Online Dispute Resolution - Theory and Practice

A Treatise on Technology and Dispute Resolution

Second Edition

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(Eds.)

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Online Dispute Resolution - Theory and Practice is intended to provide an in-depth analysis and overview of not only the past and present but also the future of Online Dispute Resolution. It serves as a guide to scholars and practitioners having an interest in the interplay between dispute resolution, ICTs and AI applications. The book employs international, comparative, empirical, and interdisciplinary approaches to a myriad of legal and technical issues across the ODR spectrum. ODR is a field that lies at the intersection of dispute resolution and technology and our challenge has been to examine the many different areas that are being touched by these elements of modern life. This second edition updates information about ODR around the world, extends and brings up to date ODR approaches to facilitation, mediation, arbitration, and ecommerce, and adds important information about new technologies like blockchain and artificial intelligence.

Online Dispute Resolution - Theory and Practice is a must read text by scholars, practitioners, academics, and researchers in the dispute resolution and information technology field.

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Chapter 13 The Wake-Up to the Virtual Space in Arbitration

*Mirèze Philippe and Mohamed Abdel Wahab**

1 Introduction

Start a movement[1] or a discussion, make noise about it, gather people around a single idea or cause, and it will soon become a trend. When such movement or discussion is initiated by recognised practitioners, the trend will grow faster. This has been the case of the discussions on virtual hearings in international dispute resolution since March 2020.

The trend of the virtual space has succeeded to make its way through the dispute resolution community which was rather opaque to using technology and move procedures or parts of them online. The sudden viral outbreak has been the triggering event that has generated popularity in the use of technology in dispute resolution and the need for avoiding disruptions. From every misfortune good things may derive. This situation has been the ideal opportunity to raise awareness about the necessity to be prepared for any unexpected circumstance that may prevent us again from meeting and travelling. We are not immune from an untimely interruption which may be caused by viruses, storms, floods, volcano irruptions, safety at the venue due to war or riots, temporary closure of airports, strikes, and any other cause. The location may also happen to be inconvenient because not well connected, in which case parties and arbitrators may consider moving the location of the meeting or hearing elsewhere, or hold it online.

From the economic perspective, the need for a virtual space for holding meetings and hearings remotely is all the more indispensable since this year, due to the fact that the economic crisis generated by the worldwide outbreak has impacted every sector, firm and individual. It is therefore crucial for the users to continue being able to bring their disputes to arbitration while reducing costs; technology offers this possibility.

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* The views expressed by the authors are their own and do not reflect those of any institutions with which the authors are affiliated in any way.

1 How to Start a Movement That Changes the World, 24 September 2017, https://writingcooperative.com/the-quick-and-dirty-guide-to-leading-a-movement-9a8eddc870c7.

"Necessity is the golden chord that lies at the base of every innovation and invention" observed some authors.[2] 'However in this instance, innovation is rather about changing our traditional way of working as opposed to innovation in tools that already existed' remarked one of the authors of this chapter, who observed that "We are living in fascinating times!"[3]

Although virtual meetings and hearings are not a panacea and may not be adapted to all types of hearings or circumstances, they offer the advantages of saving time and costs for travelling, and saving the environment. Climate change being at the centre of the world's preoccupation, reducing travelling contributes to reducing the travel footprint. Some difficulties remain to be overcome, but we are learning how to better use the tools available to us. Further technology developments may probably contribute to holding hearings so seamlessly, that travelling to a hearing may become unnecessary in some instances. Practitioners have experienced different ways of working from the traditional approaches and will likely build on this momentum to continue evolving the working methods.

Technology in dispute resolution has been around for over two decades with pioneers who built platforms to settle disputes online and who published extensively about their research and their work. They gathered in two organisations, the National Center for Technology in Dispute Resolution (NCTDR)[4] and the International Council for Online Dispute Resolution (ICODR),[5] and organised conferences and trainings around the world to explain how technology could be used in resolving disputes and how the platforms they built could assist in dispute resolution procedures. They persevered in highlighting the need for moving public and private justice as much as possible online to afford to a bigger number of people the possibility to have access to remedy. They faced reluctance in general because it is hard to move people from their zone of comfort and to have them believe in this innovative way of working.

Using technology in public and private justice is a normal continuity of the evolution that led us to use technology in our daily lives. Courts are familiar with using technology to hear a witness incapable of travelling to the court, either because the witness is old or ill, or because the witness is imprisoned or in a conflict zone and unable to travel. Some courts around the world are being pioneers in using technology to hear cases entirely

2 Abayomi Okubote and Mohamed Abdel Wahab, *Africa Arbitration Academy Takes Over the Baton on Thought Leadership. Launches Virtual Hearing Protocol in Africa, for Africa*, Kluwer Arbitration Blog, 7 May 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/07/africa-arbitration-academy-takes-over-the-baton-on-thought-leadershiplaunches-virtual-hearing-protocol-in-africa-for-africa/?doing_wp_cron=1594752787.8024549484252929687500.

3 Mirèze Philippe, *Offline or Online? Virtual Hearings or ODR?*, Kluwer Arbitration Blog, 26 April 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/?doing_wp_cron=1595548750.7013959884643554687500.

4 National Center for Technology in Dispute Resolution (NCTDR), http://odr.info/.

5 International Council for Online Dispute Resolution (ICODR), https://icodr.org/.

remotely. The National Center for State Courts (NCSC)[6] that promotes the rule of law and improves the administration of justice in state courts and courts around the world, also promotes and uses technology in courts. A few states in the United States work entirely remotely, such as the Utah State Court, and others have implemented pilot projects to settle a variety of types of disputes online.[7] Other countries around the world either work entirely remotely, such as Singapore that has probably been a pioneer in this regard, or use technology to hear witnesses like in Germany. Some courts are entirely electronic, for instance in Lithuania, Estonia and Norway. Therefore the courts, the public justice, have tested and used technology. It is time for the private justice to follow this path.

While using platforms in dispute resolution to hold hearings is nothing new, the lockdown has put the spotlight more than ever before on the assistance that technology brings to the legal community. A judge recently said that it is

> immensely ironic that the coronavirus crisis will do more for virtual courts than decades of work by NCSC. I'm glad to see it come, even if this is not the way I would wish it to happen.[8]

Ironically and suddenly, many people now proclaim to be experts in ODR!

'Are people waking up to online dispute resolution?' was a question discussed in a blog post in which it was observed that there has been a surge of interest in the legal community to discuss online dispute resolution (ODR).[9] Three years later, following the outbreak forced by Covid-19, dispute resolution practitioners are waking up to the virtual space as a means available to them to proceed with their arbitrations and hold virtual hearings. Since March 2020, a plethora of webinars were held and articles and blogs were published about virtual hearings, including guidelines and protocols on holding virtual hearings. A book was recently dedicated to the virtual procedure in arbitration following the Covid-19 crisis.[10]

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6 The National Center for State Courts (NCSC), www.ncsc.org/.

7 Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67(1) Buffalo Law Review 89 (2019), pilot projects were for example implemented in the States of Michigan, Ohio, New York, Texas, Utah. The city of Columbus seems to have saved on costs of negotiating and mediating income tax small claims and has increased its collection of recovered unpaid taxes.

8 Colin Rule, one of the two fathers of ODR with Ethan Katsh, posted a message on LinkedIn at the beginning of April 2020, quoting Tom Clarke from NCSC.

9 Mirèze Philippe, *Are People Waking Up to Online Dispute Resolution*, Global Pound Conference Blog, 22 May 2017, www.imimediation.org/2017/05/22/people-waking-online-dispute-resolution.

10 Maxi Scherer, Niuscha Bassiri, Mohamed Abdel Wahab, *Arbitration and the Covid-19 Revolution*, Kluwer Law International, November 2020, https://lrus.wolterskluwer.com/store/product/international-arbitration-and-the-covid-19-revolution.

