INDIAN JOURNAL OF ARBITRATION LAW

ONLINE ARBITRATION

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Abstract

*This editorial addresses the policy and practical considerations when we seek to use online systems with international arbitration. It traverses the criteria by which online dispute resolution ["**ODR**"] should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.*

I. Introduction

The current pandemic has forced us all to consider many things of far more importance than the disruptions to our own day-to-day working lives, particularly for those of us who have not lost our careers in the short term. But these careers must go on where they can. Effective continuance of commercial activity is a vital means to minimise the losses that we will be left with. In the arbitral context, the maintenance of fair and efficient dispute resolution processes impacts heavily on the parties' commercial potential and, in turn, their own supply chains and employees. Thus, there are always important external benefits of any well-functioning dispute settlement system. In the current crisis, ineffective dispute settlement might add to the economic damage caused by the pandemic.

In seeking solutions to the current disruption caused to international arbitration, a plethora of institutions and individuals have rapidly turned their minds to the utility of ODR. ODR is not a new phenomenon, with a massive literature on that topic and many court-based initiatives established in that regard. Nevertheless, in the main, this development has been in the context of attempts to promote efficient access to justice for small claims. Much of the academic literature is also about the feasibility of computer-assisted decision-making and not simply about technology as an aid to dispute resolution by human adjudicators. Concern for small claims or computer-assisted decision-making is not the focus of this article.[1] Instead, attention is given to the benefits and limits of technology in aid of high value international commercial and investment arbitration.

Such disputes retain a strong preference for face-to-face hearings, particularly in relation to witness cross-examination and oral submissions, and particularly where common law

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1 Other questions not dealt with here include whether the delays caused by the pandemic might alter the balance of convenience test under any interim measure application. Statutes of limitations that prevent time running during impediments might also come into contention, although it should normally be the case that proceedings can be commenced electronically and preserve rights accordingly. I am also not considering other commercial implications of the pandemic such as insolvency and its interaction with arbitration, increased demand for security for costs, or parties and law firms that might even go out of business.

practitioners are involved. Civilian arbitrators and practitioners are less concerned with the need for such hearings, as they tend to put less weight on oral testimony, preferring to make contemporaneous documents determinative, wherever possible. Documents-only arbitrations are obviously less affected by the pandemic. Nevertheless, it can now be stated with confidence that even when both parties are from civil law backgrounds, a combination of document production, written submissions, and face-to-face oral testimony is the norm in most substantial international commercial and investment arbitrations. In the short term, that model will often not be possible. In that context, the purpose of this editorial is to consider the powers, policy considerations, and practical suggestions in relation to the use of online techniques in aid of fair and efficient arbitral dispute resolution.

These questions are raised in more detail in another contribution to this issue; David Bateson provides a very comprehensive overview of the powers and practicalities as to the use of ODR in international arbitration.[2] This editorial contribution does not wish to replicate the excellent points made therein, but instead provides some broad theoretical and practical contexts as to the role of a proactive and customer-focused arbitrator. It may indeed make sense to first read Bateson's contribution and then return to this one. The following matters touched upon there are expanded further in this editorial. Bateson makes the wise observation that tribunals should, wherever possible, seek agreement of the parties. This editorial explores the scenario where that agreement is not forthcoming. Bateson acknowledges the queries that some common law counsel raise as to the effectiveness of online cross-examination. That is also explored further in this contribution. Bateson also directs attention to a plethora of very useful written guides and checklists that have recently been published. This contribution comments on some of the key suggestions being made from various sources and presents some added pointers as to design options for consideration by arbitrators and counsel.

It is important to note at the outset that there are three scenarios in which to consider the potential use of virtual arbitration. The first relates to what to do with existing arbitrations already established under more normal processes that have now been disrupted by the pandemic. To what extent can virtual processes take over? To what extent are there any permissible extensions of time? How are these questions to be resolved when there is no consensus between the parties? A second related question is to what extent can virtual processes allow for efficient arbitration of new disputes while the pandemic continues? The third aspect is a more general consideration of the role of technology in dispute resolution. Going forward to a time when the pandemic is over, would we revert to the presumptive model of a face-to-face final hearing or at most bifurcated hearings, or would we allow technology to replace some or all of the face-to-face contact we have had in the past and consider other modes of structuring the arbitral process with the aim of reducing time and cost?

It is likely to be the case that current experiences, many born of necessity, will lead to greater use of some online techniques on a regular basis post-pandemic, thus decreasing some of the costs and increasing the speed of resolution of arbitral disputes. Conversely, where some aspects of ODR are concerned, experience and evaluation may lead us to conclude that these techniques

[2] *See* David Bateson, Virtual Arbitration, 9(1) INDIAN J. ARB. L. 160–170 (2020), *available at* http://ijal.in/sites/default/files/Vol9Issue1/Amnd/David_Bateson-Virtual_Arbitration_The_Impact_of_COVID-19.pdf.

are not optimal and might only be a short-term expedient. We might also conclude from experience that in order for these processes to indeed be optimised, important safeguards must be put in place. As always, there is a need for arbitrators who are alert to these issues and who collaborate with the parties in identifying the best suite of procedures for the particular dispute at hand. We should all acknowledge that in the early days, we are likely to have much to learn through these experiences.

In aid of further consideration of each of the above scenarios, this editorial traverses the criteria by which ODR should be evaluated, considers the powers, rights, and obligations of the parties, outlines some of the key practical approaches that tribunals might encourage, and considers some of the key stages of a typical arbitration, to consider how online systems may best be utilised.

II. Criteria for evaluating ODR

As with all aspects of arbitral procedure, we need appropriate criteria by which to evaluate any procedural model. The two criteria that must always be considered are fairness and efficiency. The International Council for Online Dispute Resolution proposed the following additional standards.[3] ODR processes should be accessible, accountable, competent, confidential, support equality, be fair, impartial, and neutral, uphold all relevant laws, be secure, and be transparent.[4] One could argue persuasively that each of these is either a subset of fairness or efficiency.

Where fairness is concerned, issues might flow from differing technological capabilities of the parties and how a tribunal should deal with these. In the extreme, that could be a violation of due process rights if not handled appropriately. Even if differences are not so marked as to justify impugning an award, it is always wise to recall the salutary observation of the *Klöckner* annulment committee that "…*an award has not fully attained its purpose if it leaves one of the parties with the feeling – no doubt mistaken but perhaps understandable in the circumstances of the case – of unequal treatment and injustice*".[5]

Even very experienced arbitrators need to be alert to the fact that many things that can be taken for granted in face-to-face hearings might not be so where technology is the gateway. We are used to the fact that in highly respected neutral arbitral venues, there is more than adequate infrastructure to meet the needs of both simple and complex disputes. There will also be highly trained support staff. Persons in attendance will be operating in the same time-zone. Where virtual arbitration is concerned, however, one cannot presume these things. Some parties and witnesses who seek to access hearings remotely might not live in communities with high quality and secure internet connections or might not even have dependable electricity supplies. In addition to serious differences in access and competence, some jurisdictions still have high levels of government control or censorship over all aspects of the internet. Not even the most

[3] International Council for Online Dispute Resolution (ICODR), ICODR Standards, *available at* https://icodr.org/standards/.

[4] *See also* Fed. Ct. of Austl., Guide to video conferencing in court proceedings, art. 1.7 (2016) (which calls for attention to be given as to whether a video link would be "a just, timely, economic and efficient use of the Court's and the parties' resources and aid the progress or resolution of the litigation.").

[5] Klöckner Industrie-Anlagen GmbH, Klöckner Belge, S.A. & Klöckner Handelsmaatschappij B.V. v. Republic of Cameroon & Société Camerounaise des Engrais S.A., ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 111 (May 3, 1985), 2 ICSID Rep. 95, 135 (1994).

sophisticated and well-resourced institution can guarantee that any such problem would be prevented and could thus be ignored by the tribunals. Time-zones are likely to be different. Tribunals need to respond adequately to all predictable and emerging issues. As arbitrators, we must even be alert to the potential for us to wrongly blame counsel or witnesses who are failing to adequately employ technology, rather than see our own culpability in the way we have set up the process.[6]

Another aspect is the overall fairness of online procedures as compared to face-to-face hearings. This is a more contentious proposition, with champions of ODR presenting strong arguments in support of fairness. This editorial simply seeks to delve into this question in the areas where the concerns have been the loudest. Typically, this relates to cross-examination of witnesses. This is discussed in two parts, *first* as to the entitlement to face-to-face hearings and *second* as to the challenges to effective cross-examination via videoconferencing.

