

NYSBA

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# New York Dispute Resolution Lawyer



A publication of the Dispute Resolution Section  
of the New York State Bar Association

## Viral Changes in ADR During the Pandemic



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# Message from the Chair

Here we are together and alone in the epicenter of a pandemic. It is a moment of universal grief and challenge. We are full of sorrow and at the same time full of admiration and amazement at the willingness of medical workers, grocery store workers, sanitation workers, first responders, and delivery people to literally risk their lives to keep us safer. And we have shared the experience of trying our hardest to minimize that risk by isolating from our friends, colleagues, and loved ones and following the rules imposed by an invisible virulent threat. We have not just learned but experienced the reality that we are all connected. We are connected with the people we don't think about near and very far and with the people we always think about and love. Now what?



**Laura Kaster**

In the last decade and perhaps longer, participation in groups, including the organized bar, has been undermined by the burden of enormous work demands and effort to balance family life. We have all been bowling alone. But now that we have been truly alone and sometimes lonely for our colleagues and in need of professional support, there is a special role for our Section and association, which began in 1876, two years before the ABA (also born in New York), as an association primarily for solo practitioners. We have all been solo and have needed each other more than ever.

Let us use this inflection point. We cannot fulfill our powerful desire to return to the old normal; so let's meet the reality we face and create a resilient, more equitable and diverse future for us, for our profession, for the rule of law, and for access to justice.

I am proud to be a member and now Chair of a group of dispute resolvers dedicated to professionalism and willing to perceive and address evolving needs and demands. Arbitrators and mediators and administrative organizations have accepted the challenge of transforming practices to provide online and video conferenced solutions with a speed that is astounding and outstrips the profession as a whole. We, as a Section, with amazing help from the NYSBA, have been very active in assisting in this transformation and remaining attentive to the needs of the court system and the public. We will continue and increase these transformative efforts. We must

remain mindful that radical societal changes do not advance the cause of equality and diversity unless we focus on making that happen.

New York State has a diverse population but our dispute resolver community does not begin to reflect that diversity. In June, the Dispute Resolution Section proudly sponsored the Commercial and Federal Litigation Section's 2020 Women's Initiative Task Force Follow-up Study. The report recognized the serious and substantial efforts made by dispute resolution providers and organizations to expand the opportunities for women and minorities in ADR. We all have to do much more. ADR is behind an already sluggish performance in the rest of the Bar.

We must use our dispute resolution skills to disrupt the unconscious impediments that have prevented us from realizing our conscious commitment to equality and inclusion. We literally have to create a brainstorm. The section redoubles its commitment to making inclusion and advancement of diverse neutrals a priority.

Meeting now online is not the same as in-person contact but provides us with a chance to increase participation around the state. We can have social interaction that we crave and support each other even while at a distance. We can foster newer neutrals, greater diversity, and provide assistance to the Presumptive ADR programs that the New York Courts are focusing on and flatten the curve of backlogged cases and the expected new flood of pandemic related claims. We will continue with our extraordinarily fine programming and bring our skills to the special needs that face us.

This Section has a history of great leadership. All of our former Chairs have remained active and generous contributors. Theo Cheng has been a stellar leader this past year. Everyone found him incredibly productive, organized, focused, and a joy to work with. I have been privileged to work with him not just in New York but also in New Jersey where he simultaneously led the first all ADR Inn of Court and was just awarded the NJSBA's Boskey Award for ADR Practitioner of the Year. I extend my personal congratulations and gratitude for all of his

energy, friendship, help to individuals and the profession, and I extend our collective recognition of true dedication and professionalism.

This coming year, in continuing our Section's many existing commitments, I hope to embrace challenge and with your help:

- Continue to foster meaningful inclusion in the Section and the profession of diverse neutrals and advocates
- Support the Presumptive ADR initiative in the New York courts through informational programming and dialogue with the courts and providing advocate and mediator trainings including more training for online and videoconferenced processes
- Increase the participation and reach of our programs and trainings to all regions of our Empire State and create a strong collegial network to counter professional and social isolation
- Promote wider appreciation of our Journal, *New York Dispute Resolution Lawyer*
- Encourage negotiation skills for advocates and create a negotiation culture to assist in anticipating and resolving disputes even before mediation.
- Encourage more universal appreciation of underlying ADR skills for advocates and corporate lawyers

through negotiation, mediation, and arbitration training for the lawyer's toolbox and also for service as neutrals state-wide

- Encourage and inform about opportunities for breaking into the field or enhancing opportunities by participation in programs for co-mediation or in court programs, and participation in industry panels throughout the state and through videoconferencing
- Engage over the year in a Section dialogue about the connection of ADR to the rule of law and access to justice, with an eye to addressing special issues and meeting needs that arise out of the pandemic and the Black Lives Matter initiatives.

We welcome to the Executive Committee our continuing leaders and newly appointed members listed on the endpage of this *Journal*.

With warm personal wishes for equal justice and your safety and health in the year ahead,

**Laura A. Kaster**

## NEW YORK STATE BAR ASSOCIATION

# REQUEST FOR ARTICLES

If you have written an article you would like considered for publication, or have an idea for one, please contact the Co-Editors-in-Chief:

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*Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.*



# Message from the Co-Editors-in-Chief



Sherman Kahn



Edna Sussman



Laura A. Kaster

This is an extraordinary issue for an extraordinary moment in history. ADR practitioners and institutions have had to rise to the challenge of a global pandemic, economic peril, and the rightful claim for racial justice. In this toxic mix, the court systems around the world have been faced with the explosion of claims just as they have had to adjust to the health and safety requirements and lockdowns imposed by the silent invisible threat. ADR neutrals have been able to migrate to remote and safe processes quickly and inventively.

