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International Arbitration Experts Discuss The Major Challenges For Arbitration In 2021

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Commentary

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2021

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what the major challenges for arbitration in 2021 might be. We would like to thank the following individuals for sharing their thoughts on this important issue.

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Mealey's: What do you believe will be the major challenges for arbitration in 2021?

Gunday Sakarya and Khan: The world continues to suffer the devastating effects of the Covid-19 pandemic amidst vaccine inequity, the spread of viral variants and general uncertainty about what a return to “normalcy” will look like. The prolonged impact of the pandemic has propelled international arbitration to the forefront of dispute resolution mechanisms, likely caused by widespread domestic court closures and delays. For example, ICSID reported that it registered a record 58 new cases in 2020. Similarly, the ICC recorded 946 new arbitrations in 2020, the highest number it has registered since 2016. Arbitral institutions have swiftly amended their rules to help parties maneuver virtual hearings, expressly permitting them, as well as conference calls. However, virtual hearings pose their own unique challenges, such as the risk of theft of sensitive data. Additional costs associated with facilitating hearings include simultaneous translations for witnesses testifying in multiple languages. Hybrid hearings, those partly in-person and partly remote — seemingly the way forward as countries ease restrictions — are not without their own increased costs, including those required for compliance with social distancing guidelines. Among considerations for both hearing formats are distracted or improperly influenced witnesses — an issue recently addressed by the revised IBA Rules on Evidence. Parties' evolving needs in this virtual era could also play a role in arbitrator appointments with younger (albeit less experienced) arbitrators, adept at managing new technological issues, becoming the preferred candidates.

The major challenge for arbitration in 2021 and beyond will be to successfully adapt itself as procedurally efficient and flexible while handling the inflow of cross-border disputes arising from the pandemic, spanning numerous industries, includ-

ing insurance, construction, transportation and energy. We expect to see more claims stemming from general nonperformance, force majeure provisions and government response to the pandemic, to name a few. With such similar issues being litigated on a large scale, there is an acute risk of conflicting decisions, only to be exacerbated by the confidential nature of arbitral proceedings. Actions to challenge and enforce international awards will be further complicated by backlogged courts and the diversion or dissipation of assets by insolvent or near insolvent companies.

Pre-Covid, third-party funding was already on the rise. Now, in light of increasing insolvencies and companies choosing to avoid litigation costs, the use of third-party funding is likely to accelerate. Many arbitral institutions have updated their rules by requiring the disclosure of third-party funders to preserve arbitrator impartiality. Yet, there remains much uncertainty concerning the implications of funding in international arbitration, namely the economic imbalances that it causes and the lack of mechanisms in place to regulate a funder's conduct.

Ali: Based on data from arbitral institutions and our current workload, international arbitration activity seems to have returned to pre-pandemic levels, albeit some of the matters we are handling are those that were suspended due to travel and other restrictions. Certain challenges we were grappling with in the international arbitration community pre-pandemic — for example, the tension between procedural efficiency and due process, the lack of diversity in counsel teams and arbitrators, and unnecessarily aggressive litigation tactics — continue to confront us. The pandemic's forced hiatus gave us an opportunity to reflect with greater focus on how to respond to these challenges, and to engage in new approaches to international arbitration; with attendant benefits, but also a host of new challenges.

For example, the pandemic pushed parties, counsel, arbitrators and arbitral institutions to act on the adage that "necessity is the mother of invention." We didn't invent new technologies, but learned very quickly how to deploy existing ones to convene hearings, collaborate in drafting lengthy memorials, and use virtual data rooms. Arbitral institutions were quick to respond with procedural guidance, checklists

and trainings for "virtual hearings." Technology-facilitated practice and procedure is here to stay, with significant benefits in terms of cost savings, scheduling flexibility, and environmental impact. But it has given rise to new due process challenges — parties often have unequal access to the required technology; bandwidth in certain locations from which the parties and their lawyers or the arbitrators are participating in a hearing may be limited; digital security may be inadequate or compromised; or it may simply be harder for the participants to understand each other's accents or perceive important culture-specific body language in a virtual setting. Technology has allowed us to remain connected. It has also intensified in unanticipated ways the clash of cultures that often underlies international disputes.

