

The World Health Organization (WHO) declared the novel coronavirus (COVID-19) as a pandemic on 11 March 2020. Thus far, there have been over 4 million confirmed cases and over 200,000 deaths globally. In light of the COVID-19 pandemic, governments around the world have taken measures to limit the outbreak by effecting lockdowns and restricting movement thereby requiring millions of employees to work from home. This has had a significant impact on individuals, businesses and governments as they attempt to navigate through these uncertain and challenging times.

Flexibility is often highlighted as one of the key advantages of arbitration over other dispute resolution mechanisms, such as litigation, as it provides the parties with greater freedom to select an appropriate procedure and process for the dispute.

In response to the COVID-19 pandemic and as a testament to the flexibility of arbitration, arbitral institutions have been quick to adapt and innovate by updating their procedures to minimise disruptions to case progression and to meet the demands of justice. There has been a noticeable shift in preference from telephonic to electronic communication, paper bundles to e-bundles and from in-person hearings to virtual hearings. Most institutions have published guidance on the procedure for filing new requests for arbitration (via an online filing system or e-mail) as well as case management for existing arbitrations.

Some arbitral institutions, including the Hong Kong International Arbitration Centre (HKIAC),¹ American Arbitration Association's International Centre for Dispute Resolution (AAA-ICDR)² and International Centre for Settlement of Investment Disputes (ICSID)³ have also taken the opportunity to highlight the available virtual hearing technologies and capabilities. For instance, the AAA-ICDR have published a Virtual Hearing Guide for Arbitrators and Parties⁴ and a specific guide for those parties utilising the video conferencing application, Zoom.⁵ The International Chamber of Commerce (ICC) has also published a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic⁶ that appends a virtual hearing protocol checklist and a set of suggested clauses to be included in cyber-protocols of procedural orders relating to the organisation of virtual hearings.

On 16 April 2020, the major arbitral institutions published a joint statement offering their support and willingness to assist parties and tribunals to permit pending cases to progress and be heard without undue delay. The statement also made reference to the institutions' efforts to make the "best use of digital technologies for working remotely."

However, due to the uncertainty surrounding COVID-19 a significant number of arbitral proceedings have been or will be suspended. For those proceedings that have been suspended, it will be worthwhile for parties actively to seek out the availability of all those involved, including fact witnesses, experts and arbitrators to reschedule new dates as there will likely be a backlog of suspended cases that may cause additional delays. Parties, especially claimants, considering suspension should keep in mind the additional wasted time and cost that is likely to be incurred as a result, particularly taking into account the availability of three person arbitral tribunals.

Given the advanced technologies currently available along with the express support of arbitral institutions, an increase in virtual hearings is inevitable over the next coming months, and one needs to bear in mind that this power to order or sanction such hearings is expressly permitted and indeed contemplated by the rules of a number of arbitral institutions such as the LCIA. If both parties agree to proceed with a virtual hearing then it may be beneficial to conduct a 'dry run' of the hearing in order to verify that all parties can successfully connect to the conferencing application and any technical difficulties with the video and/or the microphone can be identified and resolved.

Parties interested in participating in a virtual hearing should take into consideration the following potential challenges:

- **Technical issues:** while a dry run may eliminate or minimise any initial technical issues, there may be unexpected video or audio problems that occur during the course of the arbitral hearing. These can cause delays to the proceedings. The parties should establish and agree on a protocol in the event that one of the parties – or arbitrator – disconnects during the hearing. The AAA-ICDR has published a Model Order and Procedures for Virtual Hearing via Videoconference⁷ that contains a template set of protocols to be used and modified by parties, including a section on technical failure.

1 <https://www.hkiac.org/content/virtual-hearings> titled "Convenient and Efficient: HKIAC E-HEARINGS"

2 <https://go.adr.org/covid-19-virtual-hearings.html>

3 <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362> titled "A Brief Guide to Online Hearings at ICSID" dated 24 March 2020.

4 https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf

5 https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf

6 <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>

7 https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf

- **Time zones:** it is common in international arbitration that parties to a dispute are located across the globe. This will increase the difficulty of scheduling a time that would be both feasible and appropriate for all parties involved. In addition, it may also limit the number of hours that can be scheduled in a single day and this may extend the length of the hearing.
- **Delays:** as a result of the potential technical difficulties and the time zone issues noted above, parties should be cognisant of the delays that will likely occur and schedule additional hearing days as necessary.
- **Internet and technology:** all attendees to the hearing will need access to high speed uninterrupted wifi and internet connection for a clear quality video/audio link in addition to suitable technology, such as a PC or laptop, capable of running the video conferencing platform.
- **Confidentiality:** parties involved in a video or audio conference will need to allocate a room in their home to ensure that the discussions taking place cannot be overheard by others to protect any confidential or privileged information. This may present a problem for those individuals living in a small house or flat.
- **Cybersecurity:** the influx of individuals working from home has increased cybersecurity and cybercrime risks. While most law firms have adequate security measures in place, fact witnesses, experts and arbitrators will need to ensure that they have installed adequate security measures to protect personal data.

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