

# 2020 in Review: The Year of Virtual Hearings

## Kluwer Arbitration Blog

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In the aftermath of the COVID-19 public health crisis, a seismic event in history, many of us feel as if 2020 is the year that did not happen. While it certainly was not business as usual, in a display of flexibility and resilience, the arbitration community ensured that the (virtual) show did go on. With 2020 now concluded, we reflect on the year's hot topic: virtual hearings (or remote hearings, see more on the issue of terminology here and here).

As a globalized profession, remote communications have already formed part of the arbitration process, ranging from procedural conferences by phone to some sort of remote participation in hearings, such as notably witnesses being examined by videoconference (see for example, a post from 2018 outlining the features and possibilities of such online proceedings).

However, uncertainty, travel restrictions, and health protocols introduced due to the COVID-19 pandemic functioned as a catalyst to change industry standards and users' decision making. As pointed out by Professor Maxi Scherer, parties, counsel, and tribunals faced the reality that a physical hearing was not possible to take place at the scheduled time. Despite prior expectations and arrangements users faced a dilemma: "should [the hearings] (cautiously) be postponed, or (proactively) be held remotely using modern communication technologies"? This sparked wide

discussion on and use of virtual hearings, and unsurprisingly, virtual hearings are already the subject of scholarly work and in-depth study. Such efforts include ICCA's recently launched research project on whether the right to a physical hearing exists and the 2020 School of International Arbitration (SIA), Queen Mary University of London (QMUL) Survey, which carries the theme "Adapting Arbitration to a Changing World."

Here, we shed light on our coverage of the following related issues: the complex practical and legal issues that need to be addressed in the context of remote hearings, the guidance that has been offered by arbitral institutions, the physical and psychological challenges presented by the increase of video conferencing, as well as the potential impact on the promotion of diversity and sustainability.

## **Addressing the Practical and Legal Challenges**

Nothing is easy about virtual hearings. Counsel, arbitrators, witnesses, and experts may be located all over the world, rendering it impossible to find a "convenient" timetable to conduct the proceedings. Even after a timetable has been agreed, further challenges including selecting an appropriate video conferencing platform (that considers security and confidentiality needs) determining an appropriate means to share information, documents, and evidence; and arranging for real-time transcription.

Jacky Fung addressed these challenges as counsel in a hearing involving eight global cities and nearly a dozen witnesses and insightfully recommended that an agreed "virtual hearing protocol" could ensure virtual hearings succeed. On the other hand, Chahat Chawla offered the institutional perspective based on two successful and distinct SIAC arbitrations: an emergency arbitrator hearing for urgent interim relief and an evidentiary hearing. He suggested users focus on three aspects: (1) developing best practices; (2) conducting a practice round, e.g., a "test call" or "dry run"; and (3) employing reliable technology. A tailored procedural order could also help ensure success. However, such a procedural order could not exist without technologically adept arbitrators leading the way, a quality that we may see taken into account in future arbitral appointments.

Users must also consider the ethical and legal framework for their hearings to ensure virtual success. Could arbitral awards rendered based on virtual hearing be

at greater risk of set aside at the enforcement phase? The Vis Moot is infamous for asking students (and their coaches and mock arbitrators) to consider current industry challenges, and so this precise legal issue appears in this year's Vis Moot problem. The problem asks whether, in a pandemic environment, a virtual hearing involving the presentation of witness testimony would be appropriate over one party's objection. It could be argued that virtual hearings violate due process, especially where one party objects and demands an in-person hearing for cross-examination. Virtual hearings may also exacerbate pre-existing inequality between parties.

While the challenges may seem novel, they are merely the most modern iteration of due process paranoia. On the Blog we have previously highlighted views from various jurisdictions, including Colombia, England, India, Malaysia, and Singapore. In the COVID-19 context, some jurisdictions have already articulated clear views. In July 2020, the Austrian Supreme Court confirmed a tribunal's power to hold a virtual hearing over one party's objection, thereby rejecting due process concerns. In August 2020, a U.S. district court reached a similar conclusion. More generally, in October 2020, an Egyptian court offered its blessing to virtual hearings.

