

A hybrid future?

Anthony Connerty assesses the impact of the COVID-19 pandemic on international arbitration

IN BRIEF

► COVID-19 and its current influence on international arbitration.

► COVID-19 and the future of international arbitration: the hybrid hearing?

The impact of the pandemic on litigation in the civil and criminal courts in England and Wales has been considerable: those courts are geared for face-to-face hearings. That is especially so in the case of criminal trials before a jury. The need for those courts to switch to remote hearings represents a major change. The effect of coronavirus on international arbitration is likely to have less impact: international arbitration is already familiar with remote hearings in one form or another.

The author's experience as counsel and arbitrator in the conduct of an international arbitration—whether institutional or ad hoc—is that various procedures are already used which may be labelled 'remote'.

With parties in different countries and in different time zones the procedure at an arbitration is likely to involve matters such as:

- the use of telephone conferences: for example in a preliminary meeting where the tribunal and the parties plan the future conduct of the arbitration and at later stages of the arbitration where interlocutory matters are dealt with;
- the use of emails throughout the course of the arbitration in communications between the parties and the tribunal;
- the service by the parties—by email—of written submissions on issues arising during the course of the arbitration; and
- the issue by the Tribunal of Procedural Orders dealing with matters arising in the arbitration: for example in relation to pleadings, document disputes, Redfern schedules, factual witnesses and expert witnesses and directions on matters leading to a hearing such as pre-hearing submissions, agreed bundles, witnesses and the order of speeches by advocates.

International arbitral institutions already make provision for remote procedures. These range from documents-only arbitrations to institutional rules which make provision for the use of remote processes within an arbitration.

There are many examples. I select a few.

Arbitral Institutions: provisions for remote processes

CIArb

The Chartered Institute of Arbitrators has issued an International Arbitration Practice Guideline, 'Documents-Only Arbitration Procedures', 2015 (<https://bit.ly/2BhTqRC>).

1. The guideline sets out the current best practice in international commercial arbitration on documents-only procedures. It provides guidance on:
 - factors that arbitrators should take into account in determining whether an arbitration or certain issues within an arbitration are suitable for documents-only procedures (Article 1); and
 - the manner in which to conduct such procedures (Arts 2 and 3).

ICC

The Arbitration Rules of the International Chamber of Commerce—like many of the international institutions—give a wide discretion to arbitrators as to how they conduct an arbitration. Article 22 states that, in order to ensure effective case management, 'the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties'. Article 24 provides that, when drawing up the Terms of Reference, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Art 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

That appendix gives examples of case management techniques. These include:

- 'c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.'

CIETAC

The China International Economic and Trade Arbitration Commission, like the ICC, gives an arbitral tribunal considerable

discretion in the manner in which it is to conduct a CIETAC arbitration: oral hearings may be unnecessary. Article 35 states that the tribunal shall:

'...examine the case in any way it deems appropriate unless otherwise agreed by the parties. Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case.

'The arbitral tribunal shall hold oral hearings when examining the case. However, the arbitral tribunal may examine the case on the basis of documents only if the parties so agree and the arbitral tribunal consents or the arbitral tribunal deems that oral hearings are unnecessary and the parties so agree.'

LCIA

The Arbitration Rules of the London Court of International Arbitration impose general duties on a tribunal to act fairly and impartially as between all parties:

'...giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.'

Subject to those duties, the rules give an LCIA tribunal the same wide discretion as granted to tribunals operating under the Rules of the ICC, CIETAC and the AAA/ICDR. Article 14.5 states that the tribunal:

'...shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.'

Article 19 of the rules deals with oral hearing and states that any party has the right to a hearing unless the parties have agreed in writing to a documents-only arbitration. As to form, 'a hearing may take place by video or telephone conference or in person (or a combination of all three).'

Platforms for virtual hearings

In mid-May, announcements were made by two organisations offering the use of platforms for virtual hearings.

Virtual arbitration: suggestions from institutions

A number of international arbitral organisations have staged webinars dealing with the effect of COVID-19: what will international arbitration look like after the pandemic? I mention two: ICC (UK) and LCIA.

ICC United Kingdom

In April 2020, ICC United Kingdom staged a series of four webinars on 'virtual hearings'.

In the webinar of 28 April Damian Hickman, CEO of the International Arbitration Centre based in Fleet Street, London EC4, spoke of the IDRC's collaboration with Opus 2 to provide facilities for virtual hearings by way of Opus 2's cloud-based Electronic Hearing Platform.

In the webinar of 30 April Ali Malek QC and Tom Sprague QC gave an example of how a virtual international arbitration hearing might look by referring to the hearing in the case of *National Bank of Kazakhstan v Bank of New York Mellon SA/NV*: Claim No FL-2018-000007, High Court of Justice - Business and Property Courts of England and Wales - Financial List (QBD).

The hearing ran from 26 March 2020 before Mr Justice Teare. The hearing took place remotely and was broadcast by YouTube.

Stewarts law firm provided the transcript of the four-day hearing.

