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International Arbitration Report

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2020

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Commentary

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2020

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what they believe will be the major challenges for international arbitration in 2020. We would like to thank the following individuals for sharing their thoughts on this important issue.

- David Lee, Partner, Appleby, Grand Cayman, Cayman Islands
- Lisa Houssiere, Principal, McKool Smith, Houston
- B. Ted Howes, Partner, Mayer Brown, New York
- Jerry Roth, Partner, Munger, Tolles & Olson LLP, San Francisco
- Kimberly Taylor, Senior Vice President, Chief Legal & Operating Officer, JAMS, Irvine, CA

Mealey's: What do you believe will be the major challenges for arbitration in 2020?

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 take 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 emphasise the importance of identifying available assets — in whichever jurisdictions they may be found — and putting in place a carefully planned and effective enforcement strategy.

Houssiere: One immediate challenge is how to handle pending arbitrations in light of the pandemic. The stark reality is that parties are choosing to either postpone hearings until in-person meetings and travel are safe again or are opting to use video conference technology to proceed with hearings. Unlike the U.S. judicial system, which for the most part has been shut down due to the virus, the major arbitral institutions — the ICC, the LCIA, and the ICDR to name a few — are all open for business and have staff working remotely. One silver lining of the pandemic is that it will likely catapult the use of video conference technology — particularly in lower value international arbitrations — which would be a way to help combat criticism that international arbitration has become a protracted and costly way to resolve cross-border disputes.

There will likely be an avalanche of cases in which parties seek to disavow their contractual obligations by invoking the force majeure provision in their contracts. Of course, declaring force majeure will not be a panacea for all legal issues companies will face with regard to the virus. However, the Covid-19 pandemic is striking in that it has both a naturally occurring element (the virus itself) and a government action element (required quarantines and governmental orders to close non-essential businesses). Government enacted measures to control the spread of the virus have resulted

in unforeseen economic hardships that make the performance of contractual obligations onerous, or in many cases, impossible. One challenge for arbitrators in these force majeure disputes will be the availability of legal precedent and how to take into account world-wide market realities. The pandemic is unlike any other situation because while disruptive events in the past such as the Ebola and H1N1 swine flu outbreaks affected certain parts of the world, this pandemic has affected all countries in the world — simultaneously. Whether arbitrators will construe force majeure provisions narrowly or broadly following the pandemic remains to be seen and will likely depend on the specific facts of the case, the contractual language, and the applicable law.

Howes: By this point in time, almost nothing about 2020 can be viewed through any lens other than the COVID-19 pandemic. This includes international arbitration. Logistically speaking, international arbitration is in a better place to weather the storm than litigation. Most international arbitration institutions, practitioners and arbitrators are already well accustomed to holding at least case management conferences and procedural arguments by videoconference or teleconference. The larger challenge will come from parties seeking extensive postponements of in-person evidentiary hearings based on the pandemic, or otherwise seeking to use (or abuse) the crisis in the service of delay. The pandemic will also likely lead to demands by parties to amend their claims and defenses in ongoing arbitrations, whether based on force majeure, material adverse change, or similar legal concepts. Arbitrators will no doubt be faced with difficult party demands, and will have to carefully navigate between justified and unjustified demands to maintain efficiency without subjecting their awards to judicial challenge.

Disputes about the safety of a chosen arbitral seat will also likely become a hallmark of 2020 arbitration. Here, the public health realities of the moment — *e.g.*, is it safe to hold an evidentiary hearing in New York City? — will clash with the legal reality that arbitrators cannot order the parties to change their arbitration situs. One can hope that parties will cooperate in reaching a safe and efficient compromise of such issues, but the potential for mischief is evident.

Disrupted global supply chains, stalled construction projects, contract cancellations and other myriad problems

caused by the pandemic and its aftermath will lead, inevitably, to an increase in the number of international arbitration claims in the second half of 2020 and into 2021. This presents both a challenge and an opportunity for the international arbitration community.

