

VIRTUAL ARBITRATION: THE IMPACT OF COVID-19

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**Abstract**

*The need of the international community to resolve their disputes during the COVID-19 pandemic has resulted in a sudden increase in the number of arbitrations taking place virtually. Governments have imposed containment measures, making it impossible to conduct in-person arbitrations. Several concerns have been raised regarding the adequacy of present-day procedural frameworks to accommodate virtual arbitrations, witness testimonies, and cross-examination taking place virtually, and limitations of new technologies, and issues arising therefrom. This note addresses these concerns in light of the various soft law instruments that were already in place or have been developed to facilitate the transition to virtual arbitrations as the ‘new normal’. In addition to serving as guidelines on how to conduct arbitrations, take evidence, and handle witness testimonies and cross-examinations, these soft law instruments ensure that the rights of the parties are not prejudiced as a result of arbitrations taking place virtually. Lastly, after listing some of the platforms available to the parties for conducting virtual arbitrations and features thereof, this note concludes with some remarks on how the ‘new normal’ impacts the future of arbitration.*

**I. Introduction**

COVID-19 is an unpredictable global health crisis and a challenge for international arbitration. Travel restrictions, quarantine notices, and lockdowns have made it impossible globally to conduct in-person hearings for the foreseeable future, and substantial hardship can be caused if hearings are adjourned indefinitely, with an extended period of financial uncertainty. For many commercial concerns and advisers, the crisis has caused immense difficulties, raising further liquidity concerns. Dispute resolution cannot stop, and options have to be explored for existing and future disputes to be resolved under the current conditions. One option to proceed is having issues decided “*on the papers*”, i.e. when a dispute is decided on the basis of written pleadings, documents and submissions without any oral hearing. Where this approach might not be appropriate, particularly in arbitrations involving high value claims and complex issues,<sup>1</sup> technology gives the means and keeps international arbitration going by virtual hearings. While such technical possibilities existed before the crisis, in the wake of COVID-19, they have become the main focus. Fortunately, international arbitration by nature is flexible, innovative, and adaptive to the needs of the present day. This note examines what arbitrators need to consider in the new era regarding the option of holding virtual hearings.

**II. Procedural frameworks for virtual hearings**

With regard to the procedural fairness requirement of arbitration, the starting point for consideration must be the legal framework within which arbitral proceedings and hearings take place. Under all popular institutional rules, for example, the International Chamber of

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<sup>1</sup> JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 535 (2003).

Commerce [“**ICC**”] Arbitration Rules, 2017 [“**ICC Rules**”];<sup>2</sup> United Nations Commission on International Trade Law [“**UNCITRAL**”] Arbitration Rules, 2013 [“**UNCITRAL Arbitration Rules**”];<sup>3</sup> London Court of International Arbitration Rules, 2014 [“**LCIA Rules**”],<sup>4</sup> and under the general statutory powers in most seats, for example, Sections 19 and 24 of the (Indian) Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”], the tribunal is granted wide powers to direct the procedures as it wishes, which should include the choice of holding a virtual hearing. Some of the rules expressly provide for a hearing to take place by telephone or videoconferencing that does not require physical presence of the participants, whilst others do not specifically refer to this, but do not prohibit it either.<sup>5</sup> Nonetheless, the Case Management Techniques under the ICC Rules and Singapore International Arbitration Centre, 2016 [“**SIAC Rules**”] on emergency arbitrators cater to the possibility of virtual hearings.<sup>6</sup>

The wide existing procedural powers of the tribunal are subject to the general duties and obligations of the tribunal which are embodied in Section 18 of the Arbitration Act titled “*Equal treatment of parties*,” which states that “[*t*]he parties shall be treated with equality and each party shall be given a full opportunity to present his case”. Holding a virtual hearing essentially relates to the right to be heard and the right to be treated equally, which are both covered in Section 18 of the Arbitration Act.

