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International Arbitration Experts Discuss The Impact Of COVID-19 On Arbitration In 2020 And Beyond

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Commentary

International Arbitration Experts Discuss The Impact Of COVID-19 On Arbitration In 2020 And Beyond

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what impact the novel coronavirus will have on international arbitration. We would like to thank the following individuals for sharing their thoughts on this important issue:

- Sarah Reynolds, Partner, Mayer Brown, Chicago
- Charlie Lightfoot, Co-chair of International Arbitration Practices and Managing Partner, Jenner & Block, London
- Jerry Roth, Partner, Munger, Tolles & Olson LLP, San Francisco
- Raúl Mañón, Partner, Squire Patton Boggs (US) LLP, Miami
- Luka Misetic, Partner, Squire Patton Boggs (US) LLP, New York
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- Albert Bates, Jr., Partner, Pepper Hamilton LLP, Pittsburgh
- David Lee, Partner, Appleby, Grand Cayman.

Mealey's: What impact do you believe the novel coronavirus will have on international arbitration?

Reynolds: Life as we knew it has changed with the global outbreak of COVID-19. Some changes are temporary. Shelter-in-place orders will lift and economies will re-open, eventually. But some changes will outlast the current pandemic.

As one might expect, COVID-19 put the brakes on a practice where in-person evidentiary hearings bringing together arbitrators, counsel and witnesses from far and wide was the norm. But not for long. After a few weeks of scrambling, many matters were back up and running, relying on remote technology to continue hearings. Long-standing reliance on those technologies for procedural conferences, positioned international arbitrations well, to dive into the deep end of fully-remote proceedings. These proceedings have been aided by the promulgation of copious guidance on how to use such technology effectively and best practices to ensure procedural fairness. See, *e.g.*, https://svamc.org/technology-resources-for-arbitration-and-mediation-practitioners/ for a compendium of such guidance.

Given collectively rising comfort levels and the existence of acceptance guidance on best practices, the increased use of remote technology in international arbitrations is likely here to stay. Cost savings for clients and convenience for arbitrators, counsel and witnesses had sparked an interest in broader adoption of remote technology even prior to COVID-19. But the enforcement risks to an arbitration award produced by a fully remote proceeding, an inhibiting factor to the expansion of the use of remote technologies in final evidentiary hearings, may be permanently diminished by the virus. Domestic courts had generally not adopted remote technology in any form, and those courts own the

important task of enforcing arbitration awards. The fear had been that such courts would view remote evidentiary hearings as categorically procedurally unfair. But, COVID-19 has had an equalizing effect here. Domestic courts, like most of us, have been forced to engage with remote technology to keep their dockets moving during this crisis.

Lightfoot: The coronavirus pandemic represents an unprecedented, global challenge to all forms of dispute resolution, including international arbitration. But the crisis is also an opportunity to fast-track the technological innovations already used in arbitration. More widely, the fallout from the coronavirus will unavoidably lead to a rise in international arbitrations, not just because of the scope for contentious situations to arise from the pandemic but because, as some state court processes grind to a halt, international arbitrations can and will continue.

Travel bans have impacted international arbitral proceedings given the location of the parties and their counsel. Reviewing hardcopy documents, taking witness evidence and face-to-face interactions of any kind are all more difficult now. But the widespread use of information technologies presents a real advantage over traditional litigation. Virtual hearings are already common for procedural matters, and witnesses frequently give evidence by telephone or video-link. Arbitral institutions have also moved quickly to minimize disruption: the ICC, for example, has digitized requests for arbitration, the LCIA has set up a virtual platform to file applications, parties governed by ICSID rules are encouraged to file submissions electronically and many arbitral bodies have now published guidance to online hearings. Issues remain, of course — technology failures, time differences, the challenges of virtual cross-examination, etc. — but the flexibility of international arbitration makes it especially well-placed to adapt to the new normal.

More widely, the impact of coronavirus will surely lead to a rise in international arbitrations across every business sector, not least insurance. There will be claims arising from state measures to tackle the pandemic, force majeure claims, MAC claims and supply chain disputes. Many construction and manufacturing projects have been disrupted, delayed or cancelled, and global transportation networks have been severely impacted. The crash in oil and commodity prices has destabilized energy markets, which will lead to disputes, including over pricing expectations. Travel and tourism have essentially shut down, crippling the airline industry. The scale of the economic downturn remains to be seen, but it is already deep and disputes will undoubtedly ripple through financing arrangements, create distressed situations and impact financial institutions.

International arbitration, with its inherent flexibility, will have an important role in dealing with the fallout from coronavirus in the coming months and years.

