



EXPERT EVIDENCE IN A VIRTUAL ERA

Panel discussion webinar

CONTENTS

| | |
|--|----|
| A Virtual Hearing Q & A..... | 1 |
| A Virtual Hearing Participant’s Checklist..... | 4 |
| Virtual Hearings: An Arbitrator’s Perspective by Janet Walker..... | 10 |
| Feedback Quotations..... | 14 |

A VIRTUAL HEARING:

Questions & Answers

Questions not answered during the live session. Please note that questions relating to live matters have been omitted from this paper.

1 I have a potential hearing in June where concurrent evidence is being considered for my discipline (forensic accounting). If not addressed during the webinar, I wonder if anyone has any experience of 'hottubbing' in the virtual world and how it worked? For example, I am thinking as to how one expert may wish to make a point on something the other expert has said - how would one be able to indicate this to the Judge? Are there any protocols to be observed?

1A We are not aware of a protocol as such. As with 'standard' concurrent evidence it is generally by agreement of the parties, for the tribunal to lead the session and, particularly when done remotely, it is hoped that each expert will be given an opportunity to respond or expand on a point after the other expert has finished speaking. Experts should seek the attention of the session leader or tribunal before they move on to another subject without speaking over the other expert.

Whilst the speakers with a legal background indicated that they would seek to avoid hot tubbing in virtual hearings, with appropriate leadership of and participation in the session there is no real reason why the utility of concurrent evidence should be lost.

2.1 I would be very interested to hear the panelists' views whether in a virtual era, they see traditional cross-examination of expert witnesses or hot tubbing as more effective.

2.2 What are the best practices to have a virtual hot tubbing of Evidence, when the experts from both sides just can't be in the same room due to lockdown?

2A Antidotally it would appear that virtual hearings gravitate to more traditional cross examination, perhaps as a result of the perceived additional challenges of virtual concurrent evidence. That may be accompanied by increased focus on encouraging experts to narrow areas of disagreement and agree the effect of facts-as-facts and figures-as-figures.

The panel's expert experience of virtual hearings to date, is that they have faced traditional cross-examination and have only been asked about their own opinion. Even where that is the case, there is a need for the expert to be able respond to differences in opinion to assist the tribunal.

3 Body language how important is it in assessing witness credibility and does a virtual hearing not detract from it.

3A The body language of witnesses has always been presented as a key reason for why witnesses should appear in person. That has not always been possible and tribunals have received remote evidence for some time, particularly in cases of international arbitration, albeit by exception. Many of the arguments for appearance in person are diminished when appropriate stable HD video and sound are accompanied with appropriate viewing of the witness, particularly for expert witnesses. Video evidence of experts may bring more focus on the witness, as opposed to what else is happening in the room, thereby increasing focus on perceived credibility indicators.

4 In situations where the hearing is governed by the “chess clock” for time, are the virtual hearings more time consuming than the actual?

4A Timing should be appropriate to the procedure adopted. Virtual hearings may be less time efficient in presentation for inexperienced counsel and tribunals.

When cross-examined virtually, questions may be more direct and so actually reduced time.

Shorter sittings can assist in maintaining time efficiency and concentration. Experience indicates that tribunals and counsel adapt quickly.

5.1 Do you think the evidence given by an expert which was collected remotely (remote psychological assessment rather than face to face) could be seen as having less weight when it comes to court?

[Psychologist involved as expert in criminal and civil hearing and parole board hearings]

5.2 What happens if the opponent opposes your proposed expert witness but refused to appoint one at the material time? Assume it is a quantum issue, and only one party has engaged an expert to assess the quantum to be paid for termination issues relating to a construction dispute and the construction site is no longer available for inspection ?

5. Further to my question, assume the proposed expert witness has prepared a report after the relevant site inspection prior to the COVID-19 situation.

5A The methodology adopted, reasons for and constraints applying to that, assumed facts and appropriate range of opinion relative to the same is key to providing transparency and context to the opinion. A disparity may arise were one expert has had direct access and the other has not. Agreeing facts-as-facts and outlining resultant opinion based on those alternatives assists the tribunal.

