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**Remote hearings and the use of
technology in arbitration**

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Remote hearings and the use of technology in arbitration

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Summary

IN SUMMARY

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In summary

This article analyses the inclination of the arbitration community and users towards the use of videoconferencing and the rise of use of technology in remote hearings. It provides practical tips and recommendations relating to organising remote hearings, and concludes with some of the advantages of holding remote hearings, how the arbitration community and users are accepting it, and how technology paves the way for arbitration in the future.

Discussion points

- The incorporation of videoconferencing into arbitration laws and arbitral institution rules
 - The guidance and protocols on virtual hearings issued by the arbitration community
 - CRCICA's experiences with remote hearings and videoconferencing
 - The issue of consent of the parties for holding remote hearings and associated problems
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Referenced in this article

- AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties
 - Africa Arbitration Academy Protocol on Virtual Hearings in Africa
 - CIArb Guidance Note on Remote Dispute Resolution Proceedings
 - Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19
 - International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration
 - ICC Guidance Note on mitigating the impacts of COVID-19
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The issue of consent of the parties for holding remote hearings and associated problems

Introduction^[1]

Arbitral institutions, users, academics, practitioners and commentators all agree that the covid-19 pandemic has triggered changes that will accelerate the integration of digitalisation to promote flexibility in efficiently handling international arbitration cases.^[2]

Technological capacity to make reliable video calls was more limited in the past, as it required specialised and expensive equipment. Today, however, there are video call platforms such as Microsoft Teams, Zoom and many others providing high-quality video calls at relatively low costs. Stable internet connections and appropriate equipment are becoming more available in many countries worldwide.^[3]

Arbitral institutions have gained experience, as have users, counsel and arbitrators, in using technology effectively, while ensuring the balance between due process rights and efficient dispute resolution.^[4]

Hearings (remote or virtual)

Professor Maxi Scherer has distinguished between 'virtual hearings' and 'remote hearings' and clarified the common misconception between them. She mentions that the term 'virtual' has many possible meanings, but in computer science, it may be defined as:

not physically present as such but made by software to appear to be so from the point of view of a program or user^[5] . . . In the case of international arbitration hearings conducted in several locations, the participants of the hearing are not virtual, but really exist; they merely interact with each other using communication technologies.^[6]

However, 'remote hearings' are understood as hearings that are conducted using communication technology to concurrently connect participants from two or more locations. This could include communication through telephone or videoconference, or possibly other more futuristic technology such as telepresence. Remote hearings use a videoconference link, namely 'technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations'.^[7]

In international arbitration, there are several types of remote hearings. There are 'semi-remote' hearings, where, for example, the arbitral tribunal might be assembled physically with the parties in one location, and one or several experts or witnesses may testify before them remotely. This is regarded as the commonly used format in international arbitration;^[8] however, in 'fully remote hearings', all participants are in different locations with no existing main hearing venue. Fully remote hearings are barely used in international arbitration, but are currently being considered in many arbitral proceedings to deal with the hassles dictated by the pandemic and the restrictions that countries are imposing. A fully remote hearing is one that could be referred to as a 'virtual hearing' as no hearing venue exists but for the use of computer technology.^[9]

As such, the importance of arbitral institutions, counsel and arbitrators being familiar with remote and virtual hearings, videoconferencing and technology, as well as guidelines to ensure their unified adoption and deployment, has been considered crucial.^[10]

In 2018, White & Case LLP conducted a survey titled 'International Arbitration Survey: The Evolution of International Arbitration'. The results showed that 43 per cent used videoconferencing frequently during arbitrations, 17 per cent always used it and 30 per cent used it sometimes. Additionally, 89 per cent mentioned that videoconferencing should be

used more often in arbitration.^[11] This study will require an updated review following the pandemic and the growing necessity of the use of videoconferencing and remote hearings.

Videoconferencing incorporated into arbitration laws and the tolerance of courts in its usage, videoconferencing incorporated into arbitral institutional rules and the issuance of guidance and protocols

For all possible forms of remote hearings, tribunals and parties must assess the relevant regulatory framework, including especially the law of the seat of the arbitration and the applicable arbitration rules. Some national laws and arbitration rules contain specific provisions on remote hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely or by way of analogy of other provisions.^[12] There is also the test of how courts in different jurisdictions tolerate the usage of videoconferencing and remote hearings. Not to mention that, as a result of the pandemic, various guidance and protocols have been issued to facilitate the usage of remote and virtual hearings and videoconferencing, although some were issued prior to the pandemic.

Videoconferencing incorporated into arbitration laws and the tolerance of courts towards the usage of videoconferencing and remote hearings

The amendments to arbitration legislation in recent years by countries such as the Netherlands (article 1072[b] in the Dutch Code of Civil Procedure Book 4 Arbitration^[13] of 2015), Austria (section 595(2) of the Austrian Arbitration Act 2013)^[14] and Hong Kong (article 20[2] of the Hong Kong Arbitration Ordinance 2011)^[15] allow witness and expert examinations to be conducted without the physical presence of the witness and expert at the hearing.^[16] Other legislation does not contain specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing and the tribunal's broad power to determine procedural matters.^[17]

With regard to the tolerance of courts towards videoconferencing, remote and virtual hearings, a landmark judgment was issued on 27 October 2020, where the Egyptian Court of Cassation upheld a decision of the Cairo Court of Appeal refusing to set aside an award issued by the Cairo Regional Centre for International Commercial Arbitration (CRCICA).^[18] Among the different matters that the Court of Cassation had dealt with, it hinted at the compatibility of virtual hearings with Egyptian law and the increased reliance on virtual hearings. In this unprecedented judgment, the Court of Cassation made an express reference to the term 'virtual hearings' (in the English language) and this was regarded as an implicit message that virtual hearings are consistent with Egyptian law, which in itself does not include any direct prohibition of virtual hearings.^[19] This is an innovative statement, whereby the Court of Cassation hints that if parties wish to try to set aside arbitral awards on the ground that a hearing is held virtually, this may simply not qualify as a ground.^[20]

A number of national courts have themselves conducted remote hearings:

In a recent decision, an Australian court balanced the health risks posed by covid-19 against the principle of just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. The court concluded that the 'technology hiccoughs' associated with remote hearings, although

unavoidable, are tolerable and would not mean that 'the trial will be unfair or unjust'.^[21]

The same conclusion was reached in the English courts.^{[22] [23]}

Gary Born mentions that all courts have virtually refused to annul arbitral awards based on objections to the use of videoconferencing and similar technology for witness and expert testimony; the same result has been reached in recognition proceedings involving remote witness testimony.^[24]

Those results are particularly likely to continue to be reached in the future with respect to entirely remote hearings, with a number of national courts conducting their own remote hearings, and with health regulations making the conduct of physical or in-person hearings impossible or unlikely for prolonged periods of time.^[25]

Videoconferencing incorporated in arbitral institutions' rules and their updates

Several arbitral institutions have included in their arbitration rules the option of using videoconferencing in arbitration cases, such as article 28(4) of the CRCICA Arbitration Rules (relating to the examination of witnesses and expert witnesses only).

The arbitral institutions that have updated their arbitration rules to include expressly the features of a hearing being conducted remotely, virtually or by videoconference are the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC).

