Norton Rose Fulbright

International arbitration report

Issue 14 | June 2020

Arbitrators' corner

Institutional responses to the COVID-19 pandemic

Insolvency and international arbitration

Disputes funding in the COVID-19 pandemic environment

Investor-state claims in the era of the COVID-19 pandemic

Doing business (but not business as usual) in a global pandemic

The energy market in a global pandemic

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Preliminary trends in arbitration in the transport sector in light of COVID-19

Arbitration disputes in the pharmaceutical, life sciences and healthcare sector in the era of the COVID-19 pandemic

Climate change and sustainability – Lessons learned from COVID-19 and resolving disputes by arbitration

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Editors-in-chief – C. Mark Baker, US; Pierre Bienvenu Ad. E., Canada
Editor – James Rogers, London
Assistant editor – Cara Dowling, Vancouver

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Editorial

In this issue of the International Arbitration Report, we explore what the current global economic uncertainties and the COVID-19 pandemic mean for the practice of international arbitration.

On Friday 24 April 2020, the Times reported that the "economy is collapsing at an unimaginable pace alongside record falls in business activity around the world and spiralling job losses." The focus of the article was the COVID-19 enforced lockdown. It did not mention the oil price. Yet earlier in the week, the Times had reported that the price of Brent crude, the international oil bench mark, had fallen to its lowest level since 2001 while futures contracts for West Texas Intermediate, the US oil price benchmark, fell below zero for the first time ever "*meaning that sellers were paying buyers to take excess oil of their hands*". These are unprecedented times – a once in a century black swan event combined by an unprecedented oil supply glut. And unprecedented consequences will follow. What is certain, however, is that there will be disputes – between contractual counterparties all along the value chain, as well as between states and companies affected by measures taken in response to the crisis. These will need to be resolved one way or another.

The process of resolving disputes has, however, also been impacted by the COVID-19 lockdown as dispute resolution institutions strive to find ways to maintain access to justice. Many courts have been closed or restricted to limited operations as they seek to implement new technologies to facilitate digital case management and virtual hearings. International arbitration too has been impacted, though as a transnational, flexible and consent-based procedure, where technology and procedural innovations have been in use by some for many years, it has been in a good position to respond to the new ways of working. Arbitral institutions are at the forefront of the international arbitration community's response to the restrictions and difficulties caused by COVID-19, with a particular focus on protocols on the use of digital technologies, including virtual hearings to enable continued access to justice during the lockdown. Anecdotal and direct experience suggests that arbitrators and counsel alike have embraced the technological and procedural change needed to ensure the expedient delivery of arbitration in these challenging times. We discuss these initiatives in this issue, and question whether the more widespread uptake of digital technology in international arbitration as a result of COVID-19 will outlast the pandemic.

C. Mark Baker, global co-head of international arbitration at Norton Rose Fulbright, concludes his Arbitrator's Corner opinion piece with the hope that the "continued acceptance of technological and procedural innovations will be our new normal, and that even after the restrictions of the pandemic are lifted, we will continue this path of progress."

With an expected increase in insolvencies as global economies teeter on the edge of (or tip over into) recession, we consider the inherent tension between the consensual, private nature of international arbitration and the public policy interests of national insolvency laws. There is little doubt that these areas of law will clash in the coming weeks and months as potential arbitration parties find themselves insolvent or pursuing claims against insolvent counterparts.

On a related topic, we look again at third party funding. The financial constraints of the COVID-19 pandemic has brought a renewed focus on third party funding, as claimants seek alternative means of funding their claims. We explore the full range of funding options available.

We also look at the potential for investor/state treaty claims that might arise as a result of the pandemic. States have taken urgent and extraordinary steps to prevent the spread of the Coronavirus and to address the public health and economic crisis that the virus has caused. Inevitably, some of these measures will affect foreign investors and their investments, triggering investor-state disputes.

Last but certainly not least, we look at the consequences of the crisis from an industry perspective, considering the impact across the energy, climate change and sustainability, transport and life sciences and healthcare sectors, as well as the impact on Belt and Road infrastructure and construction projects.

C. Mark Baker **Pierre Bienvenu Ad. E.**

Co-heads, International arbitration
Norton Rose Fulbright

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About the cover

The front cover for this issue features one of three 11-foot high "Sisters of Mercy" statues depicting nurses of World War 1 in uniform, designed by Joseph Francis Watson. The statues are now found at Cathedral Place, Vancouver B.C., which stands where the Medical-Dental 1920s art-deco skyscraper once stood. Original architects McCarter and Nairne served in WW1. McCarter credited WW1 nurses with saving his life and commissioned the statues in their honour.

Arbitrators’ corner

Doing justice in the face of a global pandemic

By C. Mark Baker

In this issue of *Arbitrators’ Corner*, C. Mark Baker, global co-head of international arbitration at Norton Rose Fulbright, offers his insights based on decades of practice as both counsel and arbitrator on the impact of COVID-19 on international arbitration and how the practice of arbitration is adapting in the face of these challenging circumstances.

Perspective as arbitrator and counsel

The global disruption caused by the novel Coronavirus COVID-19 has impacted all areas of life and all sectors of industry, including legal practice and dispute resolution. In the immediate wake of the wide disruptions and restrictions imposed in response to the pandemic, the difficulties faced by parties, counsel, arbitrators and arbitral institutions (not to mention the many other essential participants such as fact witnesses, experts, translators and transcribers) in resolving disputes efficiently and effectively at first glance seemed overwhelming. Dispute resolution – whether mediation, arbitration, litigation or other – has historically relied for good reason on bringing all participants together in one room to hash out a resolution. But that is no longer practical nor permitted in many instances (nor indeed wise). We have had to adapt, swiftly, our pre-conceived notions about how disputes can or should be resolved.

As Benjamin Franklin famously said, “out of adversity comes great opportunity” and that is certainly the case for international arbitration and other alternative dispute resolution mechanisms. I personally have been gratified by the response of our community to this adversity. Parties, counsel, arbitral institutions and adjudicators of all types have been proactively taking steps to ensure continued access to justice – fair, impartial and efficient justice. This has been helped by the inherently consensual and flexible nature of international arbitration. But the rapid pace of change in our community should not be underestimated – for many years, critics of international arbitration have noted that arbitration has too often tended to replicate traditional court proceedings rather than to embrace innovations that might drive efficiencies. The pandemic has been the impetus for change – and there has been wide-scale, rapid adoption of online or virtual dispute resolution technology and processes, in various forms.

> ***Out of adversity comes great opportunity***

Of course, some of these innovations are not new – most of us have been filing and serving documents in arbitration electronically for decades. Some of us have also been regularly dealing with pre-trial issues and motions by telephone or video hearings. The economics of doing so works – avoiding the costs of travel and/or protracted written exchanges. Moreover, in my experience, there often can be real practical benefits of getting parties together virtually to agree early procedural issues rather than doing so in writing; one key benefit being that parties and counsel get to familiarise themselves with the tribunal and how they operate, as well as their opposing parties and counsel, which ultimately makes for a more efficient and indeed substantively better final hearing. I find it also provides impetus for all participants to be better prepared in advance of the final hearing, which can aid in narrowing issues and/or provide opportunities for settlement sooner in the process.

But what we are seeing now is greater collective attention on if and how best to deal with online or virtual dispute resolution processes. As discussed in our article in this issue on Institutional Responses to the Pandemic there has, as a result, been a significant amount of advice and guidance notes produced to support those coming fresh to these technologies. I have also been impressed at the amount of training courses and seminars on conducting virtual dispute resolution being made available by law firms, barristers, and arbitral institutions and centres. There is now a large body of excellent resources available, and the community is also actively discussing some of the curlier issues.

Of course, online dispute resolution will not be appropriate in all circumstances, for all parties nor for all disputes. Whilst embracing new technologies and

processes, the parties, counsel and arbitrators must also be alive to the difficulties that can arise when replacing physical proceedings with virtual ones. Practical issues must be considered such as participants being based in different time zones (a hearing I participated in recently involved participants from 6 different continents), participants speaking different languages (I think it is fair to say that although there has been progress the difficulties with virtual simultaneous translation have not been completely ironed out yet), and differences in availability of technology including, importantly, functional internet speed and bandwidth. Advance consideration of and preparation for the potential issues is key. Arbitrators must be willing and able to offer confident and strong procedural case management. We must also be conscious of the need to address potential asymmetry between the parties – for example, experienced arbitration counsel from large law firms will likely have conducted some form of virtual proceedings and may feel on firmer ground with the process and the issues than, for example, some in-house or governmental agency lawyers.

Participants must also be willing to accept that there will be circumstances when it will not be appropriate for the final hearing to be conducted virtually – this may include, for example, some "bet the bank" cases, or those involving extensive complex or technical evidence, significant amounts of documentary or physical evidence to be tested, and/or requiring lengthy final hearings. This of course must be assessed on a case by case basis, and merely falling into one of the prior categories should not automatically disqualify the case from being determined virtually. The question must be considered in the round – including looking at whether in the circumstances some justice being done is more acceptable than a lengthy delay that might result in no justice being done at all. When coming to decisions as to whether (and which stages) should proceed virtually and how the process should play out, arbitrators need to remain on firm ground, bringing the parties and counsel along in the decision making process and documenting it as appropriate.

There have been concerns expressed by some about whether the use of virtual hearings and other novel technologies and processes might lead to a spate of challenges to awards on due process grounds. That is, of course, possible but I suspect this may be a little overhyped – as an example, I note that many courts (40 by one recent count) are themselves taking up virtual hearings and other online dispute resolution. That is not to dismiss questions of enforcement risk – these must be considered and dealt with where possible as part of the case management process. Parties, counsel and arbitrators will need to take into account regional variations of approach to due process and other relevant matters, at minimum considering the seat and likely places of enforcement. But challenges and risks to enforcement have always existed in one form or another. Sophisticated arbitrators are accustomed to dealing with such issues. The transition to virtual proceedings does throw up new factors to consider, and it is a matter of turning one's mind carefully to those, but I am leery of sliding into due process paranoia.

In conclusion, I am gratified to witness and applaud the resilience and innovation shown by our international arbitration community in recent months. In the face of significant adversity, we have found improved and new ways to resolve disputes and maintain access to efficient and effective justice. Notwithstanding the terrible circumstances that provided the impetus, recent months have served to shake up to the status quo and challenged normative beliefs around how disputes can and should be resolved. For many years, there have been discussions around how to drive greater time and cost efficiencies in the arbitration process – some of the solutions being utilised now have those benefits, but more importantly their rapid introduction have shown how adaptable and open to change parties, counsel, arbitrators and institutions really are. It clears the way for further progress. Innovation and flexibility in resolving disputes in a commercial and efficient manner are the cornerstones of international arbitration. It is my hope that continued acceptance of technological and procedural innovations will be our new normal, and that even after the restrictions of the pandemic are lifted, we will continue this path of progress.

With thanks to Cara Dowling, Of Counsel, Knowledge, for her contribution to this article.

C. Mark Baker
Global Co-head of International Arbitration. Partner, Houston
Norton Rose Fulbright US LLP
Tel +1 713 651 7708
mark.baker@nortonrosefulbright.com

C. Mark Baker practices in the areas of complex commercial arbitration, investment arbitration and alternative dispute resolution (ADR). C. Mark Baker acts as counsel as well as being regularly appointed as arbitrator (including serving as sole arbitrator, party-appointed arbitrator and chair of the tribunal). He has extensive experience in complex international and domestic arbitration under all the major arbitral rules as well as ad hoc disputes under UNCITRAL rules.

Institutional responses to the COVID-19 pandemic

Cooperation, collaboration and going virtual

By Andrew Battisson, Sherina Petit, Tamlyn Mills, Katie Chung and Clinton Slogrove

As the COVID-19 pandemic has shut down businesses, locked down communities and closed borders, the international arbitration community is not alone in having to rapidly develop new ways of working. For a cross-border system of dispute resolution that frequently involves participants from different countries, the challenge posed by COVID-19 to international arbitration is acute. However, given that arbitration is a flexible and consensual process, it is well positioned to respond swiftly to these challenges. Indeed, in a short space of time there has been a significant and collaborative response from the international arbitration community, led by the major arbitral institutions, to find ways to maintain access to justice in a timely and efficient manner.

The response from arbitral institutions

Arbitral institutions are at the forefront of the international arbitration community's response to COVID-19. Commendably, many institutions have largely remained fully operational while implementing remote working practices and virtual hearings (see our prior article on COVID-19 and The Global Approach to Court and Arbitral Proceedings). In April 2020, 13 arbitral institutions issued a joint statement calling for solidarity, cooperation and collaboration in response to COVID-19. The statement emphasised the joint ambition of the institutions to "support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay."

The ambition to see cases continue has led to a focus on the use of digital technologies, including virtual hearings. Online dispute resolution is not a new phenomenon (see our previous article Online Dispute Resolution and electronic hearings). However, the global measures taken in response to COVID-19 have meant that the use of digital technologies to facilitate case preparation, management and hearings is no longer optional – particularly where parties are unwilling or unable to wait until the current crisis passes.

The ambition to see cases continue has led to a focus on the use of digital technologies, including virtual hearings

This reality has prompted a number of institutions to issue specific guidance to parties and tribunals grappling with how to convert physical in-person hearings into a virtual environment.