Virtual hearings and ODR are however two different matters.[11] The use of technology to hold hearings remotely is meant to connect people, affording an opportunity to replace the real world, the offline space, which may not be available to them for some reason (such as difficulty to travel, illness), by an online space. The arbitration procedure is not conducted online, but technology is used to proceed with hearings remotely. ODR consists in using information and communication technology to negotiate, mediate, arbitrate, conduct proceedings, and settle disputes exclusively or primarily online. When platforms used make a significant contribution to resolving disputes, such online resolution equates to ODR. Using a platform for virtual hearings does not meet that purpose, unless other parts of the procedure are conducted online through a dedicated dispute resolution platform. The UNCITRAL Technical Notes on Online Dispute Resolution[12] issued in 2016 defined ODR as "a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology".

This chapter will address issues related to the perception of parties and their willingness or lack of willingness to use virtual hearings, and how parties' concerns can be reconciled with arbitrators' duties to proceed expeditiously: practitioners must strike the balance between the arbitrators' duties and each party's rights (I). It will then discuss best practices established by dispute resolution organisations and other firms and organisations, which may assist parties and arbitrators in organising virtual conferences and hearings (II).

2 Striking a Balance Between Arbitrators' Duties and Parties' Rights

Life and business froze during a few days around March 2020 when many countries around the world declared an official lockdown and closure of their bordures, with the hope to stop contamination by Covid-19. Such measures had immediate impact on meetings and hearings planned in arbitration cases. Practitioners were suddenly faced with a situation which was intended to be a temporary lockdown but which extended to a several months. The dispute resolution community had to organise the continuity of its activity. Dispute resolution organisations swiftly reacted to respond to the users' expectations. They provided best practices and sometimes also virtual room facilities to enable parties and arbitrators proceed with their arbitrations efficiently and expeditiously.

Despite the availability of techniques for conducting proceedings, which will be discussed in the second part of this chapter, some practitioners were reluctant to move

11 *See* note 3, Mirèze Philippe, *Offline or Online? Virtual Hearings or ODR?*.

12 UNCITRAL Technical Notes on Online Dispute Resolution, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

online and preferred to adjourn the scheduled meetings or hearings. How can parties' concerns and expectations be reconciled with arbitrators' duties to proceed with their arbitrations expeditiously? Are awards protected from potential annulments if hearings are held online (a)? A few parties have been pro-active and immediately raised the importance of proceeding with the arbitration without delaying it. While others, either considered that holding meetings and hearings in a virtual forum is not adapted to their arbitrations, or were concerned by due process and the necessity of being present 'in person' at a physical location (b). Is adjournment the only solution? (c)

2.1 *Arbitrators' Duties – Efficiency and Rapidity – Recognition and Enforcement of Awards*

In a significant number of arbitrations where meetings and hearings were scheduled before the lockdown, parties requested their adjournment. Arbitrators were faced with the dilemma of avoiding delaying the procedure while respecting due process and protecting the award. Arbitrators must thus assess whether adjournment is justified. The right of a party cannot be at the detriment of the other party or parties' right to proceed with the arbitration, as long as all parties are given an equal and reasonable opportunity to be heard. The parties' rights to be heard is 'impliedly limited by considerations of reasonableness and fairness' as recently decided by the Singapore Court of Appeal.[13] A necessary balance needs to be struck between both parties' competing interests on the one hand, and the arbitrators' duties to proceed efficiently and expeditiously on the other hand, thus, a balance between procedural fairness and efficiency.[14]

The party reluctant to appear virtually must provide substantiated reasons that justify delaying the proceedings and generating unnecessary costs. Some arbitrators who were not willing to delay the procedure, made the point – where applicable – that nothing in the law of the seat of arbitration prevented holding meetings and hearings remotely, and ordered to proceed with a virtual hearing. The European Court of Human Rights

13 Yvonne Mak, *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, Kluwer Arbitration Blog, 20 June 2020, http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/?doing_wp_cron=1593397834.5463769435882568359375. The author discussed in her blog the interesting decision of the Singapore Court of Appeal in *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and another* [2020] SGCA 12.

14 Mohamed Abdel Wahab quoted by Sylvia Tee and Andy Lau in a summary on the webinar of 18 June 2020, organised by Lipman Karas, on *Case Management in Virtual Hearings*, www.lipmankaras.com/2020/07/case-management-in-virtual-hearings/. The webinar featured speakers from four continents: Julia Dreosti (Lipman Karas, Adelaide), Mirèze Philippe (ICC, Paris), Mohamed Abdel Wahab (Zulficar & Partners, Cairo), and Kevin Kim (Peter & Kim, Seoul).

considered that hearings held by videoconference are compliant with due process provided that the technology can guarantee such due process.[15]

Moreover, as observed a practitioner,[16] at the time the UNCITRAL International Commercial Arbitration Model Law was drafted in 1985, the hearing referred to in Article 24 was clearly understood as being in person at the same physical location. Times have changed and we are now dealing with virtual hearings, albeit in person without being at the same physical location. The practitioner concluded that a virtual hearing is a hearing. He went on with the reasoning and noted that it would be surprising if virtual hearings are not accepted by national courts or tribunals, considering that in many national courts virtual hearings are taking place.

The arbitrators must examine the legal framework governing the arbitration, namely the parties' agreement, as well as the arbitration rules applicable to the procedure and the law of the seat of arbitration (*lex loci arbitri*), most of which provide for remote hearings in permissive terms.[17] They must also verify if any precedents justify not holding a virtual hearing, and whether there may be any risk jeopardising the recognition and enforcement of an award, which represents the major concern of any arbitration procedure. Article V (1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards defines violation of due process as one of the five grounds upon which recognition and enforcement may be refused.

Should a party or all parties refuse holding a virtual hearing, the tribunal may approach the parties to understand their concerns and if there are ways to address them. Sometimes the parties are not very familiar with technology and do not feel confident to present their arguments in a virtual space. It may happen that the parties have no logistics to ensure a proper participation remotely. They may feel concerned with cross-examining witnesses without being sure that answers are not being dictated to them. The various logistical issues will be addressed in the second part of this chapter.

Where the rules of arbitration or the procedural law are silent, the arbitrators may use their discretionary power to decide whether to hold a virtual hearing, unless their powers were restricted in the parties' agreement. The powers of arbitral tribunals are an

15 Aline Tanielian Fadel, Virtual Arbitration Hearings and Due Process: Two Sides of the Same Coin?, www.linkedin.com/posts/dr-aline-tanielian-fadel-a90a4728_my-newest-article-activity-6712986739566272512-mkcx. The author referred to several disputes in Italy: Visioconférence et Droit à un Procès Equitable, RDLF 2011, chron. n°08, citing: ECtHR, 5/10/2006, n°45106/04, *Marcello Viola v. Italy*; ECtHR, 27/11/2007, n° 35795/02, *Asciutto v. Italy*; ECtHR, 27/11/2007, n°58295/00, *Zagaria v. Italy*, Laure Milano.

16 Alvaro Galindo, *Arbitration Unplugged Series – Virtual Hearing: Present or Future?* Kluwer Arbitration Blog, 23 May 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/?doing_wp_cron=1595676009.6175599098205566406250. The blog is about Gary Born's presentation on the subject of virtual hearings.

17 *See* Maxi Scherer, *Remote Hearings in International Arbitration and What Voltaire Has to Do With It*, Kluwer Arbitration Blog, 26 May 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1595672568.7934119701385498046875.

important aspect of the arbitral process in international arbitration. In addition to the powers expressly conferred by the parties' agreement and by the laws and rules governing the arbitration, the arbitrators' powers have been defined in the International Law Association Resolution of 2016 on international commercial arbitration, as implied, discretionary and inherent powers.[18] The powers are implied by the parties' agreement and the rules governing the arbitration, discretionary over procedure, and inherent which is necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award.

While no law seems to exist that specifically precludes proceedings from taking place in a virtual format, and some laws and arbitration rules expressly permit hearings to be held through audio or video conferencing, if parties continue refusing a virtual hearing despite the tribunal's efforts to address their concern and avoid disruption of the proceedings, it will be ill-advised for arbitrators to hold such virtual hearing which may lead to the annulment of their award.

When the tribunal decides to hold a hearing despite a party's objection or all parties' refusal, it must make sure to motivate its decision and explain all measures duly considered before deciding against one's or all parties' objections. Thus, if a losing party attempts to challenge an award on the ground of the hearing not held in a physical location but virtually, the courts are unlikely to set aside an award on this ground.

