

**University of Miami School of Law**  
**White & Case International Arbitration Lecture**  
**by David W. Rivkin**  
**3 February 2021**  
**12:30-2:00 PM ET**

**Post-Pandemic Arbitration: Will It Be Contact-Free?**

**I. INTRODUCTORY REMARKS**

[Thanks to organizers at University of Miami and White & Case, and especially to Carolyn Lamm for inviting me and for her kind introduction.]

[I am sorry that I cannot be with you, in Florida, in person today; that is especially true as I look out my window at all the snow that is falling; but I am glad to be able to join you in this way, virtually. And I look forward to visiting the law school in person in the future.]

As we are beginning to sense the end of this terrible pandemic, as vaccinations grow more numerous, it is a good time to consider what international arbitration will look like when we do emerge. We know that one of the great advantages of arbitration is its flexibility. It is resilient; it can be adapted to the circumstances and issues relating to that case. These features of international arbitration have been particularly important over the past year. The pandemic has tested us—professionally and personally—in many ways, but we have continued to provide effective dispute resolution for our clients. This has required a careful and sustained focus and cooperation by institutions, parties and counsel on what is required and what can be achieved.

We know that in the post-pandemic world, life will not be the same as it was before 2020. Similarly in our world of international arbitration, life will not be the same. Instead,

we must apply the adaptations we have made in the past year to improve international arbitration to be more efficient and to better serve the needs of the parties that use it..

Today, I would like to discuss with you three topics: *first*, the onset of the pandemic last spring and the arbitration community's responses to it; *second*, how the lessons we have learned in pandemic arbitrations may be applied in the future to increase procedural innovation; and *third*, briefly, some of the issues to come regarding assessing damages during an economically tumultuous time.

## **II. ONSET OF THE CRISIS: INSTITUTIONAL, PARTY, AND LAW FIRM RESPONSES**

One year from the beginning of this crisis, the early days of the Pandemic are still astounding for the massive changes they wrought on the most basic elements of our collective and individual routines. In the United States, all the troubling signs in January and February culminated in the first weeks of March; within a period of days, professional sports leagues and Broadway shuttered, schools and universities sent students home, professional conferences were cancelled, and state governments began to announce stay at home orders.

Starting March 16, nearly all attorneys and staff in the New York and Washington D.C. offices of my firm began working from home and, within a week, New York's governor announced the closure of all non-essential businesses in the state, putting New York "on pause." As so many facets of our societies shut down, it was not clear how long the "pause" would last—what, precisely, the shape of the pandemic's challenge would be.

I doubt that any of us expected that we would still be working from home – or more accurately, living from work – almost a year later.

We have seen in the past year that the pandemic has highlighted the best and worst in society; it has shone a light on – and intensified -- economic, racial and other differences and the impact these differences cause in the lives of our fellow citizens. The pandemic has also accelerated technological and cultural shifts that may have taken years to develop, but have instead been compressed into the last 12 months. We have certainly seen that trend in our practice of international arbitration. All the change that I will discuss today may have happened eventually, but it has instead occurred with lightning speed this year.

#### **A. Institutional Responses**

In March and April last year, we faced a great deal of uncertainty in our personal and professional lives. In our professional community, it was not immediately clear how clients, counsel, and arbitrators would continue to use international arbitration to resolve disputes peacefully. The overwhelming response, however, was to find solutions to the challenges posed by our inability to travel and to gather in person.

In early April 2020, less than a month after the global shutdown, over a dozen arbitral institutions, including the ICC, ICSID, LCIA, HKIAC, and SIAC, released a statement on arbitration and COVID-19<sup>1</sup> The statement called for continuity in the administration of arbitrations, with a view to balancing and ensuring the twin pillars of

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<sup>1</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>

efficiency and fairness. “The joint ambition of our institutions,” the statement read, “is 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.”<sup>2</sup>

As arbitral institutions transitioned to remote work or split-team arrangements, they continued to be operational throughout the spring. To accommodate these arrangements, a number of institutions—among them, the ICC, ICSID, HKIAC, SIAC, SCC, LCIA, AAA/ICDR—pushed parties to reduce reliance on paper submissions.<sup>3</sup> These institutions permitted—or required—the electronic filing of requests for arbitration and applications for emergency interim relief and expedited proceedings. This change had been gradually developing in recent years; the pandemic forced a sudden and necessary pivot to a greener, more efficient procedure.

