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KEYNOTE REMARKS:

ETHICS AND ONLINE ARBITRATION – BRAVE NEW WORLD OR 1984?

by Justin D’Agostino

Keynote address delivered at the 32nd Annual ITA Workshop and Annual Meeting held virtually, on June 17, 2020.

Will virtual hearings mean a new age of efficiency, or Big Brother meets the Wild West? Can we arbitrate online without sacrificing conduct and confidentiality? The keynote addresses this and other difficult topics.

I. INTRODUCTION

It is an honor and privilege to stand before you today to deliver the Keynote Address. I am sure you are all familiar with the two books that I reference in the title for my keynote address.

“Brave New World” was written by Aldis Huxley in 1931, and it describes a future society in which humans are genetically engineered to fall into one of five social classes based on their intelligence and ability to work. The Alphas are designed to be leaders and thinkers, enjoying every advantage that the world/state can offer. And the lowest caste, the Epsilons, are condemned to a life of menial labor.¹

George Orwell’s “1984” is a similar dystopian view of the future under a repressive regime that controls its citizens’ every thought through the infamous “Big Brother”, making it impossible to keep anything confidential or private—even the most personal thought or relationship.²

This morning, I am going to ask for your indulgence because neither of those two novels in the title portray a positive view of the future. Both are premised on the idea that the advancement of technology is a bad thing. That it erodes societies’ ethics. That it erodes societies’ freedoms and individual freedoms.

But, actually, I believe that the advent of technology in arbitration is a positive development to be welcomed. Specifically, I do not think that using more technology

¹ ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper Perennial 2006) (1932).

² GEORGE ORWELL, *1984* (Signet Classic 1961) (1949).



in arbitration necessarily means the process will become less ethical. On the contrary, I think the move to doing more online can and will create a brave new world that is much more positive than Huxley's. More than that, I think it will be a much more positive place than the world of international arbitration as we know it today.

Before I explain what leads me to that conclusion, it is worth exploring what we really mean by "online arbitration," and what gives rise to the concerns that might make arbitration "less ethical."

II. WHAT IS ONLINE ARBITRATION?

As many have pointed out, the phrase "online arbitration" describes the whole arbitral proceeding, from request to award, and this phrase has been widely used in the last few years, mostly in a way that suggests that it is an entirely new process. But, in practice, we have been conducting arbitrations online for many, many years. We file the notice by email, the institution replies by email, email is the default method of communication amongst the institution, parties, and the tribunal, and increasingly parties file pleadings by email or by uploading to an online repository. Case management conferences are held by phone or video conferences. Tribunals issue their decisions, orders, and awards by email, often bearing electronic signatures. So, the exception, of course, is hearings.

Until the COVID-19 crisis, every merits hearing I have ever attended had been in person. I suspect the same is true for most of us. However far we had to travel; however big the logistical challenges of getting 30 plus people, thousands upon thousands of documents, all to one place; however, much it cost that was invariably what we did. We travelled and we spent the money. Occasionally, a witness would give evidence by a video link to the hearing room. But, in my experience, it would usually be only one or two witnesses who could not attend in person. Everyone else was together in one room. By everyone else, I mean the tribunal, its secretary, counsel, party representatives, interpreters, transcribers, and witnesses. In a large commercial arbitration, there can be scores of people in the room for the entire hearing, no matter how long it might last. We have become used to the logistical, financial, and environmental costs of such hearings.



But take a step back. Those costs are significant. In the post-COVID world, I venture it would be difficult to justify. If you had asked most arbitrators, even this time last year, whether they would conduct a merits hearing completely virtually, many of them would say “No.” They might even have told you that it is impossible to deliver due process in an online merits hearing for two weeks. Counsel would have objected if it was too difficult to cross examine witnesses virtually. Most lawyers would have advised their clients against agreeing to a fully online virtual hearing.

