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VIRTUAL HEARINGS IN ARBITRATION

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VIRTUAL HEARINGS IN ARBITRATION

Abstract

The rapid progress in technology has opened up new opportunities in various fields, including dispute resolution. This study focuses on the emergence and importance of virtual hearings in arbitration, highlighting their potential to bring about significant changes in the digital era. Virtual hearings, also known as remote or online hearings, involve conducting arbitration proceedings through electronic means, using videoconferencing platforms and other digital tools. The use of virtual hearings in the arbitration process has revealed significant benefits, such as overcoming geographical limitations by allowing parties and arbitrators to participate from different locations without the need for travel. As a result, time and costs have been saved, in addition to an improvement in the procedural efficiency. However, some concerns related to virtual hearings have been raised such as technological infrastructure, cybersecurity, confidentiality, and their potential impact on the dynamics of the hearing process. Virtual hearings can ensure fair and accessible resolution of disputes in the digital age as we continue to adapt and integrate technology into the arbitration process.

Keywords

Hearings-Arbitration-Technology-Efficiency-Security-Fairness. .

1. BACKGROUND AND PURPOSE

There is no doubt that arbitration is an effective dispute resolution mechanism. It is both a time saving and flexible process adapting to the challenges that may occur. For instance, the Onset of covid-19 put an end (for a period of time) to in person hearings in tribunals in courts, consequently an alternative tool was needed urgently to ensure justice, especially due process: ***“Justice delayed is justice denied”***

The scholars and practitioners evoked the concept of virtual hearings as the new norm before being regulated by the soft law¹ (Knowles, B. and Szuniewicz, W. M, 2021). In fact, The Covid-19 crisis, resulting in a total lockdown, expedited the need to regulate and adapt the process of virtual hearings. The pandemic contributed greatly in revealing the weaknesses of the existing procedural framework. Moreover, it highlighted the need for Lebanon to effectively adapt and deal with the predicament in order to become a hub for arbitration in the future.

The interplay of technical capabilities and legal standards such as “due process” and the “right to present one’s case” is assessed. The study aims to identify possible pathways to replacing the classical in-person hearing with the virtual one and the key legal and practical considerations to be assessed before deciding to proceed with it.

Virtual hearings face both legal and ancillary problems which could slow down the process.

How do different legal systems react to virtual hearings? what are the Legal and technical issues that have stopped Lebanon adapting to the new perspective of reaching justice through virtual space?

2. LITERATURE REVIEW

There are various opinions depending on the scholars’ perception on what constitutes a “virtual hearing” conducted online. The author’s opinion dictates how virtual”, “online” and “remote” hearings are described accurately, either by making reference to a medium through which it is run, or to the physical separation of the actors. However, hearings may be conducted entirely virtually or in the case of hybrid hearings, which are conducted physically, the remote technology is used only to “fill in the gaps; For example, when cross examining witnesses who are unable to attend due to medical conditions. Other cases may arise where for example part of legal teams appear virtually and others physically on either side, or one legal team appears fully virtually, and the opposing team are physically present (Pavic, V. and Dordevic, M, 2021).

The recent version of the IBA Rules on the Taking of Evidence in International Arbitration² defines remote hearings as follows: *“Remote Hearing’ means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate”*.

What changes have been observed concerning “hearings in arbitration” since the beginning of the Covid-19 pandemic?

Many testimonials were rendered by specialists in the domain and they noticed that the initial reaction of tribunals and parties to the pandemic was to postpone the upcoming hearings. However, with time things began to improve, in fact tribunals and parties were open to the idea of full virtual hearings (knowles B. and Szuniewicz-wenzel M. 2021) This was particularly prompted by the lockdowns, which were constantly enforced and then eased throughout the pandemic, as a result of which travel and in-person meetings, became almost impossible to plan. They observed that for example in February 2020, many Chinese courts released online hearing systems, and many cases were heard online thereafter. By the end of 2020, there were 865,000 online hearings, of which 40% were held in Beijing. From August 2020, as the pandemic was under control, the courts gradually resumed on-site hearings. However, for parties’ convenience, some courts would still organize online hearings for parties from different regions.

