

INSIDE ARBITRATION: RUNNING AN ARBITRATION IN CHALLENGING TIMES: COVID-19, “DIGITALISING” ARBITRAL PROCEDURE AND THE NEW WORLD OF VIRTUAL HEARINGS

Global
Legal Briefings

The arbitration community has steadily adopted new technologies over time to assist in the resolution of disputes, increase efficiency and cut down on cost. The result is that much of the “standard” process in an arbitration already takes place digitally.

The COVID-19 pandemic has 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 will enable disputes to continue to be resolved at a time of quarantine, enforced social distancing and fast-changing government guidance from across the globe.

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. Indeed, 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.

But this fast-changing world also presents considerable challenges to parties already involved in an ongoing arbitration or currently considering their dispute resolution options. How will these changes affect the running of an arbitration and do virtual hearings work? In this article we look at what this new world means for the arbitration process and the options that are available to parties considering whether or not to agree to a virtual hearing.

USE OF TECHNOLOGY IN “NORMAL TIMES”: HAS THE COVID-19 PANDEMIC HAD A SIGNIFICANT IMPACT ON STANDARD ARBITRAL PROCEDURE?

The standard process in international arbitration has taken place digitally for many years. The practical reality of running an international arbitration with parties and participants across the globe is that it makes sense both financially and in terms of timing to do so. As a consequence, most parties will commence an arbitration by email or by using an arbitral institution’s filing platform – although that may be followed up by a hard copy of the filing. After the arbitration has been commenced, correspondence, pleadings, witness statements and expert reports will usually be exchanged by email or through an institution’s electronic platform. Hard copies will not always follow, and rarely as far as routine correspondence is concerned. The exchange of documents at the document production stage will usually be carried out by exchange of password protected memory sticks, secure electronic file transfer or through document review platforms.

It is also standard practice for most case management conferences to be run using a virtual platform, by video conference or simply over the phone. It’s an established practice—where the circumstances require it—for the cross-examination of some witnesses and experts to take place remotely via a video link. It’s not often done, but it is a recognised alternative, for example where there are visa problems.

The fact that travel to hearings is often required for some or all of those involved means that electronic document storage, trial presentation and electronic bundling are practical options for many arbitrations, although some practitioners and arbitrators do still prefer to use hard copy hearing bundles.

But whilst parties, counsel and arbitrators might embrace technology throughout the process, most arbitrations, until now, have ended with a face-to-face substantive hearing on the merits. That will take place at a hearing venue in an agreed location and be attended by counsel, arbitrators, party representatives, witnesses, and experts, and be recorded by a stenographer/court reporter.

INSTITUTIONAL AND ORGANISATIONAL IMPACT: HOW HAS THE PANDEMIC AFFECTED CASE ADMINISTRATION?

Arbitral institutions and other organisations responded to the COVID-19 situation very quickly. All of the leading arbitral institutions and bodies involved in ad hoc proceedings (like the LMAA and GAFTA) issued specific guidance. In general terms, this guidance mirrored that of many of the national courts around the world—that delaying the resolution of disputes was not really a practical option in such uncertain times, and that it was up to the parties, counsel, judges and arbitrators to find solutions to keep things moving.

To that end, 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 16 April 2020 encouraging parties and arbitrators to engage constructively with each other in these challenging times.¹

Like all businesses, arbitral institutions have had to change their working arrangements to comply with the national legislation regarding “lockdowns” or social distancing. Most institutions closed their offices, but many including the LCIA, ICC and SIAC (as examples), promptly introduced remote working arrangements for all or a majority of employees. As countries move along their own “curve” in face of the virus, some institutions are beginning to staff their offices in whole or in part again.

These remote working arrangements have had different levels of impact on the institutions. Those institutions (like FINRA, SCC and VIAC) which had digitalised aspects of their case management processes before the pandemic struck, have largely continued to operate unaffected. Others who have had a blend of electronic and hard copy processes have had to permit or require that requests/notices of arbitration 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. Some institutions have also developed interim procedures relating to payments and transmission of awards.

VIRTUAL HEARINGS: SHOULD YOU AGREE TO ONE OR POSTPONE?

As the truly global nature of the pandemic unfolded, one of the first questions faced by parties, arbitrators and arbitral institutions was whether merits hearings ought to be held virtually or postponed. 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 rather than taking place virtually.

However, as the realisation that this “new normal” might be with us on a global scale for some time, so came the realisation that there might need to be 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 of the arbitral institutions began encouraging arbitrators to adopt virtual hearings wherever possible. As a consequence, many parties with upcoming merits hearings found, and will continue to find, their arbitrators inclined towards that option. This is particularly the case for arbitrators with busy hearing calendars later in the year.

