



TAHKEEM

مركز الشارقة للتحكيم التجاري الدولي
SHARJAH INTERNATIONAL COMMERCIAL ARBITRATION CENTRE

COVID-19

MEASURES GIVE
RISE TO DIGITAL
DISPUTE
RESOLUTION

LATEST ARTICLES

- . Impact of COVID-19 on arbitration
- . The future of Alternative Dispute Resolution
- . Negative impact of COVID-19 on arbitration
- . Advantages of COVID-19 on arbitration

ARBITRATION AWARDS

- . Measures taken by international arbitral institutions in response to COVID-19
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EDITOR'S NOTE

With issue No 3, Tahkeem journal is addressing the global pandemic of Covid-19 which has forced nations across the world, industries, governments, businesses, educational sectors to close in order to counter the spread of this virus.

The world had to go digital, and fully digital quickly. From Teams, to Zoom, to Google Hangouts, Cisco Webex just to name a few, companies saw their working methodology completely disrupted and had to digitize quickly.

What does this have to do with Arbitration? Well, we would say fairly a lot. Arbitration is a dispute resolution method that is quicker to adapt than the regular judiciary to the change of times. The commencement of arbitration can be done by submitting the request by email, with evidentiary submissions.

Tahkeem itself has put at the disposal of those seeking the center, the possibility to file a request online or through its applications.

The UAE in general, and Sharjah particularly, have foreseen the shift to online in order to ensure the continuity of the case procedures.

With this global crisis leading to many issues of "force majeure", closing of operations, default in execution, labor terminations to name a few, legal issues are on the rise, and so is the need to seek a resolution to disputes.

In this issue Tahkeem gives an overview of the disputes which give rise to digital dispute resolution, as seen mainly in the commercial sector.

The "new normal" post Corona details how the field of dispute resolution will never be the same, and how proceedings may be conducted.

Turning a dire situation, into a positive outcome, in "advantages of COVID19 on arbitration". Additionally, we give you a glimpse at what other arbitration centers are doing in light of the crisis. Finally, don't miss out on our tips for e-arbitration.

The current situation has definitely been tough on everyone on a personal level, and a dispute in itself, whether online or not, is not an easy matter to deal with, therefore having a fast, efficient and confidential method to resolve one's conflicts is definitely a way which will continue to go forward, and we certainly do not see it returning to the pre-Corona way.

Tahkeem will always be here to guide you in your disputes, and will keep you updated on the latest developments.

Lara Salem

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IMPACT OF COVID-19 ON ARBITRATION

The world health organization declared COVID-19 a pandemic not long after the virus had spread in multiple cities across the world, causing major disruptions to every aspect of our daily lives, be it linked to health, economies or businesses, the virus has undoubtedly affected the way we operate. However, the commercial sector is not the only one who has been affected by the disruption resulting from the spread of the virus, as it should be given its being an intrinsic part of the economy and the conduct of business, the legal field, in turn has given rise to certain questions.

In fact, the virus is raising major legal concerns with supply chains being severely affected and contractual obligations not being met, all of which are shifting focus on force majeure instances and their provisions. However, with

lockdowns and travel bans taking place globally, this has affected the judicial proceedings which were ongoing, one of which is the arbitration hearings which have also been interrupted resulting in the suspension of hearings.

Therefore, with the appearance of COVID-19, all concerned in arbitral proceedings have been looking at ways to resume their processes without further delays while keeping in mind social distancing and lockdown measures.

To that end, as issues presented by the coronavirus are merely linked to physical attendance at hearings since, typically involving the presence of all parties, experts and witnesses in person when conducting the arbitral process¹, arbitral hearings are now attempting to adapt to the virtual world. This has now introduced a new form of arbitral enforcement-The online dispute resolution, which shall be further discussed in this article.

The flexible nature of arbitration provides the parties and especially in this situation, a real

advantage over litigation. In civil dispute cases, the ones that are pending before courts are allowed to submit for an enforceable arbitration award which can ultimately resolve business related disputes and abolish uncertainty.²

Several new claims will be raised post coronavirus with regards to delays or cancellations of operations in every field and a definite increase in insurance claims in all sectors as well. Therefore, as the coronavirus is bound to eventually end, the damages left behind will not be short-term lived problems and for that, the world of arbitration will be changed and perhaps even more endorsed when you're looking to solve your issue rapidly and resume your business practices.

