

COVID-19 and Technology in International Arbitration

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The COVID-19 pandemic has accelerated the adoption of technology in international arbitration, especially in the form of virtual or hybrid hearings. Initially, some parties opted to postpone and reschedule in-person evidentiary hearings hoping that the pandemic would be short-lived. However, with continued lockdowns and international travel restrictions, it soon became evident that fully-remote proceedings were unavoidable during the pandemic.

Arbitration institutions swiftly prepared guidance and adapted their rules to accommodate virtual hearings during the pandemic. In April 2020, the ICC published its Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Pandemic, clarifying

that Article 25(2) of the ICC Rules, which provides that the tribunal “shall hear the parties together in person,” does not preclude a “hearing taking place ‘in person’ by virtual means.” ICC Guidance, Art. 23. In May 2020, HKIAC issued Guidelines for Virtual Hearings. In June 2020, the Vienna International Arbitration Centre released the “Vienna Protocol—A Practical Checklist for Remote Hearings.” In August 2020, the LCIA released an update to its LCIA Arbitration Rules, specifically allowing for any hearing to be held virtually. LCIA Arbitration Rules 2020, Art. 19.2.

In addition, arbitral institutions adopted different video-conferencing and technology platforms to facilitate virtual hearings. For example, the ICC has licensed access to Microsoft Teams, Vidyocloud, and Skype for Business. ICC Guidance, Art. 32. The SIAC collaborates with Maxwell Chambers’ Virtual ADR service. SIAC COVID-19 Frequently Asked Questions. ICSID uses Cisco’s Webex video conferencing platform. ICSID, Virtual Hearings. The IDRC partners with OPUS2 to deliver vir-



tual hearings. OPUS2, The IDRC in collaboration With OPUS2.

In line with these changes, arbitration centers have witnessed a significant increase in the use of virtual hearing services. In 2020, 70% of the hearings hosted at HKIAC involved remote hearing services in some form. HKIAC, 2020 Statistics. Seoul IDRC reported that the number of cases using its virtual hearing services has increased by 500% and the number of days of hearings held virtually has increased by 460%. Sophie Nappert and Mihaela Apostol, *Healthy Virtual Hearings*, July 17, 2020. According to the 2021 International Arbitration Survey conducted by the School of International Arbitration (SIA), Queen Mary University of London, 72% of respondents reported using virtual

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hearing rooms at least “sometimes,” if not “frequently” or “always” and 79% of respondents answered they would choose to “proceed at the scheduled time as a virtual hearing.” 2021 Int’l Arb. Survey. This is in stark contrast to pre-pandemic times, when 64% of the respondents said that they had never utilized virtual hearing rooms. 2021 Int’l Arb. Survey.

Benefits of the ‘New Normal’

COVID-19 has also accelerated the adoption of remote hearings by arbitrators and counsel. Virtual hearing and virtual appearances have become the “new normal” during the pandemic. Despite the rollout of vaccinations, relaxed travel regulations, and return to work policies, an increased number of virtual hearings and virtual appearances by witnesses will continue even after the pandemic because arbitrators, counsel, and parties experienced first-hand the benefits of non-physical hearings throughout the pandemic.

Digitalization has also increased efficiency and reduced cost and time of international arbitration. In the 2018 International Arbitration Survey conducted by SIA at Queen Mary University of London, two-thirds of the respondents identified cost as “arbitration’s worst feature.” 2018 Int’l Arb. Survey. The respondents believed that “an increased use of technology would lead to more efficiency in the conduct

of arbitration proceedings.” 2018 Int’l Arb. Survey. Embracing virtual hearings during the pandemic has confirmed the time-saving aspect of conducting hearings online. In a survey conducted by the Stockholm Chamber of Commerce in October 2020, arbitrators noted that it was more flexible to schedule virtual hearings compared to an in-person hearing. SCC Virtual Hearing Survey, October 2020. Arbitrators also found that online hearings were shorter and more focused, and more than 60% of the arbitra-

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tors surveyed agreed that virtual hearings saved costs, particularly where international travel could be avoided. SCC Virtual Hearing Survey, October 2020. In another survey conducted between June and August 2020 of over 300 legal professionals, 64% of the survey respondents answered that virtual hearings were either “as efficient or more efficient than in-person hearings.” Karen Birch, Andrew Rhys Davies, Jane Jiang, Jason Rix, *Love them or hate them: Virtual hearings are here to stay*, December 2020.

