

CIArb YMG

Writing Competition 2020



Title: Mr.

Full Name: Subhiksh VASUDEV

Location: Paris, France

Affiliation: None

Education: Geneva LL.M. in International Dispute Settlement (MIDS '18)

Professional Status: International Arbitration Lawyer | Admitted in India and Part- Qualified in England & Wales (passed the MCT under the QLTS in January, 2020)

Email: subhiksh.vasudev@mids.ch

Mobile: +33650902763

In the matter of an Arbitration held under the CIArb Arbitration Rules (dated 1 December 2015) and inspired by the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules (dated 15 October 2018)

Between:

Carrousel Technologies Inc.

Claimant

and

Fleuron S.A.

Respondents

Saudi Chemicals L.L.C.

Procedural Order No. XX

29 September 2020

I. Procedural Order No. XX

I. Background

1. On 2 January 2020, Carrousel Technologies Inc. (the “**Claimant**”) commenced this arbitration against Fleuron S.A. (the “**First Respondent**”) and Saudi Chemicals L.L.C. (the “**Second Respondent**”, and collectively, the “**Respondents**”). The Claimant’s claims arise out of one Partnership Agreement dated June 2015 (the “**PA**”) to which the Claimant and the Respondents (together, the “**Parties**”) are signatories. The PA is subject to English law.
2. The Parties have agreed to resolve their dispute through this arbitration, which is seated in Riyadh, Saudi Arabia and is being held under the CIArb Arbitration Rules 2015 (the “**CIArb Rules**”). The Parties have further agreed, as already recorded in the Terms of Reference, to a fast-track arbitration procedure inspired by the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules 2018 (the “**SCCA Expedited Procedure Rules**”).
3. The final hearing in this case is scheduled for the week of 5 October 2020. A pre-hearing conference call was recently arranged, where the Tribunal invited the Parties to discuss how that hearing should take place considering the COVID-19 crisis. The call was attended by the Parties, their counsels and all the members of the Tribunal. The following submissions were made on behalf of the Parties.
The Parties’ arguments

II. The Parties’ arguments

a. The Claimant’s Position

4. The Claimant insists on holding an in-person hearing and urges the Tribunal to disregard the evidence of any witness or expert who fails to attend. In support of its submissions, the Claimant underscores the following four arguments: (i) that article 28 of the CIArb Rules mandates an in-person hearing, (ii) that an in-person hearing would also be consistent with English law and article 33 of the Saudi Arabian Law, (iii) that the Claimant would be able to present its case only through an in-person hearing since the Respondents heavily rely on witnesses and experts in their respective defences, without any underlying documents, and (iv) that there is no reason why the Respondents’ witnesses and experts cannot attend the hearing in-person when the Claimant’s sole witness, Mr. Billy Bigelow, and two experts, Dr. Julie Jordan and Ms. Carrie Pipperidge CPA, are prepared to travel to Riyadh from California, U.S.A.

b. The First Respondent’s position

5. The First Respondent suggests that the hearing should be held entirely via videoconference. It relies on article 9(1) of the SCCA Expedited Procedure Rules in support of this submission. While it concedes that its witnesses, Mr. Christopher Maé and Ms. Nolwenn Leroy, can easily travel to Riyadh from Toulon (where they are based), it argues that the same would not be possible for its experts, Dr. Didier Raoult (based in Marseilles) and Mr. Reginaldo Rossi (based in Brazil). The First Respondent points out that Dr. Raoult, who recently lost his wife to COVID-19, cannot travel due to the family bereavement. As far as Mr. Rossi is concerned, the First Respondent submits that traveling to Riyadh would put an undue burden on him as he

would have to undergo a mandatory 30-day quarantine in full isolation before he is allowed to attend the hearing.

