

## The Viewpoint: COVID-19 and Dispute Resolution: Response by the Arbitration Community



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The COVID-19 Pandemic has thrown the entire world into a frenzy. The situation is unprecedented and requires every industry to adapt to new ways of working. This note seeks to analyze the preparedness and response of the arbitration community to ensure that the resolution of disputes doesn't come to a standstill in view of the health risks, travel restrictions and social distancing measures owing to COVID-19. This post examines how the leading arbitral institutions are responding to the challenge.

## **JOINT STATEMENT: COLLABORATE TO MITIGATE THE IMPACT**

A [joint statement](#) was issued by the leading arbitral institutions [1] and International Federation of Commercial Arbitration Institutions (IFCAI) on 16<sup>th</sup> April 2020, calling upon the parties and arbitrators to contribute collaboratively with a view to mitigating COVID-19-related delays. The parties and arbitrators have been advised to use their institutional rules and any case management techniques which may allow the dispute resolution proceedings to advance without undue delay, while at the same time enforcing the travel restrictions and social distancing measures.

## **CASE MANAGEMENT TOOLS AND ADDITIONAL STEPS**

One of the major factors which makes arbitration a preferred dispute resolution mechanism is the flexibility it offers in terms of case management. Unlike the traditional court system, there are fewer procedural formalities. Most importantly, online filings, e-communication and virtual hearings are not alien concepts to arbitrations. So, while the courts are having to suddenly come up with alternatives such as e-filing and virtual hearings, the transition for the arbitral institutions has been somewhat less of a challenge.

The nature of international commercial arbitration is such that electronic communications between the parties and the Tribunal is already a norm, including online filings. Further, all the leading institutes already offer the option of hearings through video or audio conferencing, which are regularly availed by the parties. Now due to travel restrictions and the physical hearing locations not being accessible, “remote” or “virtual” hearings are set to become a “norm” rather than mere options. The Response from the leading arbitral institutes has been somewhat uniform. Almost all of them have suspended their non-essential in person activity in their offices. The staff has been assisting the parties remotely. All the leading arbitral institutions assign counsels/ managers to each case, who work as a point of contact for that matter between the parties and the institute. This has ensured that the communication with respect to ongoing matters is being routed through the case counsels/ managers, without any disruption.

The leading arbitral institutions have case management tools, which the parties and counsels can utilize to mitigate the adverse effects or disruption in dispute resolution processes caused by COVID-19 pandemic. The institutions have been taking additional steps to streamline their processes for filings, case administration and hearings in order to adapt with the lockdowns and restriction on movements. The steps broadly include the following:

1. Closure of offices, with business continuity and staff working remotely.
2. Parties have been advised to communicate through emails or telephonically.

3. The parties and tribunals have been advised to adhere to the timelines as far as practicable.
4. Fresh requests for arbitrations, emergency arbitration applications, including documents have been permitted to be filed via emails.
5. Awards have been permitted to be communicated electronically.
6. In person hearings have either been rescheduled or shifted to virtual mode. The parties and tribunals have been advised and encouraged to hold virtual hearings, with cyber security measures in place. Some institutes have provided virtual hearing guidelines, to assist the parties and tribunals.

**The steps taken by some of the leading institutions have been stated below for ready reference (in alphabetical order):**

#### **American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR)**

As per their latest [update](#) on 20 April 2020, the The American Arbitration Association (AAA) and their international division, the International Centre for Dispute Resolution (ICDR) have issued a series of directions to assist the parties with their cases under the current situation. AAA-ICDR has suspended operations and all non-essential in-person activity in their offices throughout the United States. The institute has specified that AAA-ICDR hearing facilities have been suspended until at least 1 June 2020; however all the case, IT and finance operations continue to function. The parties may opt for alternative hearing arrangements, including the use of video conferencing. The AAA-ICDR has come up with the “[AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference](#)”, which the arbitrators and parties can use as a template and modify to fit their specific needs, in order to ensure privacy, security and ease of use. The institute has additionally created a best practices training guide/ [virtual hearing guide](#) for arbitrators and parties. The parties are being encouraged to file their cases online through Fast File or AAA Webfile [2]. The parties can continue to communicate through [www.adr.org](http://www.adr.org), by calling 800-778-7879, or contacting the case manager directly.

