

3 International Arbitration Trends To Watch In 2021

By **Caroline Simson**

Law360 (January 3, 2021, 12:02 PM EST) -- If 2020 is going to be remembered as the year our lives were turned upside down by COVID-19, it seems likely that 2021 is going to continue to be colored by the aftermath of the pandemic.

Here, Law360 looks at the international arbitration trends we're predicting for 2021, including a new focus on online hearings and related cybersecurity concerns, along with increased attention to transparency and efficiency in proceedings.

The Rise of the Virtual Hearing

In a practice area where lawyers are accustomed to traveling around the world at a moment's notice to participate in hearings or meet with clients, the emergence of COVID-19 in the early months of 2020 changed the game. Many practitioners who were likely unaware even of the existence of Zoom were suddenly flung headfirst into conducting important hearings and other business entirely virtually.

As the months have slowly ticked by since then, practitioners across the board say they have become more comfortable with the increased use of technology. While there was already momentum within the arbitration community before the pandemic to strive toward "greener" arbitrations — by reducing travel and using online filings, among other methods — COVID-19 has hastened such transitions.

"COVID has acted as a catalyst for digital change in international arbitration," said Joseph R. Profaizer, the global head of Paul Hastings LLP's international arbitration practice. "Our inability to meet in person has rapidly accelerated our acceptance of virtual hearings, client video meetings and videoconferences by many years. This progress will hopefully lower costs, reduce our collective carbon footprint and create more procedural flexibility, which is one of arbitration's greatest strengths."

But to what extent will this trend continue next year?

"We've learned a lot about how to conduct hearings virtually, and my hope is that in 2021 and beyond we will be able to achieve a leaner, more efficient arbitration as a result. But we have to do that carefully," said Debevoise & Plimpton LLP partner David W. Rivkin, who co-chairs his firm's international dispute resolution group.

Not only are there due process concerns that some parties have raised about conducting proceedings

virtually — including questions about the enforceability of awards issued in those proceedings — there are also circumstances where virtual hearings aren't practical, such as a case involving multiple witnesses, arbitrators and parties spread out in different time zones around the world, he said.

Moreover, sometimes there's just no substitute for being in the same room, according to Akerman LLP partner Francisco Rodriguez, who focuses his practice on cross-border disputes and international arbitration and litigation.

"The question is whether the arbitrators are going to miss face-to-face interactions with witnesses and with the counsel and whether counsel are going to miss that as well," he told Law360. "I definitely think it is an option that parties will have the ability to consider more so than it was before the pandemic, but I don't think it's a substitute. I think that probably at some point next year we're going to start seeing in-person hearings again."

Cybersecurity a Concern Now More Than Ever

Going into 2020, practitioners within the arbitration community had already begun to sound the alarm about cybersecurity problems. And now that many proceedings have been moved online — and potentially within reach of cyberattackers looking to steal the highly confidential and sensitive material that forms the basis of many arbitration claims — it appears these concerns aren't going anywhere.

In fact, the concerns over cybersecurity will likely be particularly acute in 2021 given that after the lockdowns began this past March, many law firms and their clients were forced effectively overnight to move information kept on systems that were geared toward in-person work to online-based platforms.

"I predict that 2021 will be the year of the cyberattack," said Debevoise & Plimpton partner Catherine Amirfar, co-chair of the firm's public international law group. "That overnight transformation had a real cost."

In some instances, she noted, data that had previously been kept on locally controlled, secure servers that were hard-wired to office computers was immediately moved to cloud servers.

"What that does is it takes secure systems, where the actual flow of data is very carefully controlled, and it puts it in a free-for-all cloud environment. When you do that ... you're inherently creating vulnerabilities," she said. "Cyberattackers know to look for those kinds of vulnerabilities."

Since the lockdowns began, Amirfar said there's been a noticeable uptick in the number of so-called phishing attacks, in which attackers attempt to entice a user to click a link or open an attachment, usually through an email from what may appear at first to be a trusted source. The goal is to find and exploit an opening through which the attackers can send malicious code aimed at disabling technology systems.

Cyberattack techniques have evolved drastically since they first began more than a decade ago, when they could be easily spotted. Now, detecting them requires sharp eyes and training to recognize the telltale signs of a phishing attack — like an email address where a well-known company name is misspelled, or grammatical errors in the body of the email.

"It's no longer the case of the Nigerian prince that needs to get his inheritance, which most everyone knows about," said Amirfar, referring to some of the original phishing scams in which targets were urged

to wire money to foreign countries or provide bank account information in exchange for a large sum. "It's turned into emails from Amazon, for example, or from Citibank, where you have to look very carefully at the address to discern that it's not actually from Citibank or Amazon."

"There's a lag between the sophistication of users and their sensitivity to these kinds of tactics that are used by cyber hackers, and that's a very dangerous place to be," she continued. "We're playing catch-up now that everybody is online. People who had never heard of Zoom before are now constantly on Zoom."

Increasing Focus on Efficiency and Transparency

Although arbitration has traditionally been touted as a confidential means of resolving disputes, parties have increasingly begun pushing for more transparency so that they can learn more about outcomes in disputes, prior awards, and statistics, with the goal of identifying patterns or previous issues that could help them to better prepare their cases.

Arbitral institutions, in turn, have begun trying to address these concerns as a means of attracting more business — and experts say the trend is likely to continue.

"You're starting to see arbitral institutions really step up competition with one another for cases, and one of the ways they can stand out ... is to offer parties the most efficient, lowest cost, most intuitive, and best modality by which you can globally determine liability," said Holwell Shuster & Goldberg LLP attorney Andrei Vrabie.

One mark of this push for more efficiency is a set of new arbitral rules adopted by the International Chamber of Commerce's International Court of Arbitration, which will enter into force in 2021. While Vrabie noted that they're not a dramatic departure from the previous ICC rules, they do contain important changes that reflect the evolving nature of arbitration and aim to address concerns from users that the procedure is not as efficient as it could be.

Among those changes is a new provision permitting the joinder of additional parties without the consent of all the parties, a development that could prove a powerful tool in attracting parties looking for efficient dispute resolution, he said.

Although arbitration is a creature of contract, the new rule "really makes a lot of sense" since parties need to have all the people involved in a dispute together in one proceeding in order to be able to resolve that dispute, he said. The new provision will prevent one of the parties from blocking a third party from joining the proceeding.

"The ICC, I think, read the tea leaves, got some feedback from practitioners, started looking at what some of the other arbitral institutions have been doing and said to themselves, 'This is the 21st century, and we have to think practically,'" Vrabie told Law360.

The 2021 rules also include a new provision requiring anyone with a financial interest in a case — meaning third-party funders paying the legal costs of one of the parties — to disclose their involvement to the tribunal, a means of trying to head off potential arbitrator challenges based on an alleged conflict of interest.

This increased emphasis on disclosure is one way of ensuring sufficient transparency in arbitrations

while also highlighting increasing dependence among parties on third-party funding.

"There appears to be a demand for transparency in legal matters, which is prompting these changes," said Lisa Houssiere, a principal in McKool Smith PC's Houston office. "The fact that the ICC has made such a striking addition to the ICC rules suggests that third-party funding is here to stay."

--Editing by Cole Hill and Daniel King.