Roth: Much has been written about the impact of COVID-19 on international arbitration, usually emphasizing the flexibility of the process. And this is accurate. Arbitral institutions and individual arbitrators are able to adjust deadlines, granting additional time and postponements where necessary, and to conduct pre-hearing proceedings and even hearings online. All of this requires technical capabilities, but counsel, their firms and arbitrators have shown themselves up to the challenge. Hearings present the most difficulties, given how tricky it can be to conduct cross-examination over video; to use documents, physical exhibits and charts; and to allow parties and their counsel the opportunity to consult privately. But experience is showing that where there is a will there is a way — and with patience, even grueling cross and complicated visuals can be managed.

The challenge for arbitration, frankly, is when there is NOT a will — and by that I mean when one party chooses to use these extraordinary circumstances to their advantage. For example, defendants have more opportunity to obstruct and delay proceedings by resisting easy solutions, insisting on in-person testimony, claiming difficulties in procuring testimony or documents in a timely way. Some of these objections are valid — it may be difficult for some witnesses to appear remotely or for some documents to be found when employees are not onsite — but often they are tactical. Some parties may have legitimate reasons to insist on an in-person hearing even though no such hearings are being scheduled at the moment, but others may see the chance to rest on their rights as a way of putting off an unwanted result or obtaining other strategic advantage. Aspects of these approaches may be considered good counseling, other aspects as gamesmanship, but regardless of their characterization, arbitrators are being forced to make decisions on issues of fairness and expediency

when parties cannot or will not reach agreement themselves. All that said, the flexibility of arbitration over court proceedings is only thrown into relief under the light of the coronavirus.

The true challenge may be the resolution of legal issues raised by the virus, from interpretation of force majeure clauses to employment obligations to the impact of inevitable bankruptcies. The international arbitration world needs to be able to show that it can develop a consistent approach to the same questions playing out across thousands of arbitration agreements worldwide. Ensuring some sense of consistency and fairness over many cases is not easily accomplished where hearings are held confidentially and precedent is a guiding but not a controlling force, and where there is no appeal to a higher authority. But my bet is that word of mouth among lawyers, arbitrators and clients; exchange of information even if incomplete; and public court proceedings for enforcement or to challenge awards will result in a sufficiently coherent body of decisions to provide the necessary certainty — or what the French call "securite juridique" or legal security — to calm the waters and safeguard the Rule of Law."

Mañón and Misetic: The COVID-19 pandemic could potentially bring ground-shifting changes to international arbitration, accelerating some trends that were already in progress. While States no doubt have a duty to act in the best interest of its people in response to COVID-19, we expect a considerable increase in investor-State disputes tied to both short- and long-term State measures. Those cases will test the limit of State authority in circumstances not seen since the inception of the current investor-State dispute settlement ("ISDS") system. Given the onslaught of new cases and the pandemic's effect on national economies, it is likely that States and critics of the ISDS system will find common ground to push through fundamental reforms once considered radical. One example are the recent calls by established think tanks for a moratorium on all new investor-State claims, even if unrelated to COVID-19; a "permanent restriction" on investor-State claims related to State measures "targeting health, economic, and social dimensions" of the COVID-19 pandemic; and a withdrawal of consent by States under ISDS clauses contained in existing investment treaties.

On the more positive side, the pandemic will also bring about welcome change: reduction of costs and a streamlined process. As social distancing becomes the 'new normal,' international arbitration users are looking for ways to streamline the process, holding virtual hearings and otherwise moving from a once paper-heavy and in-person process to online platforms. While no doubt there will be challenges and lessons to learn, long gone are the days when all hearings were in-person. Almost every major arbitration institution has enacted protocols on the conduct of virtual hearings in international arbitration. With virtual hearings, comes a significant reduction in costs (such as the costs of the hearing venue, travel costs, and the costs of all the logistics and materials needed for a hearing) and duration of the proceedings (virtual hearings eliminate the sometimes impossible task of finding common dates on which the parties, their counsel, and the tribunal can all be present at a single location).

Houssiere: International arbitration has long been a preferred method for sophisticated parties to resolve cross-border disputes because, among other reasons, it is inherently flexible and arbitration awards are much easier to enforce around the world than national court judgments. Perhaps more than ever, the advantages of international arbitration are evident as arbitral institutions are working remotely and many arbitral tribunals have requested that parties choose between either postponing the merits hearing or arrange for the merits hearing to be conducted by video-conference. Of course, one realization from the COVID-19 pandemic is that arbitration proceedings do not necessarily need to take place in person, which may be the impetus for future hearings to be held virtually — particularly for lower value and less complex disputes.