#### **Hong Kong International Arbitration Centre (HKIAC)**

As per their [press release](#) dated 27 March 2020, the HKIAC announced that their case management teams remain fully operational. Most of their staff are currently working remotely and are contactable by email and phone. Subject to certain [precautionary measures](#), HKIAC's premises at Two Exchange Square, Central, Hong Kong are operational and accessible for hearings and meetings. The institute provides the option for e-hearings through their [integrated virtual hearing services](#) which include: HD video and audio conferencing, online document repositories (including bundles and electronic presentation of evidence), and transcription and interpretation

services. The press release prescribes that the documents may be delivered by email or other electronic means pursuant to the applicable rules. In case of service of hard copy documents, the case manager or HKIAC reception is to be informed in advance.

### **International Chamber of Commerce (ICC)**

The Secretariat of the ICC International Court of Arbitration and ICC International Centre for ADR have issued an [urgent communication](#) to users, arbitrators and other neutrals, with a set of guidelines to address the pending proceedings and any new requests for arbitration. Further, ICC has issued a “[Guidance Note](#)” to parties, counsel and tribunals on possible measures that may be considered to mitigate the adverse effects of the COVID-19 pandemic on ICC Arbitrations.

All offices of the Secretariat of the ICC Court and the ICC ADR Centre are operational, with the staff working remotely. Parties have been strongly advised to conduct all their communications with the Secretariat of the ICC Court/ICC ADR Centre by email. If parties or arbitrators need to send any correspondences (including awards and ADR decisions) to the Secretariat, they are required to promptly inform the case management team ahead of dispatch. Any new requests for arbitration (including pertinent exhibits) can be filed with the Secretariat by email at [arb@iccwbo.org](mailto:arb@iccwbo.org). Applications for emergency arbitrator may be filed by email to [emergencyarbitrator@iccwbo.org](mailto:emergencyarbitrator@iccwbo.org).

The [ICC Hearing Centre](#) at Paris has reopened [3], with precautionary measures and guidelines for visitors in place, which requires a health declaration in writing by the visitors. The option for virtual hearings remains open to the parties. The Secretariat is available for assistance with virtual hearings. The [Guidance Note](#) provides “**checklist for a protocol to the parties and arbitrators on conducting virtual hearings**” (Annexure I). Tribunals are required to ensure with the parties that any video sharing platform that is used for virtual hearings is licensed and is set to maximum security settings. ICC has licensed access to the following videoconference platform options: Microsoft Teams, Vidyocloud and Skype for Business. ICC technical support is available remotely to assist tribunals with using such platforms, joining a meeting (or hearing), operating in-meeting audio and video functions, and operating screen sharing functions. The Guidance Note further provides for “***Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings***” (Annex II) which the Tribunals may use as a template to address technical issues and to ensure *inter alia* due process, privacy, confidentiality and security during virtual hearings.

### **International Centre for Settlement of Investment Disputes (ICSID)**

Their [news release](#) dated 19 March 2020 states that the ICSID Secretariat is fully-operational from remote work-stations and is coordinating with Tribunals and parties to minimize disruption to cases. The parties and Tribunals are encouraged to

implement electronic-only filing of written pleadings. Any new requests for arbitration or post-award applications may be filed electronically only (hard-copies will only be needed if requested by the other party). Advance notice is to be given to ICSID in situations where hard-copy filings are sent. For queries regarding specific cases, the Tribunal or Committee Secretary may be contacted vide email.

ICSID has published a [Brief Guide to Online Hearings at ICSID](#) vide release dated 24 March 2020. According to the Brief Guide, their video-conferencing platform does not require special hardware or software, thereby allowing participation from any location. The participants are allowed to join by telephone. A virtual court stenographer provides a real-time transcript of the proceeding, visible to all participants on the video-conference.

### **London Court of International Arbitration (LCIA)**

As per the [update](#) dated 19 March 2020, LCIA operations remain functional remotely. Parties have been directed to file all requests through their online filing system or by [email](#) (with payment of registration fees to their bank account or by credit card). Parties and arbitrators have been directed to send all other questions, documents and correspondence to the LCIA by email only to [casework@lcia.org](mailto:casework@lcia.org) or to [accounts@lcia.org](mailto:accounts@lcia.org) (as appropriate), and have been directed to avoid contact by telephone.

