

The Complete (but unofficial) Guide to the Willem C. Vis International Commercial Arbitration Moot

Risse

6. Auflage 2021
ISBN 978-3-406-77868-1
C.H.BECK

schnell und portofrei erhältlich bei
[beck-shop.de](https://www.beck-shop.de)

Die Online-Fachbuchhandlung [beck-shop.de](https://www.beck-shop.de) steht für Kompetenz aus Tradition.
Sie gründet auf über 250 Jahre juristische Fachbuch-Erfahrung durch die Verlage
C.H.BECK und Franz Vahlen.
[beck-shop.de](https://www.beck-shop.de) hält Fachinformationen in allen gängigen Medienformaten bereit:

über 12 Millionen Bücher, eBooks, Loseblattwerke, Zeitschriften, DVDs, Online-Datenbanken und Seminare. Besonders geschätzt wird beck-shop.de für sein umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

8. Training

- ICC Vis Pre-moot Shanghai.³⁰
- CBAr Curitiba Pre-Moot.³¹

Too Many Cooks Spoil the Broth

Pre-Moot events are an excellent way to prepare for the oral pleadings in Vienna and/or Hong Kong and it is great to see how many of them have sprouted up from the ground all around the globe. However, the fact that we listed no less than 18 recommendable Pre-Moot events shall not be misunderstood: This is not an invitation or recommendation to participate in as many Pre-Moots as possible.

Your decision on how many Pre-Moots to participate in is very individual and depends on various factors. Depending on the location of your team, the costs for participating might be disproportional to their benefit and you might not have the funds to travel around the world. And depending on your curriculum outside the Vis Moot there might simply not be enough time to travel around the world – even if you had the money to do so.

If there are no Pre-Moot events near your location and/or if you do not have the funds to travel to them, you should not feel disappointed. There are other possibilities for some “hands on” training: for example, you could have a practice session with another team via Skype. You can find many requests for Skype-pleadings in the annual official Vis Moot Facebook group, or post one yourself. We expect that, given the experience acquired during the pandemic, virtual Pre-Moots will continue to be held in the future. This allows teams from all over the world to practice together without expensive and time-consuming travel.

Or you can set up your own little Pre-Moot by inviting the team(s) “next door”. Another option is to arrive earlier in Vienna and/or Hong Kong to meet up with other teams there. Try to think outside the box and you are sure to find a way!

If there are many Pre-Moot events in your region and if you have the funds to participate in as many Pre-Moots as you can fit into your schedule, try to be selective.

First, you should always calculate some (and enough!) time to reflect on your experiences and feedback subsequent to having attended a Pre-Moot. This is a necessary step in order to adapt and improve your pleading accordingly. However, when receiving feedback from the arbitrators be aware that this always comprises subjective elements. You may get contradictory advice from different

³⁰ <https://2go.iccwbo.org/icc-vis-pre-moot-shanghai-2021.html>.

³¹ <https://www.facebook.com/curitibapremoot/>.

V. How to Present Your Case Before the Arbitral Tribunal

people. Therefore, sometimes less is more. If you gather too much (contradictory) advice you might be left confused and dazed. Remember: too many cooks spoil the broth!

Second, and most importantly, you might actually end up losing a bit of your enthusiasm for the real highlights in Vienna and/or Hong Kong along the way if you “tour” from one Pre-Moot to another. Like a marathon runner, you will need to use your strength optimally to make it to the winner’s podium.



beck-shop.de
DIE FACHBUCHHANDLUNG

VI. Virtual Hearings

At the beginning of 2020, the world was hit by a pandemic caused by a novel coronavirus. Consequently, people could not travel to other countries and were not allowed to meet in groups. Since then, we have learned to live with (and detest) the “new normal” – which will hopefully soon be a distant memory. Be that as it may, the hearings in the 27th and the 28th Vis Moot were held virtually, i. e. via video-conference. The same applied to many real arbitration cases. While the Vis Moot will hopefully be held in person again in Vienna and Hong Kong, virtual hearings in the “real world” are here to stay, at least to a certain extent. It is thus worth having a closer look at the pros and cons of virtual hearings. In addition, we will provide ten top tips for succeeding in virtual hearings, just in case future moot courts will be held virtually again.

1. The Virtual Vis Moot

The 27th Vis Moot (held in the first week of April 2020) had to be transferred from oral hearings in person to virtual hearings at very short notice. Kudos to the organization team – it did a fantastic job to make that possible. The other teams did as well. Out of 390 registered teams, 248 teams from all over the world participated in the virtual oral hearings. Over a period of six days, 560 hearings were conducted remotely, with more than 3,500 participants from 85 countries.¹ Despite some technical problems on the first day and some issues as a result of low internet bandwidth for some participants, the event was very successful. It gave a great number of arbitrators a chance to test virtual hearings and enabled teams from all over the world to participate despite the travel restrictions in place.