Furthermore, use of technology in international arbitration also contributes to the Green Pledge, now known as the Campaign for Greener Arbitrations (Green Campaign). The Green Campaign is an initiative to reduce the environmental impact

of international arbitrations. The Guiding Principles encourage the use of videoconferencing facilities as an alternative to travel, including for conducting fact-finding and witness interviews. The Green Campaign urges arbitrators and counsel to consider and suggest that witnesses or experts give evidence through video-conferencing facilities, rather than attend hearings in-person in order to reduce the carbon footprint and make the arbitration more environmentally friendly. In-person hearings require significant travel for arbitrators, counsel, witnesses, and the parties, which exponentially increases the carbon footprint. Preference for online hearings during the pandemic has closed the physical gap between the parties and the need for everyone to convene at a single place for hearings, resulting in reduced carbon footprint.

Challenges to Overcome

Nevertheless, there are practical challenges to conducting virtual hearings. Before the pandemic, arbitrators and counsel were reluctant to hold fully-remote hearings because of due process concerns. Physical cross-examination was preferred to analyze the body language and non-verbal cues of the witness and assess credibility. San-iyā Mirani, *Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective*, Nov. 17, 2020. There is also the potential for an actual or perceived procedural imbalance in

hybrid hearings, where some witnesses testify in-person and others testify remotely. In addition, while technology bridges the physical gap, there still exists a digital divide. Sundaresh Menon, *Technology and the Changing Face of Justice*, Maxi Scherer (ed.), Journal of International Arbitration (Kluwer Law International; Kluwer Law Int'l 2020, Volume 37, Issue 2 at 177-78). For example, in certain locations, technology may not be as available or reliable, which could create further delays or intervene with the presentation of witness evidence and virtual cross-examinations.

Many of these practical challenges of virtual or hybrid hearings can be overcome with advance preparation and cooperation among the parties. The Seoul Protocol on Video Conference in International Arbitration (Seoul Protocol) and the ICC Checklist for a Protocol on Virtual Hearings (ICC Checklist) both emphasize pre-hearing planning and consultation between hearing participants on logistics. The Seoul Protocol and the ICC Checklist encourage cooperation between the parties, such as preliminary check on compatibility of selected platform and technology, as well as mock sessions to ensure a smooth hearing. ICC Checklist, Section B. In addition, the Seoul Protocol provides detailed minimum standards for video-conferencing venues and technical requirements. Seoul Protocol, Art. 2. Virtual arbitration may require more effort and

preparation, but parties will reduce such time and costs as they become more accustomed to conducting hearings remotely.

No One-Size-Fits-All

On balance, whether remote or hybrid hearings are suitable for an international arbitration depends on the nature of the dispute. Run of the mill commercial disputes may benefit from remote hearings, which may reduce the fees and costs related to travelling to the hearing. For existential disputes, however, the cost of travel is de minimis compared to the quantum of claims and counterclaims at issue. In such hearings, counsel may also prefer to cross-examine key witnesses in-person, in order to better modulate the pace of examination and to maintain the frisson that is often needed in an effective examination. An in-person hearing or hybrid hearing may also help to ensure the smooth presentation of a party's case, without technological glitches that invariably arise when parties, stenographers, translators, and arbitrators are scattered across the globe. Hearing days may also be able to be longer and less choppy compared to online hearings that have to accommodate multiple time zones.

Given that fully-virtual and hybrid hearings are here to stay in one form or another, counsel should develop new skills to maximize their effectiveness in virtual hearings. Unlike in-person hearings

where the arbitrators are some distance away, the camera in virtual hearings is very close and picks up every micro-expression. Counsel's and witnesses' use of body and facial language should be adjusted. Voice projection, which is important at in-person hearings, can be overbearing in virtual hearings due to sensitive microphones. The tone and tenor of speech needs to modulate accordingly in virtual hearings. Closing argument demonstrative decks can also embed videos of effective cross-examinations, which can have a greater impact on the tribunal than simply producing transcript cites during in-person hearings, which tend to be transcribed without video recordings.

Since COVID-19 has created a brave new world of virtual and hybrid hearings that are here to stay, counsel who adapt will succeed over those who do not. May the best woman or man win.