

ARBITRATION NOT LOCKED DOWN: HAS THE COVID-19 PANDEMIC ACCELERATED INEVITABLE CHANGE?

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Introduction

1. The arbitration community has been swift to meet the challenges posed by the COVID-19 pandemic with almost unprecedented cohesion. By 17 April 2020 twelve leading arbitral institutions¹ had issued a [joint statement](#) pledging to “..ensur[e] that pending cases may continue and that parties may have their cases heard without undue delay.” The message has been clear and consistent; arbitration will adapt and continue in the face of the pandemic.
2. In many ways the required adaptation is not dramatic. The international character of arbitration work means that arbitration practitioners have long been used to working remotely. It is already the norm for communications to be by email, for documents to be shared on platforms, for procedural hearings to take place by telephone, and for participants in hearings to join by video conference to give evidence or make submissions.
3. What is new is the scale upon which these tools are being used. As a result of social distancing measures all participants in any arbitration proceedings are typically in different locations. The greatest impact on the arbitration process is that substantive hearings, which would normally put all the actors physically in the same place, are now taking place virtually.
4. The arbitration community has been quick to provide guidance and briefing notes to support participants in dealing with this new reality, particularly aimed at the conduct of remote hearings, including the following:
 - [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#)
 - [AAA-ICDR Virtual Hearing Guide](#)²
 - [CIArb Guidance Note on Remote Dispute Resolution Proceedings](#)
 - [Seoul Protocol on Video Conference in International Arbitration](#) (re-issued in light of the pandemic)
 - [ICODR Video Arbitration Guidelines](#)
 - [Hogan Lovells Protocol for the use of technology in virtual international arbitration hearings](#)
 - [HKIAC Guidelines for Virtual Hearings](#)
5. These protocols and guidelines offer guidance on a range of matters related to the conduct of virtual hearings, including: (i) the testing of platforms prior to a hearing; (ii) how to schedule the hearing, for example in order to minimise the impact of different time zones; (iii) available video-conference and text messaging platforms, as well as document sharing platforms, and how to ensure they are secure; (iv) technological support issues;³ and (v) protocol for managing communications between the tribunal and the parties and legal teams.

¹ CRCICA, DIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, Milan Chamber of Commerce, HKIAC, SCC, SIAC, VIAC and IFCIAI

² Also available specifically for hearings using Zoom.

³ Hogan Lovells Protocol, para. 2.5

6. Annex I of the ICC Guidance Note includes a helpful checklist of the matters to be taken into account when planning a virtual hearing, as well as text of draft procedural orders dealing with confidentiality, privacy and security, online etiquette and due process considerations, and the presentation of evidence and examination of witnesses and experts. The AAA-ICDR has also provided [model orders and procedures](#) for virtual hearings.
7. One might argue that it has been possible to produce such comprehensive guidance because there is already a wealth of experience in conducting remote proceedings, including substantive hearings taking place (at least partially) by video conference. Indeed, the Seoul Protocol on Video Conference in International Arbitration existed in its original form prior to the pandemic.
8. This note looks at how the effect of the pandemic could accelerate change in three key areas: (i) e-filing of documents/document management systems; (ii) more directional case management; and (iii) virtual hearings.

(1) E-filing/document management systems

9. There is nothing new about e-filing or the use of document management systems in international arbitration.
10. All major arbitral institutions have long had an on-line filing capability, including for documents filed to commence proceedings, and communications most frequently take place by email. This has meant that arbitral institutions have been able to continue to offer the same services despite the transition to home working. Arbitral institutions remain open for business, and much of their work can continue as before with some small adjustments to working practices. A very helpful summary of the services offered by the institutions was prepared by Herbert Smith Freehills in April 2020 and is available [here](#).
11. That is not to say that some small adaptations have not been necessary. For example, an award is usually signed and formally issued or notified in hard copy (with an advance PDF copy electronically). Although still possible, current restrictions risk delays to the issue of the hard copy. In response, the LCIA, for example, has said that it will, in all but exceptional cases, transmit awards to parties electronically during the pandemic, with originals and certified copies to follow when the LCIA physical office re-opens.⁴ Alternatively, where both parties are participating in an arbitration, they may be asked to agree to dispense with the need for a hard copy and agree that the award may be notified by email only, and/or the award may be signed in counterparts with these assembled in a single electronic file.⁵
12. It is therefore very much business as usual, but there are signs that the Covid-19 could galvanise a shift to securer document sharing platforms which are either hosted by arbitral institutions or privately arranged by the tribunal and the parties (the Hogan Lovells Protocol lists examples of those available at para 2.4 b)).
13. Again, this is an emerging development which pre-existed the Covid-19 pandemic, driven by increasing concerns regarding changes to the data protection regime and, related to that but also separately, cyber-security. A document sharing platform has the advantage of imposing a minimum standard of security on the transfer of documents as well as organising all relevant documents in