When in-person meetings and hearings became impossible, institutions quickly adopted virtual hearing infrastructure to parties seeking to advance their proceedings. The HKIAC, SIAC, KCAB, and ICSID, among others, offer e-hearing services. For example, the HKIAC virtual hearing center can support video conferencing connecting up to eight different locations, provides IT training and support, and incorporates transcription and interpretation services. ICSID’s videoconferencing platform allows hundreds of participants to gather. In April 2020, the International Dispute Resolution Centre in

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<sup>2</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>

<sup>3</sup> *See* <https://www.debevoise.com/insights/publications/2020/04/conducting-international-arbitrations-during-covid>

London, Maxwell Chambers in Singapore, and Arbitration Place in Toronto and Ottawa, jointly formed the International Arbitration Centre Alliance.<sup>4</sup> The cooperation facilitates the administration of global hybrid hearings that combine physical and virtual attendance: for example, in a single arbitration, a party based in London could make use of the physical infrastructure at the International Dispute Resolution Centre, while an arbitrator in Singapore joins from Maxwell Chambers, and witnesses or party representatives join from anywhere in the world, virtually.

In addition to providing technical support, software, and physical infrastructure, institutions have extended their expertise through a series of guidelines and best practices for the conduct of arbitrations during the pandemic. In early April, the ICC published a guidance note on measures to mitigate the impacts of the pandemic—advising on measures to enhance efficiency and to facilitate virtual hearings.<sup>5</sup> The HKIAC likewise issued guidelines in May,<sup>6</sup> and the CPR Institute published an annotated model procedural order for remote video arbitration proceedings.<sup>7</sup> The Africa Arbitration Academy issued a

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<sup>4</sup> <https://globalarbitrationreview.com/virtual-hearings/major-hearing-centres-team>

<sup>5</sup> <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/?dm=bypass>

<sup>6</sup> [https://www.hkiac.org/sites/default/files/ck\\_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings\\_3.pdf](https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf)

<sup>7</sup> <https://www.cpradr.org/news-publications/press-releases/2020-04-21-cpr-launches-annotated-model-procedural-order-for-remote-video-arbitration-proceedings>

protocol on virtual hearings in Africa, which it described as “context-specific and custom made” for arbitrations taking place on the continent.<sup>8</sup>

Again, all these developments would have occurred over time. Instead, because of the pandemic, they changed the nature of international arbitration overnight.

But as institutions provided assistance on *how* to hold virtual hearings during the pandemic, stakeholders still considered *whether* such hearings could or should take place at all.

## **B. Legal and Policy Questions**

Faced with the reality that travelling and gathering in groups would not be feasible over a span of months, if not years, parties confronted two possibilities: undetermined delay or virtual hearings. Parties and arbitrators quickly had to consider, first, whether virtual hearings were permissible, and second, if permissible whether they were preferable to delay.<sup>9</sup>

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<sup>8</sup> <https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf>

<sup>9</sup> *See, e.g.*, <https://globalarbitrationreview.com/article/1226483/what-if-parties-dont-agree-on-a-virtual-hearing-a-pandemic-pathway>;  
[http://arbitrationblog.kluwarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+Kluwer+ArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29&doing\\_wp\\_cron=1590581249.7751600742340087890625](http://arbitrationblog.kluwarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Kluwer+ArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29&doing_wp_cron=1590581249.7751600742340087890625)

Whether or not a virtual hearing is *permissible* is a question dictated by the law of the seat of arbitration, the relevant institutional rules, and the content of the arbitration agreement. Last fall ICCA launched a promising—and exhaustive—research project asking whether the right to a physical hearing exists in international arbitration.<sup>10</sup> The project will compile surveys answering this question from more than 80 jurisdictions; to date, it has published national reports from Australia, Italy, the United States, and Vietnam. This survey will be important. While there has often been a presumption that the law of the seat, rules and arbitration agreement permit virtual hearings, it is important for tribunals to consider the matter carefully. For example, when the arbitration agreement states, “The hearings shall be held in” a particular city, instead of “The seat of the arbitration shall be”, does that imply or require that physical hearings must be held? Does a virtual hearing in which some or all of the arbitrators and counsel are not physically present in that city violate that provision?