6 Given the importance of technology and setting, including sequestration, does the panel think there is a role for bespoke or even pop up ‘booths’ from which witnesses can give their evidence rather than having to do so from our own studies?

6A Absolutely. As I think we mentioned in the session, it seems clear that the major hearing centres and chambers are likely to provide virtual hearing booths for arbitrators whose homes lack a good connection or an appropriate space from which to serve. However, the point about providing virtual hearing booths suitable for fact witnesses and expert witnesses is an excellent one in that the staff could also provide the means to ensure that the witness was segregated from improper guidance and influence while testifying.

7.1 In cross examination, I have been educated to take questions from Counsel and to direct my answers to the Judge. How can this best be achieved in a virtual hearing?

7.2 Under cross-examination an expert takes questions from Counsel and replies to the Tribunal. For that communication to be most effective I think the expert needs to be able to see the faces of both. Might that be compromised in a virtual hearing?

7A Answers should continue to be addressed to the judge/tribunal irrespective of the view available to the expert. That can be done by prefacing the response by ‘your honour’ or other appropriate form of address.

The technology is capable of offering a view of the tribunal and both sets of counsel to the expert and there is no reason why that cannot be agreed in advance.

8 Does the panel think that virtual hearings remove some of the pressure and advocacy styles that Counsel often use to pressurise experts? Does this make hearing feel more process orientated and, as such, does the panel think this is an improvement or negative to the process?

8A Counsel adapt. If their personal style of examination is to pressure, they will continue to do so.

Counsel are normally very good at what they do and will not give the expert an easier time of things just because they are looking at the expert on a monitor rather than in person. Counsel will still want to make all their points and the expert's reactions will still be evident to the Tribunal on a monitor.

9 Will virtual hearings have an impact on experts being partisan and/or amicus curiae and will they be more suited to the better or 'worse' performer? Or, is it expected that there would be no impact?

9A The process of expert reports, meeting of experts, joint statements and the testing of expert evidence by concurrent evidence and cross examination in combination should continue to promote substance over style for expert opinion.

If an expert is being partisan, this will still come across and be evident to the tribunal.

10 Is there a standard universally accepted suite of 'must-have' governance rules when being cross examined virtually?

10A Various video protocols do exist, e.g.: Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention (March 2019); ICC's Commission Report on Information Technology in International Arbitration of October 2017; CI Arb Guidelines for Witness Conferencing in International Arbitration; Seoul Protocol on Video Conferencing in International Arbitration.



Lights, Camera, Action!

A Virtual Hearing Participant's Checklist

Janet Walker, C Arb

Lights...

Internet Connection

- get a strong and reliable connection (ideally fibre optic)
- use a hard-wired/ethernet cable

Light

- eliminate natural light
- use standing lamps (uplights) and white bulbs to reduce shadows

Sound

- find a quiet room
- cover walls and hard surfaces to reduce echo
- use a desktop speaker/microphone (or a headset if needed)

Camera...

Webcam

- use a separate webcam
- position in the middle of the participants' screen

Background

- virtual backgrounds work best against a blank contrasting wall
- can be a neutral indoor scene (avoid moving images)
- or sit in front of a blank wall

Action...!

Dedicated Videoconference System

- laptop with a powerful graphics card
- large screen for participants (try a smart tv) and
 - laptop screen for real-time transcript
 - an optional third screen for documents

Your own laptop

- for your copy of documents, hearing notes, and communications
- separate from videocall system to avoid interference



Early experience of major platforms

Zoom

- + breakout rooms, displays 49 active speakers, screenshare, user-friendly, good tutorials
- free version hosts just 40 min calls with paid options for transcription, audio dial-in

WebEx

- + many viewing options, secure file share, screenshare, recording services
- no breakout rooms, complex options, prone to glitches

MS Teams

- + free service with captions, option for global audio dial-in, Outlook compatible
- no breakout rooms, displays only last 4 speakers, connectivity issues particularly in MENA region

Virtual Hearings: An Arbitrator's Perspective

Janet Walker, C Arb*

The challenge of Covid-19

We are just beginning to appreciate the potentially catastrophic effect of Covid-19 on a core feature of the arbitral procedure – the in-person hearing. Disruption to travel seemed likely to be brief and geographically limited, but the reality is that it will be impossible for some time to conduct in-person the hearings currently scheduled and soon to be scheduled. Fortunately, international arbitration is flexible and innovative. This article examines the perceived deficits of current technologies, the recent developments, and the way forward for the special requirements for virtual hearings.

