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Remote Hearings: A New Dawn or a Reawakening?

By Joe Tirado

The global coronavirus pandemic has had an enormous impact on all aspects of our lives. Face-to-face meetings have all but disappeared. We have all had to adapt, and the legal profession has been no exception. This is true of both litigation and arbitration practice, although one important area that has been hit particularly hard is the administration of and access to justice. While the civil courts in some jurisdictions, such as England and Wales, have continued to function by adapting to social distancing requirements and holding hearings and even trials via telephone or video, many courts across the world have had to endure a prolonged lockdown due to COVID-19.

Despite the initial shock caused by COVID-19, the speed and relative ease, particularly in arbitration and mediation, with which stakeholders, including clients, practitioners, tribunals, mediators and institutions, adapted to the “new normal” have been impressive. It has been a steep learning curve for all, but most have han-



dled it extremely well. This process of change was greatly assisted by the support of the community and the useful guidance and protocols released by various organizations.

It was soon realized that the move to virtual or remote hearings had considerable benefits in terms of convenience, cost, environment

and the administration of justice. However, when considering using a virtual or remote hearing, there are a number of matters that must be addressed beyond those of an ordinary face-to-face hearing.

Terminology

New Article 8.2 of the revised In-

ternational Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (17 December 2020) (IBA Rules) defines the term “remote hearing.” It reflects the fact that hearings, while not being “virtual” in the common understanding of the term, may increasingly be conducted,



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in whole or in part, using teleconference, videoconference or other communications technology that allows all or some participants in more than one location to participate simultaneously. Accordingly, this article adopts the term “remote hearing,” as defined in the IBA Rules.

Is a remote hearing necessary?

Parties and tribunals should first determine whether a remote hearing is necessary. They should consider whether there are other reasonable alternatives; for example, an adjournment or a decision on papers only.

Although each hearing must be considered on a case-by-case basis, the reality is that interlocutory hearings are more likely to be viable and appropriate for remote hearings than merit hearings or trials. That will be especially true in complex arbitrations involving a high volume of documents, parties, witnesses and experts.

At the very least, when considering whether a remote hearing is necessary, a tribunal should consider, among other things, the position of the parties, the reasonableness of any objection to proceeding remotely, the tribunal’s power to order the hearing to proceed remotely, the effect of any relevant applicable laws and the position of the chamber or arbitration institution.

Collaboration

Remote hearings work best if there is a high degree of mutual co-operation between the parties and the court or tribunal. Early engagement helps identify potential problems and may lead to acceptance of one’s preferred solution. For example, a national court may be more flexible with regard to the platform used for the hearing when parties engage at an early stage to discuss the best way forward. Caution should be taken, however, not to dictate

terms to the tribunal or court. In international arbitration, all parties’ consent to a remote hearing can reduce the future prospect of a procedural challenge at the time of enforcement.

Key points to consider

The matters that require discreet consideration when considering remote hearings, include, among other things, the hearing platform, document presentation, confidentiality and security, witness examination, advocacy, communications, logistics and enforcement. If upon proper consideration of these issues, a hearing is to proceed remotely, it is highly recommended to schedule a pre-hearing review to discuss, and where possible agree to, the above matters, which are considered further below:

1. Selecting the hearing platform

Deciding upon the appropriate video platform for the hearing should be done at an early stage. Some forums, such as national court systems, may mandate the use of a specific platform and/or may have developed their own. If so, participants should be trained so that they are familiar with the technology.

Platforms like Zoom, Microsoft Teams, BlueJeans, and WebEx to name a few are often used for remote hearings, but there are many others. There have been a number of issues regarding usability and security raised by parties. Choosing a platform will come down to personal preference rather than any justified objection to one platform or another.

Some platforms may be more suitable for extended hearings than others and provide better functionality for document sharing and using breakout rooms. It is important to ensure that all parties can access the platform effectively from their homes. Experience counts, so it may be better

to select a platform with which advocates and tribunal members are generally familiar than to break new ground.

