural approaches would be completely abandoned and these new considerations could be ignored. In this regard, the positive results that some of these new tools have produced and the way that they have been received by the community and arbitration users is certainly encouraging.

Conclusion

Besides the question of whether any developments stemming from the pandemic will remain and continue to develop beyond the COVID19 era, the point remains that arbitration has thrived in this challenging environment. When the pandemic disrupted an ongoing in-person arbitration involving seventy people in Brazil in March 2020, the parties quickly moved the hearing online midway, and continued with latter half of their hearing virtually.[10] This is all the more remarkable given that cognizance of the tools and processes required for a smooth virtual hearing were not as widespread then.

Ultimately, examples such as the Brazilian arbitration demonstrate that whether specific and particular changes to the arbitration community's *modus operandi* endure after the pandemic is less important to the bigger takeaway from the COVID-19 pandemic. That is that arbitration has shown that it has an inherent agility, innovation and resilience which allows it to adapt quickly to radical changes to the external environment. If it can continue delivering justice during a global pandemic, then it is not inconceivable that arbitration can respond to other changes, which would again present challenges to its traditional means of working. This resilience shows that arbitration can offer corporates, organisations and states a reliable method to resolve their disputes peacefully and provides a basis and platform from which its stakeholders can build on to continue to develop, adapt and rebound.

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