Pursuant to article 19.2 of the LCIA Arbitration Rules of 2020:

the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, specifying that as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).^[26]

The same is noticed in the updated Arbitration Rules of the ICC of 2021, which added the following sentence in its article 26(1), as it stipulates:

The arbitral tribunal may decide, after consulting the parties, and on the basis of relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

Arbitral institutions have amended their rules so that videoconferencing can be accommodated. For example, article 24(2) of the Korean Commercial Arbitration Board, International Arbitration Rules of 2016 expressly permits hearings and meetings to be heard at any physical location that the tribunal deems appropriate.^[27] Other institutions also expressly allow the tribunal to hold hearings remotely.^[28] Other institutions have not issued specific provisions, and remote hearings will be assessed by analogy with other

provisions, such as the parties' right to a hearing^[29] and the tribunal's broad power to determine procedural matters.^{[30] [31]}

Many arbitral institutions worldwide will update or are most definitely working on updating their arbitration rules to accommodate the possibility of holding remote hearings and videoconferencing, and not only for the examination of witnesses or expert witnesses in oral hearings.

Guidance and protocols on virtual hearings and videoconferencing

Arbitral institutions, organisations and law firms have published guidelines, protocols, checklists, model procedural orders and commentary to provide guidance for navigating the digital and virtual arbitration environment.^[32]

Delos Dispute Resolution has compiled relevant resources on remote and virtual arbitration and mediation hearings under the headings Guidance & Checklists; Protocols; Model Procedural Orders; Webinar Recordings; and Other Resources.^[33] The following are some of the guidance and protocols relating to videoconferencing and virtual hearings from different institutions:

- the Africa Arbitration Academy Protocol on Virtual Hearings in Africa;
- the AAA-ICDR, Virtual Hearing Guide for Arbitrators and Parties;^[34]
- the CIArb Guidance Note on Remote Dispute Resolution Proceedings;^[35]
- the Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19;^[36]
- the ICC Guidance Note on mitigating the impacts of COVID-19;^[37]
- the HKIAC Guidelines for Virtual Hearings;^[38]
- the International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration;^[39] and
- the Seoul Protocol on Video Conferencing in International Arbitration.^[40]

CRCICA's experiences with remote hearings and video conferencing

Introduction

In its response to the pandemic, CRCICA has encouraged its users (arbitrators, parties and counsel alike) to privilege electronic means for both hearings and submissions. Accordingly, CRCICA has invested in both Zoom and Microsoft Teams to ensure high-quality videoconferencing capabilities.^[41]

CRCICA has also allowed physical hearings to take place at its premises, with a requirement that parties send no more than two representatives to maintain a safe distance between attendees and the possibility of holding remote hearings. Since the end of April 2020, several hearings have been conducted by videoconference, thereby minimising disruption to the arbitral proceedings. In general, parties, their counsel and arbitral tribunals have been cooperative with a growing trend towards using technology to accommodate the restrictions

associated with the covid-19 crisis. This can be shown in CRCICA's caseload report for 2020 and 2021.^[42]

To keep users informed of new developments, the Centre issues regular updates to its users urging them to privilege electronic means of communication and remote hearings.

CRCICA's data^[43] on its hearings for the years 2020, 2021 and 2022

From 1 January to 31 December 2020, 78 hearings took place using CRCICA's hearing facilities:

- 11 hearings were held entirely via videoconference;
- two hearings were held entirely via teleconference;
- 10 hearings were held with partial in-person and remote attendance; and
- 55 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

From 1 January to 31 December 2021, 131 hearings took place using CRCICA's hearing facilities:

- 38 hearings were held entirely via videoconference;
- 17 hearings were held with partial in-person and remote attendance; and
- 76 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

From 1 January to 31 December 2022, 129 hearings took place using CRCICA's hearing facilities:

- 15 hearings were held entirely via videoconference;
- three hearings were held with partial in-person and remote attendance; and
- 111 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

CRCICA's hearing facility and steps for holding a hearing via videoconference

CRCICA has a high-tech hearing facility equipped with a premier videoconferencing system (Polycom HDX) and interactive meeting room systems are installed to ensure high-impact visual experiences and realistic meeting environments. The videoconferencing system can accommodate a remote or virtual hearing connected to the cloud and conducted using online platforms, which can be connected up to the maximum number of persons allowed to connect remotely via such platform.

CRCICA offers through its case manager to the tribunal the opportunity to hold hearings remotely through one of its preferred platforms (Microsoft Teams or Zoom). Following that, CRCICA receives a request from the arbitral tribunal to do so. Through its case manager, the Centre then sends the link relating to the selected platform to the parties, their counsel, the tribunal and witnesses and experts, if any (the 'attendees of the hearing') and requests

a pre-conference test to troubleshoot any technical issues (at least two to three days prior to the oral hearing). In all manners, the Centre organises virtual breakout rooms for all the attendees of the hearing. The Centre asks the tribunal whether the hearing should be recorded (audio or video), and it in turn asks the parties accordingly. The centre's IT administrator assists all the attendees of the hearing before, during and after the hearing if they require any further technical assistance.

The number of attendees of the hearing is controlled via their emails. If any of the attendees of the hearing sends the invitation link to anyone else to attend, the protocol at the Centre is that, after seeking the arbitral tribunal's clarification regarding such non-listed attendee, the IT administrator can reject such request from a non-attendee to attend the hearing.

The case manager sends an email in advance to the attendees of the hearing to conduct a pre-hearing test call (under the supervision of the IT administrator) right before the beginning of every remote hearing to address once again any potential technical issues. Moreover, the Centre's IT administrator is logged on to every hearing to troubleshoot any technical issues during the hearing. During hearings that are conducted with partial physical presence at the Centre's premises and some attendees attending remotely, the IT administrator is available to ensure that all attendees to the hearing have access to the same visuals and are able to hear and respond efficiently. There is a backup internet connection for use with the agreed platform, in case a problem arises with the original internet connection. If the problem persists, the IT administrator will use another online platform. This is the protocol in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. Following the hearing, a link to the recording of the hearing is sent by the case manager to the attendees of the hearing by email with a complex password, which is valid for one week.

Practical tips and recommendations relating to organising remote and virtual hearings

If both parties are content to move forward with remote hearings, there are no legal issues. As such, if the arbitral tribunal is willing to proceed then practical issues, and not legal ones, will arise.

Below are some practical tips and recommendations to take into consideration when conducting a remote or virtual hearing:

- Conducting testing sessions: videoconferencing can work well provided the systems are compatible and have been subjected to a testing session in advance of the hearing. For example, checking for technical compatibility with the various software and hardware systems used, IT support and coaching all participants on how to connect during the hearings, to activate and deactivate video and sound, checking functionality of technology and whether adjustments are needed for volume, light, position towards the camera, background noise and the like, among other technical issues.^[44] In addition, it is preferable to hold another testing session shortly before the remote hearing is due to begin (eg, one day before).^[45]
- Check whether any guidelines or protocols are to be adopted and the procedure for the selection of an online platform.^[46]

