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BOOK REVIEW:

INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION

EDITED BY MAXI SCHERER, NIUSCHA BASSIRI, AND MOHAMED S. ABDEL WAHAB

Reviewed by Craig D. Gaver

Louis XVI: “*C’est une grande révolte.*”

Duc de la Rochefoucauld-Liancourt: “*Non, Sire, c’est une grande Révolution.*”¹

Harry Truman: “*You’ve had a revolution.*”

George VI: “*Oh no! We don’t have those here.*”²

I. INTRODUCTION

Is it or is it not? The editors of *International Arbitration and the COVID-19 Revolution* abstained, perhaps wisely, from determining whether the pandemic’s effect on international arbitration manifests a revolution of new fundamental changes or has “merely reinforced existing trends.”³ Instead, they rest safely with the observation that the “COVID-19 crisis has triggered profound and systemic changes.”⁴

Few would disagree with this assessment. Technological advances, including even artificial intelligence, have been assimilated in the field of international arbitration for years. But who would have predicted that nearly all hearings, conferences, and meetings in 2020 would be conducted through electronic means? Indeed, in February 2021, a virtual court hearing featuring a “Zoom cat lawyer,” a hapless attorney bearing the face of a kitten due to video conferencing filters, has gone viral outside of the legal profession.⁵ Prior to the pandemic, few would have been able to

¹ Ferdinand Dreyfus, *Un Philanthrope D’autrefois: La Rochefoucauld-Liancourt, 1747–1827* 509 (Nabu Press 2010) (1903).

² Hugh Dalton, *Diary Entry* (July 28, 1945), in *THE POLITICAL DIARY OF HUGH DALTON, 1918–40, 1945–60* 361 (Ben Pimlott ed., 1987).

³ See generally *INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION* (Maxi Scherer, Niuscha Bassiri, and Mohamed S. Abdel Wahab eds., 2020); see also Preface to *id.* at xxix.

⁴ Preface to Scherer et al., *supra* note 3, at xxix.

⁵ Daniel Victor, ‘I’m Not a Cat,’ Says Lawyer Having Zoom Difficulties, *N.Y. TIMES* (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.



imagine how this issue would arise in the first place.

The authors of the book's individual chapters grapple with various questions relating to the impact of the COVID-19 pandemic on international arbitration practice. For example, are these developments a sea change or something more modest? Are the changes compatible with the current legal framework of international arbitration or do they threaten it? Are the changes extensions or past developments or are they new innovations? Are these changes temporary or will they endure? The book succeeds in recording the strange times and experiences associated with the pandemic and its effect on international arbitration practice, as well as providing nuanced and practical answers and insights into these fundamental questions.

II. THE BOOK

INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION comprises seventeen chapters which touch upon the legal, practical, theoretical, empirical, and sectoral aspects of international arbitration during the pandemic. Even within chapters, the authors and editors do an admirable job of taking a multifaceted approach with each topic addressed and offering practical solutions and guidance.

The most obvious change wrought by the pandemic, as previewed above, has been remote hearings. In Chapter 4, Maxi Scherer sets forth the legal framework for remote hearings, a term preferred for its accuracy to "virtual" or "online" hearings.¹ Although she finds that remote hearings are not a new phenomenon, their expanded use from minor procedural conferences to main merits hearings was a significant development in 2020. At the heart of the debate concerning remote hearings is whether a remote hearing may be imposed against the wishes of an opposing party. The question touches upon a party's right to be heard and right to be treated equally, both fundamental principles in international arbitration. Her examination of the question is supplemented well by the book's appendix, which surveys the laws of common arbitral seats to determine whether a remote hearing can be held against a

¹ Maxi Scherer, *Chapter 4: The Legal Framework of Remote Hearings*, in Scherer et al., *supra* note 3, at 65, 68–72.



party's wishes. Similarly, Erica Stein, in Chapter 9, examines challenges to arbitration awards rendered after remote hearings, focusing on the context of enforcement and annulment proceedings.² As remote hearings and their ensuing awards become more common, a *jurisprudence constante* on the issue will hopefully be established, although there is certainly a clear trend that such awards are fully enforceable.

Several of the chapters are predominantly (though not entirely) retrospective in that they seek to collect and present the experiences of international arbitration participants during 2020. Patricia Shaughnessy, in Chapter 2, and Gary Born, Annelise Day QC, and Hafez Virjee, in Chapter 7, for example, survey and provide empirical feedback from arbitral institutions and users, respectively, on their experiences with remote hearings.³ Rather than speculate, these authors convincingly demonstrate that institutions were flexible and adept in responding in the face of crisis. Other participants, *e.g.*, parties and counsel, accepted these changes in light of the circumstances, even if they were considered less ideal than in-person hearings.⁴ Indeed, some have suggested that there are actually benefits in certain circumstances to remote hearings. Accordingly, as noted by Shaughnessy, although “[i]t is not likely or even desired that virtual hearings become the norm . . . [after the pandemic,] it should become the norm that parties and arbitrators consider virtual hearings.”⁵

Chapters 12 through 17 approach the topic in the context of specific sectors: construction, energy, aviation, TMT, finance, and insurance. Each of these chapters helpfully recount the initial effects of the pandemic on certain sectors, as well as survey what disputes have and might arise as a result of the COVID-19 pandemic. Further, each chapter serves as a useful summary introduction to the sector in

² Erica Stein, Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings, in Scherer et al., *supra* note 3, at 167.

