A Tale of Two Cities: virtual arbitration in the best of times, the worst of times

Clare Ambrose, Sara Masters QC and Josephine Davies

During the current time of the Covid-19 global pandemic we have already seen the legal industry swiftly react and adapt to new ways of working. In this first edition of *Arbitration Classics* we introduce the theme of virtual arbitrations.

Can cross examinations be conducted successfully via video link? Are varying styles in different legal cultures taken into consideration or could some tribunals be alienated?

In our round up below, you will find the following short pieces from three different perspectives:

- **Clare Ambrose** addresses quesions around virtual arbitral hearings from her chair as an arbitrator in her Q&A piece originally published for Lexis®PSL.
- **Sara Masters QC** speaks from the angle of counsel on arbitral appeals and applications in a Q&A, also published for Lexis®PSL.
- **Josephine Davies** gives her personal account, as counsel, of a recent arbitration conducted partly virtually due to Covid-19.

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1. **An in-person hearing is scheduled for my arbitration over the next [few months]. In light of coronavirus (COVID-19), what should I be thinking about, what alternatives may be available (e.g. relocation, postponement, virtual), what considerations are relevant when contemplating these options, and how would alternative approaches be dealt with procedurally with the other side and the tribunal?**

We all know the crisis is fast moving. Arrangements that seemed sensible a week ago now look unrealistic or inappropriate.

As matters stand there is some certainty that any hearing listed before the end of April 2020 will be significantly disrupted by global travel restrictions and public health rules.

Everyone concerned wants to reduce disruption but work safely. Tribunals will expect parties to co-operate, adapt and compromise in order to find solutions that work. My current experience is that most parties are doing this. Obstructive and tactical positions are likely to be fairly obvious and viewed unfavourably. The client will need to be briefed but constructive discussions need to be broached promptly with the other side with a view to seeing what measures can be taken. This is not just about the hearing, consideration should be given as to potential difficulties that may arise in preparing evidence, for example ensuring experts' meetings can take place remotely. Preparing for a hearing is always stressful. Working in isolation and with restrictions on normal facilities (for example with school closures) will create more pressure for teams in meeting deadlines. Everyone will need to be sensitive to this. Parties should feel confident to approach the tribunal for guidance, directions or an indication of whether proposals are workable.

So what are the options?

- Relocation is unlikely to work in the short term due to the global nature of the crisis. It is also probably unreliable for medium term hearings, as matters currently stand.
- Postponement may be a practical option if the parties agree. No one can be confident as to developments, but the last quarter of 2020 is now being put forward by some parties. Adjournment may, however, be unattractive as one side may be keen to keep a date or it may be difficult to find an alternative date before 2021 if

counsel or the tribunal are booked up.

- Virtual hearings may be a viable option.

In considering whether a virtual hearing might work, the most relevant considerations are the length of the hearing, the number of participants, the type of evidence involved and what arrangements can be made for transcripts and interpreters. There will also be practical matters such as enabling participation from different time zones.

Remote telephone hearings and remote attendance of some witnesses (and counsel) is already standard practice. A short hearing can be heard by telephone with little difficulty. A longer hearing of up to a day (typically without oral evidence) may also be achieved in a similar way to standard arrangements for remote attendance at a meeting. Where a small number of participants are involved it may be practical to have a partially remote hearing with some participants present and appropriate social distancing, although while a lockdown situation prevails the hearing would be wholly remote.

Wholly virtual oral hearings have been long promoted but rarely adopted. There is no doubt technology available for them to take place with multiple participants, screen sharing and every other element necessary for an effective hearing. A wholly virtual hearing will be new for most and some 'rehearsal' may be needed. There is understandable reluctance to rely on technology when practical experience suggests it may be unreliable and time-consuming. However, in the current situation it may be the only option and a risk worth taking, especially for an urgent hearing or a relatively short one. This concept is very much a part of the Green Pledge in Arbitration to travel and meet only when necessary. Perhaps this period of enforced innovation may have long-lasting positive effects.

