

Kluwer Arbitration Blog

Personal Takeaway from the Warzone: Organizing, Preparing and Attending a Two-Week Virtual Hearing

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Virtual hearings are not a new idea. The arbitration community only started to [seriously discuss the benefits and the logistics of having virtual hearings](#) in lieu of physical hearings when the world was put on pause by COVID-19 in around February 2020.

It is not easy to organize a virtual hearing, let alone all the substantive issues that legal representatives have to deal with at the same time. Reflecting on my recent experience as part of the counsel team in a two-week evidentiary hearing involving 11 factual and expert witnesses across eight cities (Hong Kong, Seoul, Nanjing, Singapore, Cayman Islands, San Francisco, San Diego and Wilmington), this article can hopefully answer some of the concerns surrounding the conduct and organization of virtual hearings.

Three Essential Components of Virtual Hearings

- **Video Conferencing:** Parties will be attending the hearing from various parts of the world by way of video conferencing (either IP-based or cloud based). An IP-based video conferencing is usually more stable and allows a smoother hearing. There are many applications designed for video conferencing and parties should be careful when deciding which one to use, given the heightened confidentiality and security concerns over the use of internet and applications these days which will be further addressed below.
- **Electronic Presentation of Evidence (“EPE”):** The Tribunal will give directions at the hearing and the EPE operator will pull up the documents from the electronic bundle to display on every participant’s screen through screen-sharing. Parties may seek help from their service provider to prepare an electronic bundle to be organized under each hearing bundle index as agreed between the parties. The service provider will be able to hyperlink each document to the respective entry in the hearing bundle indexes. Parties should allow sufficient time to resolve any technical issues.
- **Real-time Transcription:** A transcriber will be able to remotely provide real-time transcripts during the hearing and update both electronic bundle and hardcopy bundle at the end of the hearing every day. However, remote real-time transcription is more technically challenging and parties are recommended to conduct multiple tests prior to the hearing.

Suggestions on Organizing a Virtual Hearing

Once the parties know that there is a possibility of organizing a virtual hearing, the parties should come together immediately, and discuss which service provider they want to appoint as the operator of the virtual hearing. The parties should also work with the service provider to draw up a number of back up plans. On-the-ground support of a service provider is of paramount importance. Parties should check whether the service provider is able to provide technological support at each of the locations connecting to the virtual hearing.

It is important to bear in mind that the virtual hearing here contemplates a situation where the parties, due to travel restrictions, public health policy or otherwise, cannot come together and hold an in-person hearing. Some or almost all parties, advocates or witnesses will be located in different places and time zones. As such, it is important for the parties, Tribunal and service providers to come to an agreement as to appropriate sitting time.

The mode of participation of the parties should also be carefully considered. If there is differential treatment (i.e. where one party is appearing before the Tribunal in person whilst the other party is appearing virtually), that may give rise to arguments of “*equal treatment of the parties*” down the track. It is purely a point of fairness, and the maintenance of both the appearance and fact of fairness.

Virtual Hearing Protocol

In my view a Virtual Hearing Protocol is as important as the typical first procedural order because it governs the procedure and logistics during a virtual hearing. It is vital for both the Tribunal and the parties to agree on the mode and conduct of a virtual hearing upfront. This can be done by telephone or video conference and the agreed terms can then be set out in a Procedural Order as a framework for the Tribunal to operate within if and when issues arise during the virtual hearing.

Existing protocols and guidance notes addressing, *inter alia*, the procedure of witness examination, venue of the video conferencing, technical requirements and testing of the video conferencing, may be a good starting point of reference (see for example, discussions in previous post [here](#), [here](#) and [here](#)).