¹The Guidelines and Protocols of arbitration institutions.

² IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA council, 17 Dec. 2020, international bar association.

2.1 Legal Ground

2.1.1 The Lebanese Legal System: Hard law

Lebanon currently has no legal framework to govern remote hearings. During the lockdown resulting from the pandemic, the ministry of justice represented by the minister introduced remote hearings for pretrial detention renewals³. Therefore, remote hearings were occurring only in the pretrial phase and when detention was being reviewed by the courts, rather than by the Public Prosecution.

In Lebanon, remote hearings were introduced through different decisions taken by the minister of justice and the supreme judicial council during the covid-19 lockdown period. A decree was issued by the Supreme Judicial Council in light of the health emergency posed by COVID-19. However, the decree's ambiguous wording has been problematic for defendants as the implementation depended on where the meetings were being held.

Remote hearings were limited and mainly occurred in urgent cases and investigative and pretrial hearings. In fact, detainees were transferred from holding cells to rooms inside police stations and prisons, where they were detained for virtual hearings; the investigative judge, lawyer, and state official participated from the investigative judge's office.

The hearings were supposed to be conducted through a two-way video call. However, various violations were committed by those in charge. For instance, hearings were conducted via audio only due to weak internet connections at police stations and jails. In some circumstances, remote hearings were conducted with video over mobile phones held by judges throughout the proceedings. This, inhibited lawyers from consulting with their clients and it was impossible to see anyone who may have been in the room with the defendant. Therefore, the defendant could have been subject to external pressure during hearings. Moreover, lawyers hosting hearings were frequently left waiting for hours for an internet connection to resume which caused significant delays in the judicial process. In addition to technological issues, the fact that defendants remained in prison under supervision during the remote hearings casts doubt on the credibility of the hearing process as we cannot be certain that they were able to speak freely and confidentially with their lawyers. These unsuccessful virtual hearings were mainly due to a lack of technological infrastructure, knowledge of how to deal with technology and the fact that the cases were not digitized. Moreover, Lebanese authorities neglected to consult with lawyers on the matter of the meetings being held virtually.

Despite the fact that Lebanese courts have not faced problems concerning remote hearings in arbitration, this popular method of holding hearings shouldn't be a problem under Lebanese law. Moreover, the chapter concerning arbitration contained in the Lebanese civil code of procedure, which has not been amended since 1983, does not include any specific prohibitions concerning remote hearings. However, the remote hearings must always respect the right of the defense as well as comply with both Lebanese and international public policy rules to avoid being a reason to challenge the award resulting from the arbitration process.

Resorting to technology to conduct a hearing must not be hindered as it facilitates and expedites the process of arbitration. However, certain conditions are required to ensure the efficiency of the process and many risks are to be faced. Holding hearings virtually, could lead to disputes regarding the validity of the evidence and the uploaded evidence. It could also raise concerns when enforcing the resulting arbitral award due to the fact that many countries do not recognize E-

³ Decision n-67/2020, rendered by the Supreme judicial council; Decision n-1123/3, 2020, rendered by The public prosecutor at the cassation court decision's based on the minister of justice suggestion; Decree n-65/2020 issued by the minister of justice/ Public prosecution at the cassation court.

documents and hearings in their legislation, which may be an obstacle regarding the enforcement of the Award.

Over and above, the Internet platform can be abused by cyber criminals therefore both technical and judicial protection are required to limit criminal behavior; Special provisions are not yet available in most countries.

We can cite a case that illustrates one of the difficulties that can limit resorting to virtual hearings in particular in countries where hearings are supposed to be held in person. In the Case No. 21A-MI-1366. November 12, 2021⁴, appellant-defendant/Stephen Alexander vs the appellee-plaintiff Davis hotel capital, the first claimed that the arbitration award must be set aside because the Arbitrator conducted a virtual hearing, refused to postpone the hearing, and improperly prevented them from presenting relevant and material evidence. The court of appeal of Indiana, rejected this allegation, based on Rule 32 of the AAA⁵ Commercial Arbitration Rules and Mediation Procedures (Rule 32): “*When deemed appropriate, the arbitrator may . . . allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination*”.