One of the requirements expected from arbitrators appointed on a tribunal is the necessary availability allowing them to conduct the proceedings expeditiously. Such requirement exists in most of the arbitration rules, like in the ICC Rules of Arbitration which require that, after consulting the parties, the arbitrators may take into account their broad procedural authority under the Rules, (i) to "adopt such procedural measures as they consider appropriate, provided that they are not contrary to any agreement of the parties" (Art. 22(2)), (ii) to "proceed within as short a time as possible to establish the facts of the case by all appropriate means" (Art. 25(1)), and (iii) to "hear the parties together in person if any of them so requests" (Art. 25(2)).

The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic ("ICC Guidance Note")[19] provides that in deciding on the appropriate procedural measures to proceed with the arbitration as expeditiously and efficiently as possible, arbitrators should take account of all circumstances (i) including those caused by the pandemic, (ii) the nature and length of the conference or hearing, (iii) the complexity of the case and the number of participants, (iv) any need to proceed without delay, (v) whether rescheduling the hearing would entail unwarranted or

18 International Law Association Resolution of 2016 on international commercial arbitration, www.ila-hq.org/images/ILA/docs/No.4_Resolution_2016_InternationalCommercialArbitration.pdf.

19 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19, dated 9 April 2020: https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.

excessive delays, and (iv) the need for parties to properly prepare for the hearing. Furthermore, the ICC Guidance Note provides that, should a meeting be necessary in a single physical location, parties and arbitrators should make efforts to reschedule in a way that minimises delays, and should discuss the appropriate sanitary measures to ensure the safety of all participants. If it is decided to proceed with a virtual hearing, arbitrators and parties should discuss and plan for special features of proceeding in that manner. If a tribunal decides to proceed with a virtual hearing without the parties' agreement, or over a party's objection, it should carefully consider all relevant circumstances, namely, assess whether the award will be enforceable at law and provide reasons for that determination.

In an arbitration where respondent was attempting to put the case in abeyance, the tribunal indicated to the parties that it is difficult to understand why respondent would need to gather together face-to-face in a physical location to prepare for an oral argument of motions that were already very well presented in their papers. The tribunal indicated to the parties that teleconference and video facilities are available and that parties can participate wherever they are if they have access to phone or internet. The tribunal further observed that the request for re-scheduling was made without any attempt to explore available options for a virtual hearing, and that there was no constitutional due process right to a face-to-face hearing at the arbitration seat. The tribunal added that it has been holding hearings telephonically without anyone insisting that the process is prejudicial or lacking in due process, and also that even evidentiary hearings are being held virtually. It informed the parties that it was not inclined to grant a half-year extension, as the hearing format provides each party a reasonable opportunity to make its case, as it did at the case management teleconference during which all parties made detailed submissions. Furthermore, the tribunal was satisfied that each party can supplement its detailed written arguments during an audio or a video conference. It concluded that the scheduled hearing was maintained and that it expected all parties to cooperate expeditiously in the organisation of a virtual hearing. Directions were provided to the parties to make their best efforts to accommodate video and/or teleconferencing solutions, which may require purchase of hardware and/or software.

In another case, after discussing with the parties and rolling out for them the various aspects to address their concerns, the tribunal issued a procedural order amending the procedure for expert witness examination at the hearing on the merits for the reconvened hearing by video conference. It provided directions on each of the sequences, their timing, and on the technology to be used to allow each side to show PowerPoint presentations and exhibits, in addition to seeing the tribunal, the experts, the attorneys conducting the cross-examination, and the real-time transcript. The videoconference accommodated attorneys for both sides, as well as for the tribunal, the experts, and the court reporter, most of whom connected from different locations. During cross-examination all other individuals present in the room with the expert were visible on camera. The parties' concerns were appropriately addressed in this case and the

tribunal succeeded to overcome the parties' refusal to proceed with a virtual hearing. Interestingly, before starting the hearing, the tribunal took note that the parties conducted a test of the platform and confirmed that the platform performed satisfactorily in order to proceed with the hearing. The tribunal also noted that the parties had no objections to proceed with the hearing in the virtual forum.

The Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings[20] ('Hogan Protocol') suggests a useful measure under Article 2(10) on the agreement not to challenge the award on the basis of virtual hearing. It provides that:

> a) Prior to the hearing, the parties shall sign a joint agreement that: (i) videoconferencing constitutes an acceptable means of communication permitted by the applicable rules, including those at the juridical seat of the arbitration; (ii) the parties have agreed to the use of videoconferencing as the means for conducting the arbitral hearing; (iii) no party will seek to vacate any resultant arbitral award on the basis that the arbitral hearing was not held in person; and
> b) In order to minimize any risk of vacatur in certain jurisdictions where virtual hearings may be viewed as infringing on due process rights, it is recommended that the parties sign the above-referenced agreement and present it to the tribunal at the pre-hearing conference described above. (the pre-hearing conference is referred to under Art. 1(1) of the Hogan Protocol).

Likewise, the CPR Annotated Model procedural Order for Remote Video Arbitration Proceedings[21] ('CPR PO') provides a model clause dedicated to the enforcement of awards.

Although such agreement may sometimes be difficult to obtain, and does not 'protect against a risk of *vacatur*, it provides an additional security blanket for the award' as stated by an arbitrator.[22]

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20 Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings, April 2020, Protocol for the Use of technology in Virtual International Arbitration Hearings.

21 CPR Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings ("CPR PO").

22 Samaa Haridi quoted in the Global Arbitration Review of 6 May 2020, in *What If Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway,* https://globalarbitrationreview.com/article/1226483/what-if-parties-dont-agree-on-a-virtual-hearing-a-pandemic-pathway.

2.2 *Parties' Rights – In Person Hearings – Physical and Virtual Location – Due Process*

One of the allegations raised by parties reluctant to convene virtually is that hearings must be held in person. The issue of the 'in person' hearing was never a concern until the lockdown, but the fact of being compelled to move meetings and hearings from offline space to online space became an issue. 'In person' was interpreted by some people as being in the presence of all stakeholders at a physical location. Are there justifiable arguments for excluding the presence of persons virtually?

If we draw a parallel with the way we moved from paper communication to virtual communication, communications were made in paper format and through 'snail mail' before the use of telecommunications, they were made possible during the 20th century through telex machines and then through telefax, until internet allowed communications through emails by the end of the 1980s. Almost all written communications today are made by email in all domains. It is hard to believe that the emails we receive are no valid communications. Evolution and technology allowed for a swifter means of communication and sharing information. It permitted reaching people we may not be able to reach otherwise because of postal difficulties. With the lockdown, we were prevented from using postal and courier services, but luckily internet afforded us to continue business almost as usual. Likewise, we were forbidden from travelling, but virtual meetings and hearings contributed to avoid total disruption.

Considering further the 'in person' interpretation, this issue generated some discussions in the working group who drafted the ICC Guidance Note, but we had enough elements to reach a logical conclusion. Article 25(2) of the ICC Rules of Arbitration is structured to regulate whether the tribunal can decide the dispute based on written submissions and documents only, or whether there must also be a live hearing. Article 25 does not preclude a hearing taking place in person by virtual means. The French version of Article 25(2) refers to the 'contradictoire', meaning that parties must have the opportunity of an adversarial debate to ensure that their arguments are heard in the presence of all parties:

> Après examen des écritures des parties et de toutes pièces versées par elles aux débats, le tribunal arbitral entend contradictoirement les parties si l'une d'elles en fait la demande; à défaut, il peut décider d'office de leur audition.

The Secretariat's Guide to ICC Arbitration provides that 'whether the tribunal construes Article 25(2) as requiring a face-to-face hearing, or whether the use of video or teleconferencing suffices, will depend on the circumstances of the case.' The fact that persons appear at a physical location or through a virtual location makes no difference, provided such persons are all present at the meeting or hearing and are heard, whether

their appearance is physical or virtual, due process is respected. Moreover, the literal meaning or interpretation of 'in person' is contrasted with the provision of Article 26 (4) of the ICC Rules of Arbitration, which provides for 'participation through authorised representatives'. 'Physical location' is purposefully used in this chapter considering that a person is physically present at a virtual hearing when connected remotely.

The Rules of Arbitration of the London Court of International Arbitration provide in article 19(2) that '... a hearing may take place by video or telephone conference or in person (or a combination of all three)'.

