

COVID-19 - THE IMPACT ON COURT AND ARBITRATION HEARINGS

Contents

I. INTRODUCTION

II. DEFAULT POSITION - RIGHT TO AN ORAL HEARING

(A) ICC Arbitration Rules 2017

(B) LCIA Arbitration Rules 2014

(C) SIAC Arbitration Rules 2016

(D) Stockholm Chamber of Commerce Arbitration Rules 2017

(E) English Civil Courts' Temporary COVID-19 Protocol

III. VIDEO HEARINGS

IV. PRACTICAL ASPECTS OF VIDEO HEARINGS

V. GOING FORWARDS

I. INTRODUCTION

1. This Outline Briefing Note addresses the impact that the ongoing coronavirus (COVID-19) pandemic situation is having upon the ability for courts and tribunals to conduct hearings, and the measures that may be deployed in order to ensure that disputes continue to be dealt with fairly, effectively and as expeditiously as possible.

II. DEFAULT POSITION - RIGHT TO AN ORAL HEARING/ AN OPEN HEARING.

2. In the absence of a party agreement on a documents-only arbitration or some other agreement to dispense with the need for a hearing, the default position is the parties in an arbitration are entitled to have an oral hearing, almost always accessible only to the parties and arbitrators, due to the nature of arbitration being a contractually agreed confidential process. In contrast, the principle of "open justice" prevails before most Courts, which requires an open/public hearing, accessible to members of the public save in very limited circumstances.

3. Various international human rights instruments including Article 10 of the Universal Declaration of Human Rights 1948, Article 6 of the European Convention on Human Rights 1951, and Article 14 of the International Covenant on Civil and Political Rights 1966 are accepted as embodying this right. Limitations upon a "public" hearing may be imposed on grounds of national security or situations of emergency.

Applicable Arbitral Institutional Rules.

4. Article 19.1 of the LCIA Arbitration Rules 2014 provides as follows:

"19.1 Any party has the right to a hearing before the Arbitral Tribunal on the parties' dispute at any appropriate stage of the arbitration (as decided by the Arbitral Tribunal), unless the parties have agreed in writing upon a documents-only arbitration. For this purpose, a hearing may consist of several part-hearings (as decided by the Arbitral Tribunal)".

5. Similarly, Rule 24.1 of the SIAC Arbitration Rules 2016 provides as follows:

"Unless the parties have agreed on a documents-only arbitration or as otherwise provided in these Rules, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including any issue as to jurisdiction".

6. However, whilst most oral hearings are held in-person, an oral hearing can (and increasingly is) held 'remotely' - by video conference or by telephone conference.

III. VIDEO HEARINGS

7. It is not uncommon in arbitrations, in particular international arbitrations, for arbitrators, parties and witnesses to all be based in different countries and, therefore, required to travel for an in-person hearing. Availability can sometimes be a difficult issue in multi-person tribunals.

8. However, the arbitration rules of most of the major arbitration institutions either expressly provide for, or at least leave open, the possibility of dealing with matters 'remotely' through the use of technology, including video hearings and telephone hearings. Video hearings themselves are thus not an entirely new feature in dispute resolution.

(A) ICC Arbitration Rules 2017

9. Article 22 of the ICC Arbitration Rules 2017 provides (in relevant part) as follows:

"1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

2 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".

10. Thus, both the parties and the tribunal are required to be proactive in making efforts to conduct arbitrations efficiently and to agree to appropriate procedural measures to further that cause wherever possible.

11. Article 24 of the ICC Arbitration Rules 2017 provides (in relevant part) as follows:

"1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural

measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

...3 To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.

4 Case management conferences may be conducted through a meeting in person or videoconference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative". (emphasis added)

12. An ICC tribunal may therefore conduct a Case Management Conference by videoconference and, indeed, can determine to do so on its own motion in the absence of party agreement. In practice, however, tribunals and parties should act in consultation with each other on such matters.

