Documents-only arbitrations in times of coronavirus (COVID-19)

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Arbitration analysis: There has been much talk of virtual hearings in arbitrations since the coronavirus (COVID-19) lockdown. However, another alternative is a documents-only arbitration. In other words, dispensing with a formal hearing entirely and conducting the arbitration and drafting the award based on documentary submissions only. It would be going too far to suggest all arbitrations could be conducted in this way. However, documents and written submissions are extremely important not only in presenting a case but also for the arbitrators to understand and deliberate the issues in all arbitrations. The documents and written submissions are frequently carefully considered when awards are drafted despite the importance often attached to a hearing. Nicholas Gould, partner at Fenwick Elliott LLP and former member of the drafting committee for the Chartered Institute of Arbitrators (CIArb)'s Documents-Only Arbitration Procedures (2016), explores the documents-only option for arbitrations during the coronavirus pandemic.

How can an arbitration heading for a hearing be converted to a 'documents-only' procedure?

If an international arbitration is heading towards a hearing, then the only way to convert it into a 'documents-only' procedure is by agreement with all parties and the tribunal. Arbitrators are given a wide discretion under most of the international arbitration rules in relation to the procedure to be adopted. However, they may not be able to impose upon the parties a documents-only procedure. Parties generally have the right to a hearing under most national laws and procedural rules, unless that right has been waived.

Article 26 of the 2017 International Chamber of Commerce (ICC) Arbitration Rules states that the arbitral tribunal shall have full charge of the hearing '…at which all the parties shall be entitled to be present.' The tribunal may carry on in the absence of a party, but the right to a hearing would need to be waived, most likely by prior written agreement in the Terms of Reference under Article 23 of the 2017 ICC Arbitration Rules. Article 19.1 of the 2014 LCIA Arbitration Rules states that a party has the right to a hearing before the tribunal. The same approach is adopted by the United Nations Commission on International Trade Law (UNCITRAL), the Singapore International Arbitration Centre (SIAC) and others.

What should an agreement for a 'documents-only' procedure contain?

A documents-only arbitration procedure should contain detailed directions from the outset through to the issuing of the award. Careful consideration will be needed to identify the issues in dispute, and the need for witness statements and/or expert reports that deal with those issues. An opportunity for further disclosure possibly using Redfern schedules is often very helpful. Some contingency time within the procedure is helpful to provide for unexpected applications or delays. Fairness of procedure, and fairness in relation to the opportunity for a party to respond is also extremely important.

An opportunity for the tribunal to issue written questions is also helpful, as is a sequential closing submission procedure allowing the parties to have a final say before the award is rendered. An opportunity for costs submission should normally be included, and for the arbitrators to declare the proceedings are closed with the identification of the date on which they intend to make an award.

What can parties do to cater for the loss of the opportunity to cross-examine witnesses?

The parties need to focus clearly on the weaknesses in their opponents' case. Raising very specific points and using a small number of key documents within the submissions will require a response from the other party. Vague or incomplete responses need to be pointed out clearly to the tribunal.

In more recent times hearing lengths have been reduced in the move towards efficiency and cost reduction. It might not always be the case that there is sufficient time for careful cross-examination or that cross-examination elicits the results a party had hoped for. It is the closing submission that should carefully point out any inaccuracies and emphasise the best key points to the tribunal. In the absence of a hearing, a final concise submission should be used to draw out these key issues.

The tribunal may request a concise concluding summary in any event if there is no hearing. However, any party agreeing to a documents-only procedure should ensure that there is an opportunity to make a final closing submission which draws together all of the issues across all submissions. It is however important that this document is reasonably short as it must focus on the key issues and not simply repeat the material that has already been submitted. Further, there will need to be a reasonable opportunity for each party to respond to the closing submission to provide a fair opportunity to respond and comply with due process or natural justice.

What types of cases may be unsuitable for a 'documents only' procedure? What types of cases are regularly determined on documents only?

Cases that are typically suitable for documents-only arbitration are industry specific such as commodity, domain name, intellectual property rights disputes, small claims, and consumer disputes. Complex arbitrations might not lend themselves to documents-only procedures, however there could be aspects of a complex arbitration that can be dealt with on documents alone. For example, issues of construction of the contract, discrete allegations, or valuing a long list of disputed variations to a contract.

In reality, many arbitrations are suitable for a documents-only procedure. In the UK, construction dispute adjudications are often carried out within 28 days, and almost half of them are conducted on a documents-only basis without a site visit or a meeting. This is true even where the values in dispute are high and the issues complex. The parties have to focus on the key issues and keep submissions short in order to make the most important points stand out.

What are your practical tips for written pleadings and presentation of evidence in such proceedings?

A documents-only procedure is aimed at speeding up the process and saving costs. A party should consider limiting the evidence to the contemporaneous documents, clearly identifying a limited number of factual and technical issues arising in relation to the dispute. Witness statements and/or expert witness evidence should also deal with an agreed list of issues such that oral testimony is not required. Complex or possibly high-value disputes might not be appropriate. However, in reality it is the nature of the evidence that is really important. If there are conflicting factual issues with little contemporaneous documents, then it might be important for the tribunal to see and hear the witnesses in order for the tribunal to properly exercise its judgement in relation to the issues in dispute.

Detailed directions are important. Express agreement of all the parties is required in order that they have waived their right to a hearing. The scope and extent of documents to be produced needs to be carefully considered and set out. A site visit might still be useful even if there is no hearing. A clear list of issues to be addressed by the witnesses is important in order to ensure that both parties address all of the issues. A reasonable time must be given for each party to make submissions, and importantly a fair opportunity to respond to any submissions made.

See: Chartered Institute of Arbitrators, International Arbitration Practice Guidelines, Documents-Only Arbitration Procedures (revised 30 August 2016)

Interviewed by Elodie Fortin.

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