This article explores the guides, protocols and draft procedural orders issued by institutions and other bodies and considers how institutions are responding to the following key challenges:

i. Determining when it is appropriate to replace a physical in-person hearing with a virtual hearing
ii. Maintaining confidentiality and data security
iii. Mitigating due process concerns
iv. Mitigating the disruption caused by technological failures
v. Managing risks to the enforceability of awards

When to use virtual hearings

A threshold question confronting parties and tribunals is whether a particular case is appropriate for virtual hearing. Clearly, the ability of all participants to access the necessary technology, software and equipment and a reliable high-quality internet connection is a prerequisite to a virtual hearing. Additionally, time zone

differences may make it more difficult to convene a full day virtual hearing, so adjustments will need to be made to the hearing timetable. The Africa Arbitration Academy and Chartered Institute of Arbitrators (CIArb) suggest that where such access is not available, parties may solicit arbitral institutions or other centres to offer their venues.

The ICC and the CPR Institute have most clearly set out the considerations that tribunals should take into account when determining whether to proceed with a virtual hearing.

In its Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, the ICC refers to factors such as the nature and length of the hearing, the complexity of the case and number of participants, whether there are particular reasons to proceed without delay, whether rescheduling the hearing would entail unwarranted or excessive delays, the need for the parties to properly prepare for the hearing and whether the award will be enforceable.

The CPR Institute identifies the following relevant considerations:

- The tribunal's authority to convene a virtual arbitration hearing under the applicable arbitration rules and the parties' arbitration agreement;
- The applicable law, including any relevant and/or mandatory provisions regarding the conduct of hearings and the presentation of evidence and data protection;
- Whether the logistical and technical challenges of holding a remote video hearing can likely be overcome such that a hearing can be fairly managed based on the particular circumstances of the case at hand;
- Whether concerns about fairness or equal treatment of the parties can be reasonably overcome;
- Whether cybersecurity concerns have been adequately addressed; and
- Whether postponement until a hearing may be held in a single physical location could result in excessive delay, risks to health and safety and/or prejudice.

Where time zone differences cannot be easily accommodated, parties and tribunals may consider an asynchronous virtual hearing, which was suggested by Michael Hwang S.C. during a recent SIAC webinar. This can be useful for oral openings / closings, or jurisdiction challenges, though unsuitable for cross-examination. For an asynchronous virtual hearing to take place, one party appears before the arbitral tribunal and makes its oral submissions, the recording and transcript of which will be uploaded to a secure online platform for the other party to review. The second party then appears before the tribunal and makes its oral submissions and the recording and transcript of which will be uploaded to the same platform. The parties will then convene with the tribunal for a final virtual hearing during which any outstanding issues are dealt with. This is a possible method of convening a virtual hearing while ensuring that parties have a reasonable opportunity to be heard.

Confidentiality and data security

Arbitral bodies such as the American Arbitration Association (AAA) (in conjunction with the International Centre for Dispute Resolution (ICDR)), Africa Arbitration Academy, CIArb, The CPR Institute and the ICC have issued detailed guides or protocols for virtual hearings as well as draft procedural orders. These materials take parties through the technological requirements and considerations necessary to ensure a successful virtual hearing.

A recurrent theme is how parties and tribunals can ensure the confidentiality of the proceedings and protect data exchanged or recorded electronically

A recurrent theme is how parties and tribunals can ensure the confidentiality of the proceedings and protect data exchanged or recorded electronically. Common recommendations include:

- Using platforms that are password protected and generate unique, automatically generated meeting IDs for each virtual hearing;
- Only using secure internet connections;
- Nominating a "host" to control entry of participants and providing the host with a list of participants before the hearing;
- Avoid using information that would disclose the identity of the parties in the meeting description;
- Awareness of the terms of service that apply to platform recording features and either disabling or formalising the conditions under which sessions will be recorded;
- If sharing recordings, use secure file sharing platforms or cloud storage (with a password protected link to the file which must be downloaded within a few days after which the cloud recording is deleted); and
- Prohibiting any audio, video or screenshot recording of the hearing other than the official record.

Parties seeking more information on cybersecurity issues can also refer to the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition) and the IBA Cybersecurity Guidelines 2018.

Due process concerns

Due process concerns are often raised as an obstacle to virtual hearings. For example, how can opposing counsel and the tribunal be confident that a witness is not being coached by someone off screen, through instant messages or by annotations on materials that are not visible on screen? Another common concern is how to prevent ex parte communications with the tribunal, for example if one party joins a virtual hearing early or a party is disconnected part way through a hearing.

The materials published by institutions offer practical suggestions for how to mitigate these concerns, including:

To ensure the integrity of oral evidence

- When a witness is giving evidence, position the camera so that it provides a view of a reasonable part of, if not the entire, room and allow the tribunal to ask the witness at any time to orient the webcam to provide a 360-degree view in order to confirm that no unauthorised persons are present;
- Witnesses should give evidence sitting at an empty desk or table and, if it is necessary for the witness to refer to hard copy documents while giving evidence, counsel should provide the witness with clean, unannotated sets of these materials and may place them in a sealed envelope that is to be opened for the first time during the examination;
- Allow the tribunal to ask the witness at any time to display the set of documents and/or witness statement he or she is referring to in order to verify that they do not bear any annotations;
- Ensure the witness does not have access to any real-time transcript;
- Ask the witness to confirm that he or she is not receiving communications or assistance of any sort from any unauthorised person during the testimony; and
- Prepare pre-agreed “ground rules” made available to each witness.

To prevent ex parte communication with the tribunal

- Disable any private chat features available on the virtual platform;
- Utilise security features of virtual platforms such as waiting rooms and secure breakout rooms; and
- Allow the host to lock the hearing once all authorised participants have joined.

A specific issue flagged in The CPR Institute’s Annotated Model Procedural Order for Remote Video Arbitration Proceedings is whether the applicable procedural law authorises the tribunal to administer oaths to witnesses by videoconferencing. If it does not, the model procedural order recommends that parties advise the tribunal what process they propose the tribunal should follow to ensure reliable testimony.

Minimising disruption

The disruption and delay caused when technological problems prevent participants from joining a virtual hearing, disconnect them part way through a hearing, or reduce the quality of audio or video is a significant disadvantage of a virtual hearing, particularly where all participants are joining from different locations.

A key consideration with any virtual hearing is whether it risks the enforceability of the resulting award

The various guidance notes published by the arbitral institutions offer practical suggestions for how to minimise the disruption caused by technological problems or failures including:

- Conducting a trial run in advance of the hearing;
- Arranging a “back-up” option such as an alternative virtual platform or lower technology option such as an audio-only conference bridge;
- Having a technician on hand where possible to assist; and
- Agreeing in advance the protocol to be followed if there is a disconnection or failure that cannot be rapidly resolved.

Ultimately, however, the tribunal must determine whether technological failures compromise the proceedings to the extent that one or both parties were not given a reasonable opportunity to present their case. The Africa Arbitration Academy Protocol, The CPR Institute Annotated Model Procedural Order, and Seoul Protocol on Video Conferencing in International Arbitration expressly contemplate that the tribunal may pause or terminate a virtual hearing if it deems the videoconference so unsatisfactory that it is unfair or prejudicial to either party or compromises the integrity of the proceeding.

Enforceability risk

A key consideration with any virtual hearing is whether it risks the enforceability of the resulting award. This issue is of particular concern where the parties’ arbitration agreement (including any institutional rules

governing the arbitration) does not provide for virtual hearings, a party objects to a virtual hearing or local enforcing courts may question virtual hearings.

The CIArb Guidance Note cautions that, "[d]ue to differences in legal opinions and interpretations across jurisdictions, remote means of reaching a resolution to a dispute might be questioned by some enforcing domestic courts or may be used [as] a ground for challenge by parties. Parties should be aware of this possibility and adjust where necessary to ensure enforceable resolutions to disputes."

The Africa Arbitration Academy Protocol , the AAA-ICDR Model Order and The CPR Institute's Annotated Model Procedural Order provide draft orders recording the parties' agreement to a virtual hearing and waiving the right to object to an award on the ground that the hearing of the dispute was conducted virtually as well as draft orders recording the tribunal's determination to proceed with a virtual hearing in the absence of party agreement.

However, even if the parties expressly agree to conduct a virtual hearing, such agreement does not bar a party from challenging an award based on the manner in which the remote proceeding was actually conducted.

The CPR Institute therefore recommends that to protect the enforceability of an award, the tribunal should monitor the proceedings to ensure that every party's right to present its case has not been jeopardised and act quickly to rectify any incident that may have been prejudicial a parties. A practical solution may be for the tribunal to allow parties to submit post-hearing submissions to ensure all points in each party's case are addressed, or to recall witnesses for limited cross examination if technology fails during a particular segment of the virtual hearing.

Conclusion

The guides, protocols and procedural orders discussed in this article demonstrate that many of the perceived barriers to effective virtual hearings can be overcome in many instances through careful planning, preparation and tailored procedural orders along with continued vigilance by tribunal, counsel and parties as to due process issues throughout the proceedings. It remains to be seen whether the more widespread uptake of digital technology in international arbitration as a result of cCOVID-19 will outlast the pandemic, offering a lower cost and more environmentally friendly alternative to physical in-person hearings in appropriate cases.

With thanks to Ingrid Olbrei, graduate, for her assistance with this article.

Andrew Battisson
Partner
Tel +61 2 9330 8611
andrew.battisson@nortonrosefulbright.com

Sherina Petit
Head of India Practice; Partner
Tel +44 20 7444 55738
sherina.petit@nortonrosefulbright.com

Tamlyn Mills
Senior Associate
Tel +61 2 9330 8906
tamlyn.mills@nortonrosefulbright.com

Katie Chung
Special Counsel
Tel +65 6309 5434
katie.chung@nortonrosefulbright.com

Clinton Slogrove
Associate
Tel +971 4 369 6352
clinton.slogrove@nortonrosefulbright.com

Insolvency and international arbitration

Tension between competing public policy interests

By James Rogers and Paul Stothard

The COVID-19 pandemic has caused significant economic disruption and is expected to cause a deep global recession. The only uncertainty seems to be the length and depth of the recession. Even prior to COVID-19 there was talk of an economic downturn in the five major economies and worrying levels of corporate debt in certain key markets (including the US), so the disruptions of COVID-19 are being felt particularly hard with seemingly worse to come. In some sectors the effects are further compounded by other factors, such as in the oil and gas sector which has also been hit by a recent significant drop in the oil price, disruptions caused by the energy transition and greater restrictions on the availability of financing and insurance.

There is little question that there will be a significant increase in the number of corporate insolvencies across most sectors, possibly rivalling the numbers seen in 2009 during the global financial crisis. It will also likely lead to an increase in the number of international commercial disputes. Accordingly, in the coming months, many parties will find themselves in dispute with or contemplating claims against insolvent or soon to be insolvent entities. This article discusses the tension that arises between the competing public policy interests of international arbitration and national insolvency legislation.

Inherent tension between insolvency and arbitration policy

It is not always easy to reconcile the nature and aims of international arbitration and insolvency law and policy. An often used quote of the US courts neatly describes the tension: "a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralised approach towards dispute resolution." The very essence of international arbitration is its consensual nature; the process flows from the agreement of the parties and the award is only binding on the parties to the arbitration. It is also a private, sometimes confidential, process. Arbitration laws in general aim to recognise and uphold agreements to arbitrate regardless of the position the parties find themselves in. By contrast, in insolvency proceedings the aim is generally to maximise the value of the insolvent party's assets and appropriately distribute those between third party creditors, by way of a structured, centralised and transparent process. Insolvency policy also generally presumes that the state may step in when there is a change in one of the parties' circumstances such that it cannot meet all of its obligations, thereby overriding any such earlier agreement in respect of dispute resolution. In many jurisdictions, upon insolvency or bankruptcy proceedings being commenced, a moratorium on other dispute resolution processes is implemented, including in respect of arbitral proceedings.

The English example

Article V(2)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) provides that the recognition and enforcement of an arbitral award may be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country." National legislators are able to and do restrict a party's ability to arbitrate in certain circumstances and many, including England and Wales, do so in the context of insolvency. The purpose of imposing a moratorium on other dispute resolution proceedings is to ensure a level playing field amongst creditors (subject only to any formal hierarchy of payment) and a centralised and transparent insolvency process.

In England and Wales, there are a number of relevant mechanisms at play: the English Insolvency Act 1986 (the 1986 Act); the Regulation (EU) 2015/848 on Insolvency Proceedings (Recast Regulation); and the UNCITRAL Model Law on Cross-Border Insolvency (Model Law on Insolvency).

> ***National legislators are able to and do restrict a party's ability to arbitrate in certain circumstances and many, do so in the context of insolvency***

The English Insolvency Act 1986

Under the 1986 Act, the capacity of the administrator or liquidator to bring and defend proceedings in the name of the insolvent party by reference to the type of insolvency proceeding envisaged will determine the arbitrability of a dispute. Once a company enters administration, arbitration may not be commenced or continued against the company without the consent of the administrator or the permission of the court. The leave of the court is not required to pursue proceedings against a company which is undergoing a voluntary winding up. However, no proceedings may be commenced against a company in a compulsory winding up scenario without leave being granted. In either case, the courts will carry out a balancing exercise between the legitimate interests of the applicant and those of the other creditors. The burden is on the creditor to show that it would be unjust for it to be denied the right to commence legal proceedings. Ultimately, if the proceedings are unlikely to impede the achievement of the purpose of the administration, leave may be granted.

