

Draft Report on the Digital Arbitration Global Online Forum organized by the Swiss Chinese Law Association (SCLA) on 29th May 13.00-15.40 CEST

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1. Agenda

13.00-13.10 CET Time

Introduction of Swiss Chinese Law Association and SCLA Future Cloud (Tianze Zhang)

13.10-13.30 CET Time

The Reality of the New Virtual (Peter J. Pettibone,)

13.30-13.50 CET Time

Witness testimony by videoconferencing and protocols for video hearing (Chan Leng Sun)

13.50-14.10 CET Time

Art of Advocacy/ Strategies and Behaviour in Online Arbitration (Ricky Diwan QC)

14.10-14.20 CET Time

Break

14.20-14.40 CET Time

The Latest Development and Future of Online Arbitration in China (Dr. Chen Jian, Vice Secretary General, China Academy of Arbitration Law)

14.40-15.00 CET Time

Virtual Hearings – A Perspective Based on the Experience of U. S. Courts (John M. Barkett)

15.00-15.20 CET Time

Current development in the UNCITRAL Working group (Koroosh H. Ameli)

15.20-15.40 CET Time

Q & A

2. Speakers

Peter J. Pettibone, USA, Former Managing Partner of the Moscow office of Hogan & Hartson LLP

Chan Leng Sun, Singapore, Senior Counsel of the Supreme Court of Singapore, Essex Court Chambers

Ricky Diwan QC, UK, Essex Court Chambers

Dr. Chen Jian, China, Vice Secretary General, China Academy of Arbitration Law

John M. Barkett, USA, Presiding Judge, Partner of Shook, Hardy & Bacon L.L.P

Judge Koroosh H. Ameli, Netherlands, Ameli International Arbitration

3. Introduction of SCLA and SCLA Future Cloud

At the start of this Global Online Forum Mr. Tianze Zhang welcomed the speakers and participants and gave a presentation of the Swiss Chinese Law Association (SCLA).

Its vision is to be a forum and supporter of furthering the understanding and exchange between European and Asian countries. The two countries referred to in its name are a reference to the respective regions, thus not excluding, but inviting for lawyers, law firms, business enterprises and other organizations to join as members.

In line with its vision the SCLA promotes exchange between its members and with International organizations. SCLA is applying for an observer status with UNCTAD. It is organizing online fora and – when possible again – in-person conferences to allow the direct exchange of views, establishing personal contacts and share knowledge.

The SCLA also promotes the legal collaboration between China, Switzerland and European Countries. It is the editor of the Swiss Chinese Law Review which publishes articles reflecting the up-to-date legal aspects e.g. covers brand-new topics such as the legal impact of the COVID 19-pandemic. To sum up: SCLA membership provides excellent networking and business opportunities plus the chance to widen substantive knowledge and conceive new legal products.

In line with the above-described vision of the SCLA the SCLA Future Cloud is a platform for sharing ideas and practical experiences. In order to make this vision become reality the SCLA Future Cloud offers excellent services to its members such as the synchronization-, the mind map- and the chat-function.

4. Introduction to the Reality of the New Virtual

Then, Mr. Pettibone gave an introduction to the reality of the new virtual. He explained how the Covid-19 pandemic resulted in a situation where Arbitration and Mediation hearings could no longer be conducted in person.

4.1. The willingness of the Arbitration and Mediation communities to adapt

However, the Arbitration and Mediation communities speedily adjusted with this new situation for the following reason: They were open to innovate and use the services of the digital technology industry.

4.2. The necessary adjustments

But radical adjustments were necessary in order to adapt the new virtual to reality. First, everyone involved must be familiar with the use of the digital technology. Second, the equipment of the tribunal and the Parties must be adequate i.e. good internet connectivity, sufficient bandwidth and multiple screens, among others, are necessary.

Third, the timing schedule of a hearing needs to be modified to take into account that participants reside in different time zones and the fact that viewing monitor screens for lengthy periods may result in fatigue. The hearing may therefore be spread over a longer period of time since traveling is not involved.

Fourth, the number of submissions and their length need to be reduced in order to be able to be transmitted via digital technology.

Fifth, special attention needs to be paid to the preservation of confidentiality and compliance with data protection laws and cybersecurity regulations.

Sixth, contingency plans will have to be put in place at the outset of the hearing to be activated in case there are glitches.

