

A Lawyer's Perspective: Virtual Hearings

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1. Virtual hearings are nothing new. Several stages of the arbitration process were conducted via videoconference before the Covid-19 pandemic required remote participation¹. International arbitration, as a global dispute mechanism which involves parties from different jurisdictions all over the world, has long been acknowledged the great value of technologies that do away with the need to meet face to face to resolve the many issues².

However, the Covid-19 pandemic has forced us to steer towards a more technological approach to life. In arbitration, the use of virtual hearings had been limited to situations where a witness was unable to personally attend the hearing, or if the cost and inconvenience of travel was held to outweigh significantly the importance of their testifying in person, to the extent to which a videoconference was deemed acceptable³. This paradigm has been changed by Covid-19. By the end of March 2020, most of the world was working remotely, using a variety of tools, such as *Zoom*, *Microsoft Teams* and *Google Hangouts*. As a result, many of the sceptics have had no other option but to accept and embrace this⁴. Most of these sceptics come from legal systems where cross-examination of witnesses (and even of experts) is a key feature of the arbitration process, such as in common law countries⁵.

The shift towards widespread use of technology in arbitration seems to be irreversible, particularly in international arbitration proceedings. Institutions have adapted their rules to this new scenario. For instance, article 19.2 of the Arbitration Rules of the London Court of International

1 Madyoon, 'Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement' (2021) 87-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 597 (597-598).

2 *Ibid*, 598

3 Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration', in Calissendorff and Scholdstrom (eds), *Stockholm Arbitration Yearbook 2020* (2020) 99.

4 *Ibid* 101; See also Borner al., 'Videoconferencing technology in arbitration: new challenges for connectedness (2020 Survey)' (2020) *Kluwer Arbitration Blog*.

5 Waincymer, 'Online Arbitration' (2020) IX-1 *Indian Journal of Arbitration Law*, 1;

Arbitration (LCIA) (2020) states that ‘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)’. At the same time, some practitioners caution that in-person hearings are indispensable in certain cases, that in a post-pandemic world virtual hearings may be the right choice for simple cases, but not for factually complex cases, and that the codes of conduct for virtual hearings need to be improved. In-depth discussion and analysis is still needed on several matters, ranging from simple issues such as the duration of the hearing (virtual hearings usually take longer, but breaks are clearly needed to avoid concentration lapses) or the difficulty of conferring during a virtual meeting, to complex questions such the procedural adaptations required by the due process in a remote environment and assessment of oral testimony by the arbitral tribunal,⁶. International surveys highlight that

post-pandemic, respondents would prefer a ‘mix of in-person and virtual’ formats for almost all types of interactions, including meetings and conferences. Wholly virtual formats are narrowly preferred for procedural hearings, but respondents would prefer to keep the option of in-person hearings open for substantive hearings, rather than purely remote participation⁷.

Academics and practitioners have debated whether there is a right to physical hearing⁸. Efficiency gains may vary from case to case and other factors have to be assessed, particularly regarding the requirements of due process.

2. In 2021, the International Chamber of Commerce (ICC) published its ‘ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings 2021’ as an annex to the Protocol on Virtual Hearings⁹. This is a set of rules to help tribunals, arbitrators, lawyers and parties, when preparing a virtual hearing. The checklist is divided into five chap-

6 Scherer et al., *International Arbitration and the COVID-19 Revolution* (2020).

7 This conclusion is expressed in the *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, conducted by the School of International Arbitration (SIA), Queen Mary University of London.

8 Elgueta et al., *Does a Right to a Physical Hearing Exist in International Arbitration?* (2020).

9 ICC, Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings (2021).

ters: 1) Pre-hearing plan scope and logistics¹⁰; 2) Technical issues, specifications, requirements and support staff; 3) Confidentiality, privacy and security; 4) Online etiquette and due process considerations; 5) Presentation of evidence and examination of witness and experts. These five chapters contain a number of points that we feel should be highlighted¹¹:

- Agreement on the number of participants per virtual room and whether a 360.º view for all participating rooms is required or necessary;
- Consultation and agreement between parties and tribunal on the hearing date, duration and daily schedule, taking the different time zones into account;
- There has to be consultation between the tribunal and the parties regarding the preferred platform and technology to be used (including legal access to such platform and technology), the minimum system specifications and technical requirements for smooth connectivity (audio and video), adequate visibility and lighting in each location, and lastly, whether certain equipment is required in each location (phones, back-up computers, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary by the parties);
- Preliminary compatibility check on the selected platform and technology to be used;
- Consider the need for tutorials for participants who are not familiar with the technology, platform, applications and/or equipment to be used in the hearing;
- Consultation between the tribunal and the parties regarding the contingency measures to be implemented in case of sudden technical failures, disconnection, power outages (alternative communication channels and virtual technical support for all participants);
- Running a minimum of two mock sessions during the month preceding the hearing to test connectivity and streaming, with the last session being held one day before the hearing to ensure everything is in order;
- Consultation between the tribunals and the parties on whether the virtual hearing will remain private and confidential to participants;

10 Under Article 26 para. 1 of the ICC Arbitration Rules 2021, the arbitral tribunal “*may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference*”.