This issue addresses some of the many substantive and procedural issues that will arise going forward both from the pandemic and associated health rules

and consequences and from the practical and process issues posed by a transition to mediating and arbitrating remotely.

We are proud to offer this content to all New York lawyers and beyond as a New York State Bar Association and Dispute Resolution Section public service. Many of the innovations discussed here can be used more generally and in differing contexts. Some will inspire more innovation. As representatives of the justice system, we can all increase our communications to alleviate disputes as early as possible, using negotiation, mediation, and arbitration to shorten the dispute cycle and get business back to focusing on employment and productivity.

NEW YORK STATE BAR ASSOCIATION  
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## Interview with Shervica Gonzalez, Winner of the Judith Kaye 2019 Tournament's Best Advocate Award

By Leslie Berkoff

Last year the Dispute Resolution Section's Mediation Committee developed an annual Mediation Tournament, which joins the Section's Judith Kaye Memorial Arbitration Competition, as signature events for the Section. These events are possible because law schools have recognized that education in dispute resolution is now central to legal education. Many law schools have concentrations, programs, and clinics in dispute resolution alternatives. In New York, the Presumptive ADR initiatives in the courts combined with the need to move to online processes during the pandemic emergency have also expanded the need for dispute resolution advocacy and practice education. The DR Section is grateful for the ongoing participation and commitment of our local law schools (and in the case of the Mediation Tournament, of national law schools).

This is an interview with Shervica Gonzalez. She was the winner of the Judith Kaye 2019 Tournament's Best Advocate Award, was on the New York Law School team that took third place in the 2019 Mediation Tournament and was a coach for the New York Law School 2020 mediation team that took third place for their position statement at the NYSBA's Second Annual Mediation Tournament this year.

This interview with the extraordinary woman who participated in both competitions is intended to highlight her accomplishments and give practitioners an inside view of what these competitions mean to the participants.

**Q: Welcome, Shervica. How did you get involved in these programs?**

**A:** New York Law School offers a broad and varied array of experiential learning opportunities to students. These opportunities include joining competitions teams. Students are able to pick competition teams which coincide with their interests. My interest in the field of Dispute Resolution led me to join New York Law School's Dispute Resolution Competition Team and to commit to the Judith Kaye Tournament, and again, the Mediation Tournament. I also serve as a student liaison on the Executive Board of the NYSBA's DR Section Mediation Committee.

**Q: What was your experience in participating in these events?**

**A:** I work full time during the day and I was unable to participate in many of the clinics and internship opportunities provided by my law school. These events allowed me to expand both substantive knowledge and practical skills. A highlight of participating in each event is the preparation (you learn so much) and the invaluable candid critique from the judges. However, the best part is you walk away from the event with a better understanding of the ADR process, a better understanding of an area of the law, equipped with skills to be a better advocate, and the potential to be a better neutral.

**Q: Can you share some example of skills you developed?**

**A:** One very critical thing I learned was the importance of being an active listener; although we had fact patterns with built-in limitations it was interesting to see how competitors shaped (and sometimes reshaped) the facts to present their case. It was incredibly important to actively listen and be ready to throw out your theory of the case if your opponent reshaped the facts in a way you were not anticipating.

With respect to the Mediation Tournament in particular, receiving confidential information as the Tournament progressed created enormous challenges as did learning how to co-mediate with someone I had not worked with previously.

The Mediation Tournament, unlike the Arbitration Tournament, which is more closely aligned with an argument format (similar to presenting an argument either in class or in other clinical settings), provided an opportunity for participants, who generally had no mediation experience, to learn about the mediation process and practice client centered advocacy. This changed my entire understanding of mediation.

Before the Mediation Tournament, I had the notion that mediation could only work in certain practice area, i.e., family law. However, after participating in the event, which included several business centric problems, I realized that mediation could be a cost-friendly resource for many of the issues that arise in a wide variety of areas in-





cluding entertainment law, employment law, commercial law, landlord tenant, or even real estate disputes.

I found that the pliability of ADR makes it a great resource for individuals (and businesses) who would be adversely affected or prohibited from resolving disputes by the costliness of litigation.

**Q: Would you recommend participation to other students?**

**A:** Absolutely, first and foremost it is a ton of fun and an incredible opportunity to apply what is taught in law school classes because you are placed in simulated real-life experiences. In the Mediation Tournament, you have an opportunity to be an advocate, a neutral, and a client; this type of training is invaluable. Furthermore, the feedback from seasoned practitioners is priceless.

**Q: Would you recommend that law schools that have not yet fielded teams consider doing so?**

**A:** As many jurisdictions pivot towards presumptive ADR it is imperative that law schools provide adequate training in ADR. I do caution that preparing for the tournament or competition requires a lot of time and hard work. It includes: legal research, writing a brief/memo, collaborating with teammates (and co-mediators you are meeting for the first time), and practicing client-centered

advocacy. The work is intense but the events provide substantive training that is akin to an internship or clinic.

Hopefully these strong takeaways will encourage students and law schools alike to continue to support these events going forward.

The DR Section extends again its congratulations to Ms. Gonzalez and to the other participants of these important events and looks forward to putting both of these events on again in person or if necessary by videoconference.

---

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## COMMITTEES

Committee on Attorney Professionalism

### Award for Attorney Professionalism

This award honors a member of the NYSBA for outstanding professionalism – a lawyer dedicated to service to clients and committed to promoting respect for the legal system in pursuit of justice and the public good. This professional should be characterized by exemplary ethical conduct, competence, good judgment, integrity and civility.

