


Virtual Hearings: HKIAC Releases Guidelines to Encourage Embracing the New Normal

COVID-19 has fundamentally changed how society operates and people live, as people adapt their habits for the new normal. A similar shift is happening in the world of arbitration, as both practitioners and clients become more accustomed to virtual hearings. Earlier in May, the Hong Kong International Arbitration Centre (HKIAC) reported ^[1] 85% of their hearings had some form of a virtual component and shared its experience with virtual hearings in its ^[2] Guidelines for Virtual Hearings ^[3] and webinar series to address concerns parties may have about its virtual hearing services.

Technical Considerations

HKIAC has recognized virtual hearings should migrate more to cloud-based video conferencing systems such as Zoom, Cisco Webex, and Microsoft Teams from the traditional IP-based encrypted systems, as cloud-based systems are more commercially available. Wired Internet connections, such as LAN/Ethernet connections, are preferred over WiFi. It also emphasized the importance of pre-hearing tests and having back-up systems to every connection. For example, parties should have a secondary Internet connection, using either a portable router or wireless broadband access through a mobile phone. They should also try to make available telephone dial-in access for use should the audio feed of the video conferencing system fail. Parties are also advised to have a back-up laptop and should even prepare for an alternative video conferencing system in the unlikely event that the primary system experiences a system-wide outage.

HKIAC also addresses cybersecurity risks. Notably, it does not prefer any single particular video conferencing system over another, despite the security issues Zoom was widely criticized for early in the year. In general, as many of the




commercially available cloud-based video conferencing systems have similar features, parties can take similar steps across all platforms to ensure their virtual hearings are more secure. For example, HKIAC provides “Hearing Managers” to monitor and support the IT logistics of the virtual hearing and recommends giving Hearing Managers sole control of the audio and video input, except when it comes to complex exhibits such as construction drawings, which can be presented by the party’s expert. A unique meeting number/ID and a password should be used for each session. Participants should also be forced to register before the hearing so the actual number of participants can be ascertained. The “Waiting Room” feature should be enabled so the host can control when a participant joins the session. Moreover, participants other than the main advocates and witnesses should only be able to view a private live stream, rather than being allowed to join the session.

Some may fear that witnesses are more prone to coaching from their lawyers in virtual hearings, as the parties and the tribunal are not in the same physical space and have no way of ensuring what happens out of the witness’s camera’s view. HKIAC proposes using 360-degree cameras and having an independent third party, a “Hearing Invigilator,” present in the same room as the witness to pick up anything that does not go by the book.

Legal Considerations

Do arbitration laws in Hong Kong allow virtual hearings? Section 46(c) of the Arbitration Ordinance (the Ordinance) provides that the arbitral tribunal has the discretion to use “*procedures that are appropriate to the particular case*” and to “*avoid[] unnecessary delay or expense*” and is therefore empowered to resort to virtual hearings during the COVID-19 outbreak. Similarly, article 13.1 of the HKIAC Rules (the Rules) has the same effect and explicitly allows the tribunal to adopt suitable procedures to avoid “*unnecessary delay or expense*” and consider any “*effective use of technology*,” which should include a video-conferencing platform. Article 2 of the Rules provides that “*communication*” includes “*any other means of telecommunication*,” and there is no reason why video conferencing, which may allow a party to dial in, does not meet this definition. More significantly, virtual hearings do not appear to be in breach of any rule or law which concerns the seat of the arbitration; article 14.2 provides that a hearing is deemed to be conducted at the seat of arbitration even if it is held outside the seat, which should apply when parties join a virtual



hearing from locations around the world. Similar provision is made under section 48 of the Ordinance, where the hearing of witnesses, experts and parties can be held “*at any place.*” Additionally, in light of the lessons learned during this COVID-19 outbreak, parties should expressly agree on the use of virtual hearings in the arbitration agreement going forward so as to eliminate any doubt that virtual hearings are possible.

What if one of the parties objects to a virtual hearing? Again, the tribunal is under a statutory duty to proceed with efficiency, especially if the alternative to a virtual hearing is an indefinite delay to the arbitral proceedings.

Moreover, any significant delay may provide a party wishing to proceed with an argument that it was deprived of “*a reasonable opportunity*”^[4] to present a case and such a party could then raise due process arguments to challenge the tribunal’s decisions.

If you would like additional information, please contact your Winston & Strawn relationship partner or one of our partners in the International Arbitration Practice.

View our previous article, “[Arbitration Proceedings In The Age Of Virtual Hearing Rooms.](#)”

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

[1] See <https://www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories#:~:text=In%20April%20and%20May%20approximately,HKIAC%20involve%20virtual%20hearing%20support.>

[2] See https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf.

[3] See <https://hkiac.glueup.com/event/virtual-hearings-how-best-to-proceed-hkiac-insights-22465/>

[4] See section 46(3)(b) of the Ordinance.

