

CONCURRENT EXPERT EVIDENCE IN A POST-PANDEMIC WORLD

21 December 2020 | London
Legal Briefings

A necessary consequence of the Covid-19 pandemic is the greater use of virtual hearings for international construction arbitrations. Virtual hearings may well continue to feature prominently even in a post-pandemic world. Although there has been a proliferation of protocols on the conduct of virtual hearings, there has been little to no guidance regarding how expert witness conferencing (or ‘hottubbing’) should take place virtually.

As societies across the world emerge from their respective lockdowns, it is apparent that many individuals have grown accustomed to their new home-working environments. Alongside the normalisation of seeing friends and family, colleagues and clients through the lens of a laptop or tablet, we have seen an acceleration in the use of virtual technology in international construction arbitrations. Notably, there has been a significant rise in virtual hearings. Although virtual hearings are being used in response to the challenges of convening face-to-face hearings, they will likely become a normal feature of the post-pandemic world.

The authors provide their insights into the increased use of virtual hearings, discuss the challenges that virtual hearings present for hot-tubbing and discuss measures to ensure that expert witness conferencing continues to be a viable option if, or possibly when, virtual hearings become the new normal.

FROM VENUE TO VIRTUALS

The use of virtual technology has long been commonplace in international arbitration. This may partly explain why the leading arbitral institutions did not issue their joint statement on arbitration and Covid-19 until 16 April this year.¹ Although the issuance of a joint statement was relatively slow, arbitral institutions and organisations had been individually publishing guidance statements since as early as March. For example, the Korean Commercial Arbitration Board published the Seoul Protocol on Video Conferencing in International Arbitration on 18 March 2020;² the International Chamber of Commerce published its 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (the 'ICC Guidance Note') on 9 April 2020;³ and the Africa Arbitration Academy issued its Protocol on Virtual Hearings in Africa in April 2020.⁴

In addition, parties and counsel have prepared their own bespoke protocols, for individual cases, to govern virtual hearings. The protocols, in their various forms, all serve an important and necessary purpose, and cover matters such as:

- the required hardware (screens, cameras, microphones, etc);
- the mechanics of the technology (eg, how to join the virtual hearing and how to contact the virtual hearing organisers);
- how documents are to be managed and shared on screen, and by whom;
- witness examination procedure (eg, how to ensure that no one is in the room with a witness, that clean copies of documents are made available, that there are no external prompts and that any limits to the length of responses are adhered to); and
- practical issues (eg, that participants should be on mute with video off, except the tribunal, leading counsel and the witness, and that only one person should speak at a time, with others to signal an interruption). The anecdotal evidence suggests that tribunals, counsel and parties have grown accustomed to a socially distanced world. Both domestic and international arbitration hearings, including international construction arbitrations, are increasingly being conducted virtually in lieu of postponement for an unknown length of time.

VIRTUAL HEARINGS - THE NEW NORMAL?

During the pandemic, virtual arbitration hearings using industry-standard web conferencing platforms have largely been successful. However, virtual hearings are not a panacea. While offering a viable medium to proceed with arbitral hearings during the pandemic, numerous practical challenges require consideration in each case. Additional effort should be made to implement safeguards to prevent or minimise the impact of these challenges. The proliferation and use of protocols to guide the virtual hearing process confirms the need for thoughtful planning and organisation.

Nonetheless, there has been demonstrable success in the use of virtual hearings. The chairman of the tribunal in a recent virtual arbitral hearing commented:

*'I think it has been remarkable how few hitches there have been. I mean there have been one or two hitches [...] which have been overcome pretty speedily, and I think this is a great tribute to all concerned in organising this virtual hearing and I am sure there are going to be many, many more virtual hearings.'*⁵

There is comparable feedback from expert witnesses participating in virtual hearings.

One expert witness commented that their experience of a virtual hearing was 'very stressful during cross examination', akin to being in a physical hearing room.⁶

If the virtual hearing is well organised, it is an effective approach to increasing efficiency and ready access to justice in international arbitrations. This is relevant not only in a lockdown situation, but also in construction arbitrations concerning international projects where participants often reside in multiple countries.

