

CI Arb YMG

Writing Competition 2020



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In the matter of an 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

Decision on Hearing Format for the Hearing scheduled to take place in Riyadh, Saudi Arabia on 5 October 2020

1 October 2020

Background

1. In October 2015, the parties entered into a partnership agreement ("PA") for the purpose of developing, manufacturing, and commercialising in Saudi Arabia a vaccine against the COVID-14 coronavirus. On 24 December 2019, the 1st Respondent issued a termination notice purporting to terminate the PA.
2. On 2 January 2020, the Claimant commenced his arbitration seeking declaratory relief that the 1st Respondent's termination of the PA was invalid together with an order for specific performance or, alternatively, damages for wrongful termination. Central to the dispute between the parties is the question of whether the research conducted within the auspices of the PA had made meaningful progress towards the development of a vaccine, and whether that research would be useful in developing a vaccine for the more recent COVID-19 pandemic.
3. The PA is governed by English law.
4. The seat of this arbitration is Riyadh, Saudi Arabia. 4. The seat of this arbitration is Riyadh, Saudi Arabia.

5. This arbitration is being held under the CIArb Arbitration Rules. By agreement between the parties, the arbitration is being conducted as a fast-track arbitration drawing inspiration from the Expedited Procedure Rules Appendix to the SCCA Arbitration Rules (“**SCAA Expedited Procedure Rules**”).
6. A substantive hearing was scheduled for the week commencing 5 October 2020 in Riyadh, Saudi Arabia. Shortly beforehand, a pre-hearing conference call with the parties was held where submissions were made as to whether the scheduled hearing should proceed at all, and if it should, the appropriate format for such a hearing in view of the effects of the COVID-19 pandemic. That is the issue which falls to be determined in this Procedural Order.

The Parties’ Submissions

7. The Claimant argued that the Tribunal had no choice but to hold an in-person hearing. It submitted that an in-person hearing was a mandatory requirement under Article 28 of the **CIArb Arbitration Rules**, English law, and Article 33 of the **Saudi Arbitration Law**. In addition, the Claimant argued that only an in-person hearing would enable it to properly present its case in view of the Respondents’ heavy reliance on witness and expert evidence.
8. By contrast, the 1st Respondent cited Art. 9(1) of the Expedited Procedure Rules of the SCAA Arbitration Rules to argue that the hearing should be held entirely by videoconference. As to the question of witness attendance, it argued that it would be impossible for some of its witnesses to attend an in-hearing person. The expert witness to be called by the 1st Respondent, Dr. Didier Raoult of Marseille, is said to be currently mourning the recent passing of his wife whilst the attendance of its quantum expert, Mr. Reginald Rossi of Brazil, was said to be unduly burdened by Saudi Arabia’s requirement for travellers from Brazil to enter a 30-day quarantine in full isolation. In the event that the Tribunal is minded to convene an in-person hearing, the 1st Respondent submits that it should nonetheless allow witnesses with a reasonable justification to attend via videoconference, or, alternatively, if that was not permissible, that the Tribunal nonetheless take into account their written evidence.
9. The 2nd Respondent rejected the need for any hearing at all and instead argued that the arbitration should be disposed of on the papers alone. If the Tribunal were to refuse that request, it submitted that the Tribunal should convene an in-person hearing as soon as that was feasible. It suggested that this would be feasible when a vaccine for COVID-19 was developed and mass-produced. Furthermore, the 2nd Respondent submitted that in view of both of its witnesses being particularly susceptible to COVID-19, one being over 90 years old and the other suffering from acute asthma, it was appropriate to either wait until a vaccine was available to enable an in-person hearing or to ensure that all witnesses appear virtually so that there was equality of arms between the parties.