In addition, the COVID-19 pandemic will undoubtedly spark an avalanche of cross-border disputes in countries with major financial markets concerning disrupted international supply chains, contract terminations, and halted energy and construction projects to name a few. The uptick in arbitration proceedings may take time to materialize in the coming year given that companies are largely focused on maintaining operations and avoiding further financial strain rather than diverting resources to dispute resolution. The economic fallout that many companies will face as a result of the pandemic will have a concomitant impact on the enforcement of arbitral awards. Enforcing arbitral awards against multinational companies will be challenging to navigate in the post-pandemic environment because

if an award debtor does not agree to comply with the tribunal's order to pay compensation, then award creditors will have to decide whether to pursue recognition and enforcement proceedings to attach assets of the award debtor to satisfy the arbitral award. Such enforcement proceedings may be protracted given that there will be a backlog of cases in national courts for the foreseeable future. More importantly, many award debtors will have fewer, if any, assets to collect as a result of the economic crisis and market instability. Some award debtors may seek to evade their obligations by divesting or otherwise dissipating their assets, which may present furtive award debtors with an opportunity for mischief.

The COVID-19 pandemic highlights the need for a proactive global enforcement strategy, including the potential attachment of assets, before the issuance of an arbitral award to protect award creditors and the ultimate recovery of assets. International arbitration practitioners and arbitrators will certainly face challenges in the aftermath of the pandemic both in the near term and in the future, but there will be numerous opportunities and lessons learned for the arbitration community. In hindsight, the pandemic will likely be an inflection point as counsel, parties, and arbitral institutions are called to come up with creative and efficient solutions in conducting international arbitration cases. The lessons learned from these solutions will inform how the influx of cross-border disputes following the pandemic will be handled.

Moody and Molesworth: In the short term the coronavirus is likely to lead to a spike in disputes in industries where international arbitration is particularly prevalent: shipping and insurance are two examples, and disputes in the energy sector are also likely to increase given the perfect storm with the drop in the oil price. Suppliers of goods will face particular challenges as supply chains slow down or freeze up entirely, which will almost inevitably lead to knock-on claims for damages by other parties in the supply chain. Disputes are also already emerging between insureds and their insurers over liability for COVID-19 related losses. A large number of these disputes are likely to be arbitrated.

As with any major economic disruption, we expect to see an increase in disputes generally, as parties adjust to the aftermath of the crisis. We consider it likely that, in the wake of uncertainty, court closures and delays, more parties will opt for arbitration; it being outside state bureaucracy. Arbitration is inherently flexible and the major arbitral institutions have remained open and adapted well. There is likely to be a reduction in international travel and the procedural flexibility of arbitration is well placed to accommodate the need to overcome physical distance. Video conferencing has been widely used in arbitration for many years and institutional rules often expressly give tribunals the power to conduct hearings remotely — for example, Article 19.2 of the LCIA Rules. The major arbitral institutions have also published guidance to ensure that cases continue to be dealt with efficiently and appropriately: notably, the ICC Guidance Note and the KCAB's Seoul Protocol on Video Conferencing. We anticipate that this flexibility will increase arbitration's relative attractiveness over national courts as parties reflect on the ability of different dispute resolution forums to adapt to rapid changes in circumstances.

Ali: Change is occasioned by both circumstance and choice. Ironically, the circumstances of economic, social and political upheaval inevitably resulting from the COVID-19 pandemic, provides a unique opportunity for international arbitration to reset, reform, and recast itself.

International arbitration users have flirted for some time with using technology tools to reduce costs and increase efficiency in cross-border dispute resolution. Despite some progress, the solutions have been unimaginative and limited. Stay-at-home, lockdown and social distancing orders and international travel restrictions have created a new vibrancy in the use of videoconferencing, document sharing, cybersecurity and other technologies, as well as a more comfortable procedural embrace of these tools by arbitrators and counsel. This will continue as new procedural best-practices are disseminated, and arbitral institutions respond to market circumstances with rule changes and guidelines for virtual hearings.

The new pandemic paradigm will likely lead to the growth of international commercial courts, greater focus on a multilateral treaty for cross-border civil judgment recognition and enforcement, and the resurgence of mediation to facilitate faster and cheaper dispute resolution. The restructuring of global supply chains and the fragmentation of globalization will increase the pace of more regionalized corporate and commercial

decision-making, which will in turn lead to more localized dispute resolution. New counsel will enter the arbitration market, regional arbitration institutions will become more relevant, new hearing centres will sprout up, and the pool of arbitrators will grow and diversify.

The pandemic will affect foreign investment flows due to the impending global economic crisis and increased political risk. While investor-state arbitrations arising out of pre-pandemic circumstances may not abate, it is unlikely that there will be a spike in pandemic-related investor-state arbitrations, as investors may be wary of potential increased arbitral deference to government regulatory measures, the consequences of the global economic downturn on damages calculations, and the negative public relations perception associated with suing those that are fighting to protect public health and safety.

