

Virtual Hearings Interview

Lauren Rasking with Werner Eyskens and Andrew Bennett

2021

Lauren Rasking

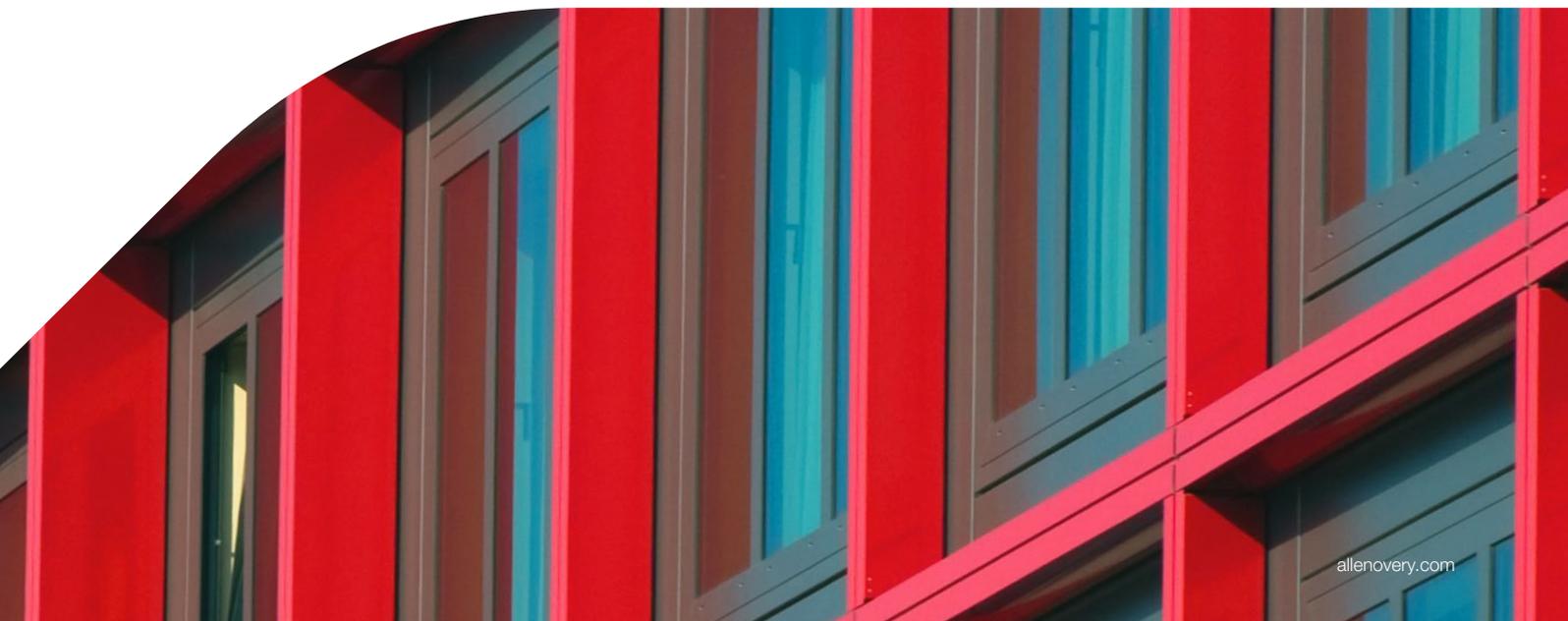
Welcome everyone, thank you for listening to this podcast on virtual hearings.

Today we are discussing how to efficiently prepare for and successfully conduct a virtual arbitration hearing. My name is Lauren Rasking, I'm a senior associate in the A&O Brussels litigation team and today I am joined by two A&O colleagues who have been involved recently in a number of virtual arbitration hearings of various sizes and will share their views with us; Werner Eyskens and Andrew Bennett. Can I ask you both to briefly introduce yourselves, and to tell us a little bit about your experience with virtual hearings? Werner, I'll let you kick off.

Werner Eyskens

Thank you Lauren.

I'm a partner in the litigation and arbitration team in Brussels, and in that capacity I've worked a lot with Lauren and Andrew. We've done quite a few of these virtual hearings in the past year, as many people have. One of those hearings probably stands out because of its size. It was a very large arbitration hearing based in Brussels. It had witnesses and experts spread across the globe, thousands and thousands of pages of evidence – we were talking, I think, about more than 15,000 exhibits and more than 200,000 pages to deal with, so it's really a bit mind boggling – and more than 30 witnesses and more than 5 weeks of hearings. So that was, for us, a completely new sized virtual hearing, and we really had to approach that differently.



