

Arbitration and Virtual Hearings

Introduction

At the beginning of COVID-19 pandemic, the world came to a halt, and it had to adjust its day-to-day needs to the present time. Governments adopted dramatic precautions to prevent the transmission of COVID-19: schools were closed, businesses were shut down, curfews were declared, and travel restrictions were adopted. One thing all these measures had in common was that they created greater challenges to holding in-person meetings. This undeniably impacted in-person court and arbitration hearings. To overcome this problem, courts and arbitral institutions started to utilize technology to conduct remote hearings via videoconferencing.

Bearing in mind that arbitration commences with the consent of the parties, the arbitration community began debating what would happen when an arbitrator decided to conduct a virtual hearing despite an objection raised by either of the parties, under the framework of due process and the right to a fair trial, a fundamental right enshrined in many international treaties, such as the European Convention on Human Rights.

There was no case law on this subject until the Austrian Supreme Court ("the Court") delivered a ruling regarding the relation between virtual hearings and due process[1]. According to the Court's ruling, an arbitrator can schedule a virtual hearing despite a party's objections if the way proceedings are conducted ensures that the parties' right to a fair trial is protected[2].

Facts

The dispute which later came before the Court within the context of challenges of an arbitral tribunal had been pending since August 2017 at the Vienna International Arbitration Centre ("VIAC") before an arbitral tribunal consisting of three arbitrators.

Prior to COVID-19 pandemic, an evidentiary hearing had been scheduled for 10 March 2020 which was later rescheduled on 15 April 2020. In a case management call arranged on 19 March 2020, the parties discussed the possibility of organizing a virtual hearing due to COVID-19 outbreak. On 2



April 2020, the respondents refused the notion of holding a virtual hearing and instead recommended scheduling an in-person hearing at a future time. However, their proposal was rejected by the tribunal on 8 April 2020, and a remote hearing was set for 15 April 2020.

On 21 April 2020, the respondents raised a challenge against the arbitral tribunal on the grounds of unequal treatment of the parties and an unfair way of conducting proceedings; however, the respondents' arguments were rejected by VIAC. Subsequently, the respondents brought the issue before the Austrian Supreme Court.

The respondents' allegations can be summarized in three parts with regards to the legality of virtual hearings:

- (1) Unequal treatment of the parties in connection with date of the virtual hearing and the lack of preparation time: The respondents argued that the tribunal did not provide them enough time to prepare for the hearing for the 15 April 2020 hearing, because the decision to reject the postponement of the hearing was issued on 8 April 2020.
- (2) Unequal treatment of the parties in connection with time zone difference: The respondents further claimed that by setting the hearing time at 15:00 CET, the tribunal disregarded the fact that the respondents' councils were working from Los Angeles and would have to start the hearing at 6:00 PST, as opposed to the Claimants' councils, who were working from Vienna. As a result, the time zone difference led to unequal treatment of the parties.
- (3) Witness tampering: The respondents argued that organizing a virtual hearing without adopting precautionary measures against the dangers of witness tampering constituted a violation of the principle of equal treatment and might cast a shadow over the impartiality of the tribunal.

Decision of the Court

The Court, after evaluating the arguments submitted by the parties, ruled as follows:

(1) With regards to the insufficient preparation time: The Court stated that the parties were informed about the hearing date before the arbitral tribunal



rejected the respondent's request for postponement of the hearing. When either of the parties apply to adjourn the hearing, they cannot reasonably assume that their request will be accepted and that the hearing date will be adjourned. A party submitting an adjournment request must always consider that the request might be rejected and therefore must be prepared for the hearing that might take place on the previously agreed date. Moreover, while evaluating the question of whether the respondents had enough time to prepare, one must consider the date set by the parties prior to the adjournment request and not the date of the issuance of the rejection. Thus, the Court ruled that the respondents had enough time to prepare for the hearing.

- (2) With regards to time zones: The Court reasoned that the respondents theoretically accepted the challenges associated with the geographical distance between Los Angeles and Vienna, whether these challenges related to travel or to time zones. Moreover, the Court acknowledged that holding a virtual hearing at 6:00 PST did not create an unbearable burden for the respondents; instead, it diminished the effort and time needed to travel from Los Angeles to Vienna for an in-person hearing. As a result, the Court rejected the respondents' time-zone-related claims.
- (3) With regards to the witness tampering: The Court stated that prior to COVID-19, remote hearings were already being conducted by way of videoconferencing for hearings and the taking of evidence. With COVID-19, the use of technology became more significant in terms of managing challenges to efficiently resolve disputes. The Court further held that the perils of witness tampering might be valid for in-person hearings as well; therefore, the mere fact that the hearing was being conducted virtually did not amount to a serious procedural violation on its own which might cloud the impartiality of the tribunal, nor did it amount to a violation of the principles of fair hearing. According to the Court, the respondents did not specify which procedural rules were violated but rather, complained about a general violation of the fair hearing principles and the right to be heard. As a result, the Court rejected the respondents' claims concerning witness tampering.

Comments



Remote hearings were also being conducted before COVID-19; however, this crisis forced courts and arbitral institutions to collectively adopt new rules and procedures to prevent them from coming to a standstill. However, even though these rules and procedures laid down the groundwork for remote hearings, they failed to answer/clarify the associated legal obscurities, such as parties' right to equal treatment, right to be heard and other issues of due process.

The Austrian Supreme Court's decision, therefore, is a landmark decision and the first of its kind, laying down foundations for conducting virtual hearings while answering some of the questions which, since the beginning of COVID-19, had kept the arbitration community busy with regards to due process issues. It is highly likely that the Court's pro-virtual hearing approach will influence other arbitrators' approach to remote hearings.

There is no doubt that COVID-19 will continue to affect and force us to change the existing ways we conduct disputes; therefore, it is important for parties as well as the legal community not to lean so much on the traditional methods and, rather, to adapt to the new way of conducting arbitrations.

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