The Committee has been conferring this award for many years, and would like the results of its search to reflect the breadth of the profession in New York. NYSBA members, especially those who have not thought of participating in this process, are strongly encouraged to consider nominating attorneys who best exemplify the ideals to which we aspire.

Nomination Deadline: **October 30, 2020**

Nomination Forms: **[NYSBA.ORG/ATTORNEYPROFESSIONALISM](https://www.nysba.org/attorneyprofessionalism)**

## Moving Your Mojo Online

By Elayne E. Greenberg

### Introduction

This column will suggest how neutrals can move their dispute resolution mojo with them when they are providing dispute resolution services online. For those neutrals who have yet to cultivate their own mojo, this column will provide some insight into how to do so. Merriam Webster has defined mojo in relevant part as a “magical power” or “charm.”<sup>1</sup> Mojo has also been described as the *je ne sais quo*, making it hard to define. Ironically, even though our mojo is such an integral part of our effectiveness as neutrals, there has been little discussion about dispute resolution mojos until now.

When the pandemic nudged<sup>2</sup> neutrals to move our dispute resolution offices to virtual rooms, experienced neutrals, including many of you and this author, seized the moment and prepared for offering our dispute resolution services online. We’ve sat through countless webinars until we were Zoom-fatigued, learned the technology, familiarized ourselves with fresh-off-the-press online guidelines from private providers and the courts, read informative articles including the ones in this magazine, and may have even conducted a mediation or an arbitration online. Phew! By anyone’s standards, it sounds as if we have satisfied the ethical parameters for competence.

Taking a closer look, we see the term “competence” has not been fully defined in the ethical codes for arbitrators<sup>3</sup> and mediators.<sup>4</sup> For example, the American Bar Association’s Code of Ethics for Arbitrators in Commercial Disputes provides in relevant part:

**CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS**

B. One should accept appointment as an arbitrator only if fully satisfied:

(3) that he or she is competent to serve;<sup>5</sup>

Providing a somewhat fuller explanation of what constitutes competence, the American Bar Association’s Model Standards of Conduct for Mediator states:

**STANDARD IV. COMPETENCE A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties. 1. Any person may be

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selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively. 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation. 3. A mediator should have available for the parties’ information relevant to the mediator’s training, education, experience and approach to conducting a mediation.<sup>6</sup>

In everyday practice, these ethical codes have been used only as a jumping off point to assess the “competence” of a neutral. Pragmatically, however, competence has been more commonly interpreted to include a variable combination of formal skills training, subject matter expertise and actual experience.

Despite all the preparation neutrals have done to competently shift to online practice and satisfy the ethical benchmark of competence, many neutrals are still experiencing a certain amount of trepidation that they haven’t experienced in their in-person dispute resolution practice. What is missing? How could they have prepared better to transition their dispute resolution services online?

## What is your dispute resolution mojo?

In the dispute resolution context, your mojo is the inner confidence that the neutral exudes that reassures disputants that they have made the right choice in selecting you as their neutral. A neutral's mojo centers the neutral and helps define them. Furthermore, a neutral's mojo brings a shared benefit to the neutral and the neutral's dispute resolution participants. A benefit to the neutral, a neutral's mojo frees you from any self-consciousness about your own competency as a neutral. A neutral's mojo allows the neutral to listen and engage with undivided attention, because your mojo helps the neutral feel confident in his ability and skills as a dispute resolution professional. This confidence helps foster trust disputants and their attorneys have for the neutral and to reassure that the neutral's engagement with them is about them, not the neutral. Without your mojo, you, as the neutral, are diverting energy, energy that is more appropriately spent on focusing on the disputants themselves and the matter at hand. Therefore, you need your mojo to lose your self-involvement and instead refocus on reading the verbal and non-verbal communications of dispute resolution participants, a central component of a neutral's role.

In many ways, each neutral's mojo is exuded somewhat differently. A neutral's mojo may be communicated by the way the neutral views the neutral role, conducts the process and engages with the participants. By way of illustration, some neutrals exude their mojo through their formal, no-nonsense approach to dispute resolution. Other neutrals exude an informality about the process, confident that most disputants will get to resolution at their own pace. Still other neutrals' mojo is all about empathy for the disputants.

Another way that a neutral exudes their mojo is in the design choices made regarding the physical space where the neutral provides in-person dispute resolution. The design choices in a neutral's physical space, like other mojo communications, reinforce the personal/professional boundaries with which the neutral prefers to engage with the dispute resolution participants.

As one example, a neutral with a no-nonsense mojo is likely to have an office filled only with business-related décor such as professional awards and certificates. In contrast, a neutral with a mojo that exudes empathy is also more likely to have an office adorned not only with professional-related accoutrements, but also with photos that share glimpses of their personal life.

## What happens when you provide your dispute resolution services online without your mojo?

Many neutrals have shared their successful initial attempts to provide their dispute resolution services

online *without* the help of their mojo. Without the support of their mojos, some colleagues have acknowledged how disconcerting and distracting it was to see themselves online, even though their cases were successfully resolved. Colleagues shared how they were stymied by the inevitable challenges of verbal and non-verbal communications online when there was a delay between what was said and when it was received. Other colleagues have shared how neutrals have still bonded with their dispute resolution participants, by focusing on their courageous commitment to try mediating online.

During the pandemic crisis, disputants and their lawyers were appreciative of neutrals' efforts to resolve cases online. In that spirit, dispute resolution participants overlooked any neutral glitches or hesitations. Yet, such benevolence may be short-lived. As the delivery of dispute resolution services online become more common and competition among neutrals for business once again becomes competitive, many neutrals will want to move their mojo to their online services and recapture the persona that made them so successful in their in-person dispute resolution work.

