Kluwer Arbitration Blog

SIAC Congress Recap: This House believes that Virtual Hearings are just as effective as In-Person Hearings

Shaun Lee, Low Zhe Ning (Bird & Bird ATMD) · Friday, September 4th, 2020

Since COVID-19, virtually everything that can be moved online has been moved online. The Singapore International Arbitration Centre ("**SIAC**")'s flagship event, SIAC Congress, is no exception and as such, it was most befitting that the motion of the debate was "*This House believes that Virtual Hearings are just as effective as In-Person Hearings*".

The debate involved some of the most illustrious names in the arbitration sphere.

Arguing for the motion were:

- Mr Gary Born, President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP; and
- Ms Joy Tan, Joint Head of Commercial & Corporate Disputes Practice, Corporate Governance & Compliance Practice and the Financial Services Regulatory Practice, WongPartnership LLP.

Arguing against the motion were:

- Mr John P Bang, Member, SIAC Court of Arbitration; Head of International Arbitration, Bae, Kim & Lee LLC; and
- Mr Rob Palmer, Managing Partner, Ashurst LLP (Singapore).

Mr Edmund J Kronenburg, Managing Partner, Braddell Brothers LLP, moderated the debate with his characteristic wit.

Results

The debate was a closely contested one. Ultimately, the opponents narrowly edged the proponents out, with 54% of viewer respondents voting against the motion.

Round 1 of arguments

The first exchange between Ms Tan (for) and Mr Bang (against) involved: (i) a debate about the

definition and context of the motion itself; and (ii) the benefits of virtual hearings versus its detriments.

Having flagged that delays as well as long and expensive hearings are the main complaints by users of international arbitration, Ms Tan highlighted the following benefits of virtual hearings: (i) costs and time efficacy; (ii) increased participation and access to justice; (iii) increased use of electronic documents and hearing bundles; and (iv) reduction in environmental externalities. Ms Tan also argued the common concern that the existing state of technology is "*not good enough*" to support virtual hearings is misplaced. With proper preparation and the promulgation of institutional protocols, issues such as slow connectivity are surmountable. Instead, virtual hearings allow for greater innovation and for arbitration to be freed of its slow, high costs shackles of yesterday.

In response, Mr Bang's central premise was that virtual hearings are not, today, as effective as in-person hearings. Whilst virtual hearings are possibly the future, two hurdles prevent it from being equally effective presently: (i) questions as to accessibility and efficiency given the reliance on technology; and (ii) enforcement of procedural rules and ethical conduct in cross-examination. On (i), Mr Bang argued that adequate high-speed internet connectivity is not always available and virtual hearing hubs are unequally distributed globally. Video-conference fatigue would also exacerbate time zone differences and possibly render unsustainable lengthy and intense cross-examination sessions. On (ii), Mr Bang flagged the increased risk of cheating and other unethical conduct. Finally, Mr Bang forcefully noted that virtual hearings were available even before the pandemic but parties preferred in-person hearings, which indicates their view that the latter is more effective.

Round 2 of arguments

The second exchange between Mr Born (for) and Mr Palmer (against) continued the debate about the definition and context of the motion itself and also undertook an empirical examination of the issues.

Mr Born opened by remarking that when it comes to remote hearings, as with anything novel, we react with uncertainty and, in some cases, fear. He bolstered Ms Tan's earlier points with empirical data:

- First, arbitral institutions and national courts have uniformly and overwhelmingly voted in favour of virtual hearings. The Canadian courts specifically approved virtual hearings as being "*just as fair*".
- Second, virtual hearings are more accessible than in-person hearings. Users, judges and arbitrators have commented on the convenience and time and costs savings.

Mr Born reiterated that guides and protocols which walk through the nuts, bolts and technicalities of virtual hearings have been published to improve the process and ensure due process. Further, a virtual hearing being the only show in town is, by definition, more effective than an alternative which is impossible. In closing, arbitration has always (and rightly) been a leader in innovation, and we should embrace innovation and technology.

In response, Mr Palmer reiterated that the motion was whether virtual hearings are "*just as effective*" as in-person hearings rather than simply being efficient. The two are not commensurate.

In the arbitration context, effectiveness encompasses: (i) the ability to cross-examine fairly; and (ii) fairness – the right to be heard, due process and confidentiality. His key concerns were: (i) the inadequacy of safeguards against witnesses conferring with counsel; (ii) preservation of confidentiality in light of reliance on technology, particularly in arbitrations involving state actors or geopolitics; and (iii) erosion of the collegiality (and hence fairness and impartiality) in decision making.

Mr Palmer also raised the online disinhibition effect which reduces the restraint of online participants, and argued that the ethical concerns and opportunities for bad behaviour are fatal. Thus, virtual hearings may never be as effective as in-person hearings.

Rebuttal

The final round of rebuttals raised the following key points.