Whether a tribunal *should* order a virtual hearing, where it is allowed, is another question, but one that falls within its competence. As ICSID recently stated in denying Spain’s motion to disqualify a tribunal for its decision to hold the merits hearing virtually, “[all] arbitral tribunal[s] [are] called on to balance considerations of efficiency and avoiding delay with ensuring that the parties are properly heard.”<sup>11</sup> As I will discuss shortly, this is an issue that requires careful balancing of many factors.

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<sup>10</sup> <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>

<sup>11</sup> *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), para. 142 (rejecting Spain’s motion to disqualify the Tribunal for its

### **C. State of Play Today**

We have come a long way in a year. Virtual hearings have become the norm, and we have all become intimately familiar with Zoom, Webex, Microsoft Teams, and other platforms. We are conducting virtually interim hearings, procedural hearings, and merits hearings involving multiple witnesses and multiple parties located around the world.

We are also sharing our experiences—in existing industry publications and in new fora. In June 2020, a combination of practitioners and arbitral institutions founded a new site specifically dedicated to sharing knowledge we have gained through pandemic arbitrating: “Virtual Arbitration” launched as a site to exchange best practices for the virtual conduct of arbitrations.<sup>12</sup> This sort of practitioner exchange—in public discourse, but also in the “virtual hallways” of our law firms, has allowed us to adapt quickly to our present circumstances.

### **III. LESSONS LEARNED**

So what have we learned, and how can we apply these lessons to the conduct of international arbitration for the remainder of the pandemic but more importantly, in the post-pandemic world? We can be sure that when life returns to some version of normal, the conduct of international arbitration will be different. An important point of every initial

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decision to hold the merits hearing virtually),  
[http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5006/DS15556\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5006/DS15556_En.pdf).

<sup>12</sup> <https://virtualarbitration.info/>. See <https://globalarbitrationreview.com/practitioners-launch-forum-share-virtual-know-how>.



procedural conference will be to consider which hearings in the case should be held in person and which may be held virtually. I expect most cases will involve some combination of the two. The telephone conferences of the past are unlikely to be used again.

In determining which hearings, if any, can be held virtually, it will be important for the tribunal to consider issues of fairness, equality and efficiency, as well as the applicable law, rules and arbitration agreement, as I mentioned earlier. Some specific considerations should include:

- Location of the parties and their counsel, as well as the tribunal: Does the time and cost of travel merit any advantage that may come with an in-person hearing? The time zones of participants also need to be taken into account. When the participants are spread around the world so that one side or another has to conduct the hearing in the middle of the night, it can raise issues of fairness and equality of arms that may warrant the expense and burden of traveling to an in-person hearing.
- Equality must be considered with respect to other issues too. Does one party have less secure and reliable access to the internet? Do language issues make it more difficult to understand a party or its witnesses when heard virtually rather than in person?
- On the other hand, because virtual hearings can involve substantially less expense than in-person hearings if substantial travel would be involved,

virtual hearings can potentially level the playing field if the parties have significantly different resources.

These considerations will be different of course depending on whether the hearing will last a few hours, a day or a week or more. They will also vary depending on whether the hearing will consist only of argument or whether witnesses and experts will be testifying, and if so, how many. As always in arbitration, the particular circumstances of every case should be considered, and parties and tribunals should not adopt cookie-cutter solutions. The new LCIA and ICC Rules, both of which have been revised to make specific mention of conducting hearings virtually by videoconference or other means, make clear that, while parties must be consulted on their preferences, the final decision on how to conduct the hearings rests on the arbitral tribunal. As the LCIA Rules state, “The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing,”

I will now make a few comments on the conduct of virtual and in-person hearings, but then turn to the more important question of how we can use our newfound technology to alter, perhaps even radically, the overall conduct of cases.