1) <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/covid-19-coronavirus-how-the-apac-courts-and-arbitral-institutions-have-adapted-to-the-challenge>
 2) <https://www.velaw.com/insights/the-advantages-of-arbitration-during-the-coronavirus-pandemic/>

THE FUTURE OF ALTERNATIVE DISPUTE RESOLUTION

There will be changes in the way arbitration is conducted post coronavirus and this is because the world will simply have to adapt to a new normal, and the arbitration field will not be exempted. As arbitral hearings and proceedings have been disrupted, the need to adapt to the change and implement a quick alternative was both significant enough to keep the contemporary implemented procedures in place to be used as a norm from now on. Thus, what will the future of alternative dispute resolution look like?

As one is not able to foresee the future, there's a certain path that is already being drawn that the courts whether arbitral or not, will be finding themselves following sooner than expected.

Arbitration is slowly incorporating the use of technology in its practice and the coronavirus has accelerated its usage. As the world will have to get used to fewer handshakes, the use of video conferencing is escalating, resulting in more online hearings, shedding more light on online dispute resolution.

It is unquestionably that the virus has affected the way evidence is usually gathered as well as transmitted. Both investigation and documentation are already shifting to digital, making way for artificial intelligence to lead the field.

Therefore, defining online arbitration would by default be that all proceedings are conducted online.³ The process would simply involve both the arbitrator and the parties' involvement online through uploading all evidential documents and discussing and negotiating through video conferencing; all of which offers the same kind of advantage that arbitration always presented: both cost and time efficiency. The only disadvantage that online arbitration may have is the lack of

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party interaction that arbitration was well known for. Less reliance on interaction may be involved and more reliance on evidentiary submissions might take place.

However, if the arbitrators and parties can engage properly through the use of technology and not allow it to create limitations, this issue could rather be prevented. Online arbitration has in fact been used a lot in the past for cases related to internet domain name disputes and it is fair to assume that the world will definitely be documenting the use of online arbitration in a variety of other fields in the near future. However, for the long-term future of online dispute resolution, technology is leading the field of arbitration further than just video conferencing. The establishment of smart contracts and blockchain arbitration is how artificial intelligence is being integrated in arbitration, developing a new mechanism for disputes arising from smart contracts.⁴ Smart contracts are contracts that are written in code language rather than our natural languages, in which the codes automatically enforce obligations implemented.

Therefore, blockchain arbitration has also been developed to serve the needs of smart contracts, where arbitral rules would immediately be imposed but this is just an overview of what the future could look like for arbitration.

3) <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>

4) <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>

ISSUES ARISING FROM REAL ESTATE ARBITRATION

Amidst the events of COVID-19, many arbitration hearings faced major delays. Thus, arbitration has also been hit by the negative impacts of the virus:



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American Arbitration Association-International Center for Dispute Resolution (AAA-ICDR) said that no arbitration hearings will take place until June 1 of 2020 and all offices of the AAA are to remain temporarily closed until further notice. According to the news agency Reuters, 53 proceedings that were set to take place at the AAA between March 16 and April 30 have been postponed.

