

**INTERNATIONAL COMMERCIAL ARBITRATION IN THE AFTERMATH OF THE PANDEMIC:
A LAW AND ECONOMICS ACCOUNT**

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1. INTRODUCTION

This essay researches the main consequences of the pandemic caused by the COVID-19 virus in the field of international commercial arbitration through an economic analysis of law.¹ This essay conceptualizes international commercial arbitration as an alternative mechanism for dispute resolution, focusing on how the pandemic may modify the incentives for parties in a different set of circumstances.

In such a context, this essay discusses how the pandemic may impact current contracts which are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international commercial arbitration as a final and binding dispute resolution mechanism in their original contract. In addition, this essay discusses which incentives parties may have to include arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance). This essay concludes that, in the aftermath of the COVID-19 pandemic (and it inducing an increased likelihood for contracts to be cancelled/ excused) and related uncertainties in different court systems, it is likely that international commercial arbitration will be even more popular among international business parties as a choice for resolving international legal disputes.

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¹ WORLD HEALTH ORGANIZATION, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (Mar. 11, 2020).

International arbitration is the primary method for resolving disputes between states, corporations, and/or individuals.² Although its popularity continues to grow in this globalized world, it has been used for centuries to resolve international disputes.³ Lew, Mistelis, & Kröll define international arbitration as “a dynamic dispute resolution mechanism varying according to law and international practice,” and most jurisdictions do not rely on a single rigid definition.⁴ International arbitration’s essential features are that it is a private mechanism of dispute resolution designed and controlled by the participating parties to determine their rights and obligations within the scope of their submission. This determination is final and binding among the parties.⁵

Accordingly, arbitration is an alternative to national courts. Its finality and binding nature clearly differentiate it from other alternative dispute resolution (ADR) mechanisms such as mediation and conciliation.⁶ The finality and binding character of arbitration is both a contractual commitment of the parties (the manifestation of the private law nature of arbitration) and the effect of the applicable law (highlighting the public law nature of arbitration).⁷ An implied obligation of arbitration is the exclusion of court proceedings.⁸ In other words, the dispute is not resolved in domestic courts, and, exempting limited cases based on minimum due process considerations, there is no appeals process. These exceptions vary according to national laws and whether the international arbitration proceedings involve an institution. For example, the International Chamber of Commerce (ICC) requires the ICC Court to check the formal requirements of every award, and authorizes a limited review restricted to correction, interpretation, and remission, as determined in Articles 34 and 36 of the 2017 ICC Rules of Arbitration, respectively. Articles 37 and 38 of the United Nations Commission on International Trade Law—UNCITRAL Arbitration Rules (as revised in 2010) allow for review of interpretation and minor corrections of the award.

International arbitration differs according to the nature of the dispute and the parties involved. Although their overall structure might be similar, each type involves specific features.⁹

² N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on international arbitration.*, U.K, Oxf., 1 (2015). (hereinafter “BLACKABY”)

³ G. Born, *International arbitration: Case and materials.* N.Y: W.K., 11(2015). (hereinafter “BORN”)

⁴ J.D.M. Lew, L. Mistelis & S. Kröll, *Comparative international commercial arbitration*, N.L.: K.L.I., 3 (2003).

⁵ *Id.* at 3.

⁶ *Id.* at 13–14.

⁷ *Id.* at 5.

⁸ *Id.* at 5.

⁹ S. KRÖLL, *ELGAR ENCYCLOPEDIA FOR COMPARATIVE LAW* 78 (U.K.: Edward Elgar 2006).

International arbitration is classified as *state arbitration* if between states;¹⁰ as *investment arbitration* if the dispute involves the host state and at least one party is a foreign investor;¹¹ and *international commercial arbitration* if pertaining to transactional disputes of a commercial nature. The last is the focus of this work, because international commercial arbitration comprises a minimum of 90 percent of all international business arbitration.¹²

It is important to note that, due to the nature of the topic involving private parties, public international law references in this essay are used when it is unavoidable. It is noteworthy that the pandemic will affect primarily international commercial arbitration (as detailed further) and also investment arbitration, as governments adopted measures such as regulating prices, restricting travel, preventing foreigners from crossing national borders, compelling private properties to produce certain goods, and restricting travel and commerce.

This essay offers three unique contributions. First, it analyses the impact of the pandemic for international commercial arbitration through a law and economics methodology. Hence, it advances the study of strategic litigation in the international context. Second, it advances the literature on the potential advantages and limitations of international commercial arbitration over litigation in the international setting. Third, the insights presented here might also be applicable to other future emergencies, regardless if another pandemic, global economic crisis,¹³ or climate change related emergencies.¹⁴

In light of the above, this essay offers preliminary considerations regarding the impact of the COVID-19 pandemic on international commercial arbitration. This essay is organized as follows. Part II presents an overview about international commercial arbitration as an alternative dispute resolution mechanism (ADR). Part III discusses how the pandemic may impact current contracts that are silent regarding international arbitration agreements. It further contrasts this legal

¹⁰ *Id.* at. 78.

¹¹ R. D. BISHOP, J.R. CRAWFORD & W.M. REISMAN, FOREIGN INVESTMENT DISPUTES 10 (Netherlands: Wolters Kluwer International 2014). THE ICSID CONVENTION, C. BALTAG (ED.), ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 23 (Netherlands: Wolters Kluwer International 2017).