The 2008 financial crisis led to significant growth in third party funding of international arbitrations. The financial pressures businesses will face resulting from the pandemic will likely see hockey stick like growth in such funding, as well as in the buying and selling of claims. Thus far, the best known funders have sourced capital from and themselves been based in developed market economies. But we are likely to see new entrants from China, the Middle East and Eastern Europe, where cash rich investors have come to recognize that returns from dispute resolution recoveries can be just as promising as those from other forms of distressed asset investing.

Taylor: COVID-19 has caused disruption and uncertainty around the globe and there will be a variety of political, economic, social and environment impacts that will undoubtedly affect international arbitration in the years to come. COVID-19 has already caused disruptions to supply chains and will add further strain to contractual relationships which like likely cause international arbitration caseload numbers to increase in the short and medium turn. Arbitrators will likely find it more challenging to select "winners" and "losers" in COVID-related contract defaults and it is probably that mediation will increasing be incorporated as parties recognize the need for flexible outcomes.

As courts around the world will grapple with their backlogs, arbitration and other forms of ADR will prove to be invaluable, and as parties have been pushed forward in the use of technology, it is hard to imagine that people will routinely fly large teams around the globe for hearings they have experienced better alternatives such as videoconference hearings. International arbitration advocates will adjust to advocating remotely, on screen, and presenting evidence in an electronic format.

Bates: *A. How Will the COVID-19 Outbreak Impact Pending International Arbitration Proceedings?*

For those parties in the midst of an international arbitration proceeding, the following are the potential impacts of the travel restrictions, stay at home orders and other limitations imposed by COVID-19 outbreak:

- **Postponements** — The most obvious impact of the COVID-19 outbreak on pending construction disputes is that many in-person hearings have been postponed. This is true not only for hearings scheduled while state and local restrictions remain in effect, but also for hearings scheduled months from now.
- **Remote Arbitration Hearings** — The arbitral institutions and many arbitrators have encouraged parties to maintain hearing dates through the use of remote/virtual hearings. The arbitral institutions and other arbitration groups have also developed protocols, guidelines, model procedural orders and other useful information to facilitate the remote conduct of hearings. However, many lawyers and their clients have been reluctant to accept virtual hearings in lieu of in-person hearings. I expect the concept of virtual hearings to gain wider acceptance by the international arbitration community over time. Further, given travel restrictions and other limitations, I also expect to see a marked increase in the remote, real-time appearance of witnesses during in-person evidentiary hearings.
- **Increased Use of Mediation and Increased Settlement Rates** — In the COVID-19 environment, short-term cash-flow requirements appear to be taking an increasing priority, both in terms of preserving cash and minimizing expenses, including legal costs. Consequently, there has been a demonstrable rise in remote mediations and other forms of facilitated settlement proceedings, and a perceived increase in the rate of settlement of disputes.

B. How Will COVID-19 Outbreak Affect International Arbitration Proceedings to be Filed in the Near Term?

- **Crowded Arbitrator Calendars** — When the COVID-19 outbreak subsides, arbitrators expect an increase in the number of new case filings as a result of the impacts of the COVID-19 pandemic on projects that were underway at the time of governmental actions, as well as projects that were deferred or cancelled due to the economic impact of the pandemic. In addition, many arbitrations that were scheduled to be conducted in 2020 have be postponed into 2021. As a result, arbitrator availability could become a significant issue following the gradual return to the new normal in aftermath of the pandemic. Thus, it is reasonable to expect that arbitration proceedings to be filed in the near term may take longer to get to hearing than would otherwise be the case.
- **Increased Use of Virtual Hearings** — While it is difficult to predict the rate or extent of acceptance, it is reasonable to expect that use of virtual hearings (or parts of the hearings being conducted virtually) will grow as arbitrators, parties and counsel become more familiar with and accepting of remote video technologies for international arbitration hearings.
- **Third-Party and Other Alternative Funding Arrangements** — Given that short-term cash-flow requirements appear to be taking an increasing priority, both in terms of preserving liquidity and minimizing expenses, it is reasonable to expect to see expanded use of third-party or other alternative funding arrangements of significant international arbitration matters.

Lee: The COVID-19 pandemic and the restrictions to combat it have inevitably already had some impact on the arbitration proceedings that are currently in progress, with tribunals and courts needing to operate in ways which takes account of the current situation. In due course, there will doubtless be a significant volume of arbitration proceedings arising from issues caused and/or uncovered by the pandemic.

However, one of the first areas of practice where the substantive impact of the pandemic will be felt is that of enforcement. In addition to limiting the ability of award debtors to inappropriately exploit the current situation, practitioners are already needing to navigate a changed enforcement environment - award debtors which previously had sufficient available assets which could readily be targeted for execution, may now have fewer assets. In many cases, the changed environment will emphasize the importance of identifying available assets – in whichever jurisdictions they may be found - and putting in place a carefully planned and effective enforcement strategy. ■

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