Where efficiency is concerned, one can at least say that an ODR process that does not require airfares and hotels and does not require one uninterrupted hearing has, at the very least, significant cost saving potential. It must always be easier to find common times for arbitrators, counsel, and witnesses when such processes do not require travel and where they can be segmented and interspersed with other unrelated activities. There is, then, less need for rescheduling when problems arise, for example, where a key participant can still function but might be too sick to travel.

III. Powers as to ODR

As with all aspects of arbitral procedure, there is a need to consider the rights, duties, and powers of the various participants where ODR is concerned. This calls attention to the interaction of party consent and the procedural framework of the arbitration. One must consider the arbitral law of the seat of the arbitration (the *lex arbitri*), the procedural rules or other agreements made between the parties, and the potential for annulment or enforcement challenges.

In that sense, there are some key gateway questions as to the potential use of ODR. What express or implied consent, if any, has there been to online processes? Alternatively, have the parties agreed on an ad hoc or institutional basis to procedures that afford such discretion to the tribunal? Conversely, is there disagreement between the parties, one in favour and one opposed to such processes? What does the procedural framework allow for in that regard? In the extreme, is there any power for a tribunal to utilise online processes where this is thought by the tribunal to be the only reasonable option, even if both parties are opposed?[7]

In answering these questions, absent binding agreement of the parties, one looks at arbitral statutes and selected rules. These typically provide tribunals with broad discretionary powers over all procedural and evidentiary matters, subject to contrary directions of the parties and subject to the requirement that processes need to meet stipulated mandatory due process norms.

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6 A range of contributions to literature have sought to warn adjudicators of some of the more problematic psychological barriers to optimal decision-making. *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2012).

7 While the presumption is that the tribunal cannot ignore an agreement between the parties, what if there was a statutory or contractual time-limit for the final award, soon to expire?

These require the tribunal to treat each party with equality and to give each a full or reasonable opportunity to present its case.[8] Annulment criteria under Article 34 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"] and Section 34 of the Indian Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] or enforcement criteria under Article 36 of the Model Law, Section 36 of the Arbitration Act, and Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], work hand in hand with the due process norms under Article 18 of the Model Law and Section 18 of the Arbitration Act.[9] A violation of such norms will typically be a ground for annulment or for blocking enforcement.

Bateson's article lists some key provisions in a range of jurisdictions, and these will not be repeated here.[10] It is simply worth pointing out that there are a range of approaches to virtual hearings in these instruments. Very few proscribe video hearings absent party consent.[11] Some provide express discretion to the tribunal, thus requiring no further agreement of the parties.[12] The bulk of both institutional and ad hoc arbitrations under *lex arbitri* and rules like the Model Law and UNCITRAL Arbitration Rules simply afford general procedural discretion to the tribunal and virtual hearings are not referred to discretely.[13]

Parties might also agree to virtual hearings by accepting certain guides or soft law instruments, most notably, the IBA Rules on the Taking of Evidence in International Arbitration ["**IBA Rules**"]. Article 8.1 of the IBA Rules stipulates that *"[e]ach witness shall appear in person unless the Arbitral Tribunal allows the use of video conference or similar technology with respect to a particular witness*".[14]

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8 Such due process norms are found in United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 18, 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) [*hereinafter* "Model Law"] and the Arbitration and Conciliation Act, No. 26 of 1996, § 18 (India) [*hereinafter* "Arbitration Act"].

9 Virtual hearings will also lead to tensions in jurisdictions that struggle to understand the difference between the seat and the place of arbitration, a question that has troubled certain Indian courts. *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc., (2012) 9 SCC 552 (India); Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India); Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., 2018 (4) Arb. L. Rep. 66 (Delhi) (India); Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472 (India); BGS SGS Soma JV v. NHPC Ltd., 2019 (6) Arb. L. Rep. 393 (SC) (India); Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., (2020) SCC Online SC 301 (India).

10 Bateson, *supra* note 2.

11 Vietnam International Arbitration Centre (VIAC), Rules of Arbitration 2017, art. 25(1) [*hereinafter* "VIAC Rules 2017"] is an exception (which states that "[t]he Arbitral Tribunal may conduct the hearings by means of teleconference, video-conference or by any other appropriate means if the parties have agreed so.").

12 Video conferencing of witnesses is expressly allowed in the ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] §§ 595(2), *available at* http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 (Austria); art. 4:1072(b) RV (Neth.); Arbitration Ordinance, (2011) Cap. 609, § 48 (H.K.). *See also* London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 19(2) (which expressly stipulates that "[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)…").

13 Model Law, *supra* note 8, art. 19; UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration (2014), art. 17.1; International Chamber of Commerce (ICC), Rules of Arbitration 2017, art. 22(2) [*hereinafter* "ICC Rules 2017"]; Arbitration Act, No. 26 of 1996, §§ 19, 24 (India).

14 Given the fact that few *lex arbitri* or institutional rules directly address the entitlement to or optimal way to conduct online arbitrations, a number of guides have been developed, some accelerated by the needs of the current pandemic. As with any guide, these are not binding on any arbitration unless expressly agreed to by the parties. Some of the more elaborate guides are outlined in Bateson's article. *See* Bateson, *supra* note 2, at 146.

All such rights and discretions are subject to mandatory due process norms as articulated in core provisions such as Article 18 of the Model Law and Section 18 of the Arbitration Act.

Where the laws and the rules are not clear, one issue is to consider what these say about 'hearings' and their required nature, if required at all. A number of debatable terms then need to be interpreted as a number of different expressions are used. For instance, the notion of a 'hearing' also relates to procedural applications and requests for interim relief as well as any final process for witness testimony and oral submissions. A proposal during the drafting of the Model Law to limit Article 24(1) to hearings on substantive issues was rejected.[15]

Article 17(3) of the UNCITRAL Arbitration Rules stipulates that if any party so requests, "*the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witness, or for oral arguments*". That rule juxtaposes "*hearings*" with decisions on documents and other materials alone. It uses the term "*oral*" with arguments but not expressly with witnesses although the latter seems implied. Most importantly, Article 28(4) stipulates that the "*tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conference)*". Article 28(2) speaks more generally about such witnesses being heard "*under the conditions and examined in the manner set by the arbitral tribunal*". The drafting history demonstrates that the drafters were comfortable with video hearings, even though the earlier versions did not say so expressly.[16] Thus, the ability of either party to demand a hearing does not allow that party to bar the tribunal from directing videoconferencing.

The Model Law was drafted at an earlier point in time than the most recent UNCITRAL Arbitration Rules. Article 24(1) of the Model Law stipulates that subject to any contrary agreement by the parties, the tribunal shall decide whether to hold "*oral*" hearings. It goes on to state, however, that "*unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party*". The reference of "*such hearings*" is to "*oral*" hearings.

This raises a key question as to whether an "*oral*" hearing means a face-to-face hearing or whether speaking via video is compliant with this entitlement. The latter is a better view. The

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15 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 674 (1989).