#### A. Right to be heard

The right to be heard means that in arbitral hearings, parties must be granted sufficient opportunity to present their case i.e. to allege facts, present legal reasoning, and to produce evidence on relevant facts.<sup>7</sup> It is one of the most fundamental and universally recognised rights, and a violation of this right will render an award unenforceable as a violation of public policy.<sup>8</sup> In the laws governing the arbitration procedure, three main positions can be found. Either (a) there exists no right to an oral hearing;<sup>9</sup> (b) there is a right to oral hearing, but it can be waived as under Article 24(1) of the UNICTRAL Model Law on International Commercial Arbitration;<sup>10</sup> or (c) the procedural power of the tribunal to decide whether an oral hearing is held is subject to the parties’ agreement in the arbitration agreement. These regulations thereby serve the purpose to distinguish between oral hearings and written proceedings. Considering, in addition, that the meaning of “*oral hearing*” cannot be equated strictly with an in-person hearing,<sup>11</sup> it follows that the

<sup>2</sup> International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* “ICC Rules”].

<sup>3</sup> United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules 2013, art. 17(1).

<sup>4</sup> London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19.2.

<sup>5</sup> Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, r. 24 [*hereinafter* “SIAC Rules”]; ICC Rules, *supra* note 2, art. 26.

<sup>6</sup> ICC Rules, *supra* note 2, app. IV(h); SIAC Rules, *supra* note 5, sched. 1, ¶ 7.

<sup>7</sup> Gabrielle Kaufmann-Kohler & Thomas Schultz, *The Use of Information Technology in Arbitration*, JUSLETTER, Dec. 2005, at 37, available at <http://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> [*hereinafter* “Kaufmann-Kohler & Schultz”]; CHRISTOPH LIEBSCHER, *THE HEALTHY AWARD: CHALLENGE IN INTERNATIONAL COMMERCIAL ARBITRATION* 243–273, 344 (2003).

<sup>8</sup> RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 387 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).

<sup>9</sup> For example, Switzerland. See Bundesgericht [BGer] [Federal Supreme Court] July 1, 1991, 117 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 346.

<sup>10</sup> UNCITRAL Model Law on International Commercial Arbitration, art. 24(1), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

<sup>11</sup> Yvonne Mak, *Do Virtual Hearings Without Parties’ Agreement Contravene Due Process? The View from Singapore*, KLUWER ARB. BLOG (Aug. 2, 2020), available at <http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual->

right to be heard does not guarantee a right to an oral, in-person hearing in all circumstances.<sup>12</sup> In fact, the exchange of arguments or evidence is made orally in both an in-person hearing and a virtual hearing, with the mere difference that the communication is transmitted either with or without technological tools.

Consequently, the right to be heard is not ordinarily a legal obstacle for virtual hearings. Nevertheless, the tribunal should always seek to obtain the parties' consent before it decides to proceed with holding a virtual hearing in order to ensure that the award is not rendered unenforceable.<sup>13</sup> Nonetheless, if the tribunal proceeds with a virtual hearing over the objection of one party, as long as parties are given equal opportunity to present their case, the author suggests an award is unlikely to be rendered unenforceable.

#### B. Right to equal treatment

With regard to the right to equal treatment, the decision to hold a virtual hearing affects generally both parties in an equivalent manner. However, issues may arise because of possible differences between the technological capabilities of the parties, both with regard to the availability of the new Information Technology ["IT"] tools and the skills to use them.<sup>14</sup> To avoid such issues, particularly during the COVID-19 crisis, the tribunal should use its existing procedural powers with due proportion, and organise the procedure in agreement with the parties in a manner which ensures that the proceedings are not disrupted by the use of the new IT tools and that both parties can effectively take part in the virtual hearing. In fact, as more people are working remotely from home via virtual platforms due to the COVID-19 outbreak, it is likely that parties and advisers will already be able to cope with the new IT tools having collected substantial experience since the crisis started.

Therefore, resorting to virtual hearings raises surprisingly few legal issues in the context of arbitral proceedings. As long as sensible actions are taken by the tribunal, neither the right to be heard nor the right of equal treatment would be violated by holding virtual hearings.

Moreover, for proper exercise of the tribunal's procedural powers, guidance to the best practice of virtual hearings can be found in the impressive number of existing soft law instruments on videoconferencing of witnesses, which give a very useful framework for almost all of the practical problems inherent in taking virtual evidence. Needless to say, the scope and nature of a virtual hearing are different compared to the mere taking of evidence. However, this impressive body of guidelines provides high standard templates as a basis from which principles can be derived and developed in greater depth for conducting full virtual hearings.<sup>15</sup>

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<sup>12</sup> See, e.g., Dirk Otto & Omaia Elwan, *Article V(2)*, in KRONKE ET AL., *supra* note 8, at 345–414.

<sup>13</sup> Mak, *supra* note 11.