Armas: In 2021, the major challenge for arbitration will be dealing with the shift in disputes following the COVID-19 pandemic. Thanks to low interest rates and pent up demand following the pandemic pause, M&A markets have been hot, however, some of these deals may deliver below expectations inevitably leading to post-acquisition disputes. The pandemic impacted construction disputes as construction continued throughout the pandemic, but since construction is heavily dependent on international supply chains, which can be disrupted, we can expect to see an increase in disputes around costs and delay. There will likely be a continued increase in disputes related to the transition to renewables as new business and regulatory structures are implemented. Nationalization risk is also increasingly prevalent in this sector, especially for the extractive industries, and even in some developed countries.

Investor-state disputes will also likely increase following the pandemic as governments come under pressure to raise revenue. Governments may also take aggressive actions against foreign-owned/operated projects in an effort to shore up short-term government deficits leading to additional investor-state claims. IP disputes in life sciences and healthcare may also lead to investor-state disputes as they relate to compulsory licenses over patented drugs and devices, and the temporarily nationalized private hospitals as seen in Spain and Italy.

Lennon: COVID will continue to present the major challenge for arbitration in 2021. While the tragedy

in India has dominated the news, COVID surges are happening across the globe. COVID will again cause schedule disruption in many cases. The issues range from inability to access evidence in hard hit countries with severe lockdowns to hearing postponements because counsel or arbitrators have contracted COVID.

While COVID has been credited for catalyzing virtual proceedings, challenges inherent therein will continue in 2021. For example, not all Wifi is created equal. Connectivity losses disrupt proceedings. Severe connectivity problems can give rise to inequality of arms and unfairness. And when witnesses, counsel and arbitrators are spread across multiple time zones, finding virtual hearing times that are fair and reasonable for all can be challenging.

But these challenges may pale next to cybersecurity risks. As COVID-related lockdowns and working from home push data to potentially less secure networks, cyber risks have grown. Reportedly, a court in Brazil has stayed enforcement of an ICC award to consider whether it was tainted by hacking. The hack does not appear to have been of a virtual hearing, but one can easily imagine that happening given Zoom-bombing early in the pandemic.

Finally, the return to in-person merits hearings post-COVID vaccine roll out remains uncertain. The New York Times recently reported a stark gap in vaccinations worldwide, which likely will remain for 2021. A globally uneven vaccine roll out may cause vaccinated and unvaccinated participants alike to be uncomfortable traveling to and attending in-person hearings. Courts will be pressed to decide the consequences of a party declining to attend for public health reasons, even though a tribunal has directed an in-person hearing. The public health and due process balance is tricky to say the least.

Huebner: One of the most significant challenges for international arbitration going forward, and not just in 2021, will be reorganizing our professional ecosystem to foster authentic, self-sustaining inclusiveness in what has historically been a distinctly exclusive field. There has certainly been meaningful, though still limited, progress in engineering greater diversity within neutral and advocate cohorts on a couple of axes with which legacy power holders are most comfortable. To meet the expectations of our current user base, expand

that user base, and mitigate pressure for externally imposed reform, however, we will need to focus on reconfiguring our institutions and structures to reflect and foster full-spectrum inclusiveness — not selective diversity — including with respect to intersectionality and diversity factors not favored because not driven by current market pressures. It will be particularly important, and difficult, to consider the degree to which pay-to-play and other cash-intensive arbitration infrastructure limits diversity and impedes inclusiveness.

Another key challenge is how best to frame and implement greater transparency in international arbitration, again in order to expand our user base, better advance other imperatives (including inclusiveness), and mitigate pressure for externally imposed reform. The most critical subset of the transparency challenge, in my view, is how best to create mechanisms to provide users and potential users of arbitration services with reliable information about neutrals' experience, qualifications, and prior performance. Most currently available information is "self-marketing" in nature and thus inherently unreliable. Reliance on "word of mouth" is untenable and inhibits inclusiveness. Laudable steps are being taken by certain arbitral institutions to increase public visibility into awards, performance, and administration, but arbitrator (and even chair) selection remains a significant gamble for most users.

Bates and Torres-Fowler: While there are promising signs that the COVID-19 pandemic is beginning to ease, the extent to which the world will, if ever, return to the pre-pandemic "normal" remains an open question. The international arbitration community will confront a similar dilemma over the coming year as parties, practitioners, and arbitrators struggle to balance a general desire to return to in-person settings with the convenience of remote work technology, all set against a backdrop of continued global uncertainty.

In the second quarter of 2020, the international arbitration community was rapidly forced to accept — whether willingly or not — remote work technology. Not only did this mean that parties, counsel, and arbitrators had to heavily rely on virtual hearings to ensure the expeditious resolution of cases, but client meetings, witness interviews, and nearly every other feature of practice had to adapt to this new normal.

