

Corporate Newsletter

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2020**Virtual dispute resolution – the new norm?**

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A. INTRODUCTION

Since its outbreak in December 2019, the world has been battling the COVID-19 pandemic and its impact on global health, economy and society. After months of lockdowns and emergency declarations in numerous countries, both the public and private sectors are implementing measures to restore social and economic functions, including access to justice.

Local courts and arbitral institutions in many jurisdictions are developing alternative ways of dispute resolution whilst in-person services and hearings remain largely suspended. The trend seems to be moving towards “contactless” trials and arbitrations via electronic filings and virtual hearings. This newsletter will highlight some of the latest developments in court and arbitral practice around the globe.

B. LITIGATION AND COURT PRACTICE

Amidst the near standstill of the judiciary, local courts in several countries are slowly resuming operations and opening up to virtual proceedings. England and China are leading the way while other jurisdictions, such as Japan, are still adjusting

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to the situation.¹

In March 2020, England enacted the Coronavirus Act, providing for greater use of remote communication technologies in hearings. Since then, numerous English courts have held their first ever virtual trials, including the Commercial Court of the High Court of Justice, the Court of Protection, and various family courts.² In Asia, China has been experimenting with online courts since 2017,³ and is now expanding its offering to a total of three fully virtual “internet courts” and a “mobile micro-court” operating on the social media platform WeChat.⁴ Other countries such as the US, Australia, Ireland, South Africa, Singapore, Malaysia, Indonesia, India, and Hong Kong are following suit, yet to a lesser extent.⁵ European courts in France, Germany, Belgium, Italy, and the Netherlands generally limit video hearings to urgent matters.⁶

Despite these efforts, virtual trials are still far from becoming regular court practice. This is because local courts are often not equipped with the necessary technology to go entirely virtual. But even where they are, courts still face substantial technical challenges as well as security and transparency issues. Also, while virtual proceedings may be suitable for civil and family matters, they may not work for hearings in other areas, e.g. those requiring jury trials.⁷

C. ARBITRAL PRACTICE

International arbitration is known for several key advantages over domestic litigation, including procedural flexibility, a neutral forum, and near global enforceability of awards. The ongoing pandemic has yet again highlighted the arbitral community’s ability to swiftly react to new challenges. In the face of COVID-19, several major arbitral institutions have pledged to collaborate to ensure that parties have their cases heard without undue delay.⁸ To assist users and practitioners in the field, many arbitral institutions are equipping themselves with the necessary technology to allow electronic

¹ Japan courts struggle to hold trials amid pandemic, The Japan Times, 14 April 2020; see also website of the Supreme Court of Japan: <https://www.courts.go.jp/english/news/index.html>.

² See <https://www.gov.uk/government/publications/coronavirus-bill-summary-of-impacts/coronavirus-bill-summary-of-impacts> and https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak?utm_medium=email&utm_source=www.lawsociety.ie/gazette/top-stories/skype-trial-keeps-justice-moving-in-london/.

³ <https://www.netcourt.gov.cn/portal/main/en/index.htm>.

⁴ http://english.court.gov.cn/2020-03/11/content_37534291.htm; China moves courts online due to coronavirus, following classes and offices, South China Morning Post, 17 February 2020.

⁵ See website of the US Supreme Court: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20. For local courts overview: <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>. *Capic v. Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, Judgment, 15 April 2020. *Liberty Group Ltd v. Illman* (1334/2018) [2020] ZASCA 38 (16 April 2020): <http://www.saflii.org/za/cases/ZASCA/2020/38.html>. Malaysia moves to Virtual Court hearings during Covid-19, GovInsider, 30 March: <https://govinsider.asia/data/malaysian-bar-malaysia-moves-to-virtual-court-hearings-covid-19/>. Indonesian courts to go virtual during COVID-19, The Nation Thailand, 20 April 2020: www.nationthailand.com/ann/30386420?utm_source=bottom_relate&utm_medium=internal_referral; Indian Supreme Court: https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf; Hong Kong: <https://www.info.gov.hk/gia/general/202004/22/P2020042200413.htm> and https://www.news.gov.hk/eng/2020/04/20200413/20200413_110404_476.html.

