Kluwer Arbitration Blog

Asynchronous Hearings: The Next New Normal?

Maxi Scherer (WilmerHale & Queen Mary University of London) · Wednesday, September 9th, 2020

Once one gets past the fact that the word “asynchronous” is impossible to pronounce or spell, it is an interesting concept, including for international arbitration. The Oxford English Dictionary defines it as “not existing or occurring at the same time, not coinciding in time.” If you think about TV shows, for instance, some are broadcast live (i.e., the event happens synchronously, at the same time as the you see it on TV), but most programs are pre-recorded. The moment when you watch it and the moment when the show was recorded are not at the same time. They are asynchronous.

This blog post discusses whether asynchronous participation in hearings will be the next New Normal. Arbitration practitioners are currently getting used to the existing New Normal of remote hearings. Even though remote hearings have been around for some time (ICSID, for instance, announced that in 2019 the majority of its hearings and sessions were held remotely, and the Seoul Protocol on Video Conferencing in International Arbitration was finalized before the start of the pandemic), COVID-19 has propelled the use of videoconferencing and other technology into the arbitration mainstream. For instance, 85% of HKIAC hearings in April and May 2020 required some form of remote hearing services. Hybrid or remote hearings – often (wrongly in my opinion) called “virtual” – have been discussed extensively in past months, including here, here and here.

In a recent UNCITRAL webinar, I was asked to consider how technology could further change our practice as international arbitration lawyers in the years to come. The video of the talk can be found here. I addressed the topic by discussing whether remote hearings could be taken to the next level, allowing for some parts to be held asynchronously. Many steps in international arbitration are already asynchronous: the filing of written pleadings (typically in subsequent rather than simultaneous submissions) and procedural correspondence (today mainly in form of emails) are just two examples. But when it comes to oral hearings, the exchange of arguments and evidence is typically done on a synchronous basis: either in-person (when everyone is in a hearing room together) or remotely (when participants connect at the same time via a video platform).

An asynchronous participation in an oral hearing could take the form of a video recording of the counsels’ opening statements, for instance. They could be made available to the arbitral tribunal some time in advance of the evidentiary hearing (which could still take place in a synchronous fashion). The arbitrators could watch the opening statements at different times, at their leisure. They could also watch them as often as they wish, going back to specific points they are particularly interested in. The tribunal members could prepare the evidentiary hearing, check the oral submissions against the written submissions and evidence already on file, and possibly even pre-deliberate some questions in advance of the evidentiary hearing.

What would be the possible advantages and disadvantages of such a scenario? First, on the positive side, the use of asynchronous oral statements could arguably further an in-depth understanding of the case by the arbitrators before attending the evidentiary hearing. As detailed above, being able to watch the opening statements as often as one wishes, rewind to relevant sections and discuss points with fellow co-arbitrators may promote an enhanced understanding of the case.

Second, any form of asynchronous participation significantly eases questions of timetabling – or rather completely takes this issue off the table. By definition, if you can record or watch a video when you please, then there is simply no need to coordinate timetables at all. Counsel and arbitrators, struggling to find common hearing dates in their busy schedules, would have no excuse to delay proceedings if participation could be done asynchronously.

Third, experience with remote hearings in recent weeks and months has shown that one major issue relates to the participants' different time zones. Many remote hearings protocols, such as from the ICC or VIAC, and best practice guidelines by practitioners and regional initiatives, advise to take this issue into account. In my own experience, important time zone differences can cause significant organizational problems, resulting either in shorter hearing days (and thus a longer overall length of the hearing) or uncomfortable log-in times for some participants. In one arbitration, a case counsel at ICSID had to regularly get up at 3am to attend a hearing. In a remote hearing scenario using asynchronous participation, again, this problem simply goes away.

Having had a chance to discuss these thoughts recently with Chiann Bao, a fellow international arbitrator, she commented: "The majority of the arbitral process is asynchronous already and by extension why should hearings not also be conducted sequentially? I would think that concerns as to not being able to react in "real-time" could probably be addressed by well thought out case management procedures."

However, while one can certainly think of other advantages, there are also possible downsides. First of all, pre-recorded messages are often less engaging than live performance. At one of the 2020 LCIA Tynley on Zoom sessions, when I floated the idea of asynchronous hearing participation, one attendee noted half-jokingly that this reminded him of online training courses that he found terribly boring. Indeed, recording an opening statement in front of a camera is less exciting than speaking live before an arbitral tribunal. Counsel might also miss the tribunal's feed-back as to which part of their submission are most relevant, and feel less effective if they cannot gauge the tribunal's expression (even though the importance of "reading of the tribunal" is often overstated).

Moreover, a serious disadvantage of an asynchronous, pre-recorded presentation is that the listener cannot interrupt to ask questions. Sometimes, in a live scenario, a short clarification question might dispel misunderstandings and further a better understanding. More generally, many arbitrators find that the ability to ask questions of counsel during the oral hearing is essential. That said, one can think of ways to minimize this drawback. For instance, one could allow for tribunal questions at the outset of a synchronous evidentiary hearing, after the oral opening submissions have been previously provided asynchronously.