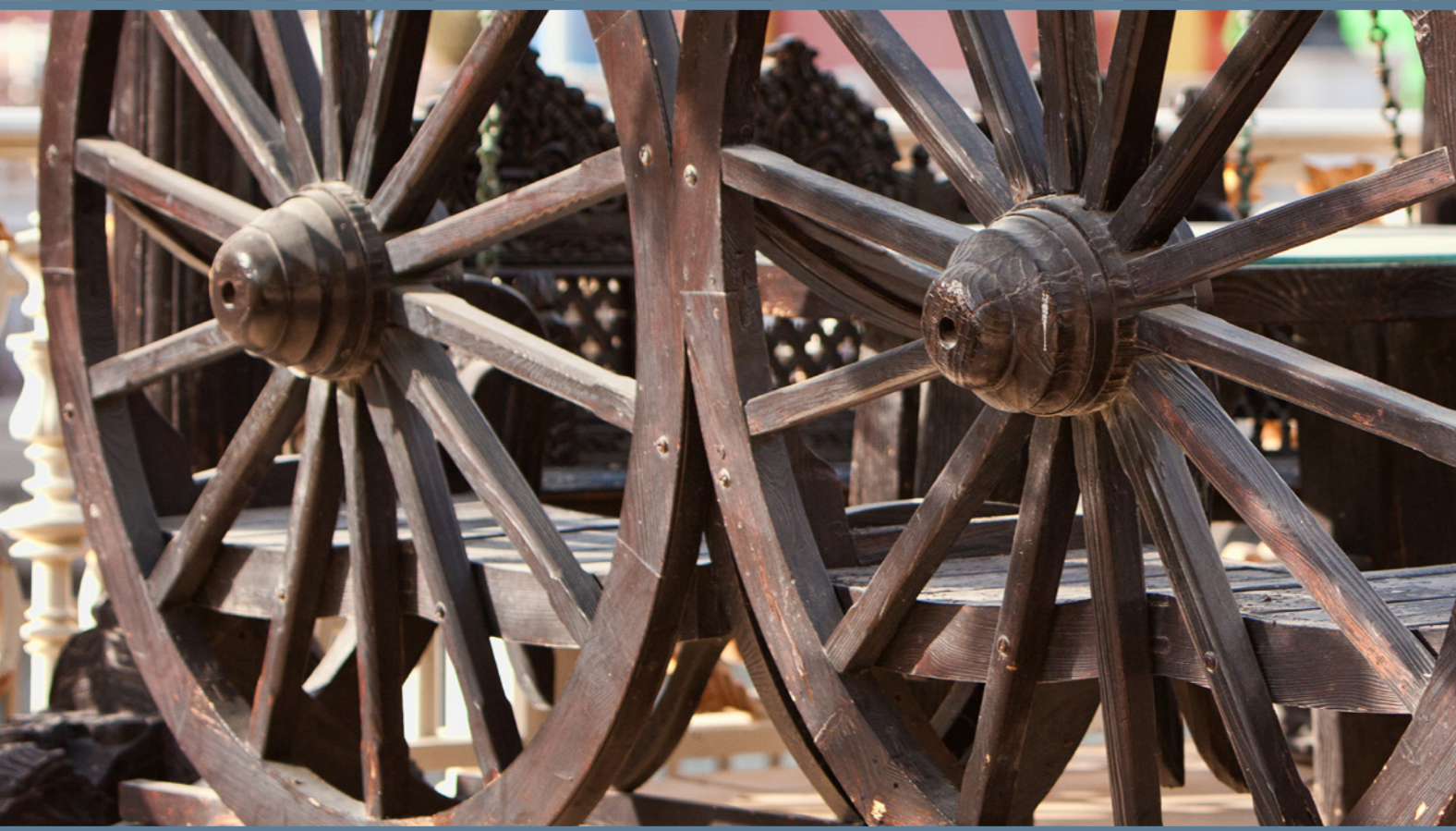
Additionally, all International Criminal court (ICC) hearings taking place in Paris have been canceled until April 13 of 2020 and The Financial Industry Regulatory Authority (FINRA) adjourned all in person hearings until July 31, 2020. As for local instances: The Dubai International Arbitration Center (DIAC) declared that arbitral hearings can either be held through video conferencing or alternatively the hearings will simply be delayed.⁵

This is at the discretion of the sole arbitrator or tribunal in which the parties involved may be hesitant to proceed in such a remote session. In addition to delays and postponements, arbitration hearings may face unprecedented load of lawsuits on the roll of hearings, as major claims arising due to the suspension of contractual obligations and force majeure clauses will trigger this addition in disputes. This will inevitably have as an effect the revision of contractual drafting in order to reconsider the contractual terms and how to incorporate current and any future pandemic in arbitration clauses.⁶

As for arbitral hearings, although COVID-19 has impacted their operations, the use of technology has undoubtedly created flexibility in which the field of arbitration has adapted to with ease. However, the technological alternative strategy adopted as a result of the virus, does raise concerns as to its long-term use. Many would still like to have in-person hearings in the future once the crisis has been dealt with since technology does not offer the same body language interpretation as well as verbal and non verbal forms of communication, and the ability to interact with one another.

5) <https://the arbitrationbrief.com/2020/04/09/the-impact-of-covid-19-on-arbitration/>

6) <https://the arbitrationbrief.com/2020/04/09/the-impact-of-covid-19-on-arbitration/>



ADVANTAGES OF COVID-19 ON ARBITRATION

With the technological feature being integrated in the arbitration process due to COVID-19, its implementation comes with certain advantages. Here are 5 key advantages that the coronavirus has in fact helped the arbitration industry:

- Virtual arbitration sessions have improved cost efficiencies and procedural timelines, which were always the core benefit of relying on arbitration rather than litigation;
- Implementing technology in arbitration makes the progress faster as it all eliminate unnecessary leaps and just stick to the necessary;