6. While the First Respondent maintains its position on holding the hearing via videoconference, it additionally requests the Tribunal to bear the following two suggestions in mind were the Tribunal inclined to hold an in-person hearing: (i) that any witness or expert who is prevented by a reasonable justification from attending the hearing be allowed to attend via videoconference, or (ii) that if the Tribunal does not hear such witness or expert, then his statement or report be nonetheless taken into consideration.

c. The Second Respondent's position

7. The Second Respondent posits that there is no need for a hearing at all and that the case should be decided only on the basis of the written submissions made by the Parties. It additionally submits that were the Tribunal inclined to hold a hearing, then that hearing must only be in-person and should not be held until the time a vaccine for COVID-19 is identified and mass-produced. In support of its submissions, the Second Respondent argues that its witness, Dr. Majid Al-Majid, and expert, Dr. Nancy Ajram, are risky profiles for COVID-19, as the former is over 90 years old while the latter is an acute asthma patient.
8. The Second Respondent insists that were the Tribunal inclined to hold a virtual hearing, then all the witnesses and experts participating in this arbitration must be asked to appear via video-conference to ensure the equality of arms.

III. Analysis

9. Based on the submissions made and the arguments advanced on behalf of the Parties during the last pre-hearing conference call, the Tribunal considers the following three issues arise for its determination:
 - (a) Whether a hearing is even necessary in this case or should the case be decided on the basis of documents and written submissions only?
 - (b) If a hearing is required, whether it should be held in-person, or via videoconference, or partly in-person and partly via videoconference?
 - (c) If the hearing is held via videoconference, then what should be the next course of action?
10. The Tribunal has carefully considered the Parties' respective positions and shall address each of these issues below.

a. Whether a hearing is even necessary in this case or should the case be decided on the basis of documents and written submissions only?

11. It is the Tribunal's understanding that the hearing, which was initially agreed to be scheduled for the week of 5 October 2020, was intended to be an in-person hearing. There is nothing on the record to suggest otherwise. The Tribunal's opinion is strengthened by the fact that at no point in time, until now, did any of the Parties even indicate their desire to have a documents-only arbitration.

As a matter of fact, the purpose of the pre-hearing conference call was to discuss how the hearing should take place (and not if it should take place at all). The Second Respondent, who merely proposes at this stage to dispense with the requirement of a hearing, offers no justification for its request. The Second Respondent's request is both belated and unconvincing, and cannot be entertained.

12. The facts and circumstances of this case also compel the Tribunal to weigh in favour of holding a hearing. The Claimant has drawn the Tribunal's attention to the fact that the Respondents rely heavily on their experts and witnesses, without any underlying documents, in support of their respective defences. There is merit in that submission, especially, when it has not been refuted by either of the Respondents. The Tribunal considers that in the absence of supporting documents, it may not be the best practice to simply rely on the Parties' written submissions or witness statements as it is. The Tribunal considers that for a fair and final resolution of the Parties' dispute, an evidentiary hearing is, therefore, necessary.

b. If a hearing is required, whether it should be held in-person, or via videoconference, or partly in person and partly via videoconference?

13. Having found that a hearing is necessary in this case (section III(a) above), the Tribunal must decide the mode of the hearing. The Tribunal is of the view that due to the prevailing COVID-19 crisis as well as for reasons of procedural efficiency, it would be prudent to hold the hearing entirely via videoconference. The Tribunal is not convinced by the 'either/or' approach, as suggested by the Second Respondent, where the hearing is proposed to be either held in-person or not held at all. Instead, the Tribunal believes that the current circumstances need to be tackled with some flexibility and a constructive mindset. The Tribunal considers that a balance must be struck between its duty to contribute to the global effort to prevent the spread of the virus and its duty to fairly and expeditiously resolve the Parties' dispute. In the Tribunal's view, that is achievable by using the videoconference option for the hearing.

14. The Tribunal believes that the Parties must be given an equal opportunity of examining and cross-examining the witnesses and experts at an evidentiary hearing. That is why, there is some force in the Second Respondent's suggestion to not hold the hearing partially via videoconference and partially in-person. Allowing some of the witnesses to appear in-person is likely to create an imbalance. It is also likely to burden some of the participants with unnecessary expense, administrative hurdles, and the risk of exposure to the virus. In the Tribunal's view, all these concerns can be successfully resolved by holding the hearing entirely via videoconference. The Tribunal takes note of the fact that none of the Parties has argued that its witnesses or experts are unwilling, or unavailable, to attend the hearing via videoconference. Therefore, the Tribunal considers that holding a hearing entirely via videoconference is the best solution under the circumstances.

15. Before concluding on this issue, the Tribunal would like to deal with two concerns that were raised during the last pre-hearing conference call.

