COUNTRY COMPARATIVE GUIDES 2020

The Legal 500
Country Comparative Guides
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Virtual Hearings On The Merits Of The Arbitration: A Step Too Far Or The Only Path To Follow?

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VIRTUAL HEARINGS ON THE MERITS OF THE ARBITRATION
A STEP TOO FAR OR THE ONLY PATH TO FOLLOW?

Introduction

International commercial arbitration has been gradually migrating to the virtual realm for years. Even before the COVID-19 pandemic, discussions on administrative and procedural matters held via telephone or video conferencing had become standard. Also, there was a growing tendency towards electronic submissions and internet-based file repository. Thus, many predicted the inevitable usage of the virtual format for hearings on the merits of the arbitration sometime in the future, although there were still some concerns and resistance from practitioners. However, the future arrived too fast, and as the pandemic spread rapidly and globally the adoption of virtual hearings eventually turned into the only path available for the progress of arbitral proceedings in 2020.

Many arbitration practitioners believe that the resistance towards virtual conduct of merits hearings derives from “change fatigue”, as well as due to the lack of knowledge and experience in the use of technology. For the virtual hearings’ enthusiasts, the virtual setting would enhance arbitration’s attractive features, such as flexibility and celerity, while minimizing costs. On the other hand, for those more conservative, costs savings could never repay the physical interaction and its subjective inference in the development of the hearing.

There is no doubt that this is a new environment, and that new skills must be developed not only by counsel but also by arbitrators. It is always important to bear in mind that fairness and due process must be the watchword and all players shall abide by those principles and act accordingly.

This article seeks to give a glimpse of, on a first moment, the pros and cons of holding virtual hearings on the merits, focusing on technical, logistical and behavioural issues. Then, on a second note, it will tackle legal issues regarding due process, seat of arbitration and the enforceability of awards arising from virtual hearings.

Technical issues

The first big concern that popped out in the arbitral community referred to technological shortages and cybersecurity issues regarding the platform that would hold the virtual hearings. It has been said that disruptions due to power outages and internet connection issues, which any participant may face, could interfere in the proper development of the hearing and hinder ones’ legal defence to the point of rendering the party unable to present its case as provided by Article (V)1 of the New York Convention (NYC).

Early on the pandemic, some flaws were detected in one of the most popular videoconferencing service providers, which raised several concerns regarding cybersecurity and privacy. That situation, when

transferred to an arbitration setting, led to many questions concerning shadow listeners, which could gain details of the dispute, trade secrets and other confidential information, as well as to the possibility of parties and witnesses overhearing others' testimonies, maculating the procedure. Another concern was data collection and exposure of confidential information when sharing document through these platforms, depending on their policies.

Nevertheless, the overall view is that these issues will gradually become a minor concern as platforms become better encrypted and more sophisticated, and parties adopt technical protocols for the conduct of the hearings. In this sense, several institutions have issued guidance notes for the organization of virtual hearings, such as: the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, the CIArb Guidance Note on Remote Dispute Resolution Proceedings, and the HKIAC Guidelines for Virtual Hearings. In the distant past of 2018, the Korean Commercial Arbitration Board released the Seoul Protocol of Video Conference in International Arbitration, anticipating the trend of 2020. In Brazil, the main institutions rapidly issued notes and resolutions on the administrative organization during pandemic, including guidelines for holding meetings and hearings online, as the CAM-CCBC and the CIESP/FIESP Chamber.

All these notes are consistent in advising parties involved in the organization of virtual hearings to agree on a single IT support provider and to perform test sessions before the hearing takes place, which will also provide the chance of coaching all participants in the usage of the platform. Another advantage of concentrating all the services needed in a single provider is to avoid disruption due to technical incompatibilities, for instance, as well as to allow arbitrators to focus on the hearing management procedures rather than to waste their precious time and patience in solving IT problems.

Some arbitral institutions have been even providing their own platform for the conduct of virtual hearings, such as the SCC, which offers its platform free of charge for *ad hoc* arbitrationsi, and the ICSID, which held about 60 per cent of the 200 hearings and sessions organized in 2019 by videoconferenceii.