- Partial hearing or no hearing

A final option would be for the parties to ask the tribunal to decide the matters on documents and without an oral hearing, or with a much shorter telephone hearing or remote hearing, perhaps with a reduced number of witnesses. This may be useful for small, medium-sized or urgent disputes where an adjourned or remote hearing may entail disproportionate delay or cost. It is unlikely to be attractive if there are heavily disputed factual issues, e.g. credibility. It would be attractive where the parties can reach agreement on a revised timetable. However, if one side objects then the tribunal may be more cautious. It would balance the various options available, deciding whether the proposal is fair to both sides, and whether an adjourned hearing is preferable. Some institutional rules enable a party to insist on a hearing but most are somewhat more flexible and the tribunal would have some discretion, especially if there are exceptional circumstances.

2. **A virtual hearing has been proposed for my arbitration in light of coronavirus (COVID-19). What practical and logistical matters will need to be considered in advance? What are the potential advantages and disadvantages of this approach?**

The obvious advantage is that the hearing can take place and the dispute resolved which is the ultimate aim of the tribunal. The tribunal's duties of fairness to the parties do not require a hearing to take place in person, and if the arrangements will enable the hearing to go ahead then this will be a significant consideration justifying it. There is also a potential upside in costs savings as while there may be a cost to use the best technology, savings in hearing rooms and travel/hotels could be significant.

Virtual hearings are still new so practice is developing to address logistics. The technology options are wide and require investigation.

To make the hearing work effectively, all participants in the arbitration need to test their technology in the space where the virtual hearing will (for each of them) be held. While working from home with the dog barking in the back of conference calls is one thing, this will not be acceptable in a hearing. Everyone must make sure they know how to mute themselves in the interests of clarity of sound and perhaps agree a protocol for when a person wishes to interrupt.

We already know that care needs to be taken with arrangements for interpreters and transcription services where participants are in different places, and also to ensure that witnesses are giving evidence independently. However, most practitioners are familiar with resolving those issues.

The most significant downside is that the process is new and unfamiliar to many. Many fear that the technology will be unreliable and communication will be poor. In particular, there is concern about the perception of witnesses in person versus on screen and the persuasiveness of counsel without being present in the same room. It could make a difference: in ***The Pounda*** [2018] EWHC 330 (Comm) there was a different outcome when a witness gave evidence face to face compared to via video-link. However, that was an unusual case and a witness's demeanour is

increasingly given less weight. As a general rule both parties will be at the same disadvantage from weaker communication, and not unfairly prejudiced. The tribunal will look carefully at potential unfairness but tribunals are already used to hearing witnesses (and counsel) remotely, and factoring in the difficulty, so any objection would need to be justified. Given the incentive for these arrangements to work there is likely to be significant enthusiasm all round to achieve success.

3. **A key witness (expert or factual) cannot attend an in-person hearing scheduled for my arbitration over the next [few months] due to travel restrictions. How should I approach this issue vis a vis the witness, the client, the other side and the tribunal?**

The party's representative should consult with the witness and the other side. It would be unusual if a solution cannot be achieved by arranging for evidence to be given remotely. This is fairly standard practice. The technical, forensic and logistical disadvantages are manageable. The tribunal is likely to make directions that protect both sides' interests but preserve the hearing date.

4. **In light of coronavirus (COVID-19), is arbitration preferable over litigation as a method of dispute resolution given the increased flexibility inherent in arbitration proceedings generally? [This could be answered in context of negotiating a new contract and in event that a dispute arising under an existing contract and the parties are considering their options in light of the pandemic].**

This is a "once in a generation" challenge. We will see over the next months how the court system and the arbitration community respond. Arbitration is more flexible and it is already common for directions to be made electronically, CMCs to be heard by telephone and disputes to be resolved by documents only. It is hoped that arbitration will be agile to meet the needs of parties. If so, and virtual hearings (or even partially virtual hearings) start to work well, then they will become an attractive feature. Corporations weathering this crisis will be mindful of resilience for the next one. Arbitration will be attractive if it is seen to work in times of crisis. If it becomes cheaper and more sustainable too then that must be a bonus.

