Virtual hearings: inflammatory markers in favour of in-person hearings

Guest Editor **Hamish Lal** of **Akin Gump Strauss Hauer & Feld** takes issue with the growing view that 'virtual hearings' are always an adequate alternative to an in-person hearing. Sometimes an in-person hearing should take precedence, he argues.

The TCC has of course amended the standard directions for adjudication enforcement, and for trials, to accommodate remote hearings where orders now include a paragraph stating "A remote hearing is, in this case, necessary for a hearing to take place at all; and it is in the interests of justice that the matter be disposed of on the date listed, rather than be adjourned".

The emphasis on the interests of justice is elevated and tangible. However, is this factor relevant in international arbitration and adjudication? Virtual hearings are not novel in the context of international arbitration. The technology required to conduct remote hearings has been available for many years and most arbitration rules, while not expressly providing for, did not inhibit remote hearings.

Yet, prior to the pandemic, a "virtual only" hearing was rare, which raises the provocative question: If virtual hearings are so efficient, effective and non-prejudicial, why did Arbitrators and Institutional Rules not advocate their use prior to COVID-19? This Editorial does not question the nature of remote hearings – it is accepted "virtual hearings are here to stay" - but raises questions on when an in-person hearing should take precedence.

The Rise in Remote Hearing Protocols

A number of institutions and organisations have issued protocols on how best to prepare and structure a remote hearing: *The Seoul Protocol on Video Conferencing in International Arbitration* issued by the Korean Commercial Arbitration Board; ICC's *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Cobid-19 Pandemic*; *CIArb Guidance Note on Remote Dispute Resolution Proceedings*. Further, Article 19.2 of the 2014 LCIA Rules grant the tribunal authority to establish the conduct of an hearing, and permit hearings at any appropriate stage of the arbitration to "take place by video or telephone conference or in person (or a combination of all three)" and the ICC rules permit the use of videoconferencing and virtual hearings for case management conferences (Article 24(4)), hearings in an emergency arbitration (Appendix V, Art. 4(2)) and hearings in an expedited procedure (Appendix VI, Art. 3(5)). The 2021 ICC Rules allow virtual evidentiary hearings provided the tribunal has consulted with the parties.

The use of remote proceedings will give rise to challenges to 'remote arbitral awards'. The decision of the Austrian Supreme Court on 23 July 2020 is relevant. The applicants claimed that videoconference hearings do not comply with the principles of a fair trial, because it cannot be ensured which documents the person being cross-examined would use or that no other person would be present in the room. The arbitrators could only be challenged if circumstances existed which give rise to justifiable doubts as to their impartiality or independence. The court emphasised that improper conduct of the proceedings and procedural errors do not in themselves establish the appearance of bias. The court highlighted that the use of videoconferencing technology is widespread and recognised in judicial proceedings for hearings, or the taking of evidence, and that this practice radiates into arbitration proceedings. Further, that

the use of videoconferencing technology does not constitute a violation of Article 6 of the European Convention on Human Rights (even if one party does not agree with holding a videoconference hearing) as Article 6 provides for not only the right to be heard, but also for access to justice.

Inflammatory Markers in Support of "In-Person Hearings"

The following factors are important:

i. **Equality of arms and right to be heard:** If the Claimant and Respondent are both in favor of an in-person hearing it is unclear whether an Arbitral Tribunal can order a remote hearing against their wishes? Users of arbitration are important and may feel that the arbitrators are directed by their own subjective preferences raising the prospects of challenge. A Tribunal must be mindful of the Parties' right to be heard and to be treated equally, so as to render an enforceable award. Other inequalities may include one Party's use of an interpreter, which slows down the process but no additional time is allocated or when one Party is based in a markedly different time zone from that of the Tribunal. Such due process challenges are set out in Article V(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the UNCITRAL Model Law as well many of the national arbitration laws. The risk of challenge cannot be ignored and may off-set the prejudice caused by delay.

ii. **Necessary Human Interactions:** It is human nature to being able to respond to the surrounding environment by processing an array of verbal and non-verbal clues, and to interact accordingly. Observing a person's overall demeanor, their surroundings, and the real time reactions of other participants in the room often helps the decision-make. Remote hearings can hinder this way of processing information because conversations by video tend to be a single channel communication, debates and spontaneous interjections are a challenge as video implies a 'take turn' to speak process.

iii. **High Value Disputes and Complexity of the Factual Matrix:** Construction disputes are complex. The complexity of the factual matrix, the size of the hearing bundle, the number of witnesses and experts are all factors cited in favour of an in-person hearing. For cases where the value of dispute is low and/or where the issues neither lengthy nor complex, tribunals and Parties may be incentivised to opt for a virtual hearing. However, the historic benefits of hearings in person remain, especially where the hearings are long complex ones involving complex demonstration exhibits, detailed technical/design issues and where the values in dispute are significant. Arbitrators need counsel, witnesses and experts physically in front of them to understand complex facts and technical issues. The risk of inadvertent 'gap filling' by Arbitrators increases with remote hearings.

iv. **Time Zones and Physical Tiredness**: Virtual hearings can lead to video-conference fatigue and exacerbate time zone differences, rendering unsustainable lengthy and intense cross-examination sessions. This fatigue hits all the participants such that the hearing days become shorter which is a problem unless the overall duration of the hearing can be extended. In a video context, participants become 'headshot talkers' who tend to stare continuously at the screen to demonstrate attendance and participation in the proceedings.

v. **Inefficiency caused by bad connections and technical outages**: With proper planning, issues such as slow connectivity are surmountable. However, there is no certainty that network connections, equipment glitches or other technical problems will not arise during a remote hearing. In lengthy and complex hearings, these small hitches can be disproportionally disruptive to procedural efficiency. There is scope for witnesses that do not feel comfortable during cross-examination to hide behind bad connectivity or 'unintentionally' switch off their cameras.

vi. **Hybrid and Segmental Hearings**: A combination of virtual hearing when appropriate and physical when possible is preferable to full virtual hearings. The Tribunal might be assembled with the parties in one location and one or several witnesses or experts might testify before them remotely; or the Tribunal Chairperson can attend in-person and the co-arbitrators virtually. One could also imagine a hearing for which the evidence taking is completed in the physical presence of the experts and witnesses followed by remote closing statements and final tribunal questions. **CL**