Logistical issues

No one can debate that the biggest *pro* of holding merits hearings virtually is the cutting of costs, environmental impact, and logistical issues of flying in all participants to the place where the hearing will take place – which not necessarily is the seat of arbitration, as many institutional rules allow arbitral tribunals to conduct hearings and meetings at any location they consider appropriate. Even years before the COVID-19 outbreak, witnesses' depositions by videoconference had become more and more common, especially due to the inconvenience of travelling long distances for a testimony that would last less than a couple of hours. Moreover, the environmental impact of international arbitration has also been a topic of great concern for the international community. Thus, the limitation of air travel and reduction of international arbitration's carbon footprint has been greatly appreciatediii.

However, logistical problems do not just disappear by adopting the virtual format for merits hearing. If participants of the hearing are not in the same place at the same time, time zone differences will surely be an issue to be dealt with. In any case, one may bear in mind that, when setting the time for the virtual hearing, the personal inconvenience be distributed uniformly among the parties, thus ensuring equality of treatment to counsel.

Behavioural issues

The adoption of a virtual setting for merit hearings surely defies practitioners' habits and may as well shift the understanding and behavioural response of all participants as to the development of the proceedings. There are already several studies dealing with the causes and effects of the so- called "Zoom fatigue". This happens because videoconferences force us to focus more intently on conversations in order to absorb information, as well as to engage in a "constant gaze", which makes us uncomfortable and tirediv. Especially when it refers to merits hearings, counsel, arbitrators, experts, and witnesses need to deal with long periods of sustained concentration and focus, which is quite challenging in a virtual environment. In order to minimize those effects, participants may agree on shorter periods for each day as well as to increase the number of breaks during the sessionsv.

Caucusing and exchanging information among counselling team member may also present its own challenges in virtual hearings. Advocates generally rely on members of their team for providing support and advice during cross-examination of witnesses, as well as consult with their clients for inputs on specific questions or concerns raised during depositions. These are dynamic real-time interactions that usually go smoothly on physical-presence hearings, but have been replaced by texting and instant messaging chat rooms in virtual hearings

More importantly, most of human features that affect communication, such as the body language, tone of voice, pace of speech, etc., tends to be mitigated or completely undermined in virtual settings.

All these challenges might affect counsel's persuasiveness and impair counsel´s ability to render effective assistance to the party. As mentioned by Paul H. Cohen at the 19th International Arbitration Conference, held online by the Brazilian Committee of Arbitration last September, counsel's performance in a physical hearing is paralleled to that of a theatre actor on stage, while its performance in a virtual setting can be compared to that of an actor on a TV show. While in person counsel may make great use of voice intonation, gestures, and body language to convey their message, virtually those skills might not be as effective, neither achieve arbitrators' unconscious responses. The same problem applies to expert witnesses. When giving a testimony, experts usually want to connect with the tribunal to perceive if they understood their explanation or to invite them to comment on a certain point, keeping them on track.

The body language of factual or expert witnesses cannot be disregarded either. Most of the times the movements of hands and feet in anxiety are a clear indicator to the arbitrators and counsel that the testimony might be reaching a tricky point. Moreover, witnesses are usually more comfortable to lie "online" than in face-to-face interactions. A possible solution could be a feature to zoom out or ask the witness to sit farther away from the camera, but then one would have to consider his/her discomfort for being on such focus.

Last, but certainly not least, virtual hearings may also raise ethical issues. Many practitioners sustained that in a virtual setting counsel might be inclined to act less ethically by coaching witnesses, being physically on the room where they would connect or even switching messages during their testimony. However, in view of the technological resources available nowadays, it has been possible to mitigate those risks, for instance by using 360o cameras during witnesses depositions, for checking its room, as well as blocking their screen on the hearing platform while they are answering questions, which might avoid undue interference.

Nonetheless, practice so far has shown that the rise of virtual arbitrations increased collaboration between parties' representatives, perhaps due to the need of consensus on extra protocols to ensure a smooth conduction of the hearings.

Indeed, pre-established protocols can be very helpful when dealing with virtual hearings. For instance, as the virtual setting may create an appearance of informality, without the need for travels, clients' participation on hearings may increase, sometimes coming suddenly into the virtual room during a deposition. This may cause distraction and disturb the testimony, impairing the development of the works.

To sum up, organization is a key word for remote hearings, so it is crucial for the arbitral tribunal to be proactive and well prepared, and to discuss with the parties' counsel in advance an specific and detailed protocol, taking command of the proceedings early on and putting in place all the rules and procedures that a virtual hearing requires.

