



Soundings

The impact of coronavirus on international arbitration and litigation: are virtual hearings a solution?

The COVID-19 outbreak has rapidly developed into a pandemic, causing wide-scale disruption as countries around the world battle to prevent the further spread of the virus. In a world where all but essential travel has been restricted and social distancing is the new norm a key concern for those parties who have ongoing legal proceedings is whether or not their case will proceed.

We consider below how the coronavirus pandemic has affected arbitration and litigation in England and Wales, along with other legal systems around the world, and the use of video conferencing to ensure that hearings can continue during this period of social distancing.

London arbitration

The use of video conferencing is not new in the context of international arbitration. It is not uncommon for witness or expert evidence to be delivered via video link, if it is not possible for the individual to attend in person. As such,

there are already protocols in place to provide guidance on the use of video conferencing in an arbitration context. The most recent example is the Seoul Protocol on Video Conferencing in International Arbitration ([available here](#)).

However, a more extensive use of remote communication and the concept of a fully virtual hearing is fairly novel.

The Managers understand that LMAA arbitrators are working from home and are accepting new appointments, dealing with interlocutory applications, and making awards on documents in the usual way.

Conventional hearings will not be possible until social distancing restrictions have been lifted. The LMAA has, however, continued to hear cases using virtual hearing room arrangements in conjunction with the IDRC in London and virtual hearing provider, Opus2, in cases where resolution by way of written submissions is not possible. In this regard, the LMAA has recommended that the guidance in the Seoul Protocol is followed, whilst it develops its own protocol.

English courts

Whilst the use of technology in arbitration proceedings is not unusual, its use in English court proceedings has been much less common. The courts have, however, demonstrated a reluctance to postpone hearings.

The English courts are therefore also conducting hearings virtually. One of the first fully remote trials (which lasted five days, involved numerous witnesses and experts and crossed three different time zones) took place before the Commercial Court recently, with the judge commenting at the end of the hearing that the use of technology had been “most remarkable”.

The Coronavirus Act 2020 permits the public livestreaming of remote hearings to ensure open access to justice, provided the judge makes an order to this effect. As such, those court hearings that would otherwise have been open to the public will be streamed online while the lockdown continues.

International legal systems

The position in legal systems internationally has been changing rapidly to deal with the developing coronavirus crisis. The below summary represents the Managers' understanding of the present situation in some legal systems around the world, although this may change depending on how the pandemic progresses.

France – all courts are closed and all hearings have been cancelled until further notice. It is anticipated that case management of pending cases will last between six and eight months. Urgent matters which were notified to the courts prior to their closure, however, will proceed.

Germany – a number of cases have been postponed and deadlines are being extended. The courts, however, remain open, with social distancing measures in place.

Hong Kong – following a period of closure, the courts are re-opening in stages, and court proceedings are due to resume but with reduced capacity. Cases will be dealt with on paper if possible, and parties will also be asked to use video conferencing facilities or conduct hearings by telephone if appropriate.

India – courts are closed, but urgent matters are still being heard by the Supreme Court through the use of video conferencing technology. Time bars have been extended indefinitely until further notice.

South Africa – only hearings which have already been listed, or urgent matters, will be heard. Any court hearings that have been postponed will be assigned expedited new hearing dates.

Spain – all hearings have been cancelled and time bars are suspended until further notice.

USA – the position varies on a state-by-state basis. Federal courts are generally continuing with trials. In the Southern District of New York, hearings are proceeding at the discretion of the judge assigned to the case. Physical attendance at court is limited to emergency matters, however, with all other matters being heard by telephone.

A brave new future?

The indications so far from those jurisdictions that are conducting virtual hearings are that they can work. Both the English courts and London arbitrators are committed to ensuring that hearings are not postponed if possible and that they go ahead as planned, albeit remotely.

Depending on how long the pandemic continues and, in particular, how long social distancing measures are in place, we may see other legal systems around the world embrace remote hearings in order to adapt to the challenges faced and to ensure that disputes continue to be resolved.

Even once the pandemic has ended, it is likely that video conferencing will continue to play a big role in both arbitration and litigation going forward, at least in London, and the concept of an entirely virtual hearing may become a popular option for the resolution of disputes.

Please contact the Managers for further advice in relation to any of the issues discussed above.

The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasml.com web: ukdefence.com