

Virtual hearings interview series


Jane Jiang and Rick Grove of Rutter Associates LLC

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Jane Good morning Rick, thank you for joining us today. I know that you have spent 30 years working in the financial markets; you began your career as a lawyer, practicing in both New York and London, and then moved to ‘the dark side’ and did sales and trading of derivative products. Then you were the CEO of ISDA from 1997 to 2001; now you are the CEO of Rutter Associates, a New York-based consulting firm. You must have seen a bit of real action in financial products disputes, both as a lawyer and as a businessman; so, what has been your experience with virtual hearings so far?

Rick Jane, it is really a pleasure to be here with you, and to talk about virtual hearings which, during the pandemic of 2020, have become something that caught on in a way that none of us could have predicted a few years ago.

My first experience with a virtual hearing actually occurred before the pandemic, in 2018, in a case in Singapore, in the Singapore International Commercial Court, where I was engaged as a consulting expert and two of my colleagues at Rutter Associates were engaged as testifying experts. One of them joined me in Singapore for the hearing, but a second colleague (who was testifying on quantum) testified remotely from New York; he did so because quantum wasn’t seriously contested by the other side, and it wasn’t expected that he would be testifying for very long. The experience was actually an eye-opening experience for me – it worked very well. It saved him a 24-hour trip to Singapore; he testified in the middle of the night in New York (we chuckled at the fact that he had to testify at 2am, New York Time), but the technology and the impact of his testimony was quite good.



I then had an experience myself in the summer of 2020, where I testified at HKIAC, an arbitration in Hong Kong, in a hearing that was a hybrid virtual hearing. I had to testify remotely because of the travel and quarantine restrictions in Hong Kong; it made it impractical for me to testify, and for many others to testify in person in Hong Kong. In that hearing, the presiding arbitrator actually was based in Hong Kong, so he was present, as were counsel – most counsel were based in Hong Kong. But the witnesses – fact witnesses, expert witnesses – were all outside of Hong Kong. In fact, two of the arbitrators were outside of Hong Kong: one was in London, and one was in mainland China; and so I testified virtually from New York in that hearing.

I had a third experience in a mediation in the second quarter of 2020, a mediation where I was engaged by the mediator as an expert; and that mediation took place between a hedge fund and six bank creditors. It all took place by telephone, so it was all virtual in that case.

So I've had those experiences; on balance, fairly positive experiences. Not completely positive, but on balance pretty positive.

Jane Great to hear [about] those, especially the full-blown arbitration hearing, that was quite impressive.

Rick, as you know, in the third quarter of this year, Allen & Overy conducted a survey of nearly 300 respondents, both internally and externally, to gather people's views on virtual hearings. The vast majority of them are private practitioners and barristers. It would be really interesting to have your take on some of the findings, through a slightly different lens. So, I may just throw some questions at you.

Based on our survey responses, one of the most controversial aspects of virtual hearings seems to be oral witness evidence, with 180 people out of 300 considering it to be negatively impacted. What are your views on that?

Rick So as I said, my experience was largely positive, but it wasn't completely positive; and I think that those respondents to the Allen & Overy survey hit upon one of the aspects of virtual testimony that I think is perhaps problematic. And that is, without actually being physically present, it's more difficult for judges or arbitrators (as the case may be), and for counsel, to 'read' the witnesses; it's tougher to see body language, and eye contact, and really to get as good a read as you could in person. And from the perspective of the witness, I found that I've had a similar concern, in that it was more difficult for me to read the other participants and to really appreciate whether my testimony was getting through to the arbitrators, in the case of the arbitration which I testified virtually. Every indication was that it had, but it's more difficult to get a sense of whether they're following, whether you're being as helpful as you would want to be in a hearing.

Jane Right, so it's both ways: we heard the lawyers say that this is one way, they couldn't read the witness – I think the witness not reading the judges, arbitrators, and the surroundings is also difficult.

Rick I think a good witness is one that you would want to have being able to see if the judge's face is just blank, or if the judge is nodding and understanding; I think it's important for the witness to gauge whether he or she is being helpful to the tribunal or to the judge.

Jane I thought the witness is just supposed to tell the truth – no matter whether they help!