## **Guidance from Arbitral Institutions**

Arbitral institutions have also actively sought to address users' needs. In hopes of developing best practice tools, several arbitral institutions issued guidelines and hearing protocols, such as for example the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic (discussed here), the Vienna International Arbitration Centre (VIAC) Protocol, the ICSID Guide to Online Hearings, the LCA Guidance on remote hearings, and the HKIAC Guidelines on Virtual Hearings.

In addition to the individual efforts made by each institution, the crisis sparked collaboration across arbitral institutions, including the April 2020 Joint Statement on "Arbitration and COVID-19" in which major arbitral institutions urged flexibility and collaboration (see also here).

In 2020, the LCIA also updated its rules. As discussed in a post following their publication, the rules clearly reflect the impact of the pandemic on international arbitration by addressing virtual hearings in greater detail. Similarly, at the end of

2020, the ICC also released its 2021 Rules of Arbitration, which leave no doubt as to a tribunal's powers to conduct virtual hearings (see relatedly the discussion of the new rules here).

## **Healthy Virtual Hearings**

Even with a trove of guidance now available, the necessary and rapid adoption of virtual hearings does not come without a cost. Sophie Nappert and Mihaela Apostol discussed the physical and psychological challenges presented by the increase of video conferencing in professional life, with an emphasis on virtual hearings. They explored the various difficulties that participants in video-gatherings experience. Among the various challenges they identified, and in addition to physical tiredness, they discussed in detail mental challenges because of screen fatigue. They called for increased awareness in relation to the tangible consequences of virtual hearings on practitioners' minds and bodies. Moreover, and in agreement with other contributors, they recommended the adoption of best practices at the earliest stages of arbitral proceedings.

## **Sustainability and Diversity in a Virtual World**

As the arbitration industry matures, voices arguing in favour of promoting sustainability and diversity have increased. Virtual platforms in the post-COVID-19-world may offer greater opportunities. Maguelonne de Brugiere and Cherine Foty approached these two heavily-debated issues in the "newly virtual world of international arbitration." They argued that the pandemic has functioned as a "natural accelerator" "for the many behavioral changes" that initiatives, such as the Campaign for Greener Arbitrations have sought to promote. As envisaged, in years to come, we will see behavioral changes in relation to traveling. In addition to more "environmentally-conscious" traveling, they emphasized the potential for reduction of material waste in arbitral proceedings by using electronic means of communication.

On the diversity side, in this new virtual world, there might be opportunities for increased visibility and participation for previously underrepresented categories (such as women and minorities). As highlighted by Ibrahim Godofa and Mercy

Okiro, event organizers now have a more global and accessible pool of candidates participating as speakers in panels, while on the other side, global attendees may now also have greater access to such high quality programming and networking opportunities. This is truly a silver lining for the arbitration community; however, the news might not be equally good for diversity among virtual hearing participants. Maguelonne de Brugiere and Cherine Foty warned that many skilled practitioners might lack the necessary technological infrastructure to cope with the high demands of a virtual hearing. There is certainly more to add to this list of bad news. For example, there is the further risk that well-established arbitrators could utilize the flexibility offered by virtual hearings (and less traveling or time zone limitations) to accept significantly more appointments (the so-called 24-hour arbitrator problem). The risk is simply that these savvy and seasoned arbitrators could get a larger part of the pie of international disputes, decreasing opportunities available to the younger generation of arbitrators.

## **Concluding Remarks**

Will arbitration ever be the same again? This was considered in depth during the 32nd Annual ITA Workshop and Annual Meeting and the resounding view was that our industry, like many others, has been indelibly impacted by the unprecedented rise of virtual work. Indeed, Gary Benton foresees a "sea change" for our community. But are virtual hearings here to stay? Luke Nottage considers that whether the COVID-19 pandemic will be a long-term game changer for international arbitration remains open. What we can safely predict is that during 2021 we will see further developments in the realm of remote hearings, as this pandemic heralds a new era in many respects, including for the use of technology in international arbitration.