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Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future

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The COVID-19 pandemic continues to test nearly every industry and break the idea of "normal" in both our personal and professional lives. Even as large segments of the population receive vaccines and look forward to once again meeting friends, hugging grandparents and traveling to foreign countries, the international arbitration service industry has entered a new era of increased reliance on technology. Before the first reported case of COVID-19, major international arbitration institutions already began accepting the necessity of virtual hearings in certain situations. Guidelines for virtual hearings were officially announced with the escalation of the COVID-19 pandemic.

Here, we explore three widely cited "guidelines" and discuss ongoing developments focusing on addressing potential shortcomings of virtual hearings.

A Comparative Analysis of Virtual Hearing Guidelines

There is no shortage of information analyzing the benefits and concerns of virtual hearings in the COVID-19 era. Parties can undoubtedly save considerable time and expense by avoiding international travel. However, concerns have also been raised in terms of confidentiality, technological shortcomings and overall fairness.

The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (19 April 2020) ("ICC Guidance Note"), HKIAC Guidelines for Virtual Hearings (14 May 2020) ("HKIAC Guidelines") and Seoul Protocol on Video Conference in International Arbitration (18 March 2020) ("Seoul Protocol") were drafted to assist tribunals and parties when holding virtual hearings. While the guidelines share the same objective, parties should be mindful of the major differences between these guidelines.

We focus on three key considerations, including: (1) technology and cyber security; (2) examination of witnesses and experts; and (3) venue.

A Difference in Approach

Each of the three guidelines shares the same objective of assisting parties during virtual hearings. The actual approach, however, differs significantly.

The ICC Guidance Note focuses on issues that may arise as a result of holding hearings virtually and encourages parties to consider certain measures that promote efficiency during arbitral proceedings. Rather than submitting hard copies, for instance, the ICC Guidance Note recommends that tribunals encourage parties to communicate electronically to the fullest extent possible.

The HKIAC Guidelines also have the objective of promoting efficiency during arbitral proceedings, but encourages parties to use available resources of the institution. Particular services (i.e., video conferencing, interpretation, electronic bundling and presentation of evidence, etc.) are considered essential when organizing a virtual hearing. With these services, the HKIAC Guidelines reference resources that the HKIAC offers, including IP-based encrypted and cloud-based video conferencing.

The Seoul Protocol offers guidance concerning the logistical challenges presented by remote arbitration hearings. Its guidelines focus on default standards applicable to streamline video-conference proceedings. To avoid disruption, for instance, the Seoul Protocol mandates testing of all video conferencing equipment and that adequate backup equipment (i.e., cable back-ups, teleconferencing, etc.) is available for use.

Technology and Cyber Security

ICC Guidance Note

Parties are encouraged to come to an agreement regarding the minimum system specifications and technical requirements for virtual hearings. The ICC Guidance Note provides examples, including hardware equipment (not limited to display screens), high-resolution webcams and other software applications.

It is recommended that parties first determine whether they reached a consensus on issues, including minimum requirements of encryption, log-in location and the recording of proceedings. Suggested clauses for virtual hearings include “no recording […] unless authorized in advance by the tribunal.” A stipulation like this would clarify any confusion when a recording occurs without the parties’ consent.

HKIAC Guidelines

The HKIAC Guidelines recommend the use of HKIAC resources, including video conferencing software, back-up systems for hearings and a hearing manager. Recommendations are made to ensure confidentiality and security of virtual hearings. One notable example is the circulation of the attendees’ personal details and locations where the attendees are attending from. In practice, these recommendations can be useful by preventing a situation where attendees log-in from a designated place and move to another location with poor security. When recording, any audio recording is subject to the parties’ agreement or tribunal’s direction.

Seoul Protocol

Seoul Protocol Art. 5 provides technical requirements to ensure sufficient quality of hearings. Detailed examples are given, including the minimum transmission speed and resolution. This is explained fully at Annex 1, where the common industry standards for video conferencing equipment recommended by the International Telecommunications Union are adopted. The specifications are classified into video, audio, picture, channels, bandwidth and more. With recordings, Art. 8 states that no recording shall be taken without leave of the tribunal.