- Data security and privacy issues:
 - data security (or cybersecurity): arbitral institutions and service providers both place a strong emphasis on preserving the integrity and security of proceedings; and
 - data privacy (or confidentiality), namely the question whether the remote hearing provider or any other involved third party that stores, transmits or otherwise has access to data during the remote hearing might misuse it outside the arbitral proceedings.^[47] By way of example, the Seoul Protocol on Video Conferencing in International Arbitration aims to protect the confidentiality of the hearing and its parties through its articles 2.1(c) and 2.2, 3.1 and 8.^[48]
- Sitting hours: in a cross-border dispute with various time zones, participants in an arbitration case could be from different jurisdictions and hence it could be quite troublesome to attend the videoconference due to the different time zones. This may adversely impact a party's ability to present its case (although arguably the issues are really not so different from those imposed by jet lag and the fatigue associated with long-distance travel, of which international arbitration practitioners are well aware).-^[49] Emphasis should be attached to the relevance of giving equality of treatment to counsel from both parties, with any personal inconvenience distributed equally among the parties.^[50] Hence, it is preferable to have shorter hearings given the time constraints in different time zones between different jurisdictions and there should be more breaks for the participants in the remote hearing.^[51]
- Have a moderator in charge of the remote hearing and someone else to control the camera.^[52] Given that not all videoconferencing systems allow hearing participants to see one another at all times, some arbitrators moderate hearings in a manner more similar to telephone conference calls than in-person hearings. To prevent participants at a hearing from talking over one another, it may prove useful for the presiding arbitrator to address counsel before they can speak and for all other participants to mute their microphones.^[53]
- A number of courts and bar associations have published guidelines on advocacy in remote hearings, suggesting that participants slow down their speaking pace in anticipation of potential delays in transmission, including more pauses to allow questions from the tribunal and maintaining professional appearance and decorum.-^[54] Having a real-time transcription service is also recommended in case anything is missed or unclear during the remote or virtual hearing.
- Have a secretary to the tribunal or the arbitral institution's case manager assist the tribunal with any technology-related matters. Further, if any participant gets logged out of the hearing, it would be the secretary to the tribunal's or the arbitral institution case manager's function to notice this and request the tribunal to pause the hearing pending the reconnection of the logged-out participant.
- The arbitral tribunal should have access to private deliberations during the hearing.
- There must be a back-up connection in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. This can be done through a different platform. The Seoul Protocol on Video Conferencing in International Arbitration nonetheless provides for this concern through its

article 6, which sets out guidelines on ‘Test Conferencing and Audio Conferencing Backup’. These guidelines can help smooth the disruption from an unpredicted communication failure and so allow for a quick recovery during a hearing.^[55]

- With regard to examining witnesses: the absence of a physical hearing means the tribunal has limited control over who is in the room with the witness. The Seoul Protocol on Video Conferencing in International Arbitration deals with this risk in its article 1.2 by requiring the videoconferencing system to show a reasonable part of the interior of the room in which the witness is located. It also requires, in its article 3.1, the tribunal to verify the identity of each individual present. Alternatively, parties could be requested to use a camera (or cameras) that display the entire room (360 degrees) or the witness could simply be asked to rotate the laptop camera to show the whole room. Tribunals will need to be prepared to be cautious in addressing concerns that witnesses may be utilising a ‘phone a friend’ approach to dealing with questions on cross-examination.^[56]
- Finally, as translating in real time is difficult in virtual hearings, it is recommended to allow for a separate interface to connect to the interpreter’s audio feed only.^[57]

Consent of the parties for holding remote hearings and associated problems

As each party in an arbitration case is entitled to request an oral hearing, all the parties, arbitrators and witnesses (including experts) should be physically present. In some cases, all parties will agree to the conduct of a remote hearing and cooperate to ensure that it proceeds smoothly. In these circumstances, there is no question as to the tribunal’s authority to conduct such a hearing.^[58]

For ongoing arbitral cases, it would be wise to obtain a joint agreement from the parties that no party would seek to vacate the resultant arbitral award following its approval on holding the remote hearing. However, for newly registered cases, the ideal scenario is to have this matter agreed upon as early as possible between the parties and the tribunal in the arbitration (ie, procedural order No. 1). In that case, there are model procedural orders intended to be used by arbitrators, parties and counsel as a checklist of issues and guidelines to address matters that are unique to remote video arbitration proceedings.^[59]

The dilemma of a party rejecting holding a remote hearing and insisting on an in-person physical hearing

In relation to the tribunal’s power to order remote hearings, parties generally object either on the basis that they are entitled to an oral hearing that necessitates a physical hearing, or on the basis that a remote hearing would violate the principle of fair and equal treatment. Some parties may also refer to provisions of applicable institutional rules, noting either that those rules do not specifically mention the power of the tribunal to order a remote hearing, or interpreting provisions requiring an in-person hearing as requiring an in-person ‘physical’ hearing.^[60]

If the arbitration agreement is silent regarding holding remote hearings and if the applicable national law or institutional arbitration rules do not contain any particular provision on remote hearings, the solution then is to refer to the tribunal’s broad power to organise procedural

matters. National arbitral laws, as well as institutional rules typically provide that, absent any agreement by the parties, the arbitral tribunal may ‘conduct the arbitration in such manner as it considers appropriate’^[61] and ‘decide all procedural and evidential matters’^[62] or ‘determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration’.^[63] ^[64]

Renowned Egyptian arbitrator Mohamed Salah Abdel Wahab shared a succinct six-point pathway to deal with this matter with Global Arbitration Review:^[65]

Institutional arbitration rules contain similar provisions regarding the tribunal’s power to organize the proceedings generally, and evidence taking more specifically.^[66] Accordingly, the question whether a hearing should be held physically or remotely is for the arbitral tribunal to decide, absent any provision to the contrary.^[67]

In general, where a party opposes a remote hearing arguing its right to be heard is compromised, the tribunal is faced with the task of providing content to the right allegedly breached. What constitutes the right to be heard in a traditional setting is likely to differ in a virtual environment. Therefore, when ruling on the objection, a tribunal might find it useful to consider whether the parties, their witnesses and experts have steady access to the virtual platform where the hearing is to take place, if there are security measures in place and if the settings enable the parties to fully present their case in an adversarial way. Here, the particular circumstances of each party will shape the content of the right at stake, and help the tribunal decide.^[68]

When a remote hearing is ordered over the objections of one party, it may result in claims in an annulment proceeding that the objecting party was denied an opportunity to be heard. If there are no objections to the use of a remote hearing in the first place, then objections to such a hearing, on grounds of a denial of an opportunity to be heard and otherwise, would generally be waived.^[69]

Gary Born mentions that ‘where national courts conduct full remote hearings in domestic litigations, it is very difficult to regard similar hearings as denying parties to an international arbitration an opportunity to be heard’.^[70]

Finally, some might consider that it is wrong to insist that an ‘oral hearing’ requires an in-person physical hearing. Parties can still make oral submissions, be heard and be seen by videoconference as well as in person. More importantly, the essential attributes of a physical hearing (real-time interaction with the tribunal, witnesses and parties, with both visual and audio connections) can be provided by a remote hearing. A remote hearing is, in every meaningful sense, a ‘hearing’.^[71]

Conclusion

Among the many advantages that remote or virtual hearings provide is that they can lead to saving time and eliminate the necessity of travelling to other countries; not to mention easing related logistics and avoiding a great deal of administrative hassle, which often weighs down on the process, such as visas, temporary work permits, arrangements for

venue and accommodation, and the provision of food and beverages, to name but a few.^[72] In support of this view, Lucy Greenwood has initiated the 'Green Pledge', 'a campaign for greener arbitration' with guiding principles aimed at minimising the environmental footprint of arbitration. In addition, there is a great need for greater diversity and more inclusiveness in arbitration.^[73] Arbitrator appointments should reflect the entire international community of users, which is not the case today. Parties and institutions need to ensure that there is diversity in all respects: gender, age, racial, geographical, religious, and professional backgrounds. Remote arbitration procedures and remote hearings will enable arbitrators located anywhere on the globe to arbitrate in a case without regard to travel times and costs.^[74]

Arbitral institutions noted that international arbitration practice will not likely return to the pre-pandemic state, but will reflect further acceptance of, and leaning towards, the use of remote hearings. It is not likely that remote hearings become the norm, but it should become the norm for parties and arbitrator to consider remote hearings. Many observers believe that post-pandemic arbitration procedures will include hybrid procedures, where there will be a mix of in-person and remote hearings in a case.^[75]

It would be incorrect to say that remote or virtual hearing services represent a revolution in the arbitral process; rather, they could be regarded as an evolutionary change.^[76] Such evolutionary innovation is what follows after the original offering is refined to a point where it becomes an effective and in-demand solution.^[77] The dynamic nature of international arbitration and its community has provided a perfect environment to foster this accelerated evolution. When one considers the non-technical innovations that have led to increased efficiencies in arbitration (such as, for example, the use of Redfern schedules or the use of witness conferencing), it becomes evident that evolution, normalisation and refinement of these innovations have been undisputed. Remote or virtual hearings should be considered as yet another of these procedural innovations.^[78]

Footnotes

[1] This article adds some updated information to an article published by the author titled 'The Challenges Raised by COVID-19, Its Impact on the Arbitral Process and the Rise of Video Conferencing', Mohamed Hafez, *International Business Law Journal* (IBLJ), Issue No. 1, 2021 (Thomson Reuters and Contributors), pp. 85–99.

