

Healthy Virtual Hearings

Kluwer Arbitration Blog

July 17, 2020

Sophie Nappert (3 Verulam Buildings) and Mihaela Apostol (ArbTech)

Please refer to this post as: Sophie Nappert and Mihaela Apostol, 'Healthy Virtual Hearings', Kluwer Arbitration Blog, July 17 2020, <http://arbitrationblog.kluwerarbitration.com/2020/07/17/healthy-virtual-hearings/>

The travel restrictions and social distancing measures imposed by the COVID-19 pandemic have brought about an exponential increase of virtual get-togethers, including hearings via video conferencing in both litigation and arbitration proceedings.

Courts and tribunals in England and Wales reported an increase of audio hearings by over 500% and video hearings by 340% during the period 23 March – 6 April 2020. Similarly, arbitral institutions and hearing centres registered a high demand for virtual hearings: Seoul IDRC reported a rise by 500% of virtual hearings and by 460% of days of hearings held virtually. Also, 85% of the hearings booked in HKIAC cases in April and May 2020 employed remote communication tools.

In a world stunned by COVID-19, the international arbitration community united in its efforts to provide users with nearly-uninterrupted effective dispute resolution services. The SCC offers its platform free of charge for ad hoc arbitrations; Arbitration Place launched Arbitration Place Virtual, an online platform developed to accommodate virtual hearings; a group of arbitration practitioners developed a resource website, virtualarbitration.info, which compiles news and experiences on the conduct of virtual hearings; the ICC prepared a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic; Africa Arbitration Academy prepared a Protocol on Virtual Hearings in Africa; a group of six international law firms released a Protocol for Online Case Management in International Arbitration (currently undergoing a consultation process in the community).

Little has been said, however, on the physical and psychological challenges presented by the sudden omnipresence of video conferencing in professional life, particularly for long periods of sustained concentration and focus such as hearings. These challenges are real, and they are scientifically documented. According to a survey conducted in March 2020 by researchers at Keio University (Tokyo), 35% of online workers reported that their mental health had deteriorated as a result of working remotely amidst the COVID-19 lockdown. Amongst the factors that were found to lead to health deterioration were the lack of transition between work and personal lives, as well as reduced physical activity and difficulty in communicating with co-workers.

In a BBC interview published in April 2020 on the topic of video conferencing, Gianpiero Petriglieri, an associate Professor at INSEAD, stated that:

“Our minds are together when our bodies feel we’re not. That dissonance, which causes people to have conflicting feelings, is exhausting. You cannot relax into the conversation naturally.”

Professor Petriglieri puts his finger on a crucial factor: the gap between the physical and the virtual, which our minds find unsettling and our bodies exhausting.

Suzanne Degges-White PhD, Professor at Northern Illinois University, in an interview for USA Today added that:

“When we’re on all these videos calls all day long, we’re kind of chained to a screen (...) It’s just psychologically off putting. I’ve got to show up again but the thing is, we’re not really showing up anywhere.”

Dr Degges-White echoes another gap: the sentiment of isolation that follows pressing the “Leave meeting” button to find oneself alone and without the informal debriefing that often accompanies the aftermath of more formal gatherings – albeit it is to be expected that this aspect will become less pronounced as social distancing measures are relaxed.

The thoughts underpinning this post are the following: There is life after COVID-19 and that life will continue to include virtual hearings as an option for the users of arbitration, with attendant costs savings. It is therefore important to get as

comfortable as possible interacting virtually. Lack of comfort for the legal team during hearings means a struggle to achieve focus and persuasiveness. Similarly, the quality of the tribunal's decision-making will suffer from physical and mental fatigue.

High-quality advocacy and decision-making are key to the future of cutting-edge, focused, efficient arbitration proceedings, whether virtual or not. This hinges on our ability to move seamlessly and with ease from the physical to the virtual. This process of familiarisation starts by gaining an awareness of the challenges of virtual, video-based proceedings on the body and mind. We set out some of these challenges below.

