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International Arbitration Experts Discuss the Impact on the Global Economy

WRITTEN BY

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what events had an impact on global economy that have led to an increase in filings. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Sarah Reynolds, Partner, Mayer Brown, Chicago
- Peter A. Halprin, Partner, Pasich LLP, New York
- Helen Conybeare Williams, Counsel & Solicitor Advocate, Haynes and Boone LLP, London
- Sandra Smith Thayer, Partner, Pasich LLP, Los Angeles
- Lisa Houssiere, Principal, McKool Smith, Houston
- Gene Burd, Partner, FisherBroyles, Washington
- Albert Bates Jr., Partner, Troutman Pepper, Pittsburgh
- Charlie Lightfoot, Co-chair of International Arbitration Practices and Managing Partner, Jenner & Block, London
- Thomas Wingfield, Associate, Jenner & Block, London.

Mealey's: What, if any, events had an impact on the global economy that have led to increased filings?

Reynolds: The COVID-19 pandemic's impact on the global economy has led to an increase in breach of contract claims, and a parallel rise in novel breach of contract defenses focused on excuses for non-performance. Government shelter-in-place orders, and other efforts to promote social distancing have forced many businesses to shut down or to cancel travel, meetings, conferences and other events, resulting in massive disruptions to business and, often, an inability to meet contractual obligations. Seeking relief, many businesses have been reviewing contracts to determine whether any contractual provision may excuse performance obligations (such as *force majeure* or **'**material adverse event**'** clauses), and looking to common law impossibility or frustration of purpose doctrines for help.

The common thread for all of these potential excuse of performance defenses is an unforeseeable event that is beyond the control of the non-performing party. Arbitrators will be busy in the coming years making determinations along those lines. Some *force majeure* clauses specifically include or exclude global pandemics or government orders, but others use less clear **'**act of God**'** language. In those clauses, the overall success of COVID-19-based *force majeure* defenses is still unknown. For example, arbitrators may find that government orders and pandemics

are predictable because parties and businesses have experienced similar events, *e.g.*, the 2002 SARS outbreak in China—though, never on a scale like we are seeing in the world today. We can expect that arbitrators will likely grapple with questions over the scope and interpretation of different *force majeure* clauses and non-performance excuse doctrines for the foreseeable future.

Halprin: At the risk of stating the obvious, the pandemic has had a tremendous impact on filings. It has disrupted supply chains, interfered with commercial contracts, and triggered civil authority actions which have hindered the flow of commerce. All of this has led to an increase in disputes and a resulting increase in filings. In addition, given court delays, many litigants have no doubt decided to have their disputes addressed through alternative means such as arbitration.

According to one study, there are presently more than 5,300 pandemic-related filings in the United States. According to another, in the United States, there are presently more than 1,250 pandemic insurance litigations. Many insureds, both in the United States and around the world, have policies which contain domestic or international arbitration provisions. The latter provide for arbitration in Bermuda, London, or elsewhere. Among these, there is likely a mix of ad hoc and institutional arbitration with the majority of such disputes likely being ad hoc.

While the numbers may not be as high as the number of pandemic-related court filings, there is no doubt that the increase in pandemic insurance and reinsurance arbitrations while parallel the trend in court filings.

Williams: The COVID-19 pandemic has put even greater pressure on the upstream oil and gas industry which is still absorbing the effects of market collapses in 2008 and 2014 and low oil prices. In the maritime and offshore construction sector, as a result of global lockdowns and repercussions on international supply chains, many companies issued or received force majeure notices suspending performance based on the COVID-19 outbreak, where their contractual force majeure clauses included specific wording covering the pandemic.

There appear to have been relatively few contract cancellations, where such contracts also provided for termination for force majeure, resulting in London arbitration referrals. There may be less appetite for disputes in this sector in the context of the general economic downturn. Also, terminations based on force majeure require special consideration in English law, including about the causative significance of such event. These force majeure issues may still play out in the context of project construction disputes in case of late delivery of ships or offshore vessels. In relation to charter parties, the impact of the pandemic has given rise to a number of legal issues, and potential for disputes up the contractual chain depending on whether the provisions are back-to-back. Again, parties have looked to see if their charter terms include force majeure clauses which can be relied on to excuse non-performance or cancellation of the charter or whether the English law doctrine of frustration applies meaning that the charter is automatically brought to an end.

These disputes may give rise to complex issues of fact and law. If these mechanisms are not available, terminations for convenience with the associated early exit payments can be the only option if a party is not able to fulfill the charter terms. These types of dispute have resulted in new London arbitration references arising out of the ongoing pandemic, alongside the usual diet of construction disputes in the energy sector.

