CLIENT ALERT

Virtual Arbitral Hearings, COVID-19, and Award Enforcement

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Reports are coming in thick and fast that both courts and international arbitrations are adapting to the remote-working climate. This alert gives a synopsis of the proposed burgeoning tools, rules and recommended practices for virtual hearings emerging from the arbitration community, which is becoming increasingly comfortable with video conferencing. It further drills down on the critical issue of award enforcement in light of these developments and the COVID-19 pandemic.

Most Institutional Rules Already Contemplate Virtual Hearings

Over recent years, nearly all arbitral institutional rules have been updated, seeking in various degrees to modernize procedures. Those changes have regularly contemplated the use of emerging video conferencing technology. For example, the 2014 revision of the LCIA Arbitration Rules, article 19.2, expressly states that any hearings may "*take place by video or telephone conference or in person (or a combination of all three)*" at the election of the tribunal.

The ICC Rules of Arbitration were updated as recently as 2017. Unfortunately, they do not expressly consider video conferencing in their main rules. Article 25(2) states that "*the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them*." However, the April 2020 guidance note from the ICC had this to say:

> *While Article 25(2) of the Rules provides that after studying the written submissions of the parties and all documents relied upon, the tribunal "shall hear the parties together in person if any of them so requests," this language can be construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place "in person" by virtual means if the circumstances so warrant.*

This view is consistent with the fact that video conferencing is expressly contemplated in case management, emergency and expedited procedure hearings at, respectively, articles 24(4), appendix V article 4(2), and appendix VI article 3(5).

The ICDR's 2014 International Arbitration Rules similarly give an expedited procedure tribunal the right to choose video conferencing at article E-9. However, as in the ICC Rules, the same cannot be said for the main arbitration rules. The 1976 UNCITRAL Arbitration Rules unsurprisingly do not contemplate video conferencing directly. Article 15(2) simply states that hearings shall take place upon the request of a party or tribunal direction. The article does not include language such as the ICC's article 25(2) of "in person," which, as noted above, the ICC itself does not interpret as "all physically in the same room." The more recent 2010 update to the UNCITRAL Rules does however include, at article 28(4), that the "*arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)*."

The recent reforms to other major institutional rules do not directly contemplate video conferencing, although they sometimes invoke the use of technology to expedite efficient proceedings. For example, the HKIAC Arbitration Rules, article 13, provide for

the tribunal's power to employ "*the effective use of technology, ... provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case*."

Institutional Guidance and Assistance

Already proliferating is a host of assistance and guides on the use of video conferencing technology for arbitral hearings and the gathering of evidence. A joint statement was put out by a group of arbitral institutions on 16 April 2020 which encouraged video conferencing. We cover that development and provide links to various guidance documents including the ICC guidance in our prior alert Amid Court Closures and COVID-Related Chaos, Arbitration Goes On. Institutions are also offering to administer virtual hearing platforms, including HKIAC and ICSID. In March 2020, ICSID noted that – even before the COVID-19 pandemic swept the globe – 60% of its 200 hearings and sessions in the previous year were conducted by video conference. CIArb publishes a series of guides for arbitral procedure, which includes Guidelines for Witness Conferencing in International Arbitration. Article 10 of the Guidelines does, however, raise some concern at the use of video conferencing for the purposes of simultaneous witness evidence. International evidence-taking for court proceedings can also be informed by the April 2020 Hague Conference Guide on Use of Video-Link under Evidence Convention.

Proposals for crafting procedural directions regarding virtual hearings within an arbitration are also appearing apace, including the Seoul Protocol from KCAB International, the Africa Arbitration Academy protocol, the CPR model procedural order, and a draft Zoom hearing procedural order from independent arbitrator Stephanie Cohen. These protocols and draft orders also include considerations for cybersecurity, which are increasingly in vogue in arbitration circles, particularly with respect to data protection and privacy issues (see further the article of one of this alert's authors here).

The scenario is not limited to arbitration. Courts around the world often remain open, and are becoming increasingly comfortable with continuing to dispense justice via video conference. A website is available on which one can monitor global developments.

