

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

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Maxi Scherer (WilmerHale & Queen Mary University of London), Niuscha Bassiri (Hanotiau & van den Berg), and Mohamed S. Abdel Wahab (Zulficar & Partners)

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This is the second of a two-part blog post series for an upcoming publication titled *International Arbitration and the COVID-19 Revolution* edited by us. As detailed in Part 1 of this series, the book contains 17 chapters from 31 leading international arbitration practitioners. The focus of the contributions range from procedural topics in international arbitration emerging during and due to the COVID-19 pandemic addressed in Chapters 1 through 11, which are covered in Part 1 of this series, and industry-sector specific contributions addressed in Chapters 12 through 17 covering construction, energy, aviation, TMT, finance, and insurance, which are covered in this post.

COVID-19 has detrimentally impacted every country worldwide, affecting many sectors. However, it has also incentivised new thinking on how to improve business continuity and efficiency. Chapters 12 through 17 address relevant points in this regard, from government-imposed sanctions to the benefit of remote hearings in collective action lawsuits and the capacity for dealing with added complexity and novel issues in different sectors, as well as the efficacy of international arbitration in times of economic strain. Although some major arbitrations have already surfaced due to COVID-19, many more disputes with increasing complexity will likely arise, rendering the importance of the points discussed in the below contributions even more fundamental for timely, sustainable, and business-

oriented solutions.

In 'COVID-19 and Construction Disputes', **Todd Wetmore** and **Simon Elliot** of Three Crowns LLP explore the effects of COVID-19 on construction disputes. They analyse the impact that the imposition of social distancing measures has had on the procurement and execution of construction projects, thus exploring the domino effects of such measures across operations, from work site attendance and development timelines to financial and supply sustainability.

The authors of this chapter also explore the different types of claims that are expected to be triggered by the COVID-19 pandemic in civil and common law systems, including requests for extensions of time and prolongation costs. The expected increased reliance on the doctrines of hardship, *force majeure*, and contractual change of law doctrines, as well as on the doctrines of frustration, impossibility, and other non-contractual doctrines, are thoroughly assessed in this chapter. The authors posit that the complexity of disputes will continue to increase, with contestation in areas such as concurrency and causation becoming more frequent.

In 'COVID-19 and Energy Disputes', **Samaa Haridi** and **Samuel Zimmerman** of Hogan Lovells LLP explore the effects of COVID-19 on energy disputes. They explore how project development has been affected across the entire global supply chain, also analysing the adoption by many States around the world of 'green recovery' aid packages focussed on investments in green energy projects.

The authors consider the types of disputes that will arise, covering contract terminations, disrupted supply chains due to manufacturing concentration (as in the case of solar panels in China), and non-performance, expecting that many of these disputes will turn on the applicable law and the specific language of the contract. The expected reliance on *force majeure* as well as hardship is also analysed. The chapter further provides an exploration of the different types of investor-state disputes, with focus on cases such as *Philip Morris*, *Marfin*, and *CMS*, which provide a framework for the analysis of the types of disputes that are expected. The enforcement of arbitral awards is also becoming more difficult during the pandemic, due to restricted mobility and backlogged courts, or because the award debtor is forced into insolvency, thus rendering the decision to commence arbitral proceedings one of paramount commercial importance.

In 'COVID-19 and Aviation Disputes', **Johnny Champion**, **Rupali Sharma**, and **Patrick Bettle** of Stephenson Harwood LLP explore the effects of COVID-19 on aviation disputes. With international passenger demand reduced dramatically, thus triggering revenue losses for airlines that precipitate across the global supply chain, the aviation industry has had one of the most severe downturns caused by the pandemic. The authors discuss that much of the future performance of the industry depends on the severity of further waves of the pandemic. Diverse supply chain stages of the industry, such as jet fuel costs, are also explored, along with the significant liabilities accrued due to previously sold flight tickets that were cancelled because of government-imposed restrictions.

The nature of the industry and the symbiotic relationship between airlines, aircraft manufacturers, and aircraft lessors is also analysed in this chapter, in combination with the reduced availability of resources amongst stakeholders that are considering disputes to move to arbitration or litigation. The types of disputes that are explored include those relating to aircraft leases and aircraft purchase agreements, with the doctrines of hardship, *force majeure*, and frustration anticipated to feature significantly in this context.

In 'COVID-19 and Technology, Media and Telecommunication Disputes', **Olga Hamama** of V29 Legal and **Danielle Herrmann** of Neuland Legal explore the effects of COVID-19 on technology, media, and telecommunications (TMT). With TMT being a broad sector that includes manufacturers of mobile devices and semiconductors, enterprise software providers, as well as broadcast and media firms, the impact of the pandemic has been varied, from remote work leading to variations in the demand and production time for certain software applications (such as online streaming and video-conferencing tools) and hardware (such as laptops).

The authors explore the changing nature of the TMT industry and the way competitors are working together, and also the spur in digital innovation that the COVID-19 Revolution has brought. Although many disputes relating to TMT have traditionally been subject to litigation, the efficiency of arbitration through the build-up of remote hearings and e-filings has made it acutely catered to address the current commercial needs of TMT stakeholders.

In 'Finance Disputes and a Pandemic: The Eye of a Perfect Storm?' **Philippa Charles** of Stewarts Law LLP explores the effects of COVID-19 on disputes in the

financial sector. The contribution explores different types of government responses in the form of aid to drive liquidity and economic activity to keep businesses active within the financial sector. However, because of travel, work, and other government-imposed restrictions, meaningful economic activity has been lax. The author contends that the range of disputes will continue to grow, increasing in complexity and type, but that engaging in 'breathing space' from disputes is critical for the future functioning of the sector.

Many of the disputes will seek to use, as with other sectors, the doctrines of *force majeure*, frustration, adverse change, as well as business interruption policies touched upon in 'COVID-19 and Insurance Disputes'. However, COVID-19 has also brought with it additional spurs of innovation within the financial services sector, particularly in relation to fintech, blockchain, and cryptocurrency projects whose tools lend themselves to arbitration to help augment the level of security, automation, and efficiency. There has been significant progress in each area with new disputes that clarify outstanding issues and pave the way for future applications.

In 'COVID-19 and Insurance Disputes', **Alexander Oddy** and **Chris Parker** of Herbert Smith Freehills LLP explore the effects of COVID-19 on insurance and reinsurance disputes. With many, if not most, disputes having been and being anticipated to continue to be resolved by arbitration, the authors unpack the types of disputes that may arise with a focus on England and Wales and on liability, trade credit, and business interruption policies aiming to recoup costs for business continuity after having suffered reduced profits due to government lockdowns. The contribution also discusses the most recent test case the UK Financial Conduct Authority (FCA) brought in the English High Court against a number of insurers, namely *The Financial Conduct Authority v. Arch Insurance (UK) Limited and others* [2020] EWHC 2448 (Comm), which was handed down on 15 September 2020 largely in favour of policyholders.

Chapters 12 through 17 address the repercussions of the COVID-19 pandemic on diverse industries and sectors. While it is indisputable that the COVID-19 pandemic has had an unparalleled impact on the economy and businesses across every sector, industry, and country, rendering it a truly global crisis, it has also triggered a revolution in many fields, international disputes being no exception. Although the pandemic is giving rise to more complex arbitrations that are conducted differently with respect to both procedure and substance, it also brings novel ways of

addressing disputes in international arbitration through cooperation, creativity, commercial awareness, and technology.

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