Insolvency laws and procedural rules vary significantly across jurisdictions and the approach to arbitrability can therefore vary. A full comparative analysis is beyond the scope of this article, however by way of example of the different approaches:

- In the US, the Federal Bankruptcy Code provides a general rule that any proceedings (including arbitrations) brought against an insolvent party or the property of the estate shall be stayed, with leave for a party to apply for relief from a stay. Where a party has petitioned for relief from the stay, the question is whether "cause" exists to lift the stay to allow the arbitration to go forward despite the potential impact on property of the estate. Courts have held that, where a valid arbitration agreement exists, the courts generally do not have discretion to continue to stay the arbitration unless the arbitration proceedings are "core" proceedings. "Core" proceedings are proceedings by or against the debtor in which the Federal Bankruptcy Code is the source of the claimant's right or remedy, or that stem from the bankruptcy itself or would necessarily be resolved in claims allowance process.
- In France, the arbitrability of a claim is determined by the nature of the dispute. For example, only 'pure' bankruptcy issues, which concern the application and exercise of the bankruptcy procedures themselves, are deemed non-arbitrable whereas contractual matters remain arbitrable. However, even if an arbitral tribunal is found to have jurisdiction to rule on a contractual dispute after the commencement of bankruptcy proceedings, it must respect the public policy underpinning bankruptcy law. For instance, while a tribunal can rule that a debt exists and determine its amount, it cannot order the debtor to pay the debt. The reason for this is that such a ruling may violate the rule of equality between the creditors, which is a matter for the state to determine.
- In Germany, insolvency administrators remain bound to any arbitration clause previously entered into by the insolvent company, while the opening of insolvency proceedings does not affect the arbitrability of a dispute. This is pursuant to section 1030, paragraph 1, sentence 1 of the German Civil Code, which provides simply that pecuniary claims can be subject to arbitration. Nor are arbitration proceedings stayed following the commencement of an insolvency. However, in order to provide for a fair hearing and to comply with the procedural ordre public the tribunal is required to ensure that the insolvency administrator is granted sufficient time to assume the pending matter.

European Union Legislation as currently applicable to the UK

The UK left the EU on January 31, 2020 but under the European Union Withdrawal Act 2018 and European Union (Withdrawal Agreement) Act 2020 it will be treated as if it were still a Member State until the Brexit transition period ends on December 31, 2020 (unless extended). EU law on insolvency therefore continues to apply in the UK, for the time being. It is an important piece of the statutory puzzle as it determines conflicts of laws issues in cross-border insolvencies involving EU Member States.

The Recast Regulation replaced and superseded the Council Regulation EC 1346/2000 and applies to insolvencies beginning on or after June 26, 2017. It provides that where the 'centre of main interests' of a debtor is found in a EU Member State, insolvency proceedings brought in that state are known as the 'main proceedings' and are to be recognised as such throughout the EU. It also sets out mandatory choice of law rules such that the law of the EU Member State in which insolvency proceedings were commenced is applicable to determining the effects of insolvency proceedings "on current contracts to which the debtor is party" and other proceedings brought by individual creditors. Further, it states that if an arbitration has already commenced, the law of the seat of the arbitration, rather than the law of the EU Member State in which insolvency proceedings were commenced, shall determine arbitrability.

The question of which law governs the effect of one party's insolvency upon ongoing arbitration proceedings was the subject of the well-known Elektrim/Vivendi cases, which dramatically highlighted the tension between arbitration and insolvency law. Elektrim SA was a Polish company that entered into an agreement in 2001 with Vivendi Universal SA and Vivendi Telecom International SA (together "Vivendi") whereby Vivendi was to purchase PTC, a Polish mobile telephone company which Elektrim was previously a substantial shareholder in. Vivendi commenced multiple arbitrations against Elektrim under different but related agreements in 2003 in London and in 2006 in Geneva. However, in 2007, Elektrim was declared bankrupt by the Warsaw District Court, and as a matter of Polish law, Elektrim's bankruptcy operated to cancel any arbitration agreement it had entered into. Elektrim raised objections to the jurisdictions of the tribunal in each of the London and Geneva seated arbitrations.

In determining this question with respect to the London seated arbitration, the English courts applied EU law (as it was then) and determined whether the dispute was arbitrable by reference solely to English law, being the law of the EU Member State in which the arbitration was pending. Under English law, the dispute referred to arbitration in London was arbitrable. In determining the same question with respect to the Geneva seated arbitration, the Swiss courts, which were not subject to EU law, took the opposite approach.

The Swiss courts deferred to Polish law, being the law of the state where the bankrupt party was incorporated. Under to Polish law, the arbitration agreement was deemed ineffective upon the commencement of bankruptcy proceedings, therefore the Swiss Supreme Court held that the tribunal in the Geneva seated arbitration had no jurisdiction. The issue was later re-litigated yet again before the Polish courts when an application was made in Poland to enforce the arbitration award rendered in the English arbitration. It was reported at the time that the Polish appeal courts rejected the challenge to enforcement notwithstanding that pursuant to Polish Bankruptcy Law the dispute was not arbitrable. Reflecting a reluctance to use the exceptions to enforcement contained in the New York Convention as a means of unnecessarily interfering with the arbitral process, the Polish courts accepted that the English courts were correct to apply English law to the question. (As an aside, Polish law has since changed and a declaration of bankruptcy will no longer automatically render arbitration agreements ineffective.) These multiple and related challenges highlight the complications that can arise in a cross-border insolvency/arbitration situation.

Model law on insolvency

The Model Law on Insolvency was implemented in the UK pursuant to the English Cross-Border Insolvency Regulations 2006. Article 20 of the Model Law, as reflected in the 2006 Regulations, provides for a stay of arbitration where foreign insolvency proceedings have been recognised.

The purpose of the Model Law is to fairly distribute an insolvent company's assets when those assets are found in more than one jurisdiction. Other countries that have adopted the Model Law include the US, Australia, Japan, South Korea and Singapore. The expectation is that as more countries ratify the Model Law, a common approach to this issue will apply around the world. Given that EU insolvency proceedings will no longer be automatically recognised in the UK (and vice versa) after the Brexit transition period ends, the Model Law is likely to take on increased importance in the UK.

Conclusion

In the face of a global recession and a consequent increase in cross-border insolvencies and disputes, the tension between insolvency and arbitration will be increasingly the subject of analysis and even litigation. When concluding arbitration agreements, and determining a dispute resolution strategy, close attention should be given to (i) the laws of the state in which insolvency proceedings may be commenced; (ii) the seat of the arbitration; and (iii) the lex arbitri and substantive governing law of the dispute likely to be applied by the tribunal.

James Rogers
Partner
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com

Paul Stothard
Partner
Tel +971 4 369 6318
paul.stothard@nortonrosefulbright.com

Spotlight on investor-state arbitration and insolvency

Where insolvency involves cross-border investments, foreign investors may have additional rights under international investment treaties or agreements (IIAs). IIAs are agreements between states in which the state receiving investment from an investor from the another state commits to provide certain levels of protection to those foreign investors in respect of their investment. Foreign investors often (but not always) will have a direct right under the IIA to commence proceedings, usually in international arbitration, against the host state for any breach of those commitments. To bring a claim under an IIA, an investor will need to identify whether under the applicable IIA the investor and type of investment in question satisfies the relevant thresholds set out in the IIA. The claimant will then need to identify whether there was a breach of the IIA obligations. In some instances, domestic insolvency proceedings have amounted to a breach of IIA obligations.

In the context of insolvency proceedings taking place within the host state, there is often an obligation on states to ensure that their insolvency systems meet minimum international standards and enable parties to be treated fairly, transparently, with due process and in good faith. As one tribunal put it, the state cannot engage in conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process." (*Waste Management v United Mexican States* (2004)).

The state must apply its laws fairly, impartially, transparently, consistently and without arbitrariness

The state must apply its laws fairly, impartially, transparently, consistently and without arbitrariness. It must avoid "a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" (*Genin v Estonia* (2001)). States should also apply their own legislation fairly and without discrimination. In *Dan Cake v Hungary* (2017), the investor's Hungarian subsidiary exported goods to Russia. The Russian market crashed and the company was subject to insolvency proceedings, The Hungarian court ordered liquidation even though the law required that the company should have an opportunity to enter into a deal with creditors before liquidation. The investor alleged that the insolvency system was inadequate by international standards and that the court and liquidator had misapplied that law. In its award, the tribunal ruled that the Hungarian court had breached the IIA by denying the investor its legal rights and imposing unnecessary conditions on the exercise of those rights. This amounted to a denial of justice and hence a breach of the fair and equitable standard in the treaty.

In assessing any claim, a tribunal will generally defer to the state to regulate domestic matters (*SD Mayers v Canada*) and the tribunal will not assess whether the state has committed mere errors of public policy. If discrimination is alleged, then any such discrimination must be unreasonable. For instance, in *Saluka Investments v Czech Republic* (2006), four major banks were to be privatised and the government provided financial assistance to three of them, all locally owned, but refused the fourth because it was partially owned by a foreign investor. This was held by the tribunal to be discriminatory and therefore a breach of the IIA. States commonly also undertake in IIAs not to expropriate investments except in the public interest and with prompt, adequate and effective compensation. Expropriation can be the outright taking of investments or where the state substantially deprives the investor of investments' economic benefit. Arguably, where an investor relies on the state to enforce contracts, loans or security but such enforcement is denied, then such failure may be tantamount to expropriation.

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Disputes funding in the COVID-19 pandemic environment

By Alison FitzGerald and Alexa Biscaro

The COVID-19 global pandemic is forcing businesses of all shapes and sizes to pursue alternate sources of funding to ensure the advancement of pending claims, to bring new claims arising out of the pandemic and to enhance cash flow where possible to survive. Understanding the range of dispute funding options available is critical to assess whether and, if so, how such funding can be leveraged to help a business weather the current COVID-19 environment – and what is yet to come.

COVID-19's impact on solvency

Many businesses have experienced a dramatic reduction in cash flow and working capital as a result of the recent global economic shutdown. Insolvency is on the rise, as is bankruptcy. Whilst some losses experienced during this period will lie where they fall, many have already and will continue to give rise to disputes. A meritorious claim in the hands of a nearly insolvent company may well be a vital part of its return to financial health. Similarly, a meritorious claim in the hands of a bankrupt party may represent the only asset capable of ensuring a meaningful recovery for creditors.

A meritorious claim in the hands of a nearly insolvent company may well be a vital part of its return to financial health

In Canada, third party funding (**TPF**) (also known as disputes funding or litigation finance) was on the rise prior to the COVID-19 pandemic. A recent judgment of the Supreme Court of Canada has cemented the availability of TPF in Canada to help unlock the value of claim assets for companies in distress and their creditors (by confirming that third party litigation funding agreements can be approved as interim financing in bankruptcy proceedings (*9354-9186 Québec inc. v Callidus Capital Corp., 2020 SCC 10*). The timing of the Court's release of this judgment has proved providential, as businesses dramatically impacted by the recent economic shutdown seek out alternative sources of financing to weather the pandemic.

How can disputes funding help address the solvency crisis?

TPF generally speaking is the process whereby a third party funder, which has no direct interest in a dispute, funds the legal costs for one of the claimants. It is rare for defendants to obtain funding, although sometimes this is made available, for example, as part of funding a portfolio of claims and defences. TPF often works alongside its insurance brethren, before the event (**BTE**) and after the event (**ATE**) legal costs insurance, which insure the risk claimants face of adverse legal costs. Many funders require funded parties to obtain such insurance and, in some instances, also require their external legal counsel to work on a conditional fee arrangement (**CFA**) in order to share some of the risk.

TPF is usually provided to claimants on a non-recourse basis, meaning that if the claim is unsuccessful, the funder loses its investment and has no recourse against the funded party. If the claim is successful, the funder recovers its investment as well as a success fee (usually calculated as either a multiple of the sum invested or a percentage of the damages awarded, whichever is the higher). Many funders also offer products designed to alleviate strain on working capital. For example, a business with a meritorious claim or holding a judgment/award may "monetize" the claim or judgment/award. This involves a funder advancing payments in tranches or a lump sum to the business, usually consisting of non-recourse capital, and securing its return by taking an interest in the claim or award/judgment. Funders have already reported an increase in requests for this type of funding since the outbreak of COVID-19.

BTE legal costs insurance covers the risk of the legal costs of a potential litigation or arbitration in exchange for a premium paid in advance, while ATE legal costs insurance covers the risk of the legal costs of litigation or arbitration after a dispute has arisen. Businesses that had BTE insurance in place prior to the outbreak of COVID-19 may be better positioned to manage their disputes risk arising out of the pandemic than those businesses with no such protection in place. BTE will commonly fund the following costs of bringing or defending a claim: the insured's lawyer's fees, disbursements (including expert witness fees), court/tribunal costs, and adverse costs. For those businesses without any BTE insurance in place and already facing disputes arising out of the pandemic, ATE insurance may offer some protection. This type of insurance provides cover against an adverse costs award or against non-recovery of a litigant's own costs up to the limit of indemnity, and is usually paid for by a contingent premium (that is, a premium paid only if the claim succeeds).

