

The Complete (but unofficial) Guide to the Willem C. Vis International Commercial Arbitration Moot

Risse

8th edition 2025
ISBN 978-3-406-84050-0
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asures Aimed at Mitigating the Effects of the COVID-19 Pandemic”.⁵ Attached to this note is a checklist for a protocol on virtual hearings. The AAA-ICDR has also issued a Virtual Hearing Guide for Arbitrators and Parties”⁶ and offers virtual hearing managed services. To provide an overview of the resources available for planning and conducting virtual arbitration hearings, the International Bar Association (IBA) has collated information on (i) video-conferencing platforms, (ii) remote interpretation and translation services, and (iii) services provided by arbitral institutions for virtual hearings.⁷

While the existing virtual hearing notes are mainly aimed at addressing the challenges posed by the pandemic, virtual hearings or “hybrid” hearings are expected to continue to frequently occur in the future. It is true that virtual hearings have disadvantages, but there are also compelling arguments in favor of them.

2.1 Challenges with virtual hearings

First, virtual hearings may involve legal issues. Arbitral tribunals need to exercise care if one of the parties objects to a virtual hearing.⁸ It has to be ensured that the award cannot be set aside because the tribunal nevertheless ordered a virtual hearing. Whether an award based on a virtual hearing held without party agreement will be upheld mainly depends on the law applicable at the seat of arbitration and the applicable arbitral rules. The ICCA formally launched a research project to that extent titled “Does a Right to a Physical Hearing Exist in International Arbitration?”⁹ The 28th Vis Moot problem asked whether a virtual hearing including witness examination would be appropriate over one party’s objection in a pandemic situation. The answer to this question is still at dispute, even after the pandemic is over.

Second, there are some external challenges in relation to virtual hearings. Technical problems may occur, especially if the internet connection is unstable. The communication needs to be adapted to avoid speaking over another due to lag in the connection. In addition, different time zones may be an issue. Having to conduct a hearing in the middle of the night can constitute an undue disadvantage for one of the parties.

⁵ Available from <https://iccwbo.org>.

⁶ Available from <https://www.adr.org>.

⁷ <https://www.ibanet.org/technology-resources-for-arbitration-va.aspx>.

⁸ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, para. 18 et seq. (available from <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures>).

⁹ <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>).

Third, and more importantly, virtual hearings involve internal challenges. Does such hearing format endanger the quality of the arbitration proceedings, for example because it is harder to fully concentrate in a virtual setting for a longer period of time? It has to be ensured that the parties get a fair hearing and that their case is given the attention it deserves. The most crucial issue in that regard is the examination of witnesses. Is it possible to judge the credibility of a witness over a camera? On the one hand, it can be difficult to judge a witness's reaction in a virtual setting, for example because it is hard to read the tone of the language. On the other hand, the witness's face is close to the camera and can arguably be seen better than in the hearing room. But is effective cross-examination possible when opposing counsel is not in the same room as the witness? How can it be ensured that a witness does not have notes with them or communicates with others while testifying?

Finally, settlement discussions are more difficult in a virtual hearing, as it is more difficult to grasp the atmosphere in the courtroom. In addition, there is no informal exchange on a personal level on the parties' side or with opposing counsel. Thus, if a party wishes to initiate settlement discussions in a virtual setting, it has to make a formal first move. Yet, parties are generally reluctant to do so because this may be perceived as a sign of weakness. Settlement discussions during the hearing itself are not that frequent anyway. However, settlement discussions often follow a hearing. It is hard to tell whether this will occur less frequently after a virtual hearing in which no informal contact was made to the other side.

2.2 Arguments in favor of virtual hearings

The obvious benefits of virtual hearings are time and cost savings, especially if a large number of people are participating and/or the travel distances are large. In any event, virtual hearings can contribute to reducing the carbon footprint of arbitration.¹⁰ When no travel is required, it will also be easier to find slots for a hearing that suit everybody's schedule. But most importantly, it is much less cumbersome for witnesses or party representatives to participate (in parts) in a virtual hearing. In video-conferences, an unlimited number of people from different places all over the world can take part. This facilitates bringing the right people to the hearing, e.g. people from different business units worldwide or counsel from a foreign office.