16 *See* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fifty-First Session, ¶ 46, U.N. Doc. A/CN.9/WG.II/WP.154/Add.1 (July 23, 2009). *See also* UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of its Fiftieth Session, ¶¶ 65, 67, 84, U.N. Doc. A/CN.9/669 (Mar. 9, 2009). Note also the comment made in earlier discussions in the UNCITRAL, Rep. of Working Group II (Arb. & Conciliation) on the Work of Its Forty-Seventh Session, ¶ 43, U.N. Doc. A/CN.9/641 (Sept. 25, 2007):
"43. A suggestion was made that paragraph (5) should also refer to the possibility of witnesses being heard by videoconference. In support of that proposal, it was suggested that paragraph (4), which required that the hearings be held in camera, when read in conjunction with paragraph (5), which referred to evidence by witnesses also being presented in the form of written signed statement, could be understood as excluding witness evidence presented in any other form. However, it was said that inclusion of a reference to videoconference delved into detail that could overburden the Rules and reduce their flexibility. Some hesitation was expressed to including a reference to a particularly technology, such as video conferencing, given the rapidly evolving technological advancements in means of communication. A suggestion was made to provide a more generic term such as "teleconference" to accommodate technological advancements. Broad support was expressed for a suggestion that paragraph (5) should state not only that evidence of witnesses might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require the physical presence of witnesses. More generally, it was also noted that the arbitral tribunal had the authority under paragraph (6) to determine the weight of the evidence." (The paragraph numbering in this Article changed with later revisions to the draft)."

plain meaning of the word 'oral' simply means spoken and not written. Rules often juxtapose the notion of an oral hearing with the notion of a documents-only arbitration.[17] Thus, a telephone or a video communication would properly be described as oral. On that basis, if either party wants an oral hearing but one disagrees as to a virtual hearing being compliant, a tribunal that utilises such a process cannot be said to have conducted proceedings contrary to the agreed procedures per Article V(1)(d) of the New York Convention.

The International Chamber of Commerce ["**ICC**"] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2019, under the ICC Rules of Arbitration ["**ICC Rules**"], allows for video-conference hearings on dispositive applications.[18] Where the Expedited Procedure Rules are applicable, Article 3(5) expressly allows for hearings by video-conference.[19] Article 24(4) of the ICC Rules expressly allows for case management conferences by video-conference, telephone, or similar means, as well as in person. Paragraph (f) under Appendix IV (Case Management Techniques) to the ICC Rules also leaves the question somewhat open when it refers to "*using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT then enables online communication among the parties, the arbitral tribunal and the Secretariat of a Court*".[20] It is not uncommon for similar express references in other rules. Some might then query whether, by inference, this precludes a similar result for final hearings when only the normal broad discretionary rules are applicable. That should not be so. An express reference to a tribunal's right to call for videoconferencing for some procedures should not be taken to limit a broad discretion to do so, absent a contrary direction from the parties.

There is, however, another query where the ICC Rules are concerned. As to the entitlement to hearings on the merits, Article 25(2) stipulates, "*the arbitral tribunal shall hear the parties together in person if any of them so request*" (emphasis added). The ICC has also published the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ["**ICC Guidance Note**"]. The ICC Guidance Note has sought to interpret the concept of hearing parties "*in person*" as allowing for a "*live, adversarial exchange…by virtual means if the circumstances so warrant*".[21] Various English dictionaries suggest the contrary and describe "*in person*" as requiring physical presence as opposed to telephone and similar devices.[22]

These supportive comments as to the meaning of "*hearing*" or "*oral hearing*" and, to a lesser extent, "*in person hearing*", coupled with the drafting history where UNCITRAL is concerned, do not alone prevent other adverse New York Convention considerations, but these should also be rejected if directed at virtual hearings per se. Challenges might be theoretically possible on either

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17 *See, e.g.*, Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, r. 22.4 [*hereinafter* "HKIAC Rules 2018"].

18 ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2019, at 12, ¶ 77, *available at* https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

19 ICC Rules 2017, *supra* note 13, app. VI - Expedited Procedure Rules, art. 3(5).

20 ICC Rules 2017, *supra* note 13, app. IV - Case Management Techniques, ¶ f.

21 ICC International Court of Arbitration, Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic 2020, ¶ 23, *available at* https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf [*hereinafter* "ICC Guidance Note"].

22 *See, e.g.*, *In person*, CAMBRIDGE DICTIONARY, *available* at https://dictionary.cambridge.org/dictionary/english/in-person.

of the Article 18 grounds, namely interference with the right to present one's case or the right to equal treatment. As to the first, there is a need to consider a per se claim that denial of a face-to-face hearing necessarily prevents a party from properly presenting its case in violation of Article V(1)(b) of the New York Convention. That should not be so, unless the applicable laws or rules demand physical presence. Courts and tribunals have long had experience of at least some witnesses needing remote access. In that context, a United States appeals court held that there was no barrier to enforcement under Article V(1)(b) when a witness refused to attend for fear of arrest, as the witness could have attended remotely.[23] In addition, a number of enforcement courts considering Article V(1)(b) claims require that the respondent to enforcement demonstrate that the procedural concerns could have affected the outcome of the case.[24] That would be close to impossible to argue in a well-run virtual hearing.

Conversely, if there are indeed significant and insurmountable technological problems facing one party that the tribunal does not respond to effectively, then this ground can be made out, but there is no justification for a mere assertion that online adjudication is an *ipso facto* barrier to presenting a case. This is discussed further below when considering cross-examination of witnesses, the element of proceedings where this concern is most likely to be raised.

Even disparity in quality as between technological resources should not *ipso facto* be seen as a proscribed form of inequality. Parties often have different quality of counsel, professional training, and proficiency in the language of the arbitral proceeding. It will have to be an extreme case of technological inadequacy, where one could say that the treatment is indeed materially unequal, in a due process sense, when relying on online technology. Tribunals will need to ensure that this is not the case and be prepared to make on-going assessments as to the implications of any technical difficulties. A tribunal must always be prepared to adjourn a hearing if the connection is inadequate, and the right to be heard is indeed being detracted from.

In some cases, a tribunal might be faced with conflicting due process concerns. For example, there may be conflicting problems with indeterminate delay. As is the case in India, *lex arbitri* might impose time-limits for completion of awards, although these can typically be extended.[25] Express duties of efficiency and expediency may still call for consideration of virtual hearings during the pandemic at least.

One inequality scenario readily conceivable during the pandemic is a dispute between parties from one country that has reopened and has allowed for travel, as against another country that

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23 Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., 01-30553 (5th Cir. 2003), ¶ 29 (U.S.).

24 Tribunale fédérale [TF] Jan. 29, 2019, 4A_424/2018 (Switz.); Hanseatisches Oberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Apr. 3, 1975, 2 Y.B. COMM. ARB. 241 (1977) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], May 15, 1986, 98 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN ZIVILSACHEN [BGHZ] 70 (Ger.); Apex Tech. Inv. Ltd. v. Chuang's Dev. (China) Ltd., [1996] 2 H.K.L.R.D. 155 (C.A.) (H.K.); Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 26, 1990 21 Y.B. COMM. ARB. 532 (1996) (Ger.); Polytek Eng'g Co. Ltd. v. Hebei Import & Exp. Corp., [1998] 1 H.K.L.R.D. 287 (C.A.) (H.K.); Schelswig-Holsteinisches Oberlandesgericht [OLG] [Schelswig-Holstein Supreme Court of Justice], June 24, 1999, 16 SCHH 01/99 (1999) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Oct. 18, 2007, 26 SCH 1/07 (2007) (Ger.); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court], Aug. 27, 2009, 35 Y.B. COMM. ARB. 377 (2010) (Ger.). *See also* M. Scherer, *Article V(1)(b)*, *in* NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958: A COMMENTARY ¶¶ 142-4 (R. Wolff ed., 2019).

25 Arbitration Act, No. 26 of 1996, § 29A (India).

does not even allow parties, witnesses, and counsel to congregate in the same place. It would seem undesirable to have one side represented face-to-face with the other wholly online unless the parties agree to this. Even then, if allowed in the face of disagreement between the parties and if appropriate safeguards were in place, most enforcement courts would not block enforcement simply because this has occurred when the party with virtual access had high quality access.

