

# The Unforgiveable ADR Error

For public health reasons, 2020 has witnessed an increase in use of telephone and video-link hearings for those involved in arbitration and certain ongoing court cases. This development was a reaction to the inability to hold physical hearings. Regardless of how permanent these changes are, such steps should be supported by an increased focus on the agreed or acceptable duration of arbitrations. Proactively capping how long an arbitration will last is a step that is within parties' powers but has been invariably overlooked.

Pour des raisons de santé publique, 2020 a été témoin d'une augmentation du recours aux audiences téléphoniques et par liaison vidéo pour les personnes impliquées dans l'arbitrage et certaines affaires judiciaires en cours. Cette évolution s'explique par l'impossibilité de tenir des audiences physiques. Quelle que soit la durée de ces changements, ces mesures devraient être soutenues par une attention accrue sur la durée convenue ou acceptable des arbitrages. Limiter de manière proactive la durée d'un arbitrage est une étape qui relève des pouvoirs des parties mais qui a toujours été négligée.



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## Introduction

The Mexican artist Frida Kahlo noted "Nothing is absolute. Everything changes, everything moves, everything revolves." It will perhaps be seen as uncontroversial, to many, if it is suggested that the rate of change in Alternative Dispute Resolution<sup>1</sup> (ADR) proceeds at a slow pace. The nature of disputes is such that they often become all-encompassing and lawyers segue from one dispute to the other. Busy lawyers often do not dwell on changing the process; rather they are pressed by successive clients to deal with dispute resolution under prevailing conditions. There have been recent and dramatic changes to how dispute hearings are managed. But it is suggested, regardless of how permanent those changes are, that such steps should be supported by an increased focus on the agreed or acceptable duration of arbitrations. In examining this issue, we suggest there are obvious advantages in knowing where the "full-stop" will be placed.

1. The term Alternative Dispute Resolution is preferred to that of Appropriate Dispute Resolution or Amicable Dispute Resolution.

## Recent Changes to Dispute Resolution Practice and Procedure

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Disruption to normal day to day life in the first quarter of 2020, for public health reasons,<sup>2</sup> has seen an increase in use of telephone and video-link hearings for those involved in arbitration and certain ongoing court cases. It may be that these enforced changes in habits will continue in some degree when the present public health crisis abates. For that reason, it is not proposed to suggest in this article what "best practice" may be in relation to virtual hearings conducted by video or telephone.

The existing commentary offered by ADR institutions, and others who offer suggestions on such matters, is likely to be buttressed by additional comment later this year and thereafter.<sup>3</sup> What we can say now, is that these institutions are joined in a common purpose to keep arbitrations on track and to encourage open and constructive collaboration in these testing times.<sup>4</sup> But this development was reactive due to an inability to hold physical hearings. Changing the format of an arbitration hearing to a virtual one may well be advantageous, especially in small value disputes. Perceived savings in time and cost that arise from the lack of a need to meet physically will in some low to medium value cases win out over foregoing the traditional advantages of face-to-face hearings. However, the developments are uncertain as to their final form and will depend on a range of issues such as technological capabilities and cultural differences. On the other hand, proactively capping how long an arbitration will last is a step that is within parties' powers but, it is suggested, invariably overlooked.<sup>5</sup>

## Expedited Arbitration

*Many arbitrations can take 18 months to conclude from the date of the appointment of the Tribunal.*

Expedited arbitration does "what it says on the tin" and caps the length of the process. Many arbitrations can take 18 months to

conclude from the date of the appointment of the Tribunal.<sup>6</sup> Parties involved in an arbitration can find it very disruptive. Many SMEs in the GCC region will be aware of the loss of time over a year and a half or more as the energy devoted to the arbitration could be deployed elsewhere. Legal costs obviously arise as well, and the time span just quoted does not allow for the initial period after a dispute breaks out and before proceedings formally commence. Dr. Hamish Lal, an International Construction Partner at Akin Gump Strauss Hauer & Feld who often handles matters in the GCC, notes:

"There are often disputes in the Gulf Cooperation Council region which would have been better served by the parties availing on an expedited arbitration but which in fact proceed at an orthodox procedural timetable. I would expect there to be greater use of this temporal approach in the future, but it will not always be a suitable approach—of course each case needs to be considered on its own pre-verse commercial and technical facts. Some parties dealing with the present challenges caused by the COVID-19 pandemic may now give greater thought to moving more quickly than in the past."<sup>7</sup>

## Institutional Rules versus Ad Hoc Expedited Arbitrations

*Expedited proceedings will be an ideal route for straightforward small claims, especially those related to real estate disputes, if the amount in dispute is less than AED 2 million.*

Looking at two arbitral institution's rules in the GCC region, we see that article 18 of the Dubai International Arbitration Centre (DIAC)<sup>8</sup> Rules allows a party to apply for expedited proceedings if the claim value is less than AED 2 million (approximately USD 550,000) exclusive of interest and arbitration costs.<sup>9</sup> The application must be made before the constitution of the tribunal. The appointment of a sole arbitrator will be made in seven days after the advance on costs is fully paid. The arbitrator will have to issue the final award within three months. In addition to the request for arbitration and answer to the request for arbitration, the parties are to submit their statement of claim and statement of defence simultaneously within 15 days, and the award is to be rendered based on the documents alone. Expedited proceedings will be an ideal route for straightforward small claims, especially those related to real estate disputes, if the amount in dispute is less than AED 2 million.

