Kluwer Arbitration Blog

Rethinking Virtual Hearings

Sue Hyun Lim (Kim & Chang) and Lars Markert (Nishimura & Asahi) · Sunday, July 19th, 2020 · KCAB Next

Conducting all or parts of a hearing in the form of a virtual hearing has become a daily reality for many arbitrators, parties, and witnesses as the COVID pandemic continues to disrupt the legal practice. But as countries gradually ease out of lockdown and find their way into a "new" normal, it may be worth reflecting on whether, and if so how, virtual hearings will replace physical hearings as the default mode of conducting oral hearings in the post-COVID world.

Permissibility, Practicality and Effectiveness

The practice of conducting parts of an evidentiary hearing by means of video connection has until recently been reserved for exceptional cases and often been limited to examining witnesses of perceived minor importance. This has changed overnight as the worldwide travel bans in response to the COVID pandemic made virtual hearings an essential part of arbitral practice. This rapid transformation from physical to virtual can be largely attributed to the procedural flexibility of international arbitration, and to the accessibility and effectiveness of relevant technology.

Permissibility

Most of the national arbitration laws found in modern states, while specifying the requirement to hold a hearing absent a contrary agreement by the parties, have no specific prohibition against holding these hearings through means of telephone calls or videoconferencing (see, e.g., UNCITRAL Model Law, Art. 24). Meanwhile, the standard practice as envisaged in the rules of major arbitral institutions provides for broad discretionary powers of arbitral tribunals to determine the appropriate method of conducting a hearing, including the power to conduct the hearing virtually, e.g., Article 17 of the KCAB International Rules. In this connection, it is even argued that the requirements of an "in-person hearing" can be complied with by meeting "virtually" in person (see ICC Guidance Note, para. 22) – as paradoxical as this might first sound.

While the New York Convention provides grounds to challenge awards for a violation of a party's right to equal treatment or its right to be heard (Article V(1)(b))[1)], so far there have been no reported cases where the imposition of a video hearing (instead of a physical hearing) in and of itself was found to amount to a violation of these rights. National courts in most jurisdictions tend

to set high thresholds for the requirements under Article V of the Convention and the authors are unaware of cases in which courts unduly failed to accord deference to the broad discretion of arbitral tribunals to conduct oral hearings as appropriate under the circumstances.

Practicality

Past reluctance to utilize video hearings often may have been due to the inaccessibility of the video-conferencing hardware and prior (bad) experiences with unreliable connections, coupled with the general inertia to change. Since then technology has advanced and people have adapted. An ample supply of low-bandwidth Internet-based conferencing software solutions, such as Zoom or Webex, now provides reliable, high-quality audio and video feeds, easily accessible to new users. For the interested viewers and readers, there are more than enough video tutorials online, as well as a host of protocols, checklists and guidelines on how to prepare for, and conduct a virtual arbitration hearing, including the Seoul Protocol on Video Conferencing in International Arbitration ("**Seoul Protocol**"). An earlier post discussed the Seoul Protocol in detail. Furthermore, the pool of arbitrators, counsel and parties, has also evolved, as we now see more "digital natives" entering the field, while "early adopters" are quickly learning to adapt to these new IT tools.

Hearings in the Post-COVID Era

In an environment that considers them legally possible and technically practicable, will virtual hearings remain the default mode even after the pandemic has subsided and restrictions of movement have been lifted? Or will they be a mere passing fad, going out of fashion after one season like some other over-hyped conference topics before? The probable answer is "neither" in that many will revert to the old ways to some degree while adopting the virtual hearing format in a manner that best fits their needs.

It would be difficult to argue that virtual hearings can fully replicate the nuanced and instantaneous interaction between tribunal, counsel and witnesses which physical hearings can offer. As humans, we have evolved to respond to the surrounding environment by processing an array of verbal and non-verbal cues, and to interact accordingly. Observing a person's overall demeanor, their surroundings, and the real time reactions of other participants in the room often yields useful information. Concerns such as witnesses reading off notes or being coached off-screen during cross-examination, or arbitrators and witnesses not looking at the correct page of a key document at the right time may constitute additional challenges when planning virtual hearings. The Seoul Protocol attempts to address these challenges that otherwise would, in principle, not occur in physical hearings. These are just a few of the disadvantages and difficulties of virtual hearings – whether perceived or real.

