New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 263—NO. 57
WEDNESDAY, MARCH 25, 2020

INTERNATIONAL ARBITRATION

Expert Analysis

International Arbitration In the Midst of COVID-19

By **John Fellas**

All of us are struggling to keep up to date with the fast-moving and heartbreaking news on COVID-19: the number of deaths, the number of infections, the number of countries, the number of cities in lockdown. And, by now, we are, unfortunately, all too familiar with the experts' worst-case predictions of what lies ahead: hundreds of thousands of deaths, numerous businesses permanently closed, enormous job losses. And we've quickly had to learn a vocabulary that not so long ago would have been unintelligible: "flattening the curve," "social distancing," and "self-isolating."

What is so striking about life in the midst of this pandemic is the combination of normalcy and calamity. Thus, even though I'm working from home, I still get the same type of work-related emails that I received before the pandemic: a message from a colleague to review and comment on a draft letter to an arbitrator; a message from the presiding arbitrator in a case in which I'm a co-arbitrator containing a draft order for review and comment; an email exchange with a co-arbitrator about the selection of the presiding arbitrator in a new arbitration. And I'm still doing roughly the same work: advising clients by phone, working on an arbitration award, or a cross-examination outline. And I'm well aware that I'm lucky that I have this normalcy, that my day job goes on. There are so many who are not so lucky.

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At the same time, there is an impending sense of doom: the fear that friends and family are at risk; that changes will be wrought from which it will be hard or impossible to recover; that there's no sense as to when it will end.

In the face of this, it seems banal to say that life must go on. But it does, even under the dark shadow of devastation and tragedy. And so, in this column, I want to focus on what COVID-19 means right now for international arbitration. My focus is two-fold, what it means for pending cases and what it means for the future.

COVID-19 and Pending Cases

Much of the work required to advance pending arbitrations can continue in spite of the coronavirus. Lawyers can communicate with their colleagues, adversaries and clients by phone and email, rather than in person. Memorials, briefs, witness statements and letters can continue to be prepared, with drafts exchanged over email for review and comment. Preliminary conferences with arbitrators and interviews with witnesses can take place by phone or video-conference. Arbitrators can deliberate over the phone, video-conference and email.

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And this work does continue, with clients, lawyers and arbitrators working remotely. And the major arbitral institutions—the AAA, the ICDR, the ICC, the LCIA, the HKIAC, SIAC, JAMS, the CPR, among others—are all open for business, with staff also working remotely.

The main manner in which the virus will affect international arbitration proceedings is through its impact on merits hearings, which invariably take place in person.

In international arbitration, cases are rarely decided on the basis of written submissions alone, the way they might be in court proceedings in the US, for example, at the summary judgment stage. There is an obvious explanation for this difference between international arbitration and US court proceedings. The US system of civil litigation has a robust discovery process, which includes depositions and extensive document production. At the summary judgment stage, in theory at least, the facts material to the dispute have been revealed through the discovery process, and they can be marshaled and presented to the court, along with legal argument as to why the court could decisively rule one way or the other.

International arbitration, by contrast, has a much less invasive discovery process. This is one of its strengths. But one result is that there's no knowing in advance that all the material facts are out there by the time of the hearings, no guarantee that cross-examination at the hearings won't reveal cracks in a case that have been carefully papered over by the written submissions prepared by the lawyers. In international arbitration proceedings, the merits hearings are often decisive. They cannot be jettisoned without serious loss; I have been involved in many cases as an arbitrator where the tentative view of a case I had formed from reading the written submissions prior to the hearings was altered, sometimes fundamentally, by the hearings themselves.

It is one of the hallmarks of international arbitration that the disputing parties are from different countries, with the result that the arbitrators, witnesses or lawyers are also often from different countries. One consequence is that when merits hearings take place, it is almost inevitable that international travel will be required by one or more of the arbitrators, lawyers, witnesses, or of all three.

Numerous merits hearings in international arbitration proceedings are scheduled over the next several months that would require people to board a plane to attend in person. COVID-19 has made travel to or from certain countries impossible or risky; does anyone really want to get on a plane right now if they can reasonably avoid it? And risks remain even when no airplane travel is required: International arbitration hearings require people to sit in close proximity over several days in the same room; and international arbitrators are often in a high-risk group, rarely younger than 50 and typically over 60.

Some parties, facing fast-approaching arbitration hearings in the midst of this crisis, understandably have preferred to negotiate a resolution to their disputes, rather than proceed to hearings.

For the disputes that remain, however, there are two main ways to deal with the impact of COVID-19 on upcoming merits hearings. The first is to postpone hearings to a time when both in-person meetings and airplane travel are safe again. (Some have optimistically chosen the fall of 2020, and we can only hope that their optimism proves to be justified). The second is to attempt to go forward with hearings on the scheduled dates, but to conduct them by video-conference. While many involved in arbitration hearings will typically have experienced a witness or two appearing by video-conference on prior occasions, few have experienced an entire virtual hearing, with all the logistical challenges this would entail. These logistical challenges are tougher when people are in different time zones. But these challenges are not insurmountable. Technology for the hosting of virtual meetings, such as Zoom or Webex, has been around for a long time. And even when people are in different time zones, in most cases, all that means is that some will participate either a little earlier or later in the day than typical.

On March 18, 2020, the Korea Commercial Arbitration Board announced the release of the Seoul Protocol on Video Conferencing in International Arbitration. While this protocol was

in preparation long before COVID-19, it contains useful provisions regarding the type of issues to consider when contemplating conducting international arbitration proceedings by video-conference, and I commend it to readers.

It is also worth noting that on March 19, 2020, the U.S. Court of Appeals for the Second Circuit held oral argument by telephone conference for the first time in its history, and, by all accounts, it proceeded in a satisfactory manner.

