Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing

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Significant advances in technology over the last decade have made videoconferencing a viable alternative to traditional, in-person witness examinations in arbitration. As the use of videoconferencing in international arbitration grows more common, we must ask ourselves: do we have the right tools to eliminate the risks that arise with this new technology? This question led to the drafting of the Seoul Protocol on Video Conferencing in International Arbitration (the "**Seoul Protocol**").

The Rise of Low-Cost Videoconferencing

Technological capacity to make reliable video calls was limited in the past as it required expensive and specialised equipment. However, we now have video call providers such as Zoom, Google, and Skype providing high-quality video calls at relatively low cost. Stable internet connections and appropriate equipment are also more readily available in many countries.

In addition, there is increased user demand for facilities and services that enable arbitration procedures to be conducted in a truly transnational manner, usually

with cost and time savings. A 2018 survey conducted by White & Case LLP showed that 43 percent of respondents used videoconferencing "*frequently*" during arbitrations, 17 percent "*always*" used it, and 30 percent used it "*sometimes*". Additionally, 89 percent said that videoconferencing should be used more often in arbitration.

Recent events arising from the COVID-19 crisis (which has developed into a global pandemic) have reinforced the demand for effective and seamless cross-border conferencing facilities to ensure that critical services, including dispute resolution services, are able to continue without prolonged disruptions that would have serious knock-on economic consequences. These events have highlighted the importance of appropriate technological infrastructure, as well as legal and regulatory frameworks, to support effective remote working and conferencing. In the international arbitration context, the importance of arbitral institutions, arbitrators and counsel being conversant with technology and virtual hearings, and guidelines to ensure their seamless adoption and deployment, have also come to the forefront.

Incorporating Videoconferencing into Arbitration Laws and Rules

Countries and arbitral institutions are addressing the emergence of videoconferencing in their legislation and rules. The amendments to arbitration legislation in recent years by states such as the Netherlands,[fn]Article 1027b, Dutch Arbitration Act 2015.[/fn] Austria,[fn]Section 595 (2), Austrian Arbitration Act 2013.[/fn] and Hong Kong,[fn]Article 20(2), Hong Kong Arbitration Ordinance 2011.[/fn] allow witness examination to be conducted without the physical and personal appearance of the witness at the hearing.

Arbitral institutions have similarly amended their rules so that videoconferencing can be accommodated. For example, Article 24(2) of the Korean Commercial Arbitration Board ("**KCAB**") International Arbitration Rules 2016 expressly permits hearings and meetings to be heard at any physical location that the Tribunal deems appropriate. KCAB's 2016 International Arbitration Rules Commentary explains that this provision exists to enhance the efficiency and convenience of arbitrations, and videoconferencing would naturally be allowed by this reasoning. The International Chamber of Commerce's commission report on controlling time

and costs in arbitration suggests that arbitration users may utilize videoconferencing in place of physical meetings to save time and costs.[fn]See paragraphs 22 and 71.[/fn]

Arbitral institutions realise that the appropriate facilities for videoconferencing will be increasingly crucial in attracting users and thus have made efforts to update their equipment to the latest models and to promote their videoconferencing services. Hearing facilities are now equipped with the necessary technology which is now increasingly made use of. For example, we understand the Seoul International Dispute Resolution Center now conducts approximately four to five arbitrations each year through video conferencing, using its high-quality videoconferencing equipment, and that it expects this number to continue to rise.

Tackling the Risks of Videoconferencing: The Seoul Protocol

The Seoul Protocol represents an initiative in response to the advent of videoconferencing in arbitration. It was first introduced by a panel at the Seoul ADR Festival 2018, comprising chairman Kevin Kim (Peter & Kim) and panellists Yu-Jin Tay (Mayer Brown), Ing Loong Yang (Latham & Watkins LLP) and Seung Min Lee (Shin & Kim). The panel had drafted the Seoul Protocol to enable users to easily identify potential issues with videoconferencing and to address them effectively by, for example, making necessary preparations in advance. We discuss three such issues below.

Due Process and Videoconferencing

The following provisions in the Seoul Protocol directly address the need for fairness and impartiality:

- Article 2.1c ensures equal chance for parties to present their case during witness examination as it provides that the videoconferencing venue be in a neutral location that gives fair, equal and reasonable right of access to all involved.
- Article 1.7 states that the conference is terminated if the videoconferencing will result in unfairness to a particular party.

- Article 5.1 provides that the parties and the Tribunal can agree on mutual technical requirements for videoconferencing, which will reduce the risk of unfairness against parties with witnesses that have access to lesser technical capabilities and know-how.
- Article 3.1 addresses the issue of witnesses being unfairly guided by off-screen individuals as it requires that all persons in the videoconferencing venue be relevant to the hearing and identified at the start of the videoconference.
- Article 4.1 ensures that the hearing is transparent by requiring that any relevant documents be clearly identified and disclosed.

Confidentiality and Videoconferencing

Eyebrows have also been raised with respect to the confidentiality of the arbitration in videoconferencing. As a form of information technology, videoconferences may be breached and intruded upon in the absence of appropriate measures to ensure confidentiality and security. Although today's videoconferencing technology is much more sophisticated and advanced than before, so too are the skills of hackers. Cybersecurity breaches do occasionally occur in international arbitration: during the 2015 Philippines-China territorial dispute, hackers famously targeted the Philippines' Department of Justice, the law firm representing the Philippines, and the website of the Permanent Court of Arbitration.

Equally problematic is when the provider of the videoconferencing service fails to uphold its security duty. Zoom, the popular videoconferencing service provider, was in hot water after a flaw in its systems meant that anyone with a link to the call could view the video call. Transferring this situation to an arbitration setting would mean detrimental results as other parties could potentially gain details of the dispute, trade secrets and other confidential information.

The Seoul Protocol aims to protect the confidentiality of the hearing and its parties through the following:

- Articles 2.1c and 2.2 specifically target the possibility of a security breach and recommends that the videoconference connection be adequately protected. They also set out a duty for the parties to use their best efforts

to ensure the security of the videoconferencing participants.

- Article 3.1 outlines the requirement that only the witness and relevant individuals may be present in the videoconference, and that these individuals must be identified.
- Article 8 prohibits recordings of the videoconference that are not made in the Tribunal's presence, and limits circulation of the recordings so that recordings are not exposed to unrelated parties.

Practical Difficulties of Videoconferencing

Other than concerns related to due process and confidentiality, there can be disruptions to the momentum of hearings due to delays, power outages and disconnection during videoconferences. As mentioned before, technological failures will likely always remain a risk when technology is involved. In the present day, however, an increasing majority of the world's companies, organizations and individuals are immersed in sophisticated technology and thus, the risk of these failures can be minimal.

The Seoul Protocol nonetheless provides for this concern through Article 6, which sets out guidelines on Test Conferencing and Audio Conferencing Backup. These guidelines can help smoothen the disruption from an unpredicted communication failure and so allow for a quick recovery during a hearing.

Concluding Remarks

The continued advances in technology and rising demand means that videoconferencing will likely be more prominently used in international arbitration. Like all new things, appropriate safeguards are crucial for proper use and the Seoul Protocol has been drafted with this in mind. KCAB INTERNATIONAL invites feedback and comments from interested parties on the Seoul Protocol.[fn]Feedback and comments on the Seoul Protocol may be emailed to KCAB INTERNATIONAL at international@kcab.or.kr.[/fn]