Once a platform has been agreed upon, the parties and the tribunal must decide who will operate the software at the hearing. Although the tribunal is traditionally in charge of directing the hearing process, this is not always the case. While some arbitrators may have the technical ability to do so, many do not and may prefer for the parties to make the necessary arrangements in consultation with one another. Often it is the claimant that will take the lead, but it may make more sense and be in the best interests of both time and cost for an independent organization with the requisite IT professionals to be tasked with this responsibility.

Among other things, the parties and tribunal should decide who should host or co-host the remote session and who is liable for costs as a result of delays caused by technology failures. Many will accept and understand that delays can happen, so they may just accept any additional costs resulting from delays to be part of the process. Where parties seek greater clarity and certainty, then it is advisable to include an agreement on liability for costs attributable to technological failures in the procedural rules applicable to the arbitration (for example, costs to be equally shared between the parties) to avoid further disputes on the liability for costs. Service providers expressly provide for or exclude liability in the event of technological delay or failure.

Another consideration is to ensure that all participants have appropriate hardware, software and internet connections. Most desktop computers and laptops are suitable for a videoconference lasting a few hours. However, for a remote hearing that may last days, or even weeks, the robustness of, among other things, one’s web-

cam, microphone, internet service provider, Wi-Fi, backup 4G/5G and battery should be taken into account.

No matter which platform is selected, it is important to plan for technical issues and identify in advance who will resolve them. Having a backup plan in place for the resolution of anticipated problems (for example, audio access numbers for participants with bandwidth problems) is a smart idea. In certain cases, a third-party consultant can assist with managing the hearing.

It is highly recommended to conduct a test run in advance of the hearing in order to work through any issues. Planning and attention to detail are crucial here. It is helpful to have someone knowledgeable check the hardware, software and connection beforehand. There is no substitute for this. Each participant should ensure that their microphone is working, that they have downloaded the latest version of the platform and that their internet speed is sufficient. Where appropriate, another test run on the day of the hearing can eliminate additional problems caused by last-minute software updates. If possible, a test call with all participants and the court or tribunal should take place. The checklist should be adapted to take any specific guidance put in place by the forum in which the proceedings are being conducted.

2. Document presentation

Ensuring that all participants have access to relevant documents is critical to the smooth running of a remote hearing. Problems with accessibility can disrupt the flow of the hearing and cause discontent with judges or tribunal members.

If hard copies of documents are available, arbitration practitioners will already be familiar with the process. However, documents may also be in an electronic format. It is important that the court or tribunal and the parties identify

which format will work for their case. At a minimum, e-bundles should be prepared in accordance with the rules applicable for each tribunal. In all cases, it is advisable to declutter and to keep to the key documents; document overload can result in confusion and can slow down the hearing. Hyperlinks and bookmarks should be used effectively. For more complicated matters, a third-party document management solution may be appropriate.

There are some organizations, such as Opus 2 or Caselines, that will provide a tailored e-bundle for use on a virtual platform. The e-bundle may be internally cross-referenced with hyperlinks. Most service providers can convert PDFs into text-searchable documents (usually for a fee). Some service providers also provide for references to documents recorded in the transcript to be hyperlinked to the documents in the e-bundle.

Not all hearings require e-bundles. Depending on the value and cost of the arbitration, these can be prohibitively expensive, or disproportionate to parties who must foot the bill.

If there aren't many documents, the parties may agree to use a PDF bundle. An electronic bundle in PDF format requires no more than a PDF editing tool. Such a tool allows for ordering, paginating and indexing the bundles; highlighting; adding notes, hyperlinking pages; and searching for terms within documents. If they choose this route, the parties should agree how the PDF bundle will be accessed during the hearing; for example, by having a member of the counsel team for the party making submissions share their screen.

There are some caveats, however. First, beware of document editing. Words in a clause or contract can be changed by dishonest parties, so users must be vigilant of the integrity of documents. Second, the number of PDF files

should be minimized where possible. Try to achieve a balance between having one large document that may freeze or take a long time to scroll through and having so many documents that time is wasted trying to locate the correct one. Third, much like hard-copy bundles, scanned documents can often cut out sections, come out blank or be illegible. Care must be taken to ensure all documents are legible and not corrupted. Finally, remote hearings eliminate the parties' ability to hand documents to the tribunal at the hearing. Parties must ensure that all necessary documents are included in the bundle in advance, especially if there are last-minute exchanges, which are common and sometimes inevitable.

