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Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway From the SCC Online Seminar Series

Velislava Hristova and Malcolm Robach (Mannheimer Swartling) · Saturday, May 16th, 2020

Two recent online seminars, organised in the context of the Online Seminar Series of the Stockholm Chamber of Commerce (SCC), focused on the fast-track digitalisation into which the world of international arbitration is forced as a result of the pandemic. The first, held on 29 April, addressed the current topic of Online Hearings When the Parties Cannot Agree. The second, held on 5 May, focused on virtual hearings from a Swedish perspective. From the experience shared and predictions made by the panellists on both events, participants departed considering whether confinement-induced adjustments might not, in fact, be sustainably transforming the international arbitration landscape.

"Online Hearings When the Parties Cannot Agree"

The first seminar was moderated by Prof. Patricia Shaughnessy (Stockholm University), with panellists Prof. Maxi Scherer (WilmerHale), Michael Mcilwrath (Baker Hughes), Wendy Miles (Debevoise & Plimpton) and Paul Cohen (4-5 Gray's Inn Square). The Secretary-General of the SCC, Annette Magnusson, indicated in her opening remarks that increased use of virtual tools in times of confinement creates an opportunity to reinvent – not merely reconstitute in a virtual context – what was being done before.

Legal aspects to holding a virtual hearing against the objections of a party: The legal power of tribunals to order a virtual hearing over the objections of a party was naturally at the heart of discussions. Panellists all agreed that tribunals usually have this power. Prof. Scherer stated that there are no national laws or institutional rules which either prohibit or impose the use of virtual hearings. In silence, tribunals will be guided by certain general principles.

Firstly, certain laws grant parties a right to a hearing. This is the case, for example, of the Swedish Arbitration Act (SAA). This should not, however, mean a right to a *physical* hearing. Prof. Scherer insisted that arguments are exchanged orally and simultaneously over video link all the same. And indeed, any notion that the SAA imposes physical hearings was dispelled during the second webinar (discussed below).

Secondly, tribunals are usually afforded broad powers to determine the procedure as they consider

appropriate. This will include *when* and *where* a hearing is to be held and, to Prof. Scherer, whether this hearing can be done *remotely*. This is a balancing exercise between the duty to conduct the arbitration expeditiously and the parties' right to equal treatment and right to be heard (although the latter two in her view are respected in the case of a virtual hearing, where all participants are equally heard online).

Prof. Scherer suggested factors to consider when deciding whether to hold a virtual hearing, including the reason for the absence and measures taken to ensure presence, the content of the hearing, the possibility for all participant to participate and the delay caused should hearing not be held virtually. One could perhaps add to this list the environmental impact of holding the hearing physically.

M. Scherer also dismissed the common view that the efficiency of cross-examinations would somehow be hampered in virtual environments: an HD screen creates an even more immediate impression of someone as opposed to being 5 metres away in a conference hall.

In concluding remarks, M. Scherer indicated that she was aware of no case where the fact of imposing a virtual hearing in and of itself raised issues at set aside or enforcement stages. As practitioners and court get acquainted with virtual tools, any such fear will dissipate. Comfort comes with the habit.

How to engage users and embrace virtual hearings: But how, then, develop this habit? Wendy Miles shared her experience in dealing with parties and co-arbitrators who are reluctant to move forward with virtual hearings.

In her view, the answer lies in *communication*. Users are sceptical for psychological reasons: virtual hearings are different, they defy our habits. But this fear can be overcome through efficient communication focused on the specific procedural concerns which are being raised in relation to virtual hearings. These procedural objections to virtual hearings were analysed by the Federal Court of Australia in *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486. Ms Miles listed and discredited them in turn.

For example, a procedural objection based on technological limitations. To Ms Miles, this is nothing but fear or lack of experience in the technology. This is a mature technology, and institutions and hearing centres are providing guidance. Another concern raised is the difficulty to interact with experts and witnesses. But this concern can be addressed with better equipment. Ms Miles agreed with Prof. Scherer that proximity with a witness or expert is, in fact, increased by virtual tools. Yet another example is difficulties in managing documents. On that front, institutions are providing satisfactory document management platforms, and Ms Miles shared her positive experience of using the SCC Platform.

In concluding remarks, W. Miles insisted that, if arbitration professionals communicate efficiently, then all participants in the arbitration process will understand that these are only apparent difficulties which can be overcome.

Optimising the proceedings: Michael Mcilwrath looked into new ways to optimise the international arbitration process, with or without digital tools.

