



“UNCITRAL Colloquium on Possible Future Work on Dispute Settlement”

Witness Examination in Virtual Hearings

29 March 2022

Yoshimi Ohara

Nagashima Ohno & Tsunematsu

TOPICS

- Witness examination protocol in physical hearings
- Challenges with witness examination in virtual hearings
- The need for witness examination protocol in remote hearings
- Reaction to virtual hearings

Witness examination in physical hearings

- A protocol is put into place during witness examination to ensure the integrity of the evidence obtained
- The need for a protocol arises in order to ensure that the evidence of the witness is not influenced by any person other than the witness (e.g. through witness coaching)

Witness examination in physical hearings

Common stipulations in witness examination protocol include:

- Having the witness use an unmarked set of documents during the hearing
- Ensuring a witness does not discuss their evidence with others during the course of the examination

Challenges with virtual hearings

- However, difficulties arise when witness examination is conducted via virtual hearing
- Oversight of the testimony becomes more difficult as:
 - The witness is located in a separate venue
 - The witness is visible only through the web camera, and anything located outside the camera's range is not captured

Challenges with virtual hearings

- There may be a greater risk of external influence over the witness testimony:
 - Other witnesses / unauthorised persons may be in the room listening to the witness giving testimony, outside the camera frame
 - The witness may be receiving cues from an unseen person / device
 - There may be unseen devices recording the witness' testimony

Challenges with virtual hearings

- To address these issues, there is a need for witness examination protocol specific to virtual hearings
- IBA Rules (2020) Article 8(2):
 - Where there is to be a virtual hearing, the Tribunal should work with the parties to establish a protocol ensuring that witnesses giving oral testimony are not improperly influenced or distracted

Virtual hearing protocol

- The ICC, SIAC and HKIAC have promulgated guidelines for examining witnesses during virtual hearings
 - These guidelines are not mandatory, but are available for parties to consider and adopt as part of the procedure for their own virtual hearings

Virtual hearing protocol

ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (2020)

Parties to discuss and agree on:

- Modalities of virtual sequestration of witnesses / experts
- Whether someone else is allowed in the witness' location (to assist them with documents, etc)
- Whether synchronous communication between the lawyers and the witness (whether through chat or otherwise) is allowed

Virtual hearing protocol

HKIAC Guidelines for Virtual Hearings (2020)

- Presence of a “hearing invigilator” in the witness’ room, to ensure no unauthorized devices / persons are present
- Camera to provide a 360-degree view of the room at the start of the hearing session, to ensure integrity of the room

Virtual hearing protocol

SIAC Guides: Taking Your Arbitration Remote (2020)

- Witness to give evidence from behind an empty table, to ensure no personal items present
- 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
- 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

Reception of virtual hearings

The reaction to virtual hearings has largely been positive

- In Asia, up to 80% of hearings are expected to remain fully virtual well into 2022 (data collected by Berkeley Research Group)
- In the UK, 66% of participants in virtual hearings rated their experience as “good” / “excellent” (2021 study by Baker McKenzie & KPMG)

As virtual hearings seem set to stay, there is a need for good practices in virtual witness examination to be set out in a clear protocol

Thank you

Yoshimi Ohara
Nagashima Ohno & Tsunematsu
yoshimi_ohara@noandt.com
www.noandt.com