As a party facing an upcoming merits hearing, it can be difficult to know how to respond to a tribunal seeking to consult the parties on whether or not to hold a virtual hearing. When deciding whether to postpone or hold the hearing virtually, tribunals will ask the parties' views and will give them an opportunity to comment. The Tribunal has duties to the parties to give them each a reasonable opportunity to put their case and to act fairly and impartially. However, they will also be under an obligation to avoid unnecessary delay or expense and adopt procedures suitable to the circumstances of the case. Tribunals have historically been reluctant to push ahead with procedural steps that a party is deeply opposed to, but may do so if it considers that approach to be justified.

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 might include:

- the provisions of the dispute resolution agreement (eg time limits, expedited arbitration etc.) or any requirements at the seat of arbitration or under the applicable institutional rules;
- the consent of the parties to a virtual hearing or the strength of views expressed by the parties for or against one. Parties may be concerned about the efficacy of cross-examination via video conference, particularly where translation is required;
- uncertainty about the future date at which another in-person hearing may be scheduled or the significant delay that might result. There might also be questions over 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 time zones involved for parties, counsel, witnesses and Tribunal members, and whether it is possible to hold an effective hearing in light of that;
- the potential due process implications of merits hearings not being held in-person;
- the impact on witnesses' recollection in postponing their evidence;
- the lost expenses in preparing for a hearing that does not take place; and
- the continuing uncertainty in not having a dispute settled.

The decision of whether to hold or postpone a hearing will therefore be very fact and case specific and be taken by the Tribunal considering all of the relevant circumstances. Any party who is opposed to a virtual hearing should give real thought to the strength of their arguments. This is particularly the case where concerns are technical ones, as these can often be overcome with the help of service providers.

As countries emerge from lockdown at different times, arbitrators may suggest that hearings take place through a combination approach, with some participants attending in person and others attending remotely. There may be concerns about whether such an approach provides a fair hearing for those who cannot attend in person and each such proposal will need to be considered in light of the specific circumstances of the case.

GETTING YOUR AWARD: WILL THE COVID-19 PANDEMIC MEAN IT WILL BE DELAYED?

For parties who have already had a hearing (whether virtually or in person), there may be concerns about the impact the pandemic may have on their award being issued. Most institutions either already have an electronic process for signing, receiving and sending out awards, and those that don't have changed their procedure in the short term. Our experience so far is that there is no delay in receiving awards – in fact, perhaps the opposite. The reduction in travel, the postponement of some hearings and the lack of conferences means that some professional arbitrators may have more time at present to push ahead with writing awards. Our partners who have sat as arbitrators and delivered an award recently have also found arbitral institutions to be highly responsive. However, it remains to be seen what impact there will be for hearings held in the Autumn, as many arbitrators may find themselves facing a particularly busy hearing schedule.

WILL VIRTUAL HEARINGS BECOME THE NORM IN FUTURE?

It seems likely that virtual substantive hearings will be the new normal, at least over the next year. But the ability of parties and the arbitral community to adapt due to circumstance does not mean that this will necessarily remain so in future.

That said, there has been a very positive response from a number of practitioners who have participated in virtual hearings, with many surprised at how efficiently and effectively they have been run. Others have focused on the dramatic reduction in the carbon footprint of these virtual hearings and whether there may be an environmental “silver-lining” to the pandemic in terms of changes in business practice for many, including international arbitration.

Some are anticipating a real change in approach for the long term. The IDRC expects the development of “semi-virtual” hearings where only the arbitrators and counsel are at the centre and other participants such as the parties and witnesses participate by videoconference even after the pandemic has ended. The newly announced alliance between Maxwell Chambers, the Arbitration Place of Toronto and Ottawa, and the IDRC offering “global hybrid hearings” involving a mixture of virtual and physical attendance during the pandemic might provide some indication as to what this future might look like. While currently aimed at mitigating the effects of travel restrictions introduced in response to COVID-19, these “global hybrid hearings” 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.

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. Whether the current public health crisis will result in longer term changes to the way arbitration is practised remains to be seen.

Practical guidance on running a virtual hearing

While it is beneficial to have services available to facilitate online hearings, such hearings will only be effective if they are well run. We outline valuable insight on conducting hearings from members of our Global Arbitration Team, who sit both as counsel and arbitrators.

How can we help?

Our team of specialist lawyers can provide legal, strategic and practical advice in order to run your arbitral proceedings smoothly in the age of virtual hearings.



Planning

- Carefully consider the **choice of platform** for the hearing and use a professional provider.
- Look for tried and tested, resilient platforms which can work on multiple devices and operating systems and can be accessed and function globally, including:
 - Commercially available services such as FaceTime, Skype, Bluejeans, Microsoft Teams or Zoom; or
 - Institutional bespoke services such as SIAC & Maxwell Chambers' Virtual ADR service, ICSID's video conferencing platform, JAMS' Endispute™ mediation platform and the IDRC's collaboration with Opus 2.
- Ensure the **hardware** that is required is available to all parties:
 - Explain what equipment is needed;
 - Provide parties with rented IT if required;
 - Suggest using "wired" rather than wireless connections; and
 - Provide 4G "dongles" to use the cellular network if a domestic connection is insufficient.