The increased use of virtual hearings is likely to continue. The use of virtual technology in international arbitration is not novel. Even before the outbreak of Covid-19, it was not uncommon to have a section of the hearing conducted virtually, particularly in emergency arbitrations or where a witness was unable to attend a hearing in person.

There is a long-held perception that it is slower and more costly for parties to obtain an award in international construction arbitration than should rightly be the case. In recent years, there has been a sharpened focus on how international construction arbitrations can be more efficient. Virtual hearings appear to be a further means of driving improvements. For example, virtual hearings eliminate the costs and inconveniences of international travel and accommodation and allow participants greater flexibility for hearing dates.

DO VIRTUAL HEARINGS MEAN PULLING THE PLUG ON THE HOT TUB?

Although the sharp rise in the use of virtual hearings is a consequence of restrictions on international travel, local lockdowns and social distancing policies, several other innovative procedural approaches applicable to international construction arbitration have been proposed over the past few years, including some involving the provision of expert evidence.

A defining feature of most international construction arbitrations is their factual and technical complexity. Consequently, tribunals rely heavily on expert evidence to understand the technical engineering, programming and economic issues involved. Although the outcome of a case will not be determined solely by expert evidence, it is a vital part of international construction arbitrations.

In traditionally adduced expert evidence, the expert witness of the claimant affirms evidence in chief by reference to served reports. The witness is then cross examined by the opposing counsel, followed by any necessary reexamination. The expert witness of the respondent then follows in a similar fashion. Often, counsel will examine areas of the expert's evidence to best advance their client's case, without necessarily focusing on the specific issues of disagreement between experts or issues in which the tribunal wishes to explore. The examination of each individual expert can take several hours, or even days. Multiplying this process across all expert evidence explains why a significant amount of time is required for an arbitration hearing.

Hot-tubbing is a departure from the traditional sequential examination of expert evidence. The process of hot-tubbing was originally developed in the Australian Competition Tribunal and has been endorsed by multiple jurisdictions through court rules and practice guidelines. Early provisions for adducing concurrent expert evidence were added to the IBA Rules on the Taking of Evidence in International Commercial Arbitration in 1999,⁷ and it was adopted, as a pilot, in the English Technology and Construction Court guidelines in 2010.⁸

The process of hot-tubbing provides that experts in the same disciplines are affirmed together and often sit in the witness box at the same time. This permits the tribunal to engage with the experts in a question-and-answer format or in a more open discussion. Typically, the process takes place after both experts have been cross-examined and after the significant issues of disagreement have been identified, through factual evidence and the submissions of counsel. The tribunal probes the evidence and allows a simultaneous comparison of the experts' respective evidence.

There are some tangible advantages to hottubbing when increasing efficiency in international construction arbitrations is high on the agenda. Professor Doug Jones AO astutely identified that:

*'The efficiency derives from the fact that witnesses 'in conference' can effectively confront each other's evidence on the spot. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness' counterpart is heard. Further, it is possible that due to the technical nature of the evidence, opposing counsel will not be able to develop fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.'*⁹

However, hot-tubbing of expert witnesses is not used as widely in international construction arbitrations as some might expect. Although 63 per cent of respondents to the Queen Mary 2012 International Arbitration Survey suggested that expert witness conferencing should take place more often,¹⁰ the use of hottubbing in construction arbitrations often only comes at the behest of the arbitral tribunal, rather than the parties or their counsel.

This may reflect the perceived disadvantages of hot-tubbing, such as a sense of loss of control, and so increased risk. In many cases, examination of the experts is led by the tribunal, such that ‘barristers, who although given the opportunity to speak, seemed very much to take a back seat’.¹¹ Some practitioners have criticised hottubbing for letting ‘very poor experts off the hook from a searching cross-examination’.¹²

In addition, some experts have a more dominant personality than others, which may become problematic if one expert ends up leading the hot tub, such that the other expert fails to be effective in presenting their opinions. There are also concerns that ‘peer pressure’ may lead an expert to make concessions more easily than would otherwise be the case. Although the use of hot-tubbing would be expected to reduce a hearing’s duration, and therefore its cost, it has been said that both counsel and experts require more preparation time. Nicola Cohen, of the Academy of Experts, noted:

‘... it is unlikely that the preparation time [for counsel] pre-hearing will be reduced. In fact, it may be that counsel will need to do additional preparation, not least of all because, while the experts are in the hottub, counsel will not be able to call upon their own expert’s assistance, should the need arise.’¹³

The existence of such barriers to the use of hot-tubbing in international construction arbitration puts into question what impact the move towards virtual hearings will have on its future use. One hypothesis is that an increase in virtual hearings would correlate with a decline in the use of hot-tubbing, with tribunals being reluctant to suggest their use. Although many protocols have now been devised on the subject of virtual hearings, they are almost all entirely silent on how concurrent expert evidence can, and should, be heard in a virtual hearing, instead assuming a sequential approach to the presenting of expert witness evidence.

