

Arbitration in a time of Covid-19

Josephine Davies

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. This note shares my recent experience which shows that, with sensible precautions, it is possible to conduct a London international arbitration safely and effectively. Techniques developed to meet this time of difficulty may even lead to new ways 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 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.



Josephine Davies

Call: 2006

Josephine specialises in all areas of commercial and competition law and litigation. She has strong advocacy experience covering both trial and interlocutory work. Josephine has appeared as sole counsel in the Court of Appeal, the High Court (Commercial Court, Chancery Division and Queen's Bench Division) and in international arbitrations and appeals from arbitration. She has wide ranging trial experience including cross-examination on fraud allegations and of financial and engineering experts.

[Read her online bio >](#)