Issues

▪ Physical tiredness

Probably the first challenge experienced by participants in video gatherings is the physical tiredness caused by eye fatigue and a limited ability to move. In a traditional hearing, attendees have some flexibility to move around the room, turn to their colleagues, or shift their gaze to different focal points. In a video context, participants become headshot talkers who stare continuously at the screen, concerned to even get up for a cup of coffee for fear of being perceived as distracted or uninterested.

In a video environment, our peripheral vision, which helps us notice objects and movements outside the direct point of vision, is much less used. Instead, we engage 'laser vision', which is focused towards one single area of interest. This is due to the 'shrinking of visual data' from a conference-room size area of visual information to a 19- to 34- inch screen. We also feel the need to stare at the camera to confirm our engagement in the conversation.

▪ Mental challenges

Participants in prolonged video calls face additional challenges. Because the camera is focused on the upper body, our minds make extra efforts to read non-verbal clues, searching for the other pieces of the complex puzzle that constitutes

physical human interaction. Our minds naturally look for and rely on those signs in our conversations to process the information that is being received. Since frequent video interaction in a professional setting is still new to most of us, we lack a frame of reference to read into non-verbal behaviour through a screen. Advocates, in particular, find the screen an obstacle to their traditional tools of persuasiveness: eye contact; facial expressions; even vocabulary need to be simplified so as to 'go through' the screen and impact the tribunal. Among other challenges, we note the increased self-awareness from seeing oneself on screen, dry and less engaging conversations or hurdles in coordinating with team members/co-arbitrators.

This phenomenon is exacerbated by the multi-person screens needed in a hearing. As the visual data is concentrated in a small area, our brain faces an increased cognitive load - reportedly *double* that of physical face-to-face interaction - presented by the multiple eye stimuli that appear on the screen. What used to be one single background (the four walls of the hearing room, for example) is now replaced by the impression of being in multiple rooms (with different backgrounds, lightings, qualities of the projected image) at the same time. This challenges our brain to read multiple stimuli at once and merge the heterogeneous visual parts of a single conversation into a coherent stream. Julia Sklar describes 'zoom fatigue' as follows:

"Multi-person screens magnify this exhausting problem. Gallery view—where all meeting participants appear (...) —challenges the brain's central vision, forcing it to decode so many people at once that no one comes through meaningfully, not even the speaker".

Conversations by video tend to be a single channel / tunnel communication. Debates, lively conversation or spontaneous interjections are a challenge given that on video we must take turns to speak. This leads to a dramatic reduction in human 'bonding' cues and to feelings of side-lining within an online group. Silent pauses present another challenge because they are magnified. They cannot be filled in with gestures, say gestures of understanding (leaning towards someone for example), or comfort.

Coordination with team members/co-arbitrators presents its own challenges. Often this is done in parallel with the main hearing, with Post-it notes being replaced by instant messaging chat rooms. This adds to the dissonance, or gap, referred to

above: these platforms are usually social, not professional, outlets. In a recent study by National Taiwan Normal University, involving 429 civil servants using instant messaging as part of their professional work, researchers concluded that the higher the level of online social anxiety of civil servants, the higher their perceived level of information overload and cognitive fatigue, which eventually can lead to reduced job engagement.

Screen/life balance

Our bodies and minds are equipped to adjust to change in their environment – even to radical change such as that brought about by COVID-19. The practitioners of international arbitration will find a way to cope with the transition of professional life to the (computer) screen. In order to allow familiarity to ease in and performance to remain high, it is important to recognise that the impact of video hearings on our minds and bodies is tangible and must be heeded. A good place to start is the case management conference: including a protocol for video hearing well-being that factors in shorter hours, more regular breaks and an ability to walk away from screens without fear of adverse inferences would address many of the concerns outlined above. Sticking to that protocol will improve the virtual hearing experience, and its outcome.