⁴ <https://www.lcia.org/lcia-services-update-covid-19.aspx>

⁵ See for example para 164 of the ICC Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration (1 January 2019) para. 15 of the ICC [Guidance Note](#) on COVID-19. While other guidance notes may not address this issue specifically, there is nothing to stop the Tribunal members from seeking the Parties' views on this. Care should be given to any requirements of applicable laws in this regard.

one central place. An institutional platform has the advantage of being hosted by a neutral organisation.

14. Institutional platforms had already emerged in varying forms. For example, ICSID has a file sharing platform and in a prescient move the SCC launched its virtual platform in September 2019. From May 2020, and for the length of the Covid-19 crisis, the SCC has made an Ad Hoc Platform available and free to access.⁶ It is also common for law firms and other independent private providers to host document platforms, although a case wide platform to which all participants in the arbitration have access tends to be available for the purpose of a hearing only and only for those cases where the value of the dispute justifies the expense.
15. Where all participants in the arbitration are working remotely, and where a host of logistical issues of remote working dis-incentivise the printing of documents in bulk, central and more secure organisation of documents seems inevitable. Not just for the large value arbitrations and not just for the purposes of a hearing, but from the outset.

(2) More directional case management

16. Practical constraints associated with virtual hearings mean that we could see shorter sitting hours in order to accommodate: (i) time zone differences; (ii) more frequent breaks to allow parties and legal teams time to consult off-screen as well as to give breaks from screen-time; and (iii) where appropriate to allow for the fact that many participants will be working from home which may result in additional domestic pressures.
17. A consequence of this is that parties and tribunals will be incentivised to adopt already existing procedural techniques which either focus the issues in the arbitration prior to the hearing or hive off issues for determination on paper. This is recognised by the ICC Guidance Note which sets out, at paragraph 8, a non-exhaustive but comprehensive list of procedural techniques to narrow the scope of issues to be determined. Chapter 3 of the IBA Arb40 [Compendium of Arbitration Practice](#) also sets out how a Case Review Conference mid-way through the arbitration proceedings could be used by the Tribunal to focus minds on the best way for the arbitration to proceed, varying, if necessary, directions set by the Tribunal at the outset of the process.

(3) Are fully virtual hearings here to stay?

18. The key change forced by the Covid-19 pandemic is the move to holding hearings on a virtual basis.
19. There is nothing new about hearings taking place by means which do not require the tribunal and parties to be physically in the same place. Most case management conferences will typically take place by telephone conference. It is also common for a witness or other participant to take place in the arbitration via video link. What is new is the fact that every participant in the arbitration is sitting separately on their own in front of a computer screen. The means of communication is not new, but its usage on such a scale is.
20. While many arbitration hearings were initially adjourned in the wake of the Covid-19 pandemic, arbitral institutions report that the parties and tribunals have started to proceed again on the basis of virtual hearings especially in light of the tremendous uncertainty as to when physical hearings will be able to take place again. That is not to say that in certain circumstances there is no resistance to fully virtual hearings.

