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01103, м. Київ, вул. Михайла Бойчука, 18
Тел.: (044) 364-80-58 - редакція
Тел.: (044) 364-80-59 - бухгалтерія
Адреса для листування: 01030, м. Київ, а/с 51
info@yur-gazeta.com

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Virtual Unreality of Dispute Resolution

The live hearings are the apotheosis of professional communications, allowing to see in action the distinguished colleagues from all sides, to admire the work of other experts, arbitrators and judges at the peak of their careers.

It is clear that in future, the parties, the arbitrators and the arbitration institutions will need to develop a procedure for an advanced agreement on the format for hearings – either live, or virtual or mixed, otherwise this can become a source of serious conflicts.

In my recent interview I told Yurydychna Gazeta that in many years of my career as an expert on Ukrainian law in international arbitrations and litigations, I just had participated in my first virtual hearings, at the UK court.

In general, switching to virtual court and arbitration proceedings is an entirely new experience for all participants of the hearings, and it is difficult to predict what long-term effect this new format would have on the system of international dispute resolution. But as this first experience is behind me, I am happy to share my impressions and to discuss the implications we can foresee for the future.

First, let me talk about the technical side, just to get it out of the way: it is imperative, before and during a virtual hearing, to be able to rely on strong technical support. Although the court has its IT support, the parties need to have their own, and everything has to be tested, re-tested and coordinated. Of course, everyone understands that this process is new and tries to be patient, but technical glitches do harm the dynamics of the hearings.

The hearings in large international cases always involve a significant number of participants. First, there are the arbitrators or judges and their support staff. Then, there are on average 15-30 participants from each side, including external counsel (the lead counsel and local counsel from each jurisdiction involved in the case), in-house counsel, fact witnesses, expert witnesses of law, forensic and quantum experts, translators and administrative personnel. In UK courts (and in UK style arbitration hearings) each external counsel team doubles in size because it includes both solicitors and barristers.

So, at the hearings I usually speak in a room full of people, with several key participants (arbitrators or judges and the lawyers who conduct my direct and cross-examinations), and many other participants, who carefully listen and analyze every word. This format has a certain theatrical effect, instigates courage and composure, which probably actors also experience on the stage. It triggers your intuition, as you can read the room and unconsciously register even smallest reactions. Sometimes a speaker feels the need, using the expression of one of my friends – a Ukrainian global opera star – "to give an emotion."

Having a feel for all these secondary factors, it is also important not to get distracted by them and not to lose your primary focus, which is to convey to arbitrators or judges your independent and objective opinion.

In a live format, there is also room for improvisation. Once, in the middle of my cross-examination, the lawyers of the opposite party were desperately trying to find a document they wanted to show me, so the Tribunal announced a short break. I got up from my desk in the middle of the room and approached the area of the other party. Their first reaction was panic – "the enemy in our camp!", but I explained that I just wanted to help them find the document, and together we found it much faster. This goodwill gesture helped to create a productive and collegial climate in the room, brought a spontaneous element into the tense proceedings, and humanized the whole process.

None of that is possible in the virtual format. I was sitting in an empty conference room, and there were only four people on my screen: the judge, one barrister from each party and myself. It felt like being in a vacuum, you cannot see any body language, you do not know how many people are watching and how they are reacting, and the dynamic of the process is hidden to you. It is also impossible to make any personal eye contact because no matter which way you look, you end up looking into the camera - at yourself.

Without a multidimensional setting, the process becomes dry and static, so about 50 to 60 % of its intangible dynamics is lost. Recently I shared this impression with a prominent dispute resolution specialist, who is well known in Ukraine – Barton Legum, partner at Dentons in Paris, and he agrees that "an entire level of communication is lost when hearings or conferences are virtual." One of the leading London solicitors characterised virtual hearings as "bloodless affairs".

Although in my case the virtual hearings were successful, and I was able to fully convey my analysis and conclusions to the court, the live format still seems deeper, more productive and creative.

