

COVID-19 SUPERCHARGES DIGITISATION OF ARBITRATION AT A GLOBAL LEVEL

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Legal Briefings

As the pandemic fires up legal tech use in international arbitration, we assess what's on offer

The arbitration community has steadily adopted new technologies over time to assist in the resolution of disputes. For example, it has become fairly commonplace for case management conferences to be run using virtual meetings or video conferencing, and it is not uncommon – where the circumstances justify it – for cross-examination of some witnesses and experts to take place remotely. The international nature of disputes has also made electronic document storage, trial presentation and electronic bundling a practical option for many arbitrations. All that being said, until very recently, remote hearings at the substantive stages of the case remained the exception rather than the norm and printed hearing bundles remained commonplace.

The COVID-19 pandemic has created an unprecedented need for arbitral institutions to adapt at very short notice to new and different ways of working, and offer solutions to parties and practitioners that will enable disputes to continue to be resolved in a time of quarantine and enforced social distancing. The leading arbitral institutions have issued a joint statement encouraging parties and tribunals to be constructive in their approach to the challenges presented by COVID-19. Many arbitral institutions have come up with several innovative responses, enabling cases to be filed, parties and tribunals to communicate and, where necessary, for merits hearings to be conducted virtually. This blog piece considers some of those new processes, before setting out the specific offerings of key arbitral institutions.

A table listing key institutions' specific offerings (as at 15 April) can be viewed and downloaded [here](#).

JOINT STATEMENT FROM ARBITRAL INSTITUTIONS ON COVID-19

On 16 April 2020 leading arbitral institutions (the CRCICA, DIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, MCA, HKIAC, SCC, SIAC, VIAC and the International Federation of Commercial Arbitration Institutions) released a joint statement to the market on COVID-19. While all of these institutions have engaged constructively and collegiately with other initiatives from the wider community (such as the Equal Representation in Arbitration Pledge), this is a "first" in being a truly cross-institutional initiative.

The statement can be found [here](#). The statement expresses the ambition of these institutions to support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay. The institutions acknowledge the current challenging times, stating their support for parties and arbitral tribunals. The statement also encourages parties and tribunals to deal with the challenges presented by COVID-19 in a constructive way. This includes by consulting each institution's website for guidelines on running an arbitration in the current landscape and the services offered by those institutions to assist parties and tribunals.

INSTITUTIONAL RESPONSES: ADMINISTRATION

Staff, offices, and pending cases

Most institutions have closed their offices and, like the LCIA, ICC and SIAC (as examples) have moved to remote working arrangements for all or a majority of employees. ACICA, VIAC and CRCICA continue to have some staff members in office for limited purposes (like receiving post) or on a restricted timetable (only on a couple of days a week). Some institutions like FINRA, SCC and VIAC digitalised aspects of case management processes before the pandemic struck, and they are therefore seeking to operate as close to business as usual through those new tools (e.g. the SCC platform or the FINRA Portal).

Almost all institutions have also put in place business continuity and contingency plans for pending cases. Most pending cases are continuing with remote support functionality from institutions or limited in-office support at institutions like the SCC and the DIS. The SCC is allowing parties with pending cases initiated before September 2019 to transfer case data to the SCC Platform.

General case administration

Almost all institutions have permitted requests/notices of arbitration to be filed via email for the duration of the pandemic, while some (like ICSID, SCAI and DIS) have continued to accept hard copies using ad hoc arrangements. Other methods of receiving such requests include telefax (DIS), USB (CRCICA) and bespoke portals (AAA-ICDR, LCIA and FINRA). Some institutions have also developed interim measures relating to payments and transmission of awards. The information available about changes in general case administration practices varies from institution to institution with DIS providing extensive detail and FINRA, SCC and VIAC not being required to drastically change their case administration practices, which already could take place largely online.

Communications

All institutions have shifted to electronic or telephonic means of communication, and only a few still permit documents or communications to be sent via courier or post. Institutions like the SCC or DIS, which had already adopted electronic methods as the standard means of communication before the pandemic, are not required to introduce drastic changes in how they communicate with parties to the proceedings they administer.

HEARINGS

Virtual meetings and hearings

In most cases, in-person hearings have been cancelled and rescheduled, with some meetings and hearings being held virtually. Some institutions like the ICC, SCC, JAMS, AAA-ICDR are using or proposing the use of commercially available services like FaceTime, Skype, Vidyocloud, Microsoft Teams or Zoom, while other institutions are offering more bespoke services - examples being SIAC in collaboration with Maxwell Chambers' Virtual ADR service, ICSID's video conferencing platform, JAMS' Endispute™ mediation platform and the IDRC's collaboration with Opus 2.