- Lauren Rasking** Thank you Werner. What about you Andrew, can you also briefly introduce yourself?
- Andrew Bennett** Good morning Lauren, good morning Werner. I am a senior associate managing a team from Allen & Overy Belfast. We are part of the Advanced Delivery & Solutions business in Allen & Overy. I led the team from Belfast managing most of the document review elements of the arbitration that Werner's been speaking about but in every case we work remotely with different offices so we are well used to being that 'partner' office to different offices in Allen & Overy.
- Lauren Rasking** Werner and Andrew, I believe it is fair to say that this pandemic has changed the way that we conduct arbitration hearings and that it has also created some new challenges on how to prepare for such hearings. Allen & Overy has taken pride in being the most advanced law firm, and Andrew you already mentioned it, advanced delivery is one of the ways to do so. You've been involved in this complex arbitration hearing that Werner's talked about – could you give us a little bit more context on how the two of you and the teams around you worked together on that matter?
- Werner Eyskens** One big focus of course was to deal with the documents and the volume of documents on this and a big step that we took was to make sure that we integrated Andrew's team much deeper in our way of working, and to work together, not only on processing data and information, but to be able to rely also on Andrew's teams' insights, their memory bank really, and their tactical suggestions to build the case.
- Andrew Bennett** Even the way that we were instructed from the outset was very different from how you'd instruct a typical third party document review provider. You instructed us, the Belgium team instructed us, by giving us access to the core documents, i.e. the witness statements, the court submissions, and asked us to do a case strategy out of that, rather than just sending us a mountain of emails and Excels; how typically a document review would have been done in the past. So, we had that insight into the actual arguments that were being used in the case and were able to play an integral role right from the outset in developing case strategy.
- Lauren Rasking** Andrew, if I remember correctly that was around Christmas, isn't that right?
- Andrew Bennett** Yes, we were in fact having our Christmas party and the documents arrived after a week's delay and it was all hands to the pump in Belfast, as I'm sure it was in Belgium, for that weekend and then the seven days after that before the client meeting. Good memories.



Werner Eyskens

Apologies for having messed up that Christmas party...

But, the net result of that way of working together was clearly that it would be as often Andrew's team as our team, that would come up with the proverbial 'needle in the haystack' – that one single piece of information we really needed to push back on arguments that were raised by the other side, so it is really the net result of that way of working together.

Andrew Bennett

In a traditional document review exercise, we may be involving in isolated document review throughout a case, but in this matter we were involved throughout the case, so that knowledge of the wider arguments was really instrumental as well.

Lauren Rasking

It's interesting you say that Andrew, because in this "new normal" environment, let's call it, of the virtual hearings many have already expressed a view on the impact of the virtual side of things on witness evidence, so cross examinations in particular. But of course cases are often decided on the basis of documentary evidence that is put in front of a tribunal. And so therefore it is extremely important to also conduct such a thorough review of documents both from the side of the client, but also of the other side, the documents that you request to see. I can imagine that in the case you mentioned, it is particularly tricky if you have literally hundreds of thousands of documents involved. So, Werner, how did you approach that? How did you make that work?

Werner Eyskens

Well, the way to do it is to really make as much use as we could, in as integrated a way as we could, of the two workstreams of what Andrew can do and that's really to work with eDiscovery and document review. Perhaps Andrew you are best placed to explain briefly how that works.



Andrew Bennett

We in Belfast work very closely with our own in-house eDiscovery team. So eDiscovery is effectively the technical way of getting documents on any litigation matter, or indeed transactional matters, onto a platform and then getting a good review done of those to inform strategy. So the fact that we've got our own in-house team in Allen & Overy and a platform that we can use and manipulate with artificial intelligence and analytic clustering, and many forms of different techniques, really helps us get ahead of the game on that. That close relationship with our eDiscovery team, who also form part of our Advanced Delivery & Solutions business, is really integral. We actually had someone from our eDiscovery team seconded to Belgium, which I'm sure you remember, for a huge period of time and being close to the documents as he was, he was able to suggest, alongside the review team in Belfast that I led, some really interesting ways to get to the bottom of these huge document sets – inboxes which might have had 60,000 emails in them.

Lauren Rasking

That's interesting because of course you mentioned the secondees, who has certain insights, but you also mentioned artificial intelligence – that's always something that makes lawyers dream, a little bit. There are even books written about artificial intelligence for lawyers as if it's something very alien. How did you use that in particular on this case?

