MEALEY'S®
International Arbitration Report

Addressing The Key Challenges Facing International Arbitration After The COVID-19 Pandemic

By
Javier Rubinstein

King & Spalding
Chicago, IL

and

Tiago Duarte-Silva

Charles River Associates
Boston, MA

A commentary article reprinted from the November 2021 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

Addressing The Key Challenges Facing International Arbitration After The COVID-19 Pandemic

By
Javier Rubinstein
and
Tiago Duarte-Silva

[Editor's Note: Javier H. Rubinstein is a partner at King & Spalding and Lecturer in Law at the University of Chicago Law School. He regularly handles high-profile international commercial and investment treaty arbitrations, representing clients from North America, Latin America, Europe, and Asia in complex disputes. Dr. Tiago Duarte-Silva is a vice president at Charles River Associates. He is a testifying expert with more than 20 years of experience who has advised investors and provided written and oral testimony or expert advice in over 130 disputes. Any commentary or opinions do not reflect the opinions of King & Spalding, Charles River Associates, or LexisNexis®, Mealey Publications™. *Responses are welcome.]*

At a roundtable discussion on May 11, 2021 titled 'Identifying And Solving Key Challenges Due To The Disruption Of The Pandemic,' leading members of the international arbitration community, including external counsel, in-house counsel, arbitral institutions and arbitrators, discussed the challenges facing international commercial and investment treaty arbitration due to the disruptions caused by the COVID-19 pandemic. This discussion provided important insights in identifying these challenges and the steps that the international arbitration community needs to take to address them. The article briefly summarizes the key takeaways that emerged from the roundtable discussion.

Remote Hearings Are Here to Stay

- Remote hearings will continue to be used, at least in certain circumstances, including preliminary hearings and merits hearings where parties wish to avoid the cost of an in-person hearing.
- In-person evidentiary hearings often are preferred in order to better observe witness demeanor, assess witness credibility and gauge arbitrator reactions; it also can be difficult on the parties and tribunals to proceed via videoconference where hearings are longer and more complex
- Virtual hearings may serve to promote arbitrator diversity by expanding the pool of potential arbitrators without regard to the seat or hearing location
- Continued availability of virtual hearings may make international arbitration more attractive to parties with more limited means by reducing hearing costs;
- Virtual hearings will enable more people to participate in or observe arbitration hearings than with in-person hearings, thereby enhancing the transparency of the process
- Further advances in technology may improve the reliability and overall user experience for parties and arbitrators in virtual hearings
- In investor-state disputes, unequal access to top-quality technology may put smaller law firms and developing states at a disadvantage

The pandemic has shown that conducting international arbitrations on a virtual basis is feasible; the international arbitration community thus has accepted virtual hearings as a viable option. We are probably moving away from the traditional presumption that arbitration hearings must be in person toward a more nuanced approach in which the choice of virtual vs. in-person hearings is assessed on a case-by-case basis.

Arbitrating in person has numerous advantages. It allows the tribunal to better weigh the demeanor and credibility of witnesses, making it easier to decide the case. Counsel also can see how the panel responds to certain witnesses and how the testimony is perceived in a way that is more difficult to gauge virtually. It also avoids some of the pitfalls of virtual hearings, which are difficult to manage when the parties and/or the arbitrators are located in disparate time zones, often leading to shortened hearing days and requiring parties or arbitrators to participate at inconvenient times of the day or night. Presentation and use of exhibits also can be more challenging virtually, particularly for counsel or arbitrators who prepare to work from traditional paper bundles that are difficult to use in virtual hearings. In-person arbitration can also make it easier to handle translation of witness testimony given in a different language, although there are effective technology solutions to handle simultaneous translation for virtual hearings.

Technology, obviously, is a major issue. Limitations stemming from our more limited attention spans in front of a computer screen make long virtual arbitrations unmanageable. The tech involved in virtual arbitration can make it more difficult to present evidence smoothly unless it is carefully managed. Additionally, conducting evidentiary hearings is logistically and technologically challenging, requiring significant planning and support to avoid technological disruptions of the hearing, frustrating both counsel and the tribunal. Weak internet access or bandwidth, power issues, and difficulties related to muting and unmuting all can be barriers. Where technology challenges disproportionately impact one of the parties, the prospect of gamesmanship and inequality potentially can give rise to concerns about the fairness of the proceedings. Cybersecurity also is increasingly important. Institutions and arbitrators must be cognizant of, and manage, these issues. Technology needs to further improve, and no doubt it will—the unprecedented demand for this kind of technology is driving improvement in the platforms and the sophistication of users.