2.3 Conclusion

During the pandemic, most lawyers and businesses got accustomed to video-conferences. The same is true for many arbitrators. Issues such as

¹⁰ <https://www.greenerarbitrations.com/greenpledge>.

2. Virtual hearings in real life arbitration

the limited attention span and time zone issues can be addressed by splitting hearings and having more breaks. Given the obvious advantages, video-conferences are still frequently encountered in post-COVID times. At the very least, this applies for instances in which “in the old days” a telephone conference would have been held or a written procedure employed. In other words, for procedural hearings or case management conferences, video-conferences will most likely become the norm. For smaller cases, virtual hearings may be a viable option to increase the proceedings’ efficiency. We believe that hybrid hearings, i.e. in person hearings with someone participating remotely, can often be effective. For example, when a witness is not key and is located far away from the hearing’s location, it makes sense to conduct their examination by way of video.

Yet, we are more skeptical with regard to virtual hearings when it comes to the merits hearing in large arbitration cases, especially if witness evidence is of the essence. Why? Well, some of the challenges regarding witness examination can be addressed, e.g. by sending a neutral person to the room in which the witness is located to ensure that no undue influence is exercised on the witness and that the witness is not using unsolicited aids. Alternatively, a second camera could be placed behind the witness. However, it is important for a witness to get into the mood of a hearing and to carefully prepare for the examination. It is more difficult to fully concentrate on the testimony if evidence is given maybe in between two other meetings. A lack of concentration from a witness can pose a risk for the party relying on the witness. This can only be replaced to a limited extent by good preparation.

Finally, parties – as well as counsel and arbitrators – will often want to have their “day in court.” It has been argued that “*an entirely remote hearing, with all the stakeholders participating from different locations, raises concerns among arbitrators that the essence of the arbitral process will be missing.*”¹¹ While the attitude vis-à-vis virtual hearings may have changed recently, there is no doubt that an in-person hearing with all participants in the same room for days or even weeks is the climax of an often long-lasting dispute. In addition, the pandemic has provided impressive evidence that humans are social beings. They usually prefer sitting in the same room instead of sitting in front of a video camera all day. In addition, not travelling away from the office may mean that one gets disturbed by other issues that go on in the office at the same time. If one changes the location, it is easier to be fully dedicated to the case at stake and to get into the “arbitral hearing mood.” We therefore believe that fully virtual merits hearings will not become the norm – at least not for big cases.

¹¹ Nappert/Cohen, quoted after Gielen/Wahnschaffe, SchiedsVZ 2020, 257 (257).

3. Top 10 tips for virtual hearings

Most of the tips provided earlier on good oral advocacy apply to virtual hearings as well. Yet, there are some specifics to be taken into account in a virtual setting. Moreover, virtual hearings pose some additional challenges that you would not have in a conventional hearing. Therefore, in the following, we will provide some useful tips for virtual presentations and virtual hearings.

3.1 Tip 1: Preparation is key and takes more time

Of course, an oral hearing in person also requires proper preparation. However, the effort required to prepare a virtual hearing is significantly higher. It is not just that the technical aspects come on top (see below).

You also have to consider how to best interact with your team and with the client while taking sufficient safeguards that your conversation is not inadvertently visible to the other side and/or the tribunal (see below).

Finally, communicating over a camera is different from communicating in person. Body language and gesture can only be used in a limited way. In addition, modulation of the voice cannot be employed to the same extent as in a courtroom. Therefore, it is worth spending even more time on how to best convey your message to the tribunal.

3.2 Tip 2: Focus on the most important issues

It is a fact that people's attention span is shorter when they are sitting in front of a screen instead of meeting in person. With this in mind, concentrate on the key points and streamline your argument even further. Include more pauses and use a slower tempo. In addition, think of how you can best present in order to keep your listeners interested. Ideally, it is best to avoid reading out your detailed outline and reciting a text learned by heart. It helps if you can deliver your pleading in a conversational way. This requires boiling down the notes to the key points. It goes without saying that it is essential to master the issues at stake with ease.