¹² RALPH H. FOLSOM, PRINCIPLES OF INTERNATIONAL LITIGATION AND ARBITRATION 63 (Minnesota: West Academic 2016). (hereinafter “FOLSOM”)

¹³ INTERNATIONAL ENERGY AGENCY., <https://www.iea.org/topics/covid-19> (April, 2020).

¹⁴ Owen Jones, *Why don't we treat Climate Crisis with the same Urgency as Coronavirus*, THE GUARDIAN (March 5, 2020), <https://www.theguardian.com/commentisfree/2020/mar/05/governments-coronavirus-urgent-climate-crisis>.

scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. Part IV discusses which incentives parties may have in order to include arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance). This essay concludes that, in the aftermath of the COVID-19 pandemic and the increasing likelihood for contracts to have performance excused as well as the potential uncertainties in different court systems around the world, it is likely that international arbitration will be even more popular among international business parties as a choice for finally resolving international legal disputes.

2. AN OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION

First, this Section establishes the nature of international arbitration as based on consent of the parties involved and relate manifestation of their autonomy. Second, it presents the main terminology. It defines arbitration agreement and its main requirements. Third, it addresses the international legal framework supporting international commercial arbitration agreements (the will of the parties to submit their future disputes to arbitration) and international awards (to be bound by the final decision reached by the arbitral tribunal) and efforts taken by disparate jurisdictions in harmonizing their legal system in support of international commercial arbitration.¹⁵

International commercial arbitration is always consensual, with very limited exceptions¹⁶ based on domestic legislation as authorized by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁷ Crucially, this convention also requires the recognition and enforcement of arbitration agreements.¹⁸

¹⁵ C. Arlota, *The Impact of (Mis)Communication on International Commercial Arbitration*, OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (May, 2020), <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-915>

¹⁶ BORN, *supra* note 3, at 34–35.

¹⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3, entered into force 7 June 1959 (New York Convention) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>. (hereinafter the “New York Convention”)

¹⁸ *Id.* Art. I & II.

An arbitration agreement is a written contract, typically a clause in a larger contract (the underlying contract, hereinafter), which requires that the parties must settle legal disputes outside of court; in this context, they must submit to international arbitration.¹⁹ The parties may submit current or future disputes. The former is known as a submission agreement or a *compromis*, but it may be significantly harder to convince parties to submit to arbitration once the contract has been signed and the problems are no longer theoretical. Parties involved in arbitration proceedings are technically denominated claimant (called “plaintiff,” if it were a court case) and respondent (“defendant”).

A valid arbitration agreement requires both an obligation to arbitrate in good faith and an obligation not to litigate (not to resort to the judiciary to resolve the legal dispute).²⁰ An arbitration clause must be in writing for the parties to be able to enforce the arbitral award abroad.²¹ Most jurisdictions²² (either through their domestic laws or their own courts), when considering the severability (separation, i.e., autonomy) between the arbitration agreement and the underlying contract, assume the validity of the arbitration agreement, and allocate to the arbitral tribunal the power to determine if the underlying contract exists, and if it does, its validity and related legal requirements.²³

Most jurisdictions also have enacted domestic statutes differentiating domestic arbitration from international arbitration, aiming at a secure, arbitration-supportive legal system in the international sphere.²⁴ States recognize the need for predictability and certainty in international commerce in light of the significant challenges posed by international arbitration itself, including choice of law, jurisdictional issues, and enforcement uncertainty.²⁵ Therefore, the New York Convention and the vast majority of current national arbitration regulations define *international*

¹⁹ BORN, *supra* note 3, at 85.

²⁰ BORN, *supra* note 3, at 315–334.

²¹ A. G. Maurer, *Settling international commercial disputes through arbitration*, N.L.: W.K.I., 156 (2018). (hereinafter “MAURER”)

²² BLACKABY, *supra* note 2, at 105–106.

²³ BLACKABY, *supra* note 2, at 104.

²⁴ BORN, *supra* note 3, at 45.

²⁵ BORN, *supra* note 3, at 45.

arbitration as that which refers solely to “arbitration agreements that have some sort of *foreign* or *international* connection,” in the words of a world expert.²⁶

The harmonized practices of international arbitration are based on sophisticated rules of procedure, which are administered by institutional arbitrations and supported by domestic legislation significantly influenced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law.²⁷ Such rules have been enacted domestically (entirely or partially), regardless if a country follows the common or the civil law legal tradition.

Countries with legal traditions as different as India, which is preponderantly a common law jurisdiction,²⁸ and Croatia (civil law jurisdiction) use the Model Law as a paradigm for their legislation on international arbitration.²⁹ The procedural rules aim for optimal effectiveness throughout the arbitral process, minimizing judicial intervention; the involvement of courts is limited to assisting the enforcement of arbitration agreements and awards.³⁰ Despite such harmonization efforts, distinctions remain with regard the specific social context in which the international arbitration is taking place, the participants involved, and the nature of the dispute.³¹

Nonetheless, the New York Convention has been considered a very successful unifier in setting the minimum requirements for the validity and enforcement of international arbitration agreements and awards.³² Finally, this study acknowledges that the consequences of the recently signed Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters remain to be seen for international commercial arbitration,³³ because one of international commercial arbitration’s main advantages has been the reciprocity of the enforcement of arbitral agreements and awards under the New York Convention.

