Kluwer Arbitration Blog

Advancing Abdel Wahab's Pandemic Pathway: Arbitral Justice as an Interposition Between the Twin Duties of Fairness and Efficiency

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In response to a query "whether an arbitral tribunal can order virtual proceedings where any of the parties to the arbitration does not consent?" posed during the drafting of the Africa Arbitration Academy Protocol on Virtual Arbitral Hearings in Africa, Professor Mohamed Abdel Wahab has now published a 6-point pathway ("Abdel Wahab's Pathway") that may be followed by arbitral tribunals when dealing with this issue.

Given that the question does not lend itself to a conventional approach, Abdel Wahab's Pathway is an ingenious intervention that focuses on the interplay between procedural rules and governing law of the arbitration. It considers three different scenarios:

1. where the procedural rules or governing law of the arbitration expressly refer to "in person" hearings on the merits and if "in person" under these rules/laws is synonymous with "physical appearance", Abdel Wahab suggests that the arbitral tribunals will not be able to take a decision to go virtual without the parties' consent. If the arbitral tribunal so proceeds, the risk of setting aside the award would be high;
2. where the procedural rules or governing law of the arbitration expressly refer to the possible use of technology and/or virtual hearings, for example, the UAE Federal Arbitration Law No.6 of 2018, expressly refers to the use of new technologies, Abdel Wahab suggests that the arbitral tribunal can proceed as it deems fit after careful consideration of the circumstances and the ability of the parties to reasonably present their cases. For this, no consent is needed from the parties, but a risk of challenge will always exist, though minimal in this instance;
3. where the procedural rules or governing law of the arbitration is silent on the issue and no direct inference can be made, Abdel Wahab suggests that the arbitral tribunal's power to proceed with a virtual hearing will be considered having regard to certain permissiveness under the *lex loci arbitri* or the governing procedural rules. He suggests relevant considerations to help the tribunal.

This post, while agreeing in large part, with Abdel Wahab's Pathway, provides the theoretical basis for a modified approach, which is anchored on the concept of arbitral justice as an interposition between fairness and efficiency of arbitration. It provides a five-question toolkit that may be administered by a tribunal faced with the issue of a party's failure to consent to virtual hearings.

Notably, the lingering concern by tribunals to ensure fairness in the arbitral process, often causes arbitrators to neglect their concurrent and equally mandatory duty to run the arbitration efficiently.

This concern, known colloquially as “due process paranoia”, is one of the interesting findings of the 2015 Queen Mary – White & Case International Arbitration Survey. The Survey defines “due process paranoia” as “a perceived reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully”. Arbitral tribunals, typically, may be circumspect when making case management decisions given that a delay (occasioning an increase in arbitration costs) is preferable to an enforcement risk to the arbitral award (see prior post by Remy Gerbay). Putting this in the perspective of virtual hearing, a recalcitrant respondent may decide to leverage the denial of an in-person hearing to claim its inability to present its case properly, invoking Article V(1)(b) of the New York Convention – relying on lack of accessibility to reliable IT facilities as a basis for its denial of a reasonable opportunity to be heard. In many instances, these are delay tactics to frustrate proceedings, and contribute to the excessive costs and duration of arbitration proceedings.

Efficiency, as an emerging defining value of arbitration, is the chord that lies between party autonomy and the tribunal’s power to ensure procedural economy. There appears to be a consensus within the international arbitration community that case management conferences would be conducted via tele or videoconferencing and a party who desires in-person meeting would have to justify the associated cost. See for example Article 24(4) of the ICC Rules, which provides that case management conferences may be conducted by video conference, telephone or similar means of communication, and imbues the arbitral tribunal with the power to determine the means by which the conference will be conducted, in the absence of an agreement of the parties. Likewise, tribunals are generally imbued with the powers to control proceedings and achieve efficiency in arbitration. For example, section 16(2) of the Nigeria Arbitration and Conciliation Act, empowers the arbitral tribunal to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

Given the continued tension between fairness and efficiency of arbitration, arbitral justice is the anchor for balancing this tension. Justice of the process should underlie any determination that is made by an arbitral tribunal including virtual hearing determination. Given that parties who agree to arbitrate, trade the technical procedures of the court for the speed and informality of arbitration, they should not expect the same procedures as those available in the court room.

One of the leitmotifs of arbitration is its justice-producing function as the process must be seen to provide comprehensive answer to the demand for arbitral justice – justice in the real and true sense of the word, as may be attested by a common but reasonable man that upon the facts as laid down, the arbitrator has done justice. Justice of the arbitral process should be at the heart of a virtual hearing determination and insulate the proceedings from potential enforcement risk. More so, it is now fairly settled that awards would not be set aside or denied enforcement because the tribunal had violated the parties’ due process rights, except where one of the parties is not heard at all or where the parties’ explicit procedural agreement is ignored. There is little or no data on cases where awards are set aside simply because the tribunal had been overly robust.