The next question is whether there are any other mandatory laws that could prevent virtual hearings, or which could at least direct certain minimum standards. One should at least consider whether any domestic laws of the seat, of the parties' home countries purporting to apply extra-territorially, or of a likely enforcement country can be argued to impose such proscriptions. Again, that is unlikely to be so, but it should be for counsel to draw any such possibilities to the attention of the tribunal. One such possibility is the application of universal human rights conventions that call for equal treatment.[26] Similarly, European legal systems must consider Article 6 of the European Convention on Human Rights ["**ECHR**"], which stipulates as follows:

> "*In the determination of … civil rights and obligations, everyone is entitled to a fair and public hearing* …"

This, of course, mixes notions of transparency in litigation that are quite distinct from the privacy inherent in arbitration. Lew, Mistelis, and Kröll argue that as arbitrations are private proceedings, Article 6 of the ECHR does not apply to arbitration.[27] At the very least, the European Court of Human Rights has concluded that by agreeing to arbitrate, certain rights under Article 6 that would flow from court proceedings have instead been waived.[28]

Finally, one could consider the way that international and domestic courts have considered these due process questions under their litigation rules. Court attitudes could be considered to see if they provide any guidance as to the interpretative challenges when parties to an arbitration do not come to the same view as to the use of virtual hearings. Domestic courts that are supportive where litigation is concerned are less likely to see problems where enforcement of arbitral awards is concerned. References to 'open court' are clearer and more specific than references to 'hearings' and even 'in person hearings'.[29] Private arbitrations do not have the same problem as to the need for transparency and public access that domestic courts must promote. Even then, domestic rules at times allow for videoconferencing for good cause in compelling circumstances

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26 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), art. 10; G.A. Res. 2200A (XXI); International Covenant on Civil and Political Rights, (Dec. 16, 1966), art. 14. Various cases discuss differential treatment, fair balance, and substantial disadvantage. *See, e.g.*, United Nations Hum. Rts. Comm'n, Gen. Cmt. No. 32, art. 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, Rep. on the Work of Its Ninetieth Session, U.N. Doc. CCPR/C/GC/32, at 3, ¶ 13 (2007); Dudko v. Australia, Comm. No. 1347/2005, Views of 23 July 2007, U.N. Doc. CCPR/C/90/D/1347/2005, ¶¶2.3, 7.3–7.4 (July 23, 2007).

27 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003).

28 Suovaniemi & Ors. v. Fin., App. No. 31737/96 Eur. Ct. H.R. (1999). *See also* GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 205 (2004).

29 FED. R. CIV. P. 43(a) (U.S.).

and with appropriate safeguards.[30] Some international criminal courts have also allowed for video testimony, often where witnesses are concerned for their safety.[31]

At the very least, the above discussion would suggest that there are a range of permutations that a tribunal might need to consider where virtual hearings are concerned. At first sight, the easiest scenario would appear to be where both parties agree to use online processes rather than face-to-face hearings. However, there is one issue that might still need to be considered. That is whether a party who has so agreed has, as a result, waived any right to seek annulment or to block enforcement even if some argument is tenable as to inequality or as to some restraint of either party's ability to put its case. This is discussed below in terms of the potential to waive such rights.

The second scenario is where one party would wish to see greater use of online proceedings, with the other party taking an opposing view. Such a scenario should not alarm an arbitrator with unconstrained discretionary powers. Many decisions as to procedure will also flow from differences in party preferences. It is the role of the arbitrator to then utilise residual discretions to promote a fair and efficient outcome. Choosing a mechanism in the face of disagreement between the parties should *ipso facto* be treated in the same way as where a tribunal selects a place for hearing, contrary to one party's preferences. This has survived a challenge in response to an ICC arbitration.[32] Those arguing for or against greater use of online processes should have to provide their reasoning and engage with the contrary arguments of the opposing party where there are no constraints on a tribunal's discretion in that context. This may also be impacted upon by rules that impose obligations of good faith on the parties. This may relate to the evaluation of the justification for refusing consent to a procedural option where no viable alternative exists.

It is nonetheless important to manage such procedural disagreements in a way that gives each party the optimal chance to present its reasoning and ultimately maintain respect for the tribunal even by a party that was not preferred under the procedural ruling. In many instances, a practical and forward-looking tribunal will not need to resolve a head-on procedural disagreement, but may instead find a practical solution that alleviates the concerns of a reluctant party.

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30 *Id.* Videoconferencing for witnesses is also allowed under the Civil Procedure Rules 1998, No. 3132 (L.17), r. 32, ¶ 3 (Eng.). While arbitral advances at times occur ahead of domestic litigation reform, the same is not uniformly so with online dispute resolution, given that a number of courts around the world have been trialling such initiatives for some time. While care should always be taken to consider whether a model that works well in one dispute resolution forum could readily be transplanted fairly and efficiently into a different environment, nevertheless, it can only be helpful to give some attention to court models and experiences when considering optimal arbitral processes. Here again, Bateson's article gives direction to the reader. *See* Bateson, *supra* note 2.

31 Prosecutor v. Mucic & Landzo, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give their Testimony by Means of Video Link Conference, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia May 28, 1997); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1996). *But see* the contrary concern as to problems in assessing witnesses' demeanour in Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness ADE, ¶¶ 12, 32 (Int'l Crim. Trib. for Rwanda Jan. 31, 2006).

32 Salini Costruttori S.P.A. v. Fed. Dem. Republic of Eth., Addis Ababa Water & Sewerage Auth., Case No. 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction (ICC Int'l Ct. Arb. Dec. 7, 2001); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 116, ¶ 146a (2d ed. 2007).

For completeness, one should also consider an extreme hypothetical – the third situation – where both parties are averse to the use of online proceedings, but where the tribunal considers that this would be the only reasonable way forward. That might arise where a tribunal is alert to express duties of expediency and efficiency and sees strict time-limits for the final award fast elapsing. One could at least envisage arguments that a tribunal might wish to invoke a duty of efficiency to urge use of online processes where there is no end in sight to the pandemic.

Nevertheless, a tribunal can only ignore an express procedural agreement of the parties if such agreement offended against mandatory due process norms or retrospectively sought to undermine the arbitrators' agreement with the parties.[33] It would not be easy to envisage a simple refusal to engage in online proceedings as being of this nature. All such an agreement would do is that it would delay the process until such time as face-to-face hearings were permitted once again. If both parties want to defer a result for an indefinite period, why should they be prevented from doing so, even if that meant that the time for the award elapsed? They can agree to abandon a process, so why can they not agree to let time run out? It would also be rare for a tribunal to have grounds for resignation in such circumstances, although hard and fast rules should always be avoided. The closest scenario to one where required norms conflict is indeed where a time-limit for the award cannot be extended and where physical presence is called for by the parties which is not possible during the pandemic. Attention might then be given to the additional question as to whether that is a force majeure event vis-à-vis the arbitration agreement.[34]

If there are in fact mandatory norms that prevent or limit virtual hearings, the next question is whether these can be waived. Conceptually, the notion of a mandatory norm is one that cannot be waived by private parties, but the key is the discretionary nature of Article V of the New York Convention. Even if a ground is made out, a court may enforce the award nonetheless, and is likely to do so if a party has waived its right to complain about a virtual hearing procedure. Gary Born points to various national laws in support of the principle that procedural protections may be waived. He argues that this is required to support the arbitral process and party autonomy.[35]

Where waiver is concerned, a related question is whether the party has made any protest at the time of the online proceedings. A number of rules or laws indicate that objections as to procedural unfairness need to be taken in a timely manner, otherwise the right to object is lost.[36] A number of enforcement courts have refused to allow an Article V(1)(b) challenge where no protest was made at the time of the subsequently challenged procedure.[37]

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33 For example, parties cannot ex post facto agree to extend the time for a hearing after contractually agreeing with arbitrators for a flat fee in relation to a shorter arbitration.

34 That may be uncertain, including as to the applicable law of force majeure or frustration.

35 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2186–2187 (2d ed. 2014).

36 *See, e.g.*, Arbitration Act 1996, c. 23, § 73(1) (Eng.).