²⁶ BORN, *supra* note 3, at 158.

²⁷ BLACKABY, *supra* note 2, at 1.

²⁸ A. Bedi, *Alternative dispute resolution in India*, (D. Campbell (Eds.), Comparative Law Yearbook of International Business (185–203) Netherlands: Wolters Kluwer International 2018), 192.

²⁹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status

³⁰ BLACKABY, *supra* note 2, at 1.

³¹ P. E. Allori, *International arbitration in different settings: Same or different practice?* (Bern: Peter Lang 2007), 223–224.

³² BORN, *supra* note 3, at 24.

³³ The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, (July 2, 2019) <https://files.constantcontact.com/31ff2a09001/37d43e0f-1cd4-4b0b-9928-89e2fd3f6caf.pdf>

3. THE IMPACT OF THE PANDEMIC ON CURRENT CONTRACTS

Part III starts with an outline of the general reasons why parties often chose international arbitration as an alternative dispute mechanism rather than pursue litigation in multiple foreign courts. In light of this basic framework, it discusses the impact of the pandemic on current contracts that are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. The issues discussed assume a significant level of generalization (as we do not control for the legal tradition or the specific stage of development in different jurisdictions). In addition, this Part assumes that parties have access to sophisticated lawyers and that the arbitration agreement was the product of strategic design (not by lack of legal planning). Part III also considers similar effects of the of the pandemic around the globe in a non-exhaustive approach, such as delays in court systems and potential lack of personnel due to health-related effects of the pandemic. This Part concludes that the COVID-19 pandemic is likely to favor parties to pursue arbitration as opposed to litigation in domestic courts regardless if they have a valid arbitration agreement in their original contract or if such contract was silent.

3.1 General Reasons for International Commercial Arbitration

This Section outlines the main reasons why parties consider the alternative dispute mechanism of arbitration instead of litigating in domestic courts (which, potentially, may occur in multiple jurisdictions in the absence of a choice of forum clause and/ or an arbitration agreement). Hence, the first major reason for parties choosing international arbitration is the centrality of the dispute, namely, they only have to present their case once, which is in the arbitral proceedings (and assuming there is no need for the intervention of domestic courts in support of the arbitral proceedings).³⁴

³⁴ G. B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (Netherlands: Wolters Kluwer International (2016), 115–117. (hereinafter “BORN 2016”)

Second, long-arm statutes, which authorize defendants to be sued in courts in jurisdictions where they have had no physical presence, but merely engaged in conduct such as negotiations or even texting, provide a significant incentive for parties to negotiate an arbitration agreement.³⁵

Third, arbitration is a “deluxe” procedure, conducted in a specialized forum, where the arbitrators have technical and (usually) legal expertise on the subject of the dispute. They also have time to hear the case and consider its implications—as opposed to generalist judges.³⁶

Fourth, arbitration is often more cost effective than court proceedings, because a valid arbitration agreement excludes the potential for multiple lawsuits in different jurisdictions—as long as the seat of the arbitration is a state member of the New York Convention. The absence of appellate review (an appeal on the merits of the case) and the fact that arbitration tends to be faster also adds to its cost effectiveness. Arbitral proceedings are conducted in the language(s) selected by the parties in their agreement. This saves time and the expense of hiring official certified translators, which are often required by certain jurisdictions. Moreover, in international arbitration, the defeated party typically bears the legal expenses.³⁷

Fifth, international commercial arbitration proceedings are generally not open to the public. Yet, in light of the recent trend in institutional arbitration rules to increase transparency, parties should emphasize the need for a confidentiality requirement in their arbitration agreement.³⁸ For parties interested in the protection of intellectual rights (including patents and trade secrets) and those who view litigation (or even the commencement of arbitration itself) as potentially damaging to their reputation (either based on cultural views, as it is often the case in Asia,³⁹ or due to their industry or particular trade, such as in boutique firms), an international arbitration agreement specifically addressing confidentiality is extraordinarily valuable.

Sixth, parties may also choose the procedural rules applicable to their arbitral proceedings as long as their agreement encompasses disputes “capable of settlement by arbitration.”⁴⁰ On the other hand, the non-arbitrability doctrine covers matters that cannot be solved by international arbitration in a given jurisdiction. The decision on non-arbitrability is left to each country, as public

³⁵ MAURER, *supra* note 22, at 150.

³⁶ Bühring-Uhle et al., 2005, pp. 105–128.

³⁷ MAURER, *supra* note 22, at 158.

³⁸ MAURER, *supra* note 22, at 159.

³⁹ G. HOFSTEDE, G.J. HOFSTEDE & M. MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (New York: McGraw-Hill 2010), 236–245.

⁴⁰ The New York Convention, arts. II(1) and V(2)(a),.

policy issues are better determined by individual jurisdictions. The rationale for the non-arbitrability doctrine is that it allows each contracting state to the New York Convention to determine the matters of domestic law that require more judicial protection and therefore cannot be arbitrated; these typically reflect concerns based on public interest and policy.⁴¹ Unlike the UNCITRAL Model Law, the Convention opted not to provide an all-encompassing legal framework for the totality of aspects of international arbitration.⁴² Due to the flexibility of the Convention, countries are more assured of their sovereignty regarding which matters must be litigated and which can be resolved in an expedited fashion through arbitration.