3. Confidentiality and security

When dealing with remote hearings and electronic bundles, parties should think about access to data and where it will be stored, processed, manipulated and/or copied.

Parties should be familiar with using security settings on digital platforms in order to minimize the risk of a data breach and to maintain confidentiality of the hearing and the documents.

Consideration should also be given to where the participants are located and any overriding government control mechanisms that may apply.

It is important to ensure that documents, information, notes and conversations between members of the same party are being shared securely, and that any private conversations, including those in breakout rooms and messages, remain private by applying the right technology and security settings.

The audio and video recording of any hearing should be done with the express knowledge and consent of all participants. Real-time transcriptionists typically record the audio of a hearing in order to

create a transcript and to resolve any uncertainties/disagreements over the transcript. Parties should also confirm that there will be no audio or video recordings of any breakout room sessions.

When a remote hearing is considered, issues of confidentiality and security must also be considered. A remote hearing might feel ostensibly like a private meeting, but in some jurisdictions (for example, in England and Wales), the law may regard a remote hearing as public even though it does not take place in a courtroom. Court reporters might attend a remote hearing, and, if demand is high enough, some proceedings in the English courts are livestreamed, giving the public wider accessibility than prior to the pandemic, when physical attendance was necessary. If a party has concerns regarding confidentiality or privacy, it is important to engage with the court or tribunal to ensure that the hearing is set up in the correct way to allow for all or part of the hearing to be heard in private (to the extent allowed under rules of open justice). In all courts and tribunals, including international arbitration, it is important to exercise care over the accessibility of a hearing (for example, with the sharing of meeting links) to ensure that only those who are authorized attend.

Beyond the inherent confidential nature of an arbitration, attention must also be given to data protection, hacking of electronic document depositories and cloud storage, distribution of hearing recordings and what has been termed as "Zoom-bombing", or external parties hijacking the video and/or audio feed.

One solution to these problems is to adjust the security settings on the virtual platforms. Most paid services allow users to increase the measures in order to avoid any issues, and this is certainly true regarding the Zoom-bombing issue. Where someone is in

charge of operating the software, this should be done beforehand. Separate breakout rooms can also be created for caucuses or private sessions so that claimants, respondents and the tribunal can meet and hold discussions in private. The identities of the participants should be determined in advance, and steps should be taken to ensure they are the only ones present in the remote hearing venue. Measures such as logging in to a waiting room prior to be given access to the main hearing room have proven to be effective.

4. Witness examination

The issue of witnesses is another important consideration. The problems vary from jurisdiction to jurisdiction and are case sensitive. Some of the concerns include, but are not limited to, whether parties are being coached, the legality of virtual evidence in the law of the seat/witness location, taking the oath or affirmation, hardware and connection, documents and translation/interpretation.

A "no surprises" approach to witness evidence is advisable so that both parties are entirely comfortable with the arrangements in place for witnesses giving evidence virtually. There should be no room for allegations of dishonesty or misconduct in witness evidence.

There are many reference sources that may be consulted as far as witness examination goes.

The gravitas of the hearing can easily be lost in a virtual setting, especially when participants are at home in a familiar environment. To address this, the parties should consider a requirement that witnesses attend a neutral physical venue for their examination, such as a law firm, a conference facility or an arbitral institution's office. An alliance of arbitral institutions, the International Arbitration Centre Alliance, has been formed for, among other things, this specific purpose. Holding the hearing in a more

formal venue should eliminate the need for imposing a dress code.

An additional level of formality to consider is which oath or affirmation (if any) will be administered to witnesses, bearing in mind the place where the witness is giving evidence and the seat of arbitration.