4.3. Discussion

Mr. Zhang asked whether online hearings may affect procedural justice? Mr. Pettibone answered that this is not the case provided the requirements of due process and opportunity to be heard are respected. Mr. Knott asked whether there was a risk of challenging an arbitral award on the basis that the hearing was conducted online (because document submissions are shorter and less body language). Mr. Pettibone answered that in a virtual hearing you may even have better experience than in in-person hearings because under the present conditions in in-person hearings witnesses may be supposed to wear masks which makes it difficult to see facial expressions.

Mr. Knott asked Mr. Chan Leng Sun about his experience in relation to online arbitration. He answered that from a counsel's point of view it is disadvantageous that you do not have your team physically around you, especially when you are looking for a document to which reference is made. Mr. Pettibone explained insofar that stenographic service providers may be able to put such documents on the screen.

Comment from the Reporter

The issue regarding equal opportunity of the parties in online arbitration is a interested one. Under German law of civil procedure a difference is made between legal and factual equality, and only the legal one is guaranteed by law. This approach would suggest that technical difficulties rather affect the factual equality. There is, however, only a slim line to the right to be heard coming into play. Therefore, the principle of equality of arms should be taken very seriously in international arbitration as any delinquency could easily subsequently affect the enforcement of an online award. But the principle should not merely be applied numerically. It was already Voltaire who said: 'God is not on the side of the big battalions, but or those who shoot best.'

5. The art of advocacy and strategies and behavior in virtual arbitration hearings

As the next speaker, Mr. Ricky Diwan, addressed the art of advocacy and strategies and behavior in virtual arbitration hearings. The focus of his presentation was how body language and communication could be experienced in virtual arbitration hearings and how counsel need to adapt compared to their previous practices.

5.1. Non-verbal communication and advocacy

After explaining the significant importance of non-verbal communication in general he went on to explain how advocacy understood as the art of convincing the tribunal comes into play. The council needs to use other means than he/she has been traditionally used to in order to properly emphasize and convince the Tribunal (slides and electronic marking up). As it is difficult to read the body language of the members of the tribunal allowing counsel to assess their reactions, Ricky Diwan recommends using pregnant pauses and changes of tone in order to stir a reaction from the Tribunal. Conducting a hearing online also requires a well-planned management of time. In an online context the level of attentions fades more quickly, thus requiring more frequent breaks. This requirement in turn poses new challenges on council's planning of time and when bringing which topic to its culmination.

5.2. Non-verbal communication and witness and expert testimony

Mr. Diwan continued his presentation describing the issue of how to assess the credibility of a witness or an expert in the context of an online hearing. Insofar non-verbal communication is of significant importance as well. He quoted Richard Posner and two English cases (**Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403** and **Gestmin SGPS SA v Credit Suisse (UK) Ltd, Credit Suisse Securities (Europe) Ltd [2013] EWHC 3560**) in order to highlight the shortcomings of a witness' memory. Therefore, witness' testimony has to be tested against documentary evidence. In this context it must be verified in advance that what the witness believes he/she saw or heard is not contradicted by other types of tangible evidence.

5.3. Discussion

At the start of the discussion a participant asked whether a witness should be placed in a separate meeting room when giving his/her testimony. Mr. Diwan answered that it is essential to separate a witness in a room to make sure he/she is not being coached. Then, Mr. Zhang asked Mr. Diwan to what aspects he paid attention when conducting the online arbitration. Mr. Diwan answered that it is very important to keep things live. Then, Mr. Zhang asked about the practice in China in relation to online witness examination. Mr. Jian Chen answered that the desk before witness should be empty to make sure the witness is not coached. And a panorama zoom of the witness' room is necessary to make sure that the witness is alone.

Comment from the Reporter

It is clear that online examining of witnesses and experts have an impact on the techniques used in the past. The biggest challenge is the lack of direct, face-to-face communication between the witness and the interviewing person, especially in cross-examinations. That could mean a drawback in bringing the truth to light. This effect should, however, be accepted compared to the otherwise existing situation that no arbitral proceedings could be held at all, while travel and restrictions regarding physical meetings are in place. In a post-Corona context council should be weighing all relevant aspects when deciding whether to agree to virtual proceedings. The lack of the opportunity of direct witness examination appears to be the biggest downside of online arbitration proceedings.