11 *Ibid.*

- Consultation between the tribunal and the parties on the recording of the virtual hearing (audio-visual recording, confidentiality of the recording and value of recording compared to any written transcript produced etc...), any overriding privacy requirements or standards that may impact access by or connectivity of certain participants, and the minimum encryption requirements to safeguard the integrity and security of the virtual hearing against any hacking, illicit access, etc...;
- Confirmation of the parties' agreement to proceed with a virtual hearing or identification of the legal basis for proceeding with a virtual hearing failing such agreement between the parties;
- Advising the parties on their duty to cooperate on technical matters prior to and during the virtual hearing;
- Consultation between the tribunal and the parties on the organisation and presentation of oral pleadings;
- Consultation between the tribunal and the parties on the examination of witnesses and experts (order of calling and examining witnesses/experts, connection time and duration of availability, virtual sequestration, the prohibition or otherwise of synchronous or asynchronous communication between witnesses and parties/counsel in chat rooms or through concealed channels of communications, interaction between the examiner and the witness/expert in an online environment etc...;
- Consultation between the tribunal and the parties on virtual transcription and the use of stenographers and interpreters able to provide the necessary level of service in a virtual environment.

3. In Portugal, the Rules of the Commercial Arbitration Centre (*Regulamento de Arbitragem do Centro de Arbitragem Comercial*) dated 1 April 2021, state the following, in Article 14 para. 3: 'The holding of virtual hearings for the production of evidence may only be determined by the arbitral tribunal after consulting the parties and ensuring respect for the principle of due process'¹². This rule is evidently vaguer than that contained in the ICC Guidelines, showing the need for further regulation on this matter at a national level in Portugal.

4. Similarly in Brazil, the Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC) has issued "Notes on Remote Meetings and Hearings", clarifying issued and providing rec-

12 The original version in Portuguese reads as follows: "A realização de audiências virtuais de produção de prova apenas poderá ser determinada pelo tribunal arbitral após consulta às partes e assegurando o respeito pelo princípio do processo equitativo".

ommendations for parties, attorneys, experts, arbitrators and other participants in proceedings administered by CAM-CCBC. In the event of a meeting or hearing being required, the arbitral tribunal is recommended to consult the parties and decide whether to hold it remotely. Virtual hearings also require more efficient management and preparation of the hearing. The Notes also recommend

that the hearing schedule of the witnesses and/or other Participants be established before the Remote Hearing is held. If the hearing schedule has not been previously determined, parties' counsel must inform the arbitral tribunal which witness they intend to call, with the Secretariat, as the event organizer (host), remaining responsible for giving the witness access to the Remote Hearing room.

The recommendations also address checks on the behaviour of witnesses:

at any time during the Remote Hearing, the arbitral tribunal, *ex officio* or at the request of the parties' counsel, may ask the Participants to display the physical environment in which they are located (360° rotation) in order to verify and confirm the people present on site.

5. In Korea, for example, on 18 March 2020, a mere few days after the official declaration of the Covid-19 Pandemic, the Korean Commercial Arbitration Board released the Seoul Protocol on Video Conferencing in International Arbitration, 'serving as a guide to best practice for planning, testing and conducting video conferences in international arbitration'¹³. The protocol consists of 9 articles and an annex, concerning technical specifications. Article 1 regulates the examination of witnesses, which we will consider further in the next chapter. Article 2 provides guidelines on the video conferencing venue, including rules such the requirement that parties should ensure that the connection between the Hearing Venue (the site of the hearing, where most of the participants are located) and the Remote Venue (the site where the remote witness is located, where the minority of participants are located) is as clear as possible, meaning that images and sounds are accurately and properly aligned, in order to avoid any delays. In addition, each of the venues must have at their disposal an on-call individual with the appropriate technological know-how to help in planning, testing and conducting the video conference. Article 3 concerns observers, and states that during the video conference the only people allowed in the Remote Venue are: the witness providing testimony (and

13 Seoul Protocol on Video Conferencing in International Arbitration, 2020.

their lawyer, where applicable), an interpreter (where applicable), paralegals to assist with documents and representatives from each party's legal team. To ensure this rule is followed, each party is required to provide the identity of every individual in the room, and the Tribunal must verify those identities at the beginning of the video conference¹⁴.