## How do you move your mojo online?

The good news is that a neutral's mojo is transportable online with just a little effort. I offer two suggestions for neutrals to reconnect with their mojo when providing dispute resolution services online. First, neutrals should become fluent in virtual communication. Second, neutrals should redefine their online professional/personal boundaries.

### • Become fluent in virtual communication

An important step, a neutral's mojo will return online once the neutral develops a degree of comfort and proficiency with online technology so that the technology fades in the background and frees the neutral to focus their energies communicating both verbally and non-verbally with dispute resolution participants. In part, some of proficiency comes with practicing and mastering a platform like Zoom and having back-up modes of communication, just in case. An overlooked way of developing proficiency is for the neutral to conduct a self-study of their participation in *both* their engaging and tedious professional, social and familial virtual meetings. *What made you feel included in the conversation? Why was that particular online meeting like water torture? As you focus on participant's verbal and non-verbal communication from the head up, are you becoming more proficient in reading their communication? What have you found to help make your verbal and non-verbal communications effective in these online formats?* The answers to these questions will help you in your neutral role deepen your understanding of how you might exude

your mojo online when engaging with dispute resolution participants.

I confess, I was among those challenged about how to exude my mojo online. I followed many of the suggested ideas, determined to overcome this challenge. Then, one day during a Zoom meeting with a collaborator, my colleague started to search for a pair of headphones to enable our communication. Without a pause, I reflexively reached out for the headphones next to me on my desk and started to share them with my colleague by passing the headphones through the screen! At that moment, I realized I had gained fluency in virtual communication.

### •Redefine your online personal/professional boundaries

When the pandemic forced us to shelter-in-place, many neutrals responded to the immediacy of the moment and moved their dispute resolution services online without giving much thought to whether their professional/personal boundaries were preserved in this online format. During that time, we have had the unprecedented opportunity to virtually peek inside our colleagues' homes, meet their children and see their pets. Some loved seeing and sharing their personal lives, while others were appalled at this boundary transgression.

Now is the time neutrals can rethink establishing personal/professional boundaries that are more consistent with your mojo. It is likely that your remote environment will remain at least one of the offices in which you conduct your dispute resolution serves. Embracing your mojo, do you prefer to have a virtual background that is neutral or do you prefer to have a remote background laden with objects that reinforce the professional you? Alternatively, you may prefer your remote background to disclose aspects of your personal life, family photos and all, because that is more consistent with your mojo.

### Conclusion

Given the positive reviews from those who have participated in dispute resolution online, it is highly likely that online dispute resolution will become a regular offering, rather than a momentary band-aid for the justice demands of the pandemic. What an exciting time! This column has focused on the importance of your dispute resolution mojo and how neutrals might retain their mojo as they move their dispute resolution service online. It's all about learning how the neutral makes the online experience a comfortable and familiar one for the neutral so that the neutral can be more effective with their dispute resolution participants. For those readers who have yet to develop their dispute resolution mojo, develop one. For those experienced neutrals who rely on their mojos for their in-person success, now you can move your mojo online. To paraphrase an old American Express advertisement, don't enter your remote office without it.

### Endnotes

1. <https://www.merriam-webster.com/dictionary/mojo>.
2. Sunstein and Thaler, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008).
3. [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/Code\\_Annotated\\_Final\\_Jan\\_2014\\_update.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/Code_Annotated_Final_Jan_2014_update.pdf).
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5. [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/Code\\_Annotated\\_Final\\_Jan\\_2014\\_update.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/Code_Annotated_Final_Jan_2014_update.pdf).
6. [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf).