13. Appendix IV, referred to in Article 24(1) of the ICC Arbitration Rules 2017, concerns "case management techniques", and provides (in relevant part) as follows:

"The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

...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". (emphasis added)

14. An ICC tribunal can therefore hold both Case Management Conferences and other hearings "where attendance in person is not essential". Given the restrictions on gatherings and on travel currently at play in many countries around the world as a result of the COVID-19 outbreak, parties and tribunals should be giving close thought to what matters it is imperative for there to be in-person attendance. In practice, even substantial hearings involving live witness examination may be dealt with without in-person attendance by everyone involved, subject to the practical considerations discussed below.

(B) LCIA Arbitration Rules 2014

15. Article 14 of the LCIA Arbitration Rules 2014 provides (in relevant part) as follows:

"14.1 The parties and the Arbitral Tribunal are encouraged to make contact (whether by a hearing in person, telephone conference-call, video conference or exchange of correspondence) as soon as practicable but no later than 21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal.

...14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:

(i) a duty 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

(ii) 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.

14.5 The Arbitral 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".

16. Thus, an LCIA tribunal must adopt procedures suitable to the circumstances in discharging its duty to provide fair, efficient and expeditious means for dispute resolution, subject to the law of the seat or other applicable rules.

17. Furthermore, Article 19.2 of the LCIA Arbitration Rules 2014 specifically allows for any hearing to be held by video or telephone:

"19.2 The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).." (emphasis added)

(C) SIAC Arbitration Rules 2016

18. Rule 19 of the SIAC Arbitration Rules 2016 provides (in relevant part) as follows:

"19.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.

...19.3 As soon as practicable after the constitution of the Tribunal, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case.

...19.7 The President may, at any stage of the proceedings, request the parties and the Tribunal to convene a meeting to discuss the procedures that will be most appropriate and efficient for the case. Such meeting may be conducted in person or by any other means".

19. Thus, Rule 19.3 allows for a SIAC tribunal to hold at least the initial preliminary hearing "in person or by any other means". Rule 24 of the SIAC Arbitration Rules 2016 (concerning "Hearings") does not directly address the issue of video hearings, but does not exclude them.

20. It is understood that SIAC have encouraged parties to make use of the virtual ADR offerings at Maxwell Chambers in Singapore for the conduct of hearings going forwards.

(D) Stockholm Chamber of Commerce Arbitration Rules 2017

21. Article 28 of the SCC Arbitration Rules 2017 provides (in relevant part) as follows:

"(1) After the referral of the case to the Arbitral Tribunal, the Arbitral Tribunal shall promptly hold a case management conference with the parties to organise, schedule and establish procedures for the conduct of the arbitration.

(2) The case management conference may be conducted in person or by any other means.

(3) Having regard to the circumstances of the case, the Arbitral Tribunal and the parties shall seek to adopt procedures enhancing the efficiency and expeditiousness of the proceedings...". (emphasis added)

22. Article 32 of the SCC Arbitration Rules 2017 (concerning "Hearings") does not directly address video hearings, but does not exclude them.

(E) English Civil Courts' Temporary COVID-19 Protocol

23. On 22 March 2020, the English courts issued a temporary COVID-19 Protocol, *inter alia*, to provide guidance to the courts and parties on the carrying out of remote hearings. In addition to providing practical guidance as to how the hearings are to take place, guidance is given on how to hold such hearings in a manner compliant with the principles of open justice. The Protocol is now found in Section AA of Volume 1 of the White Book and online on the website of the judiciary (<https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>).

24. In practice, an increasing number of English Court hearings are being conducted (where possible) by telephone or video-link. A member of the public or press may contact the Court authorities to potentially observe such hearings, signalling the fundamental importance attached to open justice.

IV. PRACTICAL ASPECTS OF VIDEO HEARINGS

25. Technology has the ability to make any hearing more efficient. For example, document viewing software exists to remove the problem of multiple people in a room struggling to find the relevant passage amongst thousands of documents in multiple hard copy files; a technology consultant presses a button and the document/passage appears simultaneously on the screens of the arbitrators, counsel, parties and (where relevant) witnesses. Additionally, many hearings benefit from real time transcripts and recordings of proceedings.

26. The other side of the coin is that technology also has the potential, if used ineffectively, to obscure the substance of a hearing which (at worst) can lead to procedural unfairness. For example, PowerPoint presentations can, on the one hand, be used effectively to simplify dense submissions and voluminous material and can also, on the other hand, have the effect of duplicating the amount of material that the tribunal needs to view and understand (if it is attempted to be used as, in effect, an extra round of 'submissions').