The platform used for the 27th Vis Moot was Immediation. This is a video-conferencing tool specifically designed for dispute resolution and legal practice. Training sessions were held for teams and arbitrators to get accustomed to the features and the specific set-up of the virtual hearing room in advance. Each hearing had technical

¹ P. Netal at: <https://www.arbitralwomen.org/the-first-vienna-virtual-vis-moot-report-on-the-27th-willem-c-vis-moot/>.

VI. *Virtual Hearings*

support from a virtual room manager to help the participants. The tribunal had access to a separate and private breakout room for its deliberations.

The 28th Vis Moot was held between 26 March and 1 April 2021, again in a virtual format. We have conducted an interview with the winner of this Moot, the Bucerius Law School from Hamburg, Germany. You can get first-hand information on the particularities of the virtual Moot at chapter X 7.

For the 28th Moot, the International Dispute Resolution Centre (IDRC) provided the platform for the remote hearings. The platform was based on Zoom's technology. The technical requirements set by the Moot organizers were a PC/notebook, camera (if not integrated into the computer) and a stable internet connection (required speed of 0.5 Mbps was recommended for HD video). Again, the Moot organizers offered training sessions for teams and arbitrators prior to the event. The training sessions were recorded and made available on the Vis Moot website.² In addition, the Moot organizers provided a technical handbook for arbitrators and teams.

Two weeks before the beginning of the oral hearings, the organizers issued specific virtual hearing rules.³ First, these rules dealt with a number of technical issues, e.g. who should be visible and whose camera should be switched off or what format should be used for the team name when signing up. Second, the rules addressed what happens if one participant or arbitrator drops out. Third, the virtual hearing rules provided that the oralists solemnly promise that they will not communicate with or in any way receive help from their coaches, fellow teammates or anyone else other than the second oralist during the argument. The problem of how to prevent undue influence on a hearing participant, most notably on a witness, also plays an important role for virtual hearings outside the Moot.

2. Virtual Hearings in Real Life Arbitration

2020 was the year of virtual hearings.⁴ Within weeks of the outbreak of the pandemic, the major arbitration institutions provided some form of guidance on how to address the challenges imposed by travel restrictions. This was followed by recommenda-

² <https://www.vismoot.org/28th-vis-moot/#trainingsessions>.

³ https://www.vismoot.org/wp-content/uploads/2021/03/28th-Vis-Moot-Rules_ONLINE_FINAL.pdf.

⁴ M. Fanou/K. Gore at: <http://arbitrationblog.kluwerarbitration.com/2021/02/02/2020-in-review-the-year-of-virtual-hearings/>.

2. *Virtual Hearings in Real Life Arbitration*

tions in relation to the conduct of virtual hearings. For example, the ICC is developing a virtual hearing solution and has published an ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.⁵ Attached to this note is a checklist for a protocol on virtual hearings. The AAA-ICDR has also issued a Virtual Hearing Guide for Arbitrators and Parties,⁶ and offers virtual hearing managed services. To provide an overview of the resources available for planning and conducting virtual arbitration hearings, the International Bar Association (IBA) has collated information on (i) video-conferencing platforms, (ii) remote interpretation and translation services, and (iii) services provided by arbitral institutions for virtual hearings.⁷

While the existing virtual hearing notes are mainly aimed at addressing the challenges posed by the pandemic, virtual hearings or “hybrid” hearings are expected to continue to frequently occur in the future. It is true that virtual hearings have disadvantages, but there are also compelling arguments in favor of them.

2.1 Challenges With Virtual Hearings

First, virtual hearings may involve legal issues. Arbitral tribunals need to exercise care if one of the parties objects to a virtual hearing.⁸ It has to be ensured that the award cannot be set aside because the tribunal nevertheless ordered a virtual hearing. Whether an award based on a virtual hearing held without party agreement will be upheld mainly depends on the law applicable at the seat of arbitration and the applicable arbitral rules. The ICCA formally launched a research project to that extent titled “Does a Right to a Physical Hearing Exist in International Arbitration?”⁹ The 28th Vis Moot problem asked whether a virtual hearing including witness examination would be appropriate over one party’s objection in a pandemic situation. The answer to the question may be different when the pandemic is over.

⁵ <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

⁶ https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf.

⁷ <https://www.ibanet.org/technology-resources-for-arbitration-va.aspx>.

⁸ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, para. 18 et seq. (<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>).

⁹ <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>).

VI. *Virtual Hearings*

Second, there are some external challenges in relation to virtual hearings. Technical problems may occur, especially if the internet connection is unstable. The communication needs to be adapted to avoid speaking over another due to lag in the connection. In addition, different time zones may be an issue. Having to conduct a hearing in the middle of the night can constitute an undue disadvantage for one of the parties.

Third, and more importantly, virtual hearings involve internal challenges. Does such hearing format endanger the quality of the arbitration proceedings, for example because it is harder to fully concentrate in a virtual setting for a longer period of time? It has to be ensured that the parties get a fair hearing and that their case is given the attention it deserves. The most crucial issue in that regard is the examination of witnesses. Is it possible to judge the credibility of a witness over a camera? On the one hand, it can be difficult to judge a witness's reaction in a virtual setting, for example because it is hard to read the tone of the language. On the other hand, the witness's face is close to the camera and can arguably be seen better than in the hearing room. But is effective cross-examination possible when opposing counsel is not in the same room as the witness? How can it be ensured that a witness does not have notes with them or communicates with others while testifying?

