Kluwer Arbitration Blog

Are We Ready for the Brave New World of Virtual Arbitrations? Insights from the 32nd Annual ITA Workshop

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In normal times, the 32nd Annual ITA Workshop and Annual Meeting would have been an in-person summer event held in Austin, Texas. In this *brave* new world, the Workshop was completely reimagined to be held virtually via Zoom on 17 – 19 June 2020. Introduced by **Joseph E. Neuhaus** (ITA Chair, Sullivan & Cromwell), and co-chaired by **Dominique Brown-Berset** (Brown & Page), **Mimi Lee** (Chevron Upstream), **Prof. Loukas Mistelis** (Queen Mary University, London) and **Ank Santens** (White & Case), the Workshop was dedicated to exploring the ethical challenges arising in today's virtual arbitrations which have been galvanised by the COVID-19 global health crisis. This was an apt topic, as remote working has become the new norm for the world at large and, without exception, for the international arbitration community across the globe.

Necessity is the Mother of Invention

The Workshop kicked off with an inspirational keynote address delivered by **Justin D'Agostino** (Herbert Smith Freehills). He discussed the deep-rooted question of whether the advent of virtual arbitrations and the increased use of technology can create a positive future, unlike the worlds portrayed in the dystopian novels of Aldous Huxley's "Brave New World" or George Orwell's "1984".

Justin D'Agostino started by stressing that the real change caused by the pandemic has been to the arbitration hearing, not the arbitration process as a whole. In recent years, most arbitrations have been conducted online, with email being the main means of communication, with online depositories becoming preferred methods for filing evidence and with tribunals issuing awards by email often bearing electronic signatures. The exception has always been the hearing, the default being an in-person hearing – however far the travel, however complex the logistics, or however high the costs. Practitioners got used to the costs and environmental impact of having arbitrators, lawyers, witnesses and experts flown in from all around the world. Post-COVID-19, such costs will become increasingly difficult to justify.

In the face of this new reality, where the arbitration community has embraced virtual hearings almost overnight, many have expressed concerns about the ability to conduct online arbitrations without sacrificing due process, ethical conduct, or confidentiality. In Justin D'Agostino's view,

the opportunities and rewards lying ahead will outweigh the hesitations regarding ethical risks and the fears of lacking control over the process. And, while not all hearings will be conducted remotely, virtual hearings are definitely here to stay.

Ethical Challenges and Opportunities

The keynote speech paved the way for an interactive panel discussion moderated by **Sylvia Noury** (Freshfields Bruckhaus Deringer). To make for a vivid debate exploring multiple perspectives, panellists included private practitioners **Elie Kleiman** (Jones Day) and **Laurence Shore** (Bonelli Erede Pappalardo Studio Legale), in-house counsel **Gabriel Costa** (Shell Brasil Petróleo Ltda.), expert **Carlos Lapuerta** (The Brattle Group), and arbitrator **Lucy F. Reed** (Arbitration Chambers). The panellists focused their discussions on six challenges arising in virtual hearings, as discussed in more detail below. They also took questions through the Zoom Q&A chat and conducted polls from the active audience who, for the first time, participated remotely from numerous locations around the world.

1. **Due process and equality of arms**

The panellists opened the debate with observations that virtual hearings have amplified parties' tendencies to bring due process claims under Article V(1)(b) of the New York Convention, by invoking various grounds to support to their alleged inability to present their case. The speakers recognised that, while there are no doubt cases where a virtual hearing would not be appropriate, due process arguments should not be abused or used as insincere strategies to postpone hearings.

From an in-house perspective, Gabriel Costa probed whether, absent express language in the arbitration clause, there could be a reasonable due process expectation that a hearing *should* be held face-to-face. He considered that parties are now taking the time to put in place well-drafted arbitration clauses; that said, he noted he had never seen an arbitration clause imposing a face-to-face hearing as such hearings have been taken for granted as a matter of practice until this point. Moreover, while the current climate has provided fertile ground for parties to engage in so-called "due process paranoia", this likely would not last long as he would expect parties to move on and start engaging with virtual hearings as they would with any other procedural aspect of the case.

A more pressing concern appeared to be whether a tribunal's order to proceed with a virtual hearing could breach the level-playing field between the parties. Equal opportunities and equal treatment of parties are fundamental principles in international arbitration. Elie Kleiman noted that, just because we make assumptions that everyone has their own equipment for a virtual hearing or indeed that everyone can cope with technology, does not mean that this is the case in practice. The reality is that the hardships suffered by the parties may remain unknown until a later stage and it will therefore be difficult to predict the types of challenges that will be made to the enforcement of arbitral awards in the future.

2. **Conduct and ethics**

The psychology of shifting human behaviour in an online setting was raised several times throughout the Workshop. Would counsel present as more organised, process-driven, and civilised, leaving behind the theatrics? Or, on the contrary, would the virtual environment embolden counsel to act less ethically, for instance by coaching witnesses with messages during their testimony?

The response was that the critical focus should be on the conduct of the parties throughout the entire proceedings, not just the hearing. As pointed out by Gabriel Costa, there are still many instances where arbitrators are reluctant to sanction parties acting in bad faith or not in line with best practices. There is a stark difference between using the procedural flexibility of the system and tolerating abuse. If the new virtual space could lead to a refreshed approach, that would be welcome.