On 26 March 2020, the judge stated that he had already directed that the proceedings were to be conducted wholly as video proceedings and that they were to be broadcast for the purpose of enabling members of the public to see and hear

the proceedings.

Mr Malek, acting for the claimant, said that 'we have agreed a protocol in terms of how we operate it, and in particular there is no question of overspeaking, and if you are not speaking, please could everybody switch off their microphones. Hopefully, on that basis we should be able to work'. [transcript p5-6].

In the webinar, Mr Malek made the point that virtual hearings in international arbitrations will inevitably proceed at a slower pace than in face-to-face hearings. And, given the constraints of virtual hearings, counsel must be well prepared. Submissions must be succinct and the questioning of witnesses short and to the point.

While the Rules of the arbitral institutions contain provisions which assist virtual hearings, one area of potential difficulty was raised in the webinars: the examination of witnesses. Video conferencing is available. But is there someone in the room with the witness being cross-examined remotely? Someone coaching the witness?

The author was chairman of a tribunal sitting in Lagos where counsel for one party objected that a witness being cross-examined was constantly looking at a member of his party before answering. The tribunal directed that the person in question should be seated out of sight of the witness.

Evidence can be taken remotely, albeit with difficulty on occasions: the author sat on a tribunal in Stockholm where an English barrister

cross-examined a Russian speaker over the telephone through an interpreter.

LCIA

The London Court of International Arbitration staged a webinar on 12 May: *'Roundtable: The pathology of arbitration proceedings – what longer-term effects and solutions will this crisis yield?'*

The webinar was subject to the Chatham House Rule. I will therefore simply mention some of the points made by the speakers. Issues raised were similar to those considered in the ICC series of webinars:

- ▶ The parties must be treated fairly at virtual arbitration hearings. There must be a level playing field.
- ▶ The nature of a virtual hearing is such that submissions should be short and it may be necessary to consider whether it is always necessary to cross-examine a witness.
- ▶ Cross-examination raised concerns as to whether a witness giving evidence remotely might be assisted off-camera by a third party.
- ▶ Reactions felt in an actual hearing, body language and the like, are missed in a virtual hearing.
- ▶ Virtual hearings are more tiring than face-to-face hearings. Four hours may be a maximum per day, with breaks.
- ▶ Hybrid hearings likely post-coronavirus.
- ▶ As to litigation: the Commercial Court adapted quickly and effectively to the switch to virtual hearings. All hearings except for committals are currently virtual.

International Arbitration Centre Alliance

Three international arbitration and alternative dispute resolution hearing centres have joined forces to form the International Arbitration Centre Alliance (IACA). The alliance organisations are the International Dispute Resolution Centre (IDRC), London; Arbitration Place of Toronto and Ottawa, Canada; and Maxwell Chambers of Singapore. CEOs of the three founding centres, Damian Hickman, Katherine Yap and Kimberley Stewart, stated: 'The alliance breaks barriers and builds international bridges, providing the platform for our partners to connect globally, allowing a seamless and smooth dispute resolution experience. This is something the dispute resolution world desperately needs right now because of COVID-19 travel and assembly restrictions. We also firmly believe it's the way of the future. International arbitration practitioners are becoming comfortable with virtual hearings. Longer term, even when global travel restrictions are eased, virtual will be used regularly to reduce travel time and cost.'

Stockholm Chamber of Commerce

In a joint initiative to support the online administration of proceedings, the Stockholm Chamber of Commerce (SCC) and Thomson Reuters offer the SCC Platform to ad hoc

arbitrations globally, starting in May. Use of the Ad Hoc Platform will be free of charge for arbitrations commenced during the COVID-19 outbreak. The SCC says that, in addition to webinars and practices, solutions to facilitate virtual hearings are emerging. In April, the Stockholm International Hearing Centre (SIHC) announced the launch of a virtual platform for digital hearings. The solution consists of a series of stand-alone solutions and services that have been merged to a unified platform where the SIHC's staff are available for support and where needed to actively curate what is being presented to the participants.

The hybrid hearing?

The conduct of international arbitration is likely to be very different following COVID-19. The use of virtual hearings of one kind or another is bound to continue.

Leaving aside documents—only arbitrations—there are various procedures already in place to assist virtual hearings. The major international arbitral bodies give a wide discretion to arbitrators as to how an arbitration is to be conducted. The ICC and LCIA rules, for example, specifically authorise video and telephone conferences. The arbitral procedures are therefore already available for the conduct of virtual hearings. The facilities to conduct such virtual hearings are now also

available: the IDRC's collaboration with Opus 2 to provide a cloud-based Electronic Hearing Platform is but one example.

Will the virtual hearing take over? Not completely. It is probably inevitable that more use will be made of remote processes. The costs implications are obvious, particularly given that parties in international arbitrations tend to be based in different parts of the world and operate in different time zones. The launch of the IACA and SCC platforms supports the view that virtual hearings will become more commonplace.

But if nothing else there will always be cases where one party in an international arbitration wants its 'day in court'.

Time will tell what the picture of international arbitration will look like after the coronavirus pandemic: the hybrid hearing, part face-to-face and part remote, seems to be a likely possibility. **NLJ**

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