

International Arbitration During COVID-19: A Case Counsel's Perspective

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Background

There is much public discourse on the impact of the ongoing pandemic on international arbitrations. Commentators and scholars have provided perspectives on how to navigate and find safe harbours in the uncharted waters of COVID-19. In the “new normal” of wide-ranging travel advisories and restrictions, there is an emerging consensus to better integrate the use of technology with dispute resolution. Indeed, major hearing centres located in Singapore, London, and Toronto have collaborated to share resources and offer virtual hearing solutions. Suggestions such as the increased use of electronic filings, virtual evidentiary hearings, and online case management have been widely discussed, and these mechanisms are now being applied at pace in international arbitrations.

In addition to the implementation of technology, stakeholders are assessing other tools to mitigate the impact of COVID-19. Recently, Mr. Gary Born, the President of the SIAC Court of Arbitration, in his Open Letter addressed some of these issues. Against the background of these unprecedented circumstances, I draw on my experience as a member of the SIAC Secretariat to shed light on some recent trends and how SIAC tribunals have responded in this crisis to fulfil their adjudicative mandate.

The first quarter of 2020 has been an active period for the SIAC Secretariat. It is common practice for SIAC tribunals to conduct the preliminary case management conference telephonically or virtually. However, given the dramatic change in the arbitration landscape in the past few months, SIAC tribunals have successfully conducted a variety of hearings remotely, including applications for emergency interim relief and evidentiary hearings. Two recent SIAC arbitrations are illustrative of this trend.

Case Study I - Conducting an EA Hearing for Urgent Interim Relief

With various national courts not fully operational, the use of EA proceedings in compelling circumstances has become more attractive to users of international arbitration. Due to travel and other constraints, SIAC EAs and parties have used different modes to conduct hearings. For instance, participants have used Maxwell Chambers ADR Hearing Solutions, Zoom, and Microsoft Teams platforms for EA-related virtual hearings. Further, in some other cases, EA proceedings have been conducted on a documents-only basis.

In one of SIAC's most recent EA applications filed in April 2020, the EA, as is required under the SIAC Rules, was appointed within 24 hours of the receipt of the EA application. After the EA was appointed, the EA swiftly scheduled a video case management conference (hosted on the Microsoft Teams platform - which was suggested by the claimant and agreed by the parties) to establish a schedule for consideration of the application.

Both parties were represented by counsel based in a common time zone. Following the case management conference, the EA, among other things, directed the parties to make submissions electronically by way of email (the EA did not require any hard copies). Further, the EA requested the parties to arrange for virtual hearing facilities with a service provider (Maxwell Chambers ADR Hearing Solutions in this case) including services for real-time transcription.

A day before the hearing, the EA and the parties, along with the service provider's IT personnel, participated in a "test call" to assess the virtual hearing software. The following day, and based on the established order for advancing oral submissions, a full day of hearing (from 9:30 am to 5:00 pm) was conducted virtually. This hearing was attended by the EA, 9 party representatives, the service

provider's "moderator", and a transcriber. In the course of the hearing, counsels relied on various documentary evidence using e-bundles. Subsequently, the EA decision was submitted to SIAC for scrutiny, and the decision was transmitted within the 14-day period as mandated under the SIAC Rules.

Case Study II – Conducting an Evidentiary Hearing

This international commercial arbitration, seated in Singapore, applied the Expedited Procedure of the SIAC Rules 2016 with a 6-month timeframe for its completion. A tranche of the oral hearing (concerning evidence taking by witness conferencing), was heard virtually with about 19 participants (comprising the arbitrator, lawyers, expert witnesses, client representatives, transcribers and an IT moderator) from different time zones (GMT +8; and GMT -5).

Given the developing situation of COVID-19, the tribunal requested the parties to liaise with each other and explore methods of conducting expert witness conferencing by way of a video facility. The parties identified and agreed on a service provider (Maxwell Chambers ADR Hearing Solutions). Subsequently, the tribunal conducted a case management hearing over the telephone to discuss logistical issues and other procedural matters.

A day before the hearing the participants took part in a "dry run" to test the screen sharing, audiovisual, and other aspects of the virtual hearing. The parties agreed to be "guided" by the Guidance Note of Remote Dispute Resolution Proceedings as published by CI Arb (**Guidance Note**). Following Appendix I of the Guidance Note, the claimant noted the parties' agreement to hold a video conference hearing, identified the party representatives, and the list of electronic documents proposed to be referred to in the hearing.

The "dry run" or the practice round enabled the tribunal to tighten loose ends and run a full day of evidentiary hearing between 8:00 am and 4:00 pm Singapore time. During the hearing, the tribunal permitted the parties to use the "chat function" for communication and to raise objections during the evidentiary hearing. To impart flexibility, the tribunal also allowed parties to raise urgent objections by use of the 'un-mute' feature. To maintain the proper structure of the evidentiary hearing, the tribunal managed the participants' order of speaking.

