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### **'Zoom to the Future: Are virtual arbitral hearings the new normal?'**

As of 5 May, a third of the global population was subject to some form of lockdown or travel restrictions. In this period of social distancing, parties, lawyers and arbitrators are adjusting rapidly to working remotely and even moving arbitral hearings online. But what are the advantages, challenges and solutions presented by Zoom courts?

### **Using technology in arbitral proceedings and virtual hearings**

Before the Covid-19 pandemic virtual hearings conducted entirely online were the exception rather than the norm. In 2018 the Queen Mary University of London's International Arbitration Survey found that 78 percent of respondents had "never" or "rarely" used a virtual hearing room.

Nevertheless, for the past few years, video conferencing technology was already widely used to conduct arbitral proceedings. Indeed, by design, arbitration is flexible enough to allow parties to adapt procedures to suit their needs. For example, filing submissions, witness statements, expert reports and exhibits electronically is already the norm in many arbitral proceedings. Many hearings also routinely include some "virtual" element. Conducting case management conferences and other procedural hearings via teleconference, for instance, is already common. As is cross-examining witnesses via video link. This has been practical for arbitrators dialling into a substantive hearing from another time zone, or where witnesses are unable to travel. Yet, until now, there has not been a strong motivation to use fully virtual hearing rooms.

But necessity is the mother of innovation. Lockdown and social distancing measures have not ended the need for efficient dispute resolution. The continuing uncertainty of not settling a dispute as originally scheduled and the time already spent on preparing for a hearing costs money. Parties, therefore, need to consider seriously virtual hearings as an alternative to postponement. In some instances, postponing a hearing is impossible, as arbitrators and counsel's calendars for late 2020 and 2021 are filling up quickly with delayed hearings. Moreover, it is unclear when international travel will resume at full capacity. Even when it does mandatory quarantines may be imposed on foreign arrivals. This makes virtual hearing be the most viable and cost-efficient option for resolving disputes in the near future.

Fortunately, arbitral institutions can accommodate and drive forward procedural and technological innovations. Indeed, many have been at the forefront of offering virtual hearing facilities. They have reported that the demand for virtual arbitral hearings has

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increased significantly since the Covid-19 outbreak. The Hong Kong International Arbitration Centre recently reported that approximately 85 percent of hearings in April and May 2020 have required or will require virtual hearing services. For the period February-September 2020, it anticipates that 65 percent of all hearing-related inquiries it receives will involve, virtual hearing support. Similarly, the China International Economic and Trade Arbitration Commission has issued guidance encouraging arbitrators to “first consider the possibility of holding virtual hearings”. The Beijing Arbitration Commission and Beijing International Arbitration Centre has advised similar methods for arbitrations in mainland China. It has also recognised the importance of its own work in assisting and operating video-conferencing platforms.

### **Key benefits of virtual hearings**

Given the risk of Covid-19, virtual hearings offer obvious health and safety benefits for participants. Additionally, virtual hearings allow those involved to comply with travel restrictions and social distancing measures and avoid the inconvenience of mandatory quarantines.

Even when the pandemic eventually passes, virtual hearings may remain a viable, indeed preferred, choice for parties. Significantly, it delivers significant cost savings. While there may be upfront costs involved in acquiring hardware and a reliable platform, those costs are usually a fraction of the costs of travel and accommodation for multiple participants involved in face-to-face hearings. For less frequent users of virtual hearings, the required hardware and software may be rented. Although lawyers and clients need to spend time familiarising themselves with the technology, such training will deliver long-term benefits. As more parties, counsel and arbitrators use those technologies the arbitration community will benefit from economies of scale.

From an environmental perspective, virtual hearings offer a sustainable and eco-friendly way to conduct arbitral proceedings. The arbitral community has widely recognised the need to “go green” and reduce the environmental cost of arbitration – in large part caused by international flights. Lucy Greenwood’s “Green Pledge” for arbitrations and mediations to avoiding unnecessary travel and requesting electronic rather than hard copies of documents, shows how this mood was increasing even before Covid-19. Greenwood’s Campaign for Greener Arbitrations, supported by Dechert LLP, found that a medium-sized arbitration valued at US\$30-50 million requires 20,000 trees to offset its potential carbon emissions. Conducting hearings remotely may be one of the most effective means to minimise the environmental impact of global travel.

### **Practical difficulties and solutions**

While virtual hearings will not be appropriate for every case, anecdotal evidence from arbitral institutions suggests that virtual hearings have been, possible for many proceedings. Notably, at the Vis International Commercial Arbitration Moot this year, over 240 teams of advocates competed remotely for time slots. Of course, in limited instances, a virtual hearing may be less appropriate. Complex factual issues may be more effectively articulated in face-to-face interactions. Equally, where a case involves participants without secure, reliable internet connections or where the number of participants exceeds software or bandwidth limits, problems will arise.

However, many other difficulties posed by virtual hearings are not so different from the day-to-day challenges faced by international arbitration practitioners. They can be overcome by existing technological or other pragmatic solutions.

*Technical difficulties:* Technological glitches can be minimised through testing all participants before the hearing. Some video-conference platforms (including Opus2) provide a dedicated operator to manage the video-link and call up documents from electronic bundles.