37 Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm], Nov. 2, 1983, 20 U 57/83 (1983) (Ger.); Hanseatisches Oberlandesgericht Hamburg [Hans OLG] [Hanseatic Higher Regional Court Hamburg], Jan. 26, 1989, 6 U 71/88 (1989) (Ger.); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. y Comm., 745 F. Supp. 172 (S.D.N.Y. 1990) (U.S.); Shenzhen Nan Da Indus. & Trade United Co. Ltd. v. FM Int'l Ltd., [1992] 1 H.K.C. 328 (H.C.) (H.K.); K Trading Company (Syria) v. Bayerischen Motoren Werke AG Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court], Sept. 23, 2004, 4Z Sch 05-04, 30 Y.B. COMM. ARB. 568 (2005) (Ger.); Oberlandesgericht München [OLG] [Munich Higher Regional Court], Nov. 28, 2005, 31 Y.B. COMM. ARB. 722 (2006) (Ger.); Oberlandesgericht Karlsruhe [OLG] [Karlsruhe Higher Regional Court], Mar. 27,

IV. Selection of arbitrator and proactive arbitrator behaviour

It is always important for parties to select arbitrators that have the necessary skill set to deal with all aspects of their dispute. Where online processes are concerned, that involves arbitrators with a sufficient understanding of the technical issues and potential due process challenges and the willingness to work with the parties to find mutually agreeable processes that ensure fairness and promote efficiency.[38]

One contentious aspect of an ideal arbitrator, at least where common law counsel are concerned, is as to how proactive an arbitrator needs to be. There is never likely to be consensus as to the degree to which an arbitrator should choose to lead the parties, as opposed to sitting back and merely umpiring their respective submissions. Current responses to the on-going COVID-19 pandemic and ODR generally heighten these questions. Some propositions are hopefully less contentious. I would argue that while many tribunals may sit back and rely on counsel where legal arguments are concerned, the same cannot be said for the design and security of online processes. Tribunals have a duty to promote fairness and efficiency and cannot rely on the lack of expertise or lack of interest of counsel or the parties to justify suboptimal use of online processes or to justify a failure to even consider their use when there are major disruptions to the normal way of doing things.

ODR allows tribunals to act in a more inquisitorial manner, identifying discrete issues and stipulating an order and method for their analysis. While this has been the norm in civilian legal systems, this also mirrors the trend under common law litigation where it is more and more the case that legislators direct judges to engage more actively in case management and to use principles of proportionality to deal fairly and efficiently with all disputes.[39] ODR means that we no longer need to see a final hearing as an all or nothing model for dispute resolution. At the very least, we should not set procedural stages without first considering whether one single hearing will indeed be the ultimate element of the process. Too often, larger arbitrations work back from the tribunal members' calendars to see the earliest time that such a hearing is possible,[40] and then set stages beforehand accordingly. But if people do not have to congregate in one foreign place, there is no longer any necessity to have all witnesses and oral submissions presented at the same time. Virtual hearing times might well be broken into discrete parts when international travel and hotels are no longer an issue. In some cases, there would be added benefits, for example, separating out fact witnesses and then giving experts the time to consider their testimony before themselves giving evidence, if the latter testimony would benefit from such reflection and analysis time.

Arbitrators should also be prepared to propose hybrid models where some matters can be dealt with on the paperwork, through contemporaneous documents and written submissions, with online hearings kept for witness examination and perhaps expert witness conferencing, and only

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2006, 32 Y.B. COMM. ARB. 342 (2007) (Ger.); AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS Ltd., No. 09-2064 (4th Cir. Dec 15, 2010) (U.S.).

38 A question then arises as to whether a proposed arbitrator could be successfully challenged for lack of technological expertise if a virtual hearing is inevitable. That would be unlikely and even less so when backed by a competent institution that can provide all necessary support and infrastructure.

39 Lord Woolf CJ, *The Woolf Report*, 3 INT'L J. L. & INFO. TECH. 2, 144, 145–155 (1995).

40 And the more famous and busy each arbitrator, the more distant will be the earliest significant intersection between their free spots on their calendars.

necessary questions posed to counsel. Tribunals should understand, as should counsel, that written submissions will often be the best way to present complex and competing arguments about an established evidentiary framework, while in-person discussion is the best way to explore matters of remaining concern to the tribunal. Tribunals can also consider greater use of summary disposition where possible or promoting agreed statements of fact and retaining oral cross-examination and submissions only where these remain optimal processes.

There may also be a difference between how to best establish procedures for new cases and, alternatively, how best to deal with existing cases with already agreed face-to-face hearings that have been adversely impacted by the pandemic. Where modifications are made to existing arbitrations that were never intended to be conducted virtually, tribunals need to be sensitive to the need to allow parties to familiarise themselves with the options and be given a meaningful opportunity to form their views as to their preferences. Where a virtual hearing is a modification to a previous procedural order, the agreed modification should also be properly documented. A tribunal should at least invite any party to raise any procedural concerns as soon as they are perceived to arise. The tribunal might also invite parties to attest to their agreement to a virtual hearing in writing and to waive, where possible, their right to challenge by reason of the mechanism alone.

V. Virtual arbitration and the stages of the arbitral process

One court-based study has strongly suggested that the effectiveness of new technologies will be very dependent on the way the adjudicatory processes are modified to best accommodate them. In a study of Australian courts and their use of video, the researchers reported two major findings:[41]

> "*Firstly, the way in which video-link technology is implemented has a real impact on service delivery, and therefore justice outcomes; how video links are used, their design and operation, matters.*
>
> *Secondly, a successful video linked court encounter requires careful consideration of the technology, environments, personnel, protocols and legislation that enable their use. These factors work together and none of them should be ignored or viewed in isolation. The type of the remote participant, the reason for their remote participation, and the nature of the remote space from which they appear, are key factors in determining the way in which these components should be configured to achieve the best results (…)*"

These findings should lead arbitrators to accept that with their first experiences, they are less likely to be expert at managing the processes or dealing with nuances in the challenges that arise. The balance of this editorial considers some of the more significant practical steps that might be utilised throughout an arbitral process. As always, the guiding criteria should be ensuring fairness and equality on the one hand and promoting efficiency wherever possible.

A. Preliminary conferences and cyber-protocols

A pre-hearing conference should cover all aspects of technological preparedness. Normally that might be limited to counsel but could instead consider bringing in necessary users such as

[41] E. ROWDEN, DAVID TAIT, DIANE JONES, ANNE WALLACE & MARK HANSON, GATEWAYS TO JUSTICE: DESIGN AND OPERATIONAL GUIDELINES FOR REMOTE PARTICIPATION IN COURT PROCEEDINGS 10 (2013).

parties, key witnesses, and interpreters or stenographers to confirm equipment and protocols. The tribunal might also need a technical manager to be involved.

There can be side benefits from logistical challenges. Providing instructions for online processes might allow tribunals to give parties better guidance as to the essence of the arbitral process. Instead of a pro forma Procedural Order No. 1 speaking primarily to lawyers, there could be better materials directed at a broader audience of stakeholders explaining the purpose of each step and the way they will be dealt with in an online format. It is always ideal to develop procedures in consultation with the parties, both to promote agreement wherever possible, and also to allow all stakeholders to bring useful insights into the analysis. Ideally, a tribunal would help the parties develop a cyber-protocol. A tribunal ought to explain to all participants the pitfalls and recommendations for virtual presentation. The ICC Guidance Note sets out a checklist for a cyber-protocol and suggested clauses on matters to be agreed or directed.[42] It is important that each participant has appropriate responsibility for certain aspects. For instance, it should be the responsibility of each party to identify any local laws that provide barriers to virtual proceedings.

While the need for adequate preparation is clear, conversely, it is also important to ensure that there should not be undue concern for technological matters. One could envisage situations where costs and delay are increased simply through debates about technological matters.

B. Equipment and equality

One challenge is to consider which platform works best for any particular dispute. If the arbitration is institutional, chances are that the particular institution has selected a particular platform. If that is not the case, the parties could be invited to seek agreement. Parties would hopefully wish to select a platform that integrates well with online document management systems.

In the absence of any other direction, arbitrators should at least consider the advantages and disadvantages of different alternatives. Tribunals should ensure that, if they make suggestions as to any platform or document management system, they are not liable for any defects. The parties themselves should ensure adequacy. At most, the tribunal should direct minimum specifications. Each platform will also have its own contractual conditions of use, which should be read by all and confirmed as agreeable.

Where parties suggest different platforms, there is a difficulty in having the tribunal make a selection if that means that a preference is given to a program familiar to one party but not the other. Choosing a neutral platform may simply mean that both parties face efficiency concerns. Selection of a platform should also not disadvantage a participant with less technological capability. An important question is whether parties have equal technological equipment and expertise. A related question is whether one party would need to purchase additional equipment and/or software and if so, how could such costs be accommodated within any ensuing arbitral award.