In most instances, remote work technology has been generally well accepted across the international arbitration community. In fact, many claim that remote work technology has increased productivity, promoted access to clients and colleagues, and even led to more expeditious and economical proceedings.

As a result, there seems to be little doubt that remote arbitration proceedings will have a permanent place in international arbitration going forward. Indeed, the normalization of remote arbitration proceedings, in many ways, has shifted the Overton window in favor of virtual arbitrations in ways that would have been unthinkable just a few years ago.

Thus, we anticipate that counsel, witnesses, experts, or other participants will more commonly appear in arbitration hearings remotely. We would caution, however, that the broader adoption of remote technology will not come without bumps in the road. Accusations of gamesmanship and legitimate due process concerns — particularly in hybrid virtual formats where one party appears before a tribunal in person and the other does not — will continue to percolate as international arbitration adapts to the long term use of this novel technology.

Notwithstanding its benefits, most will also recognize that remote work technology is an imperfect substitute. Logistical issues such as time zone conflicts and IT disruptions have been well documented. Further, generalized “zoom fatigue” has affected nearly everyone in the international arbitration community. As a result, the desire to return to in-person meetings, hearings, conferences, and other social interactions is profound.

With global vaccine distribution still relatively uneven, surging COVID-19 cases in some countries around the world, and significant travel restrictions still in place, the international arbitration community will continue to struggle with the question of when, if at all, the transition back to in-person settings should take place. As a result, while there is a significant desire to return to normalcy, we expect that this return will be uneven and will take place in fits and starts over the coming year.

Lee and Siddiqui: From a Cayman Islands enforcement perspective, we believe that the major arbitration challenges in the remainder of 2021 will be for award debtors.

As a jurisdiction where many parties choose to hold assets and one with a well-established regime for the enforcement of international arbitral awards, the Cayman Islands has been an increasingly popular jurisdiction for award creditors seeking to enforce foreign awards over the last 10 years. This enforcement activity has led the Cayman Courts to develop a sophisticated approach to enforcement as well as the legal tools to support effective enforcement to ensure that recoveries are made. This trend has continued over the last year, with the Cayman Courts making the first notification injunction preventing an award debtor from transferring assets without notification. In addition, following the *Marex* decision by the English Supreme Court, there has been particular focus in Cayman on bringing actions against award debtors' shareholders where the payment of dividends has left the award debtor unable to satisfy the award. This is not to say that award debtors have no means to resist enforcement — but effective strategies do need to be carefully thought out at an early stage.

With the recent establishment of the Cayman Chapter of the Chartered Institute of Arbitrators, the fallout from the COVID-19 pandemic still very much at large, and the willingness of the Cayman Courts to assist award creditors in making recoveries, the future of arbitration in the Cayman Islands for the rest of 2021 and beyond looks to be extremely active.

James: By any measure, 2020 was an extraordinary year. The opening act to a promising new decade swiftly departed from the script and threw up changes that will reverberate for the rest of the decade. The flexibility inherent to arbitration left it fortuitously positioned to respond, overcoming the pandemic-driven challenges to lead and shape the new “normal.”

As 2021 gets underway and the world emerges from the pandemic's lingering shadow, the challenges facing arbitration are a mix of the old and the new:

The demise of the in-person hearing

The exponential rise of the remote hearing as an alternative to the in-person hearing was the most tangible arbitral consequence of the pandemic. Buttressed by a flurry of institutional and non-institutional guidance, remote hearings became the default option.

With arbitral institutions now updating rules to expressly provide for the use of remote hearings, is there

a future for the in-person hearing outside of the largest and most complex of arbitrations? This is a question that will likely take the decade to settle. For now, as in-person hearings become an option once again, parties and tribunals will have to deal with the challenge of determining between the two options that, post pandemic, may no longer be as equal as they once were.

Changing rules

On 1 January 2020, the Madrid International Arbitration Centre ("**MIAC**") Arbitration Rules came into effect; on 1 October 2020, the London Court of International Arbitration ("**LCIA**") Arbitration Rules

became effective and on 1 January 2021, the International Chamber of Commerce ("**ICC**") implemented its 2021 Arbitration Rules. In addition, the Singapore International Arbitration Centre has announced an imminent rule review of its own.

As a general view, the changes are intended to facilitate a more efficient and flexible way of conducting arbitration and as such, are to be welcomed. However, structural change, even if minor in nature, bring their own challenges, the manifestation of which will significantly outlast the pandemic for which they were introduced. ■

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