Andrew Bennett

So the case involved many different jurisdictions, many different witnesses, issues, and a huge document set, as I've already said. So one of the things we used from the outset was clustering – thematic clustering – so putting all the documents into a review platform and asking the artificial intelligence to come up with themes that are being produced from those documents. Then we get a visual representation of the different bubbles, or different themes. Then we can see – is what we know about the case from what we've heard from our client actually accurate, or are there gaps in our knowledge? We can do that across the other side's documents as well. We can use that to build a picture for our witness statements, and our court document submissions as well. So it's another way the review team in Belfast and eDiscovery can really be integrated and play a strategic part in the lead-office work as well.

Lauren Rasking

The fact that it is, as you mentioned, across different jurisdictions – does that mean that you also reviewed documents in different languages? Did that cause any particular challenges for the team?

Andrew Bennett

That's always going to be a challenge in a big case like this and across big international cases. So, having the language identification software eDiscovery were able to deploy, was also a major factor in dividing up the work as well. The other things that we used were Continuous Active Learning, which is a way of artificially training the system to predict where the relevant documents are – so using human-based coding on a certain document set to then train up the computer to prioritise relevant documents. On a case like this, where we are talking about 60,000 documents in one inbox alone, we need to use these things to intelligently get to the bottom of where the key documents are.



Werner Eyskens

There was one really cool feature, which you could produce, which was that chart which showed the intensity of the email traffic between different persons. I thought it was a really helpful visual tool to determine who were the key participants in a conversation, and one of the [key] topics, which you then isolated. That was a great help for us to plan document production requests, to prepare the identification of key witnesses, witnesses who were going to be there – and I think as importantly, witnesses who were not there – to determine the role that they actually had in the case.

Andrew Bennett

Absolutely. So if a witness says to us in maybe a witness interview preparation meeting, ‘look, I remember speaking to this person a lot during that time period’, we can use that visualisation that you’ve been speaking about Werner to see actually, is that accurate? Is that an accurate memory of that time, which may have been five/six years ago? To see just very quickly on the visualisation where the strands are – it’s a bit like a flight destination map, that you might have seen on the EasyJet website – very easy to see, very easy to show to a client, and get results out of.

Lauren Rasking

Andrew, what is the benefit of having such a team who can do all of this in-house, compared to a third party document reviewer (because that exists of course as well) – what would you say to that?

Andrew Bennett

I’ve worked a lot with third party document reviewers, and with a sample review of their work on other matters. They’re excellent and they’re very useful and we will continue to use them in the future, but I think on a matter like this, where we need to have a detailed review, the contextual review – to have reviewers that have the knowledge of the witness statements and the court documents, and not just review the emails in isolation – it’s essential to have an integrated review team. We saw the benefit of it throughout the case as we were involved in more and more complex work, and indeed we sent people to Belgium before lockdown on secondment and then we were able to utilise them in a virtual setting as well, so having that team to directly contact you guys with key documents is really essential, I would suggest.



Lauren Rasking

So I understand there is a real advantage in terms of quality of the work. Does that also translate in terms of costs, Werner? Was that also the case in this matter?

Werner Eyskens

The hard legal costs are, of course, a real test for this way of working, and I think not just for obviously the clients, but I think also for arbitration as an institution. The results of what we could see after three to four years of working in this way with Andrew's team are really impressive. We found that the workstreams that were handled by Andrew's team can help us to drive costs [down] by as much as 50%, and that's the result of calculated, detailed analysis for cost submissions. So, that's a real hard finding.

Andrew Bennett

It's not just a case of throwing bodies on a review just to maximise the amount of documents we can get through, it's about intelligently putting a resource that can be integrated into the matter, and then take on more and more complex work throughout a huge three to four year period. By the end of the matter we are absolutely cost-effective and doing work that would normally be done by associates in the lead office.

Lauren Rasking

Thank you for that, that's very interesting.

Let's now turn from the preparation of a virtual hearing to the virtual hearings themselves. You've mentioned you have both been involved in what I would call a hybrid virtual hearing, where you work with various 'clusters' or, as we would definitely say in Belgium now, 'bubbles' of people. Could you describe this concept a little bit, Werner?

Werner Eyskens

Sure, as opposed to a real, totally virtual hearing where everybody basically works from their kitchen table, a cluster or bubble setting or a hybrid virtual hearing is really setting up small, controlled physical teams which then communicate with each other virtually – that means that each side in proceedings will have their own different clusters/teams working together, and the tribunal will sit together in one single bubble together with the secretary.