He noted that present-day international arbitrations are geared up towards their hearings, which tend to be longer in certain (oftentimes common law) jurisdictions for comparable disputes. But the

cause, in Mr Mcilwrath's view, maybe no other than the participants' orientation towards the case.

In other words, main hearings can oftentimes be shortened. Mr Mcilwrath commented on specific ways to do this and increase efficiency, all while observing the parties' right to be heard, with reference to the recent ICC Guidance Note. For example, disposing of certain issues on a documents only basis, and seeking to resolve other issues by agreement between the parties, without the need for a hearing. Other tools, he said, may require a degree of oral communication, such as disposing expeditiously of manifestly unmeritorious claims or defences or addressing at the outset potentially dispositive issues. One could add to his list that tribunals can also actively encourage parties to keep private dialogue channels open in parallel to the proceedings, with a view to finding amicable solutions.

These tools are neither new nor radical. In fact, they are fairly simple in their principle but nonetheless generate forward motion in arbitrations. Mr Mcilwrath hinted that they were underused and that parties now need tribunals to be a little bit firmer and willing to implement these over the objections of one of the parties. Perhaps tribunals will see the current pandemic as an "excuse" to implement the additional firmness Mr Mcilwrath advocates.

Available tools for holding virtual hearings: At last, Mr Cohen provided an overview of the technical toolbox available to users looking to shift away from physical hearings. Video-conferencing is a mature technology: a deluge of old and new programs is now being used in arbitration.

But he noted that one size does not fit all. Different programs will provide different features and experiences. For the purposes of an international arbitration hearing, Mr Cohen insisted on the importance of isolated chatrooms, the ability to share information (and keep the information confidential) and to monitor the number and identity of attendees in the virtual hearing room. One could add, to this list, the importance of being able to display in parallel both the shared screen and video feed of the speaker, and the participants' ability to independently choose who to look at.

A "*secretary for tech*" can assist the tribunal in navigating and implementing these various solutions. This assistant can also alleviate concerns regarding privacy and cyber-security (including hacking and intrusions). In Mr Cohen's view, these concerns are overblown: these are usually secure tools. Some of the readily available programs are transit-encrypted, others end-to-end encrypted, and breaches are most frequently "low tech" (such as responding to a phishing email or having an unreasonably simple password).

Mr Cohen referred in conclusion to the growing number of draft procedural orders and video call protocols freely available, such as the Seoul Protocol or the Africa Arbitration Academy Protocol. No single software or protocol is suited for *all* hearings. But there is something for everyone.

"Online hearings from a Swedish perspective"

The second seminar, co-organised by the SCC and the Swedish Arbitration Association, was also moderated by Prof. Patricia Shaughnessy, with opening comments from SCC Secretary-General Annette Magnusson and panellists Kristoffer Löf (Mannheimer Swartling), Fanny Gleiss Wilborg (Lundberg & Gleiss) and Polina Permyakova (WilmerHale).

Kristoffer Löf examined the legal aspects to online arbitration hearings under Swedish law. Whereas parties in Sweden have a right to a hearing if they request one, Mr Löf dispelled the notion that Swedish law requires any such hearing to take place physically. He referred, in particular, to the *travaux préparatoires* of the SAA and other laws governing the Swedish judicial process, all of which approve of oral submissions by video link and acknowledge that these virtual tools preserve the parties' procedural rights. In his view, the video link meets the hearing requirements set out in the SAA – and all panellists agreed.

Mr Löf also noted that Swedish courts are themselves well advanced in their own reliance on video hearings: they are likely to look to their own practices if, and when, the matter arises in setting aside proceedings.

From a Swedish arbitrator's perspective, Fanny Gleiss Wilborg shared her recent positive experience of online arbitration hearings. Comfort with the medium develops with habit. But the dynamics between participants are unquestionably different, and technical challenges remain to be overcome. Ms Gleiss Wilborg joined other speakers in hoping that present challenges will stimulate reflection and sustainably optimise the arbitration process.

At last, from both her counsel and arbitrator perspective, Polina Permyakova agreed that virtual hearings raise new challenges: a witness might get too comfortable before a camera, parties have new opportunities to disrupt opposite pleadings for example by feigning connection difficulties. Properly anticipating the specific needs of the hearing and scheduling practice rounds are key to success.

Conclusion

It became clear, in the course of both online seminars, that an analogy between the physical and virtual hearing is limited. These simply are not the same thing, and seeking to transpose the physical hearing as we know it in a virtual environment is a hopeless exercise. Instead, arbitration professionals should reconsider their habits: the current pandemic has the potential to increase exposure to new and existing optimisation tools, and serve as a catalyst for renewal – and improvement – of the international arbitration process.

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