Accordingly, parties engaged in international business transactions have important reasons to choose international commercial arbitration over litigation, as such arbitration offers centrality of the disputes, privacy, choices of language and applicable procedural rules, specialized judges with unique technical expertise, and the lack of appeals. The latter factors significantly contribute to a more expedited and cost-effective dispute resolution mechanism.

3.2 Why the Conditions of a Pandemic may support International Commercial Arbitration when the Contract is Silent about an Arbitration Agreement

This Section outlines the main factors that parties involved in an international transaction may consider in the aftermath of the pandemic in a scenario where they did not contemplate an international agreement in writing in their original contract. Technically, the question is if both parties will have interest in a submission agreement, i.e., in celebrating an arbitration agreement when the dispute is no longer conditional, but very concrete.

The pandemic is likely to affect delivery terms, bringing delay in performance of the contract, regardless of the object of such contract. Different industries were affected by the pandemic: contracts involving the tourism industry, the international sale of goods, service contracts for the maintenance of goods, and construction contracts, for instance, all will be negatively impacted by the pandemic. This is the case, because travels have been suspended and

⁴¹ BORN 2016, *supra* note 35, at 87–90.

⁴² BORN, *supra* note 3, at 35.

all delivery systems, including maritime, were subject to significant delays; disruption in transportation abound.⁴³

The situation might be even direr in the energy industry, for example, due to the abundant supply of oil and lower demand.⁴⁴ Seller, thus, may have more incentives to breach at such a low sale price. Nonetheless, as the oil industry routinely establishes relational contracts that cover the parties' expectations over a number of years, rather than a one-time transaction, it is likely that they will have an arbitration clause and a force majeure/escalation clause. This is in significant contrast to a contract involving an international sale of goods, for example, where parties are more likely to have neglected to have an arbitration agreement.

In this context, this Section points out that the strategic behavior⁴⁵ of the parties in pursuing an international arbitration agreement after the dispute is concrete (technically, a submission agreement) depends on several factors, namely: the object of the contract (and if the parties are within the same industry or not), and whether it is a single contract or an installment contract, and the level of disruption caused by the pandemic (if merely logistical and/or also of significant economic nature).

It is noteworthy that the existence of a legal dispute itself increases transaction costs for the involved parties in deciding whether to pursue arbitration. However, it may also be advantageous to all the parties involved to avoid the court system, where their dispute is likely to drag on longer because of cancellations and delays caused by the pandemic (and the expected increase in legal claims it is likely to provoke). Moreover, as presented in Section A, international arbitration offers the parties an option for choosing their procedural rules, including how arbitrators will consider evidence.⁴⁶ Due to the informal and flexible nature of arbitration proceedings, this is likely to be an advantage for all the parties considering a submission agreement and expedite final resolution of their legal disputes.

All in all, it is likely that parties involved in international business transactions will prefer to celebrate a submission agreement centralizing the final resolution of their legal disputes in a

⁴³ Carly A. Philips et al., *Compound Climate Risks in the COVID-19 Pandemic*. *Nature Climate Change*, 10, 586–598, (2020), 586.

⁴⁴ INTERNATIONAL ENERGY AGENCY COVID-19 TOPICS, <https://www.iea.org/topics/covid-19> (April, 2020).

⁴⁵ R. D. COOTER, *THE STRATEGIC CONSTITUTION* (New Jersey: Princeton 2000), 9.

⁴⁶ THE WORKING GROUP ON LEGAL TECH ADOPTION IN INTERNATIONAL ARBITRATION, *Protocol for Online Case Management in International Arbitration*, (July, 2020), 4.

single arbitration instead of potential exposure to litigation in different court systems (all likely more chaotic due to the pandemic).

3.3 Why the Pandemic is likely to advance International Commercial Arbitration in Contracts with an Arbitration Agreement

This Section discusses the main factors which parties commonly consider in deciding whether to actually start their arbitration based on a validly concluded arbitration agreement in their original contract and how the pandemic may change such calculus. It further contrasts this legal scenario with the one in which parties have not contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. It concludes that, all other factors being the same, the pandemic increases the probability of both parties being interested in pursuing arbitration as opposed to litigation in different courts.

The departing point for our analysis is the arbitration agreement celebrated among the parties (either in a bilateral contract or in multiparty contracts). The parties' strategic considerations when celebrating an arbitration agreement (and their process of negotiation) often leads them to determining key provisions of the arbitration agreement, such as choice of law and choice of the arbitral seat (the legal domicile of the arbitration) by selecting the best of each party's least favored options. Regardless of the cultural background of the parties, one party will rarely relinquish their advantage and agree to a seat and/or choice of law provision that works best for the other party, because it would also function worst for the first party. Hence, arbitration agreements tend to be an acceptable solution for all the involved parties, which makes transaction costs low for all parties to obey.⁴⁷

Furthermore, in the international commercial arbitration context (and regardless of the industry involved), parties tend to be unwilling to litigate in courts if a legal dispute arises. This unwillingness is not necessarily due to a particular country's "superior" legal system in which courts obey the rule of law. Rather, foreign parties tend to be uncomfortable pursuing claims in the jurisdiction of the other party, if for no other reason than they assume hometown bias.⁴⁸

⁴⁷ R. POSNER, *ECONOMIC ANALYSIS OF LAW* (New York: Aspen Publishers 2007), 597.

