Kluwer Arbitration Blog

When Virtual Doesn't Cut It: Lessons from the English Courts

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Taking witness evidence by video has long been considered acceptable practice in many jurisdictions. The Covid-19 pandemic of recent years has further affirmed the acceptability and use of this method of evidence-taking in both litigation and arbitration proceedings, especially since the only alternative to a remote hearing during those years was the even less desirable option of infinitely postponing it. Today, it is more common than ever to have hearings take place remotely either in part (e.g., taking evidence of one or several witnesses by video, with other participants including the arbitral tribunal and counsel to appear in person) or in full. Indeed, remote hearings have increasingly been lauded for their cost and time efficiencies. Nevertheless, the recent case of *Martin v Herbert Smith Freehills LLP* ("*Martin v HSF*") serves as a timely reminder that applications for the taking of witness evidence by video (or, more generally, for hearings to be held remotely) should not be readily accepted as a matter of course, as there remains times when this mode of evidence-taking may be unsatisfactory. This post discusses the case and how it may be relevant not just in the litigation setting, but also for arbitration practitioners.

Background

In *Martin v HSF*, the defendant applied to the English court for permission for a witness to give evidence at trial by video. The witness was based in Singapore, which meant that there would have been suitable videoconferencing facilities available. In addition, that witness was a native English speaker, such that there would have been no need for interpretation of his evidence, simplifying the evidence-taking process. Thus, videoconferencing in this case was likely to be able to take place in a relatively smooth manner if permitted by the court.

However, the defendant's application was denied by Freedman J in his *ex tempore* judgment (at the time of this publication, only a summary is available on Westlaw). In doing so, Freedman J recalled the applicable principles under the English Civil Procedure Rules. Specifically, CPR r. 32.3 provides that the court *may* allow a witness to give evidence through a video link or by other means, while Annex 3 of Practice Direction 32 ("Annex 3") sets out further guidance.

Pursuant to paragraph 2 of Annex 3, and as noted by Freedman J, the English court's starting point is that videoconferencing is "inevitably not as ideal as having the witness physically present in court". In particular, "the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it". Freedman J further relied on Annex 3 in holding that the convenience of using videoconferencing, including

the potential time and cost savings, should not dictate its use. In this case, the court considered that that witness's evidence was central, especially on causation on both the factual and counterfactual cases. Moreover, there had been issues at earlier stages of proceedings regarding the defendant's disclosure, such that the claimant was entitled to scrutinise the evidence carefully. In Freedman J's view, the disruption to that witness and his work obligations was outweighed by the importance to the administration of justice that he gave evidence in person. Thus, Freedman J considered that fairness in the case required all parties to appear before the court in person.

Arbitration Hearings in the (Post)-Pandemic Era – To Be Remote, or Not to Be

Although the case of *Martin v HSF* pertained to litigation proceedings in England, it may be a useful reminder to arbitration practitioners planning the logistics of their next hearing.

The rules of most major arbitral institutions tend to give arbitral tribunals a broad discretion in dealing with procedural matters, including the question of whether a witness may give oral evidence remotely: see, e.g., Article 26(1) of the ICC Rules ("The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference…"), Article 19.2 of the LCIA Rules ("The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing… As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)") and Article 27(2) of the Swiss Rules of International Arbitration ("Any hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties"). The IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), commonly relied upon as a non-binding instrument by arbitral tribunals, similarly do not provide any steer on the circumstances in which it may be more appropriate for witness evidence to be given in person.

In practice, arbitral tribunals may consider a number of factors as relevant in their decision to allow or refuse a party's request for a witness to be examined remotely, such as why the request has been made, time and cost consequences of the request and the relevant technological requirements (see also a discussion of these factors by Maxi Scherer here, pp. 65–104). Importantly, and just as Freedman J has done in *Martin v HSF*, the decision needs to be an overall balancing exercise as between a party and/or witness's preference or personal reasons with considerations of fairness to the other party or parties.

Although Annex 3 includes guidance that is likely to be in the contemplation of arbitration practitioners, it may nevertheless be instructive. For example, in making a request for their witness(es) to be examined remotely, counsel could make submissions not only on the witnesses' personal schedule and/or the overall time and cost savings of the remote evidence-taking, but also on how acceptance of the request could be beneficial more generally to the efficient, fair and economic disposal of the arbitration. Arbitral tribunals may also decide on such requests with reference to the same criteria.

Future of Remote Hearings

Looking ahead, it is unlikely that the use of videoconferencing in hearings will diminish. While arbitration users, like the English courts, remain concerned about the effectiveness of remote hearings based on their current experience (see, e.g., the analysis by Gary B. Born, Anneliese Day, et al., here, pp. 137–50) such concerns may be assuaged in time to come.

As it stands, increasingly advanced technology is available to improve the remote hearing experience. For example, 360-degree cameras are now readily available, which permit a tribunal and counsel to ascertain whether a witness is giving evidence without external (and unidentified) aid. The more technologically savvy arbitration practitioners have also been experimenting with virtual reality tools (see previous coverage here), which may further diminish the distinction between taking witness evidence remotely and in person. Such technology will only get more sophisticated in the future, bringing both benefits and risks (see, e.g., previous coverage here on deepfakes).

Besides, it is clear that the arbitration community has already come a long way from the early days of remote hearings when merely getting multiple videoconferencing participants to mute themselves was as difficult as herding cats. Thus, aside from technological developments, the increased practice of organising, attending, advocating and arbitrating at remote hearings will only make practitioners more proficient at it, and for them to be able to better exploit the advantages thereof. For example, videoconferencing may permit participants to observe the facial reactions of a witness more closely than in a physical hearing room. Videoconferences may also be easily recorded and can thus be a better record of proceedings as compared to transcripts alone, which do not capture nonverbal reactions of tribunal, counsel and, critically, the witnesses.

Nevertheless, there remain circumstances when the conduct of a hearing in person may be necessary for the administration of justice. In that respect, it may be useful for the International Bar Association to consider providing guidance in future editions of the IBA Rules on the circumstances in which remote taking of evidence in international arbitration may be appropriate and recommendations on relevant procedures in those cases.

Remote hearings, and the remote taking of evidence, are certainly here to stay. Nevertheless, amidst the enthusiasm for embracing new trends and technology, it is prudent to always consider the broader picture before deciding whether virtual, indeed, cuts it.

Update: Since this post's publication, the judgment is now available on Westlaw.

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