

DUE PROCESS IN INTERNATIONAL ARBITRATION

Arbitration due process and procedural
irregularities in the time of Covid-19

“Is there a *force majeure* provision
in the New York Convention?”

David Brynmor Thomas QC



New York Convention 1958

Article V

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) ...

(b) **The party against whom the award is invoked** was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or **was otherwise unable to present his case**; or

(c) ...

(d) The composition of the arbitral authority or **the arbitral procedure was not in accordance with the agreement of the parties**, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) ...

Statutory “equal treatment” provisions

UNCITRAL Model Law (2006) – Article 18

The parties shall be treated with **equality** and **each party shall be given a full opportunity of presenting his case.**

Arbitration Act (1996) – s33

(1) The tribunal shall—

(a) **act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and**

(b) **adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.**

(2) ...

Institutional “equal treatment” provisions

International Chamber of Commerce Rules (2017) – Article 22

- 1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
- 2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.**
- 3) ...
- 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.**

The procedural issues raised by COVID-19

Restrictions on:

Travel

 Within countries

 Internationally

Association within countries – “lockdowns”, “quarantine periods”, “shielding and isolation” of vulnerable groups

Face-to-face meetings

Prohibition of different activities across different jurisdictions

Risk of:

Illness

Contagion

Spread of COVID-19 on packaging, documents and the like

The procedural problems raised by COVID-19

Restrictions on physical attendance:

- Lawyers meeting clients to take instructions and prepare cases
- Meetings with witnesses and experts to understand and develop cases, prepare witness statements and expert reports
- Attending arbitral institution offices – delivery of papers
- Conferences of expert witnesses
- Hearings

Hearings as an example:

- Large gatherings for long periods in rooms
- Disruption in the event of infection or advice/ requirement to quarantine
- Travel
- Paper bundles

Some of the procedural solutions adopted in response to COVID-19 and objections to those

“Virtual” hearings:

- Effect on oral advocacy – lose “immediacy” and body language
- Effect on cross-examination
 - Timing
 - Body language
 - Logistics of remote witnesses
- Found to be very tiring

Paperless bundles

- Lack of familiarity with technology
- Requires new skills in document analysis, handling and deployment
- Inequality of access to technology
- Data protection concerns

Some of the procedural solutions adopted in response to COVID-19 and objections to those (2)

Delay proceedings

- Cases take longer to resolve
- No guarantee delay will avoid other procedural issues in future, especially if COVID-19 has “second waves”

Press ahead with timetables in any event

- May not allow time to prepare or present case
- May not allow time for work between the Parties to prepare the case for trial or other presentation to the Tribunal

Arbitral institutions allow “virtual” filings or publication of orders and awards

- May not comply with institution’s rules
- A Party may still need a physical award for enforcement

Acceptability of COVID-19 procedural solutions

There is no *force majeure* provision in the New York Convention or national laws

But

Test procedural solutions against:

New York Convention Article V

National “equal treatment” provisions

“Equal treatment” provisions in relevant institutional rules

Ask:

Was the arbitration in accordance with the Parties’ agreement?

Was the party resisting enforcement given the (reasonable) opportunity to put its case?

Arbitration is sufficiently flexible, without any force majeure adjustment, to deal with the procedural issues raised by COVID-19

THANK YOU

David Brynmor Thomas QC

David.Brynmor.Thomas@39essex.com

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.