What is required to secure disputes funding?

Although most third party funders disclaim the application of any particular formula in sizing up a potential case, there are several common factors that funders consider material to accepting (or not) a matter. Many of these factors are not impacted by the COVID-19 pandemic.

One of the key factors is proportionality of costs to likely recovery of damages. Some third party funders maintain minimum claim value thresholds in order to ensure that any recovery is adequate to cover both the funder's return and a meaningful return for the claimant. In some jurisdictions, this may be necessary to ensure the enforceability of the funding agreement (see e.g. *Schenk v Valeant Pharmaceuticals International Inc*, 2015 ONSC 3215, but see also *Seedlings Life Science Ventures, LLC v Pfizer Canada Inc.*, Fed. Ct. Docket T-608-17, Order and Reasons (September 12, 2017, 2017 FC 826)). They will also factor in any other elements that affect this ratio, such as likely counterclaims.

Third party funders also seek to fund only meritorious claims. The merits of a case and any counterclaims are likely to be assessed from several different angles, including the stability and predictability of the laws of the jurisdictions that are potentially applicable to the claim (including the governing law of the dispute as well as laws of the forum or seat of arbitration). An absence of documentary evidence or fact witnesses who are able and willing to testify can also lead to an adverse assessment. Indeed, funders generally tend to prefer claims where there are not significant facts in dispute, as this adds to the complexity of the matter and complicates the assessment of the likely outcome. A claim that is premature, or conversely at too advanced a stage, may also be assessed as having less merit than a claim that is about to be commenced or still in its early stages.

The competence of legal counsel retained by the party seeking funding is another important factor. A meritorious claim in the hands of counsel with no prior experience in the subject matter may lead to the rejection of an application for funding. Funders are often staffed with former dispute resolution lawyers who are familiar with leading members of the legal profession in different fields. They will also have an eye to how counsel historically have analysed and presented the merits of claims to funders, potentially preferring those with a track record of presenting meritorious claims.

The same phenomenon that is causing businesses to seek out disputes funding is forcing funders to proceed with caution

However, in the present environment, many funding decisions are likely to turn on the third party funder's assessment of the likelihood of recovery of any judgment or award for damages, including the defendant's solvency. The same phenomenon that is causing businesses to seek out disputes funding is forcing funders to proceed with caution and to closely scrutinize not just the present solvency of the defendant but its likely future solvency as well. Predictions of global economic recession suggest that businesses that have survived the COVID-19 crisis will not necessarily be out of the woods once pandemic restrictions have been lifted. More generally, the third party funder will assess the ease of enforcement, including who and what the defendant is (e.g. commercial or state entity), their historical approach to satisfying adverse judgments or awards, and the type and location of assets against which enforcement would need to be made.

The nature of the funder and its source of investment capital is also a factor in its investment appetite, as discussed below.

What are the chances of getting funding?

According to commentators, in any given year, more applications for third party funding are rejected than accepted. In the present period of economic uncertainty and disruption, this is unlikely to change. Businesses in certain sectors suffering from multiple shocks, such as oil and gas,

may face a greater challenge in making the case for third party funding due to uncertainties such as the price of oil. This uncertainty may make it more difficult for funders to gauge the merits of a claim, in particular the value of any likely recovery and the solvency of the defending party, whether a private company or a state, and therefore likelihood of recovery of a judgment or award.

Similarly, changes in law in response to or in connection with the pandemic may impact a funder's merits assessment. States may adopt changes to the legal framework applicable to a contract or an investment, leading to uncertainty in respect of the status of a company's rights and their vindication. Inconsistent judgments or awards on contract interpretation, such as in respect of *force majeure* clauses and other doctrines such as frustration of contract, may also create uncertainty.

For companies seeking to pursue TPF, careful consideration of the above factors and due diligence prior to applying for funding will assist in ensuring a company's best chances of success. Legal counsel with experience in TPF and the type of claim being considered can help guide a company in weighing its options and preparing its best case for funding, as well as identifying appropriate funders. The nature of the funder and how and from where their investment capital is raised is another key piece of the puzzle. Funders backed by private equity and those who have just completed significant capital raising rounds are more likely to be actively pursuing opportunities for investment and may therefore have a higher risk tolerance.

As many third party funders are seeking to shift their investments to portfolios, there may also be an opportunity for multiple claims to be included within a portfolio. Portfolios enable funders to spread their risk by cross-collateralizing claims: the more diverse the claims, the lower the risk to the funder. The criteria for this type of funding is similar to the criteria discussed above in respect of individual claims but within a portfolio, a funder may be more willing to take on a higher risk claim if it is balanced by a diverse set of other matters, lowering the overall risk presented to the funder and potentially lowering the cost to the funded party. There is also the potential of including defences in addition to claims.

Companies with a claim or claims subject to English law should also be aware of a recent decision over-turning the 'Arkin cap' (*Davey v Money* [2019] EWHC 997 (Ch)) which had operated to limit a funder's liability for adverse costs in litigation to the amount of funding contributed. Going forward, funders are likely to price the risk of a large adverse costs judgment into their litigation funding structure, potentially making TPF too expensive for some would-be funding applicants, or to insist that ATE insurance be in place as a condition of funding. There is no such liability in the arbitration context given that funders are not parties to the proceedings and therefore beyond the tribunal's authority.

Last, but not least, claimants seeking funding must also undertake their own careful due diligence on potential funders, in particular looking at where their capital comes from, the level of capital adequacy and if and how funds are ring-fenced for particular claims. Generally, some capital is paid in the future on a rolling basis, so claimants must be confident that the capital will be available to them when needed. The terms of funding should also be carefully negotiated to ensure for example that the funder is firmly bound to provide the capital and to reasonably limit the opportunity and terms on which they may exit the funding arrangement.

Careful consideration of proposed funding terms, once a successful application for funding is made, is essential not only to ensure funding can and will deliver the relief a company needs but also to address other matters as well. For example, it is critical that a funded party understand how and when payment of the funder's fee and investment will be made. It is also important that the funder and funded party agree an appropriate level of involvement for the funder (legally as well as practically) throughout the matter, including in respect of any settlement discussions. Issues of privilege and confidentiality must also be carefully considered both at the outset when funds are sought as well as during the subsequent funded period.

Alison FitzGerald
Of Counsel
Tel +1 613.780.8667
alison.fitzgerald@nortonrosefulbright.com

Alexa Biscaro
Senior Associate
Tel +1 613.780.8603
alexa.biscaro@nortonrosefulbright.com

Martin Valasek
Head of International Arbitration, Canada, Partner
Tel +1 514.847.4818
martin.valasek@nortonrosefulbright.com

Investor-state claims in the era of the COVID-19 pandemic

By Kevin O'Gorman, Paul Stothard and Martin Valasek

States have taken urgent and extraordinary steps to prevent the spread of the Coronavirus and to address the public health and economic crisis that the virus has caused. Some such measures are aimed directly at the need to treat those affected by the virus. In Spain, the Ministry of Health announced it would take all of Spain's private health providers and their facilities into public control. Similar steps have been taken in parts of the United States, where the Governors of both California and New York authorised the requisition of equipment and facilities to treat patients. Other steps taken by governments aim to address the unprecedented economic impact of the virus on the world economy, such as the UK government's renationalisation of rail franchises, the payment of state aid to airlines and the restriction on the import and export of commodities. Inevitably, some of these measures will affect foreign investors and their investments in host states, triggering investor-state disputes.

Foreign investors' rights and obligations under International Investment Agreements

With state measures being implemented rapidly and in some instances expansively, investors affected by these measures need to understand their rights of recourse and available remedies. Equally, states need to be cognizant of their obligations in implementing these measures.

In addition to rights under the domestic law where the investment was made, foreign investors may have rights under international investment agreements ("IIAs"). IIAs are agreements between states in which they mutually agree to protect investments made in their state by investors from the other state, or states, to the agreement. Often states also agree that such foreign investors will have the right to enforce the terms of the IIA directly against the host state through courts or (more commonly) international arbitration. IIAs can be found in bilateral and multilateral treaties (BITs and MITs) as well as in investment chapters to many free trade agreements (FTAs). There are thousands of IIAs currently in force worldwide. For example, Italy, one of the states that has been worst hit by the outbreak, currently is a party to 110 IIAs.. China is a party to over 125.

Italy, one of the states that has been worst hit by the outbreak, currently is a party to 110 IIAs. China is a party to over 125

Careful consideration needs to be taken on a case by case basis as to whether an investor is eligible for investment protection under a given IIA and, if so, the scope of investment protection available. IIAs are construed on their specific terms as drafted, however, many IIAs do contain similar provisions in relation to investment protection and are subject to common principles of international law. Most IIAs provide a menu of obligations on the host state typically including: the obligation not to expropriate a qualifying investment without payment of compensation; to provide fair and equitable treatment and full protection and security for investments; to provide a standard of treatment that does not discriminate against the investment as compared to treatment provided to domestic investors and/or investors of third states; the right to transfer/repatriate funds relating to investments outside the state; and the obligation to honour contractual commitments ("umbrella clauses").

State measures in response to COVID-19

Most of the common obligations under IIAs are qualified in some way to preserve state sovereignty. For example, states are entitled to expropriate investments but, as a matter of public international law, they are subject to certain constraints in doing so.

Where there may be difficulties is in assessing what fair compensation amounts to in the context of an international crisis

The expropriation must be for a public purpose, in a manner that is non-discriminatory and subject to due process. Critically, the state must also provide fair compensation (*The American Independent Oil Company v The Government of the State of Kuwait*, 21 I.L.M. 976, 1032 (1982) [143]). Applying that to COVID-19 measures implemented by states; the direct requisitioning of otherwise private healthcare resources for the broader public good should not be a breach of an IIA if the state does so lawfully and pays fair compensation (though it will need to be assessed on a case by case basis). However where there may be difficulties is in assessing what fair compensation amounts to in the context of an international crisis.

The situation is more nuanced in relation to "indirect expropriations", which is when the state takes steps that affect the control or use of an asset rather than taking title to the asset itself. This can involve one or a series of regulatory measures that have an effect tantamount to expropriation. Generally, tribunals have applied a "substantial" test for indirect expropriations. Tribunals have held that investors must "be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value" (*AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary,* ICSID Case No. ARB/07/22).

In the context of emergency measures, additional regulations (for instance, restrictions on the ability of businesses to operate or import and export products during a period of lockdown) may give rise to claims by foreign investors of indirect expropriation. States would no doubt respond with one or more defences available under the applicable treaty or customary international law.

States are also typically obliged to afford foreign investments "fair and equitable treatment". This is a broad concept which defies a succinct definition. Among other things, it generally requires the state to avoid conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process." (*Waste Management v United Mexican States* (2004). In the context of the current crisis, states will continue to be obliged to afford these protections to foreign investments and investors. It is likely, for example, that any emergency steps taken that discriminate against foreign investors or which lack due process or transparency, would breach the fair and equitable treatment obligation unless there was reasonable justification (*Saluka v Czech Republic* (2006)). What is "reasonable" in this context will again depend upon the circumstances. Equally, any emergency legislation should continue to afford due process and comply with the fundamental principles of the rule of law.

Exclusions and defences

Many IIAs define circumstances in which the standards of protection do not apply. For instance, some treaties expressly provide that states may take action that would otherwise breach the IIA in order to preserve public order, or to protect human health (e.g., CETA). States therefore are entitled to take reasonable and proportionate steps in relation to such essential interests. A state's action will be deemed proportionate if it strikes a balance between the state's interests pro¬tected through a governmental action and the degree of damage to foreign investors' rights affected by such a measure. In assessing whether such steps are lawful, states often argue they are entitled to a "margin of appreciation", being a degree of discretion afforded to the state party when evaluating the legitimacy of the course it adopted in the circumstances.

Additional defences may arise under customary international law. States may be excused for breaches of international obligations in circumstances where they act out of necessity, *force majeure* or distress. These concepts have been defined by the International Law Commission as follows:

- *Force majeure* is "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation" where the state is not responsible for the event and has not assumed the risk of the event occurring.
- Distress concerns a threat to life (either that of the state itself or those under the state's care), and applies where there is "no other reasonable way, in a situation of distress, of saving the … life or the lives of other persons entrusted to the [state's] care". Again, the state must not have contributed to the threat.

- Necessity is where the state must take an action "to safeguard an essential interest against a grave and imminent peril; and that action does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole". For example, in *National Grid v Argentina* (2008) a tribunal established under an IIA found that the public interest in ensuring continued functioning of vital public services such as electricity was capable of amounting to necessity under customary international law that would excuse the state from performing its international obligations (although in that case, the state failed to make out its case because it was found to have contributed to the emergency by its conduct).

Conclusion

As the COVID-19 pandemic wreaks havoc globally and governments rapidly seek to implement measures to save lives and mitigate the effects on the economy, some investors unfortunately are at risk from aggressive state measures. Whether investors will have the appetite to challenge those measures in the circumstances remains to be seen. However, with such measures being compounded by an already difficult economic environment for investors, and one that is expected to become more difficult in the face of an impending global recession, investors may have little choice. As such investors affected by state measures need to understand and consider their rights of recourse and available remedies, including both those afforded under domestic law as well as under IIAs and international law. States too need to understand their obligations and the risks in implementing these measures so as to avoid breaching their obligations and being tied up in costly and protracted disputes.