To ensure the integrity of the evidence given by the witness, the parties may agree (or the tribunal may order) for a 360-degree camera, or two or more cameras (one in front of the witness, one behind), to be placed in the room where the witness gives evidence. Alternatively, or additionally, parties may consider appointing an invigilator or a lawyer from the opposing party to sit in the room where a witness gives evidence. In such a situation, the attendees will need to follow any social distancing requirements at the place where the witness is giving evidence.

It is important to ensure everyone can see the tribunal at all times, including during the examination of witnesses. Of course, assistance should be provided to witnesses who encounter technological problems during their testimony.

5. Advocacy

Counsel must be aware of certain realities of remote hearings that simply are not issues in face-to-face hearings. Perhaps the most obvious is the fact that it may be impossible to get a feel for the hearing room, the tribunal, opposing counsel or the witnesses. The physical separation makes the whole experience a little surreal. The simple fact of being at home or in your office can give the illusion of informality. This should be avoided. A remote hearing should be given the same respect and seriousness as an in-person hearing. One should dress appropriately, have a neutral background, ensure no confidential documents are visible and try to minimize the

possibility of interruptions.

Steps should be taken to make sure that you can see the tribunal at all times, as well as the witness during examination, and that they can see you. You should mute your microphone when you are not speaking. Advocates need to think about how they will communicate with others, and particularly with their own legal team. If documents will be available in electronic format, who will be displaying them to everyone? The person sharing his or her screen should be careful not to share anything inadvertently.

As stated above, it is not possible to hand documents to the other side or the tribunal. Be sure that everything is ready well in advance so that you can deal with any unforeseen or last-minute eventualities.

Spoken submissions in remote hearings work very effectively. However, there are some drawbacks. In particular, experience has shown that participants can become fatigued more quickly. This means more breaks and less detail in spoken submissions are necessary. In this context, the importance of other presentation methods increases. This could take the form of giving more attention to written submissions or using visual aids and presentation tools to enhance oral submissions.

6. Communications

Communication outside of formal submissions is much more difficult during a remote hearing. It is important to establish a clear line of communication between advocates and their clients or co-counsel and between tribunal members. To ensure security, an instant messaging platform that is outside the platform used for the hearing may need to be used.

Ground rules must be established to ensure that advocates are not overwhelmed by the volume of well-meaning assistance. Consider having set times for pre- and post-hearing briefings.

Just as important is the communication between party representatives, who have conversations that often lead to the resolution of issues or even settlement. It may be beneficial to agree in advance when and how these should happen.

7. Logistics

Some things may take longer in a remote hearing than in an in-person hearing. The pace of a remote hearing is typically slightly slower than that of an in-person hearing. Oral argument itself may be delivered more slowly. This helps to avoid participants talking over each other. Where the members of an arbitral tribunal need to consult on issues, such as interlocutory objections, they will need to confer in a breakout session. This may also contribute to a slower pace.

Conducting hearings virtually is more tiring than holding them in person. To combat this, frequent short breaks should be built into the schedule.

8. Enforcement

Ensuring the enforceability of any arbitral award or judgment obtained following a remote hearing in the jurisdiction of likely enforcement is essential from the outset. It is important to determine whether that jurisdiction prohibits remote hearings on grounds of public policy, for example. Avoiding allegations of procedural irregularity that might provide future grounds for objection to enforcement under the New York Convention when enforcing an international arbitration award is self-evident.

If the parties do not agree to a remote hearing, a tribunal will need to determine whether it has the power to order a such a hearing. Whether a tribunal has the power to mandate a remote hearing may depend on, among other things, the terms of the arbitration agreement, any institutional rules adopted, the law of the seat and with respect to a witness's ev-

idence, and possibly the law of the place where the witness testifies.

Going the extra mile to establish compliance with principles of natural justice so that one can demonstrate in the future that the other party had a fair opportunity to present its case on a level playing field (for example, in relation to time zones or the accessibility of technology) is to be commended. Compliance with established arbitration protocols, such as the Seoul Protocol, the Vienna Protocol and the CPR Model Procedural Order, can also assist in validating the process. It is also important to ensure the court or tribunal records the reasons for adopting a virtual format.

