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A Brief Comment on ALArb's Protocol for Virtual Arbitration Hearings

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While prior to the COVID-19 pandemic it was usual for international arbitration practitioners to conduct videoconferencing or telecommunications remotely for certain procedural events (i.e., initial case management conferences or witness examinations), pandemic restrictions imposed in early 2020 led to a substantial change in the way international arbitration proceedings are conducted—forcing practitioners to hold any kind of hearing exclusively on a virtual basis in order to avoid the suspension of proceedings (among countless others, the excellent articles of Maxi Scherer, Sophie Nappert and Mihaela Apostol and Sang Jin Lee and Michael van Muelken, reflect on the deep change produced by the sudden shift to virtual hearings in international arbitration).

In this context, in July 2020 the Latin American Arbitration Association ("ALArb") chaired by Claus von Wobeser, established the Observatory on the State of Arbitration in Latin America ("Observatory"), chaired by Guido Tawil and Eduardo Zuleta Jaramillo, to monitor the development of arbitration in the region and make recommendations, propose courses of action and, in general terms, help solve pandemic-related problems related to arbitration proceedings.

Having identified a growing concern on guidance of how virtual hearings should be conducted, the Observatory launched the Protocol for Remote or Virtual Arbitration Hearings (the "Protocol") in May 2021.

The aim of the Protocol is to serve as a guide for holding virtual hearings and to provide arbitrators, parties, arbitration centers and any other arbitration practitioner in the region, a useful tool incorporating best practices for virtual and remote hearings.

The Observatory concluded that, beyond the difficulties that may arise in a particular case, a hearing held virtually is a suitable, appropriate and safe venue for the conduct of arbitration proceedings and, to the extent organized and carried out in an orderly manner, holding a hearing virtually adequately protects the procedural rights of arbitration users — a conclusion which is consistent with the main findings of the General Report of ICCA's project on whether the right to a physical hearing exists).

Considering the disparity of laws, provisions and regulations in the region, the Observatory sought to ensure that the Protocol contained rules capable of adjusting to the provisions and regulations in force in various jurisdictions. Since its release and a testament to its success, the Protocol has been

increasingly applied in arbitration proceedings throughout Latin America.

On June 7, 2022, over a year after the release of the Protocol, ALArb held a webinar (the "Webinar") with several leading international arbitration practitioners in the region (Guido Tawil, José Astigarraga, María del Carmen Tovar, Valeria Galíndez, Julián Bordaçahar and Sara Marzal) to review the application of the Protocol and discuss their personal experiences.

In this article, we review briefly the structure and content of the Protocol and analyze the most relevant conclusions from its practical application (as discussed in the Webinar).

The Protocol, its Structure and Main Provisions

The Protocol is structured in three chapters which mirror the chronological steps of any virtual hearing: (1) the preparation for the hearing and technical standards; (2) the conduct of the hearing, including the identification of the participants, rules of conduct, and examination of witnesses and experts; and (3) the post-hearing stage (mainly related to its transcription and record).

The Protocol also contains three annexes: (i) a checklist of the main issues to be considered during the different stages of a virtual hearing; (ii) a model clause to be included in agreements to prevent award challenges on the basis that the hearing was held virtually; and (iii) additional advice for successful virtual hearings.

Among its many provisions, it is worth mentioning that (i) Article I.2 (which referred to the determination of the requirements contained in the legal or conventional rules applicable to the case to held a virtual hearing) sets forth that the arbitral tribunal should discuss the possibility of holding a virtual hearing in light of the *lex arbitri*, the arbitration agreement and the applicable procedural rules in accordance with its obligation to issue a valid and enforceable award; (ii) Article I.3 (regarding the minimum recommended content for a procedural order or decision concerning a virtual hearing) notes, *inter alia*, that the arbitral tribunal should: (a) make reference to the parties' agreement to hold the hearing virtually or to the procedural order in the absence of such agreement; (b) determine the internet connection specifications; (c) set the list of participants admitted to the hearing, their respective emails and location; and (d) make reference to the application of the Protocol; (iii) Article I.7 (related to confidentiality, privacy and security for the virtual hearing) specifies that the hearing platform shall guarantee the confidentiality of the communication, as well as the privacy and security of the information exchanged, and all the participants admitted to the hearing shall undertake, in the terms and conditions to be established by the arbitral tribunal, to keep confidential all information related to the hearing; and (iv) Articles II.2, II.3 and II.4 (regarding the moderation of the hearing, rules of etiquette and examination of witnesses and experts, respectively) provide a detailed set of rules and recommendations for the development of the virtual hearing.

