



QUESTIONS AND ANSWERS ON HOW BEST TO DEAL WITH INTERNATIONAL ARBITRATION IN THE FACE OF COVID-19

Following the briefing¹ we issued on how the English Courts are meeting the challenges posed by Covid-19, and after receiving a high number of requests from clients on the impact to their arbitrations, in this briefing we set out the current issues faced by those engaging in International Arbitration (IA) and offer possible solutions, and also summarise the way in which a number of the key IA Institutions (as well as ICSID) and trade associations are adapting to support parties during the pandemic.

¹ <https://www.hfw.com/downloads/001950-HFW-Litigation-English-Courts-remain-open-for-business-Covid-19.pdf>

“Parties may be concerned about the cost of a remote hearing, and it is true that setting up the technology will involve additional cost.”

By its very definition IA is international, and so ideally placed to cope with remote hearings, it is, as are most arbitrations, flexible in approach and well used to adapting to the requirements of users in either wishing to, or due to travel restrictions, needing to avoid physical hearings with parties, their legal representatives, and the tribunal. Indeed the Campaign for Greener Arbitrations², to which HFW is a signatory and one of the authors (Nicola Gare) of this briefing is a Steering Committee member, has advocated the use of virtual hearings and electronic bundles (eBundles), long before Covid-19; now more than ever the Campaign is an initiative worth considering.

Options

Parties and their lawyers are likely to be considering the following four options:

1. Adjourning their hearings - thus avoiding the need to put in place the practical steps needed to arrange a remote hearing. However, it is not clear at the moment for how long this pandemic will last and when travel restrictions will be lifted to enable a physical hearing to take place. A distinction should also be

made between merits hearings and procedural hearings.

2. Agreeing to have the dispute dealt with on documents alone, this might be a sensible option where factual evidence is not key to the issues.
3. Agreeing to submit only part of the dispute to arbitration, either to be heard on documents alone, or via a reduced remote hearing. This may work well for disputes with distinct heads of claim.
4. Proceeding with a remote hearing.

Issues and solutions on remote hearings

Remote hearings – the practicalities

Whilst not intended for the circumstances arising from Covid-19, and where an Institution does not provide for the way in which remote hearings will be carried out or in addition to their provisions, parties may wish to consider adopting some of the recommendations in the Seoul Protocol on Video Conferencing In International Arbitration (the Protocol)³.

The Protocol largely focusses on the approach to be taken when examining witnesses etc and has been available for a couple of years.

It helpfully covers the practical aspects of remote hearings by reference to witness examination, video conferencing venue, observers, documents, technical requirements, test conferencing and audio backup, interpretation, recordings, and preparatory arrangements.

Parties may be concerned about the cost of a remote hearing, and it is true that setting up the technology will involve additional cost. However, this is easily balanced against the savings made by the parties in terms of travel and accommodation. In most cases, the cost may not be significantly (or any) higher than a physical hearing.

Hearing bundles, are now increasingly electronic rather than hard copy, and so most parties and certainly lawyers and tribunals will be used to working from eBundles, and even before Covid-19 would have preferred using these to having to deal with many hard copy lever arch files and thousands of pieces of paper- they are more efficient and easier to work from due to hyperlinked cross-references, ability to be immediately updated when new documents come to light etc., and assistance in creating written submissions, not to mention the huge environment saving impact.

² <https://www.greenwoodarbitration.com/greenerpledge>

³ <https://tinyurl.com/wl85nlg>

Witness evidence

Whilst the Protocol mentioned above assists to a degree, there may however be real considerations for parties and tribunals on whether it would be fair and just to allow witness evidence remotely and relatively unsupervised, especially where their credibility is key.

Awards

Arbitration Awards can be delivered via email and then when possible certified hard copies circulated to the parties, and most of the Institutions are providing for this. Electronic signatures are a common occurrence in business life, and there are various technological options that will support this and enable individual arbitrators to use their eSignature. However, what is less clear is whether the law of the respective seat of the arbitration, will permit this - a point parties will wish to confirm with their lawyers before embarking on a remote arbitration, to avoid any issues of enforcement that might later arise.

A further issue to be cautious about is whether an Award issued electronically (ie without wet signatures) will be capable of being enforced in the jurisdiction in which the paying party under the Award has assets. For those countries where formality around the issuance of documents is still important, this is an issue parties should confirm with their lawyers.

Cyber-security

Cyber-fraud in IA has been a concern for the last few years, and unfortunately it does not appear that Covid-19 has had a positive impact in this area, in fact the prevalence of remote hearings is likely to increase cyber-fraud. Parties and their lawyers should therefore continue to take steps to protect themselves and their arbitration proceedings, and may

wish to consider the guidance given in the 2020 Cybersecurity Protocol for International Arbitration⁴.

Illness

It is a sad fact that at some point one of the parties, their lawyers, or the tribunal may become ill. Consideration should be given to how this will be managed- will the arbitration be able to continue, and if so how?