#### **A. Virtual hearings**

As I am sure all of you have found, virtual hearings require a lot more preparation. To ensure the success of virtual hearings, we have doubled down on preparations that

should always guide our arbitrations and have developed a number of new considerations in light of this form's technological novelty.<sup>13</sup>

Before the hearing begins, we have found it to be especially important to isolate the issues in dispute between the parties, so that the hearing can be run as efficiently as possible, and to come to agreements as to how the hearing will be conducted, so that the parties are comfortable that the hearing will be conducted fairly.

These agreements include:

- Committing to the preparation and dissemination of secure electronic bundles in advance of the hearing and understanding how the parties will display demonstratives during the course of the proceedings;
- Guidelines and commitments concerning the testimony of fact witnesses and experts—for example, written commitments that there will be no improper communication between counsel and witnesses during testimony. Technological adaptations can further ensure comfort: rotating cameras that offer high-definition images and can be controlled by the arbitrators (or the presiding arbitrator or tribunal secretary) can be used to assess the witness's physical environment and nonverbal cues. Arrangements should also be made to virtually sequester witnesses during breaks in their testimony, along with written commitments by counsel that

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<sup>13</sup> See Debevoise & Plimpton Checklist for Arbitrations Impacted by COVID-19, <file:///O:/Desktop/20200610%20COVID19%20Checklist%20IDRG.pdf>.

they will have no contact with such witnesses. At a physical hearing, it is usually possible to spot any infractions, but it cannot be done in a virtual hearing.

- A range of technological considerations require agreement: for example, whether breakout rooms are required and whether a third-party service provider would be useful to provide in-hearing technical support. Arrangements for remote, real-time transcription and translation need to be made, and not all such services are equally adept at working remotely. The tribunal and all participants must conduct a test session in advance. It may also be prudent to have in place agreed protocols in the event of a technical failure.
- The parties and tribunal should also agree in advance on who will be on video in order to conserve bandwidth. And each participant who will be on camera should test his or her system in advance to make sure that the camera will not show only the top of his or her head – or that track pants or shorts are being worn below a more formal upper body. Having a hardwired connection is important to avoid wifi issues.
- Finally, cybersecurity in a virtual forum is of particular concern. The main conference line and any breakout session should be password protected. Prior to the hearing, the parties should circulate a final list of participants, including their locations, with a commitment to strict adherence to the list; and attendance should be checked throughout the proceeding. Similarly, the parties need to ensure that the virtual hearing bundle has ample security protection. The parties should also

consider agreeing to prohibit making recordings, including screenshots, of the proceedings.

## **B. In-person hearings**

There are of course many advantages to in-person hearings. Once we are able to travel again and to be together in a room, many will no doubt look forward to them. Tribunals certainly have more opportunity to have informal as well as formal conversations about the case when together, and the value of the collegial aspect of decision-making cannot be underestimated. Similarly, the informal conversations among the parties and the tribunal during breaks help breed confidence and comfort in the process.

Other considerations can also lean in favor of in-person hearings. While many clients like the cost-savings of virtual hearings, I have found that more of them prefer in-person hearings, because they have more direct access to their counsel to give and to receive real-time feedback. A separate Zoom chat is not a good substitute for a yellow stickie passed down the row to lead counsel or to conversations with counsel during breaks. Some believe that tribunals can determine the credibility of witnesses better when they are testifying in person, though I am not sure of that.

So the answer to the title of my talk is that post-pandemic arbitration will not be contact-free. But there will be complications and opportunities. Opportunities, because even in-person hearings will be able to take advantage of the new technology to which

we have become accustomed. But complications, because life will never be the same as it was pre-pandemic.

Travel restrictions may continue to be prevalent, which may raise issues of equality of arms and of the opportunity to be heard. Importantly, we have all become more sensitive to health issues. How many of us have sat in hearings uncomfortably while an arbitrator or opposing counsel coughed and sneezed regularly? We will not countenance that in the future, but how will we deal with it? Will we have to suspend hearings? Or send the ill person to another room where he or she can participate remotely? Since COVID may never disappear but merely be controlled, will masks be worn regularly in hearings? Will vaccination certificates be required of all in-person attendees? And importantly, how do we balance privacy concerns with these considerations?

