

Changes and Innovations in International Arbitration

‘When the facts change, I change my mind’ Keynes famously stated (or at least he is widely quoted as having stated) in the wake of the 1930s financial crisis. It is a statement of the obvious: our thinking must constantly change and adapt to new circumstances.

Two questions arise in relation to changes in any field, and in the field of international arbitration in particular.

The first is why do we tend to react only after a profound financial crisis or a pandemic strikes? Why do we tend to be complacent before? One possible answer is that it is an inherent condition in the human mind to feel more comfortable with the *status quo*, especially when the *status quo* largely works, albeit not for everyone. The ‘*if it ain’t broke, don’t fix it*’ approach is not just a convenient cliché; it seems to represent an essential guiding principle for the organization of our lives.

International arbitration had been largely working well before the Coronavirus disease 2019 (Covid-19) pandemic struck. Again, not for everyone: clients have often complained about the increasing complexity of arbitration proceedings, which has inevitably led to increasing costs and time for the issuance of awards. It was, thus, Covid-19 which had to force our thinking out of the ‘indispensable’ value of physical hearings. The initial (largely misplaced) fears of counsel and arbitrators that online hearings would violate principles of due process have now been substituted with the increasing realization that remote hearings can, under certain circumstances, work just as well. In the last six months, arbitration practitioners have been fervently exchanging notes and sharing experiences on best practices for online hearings. This has been international arbitration at its best: innovative, willing to embrace change, and quick to implement solutions to real life problems by relying on the use of cutting-edge technology.

Of course, the current Covid-19 exceptional circumstances will not last for ever (one would hope!). We will need to reintroduce some elements of in-person hearings. However, if there is one lesson from international arbitration’s response to the pandemic is that in-person hearings should from now on be an exception rather than an indispensable rule. Under the ICC Rules, for example, and the USD 1,200 per diem allowance for each arbitrator, a three-week in-person hearing

‘Changes and Innovations in International Arbitration’. *Arbitration: The Int’l J. of Arb., Med. & Dispute Mgmt* 86, no. 3 (2020): 229–230.

including travel expenses would cost close to USD 100,000. Even post Covid-19, parties will have to carefully consider the costs and benefits of paying this amount before quickly rejecting the idea of electronic hearings.

The second question is whether every change and innovation is as good as we want to believe it is.

With the possible exception of failing to introduce online hearings before the pandemic, international arbitration has, in fairness, never been complacent. As the 2015 Queen Mary University of London and While & Case Survey found there has been a proliferation of new ideas and innovations in the last decade in particular.

But Karl Hennessee in his insightful article in this issue '*Change for the sake of change*' is right to examine some of these innovations and assess their actual practical benefits to the users of arbitration. Drawing on his long and rich experience as corporate general counsel, Karl brings the perspective of the clients (and ultimate funders) of international arbitration and notes that '*it should not be assumed that an idea steadfastly endorsed by arbitrators will be as readily embraced by business people*'. It is sometimes easy to forget that.

Stavros Brekoulakis,

Editor-in-Chief

June 2020

Email: s.brekoulakis@qmul.ac.uk