On a less serious note, my personal disappointment was not to be able to experience UK court proceedings in a traditional setting. I have participated in many international arbitration hearings, in court hearings in Sweden and in US court depositions, and although I have provided several written expert reports to UK courts, I had never before taken part in the UK court hearings. In my imagination, I pictured a venerable building, with judges in wigs and robes, observing the centuries-old formalities. What happened "in reality," or more precisely in virtual reality, was that all participants on the screen were in ordinary business attire surrounded by plain backgrounds.

The only "traditional" aspect I noticed was how everyone addressed the judge. I was told that at this court, the judge is addressed as "My Lord" (and if a judge happens to be a woman, "My Lady"). I mentally had prepared for "My Lord," but at the last moment I learned that the judge was indeed a woman, so I had to urgently retrain myself. In third person, the judge was addressed as "Her Ladyship".

While discussing the pros and cons of virtual hearings, one of the pro arguments is that the technology allows to bring all documents on the screen and promptly highlight the important sections. In fact, this technology is not exclusive to virtual hearings, about two years ago I was participating in live arbitration hearings, and even then, we could see all the documents on individual screens. This was a major improvement in comfort and efficiency – compared to the monumental volumes of documents I used to carry with me, and then organize around my desk, each time having to search through them for a specific document. But again, this technology works equally well in live and in virtual format.

One of the cons of virtual hearings could be the difficulty in organizing expert conferences (or "Hot Tubs" as they are commonly known). In this case, the judges or the arbitration Tribunal place the experts of both parties together and question them directly. The expert conferences are extremely intense and can last for hours, and sometimes can be continued the next day. I have done several Hot Tubs – this is a professional pinnacle for an expert, which requires utmost concentration and immediate reaction, even to the smallest nuances, and it is hard for me to imagine how this unique dynamic can be fully transferred to a virtual environment.

Coming back to pros, virtual format should lead to significant cost savings. Another advantage, described by an internationally acclaimed mediator, is that virtual communications allow for less formal interactions between the parties and the mediator because they are conducting virtual sessions from home and feel more relaxed, which results in a more trusting connection. Perhaps this argument is correct with regards to mediation, but I have not noticed this effect in virtual court hearings. On the contrary, in a live format there are more opportunities for incidental interactions between parties, which can help them "humanize" each other and understand that hostile attitude is not an end in itself, and that each side is entitled to defend its own position. By the way, this mediator mentioned that in many cases where an amicable dispute settlement was achieved, the settlement was initiated precisely because of a chance interaction between the parties, which would not be possible in a virtual format.

Obviously, networking is not a part of arbitration or court proceedings, but for me one more shortcoming of the virtual format is the lack of personal contacts with colleagues. On my cases I work with the leading lawyers of the world and with the top lawyers of Ukraine. This work lasts for months and sometimes for years, but mostly it is done via email and teleconferences. The live hearings are the apotheosis of this professional communication, allowing to see in action the distinguished colleagues from all sides, to admire the work of other experts, arbitrators and judges at the peak of their careers.

It is fair to say that the preference for live format is not shared by many arbitrators. This is why in discussing which format will take over in the future – live of virtual – especially for arbitrations, the views of arbitrators need to be taken into account. As one of them shared with me, they see a great opportunity in virtual hearings, putting an end to exhausting travel, long hotel stays in foreign cities and other inconveniences. Working from home enables them to use their time and energy more productively.

The parties, on the other hand, largely prefer live hearings, believing that only this format allows them to present and defend their positions in full. The first disputes on this subject have already erupted between the parties, the arbitrators and the arbitration institutions, where the parties insist on live hearings, even at the risk of delaying them due to the pandemic. So far, the arbitration institutions reportedly have rejected such requests from the parties.

It is clear that in future, the parties, the arbitrators and the arbitration institutions will need to develop a procedure for an advanced agreement on the format for hearings – either live, or virtual or mixed, otherwise this can become a source of serious conflicts. I have several arbitration hearings scheduled for this year, and it is impossible to predict which format each of them will take.

As to the role of an expert witness, no matter what the format of the hearing is, he or she must never – never! – forget the key duty, which is to convey to the court or the arbitration tribunal the expert's independent and objective opinion and to help them establish the truth.