

MEALEY'S®

International Arbitration Report

Zooming Ahead: Challenges And Considerations For Virtual International Arbitration Proceedings In The Wake Of COVID-19 Pandemic

by
Albert Bates, Jr.

Troutman Pepper Hamilton Sanders LLP
Pittsburgh, PA

and

Danielle J. Volpe

Posillico Construction
Farmingdale, NY

**A commentary article
reprinted from the
August 2020 issue of
Mealey's International
Arbitration Report**



Commentary

Zooming Ahead: Challenges And Considerations For Virtual International Arbitration Proceedings In The Wake Of COVID-19 Pandemic

By
Albert Bates, Jr.
and
Danielle J. Volpe

[Editor's Note: Albert Bates Jr., is a partner and leads the International Construction Projects Practice at Troutman Pepper Hamilton Sanders LLP ("Troutman Pepper"). Danielle Volpe is a former associate of Troutman Pepper who recently became the General Counsel of Posillico Construction. Any commentary or opinions do not reflect the opinions of Troutman Pepper, Posillico Construction or LexisNexis® Mealey Publications™. Copyright © 2020 by Albert Bates Jr. and Danielle Volpe. Responses are welcome.]

I. COVID-19 – The Impedes For The Push Toward Remote Proceedings

The COVID-19 pandemic has brought to a head an issue that has been debated for years: how practical are virtual hearings and what unique factors must practitioners consider in preparing for remote proceedings. COVID-19 has prevented in-person meetings in most areas of the world, and international arbitration hearings are no exception. While some limited types of disputes are routinely handled through online dispute resolution ("ODR") entirely, many aspects of arbitral proceedings are particularly sensitive to remote handling (e.g. eliciting witness testimony; the use of documents and exhibits during cross examination; use of translators).

Apart from the COVID-19 crisis, the parties to an arbitration, particularly in the context of international arbitration, may on occasion agree that certain witnesses can be heard by video or other means to save time and costs, or to accommodate a witness who is unable to attend a hearing in-person for any number of

reasons, including difficulty obtaining a visa, travel restrictions, or the like. Indeed, as demonstrated in the 2018 Queen Mary/White & Case International Arbitration Survey, 43 percent of respondents report the use videoconferencing in international arbitration "frequently", 17 percent "always" use it, 30 percent use it "sometimes" and only 5 percent "never" use it.¹ In the wake of COVID-19, these proportions are likely to increase because international arbitrations which have not been postponed are likely to proceed through some type of video platform.

While remote witness testimony is no stranger to international arbitration practitioners, it is increasingly clear that more extensive use of remote communications, including virtual hearings, are wave of the future and will likely become an important consideration when we approach the "new normal." However, once the world is past the pandemic, parties will likely revert to "mostly" in-person hearings. Nevertheless, practitioners should expect more extensive use of remote technology, including virtual hearings, in international arbitration as practitioners and parties have gained greater confidence in and experience with this technology as a result of our current circumstances.

II. Arbitral Institutions Guidance for Videoconferencing

Over recent years many arbitral centers updated their institutional rules to modernize procedures and provide guidance on the use of emerging video conferencing technology to conduct virtual witness examinations,

including virtual hearings. Some arbitral rules expressly envisioned the potential for remote hearings (see the AAA-ICDR's Virtual Hearing Guide for Arbitrators and Parties and Article 24(1) of the ICC Rules 2017 referring to Appendix IV). Others, while not plainly providing for a virtual option, do not exclude the possibility of remote hearings. The International Chamber of Commerce International Court of Arbitration ("ICC"), the American Arbitration Association's International Centre for Dispute Resolution ("AAA/ICDR"), the International Institute for Conflict Prevention & Resolution ("CPR"), and the Chartered Institute of Arbitrators ("CI Arb") are just a few of the major arbitral institutions/organizations that have adopted useful measures to assist parties, counsel, and arbitrators to conduct of virtual hearings amidst the travel restrictions and health concerns imposed by the COVID-19 pandemic.