Despite being urged to deal with the new need to use technology in order to ensure fair hearings during the total lockdown, no action was taken by the Lebanese legislator. However, he enacted the law n-81/2018 “Electronic transactions and protection of personal data” to make both paper and electronic documents equal which included both the paper signature and electronic signature, as an equal means of proof. The law n-81 also provides protection for personal Data and establishes specific sanctions for cyber security crimes (*AL. Rawas, A., 2019*).

Unfortunately, the application decree for this law has not been yet elaborated which makes its application is difficult. The law n-81 does not include any specific rule related to e- arbitration including hearings via electronic platforms.

Covid-19 launched the use of ODR. During the aforementioned pandemic, arbitration hearings were suspended and alternatively, videoconferencing was used. Since then, many arbitral institutions have adopted a hybrid model of hearings (mixture of online and physical hearings) to comply with exceptional circumstances if needed. The hybrid hearing form is particularly well suited to further adaptation as the parties to the dispute, during the pandemic, found themselves obliged to resort to virtual proceedings, however the option to resort to in person hearings should now be open as the pandemic has ended.

2.1.2 Soft law:

The guidelines have been widely used in international arbitration cases, and are considered and instrument of soft law. Many relevant virtual protocols have been issued by various International arbitration centers/institutions (ie. ICC and LCIA) and Acts (the arbitration and conciliation, Act, 2021) as they saw the inevitable evolution of virtual hearings: “*necessity is the mother of invention*”. These include facilities such as e-filing of documents, protocols for online dispute resolution, and cyber securities policies, etc. Regarding the arbitrators signature of the arbitral award, both digital or paper signature have the same effect; enforceable before a court⁶.

⁴ Court of Appeal Indiana, 21 Nov. 2021, Case n-21A-MI-1366; [http://law.justicia.com/cases/Indiana/court of appeals decisions/ 2021/ Stephen Alexander vs Davis Hotel Capital](http://law.justicia.com/cases/Indiana/court%20of%20appeals%20decisions/2021/Stephen%20Alexander%20vs%20Davis%20Hotel%20Capital).

⁵ American Arbitration Association.

⁶ Leveraging Technology for fair, effective and efficient international arbitration proceedings, ICC. 2022.

The guidelines anticipate this situation and require technical personnel to be present in remote locations where litigants and witnesses are testifying, in order to assist and resolve any technological issues that may occur during the videoconference.

In 2020, The Chartered Institute for Arbitrators also issued a technology arbitration guideline “guidance notes on remote dispute resolution proceedings”. In this guideline, many steps are mentioned as preliminary considerations for a successful remote hearing which ensures a fair and just hearing for involved parties⁷.

Since the pandemic, Chinese arbitration institutions have issued their own guidelines and rules for virtual hearings in order to promote virtual arbitration actively promoted virtual arbitration, such as *CIETAC*, *BIAC*, *HKIAC* and *CMAC*.

Virtual hearings for domestic cases were mainly held during the period from March to August 2020. In most cases parties’ consented to virtual hearings, as the cases themselves were not complicated focusing on written evidence.

Arab countries are also involved, the updated version of the rules of the Saudi Arabia center for arbitration and of the DIAC have integrated a part for the use of technology in arbitration.

The guidelines have been widely used in international arbitration cases, and are considered an instrument of soft law. There is a wealth of well-developed resources on the use of technology which were issued to respond to the urge of ruling the process forcedly exercised virtually during the pandemic. However, to better use technology going forward one of the things an arbitration community needs to do is to be able to distill the message and communicate better.

Over that period where most of the national laws were silent, Soft law took their place by organizing the use of technology during hearings. Virtual hearings face also ancillary problems which could slow down the process.