[2] Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020), p. 27.

[3] Jiyeon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

[4] Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020), p. 28.

[5] Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020), p. 68. See another definition of virtual as 'not physically existing as such but made by software to appear to do so'. <https://www.dictionary.com/browse/virtual>.

[6] *ibid*.

[7] *ibid*, p. 68.

[8] *ibid*, p. 72.

[9] *ibid*, p. 72.

[10] Jiyoong Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

[11] *ibid*.

[12] Maxi Scherer, 'Remote Hearings in International Arbitration – and What Voltaire Has to Do with It?', 26 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1591028792.4605259895324707031250.

[13] <https://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf>.

[14] <https://www.viac.eu/en/arbitration/content/austrian-arbitration-act-2013#SeatotheArbTribunal>.

[15] https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1438403521242_003.

[16] Jiyoong Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

[17] See footnote 12.

[18] Court of Cassation, Economic and Commercial Circuit, judgment dated 20 October 2020, Case No. 18309 for the Judicial Year 89.

[19] 'Egypt's Highest Court Spearheads Arbitration-Friendly Stance by Recognizing Progressive Arbitration Principles and Practices', Herbert Smith Freehills, 2 February 2021, Craig Tevendale, Amal Bouchenaki and Cedric Saliba, at: <https://hsfnnotes.com/arbitration/2021/02/02/egypts-highest-court-spearheads-arbitration-friendly-stance-by-recognising-progressive-arbitration-principles-and-practices/>.

[20] Mohamed S Abdel Wahab, 'The Egyptian Court of Cassation Sets Standards and Affirms Arbitration-Friendly Principles and Trends in a Ground-Breaking Judgment', Kluwer Arbitration Blog, 22 December 2020, at <http://arbitrationblog.kluwerarbitration.com/2020/12/22/the-egyptian-court-of-cassation-sets-standards-and-affirms-arbitration-friendly-principles-and-trends-in-a-ground-breaking-judgment/>.

[21] See *Capic v Ford Motor Co. of Australia*, [2020] FCA 486, paragraphs 12–13 (Australian Fed. Ct.)

[22] See *Re One Blackfriars v Nygate* [2020] EWHC 845, paragraph 53 (Ch) (English High Ct.) ('the challenges and indeed the upsides of proceeding with a remote trial will apply to both sides equally'). Also see *Municipio de Mariana v BHP Group* [2020] EWHC 928, paragraph 24 (TCC) (English High Ct.) (five principles to determine whether case should be adjourned or proceed remotely).

[23] Chapter 15: Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342.

[24] Chapter 25: Annulment of International Arbitral Awards', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 3,451.

[25] *ibid*, p. 3,451.

[26] Though the LCIA was quite innovative in its Arbitration Rules of 2014 as it included a similar article 19.2, which stipulates 'The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties.... As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)'.

[27] http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007.

[28] See article 13(1) of the HKIAC Arbitration Rules, article 20(2) of the ICDR International Arbitration Rules, article 28(2) of the SCC Arbitration Rules, article 21(2) of the SIAC Arbitration Rules and article 28(4) of the UNCITRAL Arbitration Rules 2010.

[29] For example, article 32(1) of the SCC Arbitration Rules, article 24(1) of the SIAC Arbitration Rules and article 17(3) of the UNCITRAL Arbitration Rules.

[30] See articles 13(1) and 22(5) of the HKIAC Rules, article 20(1) of the ICDR Rules, article 23(1) of the SCC Arbitration Rules, articles 19(1) and 25(3) of the SIAC Rules and articles 17(1) and 28(2) of the UNCITRAL Arbitration Rules.

[31] See footnote 12.

[32] Niuscha Bassiri, 'Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders' in Maxi Scherer, Niuscha Bassiri and Mohamed S Abdel Wahab (eds) *International Arbitration and the COVID-19 Revolution* (Kluwer, 2020).

[33] <https://protect-eu.mimecast.com/s/PC1iCW4DCjkQgRt68QJL?domain=delosdr.org/>.

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

[35] <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>.

[36] <https://delosdr.org/checklist-on-holding-hearings-in-times-of-covid-19/>.

[37] <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/#covid>.

[38] <https://www.hkiac.org/content/virtual-hearings>.

[39] <https://icodr.org/guides/videoarb.pdf>.

[40] http://www.kcabinternational.or.kr/static_root/userUpload/2020/03/18/1584509782805DD02R.pdf.

[41] <https://crica.org/remote-and-virtual-hearings/>.

[42] <https://crica.org/annual-caseload-reports/>.

[43] It is worth mentioning that the number of arbitration cases filed before CRCICA reached 1,618 cases up to 31 December 2022.

[44] Alvaro Galindo, 'Arbitration Unplugged Series – Virtual hearing: Present or Future?', 23 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/?doing_wp_cron=1591031848.3963639736175537109375.

[45] Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 94.

[46] Chahat Chawla, 'International Arbitration During COVID-19: A Case Counsel's Perspective', Kluwer Arbitration Blog, 4 June 2020, at: <http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/>. Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22 Issue 4, p. 176.

[47] Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 93.

[48] Jiyeon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

[49] Matthew Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International 2020, p. 106.

[50] See footnote 45.

[51] *ibid*.

[52] Neil Kaplan, 'Kaplan: How we must adapt to covid-19', 30 March 2020, at: <https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19>.

[53] Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,343.

[54] See, for example, the English Administrative Law Bar Association, Guidance to Advocates on Remote Hearings (2020); English Court of Protection Bar Association, Guidance on Effective Remote Hearings (2020); Inns of Court College of Advocacy, Principles

for Remote Advocacy (2020); UK HM Courts & Tribunal Services, Video-Hearings: Guidance for Legal Professionals (2020). Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2.343. Also see footnote 45.

[55] Jiyeon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

[56] Matthew Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A "New Normal" for International Arbitration', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International 2020, p. 106.

[57] *ibid*, p. 106.

[58] Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342.

[59] For example, see Annex II 'Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings' in the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic at: <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/#covid>. Also see the International Institute for Conflict Prevention and Resolution (CPR)'s Annotated Model Procedural Order for Remote Video Arbitration Proceedings at: Annotated Model Procedural Order for Remote Video Arbitration Proceedings. Also see AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference at: https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf. Also see Annex III to the Africa Arbitration Academy Protocol on Virtual Hearings in Africa provides a Model Arbitration Clause (including Virtual Hearing Option).

[60] Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22 Issue 4, p. 175.

[61] For example, see article 19(2) of the UNCITRAL Model Law.

[62] For example, see article 34(1) of the English Arbitration Act, section 34(1).

[63] For example, see article 182(2) of the Swiss Private International Law Act.

[64] Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al. (eds), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International 2020, p. 76.