The guidelines and protocols issued by these organizations are intended to address particular scenarios and technology considerations presented in each case. Therefore, when deciding whether a particular case is appropriate for a virtual hearing, practitioners should take a critical look at the unique circumstances presented by each phase of the arbitration with an eye toward fairness and efficiency. For example, virtual hearings often raise various logistical and technical issues, including accommodating parties in different time zones, ensuring that all participants have access to sufficiently high-quality internet, adopting the appropriate technology and features to suit the specific needs of the hearing, and utilizing adequate privacy and security measures to combat cyber security risks.

While none of the protocols and guidelines released are entirely comprehensive, each provides a helpful set of considerations for the arbitration community as virtual hearings are become increasingly common.

III. A Critical Analysis of Virtual Hearings

There may be benefits to in-person hearings, including, *inter alia*, the ability to better assess the credibility of witnesses, the delivery of a more effective cross examination, the better command of the room and ability to engage more effectively with the tribunal, and the less cumbersome and more effective use of documents, exhibits, and demonstrative presentations. As a result, while virtual hearings are expedient and a generally

acceptable substitute in the COVID-19 era, some counsel and arbitrators raise concerns with the challenges inherent in proceeding with hearings on a video-conference platform. Some of the concerns that are frequently raised are addressed below.

Due Process – Fairness and Impartiality:

Questions of due process and fundamental fairness are important in any arbitral process and the use of virtual hearings only heightens those concerns. As a result, any question that a virtual hearing may impair a party's right to due process and fundamental fairness must be considered and addressed by the parties and the tribunal before the arbitral proceeding. For example, participants may not have the same access to the technology needed to optimize the virtual hearing process, or they may simply lack familiarity with the platform. This may be particularly true for lay witnesses and third-parties who may be called upon to testify but do not have a stake in the arbitration. While Zoom, Skype, WebEx, Teams, and other similar platforms are relatively inexpensive to utilize, participants with limited IT capabilities or lack of access to high quality internet connections may face challenges in a remote setting.

Additional issues can arise as a result of arbitrators being unfamiliar with virtual hearings.² Although arbitrators previously may have experienced certain phases of arbitrations being handled remote, such as cloud-based document sharing, pre-hearing videoconferences, and the remote appearance of selected witnesses, the concept of completely virtual hearings conducted in different locations and time zones may be unfamiliar to some arbitrators. That said, a plethora of training on remote hearings has been available since the pandemic, and most arbitrators have taken the time necessary to gain an understanding of the technology.

Of course, technology glitches may also present issues that could unduly affect a particular party. As a result, it is important for the parties and arbitrators to carefully consider fallback plans in the event of technical difficulties.

Another challenge to consider is translation issues. While translation services can be conducted remotely, translations can be more challenging in a remote environment, and must be carefully addressed in advance of the hearings.

To address some of these issues, the use of a third-party litigation support firm to “host” the virtual arbitration should be considered. “Zoom Masters,” as they have become known, control access to the hearings, provide enhanced cyber-security, display hearing exhibits and demonstratives, provide technology support in the event that glitches arise, and generally ease the technology burden on the tribunal and the parties by handling some of the logistical issues attendant to a virtual hearing.

As an alternative to a Zoom Master, some of the arbitral institutions, such as AAA/ICDR, as well as many of the large court reporting services will assist with training of the parties, counsel, witnesses, and the tribunal in the use of the technology in the weeks leading up to the hearings, and may provide real-time monitoring to minimize technology issues during the hearings.

Witnesses and Exhibits:

Some participants suggest that remote proceedings may pose challenges in evaluating witness testimony from the lack of in-person observation. In other words, it is suggested that it may be more difficult to gauge the demeanor, facial expressions and other nonverbal responses through a video screen. Further, virtual proceedings may raise concerns of protecting against off-camera witness coaching or reading from a script (or a text or WhatsApp) that is hidden from camera view.

