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A REPORT ON THE PANEL

“ONLINE ARBITRATION HEARING: ETHICAL CHALLENGES AND OPPORTUNITIES”

by Ernesto M. Hernández

I. INTRODUCTION

The ITA Workshop, held in Dallas on the third Thursday in June every year since 1989, is widely recognized as the leading conference in the field in the US. As one participant summarized: “It is the forum in which legitimate top practitioners gather annually. Thus, the topics are sophisticated, the networking is legitimate, and the social element is valuable.” The Workshop now begins on the preceding Wednesday afternoon, with membership meetings and activities continuing into the following Friday.

With the world turned upside down by the pandemic in 2020, the ITA completely revised the Workshop’s originally planned program to better suit the online format.

In its 32nd edition, the Workshop was an innovative online event hosting many participants.

The *Online Arbitration Hearing: Ethical Challenges and Opportunities* panel discussion addressed ethical challenges and opportunities relating to online arbitration hearings. The panelists were Sylvia Noury (Freshfields Bruckhuas Deringer LLP, London) who was the moderator, and Gabriel Costa (Shell Brasil Petróleo Ltda., Rio de Janeiro), Laurence “Larry” Shore (BonelliErede, Milan), Carlos Lapuerta (Brattle, London), Lucy Reed (Arbitration Chambers, New York), and Elie Kleiman (Jones Day, Paris). The panel of experts included diverse perspectives from in-house counsel, party representatives, an expert witness, and members of the arbitral tribunal. The panelists discussed six topics related to ethical challenges and opportunities with online arbitration hearings.

Setting the stage for the panel discussion, Ms. Noury commented that, in general, the arbitration community is ready to embrace the changes and seize the opportunities presented with virtual hearings.



II. TOPIC 1: DUE PROCESS CONCERNS WITH VIRTUAL HEARINGS

Ms. Noury noted that concerns with virtual hearings are normally centered on concerns of due process. She inquired whether virtual hearings put prejudicing pillars like equality of arms, legitimacy of the process, and due process at risk. Ms. Noury also questioned whether virtual hearings might cut against parties' expectations when entering into an arbitration agreement, particularly in long running or highly charged disputes.

From an arbitrator's perspective, Ms. Reed considered that virtual hearings will lead to new categories of illegitimate (or unsupported) abuse of due process claims and challenges, possibly weakening the foundational importance of due process. Abuse of due process claims would be used as a strategic "sword" rather than a "shield." For example, a party or its counsel would argue that a virtual hearing violated Article V(1)(B) of the New York Convention because it was unable to present its case.¹ Ms. Reed noted a few examples such as occasional internet problems (as opposed to systematic internet access problems), "Zoom fatigue" affecting counsel's performance, or a stalling party preventing the opposing party from presenting its case. As an arbitrator, she has already heard about access to the internet and electricity issues. Arbitral tribunals will need to be vigilant and prepared to press a party for its reasoning when raising due process concerns. She recognized that there might be instances when cases cannot be heard virtually without raising due process concerns (such as where the law of the seat prevents or prohibits virtual hearings, where witness testimony is critical, or where issues of fraud are to be discussed). Ultimately, arbitrators will have new challenges in the era of virtual hearings, and these challenges will be distinct from those driven by "due process paranoia." Nonetheless, Ms. Reed hopes that the legitimate protections of due process will remain protected.

From an in-house counsel's perspective, Mr. Costa stated that there is likely no reasonable due process expectation that hearings be held in-person, absent express

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 330 U.N.T.S. 38, 7 I.L.M. 1046.



language in the parties’ arbitration agreement. Although parties have taken for granted that hearings are held in-person—an expectation likely stemming more from practice than actual rules—parties will approach virtual hearings the same way they approach other procedural and strategic aspects of a dispute. Mr. Costa also predicts that while virtual hearings present opportunities for parties to contribute to “due process paranoia,” this trend will not persist, as parties, party representatives, arbitrators, and arbitral institutions will begin raising and addressing these issues early in the proceedings.

From a party representative’s perspective, Mr. Kleiman added two factors that both parties and tribunals must consider. First, although it is presumed that parties and law firms are open to virtual hearings and have access to the necessary technology to conduct the virtual proceedings, it is still unclear whether there is equal access to technology or equality in actual practice training. He predicted that parties would face additional evidentiary challenges proving that they could not present their case because, for example, they lacked the necessary access to technology. Mr. Kleiman noted that the arbitration community would have to accept that the future challenges to arbitration awards remain unclear. Second, Mr. Kleiman also believes that the human nature of arbitration is a factor to be considered. Members of the tribunal are selected and appointed because parties and counsel think highly of their independence and intellect and because parties and counsel value time spent in the same room. This human nature of arbitration remains present even in a virtual world.