Following on from this, Article 4 regulates documents, and states that all documents referred to by the witness must be clearly identified and made available to them. Parties may also agree on using shared virtual document repository, available to all venues. Article 5 concerns technical requirements; in outline, it requires the video conference to be of satisfactory quality so as to allow for clear video and audio transmission of the witness, the Tribunal and the parties. Article 6 adds that, prior to the video conference, all equipment must be tested at least twice – once before the start of the hearing, and once immediately before the actual video conference. Articles 7 and 8 deal respectively with interpretation and recordings. These rules require the parties to ensure interpretation services are available if the witness needs them, and determine that the video conference may only be recorded with the consent of the Tribunal, in which case the recordings must be made available to the Tribunal and the parties within 24 hours of the end of the video conference¹⁵.

Lastly, Article 9 deals with the preparatory arrangements. This is a crucial part of the virtual hearing process, as it serves the purpose of ensuring that the video conference itself runs smoothly. Article 9 requires parties to apply to the Tribunal for the use of video conferencing during the hearing at least 72 hours in advance, and to endeavour to agree on a seating plan that allows each participant to see the other participants to whom they will be speaking to during the video conference. It is during this preparatory stage that parties must brief the interpreters – when an interpreter is required – about the details of the case¹⁶.

6. In May 2020, the Hong Kong International Arbitration Centre (HKIAC) also issued Guidelines for Virtual Hearings. These state the view that “whether or not a virtual hearing, in part or in full, is suitable for a particular matter remains a matter for the parties and the arbitral tribunal” and offer a number of recommendations on case management (reaching an early decision on the hearing) and technical issues.

14 *Ibid*;

15 *Ibid*.

16 *Ibid*;

7. Two important issues in virtual hearings are the behaviour of witnesses, and matter of tampering and cybersecurity. Witness evidence plays a central role in international arbitration, especially in cases where recollection of past events is fundamental to the outcome of the case and where documents are not available to assess the witness evidence¹⁷. Factual recollection by witnesses remains a crucial part of international arbitration. In fact, in a complex and long dispute, witness accounts are vital to provide important context in order to acquaint the tribunal with the background story, to the point where they provide evidence on challenged factual matters which may, in due course, determine the outcome of the case¹⁸. Virtual hearings also present challenges concerning the behaviour of witnesses and assessment of oral testimony.

Kimberley A. Wade & Ula Cartwright-Finch highlight some of the most relevant research and explain why each finding is important in the setting of international arbitration. These authors distinguish between *contextual factors* – that are inherent to the witness or the reported situation itself – and *retrieval factors* – that exert themselves when a witness retrieves information from memory during an interview. Contextual factors include schemas, stress and arousal, culture, alcohol, and drugs. Retrieval factors include co-witness discussion, perspective, interviewing procedures, and memory blindness¹⁹.

Before the Covid-19 pandemic, it was common for witnesses from a remote location in certain circumstances, for example, if the witness was unable to travel due to illness, or even if the journey was too long and the witness could not reasonably be expected to travel. Indeed, Article 8, para. 2, of the IBA Rules on the Taking Evidence in International Arbitration²⁰ allows for virtual examination of witnesses, at the tribunal's discretion. But for most of 2020 and part of 2021, the uncertainty about a return to normality forced parties to rely entirely on virtual hearings, with witnesses

17 Wade and Cartwright-Finch, 'The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration' (2021) 39-1 *Journal of International Arbitration*, 1.

18 *Ibid*;

19 *Ibid*;

20 Article 8.2 of the IBA Rules on Taking of Evidence in International Arbitration, which reads: '*At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions (...).*'

testifying online. It was noticed that parties were more comfortable and relaxed than previously about using technology and remote hearings, and this, combined with the fact that it saves them time and money, will eventually make remote examination of witnesses the norm. This creates a growing need to ensure compliance with the principle of due process as a procedural safeguard, in order to guarantee a fair hearing. The definition of *due process* varies from country to country, but the basic elements, such as the right to be heard and equal treatment of parties, are uniformly applied²¹.

Safeguarding the principle of due process must be a shared responsibility for all the participants in the arbitration process: arbitrators, parties, counsels and even institutions²².