<sup>14</sup> Kaufmann-Kohler & Schultz, *supra* note 7.

<sup>15</sup> Janet Walker, *Virtual Hearings – The New Normal*, GLOB. ARB. REV. (Mar. 27, 2020), available at <https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal> [*hereinafter* “Walker”]; Simon Rainey QC & Gaurav Sharma, *Arbitration Hearings... and the Corona 'New Normal' Ten Golden Rules: or the easy path to your Virtual Hearing*, QUADRANT CHAMBERS (Mar. 30, 2020), available at <https://www.quadrantchambers.com/news/arbitration-hearings-and-corona-new-normal-ten-golden-rules-or-easy-path-your-virtual-hearing> [*hereinafter* “Rainey & Sharma”].

The body of resources comprises of the following:

1. The Hague Conference Draft Guide to Good Practise on the Use of Video-Links under the Evidence Convention, 2019,<sup>16</sup> contemplates procedural steps and other considerations before the taking of evidence through videoconferencing.
2. The ICC Commission Report on Information Technology in International Arbitration, 2018,<sup>17</sup> provides a framework that practitioners may refer to for the use of different forms of IT tools in a cost-effective and efficient manner, to identify the possible issues that may arise, and follow the international best practices for the same.
3. The Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration, 2019,<sup>18</sup> provides a practical note for parties, arbitrators and witnesses for preparing and presenting evidence through videoconferencing. It includes a checklist, standard directions and specific directions to ensure its application in different situations, and to preserve the quality of evidence.
4. The commentary on the revised text of the IBA Rules on the Taking of Evidence in International Arbitration, 2010,<sup>19</sup> supplements the rules by providing additional information for practitioners.
5. The Seoul Protocol on Video Conferencing in International Arbitration, 2020,<sup>20</sup> provides for international best practice in arbitration through videoconferencing, while addressing due process concerns, confidentiality problems, and practical difficulties.

As mentioned earlier, the key question to be answered in conducting virtual hearings is the enforceability of the subsequent award.<sup>21</sup> The author would venture to suggest there should be no impediments if the above guidelines are observed, but local laws should always be checked.

### **III. Current practice of virtual hearings**

Fortunately, technology for virtual hearings already exists and the experiences with the mass deployment of the new technological tools in the pandemic have been promising.<sup>22</sup> In general, there are two different options at use in the market.

<sup>16</sup> Hague Conference on Private International Law, Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention 2019, *available at* <https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf>.

<sup>17</sup> ICC Commission, Report on Informational Technology in International Arbitration 2017, *available at* <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf>.

<sup>18</sup> Chartered Institute of Arbitrators (CI Arb), Guidelines for Witness Conferencing in International Arbitration 2019, *available at* <https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/>.

<sup>19</sup> *Newly revised IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N, *available at* [https://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx).

<sup>20</sup> Korean Commercial Arbitration Board (KCAB) International, Seoul Protocol on Video Conference in International Arbitration 2020, *available at* [https://globalarbitrationreview.com/digital\\_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf) [*hereinafter* "Seoul Protocol"].

<sup>21</sup> Andrew Foo, *No further questions?*, SOC'Y OF CONSTR. L. (Mar. 27, 2020), *available at* <https://www.scl.org.sg/public-resources/161-resources/articles>.

<sup>22</sup> Walker, *supra* note 15.

*First*, many arbitration centres have facilities to conduct virtual arbitration in an “*all-in-one*” platform. For example, Maxwell Chambers in Singapore and the International Arbitration Centre in London have collaborated with the provider Opus 2 to offer parties an integrated platform for case preparation and electronic hearing solutions. The cloud-based platform enables access to materials from anywhere and online collaborations in a single connected environment.<sup>23</sup> Similarly, the Arbitration Place Virtual of the Arbitration Place in Canada,<sup>24</sup> the Australian Disputes Centre Virtual of the Australian Disputes Centre in Australia,<sup>25</sup> and other similar platforms also have the facilities to conduct virtual hearings. The Draft Procedural Order for the Use of Online Dispute Resolution Technologies,<sup>26</sup> published by the Australian Centre for International Commercial Arbitration, also provides guidance on how hearings may be conducted with video conferencing or the Cisco WebEx Meeting Center.<sup>27</sup>

*Second*, virtual hearings are also being conducted through online platforms and applications that provide video conferencing through the live transmission of video and audio data between different locations coupled with setting up multiple parallel meeting rooms or ‘chat’ groups for the various counsel and tribunal teams and their internal communication.<sup>28</sup> Such services are prominently provided by Zoom, Microsoft Teams, Skype for Business, and BlueJeans which all offer user-friendly, easy-to-go solutions.