III. TOPIC 2: CONDUCT OF ALL PARTICIPANTS—TRIBUNAL, PARTIES, COUNSEL, AND WITNESSES

Some argue that the advocacy style of counsel may suffer from virtual proceedings. Others think that virtual proceedings help eliminate some of the unnecessary theatrics of arbitration hearings. Ms. Noury queried whether virtual hearings would make proceedings more civilized or, conversely, would aid unethical behavior.

According to Mr. Costa, there will be a revitalization of ethical standards and codes of conduct in the virtual space, noting that several aspects of a virtual



arbitration process may require so. First, arbitral tribunals have been too reluctant to sanction parties acting in bad faith, not complying with procedural rules, or failing to abide by best practices. Second, the language of arbitration awards has caused some to discredit the arbitration process, particularly where the language in an award meant to “please” everyone actually “frustrates” everyone. Third, parties feeding the “due process paranoia” have led to a high tolerance of abuse without meaningful consequences from the tribunal. Ultimately, in Mr. Costa’s view, virtual hearings present an opportunity for newer or stricter ethical rules and standards of conduct overall.

According to Mr. Kleiman, cooperation among participants is critical when conducting virtual hearings. Virtual hearings have contributed to greater cooperation among participants because they have already had to agree on new protocols—a development that will likely become more engrained systematically. Even so, Mr. Kleiman posited that what may be lacking is a rule where counsel, parties, and the arbitrators all recognize that cooperation is not only an expectation of arbitration but also an obligation that comes with the “arbitration package.” Mr. Kleiman agreed that there is a need for more proactive arbitrators because when cooperation fails, arbitrators need to establish the organization and processes for virtual arbitrations,

Mr. Shore, on the other hand, is not concerned with parties’ conduct during virtual hearings because arbitrators—taking command of proceedings early and implementing the appropriate systems—can address problematic behavior easily. For example, there may be fewer interruptions by identifying a principal speaker, implementing procedures for objections, or incorporating time for pauses so that advocates have an opportunity to confer with colleagues. In Mr. Shore’s view, arbitrators may have to be less active with questions and be more organized internally from the outset of the proceeding. He also agreed with Mr. Kleiman that something more is needed in the virtual context, such as participants in an arbitration agreeing in advance to establish the duties to cooperate and to arbitrate in good faith.



IV. TOPIC 3: EXAMINATION OF FACT AND EXPERT WITNESSES

Before returning to the panel, Ms. Noury observed challenges concerning to witness's credibility or the integrity of proceedings are often discussed.

From an expert's perspective, Mr. Lapuerta stated that in-person testimony might be preferable because virtual testimony makes it difficult for an expert to assess whether a tribunal follows and understands the testimony. Mr. Lapuerta observed that virtual hearings present avenues for experts to not give an appropriate context for their testimony, not answer questions, or not be truthful. With respect to these dynamics, he agrees that assessing body language is critical to establishing credibility. Mr. Lapuerta proposed that an expert be placed far enough from a camera so that the video image captures the expert's entire body. Mr. Lapuerta also noted that “hot tubbing” expert witnesses might restrain them from overstating a case. Lastly, tribunals will have to develop methods to prevent experts from avoiding or inappropriately refusing to answer questions by engaging in long speeches.

From a witness's perspective, Mr. Costa noted that virtual hearings had necessitated changes to witness preparation. Unlike experts who may have the opportunity to testify multiple times during the normal course of business, fact witnesses from large companies may testify only once. Mr. Costa also noted that changes to witnesses' environments also mandate a change in the preparation strategy. Whereas fact witnesses may react and perform differently at in-person hearings, virtual hearings present witnesses with the opportunity to testify from familiar environments. It is important that fact witnesses understand their roles in the proceedings and expectations so that they remain credible during cross-examination.

Mr. Kleiman agreed that it is necessary for a witness to feel the “heat” and understand the “responsibility of the moment” to ensure the integrity of the proceedings. For example, introducing a member of opposing counsel into the same room as the witness during testimony will remind the witness that (s)he is presenting evidence and must be truthful. Mr. Kleiman also suggested that another potential solution is to focus on examining only vital issues. With a narrower scope of



examination questions from the tribunal, arbitrations increase in efficiency and obtain quality testimony and evidence.

Ms. Reed added that while virtual proceedings may complicate witness cross-examination, a positive outcome of virtual proceedings is that tribunal members would likely focus more on the proceedings because their faces are on a screen.

V. TOPIC 4: TECHNOLOGY

The panel next discussed the steps necessary to achieve an efficient virtual arbitration and the issues that increased use of technology may present.