On the other hand, the success stories, as well as experience gained, during the pandemic will encourage more frequent and proactive deployment of the virtual format, even if it only pertains to parts of hearings or some of the participants. Just as we have seen how environmental damage can be mitigated through the temporary slowing of human activities, the "great pause" caused by the pandemic has proven that we can take bolder and more specific steps towards positive changes that address some of arbitration's perceived shortcomings. Virtual hearings can reduce expenses, spent

time, and environmental damage associated with long-haul air travel, and can also ensure that necessary documents and pleadings are always at the fingertips of arbitrators and counsel. It would therefore be a waste not to maximize the benefits associated with virtual hearings, as long as it is ensured that the essential elements of a fair hearing are preserved.[2)] It can already be anticipated that, at least for procedural conferences, video-conferencing technology will replace the thus far standard telephone conferences.

Both the physical and virtual formats have pros and cons and parties will have to find the right balance for each case.

Multiple Hearing Centers as Connecting Points – Hearing Hubs

A middle ground to this dilemma possibly involves the use of hearing centers. Compared to long distance air travel, commuting within a city or to nearby regions will be perceived to be less of a cost/delay factor and more convenient/eco-friendly. Hearing centers in major arbitration locations, in close cooperation with their sister centers in other regional hubs, can provide the necessary infrastructure and common technical support. By way of illustration, one group of participants can congregate in one hearing center of their convenience, while other groups can convene in their own preferred centers. Those multiple "Hearing Hubs", through a pre-arranged protocol, will take care of everything from testing, providing on-site tech managers, implementing back-up plans, and handling document retrieval and screen-sharing systems between the multiple groups – in addition to providing the physical hearing rooms and relevant onsite services for participants in their respective centers.

That way, arbitrators and counsel can go back to focusing on the substance of the dispute, while a joint team of technicians and logistical experts from the different centers undertake centralized efforts to ensure that the technology, logistics, and cybersecurity are properly addressed. Witnesses giving evidence in a neutral environment where supervision is possible at all times may also give a significant level of comfort to those examining or following remotely.

This method of conducting remote hearings through Hearing Hubs will require some degree of coordination, such as standardization of the technology and proper testing protocols. However, it seems entirely feasible considering the pre-existing good relationships between many of the major hearing centers, particularly in Asia. In any event, it seems a preferable solution to arbitrators and counsel needing to spend substantial time and efforts on creating virtual hearing environments on an *ad-hoc* basis – rather than fully concentrating on preparing the merits of the case.

Rethinking the Need for Hearings

Many would certainly see the essence of an oral hearing as providing the parties a chance to plead their case in front of the adjudicators and the counterparty. This is believed to ensure both parties an equal chance to influence the arbitrators' views and opinions by engaging in a live, adversarial exchange with the opposing party and by challenging the other party's witness evidence. It will of course depend on the specific case at issue, but some of these essential traits may be better secured through a physical hearing, while other issues can well be replicated in virtual settings.

Amidst all the focus on *how* to conduct hearings, it may be useful for parties to pause and think *why* they are conducted, and specifically whether oral hearings and cross-examinations are essential for every type of dispute. Smaller contract disputes accompanied with sufficient documentation, or single-issue disputes in which facts are undisputed, may sometimes just as well – if not better – be resolved through a carefully designed documents-only procedure.[3)]

Regardless of the specific requirements of a particular matter, the ability to connect individual arbitrators, counsel and witnesses from remote locations simultaneously through virtual hearings, creates a level of flexibility that has hitherto been unseen. The question of how we will manage to preserve the essence of an oral hearing (assuming one is needed) while at the same time incorporating new technologies to streamline procedures, will be the subject of lively discussions in the times to come – whether in physical meetings or by way of the meanwhile ubiquitous webinars.

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References

[?1] See, e.g., *Chrome Resources S.A. v. Leopold Lazarus Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, XI Y.B. Com. Arb. 538 (1986) where the court held that "*this provision covers any restriction, whatever its nature, of the parties' rights. It appears to contemplate, amongst others, the violation of the right to be heard*."

[?2] See, e.g., Markert/Burghardt – Navigating the Digital Maze – Pertinent Issues in E-Arbitration, J Arb. Studies. (2017), pp. 3, 15-16.

[?3] See, e.g., Chartered Institute of Arbitrators' 2015 guideline on documents-only arbitration procedures.