

CI Arb YMG

Writing Competition 2020



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The Arbitration Chambers, Singapore

Ad-hoc Arbitration under the CI Arb Arbitration Rules

For the CI Arb YMG Writing Competition 2020

(THE “ARBITRATION”)

Between

Carrousel Technologies Inc.
(incorporated in the USA)

Claimant

and

Fleuron S.A.
(incorporated in France)

1st Respondent

Saudi Chemicals L.L.C.
(incorporated in Saudi Arabia)

2nd Respondent

Procedural Order

Date:

The Arbitral Tribunal

**The Arbitral Tribunal now makes the following Procedural Order (“PO”)
having taken into account the submissions of the Parties:**

I. Procedural Background

- I.1 On 2 January 2020, the Claimant, Carrousel Technologies Inc. (“**Carrousel**”) commenced arbitration against the 1st Respondent, Fleuron S.A. (“**Fleuron**”) and the 2nd Respondent, Saudi Chemicals L.L.C. (“**Saudi Chemicals**”) (collectively “**the Respondents**”).
- I.2 Subsequently, Carrousel produced an expert report of Dr. Julie Jordan, a witness statement of Billy Bigelow (Managing Director of Carrousel), and a quantum expert report of Carrie Phipperidge CPA.

- 1.1 On 2 January 2020, the Claimant, Carrousel Technologies Inc. ("**Carrousel**") commenced arbitration against the 1st Respondent, Fleuron S.A. ("**Fleuron**") and the 2nd Respondent, Saudi Chemicals L.L.C. ("**Saudi Chemicals**") (collectively "**the Respondents**").
- 1.2 Subsequently, Carrousel produced a expert report of Dr. Julie Jordan, a witness statements of Billy Bigelow (Managing Director of Carrousel), and a quantum expert report of Carrie Pipperidge CPA.
- 1.3 In turn, Fleuron produced two (2) witness statements, that of Christopher Mae (Chief Researcher of Fleuron) and Nolwenn Leroy (Commercial Director of Fleuron), an expert report of epidemiologist Dr Didier Raoult and another expert report of quantum expert Reginaldo Rossi.
- 1.4 Saudi Chemicals also produced a witness report of Dr. Majid Al-Majid (Chairman of Saudi Chemicals) and an expert report of quantum expert Dr Nancy Ajram.
- 1.5 Prior to the hearing on 5 October 2020, the Parties attended a pre-hearing conference call and parties raised the following issues:

Issue (1): Whether the case should be decided in an in-person hearing, virtual video conference hearing or a document-only proceeding;

Issue (2): Whether the Tribunal should allow any witness or expert to testify via video conference and;

Issue (3): Whether the Tribunal should take into consideration the evidence of witnesses or experts if it refuses to allow these witnesses or experts to testify via video conference.

2. Parties Submissions

Claimant's Submissions

- 2.1 Concerning issue (1), the Claimant submits that the Parties must hold an in-person hearing. The Claimant advances three arguments: (i) Art. 28 of the CI Arb Arbitration Rules (the "CI Arb Rules") requires an in-person hearing; (ii) holding an in-person hearing is also required because this is consistent with the substantive law, English law and Art. 33 of the Saudi Arbitration Law and; (iii) only an in-person hearing would allow it to put forward its case, particularly in this case where the Respondents' defences rely heavily on witness and expert evidence, without any underlying documents.
- 2.2 Concerning issue (2) and (3), the Claimant submits that the Tribunal should disregard the evidence of any witness or expert's failure to attend in person and reiterates the arguments above. Additionally, the Claimant argues that the Respondents' claims that their witnesses and experts are not available are not convincing given that Carrousel's witness and experts are prepared to travel from California to Riyadh.

1st Respondent's Submissions

- 2.3 Concerning issue (1), the 1st Respondent submits that the hearing should be held entirely via videoconference, noting that Art. 9(1) of the Expedited Procedure Rules of the SCCA Arbitration Rules ("SCCA Rules (Expedited Procedure)") provides that a hearing may take place "in person or via video conference, telephone or other suitable means".