Kevin O'Gorman
Office Administrative Partner, Houston
Tel +1 713 651 3771
kevin.ogorman@nortonrosefulbright.com

Paul Stothard
Partner
Tel +971 4 369 6318
paul.stothard@nortonrosefulbright.com

Martin Valasek
Head of International Arbitration, Partner
Tel +1 514.847.4818
martin.valasek@nortonrosefulbright.com

Doing business (but not business as usual) in a global pandemic

By Andrew Battisson, Daniel Allman and Carmel Proudfoot

The COVID-19 pandemic presents unique challenges to businesses globally. Amidst the uncertainty and disruptions to all aspects of life and commerce, many companies are facing disputes with their counterparties. Examples of common disputes arising from COVID-19 so far relate to performance disruption and delay, payment issues resulting from cash flow problems, and issues related to government measures such as restrictions on the movement of people and goods. Many companies are turning to principles of *force majeure* and frustration in an effort to suspend contractual obligations or excuse late or non-performance. However, despite this potential proliferation of disputes, as seen in the last global financial crisis, some companies will choose not to pursue legal claims for commercial or economic reasons. Legal action often involves significant expense and the commitment of employee and management time, and most companies are already facing pressures in both respects.

There are also considerations around the defendant's solvency in the current circumstances, the need to preserve ongoing commercial relationships, and the possibility that important contractual relationships might resume once the pandemic subsides. As a result, some companies are sensibly opting to negotiate or mediate a resolution. Others are seeking simply to put off determination of the dispute whilst reserving their rights to bring claims later when the immediate pressures of the pandemic have passed. If this is the chosen path, then it is critical in both instances that the flexibility to seek to resolve disputes commercially or to delay such disputes does not inadvertently prejudice the company's rights to bring claims in arbitration or litigation at a later date should they subsequently reassess their position. There are a number of simple steps discussed below that companies can take now to preserve the status quo.

Preserving the claim

Companies should take steps now to preserve their legal rights and ability to bring legal proceedings in the future, irrespective of whether they are seeking in good faith to resolve the disputes by other means. Most companies are under the same pressures currently to avoid legal proceedings, however, as the pressures of the pandemic restrictions lift and life returns to the new normal, companies will reassess their positions. It is important to be prepared for the possibility that the dispute may end up in formal legal proceedings.

As an initial practical matter, it is critical that companies preserve the necessary documentation and evidence to prove or defend a claim. This is something that is too often forgotten or not prioritised during periods of disruption as currently experienced by companies, management and employees alike. The best records are contemporaneous, accurate and thorough, and recorded in a manner that anticipates use as evidence in formal proceedings. This includes maintaining a written record of all interactions with the counterparty related to a potential claim. Other evidence that may be relevant to a claim should also be collated and preserved. This can be difficult for parties working remotely, without access to their full electronic database or physical records or even the sites in question. However, it is essential to look at ways to ensure that documentary and other evidence is properly gathered, filed for easy access, and protected from being destroyed (for example through routine procedures such as erasing older digital files).

On the other side of the coin, particularly now with remote working, companies should be alive to what evidence they are creating and whether or not it might be disclosable in subsequent legal proceedings.

Close attention also should be paid to protections of legal privilege including ensuring that how material is shared or disseminated does not inadvertently waive privilege.

Another important practical matter is to ensure any conditions precedent to bringing the claim are satisfied. Many contracts set out conditions that must be met before a party can bring a claim. These can include giving formal notice within a set timeframe or endeavouring to settle the dispute through negotiations or mediation before commencing formal proceedings. These conditions are often strictly enforced and companies should make every effort to comply with them now so that if a claim must be brought later, there are no impediments.

Similarly a party wishing to later pursue a claim for damages should ensure it has taken reasonable steps to mitigate its losses. Losses which could have been diminished through reasonable, prudent conduct often will not be recoverable. Consideration should be given to documenting what steps were taken as well as why in light of the rather unprecedented circumstances – what amounts to adequate mitigation may be a live question in a subsequent dispute (but again, seek legal advice on this).

Watching (and stopping) the clock

While the world around us seems to have come to a standstill, legal rights and obligations have not. Subject to limited exceptions, parties are required to perform their contractual obligations in accordance with the agreed terms and payment or performance dates.

Companies at risk of default due to COVID-19 related disruptions will need to take proactive steps to suspend their obligations or negotiate extensions of time. Companies facing a defaulting counterparty should in turn seek to exercise or reserve their rights to seek damages or terminate for breach as appropriate.

Companies that do not intend to issues proceedings immediately must also be aware of contractual or statutory limitation periods. Limitation periods operate to set a maximum period of time within which a claim must be brought otherwise it will be time barred and the defendant will have a complete defence to the claim. Contractual and statutory limitations often act in conjunction. Statutory limitation periods vary quite significantly from jurisdiction to jurisdiction. For example, parties generally have three years to bring a breach of contract claim in the United Arab Emirates, six years in England and Wales, but 20 years to do so in Portugal. The limitation period will sometimes depend on the nature of the contractual agreement and often there are differences between ordinary contracts as compared to those signed under a deed. Further, in some jurisdictions (such as France and Germany) temporary measures dealing with limitation periods have been introduced during the pandemic in recognition of the disruptions. These measures range from alternative methods of compliance (such as online filing of claims) through to blanket stays on the expiry of any limitation period. Companies must take note of the specific rules in all relevant jurisdictions and comply with any applicable requirements in order to preserve a legal claim. Particularly for cross-border disputes it is critical to seek legal advice on limitation periods when considering delaying issuing proceedings.

One common option for avoiding limitation issues is to seek to agree a standstill and/or tolling agreement. Such agreements generally aim to preserve the existing commercial relationship in the short to medium term by agreeing to suspend time running for limitation purposes and/or to extend the limitation period, as well as freezing certain contractual rights and duties, to allow disputing parties to focus on more immediate concerns or negotiate a resolution rather than engaging in a legal dispute now. These are separate agreements to the underlying contract and must be negotiated fresh between the parties. It is always advisable to seek legal advice on the terms of such a standstill and/or tolling agreement as getting it wrong can mean losing the right to later bring a claim. Unfortunately it is not uncommon for disputes to later arise over the construction and effect of such agreements. Such agreements must be tailored to the parties and circumstances, taking into account all relevant laws, to ensure that they are binding and operate in the desired manner. It is also important to note that standstill agreements are not always effective to suspend or amend limitation periods in all jurisdictions. Parties to cross-border transactions should again take particular care to seek local law advice.

Preserving contractual rights

Companies should review their contractual rights and obligations and consider how those might be affected by their own conduct, particularly any acquiescence to delayed performance (or other breaches of contract) and/or any delay in responding to such breaches.

In some circumstances a right to suspend performance of the contract, or to terminate or re-negotiate the contract, will arise. Common scenarios where such rights arise include the following situations:

- Where the contract provides for an express right to terminate. For example, commercial contracts often include a right to terminate if one party becomes insolvent or there is a material breach. In respect of the latter, whether delay amounts to a material breach depends on the terms of the contract and the circumstances, however where it is specified that time is of the essence, delay might amount to a material breach. There can also be common law rights to terminate that operate in parallel.
- Where one party repudiates the contract by clearly refusing to perform its obligations. In that case, an innocent party may choose whether to affirm or terminate the contract.
- Where the contract has been frustrated. Parties may be discharged from performing their obligations if performance is rendered impossible by an extreme event that occurred after the contract was entered into. It is important to focus on performance that has been rendered impossible, not merely difficult.
- Where the contract contains a *force majeure* clause that provides relief where an unexpected event outside a party's control prevents performance. *Force majeure* clauses turn on the precise language used, but may cover events such as pandemics, natural disasters, travel restrictions, governmental actions, and so-called "acts of God". Further information on *force majeure* clauses during the COVID-19 pandemic is available here.
- Where the contract contains a "material adverse change" (MAC) clause or a "material adverse event" or "material adverse effect" (MAE) clause. It is important to consider the contractual triggers and case law in relation to the applicability of such clauses on a case-by-case basis.
- Where the contract contains a "change in law" provision that is triggered by a legislative change preventing a party from performing its obligations.

Importantly however, companies must carefully consider how their response (or failure to respond) to a counterparty's breach or delay will impact these rights. For example, in some instances a company can waive its rights or enable an estoppel argument if it acquiesces to the breach or puts off objecting to it – sometimes this will occur even where there is no intention to do so. Another example is that in some instances a company can alter the terms of the contract by its conduct or communications.

Many contracts contain "no waiver" clauses purporting to preserve a party's rights even if they delay in responding to a breach. However, these are not always effective in protecting contractual rights, and again there are variations from region to region so it is important not to rely on these clauses alone. There are similar issues with so-called "no-oral modification" clauses, which seek to restrict the circumstances in which contractual changes can be made (usually limiting it to variations in writing and signed by an appropriately authorised persons). Even if these clauses are ultimately effective, ill-considered conduct or communications can spawn satellite disputes that increase the costs of and delay resolution of a dispute. It is a case of exercising a little more care now, so as to avoid greater difficulties later.

Communicating with purpose

Related to the above, companies should always take particular care in corresponding on contractual issues. If a company believes it is entitled to contractual relief, it should consider notifying the other party and expressly reserving its rights while it considers its options, being careful not to delay a final decision too long. This is important to ensure that a period of inaction is not deemed to imply a waiver of rights.

Early correspondence in many instances will either make or break a claim. If negotiating a dispute, it is a good idea to consider and stick to key position points (preferably having the benefit of legal advice). It is also generally advisable to avoid making concessions (on or off the record), even if they appear harmless now. It is not uncommon for commercial parties to seek to engage in "horse trading" of concessions with the best intentions of moving a negotiation along. With the benefit of hindsight, such concessions invariably turn out to be unnecessary or, worse, cause issues for the claim later down the track. Related to the above tips, it is also generally a good idea to have in place communication protocols so that only a limited few people within a company are responsible for discussing issues with the other party – this minimises the chance of an inadvertent waiver or estoppel or, worse, concession or admission, that might harm the company's legal position.

Some parties may wish to hold "off the record" discussions on a "without prejudice" basis in order to encourage open and frank communication that might resolve their issues.

Generally the intent behind an agreement to speak off the record or without prejudice is that the content of those communications cannot later be used as evidence in any dispute resolution proceedings. In some jurisdictions, where such discussions occur after a dispute has arisen and with a view to settling the dispute, related correspondence may be automatically protected by the so-called "without prejudice" rule (a rule of evidence, despite being commonly called "without prejudice privilege"). Where no dispute has arisen, or the discussions veer into areas that do not relate to settlement, there is often no protection under this rule. Moreover, although many jurisdictions recognise some form of "without prejudice" privilege, the scope of that protection varies widely, and in some jurisdictions there is no such protection at all. In those instances, the parties would need to contractually agree that their discussions will not be used or disclosed in any subsequent proceedings. Whichever route is chosen it is important to seek local law advice, particularly if dealing with cross-border parties.

Even if there are local protections, it can be good practice to put in place and record clear agreement between the parties as to what "off the record" means and what is and is not covered – this is another area that is commonly argued over later down the track if negotiations fail. Companies should also bear in mind during negotiations that, "off the record" or not, there is a risk that communications, whether in writing or orally, will find their way into evidence down the road. As such, care should be exercised over what is said, regardless of any agreement that the communication will not be used.

Bottom line

Flexibility is critical in continuing to do business in the face of uncertainty arising from COVID-19. However, staying flexible does not necessarily equate to having to decide now, whilst under multiple often immense other pressures, to forgo legal rights. Claims can be preserved in many instances – even strengthened – by carefully considered but simple steps taken now. Companies should settle on an appropriate strategy, tailored to their business and jurisdiction, sooner rather than later. Doing so will best protect their rights and leave their options open once they come through the immediate disruptions of the pandemic.

The authors would like to thank Lachlan Crosbie for his assistance with this article.

Andrew Battisson
Partner
Tel +61 2 9330 8611
andrew.battisson@nortonrosefulbright.com

Daniel Allman
Senior Associate
Tel +61 2 9330 8183
daniel.allman@nortonrosefulbright.com

Carmel Proudfoot
Associate
Tel +61 8 6212 3299
carmel.proudfoot@nortonrosefulbright.com

The energy market in a global pandemic

What it means for disputes in the energy sector

By Holly Stebbing, Dylan McKimmie, Lana Kelly, Daniel Wells and Karri Coles

Long-term participants in the energy sector have weathered significant fluctuations in oil and gas prices in the past, most recently during the 2014/2015 oil price crash. However, the current circumstances are unprecedented. The severe disruption to the global economy caused by COVID-19 has significantly impacted energy consumption, with sharp falls in demand around the world – the IEA has reported that energy demand globally will fall by 6% in 2020 (seven times the decline after the 2008 global financial crisis), with advanced economies predicted to see the biggest declines.