Finally, settlement discussions are more difficult in a virtual hearing, as it is more difficult to grasp the atmosphere in the courtroom. In addition, there is no informal exchange on a personal level on the parties' side or with opposing counsel. Thus, if a party wishes to initiate settlement discussions in a virtual setting, it has to make a formal first move. Yet, parties are generally reluctant to do so because this may be perceived as a sign of weakness. Settlement discussions during the hearing itself are not that frequent anyway. However, settlement discussions often follow a hearing. It is hard to tell whether this will occur less frequently after a virtual hearing in which no informal contact was made to the other side.

2.2 Arguments in Favor of Virtual Hearings

The obvious benefits of virtual hearings are time and cost savings, especially if a large number of people are participating and/or the travel distances are large. In any event, virtual hearings can contribute to reducing the carbon footprint of arbitration.¹⁰ When no travel is required, it will also be easier to find slots for a hearing that suit everybody's schedule. But most importantly, it is much less

¹⁰ <https://www.greenerarbitrations.com/greenpledge>.

2. Virtual Hearings in Real Life Arbitration

cumbersome for witnesses or party representatives to participate (in parts) in a virtual hearing. In video-conferences, an unlimited number of people from different places all over the world can take part. This facilitates bringing the right people to the hearing, e.g. people from different business units worldwide or counsel from a foreign office.

2.3 Conclusion

During the pandemic, most lawyers and businesses got accustomed to video-conferences. The same is true for many arbitrators. Issues such as the limited attention span and time zone issues can be addressed by splitting hearings and having more breaks. Given the obvious advantages, it is likely that video-conferences will be frequently encountered in the future. At the very least, this applies for instances in which “in the old days” a telephone conference would have been held or a written procedure employed. In other words, for procedural hearings or case management conferences, video-conferences will most likely become the norm. For smaller cases, virtual hearings may be a viable option to increase the proceedings’ efficiency. We assume that hybrid hearings, i. e. in person hearings with someone participating remotely, will often be effective. For example, when a witness is not key and is located far away from the hearing’s location, it makes sense to conduct their examination by way of video.

Yet, we are more skeptical with regard to virtual hearings when it comes to the merits hearing in large arbitration cases, especially if witness evidence is of the essence. Why? Well, some of the challenges regarding witness examination can be addressed, e.g. by sending a neutral person to the room in which the witness is located to ensure that no undue influence is exercised on the witness and that the witness is not using unsolicited aids. Alternatively, a second camera could be placed behind the witness. However, it is important for a witness to get into the mood of a hearing and to carefully prepare for the examination. It is more difficult to fully concentrate on the testimony if evidence is given maybe in between two other meetings. A lack of concentration from a witness can pose a risk for the party relying on the witness. This can only be replaced to a limited extent by good preparation.

Finally, parties – as well as counsel and arbitrators – will often want to have their “day in court.” It has been argued that *“an entirely remote hearing, with all the stakeholders participating from different locations, raises concerns among arbitrators that the essence*

of the arbitral process will be missing.”¹¹ While the attitude vis-à-vis virtual hearings may have changed recently, there is no doubt that an in-person hearing with all participants in the same room for days or even weeks is the climax of an often long-lasting dispute. In addition, the pandemic has provided impressive evidence that humans are social beings. They usually prefer sitting in the same room instead of sitting in front of a video camera all day. In addition, not travelling away from the office may mean that one gets disturbed by other issues that go on in the office at the same time. If one changes the location, it is easier to be fully dedicated to the case at stake and to get into the “arbitral hearing mood.” We therefore believe that fully virtual merits hearings will not become the norm – at least not for big cases.

3. Top 10 Tips for Virtual Hearings

Most of the tips provided earlier on good oral advocacy apply to virtual hearings as well. Yet, there are some specifics to be taken into account in a virtual setting. Moreover, virtual hearings pose some additional challenges that you would not have in a conventional hearing. Therefore, in the following, we will provide some useful tips for virtual presentations and virtual hearings.

3.1 Tip 1: Preparation is Key and Takes More Time

Of course, an oral hearing in person also requires proper preparation. However, the effort required to prepare a virtual hearing is significantly higher. It is not just that the technical aspects come on top (see below).

You also have to consider how to best interact with your team and with the client while taking sufficient safeguards that your conversation is not inadvertently visible to the other side and/or the tribunal (see below).

Finally, communicating over a camera is different from communicating in person. Body language and gesture can only be used in a limited way. In addition, modulation of the voice cannot be employed to the same extent as in a courtroom. Therefore, it is worth spending even more time on how to best convey your message to the tribunal.

¹¹ *Nappert/Cohen*, quoted after *Gielen/Wahnschaffe*, *SchiedsVZ* 2020, 257 (257).