



The age of virtual hearings

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As the COVID-19 pandemic lingers, the need grows to find alternatives to in-person resolution of disputes and disciplinary proceedings. Courts, administrative tribunals, and arbitration associations world-wide have published virtual hearing protocols and guidance documents in recognition that dispute resolution cannot await the end of the pandemic. One can expect that, even after the pandemic is under control, virtual hearings will remain a part of the dispute resolution landscape. Consequently, participants in dispute resolution need to be open to new ways of conducting hearings or risk being left out.

While it is not possible in these few paragraphs to undertake a thorough review of the abundance of virtual hearing literature published since the start of the COVID-19 pandemic, perhaps it is possible to emphasize two central themes that resound throughout this literature:

- the fundamentally important elements in a virtual hearing; and
- whether a particular dispute requires a virtual hearing.

The fundamentally important elements in a virtual hearing

As we introduce ourselves to virtual hearing tools and processes, it is important to have two fundamental considerations at the forefront:

- virtual hearing processes must ensure procedural fairness; and
- virtual hearings must be structured to maintain the integrity of the hearing process.

Procedural fairness

Procedural fairness is at the core of all formal dispute resolution, regardless of the forum (court, administrative tribunal, domestic tribunal, arbitration, etc.):

- parties have a right to know the case they have to meet;
- parties must have a reasonable opportunity to present evidence and argument to meet the case; and
- parties have a right to expect a decision-maker that is free of any apprehension of bias.

Procedural fairness applies whether a hearing is in-person or virtual, although the common law has stated that what is procedurally fair is informed by the dispute resolution context and the rights and interests that are at play.

There are interesting procedural fairness nuances in a virtual hearing. For example, if there is a technical breakdown in the hardware of a participant so that seeing and listening to the proceedings is impaired, who bears this risk and how must the adjudication tribunal proceed? Can the hearing continue if there is audio capability, but the visual capability has failed? If a party wants to introduce a new witness or new documents at a late stage in the virtual hearing, not only must the tribunal decide if permission should be given, but the tribunal must ensure that all participants can review the new documents or see and hear the new witness in a fashion that protects the parties' expectation of procedural fairness. What protocols are necessary to ensure all parties have the same information at the same time in the virtual hearing? What happens if a party does not have internet access, but can only participate by telephone – must all parties and the tribunal participate by telephone? The literature highlights these and other aspects of virtual hearings that do not present themselves during in-person hearings.

Integrity of the hearing process

Virtual hearings are not a completely satisfactory replacement for in-person proceedings. The in-person hearing dynamics are an important feature of dispute resolution that can only



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be imperfectly replicated in a virtual hearing environment. In addition, virtual hearings are burdened by additional layers of preparation, administration and cost that are unlikely to be ameliorated, even as the virtual hearing process becomes more ubiquitous. Nevertheless, faced with growing backlogs and the need to move forward, virtual hearings are not going away any time soon and it is incumbent upon us to become as familiar with the virtual hearing environment as we can.

Therefore, an important second consideration is the requirement for procedures, protocols and physical locations that maintain the integrity of the hearing process and eliminate the possibility for manipulation of the hearing. For example, a common refrain in the virtual hearing literature is that the technological capabilities of the audio/visual equipment used to convey a witness's testimony must:

- allow for a clear presentation of the witness and the surroundings in which the witness is located to ensure that the witness is alone and not being influenced or aided by other people during the testimony; and
- be such that the witness's access to other people and information can be restricted or monitored while testifying.

The form of oath or affirmation recommended for virtual hearings highlights the concern. In an in-person hearing, the chair of the adjudicating panel will administer an oath or affirmation to a witness whereby the witness swears or affirms to tell the truth. In a virtual hearing, witnesses will be required to make the same

oath or affirmation, but, in addition, the witnesses should swear or affirm that they are alone in the location from which they are testifying, that they have no means of communication with anybody or at least will not attempt to communicate with anyone other than examining counsel and the adjudication panel while testifying, and the only materials they have before them or will access during their direct and cross examination will be clean, un-annotated copies of hard and electronic documents provided to the witnesses for use while testifying.¹

If a proposed virtual process does not meet the primary objectives of procedural fairness and hearing integrity, it should be a non-starter. There should be careful consideration of what is necessary to achieve these objectives with sufficient lead-time before the hearing to put appropriate measures in place.