Approach of Individual Institutions

We have set out the current position of the main Institutions, and London based trade associations offering arbitration services, most of whom we are pleased to report, remain open for business. We understand that the following are operating remotely but able to provide a near business as usual service:

- London Court of International Arbitration (LCIA) encourages the use of online filing for requests and bank transfers/credit card payment for fees, parties can also make use of its online filing/ registration facility at this link.⁵ Email is to be used for applications and correspondence, and awards will be emailed to the parties with hard copies to follow once it has re-opened (*LCIA Services Update: COVID-19*).⁶
- International Chamber of Commerce (ICC) requests for arbitration, emergency arbitration (including exhibits) to be filed with the Secretariat by email. At the time of writing the ICC confirms that all hearings scheduled to take place at the ICC Hearing Centre in Paris have been postponed or cancelled (ICC guidance)⁷. Remote hearings will be explored.
- Hong Kong International Arbitration Centre (HKIAC), has not closed its centre and is

prepared to hold physical hearings (Precautionary measures at HKIAC in response to COVID-19)⁸, although enables remote hearings as well (eHearings guidance)⁹.

- Singapore International Arbitration Centre (SIAC) asks that all applications and communications are sent via email, with payments are to be via electronic bank transfer (*COVID-19: SIAC Case Management Update*).¹⁰
- Arbitration Institute at the Stockholm Chamber of Commerce (SCC) asks that requests for arbitration or applications for emergency arbitrators are sent via email (*SCC: COVID-19: How the SCC is responding*).¹¹
- The Swiss Chambers' Arbitration Institution, asks for applications for emergency relief, notices of arbitration and answers to the notice to be filed by email as well as by post/courier, and will correspond via email (*see Swiss Chambers: Our continued commitment to supporting you*).¹²
- The German Institute for Arbitration (DIS) has temporarily closed the Berlin office. However, the DIS Bonn office remains open and communications can go through that office and via email. (*see DIS: Update: COVID-19*).¹³
- The International Centre for Settlement of Disputes (ICSID) Secretariat is operating remotely. New requests for arbitration and post-award applications should be filed electronically. ICSID is also encouraging parties and tribunals to use electronic pleadings (*see ICSID: Message Regarding COVID-19 (Update)*)¹⁴. In addition, ICSID has published a guide to online hearings (*A Brief Guide to Online Hearings at ICSID*).¹⁵

4 <https://tinyurl.com/svt46cg>

5 <https://onlinefiling.lcia.org>

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

7 <https://tinyurl.com/ut5qhpq>

8 <https://www.hkiac.org/our-services/Facilities>

9 <https://www.hkiac.org/content/e-hearings-hkiac>

10 <https://tinyurl.com/wdfvhuk>

11 <https://sccinstitute.com/about-the-scc/news/2020/covid-19-how-the-scc-is-responding/>

12 <https://www.swissarbitration.org>

13 <http://www.disarb.org/en/>

14 <https://icsid.worldbank.org/en/Pages/News.aspx?CID=361>

15 <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>

- The London Maritime Arbitrators Association (LMAA) reports that it is business as usual. A significant number of LMAA arbitrations take place on a documents only basis, and so accordingly the LMAA has significant experience of conducting arbitrations where no physical hearing is required. Covid-19 should have limited impact on such arbitrations. Where a hearing is needed the LMAA states that it is working with the IDRC to promote the use of available technology to enable virtual hearings to take place. Requests for appointment of arbitrators are being processed by email, and procedural hearings can take place by conference call or video conference. (LMAA guidance)¹⁶
- The Grain and Feed Trade Association (GAFTA) has confirmed that all arbitration requests are being processed by the arbitration team who are now working remotely. Arbitration Awards continue to be published electronically. At the present time there is no current plan for virtual hearings, but the position remains under review. (GAFTA guidance)¹⁷

In conclusion

Whilst Covid-19 poses many challenges for us all, because of the contractual nature of IA it is relatively flexible, and for the most part is well able to cope with remote hearings and the use of eBundles etc., it is therefore very much a case of business as near-normal.

We are working on IA remote hearings, and aside from the very heavily witness dependant cases, where witness credibility is key, or where translators are required, or parties are in a jurisdiction where broadband or the other technology needed is simply not available or adequate, we do not anticipate arbitrations needing to be adjourned- however, parties will need to review the circumstances of their individual matters and take appropriate advice.

In our experience, the key to a smooth hearing is party co-operation, leaving enough of a lead in time to test the connections and ensure everyone involved is happy with how the technology works - a practice run may often be a good idea, and it definitely helps to work with established and experienced technology partners.

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¹⁶ <http://www.lmaa.org.uk/news-article.aspx?pkNewsEventID=2f964679-185b-4147-bed9-9dcbd6d00a4c>

¹⁷ <https://www.gafta.com/news>

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