Examination of Witnesses and Experts

ICC Guidance Note

The ICC Guidance Note provides a wide range of considerations for parties and tribunals concerning the examination of witnesses and experts. These considerations include the use of multi-screens and whether synchronous communications between witnesses and parties are permissible in chat rooms or through concealed channels of communication. Distinction of connection time and duration of availability are also considered. These considerations consist of many of the issues that have arisen during virtual hearings. This is significant as no other guidelines have had such specificity. If parties do come to an agreement concerning these issues before the hearing, parties' equal treatment and right to be heard would likely be met regardless of the newly adopted virtual setting.

HKIAC Guidelines

The HKIAC Guidelines briefly provide for remote witness and expert hearings. However, the guidelines still consider valuable points, including arranging a hearing invigilator to attend at the same place as the witness. Arrangement of a 360-degree viewing of the room by video at the beginning of each session of the virtual hearing is also required and an update on how such security can be maintained throughout the entire hearing is needed.

Seoul Protocol

The Seoul Protocol focuses on witness examination hearings throughout Art. 1. One noticeable measure is that the tribunal holds considerable discretion if it decides to terminate the witness examination via video conferencing. This can occur when the tribunal deems the video conference unsatisfactory because it is unfair for either party to continue.

Requirements of witness statements are given, including "a reasonable part of the interior of the room in which the Witness is located be shown on screen, while retaining sufficient proximity to clearly depict the Witness." Such a depiction is used to provide updates, clarify the vague standard and determine whether it is possible for both conditions to be met.

Venue

Venue is a critical consideration in the process of virtual hearings. It is the place that can reflect technical issues and cyber security methods. It also demonstrates the improvement points mentioned regarding the examination of witnesses.

The Seoul Protocol offers minimum standards for venues where the video conference must occur. The requirement for an appropriate venue covers factors not limited to on-call IT technicians, safeguarded cross-border connections to prevent unlawful interception by third parties and security of video conference participants. This is particularly the case in Art. 5.1 through 5.6, discussing various points from audio output device to communication lines and screen width. Meanwhile, the ICC Guidance Note and HKIAC Guidelines provide no guidance regarding venue.

Direction for the Future

Virtual hearings were examined before the COVID-19 pandemic and adjusted when the "new normal" arrived. Continuous updates on virtual hearing guidelines, therefore, are warranted. At the same time, venues reflecting these virtual hearing requirements can be developed alongside these guidelines.

One of the noteworthy developments soon to be presented is the "Seoul IDRC Guidelines" (tentative title), a joint-project by the Korea Commercial Arbitration Board ("KCAB") and the Seoul International Dispute Resolution Center ("Seoul IDRC"). Seoul IDRC, a neutral sophisticated hearing center located in Seoul, aims to provide case-by-case tailored virtual hearing services. Tailored services are said to include the classification of types of hearings: jurisdictional hearings, witness examination hearings, methods of hearings (partial or fully virtual hearings) and users of the hearings (foreign tribunals and foreign parties).

Concluding Remarks

While people eagerly await the end of the COVID-19 pandemic, we can reasonably expect some aspects of pandemic life to remain. This does not mean (hopefully) that we will have to wear masks in public and keep a "safe distance" from friends and family for the rest of our lives. Rather, some of the conveniences of the COVID-19 pandemic are here to stay.

As a result of the COVID-19 pandemic, parties and tribunals now know that virtual hearings are not simply possible, but effective as well. ICC Guidance Note, HKIAC Guidelines and Seoul Protocol are pioneer approaches to the changing world of international arbitration. These guidelines recognize the widely cited shortcomings of virtual hearings and address them by encouraging parties to work towards efficient proceedings.

When considering how a virtual hearing will proceed, parties should be mindful of what approach will best suit their needs. Technology and cyber security, examination of witnesses and experts and venue are just three important considerations worth noting when comparing these guidelines.

Changes will continuously be needed as a number of virtual hearings takes place. Next steps are already being discussed, as can be seen with the "Seoul IDRC Guidelines." International arbitration is still just at the beginning stage of virtual hearings, and for now we can only say "stay tuned" as we learn more.

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