In an effort to combat these risks, the AAA/ICDR model order, as an example, imposes a number of requirements on witness testimony. For example, a witness' face must be clearly visible on camera at all times during their testimony to allow participants to evaluate credibility. Further, a witness could be asked to show a 360 degree view of venue in which they are testifying to protect against off-camera coaching and the presence of unauthorized participants. Further, witnesses cannot utilize virtual backgrounds offered by some videoconferencing platforms.³

Participants should also address the preferred method for the presentation of exhibits during witness testimony, particularly during cross examination. The typical procedure is for counsel, a “Zoom Master,” or a court reporting service to “share” the exhibits virtually through Zoom while the witness testifies, such that the exhibits are visible to all attendees at the virtual hearing.

This procedure works fairly well where all participants have adequate technology, including high speed internet service. The display screen can also be “shared” as warranted during the hearing so that the exhibit presentation can be driven by the cross-examiner or even by the witness. This can be particularly helpful with very large Excel spreadsheets of other documents that may be unfamiliar to the Zoom Master or other host of the virtual hearings.

This is not, however, to suggest that the restrictions imposed on witness testimony by model orders promulgated by institutions like the AAA/ICDR are complete protections against witness tampering. Thus, even after implementing these procedural safeguards, some may still raise concerns about the presentation of virtual witness testimony. As a result, it is incumbent on counsel to abide by their own professional responsibilities during a virtual hearing and for the arbitrators to remain vigilant of any indication that witness tampering may have occurred.

Confidentiality, Security, and Recordation:

Remote proceedings require heightened attention to ensuring the security and privacy of online connections. While advances in technology have brought innovative ways to create procedural safeguards, some parties and counsel express concerns over security and privacy issues in light of publicized security breaches. While many of these security concerns have been addressed over the past few months by Zoom and the other providers, participants are encouraged to utilize appropriate security precautions to minimize potential security concerns, such as utilizing unique password protected links for each hearing and allowing only the host to control the entry and exit of participants for each session.

The potential to record the virtual proceedings poses additional concerns and considerations. Participants should unanimously decide whether the hearings will be recorded, the terms and conditions of the recording, concurrence by the tribunal, general prohibit recording outside the presence of the tribunal, and store the recording on a password protected link accessible to the parties and, in some cases, the arbitrators. Procedures also must be established and implemented to ensure the prompt and permanent deletion of the recordings.⁴

IV. Does a Tribunal Have the Authority to Order a Virtual Hearing?

In addition to the array of logistical concerns, there may not be agreement among the parties about whether to proceed virtually. While some parties may have a preference for in-person proceedings, others may have legitimate concerns about proceeding remotely. In addition, there may be situations in which a party may object to proceeding remotely in order to gain a perceived strategic advantage, such as delaying the hearings in order to further defer payment or otherwise seek to exercise leverage the counterparty.

In the event that one or more parties opposes a virtual hearing, does the Tribunal have the authority to order that a hearing proceed using virtual technology over the objection of a resistant party? Many arbitral institutions have issued guidance on this issue and, as explained below, generally answer the question in the affirmative. The second, and perhaps more intriguing question, is when the tribunal should exercise that authority to order virtual arbitration over party objection.

Both the Commercial and Construction Industry Rules and Mediation Procedures of the AAA provide that “[w]hen deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conference, internet communications, telephonic conferences and means other than an in-person presentation.”⁵ The AAA has also published a series of guides for conducting Virtual hearings, and has a Model Order and Procedures for a Virtual Hearing via Videoconference. The CPR also issued a model procedural order to provide guidance for conducting virtual hearings via videoconference. The ICC also generally acknowledges that arbitral proceedings may be conducted on a virtual platform. These protocols lay important groundwork for an arbitrator to order an online proceeding over the objection of one of the parties.

Notwithstanding the authority to do so, many arbitrators may be weary of exercising the authority to compel a virtual hearing over an objection of one or both parties, viewing arbitration as a consensual process. Indeed, arbitrators are naturally concerned that ordering a virtual hearing over the objection of one or more parties could give rise to challenges to the enforceability of the arbitration award. Many other factors may also

influence whether a tribunal would, in its discretion, exercise its authority to order virtual hearings over the objection of one or more parties.