⁴⁸ 28 U.S.C. §1332(a)(1).

In such context, a party that decides to pursue an arbitral claim must initiate it timely and in accordance with all requirements specified in the arbitration agreement, including observing conciliation or mediation first if a multi-tier clause exists. If another party initiates judicial action, the party who wants to pursue arbitration should consider invoking the existence of the arbitration agreement itself so they are not deemed to have waived their right to arbitrate. These are all strategic choices that require careful assessment on a case-by-case basis and effective legal counsel in filing notices in accordance with the arbitration agreement and domestic law on the issue. It is noteworthy that strategic thinking does not authorize legal violations of professional rules of conduct.⁴⁹

In light of the above, it is clear that once a contract has a valid arbitration agreement, parties are expected to submit their legal disputes arising out of such contract to international arbitration. The pro-enforcement bias of arbitration agreements and awards in the New York Convention is evident in the non-arbitrability doctrine (as discussed in Section A of this Part) as well as the public policy exception.⁵⁰ While often invoked in practice, neither exception has been a major obstacle to the enforcement of arbitration agreements and arbitral awards.⁵¹ National courts may refuse to enforce foreign arbitral awards in the absence of a valid arbitration agreement or arbitral jurisdiction, under the New York Convention.⁵²

The New York Convention assumes the validity of arbitration agreements, exempting defenses based on contract formation such as mistake, fraud, unconscionability, unfairness, duress, lack of capacity, and non-arbitrability,⁵³ which are addressed in the enforcement of international arbitration awards.⁵⁴ The majority of jurisdictions tend to presume the validity of arbitration agreements, with the practical effect that such claims are examined by arbitral tribunals—including claims attacking the existence and validity of the arbitration clause itself, rather than the underlying contract, due to the separability of the arbitration agreement.⁵⁵

⁴⁹ 2 RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS (Netherlands: Wolters Kluwer International 2019), 277. (hereinafter “BRAND”)

⁵⁰ New York Convention, arts. V(2)(a) and V(2)(b).

⁵¹ GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING (Netherlands: Wolters Kluwer International 2016), 135.

⁵² New York Convention, arts. V(1)(a) and V(1)(c).

⁵³ New York Convention, arts. II(1), II(3).

⁵⁴ New York Convention, art. V(2)(a).

⁵⁵ BORN 2016, *supra* note 35, at 56.

Considering the legal framework discussed above and the presumption validity of arbitration agreements, the rule is quite clear: arbitration agreements shall be enforced. Because of the certainty provided by the international commercial arbitration system (with the New York Convention and general support of domestic courts), parties are unlikely to depart from their contract, namely, the arbitration agreement and pursue litigation in courts.⁵⁶

Moreover, the pandemic provides additional incentives for the parties to pursue arbitration. This is the case, as discussed in the previous Section, because domestic courts will be busier not only with new claims due to the economic meltdown caused by the pandemic, but also due to the period they have their activities suspended due to quarantines. Here, similar incentives apply vis-à-vis the situation in which parties did not have an arbitration agreement in their original contract.

Those findings are coherent with the economic analysis of law literature which shows that the incentives created by bilateral contracts are superior to those created by unilateral contracts when performances of the parties have interdependent values or when parties are potentially insolvent.⁵⁷ An arbitration agreement is a bilateral contract with performances of the parties contemplating interdependent values (this will be the case, as all the parties involved prefer arbitration over litigation and such choice is also dependent on the others' choice) or when the parties are potentially insolvent (which is not difficult to occur in the aftermath of the pandemic).

Accordingly, the pandemic is likely to contribute to arbitration agreements being enforced by providing extra incentives for the parties to comply with the legal certainty (provided by the legal presumption of validity of arbitration agreements under the New York Convention) and the low transaction costs manifested in such agreements.

4. PROBABLE CONSEQUENCES OF THE PANDEMIC FOR FUTURE CONTRACTS

Part IV discusses which incentives parties may have in order to include arbitration agreements in their future contracts after the pandemic. Likewise to what was discussed in Part III, the arguments assume a significant level of generalization (as we do not control for the legal

⁵⁶ ROBERT. D COOTER, & THOMAS S. ULEN, *LAW AND ECONOMICS* (2016), 400–404.

⁵⁷ Parisi, F. et al. , *Optimal Remedies for Bilateral Contracts*, Minnesota Legal Studies Research Paper No. 7-45, (2007), 14–30.

tradition or specific level of development in different jurisdictions) and the main consequences of the pandemic in a non-exhaustive approach. Part IV also addresses specific considerations of the involved parties when writing future arbitration agreements in the aftermath of the pandemic, such as the specific inclusion of force majeure clauses and its interpretation in light of transnational law concepts. This Part concludes that the COVID-19 pandemic tends to increase the probability of parties celebrating an arbitration agreement in their future contracts, including specific provisions on force majeure.

4.1 Are Future Contracts in the aftermath of the Pandemic more likely to have an Arbitration Agreement?

This Section outlines the impact of the pandemic on future contracts and contends that, all things being equal, after COVID-19 parties should be more willing to celebrate international commercial arbitration agreements for the reasons applicable before, namely, domestic court systems with clogged dockets and the need to expedite resolutions of commercial disputes in a more specialized setting. Moreover, the procedural rules applicable to international commercial arbitration can also be determined by the parties, which is a major advantage for securing not only a faster process, but also one with privacy, more informal and flexible by all accounts, including the hearing and the production of evidence.