Analysis

Issue 1: Whether the Tribunal has jurisdiction to order a videoconference hearing

10. The starting point for analysing the Tribunal’s jurisdiction to determine the format of the hearing of this arbitration is the **Saudi Arbitration Law**. Article 2 thereof provides that the **Saudi Arbitration Law** applies to any arbitration that takes place in Saudi Arabia. As to the provisions of the **Saudi Arbitration Law** that bear upon the question of the permissible format of a hearing governed thereunder, the following principles are relevant:

- a. The parties may agree on the procedures to be followed by the Tribunal in conducting the proceedings, including the right to subject the proceedings to the rules of any organisation, agency or arbitration centre, provided that such rules do not conflict with Sharia (Article 25.1);
- b. In the absence of agreement, the Tribunal may adopt the procedures it deems fit subject to the provisions of the Saudi Arbitration Law and Sharia (Article 25.2);
- c. The parties shall be treated equally and afforded an equal opportunity to present its case or defence (Article 27);
- d. The parties may agree on the arbitration venue. In the absence of agreement, the Tribunal shall determine the venue with regard to the circumstances of the case and the convenience of the parties (Article 28);
- e. The Tribunal shall “hold hearings to enable each of the two parties to present his case and submit his arguments and evidence. It may, unless the two parties to arbitration agree otherwise, deem the submission of the written briefs and documents sufficient for adjudicating the dispute” (Article 33).

11. As the above principles illustrate, nothing in the **Saudi Arbitration Law** imposes a mandatory requirement for a hearing to be in-person, nor is there any evidence before the Tribunal that Sharia principles impose such a requirement. Article 33 expressly envisages the possibility of an arbitration being decided upon written submissions alone and contains no express prohibition against hearings being held by videoconference. Whilst the terminology of “hearings” and “venue” may connote a physical gathering of the Tribunal, counsel, and witnesses in one physical location, these words themselves do not mandate physical attendance.¹ In the absence of any express prohibition under the procedural law governing the arbitration, it is necessary to consider what is permitted by the arbitration rules agreed between the parties.

12. Article 28 of the **CI Arb Arbitration Rules** relevantly states:

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the matter set by the arbitral tribunal.

...

4. 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).

13. The above provisions of the CI Arb Arbitration Rules are consistent with the principles embodied in Article 9 of the SCAA Expedited Procedure Rules:

Article (9): Proceedings with an Oral Hearing

1. *In Expedited Proceedings in which an oral hearing is held, the Tribunal shall set the date, time, and location of the hearing. The hearing may take place in person or via video conference, telephone, or other suitable means, at the discretion of the Tribunal. No transcript or stenographic record shall be required unless the parties otherwise agree.*

¹ *Cyberworks Audio Video Technology Ltd (in compulsory liquidation) v Silver Kent Technology Ltd* [2020] HKCFI 347 at [17].

14. As to the plea that English law prohibits an arbitration hearing being conducted by way of videoconference, no specific authority is cited by the Claimant in support of that proposition. To the contrary, the English Courts have increasingly embraced the use of technology to conduct hearings, particularly in the context of the ongoing COVID-19 pandemic.²

15. In view of the foregoing, the Tribunal has jurisdiction to order that a hearing take place by way of videoconference. Whilst the terms of Article 28 of the CI Arb Arbitration Rules provide for witnesses being heard by videoconference (without directly addressing whether the arbitrators or the parties' counsel may also attend in the same manner), a restrictive interpretation of Article 28 prohibiting the same would be inconsistent with Article 9 of the SCAA Expedited Procedure Rules as well as the Tribunal's general powers to conduct the arbitration as it considers appropriate, to exercise that discretion to avoid unnecessary delay and expense, and to provide a fair and efficient process for dispute resolution where the parties have equal opportunity to present their respective cases.³

Issue 2: Whether a videoconference hearing is appropriate in the circumstances

16. Having established the Tribunal's jurisdiction to permit a videoconference hearing, the resultant questions is whether such an order is appropriate in the circumstances of this arbitration.

17. Useful guidance as to the relevant principles can be drawn from the judgment of HH Judge Eyre QC in *Municipio De Mariana v BHP Group plc* [2020] EWHC 928 (TCC) at [24]:

i) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.

ii) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.

iii) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.

iv) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.

v) Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

18. Considering the parties' submissions in toto, the real issue is whether a videoconference hearing would provide the parties with fair and equal opportunity to present their respective cases, and if some witnesses are to appear by videoconference, whether all witnesses and counsel should be required to attend in the same manner.

