Kluwer Arbitration Blog

Remote Hearings in International Arbitration – and What Voltaire Has to Do with It ?

Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, May 26th, 2020

Remote hearings are nothing new, but the COVID-19 crisis has forced international arbitration out of its comfort zone. Parties, counsel, and arbitrators must adapt to the new reality of conducting proceedings in the face of travel restrictions and social distancing measures. One particularly thorny question is whether and to what extent planned physical hearings that cannot be held due to the above-mentioned restrictions should be postponed, or be held remotely, using modern communication technologies. In a recent article published here, I take a step back from the immediate crisis and propose an analytical framework for remote hearings in international arbitration. In the context of the current pandemic and beyond, the article provides parties, counsel, and arbitrators with the relevant guidance on assessing whether to hold a hearing remotely, and if so, how to best plan for and organize it. The article also tests the risk of potential challenges to awards based on remote hearings, looking in particular at alleged breaches of the parties' right to be heard and treated equally.

Maybe unusually, the article begins with the opening lines of the poem "La Bégueule" from 1772 by the French philosopher Voltaire:

> *"Dans ses écrits un sage Italien*
>
> *Dit que le mieux est l'ennemi du bien;*
>
> *Non qu'on ne puisse augmenter en prudence,*
>
> *En bonté d'âme, en talents, en science;*
>
> *Cherchons le mieux sur ces chapitres-là;*
>
> *Partout ailleurs évitons la chimère.*
>
> *Dans son état heureux qui peut se plaire,*
>
> *Vivre à sa place, et garder ce qu'il a !"*

This poem is the reason why the proverb "the best is the enemy of the good" is often attributed to

Voltaire, even though the origin seems to be the Italian "*Il meglio è l'inimico del bene*."[1] The proverb is often cited as meaning that "people are … unhelpfully discouraged from bringing positive change because what is proposed falls short of ideal" and "[i]f we want to make progress, we should … seek improvement rather than perfection."[2] However, put in context, Voltaire's poem suggests quite the opposite. In "La Bégueule" Voltaire tells the story of a woman who is perpetually unhappy. According to the opening lines, when it comes to prudence, goodness, talent, or science, one should strive for excellence. Yet, for other matters, one should avoid falling for the illusion of constant improvement. Instead, one should stay put and "remain at one's place," the value of which is not to be underestimated.

The tension between the two meanings – the one typically attributed to the proverb and the other originally intended by Voltaire – is interesting. It highlights two rather opposing human approaches to uncertainty: on the one hand, a proactive approach aiming for improvement and embracing unknown situations even if they are not perfect; on the other hand, a cautious approach avoiding progress for the mere sake of it and at the risk of making matters worse. In current times of uncertainty due to the COVID-19 pandemic, we are facing many novel issues and often have to choose between being proactive or cautious. International arbitration is no exception. Among other things, parties, counsel, and arbitrators must assess whether and to what extent physical hearings that cannot be held due to the above-mentioned restrictions should (cautiously) be postponed, or (proactively) be held remotely using modern communication technologies.

Most steps in an international arbitration are done remotely nowadays, including holding case management conferences at the outset and/or mid-stream (often organized as telephone or videoconferences rather than as physical meetings) and exchanging written submissions via document share platforms. Possibly the last "pieces of the puzzle" that typically remain as physical meetings are hearings, either on the merits or on major procedural issues. But the current COVID-19 pandemic forces international arbitration practitioners to reconsider this point and assess whether those hearings, too, can be held remotely. Depending on its length, the current crisis has the potential of being a real game-changer if international arbitral tribunals, as well as national courts around the globe, become used to holding hearings remotely. Such a paradigm shift might be something that many arbitration users have wanted for some time.

The above-mentioned article takes a step back from the immediate crisis and proposes an analytical framework for remote hearings in international arbitration. Among other things, it discusses the importance to distinguish between different types of remote hearings. For instance, fully remote hearings, in which every participant is in a different location, raise additional questions compared to semi-remote ones, in which a main venue is connected to one or several remote venues. Moreover, remote legal arguments might require a different analysis from remote evidence taking. In the post-COVID-19 world, hearings might combine these different forms, with some parts of a hearing being held semi-remotely or fully remotely and others with physical meetings.

For all possible forms of remote hearings, parties and tribunals must assess the relevant regulatory framework, including in particular the law of the seat of the arbitration and the arbitration rules, if any. Some national laws or arbitration rules contain specific provisions on remote hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely.[3] Others do not contain specific provisions, and remote hearings will therefore be assessed against the backdrop of other provisions, such as the parties' right to a hearing[4] and the tribunal's broad power to determine

procedural matters.[5] The article finds that arbitral tribunals typically have the power to decide on remote hearings – either as granted under a specific rule, or as part of the tribunals' general broad power to conduct the arbitral proceedings as they deem appropriate.

However, the tribunal's power to decide on remote hearings is not without limits. The article discusses one important limit: the parties' agreement. If the parties agree on a certain conduct (i.e. to hold a remote hearing or not), absent specific circumstances, arbitral tribunals should follow the parties' agreement. The article also deals with the opposite situation, i.e. where one party requests a remote hearing while the other insists on a physical hearing. This situation raises delicate questions and arbitral tribunals have to balance the parties' right to be heard and treated equally[6] with its obligation to conduct the proceedings in an efficient and expeditious manner.[7] The finding of the article is that arbitral tribunals typically have the power of ordering remote hearings over the opposition of one party, but the exercise of that power requires careful consideration.