Not only tribunals, but domestic courts in different countries have also shifted matters to remote hearings, as illustrated by the following examples: *first*, from February 2020 onwards, a number of Japanese civil courts have adopted the submission of video evidence in virtual court hearings in order to eliminate the burden of trial participants travelling and the impact of changing court dates on participants. This includes collecting evidence between the courts and different lawyers’ offices which are all in different locations connected by Microsoft Teams.<sup>29</sup> *Second*, in China, on August 18, 2017, the Hangzhou Internet Court was established as a pilot project for a digital court, and one year later, two other such courts were set up in Beijing and Guangzhou.<sup>30</sup> In these

<sup>23</sup> *Maxwell Chambers Offers Virtual ADR Hearing Solutions*, MAXWELL CHAMBERS available at <https://www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtual-adr-hearing-solutions>; Arunn Ramadoss, *Maxwell Chambers bring virtual ADR solutions to Singapore with Opus 2*, OPUS 2 INSIGHT (Aug. 2, 2020), available at <https://insight.opus2.com/maxwell-chambers-collaborate-with-opus-2-to-bring-virtual-adr-solutions-to-singapore>; *Virtual Hearings*, OPUS 2, available at <https://www.opus2.com/en-sg/virtual-hearings>.

<sup>24</sup> *Arbitration Place Virtual – eHearings*, ARB. PLACE, available at <https://www.arbitrationplace.com/arbitration-place-virtual-ehearings>.

<sup>25</sup> *Australian Disputes Centre Virtual*, AUSTRALIAN DISP. CTR., available at <https://www.disputescentre.com.au/adc-virtual>.

<sup>26</sup> Australian Centre for International Commercial Arbitration, *Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations 2016*, available at <https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf>.

<sup>27</sup> Joachim Delaney, *The Show Must Go On: Alternative Dispute Resolution and Litigation During COVID-19 in Australia*, BAKER MCKENZIE (Mar. 26, 2020), available at <https://www.bakermckenzie.com/en/insight/publications/2020/03/alternative-dispute-resolution-covid19>.

<sup>28</sup> Rainey & Sharma, *supra* note 15.

<sup>29</sup> *Start of a New Operation for Controversial Issue Management using IT tools such as Web Conferences*, CTS. IN JAPAN (Aug. 2, 2020), available at [https://www.courts.go.jp/about/topics/webmeeting\\_2019/index.html](https://www.courts.go.jp/about/topics/webmeeting_2019/index.html); *Expediting Japan’s Civil Court Proceedings with adoption of Microsoft Teams*, MICROSOFT (Aug. 2, 2020), available at <https://news.microsoft.com/apac/2020/01/29/expediting-japans-civil-court-proceedings-with-adoption-of-microsoft-teams>.

<sup>30</sup> Guodong Du & Meng Yu, *China Establishes Three Internet Courts to Try Internet-Related Cases Online: Inside China’s Internet Courts Series-01*, CHINA JUST. OBSERVER (Dec. 16, 2018), available at

courts, all legal procedures including case filing, trial, and ruling delivery are conducted online applying blockchain technology in combination with big data and cloud storage.<sup>31</sup> Transcripts are generated electronically by a voice identification software.

In its white paper titled ‘Chinese Courts and Internet Judiciary’ dated December 4, 2019,<sup>32</sup> the Supreme Peoples’ Court of China revealed that the three courts had heard 118,764 internet-related disputes as of October 31, 2019, of which more than 88,000 were concluded. It also described that the courts took 45 minutes on average in an online hearing and 38 days in concluding a case in total.

Some of the benefits of virtual court hearings are listed as follows:

- Recognisability of the facial expressions of participants who are not physically present during the evidentiary proceedings in court;
- Case participants can use the virtual conferencing feature to participate in evidence proceedings from remote locations such as law firms;
- Virtual document sharing and concurrent editing features that allow parties to include additional claims to the evidentiary proceedings summary drafted by the court in order to provide a more consistent document; and
- Availability of a virtual screen-sharing feature for all parties to identify and view relevant documents (such as contracts and documents clarifying the disputed issues) as though they are physically in the same place, enabling document confirmation, discussion, and negotiation of key issues.

