Kluwer Arbitration Blog

Arbitration Unplugged Series – Virtual hearing: Present or Future?

Alvaro Galindo (Georgetown University Law Center) · Saturday, May 23rd, 2020

During a vivid "virtual" presentation delivered by the well-known arbitrator, professor and practitioner, Gary Born, the topic of *virtual hearings* was addressed. Another well-known international arbitrator, Elena Gutierrez García and the President of the AMCHAM-Peru Arbitration Center, José Daniel Amado, moderated the discussion.

At the outset, Mr. Born clarified that *virtual hearings* are not a novel technological device used in arbitral proceedings. In his famous treatise on international arbitration (3rd. edition coming soon), important changes in arbitral proceedings, as a result of the development of technology during the last decade, are analyzed. During his presentation, he addressed some of the more notorious changes in telephonic and videoconferencing technologies as tools impacting the organization of arbitral proceedings, even though in a more limited way than the use of *virtual hearings* the international arbitral community has witnessed during these pandemic times. He noticed that there are parties that insist on *in-person* procedural hearings, but more and more it has become standard for the first procedural hearings to be performed by conference calls as opposed to *in-person* hearings. He also clarified that videoconferencing technology has been used for witness testimony for quite some time now as a result of visa restrictions or health issues, making it necessary for a witness to testify remotely. He acknowledged that, sometimes, issues arise during such practice, e.g., coaching of a witness during testimony or the side in charge of cross examining a witness requesting for someone present in the same room with the witness during his testimony.

Mr. Born shared with the audience his recent experience in a hearing room in Sao Paulo, the week before the lockdown went down, with more than 50 people participating in that hearing. This scenario, for the time being, is out of the question. He noted that the pandemic has changed the practice of international arbitration rather dramatically.

As a result of his own experience and, in general, that of the international arbitral community, remote testimony is something we are all familiar with. Nowadays, opening and closing arguments, witness and expert examination and cross-examination, in a virtual format, is becoming the rule. As a result of this new *virtual reality*, he addressed what he labeled as (i) the *legal issues*; and, (ii) the *practical*

issues that arise as a result of such new reality.

***First*, the legal issues:**

If both parties are content to move forward with *virtual hearings*, then no legal issues arise. Under this scenario, if the arbitral tribunal is willing to proceed (as it should), practical issues -but not legal ones- will arise. Of course, this reality is not always the case: for example, when the claimant requests a *virtual hearing*, but the respondent does not want to move as fast as the claimant and raises its concerns and its preference for *in-person* hearings. The opposite scenario may also be the case: the claimant wants to exercise his right to establish its case with examination of evidence in life format (e.g., cross examination of witnesses and experts). And, finally, both parties may object to the tribunal's invitation for a *virtual hearing* (Mr. Born emphasized that the tribunal should not order a *virtual hearing* under this scenario) raising issues related to recognition or setting aside proceedings against the award.

Mr. Born addressed what he labeled as the first legal issue: the law of the arbitral seat and the institutional procedural rules applicable to arbitration. Most modern institutional arbitration rules contemplate that if one of the parties to the arbitral proceedings requests a hearing, the tribunal shall provide that party a hearing. Article 24 of the UNCITRAL International Commercial Arbitration Model Law (the Model Law) ("[T]he arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party") and many national legislations provide the same. If a party requests a hearing, the tribunal shall provide a hearing. The question arises if a hearing is the kind of oral *in-person* hearing that existed at the time the Model Law was drafted in 1985, but now we are dealing with *virtual hearings*, when not only a witness but counsel are not in the physical presence of the tribunal, so the question raised is whether this is really a *hearing*. Is it true under this scenario that counsel was provided with the opportunity to be heard? He mentioned German legal authorities concluding that a hearing is performed as long as physical presence is provided, but he concluded that most authorities today have a different view. It is generally accepted that a hearing includes any mechanism (e.g. audio and visual) to hear counsel in real time, provides the opportunity for a witness to deliver testimony directly to the tribunal in real time. In these pandemic days, he concluded, "an entire *virtual hearing* is a hearing".

A *virtual hearing* is a hearing, but this does not necessarily mean that it satisfies other requirements, for example, under article 18 of the Model Law ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case") and articles 5.1 (b) and (d) of the New York Convention (i.e., the right to be heard). The assumption that because the parties to an arbitral proceeding willingly participate in a *virtual hearing* are exercising their right to be heard could be a wrong assumption (e.g., if unequal access to use of technology and accessibility is an issue, the right to be heard could later become an issue). This is important because it is connected with the practical implications of a *virtual hearing* (this point was addressed further during the presentation).

Mr. Born addressed two additional points related to the legal issues: *first*, in many national courts (e.g., U.S., U.K., Singapore) *virtual hearings* before the local courts are taking place, so it would be rather a peculiar reasoning for a court or tribunal to conclude that this is not acceptable in the world of arbitration; and, *second*, with no *virtual hearings*, when are *in-person* hearings going to be possible? This scenario seems more detrimental to the rights of the parties, he concluded.

***Second*, the practical issues:**

Mr. Born invited the audience to address the so-called "practical" or "logistics" issues: If ordered by the tribunal, how should these *virtual hearings* be done? Again, if both parties object, then the tribunal should not move forward.

