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Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective

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On 6 July 2020 the Swiss Federal Tribunal has issued a decision in which it has held that the COVID-19 pandemic does not serve as a sufficient justification to impose virtual hearings in state court proceedings against a party's will. With a view to field of arbitration, the question thus arises whether the respective reasoning of the highest Swiss court may have any impact on the practice of arbitral tribunals seated in Switzerland.

In this post we submit that the reasoning of the Swiss Federal Tribunal is based on specific state court related premises which do not properly reflect the flexibility and further features of arbitration proceedings. Therefore, the decision of the Swiss Federal Tribunal cannot be transposed to international arbitration and arbitral tribunals may, under specific circumstances such as the COVID-19 pandemic, order the holding of virtual hearings against the will of a party.

Background

It was interesting to see how differently state courts on one hand and arbitral tribunals on the other hand reacted to the lockdowns imposed by the COVID-19 pandemic in large parts of the world in spring 2020. Whilst local courts were forced to temporarily suspend operations, numerous arbitral tribunals swiftly adapted to the new normal by shifting the proceedings into virtual space. Accordingly, various international arbitration institutions, including the ICC, have been proactively encouraging arbitral tribunals to conduct virtual hearings. The implementation of remote settings was straightforward where both parties were in consent with virtual proceedings.

But can the COVID-19 pandemic serve as a sufficient justification for arbitral tribunals to impose the holding of virtual hearings on a party actually insisting on a physical interaction with the witnesses?

Swiss arbitration law does not address this issue. A party having objected to the holding of a virtual hearing may feel that it was not in a position to properly present and develop its case on a remote basis. It may therefore be inclined to challenge the arbitral award on the basis of a perceived violation of its right to be heard pursuant to Art. 182(3) of the Swiss Private International Law Act ("**PILA**").[1)] Arbitral tribunals should, therefore, refrain from imposing virtual hearings without

regard to due process considerations.

Yet, these fundamental procedural rights need to be balanced against the principle of procedural efficiency.[2] Despite the reported breakthroughs in the development of COVID-19 vaccines, it remains unclear at what point in time unrestricted travelling and physical contacts will become possible again. It can thus not be excluded that a party's insistence on holding a conventional hearing will unduly delay the respective arbitration process.

The decision of the Swiss Federal Tribunal

The Swiss Federal Tribunal has recently addressed the conflicting interests of physical interaction and procedural efficiency in the context of state court litigation. In its decision DFT 146 III 194 dated 6 July 2020, the Swiss Federal Tribunal upheld the appeal of a party who had objected to the lower court's order to virtually conduct the main court hearing via Zoom. The highest court in Switzerland found that, contrary to other instances for which the law explicitly provides for the possibility to use electronic means, there is no legal basis in the Swiss Civil Procedure Code ("**CPC**") to hold the main hearing virtually against the will of a party (DFT 146 III 194 cons. 3.2 and 3.6.). To underline this finding, the Swiss Federal Tribunal pointed out that the publicity of civil proceedings (Art. 54 CPC) could not be ensured when hearings were to be held electronically (DFT 146 III 194 cons. 3.5.). However, the current project for the revision of the CPC foresees the possibility to take certain evidence by video conference.

Comment

Yet, it does not appear that the reasoning of the Swiss Federal Tribunal can be directly transposed to the field of international arbitration. Quite to the contrary, the publicity of state court proceedings is often one of the concerns leading parties to choose the largely confidential arbitration proceedings over litigation (see Art. 44 Swiss Rules). Art. 25(6) Swiss Rules even explicitly provides that arbitration hearings shall be held *in camera* unless the parties agree otherwise.

Moreover, Swiss arbitration law as codified in chapter 12 of the PILA is known for its flexibility leaving a wide discretion to arbitral tribunals in shaping the proceedings.[3] This discretion is solely limited by the parties' common agreement, their right to be heard and the principle of equal treatment (Art. 182(2)(3) PILA).[4]

Accordingly and as opposed to the CPC, the PILA does notably not provide for a catalogue of constellations in which arbitral tribunals may make use of electronic means of communication, thereby implicitly excluding other applications. Hence, it does not appear that a party's right to a hearing necessarily implies the entitlement to physical interaction.[5] This seems to be even more so where the right to be heard must be weighed against the principle of procedural efficiency, such as in times of a pandemic.

It was on the basis of such considerations that the Austrian Supreme Court, in a recent decision,

previously discussed on the blog, came to the conclusion that the imposition of a virtual hearing against the will of an arbitrating party did not violate the right to be heard. In support of this finding, the Austrian Supreme Court referred to Art. 6 of the European Convention on Human Rights (ECHR) and pointed out that this provision not only grants the right to be heard but also the right to effective legal protection. It concluded that, in case of an impending standstill of the judiciary, video conferencing may be an effective way to reconcile these potentially conflicting principles.

The binding nature of the ECHR in Switzerland leaves no room for Swiss based arbitral tribunals to ignore considerations of this kind.[6)]

Moreover, the long-lasting reputation of Switzerland as a place for efficient and flexible arbitration proceedings gives additional reason to believe that the Swiss Federal Tribunal would be inclined to likewise consider virtual hearings to be compatible with the right to be heard. This expectation seems to be further supported by a general tendency in international arbitration to increasingly grant arbitral tribunals the competence to order the holding of virtual hearings if the circumstance so require.[7)] As from 1 January 2021, arbitral tribunals acting under the revised ICC Rules will even be explicitly authorised by the parties, after consulting them, to conduct "any hearing […] remotely by videoconference, telephone or other appropriate means of communication" (Art. 26(1) ICC Rules 2021).

It is to be expected that this forward-thinking approach will further strengthen the reputation of international arbitration as a flexible and effective means to resolve cross-border commercial disputes.

References

?1 *See* Saunders, Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration, in Calissendorff/Schöldström (eds), Stockholm Arbitration Yearbook 2020, Volume 2, p. 108.

?2 Art. 15(7) Swiss Rules; Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, p. 419 no. 1204.

?3 Liatowitsch, Schiedsgerichtsbarkeit: 12. Kapitel IPRG und das UNCITRAL Model Law on International Commercial Arbitration, in Bonomi/Ritaine (eds.), La loi fédérale de droit international privé: vingt ans après, p. 218 et seq.

?4 Stacher, Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz, Zurich 2015, p. 21.

?5 Scherer, Chapter 4: The Legal Framework of Remote Hearings, in Scherer/Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution, p. 418.

?6 Göksu, Schiedsgerichtsbarkeit, Zurich 2014, p. 695.

?7 Saunders, Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration', in Calissendorff/Schöldström (eds), Stockholm Arbitration Yearbook 2020, Volume 2, p. 108; Scherer, Remote Hearings in International Arbitration: An Analytical Framework, in Scherer (ed.), 2020 Journal of International Arbitration, Volume 37, Issue 4, p. 420 et seq.; see references cited in Gielen/Wahnschaffe: Die virtuelle Verhandlung im Schiedsverfahren, in SchiedsVZ 2020, 257, p. 262.

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