Rick Well, that is absolutely right, but if the truth is not getting through, then it's not doing the tribunal very much good. So I do think something is lost when you are testifying virtually – potentially.

Jane Absolutely.

When we asked people to cite difficulties they had when participating in a virtual hearing generally, connectivity – not surprisingly – was by far the most frequently cited. Maybe once we step into the 6G world, it can all be resolved. What has been the greatest challenge for you personally, during your participation in virtual hearings?


Rick You touched upon it: it's IT, getting comfortable with the technology – that's the single biggest challenge that I faced. And it's one that I think we will overcome as we become more experienced – it will be less of an issue. In the same way that when you first walk into a courtroom, there's a lot that you need to overcome and to learn, and that's true with technology as well. I think each time we participate, any of us, in a virtual hearing, we will get better at the technology. That's the biggest challenge that I've found.

Jane We sometimes all have to walk outside of our comfort zone, but once you're out there, and frequently enough, then you will feel comfortable.

Rick Yes, agreed.

Jane Great.

Based on your own experiences, can you quote perhaps one benefit to making more use of virtual hearings moving forward?
And one potential disadvantage?



Rick Sure. I think the benefit is not having to travel; and that's both a time saving and a cost saving. That I think is pretty obvious. But there's another benefit that goes with that, from the perspective of counsel, and also all participants in a hearing – especially the decision-makers. And that is, that if travel is not a cost, and not a factor, then it enables counsel to look globally for the person who they think is the best expert, and not be taking travel costs into account. I've had some discussions about cases in Asia that are quite small, where there's not a large amount of quantum at stake, and in many cases I'm contacted by someone who says *'you'd be a really terrific expert in this case; but there's so little at stake that we don't want to fly you from New York – who do you know who's local?'* I'll try to provide the name of somebody who's really a good local expert, who doesn't have to travel more than a few kilometres to get to the hearing. This takes away that disincentive to seeking the person whom counsel think would be the best expert, wherever that person might reside. So I think those are the benefits as I see it.

There is a disadvantage; and the biggest disadvantage that I see is the inability or difficulty that the group at the hearing has in working together. For example, when I act as an expert witness, very often I'm in the hearing when the other side's expert witness is testifying, so that I can hear his or her testimony. But also so that I can assist the counsel instructing me with questions that they might ask that witness – that's much more difficult to accomplish if you're trying to text or email; much easier to do that when you're actually present in the hearing room. And all of the sidebar conversations that take place in breaks and at lunch, the prep, there's a loss of collegiality and teamwork. It's also true across the aisle, between counsel and, to some extent, between expert witnesses – the inability or greater difficulty that we have in communicating with each other. I do think that this lack of in-person collegiality and teamwork will continue to be a disincentive to holding a virtual hearing. So there are both benefits and disadvantages to virtual hearings.

Jane Those are great insights. Actually, on your first point, I was also thinking it would be great for those working mothers who have young children – they don't have to travel, so they can more often be testifying experts (if they are actually qualified to do so) – they don't need to worry about travelling; that's a great advantage for them.

The next one is that actually in the survey, the vast majority of respondents feel that the ultimate result of their hearing was not impacted because the hearing was virtual instead of physical. Nearly 80% of respondents believe their clients had reacted to participating in a virtual hearing positively or neutrally; that's a very high percentage. Those are very reassuring results, aren't they? What is your view on virtual proceedings being the future, as opposed to a short-term fix to Covid-19?

Rick I agree with the survey respondents. In my experience, the outcome has not been impacted, and ultimately that's what matters most: we wouldn't want to have the format changing the outcome of matters. So I do agree with that, I think that's most important.

I think that in the future, it's not going to be either/or; I think we're going to have a choice between virtual or in-person, or perhaps the hybrid hearing of the sort that I participated in in Hong Kong, because there are advantages and disadvantages to both. I do hear from my colleagues – and for the reasons that I mentioned before about being in a room together, the collegiality, the teamwork, being able to read each other – I do think there is going to be a return to in-person hearings once that's a possibility. But not a full return; I think that there will be witnesses who participate virtually. I think that there will be, potentially, arbitrators who participate virtually. I think there will be, as I said, perhaps a hybrid format. Then there may be some instances where it does make sense to be completely virtual, and we know it works so that's an option. So I think that it's going to be decided on a case-by-case basis.