- 2.4 Concerning issue (2) and (3), the 1st Respondent avers that, while Mr Mae and Ms Leroy can travel to Riyadh, it would be impossible for its experts, Dr Raoult and Mr Rossi to attend the hearing in-person – Dr Raoult recently lost his wife to COVID-19 and is currently in mourning, while Mr Rossi (who is based in Brazil) would be unduly burdened because Saudi Arabia requires all individuals entering the country from Brazil to enter a 30-day quarantine in full isolation.
- 2.5 Therefore, the 1st Respondent submits that if the Tribunal is minded to hold an in-person hearing, the 1st Respondent argues that the Tribunal should allow any witness or expert with reasonable justification for failing to attend to do so via video conference. In the alternative, the 1st Respondent argues that if the Tribunal does not hear such witnesses or experts, it should nonetheless take into consideration their evidence.

2nd Respondent's Submissions

- 2.6 Concerning issue (1), the 2nd Respondent submits that no hearing is necessary, and the case should be decided solely on written submissions. However, the 2nd Respondent asserts that if the Tribunal is minded to have a hearing, it would want an in-person hearing, and would wish to postpone until an in-person hearing would be feasible. Additionally, the 2nd Respondent highlights that its witness, Dr Al-Majid is over 90 years old, and its expert Ms Khoury suffers from acute asthma – both of which are risky profiles for COVID- 19.
- 2.7 Concerning issue (2) and (3), the 2nd Respondent does not express a position. However, the 2nd Respondent asserts that if the Tribunal decides to hold a virtual hearing, all witnesses and experts must appear virtually to ensure equality of arms.

3. Decision

- 3.1 The Tribunal has reviewed the respective Parties' submissions and publishes its decision and directions in this PO.

Issue I

- 3.2 It is undisputed between parties that the seat of the arbitration is Riyadh, Saudi Arabia and the law of Saudi Arabia shall be the applicable lex arbitri (i.e. the Kingdom of Saudi Arabia Law of Arbitration (the "**Saudi Law of Arbitration**"). It is also undisputed that the CIArb Rules are the applicable rules of the arbitration.
- 3.3 Parties have, in their agreement to arbitrate under the CIArb Rules, expressly conferred the Tribunal with powers under these terms:

*"17(1). Subject to these Rules, **the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate**, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. **The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.**"*

(emphasis added)