First, Mr. Born described his own experience during ICSID and SIAC administered arbitral proceedings. A great amount of time for preparation was required, working alongside with the arbitral institution and counsel for the other side. He recommended to parties involved in the organization of *virtual hearings* to agree on one single IT support provider (for dealing with issues of connectivity, and so forth) and test sessions performed before the hearing takes place (e.g., for technical compatibility, IT support and teaching / coaching all participants on how to connect during the hearings, activate and deactivate video and sound, among other technical issues).

Second, a number of issues should be considered and done: at the outset, and for preparation purposes, it is important to clarify among counsel for both parties and the tribunal whether all those involved in the *virtual hearings* will participate on their own. If this is the case, the tribunal should have access to private deliberations during the hearing; this also applies to counsel since you want the opportunity to rely on members of your team providing support and advice during questioning from the tribunal or during the cross examination of witnesses. It also should be an option to have access to more than one screen during the hearing (besides the main screen, it would be useful to have different screens for a *virtual* private room and one additional screen for documents). Finding the technological means to do this may be challenging but is doable.

Mr. Born raised his concern to people's attention span during *virtual hearings*. This attention is shorter than during *in-person* hearings. Mr. Born relied on academic studies to support his point. To minimize this risk, he suggested tribunals and counsel agreeing for more breaks and shorter days of 4 to 5 hours as a more realistic estimate. He also addressed issues raised with time zones differences. If you have a *virtual hearing* with Singapore and U.S. counsel and tribunal members located in different time zones, difficulties may arise. It means, "someone has to wake up too early and someone has to stay up way too late". He reminded the audience of the legal issues already addressed and the relevance of giving equality of treatment to counsel from both parties. The personal inconvenience should be distributed equally among the parties. This, he said, is "the beauty of the flexibility of arbitration!"

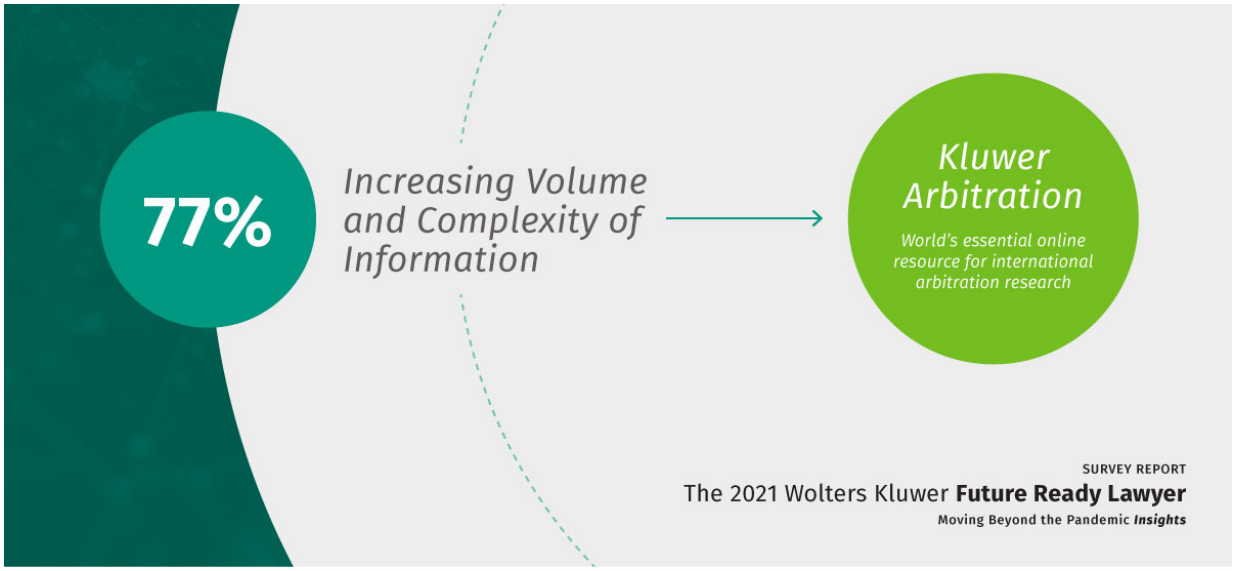
His takeaway from these logistical aspects: careful consideration to preparation will

make *virtual hearings* more effective and could provide an adequate way for examining witnesses, experts and certainly create an adequate environment for oral opening and closing arguments by counsel. As a practical consideration, he mentioned that one thing is to exercise control over a witness with the physical presence of the tribunal, with counsel looking at how the tribunal is reacting to the witness testimony and a very different reality when counsel try to exercise such control during a *virtual hearing*. For this, it becomes rather relevant how to navigate through witness examination during a *virtual hearing* with the tribunal, the witness and the other side participating from different places and from different time zones around the world.

Before closing, Mr. Born addressed several questions posted by members of the audience (e.g., *cybersecurity* issues; set aside and annulment proceedings against the award under the New York Convention; technological steps to protect the integrity of witness testimony, among many more interesting questions).

As a final remark, he invited all those involved in international arbitration to view this pandemic world we are all living in today as an opportunity to try to use technology to make the arbitral process work better. We (arbitrators, counsel and institutions) need to make arbitration work better for the users; as a result, *virtual hearings* will help us all build a better arbitral process.

This report was the result of the kind invitation made by the AMCHAM-Peru Arbitration Center in my capacity as member of its international arbitration list of arbitrators.



This entry was posted on Saturday, May 23rd, 2020 at 6:30 am and is filed under Arbitration Proceedings, International arbitration, Virtual hearings
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.