President's Message

Beam Me Up, ~~Scotty~~ Mr Chairman

I recently heard an interesting newscast on my car radio. The report was about a young French boy who had been born without a right hand. The lad fortunately received an artificial hand that was simple to get accustomed to (he had mastered the essentials after one day), easy to maintain and very inexpensive: the cost was a mere 50 Euros. Apart from the cost of the hand, one may wonder what was so special about this happy story. The novelty was that all of the components of this totally functional artificial limb had been produced by a 3D printer. Having heard good news – for once – on a newscast, I sat at the wheel, waiting for the lights to turn green, marvelling at the benefits of modern technology. As I approached my office and my thoughts turned once more to arbitration, I began to consider what all of this could mean for our wonderful profession.

Of course, technology and arbitration are already old friends. However, this President's message is not about, for example, the latest document-management software. No: it is resolutely more visionary.

Let us consider our 3D-printed artificial limb. How many times have counsel attempted to describe a physical object in what they believe to be simple terms – only to despair when seeing the arbitrators' eyes glaze over as if they were being subjected to an egregiously arcane discourse on metaphysics? Conversely, how many arbitrators have sat in hearings wearily wondering why counsel cannot simply "show" instead of "tell"? In these situations, the value of actual samples being placed in front of a tribunal is immense. However, it is not always that easy to procure samples. The object in question may be particularly rare or valuable. It may be dangerous to handle. It may be subject to export or import restrictions. So the benefit of having a facsimile available at a hearing is obvious. It can even be filed as an exhibit, with data being provided and the recipients' 3D printers doing the rest. There is in truth nothing revolutionary about this: although I have never witnessed it personally I would not be surprised to learn that it has already been done.

Site visits also offer a huge potential for applied science in arbitration. They are expensive and time-consuming. Moreover, it is obviously not possible to reproduce, say, a hydro-power plant or an aluminium smelter by way of 3D printers, and even if it were, hearing rooms are only so large. So what about re-creating a site virtually? Virtual-vision goggles are a common (if mildly alarming) feature of today's teenage world and anatomy. So why not have all present at a hearing don a headset and experience the thrills of

watching the operation of an allegedly defective margarine production system in a far-way corner of the world as if they were actually there? Again, this is by no means far-fetched and has either already been done or will soon happen. However, the real challenge will be to convey not just sights and sounds, but also smells or even feelings – the technical geniuses of this world may be only a step away from producing the "SQUID" (or "Superconducting Quantum Interference Device") of cinematographic lore![1] While we await the perfection of teleportation, be it by way of floo powder, portkeys, apparating or more elaborate systems involving pointy-eared gentlemen wearing blue Calida pyjamas, virtual tours are far better than physically transporting the parties, their witnesses and experts, counsel, the arbitral tribunal, etc. to the hydro-power plant, the aluminium smelter or the margarine factory.

Witness examination is another blue-water zone in the arbitral process. Granted, there is a strong case to be made to the effect that nothing can replace the actual physical presence of the witness in the hearing room, where all present can observe the sudden outbreaks of perspiration, nervous fidgeting or similar signs of discomfort, or, as the case may be, the intangible calm and confidence that some witnesses exude. As next-best, we have telephones and video-conferencing. But this "next best" should not even be "third-best". Let technology step in and create far more attractive alternatives! Hologram projections are a thing of the present, not the future.[2] Why not use them in the hearing room? This is aptly illustrated by a brutal observation: "Help me, Obi-Wan Kenobi, you're my only hope! [garbled static intervenes at this point] Help me, Obi-Wan Kenobi, you're my only hope!" is, very frankly, not the most powerful exhortation ever to have graced the silver screen. But with the 3D hologram projection, Princess Leia's plea achieved new heights of eye-watering pathos. So why deprive the arbitral process of such a useful tool?

