

## BRIEFING NOTE

**Virtual Hearings in International Arbitration Proceedings****- *What is the Future of Virtual Hearings as COVID-19 Becomes Endemic?*****Justyn Jagger & Sinyee Ong****25 April 2022****Introduction**

Since the beginning of 2022, governments around the world have announced the easing of travel restrictions for international travellers. As these restrictions are lifted and parties, witnesses and counsel can travel freely, will virtual hearings become a thing of the past?

**What Do the Arbitration Rules Say about Virtual Hearings?**

The International Chamber of Commerce (the “**ICC**”) updated its rules in 2021, making it mandatory for tribunals to adopt appropriate procedural measures that ensure effective case management. This includes virtual hearings if in-person attendance is not essential. The ICC also published a [Checklist for a Protocol on Virtual Hearings](#) to provide helpful guidance.

Shortly after the pandemic struck, the Singapore International Arbitration Centre (the “**SIAC**”) clarified Rule 19.1 of the SIAC Rules<sup>1</sup>, confirming that virtual hearings could proceed if appropriate for that dispute. The SIAC also published the [SIAC Guide: Taking Your Arbitration Remote](#) to help parties navigate through virtual and hybrid hearings. When the SIAC next updates its rules, it may make specific reference to virtual hearings.

**Will Virtual Hearings Continue to Feature as COVID-19 Becomes Endemic?**

Virtual hearings were an indispensable stop-gap measure during the peak of the pandemic. Yet, technology is not without its limitations. It is more difficult to take factual and expert testimony through a video link than in a hearing room. The fact that evidence is given remotely rather than in person makes the giving of evidence easier for the witness and more difficult for counsel. The technology lag can hamper cross examination and the nuances of body language and inflection, that go to credibility, can be lost. This may lead to a greater reliance on written statements than oral testimony (that often tests the written evidence).

As witnesses, counsel and arbitrators are scattered across time zones with little overlap in business hours, virtual hearings may not be as efficient. Hearing days have to be shorter, which is not ideal when there are only a fixed number of days set aside for the hearing. During the hearing, witnesses, counsel and the arbitrators may not be functioning at their best given the overlap of the early mornings or late evenings when the hearing has to be held. This may not impact the fairness of the proceedings, but it does impact the effectiveness of the hearing.

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<sup>1</sup> The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.

Perhaps most surprisingly, virtual hearings are not necessarily cheaper than physical hearings. The cost of: (a) maintaining an electronic documents repository; (b) engaging a virtual hearing provider; (c) renting physical hearing rooms (for counsel sitting at various locations); and (d) engaging foreign counsel to supervise factual witnesses (for witnesses located in different locations from both counsel), can exceed the cost of flying and accommodating everyone at a single location for the duration of the arbitration hearing.

But the most compelling factor for physical hearings is human nature. Parties to international arbitrations travel, and like to travel, as an inherent part of international business. Arbitrators like to see the witnesses and hear from counsel in real time. Witnesses are best tested when seated in the hot seat. Counsel will be most effective when ‘performing’ to a live audience.

So as travel restrictions are further eased, we think that physical hearings will resume in international arbitration proceedings. That is not to say that virtual hearings will be phased out. In arbitrations of less than US\$ 5 million, which account for the majority of arbitrations, there is an obligation on the parties and their advisers to keep time and cost firmly under control. Here, and in the green revolution, virtual hearings have a very important role to play.

### **How We May Assist**

We have been conducting virtual hearings since the start of the pandemic. If you require any information as to the conduct of physical or virtual hearings, and how they may deliver time and cost efficiencies, then please do not hesitate to contact us.

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