[65] Alisson Ross, 'What if parties don't agree on a virtual hearing? A pandemic pathway', 6 May 2020, <https://globalarbitrationreview.com/what-if-parties-dont-agree-virtual-hearing-pandemic-pathway>. 'It puts the focus on the applicable law and governing procedural rules, then it considers four different separate scenarios: where the law or rules expressly refer to the need for an in-person, physical hearing; where they expressly refer to the

possibility of virtual hearings or use of technology; where they are silent on the issue and no inferences can be drawn; and where the law and rules are inconsistent.’

[66] See, for example, articles 13.1 and 22.5 of the HKIAC Rules, articles 19 and 22(2) of the ICC International Arbitration Rules, article 20.1 of the AAA-ICDR Rules, article 14.5 of the LCIA Rules, article 23(1) of the SCC Rules, articles 19(1) and 25(3) of the SIAC Rules and articles 17(1) and 28(2) of the UNCITRAL Arbitration Rules.

[67] Maxi Scherer, ‘Chapter 4: The Legal Framework of Remote Hearings’, in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 76.

[68] María Solana Beserman Balco, ‘COVID-19 and new ways of doing arbitration: are they here to stay?’ in João Bosco Lee and Flavia Mange (eds), *Revista Brasileira de Arbitragem*, (Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International 2020, Volume XVII Issue 67), p. 133.

[69] Chapter 25: Annulment of International Arbitral Awards’, in Gary B Born, *International Commercial Arbitration* (Third Edition), 3rd edition (Kluwer Law International; Kluwer Law International 2020), p. 3,451.

[70] Chapter 15: Procedures in International Arbitration’, in Gary B Born, *International Commercial Arbitration* (Third Edition), 3rd edition (Kluwer Law International; Kluwer Law International 2020), p. 2,342.

[71] *ibid.*

[72] Nassif BouMalhab and Nour Al Jaghoub, COVID-19 Middle East Arbitration: Weathering the COVID-19 Storm, 12 April 2020, at: <https://www.mondaq.com/operational-impacts-and-strategy/928828/covid-19-middle-east-arbitration-weathering-the-covid-19-storm>.

[73] Greenwood Arbitration, The Campaign for Greener Arbitrations, Guiding Principles, <https://www.greenerarbitrations.com/sign-green-pledge>. The Greener Arbitration campaign won the Global Arbitration Review 2020 prize for the Best Development GAR Award.

[74] Patricia Louise Shaughnessy, ‘Chapter 2: Initiating and Administering Arbitration Remotely’, in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020), p. 47.

[75] *ibid.*, p. 46.

[76] Eric Ng, ‘Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption’, in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22, Issue 4, p. 176.

[77] Clayton M Christensen, *The Innovator’s Solution: Creating and Sustaining Successful Growth* (2003, Harvard Business Press), p. 49.

[78] Eric Ng, ‘Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption’, in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22, Issue 4, p. 177.

IN SUMMARY

This article analyses the inclination of the arbitration community and users towards the use of videoconferencing and the rise of use of technology in remote hearings. It provides practical tips and recommendations relating to organising remote hearings, and concludes with some of the advantages of holding remote hearings, how the arbitration community and users are accepting it, and how technology paves the way for arbitration in the future.

DISCUSSION POINTS

- The incorporation of videoconferencing into arbitration laws and arbitral institution rules
 - The guidance and protocols on virtual hearings issued by the arbitration community
 - CRCICA's experiences with remote hearings and videoconferencing
 - The issue of consent of the parties for holding remote hearings and associated problems
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REFERENCED IN THIS ARTICLE

- AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties
 - Africa Arbitration Academy Protocol on Virtual Hearings in Africa
 - CIArb Guidance Note on Remote Dispute Resolution Proceedings
 - Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19
 - International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration
 - ICC Guidance Note on mitigating the impacts of COVID-19
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THE ISSUE OF CONSENT OF THE PARTIES FOR HOLDING REMOTE HEARINGS AND ASSOCIATED PROBLEMS

Introduction^[1]

Arbitral institutions, users, academics, practitioners and commentators all agree that the covid-19 pandemic has triggered changes that will accelerate the integration of digitalisation to promote flexibility in efficiently handling international arbitration cases.^[2]

Technological capacity to make reliable video calls was more limited in the past, as it required specialised and expensive equipment. Today, however, there are video call platforms such as Microsoft Teams, Zoom and many others providing high-quality video calls at relatively low costs. Stable internet connections and appropriate equipment are becoming more available in many countries worldwide.^[3]

Arbitral institutions have gained experience, as have users, counsel and arbitrators, in using technology effectively, while ensuring the balance between due process rights and efficient dispute resolution.^[4]

Hearings (remote Or Virtual)

Professor Maxi Scherer has distinguished between ‘virtual hearings’ and ‘remote hearings’ and clarified the common misconception between them. She mentions that the term ‘virtual’ has many possible meanings, but in computer science, it may be defined as:

not physically present as such but made by software to appear to be so from the point of view of a program or user^[5]. . . In the case of international arbitration hearings conducted in several locations, the participants of the hearing are not virtual, but really exist; they merely interact with each other using communication technologies.^[6]

However, ‘remote hearings’ are understood as hearings that are conducted using communication technology to concurrently connect participants from two or more locations. This could include communication through telephone or videoconference, or possibly other more futuristic technology such as telepresence. Remote hearings use a videoconference link, namely ‘technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations’.^[7]

In international arbitration, there are several types of remote hearings. There are ‘semi-remote’ hearings, where, for example, the arbitral tribunal might be assembled physically with the parties in one location, and one or several experts or witnesses may testify before them remotely. This is regarded as the commonly used format in international arbitration,^[8] however, in ‘fully remote hearings’, all participants are in different locations with no existing main hearing venue. Fully remote hearings are barely used in international arbitration, but are currently being considered in many arbitral proceedings to deal with the hassles dictated by the pandemic and the restrictions that countries are imposing. A fully remote hearing is one that could be referred to as a ‘virtual hearing’ as no hearing venue exists but for the use of computer technology.^[9]

As such, the importance of arbitral institutions, counsel and arbitrators being familiar with remote and virtual hearings, videoconferencing and technology, as well as guidelines to ensure their unified adoption and deployment, has been considered crucial.^[10]

In 2018, White & Case LLP conducted a survey titled ‘International Arbitration Survey: The Evolution of International Arbitration’. The results showed that 43 per cent used videoconferencing frequently during arbitrations, 17 per cent always used it and 30 per cent used it sometimes. Additionally, 89 per cent mentioned that videoconferencing should be used more often in arbitration.^[11] This study will require an updated review following the pandemic and the growing necessity of the use of videoconferencing and remote hearings.

Videoconferencing Incorporated Into Arbitration Laws And The Tolerance Of Courts In Its Usage, Videoconferencing Incorporated Into Arbitral Institutional Rules And The Issuance Of Guidance And Protocols

For all possible forms of remote hearings, tribunals and parties must assess the relevant regulatory framework, including especially the law of the seat of the arbitration and the applicable arbitration rules. Some national laws and arbitration rules contain specific provisions on remote hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely or by way of analogy of other provisions.^[12] There is also the test of how courts in different jurisdictions tolerate the usage of videoconferencing and remote hearings. Not to mention that, as a result of the pandemic, various guidance and protocols have been

issued to facilitate the usage of remote and virtual hearings and videoconferencing, although some were issued prior to the pandemic.