16. First, the Claimant argues that the provisions of CIARB Rules, English law, and the Saudi Arbitration Law, mandate an in-person hearing. In the Tribunal's view, that is not the correct position. There is nothing in the CIARB Rules that compels a physical or an in-person hearing. On the contrary, the CIARB Rules give a wide discretion to Tribunal to "*conduct the arbitration in such manner as it considers appropriate*".¹

¹ CIARB Rules, article 17(1). (Emphasis added.)

It includes conducting the examination of the witnesses and experts “through means of telecommunication that do not require their physical presence at the hearing (such as video conference).”² Even under the SCCA Expedited Procedure Rules, as the First Respondent rightly points out, the Tribunal has the discretion to decide whether an oral hearing should be conducted “in person or via video conference, telephone or other suitable means”.³ Under the English law, a tribunal’s authority to “adopt procedures suitable to the circumstances of the particular case”⁴ and govern “all procedural or evidential matters”⁵ in an arbitration is equally well recognized. The Saudi Arbitration Law also gives primacy to the parties’ agreed choice of procedural rules,⁶ which, in this case, are the CIArb Rules and the SCCA Expedited Procedure Rules, and which allow a hearing to be conducted via videoconference. The Claimant’s reliance on article 33 of the Saudi Arbitration Law is misplaced inasmuch as that provision only requires a tribunal to “hold hearings”. In the Tribunal’s view, it includes a virtual hearing. The focus of all these laws is on ensuring procedural equality, fairness and a reasonable opportunity of presenting one’s case, all of which are possible in a virtual hearing just as much as in a physical hearing. The Tribunal is, therefore, not persuaded by the Claimant’s argument. It is, accordingly, rejected.

17. **Secondly**, the Claimant and the First Respondent make rival arguments on the admissibility of evidence of witnesses and experts who cannot attend the in-person hearing. In the Tribunal’s view, these arguments do not survive given the Tribunal’s decision to hold the hearing entirely via videoconference. The witnesses and experts of the Parties would testify before the Tribunal and be examined/cross-examined via videoconference. The Tribunal finds no reason to analyse the personal reasons of each and every witness or expert who could not attend the physical hearing, given that all those individuals are ready and willing to offer their evidence via videoconference. That, in the Tribunal’s view, should be the end of the matter:

c. If the hearing is held via videoconference, then what should be the next course of action?

18. Having decided that the hearing would take place entirely via videoconference (section III(b) above), the next course of action must be settled. Since we have a few days left before the week of 5 October 2020, the Tribunal considers that the hearing preparations must begin without any delay. The Tribunal believes that although making necessary arrangements, as part of the preparations, would require some intent and effort from all the participants in this arbitration, yet, it is certainly manageable.

19. In the Tribunal’s view, the following issues need to be discussed amongst the Parties for finalizing the format and agreed terms of the videoconference hearing:

- i) **Hearing date and Time:** The date and time of the hearing need to be finalized. The Parties are requested to discuss beforehand whether they would require one or more days for the hearing to complete and, accordingly, to provide the Tribunal with a time schedule. The Parties are reminded that under the SCCA Expedited Procedure Rules, an oral hearing, ideally, does not exceed one day.⁷ Therefore, when deciding on the suitable hearing date(s), the Parties should endeavour to conclude the hearing as expeditiously as possible.
- ii) **The Platform:** There needs to be a virtual platform (like Zoom, Webex, Microsoft Teams, Bluejeans, etc.) that will be used for the hearing. The Parties can mutually agree on one of such Platforms. The Parties are requested to choose a Platform that has the following capabilities:

⁷ SCCA Expedited Procedure Rules, article 9(2).