Thayer: SARS-CoV-2, COVID-19, and the subsequent actions and orders of government authorities around the world in response to SARS-CoV-2 and COVID-19 (‘COVID-19 Pandemic’) have had a devastating impact on the

global economy and have led, or are likely to lead, to a spike in the number of arbitration filings in many industries, including construction, energy, and manufacturing. At issue in these arbitrations is whether the COVID-19 Pandemic, and specifically, the various government orders requiring people to stay at home and businesses to close, are a valid excuse for nonperformance of a contract.

In the insurance coverage arena, we also have seen, and will continue to see, an uptick in the number of arbitration filings involving insurance companies as companies all over the world continue to suffer property damage and massive business interruption losses as a result of the COVID-19 Pandemic. These insurance coverage arbitrations generally involve the question of whether SARS-CoV-2 and/or COVID-19 constitute ‘direct loss or damage to property’ under property insurance policies.

In addition to property damage and business interruption disputes under property policies, we also may see an increase in arbitration filings involving insurers under political risk insurance policies as foreign economies—especially in some of the poorer countries—continue to suffer. Political risk insurance generally protects a company’s assets, investments, or contractual rights in a foreign country from losses suffered as a result of certain events in that foreign country, including political violence and the foreign government’s (i) unlawful confiscation, expropriation, or nationalization of the company’s assets or investment, (ii) enactment of new currency laws that prevent or restrict the conversion or transfer of a company’s investment returns from the local currency to U.S. dollars, and (iii) actions or changes in laws that results in the termination of a company’s trade or sales contract with a foreign company or prevents the foreign company from performing under the contract.

Houssiere: More than any other global event, the COVID-19 pandemic has impacted multinational companies around the world in a profound way, forcing many to rethink their operations and the way they conduct business. The economic hardships that have resulted have exposed many businesses to financial strain and led to an increased number of high-profile insolvencies and bankruptcies. While some industries appear to be rebounding, such as the shipping industry, the pandemic has accelerated the plight of many companies in the energy industry, for instance, given the historic plunge in global demand for oil and the concomitant sharp decline in oil prices.

As many energy companies consider whether to pursue cross-border arbitrations, it will become increasingly important to consider the impact of insolvency on their options for pursuing arbitrations now or in the future. Of course, a party in an international arbitration could become insolvent before the arbitration actually begins, during the arbitration proceeding itself, or after an award is issued. The law of the seat of arbitration, the law of the place in which the debtor has declared insolvency, and the law of any countries in which enforcement of the award against the insolvent debtor may be sought are important considerations.

Practically speaking, parallel cross-border insolvency and arbitration proceedings pose unique challenges because in certain jurisdictions, the insolvency of a respondent may restrict the claimant from continuing to pursue existing arbitral proceedings and may force the arbitral panel to stay the arbitration altogether. In addition, the insolvency of an award debtor may present a real hurdle to the enforcement of any monetary arbitral award. Given the uncertainty that arises at the intersection of international arbitration and bankruptcy, parties should consider protecting themselves against a future potential bankruptcy when negotiating arbitration agreements by, among other things, securing guarantors.

Burd: The most significant development in international arbitration in the U.S. this year was likely the Supreme

Court decision in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*. The Court confirmed—what was thought to be self-evident but was thrown into doubts by the Eleventh Circuit—the principle that international arbitration agreements can be enforced by non-signatories. U.S. courts have long recognized that the Federal Arbitration Act does not impugn the rights of non-signatories to enforce arbitration agreements in domestic arbitrations based on traditional legal principles. Because of the New York Convention's pro-enforcement bias, practitioners reasonably assumed that the same principles would even more forcefully apply in cases involving enforcement of international arbitration agreements and awards. That was until the Eleventh Circuit in *Outokumpu Stainless USA, LLC v. Converteam SAS* has held that under the New York Convention, only a party to a signed arbitration agreement can compel arbitration. The Circuit Court's decision caused puzzlement in the arbitration community and, eventually, a flurry of Amicus Curiae submissions from arbitration practitioners and organizations questioning the Circuit Court's rationale. Ultimately, the Supreme Court put the matter at rest, holding that the New York Convention does not displace state law that permits a non-party to enforce its rights under the arbitration agreement. The decision provides assurance that arbitration agreements will receive favorable treatment in U.S. courts.

Bates: A number of events have impacted the global economy and have given rise to, or inevitably will give rise to, increased international arbitration filings. However, the most obvious and consequential impact on the global economy has been, and likely will continue to be, the ongoing global COVID-19 pandemic.