Two preliminary observations: we are familiar with remote participation for in-person hearings where it is impossible or impractical for one or more of the participants to attend in person. However, the challenge today is different: for the coming months at least, it will be impossible or imprudent in most arbitrations for any of the participants to be in the same room, even if some of them are in the same city. The question, therefore, is not one of conducting a videoconference – it is one of conducting of a *virtual hearing*. This is not just a difference in degree, but a difference in kind from the challenges we have faced before.

Secondly, remote participation was once a question of balancing logistical and forensic issues: eg, Should the witness statement be admitted even if the witness cannot attend in person? However, the challenge today is different: virtual hearings are now necessary in most cases if there is to be a live hearing at all and without undue delay. This shifts the focus from whether to permit remote participation to questions of how, in the context of virtual hearings, we can best meet the forensic and procedural fairness needs of international arbitrations.

Addressing the perceived shortcomings of established technologies

Most arbitrators are unfamiliar with virtual hearings.¹ They may have experienced cloud-based document sharing and videoconferencing, but the concept of hearings conducted with everyone in different locations is unknown to them. Moreover, their experience of remote participation is often marred by technological failures making them leery of increasing their dependence on technology. What if the video-link fails or is of poor quality? What if access to the documents is cut off without warning? Who will address technical issues when everyone is in separate locations?

Further logistical questions include managing participation from different time zones. Those who have served in arbitrations with counsel teams located around the globe will be familiar with the challenge of finding times for even brief teleconferences that fall within the waking hours of the participants. Arbitrators who draw the short straw, (typically those from Australasia) may soon expect to find themselves nightly in hearings scheduled during the “business hours” of the parties and their counsel.

Finally, in evaluating witness testimony, particularly under cross-examination, there is a concern that the loss of in-person observation will impair the tribunal's ability to assess the credibility and strength of the evidence. It may be difficult to capture the ‘look and feel’ of the witness's evidence onscreen and to discern body language, facial expressions and tonal changes. Further, remote participation raises concerns of ensuring that the witness is not being coached off-camera or reading from a script that is hidden from the tribunal's view. This casts doubt on the soundness and utility of a witness' virtual evidence.

Adopting virtual hearing room technology

Service providers such as Epiq and Opus, some working in conjunction with hearing centres such as Maxwell Chambers and HKIAC, have made great strides in addressing these technological challenges. They are now offering more comprehensive solutions involving dedicated operators participating

* Int-Arb Chambers, London.

¹ The Queen Mary, University of London 2018 International Arbitration Survey found, at 31- 32, that 78% of respondents had never or only rarely used virtual hearing rooms.

remotely to manage the videolink and deploy the documents from electronic hearing bundles. This can make the documents on which the witness is being examined or to which counsel is referring available to the participants in the hearing more efficiently than the traditional process of asking everyone to thumb through the bound volumes. This can also ensure that technology glitches are addressed promptly and efficiently. Options for real-time transcripts can include onscreen captioning to promote aural comprehension. Rotating cameras can assist in assessing the physical environment in which the witness is located. All this is a significant advance on conventional videocalls.

Further, some critical features of audiovisual technology using applications such as Zoom and Bluejeans are rapidly improving the functionality of established technologies. A key feature of an in-person hearing with many participants is the opportunity to scan the room – to observe several participants in rapid succession. The Zoom and Bluejeans platforms are fast becoming a mainstay of business meetings² and distance learning.³ They permit up to 25 or 49 participants to be displayed in a grid of images with options for expanding the image of individual participants, such as those who are speaking. To be sure, arbitrators and counsel will need screens of sufficient size and quality to make the best use of these features; and in large hearings, counsel will need to develop protocols for determining which core members of the teams are displayed onscreen. Nevertheless, it is probably fair to say that even in the largest of hearings, the Tribunal is rarely able to observe accurately more than 49 participants at once.