2.2 Technological Issues

Virtual hearings require a reliable technology infrastructure (*Choudhary, A. and Srivastava, D., 2021*) The government should provide stakeholders with accessible internet services and up to date technology. However, there are many obstacles in Lebanon when it comes to accessibility to technology for virtual hearings mainly due to the weak internet services and a high level of illiteracy when it comes to technology. We should endeavor to overcome these problems by establishing reliable technology infrastructure and either enacting specific regulations to determine the nature of the dispute and whether it can be dealt with through a virtual hearing or promoting institutionalization of arbitration.

Ideally training and orientation sessions should be given to people involved in the process such as the parties and the arbitrators, to become familiar with the features of the meeting platform. However, in Lebanon the problem it is not just a case of adapting to new way of conducting hearings but to build a whole new technological infrastructure. A level of professionalism is needed when conducting virtual hearings; any technical issues that occur during the hearing may inadvertently exclude a party member who has not given his/her consent to be excluded. Therefore, the quality and monitoring of the audio and video connection is of utmost importance to reduce the probability of technical failures once a hearing has begun. Technical assistance should be provided prior to and during the hearing, plus a suitable digital platform should be chosen according to the nature of the dispute.

⁷ Guidance Note on Remote Dispute Resolution Proceedings, The chartered Institute of Arbitrators, 2020.

2.3 Personal Data protection

Nowadays where data is constantly moving across borders, protecting privacy and data has become crucial, especially regarding cross-border technology disputes, which are often difficult to resolve through national courts mainly due to their limited jurisdiction.

Due to insufficient cyber hygiene practices, serious concerns regarding data exchange, confidentiality, privacy and validating information via E-platforms may arise. The internet platform can be abused by cyber criminals, which may lead to a breach of confidentiality and secrecy, one of the main characteristics of arbitration.

Various cybersecurity protocols such as ICCA-NYC Bar-CPR Protocol on cybersecurity in international arbitration (2020 Edition) can be referred to, to secure safety of the parties. To ensure that there is no breach of trust amongst parties involved in Virtual hearings several steps can be taken: identification and verification of participants before the meeting begins.

The right to privacy is considered as a fundamental right in most countries, therefore private information disclosed during such proceedings must be protected. The protocols provided under the Personal Data Protection Bill, 2019 and the Personal Data Protection Bill, 2018 and the EU General Data Protection Regulation (“GDPR”) must be adhered to for limited processing, storage, transmission and erasure of information for all parties involved. Consent by parties must be given when processing and recording information. Password protected and secured personal networks can be accessed for internet connectivity, rather than public networks. All the e-format documents can be conserved through secure online channels or on a cloud service, through a licence fee-based document sharing platform, making it accessible to all parties, as their right.

However, there remains a high risk of a cyber-attack every time hearings are held virtually, particularly in countries lacking in technical and legal protection. In Lebanon, The Lebanese legislator, as mentioned before, enacted the law on personal data protection in 2018, however the application decree for this law has not yet been elaborated (*Zeinelddine, A. 2018*); therefore, any infringement of personal data will not be sanctioned by appropriate provisions.

3. Methodology and study design

A survey of global arbitrators and practitioners was done to find out how they were using technology before the pandemic, how they used it during the pandemic and what they are looking to do going forward. One of the things that came out while talking to practitioners and listening to responses, is that there remain substantial differences in infrastructure and access to technology amongst countries. It was revealed that the use of a third-party service provider remains a crucial step to an effective hearing. Therefore, a global mindset on the use of technology is needed and may be realized by raising awareness across the board. This should include information on readily accessible tools, tech tools and solutions and how to make them available; Focusing on the fundamental guiding principles that really affect our use of technology (*Cohen, S. 2022*).

This recommendation is no longer optional. A rapid acceleration in the use of technology especially following the pandemic, has forced policy makers to confront the issue of how to respond to these drastic changes and ensure a better integration of technology.