From a party representative's perspective, Mr. Shore noted that speaking into a camera, the inability to read a tribunal's facial queues, and issues with video images affecting a tribunal's perception cause concern that the tribunal may not fully appreciate the evidence presented. He posited that a solution for this issue might be to tailor the use of technology to the aspect of the hearing. For example: presenting oral arguments over the telephone and conducting witness examination by video. A potential outcome of this approach is that tribunals may begin to place more focus on written arguments rather than oral arguments.

Ms. Reed added that another issue presented with the use of technology is that the participant is charged with the responsibility of ensuring security throughout a hearing. According to Ms. Reed, this topic needs to be discussed and decided prior to a virtual hearing. Ms. Noury also noted that this issue is important, especially given new data security regulations.

Mr. Lapuerta added that a pragmatic solution with technology and virtual witness cross-examination might be that a witness is distanced from the camera so that a witness's body is in full view and that the witness is provided with headphones and a microphone to preserve the volume of testimony.

Mr. Kleiman noted that arbitration participants must also account for the hidden costs associated with the increased use of technology. It may require that arbitral institutions subsidize technology costs or account for these costs in their rates.

VI. TOPIC 5: ENVIRONMENTAL BENEFITS

Ms. Noury noted that virtual arbitrations present significant environmental



benefits and opportunities. There is a hope that these environmental developments will be implemented at the outset of arbitration proceedings moving forward. The panel discussed whether such benefits could endure beyond the pandemic.

According to Mr. Shore, there is a tremendous opportunity to reconnect the arbitration practice with the world, both virtually and in-person, and to contribute directly to environmental sustainability when arbitration participants know that the benefits will require tradeoffs. For example, there will be cultural tradeoffs with limited in-person interactions, and tradeoffs with virtual witness examinations. Even so, the greatest benefit of virtual hearings is the environmental impact.

As an arbitrator, Ms. Reed noted that she intends to be proactive about focusing on which parts of a dispute can be done virtually, even after the pandemic ends. With respect to efficiency, Ms. Reed noted that virtual hearings would cause arbitration practitioners to be more flexible and more creative about which portions of the proceedings can and should be held virtually. With increased flexibility, international arbitration may become more accessible to those participants who would otherwise not have been able to participate or attend hearings. She recognized that there are important due process and access to justice considerations tied efficiency and environmental sustainability issues.

VII. TOPIC 6: THE NEW (POST-PANDEMIC) WORLD

Lastly, the panel addressed what the post-pandemic arbitration world would look like and what considerations parties should consider when deciding to what extent virtual proceedings should be incorporated into their cases.

Mr. Costa noted that when parties or counsel make procedural and strategic decisions, the decision should always prioritize a party's business interests, not simply legal interests, because the decisions have collateral consequences on a party's business. Mr. Costa also listed six factors parties and counsel should consider when determining whether and to what extent virtual proceedings should form part of an arbitration: (i) the selection of key witnesses and whether the witnesses should have full or limited exposure to the tribunal; (ii) where settlement is a viable option, whether in-person proceedings will facilitate opportunities to speak directly to



opposing parties to negotiate settlements; (iii) the difference in impact that demonstrative evidence will have in-person or virtually; (iv) costs; (v) the tribunal's willingness and comfort with virtual hearings and whether it would be prudent for the deciders of the case to be uncomfortable with the format of the proceedings; and (vi) whether all participants have appropriate and functioning technology.

From an arbitrator's perspective, Ms. Reed predicts that there will be greater use of semi-virtual arbitration proceedings, with the main factors being which portions of a conventional arbitration can be done virtually and fairly, more efficiently, less expensively, more securely and confidentially, and with a lower carbon footprint.

Mr. Lapuerta stated that he wishes that participants in virtual arbitrations could shift the zoom in their cameras while a witness testifies without the witness being able to control the function. Although the implementation of such technology may require additional costs, it may be an effective solution to concerns previously mentioned.

Mr. Kleiman recognized that because the arbitration community is in a transition period, solutions to these problems would not be perfect at first. Nonetheless, he is optimistic about the new mainstream for arbitration. Mr. Kleiman predicted that institutions would offer greater online dispute resolution options, whether through arbitration, mediation, or litigation.

Mr. Shore noted two additional balancing factors to be considered by the parties and arbitrators when deciding to what extent online proceedings should be part of their case. He first mentioned, cross examination and whether the importance of cross-examination for the parties tend to indicate that in-person proceedings should be preferred over virtual proceedings. He then mentioned the arbitrator's ability to decide in cases in which—having seen one counsel in person and the other counsel only virtually—they consider appropriate to order that in-person proceedings may be more advantageous and fair.

VIII. CONCLUSION

In her closing remarks, Ms. Noury expressed a positive outlook on the new normal. The new normal will involve new flexibility and a willingness to embrace virtual



proceedings into ongoing matters. The panel demonstrated that credibility, integrity, and excellent presentational skills would continue to shine in virtual settings.



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