With the evolution of working methods compared to when laws, rules, and conventions were drafted before technology became common place, new laws and rules are now either making explicit reference to information and communication technology, or referring implicitly to such technology means, and they sometimes refer to the tribunals' powers in this respect. The UAE Federal Arbitration Law of 2018 for example explicitly refers to the use of new technologies.[23]

Basing the examination on the governing procedural rules and the applicable law ('rules and/or law'), one of the authors of this chapter has established a tree on how to assess the possibility of holding a virtual hearing despite a party or all parties' objections by providing a pathway and considering four scenarios.[24]

The first scenario looks at situations where the rules and/or law expressly refer to the need for an in person physical hearing on the merits, and where the in person is synonymous with appearance at a physical location. In such scenario, the tribunal will not be able to impose a virtual hearing without the parties' express consent, failing which the award risks to be set aside.

The second scenario considers the situation where the rules and/or law expressly refer to the possibility of holding virtual hearings or using technology. Such scenario is the most straightforward, permitting the tribunal to proceed as it deems appropriate after consulting the parties.

Where the rules and/or law are silent and no direct inference may be drawn is the third scenario considered. Most legal systems consider that the applicable legal principle is that a matter is permissible unless prohibited. There are two possible approaches: the absence of a permissive provision to proceed virtually does not allow the tribunal to

23 UAE Federal Arbitration Law No.6 of 2018, https://u.ae/en/information-and-services/justice-safety-and-the-law/litigation-procedures/alternative-methods-to-settle-disputes-/uae-federal-law-on-arbitration.

24 Global Arbitration Review of 6 May 2020, *What If Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway*, Mohamed Abdel Wahab's 6-point pathway about the possibility of holding a virtual hearing, https://globalarbitrationreview.com/article/1226483/what-if-parties-dont-agree-on-a-virtual-hearing-a-pandemic-pathway; Mohamed Abdel Wahab, Exculpating the Fear to Virtually Hear – A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations", 13(2) NYSBA New York Dispute Resolution Lawyer, *Summer 2020, Vol. 13(2) p.18-24.*

decide in favour of virtual hearings without the parties' express consent; or the absence of a prohibitive provision equates to using the tribunal's discretionary power to proceed virtually without the parties' express consent unless otherwise stated. The tribunal's power to decide in favour or against a virtual hearing is moreover dependent on various factors:

- whether the rules and/or law include an express provision giving it such power to manage the proceedings as it deems appropriate;
- whether the rules and/or law refer to the parties' right to a 'full' or 'reasonable' opportunity to present their case;
- whether according to the rules and/or law hearings are a mandatory requirement or whether they permit tribunals to proceed with a case on a documents-basis only, which would not normally put an award at risk if a virtual hearing is held despite a party's objection;
- whether all parties object to the virtual hearing, which would risk vacating an award if a virtual hearing is held, as explained above;
- whether in the terms of reference or the procedural order it was agreed to limit the tribunal's power to proceed in certain matters without the parties' consent;
- whether the rules of evidence and civil procedure at the seat recognise the possibility of using technology in legal proceedings;
- whether the proceedings are subject to strict time limits and a hearing must take place, and where the tribunal's jurisdiction *ratione temporis* cannot be extended should the hearing be postponed; in this difficult instance, being compelled to hold a virtual hearing where no hearing in a physical place is possible will likely expose the award to be set aside;
- whether the circumstances of the case make it appropriate to hold a virtual hearing (for example participants' access to reliable technology, nature and volume of the evidence and lack of any serious risk of prejudice).

Any decision in any scenario the tribunal may face must be reasoned as explained above, whether the tribunal is in favour or against holding a virtual hearing, provided due process is not affected.

Finally, the fourth scenario is whether the applicable law is inconsistent with the governing procedural rules including any institutional rules, and whether such applicable law is a mandatory or a non-mandatory rule.

2.3 *Adjournment of Meetings and Hearings is Not the Only Solution*

Parties and arbitrators must consider all opportunities available to them to move arbitrations forward. Irrespective of the stage of the procedure, arbitrators must first

examine potential factors which may disrupt the procedure should an adjournment or an extension of time limit be decided. Adjournments and extensions are not the only solution, other options are available. Practitioners benefit from many instruments and techniques ('toolkits') to assist them in ensuring effective case management, which they can adopt any time during the arbitration. The toolkits are not new but are not sufficiently utilised. They are unrelated to virtual hearings although they include such option as one of the techniques. The outbreak that the world has gone through in 2020 was hopefully an opportunity to discover or re-discover and use the toolkits, to contribute to getting procedures back under control, as well as to try to limit time and costs. Subject to any constraints of legal requirements as discussed above, the potential impediments to travelling generated by any phenomenon, whether natural or otherwise, must be seriously considered to avoid further disruptions. A practitioner recently observed that tribunals would ideally have already considered existing techniques, but that "the pandemic has moved from '*nice to try*' to '*need to use*'."[25]

The International Chamber of Commerce (ICC) Commission on Arbitration and ADR is one of the organisations that issued a few reports providing parties and arbitrators guidance on how to conduct procedures in an effective and cost-efficient manner. Such reports remain very relevant and useful to avoid disruptions.

The first one, published in 2004 and updated in 2017, concerns the Use of Information Technology (IT) in International Arbitration.[26] This report was the first publication that addressed all issues which need to be considered when using technology in arbitration and remains particularly relevant. It is intended to provide arbitrators, outside counsel, and in-house counsel with an overview of issues that may arise when using technology in international dispute resolution and how those issues might be addressed. It encourages arbitrators and counsel to analyse, as a matter of routine and not exception, whether and how IT might be used. It also helps users to address practical issues they may not think of, such as IT capabilities of each person involved in the case, data integrity issues, or coherent file naming which is important to retrieve documents easily and quickly. It addresses various logistical issues, like hearing room technologies, multimedia presentations, translations, and real-time electronic transcripts.

25 Michael McIlwrath quoted in the Global Arbitration Review of 6 May 2020, in *What If Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway*, https://globalarbitrationreview.com/article/1226483/what-if-parties-dont-agree-on-a-virtual-hearing-a-pandemic-pathway.

26 ICC Commission on Arbitration and ADR Report on the 'Use of Information Technology in International Arbitration', https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr.

The second report published in 2007 and re-issued in 2012, addressed Techniques for Controlling Time and Costs in Arbitration.[27] Some of the techniques proposed in the report were added as Appendix IV as of the 2012 version of the ICC Rules of Arbitration, including an important provision related to an early case management conference. It was recommended in the report since that time, that telephone and videoconferencing may be considered for procedural and other hearings where attendance in person is not essential. Another very helpful report, issued in 2015, provided further guidance for Effective Management in Arbitration,[28] such as maintaining realistic schedules, and raising awareness about potential settlement opportunities. The Techniques for Managing Electronic Document Production,[29] published in 2011, is another useful report.

The ICC International Court of Arbitration also issued two useful notes. The Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under ICC Rules of Arbitration[30] mentions a few techniques recommended in the various reports and also provides new solutions, like disposing expeditiously of certain claims or defences, or the possibility of signing not only the terms of reference in counterparts, but also signing awards in counterparts, of course subject to any mandatory requirements of relevant applicable laws.

The second practical note is the ICC Guidance Note. Article 8 of such Note provides that to ensure continued effective case management, Article 24(3) of the ICC Rules of Arbitration provides that the tribunal may adopt appropriate procedural measures or modify the procedural timetable by means of a further case management conference or otherwise. The tribunal may discuss with the parties about potential measures aimed at reducing time and costs, and also mitigating disruptions. The measures may include:

- disposing expeditiously of certain claims or defences;
- resolving the issues in dispute in stages by rendering one or more partial awards when doing so is likely to result in a more efficient resolution of the case;
- identifying whether the entirety of the dispute or discrete issues may be resolved on documents-basis only, with no evidentiary hearing;
- identifying issues that may be resolved by agreement between the parties, as the case may be with the assistance of their experts;

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27 ICC Commission on Arbitration and ADR Report on the 'Techniques for Controlling Time and Costs in Arbitration', https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration.

28 ICC Commission on Arbitration and ADR Report on the 'Effective Management in Arbitration', https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives.