Now, COVID has made it impossible to hold hearings in person, and we have had to rethink. In a world where we cannot travel and we cannot gather in a room, and it is not good to be able to cross countries by foot, there are only two options: to postpone the hearing indefinitely or move it online. Necessity being the mother of invention, and delay being generally undesirable, the arbitral community has embraced the virtual hearing almost overnight. Really. It is only the hearings that have recently moved online, and as a direct result of the pandemic. For this reason my thoughts today are focused mainly on virtual hearings, rather than on online arbitration as a whole.

III. ETHICAL CONCERNS ABOUT VIRTUAL HEARINGS?

From what I have seen so far, virtual hearings seem to work well. It is of course early days, and there are a variety of experiences. On the whole, however, the feedback has been good. Moving hearings online has certainly been more successful than many stakeholders had anticipated. But there are still concerns. Some are purely practical. Some, if borne out, may affect the ethical aspect of the arbitral process.

Broadly, these concerns fall into five categories:

1. Confidentiality;
2. Witness evidence;
3. Equality of arms;
4. Technology; and,
5. Human behaviour.

I would like to look at each in turn, including how valid each concern may or may



not be. I will then turn to the ways in which we can address those concerns and whether our hesitations are in fact outweighed by the positive aspects of moving hearings online.

A. *Confidentiality.*

There is very understandable concern about sharing commercially sensitive information using technology. This is not confined to arbitration but is magnified when conducting what is inherently confidential processes over the internet.

As we all know, parties choose to arbitrate, in part because the process is private, and hearings are not open to the public. Thus, it is natural to worry about losing that confidentiality if the process moves online. Parties may be concerned that the other side is recording the hearing without authorization, and it may release the recording to a competitor, the press, or to the public at large. They may worry that a third party will hack the software and gain access to information to which it has no right. The software provider or technician might misuse the data. We all know the concerns of vulnerability of data breaches across much of our lives. More basically, a party may feel it cannot control who is present in a virtual hearing. For example, if the other side allows a third party into the virtual hearing room or shares an access password.

Another concern relates to witness testimony. Parties worry that the other sides' counsel may somehow coach the witness for cross examination. Or that the witness might have more than one screen and may be reading answers to the questions. Where a witness is testifying in another language, it can also be more difficult to use interpreters if the witness, interpreter, and cross examiner are all in separate locations. Even without interpretation, counsel often feel that it's difficult to cross examine remotely. Advocates complain that it is impossible to achieve any rhythm in cross, unless counsel and witnesses are in the same room. This is exacerbated if the connection is poor, if it is difficult to hear or see the witness, or if there is a time lag between the question and the answer.

Many lawyers and arbitrators indicate that it is more difficult to read a witness' body language or other physical cues if he or she is not physically present, making it harder to assess the witness' credibility. Joe Navarro, a former FBI agent and leading



body language expert, says that it is the feet that are the best place to look for emotional shifts in reaction.¹ So, if your screen is only showing the witness' head, he says that you not only lose the ability to see his or her feet, but the rest of the body as well, and those important cues. This is not to say that it is impossible to gauge people online, but it is undoubtedly harder.

A former colleague of mine who has a doctorate in psychology, provides a useful analogy. She says that trying to read a person online is like trying to read a document with half the vowels missing. You can still do it, but it takes far more cognitive effort, and there is a very good chance that you will get the odd word wrong. Thus, there are grounds for worrying that a dishonest witness may be harder to expose if they are separated from a cross examiner by a screen. Most witnesses, of course, are not dishonest. But it still may be harder for counsel and the tribunal to read them, to assess the strength of the testimony, when you cannot see them in the flesh.

B. Equality of Arms & Technology

An equal opportunity to present your case is another serious issue. Equal treatment of the parties of course is the fundamental principle of international arbitration. As we all know, a tribunal that fails to treat the parties equally, risks its award being challenged and set aside. Conducting a hearing remotely can give rise to numerous risks around equality. The most obvious is where one party wants a virtual hearing and the other does not. There is an active debate on whether the tribunal's discretion entitles it to order a remote hearing over a party's objection. Many of you may have seen Mohamed Abdel Wahab's excellent article in GAR last month,² which proposes a pathway to determine the extent of the tribunal's power by considering the applicable law and the procedural rules.