There is no doubt some loss when everyone involved in a hearing participates by video-conference rather than in person. Among other things, it is not as easy for arbitrators to form a view of witness credibility, as straightforward for lawyers to cross-examine a witness, or as convenient for arbitrators to discuss the proceedings during a break or at the end of the day. And the sense developed by seasoned practitioners of being able to "read the room" will be either diminished or lost when the hearing room is virtual. But, in many cases, the parties to an arbitration proceeding may conclude that what is gained in terms of a speedier resolution of their dispute outweighs what is lost by holding a hearing virtually.

At a minimum, those involved in arbitration proceedings in which merits hearings are scheduled over the next few months must be proactive in considering alternatives to in-person hearings. In this context, I quote below a recent email from an arbitral tribunal to the party representatives that has doing the rounds in various forms in the United States:

> The Tribunal writes in connection with the upcoming hearings that are scheduled to commence on [DATE] in [PLACE]. In the light of COVID-19 and resulting governmental restrictions, the Tribunal requests that the parties confer promptly to determine how to proceed with hearings.
>
> There are broadly two options: the first is to postpone the hearings; the second to arrange for the hearings to be conducted by video-conference.
>
> The Tribunal requests that the parties discuss these and any other options for the conduct of the hearings, and revert to the Tribunal with their proposals, jointly if possible, separately if not, by [DATE].
>
> Although an in-person hearing is, as a general matter, preferable to proceeding by video-conference, in the current circumstances the Tribunal's preference is that the hearings proceed by video-conference on the dates previously scheduled, so as to avoid delaying the resolution of this case. Should the parties agree to proceed by video-conference, the Tribunal requests that they submit for review a joint proposal for the conduct of the hearings. In this connection, we invite the parties to review the Seoul Protocol on Video Conferencing in International Arbitration: http://www.kcabinternational.or.kr/static_root/userUpload/2020/03/18/1584509782805DD02R.pdf
>
> Because a video-conferenced hearing would involve people joining from different time zones, the Tribunal requests that the parties take that into account in formulating their proposal. The parties are requested to submit their joint proposal by no later than [DATE].
>
> The Tribunal is available by telephone to discuss this matter at the parties' convenience, should any party believe that would be helpful.

Even if a particular force majeure clause encompasses the current crisis, in order to successfully claim force majeure, a party must demonstrate that the crisis prevented (or delayed) its contractual performance.

COVID-19 and Future Disputes

The virus and the government response to it, which include lockdowns—both regional (Wuhan, California) and national (Italy)—travel bans, and the closure of businesses have created substantial uncertainty for, and significantly disrupted, international commerce and trade.

Parties that entered into acquisition agreements before the fact of the virus, or its scale and scope, were known, but have not yet closed on their transactions, may be looking for a way out. Parties whose obligations under pre-existing contracts have been rendered either impossible or more costly or burdensome likewise may be looking for a way to avoid them. Over the last few weeks, there has been an avalanche of advisories from law firms around the world on

issues such as force majeure, material adverse events, and other related doctrines (e.g., frustration of purpose under New York law) that may come into play as a result of the coronavirus. And parties are taking advice right now on whether the coronavirus and/or the government response to it constitute legitimate grounds to avoid contractual obligations that were assumed before they were aware of the virus or its impact. There will likely be many cases where the parties will be able to reach an amicable resolution of their differences. But where they cannot, arbitrations may ensue.

The question of whether the coronavirus and resulting government response constitute valid grounds to avoid contractual obligations cannot be answered in the abstract. All will depend on the wording of the contract, the applicable law, and the facts of the case. But it goes without saying that a decision by a party to disavow its contractual obligations by declaring force majeure or relying on a related legal doctrine must be considered carefully. If a party stops performing its contractual obligations without a valid legal basis, it could face a claim for substantial damages.

For those considering raising a defense of force majeure, there are at least two analytically distinct question that must be addressed. First, has there been an event of force majeure as defined in the contractual force majeure clause? Second, if so, has that event prevented the performance of the contractual obligation from which a party seeks to be relieved?

Much of the discussion of whether or not the current crisis gives rise to a basis to declare force majeure has focused on the first question. And the answer depends on the wording of force majeure clause, and, in particular, on whether the force majeure clause in question is broad or narrow. A broad clause typically will define an event of force majeure "as an event beyond the reasonable control of a party, including …," and then go on to list examples of events, such as a flood, or government action, or a strike, that constitute an event of force majeure. A narrow clause will not have the catch-all language of a broad clause, but, rather, will require that the event in question be specifically itemized in the clause. It is worth bearing in mind that not all force majeure clauses will specify that a "pandemic" is an event of force majeure. However, when it comes to the coronavirus, it is also important to note that the potential event of force majeure is not only the pandemic itself but also the government response to it; the mandatory lockdowns, the travel bans and so on. So, even if a narrow force majeure clause does not list "pandemic" or some equivalent as one of its specified events, it will likely include "government action" or some equivalent.

However, in the opinion of this author, it is the second question that will be the more contested one in future arbitration proceedings over claims of force majeure and related doctrines. Even if a particular force majeure clause encompasses the current crisis, in order to successfully claim force majeure, a party must demonstrate that the crisis prevented (or delayed) its contractual performance. This is a question of fact. For example, if a party manufacturing a product is unable to obtain an essential part because the sole source is a factory in Wuhan, and, as a result of a government-imposed quarantine, that part is no longer being manufactured, that is one thing. If, by contrast, the factory in Wuhan was not the sole source of the part, and it could reasonably have been secured from another location that was not impacted by the crisis, that is another.

* * *

As we grapple with these and other questions, let's hope that we will face the best-case rather than the worst-case predictions of what lies ahead.