42 ICC Guidance Note, *supra* note 21, annex - I, II.

A protocol should direct the minimum standards of equipment, for example, barring any person from relying solely on smartphones. A protocol can include minimum standards of video bandwidths and upload and download speeds.[43] Wired or wireless and password protected internet connections could also be directed. Consideration needs to be given as to whether to mandate the use of headsets with microphones to maximise audio quality or allow parties their own preferences. Without headphones and microphones there is unlikely to be a perfect mix between sufficient distance to the camera for comfortable and wide-ranging vision and closeness for audio clarity. If multiple devices are being used, it is important to ensure that only one is ever un-muted. Volume should be set to avoid audio feedback. Ideally, participants should try and avoid natural light in the room.

Participants should confirm suitable equipment and test it.[44] They should confirm that directed alternative mechanisms are properly established and that privacy and agreed confidentiality are to be maintained. Parties might promise each other that all necessary tests have been undertaken prior to a formal hearing. A tribunal might direct the parties to undertake training programs provided by commercial platform sources. Alternatively, a test run could be organised by the tribunal or by the hearing administrator. Such tests should cover all potential steps that might be taken during the proceedings. Guide notes should be provided as to how to deal with all key processes. If at all possible, a test session could have everyone available at one time and work through a checklist of potential steps that might be taken during the hearing itself. Aspects that may need to be tested include means of displaying multiple screens, screen sharing, audio muting, transfers between waiting, hearing and breakout rooms, document access, communal chats, inviting non-participants, and control panel features generally.

C. Control

Platforms will typically have a host with controlling powers, which should, wherever possible, be the presiding arbitrator or a secretary or a hearing administrator under the presiding arbitrator's control.

There is a need for identification and log-in details of all relevant persons whether tribunal, parties, counsel, fact and expert witnesses, interpreters, transcribers, and technical and support staff. Any platform selected must allow for proper verification of the identity of participants. The host should monitor participants, being able to note when each is offline or online, to ensure that the required persons are indeed available. Once all designated persons are in attendance, the tribunal may lock the meeting. The tribunal will also need to have sufficient technological control over the processes, for example, being able to mute parties when appropriate. It may be difficult to ensure proper sequestration of future witnesses, if that is ordered by the tribunal, but thought should be given to how best to do so. All proposed attendees should have notified the tribunal of their intentions and modes of access prior to any hearing.

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43 *See, e.g.*, Korean Commercial Arbitration Board (KACB) International, Seoul Protocol on Video Conferencing in International Arbitration 2020, art. 5, annex. - I, *available at* http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024 [*hereinafter* "Seoul Protocol"]; ICC Guidance Note, *supra* note 21, annex. - II.

44 ICC Guidance Note, *supra* note 21, app. II, cl. II, IV.

Whatever processes are selected, it is important to consider what might go wrong. The first and simple step addressed above is to test any hardware and software prior to formal use in the proceedings. There still needs to be a speedy method to notify a lack of connection as soon as it occurs. Reports via email should be sent to all registered participants. Often, connection problems are not black and white, and may simply arise from delays in the process or human error in clicking the wrong button. It may be appropriate to have a designated period before connection failures are reported. Where faults arise because of the inexperience of stakeholders, expert platform managers can often view multiple screens remotely and talk users through what is required to regain access. Ideally, parties might agree on a fallback platform or teleconference link to ensure minimum downtime, should there be problems with the primary platform. The Seoul Protocol on Video Conferencing in International Arbitration ["**Seoul Protocol**"] proposes that parties maintain similar "*cable back-ups, teleconferencing, or alternative methods of video/audio conferencing*".[45]

It is appropriate to have a waiting room as people log on so that the tribunal can admit all participants to the hearing room concurrently and not be in a position of being seen speaking to one side alone. After parties are in breakout rooms, there again needs to be a mechanism to have all parties return to the hearing room at the same time. If there are to be breakout rooms, there need to be mechanisms to ensure that there is no inadvertent access by unauthorised persons.

The parties should make clear that they agree to the tribunal's discretion to terminate a virtual hearing if it is believed that the current process is unfair to one of the parties.

D. Etiquette

Some unique etiquette issues may need to be addressed. It is important to set etiquette standards and ensure that the tribunal is indeed acting as the master of ceremonies.[46] For example, online hearings will tend to find people speaking over each other without intending to do so. Participants should not attempt to multitask such as checking emails. It is useful to turn off other computer applications not needed for the hearing. Computers used for the video link should not be used for other purposes such as making notes.

E. Cybersecurity

Normally one would expect the parties to organise all logistical details at the tribunal's directions. However, one area where tribunals have quickly come to understand that they have new duties is in relation to cybersecurity. There are three elements to cybersecurity. The first is compliance with any applicable domestic data privacy regulations. Participants in arbitration should be aware that they may have obligations under domestic data protection laws regardless of the arbitration obligations themselves.[47] The parties should be asked to indicate whether there are any such provisions that are relevant. The second aspect is the privacy of the arbitral process itself. The parties should expressly confirm that proceedings are private. The third is the protection of confidential information made available during the process.

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45 Seoul Protocol, *supra* note 43, art. 6.2.

46 ICC Guidance Note, *supra* note 21, cl. 4.

47 INT'L COUNCIL FOR COM. ARB. & INT'L BAR ASS'N, THE ICCA-IBA ROADMAP TO DATA PROTECTION IN INTERNATIONAL ARBITRATION – PUBLIC CONSULTATION DRAFT FEBRUARY 2020, *available at* https://www.arbitration-icca.org/media/14/18191123957287/roadmap_28.02.20.pdf.

There may also be problems if there is to be improper recording by any of the participants. Thought needs to be given as to whether online proceedings shall be recorded or should, in due course, be transcribed. Recordings must be promptly distributed to all appropriate persons. A tribunal is in a difficult position if one party wishes to separately record proceedings but the other opposes that option. It is important to have appropriate confidentiality obligations formally agreed to.

If electronic documents are confidential, they would need to be password protected. Passwords should be provided by a different mechanism to the email invitation to the platform. Calendar invites should not give access to information in an unsecure form. Members of each team need to ensure that passwords shared with others are done so in a secure fashion. Another possibility is to connect through a virtual private network.

Some platforms have already admitted that they were, temporarily at least, insufficiently secure. Arbitrators need to keep up to date with such information, in particular to avoid recommending a platform that allows for such problems. A tribunal must, at the very least, ensure that online communications between a three-person tribunal and/or a draft of procedural orders or awards are totally secure.

F. Timing

Differing time zones must always be considered, and tribunals should seek to ensure that no single party seems to be significantly disadvantaged. Tribunals should even be alert to how they describe time, given that there will be differing time zones represented.

Time allocated to virtual hearings should allow for some degree of administrative delay, confusion, or human error. As participants are likely to be doing other things on relevant days, there is a greater risk of persons misjudging commencement time. The tribunal should indicate how much before the scheduled start time persons must log on. Given the greater potential problems with online proceedings, the common practice of having a reserve day or two for oral hearings seems sensible, although catch-up may not be needed as promptly. The time devoted to online proceedings may also need to take into account people's attention span. Where chess-clock arbitration is being utilised, it ought to be possible to have a common stopwatch displayed.

G. Mediation and settlement

The optimal solution to most disputes is a mutually agreeable solution. Proactive arbitrators will often think about how to encourage settlement, either by inviting direct negotiations or via mediation. Some arbitrators will encourage parallel mediation, either to obviate the need for an award or to deal with discrete aspects that do not justify the expense of arbitration. This may even be done to deal with certain procedural aspects such as disputes over document production. Arbitrators active in this manner should give the same consideration to the benefits and pitfalls of online mediation as they would to an online arbitration itself. There must be some added barrier to a negotiated solution if counsel and parties are not drawn together at the time of the hearing, perhaps discussing matters in the corridors and looking for a mutually agreeable

solution, as they see arbitral costs escalate.[48] A proactive tribunal can at least invite parties to have regular conversations exploring such possible avenues.

