



International Arbitration in a Post-Pandemic World: A Look at 2022 Trends

By the IMS Insights Editor

The prevalence of international investment and trade has led to more complex relationships between businesses, investors, and governments, and a subsequent increase in cross-border disputes. International arbitration has become the most common method of dispute resolution when parties are from different countries.

International arbitration is an alternative to litigation and eliminates the need for one party to argue at a disadvantage in a foreign jurisdiction. Arbitration awards are enforceable under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly called the New York Convention), a multilateral treaty for the enforcement of arbitral awards to which over 150 states (nations) are party. This comprises most of the developed world. International arbitration has different rules than domestic arbitration and has its own non-country-specific standards of ethical conduct.

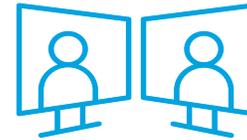
The current economic environment that global companies must operate within has been shaped by a myriad of factors, but there are a couple of clear standouts—namely COVID and the war in Ukraine. Combined with advancements in third-party funding and arbitration center rules, these trends emphasize the value of international arbitration in a post-pandemic world.

COVID Has Created More Disputes and Procedural Adaptations

While many of us hoped to be on the road to recovery by now, COVID continues to have a huge effect on our lives and the business environment. The aftershock of pandemic lockdowns is shuddering through the business collective across the globe, in all sectors and industries.

The pandemic has caused massive disruptions in supply chains globally, leading to delays and cost increases that will likely continue to be a source of new arbitration disputes. Breach of contract claims stemming from the inability to meet contractual obligations are on the rise, as are breach of contract defenses to non-performance caused by COVID mandates and restrictions.

In the US, courts generally were closed for most of 2020 and 2021. Now a backlog of cases is being sorted through. In London, where more people are working from home than in any other city in the world, many tribunals continued proceedings with virtual hearings, and yet arbitrations are down in 2022. This may be a short-term result of the recessionary economy, which has a direct effect on corporate behavior. Stalled arbitration work will eventually resume, as both US and London arbitration dockets are teeing up for 2023.



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The post-pandemic “new normal” includes hybrid work schedules. While virtual hearings were the norm in 2020 and 2021 in international arbitrations, there is an increasing interest in getting back to face-to-face proceedings. In the immediate term, there will likely be virtual and hybrid arbitration hearings taking place in 2022.

The War in Ukraine Is a Humanitarian Crisis and a Business Disrupter

The Russian war on Ukraine has severely compromised the international trade of food supplies, reset global access to energy, and disrupted the movement of goods via sea and air. Sanctions were imposed on Russian banks by EU nations, the US, and even a few normally neutral countries like Switzerland and Singapore, in an effort to cripple the Russian economy. Major multinational companies, including Apple, IKEA, ExxonMobil, and General Motors, have decided themselves to apply sanctions to Russia. Many companies pulled out of Russia because of the devalued monetary system and an uncertain business environment.

The ripple effect will be significant and is likely to produce a surge in international business disputes. Anecdotally, many London law firms represent Russian clients, which may account for a stalling of some dispute claims until the war is over and sanctions are lifted.

Third-Party Funding

In many instances, costs are an important consideration when deciding whether to commence or to continue an arbitration. As with litigation, resolving a dispute through international arbitration can be time-consuming and expensive. This can be particularly challenging to entities who have actionable cross-border disputes but need to maintain liquidity or otherwise manage risk.

Third-party funding (or TPF) involves partnering with another party—unconnected to the dispute—who agrees to pay for arbitration costs in exchange for an agreed amount once an award is determined. Third-party funders provide capital to law firms, corporations, and claimants. If the case fails, the funder is not entitled to payment. Notably, some arbitral tribunals may award successful claimants their costs of procuring TPF.



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Securing TPF can be tricky. Generally, the funder looks for a threefold return on their investment. They want legal costs to be low and the issues to be straightforward to limit their risk. The third-party funder receives a percentage of compensation, which can be between 25% and 45% of the award. Most often, the TPF institution expects the demand to be significant as a prerequisite to funding, usually not less than \$5 million USD. The one-page engagement agreements that used to be sufficient for arbitration are now reviewed and rewritten by third-party funders, which can be private equity firms or investment groups. They usually require an extensive legal memorandum outlining the dispute, which they will evaluate before committing funds.

Many TPF institutions raise and directly invest their own capital, though third-party fund brokers exist to connect parties to funding sources. There are even third-party financing institutions that underwrite commercial dispute insurance to cover the unsuccessful party who is faced with paying their own legal bills and is liable for the opposing party's costs as well. There is also a growing market for the sale of arbitration awards, which expedites the successful party's receipt of money without the risk and cost of enforcement.

Key arbitration jurisdictions such as Singapore and Hong Kong have recognized TPF for international disputes. Parties may or may not have to disclose their TPF status, depending on which arbitral institution they are using.

Arbitration Centers Are Revamping Rules

It is common for international disputes to be heard in arbitration centers. While rules vary from center to center, arbitration is generally a private proceeding and can be quicker and more flexible than litigation.

ICJ & PCA

The Peace Palace located in The Hague, the Netherlands, was originally built to handle state-state disputes. Today it is the arbitral seat for the United Nations International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA).

Tribunals resolve claims involving various combinations of states, state entities, intergovernmental organizations, and private parties. They are currently hearing disputes between Russia and Ukraine related to military activities.

LCIA, ICC, SIAC, & HKIAC

The arbitration centers in London (LCIA), Paris (ICC), Singapore (SIAC), and Hong Kong (HKIAC) are the top arbitral centers for international arbitrations. Requests for arbitration at LCIA decreased by 21% in 2021, compared to 2020 when the center reported its highest number of cases, but referrals have remained steady overall during the last decade and are returning to numbers seen in 2019. The Australian Centre for International Commercial Arbitration (ACICA) has a growing reputation, particularly in the Asia/Pacific region, for providing an alternative to either HKIAC or SIAC.

ICSID

The American Arbitration Association International Centre for the Settlement of Investment Disputes (ICSID) in Washington, DC, handles only investor-state dispute resolution. Long-awaited new ICSID rules—released on June 22, 2022, and effective July 1, 2022—are designed to make cases more efficient through case management by expediting case timelines and increasing the transparency of decisions whilst maintaining the privacy of the parties.

ICC

The International Chamber of Commerce (ICC) in Paris issued revised arbitration rules that went into effect on January 1, 2021. The ICC Annual Report is expected to be released in August 2022 with dispute resolution statistics for 2021 and an overview of the cases administered by the ICC International Court of Arbitration and the ICC International Centre for Alternative Dispute Resolution.

Choosing Your Arbitration Venue

New procedural rules for streamlining the claims process and technical adaptations like [virtual and hybrid hearings](#) are positive improvements and are appearing in new guidelines in various jurisdictions. However, each arbitration center has different regulations, such as those related to privacy and confidentiality. Parties should take the advice of counsel familiar with the different seats of arbitration to ensure that their dispute is referred to the institution most likely to be suitable for their cause of action.



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In Conclusion

When it comes to complicated global disputes, the case for international arbitration is clear. Ongoing supply chain issues, expense increases, and war-related sanctions are leading to more cross-border conflicts—particularly contract breaches—and courts are still recovering from a backlog of pandemic-era matters. Additionally, advancements in third-party capital funding provide an opportunity to mitigate financial risk during arbitration proceedings. With the added efficiency and privacy of this alternative dispute resolution approach, it can be a strategic alternative to traditional litigation for companies and attorneys worldwide.

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