

## THE VIRTUAL MATRIX: RE-THINKING HEARINGS IN INTERNATIONAL ARBITRATION

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### Introduction

The received wisdom is that virtual hearings are a subprime alternative to in-person hearings, a secondary option to be used only when classical in-person hearings are not possible or too costly. However, as a result of technological advances, and a change in perceptions based on recent experiences, virtual hearings are certain to become more common in arbitral proceedings.

This note suggests that virtual hearings will allow us to re-think how hearings and arbitral proceedings should be structured, either as an alternative to or alongside in-person hearings. In particular, they open the door to moving away from the singular-block hearing format that dominates our practice, to a more flexible and dynamic concept of how international arbitration hearings can be conducted and integrated in the arbitral procedure.

### Issues with in-person hearings

Classic in-person evidentiary hearings take place over a singular ‘block’ of time, ranging anywhere from between one day to several weeks, when all arbitrators, parties’ counsel and representatives, witnesses, experts and various other service providers are available. This singular block, in-person format poses well-known challenges.

**First**, it can be difficult to find a sufficient block of time to hear all the relevant evidence, and during which all participants would be available.<sup>1</sup> This may have the impact of significantly delaying an evidentiary hearing, in particular in larger cases involving more participants. Delays are even

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<sup>1</sup> Respondents to the “2018 International Arbitration Survey: The Evolution of International Arbitration” said they desired greater visibility over arbitrators’ availability to take on new cases (see p.22 of the survey report). Opacity in arbitrators’ schedules is just one hurdle to overcome when scheduling hearings.

greater if a hearing has to be rescheduled because of extensions of time for previous procedural steps.

**Second**, requiring all participants to be physically present at the hearing tends to lead to a notable rise in costs. The costs of travel, accommodation and catering are often not insignificant. Indeed, the desire to avoid costs associated with repeat travel and other logistical aspects of in-person hearings is perhaps the primary driver for the singular-block format.

**Third**, due to the logistical challenges and higher costs involved in scheduling multiple in-person hearings, tribunals may be reluctant to hold hearings on preliminary matters. As a result, preliminary matters may be dealt with solely on the basis of documents, or may be delayed until the main hearing.

**Fourth**, the density of issues and evidence in a singular-block hearing can be significant, in particular in larger and more complex cases. Tribunals are therefore required to absorb and analyse vast quantities of information on various points in dispute over several consecutive days (or weeks), with little time to digest it. Research suggests that the average attention span is limited,<sup>2</sup> and confirms the importance of time to allow for information to be effectively absorbed.<sup>3</sup> While singular block hearings may be logistically the most efficient way of organising an in-person hearing, they tend to make it more difficult for tribunals to absorb and assess one wave of information on a particular issue before turning to the next.

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<sup>2</sup> “Counsel as Client’s First Enemy in Arbitration?”, Ugo Draetta; JurisNet, LLC (June 2014); p. 36 at footnote 21; “Litigation in the Current Environment”, Marvin G. Pikholtz; The CPA Journal (September 2002), available [here](#).

<sup>3</sup> Hermann Ebbinghaus’ theory of the “learning curve” illustrated that spaced learning improves knowledge absorption. See on this topic: “Application of ‘The Learning Curve’ of Hermann Ebbinghaus and ‘The First Twenty Hours’ Theory of Josh Kaufman to Distribute Teaching Targets in Some of Subjects at Mien Tay Construction University”, Ngo Hong Nang; International Journal of Advanced Research (October 2018).

While arbitrators need not memorise the submissions presented to them, brief and repeated bursts of exposure to a case are more likely to lead to better absorption and understanding of the key elements of the case that can be sustained throughout the length of the arbitration, up to the time of writing the award.

**The new matrix – moving away from the singular-block concept of the arbitration hearing**

As virtual hearings become more common and more generally accepted, counsel, arbitrators and users of arbitration services no longer need to be yoked to the practice of singular-block, in-person hearings. This will allow practitioners to re-think hearings and approach them in a more flexible manner. Benefits are likely to be significant.

*Reduced costs and logistics*

If physical attendance at a hearing is not the default option, arbitration costs and the logistics associated with hearings are likely to be substantially reduced. Travel and accommodation services are no longer required or, if required, their costs are substantially reduced.

*Reduced hearing density*

Due to their nature, lower costs, and reduced logistics, virtual hearings may be held when most appropriate and efficient, and for discrete issues, as the need to compress all or most issues into one hearing falls away. Hearings may be spread out over multiple shorter hearings, or over a longer period of time with shorter hearing days or with interspersed recess days. This will afford tribunals a better opportunity to prepare themselves to hear evidence and submissions relating to various parts of a case, and to effectively absorb and analyse them.

Whether and how it might make sense to split what would have been a singular-block hearing into multiple sub-hearings will obviously depend on each case. However, in most complex arbitrations, there is considerable scope for breaking down hearings in an efficient and logical way. Indeed, the sequence of examinations of experts (and sometimes also of witnesses) at singular-block hearings often already reflects a distinction between issues. In particular, issues of liability and quantum are often separated, and experts of the same discipline are usually already heard one after another. It may also make sense to identify distinct issues or groups of issues that can effectively be dealt with individually.

A staggered, more paced, approach to hearings may also encourage more circumspection as to the need for a hearing on certain aspects of a case, and thus reduce the overall number of hearing days. In particular, multiple

hearings may give tribunals a greater opportunity to provide guidance to the parties as to the issues that they would like to see addressed in a hearing, and may give parties an opportunity to adapt their case strategies and agree to partial or full settlements as the hearings progress. Multiple hearings could also make it easier for arbitrators to issue interim awards on preliminary issues, potentially narrowing the scope of subsequent hearings, or to provide their initial views on key issues at the request and with the consent of the parties. The latter is a frequent practice in certain jurisdictions such as Germany and Switzerland and can in many cases pave the way to settlements.

*Availability: no more need to block long periods of time*

Because virtual hearings can be organised over multiple shorter blocks of time, they can be easier to schedule as they do not require identifying a substantial block of time when all participants are available, and therefore can better be tailored to participants' availabilities. This will reduce delays attributable to scheduling conflicts, in particular if it becomes necessary to reschedule hearings due to changes in circumstances. Indeed, because the scope of hearings may be more limited, not all those involved in the case need to be available and participate. Multiple shorter hearings may also make it easier for busy clients, arbitrators, and counsel to integrate hearings more seamlessly with their other professional commitments.

## **Conclusion**

The benefits and opportunities afforded by virtual hearings are potentially significant and offer an appealing alternative to the classical format. Virtual hearings allow us to re-think what hearings are, and how we use them in international arbitration, including alongside in-person hearings. A whole range of combinations are available and possible, depending on the nature of the case and the needs, requirements and preferences of the parties and their counsel, as well as those of arbitral tribunals. As a next step, arbitration practitioners should reflect not only on protocols and the logistics of virtual hearings, but also more broadly on how we integrate the virtual alternative into our professional practice, so as to maximise the potential benefits.

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