29 ICC Commission on Arbitration and ADR Report on the 'Techniques for Managing Electronic Document Production', https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0043.htm?ll=Commission+Reports.

30 Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under ICC Rules of Arbitration, https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists.

- organising mid-stream procedural conferences in order to assess with the parties the most relevant issues and to consider possibilities for focusing on the most efficient means to resolve those issues;
- considering whether potentially dispositive issues, such as the application of a contractual limitation of liability or the inclusion of a non-signatory in the proceedings, can be decided without a phase for the production of documents, or with a highly limited production of documents that are deemed to be material only to the issue(s) to be decided;
- identifying issues that may be resolved without witness and/or expert evidence or on the basis of written questions from the opposite party or the tribunal and written answers from the witness or expert;
- considering whether site visits or inspections by experts can be replaced by video presentations or joint reports of experts;
- considering whether direct recourse to a tribunal-appointed expert as opposed to party-appointed experts is appropriate;
- using either audioconference or videoconference for conferences and hearings where possible and appropriate;
- requesting that the parties establish an agreed chronology of facts, joint lists of issues in dispute or other similar jointly produced documents that help define and narrow the range of issues in dispute;
- considering whether and how the number and size of submissions can be limited; and
- considering whether the parties would agree to opt-in to the ICC Expedited Rules Provisions.

The Institution's role is to establish best practices and effective tools. Parties and arbitrators are likely to adopt them naturally once they have discovered their benefits.[31]

3 Assisting Dispute Resolution Practitioners in Organising Virtual Hearings

The flexibility that the users of international dispute resolution showed during the sudden outbreak beginning 2020 was immediately supported by the dispute resolution organisations that swiftly offered guidance to users and practitioners in organising their online meetings and hearings. Firms and practitioners have also shared their experience. A significant number of material was issued in a few weeks, from protocols, checklists, guidelines, guidance notes, best practices (collectively referred here as

31 *See* note 14, Sylvia Tee and Andy Lau quoting Mirèze Philippe in a summary on the webinar of 18 June 2020, on *Case Management in Virtual Hearings*, www.lipmankaras.com/2020/07/case-management-in-virtual-hearings/.

'recommendations') and model procedural orders, to articles in which practitioners shared their experience. The recommendations provide a roadmap guiding practitioners in this new setting. They do not intend to be exhaustive as practice may evolve on the one hand, and on the other hand, each case is different from the other which requires specific adaptations.

Interestingly, an African dispute resolution community has benefited from the opportunity of the shift to virtual platforms to provide guidelines and best practices for arbitrations within Africa. They published an African Arbitration Academy's Protocol on Virtual Hearings in Africa[32] ('African Academy Protocol'). The objectives of such Protocol are noteworthy as they deal with general issues related to arbitration and not only virtual hearings, namely, in Articles 1(2), 1(3), 1(4), and 1(9):

> 1.2. To foster security and predictability in the management of arbitrations in the continent.
> 1.3. To promote the use of reliable technology in arbitral proceedings, and where appropriate, to reduce the cost of arbitrations and enhance the efficiency of arbitral proceedings.
> 1.4. To encourage African governments, businesses, institutions and other users of arbitration to invest in information and communication technologies that would facilitate access to reliable technology, and enable virtual hearings.
> 1.9. To encourage African institutions and governments to make express references to virtual hearings in arbitration rules and laws, and to serve as guiding standards, principles, and provisions to be adopted by arbitral institutions or governments in Africa when drafting their arbitration rules and laws.

The various recommendations, procedural orders and material about virtual hearings were usefully listed and made available on two websites: Delos Dispute Resolution[33] and Virtual Arbitration.[34] To enable readers retrieve information referred to, it will be indicated which parts of the recommendations are discussed below, namely from the following material:

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32 African Arbitration Academy's Protocol on Virtual Hearings in Africa, April 2020 ("African Academy Protocol").

33 A very informative table was created by Delos Dispute Resolution https://delosdr.org/ and can be found here: https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/. The table compiles relevant resources on remote and virtual arbitration and mediation hearings, organised under the following headings: (i) Guidance & Checklists; (ii) Protocols; (iii) Model Procedural Orders; (iv) Case Materials & Legislation Reviews, (v) Survey Reports; (vi) Webinar Recordings; and (vii) Other Resources. The authors thank Hafez Virjee, Delos President, and Mihaela Apostol, Delos Team, for having prepared this useful list.

34 Virtual Arbitration, https://virtualarbitration.info/.

- ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of Covid-19 ('ICC Guidance Note')[35]
- CIArb's Guidance Note on Remote Dispute Resolution Proceedings ('CIArb Guidance Note')[36]
- African Arbitration Academy's Protocol on Virtual Hearings in Africa ('African Academy Protocol')[37]
- Vienna Protocol – A Practical Checklist for Remote Hearings ('VIAC Protocol')[38]
- HKIAC Guidelines for Virtual Hearings ('HKIAC Guidelines')[39]
- KCAB International's Seoul Protocol on Video Conferencing in International Arbitration ('Seoul Protocol')[40]
- Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings ('Hogan Protocol')[41]
- International Council for Online Dispute Resolution Video Arbitration Guidelines ('ICODR Guidelines')[42]
- CPR Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings ('CPR PO')[43]
- Stephanie Cohen Draft Zoom Hearing Procedural Order ('Cohen PO')[44]
- Delos' Checklist on Holding Arbitration and Mediation Hearings in Times of Covid-19 ('Delos' Checklist')[45]

Dispute resolution organisations, legal organisations like the American Bar Association, law firms, universities and other groups organised webinars to offer users and practitioners the possibility to learn about the recommendations or hear practitioners who have experience in virtual hearings. Many of these webinars are available on YouTube.[46]

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35 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of COVID-19, April 2020 ("ICC Guidance Note").

36 CIArb's Guidance Note on Remote Dispute Resolution Proceedings, April 2020 ("CIArb Guidance Note").

37 African Arbitration Academy's Protocol on Virtual Hearings in Africa, April 2020 ("African Academy Protocol").

38 VIAC Vienna Protocol – A Practical Checklist for Remote Hearings, June 2020 ("VIAC Protocol").

39 HKIAC's Guidelines for Virtual Hearings, May 2020 ("HKIAC Guidelines").

40 KCAB International's Seoul Protocol on Video Conferencing in International Arbitration, March 2020 ("Seoul Protocol").

41 Hogan Lovells' Protocol for the Use of Technology in Virtual International Arbitration Hearings, April 2020 ("Hogan Protocol").

42 ICODR International Council for Online Dispute Resolution Video Arbitration Guidelines, April 2020 ("ICODR Guidelines").

43 CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings ("CPR PO").

44 Stephanie Cohen, *Draft Zoom Hearing Procedural Order*, www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1815, April 2020 ("Cohen PO").

45 Delos' Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19.

46 *See* for instance Erik Schäfer, *Virtual Hearings and Remote Evidence – Technology in Arbitration*, 7 October 2019, www.youtube.com/watch?v=vzp1p_kg5es.

In the second part of this chapter, some of the recommendations provided in the various best practices (a), and a few difficulties arising from virtual hearings (b) will be discussed.

3.1 *Recommendations for Virtual Hearings*

Conducting virtual meetings and hearings online has proven to be efficient to move cases forward and circumvent further delays in arbitration. Preparation of a hearing whether offline or online is key for its success. However, the virtual setting requires a different type of organisation and further adaptations than a hearing in a physical location where all players sit in the same room.[47] Experiences in virtual hearings have been successful when parties were cooperative, no matter the number of participants and the variety of locations from where they are connected.

Some practitioners succeeded to save time and costs. Others shared different views and indicated that they incurred extra costs to ensure that they are properly equipped with the required devices. Any extra costs invested in appropriate equipment are probably opportune given that we may be faced with impediments to travel for any reason as mentioned above, therefore preparing for any future potential disruption is useful.

Where parties have no access to technology or proper equipment for virtual hearings, they may use the services of arbitral institutions or hearing centres which are reliable and can provide the necessary equipment, software, bandwidth connection, and minimal risk of signal interruptions (African Academy Protocol, Art. 2.1.6).

