

BRIEFING NOTE

COVID-19 and Accelerating Trends in Arbitrations – How the Pandemic is Encouraging Changes to the Conduct of Arbitrations

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Introduction

President Barack Obama’s first Chief of Staff, Rahm Emanuel, famously said “*never allow a good crisis to go to waste. It’s an opportunity to do the things you once thought were impossible*”.

The arbitration industry – arbitrating parties, their counsels, arbitrators, arbitral institutions, venue providers and many more – has recognised the problems posed by the COVID-19 crisis and embraced what was once thought impossible.

In this briefing note, we briefly summarise the main changes we have already seen, and the changes that we expect to see going forwards, in how arbitrations are conducted.

Virtual Hearings

The pandemic has brought about sweeping changes to the conduct of arbitration hearings. Not too long ago, parties, counsels and arbitrators travelled from all over the world for merits hearings. Similarly, witnesses submitting evidence to an arbitration were expected to attend the hearing in person to be cross-examined. This, it was thought, should be the preferred method of taking evidence because the veracity of the evidence is tested most effectively in person. The pandemic has made this impossible for now. Although anecdotal evidence suggests that many hearings have been postponed, others have been held remotely over the internet (with witness evidence being heard via video conference).

The pandemic-led trend towards remote hearings may not be a temporary solution. More and more practitioners are seeing first-hand how effective a remote hearing can be, and the cost savings involved are not going unnoticed. Post-pandemic, we predict that tribunals will be much more willing to permit not just video conferencing for witnesses, but fully-fledged remote hearings with the tribunal members, the parties and their counsel all in separate locations, connected via services such as Zoom, Microsoft Teams and Google Meet.

Indeed, the providers of hearing venues are already alive to this trend. Maxwell Chambers in Singapore, International Dispute Resolution Centre in London and Arbitration Place in Toronto and Ottawa have joined forces to promote a hybrid hearing infrastructure, offering parties and tribunals the ability to attend a facility closest to them geographically.

Determinations “on the papers”

In addition to the move towards virtual, or hybrid, hearings, we are beginning to see a shift towards dispensing with the merits hearing altogether.

Making determinations “on the papers”, in which the tribunal considers the issues by reference only to the written and documentary evidence and submissions, has long been deemed appropriate for lower value cases. With the restrictions imposed by the pandemic, it is likely that tribunals in higher value disputes will be more willing to entertain the idea of dispensing with the hearing, especially where the parties are in agreement that this is the best course of action.

Early dismissal applications

In many countries, the procedural rules for litigation allow the courts to render summary judgement in circumstances where a party is able to demonstrate that the opposing party’s claim or defence is without any merit (such that proceeding to a full trial would be a waste of time and costs). In international arbitration, however, such early dismissal of proceedings has been less common because tribunals are reluctant to deny a party the opportunity to present its case in full (thus risking the validity of the award pursuant to the New York Convention).

However, recent changes to many institutional rules have given tribunals more impetus to consider ruling in favour of early dismissal applications. We predict that the pandemic may make such applications more common, and in our [earlier briefing note](#) we discussed the possible scenarios where early dismissal may be contemplated.

Arbitrator selection

For many years now, there have been increasing calls for more diversity on arbitral tribunals – in terms of gender, ethnicity and age. Progress in this regard has, however, been slow.

With more disputes likely due to the COVID-19 pandemic, there is an opportunity for this progress to be accelerated. Popular arbitrators are likely to be busier than ever, and there will be a growing need for a bigger ‘bench’. The appointing arbitral institutions, who are already responding to the calls for more diversity, will be well-placed to ensure that a more diverse group of arbitrators gain the necessary experience to handle more complex disputes.

Concluding Remarks

As arbitration specialists, we look forward to helping the arbitration community make the abovementioned and other improvements to the conduct of arbitration proceedings. Our lawyers have years of experience acting as counsel and arbitrator in domestic and

international disputes. Please do not hesitate to contact any of us to learn how we may be of assistance to you.

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