

Dispute Resolution

COVID-19 and Remote Arbitration: How are Major Arbitral Institutes Adapting to the New Normal?

Introduction

As the famous maxim goes, justice delayed is justice denied. Amidst the COVID-19 pandemic, twelve arbitral institutions came together on 16 April 2020 to publish a joint statement on supporting "international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay."

Here, we take a look at some issues with remote arbitration, and what steps the following six major arbitral institutions ("**Arbitral Institutions**") are taking to manage cases during the COVID-19 pandemic:

1. Singapore International Arbitration Centre ("**SIAC**");
2. Indonesia National Board of Arbitration (*Badan Arbitrase Nasional Indonesia* ("**BANI**"));
3. China International Economic and Trade Arbitration Commission ("**CIETAC**");
4. Hong Kong International Arbitration Centre ("**HKIAC**");
5. International Chamber of Commerce International Court of Arbitration ("**ICC Court**"); and
6. London Court of International Arbitration ("**LCIA**").

Steps by Arbitral Institutions

The Arbitral Institutions have generally been shifting procedures online where possible, from payment methods to document submissions. Other suggested case management techniques include bifurcating the proceedings by way of rendering one or more partial awards when doing so is likely to result in a more efficient resolution of the case, and/or identifying issues that can be resolved by way of written questions and answers, thus dispensing with the need for "live" testimony from witnesses.

Where hearings cannot be done away with, some Arbitral Institutions have issued guidelines and taken other measures to carry on business as usual where possible. We summarise these steps in the table below.

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Restrictions on physical operations	Physical offices are open from 10 am to 4 pm on Mondays and Thursdays to receive hard copies of documents. SIAC remains fully functional otherwise, as the majority of staff are telecommuting.	In-person arbitrations have restarted since 1 July 2020, subject to restrictions on numbers of attendees, the wearing of masks, and other health protocols.	There are no current restrictions on operation, and physical filing of documents has resumed since early June 2020.	Premises remain available, although entry is subject to health declarations, temperature checks etc.	Hearings and other meetings at the ICC Hearing Centre in Paris have been postponed or cancelled. Staff are telecommuting.	All interactions should be done online or over the telephone. Staff are telecommuting.
Amendments to procedures in view of COVID-19	Notices of Arbitration, applications for emergency relief, and payment are to be submitted electronically. Timelines will <i>not</i> be automatically extended; applications for extensions must still be made.	BANI has enacted Decree No. 20.015/V/SK-BANI/HU on Rules and Procedures for Electronic Arbitration, which can only be implemented during a state of emergency. The decree permits the submission of any briefs to be delivered through email and the hearings, and pronouncement of decisions can be conducted through video conference.	Pursuant to its Guidelines , CIETAC encourages use of their online case filing system, electronic service of documents, and virtual hearings, among others. Further details are available here .	Documents may be delivered electronically pursuant to existing rules. Where hard copies are served, the case manager or the HKIAC reception must be informed in advance.	Generally, all requests are to be filed electronically. Further details are available here .	All correspondence, requests, and awards should be delivered electronically, with original hard copies sent after LCIA has reopened its office.

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Whether the applicable Rules specifically permit remote hearings	x Rule 19.1 provides that 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.	✓ While the original Rules do not provide for remote hearings, the issuance of BANI's decree enables parties to hold remote hearings. Further details are available in our client update titled " BANI Moves Arbitration Online ".	x Article 35 provides that the tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties, while the Guidelines expressly provide that virtual hearings shall be "a specific way of conducting oral hearings which is in accordance with [CIETAC's Arbitration Rules]".	x Article 13.1 permits the tribunal to adopt suitable procedures in order to avoid unnecessary delay or expense.	x Remote hearings are only provided for in the context of case management conferences, emergency arbitrator proceedings and expedited proceedings.	✓ Article 19.2 allows hearings to take place by video and/or telephone conference and/or in person. Further, on 11 August 2020, LCIA announced an update to its Rules which will come into effect on 1 October 2020. Among other matters, the new Rules provide for the use of electronic communication and virtual hearings.
In-house remote hearing services	x Recommends use of Maxwell Chambers' Virtual ADR Services	x	✓	✓	✓	x
Principles or guides for virtual hearings	x	x	✓ Available in annex	✓ Available here	✓ Available here	x

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Other Issues

Shifting arbitration proceedings online has many benefits, particularly with ongoing travel restrictions. However, it comes with its risks. As cyberattacks become increasingly common, parties must not overlook the imperative to ensure that the privacy and security of their remote arbitration is maintained. Arbitral institutions have published guidelines to advise users on how to address these concerns. For example, the AAA-ICDR has published a "[Best Practices Guide for Maintaining Cybersecurity and Privacy](#)", and the ICC covers suggested clauses for cyber-protocols to ensure compliance with applicable data privacy regulations in Annex II of the "[ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#)".

Another critical issue is where one party to the arbitration does not consent to remote arbitration. Article V(1)(d) of the New York Convention provides that a court may refuse enforcement of arbitral awards where "the arbitral procedure was not in accordance with the agreement of the parties". Parties should therefore bear in mind that they risk having an arbitral award which may not be enforceable in the event that an arbitral tribunal elects to proceed with a remote hearing without the consent of all parties.

Concluding Remarks

Prior to the pandemic, there had already been an interest in alternatives to in-person hearings. In the "[2018 International Arbitration Survey: The Evolution of International Arbitration](#)", 66% and 89% of respondents felt that virtual hearing rooms and videoconferencing respectively should be used more often in future. On 12 May 2020, Maxwell Chambers in Singapore, Arbitration Place in Canada, and the International Dispute Resolution Centre in the UK announced the formation of the International Arbitration Centre Alliance ("[IACA](#)") to provide "global hybrid hearings" through a combination of physical and virtual attendance methods.

Perhaps the COVID-19 pandemic has triggered the evolution of the conduct of international arbitration proceedings, and will compel users to overcome the inertia towards the adoption of remote hearings. Remote arbitration may be here to stay even after the pandemic has come to an end.

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The information in this article is accurate as of 11 August 2020.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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