- 3.4 Additionally, under the Saudi Law of Arbitration, the Tribunal is likewise conferred the power, in the absence of agreement, decide the arbitration proceedings it deems fit, subject to the provisions of Sharia and the Saudi Law of Arbitration (Art. 25(1) Saudi Law of Arbitration). Parties have also agreed to the SCCA Rules (Expedited Procedure) which states: "the hearing may take place in person or via video conference, telephone or other suitable means, at the discretion of the Tribunal." (Art. 9(1) SCCA Rules (Expedited Procedure).
- 3.5 Accordingly, the Tribunal has broad powers of discretion in the arbitration proceedings, and can direct the hearing to be virtual, or in-person, taking in consideration what is required to provide a fair and efficient process for resolving the parties' disputes.
- 3.6 The Tribunal rejects the Claimant's arguments (i) and (ii) (at paragraph 2.1 above). The Claimant has misunderstood the meaning of Art. 28 of the CI Arb Rules and Art. 33 of the Saudi Law of Arbitration. Art. 28(1) and (3) CI Arb Rules only refers to the "date, time and place thereof" of the hearing and that the hearing be held "in camera" – such language does not preclude a hearing taking place remotely, by virtual means and leaves open the possibility. Further, Art. 28(2) and (4) CI Arb Rules expressly mentions the discretion of the Tribunal to order examination of witnesses by virtual means.
- 3.7 In the same vein, Art. 33 Saudi Law of Arbitration does not preclude a virtual hearing and only states that the tribunal "shall hold hearings to enable each of the two parties to present his case and submit his arguments and evidence".
- 3.8 The Tribunal also rejects the 2nd Respondent's submission that the hearing be a document-only proceeding. The Tribunal is not convinced that a document-only proceeding is suitable: The parties have a total of 9 witnesses and experts, each with areas of factual and technical issues in dispute, the evidence is voluminous and there is little underlying contemporaneous documents. Surely a hearing would be more appropriate to have these issues resolved.
- 3.9 Nevertheless, taking into consideration each parties' position, the Tribunal is inclined for the hearing to proceed in-person for the following reasons: First, both the Claimant and the 2nd Respondent have indicated that they would prefer an in-person hearing over a virtual hearing. The 1st Respondent in principle has not objected or provided reasons as to why it should not attend in-person. The 1st Respondent's main concern is 2 of its witnesses: Dr Raoult and Mr Rossi being unable to attend physically – this has been addressed below in Issue 2. Suffice to say, the 1st Respondent can attend the hearing in-person,
- 3.10 Secondly, there is no unfairness because the hearing was initially contemplated as an in-person hearing in Riyadh – as such, parties would already have made preparations for this event. None of the parties have submitted in the pre-hearing conference that there would be any hindrances posed by the travel restrictions in Saudi Arabia and hence there would be no inconvenience to parties.
- 3.11 In totality, given that all three parties are able to attend an in-person hearing, the Tribunal directs that the hearing be held in-person in Riyadh, Saudi Arabia with the Parties making the necessary arrangements (if they have not already done so).
- 3.12 Lastly, the Tribunal notes the 2nd Respondent's submission to postpone the hearing until a feasible time (e.g. when a COVID-19 vaccine is identified). While the Tribunal would perhaps consider a short adjournment of the hearing, as of now there is no indication as to when such feasible time would

be, and the 2nd Respondent is unable to proffer a specific time. An indefinite adjournment would go against the grain of an efficient, expeditious arbitration. Pertinently, all parties have agreed to a fast-track arbitration and recognize that time is of the essence in deciding the substantive issues, and the 2nd Respondent's submission is entirely contrary to this position. As such, the Tribunal rejects the 2nd Respondent's suggestion to postpone the hearing indefinitely.

Issue 2

- 3.13 The Tribunal has already established that parties have accorded it the broad power to determine the manner in which the arbitral proceedings are carried out, and this power includes the discretion of the Tribunal to order examination of witnesses by virtual means. Art. 28(4) CI Arb Rules expressly provides that *"the arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)."*
- 3.14 The 1st Respondent has submitted that the enquiry should be whether the witness has a reasonable justification for failing to attend. The Tribunal agrees in part with the 1st Respondent, and adopts a holistic enquiry – in determining whether a witness should be allowed to testify via videoconference, the Tribunal would weigh the potential reasons and benefits of a witness testifying virtually against any potential prejudice to parties.
- 3.15 The Parties have submitted that all the Claimant's three witnesses: Dr Jordan, Mr Bigelow and Ms Pipperidge, along with two of the 1st Respondent's witnesses: Mr. Mae and Mr Leroy, are able and prepared to travel to Riyadh for an in-person hearing. Hence, the issue before this Tribunal is whether Mr Rossi, Dr Raoult, Dr Al-Majid and Dr Ajram (assumed to be the same individual as Ms Khoury) can testify via videoconference. The Tribunal will address each witness in turn.

Mr Rossi

- 3.16 The 1st Respondent states that Mr Rossi would be unable to attend an in-person hearing because he would have to enter a 30-day quarantine in full isolation. The Tribunal finds this reason convincing – requiring Mr Rossi to attend an in-person hearing would prejudice the conduct of the proceedings efficiently and expeditiously and would increase costs. Further, not having Mr Rossi testify would deprive the 1st Respondent of a testimony on quantum and prejudice the 1st Respondent.
- 3.17 The Tribunal notes the Claimant's objections that "only an in-person hearing would allow it to put forward its case". However, the Tribunal is of the view that expert witness testimony by videoconference would be of little prejudice to the Claimant: First, one of the potential reasons for the Claimant's objection is that it would be difficult to assess remotely the credibility of the expert, in particular, because of the lack of non-verbal cues. However, this is solved by modern technological solutions with high-definition screens and cameras capturing movement and audio better than a physical hearing room. The Tribunal could benefit from the recorded testimony as well when coming to a decision.
- 3.18 Second, another potential reason for the Claimant's objection is that there might be concerns that the expert is unduly influenced. This is ameliorated by the fact that it is common practice in remote hearings for the cross-examining party to send a representative to be physically present at the venue with the expert who testifies.