There is still widespread and significant reluctance to accept online examination of witnesses. From the practitioners' point of view, many are hesitant about the idea of leading a virtual hearing, as they find them rather impersonal. They argue that a virtual hearing is not capable of reproducing the formality of the arbitration process, undermining its essential character. Furthermore, traditional practitioners claim that a virtual hearing makes it more complicated to build trust between themselves and their clients, or to identify if the witness is lying, since a person's facial expressions and body language are more visible when speaking in person. In their view, the process of cross-examination is lost – a crucial part of a party's case, which they may consider decisive to a successful outcome²³.

Another very important question is that it is only human nature to suffer concentration lapses after when meetings continue for a long time, especially online. Witnesses in different time zones can also be called on to testify at anti-social times of day, unless care is taken to avoid this. Lawyers have also emphasised that it is important for them to establish credibility with the tribunal, which is harder when done via a computer, rather than face to face²⁴.

It is argued that remote hearings impair the tribunal's ability to evaluate witness testimony properly, making it harder to analyse body language, facial expressions, and changes of tone. Lawyers regard in-person contact as an essential component, critical to analysing evidence. However, it may

21 Mirani, 'Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective' (2020), *Kluwer Arbitration Blog*.

22 *Ibid*;

23 Ayala, 'The Rising Inefficiency in Arbitration: is Technology the Solution?' (2021) XVI *Revista Internacional de Arbitragem e Conciliação*, 19.

24 *Ibid* 20;

be contended that recent technological advances mean that such objections are no longer reasonable. Certainly, high-definition video is able to provide a clear picture of the participant, extremely similar to being in the same room with them, allowing the tribunal to observe body language, facial expression and changes in voice tone²⁵.

Even if the witness is fully visible, cross-examination may still be extremely difficult from a lawyer's point of view. It is common for lawyers to rely largely on an assessment of the tribunal's receptiveness, and an in-person hearing allows them to "take the pulse" of the hearing room. In a virtual hearing, it is likely that a lawyer is looking at a screen with at least five other people – three arbitrators, the witness and the opposing lawyer – at once, and it is possible to have another window open where they can chat with their legal team²⁶.

Further concerns are raised regarding other aspects of remote testimony. A good example is witness coaching. In a virtual hearing, it is very hard to determine whether the witness is being instructed by someone else in the same room, or even if they are following a previously prepared script. A solution for this would be having the witness sit in a room prepared with multiple cameras that point to every angle, as well as having a neutral and independent third-party to observe the witness' surroundings²⁷. Nevertheless, having a third-party observing the witness cannot be considered the best practice, because of the added cost of having yet another person involved in the arbitration, and also because their presence may make the witness more nervous when testifying. But if both parties and the tribunal are in agreement, a solution such as this can be arranged²⁸.

Another example is the use of physical documents to confront the witness with. Many witnesses prefer to see the full document on paper when being questioned about them, as opposed to viewing them on a screen. However, it is essential that witnesses do not have access to those documents before the hearing, in order to obtain their genuine and truthful insights. A possible solution would be to send the documents to the

25 Madyoon, 'Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement' (2021) 87-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 597 (600).

26 *Ibid*;

27 *Ibid* 600-601;

28 Wikstrom-Hermansen and Spreigl, 'Chapter 13: Witness Examination in International Arbitration – Best Practices Regarding Cross-Examination and Related Issues', in Calissendorf and Scholdstrom (eds), *Stockholm Arbitration Yearbook 2020* (2020), 245.

witness in a sealed box, which the witness would be required to open on camera immediately before testifying²⁹.

8. Cybersecurity concerns have expanded to include not only the internal network of the venue, but also individual home networks, due to growth in virtual hearings and remote working. In 2020, top arbitral institutions felt the need to address the issue of virtual hearings and published guidelines for tribunals. By agreeing on specific procedures for the management and exchange of sensitive information, all participants in an arbitration can lessen the cybersecurity risks³⁰.

This begs the question: *who should be responsible for ensuring cybersecurity?* One approach is that where the parties and the tribunal establish a security protocol for storing and transferring information, limiting the disclosure of information and documents that may attract attack, and, if a breach or an attack takes place, establishing the procedure for notifying the parties affected and for damage mitigation. A second approach is for the parties to address the matter of cybersecurity measures for the proceedings as a whole, and not merely for the exchange of information. In this approach, all participants – not only the parties and tribunal, but also the institution (if applicable), witnesses, experts and translators – must be considered. Moreover, practitioners are instructed to include all likely risks and the distribution of liability in the procedural order, and to include a protocol addressing all use of electronic equipment and video conferencing³¹.

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29 *Ibid* 602;

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