- The use of technology in arbitration has minimized if not abolished the use of paper and reduce carbon footprint;
- With virtual hearings being conducted, it paves the way for opportunities to engage with the counsel and experts located abroad and would limit the need to travel. This definitely develops competitiveness;
- The use of virtual hearings has also minimized major costs that were usually present related to administration such as costs for: visas, temporary work permits, accommodations and even venues. These costs are no longer needed with the adaptation of virtual hearings amid and post COVID-19.⁷

⁷ <https://www.clydeco.com/insight/article/covid-19-arbitration-weathering-the-covid-19-storm-in-the-middle-east>

ARBITRATION AWARDS

MEASURES TAKEN BY INTERNATIONAL ARBITRAL INSTITUTIONS IN RESPONSE TO COVID-19

Several international arbitration institutions have responded to COVID-19 by taking specific measures to ensure the continuity of arbitral proceedings. Here are a few examples of measures taken by international arbitration institutions:

ICC

The international criminal court (ICC) has launched virtual hearings. Therefore, all hearings schedules were either postponed or changed to virtual meetings. All ICC staff were reachable at all times and working remotely. Additionally, the ICC has established a Guidance Note which essentially offers the required steps and help to the parties, counsel and arbitral tribunals such as suggest clauses for cyber-protocols and relevant procedures.⁸

ICSID

The International Centre for Settlement of Investment Disputes (ICSID) has made electronic filings its default procedure for the sole purpose of reducing reliance on paper filing. This default procedure requires solely the electronic copy for the request of filing for arbitration or conciliation or fact finding in addition to encourage all written submission by the parties to be made electronically.⁹

HKIAC

The Hong Kong International Arbitration Centre (HKIAC) has taken measures by launching several webinars. The HKIC remained accessible at all times for all hearings and with accessibility with its employees regarding working from home

based on governmental restrictions. Albeit HKIC is still accepting hard copies, it has encouraged the e-filing delivery method by email. As HKIC remained, all staff members had to wear masks and their temperature was taken on a daily basis.¹⁰

LCIA

All London Court of International Arbitration (LCIA) staff were said to be working remotely until further notice. All parties involved with them were advised to file their requests through the online filing system-<https://onlinefiling.lcia.org/>. The LCIA has notifies their clients that arbitral awards may be delayed and that the parties should plan accordingly.¹¹

SIAC

The Singapore International Arbitration Centre has offered virtual ADR hearing with all their staff working remotely. As for those attending the hearings in person, they are obliged to fill out a health and travel form declaring it and their temperature shall be tested upon landing.

⁸ <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>

⁹ <https://icsid.worldbank.org/en/Pages/News.aspx?CID=359>

¹⁰ <http://arbitrationblog.practicallaw.com/covid-19-arbitrating-in-the-midst-of-a-pandemic/>

¹¹ <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>

MEASURES TAKEN BY THE UAE COURTS AMID COVID-19

The United Arab of Emirates is an arbitration hub in the Middle East and ensuring the continuation of all arbitration hearing is both critical and crucial in those unprecedented times. The UAE encompasses several arbitration courts,

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which includes: TAHKEEM, DIAC, DIFC-LCIA, and ADGM.

TAHKEEM

The Sharjah International Commercial Arbitration Center has continued to fully operate with their team working remotely. They have adapted the email filing procedure and they've implemented the remote payment method in order to ensure all case administration is operating as normal. In addition to the online procedures, the messenger services remain available in the case where hard copies are absolutely mandatory and required.

DIAC

The Dubai International Arbitration Center has embraced the adaptation of a digital culture rather than a physical one in arbitration hearings and has implemented various measures such as all new requests should be submitted through the only DIAC website and all documents submitted by mail.¹² All hearings shall be conducted virtually.

DIFC-LCIA

The DIFC-LCIA has also continued to work remotely. The Center has also activities its online services and their front office remains open with proper measures in place. All hearings are either held electronically or postponed.

ADGAM

The center has closed amid COVID-19; however, all enquiries can be submitted by mail.

¹² <https://www.clydeco.com/insight/article/covid-19-arbitration-weathering-the-covid-19-storm-in-the->

E-ARBITRATION TIPS

- Target videoconferences as if they are truly taking place physically and try to engage with one another as much as

possible, rather than solely relying on evidentiary submissions.