In addition, parties may want to consider the following issues:

- Hearing timetable: A higher degree of flexibility from the parties and legal teams are needed to accommodate any time zone differences between participants. Advance notice to call a witness is required to prevent delay during the virtual hearing. A well-designed hearing timetable should cater for this.
- Witnesses’ location and environment: With the benefit of hindsight, parties should perhaps agree in advance in the event the witnesses cannot testify in an arbitral institution in person, a suitable location for the witnesses to attend the virtual hearing (as opposed to purely at home) and the materials allowed to be placed in front of the witnesses, taking also into account any applicable lockdown measures in place.
- Testing of the virtual hearing: It is recommended that there should be at least 2-3 [test runs](#) – ideally, one between the parties to ensure all parties are content with the set up; another between the party and its own witnesses/experts to ensure that all are comfortable with the setting; and

one between the Tribunal and parties to familiarize the Tribunal with the virtual hearing set up. If possible, a floor plan setting out the exact placing of equipment in front of each member of the Tribunal and party should also be drawn up, since the equipment has to be readjusted every day at the beginning of the hearing.

- Pausing or terminating the virtual hearing: An instant contact method (such as a phone number from the Tribunal secretary) should be provided to the parties such that a request to pause the virtual hearing may be made to the Tribunal where needed. If possible, parties may want to agree and confer a wide discretion to the Tribunal to pause or terminate the virtual hearing, if and when the Tribunal deems necessary.
- Security protocol: As described above, given the increasing confidentiality and security concerns over use of internet and applications these days, parties should agree and establish a security protocol under which the service provider can allow participants to join the virtual hearing room. Password protected link plus a virtual waiting room will usually be sufficient. Of course, the protocol should set out clearly the steps for the service provider to vet the participants' identities.
- EPE operator: Ideally, an EPE operator should be familiar with the E-bundles, and therefore will be able to pull up the documents as and when a reference is made. However, parties may consider assigning a specific person familiar with the bundle to sit next to the EPE operator during opening submissions, cross examination and expert witness conferencing to facilitate EPE presentation.
- List of required equipment: This should be readily available from the service provider, although the recommended set up may not suit the parties' need. 3 screens are more than enough (1 for video conferencing, 1 for EPE and 1 for real-time transcript). Anything more could be quite confusing and potentially chaotic for an intense virtual hearing.
- Microphone and videoconferencing: Those who do not have speaking roles should turn off their microphone and video. This is particularly relevant at the time of expert witness conferencing since there can be 7 active speakers at one time (i.e. 2 experts from each party, 2 advocates from each party, and 3 Tribunal members).
- Delivery of electronic bundle and hardcopy bundle: It is vital to have electronic bundle for a virtual hearing since that is how EPE is carried out. Hardcopy bundles may not be necessary anymore. However, parties may want to make available at least one hardcopy for witnesses and/or experts if they do not testify within the arbitral institution as a safety blanket in the event that EPE does not perform normally due to connection issues.
- Simultaneous or consecutive interpretation: In general, I find consecutive interpretation to be more effective and smoother in the video conferencing setting due to slight delay in time of audio and visual delivery in video conferencing.
- Protocol for finalising transcripts and standard delivery time: Unlike the usual in-person hearing, parties may not get to speak with the transcriber before or after the hearing to adjust approach. It is therefore important to agree with the service provider a protocol for finalizing transcripts and their delivery time upfront such that parties and the Tribunal can plan their work ahead.

It goes without saying that parties will need to work continuously in implementing the above agreed terms in the time leading up to the hearing.

Concluding Remarks

Virtual hearing is very different from an in-person hearing and for sure, organization is more difficult. While a virtual hearing overall is likely more costly than an in-person hearing, such costs

would need to be balanced against the eliminated travel costs for multiple parties, advocates and witnesses. Also, legal teams may require more time and efforts to organize a virtual hearing to prepare for all eventualities arising from the uncertainties of technology.

Virtual hearings are also in some ways less user-friendly, as they require at least 2-3 onsite inspections to agree on the set up and to ensure everything runs smoothly. Issues like audio feedback, camera angle, availability of physical equipment (such as computers and screens) must be dealt with prior to the hearing. The time invested in doing so should not be underestimated.