Even if this is not possible, multiple cameras in the venue or asking the expert to pan the camera around are valid alternatives.

3.19 T The Tribunal also disagrees with the Claimant's comparison of Mr Rossi to its witnesses. The Claimant's witnesses presumably would not be subject to any restrictions when entering Riyadh, which is a starkly different position from Mr Rossi who would be required to serve a 30-day quarantine in full isolation just to turn up for at most, a day for the in-person hearing.

3.20 In toto, the Tribunal finds that Mr Rossi should be allowed to testify via videoconference. The Tribunal hence directs the parties to liaise and agree on a neutral service provider and other logistical arrangements. The Tribunal further proposes for parties to agree to be guided by the Seoul Protocol on Video Conferencing in International Arbitration ("**Seoul Protocol**"). The Tribunal additionally directs the parties to agree on a date before the actual hearing for participants to take part in a "dry run" to iron out outstanding logistical and procedural issues.

Dr Raoult

3.21 The 1st Respondent avers that it would be impossible for Dr Raoult to attend because he "recently lost his wife to COVID-19 and is currently in mourning". While the Tribunal is sympathetic to Dr Raoult's loss and understands there is no scale to indicate how long such grief will last, it is also noted that the actual hearing is still some time away, which would provide time for him to recover. This must be weighed against the fact that there is no inconvenience in the form of travel restrictions for Dr Raoult to be present in Riyadh for an in-person hearing.

3.22 In the circumstances, the Tribunal finds that Dr Raoult should testify in-person at the hearing in Riyadh.

Dr Al-Majid

3.23 The 2nd Respondent avers that Dr Al-Majid's age (over 90 years old) makes it difficult for him to appear in-person as he is especially vulnerable due to the COVID-19 situation.

3.24 While the Tribunal acknowledges the above, the Tribunal notes that Dr Al-Majid is in fact in Riyadh, the place of the hearing. Given that the 2nd Respondent has not raised any social distancing measures or concerns which prevents people from traveling and congregating in Riyadh, the Tribunal is inclined for Dr Al-Majid to testify in-person as there is no inconvenience to him.

3.25 The Tribunal therefore finds that Dr Al-Majid should testify in-person at the hearing in Riyadh, but taking into consideration the circumstances, directs the parties to have special precautions (e.g. the wearing of protective equipment, physical distancing between parties, special witness stand) put in place for Dr Al-Majid.

Dr Ajram

3.26 The 2nd Respondent avers that Dr Ajram suffers from severe acute asthma, which makes her a risky profile for COVID-19. The Tribunal finds this reason compelling as it concerns the health and life of an individual. There is little prejudice to the Claimant and the Tribunal repeats paragraph 3.19 and 3.20 above.

- 3.27 Accordingly, the Tribunal finds that Dr Ajram should be allowed to testify via videoconference. The Tribunal repeats the directions in paragraph 3.22.
- 3.28 Lastly, the Tribunal disagrees with the 2nd Respondent's argument that "to ensure equality of arms, all witnesses and experts must appear virtually". The underlying principle that must be achieved is for full and equal opportunity for all parties to present their case – this is achieved because witness/expert testimony can be presented efficiently in both in-person and virtual hearings.

Issue 3

- 3.29 Issue 3 does not need to be addressed given that the Tribunal has directed every witness/expert to either attend the hearing in-person, or via videoconference.

