

THE IMPACT OF COVID-19 ON INTERNATIONAL ARBITRATION—HICCUP OR TURNING POINT?

Stephan Wilske^{*}

*“I was lying in a burned out basement
With the full moon in my eyes
I was hoping for replacement
When the sun burst through the sky”¹*

Neil Young, *After the Goldrush*

^{*} Partner, Gleiss Lutz, Stuttgart (Germany); FCI Arb, admitted to the New York and German bar as well as to the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the Second Circuit; Maîtrise en droit, Université d’Aix-Marseille III, France; LL.M. (The University of Chicago; Casper Platt Award); Dr. iur (Tübingen); Diploma in International Arbitration (Chartered Institute of Arbitrators); lecturer at the Universities of Heidelberg and Jena; Visiting Professor at the National Taiwan University, College of Law (Spring 2010); Advisory Committee Member of the Swiss Arbitration Academy. Senior Committee Member of the Contemporary Asia Arbitration Journal. Since 2011, he has been a member of the American Law Institute (ALI), since 2016 a member of the Singapore International Arbitration Centre Users Council, since 2018 a fellow of the Asian Institute of Alternative Dispute Resolution (AIADR), and since 2019 a Vice President of the CAAI Court of Arbitration and a member of the ICC Task Force “*Addressing Issues of Corruption in International Arbitration*”. This paper was supposed to be presented at the 2020 Taipei International Conference on Arbitration and Mediation (October 15 and 16, 2020) which was canceled because of the COVID-19 pandemic in May 2020. As usual, many thanks go to Yu-fen Chang for her sharing of Chinese wisdom, my colleague Todd J. Fox for valuable comments and a critical review, and to Nicole Rohbeck and Cornelia Gauch for their invaluable assistance in patiently formatting the work of my various night shifts. For all errors and omissions, the author assumes sole responsibility. He can be reached at: stephan.wilske@gleisslutz.com. This paper was completed on 26 May 2020.

¹ *After the Goldrush* is the second track of Neil Young’s third studio album also entitled *After the Goldrush* that was released on 19 September 1970 by Reprise. The track was written by Neil Young.

ABSTRACT

COVID-19 had an immediate and significant impact on the practice of international arbitration. Nevertheless, arbitral institutions, arbitral tribunals, counsel and other participants learned quickly how to deal with this new challenge. The crucial question is whether there will be long-term impacts by these COVID-19 experiences on international arbitration even once this pandemic is over. The spontaneous and probably correct answer would be “Yes”. Most probably, more elements of a typical arbitration that were based on physical presence will from now on occur contactless, i.e. in virtual reality. However, it is not only helpful but also necessary to identify which elements of international arbitration could easily take place in virtual reality and for which elements physical presence is and remains desirable or maybe even indispensable. In the end, COVID-19 will most probably speed up processes aimed at more efficiency that had already commenced prior to the outbreak of COVID-19, but will not change the core elements of international arbitration, i.e. the search for impartial and independent and—hopefully in most cases fair and just—decision-making in cross-border disputes through a voluntary and flexible process.

KEYWORDS: *African Arbitration Academy, American Arbitration Association-International Centre for Dispute Resolution, Arbitration Institute of the Stockholm Chamber of Commerce, Australian Centre for International Commercial Arbitration, Chartered Institute of Arbitrators, China International Economic and Trade Arbitration Commission, Chinese Arbitration Association, commercial arbitration, compensation, complexity problem, contactless arbitration, COVID-19, distress, “documents only” arbitration, due process risks, flexibility, force majeure, foreign investors, frustration of purpose, full protection and security, Hong Kong International Arbitration Centre, human touch, International Centre for Settlement of Investment Disputes, International Court of Arbitration at the International Chamber of Commerce, investment arbitration, Istanbul Arbitration Centre, Living in a Ghost Town, London Court of International Arbitration, material adverse events, necessity, non-discrimination, physical hearings, privacy, public health exception, Seoul International Dispute Resolution Center, Singapore International Arbitration Centre, state of emergency, technocrats, Vienna International Arbitral Centre, virtual hearings, webinar, Willem C. Vis Moot Court Competition*