

Message from Nigel J. Hawkins, SMA President, re SMA proceedings during the covid-19 crisis:

On behalf of the officers, governors, and members of the SMA, I wish everyone health and safety during this pandemic and its consequences.

It is now apparent that our prior work routines will remain disrupted in the near term and even intermediate and longer term as and when a “new normal” is created. Pre-existing disputes still need to be resolved and disputes arising during -and in many cases due to- the pandemic will need to be resolved.

The SMA and its members are active, equipped, and ready to arbitrate and mediate disputes while facing the reality of social distancing and travel restrictions, including acting on an expedited basis, by using “virtual” and online platforms available publicly or via end-users and their law firms.

- Parties to an SMA arbitration under SMA Rules enjoy considerable autonomy in the way their disputes are presented to a panel. To the extent a dispute requires a “live” organizational hearing, or hearings to decide procedural matters, or evidentiary hearing(s), or hearings for oral arguments, SMA arbitrators are authorized and prepared to proceed “virtually.”
- The venue provisions in Section 7 of the Rules and the procedures for taking evidence in Section 23 provide the parties with autonomy and flexibility to have their disputes heard and decided fairly and promptly, even in the present circumstances.
- This autonomy and flexibility, occurring under the direction and control of the panel, ensures that the process will be fair to both sides.
- Reminder, too, that SMA arbitrators are available to resolve disputes on documents only.
- In particular, the Shortened Arbitration Procedure is an option to resolve disputes promptly and cost-effectively: the claim, defenses, and any counterclaim are presented on documents which can be exchanged by electronic means and submitted to a sole arbitrator for a fixed fee, and the decision can be distributed by email.

In particular, as to “virtual” hearings to take evidence:

- Section 23 of the SMA Rules, amended in 2016, provides:

In those circumstances it deems appropriate, the Panel has the discretion to direct that the testimony of witnesses be taken by video conference or such other electronic means.

Should a party object to taking testimony by such means, the Panel will hear the objection and make a ruling which will be final and binding.

- Accordingly, if the parties agree to proceed by any of the available methods to conduct online hearings, they are free and encouraged to agree on the procedures by which such hearings may proceed, subject to the approval of the panel. If a dispute arises as to such procedure, the panel will consider the pros and cons presented by the parties and direct how the matter should proceed, mindful of their obligation to provide a procedure fair to both parties.

- Concerns which have arisen about the security of online hearings/proceedings security are being addressed and resolved by the providers and can and should also be addressed in protocols the parties present to panels for the conduct of any virtual hearings.

I have formed an ad hoc committee which is reviewing issues with respect to virtual proceedings in the SMA and other organizations, both with respect to arbitrations and mediations. The committee consists of Vice-President Lambert (Chair), Board of Governors member and Rules Committee Chair, Lucienne Bulow, Tech Committee Chair Daniel Schildt, Board of Governors member Tom Fox, Mediation Committee Chair Robert Milana, MLA ADR Committee Chair Peter Skoufalos, and our tech consultant, Chip Pursell. You are welcome to direct questions and provide input to any of them. The SMA remains here to help.

The committee will report from time to time on developments generally and also be a resource for SMA members in sharing and developing “best practices.” I thank the committee for its work, the text above being the first report, and wish all readers and supporters health and safety again during this pandemic.

Nigel J. Hawkins, SMA President