

Kluwer Arbitration Blog

'International Arbitration and the COVID-19 Revolution' (Part 1 of 2)

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The COVID-19 pandemic has exerted an unprecedented impact on individuals, entities, businesses, and states. National court systems and alternative dispute resolution regimes have also been severely affected. Yet, international arbitration has demonstrated itself to be both adaptable and resilient throughout the crisis and emerged more strongly positioned as a method of dispute resolution for a number of reasons that are explored in the book *International Arbitration and the COVID-19 Revolution*, which has just been published by Kluwer in online form [here](#), and which will be available in [hardcopy](#) in the coming weeks.

This is the first of a two-part blog post series and highlights Chapters 1 through 11, which cover primarily conceptual, analytical, procedural, and empirical aspects of international arbitration in light of the pandemic, including the necessity of putting in place proper dispute avoidance, management and resolution policies, arbitration initiation, arbitrator appointments, analytical legal frameworks of arbitration procedure, remote hearings, remote advocacy, e-filings, digital awards, challenges to remote arbitration awards, and third-party funding mechanisms. Part 2 (forthcoming next week) concerns Chapters 12 through 17, which are sector-specific and deal with the aviation, construction, energy, finance, technology, media and telecommunications, and insurance industries.

We could not have published *International Arbitration and the COVID-19 Revolution* in such a timely manner without our excellent team of authors. We have been fortunate to bring together 31 leading international arbitration practitioners who act as counsel or arbitrators, serve in arbitral institutions and as third-party funders or work in-house, and thus have first-hand knowledge about the impact of the COVID-19 pandemic on international arbitration from these various angles.

We explore the COVID-19 Revolution and the changing nature of international arbitration in this new era of added complexity and digital transformation. In doing so, we hope to provide useful frameworks and tools to promote enhanced adaptability and efficiency in international arbitration moving forward in relation to technology, process, and procedure. We also aim for the book to be a practical and helpful compendium as a practitioner's guide, as well as a thought-provoking and insightful resource for academics, researchers, in-house counsel, and industry experts with an interest in dispute resolution. We hope it brings together the arbitration community in its endeavor to transform international arbitration into an even more sustainable form of dispute settlement.

We analyse the emerging global positioning of arbitration as a regime that is well-equipped to address the complex disputes arising from the pandemic by ensuring timelier and business-oriented solutions needed in times of crisis. This is done by highlighting many of the issues and areas of procedural uncertainty that need work in response to the pandemic and beyond. The book also addresses many of the responses taken throughout the COVID-19 Revolution.

In ‘[Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis](#)’, **Mohamed S. Abdel Wahab** of Zulficar & Partners begins by analysing the theoretical framework for crisis management. Abdel Wahab construes the pandemic as a ‘catalytic crisis’ for the traditional procedural framework of dispute resolution that is being reformed through the COVID-19 Revolution. By adopting an interdisciplinary approach, Abdel Wahab applies crisis management theory to dispute prevention, management, and resolution. This provides indelible advice to the arbitration community for better resolving disputes that arise during the pandemic. He also notes that the disruption experienced by national courts during the early weeks of the pandemic led to a surge in the number of arbitration cases because of the adaptability and flexibility of arbitration as an efficient means of dispute resolution.

Similarly, in ‘[Initiating and Administering Arbitration Remotely](#)’, **Patricia L. Shaughnessy** of Stockholm University highlights many of the positive changes brought about by the COVID-19 Revolution, based on a survey of nineteen arbitral institutions. These arbitral institutions have actively responded to the disruptive consequences resulting from the pandemic by adopting procedures to allow enhanced remote administration of cases and by implementing secure online communication and information sharing platforms. Interesting findings from the survey also help identify key trends discussed in later chapters, such as electronic awards and signatures, and driving efficiency through technology and digitalisation.

Catherine A. Rogers and **Fahira Brodlija** of Arbitrator Intelligence uncover the difficulties faced by arbitral institutions in ‘[Arbitrator Appointments in the Age of COVID-19](#)’ from the specific angle of arbitrator appointments. Indeed, the fact that arbitration proceedings are likely to be conducted remotely may require parties and counsel to consider specific skill sets for prospective arbitrators. Issues such as the lack of information about arbitrators is a current problem that has significant consequences. The contributors propose the use of online tools to fill this information gap. They also make a series of recommendations around the geographical limitations and increased connectivity in remote arbitration, such as strengthening the community by means of encouraging diversity amongst arbitrators.

A central issue still needs to be answered. Even if remote arbitration is beneficial, are there any rules regulating this practice? In ‘[The Legal Framework of Remote Hearings](#)’, **Maxi Scherer** of WilmerHale and Queen Mary University of London defines related concepts and lays out the legal basis for remote hearings, while providing guidance on whether or not to hold a hearing remotely in different scenarios and based on different considerations. For example, she considers those instances where one party is in favour of a remote hearing, and the other is not. This chapter provides guidance for arbitrators on how to engage in a balancing test when faced with such decision-making dilemmas that fall under their discretion.