6. Protocols for Virtual Hearings

Thereafter, Mr. Chan Leng Sun gave his presentation on Protocols for Virtual Hearings. Insofar he distinguished between the Pre-Covid 19-Situation and the Post-Covid 19-Situation.

6.1. Pre-Covid 19-Situation

Mr. Chan explained that virtual hearings by video conferencing already existed before the Covid 19-Pandemic. Insofar he referred to Art. 8.1 IBA Rules on the Taking of Evidence in International Arbitration 2010 according to which “each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.” In Court witness testimony by video link is allowed as an exception according to section 62A Singapore Evidence Act and Part 32.3 English Civil Procedure Rules.

In that regard he referred to the case *Polanski v Conde Nast* [2005] UKHL 10. In that case the issue was whether the claimant who brought an action for libel against the editor of the “Vanity Fair”-magazine before English Courts was entitled to present his oral evidence from France by means of a videolink. The claimant argued that if he came to England, he would run the risk of being extradited to the USA. The House of Lords held that the requested order for online testimony may be granted. Otherwise a fugitive from justice would be deprived of his right to recourse to courts in order to protect his civil rights. It is interesting to note insofar that the House of Lords considered that “recent advances in technology have made video conferencing a feasible alternative way of presenting oral evidence in court¹.”

From a lawyer’s point of view there are mainly two concerns: First, in a virtual hearing you do not get the complete body language. Second, in relation to the integrity of the witness one has to make sure that the witness is not coached.

Comment from the Reporter:

Witness coaching is a pervasive problem as nobody can control how the witness is being prepared outside the hearing room in advance. Online hearings can solve the issue of preparing the witness in the hearing room, but unless drastic and quite restrictive practices are applied, influencing witnesses outside the hearing room is not possible, neither in case of in-person nor in that of virtual hearings.

6.2. Post-Covid 19-Situation

Since the Covid 19-Pandemic virtual hearings have become the new normal and they are not limited to taking witness testimony. In Singapore, even Courts allow for court hearings by Zoom as an alternative to the adjournment of hearings. In relation to online-Arbitration Arbitral institutions have issued guidelines such as the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic², the Seoul Protocol on Video Conferencing in International Arbitration³, the HKIAC Guidelines for Virtual Hearings⁴ and the CIArb’s Guidance Note on Remote

¹ *Polanski v Conde Nast* [2005] UKHL 10 para 21.

² <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

³ [https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf).

⁴ https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_0.pdf.

Dispute Resolution Proceedings⁵. On the technical side the following guidelines have been published: the ICCA-NYC Bar-CPR's Protocol on Cybersecurity in International Arbitration⁶, the AAA-ICDR Virtual Hearing Guides⁷, the AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference⁸, IBA's Cybersecurity Guidelines⁹ and the CPR's Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings¹⁰. In any case Parties need to agree on the platform of their virtual hearing.

7. Latest development & future of Online-Arbitration in China

Thereafter, Mr. Jian Chen, gave an overview on the latest developments and expected tendencies for the future of online arbitration in China. He explained that before the Coronavirus Online-Arbitration already existed mainly for e-commerce related disputes. During the epidemic Arbitration has mainly taken place in the digital form with virtual hearings rising rapidly. Approximately 30 Arbitration institutions have different sets of rules on Online-Arbitration. Also, online platforms for Online-Arbitration have been established. The problems arising from Online-Arbitration are manifold: Only 10% of the Arbitration institutions have rules for Online-Arbitration; eye contact is almost lost and simultaneous hearing of voices is not possible. Looking into the future an update of Arbitration Rules is necessary.

During the discussion Mr. Chen explained that we cannot be sure that an Online-Arbitration award will be enforced in China.

8. Virtual Justice: A perspective from the United States

The next presentation by Mr. John M. Barkett was about Online-Arbitration from the perspective of United States Courts. In Federal as well as in most State Courts electronic filing is in place. Courts throughout the U.S. have adapted rapidly to virtual hearings on motions. In a documents-only evidentiary hearing, lawyers and judges are adjusting to presenting documents on a shared screen for the Court's review. In evidentiary hearings in which witnesses are involved the issues are the same as in arbitration:

- Where is the witness?
- Is the witness alone?
- Does the witness have any communication devices in use?
- Where will the court reporter be located?
- Does the jurisdiction permit the taking of a virtual oath?
- Are documents going to be shown to the witness?
- Will they be provided to the witness beforehand?
- Does the witness's set of documents have any notations on them?
- Do a test run to be sure everyone has access to and can operate the exhibit platform.
- For audio, use telephone connections instead of the Internet connection in case of Internet interruption, or have telephone connections as a backup that can be implemented rapidly if needed.