This comes at a time when markets are awash with a glut of oil. Whilst some corrective steps have been taken, including an announcement from OPEC+ in early April of a three-month agreement to reduce production levels, these measures do not appear to have been enough to ease the pressure, as the price of West Texas Intermediate fell into negative in mid-April for the first time in history and remains historically low. Against this bleak market backdrop and with cash flows stretched, energy companies are also tackling the immediate operational challenges of COVID-19 including restrictions on movement of workers, difficulties with supply chains and a significant amount of uncertainty as to when "business as usual" can be resumed.

As energy sector participants grapple with these challenges, there will inevitably be an increase in complex disputes in the coming months and years as parties argue about how the huge costs of COVID-19 should be allocated. Given the prevalence of international arbitration in energy market disputes, a corresponding increase in arbitration is also likely.

This article will consider several key issues facing the energy sector as a result of COVID-19 and the potential implications for arbitral disputes.

Potential disputes

The collapse in oil and gas prices, coupled with the operational difficulties caused by COVID-19 are likely to have a reverberating impact across the whole sector. Particular areas of concern that may give rise to disputes include the following:

Contractual disputes

Should prices stay low over the medium- to long-term and lockdown restrictions remain in place, contracting parties may be compelled by unfavourable commercial circumstances to look at all options for relieving contractual burdens, including *force majeure* (**FM**), change in law, termination at will and frustration. The economic pressure on companies will also put strain on commercial relationships. With most industry (and particularly upstream) assets owned by several parties through unincorporated JVs which establish 'owner-operator' models, disputes between co-owners and/or owners and operators in relation to the management of assets are likely.

Force majeure

Each FM clause is unique, and usually contains a list of qualifying events that may or may not expressly include epidemics and acts of government but often includes "any other event beyond a party's reasonable control" as a catch-all. Where a FM event arises, the affected party will generally be relieved from performing its contractual obligations. Thus if a refinery had to shut in or dramatically scale back as a result of government COVID-19 quarantining measures it may be entitled to *force majeure* relief for contracts it is unable to perform.

However, a drop in oil or gas price or demand is unlikely to constitute an FM event, even where very substantial, and may in fact be expressly excluded depending on the wording of the particular clause. Notwithstanding this we are seeing

FM notices being issued across the sector for what appear to be economic reasons. This might be a tactical effort to push counterparties to engage in renegotiations.

Notably, the 2014/15 oil price collapse was largely not considered a FM event as oil price fluctuations were considered to be "*legally foreseeable*". However, current negative prices may push the industry into uncommercial lows and, combined with other factors (e.g. inability to staff projects, government restrictions, increased health & safety obligations), this may result in triggers for widely drafted FM clauses. For more information about force majeure amid COVID-19 please read our global guide.

Frustration

Contracts that do not contain FM clauses may be frustrated by the current circumstances, if they are impossible to continue performing. However, a temporary change in circumstances is unlikely to amount to frustration, and so whether COVID-19 amounts to frustration is likely to depend on the particularities of each operating environment and each jurisdiction.

A frustrated contract terminates immediately. Accordingly, it is an extreme remedy that parties should only consider if there are no other options.

Insolvency and liquidity issues

Falling demand has already resulted in significant pressure on certain companies' balance-sheets; a US-based mid-stream contractor recently filed for insolvency citing the unprecedented impact of COVID-19 and an oil price war as the key contributing factors. Companies operating on thin balance sheets with high operating costs and falling revenue will be particularly exposed to insolvency risks should current market conditions continue.

Most contractual arrangements will have triggers (for review, suspension or termination) upon one party's insolvency. The result will vary depending on the mechanism for declaring (and emerging from) insolvency in the relevant country, and on the drafting of the clause. However, it is likely that the market will see an increase in restructuring, either through consensual settlements or through formal insolvency processes.

Insolvency and liquidity concerns are likely to have a greater impact in oil and gas than in other industries, especially given the rise of smaller participants over the past few years. Particular concerns include co-owners struggling to meet cash calls under joint operating agreements (**JOAs**), operators facing challenges to get budgets approved by co-owners and resistance from co-owners to cover the additional "COVID-19" costs of operational performance.

In such circumstances, parties may seek to review JV agreements, JOAs and/or other agreements to assess options for enforcement of their contractual rights (which can include self-help remedies, such as forfeiture) or to seek contractual relief from performance. Inevitably, some disagreements between contractual counterparties will develop into dispute resolution processes, including arbitrations.

Investor-state disputes

The energy sector has always accounted for a high proportion of recorded investor-state disputes. Steps taken by states in response to COVID-19 may adversely impact the investments of international energy companies in other jurisdictions and investors may look to the stabilisation provisions in their concession agreements and the protections in bilateral investment and similar treaties for recompense. For additional information about energy disputes please read our prior article *A Global overview of dispute trends in the energy sector*.

Other impacts

Energy storage

The most immediate impact of the supply/demand imbalance is on global oil storage capacity. As demand dramatically falls, many producers are attempting to store crude until a rebound in price makes selling more economical. However, storage options are quickly approaching maximum capacity, and by mid-April some producers were forced to pay buyers to take barrels they could not store.

As a second resort, many producers have stored barrels on offshore supertankers. However, faced with dramatically increased demand, the cost of offshore storage has grown significantly and is now at a significantly high premium.

With the potential for global storage capacity to dry up in a matter of weeks, and with many parties physically unable to take receipt of barrels, parties may increasingly seek to rely on FM or the doctrine of frustration for relief from contractual obligations to take delivery of oil.

Natural gas: Price reviews

While historically the price of oil and the price of gas have not always correlated, the global economic shutdown has led to a corresponding drop in the price of natural gas as well.

Many long-term gas sale and purchase agreements, including LNG SPAs, have price review mechanisms which allow parties to review the contract price, which is typically indexed link to the price of oil or oil product, either periodically (e.g. every three years) or when there is a substantial change in the market which means the price is no longer 'fair' or 'competitive.'

While individual cases will depend on the contract language, buyers will no doubt be looking to take advantage of market movements to trigger price reviews and sellers will be considering their exposure.

Health and safety

With most countries introducing lockdown measures, which only allow "essential services" to operate, many companies are facing operational challenges. For the energy sector, shortages in personnel can be particularly acute with occupational health and safety (**OHS**) risks and environmental concerns.

In recognition of this issue, countries such as the UK, Australia and Canada have designated oil and gas production as an "essential service", subject to significantly increased OHS restrictions. However, although this may be helpful for cash flow, continuing operations during lockdown may present challenges for operators under "reasonable and prudent operator" obligations and could give rise to disputes about what exactly that and similar standards such as "good oilfield practice" mean in the current environment.

Conclusion

The current climate is uncertain for almost everyone, and that is certainly true for those in the energy market which is truly globalised, is connected to almost every other industry and is often highly political. There are many potential disputes on the horizon, as oil and gas prices remain at historic lows and operations both up and downstream become uncommercial.

Each dispute will likely contain multiple complex elements and parties will need to consider their options under existing and contemplated contracts in order to ensure they are maximising their contractual options and entitlements.

With thanks to Maja Mazur, trainee, for her contribution to this article.

Holly Stebbing
Partner
Tel +44 20 7444 5143
holly.stebbing@nortonrosefulbright.com

Dylan McKimmie
Partner
Tel +61 8 6212 3291
dylan.mckimmie@nortonrosefulbright.com

Lana Kelly
Senior Associate
Tel +61 7 3414 2836
lana.kelly@nortonrosefulbright.com

Daniel Wells
Associate
Tel +44 20 7444 5595
daniel.wells@nortonrosefulbright.com

Karri Coles
Associate
Tel +61 8 6212 3136
karri.coles@nortonrosefulbright.com

The impact of COVID-19 on Belt and Road Initiative infrastructure and construction projects

By Alfred Wu, Kevin Hong and Katie Chung

Infrastructure and construction projects, some of which are part of the People's Republic of China (PRC)'s Belt and Road Initiative (BRI) have, as one would expect, been largely halted by the COVID-19 pandemic. Disruptions to supply chains around the world, lockdowns and travel restrictions on foreign workers, especially Chinese workers who are commonly employed on BRI projects, are some of the main reasons for the project suspensions and slowdowns. Many of the BRI projects are in developing countries where controlling the pandemic driving the recovery may be more difficult than in more developed countries. Resumption of work in these countries will largely depend upon how quickly the infection curve flattens and availability of medical and health care resources.

The BRI

According to the OECD Report on China's BRI in the Global Trade, Investment and Finance Landscape, the BRI covers over 100 economies and six economic corridors west from China, which "covers a large energy and resource-rich part of the world". The COVID-19 pandemic is similarly far-reaching and has caused unprecedented global economic uncertainty. The six economic corridors are:

i. New Eurasia Land Bridge: involving rail to Europe via Kazakstan, Russia, Belarus and Poland.

ii. China, Mongolia, Russia Economic Corridor: including rail links and the steppe road, linking with the land bridge.

iii. China, Central Asia, West Asia Economic Corridor: linking to Kazakhstan, Kyrgyztan, Tajikistan, Uzbekistan, Turkmenistan, Iran and Turkey.

iv. China, Indochina Peninsula Economic Corridor: Vietnam, Thailand, Lao People's Democratic Republic, Cambodia, Myanmar, and Malaysia.

v. China, Pakistan Economic Corridor (CPEC): Xinjiang Province (via Kashgar city) to the Pakistan port of Gwadar.

vi. China, Bangladesh, India, Myanmar Economic Corridor.

Monitoring the uncertainties

Parties involved in BRI projects, including employers, contractors and financiers, are actively monitoring the COVID-19 pandemic as the situation evolves in the different countries in which the key supply chains, labour resources and project sites are located. Complicating matters is the uneven application of lockdown measures across different jurisdictions. While manufacturing has resumed in the PRC and there is no longer a lockdown in many provinces, other countries and regions involved in the BRI are still under some form of government lockdown. Moreover, the nature and extent of the lockdown and related restrictions varies from jurisdiction to jurisdiction, and will continue to do so as COVID-19 spreads at differing rates across the region.

Force majeure – a Chinese approach

Unsurprisingly, when first faced with performance restrictions and obstacles brought about by the COVID-19 pandemic, parties will have first looked to whether a force majeure clause exists in their contract which can be invoked to protect against liability from non-performance of an obligation. The question then becomes whether the pandemic or government restrictions fall within the scope of the specific force majeure clause, causation has been established and whether notice provisions (sometimes worded as conditions precedent) have been complied with. Depending on the wording of the clause, a party may need to show that reasonable steps were taken to avoid the effect of the force majeure event.

In the Chinese market, to protect Chinese companies and assist them in dealing with disputes with foreign partners, the China Council for the Promotion of International Trade (CCPIT), a quasi-governmental body, has since February 2020 issued thousands of "force majeure certificates" to PRC companies.

These certificates prove that the lockdowns took place in the specific province of the PRC and support a party's claim of its inability to perform a contract. However, the value of such force majeure certificates outside China remains doubtful, particularly in common law jurisdictions where there is no doctrine of force majeure and force majeure is a creation of contract. Force majeure is therefore subject to the precise wording of the contract in question and the mere provision of a FM certificate by the government may not be sufficient to trigger force majeure rights.

The Supreme People's Court of China has also released a "Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law". These contain directions to lower courts as to common issues in civil cases arising out of the COVID-19 pandemic, including force majeure claims as well as other contract disputes over performance.

Post COVID-19 – longer term implications

The long term impact of the pandemic on BRI projects is a real cause for concern. Various projects will face difficulty getting off the ground because of problems with financial viability as banks decide not to proceed with funding. Notably, a main source of funding for BRI projects is the Chinese development banks, the Silk Road Fund, the New Development Bank and the Asian Infrastructure Investment Bank. It remains to be seen as to whether these Chinese development banks are able to continue financing certain BRI projects the long term profitability of which has been compromised

Various projects will face difficulty getting off the ground because of problems with financial viability as banks decide not to proceed with funding

Ongoing projects will need to be rescheduled if critical path work streams cannot be commenced or completed in time based on current scheduling. Additionally, parties seeking to rely on force majeure clauses to deal with the impact of the COVID-19 pandemic and related government restrictions may also be looking at contractual termination as a commercial solution.

A broader issue is whether planned BRI projects will be able to come to fruition in the current economic climate. For instance, it was recently reported that, almost seven years after the CPEC was established, less than one-third of announced projects had been completed.

With the sustainability of financing for the BRI projects already posing a challenge and Chinese capital expected to be mobilised to first meet its domestic needs, the pandemic as well as its induced economic slowdown will be a further set back and may even be the death knell for some BRI projects.

Alfred Wu
Partner
Tel +852 3405 2528
alfred.wu@nortonrosefulbright.com

Kevin Hong
Special Counsel
Tel +852 3405 2535
kevin.hong@nortonrosefulbright.com

Katie Chung
Special Counsel
Tel +65 6309 5434
katie.chung@nortonrosefulbright.com

Preliminary trends in arbitration in the transport sector in light of COVID-19

By Vanessa Rochester, Phil Roche, Malcolm Hartwell and Utsav Mathur

The COVID-19 pandemic has resulted in court access in many jurisdictions being severely curtailed. Certain jurisdictions are permitting urgent matters to proceed, often by way of telephone or videoconference. Many matters, however, have been delayed or postponed. By virtue of its flexibility, arbitration has been offered up as a solution to commercial parties who wish to nevertheless progress the resolution of their dispute. In light of COVID-19, are we seeing more parties in the transport sector turn to arbitration? In addition, for those parties whose contractual arrangements already provide for arbitration, how has COVID-19 affected the behaviour of parties for whom difficulties or disputes have arisen? Reflecting the global reach of our transport practice, this article explores the trends that we are seeing in the transportation and logistics sectors worldwide.

