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Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective

Saniya Mirani · Tuesday, November 17th, 2020 · Young ICCA

Before the Covid-19 pandemic, virtual witness testimonies were prevalent in specific instances, such as when witnesses could not reach the venue because of illness. Article 8.1 of IBA Rules on Taking of Evidence in International Arbitration permits virtual testimony only at the discretion of the tribunal. The [Commentary on the Rules](#) establishes that the tribunal's decision to allow video-conference should depend upon the "sufficiency" of the reasons given.

The uncertainty of the return of normalcy has forced the parties to adapt to a new normal, by relying entirely on virtual hearings, including virtual witness testimonies. Arbitral institutions are organizing virtual hearings using [various video-conferencing platforms](#). As parties get more comfortable with technology and realise the associated time/cost benefits, virtual witness testimonies are likely to [become more prevalent](#).

Accordingly, there is a need to analyse the manner in which procedural safeguards such as, "due process", would play out in virtual witness testimonies, in order to enable a [fair and proper hearings](#).

The exact contours of "due process" vary amongst national laws, but certain broad principles, including, the right to be heard and equal treatment of parties are universally accepted. While the principle of the right to be heard entails that each party should have an opportunity to present its case and defend against opposition's case, the concept of equal opportunity entails that a party should not be less favourably treated than its counterparty.

Understanding the prevalent due-process concerns

One prevalent due process concern is that witnesses may be coached using [concealed means of communications](#) during virtual witness testimony. Moreover, the credibility of virtual testimony, particularly in cross-examinations, has been questioned as the practice involves analysing [body language and non-verbal cues of the witness](#), such as eye gestures, gesticulation, and expressions, which becomes difficult during virtual hearings.

However, modern technology combined with [logistical best practices](#) has alleviated [these concerns](#). Using HD video quality ensures that facial expressions and body gestures are clearly visible. As opposed to an in-person hearing, video-conferencing provides a closer-up view of the witness and

allows for video replays (if recording permitted) for analysing body language. Through the installation of rotating or 360-degree view cameras, parties/tribunals may monitor the witness and ensure that he or she is not accessing other devices or persons for being coached. Separately, software applications/extensions may be used for blocking other web-pages for communication while the hearing is in progress.

These tech-solutions coupled with logistical best practices provided by the [Seoul Protocol on Video Conferencing in International Arbitration](#), (“**Protocol**”) address a majority of these concerns. The Protocol’s requirements include: a reasonable part of the interior of the (witness’s) room to be visible and giving testimony on an empty desk, which would further eliminate risks of witness coaching. The safeguard to opt-out of the videoconference, if the tribunal deems it unfair to either party, ensures a safe back-up.

However, certain shortcomings of the virtual testimonies still need to be addressed. Virtual hearings may be more time-consuming in cases requiring [bulky documents to conduct cross-examination](#). Moreover, there are issues of unreliability of technology. For instance, the right to be heard may be impacted when the connection is lost during a cross-examination leading to the loss of momentum and [enabling the witness to re-evaluate their answers](#) in the extra time. Virtual cross-examination may also not be helpful if there are audio/video distortions/ freezing of images/ time-lags. Further, concerns regarding equal treatment may arise where one party presents evidence and cross-examines in person, while the counterparty is expected to take evidence by virtual hearing.¹⁾

A close-up view of the parties may also lead to [over-interpretation of the visible gestures or actions](#). For instance, a miniscule-time lag in answering a question or visibility of sweat on the face may be over-interpreted.²⁾

In my opinion, amidst these challenges, safeguarding the right of due process should be a dual responsibility of both the participants of the arbitral process (parties, arbitrators, institutions) and the courts enforcing the award. To minimize issues of unreliability/misuse of technology, parties (to the extent it can be afforded) should implement the logistical/technological best-practices, including installation of rotating cameras, communication blocking software, etc. Counsel should make a judgement call on whether to remotely take a clinching testimony, i.e., one which would affect the award. Tribunals may order to [opt-out of videoconference where connectivity issues persist](#).

If, however, participants fail to remedy due process breaches internally, courts must ensure that [grounds to challenge or resist enforcement](#) dynamically interpreted in order to address due process violations owing to unreliability/misuse of technology.

Witness Examination by Video in India

While the legislation is silent on video-conferencing, the recording of witness testimony through video-conferencing has been permitted by the Indian Supreme Court, where the presence of witness is required, but the witness cannot appear without an unreasonable amount of delay, expense or inconvenience. ([State of Maharashtra v. Dr. Praful Desai](#), (2003) 4 SCC 601.)