⁵ <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>.

⁶ https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.

⁷ https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf.

⁸ https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf.

⁹ <https://www.ibanet.org/LPRU/cybersecurity-guidelines.aspx>.

¹⁰ <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>.

- Is there a need for a technician to operate the exhibit platform (highlighting text, pulling out relevant text)?
- How long will the witness be testifying?
- Managing breaks
- Managing communications with the witness during breaks
- Reliability of Wi-Fi Networks

In relation to the question of how to restart jury trials in the U.S. Mr. Barkett pointed out that mass gatherings have been identified as the major transmission method of the SARS-2 virus that causes infections. A typical jury pool pre-COVID-19 might consist of up to 700 persons. That will not work in today's environment in particular because Courts were not built for social distancing. Thus, the question arises whether a virtual civil jury trial would be constitutional.

During the discussion Mr. Zhang raised the question of the constitutional requirements of due process in relation to Online-Arbitration. Mr. Barkett explained that U.S.-Courts are in favor of Arbitration if there is consent. Due process comes into play at the enforcement stage.

Comment from the Reporter:

It appears to be very important to keep in mind that while the whole online proceeding may be running smoothly the big surprise comes at the enforcement stage, when the losing party starts raising all kinds of challenges to the arbitration award. Therefore, it is important to always document the agreement of the other side with the procedural details of the arbitration. An alternative is also to have an independent observer accompany the proceedings and confirm that all procedural rights of the parties have been properly observed and adhered to. It is important to void subsequent surprises.

9. Current developments under UNCITRAL Rules and Practice

Finally, Mr. Koorosh Ameli gave his presentation on current developments under UNCITRAL Rules and Practice by presenting an Investment-Arbitration case¹¹. Among other aspects raised by this case the Respondent's request for suspension of the time-limit for the submission of its Statement of Defense on grounds of force majeure arising from the current COVID-19 pandemic was being discussed. The Arbitral Tribunal denied the request, although a 30-day extension was granted, on the basis that the Respondent has already had an extended period of time to prepare its Statement of Defense before the advent of the COVID-19 pandemic.

Mr. Ameli explained that the background of this decision was that Art. 17.1 UNCITRAL Arbitration Rules 2010 requires that the Arbitral Tribunal gives each party a reasonable opportunity of presenting its case while under the corresponding Article of the UNCITRAL Rules 1976 each party must have been given full opportunity to present its case. In its reasoning the Arbitral Tribunal also recognized that the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to the new reality of communicating remotely – a practice that has already been established in other proceedings. Mr. Ameli also referred to Article 122 UNCITRAL Notes on

¹¹ Orlandini v. Bolivia, PCA Case No. 2018-39, PO No. 7 (10 Apr. 2020), US-Bolivia BIT 1998, UNCITRAL Rules 2010, as amended, Place of Arbitration: Paris
<https://pcacases.com/web/sendAttach/11388>.

Organizing Arbitral Proceedings 2016 according to which “Hearings can be held in-person or remotely via technological means [...] The decision whether to hold a hearing in-person or remotely is likely to be influenced by various factors, such as the importance of the issues at stake, the desirability of interacting directly with the witnesses, the availability of parties, witnesses and experts as well as the cost and possible delay of holding a hearing in-person. The parties and the arbitral tribunal may need to consider technical matters, such as the compatibility of the technological means to be used at different locations.”

Comment from the Reporter:

The case reported by Judge Ameli and the quotation from the UNCITRAL Notes very well summarize the criteria the parties should weigh before agreeing to online hearing and expert and witness examination procedures. It appears that with respect to the document management aspects of virtual hearings there is less change compared to what lawyers have been used to. Digital tools available today allow large volume of documents to be handled electronically, especially if – as is the case – those documents have already previously been handled electronically as well.

The SCLA will continue monitor and otherwise stay actively involved in the developments of virtual arbitral proceedings and will assist and being an active partner in the next steps improving virtual proceedings. That will be unrelated to the pandemic – virtual hearings will have a significantly greater role in any case.

Cologne,

sgd. Hermann Knott

sgd. Martin Winkler