This article was first published for Lexis®PSL Arbitration.

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While appreciating that the position is frequently changing, with regard to arbitration related applications to the courts of England & Wales, how, if at all, should parties approach such applications differently in light of the impact of the coronavirus (COVID-19) on HMCTS?

Under the Arbitration Act 1996 (AA 1996), the courts of England & Wales have wide powers to support arbitration. These include measures to support the commencement of an arbitration or a pending reference (e.g. applications to appoint arbitrators, anti-suit injunctions and other interim measures under AA 1996, s44) and appeals or other applications after an award has been issued.

With the ever-increasing impact of COVID-19, the first question is whether a court application is necessary at all. Consistent with the policies of limited court intervention and party autonomy underpinning the AA 1996, the Tribunal should be the first, and increasingly the last, port of call. HMCTS will doubtless become increasingly stretched and many applications can and should be dealt with by the Tribunal. Tribunals are well positioned to act quickly and with agility. Parties should be encouraged to make applications to arbitrators in those areas where the court has traditionally been favoured hitherto. A good example of this are anti-suit injunctions which can be backed up by court sanctions if ignored by converting the relevant arbitration award into a court judgment. However, using the Tribunal rather than the court will only be an attractive solution if a Party does not require ex parte relief.

If a court application is required, the next question is whether it can be dealt with on paper. A number of court related arbitration applications have traditionally been dealt with without an oral hearing (e.g. applications to appoint an arbitrator and applications for permission to appeal). This will doubtless become more widespread as parties are unable to attend court in person and, in any event, is cheaper and more efficient. In the current circumstances, judges will give "procedural posturing" short shrift and Parties will be expected to cooperate.

There will, however, still be cases where an oral hearing will be necessary (e.g. ex parte injunctions and most appeals from arbitration awards).

Recent guidance as to the impact of COVID-19 has been given by the Lord Chief Justice in a Protocol (now Revised) Regarding Remote Hearings dated 19 March 2020. In short:

1. Remote hearings will be used whenever possible. Normally it will be possible for all short, interlocutory or non-witness applications. So, the vast majority, if not all, arbitration applications will be heard remotely for the time being.

2. Any method of communication can be considered, including telephone conference calls and Video Skype for Business. Experience in arbitration (where remote hearings have been used for some time) suggests video conferencing works best for hearings if available. Testing that the technology works in advance is obviously critical and by no means a given. Many practitioners, including myself, have had the frustrating experience of the video link failing at that critical moment. The Parties should also bear in mind HMCTS technology is less sophisticated than that generally available to law firms or barrister chambers. That said, my recent experience is that Parties' lawyers are being pragmatic; keen to assist the judges in suggesting technological solutions that work effectively.

3. Cases may be adjourned. This may well be the best solution for applications that are not urgent such as appeals, or where clients are overseas and want (but currently cannot) attend hearings.

HMCTS is reacting quickly and pragmatically to a rapidly evolving situation. The courts remain open for arbitration related business and ready, willing and able to assist.

This article was first published for Lexis®PSL Arbitration.

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Arbitration in a time of Covid-19

The spread of Covid-19 across the globe has been dramatic. Worldwide, governments are imposing restrictions. This should not, however, stop us helping our clients to resolve their commercial legal disputes. I have written this note to share my recent experience which shows that, with sensible precautions, it is possible to conduct a London international arbitration safely and effectively. It may even suggest that there is a new way to conduct arbitration.

