

## The coronavirus: what impact?

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07 March 2020



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**GAR considers the impact of the coronavirus on international arbitration and how it might change the way cases are conducted.**

As a global field of law that regularly brings together people of different nations for hearings and conferences, international arbitration looks set to be one of the practice areas most affected by the new COVID-19 strain of the coronavirus and the accompanying disruption and panic.

In time, international arbitration specialists may also play a key role in dealing with the fallout – the inevitable disputes arising from unfulfilled contracts, disabled commerce and sharp drops in global stock markets.

While the virus is first and foremost a source of human suffering and fear that has already claimed thousands of lives, lawyers are looking beyond the immediate health threat and considering the types of dispute it might generate and the legal tools available to deal with them.

They're also considering how the virus might affect the way arbitration is done, with some predicting that COVID-19 will usher in a new era of "contactless arbitration", when many more proceedings are conducted remotely with few in-person meetings and hearings.

### **The crisis so far**

With close to 100,000 confirmed cases across the globe, the new coronavirus places us "in uncharted territory", World Health Organization (WHO) chief Tedros Adhanom Ghebreyesus told a press conference on 2 March. This is because of the unique nature of the virus: "we have never before seen a respiratory pathogen that is capable of community transmission, but which can also be contained with the right measures."

Similar concern has been voiced by Nancy Messonnier, the director of the US-based National Center for Immunization and Respiratory Diseases, who said "It's a matter of when, not if, the coronavirus will spread" and that the American public should "prepare for the expectation that this might be bad".

From its first outbreak in Wuhan, in China's Hubei province, last year the virus has moved beyond this epicentre with alarming speed, leading the WHO to declare a "public health emergency of international concern" on 30 January.

Cases have been reported in more than 60 countries and in all continents except Antarctica, with South Korea, Iran and northern Italy particularly badly affected. On 26 February, it was announced that the number of new infections outside China had surpassed those inside the country, while this week it emerged that 3.4% of global cases have led to deaths.

All this stokes fear that, if the virus is not swiftly contained, we may be facing a disaster on the scale of the Spanish flu epidemic of 1918, which claimed the lives of 50 million people worldwide, although many experts say it is too soon to make accurate predictions. It could even develop into a pandemic.

The emergency has been felt in stock markets across the world, with all major US indexes falling over 10% from recent highs, the S&P 500 plunging 4.4% – the most since 2011 – and the Dow Jones closing 1,191 points down in the worst-ever drop in a single day.

In the words of **Jil Ahdab**, partner at Bird & Bird in Paris, the impact on the world economy has been "unique and dramatic", with French companies alone estimated to have lost €1 billion of revenue to date and airlines expected to lose between €63 billion and €113 billion by the end of the year.

For the first time in many decades we are facing shortages at both ends of the economic chain: in supply *and* demand, he explains. "This is a double challenge to face, which the world economy, already in what some see as a trend towards deglobalisation, will have a difficult time confronting."

Though panic in the markets is not a sure indication of long-term volatility, Ahdab adds that, if the crisis escalates, the world economy could face a major slump "because of the interconnection between various economies, despite the various trade wars that we have seen at play over the past few years".

"Every national economy will be preoccupied with containing the virus and will halt key activities until this has been achieved," he warns.

### **Snap decisions**

Of course lawyers are as susceptible to illness as anyone else and early reported coronavirus sufferers include a lawyer practising in Manhattan and three employees of a Vienna-based law firm.

For most international arbitration practitioners, however, the most serious effect of the COVID 19 outbreak so far has been the postponement or relocation of hearings, especially in the worst affected countries and regions. Snap decisions have had to be taken on how to proceed, with arbitrators, counsel and witnesses from less affected countries understandably reluctant to risk contagion through travel and some law firms forbidding it.

Even arbitration hearings far from the main centres of outbreak, in countries such as the US and Canada, have had to be postponed because of travel restrictions or quarantine requirements on witnesses who were meant to attend from Asia.

Conferences have also been postponed or cancelled – including the IBA International Arbitration Day in Istanbul and Johannesburg Arbitration Week, which were both scheduled to take place this month; the Chartered Institute of Arbitrators' annual European branch conference due to take place in Venice in April; and GAR Live Singapore in May.

Just yesterday it was announced that the Vis moot, which normally attracts some 400 student teams for oral hearings in Vienna before Easter, will be cancelled, like the Vis East in Hong Kong before it (although both will proceed virtually).

In a letter on the Vis website, organisers **Christopher Kee**, **Stefan Kroll** and **Patrizia Netal** explain that, although Vienna has not banned large scale events, the international nature of the moot, which is normally its "greatest strength", would create a risk. Several teams had already pulled out, they say, and they would not be able to guarantee that the intended venues for the moot would be open.

