

LIGHT IN THE TUNNEL - THE POST-COVID ARBITRATION OUTLOOK

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Legal Briefings

With the pandemic ushering in dramatic change in arbitration hearings, we ask how the disputes world will find a new equilibrium

The approval and rollout of mass Covid-19 vaccinations across many parts of the world has prompted many to look ahead to a “post-Covid” world. For clients and practitioners of arbitration who have witnessed the almost overnight shift of arbitral practice into the virtual arena, that quest for a sense of when, and how, we may return to “normal” is just as powerful.

But are we really there yet? There remain many questions about the virus and our global response to it. While the direction of travel may appear to be a positive one, there are likely to be a number of twists and turns before “normality” will return. And, importantly, for an international practice area such as arbitration, the speed and trajectory of that journey will differ from country to country.

With that in mind, are we really ready to predict what will happen next in terms of disputes and arbitral practice?

THE DISPUTES LANDSCAPE: IS THE 2008 GLOBAL FINANCIAL CRISIS AN HELPFUL INDICATOR?

The Covid-19 pandemic has led to unprecedented disruption to economic activity on a global scale. Many have drawn on the experience of the 2008 Global Financial Crisis in their efforts to predict the consequences of this current crisis, particularly as regards the type and number of disputes that may arise. There are, however, a number of noteworthy differences in the implications for disputes between the two situations, understandably given their markedly different nature.

The 2008 Global Financial Crisis	The Covid-19 Pandemic
<p>The financial crisis stemmed from particular actions of individuals and entities and was initially felt first in one jurisdiction</p>	<p>The Covid-19 pandemic is a natural phenomenon, and spread extremely quickly on a global scale.</p>
<p>Immediately after the events of 2007 - 2009 we saw an initial spate of corporate and securities-related disputes, many of which were focused on the allocation of blame and the resulting financial consequences. Governments began civil and criminal investigations into the events that led up to the crisis and focused on allocating responsibility and managing the considerable fallout.</p>	<p>While there have been efforts in certain jurisdictions to allocate blame in relation to the cause of the pandemic, notably in a series of lawsuits brought in th</p>
<p>The first wave of civil disputes was felt within the financial and mortgage sectors. As the crisis spread to other sectors, it resulted in a global recession and seismic financial shock to international markets, causing a large wave of civil litigation and insolvency-related disputes. The long tail of these later disputes is still being fought.</p>	<p>A far higher number of industries and sectors have been affected by the pandemic more quickly and directly than was witnessed in the first stages of the financial crisis. The almost overnight contraction of global mobility and the imposition of national restrictions have impacted aviation, shipping, commodities, travel, leisure, hospitality, consumer products, energy and the insurance industry, to name but a few. Each of these industries has already seen a significant number of disputes, many of which are focused on the allocation of financial risk with the aim of preserving valuable and necessary cash resources. In some cases, this has resulted in boilerplate Force Majeure and Material Adverse Change clauses being triggered. The contraction of the industries most severely affected has also resulted in a spate of M&A disputes where buyers have sought to avoid completing deals struck before the crisis hit, particularly in the retail and hospitality sectors. Industries hit by the restrictions have also faced a number of consumer actions and employment claims.</p>
<p>Quick move towards formal dispute resolution to allocate risk and responsibility.</p>	<p>Perhaps as a consequence of the scale of the pandemic and its human impact, the way some disputes have been resolved has differed from the financial crisis. At the start of the pandemic, many businesses found themselves unable to meet their contractual obligations or were faced with their counterparties being unable or unwilling to perform. There does appear to have been a significant effort made by many parties to adopt a collaborative rather than combative attitude in light of the global nature of the pandemic. Some parties have sought to reach negotiated settlements and to share risks and costs with a “we are all in this together” approach.</p>

WHAT CAN WE EXPECT FROM THE NEXT WAVE OF PANDEMIC-RELATED DISPUTES?