The arbitration in question involved parties and expert witnesses from the People's Republic of China ('PRC'), Singapore, Thailand and Hong Kong. It began in February 2020 before extensive government restrictions were in place but while there were developing concerns about the spread of Covid-19 from those countries. Several of the lawyers and experts involved were already subject to precautionary restrictions by their firms and chambers. Duncan Matthews QC, Andrew Dinsmore and Michal Hain of Twenty Essex were also part of my client's team.

The hearing was to resolve a long running multimillion-dollar litigation and could not be adjourned. At very short notice, we had to adopt remote working procedures. In the end, the hearing was effective and efficient.

Minimising lawyers in the room

One party to the arbitration had instructed lawyers from the PRC who had arrived only a few days before the hearing was due to start. This posed a problem for many other participants who were prevented, by firm policies and health reasons, from being present in the same room as recent arrivals from the PRC. To ensure a level playing field, both sides were required to minimise their legal teams and a video link was set up to the arbitration room using a commercial service.

This system worked very effectively. All lawyers and experts able to gain a full understanding of what was taking place without any (actual or perceived) risk of infection. It may even have improved efficiency because the legal team back in the office could provide support and insight much more conveniently than when constrained by the confines of an arbitration room.

Avoiding unnecessary factual and expert witness presence

The majority of witnesses were from jurisdictions with significant Covid-19 outbreaks. All those witnesses were therefore asked to give evidence by video link. A couple of witnesses were from jurisdictions then unaffected by Covid-19 but, to ensure a level playing field, those witnesses also gave evidence by video link.

In the common law tradition, great emphasis is placed on cross examination and there is scepticism as to its efficacy by video link. In this case, however, I consider that concern was misplaced.

Each witness gave evidence from a room with two cameras – one facing the witness, one showing what the witness could see. Thus, the traditional requirement that a representative of the opposing party be present with the witness to 'supervise' was removed. Interpreters were present in the arbitration room (rather than being closeted with the witness). All went well.

Although video link has historically had a bad reputation, in the 10 days of evidence, there was only one morning where we experienced technical challenges (which were ultimately resolved without impact).

Remote access to documents

Given the short notice on which the arbitration was converted to a largely remote event, it was fortunate that electronic trial bundles had already been adopted. Screens were set up for each witness in their location and the electronic trial bundle provider synchronised the pages. This worked well, even for technical documents which required enlargement.

Of course, not every hearing justifies the cost of a full electronic trial bundle system. However, it is now a rare case in which it is not possible to provide pdfs of the trial bundles. With pdf trial bundles and modern technology, it should be easily possible to provide a screen share where a junior lawyer simply opens the pdf to the relevant page in much the same way they have always helped the witness find a page in a hard copy bundle.

Could everyone have been remote?

If you've read this far, you will have detected that the advocates and tribunal were in the same room. So, this begs the question, could we have done everything remotely? In my view, the answer is yes. Although the immediacy of personal interaction in the same room can never really be replaced, detailed written submissions and a careful hearing management can make remote hearings effective. For me, this is demonstrated by a Commercial Court hearing I was involved in last summer. Counsel were all outside London but, with the benefit of the parties' detailed written submissions, the judge conducted an effective telephone hearing and produced a judgment

which dealt in detail with all the issues raised in the written and oral submissions. With a video link, the results would be even better.

What does the future hold?

We live in an increasingly globalised society. Transnational issues are resolved in jurisdictions remote from the action and the parties' home countries. The question is, can such disputes fairly be resolved with all participants placed remotely? In my view, if all the participants are willing, I would say the answer is unequivocally 'yes'. Our clients are based internationally. They do their deals over the phone, email and the internet. If anyone can understand the efficiencies and potential for remote international dispute resolution, it should be the commercial client. It is up to us, as their lawyers, to provide them with the best way to resolve their disputes. We need to keep our minds open.

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Josephine specialises in all areas of commercial and competition law and litigation. She has strong advocacy experience covering both trial and interlocutory work.

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