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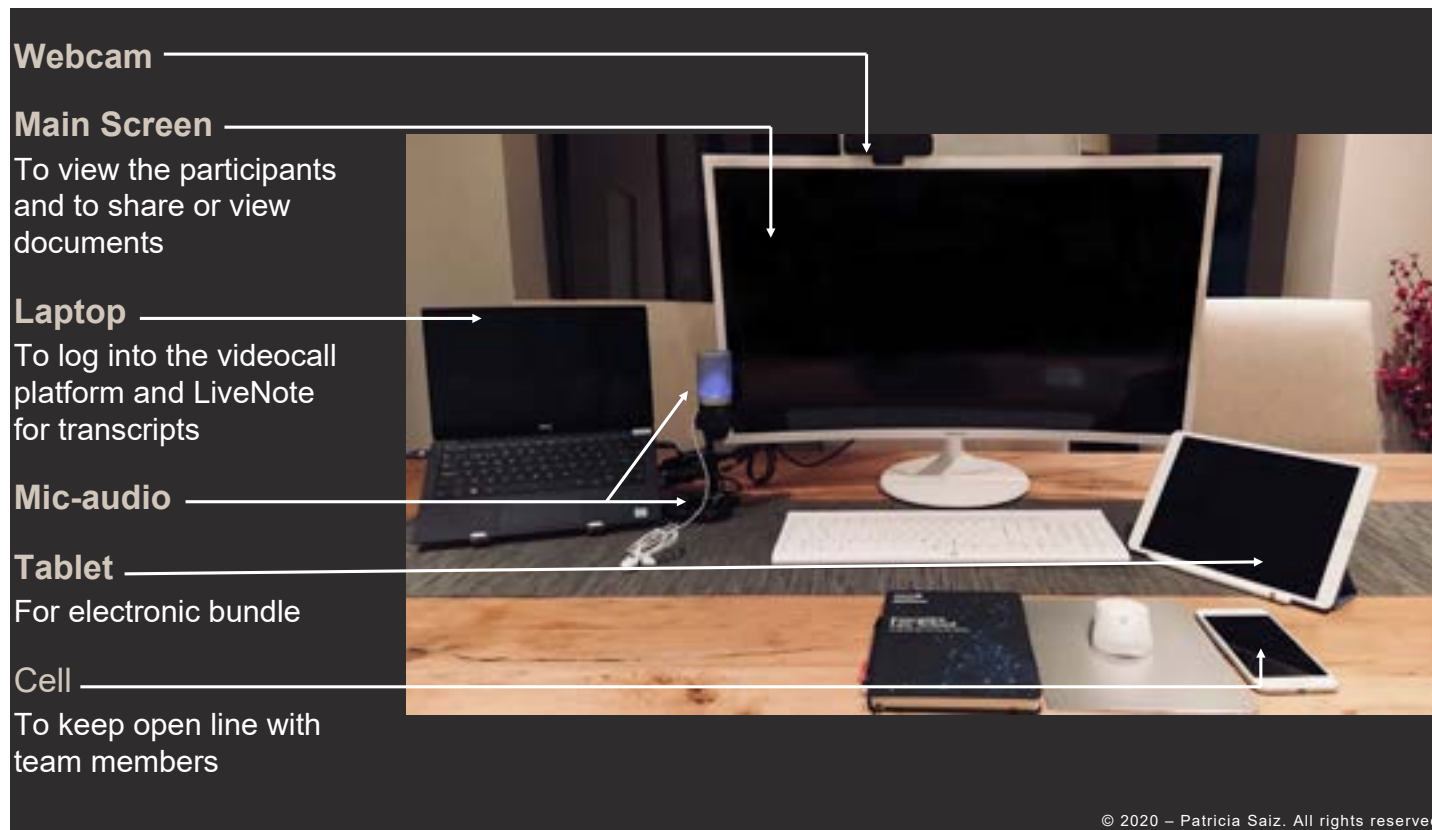
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## Practical Considerations for Holding a Remote Arbitration Hearing

James Hosking and Marcel Engholm Cardoso



It is not uncommon for portions of arbitrations to be held “remotely,” i.e., without all participants being in the same room. For years, procedural conferences, oral arguments and some witness testimony have been conducted using telephones and video platforms. But it has taken the COVID-19 pandemic to cause us to hold entire hearings remotely and, given social distancing restrictions, to do so where all participants (arbitrators, counsel, witnesses, court reporters, etc.) are attending remotely. Necessity is the mother of invention.

Although not always known for being enthusiastic about change, this is one innovation lawyers should embrace. There are undoubtedly benefits to remote hearings: reduced travel (with its cost, jetlag and environmental impact); potentially fewer calendar restrictions; and ideally more streamlined arguments. After all, our clients have been negotiating and closing complex deals remotely for years. But not all cases are suited to being held remotely. Arbitrators should carefully consider whether a remote hearing is appropriate and, if so, devise the best procedure to ensure it runs smoothly and fairly.

This article suggests some practical aspects of conducting a remote hearing—whether as arbitrator or counsel—that should guide one in deciding whether, and how, to proceed remotely. But the article is not intended to be prescriptive. Importantly, remote hearings offer a fresh opportunity to all participants to re-think what procedures may best meet the specific needs of the case.

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## Technological Considerations

The two most fundamental issues are the technological set-up and the choice of video platform.

### The Technological Set-Up

Whether as counsel or arbitrator, the practitioner should have enough devices to (a) see all participants; (b) hear the participants and any required interpretation; (c) see documents the parties project on-screen, as well as access soft copies of the record; (d) have a live-transcript feed; and (e) have an open line of communication with immediate colleagues. All of this *could* be accomplished with a single laptop. However, some additional equipment can vastly improve the experience.

The preferred set-up would have a separate screen or device for each of the aforementioned components, as seen in the photograph (above).<sup>1</sup>

Thus, in addition to a laptop screen, consider using an external larger screen or smart TV to see video feeds, a tablet to access documents or see the live-transcript, and a phone with a text message or WhatsApp group. Video quality can be improved by using a computer with a powerful graphics card, as well as an external HD camera. Using a headset improves audio quality and can be particularly helpful when separate audio channels are used for the witness and live interpretation. The headset may have a built-in microphone or, if possible, use an external remote microphone—do not rely on a laptop. Finally, a continuous and fast internet connection is essential. Rather than connecting to a wi-fi network, if possible, use a direct ethernet connection.

### The Platform

There are multiple products providing video-conference services, such as BlueJeans, Cisco WebEx, Microsoft Teams and Zoom. Consider whether the platform addresses the needs of the particular case, which may include (a) whether it supports the required number of attendees; (b) does it allow an additional channel for interpretation; (c) whether it allows for parallel break-out rooms; (d) and if it permits live presentation of documents, among others. Check carefully the security protocols available, bearing in mind that some countries, institutions or companies may have specific security needs. For institutional arbitrations, a decisive factor may be which platform the institution is familiar with and whether a tribunal secretary or case manager will be able to assist with logistics. In this respect, there is a wealth of knowledge amongst institution staff who have seen what works and what does not.

Importantly, access to the platform should be obtained early to allow everyone to get familiar with its operation. Whether arbitrator, counsel or witness, conduct a mock hearing to ensure you are fully prepared. Do so with enough advance time to remedy any problems.

## Considerations for Arbitrators

Technological challenges make early planning even more important than in an in-person hearing. A comprehensive protocol, whether agreed or ordered by the tribunal, is essential to ensuring the hearing runs smoothly. Consider addressing the following.