It should also be added that all of the above techniques are very environment-friendly. The carbon footprint of the average arbitration is unflattering, and that is putting it mildly. Assuming that proceedings still involve sending boxes (or, as the case may be, crates) of documents and other objects via courier, this alone means, for reach arbitration, several aircraft criss-crossing the globe every few months or so for limited added value. Add to this the travel – frequently air travel – triggered by the average hearing,

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1 Readers may wish to do a google search at this stage, using the search terms "strange days movie". For a more sober assessment of virtual reality goggles and the like, see "*Virtual Reality – Grand Illusions"*, The Economist August 29th 2015, pp. 61-63.

2 See, for example, http://www.theguardian.com/science/2013/mar/20/princess-leia-hologram-3d-display.

and the sum translates into several tons of CO2 being spewed into the atmosphere. The additional potential for pollution attendant to any site visit makes one shudder. Virtual reality and teleportation of data instead of objects or persons eliminate all of this. Green-certified arbitrations are just around the corner!

Regrettably and no doubt inevitably, there is a darker side to these technological leaps and bounds in arbitration.

To begin with, novelties that aim to streamline the process will very probably be hijacked by the lawyers. Consider the scope for dispute as to the data that is fed into a 3D printer: is the resulting facsimile a true copy? As for the virtual reality that is produced by goggles or a hologram, the vista of potential dispute is boundless. The less scrupulous – or more garrulous – members of the legal profession are no doubt already licking their chops at these prospects. And they will certainly be assisted by experts who will helpfully educate arbitral tribunals about the opposite party's "virtual reality" being more "virtual" than "real".

Arbitrator surveillance is another particularly troubling development. Recently, this activity involved only the crudest of technologies, if any technology at all. In a well-known matter, the chairman of a tribunal was followed and his garbage searched. More recently, a slightly more sophisticated exercise consisting in tapping an arbitrator's phone has made a much-commented appearance on the arbitration stage. Alongside eavesdroppers, arbitration is also facing hackers, as recently demonstrated in another high-profile case. It has also become commonplace for parties and their counsel to troll the Internet for information on potential or appointed arbitrators, not forgetting to conduct painstaking cross-checking of Facebook "friends", LinkedIn contacts and the like.[3] None of this involves any particularly new or exciting forms of technology (the garbage investigation did not require any "technology" at all apart from rubber gloves).

This novel and more sinister use of existing technologies is unwelcome, and could readily spiral out of control. Those of us having a household pet know how easy and inexpensive it is to implant tracking microchips, featuring inter alia GPS nanotechnology, in our furry companions. The procedures are simple and painless, and, apart from the pinning-down by the veterinarian's assistant, the subjects often appear not even to notice what is transpiring. Knowing this, modern arbitrator-stalkers would need no more than an umbrella or walking-stick surreptitiously to

[3] Although the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration should eliminate the attractiveness of this type of research. See Guidelines 4.3.1 and 4.4.4, which are on the "Green List".

implant such devices in unsuspecting practitioners as they congregate around the lunch buffet in arbitration conferences. Even a moderately diligent implanter could thus earmark hundreds or even thousands of innocents in any given year. The comings and goings of the victims would be tracked, recorded and duly stored in data banks, and then cross-checked whenever the time has come to ascertain whether an arbitrator has, within the last three years, come within a 50-metre radius of any other person involved in the proceedings and failed to disclose this damning circumstance prior to accepting his or her appointment.

The reader of this President's Message may get the impression that as a youth I spent too much time in front of a TV set and, in later years, far too many hours reading or watching science-fiction stories. If so, he or she is forgiven. However, the practitioner who stumbles upon this humble text in a few years will probably shake his or her head… because reality will by then be far more fascinating than anything (science-) fiction has to offer today.

ELLIOTT GEISINGER

SAVE THE DATE

ASA Annual Conference 2016
Commercial Arbitration Involving States: Public Interests and Private Justice?
22 January 2016, Zurich

For more information see www.arbitration-ch.org