4. RESULTS

A “hub for arbitration” cannot neglect the integration of technology in arbitration. In Lebanon, theoretically speaking, it is easy to introduce virtual hearings; however, the absence of a technological infrastructure poses a real obstacle when putting it into practice. Moreover, the absence of the mindset can also be an obstacle. A real intention from the Lebanese policy makers is required to establish a whole system facilitating the recourse to technology in ensuring justice. The “soft law” can be used as a principle guideline while establishing a legal framework for virtual hearings in Lebanon; taking into consideration that managing virtual hearings requires a different method of defense than that applied to physical hearings (*Pavic V. and Dordevic M. 2021*)

Compliance with technology evolution is no longer optional, otherwise there will be no role to play within the international space. Practically, there are no reasons to object to holding the hearings virtually especially, if they are conducted properly.

Over and above, virtual hearings ensure compliance with Due process unless parties' object to them; in which case the arbitral tribunal cannot disregard the objection, as holding the hearing virtually without the parties would violate due process (*Fadel, A. 2021*).

Regarding the Lebanese legal system, in particular procedural law, there are no express objections to conducting virtual hearings. However, the Lebanese tribunal practices during Covid-19 revealed weaknesses in achieving justice through the virtual space at different levels such as, lack of infrastructure, technological expertise and weak data protection....

Working on the technology infrastructure and adapting the law and rules to the needs of the virtual space are recommended; the pandemic showed the importance of resorting to technology to ensure justice in a reasonable timeframe.

Since it is not obligatory post-Covid, the choice to hold a virtual hearing now depends on the acceptance of parties and their counsels; unlike during the pandemic, when there was no other option. However, it is important to mention that under the regulations of some of the arbitration institutions virtual hearings are the only way out. The involved parties should be assured that the rendered award will be recognized and enforced, and that the virtual hearing complies with the due process requirements.

5. CONCLUSION

It goes without question that efficient use of technology can greatly improve the arbitral process as it can speed up the process, reduce costs, and generally make it more efficient. The process has been made easier by utilizing technology; it has facilitated the recourse to arbitration at the expense of litigation due to its time and money savings advantages. For example, large amounts of paper evidence can be analyzed by utilizing software solutions in ways that would not be possible by hand; conferencing technology is an alternative to traditional in-person hearings (*Pavic V. and Dordevic M. 2021*), fast means of communication such as emails, on-line filing sites are able to provide safe and convenient repositories for all documents pertinent to an arbitration (*Halkert, 2007*). Undoubtedly nowadays technology is an inevitable choice, despite the challenges it presents. Misuse of technology may undermine not only the confidentiality of the arbitration process but its credibility as well;

However, the widespread use of Internet technologies globally has greatly transformed the nature of technology-related disputes that may arise in arbitration.

As the tech industry continues to expand worldwide, resolving disputes through judicial courts has become more and more complicated which may have a negative impact on international commercial transactions. Moreover, with the rise of smart contracts and a rapid growth in technical innovation, arbitration is emerging as an essential mechanism to ensure that business operations run smoothly in this fast-paced era.

Artificial intelligence (AI) has endless potential and can go beyond the human mind, leading to impacts that we cannot even begin to imagine. As AI continues to be used in different fields, we can now foresee new court cases and arbitrations using this technology in the future.

Taking into account the complex and fast-paced nature of technology-related disputes, traditional court systems are often overwhelmed and unable to render cost-effective and efficient decisions. On the other hand, arbitration has come to the forefront as a preferred method of dispute resolution in this field. This is mainly due to the belief in the fairness of arbitration proceedings for all parties involved, plus its ability to provide multinational solutions that transcend geographical limitations and court jurisdictions.

Arbitration has proved its ability to adapt to the fluctuating landscape of technology, and its flexibility is promising for even greater opportunities (*Alvarado A. 2022*). Despite the fact that the future of technology and technology arbitration remains uncertain, arbitration has already proven its value and its growing importance in resolving technology-related disputes in a fair and flexible way.

The question is will e- arbitration become the new and only form of arbitration in the near future and consequently, will virtual hearings replace in-person hearings?

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