Delving into procedural details, ‘[Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders](#)’ by **Niuscha Bassiri** of Hanotiau & van den Berg analyses the practical challenges arising out of the planning and preparation for remote hearings. This chapter provides arbitral tribunals, counsel, parties, and witnesses with useful and practical advice relating to virtual

and digital aspects of remote hearings. Bassiri conceptualises the factors that hearing participants need to consider and proposes a sample procedural order for remote hearings which offers different variants for arbitration practitioners to choose from, together with insightful commentary regarding each procedural and practical consideration.

Focusing on advocacy, ‘[Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges](#)’ by **Wendy Miles** of Twenty Essex addresses the challenges that may arise in written and oral submissions, as well as critical considerations relating to evidence. Miles offers useful tips to conduct effective advocacy remotely in light of the COVID-19 Revolution and argues that remote arbitration proceedings ‘herald an opportunity for a different approach to arbitration and advocacy’, which will save parties in time, cost, and complexity by transforming arbitration into a modernised dispute settlement alternative.

Readers will be wondering whether remote hearings will remain the ‘new normal’ in international arbitration even in the post-pandemic era. ‘[Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views](#)’ by **Gary Born** of WilmerHale, **Anneliese Day QC** of Fountain Court Chambers and **Hafez Virjee** of Delos Dispute Resolution considers this question from an empirical point of view by surveying over 200 arbitration participants and providers. They observe one clear trend from the survey, which is the significant increase in the fully remote conduct of case management type hearings as an effect of the COVID-19 Revolution. Their study also illustrates that arbitration participants may remain cautious about fully remote hearings, particularly in cases with numerous witnesses and experts. However, their findings show that many participants in the study were more willing to propose fully remote hearings than was previously the case.

With the high level of digital penetration that the COVID-19 Revolution has brought with it, it is conceivable that all documents produced in international arbitration proceedings will be digitised in the future. This raises questions that are considered by **Erik Schäfer** of Cohausz & Florack in ‘[E-Signature of Arbitral Awards](#)’ regarding the legitimacy of digital awards. This chapter explores not only the legal framework governing digital signatures but also their feasibility. Schäfer identifies the technical hurdles that prevent the arbitration community from adopting digital formats of arbitral awards and calls for joint efforts from arbitration institutions and associations in light of the COVID-19 Revolution to establish a body to implement virtual facilities for the secure use of digital tools and to create applicable standards.

Given the myriad legal and practical uncertainties associated with remote arbitration, ‘[Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceeding](#)’ by **Erica Stein** of Dechert LLP explores the possible grounds that an award debtor may be able to rely on when challenging an arbitral award that was made in remote proceedings. Remote hearings may be said to violate due process rights and exacerbate inequality between parties, which might constitute grounds to vacate an award. Stein analyses these issues comprehensively and discusses whether remote hearings will remain the norm in a post-pandemic world, considering the impact they may have on participants’ rights.

In an era of reduced liquidity, the financing of disputes becomes an even more acute issue. In ‘[Third-Party Funding and COVID-19](#)’, **Dana MacGrath**, **Cheng-Yee Khong**, **Annie Lespérance**, and **Nilufar Hossain** of Omni Bridgeway argue that demand from outside financiers will help transform arbitration ‘from an expense into a cash-generating asset’ providing opportunities to substantially recover assets without undermining liquidity along the way. During the first half of 2020, business-specific sectors that were heavily affected by the pandemic increasingly sought out

third-party funding for their claims, for example against insurers, as explored in ‘COVID-19 and Insurance Disputes’, and there is an increase in portfolio funding applications from law firms and corporations. This is a trend that is expected to continue, especially through a second wave of the pandemic and the economic recovery thereafter.

‘The COVID-19 Revolution: The Future of International Arbitration Is Not over Yet’ brings many of the aforementioned points together. **Emma Vidak Gojkovi?** of King & Spalding and **Michael McIlwrath** of Baker Hughes highlight how difficult, but also how meaningfully transformative, the COVID-19 Revolution has been, and that all aspects of commerce, including international arbitration, will never be the same. They assess the fundamental and necessary adaptations occurring in the field of arbitration, noting that many of those changes were already on their way. Changes relating to the accessibility of the arbitral practice, the selection of arbitrators, and the modalities of conducting cases will continuously evolve throughout this period of adaptation.

The Appendix on ‘Conducting Remote Hearings Against a Party’s Wishes: Overview of Arbitration Laws of Main Arbitral Seats’ by **Amina Afifi** of Debevoise & Plimpton neatly complements these chapters.

Chapters 1 through 11 address some pre-existing issues that have been accentuated by the pandemic, novel issues that are unique to the crisis, as well as future challenges that will certainly arise from remote arbitration. The contributors offer conceptual, academic, empirical, anecdotal and practical guidance to the arbitration community on how to conduct arbitration meaningfully in times of crisis and beyond. They highlight issues of continued uncertainty and useful methods aimed at further promoting efficiency and diversity, and ensuring fairness, due process, and the integrity of the proceedings in this new era of digitalisation. Chapters 1 through 11 also delve into the essence of international arbitration as a preferred method for dispute resolution and the adaptations by means of which it can emerge more resilient from the COVID-19 pandemic, namely through active and targeted participation by the global arbitration community and the development of creative solutions to complex legal and procedural challenges.

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