This balancing exercise must contain a multi-factorial approach, including, for instance, assessing the reason for, and content of, the remote hearing, as well its envisaged technical framework. The envisaged timing for the hearing and any potential delay if it is held physically, and a comparison between the costs for a remote hearing and a physical one might also be relevant. Among other things, the article addresses concerns often raised in the context of remote witness and expert testimony, namely, the alleged prejudice to the cross-examining party and the tribunal's supposed inability to assess the credibility of a remote witness or expert. Analyzing case law from around the world, the article finds that these fears are often overblown and typically can be counterbalanced by appropriate technological solutions.

The previous points emphasize the importance of careful planning and organization of remote hearings. Existing soft law instruments on remote hearings mainly focus on the actual set-up of remote hearings, but the article shows that the planning thereof may start much earlier. This includes considering specific language regarding remote hearings in the parties' arbitration agreements or the tribunal's first procedural order (of which sample clauses are suggested in the article).

Finally, the article also tests whether awards based on remote hearings withstand potential challenges in recognition/enforcement or set aside proceedings. Detailed analysis of existing case law from jurisdictions around the world shows no reported cases in which such challenges were successful. The article discusses the most likely grounds for challenges, namely, the parties' right to be heard and treated equally. It concludes that, absent specific circumstances, remote hearings in and of themselves do not violate any of these principles.

The assessment of remote hearings is a delicate issue and the analytical framework proposed in the article seeks to help parties, counsel, and tribunals in making this assessment. In the current COVID-10 pandemic and beyond, the choice between holding a remote hearing, possibly over the opposition of one party, or postponing it, illustrates the two opposing approaches, exemplified by the diverging interpretations of Voltaire's poem. Are we proactively striving for novelty, without fear of possible imperfections, or do we take a cautious approach, stressing both the benefits of the status quo and the risks of too radical a change?

In Voltaire's poem, the discontent woman eventually returns to her husband and lives a happy life, but not without taking a secret lover. Leaving aside questions of morality, and pushing the

interpretation of the poem to its limits, it shows that solutions cannot be found by imposing a principled approach, but are better if they are specific to each individual case, taking into account all relevant circumstances. In any event, the fact that many arbitral tribunals, as well as national courts, are growing their experiences with remote hearings is an opportunity that should not be underestimated. It allows users of international arbitrations – parties, counsel, and arbitrators alike – to increase their toolbox and find the best-suited solution for any given case.

References

?1 Susan Ratcliffe, Concise Oxford Dictionary of Quotations 389 (OUP 2011).

?2 Richard Susskind, *Online Court and the Future of Justice*, 89-90, 182 et seq. (OUP 2019).

See e.g. Dutch Civil Procedure Code, art. 1072b(4); UNCITRAL Arbitration Rules 2010, art. 28(4); London Court of International Arbitration (LCIA) Rules, art. 19.2; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules, s. 30.6. *Compare* Hong Kong International Arbitration Centre (HKIAC) Administered
?3 Arbitration Rules, art. 13.1; Court of International Arbitration at the International Chamber of Commerce (ICC) Rules, art. 24(4), App. V, art. 4(2), App. VI, art. 3(5); International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 20.2; Singapore International Arbitration Centre (SIAC) Rules, art. 21.2; Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Rules, art. 28(2).

See e.g. German Civil Procedural Code (ZPO), s. 1047(1); Swedish Arbitration Act, s. 24(1);
?4 Arbitration Law of the People's Republic of China, art. 47; SCC Rules, art. 32(1); UNCITRAL Rules, art. 17(3); ICC Rules, art. 25(6); SIAC Rules, art. 24.1.

UNCITRAL Model Law, art. 19(2); English Arbitration Act, s. 34(1); Swiss Private International
?5 Law Act, art. 182(2); HKIAC Rules, arts. 13.1, 22.5; ICC Rules, arts. 19, 22(2); ICDR Rules, art. 20.1; LCIA Rules, art. 14.5; SCC Rules, art. 23(1); SIAC Rules, art. 19.1, 25.3; UNCITRAL Rules, art. 17(1), 28(2).

See e.g. Dutch Civil Procedure Code, art. 1036; English Arbitration Act, s. 33(1)(1); French Civil Procedure Code, art. 1510; German Civil Procedure Code ZPO, art. 1042; Hong Kong Arbitration
?6 Ordinance, s. 46; Swiss Private International Law Act, art. 182(3); UAE Federal Law, art. 26; UNCITRAL Model Law, art. 18; HKIAC Rules, art. 13.1; SCC Rules, art. 23(2); UNCITRAL Rules, art. 17(1).

See e.g. ICDR Rules, art. 20.2; HKIAC Rules, art. 13.5; ICC Rules, arts. 22.1, 25.1; LCIA Rules,
?7 art. 14.4(ii); SCC Rules, art. 23(2); SIAC Rules, art. 19.1; UNCITRAL Rules, art. 17.1; Vienna International Arbitration Centre (VIAC) Rules, art. 28(1).

This entry was posted on Tuesday, May 26th, 2020 at 8:00 am and is filed under COVID-19, International arbitration, Remote hearings
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.