At present, other major events are still set to go ahead – including Paris Arbitration Week in late March and early April and the ICCA Congress in Edinburgh in May. But organisers say they are watching developments closely.

As one source GAR spoke to noted, the advanced age of many leading international arbitration specialists who would normally chair hearings, headline conferences and judge the moot is a worry, given the higher risk the virus presents to those aged 60 or over or with underlying health conditions such as diabetes or cardiovascular disease. The WHO has recommended that those in this age group should avoid large gatherings.

For younger people, symptoms are often mild, like those of seasonal flu, and sometimes not noticeable at all. But they may still worry about passing the virus to someone more vulnerable; having to self-isolate or be quarantined if they contract or are exposed to it; or being stranded abroad if a government declares a region in lockdown.

### **Normal business with precautions**

Like other businesses, law firms have had to respond to the evolving situation and most have closed their offices in mainland China, Hong Kong, Seoul and Milan, requiring employees to work remotely from home. Only one international law firm, Dentons, has an office in Wuhan, which of course is closed.

Outside these places, there have been only limited closures – including of Baker & McKenzie's London office, which temporarily shut in late February after one of its employees showed flu-like symptoms on returning from northern Italy.

Many firms, however, are preparing for the possibility of employees working remotely from home should the crisis escalate and taking precautions such as installing hand sanitiser stations, restricting non-essential foreign travel and requiring self-quarantine by those who have visited affected regions or been in contact with people who have.

Some are paying for employees to travel to and from work by taxi so they avoid the risk of contagion on public transport and others are posting regular updates and guidance on their websites to assist employees and clients during this tumultuous period.

Arbitral institutions, too, remain open, including China's leading centres in Beijing, Shanghai and Shenzhen, the Hong Kong International Arbitration Centre and the Korea Commercial Arbitration Board – albeit they are encouraging users to conduct hearings and meetings remotely.

On its website, the HKIAC confirms it is “operational and accessible for hearings and meeting”, unlike the courts of the special administered region, which have been closed since 29 January for public health reasons.

However, the HKIAC states that the “health and safety” of its employees and guests is “of top priority” and lists preventive measures it is taking to protect them from infection – including making handwashing and the wearing of masks mandatory for front-line service staff and stepping up cleaning and sterilisation of its offices.

Along with the Korea Commercial Arbitration Board, which has posted a similar announcement on its website, the HKIAC is protected by a system of mandatory temperature-scanning for all visitors and delivery personnel who enter its building. Entry will be denied to anyone with a temperature higher than 37.8 degrees Celsius and to those who show signs of respiratory illness such as coughing or laboured breathing.

In northern Italy, the Milan Chamber of Arbitration is also doing business as usual. The director general of the centre, **Stefano Azzali**, tells GAR: “This is almost the second week of the emergency. During the first week we had to cancel almost all arbitration and mediation hearings and two training programmes. This week, the cancellations have been fewer, which indicates users of our services have got over the shock and are adjusting to the emergency situation.”

“The chamber is fully operative and able to guarantee the continuation of its activity and to organise meetings and hearings by video conference if required – something we did many times before the crisis. We can also offer a 100% online service, part of the EU Online Dispute Resolution Platform.”

Azzali adds that he anticipates the crisis will cause only minor delays to cases and, in time, generate new arbitrations and mediations for the chamber arising from the disruption to business in northern Italy. He is considering offering a limited time discount for parties to file those proceedings, an approach also taken by the Shenzhen centre, which has offered reduced rates for its online arbitration service.

### **Force majeure to the rescue?**

“In the course of just a couple of weeks COVID-19 has evolved from a problem largely affecting a distant region of China to a threat that is affecting all of us”, says **Gary Benton**, founder and chairman of the Silicon Valley Arbitration and Mediation Centre in Palo Alto, California, who has been monitoring the spread of the virus.

In the past days, the US has seen a surge of new infections, with clusters in California, Washington state and New York.

While Benton believes there is still hope that the localised outbreaks in many different countries can be successfully contained, he warns of the risk of a serious epidemic or global pandemic with devastating outcomes.

Beyond the human tragedy, such a pandemic could have a transformative effect on the international arbitration landscape, he says, perhaps “marking the end of certain arbitral seats or the rise of others as states struggle to recover from economic, political or even military turmoil.”

Even if a pandemic is avoided, it is clear that COVID-19 will leave its mark on arbitration practice, just as the Asian SARS virus of 2003 did, because of the massive commercial damage wreaked. Already many law firms have been advising clients on the suspension of contractual performance as a result of outbreaks and on the effect of contractual provisions on arbitral seats, institutions, procedures and choice of law.