Guidance and advice

While it is hugely beneficial to have the services available to facilitate online hearings, such hearings will only be effective if they are well run. This requires tribunals, counsel and parties to cooperate to ensure that learning in the use of this technology is shared and adopted. Given the sensitivity of many arbitrations, it will also require that they ensure that cybersecurity is maintained throughout and that any personal data only processed in ways that are compatible with applicable laws. The [ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration](#) and the consultation draft of the [ICCA/IBA Joint Task Force's Roadmap on Data Protection in International Arbitration](#), both released earlier this year, offer helpful suggestions to maintain cybersecurity and comply with data protection requirements in any arbitration, however conducted.

Other helpful guidance has been provided by arbitral institutions in the past few weeks, such as (i) the ICC's [Guidance Note](#) on possible measures aimed at mitigating the effects of the Covid-19 pandemic, which contains a number of helpful suggested clauses to incorporate in cyber-protocols and procedural orders dealing with the organisation of virtual hearings, as well as a checklist to assist parties in dealing with the logistics of holding such hearings, (ii) the [Delos checklist](#), which has been publicised by the SCC and the VIAC, and (iii) the [Seoul Protocol on Video Conferencing in International Arbitration](#) providing guidance on best practices in conducting arbitration hearings through video conferencing. Despite the timely release of the Seoul Protocol, it was not released in response to the COVID-19 pandemic, but is the product of discussions within the arbitral community since 2018. While focused, in the main, on witness evidence, it still provides some useful advice that may be helpful for virtual hearings taking place in the present circumstances.

Further guidance is expected to be issued in the coming weeks by a collaboration group of large international law firms set up and led by Herbert Smith Freehills LLP, in consultation with arbitration institutions and technology providers, addressing the characteristics and functionality that parties should require of the tools they use for the exchange of data online in their proceedings.

It is also important to consider that the decision to substitute a virtual hearing for an in-person hearing may not be agreed between the parties. In practice, it is likely to be difficult to proceed to a virtual merits hearing where one party insists on an in-person hearing. Nonetheless, there is likely to be a trend towards more virtual hearings, particularly for cases requiring limited or no oral evidence. Appendix 1 to the Delos checklist lists some of the considerations that might influence a party's decision whether or not to agree to postpone the hearing, instead of substituting a virtual hearing for an in-person one.

A decision on whether to hold or postpone a hearing will ultimately need to be made by the tribunal on a case-by-case basis considering all the relevant circumstances. These include the availability of the Tribunal members and parties' counsel to hold the hearing in-person in short order, if it were to be postponed (especially in light of uncertainty as to when travel restrictions will be lifted and the likelihood of congested diaries in the aftermath of COVID-19), the potential due process implications of merits hearings not being held in-person and the institutional rules in question. Given the institutional joint statement mirrors many national courts in seeking to continue with the resolution of disputes during this challenging time, it is likely that those institutions will encourage arbitrators to adopt virtual hearings wherever possible. For example, the SCC currently expects parties "to live up to their obligations under the SCC Rules and make efforts to keep to established timetables by, when necessary and deemed possible, for example transferring the arbitration to a fully digital environment, including using audio- and visual meeting facilities in the proceedings". Delos have reported that this part of their checklist was expanded in response to institutional feedback that many parties had initially assumed proceedings would be temporarily suspended, rather than moving forward virtually.

Hearing services and service providers

Language service providers for arbitration remain fully operational due to their remote working capabilities and are offering alternatives to their usual face-to-face interpreting services for hearings. Similarly, court reporters remain operational by offering remote transcription services.

IMPACT ON THE WIDER ARBITRAL COMMUNITY: EVENTS AND CONFERENCES

Unsurprisingly, large numbers of upcoming events and programmes have been cancelled by arbitral institutions, while many of the key conferences in the arbitration community calendar (such as ICCA) have also been postponed. Several institutions have responded by conducting webinars and training sessions specifically tailored to adapting to the COVID-19 pandemic such as the HKIAC Webinar series, SCC Online Seminars, AAA's education for arbitrators on cybersecurity, AIAC Webinar series and CPR's webinar on ADR in the time of COVID-19.

COMMENT

Arbitral institutions, like many domestic courts, have responded quickly to the COVID-19 pandemic and offered parties and practitioners innovative ways to keep dispute resolution on track in challenging times. While some institutions were already equipped with technology which could be adapted to the changing situation, others have had to make more rapid changes to their processes. The effectiveness of all these new proposals will depend on the willingness and ability of tribunals, practitioners and parties to embrace these technologies and share best practice in arbitration. To this end, guidance and training offered by institutions to educate arbitral participants should be welcomed. Whether this public health crisis will result in longer term changes to the way arbitration is practised remains to be seen.

A table listing key institutions' specific offerings (as at 15 April) can be viewed and downloaded [here](#).

[More on COVID-19](#)

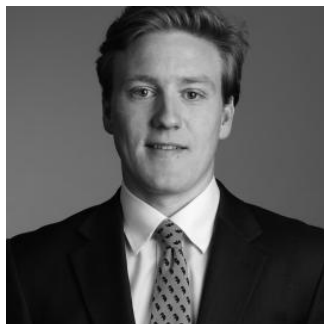
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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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