Virtual Arbitration

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A few years ago, I met a lawyer from San Francisco who had made twenty-four trips to Asia to participate in the resolution of a single dispute. He reported that the arbitrators would listen to one witness a week. The witnesses came from diverse places in Asia and North America. If a witness occupied the attention of the forum for more than a day or two, they would take a week off between witnesses so that the arbitrators could catch up on other work and decide which witness to hear next. Meanwhile, counsel was free to return to California or could stay in Asia at his client's expense. While the example is extreme, persons experienced in international commercial arbitration nod at the account.

Digital technology soon will make such a proceeding obsolete. My wife and I have been equipped for several years to hold video conferences with our grandchildren who live in other states. The technology is not perfected, but surely it will be. It therefore soon will be possible to conduct a virtual arbitral proceeding. Virtual arbitration will have no situs, but will be an entirely digitized event.

Let us imagine an important international commercial dispute to be settled by arbitration. A lawyer in Tokyo and one in Columbus can appear before arbitrators in Stockholm, Hong Kong, and Toronto without any of the five leaving their desks. Indeed, it would be a breach of fiduciary duty for any of the five to waste their time or the parties' money by getting on an airplane and traveling at a client's expense to the place of the others merely to participate in the arbitral hearing.

Of course, this would not be so if there were live witnesses to be examined. But there will be none. Testimony will be taken at depositions and recorded digitally. The depositions will be discontinuous. The party calling a witness will prepare a direct examination on videotape and send a print to the adversary. When the adversary is prepared to do so, he may conduct a cross-examination at a time reasonably convenient for the deponent. If need be, there can be redirect and recross, each examination to be conducted at the mutual convenience of the examiner and the deponent. Neither deponent nor examiner need leave her home or place of business. The lawyer in Columbus can, in digital form, present the testimony of witnesses who never left Ulan Bator or Timbuktu.

Note that the feasibility of discontinuous depositions answers an otherwise insurmountable problem regarding the taking of testimony on

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opposite sides of the planet. No human technology can arrange to have it be the same time of day in Ulan Bator, Columbus, and Timbuktu. It would be a serious impediment to a lawyer if he had to begin taking a deposition at, say, midnight in order to accommodate the work schedule of a deponent in Wuhan. On occasion, lawyers engaged in vigorous cross-examination might find it necessary to perform such an "all-nighter," but it generally will be sufficient to secure narrative testimony by posing questions to be answered a few hours later while the examiner is asleep. The process would not be far different from that prescribed in Rule 31 of the Federal Rules of Civil Procedure for depositions on written questions.[1]

When all oral testimony has been assembled and any useless chatter elided by the lawyers acting as television producers, there will be an oral record ready for submission to the tribunal. It will be transmitted along with any documents a party may choose to submit as exhibits. These will, of course, also be in digital form. Also submitted will be documents looking rather like trial briefs, summarizing the facts each party deems material and supported by the evidence and setting forth any legal contentions it may be necessary to make. Each arbitrator will be provided with a copy of this submission and can view it at her own desk at leisure.

There then will be a hearing conducted by videoconference from five locations, all images transmitted from each location to the other four. Transmissions will be simultaneous to all locations unless it is necessary to make some accommodation for the reality that if it is morning in Hong Kong and Tokyo, it will be evening in Columbus or wee hours in Stockholm. The lawyers then will have an opportunity to review the evidence orally, summarize their contentions, and make any legal arguments that seem apposite. The arbitrators can question the lawyers at length. It should be expected that the arbitrators will question counsel with sufficient care to reveal their own lines of thinking and to provide counsel with a full opportunity to point to the material in the submission bearing on the matter of concern to the interrogating arbitrator. The arbitrators then can confer right there on the digital camera and announce their award forthwith. If the parties desire a speaking award, then each arbitrator can render an oral opinion, seriatim in the traditional English manner. Indeed, the proceeding just described will resemble a hearing conducted at Westminster by an English common law court sitting en banc to evaluate a record made at *nisi prius*.[2]

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[1] *See* FED. R. CIV. P. 31.

[2] *See* Joseph B. Koczko, Note, Gasperini v. Center for Humanities, Inc.*: State Jury Award Controls Supplant Seventh Amendment Protections*, 18 PACE L. REV. 199, 216–17 (1997).

In a complex and bitterly contested case, an additional neutral may be needed. The additional neutral would be an expediter who would oversee the assembly of the submission and make any interlocutory rulings needed to conduct the hearing preparation speedily and fairly. The decisions of the expediter could be reviewed by the tribunal. To correct consequential errors of the expediter, it might be necessary to suspend the hearing while additional material is added to the submission. But such an interruption will not be so disastrously expensive as it would be if the lawyers and arbitrators had gathered in one place. Because they are all at home, the lawyers and arbitrators simply can turn off their monitors and proceed to other work until it is time to resume the hearing.

Knowledgeable readers will recognize that the placement on lawyers of the responsibility for developing the factual material bearing on the dispute reflects the Anglo-American tradition, not the civil law custom. It is still common in much international arbitral practice to pursue civil law custom and place this responsibility on the arbitrators, leaving counsel to a more passive role.[3] That can be done in virtual arbitration if the parties so desire by placing on the expediter full responsibility for developing the factual record. This would require no material change in the process I have described.

