

Virtual hearings in international commercial arbitration

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Virtual hearings have become a common practice in arbitration as the COVID-19 pandemic continues to disrupt the legal practice. Parties, counsel and tribunals have common obligations to use procedural measures that can mitigate the effect of delays to the arbitral process, including delays caused by the COVID-19 pandemic [9, p. 1, para. 4].

A number of arbitration institutions have recently released their own guidelines and protocols mainly or partially dedicated to online hearings. Among those institutions are ICC, LCIA, SIAC, HKIAC and SCC. Hearing facilities are now equipped with the necessary technology which is increasingly made use of. For example, ICSID announced that the majority of its hearings in 2019 were held by videoconference. Seoul IDRC has observed that demand for its virtual hearing services is "significantly rising", reporting that the number of cases using its remote hearing services have increased by 500% and the number of days of hearings held virtually have increased by 460%.

The courts have been largely positive towards video testimonies in arbitrations. The Calcutta High Court directed a witness present in Russia to present himself for a cross-examination through videoconference [13].

More recently, the Delhi High Court, in the case of Rategain Travel Technologies Private Limited v. Ujjwal Suri, recognizing the possibility of conducting virtual arbitral proceedings, stated, "the arbitral tribunal may consider conducting the hearings and recording of evidence by video-conferencing, if considered feasible" [12].

At the same time, it is not a novel. The Cybersecurity Protocol in International Arbitration was launched in late November 2019 and the consultation draft of the ICCA-IBA Roadmap to Data Protection in International Arbitration was released in February 2020.

Nowadays very few arbitral institutions have express references to videoconferencing in their rules. The Swiss Chambers' arbitration institution can be given as an example. There is an express reference to videoconferencing in Art. 25(4) of the Swiss Rules. The tribunal's right to order virtual hearings is based on its widest discretion in terms of how the proceedings are conducted [2, p. 2150; 3, p. 866; 6, p. 50]. Article 19 of the UNCITRAL Model Law, in line with it, provides that tribunals can decide on the way the proceedings shall be conducted.

Even if one of the parties objects to virtual hearings, the Tribunal has a right to order them [13]. In a recent arbitral decision, the respondents in arbitration seated in Vienna and administered by the VIAC had challenged the arbitral tribunal over its decision to conduct an evidentiary hearing remotely by videoconference [15]. The Austrian Supreme Court held that remote hearings are generally permissible under Austrian arbitration law and that the arbitral tribunal enjoys broad discretion in organisation and conduct of the proceedings and, therefore, it rejected the respondents' challenge [14].

Arbitral tribunals and parties are asked to mitigate the effects of any impediments to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. The first impediment is the time difference.

In some occasions it is more convenient for both parties and the tribunal to use videoconference. Firstly, because the exact time of videoconference may be chosen according to the Parties' preferences. Secondly, the Parties would not have to adopt to changing time zones that may affect their physical condition. Thirdly, some of the participants might not feel comfortable in travelling in the pandemic. Supporting the first argument, the Austrian Supreme Court took the view that starting a hearing at 6.00 a.m. local time was less burdensome than having to travel from Los Angeles to Vienna for an in-person hearing [14].

Such hearings are also beneficial from the ecological perspective. Compared to long distance air travel, commuting within a city or to nearby regions will be perceived to be eco-friendlier.

Arbitration is sought for its many advantages, particularly the confidentiality of the proceedings [2, p. 2568; 4]. Practitioners point out that the key concerns connected with virtual hearing is the preservation of confidentiality in light of reliance on technology. In case of virtual hearings, it cannot be excluded with 100 % certainty that no third parties may interfere and get access to the hearing. Hackers could crash the proceedings through zoom-bombing or the arbitral institution's website or electronic hearing bundle could be hacked. In July 2015, well before the trend to move proceedings virtually, the Permanent Court of Arbitration was hacked in the midst of an ongoing maritime border dispute between China and the Philippines. Malware was implanted on the PCA's website which infected the computers of visitors, potentially exposing them to data theft [8].