At this point, it is worth discussing more details on the taking of evidence and flexibility of international commercial arbitration. International commercial arbitration may be institutional or *ad hoc*. The former involves an arbitral institution whose procedural rules are applicable to the parties' dispute, with administration and supervision of the proceedings implemented by the institution. In *ad hoc* arbitrations, the parties agree to submit their dispute to arbitration without the benefit of a supervising institution. Parties may select a pre-existing set of arbitral procedural rules designated for *ad hoc* arbitrations; if so, they should also designate an appointing authority to choose the arbitrator(s) in the absence of agreement among the parties.⁵⁸ The IBA issues guidelines on evidence taking, which are intended to supplement the legal rules chosen by the parties (whether institutional, *ad hoc*, or any other rule that may be applicable to the arbitration

⁵⁸ BORN 2016, *supra* note 35, at 26–27.

proceedings).⁵⁹ As all international commercial arbitration institutions are private entities,⁶⁰ so they have incentives to act fast and change their procedures in order to adapt to the effects of the pandemic.⁶¹

Hence, this Section contends that parties will opt for balancing flexibility and certainty in the procedural rules applicable to their proceedings, regardless of the type of commercial arbitration (institutional or *ad hoc*). With regard to institutional arbitrations, parties will look to how the major institutions responded to the pandemic and act upon such responses according to what they may assess as the best balance between flexibility and certainty. Importantly, the more flexible (and the more the informal) a particular set of rules may be, the higher the likelihood of potential judicialization in international commercial arbitration proceedings, namely, the interference of domestic courts with the arbitral proceedings. Judicialization, of course, is not cost-effective and may defeat the purpose of international commercial arbitration itself as an alternative dispute resolution mechanism, because it increases delays, bring higher costs, and leads to greater workloads.⁶²

As the pandemic brings incentives for parties to move their hearings online as well as overall remote proceedings with more online sharing of data, this Section outlines the main relevant points that parties should consider. It is noteworthy that when the pandemic struck, online hearings and the use of video-conference were already well advanced in international arbitration while courts around the globe were scrambling to equip themselves with Zoom, for instance.⁶³

First, experts in the field contend that the power of the arbitral tribunal to authorize remote hearings is contingent on the existence of several factors, including: specific authorization granting to such tribunal powers to manage the proceedings as it deems appropriate; whether the applicable law/rules refer to the parties' "*full or reasonable* opportunity to present their case"; if the applicable

⁵⁹ INTERNATIONAL BAR ASSOCIATION, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2010).

⁶⁰ A. S. SWEET & F. GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION* (U.K. Oxford 2017), 45.

⁶¹ INTERNATIONAL CHAMBER OF COMMERCE, <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> (March, 2020).

⁶² Sundaresh MENON, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 5 Asian J. Int. Law 219-245, 25 (2015).

⁶³ George Bermann, *Dispute Resolution in Pandemic Circumstances*, LAW IN THE TIME OF COVID-19, (2020) 168–170.

law/rules consider hearings a mandatory requirement or if arbitral tribunals have the authority to proceed on the basis of documents only, despite parties requesting hearings.⁶⁴ Therefore, parties should specifically address that situation in their future arbitration agreements.

Second, cross-examination online has been traditionally quite contentious. Nonetheless, current renowned literature finds that alleged risks of remote testimony and concerns regarding the body language and the demeanor of witnesses are overstated.⁶⁵ Moreover, there appears to be no successful challenges of an arbitral award due to hearings being conducted remotely, so far.⁶⁶ This, however, does not mean parties will not attempt to do so. Therefore, aiming to avoid potential challenges, incentives point to parties specifically contemplating remote hearings, including cross-examination of witnesses and experts, in their arbitration agreement.

A related concern that is expected to be magnified after the pandemic is cyber intrusion in international commercial arbitration proceedings. The more remote hearings occur, the higher the risk of such intrusions. A survey of the ethical rules governing lawyers shows that, except for Russia, national legislators remain reluctant to extend the duty to incorporate cyber-security-related obligations.⁶⁷ However, the existence of general duties that can be interpreted to include the duty to protect data in general should encompass such obligations. There is a general expectation of confidentiality, regardless of the extent to which the proceedings are deemed private, as parties and lawyers expect that they alone will have access to their communications and case strategy, and arbitrators expect that no one else would attempt to view their previous working drafts or overhear their deliberations.⁶⁸ Therefore, parties should specifically address cyber risk and related obligations in their arbitration agreements.

4.2 Specific Considerations when drafting Future Contracts in the Wake of the Pandemic

The common legal challenges posed by international transactions include difficulties in coping with potential fluctuation caused by natural or market forces that affect factors such as

⁶⁴ Abdel Wahab, *Abdel Wahab's Pandemic Pathway*, GLOBAL ARBITRATION REVIEW ONLINE (May 6, 2020).

⁶⁵ M. Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37 J. Int. Arbitr., 21 (2020).

⁶⁶ *Id.* at 29.

