

Open for Business? International Arbitration in the COVID-19 Era and Beyond

April 30, 2020



Presenters



Brendan Cook
Partner, Houston
Brendan.Cook
@bakermckenzie.com



Grant Hannessian
Partner, New York
Grant.Hannessian
@bakermckenzie.com



Kyle Olson
Partner, Chicago
Kyle.Olson
@bakermckenzie.com



Christina Doria
Associate, Toronto
Christina.Doria
@bakermckenzie.com



Glenn Gibson
Associate, Toronto
Glenn.Gibson
@bakermckenzie.com



Eugenie Rogers
Associate, Dallas
Eugenie.Rogers
@bakermckenzie.com

Agenda

1

Is arbitration “Open for Business”? What new protocols apply?

2

How are cases being administered during Covid-19?

3

Are virtual hearings the solution? Are they feasible?

4

Will awards obtained by virtual hearings and remote decision making be enforceable?

5

Are Covid-19 protocols the future of arbitration?

1

Is arbitration “Open for Business”? What new protocols apply?

Arbitrating during a pandemic

The Challenge

- Covid-19 has disrupted court proceedings and to a lesser extent arbitration proceedings.
- The pandemic will generate new disputes that may be difficult to advance because of:
 - safety concerns
 - public health restrictions

Arbitrating during a pandemic

Joint Statement of Arbitral Institutions



DIS



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION*

AMERICAN
ARBITRATION
ASSOCIATION*



International Centre for
Settlement of Investment Disputes
WORLD BANK GROUP

KCAB
INTERNATIONAL

LCIA
Arbitration and ADR worldwide



香港國際仲裁中心
Hong Kong International
Arbitration Centre



VIAC II Vienna International
Arbitral Centre



International Federation of
Commercial Arbitration Institutions

Arbitration and COVID-19

Many parties and tribunals have turned to us at the arbitral institutions for information and guidance in the wake of the COVID-19 outbreak, and we are very conscious that these are challenging times for everyone.

As is being demonstrated daily across the globe, cooperation and collaboration is at the center of an effective response to Covid-19. Our respective institutions are committed to working together at this time for this purpose.

The joint ambition of our institutions is to support 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.

Collaboration is particularly important as each of our institutions looks to ensure that we make the best use of digital technologies for working remotely.

We encourage parties and arbitrators to discuss any impact of the pandemic and potential ways to address it in an open and constructive manner. Arbitral tribunals and parties are asked to mitigate the effects of any impediments to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. In so doing, they are invited to use the full extent of our respective institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments.

By jointly enabling international arbitration to deliver some degree of certainty in a volatile economic climate, we seek to jointly contribute to a world better prepared to meet the challenges of the post-corona crisis.

Our institutions stand ready to assist to the best of our ability, and welcome parties and tribunals to reach out and to consult guidelines and information as published on our respective websites.

Arbitrating during a pandemic

New Protocols

- Service of documents and notifications
- Guidance on organizing virtual hearings
 - services to conduct proceedings electronically and remotely
 - cyber protocols
 - procedural issues

Arbitrating during a pandemic

New Protocols

- Arbitration is well equipped to meet the challenges:
 - virtual hearings
 - tailored timelines
 - paperless process
 - flexibility
- Court proceedings may move in whole or in part to arbitration.

2

**How are cases being
administered during
Covid-19?**

Case Administration Issues

- Continued focus on fair, expeditious, and cost-effective resolution of disputes
- Certain activities can be conducted remotely
- E.g., Pandemic should not materially delay:
 - *initial case management conferences in newly introduced cases*
 - *Tribunal deliberations*
 - *Preparation of awards*
- Parties, counsel, and tribunals have shared obligations to consider procedural measures to mitigate delays to the arbitral process

Case Administration Issues

- Embracing electronic document management:
 - *New requests for arbitration with exhibits and other initiating documents*
 - *Terms of Reference*
 - *Other documents and notifications*
- Take advantage of case management techniques (many of which are not new) to mitigate delays and increase efficiency:
 - *2019 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*
 - *AAA-ICDR Arbitrator Survey – Best Practices for Increasing Efficiency & Lowering Costs*
 - *Expedited Procedures under applicable rules*

3

**Are virtual hearings
the answer? Are they
feasible?**

Virtual Hearing Checklist

- ✔ Agree with adversary and tribunal on detailed protocol/procedural order re: platform, provider, documents, witnesses, security.
- ✔ Prepare for every step of the process, particularly use of documents with witnesses.
- ✔ Test the technology.

Virtual Hearing Resources

Model Procedural Orders / Clauses

CPR Annotated Model Procedural Order for Remote Video Arbitration Hearings (available [here](#)).

AAA/ICDR Model Order and Procedures (available [here](#)) and Panelist Resource for Virtual Hearings (available [here](#)).

S. Cohen (Independent Arbitrator) Draft Zoom Hearing Procedural Order (available [here](#)).

Guidance Notes and Other Resources

ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of COVID-19 Pandemic and Suggested Procedural Order Clauses (available [here](#)).

CIArb Guidance Note on Remote Dispute Resolution Proceedings (available [here](#)).

Seoul Protocol on Video Conferencing in International Arbitration (available [here](#)).

ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (available [here](#)).

IBA Technology Resources for Arbitration Practitioners (available [here](#)).

4

**Will awards obtained by
virtual hearings and
remote decision making
be enforceable ?**

Enforcement

NY Conv. Art V, §§ 1-2 re Refusal to Recognize or Enforce Award

- Section 1: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that..."
 - Section 1(b): "The party against whom the award is invoked was not given proper notice ... of the arbitration proceedings or was otherwise unable to present his case"
 - Section 1(d): The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"
- Section 2: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that..."
 - Section 2(b): "The recognition or enforcement of the award would be contrary to the public policy of that country"

Enforcement

Videoconference hearing – Enforcement Risk?

- Courts in U.S./Canada: Videoconference generally does not affect procedural fairness
 - *Best Practice*: Absent express agreement, party seeking videoconference hearing should make a formal request to tribunal, emphasizing: (1) favorable rule provisions and/or guidance by arbitral institutions, where possible; (2) proposed method for taking testimony and (3) why the use of technology would not prejudice opposing party.
- Enforcement risk still remains. See *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019) (construing "attendance" and "appear" under Section 7 of FAA, "a court may not enforce an arbitral summons for a witness to appear via video conference")

Virtual Hearings under Institutional Rules

ICC Arbitration Rules 2017	CPR Int'l Arbitration Rules 2019	ICDR Int'l Arbitration Rules 2014	AAA Comm'l Arbitration Rules 2013	LCIA Arbitration Rules 2014	UNCITRAL Arbitration Rules 2010
<i>Requires “in person” hearing</i>	<i>Silent on Hearing Method</i>	<i>Expressly Allows Virtual Hearing</i>			
Article 25(2): After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests [...]	Rule 12.1: The Tribunal shall determine the manner in which the parties shall present their cases. [...]	Article 20(2) [...] In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.	R-32(c): When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. [...]	Article 19.2: [...] As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three). [...]	Article 28(4): The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

5

**Are Covid-19
protocols the future
of arbitration?**

The future of arbitration?





Questions

Baker McKenzie.

Baker & McKenzie LLP is a member firm of Baker & McKenzie International, a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2020 Baker & McKenzie LLP

bakermckenzie.com