3.3 Tip 3: Act before the camera

While you are presenting, it is highly recommendable that you look into the camera, not into your screen. The camera should be placed at eye level (or slightly higher). Avoid looking downwards toward your laptop – this will not provide for a pretty look. Ideally, you visualize the arbitrators sitting right behind the camera and address your speech directly to them.

3. Top 10 tips for virtual hearings

If you find this too difficult, it may be worth placing a team member behind the camera and looking at them while presenting. Alternatively, you could draw a smiley face on a post-it and affix it above your camera to remind you where to look.

A note of caution: If you concentrate on the camera, it is difficult to look at the screen at the same time to check the reactions of the arbitrators (or the witness). Thus make sure that the arbitrators' (or the witness's) camera feed is positioned as close as possible to your camera. This allows you to keep an eye on the tribunal or the witness. In addition, it is crucial to listen carefully in case one of the arbitrators wants to say something. If in doubt, just pause or even consider asking whether someone has a question.

Make sure that your face is perfectly illuminated. You can do this by placing the source of light in front of your face, and never behind it (unless you want to appear as a person participating in a witness protection program). It is also best to avoid illumination from the side because that will put half of your face in darkness. A good and inexpensive investment would be to buy a lamp that simulates daylight, since normal lamps often create a reddish ambience.

Make sure that the background is not distracting the viewer from what matters, and that is you. It stands to reason that the background must be neat and tidy. Do not present any details in the background, such as personal photos or books. The viewer might then concentrate more on deciphering the book titles than on listening to your presentation. Virtual backgrounds are a good idea if you want to convey a professional impression of the entire team all using the same bespoke background, e.g. by displaying the name of your university. If you do this, ensure that the clothes you are wearing are very different from the color of your virtual background. Otherwise, the computer algorithm cannot distinguish you from the background, which results in blurry images. A final word on clothes: To avoid the moiré effect with flickering images, do not wear stripes, checkered tops or other patterned clothing. When using a virtual background, do not move around.

In a virtual hearing, you need a microphone to pick up your voice. The microphone integrated into your laptop will not do the job. A distorted voice or echoes will reflect badly on the perceived quality of your arguments. Hence, you must invest in a professional microphone to be placed in front of you or affixed to your clothes. Headsets work as well but have negative effects on your outer appearance. Therefore, they remain second choice.

If you normally plead in a standing position, consider standing in front of the camera. This will allow you to act more freely and present more vividly. Yet, you need to practice with a camera in order to see what

gesture is appropriate and comes across naturally over the screen. For example, if you hold your hands too close to the camera, they will appear unnaturally large and distorted. What's more, you have to ensure that you are not too far away from the camera so that the other participants can still see your profile.

3.4 Tip 4: Allocate defined roles within your team and ensure effective communication with the client

While it is highly advisable that the key client representatives are in the same room as you, this may not always be possible. In this case, you have to ensure that an effective communication channel is established (which the client is allowed to use). Otherwise, you risk missing instructions from the client or not getting information from the client that you may need at short notice. Therefore, we recommend assigning a team member in charge of conversations with the client. If your team is large enough, asking a team member to pay special attention to the arbitrators' and opposing counsels' reactions can be helpful as well.

If the hearing involves a live transcript, it may be worth having another team member concentrate on the transcript and prepare quotes to be used later on, e.g. during cross-examination.

Do not forget to agree in advance when and how you communicate with team members. Ideally, the team members will be in the same room as you. If this is not feasible, you may want to install a separate communication channel with your team, using a different platform. Inadvertently sending a message over the chat to all participants instead of sending it to one of your team members might get you into big trouble. Always remember to also maintain a professional demeanor. In other words, extensive texting via chat or mobile phone while others are talking will most likely make you appear distracted or disrespectful.

Last but not least, technically skilled people should be available at all times in order to assist with technical issues, if any, and to ensure that everything is working well.