H. Ethics and ODR

Differences in views about ethics may come to the fore with certain questions about online preparation and behaviour. Arbitrators must be prepared for the fact that a small but not insignificant number of parties might engage in unduly aggressive tactics for strategic purposes. Sometimes such behaviour seeks to escalate costs that would be more damaging to one's opponent. In other circumstances, a party who expects to lose may seek to draw out proceedings as long as possible. Contests as to the use of new technologies can be a fertile ground in which to try and manipulate the process in that way. There is the potential for parties to call for delays and extensions simply as a result of the pandemic and rely on claims of technological failure. It may be desirable to utilise a commercial manager, particularly if they can accurately determine whether any breakdown is legitimate or not.[49]

On the other hand, it is important to not generate undue ethical concerns about matters that also permeate live hearings, for example, the possibility of unauthorised secret recordings, which any unscrupulous counsel can do in an in-person hearing with a smartphone.

I. Document management

As noted above, it would be desirable for the virtual platform to work well with the electronic management of documentation. Given that physical bundles may not be available in each key place, some special concerns may need to be addressed. Methods of identifying documents should be the most efficient for actually accessing electronic data management platforms. Thought should be given as to how to access more than one document at any point in time, particularly when sourced from different avenues. Size of electronic document files is also important. If too large, it can be difficult to manage or even send via email. Effective document management also must involve integration of written submissions. Arbitrators need to be able to link to necessary supporting material with ease. If presentation slides are to be used, these also need discrete visuals that do not override the views of key faces.[50]

J. Witnesses and cross-examination

There are two elements to cross-examination within ODR. The first, alluded to above, is whether a denial of the right to cross-examine in the same room is somehow a denial of the right to fully present one's case or is contrary to general procedural models that do not express a position either way. The second element is, if cross-examination in ODR is not proscribed, what

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48 Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22–23 May 2016*, 3 INT'L J. ONLINE DISP. RESOL. 4, 7 (2016) (Carrie Menkel-Meadow notes the value in face-to-face procedures providing "room to brainstorm and create a different solution, give an apology, come to understand someone else's perspective and improve, rather than just 'resolve' relations and disputes.").

49 In addition to the question of counsel ethics, even arbitrators might benefit from thinking about their own efficiency obligations. Arbitrators with the busiest practices that have been disrupted by the pandemic will need to carefully consider their ethical obligations when rescheduling hearings. One systemic concern might be that the busiest arbitrators may feel able to take on even more work in the hope that they can sneak the odd witness in-between other time-consuming activities.

50 At the end of a normal hearing, it is easy for the party owning documents to remove them and deal with them as they wish. If physical documents have been delivered to opposing witnesses and counsel in a virtual hearing, steps might need to be taken to ensure proper disposal.

is the way for a tribunal to structure any virtual witness process to promote fairness and efficiency and minimise the chances of any due process challenge.

As to the first, it was suggested above that an online dialogue is indeed a 'hearing' and is also 'oral.' More debatable is whether that is also 'in person.' The better view should be in the affirmative. Nevertheless, those seeking to argue the contrary, might gain support from unlikely sources that would perhaps be misused in this context. Without referring to video evidence, Born suggests that "*it is almost uniformly accepted and reflects sensible policy: the opportunity to present its case, in person and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected*".[51] He also notes and criticises contrary U.S. authority that would readily allow video evidence under the concept of an oral hearing.[52] Confusion remains, as the logic in that case can indeed be criticised. The Court suggested that an arbitrator "*hears evidence by providing a 'legal hearing,' that is, by affording an 'opportunity to … present one side of a case'*". This is obviously going too far in the other direction – allowing a documents-only hearing when an oral hearing has been called for.

The better view remains that a properly conducted online cross-examination should be acceptable. Other courts have also supported video cross-examination,[53] including the Indian Supreme Court.[54] Those more reluctant have suggested that physical presence before the adjudicator and one's opponents supports an understanding of the solemnity, gravity, and importance of truth-telling.[55]

During the pandemic, any solution must also be compared to alternatives. Written questions and answers seem an undesirable alternative as one would expect that answers would simply be

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51 BORN, *supra* note 35, at 2266.

52 Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 656 (Cal. Ct. App. 1995) (U.S.) ("… the arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required." "Legally speaking the admission of evidence is to hear it.").

53 *Polanski v. Condé Nast Publ'ns. Ltd.* [2005] UKHL 10, [13] (Eng.) (the U.K. House of Lords did not consider that video conference cross-examination was itself prejudicial); *see also* Ian McGlinn v. Waltham Contractors Ltd. & Ors. [2006] EWHC 2322 (TCC) (Eng.). Canadian courts have also been receptive. *See, e.g.*, the Ontario Superior Court in Arconti v. Smith, 2020 CanLII 2782 (Can.) and Chandra v. CBC, 2015 CanLII 5385 (Can). In Australia, consideration is directed towards what will ultimately "best serve the administration of justice… [whilst]... maintaining justice between the parties." *See Kirby v Centro Props.* [2012] FCA 60 (Austl.); *Tetra Pak Mktg. Pty Ltd. v Musashi Pty Ltd.* [2000] FCA 1261, ¶25 (Austl.) (wherein Katz J. concluded that there was "a strong current of authority in favour of permitting the relatively new video-link technology to be used, in the absence of some considerable impediment telling against its use in a particular case."); *Capic v Ford Motor Co. Australia Ltd. (Adjournment)* [2020] FCA 486 (in this recent case before the Australian Federal Court, Perram J. considered that while video cross-examination might interfere with "chemistry" and "formality," it was acceptable on the facts of that case). *See also* the Evidence (*Miscellaneous Provisions) Act 1958* (Vic) § 42G (Austl.) (which provides the minimum technical requirements that must be met before a court may direct that a witness give evidence by video-link).
Entitlement has been refused where the witness provided no reason for non-attendance and the evidence went to a key issue (*Campaign Master (U.K.) Ltd. v Forty Two Int'l Pty Ltd. [No. 3]* (2009) 181 FCR 152 (Austl.) [*hereinafter* "Campaign Master"]) or where the witness' evidence was highly controversial and required interpretation (*Stuke v ROST Capital Grp. Pty Ltd.* [2012] FCA 1097 (Austl.)).

54 State of Maharashtra v. Praful B. Desai (Dr.) (2003) 4 SCC 601 (India)(wherein the Court considered that when technology works well, credibility can be adequately assessed).

55 Campaign Master, [2009] FCA 1306, ¶ 78 (Austl.).

drafted by counsel. Alternatively, merely delaying proceedings will often breach duties of expediency and efficiency and can run into time-limits for awards.[56]

Some common law commentators suggest that arguments against the use of videoconferencing for cross-examination purposes seem stronger where issues of credibility are concerned. An important issue, then, is to consider more generally when and why the demeanour of a witness is relevant and if so, how can this be validly assessed by an adjudicator. Leggat J. in *Gestmin SGPS SA*[57] considered that in commercial cases, little reliance should be placed on witness recollections, and instead, factual findings and inferences should be drawn from documentary evidence and known or probable facts.[58] There also remains a healthy debate as to whether questions going to credibility alone are appropriate for international commercial arbitration on all but the rarest of occasions. Many would argue that general challenges to credibility, where it is not otherwise an obvious issue, are less appropriate for arbitration. Human beings do particularly badly on psychological tests directed at discerning whether they can detect when a person is lying, so the presumption as to this supposed value of cross-examination is questionable.[59]

While there should not be successful per se challenges to video cross-examination unless the use of videoconferencing is expressly proscribed, there are a number of matters that should be considered by tribunals and counsel. Witness preparation has an added dimension whereby counsel should familiarise witnesses with the technology to be employed. Experienced counsel might be concerned to have adequate visuals both as to the witness and also as to the tribunal, to gauge the latter's reaction to the flow of the discussion. A related question is whether the camera must be on each arbitrator at all times so that counsel can view their facial reactions as an element in optimising submissions. The ability of counsel to evaluate the body language of witnesses and the receptiveness or otherwise of a three-person tribunal may also be impacted by whether the tribunal sits in one place, with only two screens to be viewed by counsel or instead, is fully separated. Where common law style cross-examination is concerned, there may potentially be greater difficulty in assessing body language depending on the technological quality and set-up, any technological delay that breaks the flow of questioning and even slight but annoying delays between the audio and the video. All can adversely impact the ambience of the process.[60] Live text may assist the process when there is any diminution in the quality of the audio output. Expert witness conferencing (sometimes described as 'hot-tubbing') is likely more problematic where all persons are physically separated.