The fact that the virus originated where it did makes the commercial repercussions particularly acute since so many goods are “made in China” – from electronic devices to car and machinery parts, clothing and Apple iPhones. As **Michael Chik** of Bird & Bird in Hong Kong explains, the lockdown of China’s Hubei province alone has the potential to cause huge disruption to national and international supply chains that rely on its production of lithium batteries and pharmaceutical products.

As the virus spreads, we face the prospect of further lockdowns internationally and of travel bans, quarantine measures and trade restrictions – not to mention the decimation of work forces because of illness.

As a result of all this, many companies are anticipating being unable to fulfil contractual obligations and investigating whether they are shielded by force majeure or related legal principles. “The question is whether force majeure, a concept which is often forgotten about and addressed in mere boilerplate terms in contracts, can come to the rescue,” Chik says.

A force majeure clause is in essence a contractual risk allocation mechanism which excuses non-performance of a contract because of circumstances defined in the provision itself. “Parties are free to agree and define the list of events that they consider should amount to force majeure events,” Chik says, “as well as how one party should invoke the provision and notify the counterparty and the consequences which will flow from declaring force majeure”.

“In our experience, disputes in this regard usually concern the definition of force majeure events in contracts and whether a particular event falls within their scope – with common law courts construing the clauses strictly in light of the objective intention of the parties.”

Whether the outbreak of a virus and its repercussions would be covered by a force majeure clause would depend on its wording, Chik says. “If the clause includes words such as ‘epidemics’ or ‘diseases’, then the COVID-19 outbreak is likely to be covered. However, more often than not parties negotiating a commercial deal do not consider a scenario where their business is stymied by a public health crisis. If there is no explicit wording on this in the clause, a party may instead have to rely on some kind of a catch-all provision, referring to ‘any other cause beyond the parties’ reasonable control’ or similar.”

If the contract is governed by the law of a civil law jurisdiction, successfully invoking force majeure is even trickier since regard must be had not only to the wording of contract and intention of the parties but also statutory pronouncements on what constitutes force majeure.

Chinese contract law, for example, states that for an event to be force majeure it must be unforeseeable, unavoidable and insurmountable, potentially raising sensitive questions about whether the Chinese government did enough to contain the virus when the first cases emerged and at what point it became out of control.

While common law offers several other defences to non-performance of contract that are related to force majeure, these may be of even more limited help, according to London-based lawyers **Brian**

**Kotick** of Winston & Strawn, **Joel Dahlquist** of Arbitration Chambers and **Saadia Bhatti** of Gide Loyrette Nouel, who discussed the coronavirus in a recent Arbitration Station podcast.

"Act of God" clauses, which regularly appear in contracts governed by New York law, allow parties to avoid liability for non-performance in the event of natural disasters such as earthquakes, volcanic eruptions and landslides, they noted. But it is questionable whether they would apply to an epidemic or pandemic, especially one like COVID-19 which is thought to have originated in bats and passed to humans as a result of the trading of exotic animals at a market in Wuhan.

Frustration of purpose, meanwhile, is a defence that can only be invoked in circumstances where the entire objective of the contract has been defeated, so might be successful in relation to a deal to provide tourist services in Wuhan in early 2020 but not in relation to most contracts affected by the virus. And impossibility of performance is also extremely difficult to establish given the vast array of options that are nowadays available to big commercial players.

In China, Bhatti said, the China Council for the Promotion of International Trade (CIETAC's parent body) has sought to simplify things for Chinese companies by issuing them with official confirmation that COVID-19 *does* constitute a force majeure event. However, she questioned whether such "government joker cards" will necessarily satisfy courts and tribunals internationally, especially as most of the companies benefitting from them are state-owned.

France has taken a similar approach, declaring that COVID-19 is a force majeure event under French law and companies with performance obligations under state public contracts are protected from liability.

## **Insurance**

Where force majeure and related defences do not come to the rescue, parties affected by the virus outbreak may minimise or mitigate losses arising from contractual non-performance through recourse to insurance policies, another topic on which Bird & Bird offers insights.

"Common insurance products which may cover such losses include force majeure insurance, which allows claims where a project is suspended or unable to be completed owing to factors or circumstances beyond the control of the party; business interruption insurance, which covers disruption more generally; and contingent business interruption insurance, which mainly protects against losses stemming from disruptions in the supply chain of the insured," says Hong Kong-based partner **Andrew Robinson**.

"There's also political risk insurance, sometimes invoked in the context of the Arab Spring, which allows the insured to claim for loss of assets, income or property as a result of political events or the actions or inaction of government authorities. And there may be performance or contract bonds issued to a contractual party by an insurance company or bank as a guarantee against the failure of the other contractual party to meet their contractual obligations."