Organisations and practitioners shared practical views and their experiences on issues to be considered before holding a virtual hearing and during such hearing. They mainly concern logistical and procedural issues which will be discussed in the various points raised below, and which need to be considered in order to ensure that parties are treated equally and given full opportunity to present their case during a virtual hearing. The sophisticated recommendations may assist parties and arbitrators who may take inspiration from such recommendations and tailor them to any given case. Whatever recommendations are adopted, none is intended to supersede any agreement between the parties and any arbitration rules governing the procedure.

3.1.1 Technology, Technical Support, Connectivity, Testing

The technology to be used constitutes a major part of the elements that come into play when a virtual hearing must be organised. Technology capabilities of all participants are fundamental. The support of computer technicians is thus indispensable from the outset

47 *See* for instance "Preliminary checklist prior to conducting remote dispute resolution proceedings" in Appendix I to the CIArb's Guidance Note on Remote Dispute Resolution Proceedings, April 2020 ("CIArb Guidance Note").

to assist the parties and the arbitrators in the choice of the platform and the technology best suited for the hearing. The platform must offer sufficient protection against unwanted third-party access. In addition, the conditions of use of the platform for data protection must be reviewed considering that some platform providers may assume ownership rights of the data transmitted through their platform (section II of the VIAC Protocol). The legal access to the platform and the technology selected must be verified to ensure that each participant may access it, given that some platforms are forbidden of use in some countries. Useful recommendations are provided under Article 2(5) of the Hogan protocol.

Needless to say that the selection of secure and stable platforms is essential (Art. 2(4) of the Hogan Protocol) to protect the integrity of the proceedings, and that consideration should be given to the level of encryption a platform offers, the types of security measures in place (e.g. whether the platform offers password protected meetings), and the potential cyber-risks presented by the platform. Article 2(4) of the Hogan Protocol also refers to some potential proprietary high-end teleconference systems password-protected, and to document sharing platforms. An annex to the Seoul Protocol provides technical specifications about video conferencing equipment with the common industry standards recommended by the International Telecommunications Union to serve as a guideline. The platform selected must enable the participants to have everyone on the screen at the same time as opposed to only highlighting the speaker (ICODR Guidelines).

A wired network connection should be preferred over a wireless connection, and no public Wi-Fi should be used without being password-protected (Art. 2(5) of the Hogan Protocol). The connection and the bandwidth may work fine at a time where not many people are connected, but the streaming can become slower if many people are connected and depending on their use of internet. During the lockdown and considering that activities and travelling were suspended, all people were connected through internet, to work remotely, to connect to their schools and universities, to access administrative services, to purchase online products and services, to download films, to organise meetings or webinars. The significant number of people connected made it sometimes hard for some people to be seamlessly connected from their homes without disconnections. Therefore testing the connection of participants at a time during the day where the hearing is scheduled to take place should be preferred to another time during the day where traffic on internet may be lower.

Tutorials may be needed and are an important support for participants who are unfamiliar with any platform, technology, plug-in, and any equipment to be used during the hearing.

Moreover, at each venue, the parties must jointly designate at least one person with adequate technical knowledge to be present virtually or in the physical room, at the pre-hearing conference and during the actual hearing for any troubleshooting. It is also

recommended that the computer technicians cooperate with each other and report any issues promptly to the tribunal (Art. 2(3) of the Hogan Protocol).

The technical support staff assistance throughout the hearing is essential for any troubleshooting, and back-up facilities are equally indispensable in case of sudden disconnection, power outage which may happen especially in some countries, or technical failures. Alternatives must be available, namely dial-in numbers to connect and any other communication channels. Additional equipment in each location may be needed to ensure a proper back-up, namely back-up computers, telephones, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary (ICC Guidance Note, Checklist, section B).

The testing phase is one of the main components to ensure a successful connection and a successful use of all needed features. A virtual hearing can run smoothly and usually does, if proper verifications are conducted before the hearing. Running a minimum of two mock sessions is recommended within the month preceding the hearing, with the last session being held one day before the hearing to ensure everything tested the first time or times, continue working properly (ICC Guidance Note, Checklist, section B). All technical functionalities must be tested, namely: successful connection to the platform for all participants; secured connection to the breakout rooms; use of the mute and un-mute function; use of the audio and lack of background noise and echo; pop-up notifications disabled on the device in use (clause 2 (9) of the Hogan Protocol); use of the video with adequate lighting in the physical rooms (ICC Guidance Note, Checklist, section B) and back-lighting to avoid, such as sitting in front of a window or bright light (HKIAC Guidelines). Likewise, the screen or screens on which documents are shared must be tested and the smooth travelling from a document to another must be verified.

Finally, a decision on which party bears the costs must be made, pending the final decision on costs to be determined by the tribunal in the final award (section III of the VIAC Protocol).

3.1.2 Hearing Date and Duration

Parties and arbitrators must agree on the hearing date, the duration and the daily timetable to take into account the different time zones, as well as the number of breaks. In case of competing preferences, parties must defer to the wishes of the tribunal. Electronic calendaring invites must be limited to authorised attendees (Art. 2(1) of the Hogan Protocol).

Practitioners suggest that in selecting a time zone, the office hours of the seat of arbitration should be the default, with adjustments to be made to accommodate the

time zones of the parties' representatives and the members of the tribunal.[48] Parties may consider travelling to locations that minimise time zone differences, and where travelling is not practical, to give preference to individuals and witnesses with health, family or other circumstances that raise special concerns as to the location from which they will testify (Art. 2(2) of the Hogan Protocol).

Similarly, and considering the different time zones, the start and the finish times must be considered to avoid starting too early and proceeding with the hearing too late. No party shall be expected to partake in a hearing at an unreasonable time based on their individual time zones (Art. 2(2) in the Hogan Protocol).

Furthermore, hearings need to be shorter than a normal hearing day, and limiting the number of hours per day has proven to be vital given that concentrating several hours on a screen and often on several screens is different from concentrating on what happens in a physical room. In a virtual room the attention can be much more limited, and participants sometimes spend several hours alone, connected to screens. Whereas in a physical setting, participants move, lawyers can present their arguments sitting or standing, they can walk to a board to present charts, they can show demonstratives and hand them potentially to arbitrators, lawyers can exchange short notes with the members of their teams or with their clients, arbitrators may have short discussions among themselves; the action and inter-action in a physical location is entirely different and more dynamic. The advocacy skills may need to be adapted to the virtual setting. Some practitioners consider the screen as 'an obstacle to their traditional tools of persuasiveness'.[49] Incidentally, as reported by some authors, sustained concentration and focus during video conferencing, the gap between the physical and the virtual, and the feeling of isolation may impact the mental health.[50] Although virtual hearings need to be shorter to avoid exhausting participants, the advantage of virtual hearings is to avoid the costs incurred by travelling and the accommodation, including the time wasted for the travelling.

Taking into account that virtual hearings need to be shorter than offline hearings, parties and arbitrators need to identify whether and which issues are essential to be on the hearing agenda and those which can be dealt with on a documents-basis only. Efficiency dictates that identifying such issues and concentrating on essential matters is a good practice, whether the hearing is offline or online.

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48 *See* note 14, Sylvia Tee and Andy Lau quoting Kevin Kim in a summary on the webinar of 18 June 2020, on *Case Management in Virtual Hearings*, www.lipmankaras.com/2020/07/case-management-in-virtual-hearings/.

49 Sophie Nappert and Mihaela Apostol, *Healthy Virtual Hearings*, Kluwer Arbitration Blog, 17 July 2020, http://arbitrationblog.kluwerarbitration.com/2020/07/17/healthy-virtual-hearings/?doing_wp_cron=1595002045.9255509376525878906250.

50 *See Ibid.*

3.1.3 Participants in the Rooms and Breakout Rooms

Although the determination of the number of participants must be agreed upon whether hearings are held offline or online, the electronic setting is a constraint that needs to be addressed differently. In a physical room, it probably less matters how many people are in the room once parties and arbitrators agree on who should be in the room: arbitrators, parties, counsel, witnesses, experts, administrative secretaries, interpreters, stenographers. The situation is different when the participants connect remotely and from various locations. The number of participants potentially multiplies the number of virtual rooms, unless several persons connect from the same physical location. To the extent practicable, it is recommended that parties appear with their counsel in a single venue (Art. 2(8) of the Hogan Protocol), but it is discouraged that one of the parties attend the hearing in the same physical venue as the tribunal if the other party can only attend remotely, unless expressly agreed (African Academy Protocol, Art. 2.2.6). The single hearing room in a physical space that became multiple in a virtual space, requires a bigger control. The tribunal needs to see all persons present at the hearing through the various screens, so do the parties, and also the interpreters and the stenographers who need to know who is speaking.