3.5 Tip 5: Resist the temptation of looking into your "mirror"

Avoid constantly checking how you look like while presenting. It will distract you and it will hinder your ability to maintain good contact with the listeners. Thus, if the platform allows, close your self-view. Alternatively, you can cover part of your screen e.g. by using a sticky note.

3.6 Tip 6: Make prudent use of hearing bundles

Some arbitrators may prefer traditional hard-copy hearing bundles over electronic bundles. Even if the arbitrators do not expressly request them, it might be a good idea to send over paper copies sufficiently in advance so that they are available in the hearing. Many people will remember better when they see something in writing on their desk and can make handwritten annotations or highlight certain issues.

If electronic bundles are used, it goes without saying that extra time will be required, e.g. to hyperlink documents. It may also be worth pre-sending the electronic bundles. When it comes to the hearing, it needs to be ensured that everybody has the right document ready, whether in electronic format or on paper. Bear in mind that this will require more time in a virtual setting. Of course, it has to be ensured that the page numbering is the same in the electronic bundle and the paper bundle if both are used.

For larger cases, a virtual hearing bundle provider may be a good investment. At the very least, it is advisable to ask a team member to put the slides on the screen so that you can concentrate on your argument. Do not forget to zoom in on a document to ensure that it can be read easily and does not appear too small on the screen.

3.7 Tip 7: Choose the right platform for your hearing

There are a number of platforms that can be used, both commonly used video-conferencing systems and platforms especially designed for use in a legal context. Depending on the size of the case, a virtual hearing manager may be required. The manager would not only provide technical support but could be tasked with setting up breakout rooms and checking that only authorized people are allowed into the virtual rooms.

The choice of the appropriate platform and service provider, if any, will depend on the specifics of the hearing. To give some examples:

- ➔ How many people will participate? → How many participants can be seen on the screen? Is extra effort needed to ensure control over who is allowed to join which virtual room?
- ➔ Is translation required? → Are there separate audio channels for translators to use?
- ➔ Should an electronic hearing bundle be used? → Can screen views be shared?
- ➔ How large is the file? → Are extra personnel required to pull out exhibits from the file?

3.8 Tip 8: Ensure that you have a proper setting

One laptop will not be enough to properly participate in a virtual merits hearing. Additional screens are at least needed so that the other participants and documents shared on screen can be seen at the same time. As stated above, the integrated cameras and microphones are often not of sufficient quality. Thus, investing in external microphones and cameras makes sense. This is more so because this provides you with a back-up solution if one part of the technical equipment stops working during the hearing.

There is another small but important issue. Make sure that the conference system does not only state your name but also your role in the proceedings. Thus, re-name yourself (“John Doe, Claimant’s Counsel”).

Finally, plan where to put your notes. Looking down at notes on your desk is much more noticeable in a video-conference. This will also prevent you from looking into the camera. In addition, shuffling papers will create disturbing noises. Thus, carefully consider where to place your notes. Taping poster boards to the wall behind the camera may be a good idea. A possible alternative would be a music stand, or consider arranging two screens one above the other (one with your notes and one with the tribunal) and position the camera between them.

3.9 Tip 9: Beware of the technical traps

Let’s start with the simplest thing, which is nevertheless sometimes forgotten – make sure that your devices have sufficient energy or are connected to a power source. The danger of confusing private chat and chat to all has already been mentioned. Yet, there are more pitfalls. Check that you are on mute when you are not talking in the hearing. Close all other apps in order to avoid distractions, e.g. by pop-up email notifications. This applies even more if you want to share your screen during the hearing. In this case, make sure that everything is off your computer that you do not want to share. Sharing the outline for your cross-examination instead of the document you want to direct a witness to will most likely not help your case. Showing exhibits and sharing screens have to work smoothly. Otherwise, it may ruin your argument. This brings us to the last tip ...

3.10 Tip 10: Testing, testing, testing

It is absolutely crucial that you and all other participants, including witnesses and experts as well as translators, are accustomed to the system and the platform that is used for the hearing. For significant hearings, not only an in-house test but also a test run including the tribunal and