Proposition:

- Mr Born reiterated the "*fundamental point*" that something is better than nothing; in which case, virtual hearings are more effective today.
- As regards the "*limited*" number of practical issues raised, Mr Born noted that witness coaching is not unique to virtual hearings. He suggested (in accordance with published arbitral protocols) that a camera showing a reasonable amount of the room the witness is in could be used to ensure that there is no foul play. Further, rather than make it difficult to observe a witness' demeanour, virtual hearings enable greater focus on a witness' facial expressions and body language.
- Mr Born also argued that the online disinhibition effect results from a "*vast and unregulated*" cyberspace and would not apply to virtual hearings which are tightly controlled by tribunals and where counsel are bound by ethical and procedural rules.
- Ms Tan posited that the technological and ethical concerns raised by the Opposition had practical solutions such as the use of virtual hearing hubs with dedicated and integrated facilities which would allow for seamless hearings. She noted that the SIAC itself had taken steps to partner other institutions to provide such facilities for parties in London and Canada.

Opposition:

- Mr Palmer emphasised that any user given the option would opt for a physical hearing rather than a virtual one. That was, in and of itself, dispositive of the motion.
- On costs efficiency, Mr Palmer argued that this is a critique of the arbitral system itself and not in-person hearings and, in any event, the cost savings from virtual hearings are marginal.
- Finally, Mr Palmer referred to judicial scepticism in the US and in Australia, that virtual hearings are a problem for due process.
- Mr Bang ended by stating that the Proposition's argument that "*something is better than nothing*" was an unfair reading of the motion.

Q&A

With over a thousand viewers, there was certainly no lack of questions on the debate. Some of the

questions included.

Q: How can virtual hearings be as effective if access to technology is unequal? What happens to places where internet is not as good?

Both the Proposition and Opposition took the view that access to technology would not be an issue in the vast majority of cases.

Ms Tan further noted that if technology is in fact a threshold issue, it is for the tribunal and parties to consider what is appropriate, but ultimately, the minority cases can be dealt with and managed with the necessary safeguards.

Q: Would virtual hearings negatively affect cross-examination by limiting counsel's view of facial expressions? What about issues relating to camera quality?

The Proposition argued that video cameras (even standard laptop cameras) allow for "*tight focus*" on the witness's face. Further, video-recording playback would allow the tribunal/parties to replay and/or zoom in on a witness's expression, rather than rely on transcripts.

Q: Would virtual hearings affect enforceability of an award?

Mr Born stated that if parties have agreed to a virtual hearing, then this is not an issue. He also took issue with Mr Palmer's earlier reference to US judicial scepticism on the basis that those comments were made in the context of a criminal matter and so had domestic constitutional implications.

On the other hand, Mr Palmer noted that in some ICC arbitrations, the power of the tribunal to conduct virtual hearings under the ICC Rules has been challenged and that that challenge could be rehashed at the enforcement stage.

Comments

Two points are worth noting at the outset. First, the debate motion cannot be construed in a vacuum and must be looked at in the post-pandemic context with the attendant travel restrictions. Second, the unspoken assumption was that the issue is raised in the context of international commercial arbitration.

The substantive issues running through the debate and the Q&A session were chiefly: (i) technological equality of arms; (ii) ethical considerations; and (iii) due process (confidentiality and impartiality).

On (i), fringe cases where parties have limited or no internet access (whilst uncommon) cannot be dismissed. One audience member noted that his jurisdiction might lose internet connectivity for weeks, if not months. While this might mean that virtual hearings may never be as effective, it would be unfair to consider the motion divorced from the present health concerns and international travel restrictions.

On (ii), one issue worth exploring is the extent to which suggested practical solutions to ethical concerns would increase costs and render virtual hearings less efficient than in-person hearings. For example, one solution already used by tribunals and national courts to address witness

coaching concerns or technical cheating mechanisms is for opposing counsel to have a representative in the same room as the counterparty's witness.

On (iii), confidentiality and attendant concerns of data privacy and protection are as important as impartiality concerns. This is not a novel issue: the Cybersecurity Protocol in International Arbitration was launched in late November 2019 and the consultation draft of the ICCA-IBA Roadmap to Data Protection in International Arbitration was released in February 2020. It is crucial to the legitimacy of the process that data can be exchanged virtually without compromising confidentiality and data privacy.

More generally:

- The online disinhibition argument raises interesting questions. Donning a practitioner's hat, a less tense witness is likely to give evidence more freely and forthrightly but, on the other hand, may also be more prone to slips of tongue or glib admissions.
- The extent to which national courts' sentiments about virtual hearings are applicable in the international commercial arbitration context is a legitimate question. National courts normally deal with domestic disputes or, even when faced with an international commercial dispute, the judge(s) and counsel are invariably in the same jurisdiction. It might have been more relevant to canvass the views of specialist international commercial courts instead.
- Nonetheless, it was interesting to hear from Mr Bang that the Korean courts have not adopted virtual hearings at all. Mr Palmer also observed that the Honourable Chief Justice Sundaresh Menon had referenced the use of video-conference links only for directions hearings and hearings without witnesses in the Singapore courts, which suggests the limits of virtual hearings for proceedings which require witness evidence and examination. Relatedly, we note that UK has moved towards increased face-to-face hearings.
- Finally, it would have been interesting to hear the debaters' views on whether a tribunal's deliberation (including its speed) would be impacted by an inability to deliberate in person.

Conclusion

Inertia notwithstanding, the contours of the legal profession have in recent years shifted rapidly in light of technological disruption and globalisation. Just as we have learnt to adapt and evolve with the demands of modern practice, we must continue to do so in this post-pandemic world where virtual hearings have inevitably become the norm.

This post concludes our coverage of SIAC Congress 2020. More coverage from SIAC Congress is available here.

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