Accordingly, in cases where witnesses have had poor health conditions, financial burden, were

aged or resided abroad, testimonies have been taken through videoconferences. (*See The State of Maharashtra v. Chandrabhan Sudam Sanap*, 2018 SCC OnLine Bom 6576; *Zaishu Xie & Another v. The Oriental Insurance Company Ltd. & Others*, 2014 (207) DLT 289; *Amitabh Bagchi v. Ena Bagchi*, 2004 SCC OnLine Cal 93.) At the same time, the courts have given directions for conducting a videoconferencing examination including, (i) proper identification of witnesses; (ii) the appointment of a technical coordinator; (iii) ensuring access of documents to witnesses; and (iv) presence of an officer to ensure witness is not coached. The Court has further caveated that the cross-examinations should be finished in one-go, without granting adjournments. Although, High Courts have also noted the unsuitability of virtual cross-examination where there are voluminous documents. (*R Shridharan v. R Sukanya*, 2011 (2) MWN (Civil) 324.)

Likewise, the courts have been largely positive towards video testimonies in arbitrations. The Calcutta High Court directed a witness present in Russia to present himself for a cross-examination through videoconference. (*Saraf Agencies Private Limited v. Federal Agencies for State Property Management*, 2018 SCC OnLine Cal 5958.) The Madras High Court went one-step further and encouraged parties from different parts of the country to conduct entire arbitration via videoconference. (*Axis Bank v. M/s Nicco UCO Alliance Credit Limited*, 2017 SCC OnLine Mad 33928.) More recently, the Delhi High Court, in the case of *Rategain Travel Technologies Private Limited v. Ujjwal Suri*, recognizing the possibility of conducting virtual arbitral proceedings, stated, “*the arbitral tribunal may consider conducting the hearings and recording of evidence by video-conferencing, if considered feasible*”. (*Rategain Travel Technologies Private Limited v. Ujjwal Suri*, High Court Of Delhi, O.M.P (MISC) 14/2020, May 11, 2020.)

In light of these judicial precedents, it may be reasonable to conclude that the Indian courts may continue taking a positive view towards video testimonies in arbitration. Taking inspiration from above-cited decisions, in order to further eliminate risks of witness coaching, either the representative of an institution or the counterparty may be present in the same room as witness. Moreover, parties should be encouraged to keep the virtual cross-examinations brief and conduct them in one session.

Enforcement of awards in India

For due process purposes, a party may challenge or resist the enforcement of an award on grounds of, inability to present one’s case or the tribunal’s lack of compliance with the procedure contemplated in the agreement.

A common instance where an award may be successfully challenged or resisted on the ground of inability to present one’s case, is where no opportunity was given to a party to deal with an argument which goes to the root of the case. (*Vijay Karia and Others v. Parysmian Cavi E Sistemi SRL and Others* (“Vijay Karia”), 2020, SCC OnLine SC 177; *Ssangyong Engineering and Construction Company Limited v. NHAI* (“Ssangyong”), 2019 SCC OnLine SC 677.) In *Vijay Karia* case, the Supreme Court propounded that the test to determine if a party has been unable to present its case is – “*whether factors outside the party’s control have combined to deny the party a fair hearing.*”

Further, the ground of violation of “public policy” may also be invoked by courts *sua sponte* to set aside or resist enforcement. However, the Indian Judiciary has been taking a pro-enforcement

approach by narrowly interpreting the ground of public policy.

Given the pro-enforcement approach of the Indian judiciary, the courts are unlikely to set-aside/resist enforcement of domestic/foreign awards, unless there has been an “apparent” due process violation during virtual testimony. Accordingly, enforcement challenge to an award based on virtual witness testimonies would be successful when fairness has been visibly impacted, and not when grounds made out are hyper-technical. In my opinion, such a standard, although high, aims to strike a balance between fairness and ensuring that parties do not indulge in speculative litigation. The standard would also assist in reducing **due process paranoia**, i.e., “a perceived reluctance by arbitral tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully”.

Conclusion

The due process concerns in virtual testimonies are yet to be fully resolved. In my opinion, until such resolution, the decision to take virtual testimonies should be taken carefully – technological capabilities of participants, importance of witness, are relevant considerations in such decision-making. Furthermore, in my opinion, where virtual testimonies are taken, implementation of technological/logistical solutions coupled with vigilance of courts is necessary to avoid due process concerns.

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References

See, for instance, [Sino Dragon Trading Ltd](#) (“Sino Dragon”) v. Noble Resources International Pte Ltd (“Noble Resources”) [2016] FCA 1131. Sino Dragon argued that the technical glitches arising in witness testimony given via video-conference violated principles of equal treatment of parties, opportunity to be heard and public policy. The Federal Court of Australia held that there was no lack of equality because, (i) the mode of taking evidence was chosen by Sino Dragon; (ii) the technical difficulties were due to act/omission of Sino Dragon; (iii) the evidence of Sino Dragon was not excluded because of technical difficulties; (iv) the technical difficulties more acutely disadvantaged Noble Resources as they arose while cross-examination of Sino Dragon’s witness. Overall, no “*real unfairness*” was caused to Sino Dragon, and hence the challenge was unsuccessful.

[Stuke v. ROST Capital Group Pty Ltd](#) [2012] FCA 1097, where, in context of giving evidence by video-link, the Federal Court of Australia discusses as follows: “*And what if there is a delay in giving a response to a critical question? It may be impossible to tell whether the delay is due to evasiveness or uncertainty on the part of the witness or merely to difficulties with the transmission.*”

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