- **Parties' agreement to a remote hearing.** If not agreed, have a well-reasoned order as to why the arbitration is proceeding with a remote hearing. If possible, include an explicit waiver of any challenge to the award based on the hearing being conducted remotely.
- **Hearing times.** Hearing days may need to be shorter or have unusual start/finish times to accommodate different time-zones. Consider having more frequent short breaks to allow participants to re-focus and address any technological issues.
- **Host.** Establish the host's level of control (e.g., mute microphones, switch cameras on and off, and control who joins the room). Establish whether this role will be exercised by the institution, a tribunal secretary, the chair, IT staff, or a combination of them.
- **Privacy and security.** At a minimum, the hearing room must be password protected. The parties should disclose a participant list in advance and the host should ensure there are no unauthorized attendees. Consider other security issues like two-factor authentication, is a video/audio recording being made and separate passwords for virtual break-out rooms. Entering into a cyber-security protocol is even more important than usual.
- **Contingency measures in case of sudden technical failures.** Consider a protocol whereby in the event of a problem, microphones and cameras are turned off to avoid concerns with *ex parte* communications. Key participants may be required to have backup devices. Arbitrators should have alternative communication channels if necessary to confer.
- **Video directives.** Determine if all participants should have their cameras on at all times. It may be preferable to limit the screen to only the Tribunal, the witness and the examining lawyer, especially with a large number of participants. Some platforms may also offer more advanced split-screen technology or use of a non-static camera, but remember that simpler may be better.
- **Audio directives.** Agree to have all participants muted except for the immediate speaker (and any interpreter) to avoid background noise. As to interpreters, this may be as simple as opening a separate audio-only meeting. But more sophisticated platforms may offer a separate audio channel in the

same meeting. The court reporter may also need an open line to raise any problems immediately.

- **Documents.** Determine how document bundles will be shared (hard copies, FTP or Virtual Data Room); if possible, use an agreed joint bundle and/or key-documents to avoid switching folders or systems. When using electronic copies, determine if references will be made to the .pdf/.doc page or to a page number embedded in the document. Consider providing in advance a hard copy cross-examination bundle, rather than screen sharing, to avoid unnecessary delays and save screen real estate. If so, agree on a protocol for delivery, whether electronically or in hard copies, and have the witness undertake not to access the bundle before testifying.
- **Examination of witnesses.** The twin objectives are to ensure the best audio/video quality while protecting due process. If witnesses are able to leave home, consider having testimony from a neutral location with good IT (e.g., a law firm or hearing center). Give directives to ensure there is no one else in the room to coach the witness (e.g., use a 360-degree camera or ask the witness to show the room). Alternatively, consider whether it may be more efficient to have a party representative present (abiding by social distancing directives) to assist with logistical issues. Technology and time zone constraints may mean that witness evidence needs to be staggered.
- **Objections.** Competing voices will make the hearing incomprehensible. Establish a protocol for making objections (to the extent they are necessary). This could be as simple as unmuting and turning video on, or using the “raise hand” functionality. Consider allowing the host to mute the witness once an objection is raised.
- **Narrower scope.** A remote hearing is most efficient when it can focus on the evidence and issues that cannot be dealt with exclusively through written submissions and documents. Consider procedural tools like an agreed list of issues, agreed facts or bifurcation of stand-alone issues to narrow the remote hearing to focused evidentiary issues.

In addition to these issues that may appear in a procedural order, consider how the arbitrators will attend the remote hearing and how deliberations will be conducted. The arbitrators might be able to sit “together” in the same location with social distancing precautions. If not, schedule regular breaks with a secure audio/video line to be able to discussing issues timely. In addition, many arbitrators use email, messaging or WhatsApp to allow real-time comments on pressing issues.

## Considerations for Counsel

Remote hearings should not just duplicate an in-person hearing. Consider some of the following unique challenges, opportunities and strategies.

- **Written submissions are even more important than usual.** Watching the hearing through a screen is less dynamic than being present in an actual hearing room. As a result, it may be more difficult to assess whether the tribunal is following along. Submission of written pre-hearing briefs or focused openings may be useful. Perhaps it is possible to have, for example, an “afternoon off” between openings and witness testimony to allow the tribunal to focus. Post-hearing briefs and directed questions from the tribunal may be all the more important.
- **Witness preparation.** Obviously, it is incumbent on producing counsel to ensure the witness is familiar with the video platform, with using electronic bundles, and has a secure internet connection. For a technologically insecure witness, consider agreeing to having someone (perhaps a third party paralegal) available to assist. At the same time, make sure the witness is not lulled into being too relaxed by the less formal setting of a remote hearing.
- **Pace and scope of cross-examination and redirect.** Cross-examinations are, arguably, less effective due to video lag and the fact that there is less immediacy. Counsel should be less expansive and more surgical in planning their cross-examination. Consider also how the witness will interact with exhibits, which almost certainly is more time-consuming. Accordingly, use exhibits sparingly. For redirect, counsel may have to react quickly to “share” an exhibit or a screen-shot of the transcript.
- **Use of exhibits.** In general, less is more. Consider constructing a cross-examination that is less dependent on documentary exhibits, e.g., focused more on statements. To avoid the potential for time delays and errors in loading a document from a joint bundle folder, consider using a set electronic cross-bundle or, even better, a hard copy bundle sent in advance.
- **Advocacy style.** Given possible audio constraints, the live transcript may be even more important than in an in-person hearing. To this end, be extra careful about moderating speed of presentation and consider using clear verbal “signposts” so that the tribunal can follow along in real-time and in using the transcript in deliberations. Counsel should also consider that the camera frame will have the tribunal focus exclusively on the speaker’s face, affecting the perception of non-verbal cues. While it is unclear whether this aids or hinders the viewer’s focus, counsel must be mindful of this particularity and consider adjusting delivery style.



