

Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications

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The COVID-19 outbreak as of now affects 183 states and a number of territories. Out of 164 State signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”) only Marshall Islands, Tonga, Palau are not affected by the pandemic; all 153 state members to the ICSID Convention have been impacted by the pandemic. Most of these states have taken lockdown or health-related precautionary measures inevitably affecting the conduct of court proceedings all over the world.

Much has already been done by arbitral institutions to adapt to the current situation, but unfortunately, state courts have been slow to catch up primarily because of the increasing pressure to deal with urgent cases such as criminal actions. While, according to Remote Courts Online, a substantial number of state courts such as Australia, Norway, New York, Mexico, Uganda have switched to virtual hearings, others such as Armenia and Iran have chosen to postpone hearings or to allow only essential litigation.

The partial closure and reduced capacity of courts due to this unprecedented

situation is affecting and could continue to affect enforcement of arbitral awards under the New York Convention. In examining the possible effect of the pandemic on enforcement of arbitral awards we must acknowledge that delays in every procedural aspect are inevitable. However, the effect might be greater in state courts that have shut down enforcement proceedings.

Justice delayed = justice denied?

The ultimate aim of a party in arbitration is quick enforcement of a successful arbitral award. Being unable to timely enforce an award will likely increase parties' expenses and is counterintuitive to arbitration.

A significant impact of the pandemic on enforcement proceedings are the likely delays. For example, arbitration proceedings that were nearing closure may be left open indefinitely, especially where formalities such as requiring original copy of final award cannot be completed, especially, where parties fail to agree to an electronic award.

Enforcement becomes a bigger issue with flights being canceled and postal communication being interrupted or delayed. Filing enforcement applications online is not always possible and the disruption of postal services could result in situations where parties have difficulties or the least experience delay with filing the enforcement application with the court in question.

Additional obstacles could arise where some courts will insist on the hard copy of the award and supporting documentation. They may require the parties to provide a duly authenticated hardcopy of the award or proof that the award has become binding on the parties. This would need to be acquired at the seat of arbitration which in turn would likely impact the time it takes to enforce the award.

It is not possible to predict the end of the pandemic. Parties should therefore be cognizant of any time limits in recognizing and enforcing an award in some jurisdictions. For instance, if a State requires arbitral awards to be enforced within a year, a party should be mindful of this limitation in order to avoid being time barred.

Non-enforceability of an award due to procedural irregularities

While considering online arbitrations, the parties and the tribunal need to consider how best to ensure that in the end the final award is enforceable.

Article V(1)b of the New York Convention allows a party to challenge an award where it was unable to present its case. During the drafting of this article, drafters may have considered a scenario where one of the parties was unable to appear before the arbitral tribunal due to visa refusal, or when a party might not have sufficient opportunity to present the case before the tribunal.

The pandemic and lockdown caused numerous restrictions and travel bans. If interpreted narrowly, arguably the cancelation of flights and, thus, inability of the party or the witness to participate in the proceedings or the hearing could be considered as a ground for not enforcing the award under Article V(1)b of the New York Convention. Some courts have granted this provision a wider interpretation. For example, in the Italian case *Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, the Court considered a recent earthquake a circumstance preventing the parties from presenting their case in the required period of time. However, parties wishing to object under Article V(1)b need to present that adequate actions have been taken to remedy their defaults.

When invoking Article V(1)b, the parties need to prove that the inability to present their case could have resulted in a different outcome than what was achieved by the tribunal.

The strength of such an argument is questionable as parties can agree to hold virtual hearings (VHs) to solve the problem. However, it is debatable whether having a VH will provide the party with the same opportunity as in the case of physical hearings. When referring to a “hearing” did the New York Convention envisage VHs?

Interestingly, in the 2001 case *Tongyuan International trading Group v. Uni-Clam Limited*, while referring to Article V(1)d the English High Court stated that “a different location did not affect the fairness of the proceedings or prejudice to that party”. The Court further reasoned that in the mentioned case, the wording of the arbitration agreement did not consider the venue as an important factor. According to practitioners such as Pieter Sanders, the role of the venue of arbitration was considered of secondary nature while drafting the convention as well.

As discussed above, in light of the current situation and restrictions, many courts have delayed in-person hearings or cut down the hearings only to essential matters, and many arbitral tribunals transitioned to online hearings or are considering it. VHS may give rise to a serious concern regarding the validity of the rendered award, in its turn creating room for parties to attempt objecting to enforcement of award because of VHS. Article 19 of the LCIA rules straightforwardly grants the arbitral tribunal the power to decide upon the form of the hearing: “... a hearing may take place by video or telephone conference or in person (or a combination of all three).” Accordingly, it may be difficult for parties having chosen LCIA rules to attempt to object to enforcement of an award where a tribunal exercises its discretion under the Rules and orders an online hearing regardless of parties’ consent.

In contrast, the ICC rules do not grant the tribunal the authority to decide on a VH; if the parties agreed to have a hearing it should not be remote. This can be inferred from Article 26(1) of the ICC Rules:

“When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.” (ICC Rule 26.1)

That said, in the event the parties agreed to ICC rules, and if no agreement is reached to replace the hearing with a virtual one, enforcement of the award might become problematic due to failure to have the arbitral procedure agreed by the parties. (Article V(1)d)

Final thoughts

Under the New York Convention the enforcement of the award is not hindered by any aspect unless a member state may find it contrary to its public policy to enforce the award (Article V(2)b), which is worth considering as COVID-19 has already had its devastating effects on the many developed states, one of the most vivid examples being Italy. The courts could also be non-cooperative in cases where the awards negatively impact their interests (investment awards), and could potentially delay enforcement of the award. The states may also misuse the process and time limits of court procedure in the same way.

There is a general consensus that there is likely to be an increase in international arbitration disputes in the wake of the pandemic, the extent to which these cases will be successful procedurally remains to be seen.