At this juncture, the global situation and the resulting impacts continue to evolve

Greater appetite to re-negotiate and share the pain

In contrast to certain trends seen in 2009 during the last financial crisis, we are seeing a much greater appetite to re-negotiate and share the pain of the current difficulties. In long term charterparties and contracts of affreightment, rather than insist on their contractual rights and trigger the arbitration clauses, we are seeing parties seek to cooperate in order to weather the storm. This is also the case in the offshore context. At this juncture, the global situation and the resulting impacts continue to evolve.

Even if a party has a claim, it is a challenge to begin to quantify it when one cannot yet predict the extent of loss nor how long the current situation will last. This has resulted in a flurry of commercial discussions, rather than entrenched positions. Consequently, for the volume of disputes and difficulties we have been seeing, there are comparatively fewer arbitration proceedings commenced in the transportation sector than we might have anticipated.

New LMAA (London Maritime Arbitrators Association) proceedings are regularly being commenced

Some increase in arbitrations, arrest proceedings and injunctions

This is not to say that it is all peace and harmony. There is certainly a segment of the market that is charging ahead. New LMAA (London Maritime Arbitrators Association) proceedings are regularly being commenced. For those parties currently in LMAA proceedings, while there have certainly been some delays due to COVID-19, many arbitral proceedings are business as usual. While the courts systems have been affected by COVID-19, arrest proceedings and injunctions in support of arbitration remain available in many jurisdictions. This is the case, for example, in Canada, England, the United States, Singapore, and South Africa.

Insolvencies and restructurings

In the grand scheme of things, we are still in the early days of the COVID-19 crisis. We anticipate that the insolvencies and restructurings to come will impact on the number of arbitrations being commenced. If a contractual counterparty is teetering on the edge of an insolvency, one must carefully consider whether it is actually worthwhile incurring the time and cost of commencing arbitral proceedings, only to have them stayed at a later date. For further information about COVID-19 related insolvencies, please also see our article on Insolvency and Arbitration.

Concluding thoughts

To conclude, international arbitration remains a flexible way to resolve disputes during the COVID-19 crisis. Both institutional and ad hoc arbitrations have been accommodating in terms of virtual hearings and electronic documentation. In our view, the increased appetite for resolving matters commercially has less to do with the dispute resolution process itself, and more to do with seeking to ensure that co-contacting parties stay afloat and that money is not spent on proceedings that could well be pyrrhic victories at the end of the day.

Vanessa Rochester
Of Counsel
Tel +1 514.847.4746
vanessa.rochester@nortonrosefulbright.com

Phil Roche
Partner
Tel +44 20 7444 2609
philip.roche@nortonrosefulbright.com

Malcolm Hartwell
Director
Tel +27 31 582 5622
malcolm.hartwell@nortonrosefulbright.com

Utsav Mathur
Senior Associate
Tel +1 713 651 5374
utsav.mathur@nortonrosefulbright.com

Arbitrating disputes in the pharmaceutical, life sciences and healthcare sector in the era of the COVID-19 pandemic

By Martin Valasek, Jordana Sanft, Randy Sutton and Brian Daley

A signature feature of the last several months has been the scramble for masks, shields and gowns – personal protective equipment (PPE) – for doctors, nurses and other care workers. Governments have been focused on ensuring that health authorities, both public and private, have a sufficient supply of essential medical equipment (such as PPE and ventilators) and pharmaceutical products to deal with the initial surge of COVID-19 cases. Parallel races are under way to find safe and effective therapies, tests and vaccines, all of which will involve intellectual property (IP), new and old, and many new collaborations globally.

These events are putting tremendous strain on the life sciences and healthcare sector, including the pharmaceutical, medical device and biotechnology industries, as well as on the contractual and IP infrastructure that supports them. Disputes can be more disruptive than usual during this time, not least because it adds further pressure on often already limited financial and management resources. Many parties are therefore seeking alternative ways to avoid disputes. However, some disputes are inevitable and a number are likely to be resolved through international arbitration.

Disputes involving the manufacture and supply of critical products

The stresses on international and national supply chains the entire length of the value chain in the life sciences and healthcare sector are manifold. There are the complications for manufacturing due to lockdown restrictions as well as the effect of the virus on workers, and complications for logistics due to hardened borders that are affecting all international and some national trade. The increased urgent demand for certain products has resulted in examples of inferior products entering the marketplace and being rejected by customers. There are also new entrants to the market, as businesses seek to re-tool to provide much needed equipment, as well as new collaborations and ventures. Governments are taking a keen interest in ensuring expanded and diversified supply chains and ensuring a secure supply of necessary material, both in the short term and over the long run. There have also been high profile examples of nationalism as demand for these products outstrips supply globally. In producing countries, we have seen attempts by governments to require exporters to supply new local or regional needs instead of their usual contracting parties farther away. In countries relying on imports, governments could push for moving to new, domestic sources of supply that may be perceived as more reliable in times of crisis. As tensions between the U.S. and China continue to mount, there are likely to be particular difficulties for supply chains originating in China. Developments such as these could put existing long-term contracts at risk, with pressures on both suppliers and buyers of everything from PPE to drugs to ventilators and the raw materials that go into making these products. All of this adds to the strain on existing manufacture, supply and distribution contracts and licensing agreements, potentially leading to disputes.

> ***Arbitration is increasingly popular in this sector for a variety of reasons***

Particularly in the case of cross-border transactions, many of these manufacture and supply agreements will have clauses that provide for international arbitration as the dispute resolution mechanism.

Arbitration is increasingly popular in this sector for a variety of reasons including privacy/confidentiality of proceedings, ability to choose an expert adjudicator, flexibility of process, that it denationalises justice (particularly important where a party is a state or state owned entity), and – often most critically – greater ease of enforcement of arbitral awards than foreign court judgments. The latter is due to the New York Convention, which provides a streamlined global framework for recognition and enforcement of foreign arbitral awards as well as respect for arbitration agreements. With a few exceptions, most countries worldwide are now a party to the convention. Disputes between companies and states over the measures implemented by states, as discussed below, may also lead to investor-state arbitration.

Disputes involving access to IP

There is a clear need for extensive and rapid innovation to respond to the pandemic. Companies and governments are working to advance as quickly as possible. This also necessarily involves some consideration around expanding access to IP. It is important, however, to remember that IP rights holders do still need protections, albeit in these challenging times many will advocate for a balancing act.

In some cases, governments will be leading the charge to expand access to IP. For example, in an effort to make critical drugs more widely and cheaply available to their populations, governments may override existing licensing arrangements and even the underlying patent protections. Assuming that governments do so through duly adopted laws and regulations, such measures may be difficult to challenge in local courts.

It is possible however, that such measures could violate international law, such as investment protection standards set out in international investment agreements (**IIAs**).

Investment protection standards set out in international investment agreements

Assuming an affected company qualifies under the IIA as a foreign investor with a protected investment, the company could have a claim for compensation against the host state. In turn, however, a host state would likely seek to rely on several defenses available to it as a result of the pandemic. Such investor-state disputes are typically resolved through international arbitration. (For more detail on investor-state arbitration in the COVID-19 context, see our separate article in this issue Investor-State Claims in the Era of the COVID-19 Pandemic.

Where the need for immediate access may not be as acute, or where the goal is promoting new innovation, governments will see the benefit of promoting cooperation rather than forcing it. In early May, the US Patent & Trademark Office launched an online platform called Patents 4 Partnership, a searchable repository of patents (and patent applications) related to the COVID-19 pandemic that are available for licensing. The new platform aims to facilitate the voluntary licensing and commercialization of innovations to help fight the disease.

Some IP owners are getting ahead of government action, embracing cooperative models over adversarial ones. Several major innovators from the tech and medical sectors (among them Amazon, Microsoft, IBM, Sandia National Laboratories, Open Ventilator System Initiative) are behind the Open COVID Pledge. Those that sign the Pledge offer an open non-exclusive, royalty-free, worldwide, fully paid-up license under the Pledgor's patents "to make, have made, use, sell, and import any patented invention, solely for the purpose of diagnosing, preventing, containing, and treating COVID-19." The standard license that Pledgors are asked to sign is effective as of December 1, 2019 and lasts until one year after the World Health Organization declares the COVID-19 Pandemic to have ended (but not later than January 1, 2023 unless otherwise extended). Reports of similar initiatives abound. Medtronic PLC and Smiths Group PLC released ventilator-design files and manufacturing guidance using a permissive license. Stanford University, the Massachusetts Institute of Technology and Harvard University have agreed to let their IP be used through their joint COVID-19 Technology Access Framework, which is similar in spirit to the Open COVID Pledge. They are offering non-exclusive royalty-free licenses in return for a commitment from licensees to distribute the resulting products as widely as possible and at a low cost that allows broad accessibility during the term of the license.

Once the dust settles, it is likely that some of the licensing arrangements could lead to disputes

However, it is not yet clear how all of these new arrangements will work out. In the case of the Open COVID Pledge, licensors may be encouraged by the prospect of converting their free licenses into paid commercial licenses, and licensees may be incentivized to enter into these paid licences rather than finding their free licenses cut off at the end of their term.

At the same time, once the dust settles, it is likely that some of the licensing arrangements could lead to disputes, including some that could be quite complex.

Parties would be wise to consider entering into arbitration agreements in connection with these licenses – or in the case of pre-existing disputes, to consider agreeing to arbitrate those – as this may offer greater certainty over where, when and how disputes would be resolved, as well as greater certainty regarding the enforceability of the outcome. Related to this are the further benefits of the disputing parties being able to choose their arbitrator (potentially selecting someone with expert technical knowledge in the relevant field), as well as having proceedings conducted privately or confidentially rather hashed out in public litigation.

Arbitrating IP disputes

As a result of social-distancing requirements, courts in many countries – including specialized tribunals that deal with IP issues – have been closed for an extended period of time. In France, for example, all civil/commercial cases were postponed in mid-March 2020 until further notice, except for litigation considered essential (criminal hearings in particular), which does not include IP litigation. The European Patent Office pushed back deadlines for in-person oral proceedings in its opposition divisions, where patents are challenged, until early June 2020. In the US, jury trials have been postponed or cancelled by most courts, although bench trials are continuing, at the discretion of the judge, and held via video conferencing. As the courts reopen, certain cases will likely be prioritized, with others facing delay. And further closures or delays cannot be ruled out, given the possibility of a "second wave" of infections from a resurgent virus.

In addition, complex cases involving technical evidence may be poorly suited for remote, virtual hearings – particularly those ordinarily conducted before a jury. Parties may prefer, or indeed be forced, to consider alternative ways of resolving disputes especially if they are unwilling or unable to wait for courts and specialized tribunals to reopen.

The lack of a pre-existing arbitration agreement is no barrier. In most jurisdictions, parties are able to subsequently agree to arbitrate their disputes – regardless of whether or not a dispute has already arisen. Even if litigation has been commenced, there are usually simple steps available to transfer proceedings to arbitration or mediation instead.

> ***Close attention to issues of arbitrability must be given where a dispute involves invalidation or confirmation of underlying IP rights as against the world***

But is this a good idea? Arbitration has not always been an obvious choice for IP disputes. Litigation has tended to be the default, in large part due to a perception that IP disputes are non-arbitrable. However, that is not strictly true and much depends on the jurisdiction. It is not uncommon for there to be restrictions on arbitrating questions pertaining to fundamental IP rights. This means close attention to issues of arbitrability must be given where a dispute involves invalidation or confirmation of underlying IP rights as against the world. But commercial IP disputes are arbitrable in many jurisdictions. Parties may also default to litigation because interlocutory injunctions can be a popular and common part of IP litigation strategy. Potentially, however, injunctive relief can be available within or as an adjunct to arbitration proceedings.

> ***There is a real risk of getting a judge and/or jury who know nothing about the law in this area and almost certainly will not have the requisite technical expertise***

Beyond the fact that arbitration is often a viable option, there can be significant benefits to resolving IP disputes in arbitration. There are known difficulties with litigating IP disputes beyond mere access to courts. This is particularly the case where the disputes are global and involve rights protected in different jurisdictions. Litigation of these disputes is, in some regions, notoriously complicated, expensive and slow. Disputes involving IP are often highly technical, and generally evidence-heavy. Yet not all countries have specialist IP courts so there is a real risk of getting a judge and/or jury who know nothing about the law in this area and almost certainly will not have the requisite technical expertise. The discovery and trial process in many jurisdictions can also result in the costs of a case reaching millions of dollars and sometimes much, much more. Add to that, IP rights are generally national yet as most large companies trade and operate internationally their disputes are often international. Further complicating things, the scope of the parties' rights can be interpreted differently in different countries, even when dealing with, for example, the same wording in a patent. This can lead to fighting essentially the same issues in multiple regions and potentially seeking to enforce competing court judgments in multiple regions. Lastly, IP disputes are frequently as much about the present behaviour of the parties as an historical evaluation of past damages or past monetary compensation. For all the above reasons, such disputes can be difficult to settle.