MAKING A SPLASH: CAN GUIDELINES BE ADAPTED IN THE CONTEXT OF VIRTUAL HEARINGS?

The absence of any guidance on hot-tubbing in virtual hearing protocols suggests a reluctance about its use in these circumstances. Indeed, the recently published Chartered Institute of Arbitrators’ Guidelines for Witness Conferencing in International Arbitration (the ‘CI Arb Guidelines’) notes that:

‘There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.’¹⁴

There are several legitimate concerns about obtaining concurrent expert evidence in virtual hearings. After a recent virtual hearing, leading counsel confirmed to the authors that they preferred physically sitting in the same room as the tribunal members because they were able to speak to the members directly, which gave a better sense of their reactions and allowed rapport building. Furthermore, the extent to which an expert witness's credibility may be impeded by video links is another oft-cited concern due to the reduced ability to assess the disposition of the expert. In addition, the lack of proximity in a virtual hot tub may exacerbate differences of language between participants, leading to a loss of nuance.

Before the CI Arb Guidelines, procedural guidance for parties and representatives on exactly how hot-tubbing should be implemented was limited, an issue long recognised as a lacuna in the arbitration landscape.

The CI Arb Guidelines, published in April last year, are broadly divided into three parts:

- a Checklist, which sets out a non-exhaustive list of matters for the parties and tribunal to consider when determining whether witness conferencing should be used;
- Standard Directions, which provide a general framework for witness conferencing that can be included in an initial procedural order, providing a set of applicable principles if the tribunal subsequently orders some of the witness evidence to be taken concurrently; and
- Specific Directions, which provide three possible procedural frameworks for witness conferencing depending on whether it is led by the tribunal, the witnesses or counsel for the parties.

While the CI Arb Guidelines appear reluctant to endorse the use of hot-tubbing when hearings take place virtually, it is these same guidelines that may provide a springboard for parties, counsel and tribunals to consider what measures to take to ensure the efficiency and effectiveness of witness conferencing in a virtual hearing.

The authors are aware of virtual arbitral hearings involving expert witness conferences taking place in the wake of the Covid-19 pandemic. In these cases, the tribunal led a question-and-answer session where each expert responded to their specific questions, and with the opportunity to reply to the other expert's views. Counsel were then permitted to raise any further points following the tribunal's joint examination. It would therefore be beneficial for existing virtual hearing protocols to include terms for hot-tubbing.

However, the CIArb Guidelines were compiled in a pre-pandemic world. The CIArb itself has openly acknowledged that there would be circumstances in which the constraints of giving evidence concurrently through virtual means would be outweighed by the benefits of hot-tubbing. Indeed, one consequence of the digitalisation of international construction arbitrations in response to the pandemic might be a faster uptake of the CIArb Guidelines. Tribunals, parties and counsel will be reliant on having much clearer procedural directions if hot-tubbing is to be used in virtual hearings. The logistics and procedures for hot-tubbing must be more clearly defined: experts will not, for example, easily be able to intervene with a response to points made by the other expert.

The CIArb Guidelines provide that where video conferencing is used, the tribunal should issue necessary directions on:

- advance testing of video conferencing facilities;
- the presence of a legal representative of the disputing parties at the venue of the relevant witness;
- the presence of an interpreter, if required; and
- access to all the documents relevant to such a witness's examination.