⁶ <https://sccinstitute.com/scc-platform/>

21. Some parties will still judge a physical hearing or overall delay to be in their interest, and due process issues may be raised in connection with this, or otherwise. Related to this, one issue which is flagged in the guidance notes is the risk to enforcement of an award where the arbitration proceeds on the basis of a virtual hearing: see for example para. 22 of the ICC Guidance Note and para. 2.10 of the Hogan Lovells Protocol which recommends that the parties sign an agreement expressly consenting to a remote hearing and that they will not seek to vacate an award on this basis.
22. New ways of working may be approached with a certain degree of trepidation, but that does not mean that they pose a risk to enforcement. The reality is that very little cannot be achieved in a virtual hearing that could not be achieved in a physical hearing. The same procedure, oral submissions and cross-examination, is still possible. The difference is that instead of ‘in person’ communication, the communication is virtual. Is there anything inherent in communicating virtually which would cause a due process concern? While ultimately this is a matter of law applicable at the seat and the likely place(s) of enforcement, three points of concern in particular have emerged:
 23. First, a risk of poor or intermittent internet connections. This could be a valid concern if it prevents party from putting its case to the tribunal because the legal representatives or the witnesses are not able to access the virtual hearing. However, a protocol can be put in place for ensuring that the tribunal is aware of any participant losing connectivity⁷ and a Tribunal does not have to proceed with a hearing in the face of such disruption. It could direct a short adjournment. Moreover, the risks should be fully investigated through prior testing of the platform being used for the hearing and/or whether it is possible to make safe arrangements for an individual to travel to a location with a more stable internet location.
 24. Second, there may be some concern of a risk that a witness giving evidence will be assisted by some impermissible communications or documents. The devised guidance and protocols again suggest various different steps which can be taken to verify that the witness is alone and only has access to the correct documentation.⁸
 25. Third, there may be a concern that a tribunal will not be able to fully assess witness evidence when that evidence is given and tested through video conference facilities. There is nothing inherent in the conduct of a virtual hearing which means that oral submissions cannot be made and evidence cannot be tested through cross-examination in the usual way. The key difference is that all the usual communications are filtered through a screen. It has been said that the effect of this is that the Tribunal will miss some of the usual human interactions, such as body language and other cues, which assist it in assessing the evidence of a witness.
26. While it is must be right that interaction over a screen feels different, it is less clear whether this would have a meaningful impact on the Tribunal’s ability to assess the evidence. As a starting point, it is relevant to bear in mind the limitations inherent in witness recollections due to the fallibility of human memory, something which was highlighted in the context of arbitration proceedings more than a decade ago by Toby Landau QC in his 2009 Clayton Utz lecture.⁹ The subsequent observations of Leggat J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* are also well known. Leggat J cautioned against over reliance on witness recollection and urged findings of fact to be based on inferences from the documentary evidence and known or probable

⁷ Hogan Lovells Protocol, para 2.9 b)

⁸ For example, ICC Guidance Note, Annex II, Schedule V; Hogan Lovells Protocol, para 3

⁹ Transcript of the Clayton Utz, The Day Before Tomorrow: Future Developments in International Arbitration, Toby Landau QC, 2009
https://www.claytonutz.com/internal/archive/ialecture/content/previous/2009/speech_2009

facts.¹⁰ Moreover, in a virtual hearing a Tribunal can observe a witness from a closer perspective in some senses given that all participants are closer to the screen than they are likely to be in real life. Thus, even if how the witness conducts him or herself is deemed important, the Tribunal is not operating blind in this respect.

Final observations

27. There is a case that Covid-19 is accelerating inevitable change in how arbitrations and specifically hearings are conducted. Pressure on costs, efficiency, cybersecurity¹¹ and the environmental concerns,¹² combined with the availability of platforms which make virtual interaction easier than ever, may have led to the three changes discussed above in any event. However, the speed of the transformation to virtual hearings has been unquestionably spurred on by the Covid-19 pandemic.
28. Once the Covid-19 pandemic has retreated, will we likewise retreat from this technology? Crystal ball gazing in the middle of a crisis may be a dangerous exercise, but given the other external pressures, this seems unlikely, save for in relation to virtual hearings where the picture is more mixed.
29. For certain categories of hearing and cases, it is very plausible that we will see an increase in the use of fully virtual hearings. It is common for case management conferences to be conducted by telephone conference, but as the default mode of communication moves from telephone calls to virtual calls (as it once did from fax to email), it is likely short hearings like this will follow suit. For cases where the value of dispute is low and/or where the issues neither lengthy or complex, tribunals and parties may be strongly incentivised to opt for a virtual hearing to save on what can be significant travel and accommodation costs. However, the benefits of hearings in person remain, especially where the hearings are expected to be long complex ones and the value in dispute is significant. There is much to be said for having all participants in the same time zone, without distraction and enabled to build rapport.
30. Thus, while virtual hearings may become the norm for a period of time, and this seems likely to generate a legacy of hearings being conducted virtually, in the long term we should also see a return to physical hearings for appropriate cases. In the meantime, arbitration remains well equipped and guided to proceed in the face of the Covid-19 pandemic.

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13 May 2020

¹⁰ [2013] EWH C 3560 (Comm) [15]-[21]; In particular “the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

¹¹ [ICCA/-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, 2020](#)

¹² <https://www.greenwoodarbitration.com/greenpledge>

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