Because of these considerations, there may be times when not all the arbitrators or counsel may be able to be in the same physical location. Tribunals will have to consider whether the need to proceed without delay requires such an accommodation and whether having some participants connect virtually causes violates an equal opportunity to be heard. I also expect that, because of travel or other restrictions, we will have hybrid hearings, in which arbitrators and parties may gather in multiple locations across the globe and be connected virtually.

### C. Procedural Innovations

Most importantly, our new technology should lead to broader procedural innovations in the conduct of international arbitrations. As most of you know, I have spoken and written for years to encourage parties and tribunals to focus only on what procedure is necessary for that particular case and not to use standard procedural orders. The ability to conduct hearings virtually, without the time and cost involved in travel, should make it much easier for tribunals to order procedures that are appropriate for each particular case and to be much more proactive than many arbitrators are today.

One simple way of incorporating virtual conferencing into procedure is to provide for very **regular check-ins** with the tribunal at different stages of the arbitration. This is an element that Debevoise introduced in our Efficiency Protocol, and we have used it to inform our procedural schedules over the past several years. Now that we all feel so comfortable bringing together the tribunal, the parties, and counsel for even brief meetings of an hour, tribunals should use this technique more often.

These check-ins can occur after major submissions have been received and during the document disclosure phase. At various stages of the case, including before the final merits hearing, arbitrators can provide guidance to the parties on the issues that they see as most relevant. Such check-ins can help focus and streamline the parties' written submissions and oral argument.

They can also provide for **better document management** by the tribunal. A virtual hearing on document requests could save a considerable amount of time and money.

Tribunals can be proactive in considering why any requested evidence is necessary. How easily can evidence that is *relevant* to the case and *material* to its outcome be located, as opposed to *all* evidence relating to a subject? What is the best way to search for the electronic evidence? This could also be a collaborative process, perhaps in many steps, as a party could run an initial search using agreed terms, let the parties and the arbitrator know the results, and then discuss how the search can be narrowed to find the evidence that matters. Cost considerations would be discussed at each step. Only when everyone (or at least the arbitrator) is satisfied that the request is as focused as possible to obtain relevant evidence, would the arbitrator then order the evidence to be produced.

I also hope that tribunals will make more use of virtual hearings to hear more frequently preliminary issues that may determine some or all of the issues in the case. When counsel and arbitrators no longer need to travel for a hearing that might only last a few hours, they should be less reluctant to hear and determine these issues. Greater use of preliminary issues can substantially shorten cases.

We can also make use of virtual hearing technology to fashion entirely new procedures. I would like to outline for you an alternative process, made possible by virtual hearings, that would allow certain disputes to be divided into phases, on an issue-by-issue basis—what I am calling **decision-tree or roadmap arbitration**.

In this alternative approach, there would be critical differences with today's routine:

- *First*, the process would be very fluid, potentially involving many steps, and changing as the process moves ahead; and



- *Second*, the arbitrator would be involved in each step and would participate in far more interaction with the parties than currently. The arbitrator would not simply set the schedule, deal with an occasional procedural issue, and then show up at the final hearing. While this would require substantially more time from the arbitrator, in the end it could provide substantial efficiencies and save time and costs.

As soon as possible after appointment, the arbitrator would meet with the parties. In order to make this meeting as useful as possible and to permit the arbitrator and the parties to develop an appropriate roadmap for the arbitration, the arbitrator needs to have a solid understanding of the dispute. In order to initiate the arbitration, the Claimant should submit a pleading that is as detailed as possible. It would provide an effective statement of the issues in dispute and the parties' positions on them (including its understanding of the opposing party's positions). The Respondent would be expected to arrive at the first meeting with a solid view of its positions, so that a meaningful discussion could be had, even if a written pleading may or may not be possible by then.

At this first meeting, rather than the standard, generally limited, procedural conference now held, the arbitrator would question the parties in detail about their positions, the evidence that may exist to support those positions, witnesses who may have appropriate evidence (and on which issues) and the legal issues or contract interpretations that will be important. This will require a greater level of preparation for the parties and for the arbitrator, but in the end time and money would be saved.