Assuming a party is ordered, or the tribunal does order a remote hearing, there are many potential inequalities. What if one party is located in a jurisdiction with poor internet connectivity, or electricity that cuts out every hour? What if one party

¹ See Joe Navarro Forensics, <https://www.jnforensics.com/>.

² Mohamed Abdel Wahab, What if Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway, *GLOBAL ARB. R.* (May 6, 2020)



does not have access to appropriate technology, laptops, etc., while the counterpart enjoys the benefit of good connectivity and equipment? What if your counterpart has technical support and you do not? What if your witness is giving evidence to an interpreter while the other sides are not, and there is a large time delay on the video call? The issues of time zones—is it fair that the hearing is timed to fall on a business day where one party is based, but very late at night for the other? Is that fair?

In most developed seats, courts are resistant to efforts to set aside or resist enforcement except in most egregious cases. There is no reason to think that this will change simply because the hearing was held remotely. However, my examples show that the remote hearings could provide fertile ground for award debtors to try to set aside or resist enforcement. Even if these applications ultimately fail, we know that time and money may be lost in defending them.

There are valid concerns about a hearing that relies on technology if the arbitrators themselves are not comfortable with that technology. This will not always be an ethical issue, but it could be. For example, if the tribunal's ability to manage the IT significantly disrupts the hearing or means the hearing overruns and the time for witness testimony is cut short, that could give rise to problems. We did an arbitration with an arbitrator who was completely unused to video conferencing. He was unfamiliar with the mute button, with the camera, repeatedly put his finger over the camera and the like, and he just could not work it.

Tech concerns are not confined to arbitrators. Most of us had never heard of Zoom, Blue Jeans, or Microsoft Teams before this year. Now, we are being asked to use them in two-week hearings in billion-dollar cases. Arbitrators and lawyers are not known as being particularly tech savvy. As a group, we are not the early adopters. We tend to hang back, stick to what we know, and evolve slowly. But that is not an option in the post-COVID world.

C. *Human Behaviour.*

Before I turn to solutions, I have one final thought in terms of the challenges, and that is around human behaviour. I wonder if there is a concern that individuals, that is, counsels and witnesses, may behave less ethically when they know they will not



come face-to-face with the other side. Do we naturally feel that a person testifying to a screen in an empty room may be less reluctant to bend the truth, or lie outright, than if he or she were sitting feet away from senior arbitrators, flanked by lawyers?

Experience with social media has taught us that people are willing to make offensive, threatening, and abusive comments online in a way that we rarely see in person. Many put their names to their comments, so it is not anonymity that emboldens them. Online, people seem much more willing to ignore the societal norms that would stop them from saying the same thing to someone's face. Being separated by a screen emboldens people, often in ways that are unpleasant, unhealthy, and sometimes illegal. Of course, most people do not spend their time trolling people online, but significant numbers do. I just wonder if we have learned consciously or otherwise to view online platforms as places where people do not respect society's conventions, and where they feel less constrained by ethics.

There are many ways in which moving hearings online can be detrimental to the values of the process, and these are all valid concerns. It is for the arbitration community to have to evaluate, address, and overcome them.

Many of our worries, I think, stem from a lack of control. Now, it seems less easy for any party or tribunal member to control the process that is conducted remotely than if all participants are physically present in the same room. As a matter of human nature, that is entirely natural. Lack of familiarity is another root cause. We are having to find new ways of working and new technologies, all at once. The learning curve is really, extremely steep. It is only natural that we are hesitant. However, I would argue that these feelings will naturally dissipate as we become more accustomed to remote hearings. Human beings, even lawyers, are traditionally adaptable.