Further, due to the COVID-19 crisis, in March 2020, the Vis Moot (East) was conducted virtually using Microsoft Teams supported by eBram, a Hong Kong-based not-for-profit start-up. The virtual competition comprised of 71 teams and 250 arbitrators from all over the globe and from different time zones. In April, 2020, the even larger Vis Moot 2020 took place by using the online dispute resolution platform, Immediation,<sup>33</sup> and video-links for the first time ever, giving the best practice example for working virtually and safely in the current circumstances.<sup>34</sup> The move to a virtual event was strikingly described during the opening ceremony as a result of being “forced to think about the ‘new normal’”. Further, the fact that traditional dispute resolution is now being reinvented as a consequence of the pandemic was also appreciated.<sup>35</sup>

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<https://www.chinajusticeobserver.com/insights/china-establishes-three-internet-courts-to-try-internet-related-cases-online.html>.

<sup>31</sup> Guodong Du & Meng Yu, *Big Data, AI and China's Justice: Here's What's Happening*, CHINA JUST. OBSERVER (Dec. 1, 2019), available at <https://www.chinajusticeobserver.com/a/big-data-ai-and-chinas-justice-heres-whats-happening>.

<sup>32</sup> *White paper reveals how courts are using internet to improve efficiency*, SUP. PEOPLE'S CT. CHINA (Dec. 6, 2019), available at [http://english.court.gov.cn/2019-12/06/content\\_37528024.htm](http://english.court.gov.cn/2019-12/06/content_37528024.htm).

<sup>33</sup> IMMEDIATION, available at <https://www.immediation.com/>.

<sup>34</sup> Neil Kaplan, *How we must adapt to COVID-19*, GLOB. ARB. REV. (Mar. 29, 2020), available at <https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19>.

<sup>35</sup> *Virtual Vis Mooting and Recalibrating for the Future*, LONDON CT. INT'L ARB. (Aug. 2, 2020), available at <https://lcia.org/News/virtual-mooting-and-recalibrating-for-the-future.aspx>.

Another recent development in light of the developing COVID-19 crisis is the American Arbitration Association's update dated March 17, 2020, which encourages parties to explore alternative hearing capabilities, explicitly including the use of video conferencing that allows for remote participation in hearings.<sup>36</sup> Similar approaches can be found by courts in different countries to keep the litigation process on track, as can be seen from following illustrations:

- After the courts had been closed in Hong Kong for more than two months from January 29, 2020 with a general adjournment of all proceedings, the judiciary announced that it would make greater use of video conferencing facilities to ensure justice during the crisis by the Guidance Note dated April 2, 2020,<sup>37</sup> stating that “[t]he essence is to replicate as closely as practically possible the core requirements of court” and that “[r]emote hearings using video technology preserve most of the benefits of an oral hearing, allowing parties and their legal representatives and the court to interact with each other on a real-time basis”.
- In the United Kingdom, on March 18, 2020, Her Majesty's Courts and Tribunal Service declared that courts will start holding trials and hearings through video conferencing during the current health crisis, and it justified this step by saying that running courts and tribunals are an essential public service to ensure justice.<sup>38</sup> A Guidance Note<sup>39</sup> and the Practice Direction 51Y<sup>40</sup> have been introduced, providing for remote hearings (by video or audio) by using either the Justice Video Service or Skype for Business. The latter provider was only added during the crisis to give staff and judges a more quick and flexible capacity. After the Supreme Court building was closed for the foreseeable future, from March 24, 2020 onwards, it switched to video conferencing to hear cases, and conducted the matter of *Fowler (Respondent) v. Commissioners for Her Majesty's Revenue and Customs (Appellant)* as a virtual hearing by video-link for the first time in its history.<sup>41</sup>
- During the height of the outbreak in February, 2020, the Supreme People's Court of China ordered “courts at all levels to guide litigants to file cases or mediate disputes online, encouraging judges to make full use of online systems for litigation, including those for case filing and ruling delivery, to ensure litigants and their lawyers get better legal services and protection”. In addition, the Supreme People's

<sup>36</sup> See American Arbitration Association–International Centre for Dispute Resolution (AAA–ICDR), *AAA-ICDR COVID-19 Resource Center*, available at [https://go.adr.org/covid19.html?\\_ga=2.266173005.351640490.1584719392-888347822.1584719391](https://go.adr.org/covid19.html?_ga=2.266173005.351640490.1584719392-888347822.1584719391); Raid Abu-Manneh, Menachem M. Hasofer, B. Ted Howes, Dany Khayat & Yu-Jin Tay, *Impact of Covid-19 in International Arbitration*, MAYER BROWN (Mar. 20, 2020), available at <https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/impact-of-covid19-in-administered-arbitrations>.