Witnesses and Experts

- Remember that commercial courts and arbitral tribunals have managed cross-examination via video conferencing for many years.
- Ensure witnesses and experts have access to the **document bundles** they need.
- Ensure they are aware of their **duties** to the tribunal, particularly in refraining from discussing their evidence during any breaks.
- Consider parties' various **time zones** and build **flexibility** into the timetable;
- Where witnesses or experts give evidence in their native language, simultaneous **translation** is possible, given enough notice and the right kit;
 - Alternatively, consider sequential translation.
- **Court reporting** and **transcription** services can also be delivered by a stenographer as a member of the video conference.



Advocacy

- Merits hearings will usually have **breakout rooms** for different parties and their counsel and for the arbitral tribunal to share thoughts and strategies.
- When involved in a face-to-face hearing, counsel teams will **pass down notes** to each other during cross-examination. These are critical aspects of a hearing and somehow need to be recreated.
- There are many digital options to accommodate these face-to-face practices:
 - WhatsApp distribution lists;
 - virtual "break out rooms" within conferencing platforms
- All of these would achieve the same end and they might even be more efficient and easier.
- Your advocate and your tribunal will all have had some experience of "**virtual advocacy**" in cross-examining witnesses by video conference for an in-person hearing. However, it is critical that your advocates have the right hardware to deliver effective advocacy and both side's advocates are operating under the same rules (see **virtual hearing protocol** below).

RUNNING THE HEARING

- It is imperative during a truly "virtual" arbitration to make sure that cybersecurity is maintained throughout and that any personal data is only processed in ways that are compatible with applicable laws. Helpful guidance includes:

- ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration; and
- Consultation draft of the ICCA/IBA Joint Task Force's Roadmap on Data Protection in International Arbitration.
- The approach to bundling and providing documents will depend entirely on the number of documents, the size of the case and the resources available to you. Consider:
 - agreed case management systems (e.g. Opus2 Magnum) which can be expensive;
 - an OCR enabled PDF as a low cost electronic option; or
 - hard copy bundles.
- Electronic trial presentation may be included in a case management system, but there are also very good and zero cost ways of presenting documents to a witness and arbitrators, simply by sharing a screen through many of the video conferencing platforms.
- It is very important that all those involved in the hearing are operating under the same rules. Tribunals should either produce or ask the parties to agree a virtual hearing protocol on how they will approach timing, questioning and putting documents before witnesses and experts.

PODCAST

In this podcast we explore what arbitral institutions and other organisations have been doing to assist parties and arbitral tribunals through this difficult period. The team also shares some practical tips from our recent experience on how to manage virtual hearings given the current restrictions on travel and social distancing.

This podcast is chaired by Vanessa Naish, Arbitration Practice Manager and Professional Support Consultant, who is joined by Craig Tevendale, head of our international arbitration group in London, Patricia Nacimiento, co-head of the German dispute resolution team and Kathryn Sanger, Partner in our Hong Kong office. Along with their roles at Herbert Smith Freehills, Craig, Patricia and Kathryn each have roles at arbitral institutions and also sit as arbitrators, and can therefore share multiple perspectives on the current situation.

EXPERIENCES FROM WITHIN THE PRACTICE

"Over the last couple of months, I have participated in two "semi-virtual" arbitration hearings - one procedural and one merits hearing. For both hearings, the HSF team met in person in a very large meeting room at our London office where we were able to maintain the necessary social distancing. The other side did the same from their office, while our tribunal and local counsel connected from their respective homes in the UK and South Africa. One of the witnesses gave evidence from his home in the US and our clients connected from Russia. We agreed a virtual hearing protocol in advance and used Zoom as the platform, with the IDRC administering the process for the merits hearing - this worked very smoothly with both sides and the tribunal having their own break-out rooms. From my perspective, the virtual hearings delivered a fair and efficient process and I would definitely consider virtual hearing options in future regardless of travel and other restrictions."

PAULA HODGES QC

"I was involved in the first virtual hearing in the English High Court. While it wasn't an arbitration matter, I was extremely impressed by how well the whole process ran. The hearing involved testimony from witnesses and experts in 4 jurisdictions, some with translation. About 30 participants took part from their homes. As with any dispute resolution process, preparation and organization is key. A well thought through and well planned process can deliver what the parties need. In that respect, a virtual hearing is no different to an in-person hearing."

PATRICIA NACIMIENTO

KEY CONTACTS

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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