Lauren Rasking

What would be the advantage of working in such a way?

Werner Eyskens

Well, our experience is that it gives a number of advantages. One key advantage, we believe, is that you can really have a core team sitting together which can be the centre of gravity to drive the proceedings and I think for strategic decision making that is extremely important. It can also – because everything is set up on a virtual platform, basically – help you to work together very well with people who are not sitting physically next to you, and that is, I think, the key tool for us to be able to integrate with teams like Andrew’s team.

Andrew Bennett

I would definitely echo that Werner. I mentioned previously about our secondee who was in Belgium before, in a virtual setting, but then who was able to attend the tribunal remotely from Belfast. That’s not something that we were able to do before very easily. So having that person that was as present, from Belfast, as anyone else for the tribunal meant that they felt completely integrated to the team and they could be the eyes and ears for any last minute questions that were coming out of the tribunal, or any anomalies or surprises that were being produced at the tribunal, that could be fed directly back to our review team who could then answer questions and be that backstop to support you guys.

Werner Eyskens

I think when I then look back at the inside, I would say, of one single bubble, I think it is also very helpful to work together within that bubble. Our experience is that as a human being, there are only that many screens that you can manage. You typically have already three or four screens in front of you to follow the hearing and the documents that are shown. I think intra-team communications, so communications with your team members, if they need to come in through WhatsApp, text messages or another chat function, that’s yet another screen on top of all that and that is just too much information. The thing that works best in our experience is to be able to communicate with the good old post-its and just a few carefully chosen key words in capitals on the documents, or sometimes just a quick glance to a team member, is the best and fastest way to communicate. So that’s something really important within that team. Then, without sliding into armchair psychology here, building up the team’s spirits by physical presence and to be able to support each other in stressful circumstances is something, I think, that cannot be replaced by somebody on a screen. So that physical presence is something incredibly important. I also think that when you need, during hearings, to make very fast and important decisions, making those decisions when you are in the same room leads to better decisions than when you need to make them over a screen.

Lauren Rasking

So physical presence has its importance, but how do you do it in times where social distancing has become the 'new normal'? How did you set up your cluster, or bubble, Werner?

Werner Eyskens

That was a real challenge. We started from basically measuring the distance that we had to respect and tried to see how many people we could bring into a room. So we ended up with a room set up that we called our 'Houston control centre'. It looked a bit like the space centre when they launch a rocket into space. The guidance was also that we had to make sure to have enough ventilation so that meant opening windows. This was during the winter season, so the internal rule was also 'dress warmly' – because it was cold in that room.

Lauren Rasking

I can imagine.

Let's maybe, Andrew and Werner, zoom out a little bit from that one case. I would like to just generally have your views on what you think are the main advantages of having a hearing in such a virtual setting?

Werner Eyskens

I'm happy to jump in here Lauren. I think multitasking takes a completely different shape. You have quite a few team members within the bubble and outside your bubble in your clusters who can do a lot of work off screen while they really remain completely tapped into the hearing. So that allows you, I think, in a much more efficient way to simultaneously deal with workstreams without losing people's attention for what is going on in the hearing and it allows for very quick follow-up tasks, as Andrew just explained. I think time management, to a certain extent, is easier too. There have been a lot of publications and earlier comments in the other podcasts about how much more tiresome virtual hearings are. That also leads to better, I think, planning and predictable hours for hearings because people just collapse if hearings go on for too long, so they do stop on time. I think, finally, hearing techniques and the cross-examination techniques, we talked about that in the past – it is different. So you need to adjust in a typical, virtual set-up, you will see the witness whom you need to cross-examine in a screen-size that imitates somebody who is standing 50cm away from you. So that's probably the distance you stand away from somebody in an elevator. I think that our brains are wired to either punch or kiss somebody at that distance and those are, of course, obviously the two things that you cannot do with a witness. So you need to really adjust to that. It is also more tiring, I find, because eye contact tends to fall away. There is different body language – you cannot see the lower part of somebody's body, including your own, you cannot show that, and witnesses, when they dial in from home, they tend to be more relaxed. That can be something very positive or negative, depending from which side you approach this, but all of these are new elements to which you need to adjust in a different way. I also think that the client involvement in a virtual hearing can in fact be much more effective, because they can be close by without sitting in the actual virtual cluster room. I think that allows the team to work very efficiently when, under high pressure, decisions need to be taken and to very quickly relay those to the clients and take instructions.