The arbitrator and the parties should also focus at that first meeting on the best means of presenting the arguments and evidence on those issues. What testimony or documents are required for each issue on the decision tree? Is a written submission necessary? Should the arbitrator simply hear from witnesses who have evidence? Is any discovery necessary or appropriate? The answers, and thus the methods, will vary for each case and even within each case, depending on the issue to be decided.

Importantly, the arbitrator would also ask the parties to explain their business needs, the type of decision they need, and the time by which they need a decision.

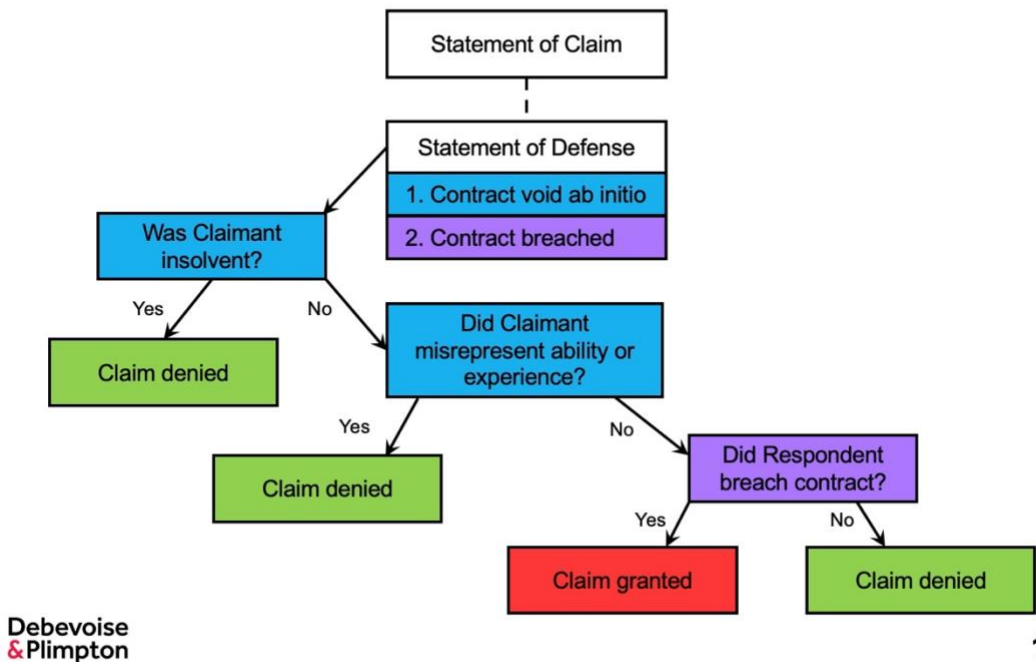
Having discussed these issues, the arbitrator and the parties would create a roadmap to a final decision: essentially, a decision tree. They would decide together, or the arbitrator would determine, which of these issues needs to be decided first and the proper sequence from there. The arbitrator would thus often conduct the arbitration in steps, as a determination of one issue could dispose of the case, lead to settlement, or change the focus to different issues. Because every case is different, the number of steps—and even whether to proceed this way—would vary.

For each step in this process, each side could simply make a single submission that would include all its arguments and evidence, in the style of a Court of Arbitration for Sport case. Reply submissions would not be necessary, as replies can be made more efficiently at the hearing.

As the steps proceed and the evidence unfolds, the arbitrator would need to make some determinations on the various steps in the decision tree. These determinations may be in writing or delivered orally to the parties, as appropriate for the issue or for the case.

[EXPLAIN SLIDE]

## DECISION TREE ARBITRATION



Importantly, as the case unfolds, the arbitrator may also make suggestions designed to lead to settlement. This would be facilitated by the discussion at the beginning of the case about the business needs of the parties. It would also be made more possible by the simultaneous hearing of both sides' evidence on each issue as the case unfolds. The

arbitrator can and should be starting to make some judgments as the case proceeds in this manner.

Ultimately, the case would be decided by (a) an award that decides an early issue in the decision tree; (b) a settlement arising from one or more of the arbitrator's step decisions; or (c) a final award dealing with all issues raised. Arbitrators would have to issue decisions promptly. As mentioned earlier, the size and scope of the award—how complete it needs to be in describing the evidence and the reasons for decision—would be determined by the parties with the arbitrator at the beginning of the case.

