EXPLORING OPPORTUNITIES: A CATALYST FOR PROGRESS IN INTERNATIONAL ARBITRATION? (GLOBAL)

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Legal Briefings

As the Covid-19 pandemic continues, infection rates in many countries are starting to fall, and businesses and governments alike are seeking to establish a “new normal” recognising that the virus will be present in society for some time yet. Other countries still face climbing numbers and a peak yet to come. For all, the prospect of multiple waves of high infection rates throughout the year and beyond remains. As such, we will continue to see an ever shifting patchwork of lockdowns and other government responses internationally.

In our earlier series of blog posts, we highlighted the individual steps taken by different arbitral institutions, organisations and the wider community as an initial crisis response to the pandemic. We produced a table setting out those steps and will continue to monitor and update this information going forward. An updated table, accurate to 16 July 2020, can be found here.

In this blog post, we turn to the future and look at how the arbitration community continues to respond to the challenges of operating internationally, as different countries prepare in different ways to live with the Covid-19 virus in the medium term at least.

A STEEP LEARNING CURVE: THE INITIAL RESPONSE

The initial wave of the pandemic created an unprecedented need for arbitral institutions and organisations to adapt at very short notice to new and different ways of working, and offer solutions to parties and practitioners that would enable disputes to continue to be resolved at a time of quarantine, enforced social distancing and fast-changing government guidance from across the globe. What became clear was that there was no “one size fits all” approach to be taken by those institutions or organisations. Some institutions (such as the SCC) already functioned largely online with online filing systems. For other organisations (such as the LMAA) the majority of their cases were resolved “on the papers” rather than in face-to-face hearings. Other institutions (such as the ICC or LCIA) needed to introduce changes in their processes, enabling cases to be filed virtually while their secretariats worked remotely and for parties and tribunals to communicate online.

As the truly global nature of the pandemic unfolded, one of the first questions faced by parties, arbitrators and practitioners was whether merits hearings ought to be held virtually or postponed. While electronic communication and the use of other online tools in an arbitration is nothing new, most arbitrations, until now, involved a face-to-face substantive hearing on the merits. For many, a shift to a fully virtual merits hearing was, at least initially, viewed as a step too far. We saw many arbitration hearings in March and early April being postponed to later in the year. However, with the realisation that this “new normal” might be with us on a global scale for some time came a change in attitude towards virtual hearings.

The institutional joint statement in April 2020 mirrored the approach of many national courts in encouraging parties to continue with the resolution of disputes, and many arbitral institutions began encouraging arbitrators to adopt virtual hearings wherever possible. As a consequence, many parties with upcoming merits hearings found their arbitrators inclined towards that option.

Where a decision has been taken to hold a hearing virtually, the arbitrators, practitioners and clients involved have been on a steep learning curve. Just as we have all become used to operating through Skype, Teams and Zoom in the workplace, we have adapted to using that same virtual technology (and others) to hold hearings.

There has been a very positive response from a number of practitioners who have participated in virtual hearings, with many surprised at how well they have worked. We have seen the development of guidelines, protocols and procedural orders to govern the efficient and effective running of virtual hearings and to ensure that the hearing remains fair to all.

We have also seen other new ideas and initiatives come from within the community during this challenging time. New websites and initiatives have been launched to help keep practitioners up to date with Covid-19 developments or to facilitate the use of online platforms to enable cases to truly operate virtually.

RESPONDING TO AN EVER-SHIFTING INTERNATIONAL PICTURE: THE NEED FOR FLEXIBILITY

So what does the “new normal” mean going forward?

Commercial arbitration has grown in popularity over the past decades as parties recognise the benefits it brings in cross-border transactions by offering a neutral forum and an adaptable, international, procedure. But the international nature of the parties, practitioners, institutions and arbitrators also means that arbitration must be able to adapt and flex to fit the unique requirements of those international participants, both in terms of their transactions and disputes, but also to the specific implications of the pandemic for each country in which those participants reside.

Clearly, if circumstances require it, all those involved in the process should be able to revert back to “lockdown” ways of working. And if circumstances require it, all the learning of the past months will be able to be put into use in continuing to hold wholly virtual substantive hearings. But what seems more likely is that we will see more flexible and adaptable approaches to respond quickly to the immediate, and often changing, circumstances.

“Hybrid” or “semi-virtual” hearings are likely to be the answer to that need for flexibility. A mixture of virtual and physical attendance will help to mitigate the effects of travel restrictions and local or national lockdowns. They will also enable those involved in hearings (such as the parties and their counsel, the Tribunal and any witnesses or translators that might be involved) to participate to the fullest extent possible. Some participants may meet in a single or in multiple locations, with appropriate social distancing, while others attend virtually. These hybrid hearings can be set up to change format at short notice, enabling those involved to plan for a myriad of different scenarios but ensure that the final hearing remains fair, offering each party the opportunity to put their case.

IMPACT ON THE FUTURE: A CATALYST FOR CHANGE IN THE POST-COVID WORLD?

Many sectors of the economy have proven themselves to be extremely adaptable in the face of the pandemic, and arbitration is no different in that regard. At this stage, however, it is difficult to gauge the longer term impact of Covid-19 on the process and procedure of arbitration globally, particularly if a future vaccine were to reduce or remove the need for social distancing.

However, the longer arbitral participants are required to work in a different way, the more those new ways of working will be seen as the norm. The more positive experiences participants have of virtual or hybrid hearings, the more likely it is that these will remain at least options for future merits hearings. When faced with participants from across the globe, parties may become less comfortable with the expense of holding a face-to-face hearing if they are reassured in the effectiveness of a virtual or hybrid option. Indeed, the dramatic reduction in the carbon footprint of these virtual and hybrid hearings may lead to an environmental "silver-lining" to the pandemic in terms of changes in business practice for many, including in international arbitration.

Most importantly, we have seen innovation and blue sky thinking at its best in the last few months. And that shift in mind-set towards different ways of delivering the product of arbitration effectively and efficiently has been exciting to see and experience. That ability to adapt and change to challenging circumstances is likely to continue, and we will see the longer term impact of that innovation for many years to come.

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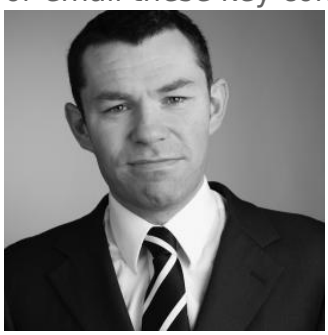
KEY CONTACTS

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



CRAIG TEVENDALE
PARTNER, LONDON

+44 20 7466 2445
craig.tevendale@hsf.com

VANESSA NAISH
PROFESSIONAL SUPPORT CONSULTANT, LONDON
+44 20 7466 2112
Vanessa.Naish@hsf.com

CHARLIE MORGAN
DIGITAL LAW LEAD – UK, LONDON
+44 20 7466 2733
Charlie.Morgan@hsf.com

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