*Proper equipment:* Each participant should consider having at least four screens to display their own video screens; the live transcript; any documents from the electronic presentation of evidence platform; and email or Whatsapp chats for their team.

*Witness examination:* Arbitral tribunals have often not had significant concerns about their ability to assess a witness's credibility via video-conference. On the contrary, video-link can sometimes improve visibility of a witness's facial expressions, especially if high-definition cameras are used.

Furthermore, parties may consider whether witness cross-examination is necessary at all. Few modern commercial agreements are concluded without an extensive paper trial and in psychological research has highlighting the unreliability of human memory. Indeed, Justice Leggatt in the English High Court has commented that memory is "especially unreliable when it comes to recalling past beliefs", especially during litigation. Indeed lawyers often prepare witness statements that may cause witnesses' memories to be reshaped by recent interpretations and not their original experience. These concerns also arise in many arbitration contexts.

*Unfair advantage for witnesses:* Concerns that witnesses are being coached off-camera or reading a hidden script can be addressed by installing rotating cameras, 360 degree cameras or multiple cameras at different angles. Mandatory screen-sharing can also prevent a witness from accessing hints displayed on their computer screen. Close-up video shots should make it readily noticeable if a witness is looking elsewhere for answers or assistance.

Although it would be difficult to strictly enforce witness sequestration, that problem is not unique to virtual hearings. Such issues can be addressed, in some cases, through scheduling so that examination of a witness is completed in one day, or by extending the hearing day slightly to accommodate this.

*Interpretation:* As in an in-person hearing, various platforms offer consecutive and simultaneous interpretation for virtual hearings. Participants can select their preferred audio channel. The International Centre for the Settlement of Disputes has used Kudo to provide real-time interpretation for virtual hearings.

*Audibility:* Poor sound quality can be addressed by real-time transcripts. Livenote, for example, is already frequently used in in-person hearings to broadcast real-time transcripts.

*Time difference:* Coordination of participants attending from different time zones may cause scheduling difficulties. For example, a case involving Asian and US parties may only

find two or three overlapping hours in a business day. This could extend the hearing over an unduly number of days or with unreasonably short breaks. It could impose a disadvantage on the party required to attend the virtual hearing either very early or very late each day.

In these situations, it should be considered whether both parties must appear in the virtual hearing room at the same time. An asynchronous hearing might be appropriate. In hearings, each party makes oral submissions, expert presentations, and even witness cross-examination in front of the tribunal without the other party's presence. A full video recording and transcript is then made available for the other party. They then proceed similarly. The asynchronous hearing would be followed by a "plenary" session with both parties attending the virtual hearing room to address points they consider necessary to raise, such as objections or rebuttals, or to conduct re-examinations. Asynchronous hearings may be appropriate for hearings dealing with relatively straightforward matters, without a large number of witnesses and or issues that are likely to be dispositive of the entire case. Although there may be concerns that in an asynchronous hearing it may make more sense to make objections at the time a submission is made or witness examination is conducted, it is a solution nonetheless worth considering given that "plenary" hearing time would be significantly shortened.

*Cyber fraud:* Cyber security is an issue that has long existed in international arbitration, where correspondence and data is often exchanged online. It is not unique to virtual hearings. The International Council for Commercial Arbitration, New York City Bar and the Institute for Conflict Prevention and Resolution have jointly issued an up-to-date Protocol of Cybersecurity in International Arbitration, which provides a framework for reasonable information security measures.

*Team communication:* In an in-person hearing, it is common to see a flurry of post-it notes being passed up and down one side of the hearing room where a party's team is seated. Now, frequently, Whatsapp conversation groups also facilitate communications between counsel, the client, witnesses and experts. However, some thought should be given in advance as to who should be in which conversation groups, and whether anyone should be responsible for filtering messages to the lead advocate. Whatsapp group calls can also be helpful for discussion purposes, although such group calls are currently limited to four members.

## **Conclusion**

The pandemic offers the arbitration community an invaluable opportunity to consider the flexibility and novelty possible in arbitration. To think of virtual hearings as merely replicating face-to-face hearings in an online space misses an opportunity to innovate. We should seize the opportunity to consider how to use technology to streamline arbitration proceedings, even after social distancing measures. For example, virtual hearings can promote innovations like the Kaplan Opening, which proposes a hearing after the first round of written submissions and witness statements but before the main hearing, so that the parties can brief the tribunal on their respective positions early in the arbitral process and help facilitate the tribunal's preparation. The arbitration community is on a steep learning curve, but we hope we will emerge from this crisis having embraced this unique opportunity to improve our profession.

*For readers who are contemplating a virtual hearing, there are numerous resources that provide helpful guidance, including:*

- **The Delos checklist** on holding arbitration and mediation hearings in times of Covid-19 lists matters to consider when deciding whether to maintain a hearing date, and preparing, conducting and following up regarding the hearing in light of Covid-19.
- **The Seoul Protocol on Video Conferencing in International Arbitration** provides a guide to best practice for planning, testing and conducting video conferences in international arbitration.
- **The International Chamber of Commerce** has issued a guidance note for parties, counsel and tribunals on possible measures that may mitigate the adverse effects of the Covid-19 pandemic on its arbitrations.
- **The International Bar Association Arb40 Subcommittee** has listed the currently available technologies that assist or augment international arbitration, including, but not limited to, virtual hearings.