Furthermore, to the extent that the operator or another dedicated attendant is calling up the relevant documents onscreen, these can be displayed along with the images of the participants; and the integration of powerpoint or multimedia presentations is, in principle, seamless. Moreover, with the recording of the hearing, the synchronized video of the document, the witness, the counsel, and others can create a more precise record of the events than would exist in hearings today.

The early experience with the mass deployment of these technologies is promising. For the first time, the 2020 Vis Moots are taking place by video-link, and initial anecdotal reports from pre-moots have been very positive. Significant diplomatic meetings have taken place virtually as well, including the G7 leaders meeting about the COVID-19 response,⁴ and that of the foreign ministers of South Korea, Japan and China.⁵

In addition to the simplicity of operating these programs, and the features already mentioned, this video platforms readily accommodate breakout rooms for the parties and the tribunal. The high-definition images and sound address concerns over the capacity to display the participants' facial expressions, body language, voice tone, and other subtle non-verbal cues, making it almost as if they were in the same room; and rotating cameras, which can be controlled by the tribunal, alleviate concerns of witness coaching or behind-the-scenes collusion by confirming that a witness is alone or accompanied only by an approved assistant. Further, the improved quality of the connection in many locations has largely eliminated the time lag that has plagued long-distance communications over the years.

Clearly, not all technological needs can be met so effectively. For participants located in places with poor connectivity, there is no magic solution. For them, the quality and reliability of the sound and picture will necessarily lag behind that in better serviced areas. This larger question of connectivity is likely to be given higher priority as a public service as the challenges of travel and distance participation increase across the range of commercial and consumer activities. And, as with any new technology, virtual hearing technologies are bound to improve in reliability, ease of use, and overall quality with increased deployment.

Some of the most encouraging aspects of these developments are the significant financial and environmental benefits to be expected from reductions in the travel associated with virtual hearings. The necessary technologies are available at minimal expense – a fraction of the cost of travel for the

² <https://www.cnbc.com/2020/03/21/why-zoom-has-become-darling-of-remote-workers-amid-covid-19-outbreak.html>

³ <https://zoom.us/docs/en-us/covid19.html>

⁴ <https://www.businessinsider.com.au/photo-of-g7-meeting-shows-coronavirus-is-impacting-world-leaders-2020-3?r=US&IR=T>

⁵ <https://www.channelnewsasia.com/news/asia/south-korea-china-japan-discuss-covid-19-response-12559190>

many participants to distant hearings and accommodations there for long periods; and the reduced toll on the environment by eliminating the need for long-distance travel speaks for itself.

Adapting to the new normal of virtual hearings and videoconferences

Understanding the technological possibilities is only one aspect of embracing the new reality. Who can we expect to advance the use and availability of these technologies? Who will take leadership in establishing the protocols for conducting hearings in these new formats so as to promote efficiency and procedural fairness?

Not surprisingly, some of the leading hearing centres, are stepping up and, in some cases partnering with major service providers to facilitate virtual hearings. While much of their business, traditionally, has been in the management of physical space, their core expertise is the logistical management of hearings and they are eager to include virtual hearing facilities among the services they provide. For example, Arbitration Place in Canada, now offers *Arbitration Place Virtual*,⁶ and the Australian Disputes Centre offers *Australian Disputes Centre Virtual*⁷ for any type of dispute resolution proceeding to be held remotely. These include software and hardware videoconferencing capabilities, live document display and sharing, transcription services and technological support.

Many domestic courts have also shifted matters to remote hearings. For example, the Business and Property Courts in the UK have produced a protocol which states that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Certain witness cases may also be suitable for remote hearings.⁸ Recently, a trial in a UK Court of Protection case was conducted solely over Skype, to a great degree of success.⁹ In Australia, the Supreme Court of New South Wales has directed that the Registrar's Lists are to be conducted remotely, by the online court, telephone link or videoconference.¹⁰

Arbitral institutions have an important role to play in developing practices and protocols. Most institutional rules grant the tribunal the power to direct the procedure as it wishes; and the onus will now likely be on the party raising an objection to a virtual hearing to explain why it would be untenable under exigent circumstances such those we currently face.