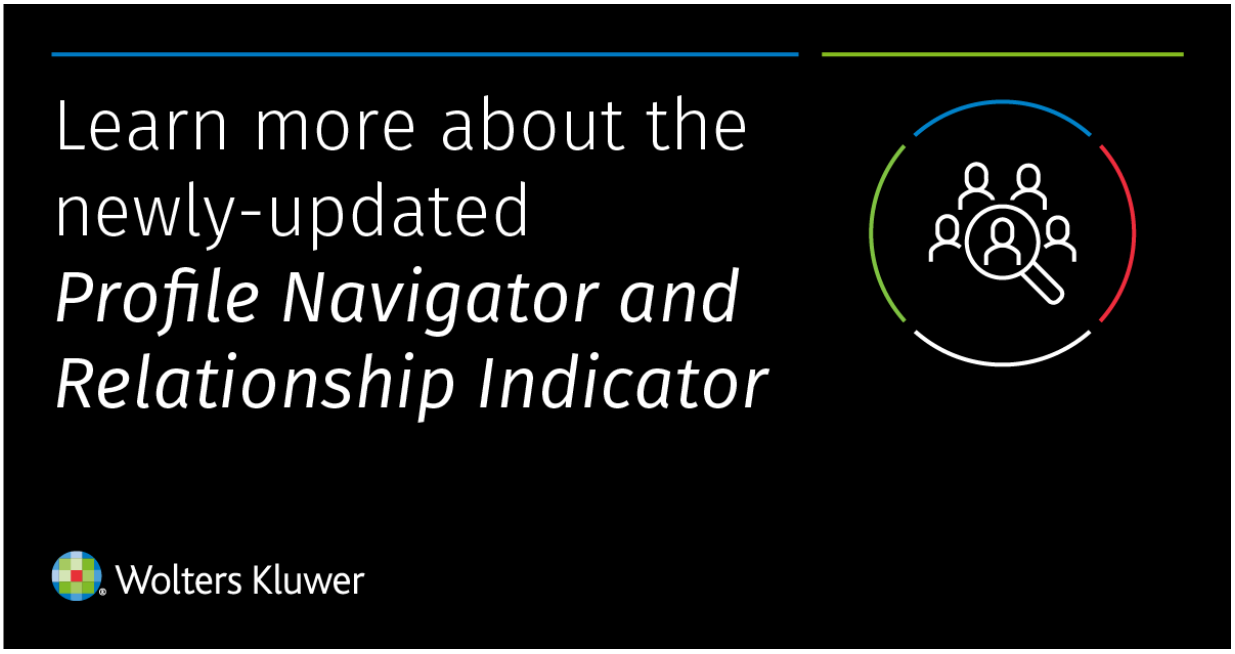
For the same reason (i.e. the absence of live questioning), asynchronous forms of hearing participation are not well-suited for the taking of evidence, such as witness and expert testimony. At least as currently practiced in international arbitration, parties expect to be able to ask questions of their witnesses in direct examination, and more importantly still, of the other side's witnesses in

cross-examination. It is difficult to see how these practices could be maintained in an asynchronous setting. Arbitrators typically also find it essential to be able to put questions to the witnesses and experts. One solution could be to limit witness and expert examination, as we currently know it. While there have been calls to limit oral testimony of witnesses and experts, including cross-examination (for instance in the so-called Prague Rules or Rules on the Efficient Conduct of Proceedings in International Arbitration), excluding them altogether seems too far-reaching in most cases.

In addition, and maybe most importantly, just like remote hearings, asynchronous hearing participation further reduces "normal" human interaction. A random exchange or smile at the coffee machine, or a courteous word when entering the hearing room, are sometimes just as important to ensure a good atmosphere between the participants as anything that is done during the hearing.

Many arbitration practitioners will find the hypothetical scenario of asynchronous hearings daunting and remain sceptical about their feasibility. While I share some healthy reticence towards "crazy new ideas," let me also point out that others have even more far-reaching suggestions. In his book Online Courts and the Future of Justice, Richard Susskind advocates eliminating entirely synchronous hearings for national court litigation. Given the complexity of matters typically involved in international arbitration, such a radical solution might be a bridge too far. Nonetheless, his idea has already found followers in national courts, such as in Singapore where the State Courts Centre for Dispute Resolution (SCCDR) is experimenting asynchronous court dispute resolution hearings by email (aCDR) as part of various initiatives amidst the COVID-19 pandemic. Courts in China, including the Hangzhou Internet Court, are also reported to have developed asynchronous court trials.

Finally, maybe this is a generational question. I realize that when I wrote a couple of paragraphs above that live, synchronous, in-person human interaction is the "norm," I have outed myself as someone who grew up before mobile phones and the Internet. Lise Alm, Head of Business Development at the SCC and one of the excellent co-panellists at the UNCITRAL webinar mentioned above, pointed out that younger generations have a very different way of communicating. She is right, of course. Anyone who has lived with teenagers will know that they simply do not use synchronous communications, such as phone conversations, anymore. They have been replaced by asynchronous chats on various social media platforms or text messages. And this is not even taking into account a generation of lawyers who will have grown up post-COVID-19. So maybe, after all, asynchronous hearings will be the next New Normal!



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