2. From around the middle of March, many courts both inside and outside the GCC region ceased to sit in the normal way due to public health issues arising from the 2020 COVID-19 crisis.

3. Global Arbitration Review's online edition of 27 March 2020 noted that "Jones calls for sharing of virtual hearing knowhow."

4. See Joint Statement of 13 ADR Institutions at: [https://www.hkiac.org/sites/default/files/ck\\_filebrowser/PDF/News/Covid-19%20Joint%20Statement.pdf](https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/News/Covid-19%20Joint%20Statement.pdf) (accessed on April 17, 2020).

5. The authors can offer no empirical basis for this contention but rely on their mutual professional experience.

6. While as a general rule due to the very nature of ADR processes it is frequently difficult to obtain statistics on the practice of international arbitration the regular surveys run by Queen Mary University in London do provide helpful information. See <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey?pageNumber=1> (accessed on 10 April 2020).

7. Dr Lal's conversation with the authors on 10 April 2020 Dr. Lal can be confirmed at [Hamish.Lal@akingump.com](mailto:Hamish.Lal@akingump.com).

8. <http://www.diac.ae/idiac/> (accessed on 10 April 2020).

9. For further discussion of recent caselaw that has created uncertainty over the issue of an arbitral tribunal awarding legal costs in a UAE seated arbitration See [inter alia https://cms.law/en/are/blogs/law-now-blog/arbitration-in-the-uae-curbs-on-the-awarding-of-legal-costs](https://cms.law/en/are/blogs/law-now-blog/arbitration-in-the-uae-curbs-on-the-awarding-of-legal-costs) (accessed on 10 April 2020).

The International Chamber of Commerce (ICC)<sup>10</sup> Arbitration Rules were amended in 2017 and specifically introduced an expedited procedure providing for a streamlined arbitration with a reduced scale of fees, which applies automatically in cases where the disputed sum does not exceed USD 2 million unless the parties decide to opt out. The expedited rules (article 30 and Appendix VI)<sup>11</sup> are also available on an opt-in basis for higher-value cases.

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It is the case that those who are involved in ad-hoc arbitrations which do not automatically fall under the umbrella of institutions such as DIAC or ICC can agree bespoke rules to allow for expedited arbitrations and/or they can adopt other institutional rules. In very particular circumstances, it could be possible to agree the terms, and time span, to an expedited arbitration that would not already not be captured by generic rules. Significant disputes can be resolved very quickly indeed and well within the three-month time frame already referred to. A well-known example is the work done by the Court of Arbitration for Sport<sup>12</sup> at major international sporting events such as the Olympics, where cases are turned around in 24 hours from the lodging of the application to arbitrate save in exceptional cases.<sup>13</sup>

10. Which has ten National Committees in the Middle East and eight National Committees throughout Africa.

11. See <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (accessed on 17 April 2020).

12. <https://www.tas-cas.org/en/index.html> (accessed on 10 April 2020).

13. See Ad Hoc Rules, art. 18 at <https://www.tas-cas.org/en/arbitration/ad-hoc-division.html> (accessed on 17 April 2020).

## Conclusion

*A particularly appropriate time to use an expedited arbitral process will be as part of a multi-tier dispute clause.*

The obvious, as Agatha Christie noted, can be overlooked and where this is the case, it can be according to Christie an "Unforgiveable Error". An expedited arbitral timetable can be particularly attractive to some but not all users of arbitration. The necessity to focus extensively on just one case over a sustained period will not suit all legal representatives. In a certain percentage of cases, some users of dispute resolution processes will be involved in multiple cases at any one time and, like lawyers, may not welcome an expedited process, or indeed a particular case will not suit expedition. A particularly appropriate time to use an expedited arbitral process will be as part of a multi-tier dispute clause. Not all disputes will be resolved by mediation.<sup>14</sup> Where parties come out the other end of a mediation and still need to resolve their dispute, they may each wish—having anticipated a possible settlement in the earlier process—to continue at pace in the subsequent arbitration. While it is possible to use shorter—or indeed longer—time frames, many expedited processes look at a period of between three months and/or up to 99 days. We are told COVID-19 will have many significant changes on how the world operates in the future. It is to be expected that there will be changes in the resolution of disputes.

14. Commentary on the success of mediations starts off on the premise that the parties participating in the mediation are *bona fide*. In such circumstances it is suggested that 60-80% of mediations are successful. It follows therefore that 20-40% of mediations do not work. Moreover, the nature of some disputes is such that they are not suitable for resolution by mediation and/or a participant may not be *bona fide*.

شهد عام 2020، لأسباب متعلقة بالصحة العامة، زيادة في استخدام الهواتف وروابط الفيديو في جلسات استماع قضايا التحكيم وقضايا أخرى جارية. كان هذا التطور رد فعل على عدم القدرة لإجراء جلسات استماع بالحضور الشخصي. بصرف النظر عن مدى ديمومة هذه التغييرات إلا أنه من الضروري أن يتم دعمها مع تركيز خاص على المدة المقبولة للانتهاء من نظر قضايا التحكيم. القدرة على المبادرة لتحديد سقف زمني للتحكيم هي ضمن سلطات الأطراف المعنية إلا أن ذلك الأمر طالما تم تجاهله

## BIOGRAPHY

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ADR – Expedited Procedures  
Règlement extrajudiciaire des différends  
– Procédures accélérées