- Try to make the videoconference call as 'humanly' as much as possible. Dress and act as if you're physically there.
- Transcripts should be sent to all parties involved after the video call or hearing.
- Make sure that the platform in which the videoconference or hearing taking records the session for future use and reference.
- As speed and time is of essence of arbitration, when preparing for e-arbitration make sure that the arbitrators have had a proper amount of time to familiarize themselves with your case prior to conducting the video call. The lack of complexity makes the process even faster.
- With the increase of technology and online usage, this raises concerns of cybercrime issues. Therefore, while adapting to online arbitration, make sure to implement proper cybersecurity and data privacy protections.
- When adopting cybersecurity policies, making sure that arbitrator has been given proper training.
- The 2020 Cybersecurity Protocol for International Arbitration have put together certain protocols established by the ICCA, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution. These protocols are aimed at providing awareness in the arbitration community as to how to use online arbitration properly and effectively. Such measures include the implementations of procedures virtually regarding transcripts, recordings or videos and any other documents that may be brought up in hearings.¹³

¹³ <https://www.infosecurity-magazine.com/news/cybersecurity-protocol-arbitration/>



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QUESTIONS & ANSWERS

How does digitalization help in the arbitration process?

There has been major complaints recently that arbitration process is not being as fast as expected causing delays as well as rising in costs.

The integration of digitalization has made the process faster and has minimized the cost for all parties. Additionally, as mentioned previously, digitalization offers the advantage of having virtual hearings where traveling to another country is no longer necessary.

What are some restrictions of virtual hearings?

Although virtual hearings have been effective, there are some restrictions that may cause limitations such as:

- Availability of internet at all times is absolutely necessary. The issue may sound absurd but the availability of internet differs around the world and should not be taken for granted
- The length of virtual meetings may cause everyone involved to lose concentration. Therefore, the length of the meetings should be minimized as much as possible.
- When conducting a virtual hearing, time difference may be a restriction if parties are in different countries. Take that into consideration and find a common ground that suits all.
- In arbitration, an independent witness

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should ideally be present to make sure that the witness is properly sworn. This could not be possible.

What are the options open to businesses involved in arbitration?

As there are advantages to the use of virtual hearings, they're not the solution to every case. Although ideal, some parties may not like its implementation and would want to avoid financial uncertainty in those critical times. Therefore, businesses may be open to other alternatives, here are some:

- Postponing in-person hearings for the time being is the number one option. To resume the hearing will only be subject to when the coronavirus demolishes and it is deemed safe to proceed.
- All issues or at least some issues could be decided on through written documents without the need to conduct an in-person hearing. However, this would have to depend on the issue in dispute as this can simply not work for all disputes. In the case that it can be implemented, the final award might be reduced and an interim award might be used and enable the parties to settle.¹⁴

Is the UAE prepared for Digitalization in arbitration?

The UAE has portrayed an exceptional ability and preparation to adapt to a digital world. The UAE's legal system and electronic evidence is highly supported by technology and is able to cope very well with technological advancements. For instance, Federal Law No. 10 of 1992 related to civil and commercial transactions have stated in Article 17 that electronic signatures shall serve the same force as a hand-written signature. Sub clause 4 of the aforementioned law stipulates



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that all electronic documents, correspondents or writings shall be seen equivalent to soft copies.¹⁵ This portrays the UAE's support for shifting its legal practice to a more digital friendly one.

Will force majeure have an effect on arbitration?

The coronavirus will surely result in an immense amount of cases especially in commercial related ones, all of which force majeure clauses will be relied on to be exempted from liability for delays, failing to meeting contractual obligations and so on.

Many companies will have to deal with arbitration to solve their problems caused by force

majeure. Cases involves in arbitration will raise debates regarding issues such foreseeability, reasonableness, loss and damage.

However, arbitration will undergo its nature as usual and will have to analyze both sides and analyze the reasonableness of the presented arguments.¹⁶

14) <https://www.pinsentmasons.com/out-law/analysis/coronavirus-arbitration-options>

15) <https://www.mondaq.com/Litigation-Mediation-Arbitration/707288/Electronic-Evidence--UAE-And-Saudi-Arabia>

16) https://www.garrigues.com/en_GB/new/will-covid-19-revolutionise-arbitration

ABOUT TAHKEEM

The Sharjah International Commercial Arbitration Center has portrayed a full ability to operate remotely. Tahkeem is one of the leading arbitration centers in the UAE who have been able to adapt to the crisis and shift their work virtually amid the COVID-19 crisis. Tahkeem has shown to be well-equipped with the right tools to adapt to digital dispute resolution.

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