Jane I think that must be right; I mean, horses for courses, right? During the pandemic, I learned to listen to concerts online; I used to think to go a concert, you had to dress up nicely and sit there to make an occasion out of it. Now you can wear your pyjamas, sit in bed with your husband, and watch a concert – which is also great. Depends on what mood you are in, right?

Rick Yes! I'm sure you're looking forward to getting back to the concert hall and dressing up, and doing that occasionally; but I'm sure you'll also want to stay in your pyjamas and watch some that way as well.

Jane Exactly. I guess for different cases, you have to make different choices.

I know Rick you are a fan of alternative dispute resolution methods. With the difficulty in scheduling hearings, do you expect to see methods of alternative dispute resolution becoming more popular?

Rick I think we're going to see more attempts at ADR. In part because, during the pandemic, our experience with having virtual hearings and calls in advance of hearings, everything done remotely, lends itself to at least attempting, in some cases, to resolve the disputes – perhaps more frequently than we did in the past – through negotiation, through mediation, through other forms of ADR. So I think our experience with different ways of resolving disputes and different ways of holding hearings and the like, I think that's going to lead us to at least try to resolve our disputes without going the full distance to court or to arbitration.



Jane I heard one friend citing doing a mediation virtually; I thought that was rather fascinating. I mean the mediator basically going between parties, just switching on and off camera and going between the two different parties, as if they are in different rooms. I thought that was very interesting. And also, of course, mediation is easier, because you only have very few parties involved; so I thought even virtual hearings will have room for alternative dispute resolution mechanisms.

Rick I agree; and in fact in mediation there's even an advantage to not being in the same building. Even if you're not in the same room for the entire time, typically the parties may be in the same room at the very beginning of the mediation, and then go to separate rooms, with the mediator shuttling back and forth. There's less tension when you're not in the same building; greater latitude for the mediator to work both sides. That was my experience in the mediation I was involved in in the second quarter of 2020, that the mediator was able to maintain a dialogue and a discourse without the tension that I've seen in some previous mediations.

Jane Absolutely. I think this is all fantastic Rick. I could go on for hours, as you can see, on this topic; but I know our time is up. Thank you very much for sharing your experiences and insights on virtual hearings; I really look forward to our next conversation.

Rick Well it's my pleasure Jane, thank you very much for having me tonight.



Contacts

Interviewer



Jane Jiang
Partner – Shanghai

Jane Jiang is an accomplished litigator with extensive experience across international arbitration, litigation, debt restructurings and recovery, and disputes concerning financial products, in addition to regulatory investigations. Jane is well versed in the legal, regulatory and commercial environment in China and the general regulatory environment relevant to Chinese financial institutions and corporates around the world. This sensitivity to the cultural differences relevant to cross-border business transactions involving Chinese parties makes her a unique asset in the resolution of disputes with a Chinese nexus. Jane is qualified in England and Wales and has worked in A&O's London, Hong Kong, Shanghai and Beijing offices.

Interviewee



Rick Grove
Rutter Associates LLC

Rick Grove is the Chief Executive Officer of Rutter Associates LLC, the New York based financial markets consulting firm, assisting financial institutions, companies and government regulators in the Americas, Asia, Europe, and the Middle East. He has acted as a consultant and expert on a variety of financial markets disputes being mediated, arbitrated, or litigated in Hong Kong, London, New York, Shanghai, Singapore, Stockholm, and Taipei.

Rick has spent over 30 years working in the financial markets, as both an investment banker and a lawyer practicing in New York and London. From 1997 to 2001, he was the CEO of ISDA. Rick is a member of the panel of experts of P.R.I.M.E. Finance, the financial markets dispute resolution service in The Hague. He has testified about derivatives in the U.S. Senate and House of Representatives and served on ISDA's panel of experts for credit event determinations. Rick has taught classes on financial markets at central banks, government agencies, universities, banks, and law firms around the world. He is a member of the International Institute for Strategic Studies in London, the International Advisory Committee of EcoPeace Middle East, and the Board of the University of St Andrews American Foundation. Rick received his J.D. from Harvard University and his A.B. from Princeton University.



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