⁶ See https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do and EU Commission Directorate-General Justice And Consumers, Comparative Table On Covid-19 Impact On Civil Proceedings.

⁷ See The Jury is still out on Zoom trial, The Verge, 22 April 2020: <https://www.theverge.com/2020/4/22/21230022/jury-zoom-trials-court-hearings-justice-system-virtual-transparency>.

⁸ Arbitral institutions COVID-19 joint statement: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>.

submissions and to conduct meetings or hearings via videoconference.⁹ Moreover, many institutions have published their own guidelines on virtual arbitrations and are holding numerous webinars on the topic.

I. Response by arbitral institutions

One of the first initiatives to be finalized was the Seoul Protocol on Video Conferencing in International Arbitration (“**Seoul Protocol**”) of March 2020.¹⁰ Discussed since late 2018 and thus long before the COVID-19 outbreak, the Seoul Protocol is aimed at ensuring efficiency, fairness and confidentiality of arbitral proceedings with a significant virtual component. It is promoted by KCAB International and the Seoul IDRC. Other arbitral institutions such as the ICC and AAA-ICDR, as well as organizations such as CIArb, Delos Dispute Resolution and the African Arbitration Academy have released similar notes and checklists.¹¹ To make up for the sudden cancellation of in-person arbitration seminars, a whole range of online trainings and events have emerged. Some arbitral institutions, such as SIAC, AIAC and the SCC, were quick to set up regular webinar series.¹² This has led to a novel situation for busy practitioners: previously, their grumbling about too many arbitration conferences was mainly anecdotal as nobody actually had the time and money to attend them all. Suddenly, practitioners are spoilt for choice and are forced to carefully balance numerous webinars against their competing work commitments.

In terms of accessibility, the pandemic has accelerated the shift to the all-electronic filings and document databases that several institutions had been pursuing for some time. A variety of institutional rules already expressly allow electronic submissions, for example the DIS, JCAA, SIAC and HKIAC.¹³ The SCC has transferred all case data to its own SCC Platform.¹⁴ More integrated services include arrangements for virtual hearings currently provided by the ICC, KCAB International in conjunction with the SIDRC, SIAC in cooperation with Maxwell Chambers, HKIAC, SCC and ICSID.¹⁵ While institutions generally rely on standard videoconferencing platforms such as Zoom, WebEx, Microsoft Teams or Skype, the Australian Centre for International Commercial Arbitration (“**ACICA**”) through the Australian Disputes Centre (“**ADC**”) has developed a customized platform called “ADC Virtual”.¹⁶

⁹ For an in-depth introduction, see Markert/Burghardt, *Navigating the Digital Maze – Pertinent Issues in E-Arbitration*, 2017 Journal of Arbitration Studies 27(3), pp. 3-31.

¹⁰ KCAB International website: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024.

¹¹ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic: <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>. AAA-ICDR website: <https://go.adr.org/covid-19-virtual-hearings.html>; CIArb Guidance Note on Remote Dispute Resolution Proceedings: <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>. Delos checklist on holding arbitration and mediation hearings in times of COVID-19: <https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/>. African Arbitration Academy website: <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/>.

¹² SIAC website: [https://www.siac.org.sg/images/stories/press_release/2020/\[Open%20Letter%20from%20SIAC%20Court%20President\]%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf](https://www.siac.org.sg/images/stories/press_release/2020/[Open%20Letter%20from%20SIAC%20Court%20President]%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf). AIAC website: <https://www.aiac.world/events>. SCC website: <https://sccinstitute.com/about-the-scc/event-calendar/>.

¹³ Article 4.1 2018 DIS Rules; Article 2(3) 2019 JCAA Commercial Arbitration Rules. Articles 2.16 and 3.1 HKIAC Rules; Article 2.1 2016 SIAC Rules.

¹⁴ SCC website: <https://sccinstitute.com/scc-platform/>.

¹⁵ Seoul IDRC website: http://www.sidrc.org/bbs/board.php?bo_table=news_en&wr_id=862. HKIAC website: <https://www.hkiac.org/content/virtual-hearings>. SCC website: <https://sccinstitute.com/about-the-scc/news/2020/stockholm-international-hearing-centre-launches-platform-for-virtual-hearings/>. SIAC website: <https://www.siac.org.sg/faqs/siac-covid-19-faqs>. ICSID website: <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>.