Given that the first wave of disputes looked rather different, does that mean that the 2008 Global Financial Crisis is not a good indicator for predicting future disputes? Right now, it remains hard to tell. While some may have declared the worst of the pandemic behind them in more highly vaccinated countries, this is not the case worldwide, and the course the pandemic takes could significantly impact the shape of the disputes landscape. Many governments have borrowed large sums to introduce public support schemes and have also changed insolvency regimes during the pandemic, making it difficult for creditors to pursue companies in difficulty. Nevertheless, the longer the pandemic lasts and the global economy remains in stasis, the greater the underlying economic distress we are likely to see in all markets, even if that distress is deferred by those public support systems. Fast-paced vaccination programmes in some jurisdictions may enable a swifter bounce back and economic recovery. Indeed, some predict a post-pandemic “boom”. Fast-growing domestic economic growth and the return of consumer confidence in those jurisdictions may help to limit the number of domestic disputes. However, the disparity in vaccination rates and emergence of variants is likely to mean that the pandemic will continue in many parts of the world throughout 2021 and into 2022, having a significant impact on domestic trade in those countries and international trade globally. If so, the number of disputes that arose out of the 2008 Global Financial Crisis may pale by comparison to disputes generated by the pandemic. While the scale may be in question, there will certainly be disputes. And just as there was in the financial crisis, there is likely to be a long tail of disputes.

"The gradual retreat of the pandemic may well lead to a new wave of disputes. As "crisis mode" starts to abate and the economic impact of the pandemic is felt more keenly, parties may have no choice but to consider their dispute resolution options as they decide how they want to allocate risk and responsibility for the past year and a half. As businesses regroup and the global economy rebounds, we are likely to see a move away from ADR to more adversarial options. We may also see new disputes emerge as businesses seek to consolidate, "de-globalise" and build resilience going forward."

Paula Hodges QC

The disruption has caused losses that are not unique to an individual or business, but are common to many, which provides a fertile environment for class actions or group claims. Regulators showed leniency during the pandemic, but are likely to resume investigations and aggressive enforcement action, also giving rise to increased litigation and arbitration. Employee, insurance, securities and competition claims have already been commenced across the world and in numbers that suggest more may follow. As public support schemes and insolvency restrictions come to an end, businesses will be expected to return to more normal operations, albeit potentially with increased costs and reduced turnover. Creditors will pursue unpaid debts and landlords will evict for non-payment. As a consequence, there is a much higher risk of restructurings and insolvency filings, which in turn increase the risk of disputes.

"The restrictions we have seen over the past year and a half may prompt parties to consider any claims they may have against governments or states under investment treaties. Whether or not a specific state's actions in response to Covid-19 could result in a breach of treaty protections, and whether an actionable claim arises for a specific investor as a consequence, will be heavily fact- and treaty- specific. It may well be a 2-4 year lead time for the majority of these claims to materialise, but the first few are starting to be made. For example, a notice of dispute has reportedly been submitted by two French investors against Chile under the France-Chile BIT regarding the concession for the operation of Santiago's airport and the impact of the pandemic, while potential claims have also apparently been threatened against both Peru and Mexico."

Andrew Cannon

THE OUTLOOK FOR ARBITRATION

Are pandemic disputes being arbitrated?

Of particular interest to arbitration practitioners will be whether these different waves of disputes will be arbitrated, litigated, or pursued through other dispute resolution mechanisms. Unlike the 2008 Global Financial Crisis, the pandemic has had a seismic impact on the entire system, forcing all forms of dispute resolution onto some form of virtual or hybrid platform. In the early stages of the pandemic, when the long term implications were still unclear, it appeared that only the most critical cases would progress, with many parties choosing to postpone hearings and to defer initiating disputes.

Nevertheless, despite an initial short, sharp shock for all forms of dispute resolution including arbitration, there has been a palpable sense of activity increasing over time. In the English courts, case numbers stayed low until August 2020, before rising to baseline levels in October and November 2020. Similarly, the number of arbitration cases since the summer of 2020 appears to have been particularly strong, with the first wave of 2020 statistics from the arbitral institutions matching anecdotal evidence that there has been an upswing in arbitrations across the board.

An increase in arbitrations due to the pandemic?

All the main arbitral institutions have seen an increase in their annual caseload, with many registering their highest number of cases for many years or, in the case of the LCIA and SIAC, an all-time high.

Institution	2019	2020
International Chamber of Commerce (ICC)	869	946
Hong Kong International Arbitration Centre (HKIAC)	308	318
Singapore International Arbitration Centre (SIAC)	479	1080
Stockholm Chamber of Commerce (SCC)	175	213
London Court of International Arbitration (LCIA)	395	444

It remains hard to conclusively “prove” that this rise is due to the pandemic given that most arbitral institutions had been on a trajectory of growth over the last 3-4 years in any event. Indeed, the recent LCIA 2020 report identifies that *“it is not always apparent on the basis of the documents received by the LCIA as the administrating institution whether the pandemic was the stated and/or ultimate trigger for a dispute. In addition, the ripple effect of this pandemic has reached every sector of the world economy and society making it difficult to assess whether “but for” the pandemic a dispute would have arisen”*. However, the LCIA has identified a considerable contraction in the time lag between the date agreements were entered into and when actual disputes arise, with almost half of all disputes filed in 2020 arising out of agreements executed in the previous two years, much higher than the percentage of disputes arising between 2018-2019. This may suggest an increase in disputes arising out of recently concluded agreements as a result of the pandemic. If correct, it would appear that many of the disputes from the first wave, at least, are being arbitrated, and that these arbitrations may have been initiated more quickly than during the 2008 Global Financial Crisis.

