



Coronavirus (COVID-19)—practical tips for conducting teleconferences and videoconferences in arbitral hearings

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Arbitration analysis: Steven Finizio, partner, and Polina Permyakova, counsel, of WilmerHale offer practical guidance and tips to practitioners on conducting teleconferences and videoconferences in arbitral hearings in light of the coronavirus (COVID-19) pandemic.

Scenario: a teleconference for a short procedural hearing in an arbitration

What practical steps need to be considered in advance of a hearing conducted by teleconference?

Teleconferences are frequently used for and are particularly suitable for resolving procedural and preliminary issues, including issues relating to the conduct of the arbitration such as the timetable, applicable law, language and the seat of arbitration, requests for an extension of time, requests to dismiss, and similar issues. They are also often used for hearings related to disclosure issues. Although relatively simple to run technology-wise, an efficient hearing by teleconference does require coordination between the arbitral tribunal and the parties in advance of the hearing.

As with any other oral hearing in person, a teleconference should be conducted by and proceed under the direction of the tribunal. Depending on the issues to be addressed, the tribunal and the parties may need to consider and agree on the technology to be used, including for example the need for a screen-sharing technology or other document management software that enables shared digital access to documents. The parties are also well-advised to agree in advance on a paginated electronic bundle or identify the documents that would be addressed on the call.

A good practice is for the tribunal to require attendance of party representatives where necessary and possible, agree with the parties whether a hearing will be recorded and/or transcribed, and inform the parties of the agenda sufficiently in advance of the hearing. Both the tribunal and the parties are also well-advised to consider how members of the tribunal may communicate during the hearing (for example, if they want to deliberate) outside of the parties.

What are your top tips for successful presentation and advocacy at a hearing over the telephone? Any pitfalls or traps to avoid?

For clarity, where possible, each party should identify one speaker who will address the tribunal and will respond to the tribunal's questions. Each speaker should identify herself each time she speaks. It is also important that speakers try to be concise and pause. It is particularly important for the presiding arbitrator to be clear about the sequence of presentations and to avoid having speakers talking over each other. If the hearing involves presentation of documents, the parties should agree in advance on an electronic paginated bundle and make use of available technology for screen sharing.

How should I prepare my (non-witness) client in advance of a teleconference? Should they attend?

It is a good practice to have clients attend hearings, including by teleconference. The client should understand the purpose and scope of the teleconference, and the ground rules that have been agreed (eg, the conduct of the hearing and what is to happen, and how comments and questions arising during a teleconference should be communicated). Depending on the nature of the hearing, it can be helpful to have agreed to a way to communicate among the team and with the client during the hearing (eg, by email or text message).

What, if any, actions should be carried out after the hearing?

It is advisable for the arbitral tribunal to agree with the parties on whether there will be a transcript, minutes or a recording of the hearing. To the extent a hearing has been transcribed or recorded, the transcripts or recording should be made available to the parties and the tribunal.

Scenario: a video-conference for a longer, substantive hearing in an arbitration

What practical steps need to be considered in advance of a substantive hearing conducted by videoconference?

Use of video conferencing for arbitration hearings has been increasing. Among other potential benefits, it can save costs and reduce the environmental impact of a hearing. Now that we are experiencing a pandemic, it may be critical to allowing parties to continue to resolve their disputes in a timely fashion.

There are certainly challenges to conducting longer hearings by videoconference, and it is important to ensure due process and each party's right to be heard. However, with proper planning, videoconferencing can be used effectively.

There are a number of different ways that a substantive hearing can be conducted by videoconference. In some instances, the tribunal and parties are in one location, and a witness is testifying remotely. In other circumstances, it may be that a witness and the examining lawyers are in one location, while the tribunal and other participants are remote. And in some cases, everyone will participate remotely. The challenges differ depending on the circumstances.

When deciding on whether some or all aspects of a hearing can be conducted by videoconference, the arbitral tribunal and the parties need to consider what technology is available and the technical requirements involved, including the number of remote venues that can be connected, the mini-

imum transmission speed and resolution that are required for a clear video and audio transmission. A log-on function or an IP-to-IP encryption that excludes access for unauthorized individuals and preserves the confidentiality of the process should also be considered. The arbitral tribunal and the parties are well-advised to discuss and agree on a seating plan in advance of the hearing. The set up should allow sufficient proximity to clearly see the tribunal and each speaker. It is also advisable to ensure a sufficient number of screens, microphones with an echo cancellation function, and a computer with an email function.

Another important decision to be made is who is going to be seen on the screen. If the examining lawyers and the tribunal are not in the same place, particular consideration should be given to how the tribunal will maintain control of the proceedings.

The set up should be tested in advance and immediately prior to the opening of the hearing. The arbitral tribunal and the parties should ensure the availability of technical assistance throughout the hearing. And everyone should be prepared to be patient if there are some delays.

As is the case for teleconferences and indeed any in-person hearing, a hearing by videoconference should proceed under the direction of the tribunal, and particular consideration should be given to avoid having speakers talking over each other and for the tribunal to be able to intercede effectively during witness examinations when necessary.

What are your top tips for successful presentation and advocacy during a video hearing? Any pitfalls and traps?

Ensuring a set up that allows sufficient proximity to clearly see the tribunal and each speaker and provides for a clear video and audio transmission is key to successful presentation and advocacy.

As with teleconferences, it may be advisable for each party to identify one speaker who will address the tribunal on the particular issue.

Another important issue to consider is how documents are going to be presented and whether the technology allows documents to be displayed on a separate screen or window. Large electronic bundles can sometimes cause problems; at the same time, it can be difficult and disruptive to look for separate documents. Thinking about the best approach for the particular case is important. Whenever documents are referred to, it is important to allow sufficient time to navigate to the relevant document.

What are your top tips for successful examination and cross-examination of witnesses during a video hearing? Any pitfalls and traps?

It is usually important to agree to rules for the remote presentation of witnesses. The tribunal and the parties should discuss and agree in advance about who will be present in the room with the witness, how documents will be put to the witness and who is going to be seen on the screen. Considerations will vary from case to case, but there needs to be some agreement as to whether representatives from both parties are able to be in the room with a witness who is testifying remotely. If not, the tribunal and the parties should discuss what steps will be taken to ensure that the witness is testifying without interference or influence by the party presenting the witness. That

may mean that the entire room is visible or other steps are taken to ensure that all the parties are comfortable with the set up for the witness's testimony.

Where possible, it is advisable to display the tribunal, the witness and the cross-examiner. Videoconferencing technologies that switch the camera view to the speaker have positives and negatives. It is usually helpful to see the speaker, but switching camera views can be disruptive. It is also an additional challenge for a court reporter to transcribe a hearing because it may not be apparent who is talking when there are interruptions. Each speaker should therefore identify herself each time she speaks.

Using documents with witnesses during the examination or cross-examination can be a particular challenge. If documents are displayed on the same screen as speakers, it may make it difficult to see the witness and other speakers. However, it may be costly or otherwise difficult to display documents on a separate screen or device.

Because of the challenges to cross-examining witnesses remotely, one tip is to practice with the particular technology that will be used for the hearing. It is much easier to be effective if the examining lawyer understands how documents will be displayed and how that will interact with the particular video conferencing technology being used (including what will be seen on the screen).

What steps should be taken after the hearing has concluded?

As noted above, transcribing a hearing that has been conducted by videoconference can be a challenge. One issue that should be considered is whether the hearing will be recorded. If the hearing is recorded, the tribunal and parties will need to decide whether the recording is to be provided to the parties after the hearing.

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