Videoconferencing Incorporated Into Arbitration Laws And The Tolerance Of Courts Towards The Usage Of Videoconferencing And Remote Hearings

The amendments to arbitration legislation in recent years by countries such as the Netherlands (article 1072[b] in the Dutch Code of Civil Procedure Book 4 Arbitration^[13] of 2015), Austria (section 595(2) of the Austrian Arbitration Act 2013)^[14] and Hong Kong (article 20[2] of the Hong Kong Arbitration Ordinance 2011)^[15] allow witness and expert examinations to be conducted without the physical presence of the witness and expert at the hearing.^[16] Other legislation does not contain specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing and the tribunal's broad power to determine procedural matters.^[17]

With regard to the tolerance of courts towards videoconferencing, remote and virtual hearings, a landmark judgment was issued on 27 October 2020, where the Egyptian Court of Cassation upheld a decision of the Cairo Court of Appeal refusing to set aside an award issued by the Cairo Regional Centre for International Commercial Arbitration (CRCICA).^[18] Among the different matters that the Court of Cassation had dealt with, it hinted at the compatibility of virtual hearings with Egyptian law and the increased reliance on virtual hearings. In this unprecedented judgment, the Court of Cassation made an express reference to the term 'virtual hearings' (in the English language) and this was regarded as an implicit message that virtual hearings are consistent with Egyptian law, which in itself does not include any direct prohibition of virtual hearings.^[19] This is an innovative statement, whereby the Court of Cassation hints that if parties wish to try to set aside arbitral awards on the ground that a hearing is held virtually, this may simply not qualify as a ground.^[20]

A number of national courts have themselves conducted remote hearings:

In a recent decision, an Australian court balanced the health risks posed by covid-19 against the principle of just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. The court concluded that the 'technology hiccoughs' associated with remote hearings, although unavoidable, are tolerable and would not mean that 'the trial will be unfair or unjust'.^[21]

The same conclusion was reached in the English courts.^{[22] [23]}

Gary Born mentions that all courts have virtually refused to annul arbitral awards based on objections to the use of videoconferencing and similar technology for witness and expert testimony; the same result has been reached in recognition proceedings involving remote witness testimony.^[24]

Those results are particularly likely to continue to be reached in the future with respect to entirely remote hearings, with a number of national courts conducting their own remote hearings, and with health regulations making the conduct of physical or in-person hearings impossible or unlikely for prolonged periods of time.^[25]

Videoconferencing Incorporated In Arbitral Institutions' Rules And Their Updates

Several arbitral institutions have included in their arbitration rules the option of using videoconferencing in arbitration cases, such as article 28(4) of the CRCICA Arbitration Rules (relating to the examination of witnesses and expert witnesses only).

The arbitral institutions that have updated their arbitration rules to include expressly the features of a hearing being conducted remotely, virtually or by videoconference are the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC).

Pursuant to article 19.2 of the LCIA Arbitration Rules of 2020:

the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, specifying that as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).^[26]

The same is noticed in the updated Arbitration Rules of the ICC of 2021, which added the following sentence in its article 26(1), as it stipulates:

The arbitral tribunal may decide, after consulting the parties, and on the basis of relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

Arbitral institutions have amended their rules so that videoconferencing can be accommodated. For example, article 24(2) of the Korean Commercial Arbitration Board, International Arbitration Rules of 2016 expressly permits hearings and meetings to be heard at any physical location that the tribunal deems appropriate.^[27] Other institutions also expressly allow the tribunal to hold hearings remotely.^[28] Other institutions have not issued specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing^[29] and the tribunal's broad power to determine procedural matters.^{[30] [31]}

Many arbitral institutions worldwide will update or are most definitely working on updating their arbitration rules to accommodate the possibility of holding remote hearings and videoconferencing, and not only for the examination of witnesses or expert witnesses in oral hearings.

Guidance And Protocols On Virtual Hearings And Videoconferencing

Arbitral institutions, organisations and law firms have published guidelines, protocols, checklists, model procedural orders and commentary to provide guidance for navigating the digital and virtual arbitration environment.^[32]

Delos Dispute Resolution has compiled relevant resources on remote and virtual arbitration and mediation hearings under the headings Guidance & Checklists; Protocols; Model Procedural Orders; Webinar Recordings; and Other Resources.^[33] The following are some of the guidance and protocols relating to videoconferencing and virtual hearings from different institutions:

- the Africa Arbitration Academy Protocol on Virtual Hearings in Africa;
- the AAA-ICDR, Virtual Hearing Guide for Arbitrators and Parties;^[34]

- the CI Arb Guidance Note on Remote Dispute Resolution Proceedings,^[35]
- the Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19,^[36]
- the ICC Guidance Note on mitigating the impacts of COVID-19,^[37]
- the HKIAC Guidelines for Virtual Hearings,^[38]
- the International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration,^[39] and
- the Seoul Protocol on Video Conferencing in International Arbitration.^[40]

CRCICA's Experiences With Remote Hearings And Video Conferencing

Introduction

In its response to the pandemic, CRCICA has encouraged its users (arbitrators, parties and counsel alike) to privilege electronic means for both hearings and submissions. Accordingly, CRCICA has invested in both Zoom and Microsoft Teams to ensure high-quality videoconferencing capabilities.^[41]

CRCICA has also allowed physical hearings to take place at its premises, with a requirement that parties send no more than two representatives to maintain a safe distance between attendees and the possibility of holding remote hearings. Since the end of April 2020, several hearings have been conducted by videoconference, thereby minimising disruption to the arbitral proceedings. In general, parties, their counsel and arbitral tribunals have been cooperative with a growing trend towards using technology to accommodate the restrictions associated with the covid-19 crisis. This can be shown in CRCICA's caseload report for 2020 and 2021.^[42]

To keep users informed of new developments, the Centre issues regular updates to its users urging them to privilege electronic means of communication and remote hearings.

CRCICA's Data^[43] On Its Hearings For The Years 2020, 2021 And 2022

From 1 January to 31 December 2020, 78 hearings took place using CRCICA's hearing facilities:

- 11 hearings were held entirely via videoconference;
- two hearings were held entirely via teleconference;
- 10 hearings were held with partial in-person and remote attendance; and
- 55 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

From 1 January to 31 December 2021, 131 hearings took place using CRCICA's hearing facilities:

- 38 hearings were held entirely via videoconference;
- 17 hearings were held with partial in-person and remote attendance; and
- 76 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

From 1 January to 31 December 2022, 129 hearings took place using CRCICA's hearing facilities:

- 15 hearings were held entirely via videoconference;
- three hearings were held with partial in-person and remote attendance; and
- 111 hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

CRCICA's Hearing Facility And Steps For Holding A Hearing Via Videoconference

CRCICA has a high-tech hearing facility equipped with a premier videoconferencing system (Polycom HDX) and interactive meeting room systems are installed to ensure high-impact visual experiences and realistic meeting environments. The videoconferencing system can accommodate a remote or virtual hearing connected to the cloud and conducted using online platforms, which can be connected up to the maximum number of persons allowed to connect remotely via such platform.

CRCICA offers through its case manager to the tribunal the opportunity to hold hearings remotely through one of its preferred platforms (Microsoft Teams or Zoom). Following that, CRCICA receives a request from the arbitral tribunal to do so. Through its case manager, the Centre then sends the link relating to the selected platform to the parties, their counsel, the tribunal and witnesses and experts, if any (the 'attendees of the hearing') and requests a pre-conference test to troubleshoot any technical issues (at least two to three days prior to the oral hearing). In all manners, the Centre organises virtual breakout rooms for all the attendees of the hearing. The Centre asks the tribunal whether the hearing should be recorded (audio or video), and it in turn asks the parties accordingly. The centre's IT administrator assists all the attendees of the hearing before, during and after the hearing if they require any further technical assistance.