Due process issues

One of the main concerns regarding virtual hearing is the potential due process implications of that hearing not being held in-person, as well as the power of the arbitral tribunal to decide on conducting the hearing on the merits virtually without the consent of one of the parties. In any circumstance, due process arguments should not be used as strategy to postpone hearings indefinitely.

Recurrent deferment or rescheduling may affect arbitrators' duty to conduct the arbitration in an expeditious and cost-effective manner. To assess the authority of the arbitral tribunal to order a virtual hearing, all laws applicable to the arbitration should be carefully analysed, starting by institutional procedural rules.

Most modern institutional arbitration rules sustain that if one party requests a hearing the tribunal shall provide that party with a hearing. However, the wording of such provision is very important. One must consider if the rules expressly refer to "in person" hearings on the merits, as well as whether, under institutional rules or practice, that expression is synonymous with "physical appearance". If this is the case, the arbitral tribunal might be refrained from determining a virtual hearing without the consent of both parties, due to the risk of setting aside the award based on article V(1)(b) of the New York Convention, which refers to the parties' right to be heard and treated equally.

The LCIA has prevented itself against such uncertainty amending its Arbitration Rules right before the outbreak of the pandemic, in early 2020. The Article 19(2) of LCIA Arbitration Rules provides: "*The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing (…) as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)*." Even the 2014 LCIA Guidance Note for Arbitrators had already acknowledged that "*it might, in some cases, be appropriate for certain hearings (for example, procedural conferences) to be held by telephone or by videoconference, rather than in person. The Arbitral Tribunal should also consider, where appropriate, whether some or all of those who must attend any meeting or hearing might do so by video conference, rather than in person (for example, if a witness is unable to travel due to health issues)".*

As for the AAA, article R-32 (c) of its Arbitration Rules states that *"when deemed appropriate…the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation"*. Even though such provision does not concern virtual hearings on the merits, it has exceptional extended its scope due to the unviability of holding in-person hearings.

Regarding the ICC Arbitration Rules, while Art 25(2) refers that the arbitral tribunal *"shall hear the parties together in person if any of them so requests",* it does not preclude a hearing to take place "in person" by virtual means, as clarified in its Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. In this sense, the ICC Commission Report on Information Technology in International Arbitration had already addressed, in 2017, the use of IT during oral hearings, acknowledging that the parties may agree or the tribunal may order that certain (or even all) witnesses may be heard by video or telephone instead of requiring the witness to attend the hearing in person.

The applicable law of the seat of arbitration must also play an important role for this due process analysis. If the applicable law expressly refers to the possible use of technology or virtual hearings, there is no doubt that the arbitral tribunal is free to proceed as it deems appropriate after careful consideration of compatibility of the virtual format to that case. Although there is always a risk of the award being challenged, in such case a challenge based on the determination of virtual hearings would be minimal. And in the absence of express provision, one can also take a look on how the hearing have been conducted by the national courts. In many countries, virtual hearings before the local courts are taking place (e.g., U.S., U.K., Singapore, Brazil), which shall be tantamount to arbitration proceedings.

Conclusion

Even though evidence in international commercial arbitration is rarely concentrated in a single key witness, but rather in a complex combination of written and oral evidence (including factual and expert witnesses), hearings are often considered the *icing of the cake*.

The adoption of a virtual setting, and all its limitations and enhancements, could generate a shift in international culture as to the decisiveness of hearings, considering that arguments might be better presented on paper, thus limiting hearings to the strictly necessary controversies.

There is no doubt that COVID-19 outbreak has impacted international and domestic commercial arbitration worldwide. However, it is not possible to predict whether virtual hearings on the merits of an arbitration will actually become the rule rather than the exception. While some practitioners sustain that there is no turning back from here, others insist that virtual hearings will never be preferable to physical ones. It will all depend ultimately on how long it takes for social isolation to finally end.

As the well-known proverb says, necessity is the mother of innovation. The COVID-19 outbreak may cause inevitable disruption to international commercial arbitration as well as to dispute resolution in general. However, it is up to the parties, counsel and arbitrators to adapt themselves to the new technologies and the new tools available, embracing its use and bearing in mind the equality of arms and fairness, so as not to deprive any party of its due process rights. This will be crucial to mitigate the risk of setting aside an award, especially on those cases where a party strategically resists to participation in virtual hearings.

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