⁶⁷ S. Alekhin, A. Foucard & G. Lourie, *Cybersecurity, international arbitration and the ethical rules and obligations governing the conduct of lawyers: A comparative analysis*, Transnational Dispute Management: Special Issue on Cybersecurity in International Arbitration, 21 (May 2019).

⁶⁸ S. Cohen, & M. Morril, *A call to cyberarms: The international arbitrator's duty to avoid digital intrusion by taking reasonable cybersecurity measures*, 40 Fordham Int. Law J., 981, 994 (2017).

currency, delivery, insurance, and freight and overall costs.⁶⁹ Moreover, international business transactions tend to rely more on e-communication, which may contribute to additional misunderstandings caused by language, interpreters, and what should actually be written down.⁷⁰ Hence, negotiating force majeure clauses in international arbitration agreements is an intricate process. They may be even more complex than negotiating the underlying contract they aim to protect, due to detailed specificities, including their scope and relation with the arbitration agreement, their relation with legal duties imposed by legislation applicable to the main contract,⁷¹ as well as a lack of legal (and cultural) knowledge about arbitration, inherent bias among the negotiating actors, for example.⁷²

In such a context, the more detailed an arbitration agreement establishing a force majeure event is, the higher the transaction costs in negotiating such agreement. That said, parties often agree on such excuse of performance, despite the fact that there is not a single definition of force majeure.⁷³ Common elements allude to an event which occurs after the contract formation and which is beyond the reasonable control of the parties; and the event may cause performance to be more onerous or impossible for one or all the parties. Hence, force majeure clauses may determine the suspension of performance, renegotiation of key elements of the contract, and preclusion of the termination of the contract due to a breach caused by the event or even bringing the contract to an end.⁷⁴ The International Chamber of Commerce Force Majeure Clause 2003 (as the recent updated 2020) do not mention pandemic, as they only referred to epidemic; this, however, does not preclude invocation of such force majeure clause, as pandemics are epidemics of global proportion.⁷⁵

⁶⁹ BRAND, *supra* note 50, at 2.

⁷⁰ J. R. SILKENAT, J. M. ARESTY, & J. KLOSEK, (EDS.), *THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS: A COMPARISON OF CROSS-CULTURAL ISSUES AND SUCCESSFUL APPROACHES* (New York: American Bar Association 2009)

⁷¹ Martins, José Eduardo Figueiredo de Andrade, *Duty to mitigate the loss no Direito Civil brasileiro*. São Paulo: Verbatim, (2015) 224–228.

⁷² O. Lando, *Contracts*, 3 K. Lipstein (Ed.), *International encyclopedia of comparative law*, 13–41 (1986).

⁷³ C. Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 Change of Circumstances, Force Majeure or What?*, Katharina Pistor (Ed.) *Law in the Time of COVID-19*, 155–165, 156 (2020). (hereinafter “TWIGG-FLESNER”)

⁷⁴ TWIGG-FLESNER, *supra* note 74, at 156.

⁷⁵ TWIGG-FLESNER, *supra* note 74, at 157.

The party which tends to be the repetitive player in any transaction is likely to have the advantage in writing the contract draft,⁷⁶ including the tentative provisions of the arbitration agreement and force majeure clauses. The repetitive player is the party who professionally engages in the commercial activity sought: the seller, in a sale of goods transaction; the moneylender, in a lender contract, and so on. Because the seller is the repetitive party, they often write the first proposal. Most sectors use model clauses developed by sophisticated legal counsel and suited to their needs.

An interesting discussion regarding repeated players and domestic litigation in the U.S. court system is worth mentioning. The Priest and Klein model for litigated disputes and disputes that were settled before or during litigation in the United States does not seem applicable to the decisions in international commercial arbitration settings.⁷⁷ The main justification for this understanding is that the advantages of international arbitration over multiple litigation in different courts are applicable to both parties and that settlement might be encouraged even before commencing arbitration (though mediation or conciliation) or at any time later in the arbitration proceedings.

Moreover, as discussed earlier in Part II, arbitration agreements are perceived as the optimum solution for both parties when they celebrated their contract. Besides these specificities, there is prestigious U.S. literature applicable to courts defending that any litigation rate favoring the plaintiff is possible, to the extent that the 50% winning prediction defended by Priest and Klein has very difficult requirements for validation.⁷⁸ Professor Shavell argues that any litigation rate is possible when the parties involved have asymmetric levels of information.⁷⁹ This would be the case for the seller in a given transaction, in particular, if we consider it as a repeated player.⁸⁰

Having established the potential advantage of the repetitive player, this Section turns its analysis to the drafting of international arbitration agreements. This activity is considered a specialized craft, a work of art that involves strategic choices such as the choice of law, choice of forum, excuses of performance, and yet this does not mean the opposing party will accept the

⁷⁶ C. K. ADAMS & P.K. CRAMER, *DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS-BORDER AGREEMENTS GOVERNED BY U.S. LAW* 14 (New York: Wolters Kluwer 2013).

⁷⁷ G. Priest & B. Klein, *The Selection of Disputes for Litigation*, 8 Oxf. J. Leg. Stud. , 1–55 (1984). (hereinafter “PRIEST & KLEIN”)

⁷⁸ S. Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 Oxf. J. Leg. Stud, 493, 495–498 (1996).

⁷⁹ *Id.* at 495–498.