Despite its drawbacks, today's technology does make virtual hearings a viable option, as the experience of the last 18 months has shown. It also is likely that some arbitration hearings, especially preliminary hearings that do not require witness testimony, will continue to be held virtually. Video hearings are preferable to conference calls because they enable the parties and counsel to see the tribunal and to interact with one another in a more meaningful manner. The American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR) have administered thousands of virtual hearings in the past year; everyone is more knowledgeable about virtual arbitration and has adapted to the circumstances.

Technology will be vital to the future of virtual arbitration. Minimum technology requirements, including camera quality and microphone quality, are increasingly becoming part of rules issued by tribunals as they begin to address level-playing-field issues. Outside counsel play a fundamental role in ensuring that no one is prejudiced by the use of technology. When different languages are involved, it is difficult to check translations in real time, and the limited amount of time available each day makes sequential translation problematic. On the other hand, the use of certain video platforms like Zoom may enable a more seamless use of simultaneous translation than in-person hearings.

We are likely to see hybrid hearings in the future, with some witnesses testifying virtually while others will give in-person testimony. In fact, it may be easier to obtain the testimony of certain witnesses if they can attend virtually due to scheduling or travel restrictions. It also is beneficial, for educational reasons, for more junior lawyers to attend virtually. Virtual hearings also allow a larger number of people to participate in or attend a hearing without crowding a physical room; this helps to make the process more accessible and transparent to the parties. Virtual hearings also make it possible to expand the pool of arbitrators and perhaps to make it more diverse. On the other hand, such efforts could be frustrated because arbitrator appointments often are based on trust and confidence, which can be more difficult to establish virtually.

Video hearings reduce the cost of arbitration by minimizing or eliminating the travel costs -associated with in-person hearings. In-house counsel, who obviously must play a key role in choosing between virtual and in-person hearings, are likely to opt for virtual hearings in cases that are less complex or in which the stakes are relatively low, while still preferring in-person hearings for more complex or high-stakes disputes.

Further complicating the question of whether arbitration hearings should be virtual or in-person is the uncertainty over when the pandemic will be over, especially on an international scale where different regions and countries are likely to experience different stages of recovery. During the transition period especially, a party or counsel could try to gain an advantage by seeking virtual or in-person arbitration (for example, if they think a witness is weak and would perform less well in person, they may push for a virtual hearing). A witness could refuse to travel, citing health concerns. Whether a witness can navigate travel restrictions will vary by jurisdiction. Resolving such issues shouldn't be up to in-house counsel or arbitrators alone. However, arbitrators—who have a duty to make reasoned and prudent decisions and to be fair to all parties—will need to be aware of these considerations and the potential for a party attempting to leverage the pandemic (or the end of the pandemic) to gain an unfair advantage. In any event, the question of whether hearings should be conducted in-person or virtually is likely to remain a standard procedural issue to be discussed with the parties at an early stage of the arbitration.

If parties want to arbitrate virtually, there needs to be more clarity in drafting arbitration agreements. It also is important for the tribunal to establish a transparent, knowledgeable set of procedural rules to govern virtual hearings, including the steps that should be taken in the event of a technological disruption.

Virtual arbitration hearings will continue to be used for ISDS post-pandemic, but perhaps on a narrower basis than commercial arbitrations. Preliminary conferences in investor-state disputes are likely to continue being held on a virtual basis after the pandemic, although evidentiary hearings are likely to take place in-person. Investor-state disputes often have too much at stake for the parties to give up in-person hearings. States are likely to also insist on in-person hearings because of the amounts at stake and the public interest, as well as the technology and time zone challenges discussed above.

The Continued Relevance of Arbitral Seats

- Even if parties agree to arbitrate virtually, the seat will remain important since it is a source of procedural rules, including those that govern judicial review

Even where an arbitration proceeds virtually, without the tribunal or parties ever visiting the seat, seat selection will continue to be vital. In fact, virtual arbitration proceedings give the parties a greater opportunity to choose an arbitration, predictable seat, without having to be concerned with associated travel costs. In other words, the growth of virtual arbitration will place an even greater focus on the quality of the arbitration laws and the judicial respect given to arbitration proceedings. This likely will cause lead arbitration seats to make themselves more attractive to parties who agree to arbitrate virtually. For instance, the United States federal district court in Chicago recently adopted a local rule making itself available on a virtual basis to parties who agree to a Chicago seat and wish to conduct their arbitration virtually.

Appellate Mechanisms for ISDS

- Controversy persists over the possible establishment of an appellate tribunal in ISDS cases to foster greater consistency in the interpretation of investment treaties

Coming out of the pandemic, many of the traditional, non-COVID-19-related challenges facing international arbitration will remain. For instance, in order to introduce greater consistency and clarity in the application of the international laws that are utilized to interpret investment treaties and trade agreements, there is continued interest in establishing an appellate tribunal or other review mechanism for ISDS awards. On the other hand, there is concern that such appellate mechanisms could greatly increase the cost and duration of ISDS proceedings. There is also the risk that a losing party could seek to re-litigate the merits of the arbitration on appeal, thereby undermining some of

the fundamental attributes of arbitration. That said, an appellate mechanism could help to resolve inconsistencies in the arbitral jurisprudence and thus bring a greater degree of clarity to treaty requirements.