Besides a radically different thought process for the conduct of the arbitration, some other changes would have to be made in this system:

- Parties would more often use a sole arbitrator, often someone in whom they would each have trust. A sole arbitrator is more likely to be able to be interactive and directive, as is required by this system, than three arbitrators. A sole arbitrator would also be a significant advantage in dealing with the calendar challenges that will be even greater in this dynamic and fluid system.
- In order to make this process possible, the parties would have to agree to it in writing in advance, particularly that the arbitrator has the ability to express preliminary views at any point. This would eliminate any concern that the award would be overturned on that basis.

I know of course that this system poses many challenges, but we owe it to ourselves and to our clients to experiment and to push the limits of the new technologies to which we have grown accustomed.

Whether or not we make such drastic changes, harnessing the technologies of the pandemic can generate a better, slimmer, redesigned process that will encourage more and more parties to use international arbitration. It will also, of course, mean that the international arbitration community can create a smaller carbon footprint; and we know how important that is as we watch the effects of climate change already unfolding.

#### **IV. DECISIONS TO COME: ASSESSING DAMAGES**

Finally, I would like to discuss one additional issue that will be very important in the aftermath of the pandemic.

The pandemic has wrought economic upheaval across the global economy. Lockdowns, unemployment, and widespread uncertainty have altered consumer demands, impacted supply chains, and enhanced volatility in stock markets. Particular industries, including the aviation, tourism, and restaurant industries, have borne a large share of the economic downturn. Meanwhile, some companies have prospered by providing services necessary for the newfound realities of the pandemic.

In the future—including in cases that are currently pending—arbitrators will need to assess how the volatility of this moment should impact the assessment of damages. This is a task that may be especially complicated with respect to breaches that pre-date and are unrelated to the pandemic and in decisions that must be made before we have a clear view

as to when and how the pandemic will end. But the substantial change in economic activity and in the profitability of industries and companies will also impact calculation of damages for breaches that have yet to occur.

I am sure that many of you are familiar with the customary international law requirement from the *Chorzow* case that “[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.”<sup>14</sup> We are, however, experiencing improbable times. The unique global challenges that we are facing raise a number of fundamental questions when it comes to the assessment of damages.

The first question is a legal issue. It relates to the selection of the valuation date—whether the Claimant’s damage should be measured *ex ante*, compensating the Claimant for the value of its loss as of the date of the breach, or *ex post*, compensating the Claimant for the value of its loss as of the date of the award. In the former, events subsequent to the breach have no bearing on the value of the asset lost or the contractual obligation that is breached; and in the latter, events subsequent to the breach are factored in to the compensation due to the Claimant. In investment disputes, a treaty may specifically require compensation for expropriation as of the date of the expropriation; but in certain instances, investment treaty or commercial arbitration tribunals or national courts may find *ex post*

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<sup>14</sup> *Factory at Chorzow (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, Claim for Indemnity – The Merits (13 September 1928), para. 125.

valuation to be more appropriate.<sup>15</sup> A factor in the determination of the appropriate valuation date includes identifying the party that bears the risk of economic misfortune: does that risk pass to the Respondent immediately upon its breach? Is the Claimant entitled to reap the benefits of post-breach impacts, but not bear any risk for negative impacts? In cases where the breach occurred prior to the pandemic, the selection of valuation date could have a particularly significant impact on the total compensation received.

The second question concerns methodology. A typical valuation exercise is comparative: what would the Claimant's position have been but for the breach and how does it compare to the actual situation, in light of the breach?

The current economic downturn may complicate this comparative exercise in a number of ways. In the but-for scenario, the forecasts typically relied upon are unlikely to have taken into consideration the type of downturn we are currently experiencing. While taking a purely *ex ante* approach could potentially overstate a Claimant's damages, not doing so may unfairly pass the risk of Respondent's breach to the Claimant. Or in the actual scenario, the Claimant's economic position may be attributable, in addition to the alleged breach, to the pandemic.