- Protections for the confidentiality of the proceedings;
 - High resolution audio-visual abilities;
 - Ability to enable private meetings of subgroups, including the tribunal members, and each counsel and client;
 - Ability to accommodate multiple parties to participate and access documents at the same time;
 - In-built settings for screen sharing to enable participants to view documents at the same time; and,
 - Compatibility with any legal deposition software that the Parties prefer to use for the hearing.
- iii) **The Host:** There needs to be a designated Host for the videoconference hearing. The Host will have control over, among other things, the participants who enter the hearing, setting up of subgroups, muting participants, controlling recording, managing virtual breakout rooms and waiting rooms and other features on the Platform. The Parties should consider, one of the following persons to host the hearing:
- The Chair of the Tribunal, or
 - The Tribunal Secretary, or
 - The Stenographer (in case the Parties decide to have one – see point no. (xvi) below).
- iv) **The Technical Support Staff:** The hearing will require one person to act as the technical support staff. The task of that person will be to operate, support, and work throughout the hearing to resolve problems that may arise concerning the use of the Platform. The Parties should consider engaging either a vendor for this purpose or someone already involved in the case, for example, a paralegal at one of the law firms.
- v) **Connectivity:** All the participants at the hearing, including the members of the Tribunal, the Parties and their representatives, their counsels, witnesses, experts, and stenographer (if any), will need to have a device (laptop, desktop or tablet) and high speed broadband access to connect to the hearing. They will need to install and use the latest version of the Platform software that the Parties choose for the hearing. In addition, each participant will need to have a second method of connecting to the videoconference (such as telephone, and the telephone number must be communicated to the Tribunal and the participants in advance of hearing) in case the primary means of connection fails. This will be necessary to notify the Tribunal of any connectivity failure so that it can avoid delay in taking further steps.
- vi) **Equipment:** All the participants will need to have a device (laptop, desktop or tablet) with a functional microphone and a camera to show a 3600 view of the room in which they are seated. It will be ideal to avoid using virtual backgrounds or backlighting.
- vii) **Seating arrangements:** The Parties can confer on the most transparent and effective ways in which the participants may be seated in their respective physical rooms. This can include matters like the lighting, camera angles, soundproofing, isolation from non- participants and so on.
- viii) **Training:** The Parties can try to identify any online training videos or materials to familiarize all the participants with the use of the chosen Platform.

- ix) **Confidentiality:** The Parties can jointly explore methodologies to protect sensitive, confidential and private data that may be exchanged in the arbitration and/or submitted to the Tribunal.
- x) **Cybersecurity:** The parties should explore the level of encryption offered by their choice of Platform.
- xi) **Documentation:** The Parties can create an electronic version of the hearing bundle and share it with the Tribunal as well as the witnesses and experts through a secure downloadable link. The Parties may also consider using a shared virtual document repository (like Dropbox, Google Drive, etc.).
- xii) **Witnesses and Experts:** The Parties can discuss how the testimony should be taken, whether it should be through administering oaths, or if not, what procedure should be followed.
- xiii) **Timetable:** The Parties are encouraged to mutually agree on a time schedule for opening and closing statements, for examination and cross-examination of witnesses and for breaks. The order of appearance of the witnesses and experts can also be agreed between the Parties.
- xiv) **Costs:** The Parties may also wish to discuss the apportionment of costs that may be incurred by any of the participants in relation to the services provided for the purposes of the videoconference hearing.
- xv) **Seat of Arbitration:** For avoidance of any doubts, the Parties are requested to agree that Riyadh, Saudi Arabia will remain to be the seat of the hearing and that holding the hearing via videoconference will not affect the original agreement of the Parties.
- xvi) **Housekeeping Issues:** The Parties may decide on the list of participants who would be attending the hearing at a given time. A procedure for virtual breakout rooms and for deliberations and private caucusing may also be discussed between the Parties. The Parties can also discuss if stenographic record or transcript will be needed for the hearing. This is because, unless otherwise agreed, the SCCA Expedited Procedure Rules do not permit stenographic record or transcript.⁸
- xvii) **Mock hearing:** If the Parties desire, they can agree on a time to test the network, software, and hardware settings through a mock hearing on 4 September 2020. The mock hearing can be arranged for one hour and the Parties can agree on a time where all the participants are available to attend the same.

20. The Parties are invited to confer on these issues (as set out in paragraph 19 above) and to try and reach an agreement on each of them. The Parties are encouraged to take benefit of the '*CI Arb Guidance Note on Remote Dispute Resolution Proceedings*'⁹ that contains practical advice on how arbitration proceedings can be conducted under remote conditions using the necessary tools and techniques.

21. The Tribunal will hold a pre-hearing conference call with the Parties and their counsels on 3 October 2020 at 5:00pm CET to decide on the format of the hearing based on the Parties' deliberations on the issues listed above.