> ***Confidentiality deserves a special mention given that trade secrets and know how are frequently at the heart of IP disputes***

This is where the potential advantages of arbitration come into play: offering a transnational forum where disputes can be resolved holistically; avoidance of litigation in a foreign court(s); confidentiality/privacy of proceedings; the ability to select an expert arbitrator; neutrality of the forum; speed and finality (limited appeal/judicial review rights); flexibility of procedure; and, in many cases, costs (by, for example, agreeing less expansive discovery); and of course the enforceability of awards across multiple jurisdictions under the New York Convention. Confidentiality deserves a special mention given that trade secrets and know how are frequently at the heart of IP disputes including the life sciences and healthcare sector. As does the ability to resolve disputes holistically – where there are multi-jurisdictional and multi-party issues, the ability to have these addressed in one forum and before one adjudicator can provide greater opportunity for meaningful settlement as well as consistency of outcome. In the right circumstances, arbitration can also be a less adversarial process which further supports settlement and preservation of ongoing business relationships.

Conclusion

Litigation remains somewhat of a default method for resolution of disputes in the life sciences and healthcare sector arising out of the COVID-19 pandemic. It is of course a viable option, but it will not always be the best method for resolving disputes. There are clear benefits of arbitration and other alternative dispute resolution mechanisms in the right circumstances, and these should be borne in mind when seeking to resolve disputes, whether they be IP or contractual, as well as when choosing the dispute resolution mechanism in new contractual arrangements.

Martin Valasek
Head of International Arbitration, Canada, Partner
Tel +1 514.847.4818
martin.valasek@nortonrosefulbright.com

Jordana Sanft
Partner
Tel +1 416.216.4798
jordana.sanft@nortonrosefulbright.com

Randy Sutton
Global Co-Head of Life Sciences and Healthcare, Partner
Tel +1 416.216.4046
randy.sutton@nortonrosefulbright.com

Brian Daley
Partner
Tel +1 514.847.4764
brian.daley@nortonrosefulbright.com

Climate change and sustainability

Lessons learned from COVID-19 and resolving disputes by arbitration

By C. Mark Baker, Kevin O'Gorman and Cara Dowling

Prior to COVID-19, few people would have found an obvious practical connection between a pandemic and climate change. But with hindsight, the connections are manifold – as discussed below, some are obvious, some more subtle, while others are still playing out. What is however becoming clear is that climate change related disputes are unlikely to abate in the wake of the pandemic. Indeed all signs point to a possible surge in cases as political and economic positions harden and all sides seek to take advantage of the compounding pressures on companies, individuals and governments in the wake of the pandemic. International arbitration and ADR have important roles to play in resolving such disputes.

COVID-19 and climate change

The most obvious impact of COVID-19 has been the reduction of greenhouse gas emissions (and other pollutants) globally as the restrictions imposed by public bodies severely curtailed industry and transport. In the face of this disruption to businesses and supply chains globally, the pandemic has served to shine a spotlight on the resilience and sustainability of business practices and supply chains across many sectors. While other sectors – technology and innovation notably – have consolidated their position as drivers of the future for many industries. Science too, is having its moment (albeit, not without some challengers). The pandemic has also given tangible shape to the potential wide scale commercial, economic and societal disruption (global and domestic) that scientists and economists have been warning will follow if global warming is not limited to manageable levels. This may result in added impetus for climate change and sustainability measures. In a similar vein, the combined impact on the oil and gas sector of the oil price crash, COVID-19 and other pre-pandemic pressures including the energy transition and digitalisation has, for some, increased the attractiveness of investment in green or sustainable energy assets.

The pandemic has also given tangible shape to the potential wide scale commercial, economic and societal disruption if global warming is not limited to manageable levels

Conversely, however, the pandemic is having a negative impact on the energy transition (at least in the short term) – for example, renewable energy projects have faced supply chain issues, and with economic pressures there is likely to be less ambitious investment in green or sustainable projects and research and development at least from some quarters. (Few may be aware that the currently beleaguered oil and gas industry is one of the larger investors in this area.) Meanwhile, governments and societies faced with serious economic downturn are grappling with questions such as how to fund a post-pandemic recovery, including whether to tie bail-out or stimulus measures to green or sustainable targets, or whether in fact short term economic recovery should be prioritised over climate change commitments and ambitions. Extensive lobbying from both camps is ongoing. These complicate already difficult questions as to when and how to finance a global wide scale transition to a more sustainable future.

The net result has been that climate change and sustainability policy, regulation and law – areas already in significant flux globally prior to the pandemic – are likely to see significant change in coming months and years. In the face of this, climate change related disputes are not likely to abate. Indeed, the post-pandemic melting pot of economic and political pressures is likely to result in greater levels of disagreement and disputes.

The range of climate-related disputes is vast

Resolving climate change disputes by arbitration and ADR

The range of climate-related disputes is vast. It is now a global phenomenon, where legal issues traverse multiple fields of law and various causes of action, and involve a wide range of claimants and defendants from multiple sectors. New disputes – against corporates, individuals (such as directors and officers), and governments – are reported nearly daily. The risk profile is not only complex but as mentioned above it is in a state of flux. This is partly due to innovative claims being brought by claimants as they seek to get around the legal hurdles frequently faced by such claims (standing, justiciability, causation, to name a few). It is also due to the ongoing evolution of climate related regulation and policy, on the national and international stage, as states grapple with how to address climate change and who should shoulder the fiscal burden – questions that are now even more complex in a financially challenged post-pandemic world.

Whilst most climate change disputes to date have been argued before national courts, there is a role for international arbitration and ADR in the resolution of climate change related disputes. We have written extensively on the potential we see for arbitration and ADR to resolve climate change related disputes. See for example, our article on Climate-related disputes: adaptation and innovation. The factors in favour of a greater role for arbitration and ADR as discussed in that article are even more prominent in a post-pandemic world. There is little doubt that – if sensitively addressed – this area will grow in importance for the arbitration community.

Reflecting that realization, major arbitral institutions have in recent years been turning their focus to how to best facilitate efficient and effective resolution of climate change related disputes. The recent report by the ICC Task Force on Arbitration of Climate Change Related Disputes has been particularly ground breaking in its detailed attention to this important area as summarised below.

The ICC Task Force's Report

The ICC Arbitration and ADR Commission, with the support of the ICC Commission on Environment and Energy, created a task force on Arbitration of Climate Change Related Disputes (the **Task Force**). Kevin O'Gorman, one of the authors hereto, was a member of the Task Force, along with business representatives, lawyers, arbitrators, arbitral institutions, in-house counsel, NGO representatives, business and industry groups and academics. Kevin O'Gorman and C. Mark Baker both also participated at the ICC Commission debate when Task Force's draft report was presented for approval. The remit of the Task Force. The remit of the Task Force was to examine the current use of international arbitration and alternative dispute resolution (**ADR**) in resolving international disputes related to climate change as well as what features would be required for a dispute resolution mechanism to be effective to resolve such disputes. In addition it looked at the ICC's Arbitration Rules, Mediation Rules, Expert Rules and Disputes Board Rules to consider their fitness for resolving such disputes and whether additional guidance or materials (such as sample procedures or dispute resolution clauses) might be needed.

The Task Force's Report on Resolving Climate Change Disputes through Arbitration and ADR (the Report) was launched in November 2019 both in Paris and at Norton Rose Fulbright's offices in New York.

The Report identified six areas in which the existing procedures may be enhanced when arbitrating such disputes, as well as providing additional guidance and language parties may use when drafting arbitration agreements in respect of capture climate change disputes.

The need for appropriate expertise

Given the breadth and complexity of the area, securing relevant scientific and technical expertise is essential to arbitrating climate change related disputes. In arbitration, this essential expertise can be obtained via the parties' choice of arbitrator plus any party or tribunal appointed experts. When choosing the arbitrator, parties may of course expressly provide for specific requirements but (as always) care should be taken over being too prescriptive as it may lessen the pool of potential arbitrators to the detriment of both parties. The Report provides sample wording which parties may consider when drafting arbitration agreements as well as guidance on the procedure for the parties or the tribunal to appoint experts. In addition, the ICC itself may assist either in selecting arbitrators or experts with the relevant expertise or in offering guidance as to the relevant expertise required.

The factors in favour of a greater role for arbitration and ADR are even more prominent in a post-pandemic world

Measures to expedite dispute resolution

The Report acknowledges that the meaningful resolution of climate change related disputes is often urgent. Not only is climate change science and technology constantly developing at pace but, in some situations, delay may have a detrimental impact on the environment or populations, which may even ultimately result in further proceedings being brought. The Report offers guidance on expediting dispute resolution by:

- Effective use of case management techniques to increase efficiency, including bifurcating proceedings, limiting the length of hearings and submissions at the CMC, and identifying issues which may be decided by experts.
- Proceeding on the new "ICC Expedited Procedure" whereby the parties accept this procedure if:
  - i. the amount in dispute does not exceed US$2 million, or
  - ii. the parties otherwise agree pursuant to Article 30 of, and Appendix VI to, the ICC Arbitration Rules.
- Reminding parties of the additional features of ICC arbitration already available including emergency arbitration, interim and conservatory measures, and the use of escalating dispute resolution clauses.

The Task Force anticipated that, increasingly, parties may seek to argue termination, force majeure, frustration, change of circumstances or illegality as a result of states' and business' commitments to those frameworks and industry standards

Climate change commitments and frameworks

The Report also recommends that consideration be given to national legal and regulatory frameworks that action commitments under international agreements such as the Paris Agreement, and to commercial agreements which increasingly adopt industry standards such as the Equator Principles (for further information see our prior articles on the Equator Principles and navigating ESG issues). Although the arbitral tribunal will be confined to the governing law to which the parties have agreed, such frameworks and industry standards may become increasingly relevant to climate change related disputes in the future. The Task Force anticipated that, increasingly, parties may seek to argue termination, force majeure, frustration, change of circumstances or illegality as a result of states' and business' commitments to those frameworks and industry standards. The ICC is currently considering whether to propose specific guidance in this respect of these beyond the sample wording provided in the Report.

Transparency

A major concern of the Task Force was that a perception of a lack of transparency in traditional arbitral proceedings may deter parties from choosing to arbitrate climate change related disputes. This concern over transparency is often traced back to public policy implications that can be associated with climate change disputes, and lead to questions over the legitimacy of private proceedings. The Report suggests that in order to ensure that arbitration remains a trusted dispute resolution tool for climate change related disputes, more information should be made available to states, businesses and interested parties.

There already has been significant progress towards transparency in the context of investor-state disputes, with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration providing rules for transparency and accessibility to the public. Similarly, the ICC Rules provide for publication of awards of certain commercial arbitrations. However, the Report reminds parties that there is nothing in the ICC Arbitration Rules to prevent parties from agreeing to the disclosure to the public of information as to pending arbitral proceedings or final awards. This should, however, be read in the context of the parties' original reasons for choosing arbitration, which in some instances may stem from the privacy that arbitration can offer over other forms of dispute resolution, notably litigation.

Third party participation

As with transparency, there is some concern that disputes that stray into issues of wider public concern, such as climate change related disputes, should allow for participation of interested third parties. With the increase in climate change projects or policies, it is expected that there will be a corresponding increase in impact on citizens and industry, which may result in disputes. The Report suggests that parties may therefore consider incorporating appropriate dispute resolution mechanisms in their bespoke arbitration agreements to ensure that third parties do not bring parallel proceedings in other fora as well as to allow for appropriate levels of third party participation in the arbitral proceedings. The Report suggests that there are two main ways in which this can occur in ICC arbitral proceedings: (i) by joinder of additional parties, or (ii) allowing for amicus curiae submissions.

There already has been significant progress towards transparency

Costs

The Report highlights concerns over costs – an increasingly important consideration for all in the current economic situation. The Report proposes revisions to the existing ICC rules so as to remind the parties and any legal representatives of the costs provisions applicable to ICC proceedings, and in order to ensure that appropriate stakeholders are able to participate in the dispute resolution process.

With thanks to Scott Hobbs, trainee, for his assistance with this article.

C. Mark Baker
Global Co-head of International Arbitration. Partner, Houston
Norton Rose Fulbright US LLP
Tel +1 713 651 7708
mark.baker@nortonrosefulbright.com

Kevin O'Gorman
Office Administrative Partner, Houston
Tel +1 713 651 3771
kevin.ogorman@nortonrosefulbright.com

Cara Dowling
Of Counsel, Knowledge, Vancouver
Tel +1 604 641 4874
cara.dowling@nortonrosefulbright.com

Contacts

International arbitration, Co-heads

Mark Baker
Houston

Pierre Bienvenu, Ad. E.
Montréal

Canada

Calgary
Allison Kuntz
Clarke Hunter, QC

Montréal
Martin Valasek

United States

Houston
Kevin O'Gorman

Washington DC
Matthew Kirtland

South America

Mexico City
Mark Baker
Kevin O'Gorman

Europe

Amsterdam
Yke Lennartz

London
Patrick Bourke
Sherina Petit
James Rogers

Germany
Jamie Nowak

Paris
Christian Dargham

Moscow
Yaroslav Klimov

Middle East

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Paul Stothard
Deirdre Walker

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South Africa
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