Other Trends

In addition to the shift to online platforms, the tribunals have, on a case-by-case basis and subject to the circumstances of any particular dispute, adjourned some hearings for a later date or have extended timelines for written submissions or witness statements. In some cases, parties have jointly requested for the suspension of the proceedings to hold without prejudice settlement talks. In less complex cases, parties have requested the tribunal to dispense with the oral hearing and decide the dispute based on documents alone.

In one EP case, the parties agreed to inform the tribunal whether they would be agreeable for the proceedings to proceed on a documents-only basis after filing of the first round of pleadings. This shows that there may be merit in an ongoing conversation about the possibility of deciding the dispute solely on the documents in circumstances where it may be difficult to properly evaluate the suitability of documents-only arbitration at an early stage. Tribunals are also working to minimise the impact of COVID-19 on arbitral timelines. For instance, a tribunal suggested (and the parties agreed) to facilitate the exchange of unsigned final witness statements as the witnesses found it difficult, due to governmental regulations, to affix physical signatures on their statements. In this case, the tribunal directed the parties to exchange the final signed version of the witness statement on a later date.

Three Key Considerations for Virtual Hearings

1. Developing best practices for a virtual hearing: If managed properly and applied in appropriate disputes, virtual hearings can save considerable time and costs. As a matter of prudence and proper planning, stakeholders may wish to consider the following factors whilst opting for virtual hearings:

- a. feasibility to organise a virtual hearing – assessing the number of participants, the participants’ access to technology, time-zone differences, and the parties’ ability to present their case virtually;
- b. whether any guidelines or protocols (including security measures) are to be

adopted;

- c. whether there are any data privacy concerns;
- d. whether any specific communication protocol may be followed (e.g., a paperless arbitration);
- e. the procedure for the selection of an online platform;
- f. revisiting the appropriate length of the oral hearing (stakeholders may explore the possibility of minimising the duration of the hearing);
- g. the order of presentation and time-allocation between the parties;
- h. the speaking etiquette (for instance, identifying oneself before speaking and exploring means to ensure that participants do not talk over one another);
- i. format for e-bundles (tribunals may have subjective preferences in this regard);
- j. whether a third-party vendor is needed to host documents;
- k. the mode for taking of evidence and how objections may be made;
- l. planning for breaks (the duration and modalities for requesting short-breaks);
- m. whether additional services such as transcription and translation are required;
- n. whether the hearing would be recorded;
- o. planning for alternative hearing and communication arrangements (such as teleconferencing) in case there are technical issues during the virtual hearing; and
- p. applicability of any recent case law and other policies being generated in the context of virtual court hearings.

2. *The practice round*: Various service providers allow arbitral participants to organise “dry runs” before the hearing day so that the users can acquaint themselves with the relevant technology. A well-organised dry run will work to ensure that participants have an uninterrupted experience on the hearing day. Participants should take particular note of the following features:

- a. audio-video quality and the tribunal’s clarity of line of sight (in particular for

hearings with factual witnesses where arbitrators may require an unobstructed panoramic view of the witness' location and any documents that they may be referring to);

b. functionality of the "break-out rooms", common and private chat features, and understanding how and when these will be engaged (this may be particularly useful in case of a three-member tribunal);

c. how parties and the tribunal will view e-documents (participants may use actual or dummy e-bundles to check ease of access to the documents);

d. communication protocol with the moderators or third-party vendors. For instance, it is important to consider how the transcribers will notify the tribunal in case they are experiencing technical issues and are unable to transcribe any specific portion of the hearing;

e. parties and the tribunal should consider the adequacy of their IT infrastructure. For instance, and even though it is a matter of individual preference, an SIAC tribunal described having multiple screens for the hearing as "very important". The tribunal used four screens for the evidentiary hearing – the first screen for the live video feed of the hearing room, the second screen for viewing and comparing documents, the third screen for witnesses, and the fourth screen for transcription and translation. Further, using a desktop or a laptop as one of the four screens was recommended as it would allow a tribunal to edit, search for specific keywords, and perform other editing tasks with relative ease;

f. ordering of communication to ensure that participants do not speak over each other; and

g. finally, the tribunal and the parties may consider situations where one or more participants (including witnesses) get disconnected or "dropped off" from the virtual platform. In these situations, the tribunal may consider solutions such as a short break until the participant re-connects.

3. Using reliable technology: Most service providers offer a technical guide to plan a virtual hearing. The following checklist sets out factors that participants may consider in case they opt to hold a hearing without a service provider's oversight: (a) selection of a quiet location with adequate lighting; (b) assessing internet connectivity; (c) use of earphones with microphones for audio clarity; (d) muting

microphones when a participant is not speaking and minimising competing sounds such as typing as they may create issues with transcriptions; (e) testing all the devices; and (f) planning for troubleshooting processes.

Conclusion

COVID-19 has undoubtedly accelerated the use and acceptance of virtual hearings in international arbitration. In the coming months and after the travel restrictions are eased, it is expected that users of arbitration will continue to refine and enhance the use of technology for virtual hearings. These hearings may become a “new normal” for cross-border disputes, at least for less complex cases, which may be better suited for online platforms. The arbitration community will also need to consider the question of whether virtual hearings should directly replicate “in-person” hearings or whether further efficiencies may be achieved to streamline the arbitral process.