Assuming a similar pattern of disputes emerges to that flowing from the 2008 Global Financial Crisis, we should expect a further rise in arbitrations during the remainder of the pandemic, with a long tail of disputes over the following 3-5 years.

THE ARBITRATION WORLD: CHANGES IN PRACTICE AND PROCESS?

There has been much discussion about the impact of the pandemic on working practices and the move away from office-based working to a more flexible working style. Those practicing arbitration have had to adapt extremely swiftly to the virtual world and, as we discussed in Issue 10 of Inside Arbitration, the move to virtual hearings has been extremely effective and successful. But will this move to the virtual world be a more permanent one?

The biennial [QMUL Survey](#) provides helpful insight into arbitration sector attitudes across the globe. In the latest survey from 2021, participants were asked about their experience of virtual hearings and use of technology during the pandemic. The results recognise that virtual hearings may produce “greater procedural and logistical flexibility” and offer a chance for “greater efficiency through use of technology”.

Interestingly, 70% of respondents would choose “to proceed at the scheduled time as a virtual hearing” and only 16% would “postpone the hearing until it could be held in person”. Some negatives were identified, including the difficulty of accommodating time zones, the fallibility of technology, “screen fatigue” and challenges for counsel teams to confer effectively.

Nevertheless, if the experience has been largely positive, what does this mean for the future? Well, for many of us during the course of 2021, and into 2022, there may be little choice and it remains hard to predict whether a preference for holding an in-person hearing will re-emerge. As in all areas of life, the return to “normal” will be dependent on the availability and supply of vaccine doses, the speed and ease of distribution and the protection offered by those vaccines. While there are positive signs so far, data is still being gathered about the extent to which the vaccines will work to prevent infection, limit serious illness and reduce the ability of the vaccinated person to transmit the virus, particularly in light of new variants. The answers to each of these questions will have a significant impact on when, and how, we can return to normal. Moreover, countries will face different trajectories to “normality” based on how these issues play out on the global stage. The speed with which international trade and travel opens up will require considerable negotiation and planning by each government, balancing the protection of public health against the recovery of domestic economies. Few can yet predict with any real certainty whether and when people will be able to travel freely across international borders and the extent to which they will need to prove immunity, immunisation or a negative test prior to doing so.

International arbitration often involves parties from multiple jurisdictions. While so much uncertainty remains, it would seem overly optimistic at this stage to assume that many in-person international hearings will be possible during 2021. What we may see is an increasing number of “hybrid” hearings over the latter half of 2021 where those who are able to travel will do so, or those in the same jurisdiction meet in person, with those from other jurisdictions attending virtually. These hybrid hearings will require careful handling to ensure equal treatment and procedural fairness, particularly if not all of the parties are able to appear in person before the arbitrators.

As a consequence, those planning hearings during 2021 and 2022 would be well advised to be flexible, working on the assumption that virtual hearing arrangements of some form may be required. Awareness of Covid restrictions, variants and vaccination schedules within the jurisdiction in which an in-person hearing is scheduled to take place is likely to become an increasingly relevant factor, with the picture potentially shifting month to month. For the medium term at least, virtual hearing technology in some format looks likely to remain prevalent.

But what about the truly post-Covid world? Will the shift towards virtual or hybrid hearings be permanent? The QMUL Survey would suggest a narrow preference for procedural hearings to be wholly virtual (48%), a preference for substantive hearings to be a mixed model (some attending virtually and some in person) (48%) but with in-person hearings a very close second (45%). Only 8% of respondents indicated a preference for retaining fully virtual substantive hearings if given the option. This split between the mixed and in-person model seems to be the most likely outcome. We may find a two-tier approach to hearings based on the amounts in dispute, with lower value disputes erring towards the hybrid option finding the cost savings and environmental benefits attractive even when in-person hearings become feasible. For those involved in truly “bet the company” cases, in-person hearings are likely to remain the preferred option, allowing both sides to see the whites of each other’s eyes, particularly where witnesses from different time zones are involved.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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