4. Directions

- 4.1 The Tribunal reiterates and particularises the directions in this PO and DIRECTS:
- 4.1.1 The Claimant, 1st Respondent and 2nd Respondent shall attend an in- person hearing in Riyadh, Saudi Arabia on the week of 5 October 2020.
- 4.1.2 All the Claimant's Witnesses/Experts (Dr Jordan, Mr Bigelow and Ms Pipperidge), three of the 1st Respondent's Witnesses/Experts (Mr Mae, Ms Leroy and Dr Raoult) and one of the 2nd Respondent's Witness (Dr Al-Majid) shall attend the in-person hearing in Riyadh, Saudi Arabia. Special precautions shall be taken for Dr Al-Majid, and parties are requested to agree on such special precautions.
- 4.1.3 Mr Rossi, one of the 1st Respondent's Experts, and Dr Amraj, the 2nd Respondent's Expert shall be allowed to testify via videoconference.
- 4.1.4 Concerning the videoconferencing, the Tribunal:
- (a) Directs the parties to liaise and agree on a neutral service provider and other logistical arrangements **3 weeks before the in-person hearing**;
 - (b) A case-management conference (if necessary) for parties and the tribunal to discuss arrangements;
 - (c) requests parties to agree to be guided by the Seoul Protocol (or similar virtual hearing protocols);
 - (d) directs the parties to take part in a "dry run" **2 days before the in-person hearing** to iron out outstanding logistical and procedural issues.

Date:

Presiding Arbitrator

Explanatory Note

Dear colleagues, I attach for your review this draft PO. It is fairly self-explanatory. Nevertheless, I set out my reasons for the decisions in the PO to help explain my thought process. Ultimately, I have directed the parties to continue with an in-person hearing in Riyadh, Saudi Arabia and have allowed 2 experts to testify via videoconference.

Concerning Issue 1, the arbitral tribunal's broad powers regarding procedural matters is recognized in most, if not all national arbitral laws and arbitration rules, and in our case, this is no different in the Saudi law of Arbitration and CI Arb Rules. This broad power has to be tempered with parties' agreement and parties' right to be heard and treated equally. Despite the COVID-19 situation, none of the parties cite arguments against an in-person hearing. The 1st and 2nd Respondent's main concerns were that some of their witnesses/experts might not be able to attend. As such, there was nothing preventing me from upholding the parties' original agreement to have an in-person hearing for the parties and the bulk of the witnesses/experts.

In particular, regarding the 2nd Respondent's submission for a document-only proceeding (paragraph 3.8), I took guidance from the Documents-Only Arbitration Procedures authored by CI Arb¹ which represent the best practice in international commercial arbitration on documents-only procedures. Agreeing to a documents-only proceeding and going against the other parties would likely be a breach of the parties' right to be heard, leading to possible setting aside of the award.

Concerning Issue 2, in deciding what test should be applied to decide whether a witness should be allowed to testify, a balancing exercise taking into consideration all circumstances of the case is the most in line with the broad discretion of the tribunal (drawing inspiration from Prof Dr Maxi Schrer's analytical framework). Factors to take into account can be: whether it is due to professional inconvenience, sickness etc. the stronger the impediment, the heavier the factor will weigh; whether the organization for the remote hearing is satisfactory; whether there would be prejudice to other parties etc.

I have stated the reasons for allowing/disallowing testimony by videoconference in the PO. Of note is Dr Raoult, which I felt the reason given was not convincing – and I draw analogy to the fact that even in everyday work, it is not the norm to give compassionate leave to individuals (at best, a week of leave is given). The Claimant's fears that testifying via videoconference would not allow it to present its case fully is overstated. Apart from the reasons given in the PO, it is pertinent to note that courts and international arbitral institutions have already been allowing virtual testimonies from witnesses for years.

Concerning the direction for the setup of a videoconferencing, I cited the Seoul Protocol because it is fairly extensive on the procedural and logistic arrangements – however, there are many other guidelines and practice notes, and I defer to your suggestions if you feel any other guideline is more suitable.

¹ <https://www.ciarb.org/media/4202/guideline-8-documents-only-arbitration-proceedings-2015.pdf>