It is not possible to attempt any representative presentation of the virtual hearing literature in the short space of this writing. [Some sources are provided in the endnotes.²] However, very shortly into researching virtual hearings, the reader will discern repeating themes and concerns including:

- the legislative or consensual basis upon which a virtual process can be undertaken;
- the technology requirements to enable virtual hearings;
- privacy and cyber-security issues;
- processes and arrangements that will make the virtual hearing workable if not necessarily convenient; and
- enforceability of a decision resulting from virtual hearings.

Some of the published protocols are surprisingly short being essentially bullet-point lists of considerations with none of the underlying details. On the other hand, some guidance documents span dozens of pages and contain detailed checklists covering procedural protocols, technology requirements, the characteristics of the available virtual hearing platforms, advantages of competing document management platforms, etc.³ One particularly useful publication for ZOOM platform users provides a settings checklist.⁴

Is a virtual hearing necessary?

In pre-COVID-19 days, preparation for and attendance at any kind of in-person hearing was an expensive, time-consuming logistical challenge. The complexity of the hearing processes is burdened by the inevitable adversarial nature of dispute resolution. All of this remains in the COVID-19 environment, but it is also hampered by the extra layers of administration, planning, practice, technology requirements, and privacy and confidentiality issues.

It is striking the amount of upfront learning and preparation that is required for successful virtual hearings. Selection among the number of available hearing platforms and document management platforms alone is a daunting consideration. Participants will need to invest significant time learning how to use the platforms or have the financial wherewithal to avail themselves of personnel that can manage the technological aspects for them.

These extra layers come at a cost in time and resources. It should drive parties and decision-makers to consider if a hearing is necessary at all and, if so, what mechanisms and tools can be brought to bear to reduce the scope of the hearing.

The first critical step is for the parties to clearly and precisely determine what are the issues in a dispute so that appropriate decisions can be made about what requires a virtual hearing and how the remaining aspects can be most efficiently presented. If the parties have not proactively established what is in dispute through pleadings, statements of issues or some other process, it would be beneficial for the decision-maker to drive the process in pre-hearing discussions. For each identified issue, the parties should be determining what evidence is relevant and material to the issues and how that evidence can be placed before the adjudicating tribunal.

It may be that the facts in a particular case are not challenged leading to the possibility that an agreed statement of facts can serve as the evidentiary basis upon which the law or governing principles are to be applied. In such instances, the need to hear oral testimony from witnesses is eliminated or at least reduced. It might be possible to rely upon an agreed compilation of documents accepting that what is contained in the documents is the truth of the matters addressed in them.

Joint books of documents and case authorities have always promoted efficiency in hearings and will continue to do so in virtual hearings. Even if only some of the issues can be dealt with summarily or in some fashion short of the need to hear from a witness, the dispute resolution process will proceed more quickly and less expensively.

Note that all of these suggestions for expediting the virtual hearing depend upon parties cooperating with each other and maintaining a level of cordiality and civility that can often be challenging in an adversarial environment. Nevertheless, it will be in the best interests of the parties to make the effort.

Closing

Like anything new, there will be much trial and error associated with virtual hearings. One hopes that, as practices evolve, the process will simplify, but, in the meantime, there will be much heavy lifting upfront. Good luck on your new adventure.

End notes

- ¹ See for example Africa Arbitration Academy – *Protocol on Virtual Hearings In Africa* – April 2020, Annex V – Witness Oath, page 14
- ² Africa Arbitration Academy – *Protocol on Virtual Hearings in Africa* – April 2020; International Court of Arbitration – *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* – April 9, 2020; American Arbitration Association/International Centre for Dispute Resolution: *Virtual Hearing Guide for Arbitrators and Parties*; The Canadian Bar Association – British Columbia Branch – *Best Practices in Virtual Hearings* – 2020; The Chartered Institute of Arbitrators – *Guidance Note on Remote Dispute Resolution Proceedings* – 2020; The Seoul Protocol on Video Conferencing in International Arbitration
- ³ See for example Joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association – *Best Practices for Remote Hearings I* – May 13, 2020
- ⁴ American Arbitration Association/International Centre for Dispute Resolution: *Virtual Hearing Guide for Arbitrators and Parties* – Appendix A – AAA-ICDR Suggested Zoom Default Settings for Virtual Hearings

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners. 