Agreeing on the number of participants per virtual room is equally important as the number of rooms connected, and may need to be reviewed and limited to ensure that participants can be visible. Parties must endeavour to have no more than two individuals in the camera frame at once and at all times the tribunal and at least any speaking participant(s) shall be visible (Art. 2(8) of the Hogan Protocol). Moreover, parties and arbitrators need to agree on whether a 360° view for all participating rooms is required; normally, it would be necessary only for the rooms from which witnesses and experts will connect.

The tribunal is encouraged to ask parties to confirm that the only persons permitted to attend the hearing are those noticed or approved by opposing counsel and the tribunal, that no unauthorised parties shall attend in violation of that agreement, and that any witness who is giving evidence shall not be assisted during the course of his / her evidence (Art. 2(12) of the Hogan Protocol).

The rooms from which participants connect, whether from their homes, offices, or in special hearing venues, should be completely separate from non-participants to the remote hearing, and soundproofed where possible. The use of headsets is recommended to increase both privacy and audibility of participants (CIArb Guidance Note).

Similarly, identifying all log-in locations and points of connection is paramount for security. The arbitrators must have control over allowing in the room not only the participants agreed upon, but also the locations from which they will be logging into the platform chosen for the virtual hearing. Once all participants are allowed in the virtual room and before the start of the videoconference, measures should be taken to orally identify all individuals present at each venue, including any technical support (ICC

Guidance Note, Checklist, section A). The same procedure may need to be repeated after each break to confirm again who is present in each room, including the witnesses and experts during certain parts of the hearing (Delos Checklist, Art. B6). When all participants allowed in the room have joined, the tribunal must lock the room so others cannot join in.

With respect to breakout rooms, at a hearing or conference centre, participants can use several rooms to meet separately from the other participants. Usually, arbitrators want to have a breakout room to allow them to confer privately amongst themselves either during the hearing or during a break. Each side also needs a room to have private discussions between the counsel and the party or parties they represent. The technology permits today to use platforms that offer virtual breakout rooms, where arbitrators can mute themselves if all three are sitting in the same location, and if they are connecting from various locations to go to a virtual room offering them the opportunity to confer privately. Parties and arbitrators may need to select a platform that offers breakout rooms password-protected to ensure total privacy of the discussions, and to avoid that no person who is not allowed in the room access such room. If their hearing is hosted by a hearing centre offering virtual settings, virtual breakout rooms are available. The tribunal must decide who controls the breakout rooms, whether an administrative secretary or themselves will have control, or whether the hearing centre will manage such rooms.

3.1.4 Confidentiality, Privacy and Security

Cybersecurity and data protection have been in the last two decades among the major concerns of all communities or institutions. With the increased use of internet and the professional hackers who are capable of breaking through almost any system, significant care should be taken for all steps, from selecting platforms and plug-ins (for example live notes), to communicating the connection details enabling the participants to enter the virtual room. One typical mistake is the fact of communicating the URL address to the platform, together with a username and a password in the same unencrypted email to one or several participants. Annex 1 to the African Academy Protocol provides also some minimum cybersecurity standards, such as avoiding unsecured connection, ensuring encryption set-up and password-protected accounts. The connection of all devices to a secure and password-protected network is of paramount importance, so do compliance with all data protection laws and regulations which are generally of mandatory application. All cloud-based video conferences should be password-protected.

Dispute resolution users will find very useful recommendations in the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration.[51] As indicated in the

51 *See* the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, www.arbitration-icca.org/media/14/52278078693299/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_electronic_version.pdf?mc_cid=8bb910d616&mc_eid=0d618241b1.

foreword of the Protocol, it includes procedural and practical guidance to assess security risks and identify available measures that may be implemented, and is intended to increase awareness about information security in international arbitrations. Likewise, the ICCA-IBA Joint Roadmap to Data Protection in International Arbitration Proceedings[52] has been developed to help arbitration professionals better understand the data protection and privacy obligations to which they may be subject in relation to international arbitration proceedings.

Parties and arbitrators must use a secure videoconferencing platform with end-to-end encryption. They must use no apps or software that requires location information to be shared, and must inform the parties that they have the ability to turn that off and explain how to do so. They must ensure that the videoconference will not time out or close down after a certain duration of time (ICODR Guidelines).

Tribunals should ensure with the parties that any videoconference platform and documents sharing platform for electronic bundles are licensed and set to maximum security settings. Customised or licensed fee-based platforms may offer greater security, confidentiality and data protection, than free-to-use, public platforms (ICC Guidance Note).

Parties and arbitrators must decide whether the virtual hearing will remain private and confidential to participants, and agree on an access and confidentiality undertaking that binds all participants. Likewise, they must agree on the recording of the hearing and whether it will be an audio or an audio-visual recording, as well as on the confidentiality and the value of the recording compared to any produced written transcript. Any overriding privacy requirements or standards that may impact access or connectivity of certain participants must be discussed, including the minimum requirements of encryption to safeguard the integrity and security of the virtual hearing against any hacking or illicit access (ICC Guidance Note).

3.1.5 Online Etiquette and Due Process Considerations

The parties shall provide the tribunal and opposing counsel a list of all anticipated attendees at least 48 hours in advance of the hearing. Participants to a hearing shall be limited to party representatives, counsel, witnesses, tribunal members, interpreters, reporters, and such logistical, technical, or other support as may be required to assist in the presentation of evidence; and if a party wishes to include an additional person not noticed in advance of the hearing, such person may participate only with the agreement of all parties or at the direction of the tribunal. In any event, no individual shall be in attendance who is not announced and to which all parties have not agreed.

52 *See* the ICCA-IBA Joint Roadmap to Data Protection in International Arbitration Proceedings, www.arbitration-icca.org/media/14/18191123957287/roadmap_28.02.20.pdf.

To achieve the necessary level of cooperation and coordination for a successful hearing by videoconference, parties and arbitrators must agree on the practices needed to safeguard the rights and obligations of participants in a virtual environment. This includes among others, identifying the lead speakers, refraining from interrupting any speaker, observing reasonable and responsible use of the platform and bandwidth, avoiding use of equipment that interferes with connectivity, refraining from any non-authorised recording, and taking whatever measures to support the procedural efficiency of the hearing (ICC Guidance Note).

After consulting the parties, the tribunal must set the mechanism for objections on the first hearing day during the introductory discussion of housekeeping matters. The parties must within a fixed period of time confirm in writing that (i) they have conducted the test runs envisaged and (ii) that the service provider, equipment, technical specifications and requirements are adequate for their participation in the hearing. The tribunal must finally advise the parties on their duty to cooperate on technical matters prior to and during the virtual hearing (ICC Guidance Note).

At the outset of any virtual proceedings, the presiding arbitrator or the tribunal-designated assistant shall be made the host and moderator of the meeting to the extent possible. If multiple parties and/or witnesses are speaking at the same time, it shall be the role of the presiding arbitrator or the tribunal-designated assistant to operate the mute function on the audio feed, to pause the proceedings and determine the appropriateness of any participants' contribution at the time in question. If disagreement or uncertainty regarding the application of the protocol agreed upon by the parties and the arbitrators and other procedures arise during the course of the proceedings, the tribunal shall resolve such a dispute.

In case one of the parties or the person speaking loses connectivity, it should be immediately reported to the rest of the attendees using a designated messaging system. This is especially relevant where there is only an audio connection (clause 2(9) of the Hogan Protocol). If one party disconnects, the tribunal must request that the rest of the attendees remain silent until the connectivity is restored. If a party's audio disconnects or becomes distorted, once the audio resumes, the tribunal must ask the participants to repeat what has been said during the outage (ICODR Guidelines).