Roth: The number one 2020 challenge that risks rocking international arbitration to its core is of course the impact of COVID-19. While much of international arbitration can be conducted at a distance, the final hearing on the merits is virtually always in person, with counsel and witnesses appearing in the same room in the same city as the arbitral panel. Arbitration institutions across the globe are having to confront travel and health restrictions and, as a result, hearings have been delayed as parties and panels try to work through the issue of whether online hearings are feasible — and acceptable to the parties — in particular cases. That solution of course requires adaptation of new technologies, finding novel ways to exchange and submit evidence in digestible form, and ensuring confidentiality of the proceedings and privacy of the parties and witnesses — far more important in the arbitration context than in international court proceedings. The process also faces a host of logistical issues. These include counsel's ability to consult with clients and witnesses in real time outside the presence of other parties to the proceeding, proper observation of witnesses' demeanor, and deliberation among the members of the panel. Institutions should also anticipate that parties will be far more cost conscious given the economic impact of the shutdowns. While online hearings should be less expensive because of the avoided travel, rental and related costs, parties may also expect the panel's fees to be lower as well. We should also expect that there will be many international contract arbitrations in which the principal question in dispute is the applicability of force majeure and Act of God clauses — the extent to which different arbitration panels give inconsistent answers to similar questions simultaneously may frustrate parties, especially in light of the lack of substantive appeal rights to bring uniformity as in the court process. At the same time, courts may adopt a more skeptical approach to judgements in enforcement proceedings, given the political and public policy issues such cases present. At this early stage, the main challenge is the unknown — few can predict how significant changes may be, how disruptive to the international arbitration scene, and how likely to give rise to longer-term shifts that outlast the current crisis.

Of course international arbitration faced a variety of significant challenges in 2020 even before the dramatic changes of recent months. For one thing, changes in international trade ranging from the unpredictability of the Trump administration, to Brexit, to the growing strength of China, symbolized by the Belt and Road Initiative, were already likely to transform the arbitration landscape as well. At the same time, a number of countries are developing international court entities dedicated specifically to hearing cross-border matters in an unbiased forum that otherwise might have been submitted to arbitration. The role of ethics and criminal sanctions, which have drawn a lot of attention in arbitration circles over the past few years continue to leave room for uncertainty. Some national and supranational courts have balked at the inconsistency of arbitration results with their own view of otherwise applicable domestic law, and have found that the latter can trump the former in certain circumstances. And the lack of diversity in arbitration panels, including the inexcusably low number of women arbitrators on many institutions' standard lists, has given a black eye to the international arbitration scene in the view of many, although initiatives such as the Equal Representation in Arbitration Pledge (www.arbitrationpledge.com) are beginning to have an impact.

Taylor: The biggest challenge all of us face is the disruption and uncertainty caused by COVID-19. Travel

bans and regional and national “stay at home” or “pause” orders by government officials upended planned arbitration hearings with little notice. Arbitration providers — concerned about the safety of their employees, arbitrators and parties — closed down arbitration centers, causing long-planned arbitration hearings to be rescheduled with no clear indication when it would be safe to resume.

Fortunately, with challenge comes opportunity. Even as government leaders begin to plan for easing of some restrictions to permit businesses to return to normal operations, there is uncertainty about whether and when domestic and international travel restrictions will be lifted. At the same time, arbitration participants have become increasingly comfortable with video conferencing to conduct arbitration hearings. The feedback from JAMS arbitrators is that they've had successful results with Zoom as well as other available platforms such as JAMS online dispute resolution platform, Endispute, via Court Call. We are encouraging our arbitrators to be flexible in their approach, keeping in mind that their clients' comfort-level with video may vary.

The legal industry has been forced to reckon with a sea change and while we will be dealing with the repercussions of COVID-19 for a long time, virtual arbitration hearings will undoubtedly continue. dispute. ■

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