

Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: International Arbitration in Times of COVID

Philip Kim, Luke Rowe (Herbert Smith Freehills) · Tuesday, October 20th, 2020 · Herbert Smith Freehills

The first day of Hong Kong Arbitration Week 2020, hosted by the Hong Kong International Arbitration Centre (“**HKIAC**”), was an opportunity for practitioners to discuss the topic: “*Socially Distanced or Procedurally Flawed: International Arbitration in times of COVID*”, which sought to address some of the ever-evolving challenges of conducting virtual hearings in times of COVID.¹⁾ Insights were shared on a range of topics, from hybrid hearings to witness credibility and future trends to monitor.

The moderator guiding the event’s discussion was **Mr Nicolas Wiegand** of CMS Hong Kong, and he was joined by experts in the field representing the perspectives of clients, arbitrators, experts and counsel:

- **Ms Christina Taeuber** of STRABAG;
- **Ms Judith Levine**; and
- **Mr James Nicholson** of FTI Consulting.

Mr Wiegand opened the session by asking the panellists for their observations on the benefits and challenges of the shift to virtual hearings in the wake of the COVID pandemic.

The panel broadly noted that the shift to virtual hearings, while difficult, had been relatively smooth. For example, **Ms Levine** noted that for arbitrators, some unexpected advantages had been not only time saved on travel, but time saved on travel planning and travel recovery. The online format has also facilitated easier discussions between arbitrators in different locations outside of hearing dates. **Mr Nicholson**, as an expert witness, noted that the expert actually can have more impact in a virtual hearing. Being the person navigating the online participants through the material, he can make sure that a tribunal gets a clear picture of what he is seeking to convey.

Ultimately, virtual hearings have not made physical hearings redundant, but they do open new opportunities.

How hearings are structured and whether hybrid hearings are effective

Broadly speaking, the panellists noted that wherever possible, the structure and format of the arbitration should conform to the circumstances of the case. This ranges from considerations of protocol, whether a hybrid format works for each party, whether a hearing should be delayed so it can be held in person, and whether a different approach may be appropriate for different stages within the arbitration.

While currently, a purely virtual hearing may be the only format available in some places, in others where lockdowns have eased, a hybrid format might be a possibility. This could take the form of some parts of the arbitration being held online, or with some participants appearing in person and some online as needed.

For example, **Ms Taeuber** noted that even if an in person element would be helpful for witnesses, it may still be possible to assess preliminary or final questions, such as jurisdictional issues or opening/closing submissions generally, in an online format. Alternatively, parties might decide that only those with speaking roles, such as counsel and witnesses are required in person, with support personnel participating online, creating cost efficiencies.

However, this hybrid model can also create issues. **Ms Levine** stated that in a hybrid model there may be a perceived, or real, inequality if there is no equality of physical representation for each party, and **Mr Nicholson** suggested that where one expert is in the room and the other is not, this could create a perception of disadvantage.

Issues surrounding witnesses

The panellists noted that while there are differing views on whether assessment of witness credibility is more difficult, no different, or even easier in an online format, in most circumstances issues with online witness evidence were able to be overcome and ultimately did not prevent a fair hearing.

While some parties have gone to extreme measures to combat any reliability issues, for example in one case, each party sending a witness to be physically present to monitor the giving of evidence in the expert's house, generally a more common sense approach has developed, in which protocols are tailored for the specific circumstances. For example, a protocol may require the door to the room being visible, or the witness giving a 360 degree view of the room prior to giving evidence.

For witness observation, while online evidence means that tribunals may miss out on physical cues, such as nervous tapping or fidgeting, some perceive that all parties being able to see the witness in front-on profile allows for easier observation.

New issues, trends, and looking ahead to the future of arbitration

Going forward, the panellists agreed that there were real issues surrounding party agreement and digital equality in relation to virtual hearings, which need consideration by the arbitration community.

As **Ms Levine** noted, an online hearing is only as good as its weakest internet connection and for

virtual hearings to be effective and just, this must be a paramount consideration. While a virtual hearing may give greater access to arbitration for those who may find it difficult to physically travel, a virtual hearing may also pose problems for those with weak connections or unstable power supplies.

Further, while many parties are willing to participate in online proceedings, there will of course be times when that is not the case. Two particular instances in which issues may arise are in respect of enforcement of judgments and challenges to arbitrators themselves. **Ms Levine** suggested that, while arbitration regimes are catching up with the sudden online shift, it is particularly important for tribunals to provide very clear reasons in deciding to conduct an arbitration online against the wishes of one party.

Finally, **Mr Wiegand** invited the panellists to comment on issues and trends to monitor over the coming period.

Mr Nicholson suggested that economically, there are likely to be parallels to the global financial crisis, with loss of profit claims poised to be a significant issue in the coming months and years. For these claims, whether loss is assessed before or after the beginning of the pandemic will result in significant ranges in damages.

Ms Taeuber believed that digital literacy of arbitrators will be significant, and may lead to a new generation of arbitrators getting opportunities previously not available to them. She further reiterated that developments in force majeure cases will be important to watch.

Ms Levine suggested that flexibility, preparation and equality are key for the profession going forward. The online and hybrid formats can create significant advantages, but pose issues of planning, digital equality and timing that must be properly considered.

In summary, despite the many and significant challenges for arbitrations raised by the COVID pandemic, the profession has quickly developed solutions to many of these challenges. These solutions will not only help the arbitration community weather the ongoing pandemic itself but, with care and consideration, will hopefully be the beginning of creating a stronger, more flexible, commercial and efficient arbitration framework for the post-COVID world.

More coverage from Hong Kong Arbitration Week is available [here](#).

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References

?1 The views expressed in this article are those of the authors and should not be attributed to Herbert Smith Freehills.

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