With arbitrations, it will never be possible to stamp out unethical behaviour entirely. Even where a hearing takes place in person, someone could have a recording device tucked into his suit pocket or could be handing out confidential documents to a third party. We have long been concerned with arbitrators using Hotmail and Gmail, and the risk that poses to confidentiality and data security. Many of us have had



witnesses lie in cross examination despite sitting in front of the tribunal.

But my view is that the community will overcome the ethical challenges and will move forward with virtual hearings in a way that does not prejudice the process. Indeed, I would go further. I think that moving hearings online will improve arbitration in a number of ways, and not just the costs or the carbon footprint. In the meantime, there are a number of ways to alleviate even the most common concerns.

IV. POTENTIAL SOLUTIONS?

What are the solutions? While much has been written on this, including articles by Prof. Maxi Scherer³ and Arbitrator Janet Walker,⁴ and I do not claim to offer much original advice, I want to highlight some suggestions offered, as our community starts to grapple with the challenges of online hearings.

I would venture that virtual hearings are likely to be part of the new normal. Virtual hearings will be part of the new normal even after COVID subsides—that much is clear. It does not mean that every hearing from now on will be conducted remotely. But I suggest that virtual hearings are now on our radar as never before, and are here to stay.

Just as transactional lawyers are putting force majeure clauses into every contract, arbitrators are well advised now to include in their first procedural order the possibility of virtual hearings and to include a virtual hearings protocol. This will be a change, but a necessary one, and I think a welcome one.

Part of the solution would lie in the importance of soft law. There are numerous guidelines already available. Arbitral institutions have published guides in the wake of COVID, which are practical and helpful. There is also the Seoul Protocol on Video Conferencing in International Arbitration⁵ and the Hague Conference Draft Guide to

³ Maxi Scherer, Remote Hearings in International Arbitration: An Analytical Framework, 37 J. INT'L ARB. 407 (2020).

⁴ Janet Walker, *Virtual Hearings: An Arbitrator's Perspective*, (2020), <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf>.

⁵ Seoul Protocol on Video Conferencing in International Arbitration (2018), [http://www.sidrc.org/static_root/userUpload/data/\[FINAL\]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf](http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf).



Good Practice on the Use of Video Links Under the Evidence Convention⁶ from March 2019.

In terms of appropriate technology, there is some good practice emerging. First, it is important to understand the minimum technical standards that need to be applied to the quality of the feed and the delay. The Seoul Protocol sets these out well and provides a useful checklist for engaging with technical providers. For some it may be easier said than done. But using the best technology available clearly helps. That includes hardware that's fit for the purpose, licensed secure software, and the best internet connection you can obtain. Consider working with external service providers to facilitate the process and have someone on hand to provide technical support during the hearing, to help set up, and in case the IT fails.

Another technology that I am regularly seeing now is the encryption of signals to avoid illegal interception during the hearing and requiring passwords to access the virtual hearings and breakout rooms. Many commercial software packages are now offering end-to-end encryption. Another very practical piece of advice is to test every aspect of the technology well before the hearing. Testing the platform well with the parties present from every computer that will be used on the day and the location they will be in on the day of the hearing. The test will be done ideally more than once. Just because it works once does not mean it will always work. We did a hearing earlier this year in a less well-known arbitral centre. On inquiring about the internet, we were told that it is completely reliable, unless it was raining. So, test and ask questions.

In terms of witness tools, use cameras that pan, tilt, and zoom to scan the room and pick up any other person present. Or simply ask the witness to do so if you cannot. Consensus also is that sequential interpretation works better than simultaneous when the interpreter and the witness are in different places.

These solutions address many of the concerns that I have identified. However, I

⁶ Hague Conf. on Private Int'l L., *Guide to Good Practice on the Use of Video-Link under the Evidence Convention* (2020), <https://www.hcch.net/en/publications-and-studies/details4/?pid=6744>.



have “nailed my colors to the mast,” and I have claimed that moving hearings online will positively improve arbitration. I would like to finish by fleshing out that claim. To do that, I need to shift my focus from the risks of online arbitration to the rewards.