² *National Bank of Kazakhstan v The Bank of New York Mellon SA/NV London Branch* [2020] EWHC 916 (Comm) at [6]; *Re Blackfriars Ltd* [2020] EWHC 745 (Ch) at [35]-[36].

³ **CI Arb Arbitration Rules**, art. 17

19. The need to avoid delay and to provide a fair and efficient process for dispute resolution is central to the exercise of the Tribunal's discretion.⁴ Accordingly, we unhesitatingly reject the submission that the substantive hearing be adjourned until such time an in-person hearing with all witnesses attending is feasible, irrespective of whether one defines feasibility with reference to the availability of a vaccine against COVID-19. Given the impossibility of predicting when travel restrictions will be eased in order to permit all relevant persons to travel to Riyadh or when a vaccine will be available, the submission that the arbitration be adjourned indefinitely is unattractive and contrary to the parties' entitlement to the efficient resolution of their disputes; there would be no opportunity at all for the parties to present their case in a timely manner. That factor has added weight in circumstances where the parties have agreed to this arbitration being conducted on a fast-track basis drawing inspiration from the **SCAA Expedited Procedure Rules**, which imposes tight deadlines for bringing an expedited arbitration to a conclusion.
20. Whilst not expressly addressed in the parties' submissions, it is also relevant to observe at this juncture that Article 10(2) of the **SCAA Expedited Procedure Rules** requires that "*in any case, the final Award should be made within 180 days from the Tribunal's constitution date unless the Administrator decides, in exceptional circumstances, to extend the time for making such final Award*". Bearing in mind that this arbitration was commenced on 2 January 2020, applied strictly this should have resulted in delivery of a final Award by 30 June 2020. In the Tribunal's view, this is not a mandatory requirement given that the Terms of Reference merely agree a fast-track arbitration that draws "inspiration" from the **SCCA Expedited Procedure Rules** without conferring the Administrator of the Saudi Centre for Commercial Arbitration with jurisdiction to make orders for the extension of time contemplated by Article 10(2). Nonetheless, the need for expedition is one that properly weighs on the exercise of the Tribunal's discretion.
21. Some witnesses are said to be willing and able to travel to Riyadh next week. Others are said to be either unwilling or unable to do so. None of the rules relevant to this arbitration specify the conditions or principles that govern the Tribunal's discretion to permit a witness, party, or counsel to attend via videoconference. For present purposes, the Tribunal considers that it is not necessary for a party to establish that a witness is unable, whether legally, physically, or otherwise, to attend in-person.⁵ Parties to international arbitration will frequently need to call witnesses over whom they do not exercise control and cannot compel to attend against their wishes. That is certainly the case in respect of the expert witnesses whom the Respondents intend to call in this arbitration. Whilst the Claimant's witnesses may be able to travel from California to Riyadh, that does not mean that the Respondents' witnesses would also be able to travel from Brazil or France to Riyadh, nor does it address the medical frailties of the 2nd Respondent's witnesses said to preclude their attendance.
22. In the absence of any evidence that the unwillingness or inability of any witness to attend an in-person hearing is predicated on a desire for a collateral disadvantage or disrespect for the Tribunal,⁶ we do not consider that there are grounds to refuse permission for witnesses to attend by way of videoconference.
23. Turning to the question of whether a videoconference hearing would permit all parties equal opportunity to present their respective cases, neither Respondent argues that it would suffer any disadvantage in that regard. By contrast, the Claimant argues that it can only put forward its case via an in-person hearing because the Respondents' defences rely heavily on witness and expert evidence without any underlying documents.

⁴ Ibid.

⁵ *Gurm v J S Yeh & Co* [2020] SGCA 5 at [34]-[41]

⁶ *ibid* at [74]-[75].