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56 Domestic courts have supported video-link because of logistical difficulties of bringing witnesses and their attorneys from one country to another (Dist. Ct. of the D.C. in U.S. v. Philip Morris USA, Inc., Civ. App. No.- 99-2496 (GK), 2004 WL 3253681, at *1 (D.D.C. Aug. 30, 2004) (U.S.) or because of the inability of witnesses to travel for health reasons. These circumstances were seen as constituting "*good cause*" and "*compelling circumstances*" (Dist. Ct. of Conn. Sawant v. Ramsey, No. 3:07-CV-980 (VLB), 2012 WL 1605450, at *3 (D. Conn. May 8, 2012) (U.S.). In the Singapore International Commercial Court case of Bachmeer Capital Ltd. v. Ong Chih Ching [2018] S.G.H.C. (I) 01 (Sing.), the Court permitted one witness to give evidence by video link on the grounds of inability to obtain passport and permission to travel to the place of hearing.

57 Gestmin SGPS SA v. Credit Suisse (UK) Ltd. & Anr. [2013] EWHC 3560 (Comm) (Eng.)

58 *Id.* [15]–[23].

59 See ROBENNOLT & STERNLIGHT, *supra* note 6.

60 To many civilian scholars and practitioners, this is less a problem with the medium than a pointer to the problems with cross-examination per se.

If the tribunal would normally administer an oath or seek some affirmation of truthfulness from a witness, consideration might also be given to asking the witness to affirm that no unauthorised communication would take place and no unauthorised materials would be accessed during their testimony. If oaths or affirmations are to be utilised, care should be taken to ensure that local law does not negate an online form. The relevant witness should also have ready access to the required documentation if some is needed.

An important aspect is to ensure that no party gains improper assistance when utilising video or phone connection for cross-examination purposes. Natural responses are to organise dual cameras to show both the room and the witness, and ideally, where circumstances permit, to have an observer from the opposing party's camp or at least from a neutral source, to ensure no improper assistance is given in answering questions. Neutral observers are, of course, problematic in the time of COVID-19. Institutions in one jurisdiction could invite those in others to host witness cross-examination to ensure integrity. Parties should agree that the tribunal may take whatever steps it wishes to ensure proper security. Given that witnesses should not have notes when being cross-examined, other than the authorised ones, it is preferable that they give evidence in front of a computer on a clear desk. Venues for witness cross-examination might be directed to be neutral.[61] Conversely, witnesses may feel more comfortable when in their own natural environment. They may feel less intimidated than they would with the plethora of counsel often present in significant-sized arbitrations.

There is also an issue as to how cross-examining counsel presents a document to a witness during cross-examination. It is important for the tribunal to establish a process that allows key documents to be considered at the same time that witnesses are cross-examined about them. Separate cameras or split screen programs must all be optimised for this to occur. Physical bundles may suffice, or a technician might be utilised to *send* documents to all necessary screens. Opposing counsel who wish to put hard copy documents in front of the witness being cross-examined might send the hard copies in a sealed envelope to be opened on camera.

It would be unfortunate if witnesses seem more engaging if they are better able to concentrate on the camera point than on the screens where the listener is visible. Ideally, a camera can be placed mid-screen so that one appears to be looking directly at the listener. A tribunal might even indicate a protocol as to how far away one should be from the screen to ensure that all witnesses and counsel are at an optimal distance and do not look too different in approach. Even identical background protocols for witness examination might be desirable. With some platforms, there is also the potential to digitally enhance one's image. This should be barred. A related issue is whether the cross-examining counsel can call for the witness to position themselves closer to the camera so facial expressions can be better gauged. Arbitrators who believe that they would never be affected by such differences could readily find respected general psychological studies as to human biases that at least suggest contrary hypotheses.

K. Translation, interpreters, and stenographers

The need for interpretation and translation slows down hearings in any event. Cross-examination via an interpreter can be even more problematic when videoconferencing is concerned. There is

[61] *See, e.g.*, Seoul Protocol, *supra* note 43, art. 2.1(c).

a need to consider whether translation will be simultaneous or consecutive. Interpreters and transcribers are particularly disadvantaged when different people attempt to speak at the same time. Interpreters and transcribers would need a discrete method of communicating with the tribunal. If live transcript is to be utilised, it is preferable to display it on a different device to that which is used for visuals.

L. Oral submissions

Regardless of the potential for ODR, tribunals should consider the utility of oral openings and post-witness closing oral submissions. As to oral openings, it is problematic to hear counsel outline a case for many hours and sometimes days, if the tribunal is properly prepared, has read all written submissions and witness statements, and simply wishes to hear the results of testing of the witness testimony and orally explore matters of remaining uncertainty. Similarly, if post-hearing written briefs are to be allowed, only the briefest oral recap of matters considered at a hearing would seem worthwhile. In some cases, an earlier opening might allow all parties to carry out their preparation more efficiently.[62]

Another potential scenario discussed above is where one party's counsel can be present, but the other's may not. It was suggested above that this is problematic either way. The choice is between the appearance of favoured circumstances for one versus lowest common denominator for both.

M. ODR and side-communication and consultation

Due process and a full opportunity to present one's case should include adequate means for separated parties and counsel to be able to regularly confer before, during, and after proceedings. During proceedings, there ought to be separate secure communication platforms. Some platforms provide for virtual breakout rooms that are password protected and with their own videoconferencing options. Counsel in different locations may need some form of distinct communication mechanism to provide thoughts and suggestions for further questions or submissions. If counsel, parties, and advisers are discussing matters remotely, perhaps by chat rooms, a tribunal may need to give them time to allow comments to be read and synthesised where concurrent links are unavailable. There may also need to be channels for communication between opposing counsel. Some platforms may not allow for arbitrator chat, requiring instead that parties be put into a waiting room while the tribunal wishes to confer.

Each team should indicate exactly what method they seek to use for private communication. Only methods approved by the tribunal should be permitted. Chat windows with the tribunal should be open to all and there should be no ex parte communications with the tribunal or between counsel and witnesses during their testimony. Tribunals should direct that there be no communication with witnesses during breaks in cross-examination. Because breaks in technology might be inadvertent, such warnings should be given at the outset of each witnesses' testimony.

Where counsel wishes to object to a question, it would be desirable if there was a simple flagging method, otherwise parties would be speaking over each other.

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[62] 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.

N. Costs

Tribunals may need to consider how to deal with disparate technology costs between the parties. Proportionality principles dealing with value and complexity may then be further impacted by both the level of technology costs and any disproportionate distribution.

O. Deliberations and awards

Where three-person tribunals are concerned, there may well be a difference between the interpersonal communication when all are temporarily living in a neutral venue, for example, dining together regularly, as opposed to the more remote ambience of online proceedings from separate locations. It is not clear whether the likely lesser interpersonal connection has any meaningful impact on the justice or otherwise of the outcome. Technology can still allow tribunals to regularly confer as to the progress of the hearing.

Tribunals will need to be careful about the rules for signature of hard copy of awards, whether members of the tribunal can sign counterparts in different places or electronic signatures will suffice.

VI. Conclusion

Some criticisms of online hearings flow from views about optimal procedure that are themselves subject to dispute, particularly as between different legal families. For common law advocates trained to test credibility in cross-examination, anything other than the face-to-face theatre of experienced Queen's Counsel against inexperienced fact and expert witnesses is problematic. Conversely, the more proactive a tribunal, the more likely that online processes can achieve most of what face-to-face hearings can do and can, in turn, save time and expense. Importantly, for significant-sized arbitrations, those typically in the tens of millions of dollars and above, the parties must be able to access the most sophisticated video technology that negates the most simplistic challenges about body language and visualisation of witness behaviour. In the short term, whatever one's philosophical views, necessity will be the mother of invention. We can all strive to also make a virtue of that necessity and continually work towards ever more efficient and fair arbitral processes. In this case, by using the best that technology has to offer to question and improve upon traditional processes.