V. IMPROVEMENTS TO THE ARBITRAL PROCESS

How will virtual hearings improve the arbitral process? It is essentially by providing more reward than risk.

There are obvious significant cost advantages by moving the hearing online. By avoiding the need to travel, to rent expensive facilities, to print bundles, you eliminate some of the major costs associated with the hearing. The lawyers’ fees remain constant, of course, but even they will need to travel less.

We are all familiar with the challenge of fixing two-week hearings with busy arbitrators, particularly if they have to travel for the hearing. Moving online does not entirely remove these challenges, but it does reduce them. Arbitrators are more likely to be able to find two weeks if they do not have to travel on either end. Remaining home reduces their overall time commitment and allows them to schedule other commitments around hearing days. Alternatively, the tribunals may split the hearings into shorter periods, rather than having to hear it all at once and fly home. If we are all not in the same place, the tribunal can split up the hearing much more easily. The same applies to counsel teams. Moving online also avoids the issue of obtaining visas.

In terms of process improvements, once we all get used to them, there is potential for online hearings to run more efficiently than in person hearings.

Providers are now offering excellent real time transcription services, including on-screen captions which are known to help us understand better what we hear. Moreover, an entire hearing can be recorded creating a full audio-visual record. Tribunals may find that more useful than a transcript, particularly if they are assessing witness credibility and want to re-assess the witnesses’ demeanour, as well as his words.

Many platforms provide virtual breakout rooms in addition to the main hearing room. This allows the tribunals to deliberate or the counsel teams to confer; so that is not lost. We can also integrate very easily into this new tech aids like video clips,



diagrams, and slides, seamlessly into the hearing software and test them in advance.

Compare that to the messing around with laptops and USB sticks under the eyes of the arbitrators. It seems to me like a clear improvement. Electronic bundles where all the documents are collated in soft copy are already a major step forward. We are already doing that of course, but it is easier to access a specific document during the hearing using a software. Counsel can present a document to a witness during a cross examination or pull it up to support a point made in oral submissions. Even better, a technician can be tasked with managing the documents online. Surely this is better than going through paper files and bundles while the entire room waits for you to search for a document.

I want to say a word about increased diversity. There have long been calls to appoint younger arbitrators. For international arbitration to survive, we must expand the pool of arbitrators. If arbitration relies heavily on technology, arbitrators will need to be more tech savvy. Adding that criteria may increase the diversity faster than now, as it may benefit the younger generation of arbitrators.

It is also important to pause on the environmental impact. There are increasingly insistent calls to reduce arbitration's environmental impact. Online hearings will significantly reduce the number of flights we take, with a significant reduction in our carbon footprint. Electronic bundles radically reduce paper use. The younger generation is often drives the environmental agenda. If we end up with more arbitrators from that generation, they may order more online hearings—a welcome, virtuous circle.

VI. CONCLUDING REMARKS

Many of these positive changes would have come in time; COVID has simply accelerated the pace of change. Will it be a revolution? Will it be a total shift to online? Well, probably not.

Old habits die hard. Once COVID has passed, and it will pass (hopefully), many arbitrators and parties will go back, I am sure, to in person hearings. What has shifted—I think forever—is the arbitration community's openness to more virtual hearings. Alongside that will come a rapid shift in our ability to use technology.



We would have got there eventually without COVID, and probably we would have all become more reliant on remote solutions over the next, say, five years. But gradually and generationally, led by the younger members of the community, COVID has been a catalyst and it has accelerated that change.

The COVID crisis has pushed the arbitration community, perhaps unceremoniously, over its resistance and straight into the brave new world of technological solutions to human problems. It is up to us to embrace it and to reap the rewards.



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