<sup>37</sup> Judiciary of Hong Kong Special Administrative Region of the People's Republic of China, *Guidance Note for Remote Hearings For Civil Business in the High Court*, available at [https://www.judiciary.hk/doc/en/court\\_services\\_facilities/guidance\\_note\\_for\\_remote\\_hearings\\_phase1\\_20200402.pdf](https://www.judiciary.hk/doc/en/court_services_facilities/guidance_note_for_remote_hearings_phase1_20200402.pdf); Antonia Croke & Nigel Sharman, Hogan Lovells, *Hong Kong Courts in Lockdown – How Technology is Helping with Dispute Resolution in the time of COVID-19*, JD SUPRA (Aug. 2, 2020), available at <https://www.jdsupra.com/legalnews/hong-kong-courts-in-lockdown-how-51811>.

<sup>38</sup> Her Majesty's Courts & Tribunal Services, *HMCTS telephone and video hearings during coronavirus outbreak*, GOV.UK (Mar. 18, 2020), available at <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.

<sup>39</sup> *Id.*

<sup>40</sup> MINISTRY OF JUSTICE, PRACTICE DIRECTION 51Y – VIDEO OR AUDIO HEARINGS DURING CORONAVIRUS PANDEMIC 2020 (U.K.), available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>.

<sup>41</sup> See *Fowler v. Comm'rs for HM Revenue & Customs* [2020] UKSC 22 (Eng.).

Court promoted the use of ‘mobile micro court’ on the social media platform WeChat to support the courts in conducting trials over the internet.<sup>42</sup> Acknowledging the prevalence of mobile phones and the WeChat application, it is a well-structured WeChat Mini Program that litigants and judges can use to conduct online litigation activities such as filing, service, hearing, evidence exchange, and mediation via mobile phone upon the employment of facial recognition, remote audio and video systems, e-signature, and other technologies. It is available in 12 provinces and cities.<sup>43</sup>

#### IV. Adapting to the new technology

Most arbitrators were not familiar with full virtual hearings before the COVID-19 crisis set off, and concerns of technical, procedural and arbitral nature were raised. However, the new technology offers promising features which can serve in particular the needs of virtual hearings in arbitration.

##### A. Challenges and risks

Indeed, while on an exceptional basis, remote participation of a single or few participants at in-person hearings is not an unfamiliar concept to international arbitration, the new challenge is different as parties, counsels, and arbitrators are faced with carrying out a full hearing on a virtual basis, which represents a different level and intensity in the use of new IT tools.<sup>44</sup>

The challenges and concerns expressed in technical regards, therefore, include the requirement of connectivity for each participant, which goes along with the fact that the system is only as good as the weakest link, and there is no magic solution for participants located in places with poor connectivity.<sup>45</sup> Another such challenge is the need to avoid technical failures upfront and during the virtual hearing, combined with the new necessity to define who immediately addresses technical issues when everyone is in separate locations. Technical breakdowns are a real issue, but, in fact, the risk that they occur can be significantly reduced by implementing a strict set of chronological steps and measures to be taken, such as testing the equipment beforehand, a test conference with all participants in advance, and fallback solutions in case of disruptions. The latter is prudently encouraged by Article 6 of the Seoul Protocol on Video Conferencing in International Arbitration. With regard to technical assistance, virtual hearings might involve a new kind of tribunal secretary, who acts as a technical advisor participating and addressing all technical needs. Many arbitration centres offering virtual hearings include such a technological operator in their service. All of these measures should be determined by a procedural order of the tribunal and, if possible, in agreement with the parties.<sup>46</sup>

Another logistical problem which is often raised is the challenge to manage participation from various time zones, with participants located around the globe, forcing some or all parties to sit