Assuming a review mechanism is created, there is strong disagreement about the approach the process should take—should only questions of fact be subject to review, or would questions of law also be reviewable? And there is disagreement about how to deal with reflective loss/shareholder claims, which would also reduce access to ISDS for smaller enterprises. Overall, a reformed appeal process would involve a trade-off between consistent outcomes and higher costs.

Arbitrator Appointment Reforms

- The arbitrator code of conduct is an important part of reform efforts.

There was disagreement about the merits of arbitrator appointment reforms. An opinion was expressed that one of the major concerns is repeat appointments of arbitrators by investors or States, coupled with lack of information about new arbitrators. In response, the view was expressed that States appoint certain arbitrators on a repeat basis not because they cannot find others but for strategic reasons—they like how those arbitrators decide certain issues, and they will resist any efforts to prevent them from appointing preferred arbitrators. Code drafters are considering the balance between regulation and improving the market so there is more choice.

Arbitrator accountability is also important. For instance, to allow an arbitrator to resign to preserve their ability to represent parties in other cases without consequences can call into question the legitimacy of the system.

Growth of Pandemic-Related Disputes

- An increase in claims arising out of regulatory measures taken during the pandemic may lead to a greater push for investor–state dispute settlement (ISDS) reform
- The pandemic may foster development of certain substantive areas of law, such as force majeure or distress, in which case law is limited

There already is an increase in the number of disputes arising from pandemic-related measures. Multinationals may think twice, however, about bringing claims related to the crisis because that would be bad for the ISDS system's reputation and it could lead to increased calls for ISDS reform. States should bear in mind the long-term consequences of the reforms being considered; however, it is the day-to-day decisions made in regulation that ultimately will impact the willingness of investors to invest and the likelihood that claims will be raised in arbitration. So, it is to be hoped that States will also bear in mind the ongoing desire to minimize risk and conflict.

The pandemic, as well as the need to combat climate change, will drive a tremendous need for foreign direct investment. Some States have been bankrupted by the pandemic and will require investment to achieve sustainable development goals. Therefore, there is tension between States' desire to effectively eliminate investment claims and their need to attract investment in order to overcome the effects of the pandemic.

Finally, the pandemic will likely lead to development of certain areas of law, including force majeure, distress, compulsory licensing of patented vaccines, and the police powers doctrine.

Endnotes

1. The Roundtable participants included:
   - Kate Brown de Vejar, Partner and Global Co-Chair of International Arbitration at DLA Piper
   - Marta Carreira-Slabe, America's Chief Compliance Officer and Chief Counsel for Latin America at Aon Corporation
   - Alan Crain, an independent arbitrator
   - Gonzalo Flores, Deputy Secretary General of ICSID at The World Bank Group
   - Michael Glackin, Head of Litigation at the Dow Chemical Company
   - Jose Luís Gómara, Former Chief of the Investment Arbitration Team at Spanish State's Attorney Office and State Attorney and General Counsel for the Spanish Treasury of the Ministry of Economic Affairs and Digital Transformation for the Government of Spain

- Samaa A. Haridi, Partner and Middle East Practice Group Lead at Hogan Lovells US LLP
- Karl Hennessee, Senior Vice President and Head of Litigation for Investigations & Regulatory Affairs at Airbus
- Kenneth Juan Figueroa, Partner and Member of the International Litigation and Arbitration Department at Foley Hoag LLP
- Jaroslav Kudrna, Head of the International Arbitration and Investment Protection Unit at the Ministry of Finance of the Czech Republic
- Michael L. Martinez, Senior Vice President and Associate General Counsel for Dispute Resolution at Marriott International, Inc.
- Michael L. Morkin, Partner at Baker & McKenzie LLP
- Jan Paulsson, Founding Partner at Three Crowns LLP
- Joe Profaizer, Partner of the Global Head International Arbitration Practice Group at Paul Hastings LLP
- Natalie L. Reid, Partner of the International Disputes Group at Debevoise & Plimpton LLP
- Catherine Rogers, Founder and CEO at Arbitrator Intelligence
- Tom Sikora, Senior Vice Chair at the Institute for Transnational Arbitration and Senior Counsel for the International Disputes Group at Exxon Mobil Corporation
- Eric Tuchmann, Senior Vice President and General Counsel and Corporate Secretary for the American Arbitration Association at the International Centre for Dispute Resolution
- Javier H. Rubinstein, Partner at King & Spalding LLP
- Dr. Tiago Duarte-Silva, Vice President at Charles River Associates ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397