⁸ SCCA Expedited Procedure Rules, article 9(1).

⁹ CI Arb, Guidance Note on Remote Dispute Resolution Proceedings, dated 8 April 2020 (at: <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>).

The Parties are requested to distinctly highlight the issues on which they were able to reach an agreement and those on which they require the Tribunal's assistance. The open issues, as well as any other matter that the Parties wish to bring to the Tribunal's notice, will be discussed during the conference call. After consultation with the Parties, the final agreed terms for holding the hearing via videoconference will be formally set out in a procedural order by the Tribunal. That procedural order will be made and circulated by the Tribunal on 4 October 2020 (1:00pm CET). The Tribunal Secretary will circulate the dial-in detail for the pre-hearing conference call shortly.

IV. Decision of the Tribunal

22. For these reasons, the Tribunal decides that:

- i) the hearing scheduled for the week of 5 October 2020 will be held entirely via videoconference;
- ii) a pre-hearing conference call will be held on 3 October 2020 at 5:00pm CET to finalize the date and time as well as the terms for holding the videoconference hearing. The call will be attended by the Parties, their counsels and the members of the Tribunal.

Place of Arbitration: Riyadh, Saudi Arabia

-/ sd /-

(Presiding Arbitrator)

On Behalf of the Tribunal
29 September 2020

Explanatory Note for Procedural Order No. XX

Dear Fellow Members of the Tribunal,

Attached is the procedural order no. XX addressing various issues that arose during the pre-hearing conference call earlier. I have tried my best to delineate and analyse those issues based on the Parties' submissions. Although the procedural order is sufficiently detailed, I wish to share the reasons for my decision with both of you through this Note. They are as follows:

- 1. On having an oral hearing and not a documents-only arbitration.** It is a matter of record that the Parties have adduced substantial amount of evidence in the form of witness statements and expert reports. There are total 5 experts and 4 fact witnesses in this arbitration, all of whom, at least prima facie, appear to address relevant issues that are material to the dispute. Thus, it is not possible to ignore that evidence altogether and decide the dispute based on the Parties' written submissions alone. Although we cannot be expected to conclusively determine the weight (or even admissibility) of their evidence at this stage, the same can be satisfactorily examined at an evidentiary hearing. The credibility of these witnesses and experts and the genuineness of their statements and reports can be ascertained after they have testified and been cross-examined at the hearing. Moreover, the question of deciding between an oral hearing and a documents-only arbitration does not really arise given that the Claimant and the First Respondent have already requested for an oral hearing. That question could have arisen only in the absence of such a request.¹ That is why, I consider an oral hearing is the best way forward for inquiring into the facts and resolving the present dispute.
- 2. On having a videoconference hearing.** Our main duty as the Tribunal is to ensure that “each party is given a reasonable opportunity of presenting its case” and that “a fair and efficient process for resolving the parties' dispute” is adopted, all while avoiding “unnecessary delay and expense”² and “with a view to expediting the resolution of the dispute.”³ The global pandemic has severely affected the personal and professional lives of people worldwide. The Tribunal needs to be mindful of their hardships, particularly, due to the numerous travel restrictions currently in place. Having a hearing via videoconference would save the Parties and their counsels, representatives, witnesses, experts, support staff, etc. from undergoing unnecessary administrative difficulties, incurring excessive travel expense, and running the risk of getting exposed to the coronavirus. It would also ensure uniformity in recording of the evidence and oral presentations, thereby, addressing the Parties' concerns regarding procedural equality and fairness.
- 3. On the format of holding the video conference hearing.** I have set out a detailed agenda for the Parties to discuss amongst themselves. The purpose is to reach an agreed set of terms for holding the hearing via videoconference and to address all related concerns. We will have the opportunity to discuss it in further detail during the pre-hearing conference call but I believe the Parties will have sufficient time to confer on all the issues and assist us in our decision-making.

I hope my reasons are satisfactory and will find favour with both of you.

¹ CIArb Rules, article 17.3: “**If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings** for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.”. (Emphasis added.)

² CIArb Rules, article 17(1).

³ SCCA Expedited Procedure Rules, article 12(1) read with SCCA Arbitration Rules, articles 20(1) and 20(2).