Knowledgeable readers also will recognize that because the virtual arbitration has no situs, there is no clearly applicable curial law to govern the conduct of the proceeding. This presents some wonderful issues of conflict of laws.[4] For example, in Japan, arbitrators may not put witnesses under oath or at risk of criminal prosecution for lying.[5] Would the arbitrators admit unsworn testimony taken in Japan and weigh it against conflicting sworn testimony taken in Columbus?

A similar issue is presented with respect to the language in which the proceeding is conducted. That problem is, however, not far different from issues arising in the present practice of international arbitration. Presumably the digital record will include interpretations so that all is presented in the same language, but which language if there is no situs?

It was long the rule that foreign lawyers may not represent their clients in an arbitration in Japan. Presumably, there are still such laws in force in some

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[3] *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A LEGAL TRANSNATIONAL ORDER 42 (1996).

[4] *See* 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT §§ 44.3, .22 (1995); *see also* DEZALAY & GARTH, *supra* note 3, at 39.

[5] *See generally* Andrew M. Pardieck, *Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan*, 11 TEMP. INT'L & COMP. L.J. 31, 49 (1997).

countries. Would a lawyer in Columbus who examines a witness in such a country and makes a legal argument to an arbitrator in a place having such a law be unlawfully practicing law?

Similar issues arise with respect to the scope of discovery.[6] For example, American arbitrators are prone to require parties to produce documents that might reveal weaknesses in the disclosing parties' contentions. This practice reflects discovery practice in American courts, a practice not only unfamiliar to most lawyers in other countries, but reviled by many of those to whom it is familiar. Plainly, the playing field must be level; it would not do to require an American party to produce documents that his adversary in France or India could keep secret.

Parties to a commercial arbitration may agree that the arbitral tribunal should perform as an *amiable compositeur*, that is, to split the difference between disputants so that each leaves the table with something, perhaps in disregard of one another's legal entitlements. It may be the law of some countries that the arbitrators are free to make that choice on their own. In the United States, in the absence of any agreement that the arbitral tribunal can be an *amiable compositeur*, it sometimes is said that an award may be set aside if it is "in manifest disregard of the law," and on rare occasion a speaking award may be set aside on that ground.[7] In other countries, India may be one, an arbitral award is subject to judicial review very similar to that imposed on judgments of trial courts of general jurisdiction.[8] If there is no situs for the arbitration, what law governs on these issues? We know for sure only that we cannot give free rein to the Spanish member of the arbitral tribunal while intensely reviewing the opinion of the arbitrator who was in India when she rendered her opinion.

Most of these conflict-of-laws problems can be handled by terms in the submission agreement. Just as the parties may make a reasonable choice of the law controlling their contract dispute, so they may in the contract designate an appropriate law to govern their virtual arbitration proceeding.[9] Moreover, much international commercial arbitration is done under the auspices and pursuant to the rules of institutions such as the International Chamber of Commerce or the American Arbitration Association, or counterparts in diverse countries.[10] To some extent, these issues can be resolved by their internal rules.

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[6] *See* 3 MACNEIL ET AL., *supra* note 4, § 34.

[7] 4 MACNEIL ET AL., *supra* note 4, §§ 40.7.1, .8.2.

[8] *See* Curt M. Dobek, *The Twilight Zone of International Arbitration*, LITIGATION, Summer 1995, at 42, 45.

[9] *See* 4 MACNEIL ET AL., *supra* note 4, §§ 40.3, .22.

[10] *See id.* §§ 44.6.3, .6.4, .29–.30.

Nevertheless, it seems likely that the advent of virtual arbitration will intensify and complicate the collisions of legal cultures. The subject would be an appropriate one for an international convention. Perhaps such a convention would be a natural extension of the United Nations 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[11] Indeed, that Convention limits the grounds on which "awards not considered as domestic . . . in the State where their recognition and enforcement is sought" may be set aside or denied enforcement.[12] Would a virtual award be considered a foreign award for purposes of enforcement of the Convention? Under what circumstances? These would be other questions to be answered.

Meanwhile, it perhaps would be useful for other institutions to examine the problems. I have in mind the American Law Institute (ALI). It has undertaken to fashion a transnational judicial procedure for use in international commercial cases.[13] Gary Born, an experienced international lawyer, has objected pointedly to that undertaking.[14] He has, for the moment, convinced me that it is not useful to think of conforming judicial institutions established in different countries to reflect diverse political cultures to a single set of procedural norms.[15] But it seems to me that his objections are not applicable to transnational laws governing procedure in arbitral tribunals created by the parties to an international commercial transaction. I would favor redirecting the ALI project away from court procedure to arbitral procedure.

There will, of course, be resistance to such a reform. However, the economics would seem to be compelling. Once these are visible, it will not be easy to convince parties to international commercial transactions that they should continue to bear the sometimes fantastic costs of assembling a private tribunal in the same room with lawyers, parties to a dispute, and witnesses: International lawyers who cherish the right to look a hostile witness in the eye would be wise to begin to wean themselves from that need.

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[11] *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[12] *Id.* at 21 U.S.T. 2519, 330 U.N.T.S. 38.

[13] *See* TRANSNAT'L R. CIV. P. (1996 Draft), *reprinted in* Geoffrey C. Hazard & Michele Taruffo, *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493, 495 (1997).

[14] *See generally* Gary Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998).

[15] *See id.* at 399–404.

Doubtless there will be unintended secondary and tertiary consequences to such a transformation of international commercial arbitration. As to what those might be, we can of course only wait and see.