That said, virtual hearings do have a number of advantages over in-person hearing. For example:

- Better teamwork: Unlike in-person hearings, if there is anything that a solicitor or client wants to discuss with the advocate, they can simply mute the microphone and turn off the video such that team members can discuss amongst themselves on certain point of law or fact arising from submission or cross examination, which definitely facilitates discussion and teamwork. However, participants should be mindful of etiquette and facial expressions as camera is on most of the time and virtual hearing should be treated just as seriously as an in-person hearing.
- No need for physical presence: This may be the greatest advantage as one does not need to travel abroad or commute to attend hearings in person. This will also suit witnesses and clients who are busy but nevertheless want to participate in part of the hearing.
- Ability to better read the bench and witnesses: In a virtual hearing, facial expressions, emotions and body language are magnified which helps the advocate and the legal team to better assess the demeanor of the witnesses and to read the bench.
- Usage of EPE gives a better view than a hardcopy bundle: EPE allows an advocate to focus the Tribunal and witnesses on what they exactly need to see, and to magnify or highlight exhibits, which is not viable with traditional hardcopy bundles. Original text and translated text of exhibits can be shown in split screen.
- Expert witness conferencing is more organized: Parties would have to be more disciplined to ensure that the microphones could clearly pick up what they say, which can make the overall conduct of the hearing more orderly.
- Unlimited number of attendees: Unlike in-person hearing where there is physical space constraint, it is possible to have as many attendees as one needs in a virtual hearing.

With further joint efforts between law firms, arbitrators, parties and service providers, virtual hearings will no doubt be more user-friendly and less costly. Once that is achieved, virtual hearings will likely become the new norm in the arbitration community.

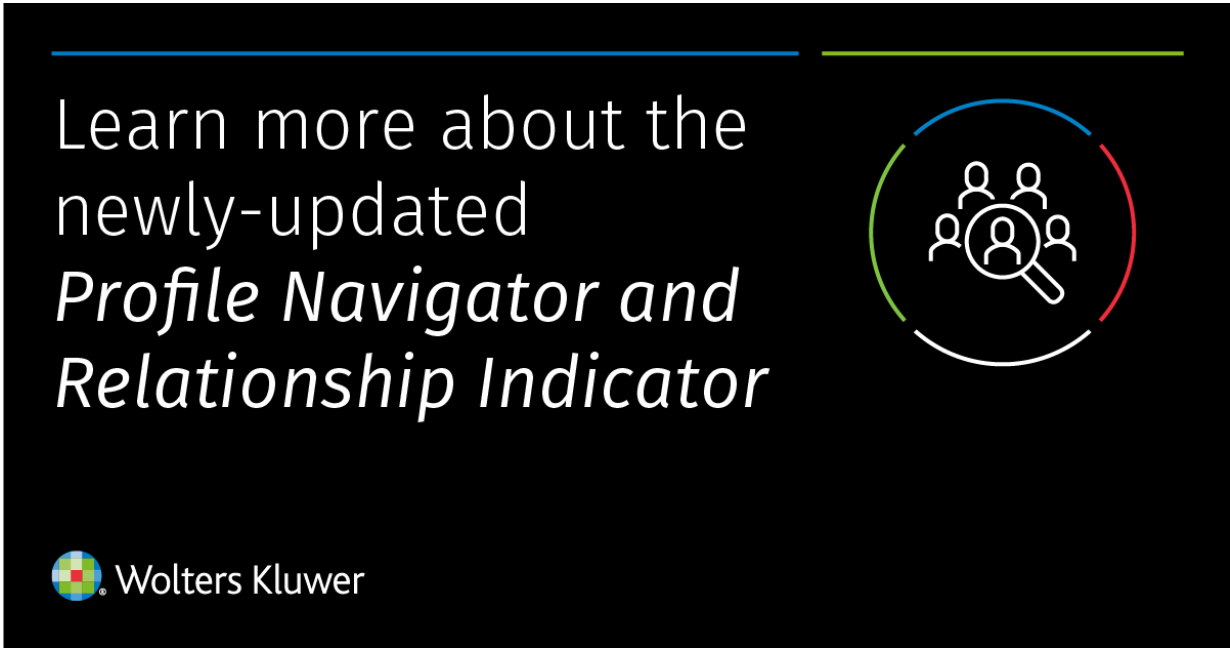
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