- **Team communication.** Hurriedly scribbled Post Its are a thing of the past. Have an open line of communication, such as a permanently open break room, email feed or WhatsApp group. It may be best to have a designated colleague reviewing the feed and filtering comments to the first chair. More generally, and more so than usual, counsel may need to assign specific roles to team-members to better manage the several moving parts of the remote hearing.

### What other resources are available to help?

As initial fears about remote hearings have faded, their use has become almost commonplace. Of course, the real test will arrive once the public health emergency abates and in-person hearings become a more viable option—the authors are confident that remote hearings (especially when not constrained by social distancing) will remain an important part of the arbitration scene. In the meantime, there are a number of excellent practical resources available to aid arbitrators and counsel (many of which are collated on the NYIAC website).<sup>2</sup> These include:

#### Guidance Notes:

- AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties<sup>3</sup>
- CIArb Guidance Note on Remote Dispute Resolution Proceedings<sup>4</sup>
- Delos Checklist on holding Arbitration and Mediation Hearings in Times of COVID-19<sup>5</sup>
- Hague Conference Draft Guide to Good Practice on the Use of Video Links<sup>6</sup>
- ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic<sup>7</sup>
- ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration<sup>8</sup>
- Joint Statement on Arbitration and COVID-19<sup>9</sup>
- Seoul Protocol on Video Conferencing in International Arbitration<sup>10</sup>

#### Model Procedural Orders:

- AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference<sup>11</sup>
- CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings<sup>12</sup>

### Endnotes

1. Image used with the kind permission of Patricia Saiz González. (patricia.saiz@esade.edu).
2. <https://nyiac.org/resources/covid-19-resources/>.
3. [https://go.adr.org/rs/294-SFS-516/images/AAA269\\_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf](https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf).
4. <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>.
5. <https://delosdr.org/wp-content/uploads/2020/03/Delos-checklist-on-holding-hearings-in-times-of-COVID-19-v2-as-of-20-March-2020.pdf>.
6. <https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf>.
7. <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>.
8. [https://www.arbitration-icca.org/publications/ICCA\\_Report\\_N6.html](https://www.arbitration-icca.org/publications/ICCA_Report_N6.html).
9. <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>.
10. [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).
11. [https://go.adr.org/rs/294-SFS-516/images/AAA270\\_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf](https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf).
12. <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>.

# Exculpating the Fear to Virtually Hear: A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations

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## Introduction

Virtual<sup>1</sup> hearings have precipitously become a topical issue due to the COVID-19 global pandemic that has had, and continues to have, far-reaching ramifications for governments, people, businesses, transactions, disputes and dispute resolution. Ever since the COVID-19 crisis forced governments to take varying measures between lockdowns, curfews, travel bans and other restraining measures, physical distancing became normative in many localities and physical interaction remains curtailed. This status quo together with the uncertainties (surrounding the restrictions on travel and social proximity) have brought about a new realism that is powered and driven by information and communication technologies (ICTs).

In the specific context of international arbitration, certain ongoing cases have experienced suspensions and/or delays, and others have witnessed a degree of change in the manner in which proceedings are conducted. Naturally, ICT-based tools presented themselves as options to mitigate certain consequences of COVID-19 on arbitral proceedings. Amongst these tools that were presented as options are *virtual hearings*. Since March 2020, parties, counsel, arbitrators and institutions have explored, and continue to explore, their options to hold virtual hearings. It is in this context that institutions, associations and organizations have issued guidance notes, and prominent practitioners have expressed views, in an attempt to address efficiency and mitigate risks of breaches of due process.<sup>2</sup> Despite the wealth of available resources, still a roadmap or a pathway, setting out the diverse legal issues that ought to be considered when assessing whether to proceed with a virtual hearing or not, was missing. It is in this context that the author has proposed the below pathway capturing a step-by-step analysis of the issues to consider.<sup>3</sup>

## The Proposed Pathway to Virtual Hearings

First, if the applicable *lex loci arbitri* or the governing procedural rules (including any institutional rules) (i) expressly refer to “in person” hearings on the merits, and (ii) if “in person” (under these rules/laws) unequivocally means “physical appearance,” then virtual hearings may not take place without the parties’ consent, otherwise the risk of setting aside actions or vacatur motions would be high.

Second, if the applicable *lex loci arbitri* or the governing procedural rules (including any institutional rules)

expressly refer to the possible use of technology or virtual hearings, then there is no issue and the arbitral tribunal can proceed virtually,<sup>4</sup> as it deems fit after careful consideration of the circumstances and the ability of the parties to reasonably present their cases. No consent would be required from the parties, unless the parties have agreed otherwise or opted out of such provisions (assuming opting out therefrom is permissible).

Third, if the applicable *lex loci arbitri* or the governing procedural rules (including any institutional rules) are silent on the issue of virtual hearings and no direct inference can be made, then there exist two possible legal approaches (i) the absence of a permissive provision to proceed virtually implies that the arbitral tribunal cannot proceed with a virtual hearing without the parties’ consent; or (ii) the absence of a prohibitive provision to proceed virtually implies that the arbitral tribunal has the discretion to consider the matter and proceed with a virtual hearing without the parties’ consent, if it deems it appropriate.

Fourth, if the applicable *lex loci arbitri* is inconsistent with the governing procedural rules (including any institutional rules) on this matter, then the way forward will depend on whether the rule under the *lex loci arbitri* is mandatory or non-mandatory.

