

BRIEFING NOTE

Virtual Arbitration Hearings – When to Conduct Hearings Virtually? How should Virtual Hearings be Conducted?

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Introduction

It has been many months since the global pandemic was declared. The optimists amongst us may have hoped that pandemic restrictions would be lifted fully and swiftly. The reality, it seems, is that restrictions on travelling are likely to remain with us for quite some time.

Meanwhile, those who have postponed physical arbitration hearings in hopes of loosening restrictions may now need to face reality and consider (partially) virtual hearings. Before jumping into a virtual hearing, it is useful for parties to consider whether virtual hearings are suitable and if so, the conduct of such virtual proceedings.

When to Conduct Hearings Virtually?

Arbitration proceedings are often touted to be more efficient than traditional litigation proceedings. Indeed, many institutional arbitration rules provide that arbitral tribunals are to conduct proceedings expeditiously and cost-effectively. Yet, expediency and efficiency do not mean that every physical hearing must now be conducted virtually.

Before committing to a virtual hearing, parties are encouraged to consider various factors:

- The nature of the dispute and whether the determination of the dispute relies heavily on factual witnesses. Insofar as the matter depends on the credibility and veracity of factual witnesses, a virtual hearing may not be as effective as a physical hearing. The arbitral tribunal may struggle to capture subtle clues from the countenance and body language of factual witnesses in virtual proceedings where interaction with witnesses is limited to a small video of his/her face.
- The complexity of the dispute and the length of the hearing. For complex matters with a lengthy hearing period, parties would be wise to consider the suitability of virtual hearings given the shorter attention spans of all participants for virtual interactions.
- The potential delays resulting from rescheduling the physical hearing and whether these amount to excessive delays. For example, an arbitral hearing that is set for the end of the year may not be excessively delayed if parties managed to postpone the physical hearing until the start of the new year. However, this may not be possible if counsel and the tribunal members have heavily packed schedules and cannot realistically reschedule physical hearings without excessive postponement.

Parties should also bear in mind the rules of natural justice, which dictates that all parties should have a fair opportunity of presenting its case. Should there be a breach of natural justice, parties may be faced with enforceability issues after the issuance of the award.

How should Virtual Hearings be Conducted?

Be that as it may, there will still be instances where virtual hearings are suitable for the expeditious and efficient conduct of arbitration proceedings. Parties proceeding with virtual hearings are encouraged to consider the following issues:

- The time and length of hearing. In virtual hearings, parties would be at different places with different time zones: To ensure that parties do not have to 'wake up too early' or 'stay up too late', the hearing duration for each day may have to be shorter than the conventional eight-hours (9am-6pm) physical hearing. It is also worth considering including more breaks due to parties' shorter attention spans for virtual interactions.
- The procedures for factual and expert witnesses to join the hearing remotely without compromising on the integrity of the oral testimony. In virtual hearings, there is a risk that witnesses may not be alone (for example, there could be someone else behind the video camera, in the same room as the witness or elsewhere who may be influencing the witness). To preserve the integrity of the testimony, parties may consider appointing a hearing invigilator (for example, a representative of the arbitration institution or an independent lawyer) to be in the same room as the witness or requiring 360-degree video viewing of the room.
- The procedures for document storage and viewing: Whilst each of the arbitral tribunal members and legal counsel would no doubt have hard copy bundles of the required documents, it is useful to also have a shared electronic bundle of documents (for example, for direct and cross examination of witnesses and for highlighting points to the tribunal). Given the confidentiality of arbitration proceedings and the potential for electronic documents to be leaked, parties should consider appropriate software solutions to overcome these potential issues (for example, opting for document sharing platforms that prohibit downloads, printing and screen captures of documents).
- The virtual facilities for deliberations of the tribunal and discussions of the parties to be conducted separately. Similar to physical hearings, members of the arbitral tribunal will need to deliberate between themselves and parties will need to discuss hearing strategies or updates with counsels. In the event that all of these people are in separate locations, the technology will need to facilitate break out rooms for each of these groups that are away from the prying eyes and ears of the other groups.

- The technical requirements of the virtual hearing. Unlike physical hearings, virtual hearings run the risk of connection or other technological issues. Parties are well advised to limit the risk of unauthorised hacking by ensuring maximum security settings or password protection for the video platform. To prevent lagging and to ensure quality, parties should ensure a minimum transmission speed (for example, 256 kbs/second and 30 frames/second) and minimum resolution (for example, high definition quality).¹ Parties should also test the platform at least twice prior to the hearing (one of which should be the day before the hearing) and to agree on a contingency procedure should there be connection issues, technical hiccups or power outages.

The issues outlined above are just some of the key issues that should be considered by parties in relation to the conduct of arbitration hearings virtually. In view of the relatively novel development of virtual hearings, it is likely that there will be additional considerations as parties, counsel and arbitrators acquire more experience in virtual proceedings.

How We May Assist

As arbitration specialists, we have a wealth of experience in the conduct of arbitration proceedings. We often act as lead counsels and receive appointments as arbitrators in various arbitration proceedings. We are well placed to advise on arbitration strategies, procedures and proceedings.

To find out how we may be of assistance to you, feel free to contact any member of our team.

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¹ Seoul Protocol on Video Conferencing in International Arbitration, released in March 2020.