Any applications under LCIA Article 9 (Expedited appointment of arbitrator, replacement arbitrator or request for Emergency Arbitration) have to be notified in advance at [casework@lcia.org](mailto:casework@lcia.org) to enable necessary arrangements. The arbitrators have been requested to deliver their awards by email to [casework@lcia.org](mailto:casework@lcia.org). The awards will be transmitted to parties electronically, with originals and certified copies to follow, once the LCIA office has re-opened. LCIA Rules provide that hearings may take place through video conferencing or telephonically, at the discretion of the tribunal and parties.

### **Singapore International Arbitration Centre (SIAC)**

In view of the Singapore Government's order, SIAC offices have been shut down with effect from 7 April 2020; however, the services are fully operational with the staff working remotely and telecommunicating. The Maxwell Chambers (where SIAC's office is located) is closed from 7 April 2020 until 4 May 2020, so any new bookings will only be accepted after 4 May.

Parties are asked not to send physical copies of documents or facsimiles to the office whilst it is closed. Until the office re-opens, all communication with SIAC is to be conducted via email. All queries relating to case administration should be directed to [casemanagement@siac.org.sg](mailto:casemanagement@siac.org.sg). Any queries relating to an existing case should be directed to the relevant SIAC Case Counsel. All other queries should be directed to

corpcomms@siac.org.sg. Time sensitive queries requiring an urgent response can be directed to casemanagement@siac.org.sg, or contacted by telephone on +65 6713 9777.

Fresh notices of arbitration and applications for emergency interim relief can be filed by email to casemanagement@siac.org.sg. Payments are to be made via electronic bank transfer. Awards issued by the Registrar, will be first be transmitted via email, with original copies to follow (wherever feasible).

## CHALLENGES AND WAY FORWARD

With increased usage of virtual hearings, one of-course cannot lose sight of the practical challenges such as safety concerns, due process, technical know-how, accessibility, technical glitches, privacy concerns et. al. To meet any possible due process challenges arising out of hearing by virtual means, it is essential that the decision to hold a virtual hearing (as opposed to postponing the same to be held in person) is taken on case to case basis and after obtaining explicit consent of the parties. Under these circumstances, the arbitration community is expected to come up with and adhere to certain uniform guidelines to ensure cyber security and due process. Delos checklist as stated above, may be used as one such tool. A recent attempt to develop guidance and establishing international standards for video conferencing in arbitration is the ***Seoul Protocol on Video Conferencing in International Arbitration, 2020***, which is a result of discussion among arbitration practitioners since 2018.

The arbitration community needs to collaboratively build up an eco-system to tackle the uncertainty on account of the pandemic. This is an opportunity to strengthen the use of digital platforms for document exchange and communication. For instance, keeping up with the spirit of collaboration and support, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has gone a step ahead and made its SCC Platform available to ad-hoc arbitrations (“[Ad-Hoc Platform](#)”). The Ad-Hoc Platform will be free of charge for any ad-hoc arbitrations initiated during the outbreak, for the full duration of arbitration. Digitalisation of information sharing platforms must be accompanied by strengthening cyber security and enforcement of data protection measures [4].

As an immediate response, it is essential that the practitioners and arbitrators keep themselves abreast with the additional steps being taken by the institutes relevant to their case. The stakeholders must use the case management tools available to their disposal to ensure that the established timelines are adhered to as far as practicable and delays on account of the COVID-19 pandemic are mitigated.





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<sup>1</sup> CRCICA, DIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, MCA, HKIAC, SCC, SIAC, VIAC and IFCAI.

<sup>2</sup> See <https://go.adr.org/covid19-flattening-the-curve.html>

<sup>3</sup> Vide announcement dated 17.03.2020, hearings and other meetings scheduled to take place at the ICC Hearing Centre in Paris until 13 April 2020 had been postponed or cancelled.

<sup>4</sup> See [https://www.arbitration-icca.org/projects/ICCA-IBA\\_TaskForce.html](https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html); <http://documents.nycbar.org/files/ICCA-NYC-Bar-CPR-Cybersecurity-Protocol-for-International-Arbitration-Electronic-Version.pdf>