The number of attendees of the hearing is controlled via their emails. If any of the attendees of the hearing sends the invitation link to anyone else to attend, the protocol at the Centre is that, after seeking the arbitral tribunal's clarification regarding such non-listed attendee, the IT administrator can reject such request from a non-attendee to attend the hearing.

The case manager sends an email in advance to the attendees of the hearing to conduct a pre-hearing test call (under the supervision of the IT administrator) right before the beginning of every remote hearing to address once again any potential technical issues. Moreover, the Centre's IT administrator is logged on to every hearing to troubleshoot any technical issues during the hearing. During hearings that are conducted with partial physical presence at the Centre's premises and some attendees attending remotely, the IT administrator is available to ensure that all attendees to the hearing have access to the same visuals and are able to hear and respond efficiently. There is a backup internet connection for use with the agreed platform, in case a problem arises with the original internet connection. If the problem persists, the IT administrator will use another online platform. This is the protocol in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. Following the hearing, a link to the recording of the hearing is sent by the case manager to the attendees of the hearing by email with a complex password, which is valid for one week.

PRACTICAL TIPS AND RECOMMENDATIONS RELATING TO ORGANISING REMOTE AND VIRTUAL HEARINGS

If both parties are content to move forward with remote hearings, there are no legal issues. As such, if the arbitral tribunal is willing to proceed then practical issues, and not legal ones, will arise.

Below are some practical tips and recommendations to take into consideration when conducting a remote or virtual hearing:

- Conducting testing sessions: videoconferencing can work well provided the systems are compatible and have been subjected to a testing session in advance of the hearing. For example, checking for technical compatibility with the various software and hardware systems used, IT support and coaching all participants on how to connect during the hearings, to activate and deactivate video and sound, checking functionality of technology and whether adjustments are needed for volume, light, position towards the camera, background noise and the like, among other technical issues.^[44] In addition, it is preferable to hold another testing session shortly before the remote hearing is due to begin (eg, one day before).^[45]
- Check whether any guidelines or protocols are to be adopted and the procedure for the selection of an online platform.^[46]
- Data security and privacy issues:
 - data security (or cybersecurity): arbitral institutions and service providers both place a strong emphasis on preserving the integrity and security of proceedings; and
 - data privacy (or confidentiality), namely the question whether the remote hearing provider or any other involved third party that stores, transmits or otherwise has access to data during the remote hearing might misuse it outside the arbitral proceedings.^[47] By way of example, the Seoul Protocol on Video Conferencing in International Arbitration aims to protect the confidentiality of the hearing and its parties through its articles 2.1(c) and 2.2, 3.1 and 8.^[48]
- Sitting hours: in a cross-border dispute with various time zones, participants in an arbitration case could be from different jurisdictions and hence it could be quite troublesome to attend the videoconference due to the different time zones. This may adversely impact a party's ability to present its case (although arguably the issues are really not so different from those imposed by jet lag and the fatigue associated with long-distance travel, of which international arbitration practitioners are well aware).-^[49] Emphasis should be attached to the relevance of giving equality of treatment to counsel from both parties, with any personal inconvenience distributed equally among the parties.^[50] Hence, it is preferable to have shorter hearings given the time constraints in different time zones between different jurisdictions and there should be more breaks for the participants in the remote hearing.^[51]
- Have a moderator in charge of the remote hearing and someone else to control the camera.^[52] Given that not all videoconferencing systems allow hearing participants to see one another at all times, some arbitrators moderate hearings in a manner more similar to telephone conference calls than in-person hearings. To prevent participants at a hearing from talking over one another, it may prove useful for the presiding

arbitrator to address counsel before they can speak and for all other participants to mute their microphones.^[53]

- A number of courts and bar associations have published guidelines on advocacy in remote hearings, suggesting that participants slow down their speaking pace in anticipation of potential delays in transmission, including more pauses to allow questions from the tribunal and maintaining professional appearance and decorum.^[54] Having a real-time transcription service is also recommended in case anything is missed or unclear during the remote or virtual hearing.
- Have a secretary to the tribunal or the arbitral institution's case manager assist the tribunal with any technology-related matters. Further, if any participant gets logged out of the hearing, it would be the secretary to the tribunal's or the arbitral institution case manager's function to notice this and request the tribunal to pause the hearing pending the reconnection of the logged-out participant.
- The arbitral tribunal should have access to private deliberations during the hearing.
- There must be a back-up connection in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. This can be done through a different platform. The Seoul Protocol on Video Conferencing in International Arbitration nonetheless provides for this concern through its article 6, which sets out guidelines on 'Test Conferencing and Audio Conferencing Backup'. These guidelines can help smooth the disruption from an unpredicted communication failure and so allow for a quick recovery during a hearing.^[55]
- With regard to examining witnesses: the absence of a physical hearing means the tribunal has limited control over who is in the room with the witness. The Seoul Protocol on Video Conferencing in International Arbitration deals with this risk in its article 1.2 by requiring the videoconferencing system to show a reasonable part of the interior of the room in which the witness is located. It also requires, in its article 3.1, the tribunal to verify the identity of each individual present. Alternatively, parties could be requested to use a camera (or cameras) that display the entire room (360 degrees) or the witness could simply be asked to rotate the laptop camera to show the whole room. Tribunals will need to be prepared to be cautious in addressing concerns that witnesses may be utilising a 'phone a friend' approach to dealing with questions on cross-examination.^[56]
- Finally, as translating in real time is difficult in virtual hearings, it is recommended to allow for a separate interface to connect to the interpreter's audio feed only.^[57]

Consent Of The Parties For Holding Remote Hearings And Associated Problems

As each party in an arbitration case is entitled to request an oral hearing, all the parties, arbitrators and witnesses (including experts) should be physically present. In some cases, all parties will agree to the conduct of a remote hearing and cooperate to ensure that it proceeds smoothly. In these circumstances, there is no question as to the tribunal's authority to conduct such a hearing.^[58]

For ongoing arbitral cases, it would be wise to obtain a joint agreement from the parties that no party would seek to vacate the resultant arbitral award following its approval on holding the remote hearing. However, for newly registered cases, the ideal scenario is to have this matter agreed upon as early as possible between the parties and the tribunal in the arbitration

(ie, procedural order No. 1). In that case, there are model procedural orders intended to be used by arbitrators, parties and counsel as a checklist of issues and guidelines to address matters that are unique to remote video arbitration proceedings.^[59]

The Dilemma Of A Party Rejecting Holding A Remote Hearing And Insisting On An In-person Physical Hearing

In relation to the tribunal's power to order remote hearings, parties generally object either on the basis that they are entitled to an oral hearing that necessitates a physical hearing, or on the basis that a remote hearing would violate the principle of fair and equal treatment. Some parties may also refer to provisions of applicable institutional rules, noting either that those rules do not specifically mention the power of the tribunal to order a remote hearing, or interpreting provisions requiring an in-person hearing as requiring an in-person 'physical' hearing.^[60]

If the arbitration agreement is silent regarding holding remote hearings and if the applicable national law or institutional arbitration rules do not contain any particular provision on remote hearings, the solution then is to refer to the tribunal's broad power to organise procedural matters. National arbitral laws, as well as institutional rules typically provide that, absent any agreement by the parties, the arbitral tribunal may 'conduct the arbitration in such manner as it considers appropriate'^[61] and 'decide all procedural and evidential matters'^[62] or 'determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration'.^{[63] [64]}

Renowned Egyptian arbitrator Mohamed Salah Abdel Wahab shared a succinct six-point pathway to deal with this matter with Global Arbitration Review:^[65]