There shall be no *ex parte* chat window communication with the tribunal. Similarly, there shall be no *ex parte* chat window communication between testifying witnesses and counsel offering their testimony. Each party should identify a member of their team to monitor the chat room and flag any relevant issues to their team (Art. 2(9) of the Hogan Protocol).

A single procedure for recording and a single individual responsible for the recording should be agreed upon (Art. 2(6) of the Hogan Protocol). It is also recommended that, with the exception of reporters, no separate recordings be made by the participants, unless otherwise agreed. The person responsible for the recording must circulate the

recording to the parties and the arbitrators as soon as possible, within 24 or 48 hours of the close of the proceedings, depending on the time limit agreed upon. Likewise, if the parties agree to transcribe the proceedings, they shall agree to a single reporter who should remain available at all times to ensure integrity and ease of communication with the parties (Art. 2(7) of the Hogan Protocol).

3.1.6 Presentation of Evidence and Examination of Witnesses and Experts

Whether the hearing is held offline or online efficiency dictates to utilise a common bundle during the hearing including for cross examination of witnesses and experts. The use of electronic bundles also allows participants to share content concurrently in a share screen mode (CIArb Guidance Note).

Discussion on the applicable rules for examination of witnesses and experts is likewise important, in particular whether a representative of one party should be present in the room with the witness or expert for the other party who is being cross-examined, and what documents will be available to the witness or expert during their examination (Delos Checklist, Art. 6).[53] The Hogan Protocol provides from the outset under Art. 1 (c) that counsel shall arrange for all relevant documents to be transmitted to the testifying witnesses in advance of the preparation sessions so that the witness may prepare to be examined with documents during the hearing.

The modalities for submitting and showing demonstrative exhibits must also be discussed, namely: the order of calling and examining the witnesses or experts; the connection time and duration of availability; their virtual sequestration; the permission or prohibition of synchronous or asynchronous communications between witnesses or experts and parties or counsel in chat rooms or through concealed channels of communications; the interaction between the examiner and the witness or expert in an online environment and whether s/he will be assisted by anyone whilst giving his/her testimony (ICC Guidance Note, Checklist section E).

Moreover, an arrangement may be needed where a witness or expert will require the assistance of an interpreter to ensure that the interpreter is able to provide his/her services virtually. It must also be determined whether interpretation will be simultaneous or consecutive (ICC Guidance Note, Checklist section E), which may require adjusted time frames as consecutive interpretation is commonly used in remote proceedings (CIArb Guidance Note). If the parties do not reach an agreement on any or all items, they should communicate their proposals to the tribunal who will decide about the organisation (ICC Guidance Note, Checklist section E).

53 Delos checklist on holding arbitration and mediation hearings in times of Covid-19, March 2020, https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/.

When presenting a witness, counsel shall ensure that both the table in front of the witness and the top of the witnesses' head are in the frame (Art. 2(8) of the Hogan Protocol).

Where parties intend to use during the oral pleadings demonstrative exhibits and presentation of certain evidence on record, they should ensure that the demonstrative exhibits will be clear and visible on a screen to all tribunal members, the other party or parties and any participants authorised to attend that portion of the hearing. If multi-screens are required for the presentation of demonstrative exhibits and evidence, the parties should ensure that such multi-screens are included in the list of required equipment (ICC Guidance Note, Checklist section E). The witnesses must be provided with an unmarked copy, no annotations, notes or mark-ups, of the agreed bundle of documents at the start of the examination of the witness (Seoul Protocol, Art. 4(2)).

Parties need to agree on whether real-time transcript or another form of recording, as well as live notes will be used, in which case and where practicable, to use a different screen than the one used for the videoconference. Procedures for the taking of evidence from fact witnesses and experts must also be agreed upon to ensure that the integrity of any oral testimonial evidence is preserved.

3.1.7 Model Procedural Orders

Finally, hugely useful model procedural orders are provided in various materials, such as in the CPR Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings,[54] the Draft Zoom Hearing Procedural Order,[55] the Practical Law's Procedural Order for Video Conference Arbitration Hearings,[56] and the ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings,[57] which serve as basis for discussion between the arbitrators and the parties. In the latter, in addition to issues to consider during the pre-hearing plan including scope and logistics, drafting is proposed and organised in four sections related to technical issues, specifications, requirements, and support staff; confidentiality, privacy, and security; online etiquette and due process considerations; and presentation of evidence and examination of witnesses and experts.

Useful checklists are made available and annexed to the CIArb Guidance Note, the VIAC Protocol, the African Academy Protocol, and the ICC Guidance Note.

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54 CPR Model Annotated Model Procedural Order for Remote Video Arbitration Proceedings ("CPR PO").

55 *See* note 44, Stephanie Cohen, *Draft Zoom Hearing Procedural Order*, Transnational Dispute Management, April 2020.

56 Practical Law's Procedural Order for Video Conference Arbitration Hearings ("Practical Law PO").

57 ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings, https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/.

3.2 *Difficulties with Virtual Hearings*

A few practitioners considered that preparation for online hearings may be more time consuming than hearings held in a physical location. This may be true considering that it could be harder to have a similar interaction between the members of a team present side by side at a hearing in a physical location and able to communicate.

Despite the evolution of the technology and the fact that many practitioners around the world have had the opportunity to use virtual hearings during the lockdown, some uncomfortable situations seem to indicate that remote hearings may not be suited to all circumstances and that there needs to be some adaptation; there are pros and cons to practically all situations.

A virtual setting may be considered as disproportionately unfair for one or several parties who do not benefit from the same technology capabilities and support that other parties enjoy. Access to technology and the necessary facilities are paramount to ensure an equality of arms and that all parties are in a position to present their case.

The lack of willingness to participate in a virtual hearing may not necessarily be due to the absence of cooperation of a party or several parties. Sometimes, the bandwidth connection of their location is not sufficient to hold a video conference during several hours. In addition, many computers may be connected and may thus slow down the connection for all persons present in such location.

Conciliating several time zones with significant difference is another example of difficulties that parties and arbitrators may be faced with. If a participant is joining at an uncomfortable hour for him or her, the efficiency of appearing might be limited. One way to remedy this impediment is to have some people travel to join one of the virtual spaces from which participants will connect, reducing thus the time zones.

Staying focused on a screen during several hours of hearings may be difficult. Moreover, there still needs to be adaptation with regard to the multiplicity of screens to see everyone in the virtual rooms and more specifically the witnesses during cross-examination.

The effectiveness of demonstratives produced at a virtual hearing may be limited when arbitrators cannot touch them or verify them by themselves.

As raised by a practitioner, how will 'the concern about real-time witness coaching' be addressed, and how will it be ensured 'that witnesses are sequestered where this is appropriate'?[58]

58 Janet Walker discusses whether virtual hearings can rise to the challenge, in *Virtual Hearings – The New Normal*, Global Arbitration Review, 27 March 2020, https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal.

4 CONCLUSION

To conclude, the lockdown has given impetus to the use of technology in arbitration and to travelling other avenues. The way people now interact with technology has removed barriers which were difficult to remove before the outbreak. Practitioners have become more familiar with virtual meetings and hearings and will soon consider them as one of the techniques in their business toolkit to conduct proceedings more efficiently and expeditiously.

More importantly, the flexibility demonstrated by many practitioners is a positive game changer on which we need to build. Having addressed the lockdown with the resilience that people showed in general, should encourage us to develop different practices in a field that has proven to be constantly evolving and adapting to all situations and needs of the users. It is the ideal opportunity to revisit some of our current practices and streamline procedures.

The positive impact includes learning to work differently, saving time and costs on travelling, reducing the footprint generated by travelling and thus saving the environment, the climate change being at the centre of the world's preoccupation. Whereas the negative impact demonstrated by scientists concerns the isolation and the gap between the physical and the virtual, which have proven to be potentially detrimental to our mental health. We must necessarily strike a balance between the practical usefulness of virtual conferences and hearings, and the need for meeting in the same physical room and inter-acting in a more dynamic way.

We also learned to take more time for ourselves and our families, technology permitting to meet remotely without investing time in transportation, and rather using that time more efficiently. We are therefore unlikely to be willing to return to some practices which we now may consider as constraints that we are capable of overcoming by using other means to continue our activities.

Practitioners recognise in general the great opportunity offered to us to change some methods and continue improving.