⁸⁰ PRIEST & KLEIN, *supra* note 78, at 28–29.

proposed clause.⁸¹ If parties are not in the same industry, the asymmetry of information will likely be higher, because it would be harder to obtain information about the reputation of the repetitive player. Hence, pertinent concerns about specific sectors are illustrative and relevant for future claims arising out of legitimate expectations of the parties and to the interpretation of the arbitration agreement. The arbitration agreement itself is a contract; as such, it builds on contractual cannons of interpretation: ambiguity is constructed *contra proferentem* (i.e., against the drafter of the provision); specific terms prevail over general terms, giving effect to all parts of the parties' agreement; and trade usage.⁸²

In such a context, parties should include information about their expectations and contractual equilibrium, which may provide guidance for future arbitral panels in assessing claims of excuse of performance and related defenses of the contract itself. Among the principles of the *lex mercatoria* derived from reported arbitral awards, *pacta sunt servanda* ("contracts shall be obeyed") and *rebus sic stantibus* (the mandatory nature of contractual clauses exists as long as the initial set of circumstances among the parties remains the same, without unforeseeable events altering the initial equilibrium of the contract) are noteworthy because they are related to potential excuses of performance, including force majeure events. Nonetheless, these principles on their own are generally insufficient when applied to actual disputes, due to the absence of rules indicating where the application of *pacta sunt servanda* terminates and that of *rebus sic stantibus* begins.⁸³

Accordingly, parties have incentives to actually negotiate provisions on excuse of performance and related liability, and to specifically contemplate pandemics and climate change disruptions from now on in their contracts, as these events appear to become more common.

⁸¹ FOLSOM, *supra* note 13, at 5; S. M. Chesler & K.J. Sneddon, *The transactional lawyer as storyteller*, 15 L.C. & R. 119, 120–121 (2018).

⁸² BORN 2016, *supra* note 35, at 92.

⁸³ A. Samuel, & M. F. Currat, *Jurisdictional problems in international commercial arbitration: A study of Belgian, Dutch, English, French, Swedish, U.S. and West German Law*, Zürich: Schulthess Polygraphischer Verlag, 245 (1989).

5. CONCLUSION

This essay started with an outline of international commercial arbitration. It proceeded to analyze the potential impact of the pandemic in current contracts which are silent regarding international arbitration agreements. It further contrasted this legal scenario with the one in which parties have already contemplated international commercial arbitration as a final and binding dispute resolution mechanism in their original contract. In addition, this essay addressed which incentives parties may have to include in arbitration agreements in their future contracts after the pandemic and related considerations on force majeure (and general clauses on excuse of performance).

Part II presented an overview of international commercial arbitration, introducing basic concepts and applicable terminology in light of arbitral proceedings and the New York Convention dynamics with domestic courts, in particular.

Part III started with an outline of the general reasons why parties often chose international arbitration as an alternative dispute mechanism rather than pursue litigation in multiple foreign courts. In light of this basic framework, it discussed the impact of the pandemic on current contracts that are silent regarding international arbitration agreements. It further contrasts this legal scenario with the one in which parties have already contemplated international arbitration as a final and binding dispute resolution mechanism in their original contract. Part III found that the COVID-19 pandemic is likely to favor parties to pursue arbitration as opposed to litigation in domestic courts regardless if they have a valid arbitration agreement in their original contract or if such contract was silent.

In Part IV, the incentives that parties may have in order to include arbitration agreements in their future contracts after the pandemic. This Part also addressed specific considerations of the involved parties when writing future arbitration agreements in the aftermath of the pandemic, such as the specific inclusion of force majeure clauses and its interpretation in light of transnational law concepts. This Part concluded that the COVID-19 pandemic tends to increase the probability of parties celebrating an arbitration agreement in their future contracts, including specific provisions on force majeure that go beyond pandemic but also include disruptions caused by climate change.

In light of all the arguments discussed previously, this essay concludes that in the aftermath of the COVID-19 pandemic (and its induced increasing likelihood for contracts to be cancelled/

excused) and related uncertainties in different court systems, it is likely that international commercial arbitration will be even more popular among international business parties as a choice for resolving international legal disputes.

Annex I: International Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3, *entered into force* 7 June 1959 (New York Convention). Retrieved from <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>

European Convention on International Commercial Arbitration of 1961 – UN Treaty Series, Vol. 484, p. 364, N. 7041

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded July 2, 2019). Retrieved from <https://files.constantcontact.com/31ff2a09001/37d43e0f-1cd4-4b0b-9928-89e2fd3f6caf.pdf>

Inter-American Convention on International Commercial Arbitration of 13 January 1975. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf>

UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (as revised by the 2010 Amendments). Retrieved from <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

Annex II: Databases on International Commercial Arbitration

For a free database on international awards: International Arbitration Case Law (IACL), which produces summaries of recently released arbitral awards, including investment arbitration: www.transnational-dispute-management.com/casereports.asp

For a free database on the New York Convention, including its history, different versions, authoritative final versions in different languages, and court decisions: <http://www.newyorkconvention.org/>

For free access to cases on the New York Convention and additional UNCITRAL documents, the Case Law on UNCITRAL Texts (CLOUT) website is hosted by the United Nations: <https://uncitral.un.org/>

For a public database providing information on published and unpublished awards and all features of arbitrator decision making, see Arbitrator Intelligence: <https://arbitratorintelligence.com>