Lauren Rasking

Thank you for those insights Werner. Maybe as a final consideration here of this discussion; we see that more and more legal practitioners, like ourselves I would say, see the advantages of the virtual hearings like we mentioned before: more efficient, higher quality or in terms of time management, etc. Now we see, of course, in this Covid context, the vaccination campaigns are thankfully progressing and so maybe the end of the pandemic might come into sight. The question is; does that also mean the end of these virtual hearings? Will we switch back to how it used to be? My personal view is that we won't and that virtual hearings are probably here to stay. It is not just Covid that we are talking about. There are also other challenges that are clearly on the agenda, also of the three of us I might say, such as climate change that will also change the way that we are conducting these hearings. So, I think virtual hearings are here to stay. Would you agree with that? What are your views? Werner can I start with you again.

Werner Eyskens

Yes I agree. I think they are here to stay for the reasons that you just explained Lauren. I think that they come with a number of challenges. These are mainly technical and I think these are all manageable. If you know you can identify the differences, you can deal with them and I think the experience of the past year, not just for our firm, but I think throughout the arbitration community has demonstrated that it is perfectly possible. So yes they will stay. I think these downsides can be managed without losing sight I think of one important downside for which I have not yet seen a real solution and that is, of course, that you don't have that physical contact. You are not in the same room as the other side, and for example that leads to the consequence that the only contact you have with the other side are in a very formal setting, in the presence of the tribunal. So you don't have those coffee break moments anymore. It's perhaps a little bit of an urban myth, but I do think that sometimes settlement discussions can be sparked by a coffee break moment – and you don't have those anymore. Something else that has disappeared, I think, is the social contact you typically have in a hearing. It's also an opportunity to meet other people outside of your own team and that is something which has fallen away. I have not seen, yet, a real solution for that in the virtual setting. So I think virtual hearings are there to stay. I hope they will not entirely replace real, good old-fashioned, physical hearings.



Andrew Bennett

Just to add to that, I think virtual hearings do present more challenges and there are advantages and disadvantages as we have discussed, but they also present a real opportunity for innovation and for non-legal teams, perhaps, to get involved, like e-discovery, like legal technology teams or consulting as well. So from my point of view, leading a team in Belfast, which is an alternative way of resourcing work, and seeing the success of that in this tribunal, I am very positive about virtual hearings and how it can lead to more integration, and the legal teams having to reach out to non-legal teams to get innovative solutions. At Allen & Overy we have obviously got the Advanced Delivery and Solutions businesses already up and running. So that's a natural way to progress and develop this in the future, to expand those offerings and to tap into those groups, which as we've seen can be done very successfully on a remote basis.

Lauren Rasking

OK, so I heard that it also offers opportunities of innovation, this Covid situation, so that's maybe a bright note to end this discussion on! Thank you both. It seems that the virtual hearings have a bright future ahead. Thank you.

Werner Eyskens

Thanks Lauren and Andrew, bye.

Andrew Bennett

Thank you, bye.

Contacts

Interviewer



Lauren Rasking
Senior Associate, Brussels

Lauren Rasking is a member of our Brussels litigation team and also previously worked in our London arbitration group. She has extensive experience in advising clients on local and multi-jurisdictional disputes before Belgian state courts and national (Cepani) and international (ICC) arbitration tribunals. In addition to representing clients in arbitration cases, Lauren has a particular interest in antitrust litigation and commercial litigation.



Interviewees



Werner Eyskens
Partner, Brussels

Werner is the head of Allen & Overy's Belgian arbitration practice. He has more than 25 years of experience of international arbitration proceedings (ICC, CEPANI, SIAC, ICSID and LCIA) in construction and post M&A arbitration. Werner is a board member of CEPANI (the Belgian arbitration institute), co-chairs its diversity committee, and is regularly appointed as arbitrator.



Andrew Bennett
Senior Associate,
Allen & Overy Belfast

Andrew Bennett is a senior associate in Allen & Overy Belfast. Andrew co-ordinates large scale document review tasks on international litigation matters and has responsibility for linking our Advanced Delivery legal services team with Arbitration teams around the Allen & Overy network. He has successfully led teams of specialist reviewers, incorporating them into the wider review team and liaising with both internal and external eDiscovery teams. Andrew has also driven the development of lawyers in Belfast from being purely document reviewers to being lawyers who can be incorporated into litigation teams and used on a variety of other litigation tasks.

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