For international construction projects, COVID-19 and the governmental actions in response to the public health risks posed by the pandemic significantly disrupted ongoing projects in a myriad of ways. For example, supply chains were significantly impacted by government orders to temporarily close or otherwise restrict businesses, lack of available staff, lack of available materials, and shipping and transportation delays just to name a few. In some cases, suppliers were forced into bankruptcy or liquidation leaving contractors responsible for sourcing specialty goods for complex infrastructure projects in the difficult position of identifying alternative suppliers. As a result, both upstream and down-stream disputes over the contractual allocation of risk for such events will, to the extent they have not already, lead to international arbitration filings. The legal issues in these disputes will center around force majeure, change in law, frustration, impossibility, hardship, and related legal concepts and will focus on the applicable law and the specific contractual provisions.

In addition to project impacts attributable to the supply chain issues mentioned above, the pandemic also impacted the time schedule and cost of many ongoing projects due to a general lack of manpower, particularly among specialty trades and highly skilled specialists. Indeed, travel restrictions aimed at limiting the spread of the virus made it even more difficult for contractors to access the already limited supply of labor and goods needed to achieve planned levels of productivity. Furthermore, the health and safety risks posed by COVID-19 have frequently limited the number of individuals that a contractor can call upon to work in a specific area at any given time. As a result, contractors have experienced project delays and incurred additional costs, giving rise to disputes concerning whose responsibility these delays and cost. The central legal issues in these construction disputes will also center around force majeure, change in law, frustration, impossibility, hardship, and related legal concepts.

In terms of international construction arbitration claims, most of the claims that I am aware of to date arise principally with respect to claims of (i) force majeure and/or (ii) changes in law.

In general terms, force majeure claims typically stem from contract provisions that afford a party relief in the event

an unforeseeable act of god interrupts that party's performance. Importantly, however, in the construction sector, force majeure claims typically afford contractors relief from liquidated damages in the event a force majeure event delays the contractor's performance, *but not* to compensation for additional costs stemming from the force majeure event. By contrast, change in law claims—construction contract claims that generally entitle a contractor to relief in the event governmental authorities change the law where the project is located— often afford contractors the right to seek *both* relief from liquidated damages *and* compensation for additional costs stemming from the change in law. As a result, given the relationship between COVID-19 and recent governmental actions (e.g., governmental restrictions), construction disputes have generally focused around the concept of whether a claim for relief stems from an event of force majeure or change in law, and as stated above, are governed by the applicable law and the specific contractual provisions at issue in the dispute.

I would also note, however, that while COVID-19 will inevitably increase the number of international construction disputes and international arbitration filings, the financial impact of the pandemic may, in some instances, decrease the likelihood that a party may pursue arbitration. Given the global economic downturn associated with the pandemic, many companies, including those within the international construction sector, have experienced significant financial strain. This economic reality may influence the decision or timing to initiate an international arbitration proceeding.

Lightfoot and Wingfield: COVID is the clear answer: from the outset, we have seen COVID cause new disputes and catalyse latent disputes.

There are the obvious 'COVID cases' arising out of the pandemic itself: claims for force majeure, material adverse change, insurance, delay, disruption, etc. The first investment treaty claim against state measures to stem the virus has yet to enter the public domain, but it can only be a matter of time. What is more, most of COVID's impact will be less obvious. In disputes where COVID does not play the starring role, its economic impact will often stand behind the scenes, perhaps pulling the strings.

The closest and perhaps only analogy is the last global financial crisis. 2020 is already breaking 2009's records for insolvencies. The full force of COVID's economic blow is not yet knowable, but its shockwaves will be felt for many years to come — and sometimes in unlikely places. Arbitration will be dealing with COVID into the 2030s.

That said, the pandemic is simultaneously acting as a brake on some filings. Starting a dispute in the midst of global disruption is not always sensible. For some parties, the concern will be quantum. In 'COVID cases', their losses may still be developing; but even for claims with little else to do with COVID, COVID calls financial projections into question. For many, it makes sense to wait and see. The question is how long they will wait and what they will see.

This braking effect was also felt in litigation. The English High Court reports only a **'**slight fall**'** in new claims in April and May, before returning to previous levels — whilst the Administrative Court urgently dealt with the many judicial review claims arising from legislation to address COVID. However, as parties elected to adjourn existing cases, the flow of English court judgments slowed. The flow is now picking up again. With the reservoir of delayed claims added to the new, it will be interesting to see what happens downstream.

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