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<sup>42</sup> Ben Knowles & Maurice Kenton, *COVID-19 Global: Arbitration and court impacts*, CLYDE & CO. (May 1, 2020), available at <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>43</sup> *Chinese courts urged to promote online services amid virus battle*, SUP. PEOPLE'S CT. CHINA (Feb. 19, 2020), available at [http://english.court.gov.cn/2020-02/19/content\\_37533789.htm](http://english.court.gov.cn/2020-02/19/content_37533789.htm); *Internet court handles cases despite coronavirus epidemic*, SUP. PEOPLE'S CT. CHINA (Mar. 11, 2020), available at [http://english.court.gov.cn/2020-03/11/content\\_37534291.htm](http://english.court.gov.cn/2020-03/11/content_37534291.htm); *Chinese Courts and Internet Judiciary*, SUP. PEOPLES' CT. CHINA 69-70 (Dec. 4, 2019), available at <http://english.court.gov.cn/pdf/ChineseCourtsandInternetJudiciary.pdf>.

<sup>44</sup> Walker, *supra* note 15.

<sup>45</sup> Kaplan, *supra* note 34.

<sup>46</sup> Kaufmann-Kohler & Schultz, *supra* note 7; Rainey & Sharma, *supra* note 15.

at unsociable hours, and thus creating an imbalance between the parties.<sup>47</sup> These issues are neither new nor unknown to tribunals, as they have already appeared in the past with regard to management conferences and procedural hearings, which usually take place on video call. These issues have been smoothly resolved, either in agreement with the parties or by way of the tribunal's directions.

Other concerns are more specifically related to arbitration in terms of its basic elements and the decision-making process. Regarding the latter, evaluating witness testimony, particularly under cross-examination, with the loss of in-person observation is the major focus and, consequently, so is the ability to assess the credibility and strength of the witness evidence. There is also the possibility and the risk that witness statements are influenced unnoticed by a coach or a script hidden from the tribunal's view.<sup>48</sup> However, these worries are not completely new and are elaborated upon in the existing soft law instruments on videoconferencing of witnesses mentioned above with reasonable solutions, such as a camera that can be controlled by the tribunal.<sup>49</sup>

With regard to virtual hearings, the issue that currently appears to be more pressing is the impact on privacy and cybersecurity when using new IT tools.<sup>50</sup> To avoid such conflicts, it is important to carefully examine the extent of the user's consent to the collection of data given according to the privacy policy of the respective platform. While the professional "*all-in-one*" solutions of many arbitration centres provide a set of given rules tailor-made for the needs of arbitration, the video-conference applications which are widely used in all different kinds of professions and exchanges are often new kids on the block which have become popular just recently. Thus, it is advisable to always enquire carefully about the security measures incorporated in the software one plans to use, and cross-check if there are any warnings either regarding the privacy policy, or the host's capacity to monitor the activities of attendees, such as, attention tracking or user tracking.<sup>51</sup> Some of the products on the market provide encrypted data, two-factor authentication, and cloud-based backups with no standing access to customer data. These features may be preferred for the security and privacy of arbitrations.<sup>52</sup>

Thus, a tribunal needs to carefully consider availability, usability, and security when adopting the new technological tools but all of these conditions are no obstacles on the pathway to virtual hearings.

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<sup>47</sup> Walker, *supra* note 15.

<sup>48</sup> *Id.*

<sup>49</sup> Seoul Protocol, *supra* note 20, art. 1.

<sup>50</sup> Lindsay Oliver, *What you should know about online tools during the COVID-19 crisis*, ELEC. FRONTIER FOUND. (Mar. 19, 2020), available at <https://www.eff.org/deeplinks/2020/03/what-you-should-know-about-online-tools-during-covid-19-crisis>.

<sup>51</sup> *Id.*; Jane Wakefield, *Coronavirus: Zoom is in everyone's living room – how safe is it?*, BBC NEWS (Mar. 27, 2020), available at <https://www.bbc.com/news/technology-52033217>; Natasha Gillezeau, *Mind that Zoom in the work-from-home boom*, AUSTL. FIN. REV. (Mar. 24, 2020), available at <https://www.afr.com/technology/later-are-zoom-video-meetings-giving-up-business-secrets-20200324-p54ddd>; *Coronavirus: Zoom under increased scrutiny as popularity soars*, BBC NEWS, Aug. 2, 2020, available at <https://www.bbc.com/news/business-52115434>.