Remote hearing protocol

Parties should address any rules and concerns in an e-hearing protocol (similar fashion to the terms of reference) at a case management conference prior to the hearing. Indeed, Article 8.2 of the IBA Rules calls for establishing a remote hearing protocol (RHP) with the aim of conducting the remote hearing efficiently, fairly and, to the extent possible, without unintended interruptions.

Article 8.2 also suggests issues that the RHP may deal with and which apply to all forms of remote hearings. These include issues such as the technology to be used; the advance testing of the technology or training in use of the technology; the starting and ending times, considering, in particular, the time zones in which participants will be located; how documents may be placed before a witness or the arbitral tribunal; and the measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

In the interest of flexibility, Article 8.2 leaves open the question of who will prepare the RHP. Either the parties or the arbitral tribunal may do so. Where the parties do not agree on the content of the

RHP, the content will be fixed by the arbitral tribunal after consultation with the parties.

The RHP ensures that there is clarity on which rules will apply and allows everyone to plan accordingly. The RHP should be agreed upon and determined as early in the proceedings as possible.

We do not yet know what arbitration will look like after the pan-

demic has passed. There is a good chance, however, that remote hearings will remain, particularly for lower-value cases and short hearings. There is an equally good chance that the technology for remote hearings will continue to evolve.

Fully remote hearings bring with them many challenges that most of us are not been accustomed to addressing. However, we

are lucky to live in an age where technology exists that allows us to continue working and resolving disputes, even in the direst of circumstances.

There is also a wealth of resources available on virtual hearings, including guidance published for court proceedings in various national domestic courts.

As can be seen from the forego-

ing, the use of remote hearings is neither new nor particularly unusual in either full or hybrid form. Many have been advocating for and predicated a greater use of technology in both litigation and arbitration proceedings. While such change was no doubt happening, the global pandemic has accelerated the acceptance and adoption of the use of remote hearings.

Footnotes:

- ¹ A useful tool in considering this initial decision is Delos' checklist on holding arbitration and mediation hearings in times of COVID-19.
- ² Annex 1 of the Seoul Protocol on Video Conferencing in International Arbitration is particularly helpful in establishing minimum requirements. The International Centre for Dispute Resolution (ICDR) has also published comprehensive guidance specific to Zoom in its Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom. Many of the principles may be applied sensibly to other platforms.
- ³ The Arbitration Institute of the Stockholm Chamber of Commerce has launched its Platform for Ad Hoc Arbitrations, which includes document management aimed at ad hoc arbitrations, such as many shipping arbitrations.
- ⁴ A number of protocols have been issued in this regard; for example, the ICDR's Best Practices Guide for Maintaining Cybersecurity and Privacy, the IBA's Cybersecurity Guidelines, the ICCA-IBA's Joint Task Force on Data Protection in International Arbitration Proceedings and the ICCA-NY State Bar-CPR's Protocol on Cybersecurity in International Arbitration. Together, they provide a comprehensive checklist of matters to be considered for remote hearings.
- ⁵ These tend to be included with general guidelines, and can be found within the African Arbitration Academy's Protocol on Virtual Hearings in Africa, COMBAR and DELOS' guides and HKIAC's Guidelines for Virtual Hearings, to name a few.
- ⁶ Helpfully, both Practical Law (Procedural Order for Video Conference Arbitration Hearings) and CPR (Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings) have published model procedural orders for this purpose.
- ⁷ The following resources are particularly useful: The Seoul Protocol on Video Conferencing in International Arbitration (available online); the overview of guidelines and checklists issued by ICCA, which includes links to ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of COVID-19 (Annex 1 is particularly helpful); CIARB's Guidance Note on Remote Dispute Resolution Proceedings (the checklist at appendix 1 is especially helpful); ICSID's Brief Guide to online hearings; ICDR's comprehensive guidance specific to virtual hearings via Zoom; and the SIAC's various guides (for arbitrators and practitioners) on virtual hearings.
- ⁸ For example, the guidance issued by Judiciary.uk on virtual hearings in the English Civil Courts, the guidance issued by the Supreme Court of Singapore on the use of videoconferencing and the guide to videoconferencing published by the Federal Court of Australia.