Tribunals may, therefore, need to take into consideration certain additional realities, which will vary depending on the facts of the case. These may include a comparative

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<sup>15</sup> *E.g. Golden Strait Corp. v. Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12 (March 28, 2007) (reducing damages claimed for wrongful termination to account for events subsequent to the breach—in particular, the outbreak of war, which would have authorized termination of the contract).

review of how the Claimant’s industry has fared during the pandemic, a study of the attributes of the Claimant that may position it to fare differently in the pandemic than its counterparts, or real post-breach/pre-pandemic data demonstrating the Claimant’s actual loss.

Discounted cash flow analyses may face a number of challenges, or require specific adjustments in light of the unique impacts of the pandemic. One problem, of course, is that it is not clear how long current conditions will persist. Another is that the inputs that inform discount rates are currently very volatile. Moving forward, even as the pandemic subsides and the economy recovers, experts and tribunals will have to consider how to grapple with these inputs, as they are factored into historical norms and averages used in valuation.

Moving forward, arbitrators may seek guidance from decisions in which damages were incurred during similarly acute periods of tumultuous economic times. They may not provide a direct corollary but decisions taken in the wake of the Argentine financial crisis may be instructive in certain cases.<sup>16</sup>

The tribunals that valued damages in these cases adopted a variety of methods, but many made explicit efforts to incorporate post-breach data to rationalize the analysis and to isolate damage proximately caused by treaty breaches from loss attributable to the wider

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<sup>16</sup> See *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), paras. 247-251 (taking into account “different situations present at distinct periods of time”), paras. 442-457 (taking into account post-breach data); *Hochtief v. Argentina*, ICSID Case No. Arb/07/31, Decision on Liability (29 December 2014), para. 325 (valuing damages as of the date of the award); *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award (25 July 2007), para. 101 (taking into account post-breach data).



financial crisis. For example, in *CMS v. Argentina*, where the DCF method was adopted, the tribunal noted that this approach involved innate challenges, including because it required the forecast of Argentina’s future economic health.<sup>17</sup> In computing damages, the tribunal used the date of breach as the date of valuation, but took into account the various stages of the financial crisis<sup>18</sup> as well as real data on demand for gas, changes in exchange rate, and tariff increases in Argentina subsequent to the breaches and prior to the rendering of the award.<sup>19</sup> And in *LG&E v. Argentina*, where the tribunal calculated the Claimant’s lost dividends as of the date of the award, it considered the actual performance of the Claimant’s shares in the local Argentine company (which the Claimant had retained) after the treaty breaches began; while their value suffered in the immediate term, it rebounded after the height of the economic crisis had passed.<sup>20</sup> The *Hochtief* tribunal, which valued the Claimant’s loss as of the date of the award<sup>21</sup> made efforts to “isolate the financial effects of Argentina’s breaches ... from those resulting from ... [the] ‘extraordinary financial crisis’ ... confronting Argentina” in which the breaches took place.<sup>22</sup>

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<sup>17</sup> *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 419.

<sup>18</sup> *CMS v. Argentina*, paras. 247-251.

<sup>19</sup> *CMS v. Argentina*, paras. 442-448, 449, 457.

<sup>20</sup> *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award (25 July 2007), para. 101.

<sup>21</sup> *Hochtief v. Argentina*, ICSID Case No. Arb/07/31, Decision on Liability (29 December 2014), para. 325.

<sup>22</sup> *Hochtief v. Argentina*, para. 22. See also *id.* para. 324 (finding insufficient evidence that the local company in which Claimant owned shares filed for bankruptcy as a result of conduct in breach of the treaty, as opposed to as a result of the deteriorating

## V. CONCLUDING REMARKS

The past year has presented truly novel challenges to our practice. And as we move forward, slowly, towards a post-pandemic future, we will meet a new landscape, not a simple return to what came before. It would be a mistake, as the pandemic subsides, to simply restore our prior status quo, without incorporating the lessons we have learned and putting to use the technologies and efficiencies that have allowed us to continue our practice remotely. I hope that today's talk has provided some guidance on how we can take advantage of this opportunity.

Thank you for your attention.

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financial conditions present in Argentina prior to the enactment of the country's Emergency Law).