¹⁶ ADC website: <https://www.disputescentre.com.au/adc-virtual/>.

II. Possible limitations to virtual hearings

Despite the wide support from arbitral institutions, the question arises what options exist if a party objects to a virtual hearing. Tribunals will have to decide the issue on a case-by-case basis, considering all relevant circumstances. This includes their duty to conduct the arbitration expeditiously, the COVID-19 restrictions affecting each party in its respective domicile, and the limitations to virtual proceedings in the applicable institutional rules and mandatory laws at the seat of the arbitration. Most importantly, virtual hearings have to keep up with the basic tenets of international arbitration, i.e. equal treatment of the parties and right to be heard.

Most institutional rules only permit the use of video-conferencing explicitly for case management conferences, emergency and expedited procedures.¹⁷ As an exception, the LCIA Rules and JCAA Commercial Arbitration Rules allow tribunals to select the appropriate means for holding a hearing, including by video.¹⁸ The UNCITRAL Rules and AAA Rules foresee that witness examinations and presentations of evidence may be conducted by alternative means, including video.¹⁹

At the same time, the arbitration rules of leading arbitral institutions grant tribunals a broad discretion to conduct proceedings as long as they are fair, expeditious and effective.²⁰ Such provisions could be understood as implicitly envisaging virtual hearings. While the English version of the ICC Rules requires tribunals to “*hear the parties together in person*” upon request by a party, the ICC has clarified that “*in person*” does not necessarily mean a physical meeting precluding virtual hearings.²¹ It remains to be seen whether arbitral awards rendered after virtual hearings will withstand applications for set-aside or for denial of enforcement on the grounds that a tribunal breached due process, public policy or mandatory law at the seat of the arbitration. In light of the developments in domestic litigation, it would appear that courts will become more open to the notion that hearings can proceed without the parties’ physical presence.

D. OUTLOOK

Virtual dispute resolution is still in its infancy and far from unanimously accepted. Some may argue that numerous practical and legal uncertainties outweigh its benefits. In-person attendance of hearings may no doubt simplify coordination for parties and tribunals, and improve the quality of oral pleadings by counsel or witness examinations. Moreover, solutions to looming (cyber-)security and confidentiality risks are yet to be fully explored. From a legal perspective, certainly only enforceable arbitral awards will help a party to obtain justice.

However, as rightly pointed out by the Federal Court of Australia, these problems are “*not insurmountable*”.²² For the time being, all that courts and the international arbitral community can do is to look ahead and work towards the efficient and fair resolution of disputes in the best possible way, including (but not limited to) the use of virtual hearings.

¹⁷ Article 4(2) and Appendix IV 2017 ICC Rules; Schedule 1 2016 SIAC Rules; Article 28(2) 2017 SCC Rules; Article 6(3) and Article E-9 2014 IDRC Rules, Article R-38(d) and Article P-2(a)(xiv)(a) AAA Rules.

¹⁸ Article 19.2 2014 LCIA Rules and Article 6.4 para. 33 Guidance Notes for Arbitrators. Article 50(3) 2019 JCAA Commercial Arbitration Rules (“Where the hearings are to be held, the arbitral tribunal should select appropriate means for holding a hearing, including by video conference or other methods”).

¹⁹ Article R-32(c) AAA Rules; Article 28(4) 2010 UNCITRAL Rules.

²⁰ Article 22(2) 2017 ICC Rules (“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 17(1) 2010 UNCITRAL Rules (“the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate...”). See also Article 20 2014 IDRC Rules; Rule 19(1) 2016 SIAC Rules; Article 16(1) 2016 KCAB Rules; Article 13(1) HKIAC Rules; Article 23(1) 2017 SCC Rules; Rules 19 and 36 ICSID Arbitration Rules.

²¹ Article 25(2) 2017 ICC Rules (“2. After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person...”). ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, para. 24.

²² *Capic v. Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, Judgment, 15 April 2020.



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