

Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: A Korean Take on Virtual Hearings

Valerie Park (Shin & Kim) · Wednesday, October 27th, 2021 · KCAB Next

In the past year, there has been a paradigm shift from a norm of in-person hearings to a norm of virtual hearings. As part of the 10th Hong Kong Arbitration Week, KCAB INTERNATIONAL and the Korean Council for International Arbitration (KOCIA) invited arbitration practitioners, mostly based in the dynamic Korean arbitration market, to share their experiences and personal observations related to virtual hearings.

In the two-part session titled, ‘*Can you hear me, Madame President? Oral Advocacy in Virtual Hearings in 2021: Lessons Learned and Strategies for the Future (Virtual)*,’ these practitioners provided their in-depth perspective on the virtual hearing experience and related practical challenges they have faced. The session prompted this author to consider another way in which virtual hearings have caused the arbitration world to adapt to a new reality – opening the doors of the hearing room to junior attorneys and relying on them for technical expertise.

Panel #1: Opening statements in virtual hearings

The first panel, ‘*Making your case virtually: opening and closing statements in virtual hearings*,’ was moderated by Ms Sue Hyun Lim of KCAB International, and featured insights from four panelists: Ms Hye Sung Kim of Kim & Chang, Mr Mino Han of Peter & Kim, Ms Hyun Ah Park of Yulchon and Mr John Rhie of Quinn Emanuel.

The panel first considered whether opening statements take on greater significance in virtual hearings compared to in-person hearings. Ms Park remarked – to the agreement of the others – that opening statements remain important in the virtual setting as they continue to provide a definitive indication of how each party is planning to prove its case through witness examination. While acknowledging the importance of oral advocacy in the virtual setting, Mr Han opined that written submissions have become even more important than in in-person hearings. In Mr Han’s experience, for cases involving a virtual hearing, tribunals have seemingly come to adopt the mindset of focusing more intently on written pleadings prior to the hearing.

In the discussion that followed on effective openings during virtual hearings, Ms Kim recommended delivering one's most important messages to the tribunal by way of anchoring points. She also stressed the importance of effectively using technical tools during openings, e.g., using video clips to explain complex construction issues and zooming in on the relevant portions of documents to focus attention on key wording or phrases. Voicing agreement, Mr Rhie commented that it is effective advocacy to focus on both the auditory and visual senses. He also suggested that, although it may be difficult, we need to adapt to technology and use it as expertly as we can.

The panelists also shared further suggestions for the virtual setting, such as making use of pauses to create pockets of silence and grab the tribunal's attention and using one's body language and facial expressions for effective communication.

Panel #2: Cross examination in virtual hearings

The second panel, '*Cross-examination at virtual hearings: how to make the best of a difficult situation*,' was moderated by Mr John P. Bang of Peter & Kim, and the discussion was led by four panelists: Mr Anton Ware of Arnold & Porter, Ms Sun Young Kim of Lee & Ko, Mr Mike McClure of Herbert Smith Freehills and Mr Woojae Kim of Bae, Kim & Lee.

The question raised by Mr Bang at the outset was whether there is a fundamental difference in how one conducts cross examination in a virtual setting. The overarching consensus among the panel was that there is no fundamental difference.

Mr Ware emphasized that a cross examination – whether virtual or in person – is still cross examination. He explained that counsel's preparation related to (i) identifying clear and achievable objectives for cross, (ii) mastering the factual record and organizing documents and (iii) preparing tightly focused questions backed by supporting documents remains the same. While the actual conduct of virtual examinations also shares similarities to the in-person examination experience, Mr Ware commented that potential differences may arise in terms of making use of documents during cross due to the use of technology.

Mr McClure further highlighted ways in which counsel can take advantage of the use of virtual hearings for examination. He explained that he found the use of multiple documents on the screen and the use of operators to highlight certain points on documents helpful in directing the tribunal's direction to the appropriate part. Mr McClure shared the same view that, regardless of whether the examination is conducted in person or virtually, the fundamentals remain the same, but he emphasized that there may be tricks we can use to our advantage to make it a more effective examination.

On the question of the role of the second chair in a virtual examination setting, Mr Kim stressed the importance of the second or the third chair's role in terms of taking control of the documents as well as the screen. He said he finds that there are certain advantages for the second or third chair in virtual examinations but stressed the importance of being prepared.

While acknowledging the benefits of virtual examination, Ms Kim also warned about certain limitations of examining witnesses virtually. For instance, difficulties may arise if the witness is not fully visible on the monitor, and Ms. Kim suggested that for large cases or those cases that involve multiple witnesses, it would be more effective to conduct examinations in person rather than virtually.

Comments from the perspective of a junior arbitration attorney

Despite the initial concerns voiced in 2020 regarding the shift from traditional in-person hearings to “modern” virtual hearings, practitioners have found ways to adapt in order to maintain high-quality advocacy as confirmed by the panelists of this session. Another interesting aspect of virtual hearings that was touched on briefly by the panelists and has not been discussed as much in the overall assessment of virtual hearings is their impact on the development of junior attorneys.

From the author's perspective, virtual hearings have given junior arbitration attorneys both a unique opportunity and a demanding level of responsibility to actively collaborate on a successful virtual hearing experience. As a junior arbitration attorney based in Korea who has taken part in several virtual hearings in the past two years, the author believes virtual hearings are a net positive for junior attorneys in the sense that they provide opportunities for junior associates to more actively participate in the hearing process. Whereas in the past, a junior associate might be expected to “man the home base” and potentially wait a substantial time before actively participating in an in-person hearing in a foreign seat, virtual hearings have opened an otherwise closed door to the hearing room. This has expedited the learning process for junior attorneys by enabling them to gain a better understanding of the most critical part of the process – the endpoint toward which the whole rest of the arbitral process flows: the hearing.

In addition, it is notable that virtual hearings have created a new niche role for junior attorneys that has arguably increased the importance of their role in hearings in general. In addition to completing more substantive work, throughout the pre-hearing and hearing phases, junior attorneys work closely with virtual hearing service operators to ensure that all technological aspects are in order and that the virtual hearing runs as smoothly as possible. This is a duty that did not even exist before virtual hearings became the norm, but it is now vitally important.

Prior to the hearing, junior attorneys help ensure that the virtual hearing protocol covers all critical technical aspects, that the online platform for hearing bundles is working properly and that test runs are completed effectively. During the hearing, junior attorneys ensure that documents and demonstratives are pulled up electronically on demand, that transcription and translation issues are dealt with effectively, and that helpful personalized annotations are jotted down within the real-time transcript and online platform for hearing bundles for use in the post-hearing brief. Effective performance of such tasks can lead senior attorneys to more quickly gain trust in junior attorneys' potential to aid in the overall hearing process, leading to faster graduation to higher-level hearing tasks, like presentation and witness examination.

In this light, the panelists' advice on advocacy in the virtual hearing setting was useful not only to experienced arbitration practitioners but also to juniors who may be expected to adopt such techniques and best practices sooner than they would have historically.

More coverage from Hong Kong Arbitration Week is available [here](#).

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