Any Impact on Award Enforcement Appears Unlikely

Arbitration ultimately results in awards which may need to be enforced by courts. An arbitral seat[1] designates the local court at which a losing party may challenge the award. However, for international disputes, this is often not the court at which the winning party will wish to enforce it against the debtor. Furthermore, one of the key advantages of arbitration for international disputes is the ease of enforcement compared with court judgments owing to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (otherwise known as the "New York Convention"), which has been joined by nearly every country around the globe.[2]

Typically, arbitral rules provide for a duty of fairness and require the parties have a reasonable opportunity to present their case: *see, e.g.*, LCIA Rules, article 14.4(i); ICC Rules, article 22(4); 1976 UNCITRAL Rules, article 15(1). Legislation will also do so: *see, e.g.*, section 33(1)(a) Arbitration Act 1996 in England; section 1510 CPC in France; section 10 Federal Arbitration Act in the United States. The New York Convention's article V(1)(b) provides for challenge of an award brought before a Convention member court where "*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*," while article V(1)(d) does so where "*the*

composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

Challenges to awards may therefore encompass objections related to purported procedural irregularity. It is well accepted that courts all over the world are, on balance, deferential to arbitration results and process. This enforceability is one of the hallmarks for the success of international arbitration. For domestic awards in England, challenges may be brought under section 68 of the Arbitration Act 1996 where there has been a "*serious irregularity*" in the arbitral proceeding. Moreover, "[r]*elief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.*" *Terna Bahrain Holding Co. v Ali Marzook Ali Bin Kamil Al Shamsi et al.* [2012] EWHC 3283 (Comm) [85]. The 2018 Commercial Court Users Group Meeting report indicated that, in the period from 2015 to March 2018, there was a single successful challenge to an arbitral award for procedural irregularity out of 112 made.

There is no universal and international application of article V(1)(b) of the New York Convention. Federal American jurisprudence is typical when it said that the question falls to "*the application of the forum state's standards of due process, in this case, United States standards of due process*." K*araha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298 (5th Cir. 2004) (internal quotations and citations omitted). In the United States, therefore, a hearing must "*meet*[] *the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator* [given the parties' have had] *an opportunity to be heard at a meaningful time and in a meaningful manner*." *Id.* at 298-99 (internal quotations and citations omitted). Further, article V(1)(d) expressly provides that the views of due process of the seat of arbitration must be considered, as well as any agreement of the parties which may have been ignored.

Video conferencing remains a relatively new tool for dispute resolution hearings, and consequently there have been few challenges to arbitral awards which discuss the issue. But given the above indications regarding standards for "minimal fairness" and "serious irregularity," as well as the fact that many institutional rules and emerging guidance openly advocate for video conferencing, it seems unlikely that a challenge to a tribunal decision to hold a virtual hearing will meet the high standards to be successful. Recently, but still before the pandemic, in *Eaton Partners LLC v. Azimuth Capital Mgmt. IV Ltd.*, No. 1:18-cv-11112, 2019 WL 5294934, *3 (S.D.N.Y. Oct. 18, 2019) a U.S. court held that the examination of a witness by video conference, as opposed to adjournment of the hearing, would not constitute "*a deprivation of* [the] *right to a fundamentally fair hearing*." *Id.* at *4.

As noted above, the New York Convention standards of fairness and due process involve consideration of local views and practice. While the best means of avoiding a challenge to an arbitral award is always to obtain party agreement, some parties may never be able to do so. In such cases, a request to proceed with a hearing or conference by video may prevail, and will likely survive a subsequent challenge. During a period where courts are themselves turning to video conferencing to dispense their own justice, it seems dubious they would take a different view when considering the effectiveness of virtual hearings in arbitral proceedings.

Be Practical

In these unusual times, events will undoubtedly unfold differently from what disputants, arbitrators and judges would have hoped or expected. Of course, if key players in arbitral proceedings, be they an arbitrator, counsel or witnesses, should

unfortunately fall ill, or if travel remains difficult or impossible, that will inevitably have to be taken seriously as hearings are convened. But technology is now sophisticated, and environmental concerns are increasingly salient in the world gestalt. Absent events which put the very idea of a hearing in jeopardy (*e.g.* the unavailability of key witnesses or an arbitrator), we now have the tools to press ahead with the administration of justice in a practical manner wherever we are – and there is good reason to think that such tools will not in future be objectionable to courts. We should use them.

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[1] The arbitral seat is usually determined by the parties in their arbitration agreement, but institutional rules often provide for a default seat of arbitration or give the choice to the tribunal or institution if the parties do not select one in their agreement to arbitrate. For example, LCIA arbitration defaults to a seat of London, England, HKIAC defaults to Hong Kong, and ICC and UNCITRAL rules delegate the task.

[2] See: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards. At the time of this alert, there are 163 Parties to the Convention.

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