24. Whilst that may be a reason to avoid determining the case based on written submissions alone or via telephone hearing, this is not a reason which makes a videoconference hearing impractical or prejudicial to any party. One of the perceived justifications of in-person hearings is the ability to observe the credibility of a witness with reference to demeanour and facial expressions. Videoconference technology enables the Tribunal and counsel to make the same visual observations as they would in-person. That is reflected in the increasing proliferation of protocols and guidelines for the examination of witnesses by videoconference.⁷ That the Respondents' witnesses are said to not be relying on underlying documents would tend to suggest that a videoconference hearing would reduce one of the common practical burdens on this style of hearing, namely, the need to coordinate access to hearing bundles in the course of their evidence and cross-examination.
25. That is not to say that a videoconference hearing will be without technical or other challenges. However, those challenges will apply equally to all parties involved and cannot be said to cause unfairness.⁸
26. Article 33 of the **Saudi Arbitration Law** requires the Tribunal to "hold hearings to enable each of the two parties to present his case". For the reasons explained above, this is not constrained to an in-person hearing; an interpretation supported by the fact that Article 33 goes on to permit a dispute to be adjudicated on papers alone. Moreover, a party's right to present his case, including the right to request a hearing under Article 17(3) of the **CIArb Arbitration Rules**, is tempered by the considerations of fairness and efficiency contained in Article 17(1).⁹
27. The touchstone of the Tribunal's power to permit a videoconference hearing is the duty to treat parties equally and ensure that each party has an equal opportunity to present its case.¹⁰ For that reason, we agree with the 2nd Respondent's submission that all witnesses and experts should appear virtually to ensure equality of arms, mindful of the need to avoid the possibility of criticism that witness evidence may have been unfairly treated if some testify in person and others do so virtually. The equal opportunity principle also militates against the submission that witnesses either attend in-person or not be heard at all, or that the Tribunal ought to decline to hear evidence by videoconference but nonetheless take into consideration their written evidence. In the same vein, we also consider it appropriate that counsel and other individuals intending to attend the arbitration do so virtually. We are mindful that any perception of a lack of equal opportunity may also affect the enforceability of any final award delivered in this arbitration insofar as it may be asserted that such an award was not delivered in accordance with the **Saudi Arbitration Law**.¹¹

Issue 3: What arrangements are necessary to facilitate a videoconference hearing?

28. Prior to the present application, the parties had been working towards convening for an in-person hearing starting on 5 October 2020. That date is now just four days away. Given that the Tribunal is now ordering that a hearing take place by videoconference, we do not consider it realistic to order that the parties must attend a videoconference hearing on that date. It is desirable in our view that there be a short adjournment in order to allow the parties adequate time to make the necessary technical preparations for attending a videoconference hearing. For example, electronic documents bundles will need to be prepared (or, alternatively, physical bundles couriered to the various locations where the parties and witnesses

⁷ See, e.g., **Seoul Protocol on Video Conferencing in International Arbitration**, art. 1; **CIArb Guidance Note on Remote Dispute Resolution Proceedings**, para. 4; **CIArb Guidelines for Witness Conferencing in International Arbitration**; **Hague Convention Guide on the Use of Video-Link Under Evidence Convention**.

⁸ *Re Blackfriars Ltd* [2020] EWHC 745 (Ch) at [12] and [53].

⁹ *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] SGCA 12 at [96]-[97] and [111]-[112].

¹⁰ **Saudi Arbitration Law**, art. 27.

¹¹ See, e.g., *ibid*, art. 52.

will physically be),¹² internet connections tested for speed and stability, and appropriate cybersecurity arrangements put in place to ensure confidentiality.¹³

29. It would no doubt assist the parties if the Tribunal were to provide guidance in terms of how the videoconference hearing should be conducted. There are several different guidelines and protocols now available in that regard. The Tribunal therefore orders that the parties arrange and prepare for a videoconference hearing on the Zoom platform in accordance with the **Seoul Protocol on Video Conferencing in International Arbitration**.

Decision

30. For the reasons set forth above, the Tribunal hereby orders:

- a. That the hearing scheduled for the week commencing 5 October 2020 be adjourned to the week commencing 2 November 2020;
- b. That the aforesaid hearing be conducted by way of Zoom videoconference with no party, counsel, or witness being permitted to attend in-person;
- c. The Seoul Protocol on Video Conferencing in International Arbitration shall apply;
- d. That electronic bundles, including an electronic list of documents, be provided to the Tribunal and circulated amongst the parties no later than 5pm Riyadh time on 26 October 2020;
- e. There be liberty to apply; and
- f. Costs of the pre-trial conference and the costs of and occasioned by this Procedural Order be costs in the arbitration.

