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How the COVID-19 Crisis has Reshaped the Presentation, Techniques & Tactics in Arbitration Practice

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Arbitration in a Post Pandemic World – People, Places and Things

- I. People
 - a. Planning issues
 - i. Investigation made more difficult when not physically present
 - ii. Challenges of relying more on contemporaneous written emails/documents
 - iii. Managing parties' concentration and fatigue levels during remote proceedings
 - iv. Managing parties' different time zones and scheduling difficulties caused as a result
 - b. Remote Advocacy
 - i. Integrity of the witness and their counsel
 1. The integrity of a witness's reliability may be questioned as there is no way for the arbitrator to ensure that a witness is not reading off notes or being prompted in other way.
 2. Fortunately, all international arbitration bodies have introduced guidelines to mitigate the risk of witness prompting.
 - a. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (2020)
 - b. Parties to discuss and agree on:
 - i. Modalities of virtual sequestration of witnesses / experts
 - ii. Whether someone else is allowed in the witness' location (to assist them with documents, etc.)
 - iii. Whether synchronous communication between the lawyers and the witness (whether through chat or otherwise) is allowed
 - c. HKIAC Guidelines for Virtual Hearings (2020)
 - d. Presence of a "hearing invigilator" in the witness' room, to ensure no unauthorized devices / persons are present
 - e. Camera to provide a 360-degree view of the room at the start of the hearing session, to ensure integrity of the room
 - f. SIAC Guides: Taking Your Arbitration Remote (2020)
 - g. Witness to give evidence from behind an empty table, to ensure no personal items present
 - h. Witness to remain in frame throughout the hearing session; if they need to move off camera (e.g., during break) parties will need to consider how to manage this
 - i. Camera to provide a 360-degree view of the room at the start of the hearing session and after each break, to ensure integrity of the room.
 - ii. No opportunity for real sidebar conversations
 1. Whilst there is no direct ability within software such as zoom to hold a sidebar, it is possible to do so through a messaging platform such as

WhatsApp. However, this process is far less time-effective and limits the effectiveness of communication between the members of counsel.

- iii. Issues about cross-examination of witnesses.
 - 1. Some sources have discussed having difficulties in cross-examining witness for a sustained period while other sources have made comment that there is no inherent difficulty.

c. Witness Preparation

- i. Is witness prep and presentation any different post COVID?
 - 1. Yes, one major challenge is for witnesses to be concise in their answers as it is far more effective to limit responses to questions.
 - 2. Moreover, there is a risk that the witness may feel the need to have notes nearby to assist which is clearly not permissible but may be hard to prevent or detect.
 - 3. Another challenge in regard to witness preparation via zoom is that it is harder to build a rapport with the witness, which may affect their confidence when responding to question alone.
- ii. Can strength of delivery in the presentation be reduced by hybrid arbitration hearings
 - 1. Yes, the inability to read body language and social cues will reduce the strength of counsel's delivery.
 - 2. Moreover, the way in which the presentation is delivered may change to reflect the new environment. When using virtual conferencing tools counsel should consider using more visual graphics. It has been suggested that counsel should also strive to make their oral submissions shorter and 'punchier', however this is not a necessity and comes down to which method of delivery is best suited for the hearing at hand.

II. Places

- a. What happens when arbitration agreement does not allow for remote hearing?
 - i. At the start of the COVID-19 pandemic many arbitral institutions postponed their matters but later continued them online. Due to the extraordinary circumstances these agreements were not enforced.
 - ii. Now, many arbitral institutions, such as the ICC and the LCIA permit either in person or virtual conferencing so these agreements will remain enforceable.
- b. Multiple remote locations or main hearing venue
 - i. Due to the pandemic, there has, and will continue to be a strong trend towards online hearings, thus reducing the need for main hearing rooms.
 - 1. It is considered this will continue because of how cost-effective virtual/remote hearings are, largely because of the reduction in travel costs for the parties, especially in international arbitrations.
- c. Video Conference Hearings affecting Presentation of Evidence – engagement of counsel or witnesses with arbitrator when on a small screen rather than physically present?

- i. Observations limited to what is presented on screen – inability to read body language and other physical cues typically relied on when giving oral submissions.
 - ii. Greater emphasis placed on documentary and written evidence as oral submissions made by counsel and witnesses are less effective over virtual hearings.
- III. Things
 - a. Investment in Virtual Technology
 - i. The variety of virtual platforms may result in different parties using different platforms which will create inefficiency.
 - 1. Due to this parties may need to invest in several different virtual software's' to ensure they are capable of meeting with all different parties.
 - ii. There is a need to invest in webcams, microphones and potentially speakers and monitors to ensure the quality of the video conferencing being undertaken is high.
 - 1. These technologies can be expensive and increase the risk of technical issues but also make it easier to understand and communicate between parties.
 - iii. Another essential investment is in a strong broadband (WI-FI) connection, this is to minimize the risk of dropping out/out/losing connection to the meeting. The subsequent exercise is reconnecting can become very time consuming if it continues to happen throughout the hearing.
 - b. Challenges in Technology Presentation
 - i. 'Zoom Fatigue' – caused by
 - 1. Excessive amount of highly intense close-up eye contact
 - 2. Seeing yourself constantly which is fatiguing
 - 3. Video chats dramatically reduce mobility
 - 4. The cognitive load is much higher in video chats
 - ii. 'Zoom Fatigue' – solution
 - 1. Take Zoom or other platform out of full screen mode and face size and use external keyboard to increase 'personal space bubble'
 - 2. Users should 'hide self-view'
- IV. Conclusion
 - a. In a post-COVID world, does all of this lead to timely, efficient and thoughtful arbitration awards?