<sup>52</sup> *Id.*; Ravie Lakshmanan, *COVID-19: Hackers begin exploiting Zoom's overnight success to spread malware*, THE HACKER NEWS (Mar. 30, 2020), available at <https://thehackernews.com/2020/03/zoom-video-coronavirus.html>; Hannah Murphy, *Zoom admits user data 'mistakenly' routed through China*, FIN. TIMES, Apr. 4, 2020, available at <https://www.ft.com/content/2fc518e0-26cd-4d5f-8419-fe71f5c55c98>.

### B. Technological possibilities

In the past years, technological possibilities have advanced tremendously, and the new IT tools feature possibilities exceeding the conventional video calls used for case management conferences and other procedural hearings. Moreover, many of the new features are ideally suited for the needs of arbitration, such as real-time transcripts generated electronically and simultaneous recording and translating of the hearing which can be spread easily and quickly to all participants right after the virtual hearing. As far as scanning the room with many participants and observing several participants in rapid succession are said to be key features of in-person hearings,<sup>53</sup> the new technology also permits up to 49 or even more participants to be displayed in a mosaic of images with the option for expanding the image of individual participants such as those who are speaking.<sup>54</sup> In addition, relevant documents can be displayed on-screen, with images of the participants and integration of the PowerPoint or multimedia presentations that are often used by experts. Further, video platforms accommodate breakout rooms for the parties and the tribunal either for one-to-one conversations or as a group.

### V. The 'new normal' and the future?

In the wake of COVID-19, all participants in the arbitration process must be flexible and bold in examining whether holding a virtual hearing offers a viable solution to overcome the travel restrictions and to avoid long deferral of scheduled in-person hearings. As the extraordinary circumstances of COVID-19 are affecting the running of businesses, it is a logical consequence that it will also impact the way disputes are resolved. In countries such as Singapore and China, courts have already introduced virtual hearings to ensure smooth functioning of the judicial system during the crisis. Similarly, due to the new technological tools, the arbitration community is also well-equipped and well-placed to carry on.

As mentioned earlier, in case virtual hearing is an option, the tribunal should always seek to obtain the parties' consent before proceeding in order to avoid potential challenges to enforcement. While these challenges may not be ultimately successful, they still serve to prolong the process of dispute resolution. Further, regarding the procedure, the tribunals can find a useable framework to build on the existing soft law instruments on witness evidence by video conferencing. Undoubtedly, more developments will come in the near future regarding full virtual hearings. In particular, a tribunal should by way of procedural orders, implement a set of procedural steps to reduce the risks of technological failures and balance the logistical hardships for all participants in a fair manner. Issues to be addressed include recording, technical aspects, managing witnesses and exhibits, the hearing schedule and logistics, test runs, potential technical failure, and costs.<sup>55</sup> Taking into account privacy and security issues, the tribunal should decide in agreement with the parties which specific provider is chosen, depending on the specific features that are needed.

While virtual hearings were once considered an exceptional solution, without other viable solutions at hand due to the COVID-19 crisis, the arbitration community is already in the midst of the new virtual experiment. It is being conducted on a trial-and-error basis with multiple challenges and new risks, but best guidance will be provided through the experience gained in

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<sup>53</sup> Walker, *supra* note 15.

<sup>54</sup> Kaplan, *supra* note 34.

<sup>55</sup> Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) J. INT'L ARB. 12–13 (2020).

the upcoming months, and many of the practical issues will be resolved soon. From its early beginnings, one of the strengths of arbitration was its character of being an informal option of dispute resolution that can adapt to the specific needs of a dispute and its parties. Historically, arbitration has been a pioneer of procedural and technological innovation among other things with electronic filing and service of documents, long before such features were introduced in court proceedings.<sup>56</sup> Without a doubt, as more people work remotely, the use of virtual technologies will improve in terms of reliability and efficiency to meet the higher demand. Clearly, the COVID-19 crisis is changing the way international arbitration works, and the 'new normal' may be different even when the pandemic is over. Virtual hearings may not be the only option in the future, but they might become an equal alternative to in-person hearings, which are unattractive due to costs and time efficiency. Thus, the pandemic may accelerate a permanent shift to a more digital and virtual arbitration.

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<sup>56</sup> Matthew Croagh, Gemma Thomas & Rahul Thyagarajan, *Online Dispute Resolution and electronic hearings: Arbitration in motion*, in NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 5–8 (2017), available at, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en&revision=c9a5375e-5aff-4a71-a492-18c9305047d6>.