Beyond this, there are a host of refinements and adjustments to be made to tailor traditional procedural safeguards to the virtual hearing setting. How will we address the concern for real-time witness coaching? Will the debate echo traditional discussions of the standards for witness preparation? How will we ensure that witnesses are sequestered where this is appropriate? Will we need to adjust the typical daily hearing schedule now that participants can expect to sit for long periods in front of their monitors? What should be done in the event of technical failures? These are among the practical issues that the international arbitration community will be considering and on which the proactive contributions of arbitral institutions will be welcome.

In developing new approaches, a number of existing soft law instruments will assist.¹¹ Although they do not deal directly with virtual hearings, they offer helpful guidance on examining witnesses by videoconference. For example, the Hague Conference Draft Guide provides an exhaustive discussion of best practice in relation to video-link witness evidence. It considers factors such as time differences

⁶ <https://www.arbitrationplace.com/arbitration-place-virtual-ehearings>

⁷ <https://www.disputescentre.com.au/adc-virtual/>

⁸ <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#telephone-and-video-hearings-during-coronavirus-outbreak>

⁹ <https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>

¹⁰ http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx

¹¹ CI Arb Guidelines for Witness Conferencing in International Arbitration (April 2019) <https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/>; Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention (March 2019) <https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf>; ICC Commission Report on Information Technology in International Arbitration (October 2017) <https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/>; and Commentary on the IBA Rules on the Taking of Evidence in International Arbitration (2010).

and operating outside regular business hours;¹² introducing documentary evidence via video link;¹³ a protocol for speaking and interruptions, where there is a delay between the picture and the sound;¹⁴ and advice on room layout, access, acoustics and lighting.¹⁵ The ICC Commission Report provides a sample wording for a pre-hearing order for testimony to be given via videoconference¹⁶ that could be adapted to virtual hearings and issues of technological breakdown.

The future of arbitral hearings?

The Covid-19 pandemic is requiring us all to adapt rapidly and in unprecedented ways to a new reality – one in which the need to develop virtual hearings has been transformed from an option for unusual circumstances to an imperative for us all to address. The genius of arbitration and the international arbitration community is that of innovation. We must all work together to advance the technologies and develop the protocols needed to meet the challenges ahead.

¹² Council on General Affairs and Policy of the Conference, 'Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention' (Document No 8, Hague Conference on Private International Law, December 2018) 48-9.

¹³ Ibid 52.

¹⁴ Ibid 59.

¹⁵ Ibid 56-8.

¹⁶ ICC Commission on Arbitration and ADR, *Information Technology in International Arbitration* (Report, October 2017) 23.

When asked 'What did you like about the event' attendees noted:

Everyone was so very practical, and the overall opinion of the speakers is that online evidence-giving is nothing to worry about.

Speakers were clear and concise, addressing practical as well as theoretical issues.

Useful tips and hints for giving evidence remotely and online. I have two trials in June and this was useful preparation material.

The event was well presented and well managed, the speakers were informative and obviously very experienced.

Very informative and had different views of the subject.

Excellent speakers from different disciplines covering wide range of topics.

Timely and pertinent topic. Competent panellist. Informal atmosphere. Chaired impeccably, including Q&A session. Good flow between panellist without excessive overlap.

The event clarified some of the challenges which will be faced by the legal process when dealing with COVID.

Very informative, a mix of practical info and detailed experiences. A good range and selection of speakers.

Practical advice that is relevant to the current situation.

Diverse range of speakers and the level of technical detail that they went into.

The high profile speakers who took part who provided first hand insight to the challenges of virtual hearings.

Discussed issues I had not considered.

Speakers appeared professional and fair in their assessment of reality.

Good speakers and because no one speaker spoke for too long it retained your interest.

Great speakers and very informative.

Good discussion about adjustments counsel should make for virtual cross-examinations and also tips/tricks.

It worked.

Everything.

Variety of expertise each of the speakers brought; the natural style of the event - not rehearsed so came across very well.

Seeing some of the living legends like Mr Gary Born. It turned out to be a congregation of real experts, Titans of the field. Counsel were counsel, undecided and 'it depends' mode, hence interesting and thought provoking. By all means I liked the 'cool' moderator!"

Practical tips from people with experience.