So ordered by the Tribunal on this 1st day of October 2020 in Riyadh, Saudi Arabia.

Co-Arbitrator

Chairman

Co-Arbitrator

¹² *Invista Textiles (UK) Ltd v Botes* [2019] EWHC 58 (Ch) at [72]; **CIArb Guidance Note on Remote Dispute Resolution Proceedings** at [4.3] and [5.4].

¹³ *Re Blackfriars Ltd* [2020] EWHC 745 (Ch) at [51].

Explanatory Note

Dear Co-Arbitrators,

Please see enclosed with this Explanatory Note a draft Procedural Order in relation to the recent pre-hearing conference concerning the in-person substantive hearing scheduled for the week commencing 5 October 2020 in Riyadh.

As you may recall, the issues arising out of the pre-hearing conference pertained to how the arbitration should proceed in view of the effects of the COVID-19 pandemic, namely, (i) whether the in-person hearing should proceed as planned; (ii) if so, the timing of that hearing; and (iii) the extent to which witnesses should be permitted to attend by way of videoconference, if at all.

The positions and arguments raised by the parties are outlined in paragraphs 7-9 of the draft order. In summary:

- (i) The Claimant argued that an in-person hearing was mandatory under the relevant laws and rules applicable to the arbitration and that this was the only hearing format which would allow it to present its case.
- (ii) The 1st Respondent argued that the hearing should be held entirely via videoconference in view of the difficulties it anticipates some of its witnesses will face in attending.
- (iii) The 2nd Respondent argued in favour of a hearing based on written submissions alone and, alternatively, an in-person hearing to take place after a COVID-19 vaccine is mass-produced.

Bearing in mind that the parties had previously agreed to a fast-track arbitration in view of the importance of the issues in dispute, it does not seem appropriate to adjourn the arbitration indefinitely as nobody can say with any degree of certainty when international travel will be liberalised or when a COVID-19 vaccine will be available. We are also duty-bound to conduct the arbitration in a fair and efficient manner. After all, justice delayed is justice denied.

The undesirability of delay is the key reason why the draft order opts for a videoconference hearing to take place. There are certain practical implications which will need to be addressed as a result to ensure that everyone has the necessary IT infrastructure in place to facilitate a smooth hearing. Thus it seems sensible to order a short adjournment for those arrangements to take place, and for the parties to have a small window within which to make further submissions, if necessary, on the format of a videoconference hearing as this was not canvassed in detail during the pre-hearing conference.

In the draft order I have tentatively proposed postponing the hearing by one month, so that there is adequate time to make adequate preparations without incurring further delay. Naturally, we will first need to confirm amongst ourselves that all three of us will be available to attend a hearing on those new dates. Whilst some witnesses (primarily the Claimant's) appear to be willing to travel to Riyadh to attend in-person regardless, that does not seem tenable in view of the requirement under Saudi law to ensure that the parties be treated equally and afforded equal opportunity to present their case. Were we to allow some witnesses to attend in person whilst others did not (by choice or otherwise), there is a risk that this would breach Article 33 of the Saudi Arbitration Law. There may also be consequential effects on the enforceability of any final award as a result of such a breach, although that was not the subject of submissions at the pre-trial conference. Nonetheless, it is a factor which we should be mindful of.

Accordingly, the final issue is a practical one: what rules or guidelines ought to apply to a videoconference hearing? Neither the CI Arb Arbitration Rules nor the SCAA Expedited Procedure Rules contain any specific guidance beyond giving the Tribunal the option to proceed via videoconference. In light of previous experience, I have suggested adopting the Seoul Protocol, which I found to be helpful. It also avoids the need for us to draft detailed directions ourselves. I have suggested that Zoom be used, as this seems to be popular numerous courts globally and is also generally the most popular videoconferencing platform globally.

As always, comments on the draft and the reasoning are appreciated. I look forward to hearing from you both as soon as possible.

Yours sincerely,

Chairman