In contrast, nowadays there are lots of platforms that use different security protocols, so parties should not worry about any leaks of confidential information. Arbitral tribunals may use the practices of other arbitral institutions. For example, HKIAC provides IP-based encrypted videoconferencing that supports up to eight different locations and cloud-based videoconferencing compatible with all major videoconferencing platforms (Zoom, Cisco Webex, Microsoft Teams, BlueJeans). In addition to the primary system, HKIAC arranges a back-up system for each hearing. It also provides "hearing managers" to monitor the proceedings and an IT support as needed [10, p. 1, para. 5].

Critics of virtual hearings are also based on the possibility of violation of procedural rights of the parties. One of the main procedural rights of the parties is the right to be heard [2, p. 2164]. The right to be heard may be affected when the connection is lost during a testimony leading to the loss of momentum and enabling the witness to re-evaluate their answers in the extra time [7]. Virtual witness and expert testimony may also not be helpful if there are audio or video distortions, freezing of images or time-lags. A close-up view of the parties may also lead to over-interpretation of the visible gestures or actions [11]. For instance, a minuscule-time lag in answering a question or visibility of sweat on the face may be over-interpreted.

It is generally accepted that the biggest concern for arbitrators is enforceable award as a subsequent result of the arbitration proceedings [5, p. 135, para. 1].

Theoretically, Art. V (1) of the New York Convention provides that an arbitral award may be challenged if "a party against whom the award is invoked . . . was otherwise unable to present his case". Article 34(2)(a)(ii) of the UNCITRAL Model law sets forth the same ground for setting the arbitral award aside, and if the award would be set aside, it would also become unenforceable under Art. V (1) (e) of the New York Convention. As it was explained above, some may argue that this right is violated in case of virtual hearings.

In practice, if the tribunal proceeds with virtual hearings against the objection of the other party, the award will still be enforceable, provided that the parties were given equal rights to present their case [1, p. 161]. So far there have been no reported cases where the imposition of

a virtual hearing (instead of a physical one) was found to be a violation of a party's right to equal treatment or its right to be heard, which are protected by the New York Convention.

Источники и литература

- 1) Bateson D. Virtual Arbitrations: The Impact of COVID-19. *Indian Journal of Arbitration Law*, 2020.
- 2) Born G. *International Commercial Arbitration (Second Edition)*. Kluwer Law International, 2014.
- 3) Gaillard E., Savage J. *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague, 1999.
- 4) Goins A., Guillet E. Challenges and Opportunities of Virtual Hearings in International Arbitration. *V & E International Dispute Resolution Update Coronavirus: Preparation & Response*, 19 October 2020.
- 5) Horvath G. *The Duty of the Tribunal to Render an Enforceable Award*. Kluwer Law International, 2001.
- 6) Lew J. *Contemporary Problems in International Arbitration*. Springer Science + Business Media Dordrecht, 1987.
- 7) Mirani S. Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective. *Kluwer Arbitration Blog*, 2020. Available at: <http://arbitrationblog.kluwerarbitration.com/2020/11/17/due-process-concerns-in-virtual-witness-testimonies-an-indian-perspective/>.
- 8) Peterson L. Permanent Court of Arbitration website goes offline, with cyber-security firm contending that security flaw was exploited in concert with China-Philippines arbitration. *Investment Arbitration Reporter*, 2015. Available at: <https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/>.
- 9) ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. ICC International Court of Arbitration, 2020. Available at: <https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.
- 10) HKIAC Guidelines for Virtual Hearings. HKIAC, 2020. Available at: https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_2.pdf.
- 11) *Strategies for Effective Oral Advocacy & Cross Examination for Virtual Hearings: A Guide for Counsel*. SIAC, 2020. Available at: https://www.youtube.com/watch?v=f7gjopr8u_k.
- 12) *Rategain Travel Technologies Private Limited v. Ujjwal Suri*, 2020.
- 13) *Saraf Agencies Private Limited v. Federal Agencies for State Property Management*, 2018.
- 14) Case No. 18 ONc 3/20s. Supreme Court 23 July 2020 (Austria).
- 15) 14. Case No.18 ONc3/20s. Award of 23 July 2020 (VIAC).