27. A common practical difficulty is ensuring that everyone involved in a hearing (wherever they may be in the world) can access the relevant technology/equipment and has a sufficiently strong Internet connection to be able to run it smoothly. A concern that is being raised by some, which must therefore be addressed by service providers with greater clarity is the confidential/secure nature of internet based video communications.

28. Perhaps the most common area in which videoconferencing has been deployed in arbitration (and in the English courts) so far has been for the hearing of the evidence-in-chief and cross-examination of live witnesses.

29. In *Hanaro Shipping v Cofftea Trading* [2015] EWHC 4293 (Comm), Teare J rejected an argument that there was a procedural imbalance between one party's witnesses giving evidence in person whilst the counterparty's witnesses gave evidence only by video link. Teare J held (at paragraph 16) as follows:

"16. In any event, there is the possibility of evidence being given by video link. It seems that is not possible in the Sudan, but would be possible elsewhere; Dubai has been mentioned. No doubt that would take - I think it is said in the skeleton argument - two days and involve expense, but that expense it seems to me would be well within the means of the defendants who have purchased as I say this cargo for \$18 million. Finally I should say in relation to the video link Mr Buckingham suggested that there would be an imbalance between witnesses who have to give evidence by video link and witnesses who give evidence in person. I am not persuaded that there is such a risk. Perhaps in the early days of video link when the quality of the video link was poor and it was a novelty, perhaps that might have been said, but these days I do not consider that that can be said".

30. However, whilst taking evidence by video link is aimed at contributing to procedural fairness (if the alternative is that witness evidence cannot be received or adequately tested), it is important to understand and guard against the risk that the method of videoconferencing should be such as to allow the tribunal and the parties to be satisfied that the witness is not being coached or prompted offscreen, either by a person or other materials.

31. Furthermore, the effectiveness either of the witness's evidence or the ability of counsel to examine or cross-examine can be undermined by a poor or intermittent Internet connection at either end. There are many examples of English court judgments where judges have felt compelled to make a note of unsatisfactory videoconferencing. For example:

31.1. In *Jiangsu Shagang Group Co Ltd v Loki Owning Company Ltd* [2018] EWHC 330 (Comm), Carr J, discussing the underlying arbitration proceedings, noted (at paragraph 15) as follows:

"15. ...The hearing spanned a week in July 2016 during the course of which Mr Shen Wen Ming ("SWM") alone gave oral evidence for JSG via (an unsatisfactory) video link from the PRC (and with the aid of an interpreter). SWM was at all material times the Vice President of JSG and also a director of Shagang".

31.2. In *PEC Ltd v Asia Golden Rice Company Ltd* [2014] EWHC 1583 (Comm), Andrew Smith J held (at paragraph 34) as follows:

"34. ...However, it is less clear whether anyone other than Mr Narang gave approval: Mr Mirchandani's evidence about this was not assisted because the video-link to India broke down while he was being cross-examined about this. I conclude on balance that Mr Mirchandani probably did not give approval in advance ...".

V. GOING FORWARDS

32. The ongoing COVID-19 situation has compelled both courts and arbitral tribunals to hold virtual hearings, to a far greater extent than has ever been experienced before. As a result, the general level of exposure to videoconferencing technology will lead to a greater level of understanding of and competence in the use of such technology amongst judges/arbitrators, counsel and parties.

33. Whilst we must all hope that the impact of COVID-19 on the vulnerable, elderly as well as businesses all over the world is minimised, it seems inevitable that there will be greater use of video hearings and the online aspects of dispute resolution not just during the course of the stringent 'lockdown' situation currently being experienced around the world but also, possibly, thereafter.

McNair Chambers specialise in International Arbitration, Commercial Litigation, Public International, Energy and Regulatory Law. For further information please do not hesitate to contact Lucy Marie Jamieson, contact details below.

Lucy Marie Jamieson

Chief Executive

McNair Chambers (a QFC registered entity)

5th Floor, Tatweer Tower

West Bay, Doha-Qatar

Tel: +974 4491 1404

Fax: +974 4491 1407

Mobile: +974 6612 6620

www.mcnairchambers.com