In England and Wales, Section 68(1) of the 1996 Arbitration Act 1996 allows a party to challenge an award in circumstances where there has been a ‘serious irregularity’ affecting the tribunal, the proceedings, or the award. Section 68(2) defines the term ‘serious irregularity’ by setting out an exhaustive list of situations that has caused or will cause substantial injustice to the applicant.

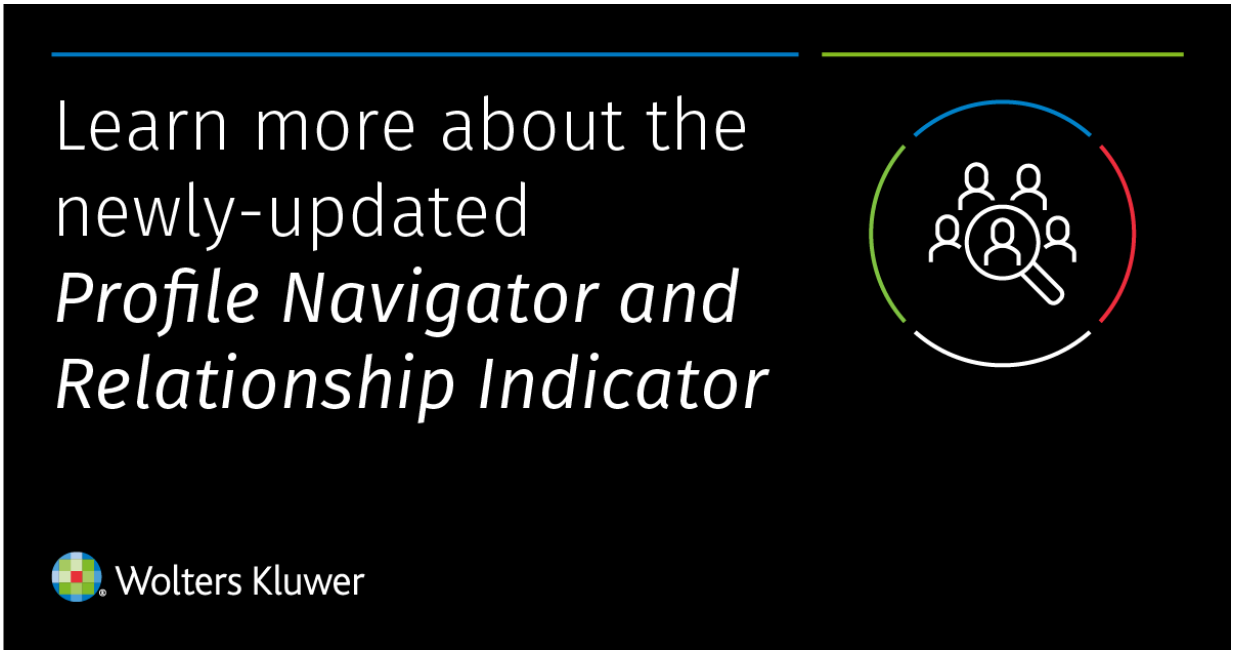
Toolkit for Virtual Hearing Determination

Whether a tribunal should order virtual proceedings should be treated on a case-by-case basis conducting a realistic assessment of the enforcement risk to the award, balancing this with the need to shield the efficiency of the process against dilatory tactics, and achieving justice, which is the hallmark of the process. Most institutional arbitration rules, including Rule 17 of the UNCITRAL Arbitration Rules, obligate an arbitrator to "provide a fair and efficient process for resolving the parties' dispute." Similarly, section 15(2) of the Nigeria Arbitration and Conciliation Act provides that where the rules contain no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.

Having the notion of justice in mind, an arbitral tribunal who is faced with the issue of deciding whether to order virtual hearing where one of the parties does not consent, should consider the five-questions toolkit for virtual hearing determination (set out below) and where the five questions are answered affirmatively, the tribunal should act boldly, without excessively worrying about due process.

1. Are the parties represented by sophisticated or experienced counsel?
2. Have the parties been given reasonable opportunity to make submissions on the issue of virtual hearing?
3. Will the virtual hearing ensure that parties are able to present their case and no prejudice will be suffered by any of the parties?
4. Is the case suitable for virtual hearing taking account of cost, location of the parties, subject-matter of the dispute, etc.?
5. Is virtual hearing or use of technology not expressly prohibited by the mandatory governing law of the arbitration and the parties' agreement?

This five-question toolkit builds on Abdel Wahab's Pandemic Pathway, and is bolstered by a theoretical ballast, rooted in the concept of arbitral justice. Parties may however sidestep the use of the toolkit by designing their own efficiency paradigm and exercising party autonomy through express provisions in their underlying agreement to exclude virtual hearing.



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