From the private practice perspective, Elie Kleiman and Laurence Shore agreed that the rise of virtual arbitrations has seen increasing collaboration between parties, perhaps due to the need to agree extra protocols for the smooth running of the hearing. In an ideal world, however, cooperation between parties should become an obligation rather than an aspiration. Therefore, what remains crucial is a proactive and organised panel of arbitrators taking command of the proceedings early on and putting in place the organisation and process that a remote arbitration requires. Lucy Reed observed another positive behavioural change in arbitrators who, conscious of constantly being seen on screen, may be more incentivised to be proactive and focus their full attention to the proceedings.

3. **Examination of experts and factual witnesses**

By far the most hotly debated theme of the Workshop was how to ensure a meaningful examination of experts and witnesses by video-link. As an expert, Carlos Lapuerta viewed giving evidence virtually as particularly difficult given the risk of having limited visual cues from the tribunal. Expert witnesses want to connect with the tribunal, to gauge if their comments are understood, and to see if the tribunal is on track. On the other hand, arbitrators and counsel may themselves not see the expert's body language, particularly movements of their hands and feet, which are often indicators of reaching a tricky point in their testimony. A solution could be a feature to zoom in and out or ask the witness to sit farther away from the camera. Virtual hearings may also lead to experts having more leeway to avoid giving sufficient context or exaggerate their cases, especially if the option of hot-tubbing is limited or non-existent.

As for factual witnesses, the concern was whether anything should be done differently when preparing for a virtual hearing. As some speakers mentioned, parties need to ensure that their witnesses are prepared emotionally and psychologically, and that they understand their role in giving testimony. Particularly, factual witnesses should not treat the remote testimony as a presentation or a call but appreciate the heat and responsibility of the moment, which might be minimised by the virtual setting.

Linking back to the theme of cooperation, Elie Kleiman finally stressed that practitioners also bear responsibility in reducing the scope of cross-examination, as much as they relish doing it. They should refrain from inflating the existing evidence and agree the facts and technical or quantum issues that are undisputed. Overall, this would achieve a balanced and qualitative remote examination of the witnesses.

4. **Cybersecurity and confidentiality**

The use of virtual hearings may come with inevitable trade-offs such as technological shortages and cybersecurity issues, risking the confidentiality of the arbitration proceedings. The overall view was that, in time, these would become a lesser concern as platforms become better encrypted and more advanced. To this end, guides to best practices for virtual hearings have started to emerge, such as the Seoul Protocol on Video Conferencing in International Arbitration (discussed in another blog post) and the Guide to Good Practice on the Use of Video-Link under the 1970 Hague Evidence Convention. One question for debate was who has responsibility for ensuring the security of the hearing. As a clear-cut answer may not exist, this should be discussed before the hearing and not left to the award enforcement stage. Elie Kleiman also pointed to the costs associated with the technical and security support, which in his view should not rest solely with the parties and arbitrators but also with the arbitral institutions.

Despite technological advances, a particular sticking point remains the inability to see the reactions around the hearing room. Laurence Shore warned that counsel not having a sound feeling of the arbitrators' reactions to the evidence and submissions will be a continuing reality of virtual hearings. The result may be the revelation that ultimately, the better argument is the one presented on paper, leading to a shift when deciding what arbitrators should focus on in the papers and what really needs to be presented at a hearing.

5. **Carbon footprint and costs**

The costs and environmental impact of international arbitrations have been intensely criticised in recent years. In this regard, Sylvia Noury referenced the "Green Pledge" and the growing efforts to actively reduce the carbon footprint of international arbitrations (discussed in another blog post). Indeed, there could be a silver lining to this global crisis and, while the social and cultural trade-offs are regretful, the environmental benefits of limiting international air travel for a hearing are immense. Lucy Reed particularly flagged those unsatisfactory situations where a witness needs to fly half around the world for a half an hour examination. By contrast, where the witness would be on stand for three days, the approach would be entirely different.

6. **Increased diversity and the future of international arbitration**

When asked to crystal ball gaze into the future of international arbitration, the panellists were optimistic. Gabriel Costa advised that this should be a time for reflection, as sometimes it is easy to lose sight of what the process actually serves. Whether one is dealing with a small commercial dispute or a large investor-State arbitration, parties should consider the dispute's collateral impact on their business and assess it as a commercial, rather than legal, matter.

In light of the transition to virtual hearings, Elie Kleiman projected more diversity in the arbitral community, particularly more opportunities for the younger generation of lawyers who are more open to and familiar with using online facilities for dispute resolution. Lucy Reed also predicted an emerging preference for the partial virtual hearing – one that would be equally fair and secure, but

more efficient, less expensive, and with lower carbon emissions.

Will Arbitration Ever Be the Same Again?

Circling back to the opening speech, there is no doubt that the switch to virtual hearings would have become a reality in the years to come. COVID-19 has simply been the catalyst accelerating the pace of change. In the post-pandemic world, many practitioners may revert to former practices, but the general receptiveness to reconfigure the practice of arbitration hearings has shifted. As many times advocated at turning points in history, the lesson going into this new world is to never let a good crisis go to waste.

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