

Sidestep COVID-19 Judicial Logjams by Converting Litigation to Arbitration

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Lea Haber Kuck

Partner / New York
212.735.2978
lea.kuck@skadden.com

Julie Bédard

Partner / New York / São Paulo
212.735.3236
julie.bedard@skadden.com

Betsy A. Hellmann

Counsel / New York
212.735.2590
betsy.hellmann@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

Civil litigation in many of the nation's busiest commercial centers has been disrupted to varying degrees by measures to combat the COVID-19 virus. When the courts resume normal operations, there is expected to be a backlog of civil matters requiring judicial attention, which may take a backseat to pending criminal matters. At the same time, new disputes are arising between commercial parties as a consequence of the pandemic — concerning, for example, whether one party's failure to perform under a contract is excused by a claim of *force majeure* or the doctrines of frustration and impossibility, whether a party's actions were negligent in the context of the coronavirus outbreak, or whether a contractual price adjustment has been triggered.

In the circumstances, parties may want to consider entering into arbitration submission agreements, which can be used after a dispute arises to have it resolved through arbitration — even if the parties had not previously contemplated arbitrating their disputes. Such agreements can take the form of a simple agreement to arbitrate a specific dispute or an amendment to an existing contract to include an arbitration clause, and can be used both to resolve new disputes and to convert a pending lawsuit to arbitration.

Such agreements can be tailored to the specific needs of the parties. The parties can choose to have the dispute administered by a major domestic or international arbitral institution, all of which continue to function during the pandemic, or to arbitrate on an *ad hoc* basis. In either case, the parties can work with experienced arbitration counsel to design a process that meets their specific needs, including the scope and speed of the arbitration and the parameters of any discovery or disclosure. The parties also can specify the number and the qualifications of the arbitrators, or even name the arbitrators themselves, in order to ensure that the chosen decision-makers have the time and experience to devote to the parties' particular dispute.

Well before the pandemic, the arbitration community was engaged in a discussion about the use of technology to make arbitration proceedings more efficient and secure. For example, in 2019, the International Bar Association's Arb-40 Subcommittee produced a guide to "Technology Resources for Arbitration Practitioners" and the International Council for Commercial Arbitration, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution released the "Protocol on Cybersecurity in International Arbitration." Arbitral institutions and experienced arbitrators are thus well-equipped to use technology to

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proceed notwithstanding restrictions on travel and meetings. The arbitral rules also provide for, and experienced arbitrators are well-versed in, methods to resolve disputes primarily on written submissions.

The flexibility of the arbitral process and the ability to tailor it to a particular dispute may make arbitration an attractive option for resolving disputes and helping parties move their businesses forward during this challenging time.