A recent decision from the U.S. District Court for the Southern District of New York offers some helpful instruction on whether an arbitrator’s decision to order a virtual hearing could render the subsequent award unenforceable. In Eaton Partners LLC v. Azimuth Capital Management IV Ltd., the respondent brought a motion to vacate an arbitral award, arguing that the arbitrator was guilty of misconduct for failing to postpone the hearing when the respondent’s witness became unavailable to appear in person. The respondent argued that the arbitrator’s decision to allow a witness to appear by video, rather than adjourn the proceeding, showed favor to Claimant. The court disagreed, finding that even if the witness had appeared by video, such an appearance does not constitute a deprivation of the right to a fundamentally fair hearing.⁶ Although Eaton Partners only raised the issue of whether an order to permit a single witness to appear via video over a party’s objection constituted misconduct, as opposed to an entire virtual hearing, the court’s decision supports to notion that virtual/remote testimony is not *per se* problematic, particularly in light of the current pandemic.

V. Where Do We Go From Here? – Practical Considerations

As the limitations imposed as a result of COVID-19 remain in effect, virtual hearings will generally be the norm for the foreseeable future. Further, as parties, counsel, and arbitrators become more familiar with virtual hearing practices, many believe that virtual hearings, and the presentation of certain witnesses remotely, will endure long after the global pandemic has passed.

In deciding whether, and how, to proceed using a virtual platform, the following checklist is useful for parties to consider:

- Does the arbitration agreement specify a particular locale or seat? If so, ensure counsel familiarizes itself with the arbitral laws of that jurisdiction to ensure the use of virtual hearings would not risk of set aside or vacatur if a future award.
- Does the arbitration agreement require the use of a set of rules from a specific arbitral institution?

- If the arbitration agreement incorporates the use of a specific set of institutional rules, review those rules to see if guidance is offered as to: (i) the use of videoconferencing – either in the context of the entire proceeding or only for certain portions of the arbitration (for example, an unavailable witness); (ii) whether the rules explicitly require in-person attendance; (iii) whether the rules require that videoconferencing proceed only by unanimous agreement.
- Consider whether the rules vest the tribunal with the authority to order that the hearing proceed using a virtual platform over the objection of a party or parties.
- Are there any particular reasons why an in-person assessment of a witness may be especially important? Are any parties' right to a fair hearing impaired by the use of a virtual platform?
- If the hearings are to proceed virtually, develop thorough protocols for how the proceeding will be conducted. Separately, if possible, counsel should attempt to reach agreement on the protocols and make ensure that all participants are clear about the process.
- Select a trusted and secure platform for the virtual proceeding. A hearing test run should be conducted on the virtual platform at least one week prior to the scheduled hearing date.
- Consider the use of a Zoom Master to minimize technological and logistic issues and security concerns.
- Prepare witnesses on the ground rules and novel circumstances of a virtual hearing.
- Ensure technical support is available throughout the hearing to avoid disruption, and consider a non-virtual backup plan (such as a teleconference dial-in) in the event of a technology failure during the hearing.

The COVID-19 crisis is providing tribunals and users of international arbitration with more opportunities to utilize new technology to streamline the final resolution of disputes. The guidance issued by arbitral institutions on proceeding virtually offer helpful stepping stones to the administration of justice during these unusual times. However, it is important that these tools be utilized thoughtfully, considering and evaluating the legal and practical challenges of virtual proceedings.

Endnotes

1. 2018 Queen Mary/White & Case International Arbitration Survey: The Evolution of International Arbitration, p. 32.
2. 2018 Queen Mary/White & Case International Arbitration Survey: The Evolution of International Arbitration found, at 31- 32, that 78% of respondents had never or only rarely used virtual hearing rooms.
3. AAA/ICDR Model Order and Procedures for a Virtual Hearing via Videoconference.
4. AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM.
5. AAA Commercial Arbitration Rules and Mediation Procedures R-32(c), Conduct of Proceedings.
6. Eaton Partners, LLC v. Azimuth Capital Management IV, LTD., No. 1:2018cv11112 - Document 44 (S.D.N.Y. 2019). ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT

edited by Samuel Newhouse

The Report is produced monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

ISSN 1089-2397