While all these provisions are intended to be used as a guide and are in fact meant to be adjusted by arbitration practitioners to the particular circumstances of each case, the rules set forth in the Protocol are designed to encompass established best practices in this field.

Difficult Situations Posed by Virtual Hearings and Recommendations to Avoid Them

One of the first issues discussed at the Webinar related to the potential problems that different time zones may cause. Guido Tawil illustrated the problem by explaining that he was recently involved in a case in which there were more participants from more than ten different time zones. The tribunal decided to have only a few hours of hearing per day and, in some cases, to have a participant attending the hearing in very late or early hours (like at 2:00 or 3:00 am). In order to avoid these kinds of situations, it was suggested that arbitrators and parties should try to reduce their time zone differences as much as possible (for example, by having all the participants of the same party gather in a single location).

José Astigarraga pointed to another challenge of virtual hearings: The difficulties in both perceiving and expressing body language. It was suggested that, despite the convenience of having an entire legal team gather in one place, each counsel or speaker should have his or her own camera and microphone in order to communicate as directly as possible with the arbitrators, witnesses and/or experts attending a hearing.

The matter of the location of witnesses and experts and the use of devices other than computers during virtual hearings was also addressed. Guido Tawil and Julián Bordaçahar stated that in some cases witnesses testified while driving a car or stopped at the side of a road. In one case, counsel to one of the parties shared his screen in a way that allowed all participants to see the conversations he was having through chat. With respect to these kinds of issues, it was suggested that individuals exercise additional caution when using devices other than computers during virtual hearings to ensure that all witnesses and experts are able to testify from an appropriate location if at all possible.

Where We Are Headed: The Future of Virtual Hearings in International Arbitration

The Webinar also addressed the future of virtual hearings. It seemed clear from all the speakers that the world will not return to the way it was before the COVID-19 pandemic and that the lifestyle changes brought by it have not sidelined legal practice. Virtual hearings are certainly here to stay, but they won't be the rule—at least for a while.

There is no doubt that virtuality has brought many advantages to international arbitration, especially in saving travel expenses, saving time, organizing agendas, as well as being an eco-friendly option that has helped create awareness of the sheer amount of documents and resources the arbitration community uses at in-person hearings. Nevertheless, the practitioner view is still that in-person hearings and face-to-face meetings are preferred. And thus the question remains: what will international arbitration look like in the near future?

For starters, some procedural aspects that used to be in-person will probably not be held face-to-face again. This will be done with quick virtual meetings and hearings that need to be expedited such as initial procedural conferences or interim measures hearings. While expeditious, Guido Tawil noted in the Webinar that this may affect the learning process of younger practitioners in international arbitration.

However, for complex cases and hearings involving multiple testimonies and arguments, practitioners believe that in-person presence remains an advantage regarding the assessment of witness credibility and the sheer ease of human interaction. This conclusion was highlighted by Valeria Galíndez and María del Carmen Tovar, who agreed that it is reasonable to expect that in-

person hearings will continue to be held principally for complex cases and for the examination of witnesses and experts.

With this scenario in mind, arbitration practitioners have learned the importance of preparation before a hearing. Today, it is necessary to anticipate the possibility of virtual hearings or at least hybrid procedures. Therefore, there is a fundamental need for the parties to discuss a protocol on the preferred conduct of any hearing.

As it was explained at the Webinar, it is a common practice in the region to have a draft prepared by the Tribunal that is submitted to the parties for their review and approval. The Protocol, as mentioned, covers most aspects of the preparation and conduct of virtual hearings. Therefore, it is strongly suggested to implement it as a set of guidelines in the initial procedural conference. Once this initial framework has been implemented, the parties will have the opportunity to tailor their arbitration and consequent virtual settings to the needs of their particular case.

Conclusion

Two years of online practice have left us with a variety of interesting experiences, but it has also left the international arbitration community with much-needed technological expertise. The uncertainty of knowing when a virtual hearing will be needed has become incredibly common, to the point of assuming that virtuality will be required at least once during any arbitral proceeding. Therefore, arbitrators and counsels must be prepared for the virtual environment moving forward.

As we are still learning, we can all agree that preparation is key. Practitioners are now facing tactical decisions about whether to agree to a virtual hearing and how that may impact the outcome of an arbitration. Clearly, due process, effective persuasion and cost-time efficiency are factors that come into play when tailoring the procedural aspects of both virtual and in-person hearings. As discussed in the Webinar, the Protocol has been developed to be the ‘go-to tool’ for arbitration users by providing them with guidance on the new virtual reality of legal practice. For that reason, it remains an invaluable tool for international arbitration practitioners in the region and throughout the world moving forward.

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