³ Patricia Louise Shaughnessy, Chapter 2: Initiating and Administering Arbitration Remotely, in Scherer et al., *supra* note 3, at 27; Gary Born, et al., Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views, in Scherer et al., *supra* note 3, at 137.

⁴ See, *e.g.*, Born, et al., *supra* note 8, at 144–49.

⁵ Shaughnessy, *supra* note 8, at 46.



general. These chapters also provide insightful overviews of applicable legal doctrines related to such disputes, such as *force majeure*, change-in-law clauses, frustration or impossibility/impracticability. However, without discounting the different effect each of those doctrines might have in different sectors, it might have been helpful to dedicate a chapter of the book to a comparative survey of those important doctrines. Indeed, it is not until page 8 of the book that the term “*force majeure*” first appears, even though this was often the central (at least initially) focus relating to disputes during the pandemic. This centrality deserves a detailed examination of the doctrine’s application in pandemic related disputes and issues.

Certain chapters are highly practical related to remote hearing practice and procedure. In Chapter 5, for example, Niuscha Bassiri offers a template procedural order to ensure that a remote hearing does not neglect important considerations, such as a pre-hearing test videoconference, the procedural sequence, hardware and software, etiquette, evidence, and document management.⁶ In Chapter 6, Wendy Miles QC updates a Toby Landau QC lecture on witness testimony to provide helpful advice for advocacy, witness preparation, and cross-examination under the unique circumstances and challenges of remote hearings.⁷ In Chapter 3, Catherine A. Rogers and Fahira Brodlija examine what considerations the pandemic has had or ought to have on the selection and appointment of arbitrators.⁸

Other chapters are more theoretical and discuss specific legal issues. For example, in Chapter 8, Erik Schäfer considers the promise and challenges of the e-signature of arbitral awards, thus eliminating the tyranny of distance.⁹ Remote

⁶ Niuscha Bassiri, Chapter 5: Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders, in Scherer et al., *supra* note 3, at 105.

⁷ Wendy Miles, Chapter 6: Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges, in Scherer et al., *supra* note 3, at 121 (citing Toby Landau QC, Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration, Kaplan Lecture, NEIL KAPLAN, <https://www.neil-kaplan.com/kaplan-lecture> (click hyperlink for 2010 Toby Landau QC lecture)).

⁸ Catherine A. Rogers & Fahira Brodlija, Chapter 3: Arbitrator Appointments in the Age of COVID-19, in Scherer et al., *supra* note 3, at 49.

⁹ Erik Schäfer, Chapter 8: E-Signature of Arbitral Awards, in Scherer et al., *supra* note 3, at 151.



hearings also raise obvious questions as to confidentiality and security; and Schäfer provides technical insight into digital signatures, as well as an illustration of their treatment by German civil law, in an easily digestible way.¹⁰ He also discusses cybersecurity, an extremely important topic.

Returning to the initial question posited above, the authors of Chapter 11 assert that “the future of international arbitration is not over yet,” likening the effect of COVID-19 on the field to that of the Chicxulub asteroid’s impact on Earth: it was a significant event in itself, to be sure, but it also provides the starkest delineation between what came before and after. The authors applaud the democratizing effects of remote hearings and warn not to take these changes for granted or let them backslide.¹¹

This discussion in Chapter 11 is useful for illustrating one of the few shortcomings of the book. The impressive list of 28 contributors spans a number of national jurisdictions, allowing the authors to provide sophisticated insight into the law and practice of their home jurisdictions, including Egypt, France, Germany, the UK, the US, and others. On the other hand, only three of those 28 contributors appear to be based outside Europe or North America. Although certain other jurisdictions are discussed in passing, it would have been interesting to highlight the unique pandemic experiences of those in other parts of the world and provide a more diverse set of reference points to this discussion.

III. CONCLUSION

Overall, *International Arbitration and the COVID-19 Revolution* succeeds in capturing the international arbitration community’s response to the unforeseen, chaotic challenge of the pandemic. No doubt, the book will be consulted frequently when considering novel legal questions the pandemic has raised, but it is even more impressive as a practical guide: It is an indispensable practice resource for managing

¹⁰ *Id.* at 154–62.

¹¹ See, e.g., Ema Vidak-Gojkovic & Michael McIlwrath, Chapter 11: The COVID-19 Revolution: The Future of International Arbitration is not Over Yet, in Scherer et al., *supra* note 3, at 191, 198–201.



remote hearings and addresses other issues raised by the pandemic. And since the book contains practical, distilled wisdom from leading practitioners, it also provides important insights for solving future challenges international arbitration will surely face in the coming years.¹²



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¹² For example, in Chapter 1, Mohamed Abdel Wahab discusses the field of crisis management and the meaning and conduct of dispute resolution in the wake of a crisis. Mohamed S. Abdel Wahab, *Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis*, in Scherer et al., *supra* note 3, at 1.



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