Institutional arbitration rules contain similar provisions regarding the tribunal's power to organize the proceedings generally, and evidence taking more specifically.^[66] Accordingly, the question whether a hearing should be held physically or remotely is for the arbitral tribunal to decide, absent any provision to the contrary.^[67]

In general, where a party opposes a remote hearing arguing its right to be heard is compromised, the tribunal is faced with the task of providing content to the right allegedly breached. What constitutes the right to be heard in a traditional setting is likely to differ in a virtual environment. Therefore, when ruling on the objection, a tribunal might find it useful to consider whether the parties, their witnesses and experts have steady access to the virtual platform where the hearing is to take place, if there are security measures in place and if the settings enable the parties to fully present their case in an adversarial way. Here, the particular circumstances of each party will shape the content of the right at stake, and help the tribunal decide.^[68]

When a remote hearing is ordered over the objections of one party, it may result in claims in an annulment proceeding that the objecting party was denied an opportunity to be heard. If there are no objections to the use of a remote hearing in the first place, then objections to such a hearing, on grounds of a denial of an opportunity to be heard and otherwise, would generally be waived.^[69]

Gary Born mentions that ‘where national courts conduct full remote hearings in domestic litigations, it is very difficult to regard similar hearings as denying parties to an international arbitration an opportunity to be heard’.^[70]

Finally, some might consider that it is wrong to insist that an ‘oral hearing’ requires an in-person physical hearing. Parties can still make oral submissions, be heard and be seen by videoconference as well as in person. More importantly, the essential attributes of a physical hearing (real-time interaction with the tribunal, witnesses and parties, with both visual and audio connections) can be provided by a remote hearing. A remote hearing is, in every meaningful sense, a ‘hearing’.^[71]

CONCLUSION

Among the many advantages that remote or virtual hearings provide is that they can lead to saving time and eliminate the necessity of travelling to other countries; not to mention easing related logistics and avoiding a great deal of administrative hassle, which often weighs down on the process, such as visas, temporary work permits, arrangements for venue and accommodation, and the provision of food and beverages, to name but a few.^[72]

In support of this view, Lucy Greenwood has initiated the ‘Green Pledge’, ‘a campaign for greener arbitration’ with guiding principles aimed at minimising the environmental footprint of arbitration. In addition, there is a great need for greater diversity and more inclusiveness in arbitration.^[73] Arbitrator appointments should reflect the entire international community of users, which is not the case today. Parties and institutions need to ensure that there is diversity in all respects: gender, age, racial, geographical, religious, and professional backgrounds. Remote arbitration procedures and remote hearings will enable arbitrators located anywhere on the globe to arbitrate in a case without regard to travel times and costs.^[74]

Arbitral institutions noted that international arbitration practice will not likely return to the pre-pandemic state, but will reflect further acceptance of, and leaning towards, the use of remote hearings. It is not likely that remote hearings become the norm, but it should become the norm for parties and arbitrator to consider remote hearings. Many observers believe that post-pandemic arbitration procedures will include hybrid procedures, where there will be a mix of in-person and remote hearings in a case.^[75]

It would be incorrect to say that remote or virtual hearing services represent a revolution in the arbitral process; rather, they could be regarded as an evolutionary change.^[76] Such evolutionary innovation is what follows after the original offering is refined to a point where it becomes an effective and in-demand solution.^[77] The dynamic nature of international arbitration and its community has provided a perfect environment to foster this accelerated evolution. When one considers the non-technical innovations that have led to increased efficiencies in arbitration (such as, for example, the use of Redfern schedules or the use of witness conferencing), it becomes evident that evolution, normalisation and refinement of these innovations have been undisputed. Remote or virtual hearings should be considered as yet another of these procedural innovations.^[78]

Endnotes

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- 5 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020), p. 68. See another definition of virtual as 'not physically existing as such but made by software to appear to do so'. <https://www.dictionary.com/browse/virtual>. [^ Back to section](#)
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- 7 *ibid.*, p. 68. [^ Back to section](#)
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- 17 See footnote 12. [^ Back to section](#)
- 18 Court of Cassation, Economic and Commercial Circuit, judgment dated 20 October 2020, Case No. 18309 for the Judicial Year 89. [^ Back to section](#)
- 19 'Egypt's Highest Court Spearheads Arbitration-Friendly Stance by Recognizing Progressive Arbitration Principles and Practices', Herbert Smith Freehills, 2 February 2021, Craig Tevendale, Amal Bouchenaki and Cedric Saliba, at: <https://hsfnotes.com/arbitration/2021/02/02/egypts-highest-court-spearheads-arbitration-friendly-stance-by-recognising-progressive-arbitration-principles-and-practices/>. [^ Back to section](#)
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- 21 See *Capic v Ford Motor Co. of Australia*, [2020] FCA 486, paragraphs 12–13 (Australian Fed. Ct.) [^ Back to section](#)
- 22 See *Re One Blackfriars v Nygate* [2020] EWHC 845, paragraph 53 (Ch) (English High Ct.) ('the challenges and indeed the upsides of proceeding with a remote trial will apply to both sides equally'). Also see *Municipio de Mariana v BHP Group* [2020] EWHC 928, paragraph 24 (TCC) (English High Ct.) (five principles to determine whether case should be adjourned or proceed remotely). [^ Back to section](#)
- 23 Chapter 15: Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342. [^ Back to section](#)

- 24 Chapter 25: Annulment of International Arbitral Awards', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 3,451. [^ Back to section](#)
- 25 *ibid*, p. 3,451. [^ Back to section](#)
- 26 Though the LCIA was quite innovative in its Arbitration Rules of 2014 as it included a similar article 19.2 , which stipulates 'The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties.... As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)'. [^ Back to section](#)
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- 28 See article 13(1) of the HKIAC Arbitration Rules, article 20(2) of the ICDR International Arbitration Rules, article 28(2) of the SCC Arbitration Rules, article 21(2) of the SIAC Arbitration Rules and article 28(4) of the UNCITRAL Arbitration Rules 2010. [^ Back to section](#)
- 29 For example, article 32(1) of the SCC Arbitration Rules, article 24(1) of the SIAC Arbitration Rules and article 17(3) of the UNCITRAL Arbitration Rules. [^ Back to section](#)
- 30 See articles 13(1) and 22(5) of the HKIAC Rules, article 20(1) of the ICDR Rules, article 23(1) of the SCC Arbitration Rules, articles 19(1) and 25(3) of the SIAC Rules and articles 17(1) and 28(2) of the UNCITRAL Arbitration Rules. [^ Back to section](#)
- 31 See footnote 12. [^ Back to section](#)
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- 42 <https://crocica.org/annual-caseload-reports/>. ^ [Back to section](#)
- 43 It is worth mentioning that the number of arbitration cases filed before CRCICA reached 1,618 cases up to 31 December 2022. ^ [Back to section](#)
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- 45 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 94. ^ [Back to section](#)
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- 57 *ibid.*, p. 106. [^ Back to section](#)
- 58 Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342. [^ Back to section](#)

- 59** For example, see Annex II ‘Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings’ in the ICC’s Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic at: <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/#covid>. Also see the International Institute for Conflict Prevention and Resolution (CPR)’s Annotated Model Procedural Order for Remote Video Arbitration Proceedings at: Annotated Model Procedural Order for Remote Video Arbitration Proceedings. Also see AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference at: https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf. Also see Annex III to the Africa Arbitration Academy Protocol on Virtual Hearings in Africa provides a Model Arbitration Clause (including Virtual Hearing Option). [^ Back to section](#)
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- 75** *ibid.*, p. 46. [^ Back to section](#)
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