The guidance is limited and not wholly fit for present purposes (eg, the physical presence of a legal representative may be impossible following social distancing measures, travel restrictions and each firm's guidelines). However, it provides a baseline protocol that participants can develop in the arbitration to suit the needs of a specific virtual hearing. The inherent flexibility to do so is built into the CIArb Guidelines, which are not intended to be overly prescriptive but instead aim to 'recognise the diversity of approaches that can be adopted without seeking to restrict the ability and imagination of tribunals and parties to shape a conference most suited to any given dispute'.¹⁵

LOOKING AHEAD: THE FUTURE OF CONCURRENT EVIDENCE

It is timely for virtual hearing protocols to specifically address terms for virtual expert witness conferencing. These protocols may build on the foundation established by the CIArb Guidelines. As well as agreeing on the usual provisions of a witness conferencing protocol, parties, counsel and the tribunal should include provisions that address the specific challenges of a virtual hot tub, such as:

- agreeing the location from which each expert witness is to give their evidence;

- determining whether the oaths or affirmations given by the expert witnesses need to be expanded, for example, to include the confirmations that:
 - there are no other persons in the room with the expert;
 - the experts are not in communication with anyone outside the virtual hearing; and
 - the experts are only using clean copies of any statements or reports;
- requiring that experts provide their own holy book or scripture, if they wish to give an oath rather than an affirmation;
- designating a neutral individual to run the witness conference, including by:
 - taking an initial 'roll call' of the expert witnesses;
 - identifying which expert is being called on to speak next (whether for oaths and affirmations, to give oral presentations or examination by the tribunal or counsel); and
 - managing any interventions from the tribunal;
- specifying the use of an electronic document repository for the participants' exclusive use during the witness conference;
- specifying the use of separate display screens or windows for viewing documents during the conference;
- setting out an agreed running order for witnesses' examination by the tribunal or counsel;
- making it clear that the tribunal or counsel may intervene during expert witness presentations, counsel's examination of the witnesses or witness discussions; and

- setting out how any tribunal or counsel interventions or interruptions should be signalled.

This is not intended to be an exhaustive list. Participants in a virtual hearing featuring witness conferencing are likely to face other issues that can be proactively managed through their virtual hearing protocols. If, as the authors anticipate, there is a continued uptake in the use of virtual hearings, tribunals, parties, counsel and experts will need to be equipped for the resulting challenges, including those related to expert witness conferencing. A move to virtual hearings cannot signal the end of expert witness conferencing, despite its inherent disadvantages, because hot-tubbing continues to play a significant role in international construction arbitrations and is viewed positively by many experts and tribunals.

Notes

1 International Chamber of Commerce, 'Arbitral institutions COVID-19 joint statement' (16 April 2020) [//iccwbo.org/publication/arbitralinstitutions-joint-statement-in-the-wake-of-the-covid19-outbreak](https://iccwbo.org/publication/arbitralinstitutions-joint-statement-in-the-wake-of-the-covid19-outbreak) accessed 1 September 2020.

2 Seoul Protocol on Video Conferencing in International Arbitration (18 March 2020) www.kcabinternational.or.kr/user/Board/comm_notice_view.do?bbs_no=548&bd_no=169¤t_menu_code=menu0025&top_menu_code=menu0024 accessed 1 September 2020.

3 International Chamber of Commerce, 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (9 April 2020) [//iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic](https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic) accessed 1 September 2020.

4 Africa Arbitration Academy, Protocol on Virtual Hearings in Africa (April 2020), www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-ArbitrationAcademy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf accessed 1 September 2020.

5 Interview with a senior managing director, Ankura Consulting (London, 30 June 2020).

6 *Ibid.*

7 *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration* (adopted by a resolution of the IBA Council June 1999), Article 8(2).

8 Technology & Construction Court issued a revised guide on Friday 1 October 2010.

9 Doug Jones, 'Improving Arbitral Procedure: Perspectives from the Coalface' ch 11 in Bernd Ehle and Domitille Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider)*, pp 97–98.

10 Queen Mary, University of London and White and Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, p 28.

11 Civil Justice Council, 'Concurrent Expert Evidence and Hot-Tubbing', *English Litigation since the 'Jackson Reforms'* (2016) p 19.

12 *Ibid.*

13 *Ibid.*

14 'CIArb Guidelines for Witness Conferencing in International Arbitration 2019', Checklist Item (10).

15 *Ibid.*, preamble, para 1.

Nicholas Cousino is a senior director at Ankura Consulting in London and can be contacted at nicholas.cousino@ankura.com.

Originally published by Construction Law International

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2022