Robinson notes, however, that some insurance policies expressly exclude losses caused directly or indirectly by epidemics or communicable diseases and that, in the wake of SARS, it is not uncommon for them to specifically exclude bacterial or viral infections.

"These exclusions are intended to avoid complications arising from the interpretation of insurance policies in an epidemic scenario, such as determining when the disease became a notifiable event for the purpose of coverage or the relevant 'loss period'," he explains.

## Contactless arbitration

In the long term, international arbitration specialists expect a plethora of new claims arising from the virus, both relating to the biotech, pharma and healthcare industries (which are playing a direct role in trying to contain it) and to sectors as diverse as energy, construction, fashion, transport, tourism and technology.

In the words of Benton, "COVID-19 will shake supply and pricing expectations in nearly every global market from commodities to industrial products – with experts in force majeure, frustration of purpose and related defences in high demand to help defend against claims."

But what form will these new virus-related arbitration proceedings take? Could COVID-19 mark a tipping point when use of video technology and e-documents and submissions becomes the norm?

According to **Jonathan Choo**, partner at Bird & Bird in Singapore, "a potentially positive consequence of the outbreak is that the arbitration community may be compelled to reduce the frequency of in-person meetings, simultaneously reducing costs and environmental impact while improving efficiency of proceedings."

Even before the outbreak of the virus, Choo notes there was a trend of tribunals directing that cases should be conducted "in a paperless manner". There was also much debate in the arbitration community about the responsibility of arbitrators and counsel to reduce their international travel to fight climate change.

He says COVID-19 may lead to those ideas actually being implemented, with lawyers recognising the need to cut flying for health as much as environmental reasons.

However, questions remain as to whether "contactless" arbitration would be suitable for all cases, especially major commercial and investment treaty arbitrations involving multiple witnesses and experts.

Benton agrees that arbitration proceedings will be very different during and after the crisis, noting participants should "expect fewer handshakes, more elbow bumps and bows".

"Reliance on paper contracts and documents sent through the mail or courier is likely to be curtailed and the hard copy evidentiary bundle is likely to fall by the wayside as arbitrators show more willingness to operate digitally," he says. "Evidentiary hearings may be conducted either entirely online or with a degree of remote participation."

As the stock markets teeter, Benton adds that now may be a good time to invest in the booming video conferencing technology industry, one of the few winners from this crisis along with the manufacturers of hand-sanitising gel, latex gloves and masks.

Another winner could be ADR providers since Benton anticipates that, especially in cases where the application of force majeure clauses or insurance coverage is questionable, parties will opt for alternatives to litigation and arbitration to resolve their disputes, including direct negotiation, mediation and conciliation.

"The timing of the Singapore Convention on Mediation may be just right to help get the world back in shape," he says.

## The cost of internationalism

The coronavirus gives arbitration practitioners cause to reflect not only on the way cases are conducted but on their entire way of life. In the age of the potential global pandemic (either COVID-19, if it spirals further out of control, or a possible COVID-20 down the line) is jetting around the world in pursuit of international instructions and publicity in the interests of either the planet or one's fellow man? And does internationalism, the hallmark of this practice area, come at a cost?

It is also a humbling reminder that some of the revered "giants of arbitration" are elderly people vulnerable to this and other illnesses.

It is to be hoped that, for as long as the emergency lasts, arbitration practitioners will continue to be responsible in following health leaders' advice on travel and large gatherings in the interest of containing the epidemic. And that, even in the most bitter of disputes, they will show concern for others and refrain from exploiting the crisis for case advantage or putting the interests of global corporations above those of real people. Contactless arbitration does not mean compassion-less arbitration.

In the tight-knit if physically disparate arbitration community, where many have strong personal as well as professional ties, there is no suggestion this would not happen.

While their expertise means that many arbitration practitioners are in a position to help alleviate some of the havoc created by the virus, now is also not the moment for naked profiteering. While opinions are divided as to the proper response to the crisis – and some think there has been an overreaction – eyebrows have been raised at firms in badly affected areas continuing to advertise their willingness to travel.

If and when COVID-19 passes (and there is still hope that it might prove short-lived) the business of cross-border arbitration can continue as before – but with heightened awareness of the risks of overseas travel and of the need to balance economic, commercial and legal imperatives with human ones. That would mark a true sea change in the field.

*This article was prepared by GAR using insights from Bird & Bird partners Michael Chik, Andrew Robinson, Jonathan Choo and Jil Ahdab; Gary Benton, founder and chairman of the Silicon Valley Arbitration and Mediation Centre; Stefano Azzali of the Milan Chamber of Arbitration and others. Thanks also to Bird & Bird trainee associates Claire Bentley, Low Zhe and Calista Chiu.*