## Reflections and Observations on the Pathway to Virtual Hearings

In light of the above four-step pathway, certain observations and reflections merit a mention.

Regarding the *first step*, it should be mentioned that the term *in person* linguistically may mean *with personal presence, actually present, or in one’s physical presence*, and legally it may mean *an individual appearing by himself/herself, rather than through an appointed representative*. Thus, it is clearly arguable that the term *in person* is satisfied in a virtual milieu if the individual personally participates in any

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tele- or video-conference meetings or hearings. However, as the first step indicates, the term ‘in person’ may have a certain connotation under the applicable procedural rules or law, hence the express reference to the necessity of considering whether *in person* under the pertinent applicable procedural rules/law are unambiguous so as to suggest *physical appearance in flesh and blood* or simply *personal appearance or presence*, or whether an interpretation (be it literal, contextual and/or purposive) is required. In any event, the proper reading and application of the pertinent procedural rules/law will determine the prospects of any setting aside or *vacatur* motions.

Concerning the *second step*, even in a situation where the applicable procedural rules/law expressly refer to the possible use of technology or virtual hearings, arbitral tribunals should carefully consider the situation if the parties jointly request to proceed with a physical (non-virtual) hearing, because their joint request or agreement may bind the arbitral tribunal such that the latter may not be able to proceed in a manner contrary to what the parties expressly agreed. Thus, due consideration must be given to the principles set forth in any agreed procedural orders or terms of reference as well as any prevailing principles that give more weight to party autonomy under the applicable procedural rules/law.

Concerning the *third step*, where the applicable procedural rules/law is silent on the issue of virtual hearings and no direct inference can be made as to the legality or illegality of virtual hearings, it should be noted that the majority of arbitration or civil procedures laws make no express reference to virtual hearings. By way of illustration, the laws of Bahrain,<sup>5</sup> Egypt,<sup>6</sup> Kenya,<sup>7</sup> Nigeria,<sup>8</sup> Qatar,<sup>9</sup> Saudi Arabia,<sup>10</sup> South Africa<sup>11</sup> and Tanzania<sup>12</sup> are amongst the statutes that are silent on the issue of virtual hearings. That said, arbitral tribunals will be frequently confronted with situations where laws and procedural rules are silent on virtual hearings and decisions will need to be made. It is in this specific scenario that arbitral tribunals will need to consider and assess the following factors:

(a) whether the applicable law/rules include an express provision giving the arbitral tribunal the power to manage and determine the procedural path of the proceeding as it deems appropriate;<sup>13</sup>

(b) whether the applicable law/rules refer to the parties’ “full”<sup>14</sup> or “reasonable”<sup>15</sup> opportunity to present their case, and whether both terms have different legal implications or connotations under the applicable law/rules;<sup>16</sup>

(c) whether the parties have access to technology, reliable technology and/or cutting-edge technology, noting that access to varying degrees of technology is not, in and of itself, prohibitive of virtual hearings (but ought to be considered in the specific context of the case);

(d) whether the applicable legal principle under the *lex loci arbitri* is absent a prohibition, the matter is considered permissible or whether permissibility requires an express provision, noting that most legal systems consider that a matter is generally permissible unless prohibited;

(e) whether the applicable law or rules consider hearings a mandatory requirement (or a must if requested by a party), or whether arbitral tribunals have broad powers to proceed in the manner they deem appropriate including proceeding on the basis of documents only or through other means (which would naturally include virtual means), insofar as due process is safeguarded without undue paranoia;<sup>17</sup>

(f) whether one or more parties object to the virtual hearing and for what reasons;

(g) whether any terms of reference or practice direction was agreed and included constraints on the arbitral tribunal’s power to proceed in certain matters without the parties’ consent;

(h) whether the proceedings are subject to strict time limits, such that the arbitral tribunal’s jurisdiction *ratione temporis* will expire (and cannot be extended) if the hearing is postponed and a hearing *must* take place, and a virtual hearing is the only option;

(i) whether the laws of evidence or civil procedures at the seat of arbitration apply to arbitration and recognize the possible utilization of ICTs;

(j) whether the circumstances of the case make it appropriate (for example, the participants’ access to *reliable* technology, the nature and volume of the evidence and the lack of any serious risk of prejudice); and

(k) whether, subject to any constraints under the applicable procedural rules/laws, the arbitral tribunal can resort to any soft law instruments that may define and ascertain the arbitral tribunal’s scope of powers, such as the International Law Association’s Resolution of 2016 on international commercial arbitration, which deals with arbitral tribunals’ inherent, implied and discretionary powers.

With respect to the *fourth step*, where the applicable procedural law could be inconsistent with the governing procedural rules chosen by the parties, the arbitral tribunal will need to carefully consider and assess the mandatory nature of the relevant provision under the *lex loci arbitri* and whether it overrides the parties’ choice of any specific procedural rules. In ascertaining the mandatory nature of any procedural rules under the *lex loci arbitri*, the arbitral tribunal may consider asking the parties at a very early stage of the proceedings to compile and furnish the tribunal with a joint list of the mandatory provisions that override the otherwise applicable procedural rules and any choices made by the parties. This will indeed assist the tribunal in making any informed decision as to the

mandatory (or non-mandatory) nature of any procedural rule under the *lex loci arbitri* if its application is invoked during any phase of the proceedings.

## Concluding Remarks

Ever since governments across the globe have put in place measures and restrictions to mitigate the adverse impact of the COVID-19 pandemic, virtual hearings became the only option available for parties and tribunals wishing to proceed with their already scheduled hearings in international arbitrations involving parties, counsel and arbitrators from different countries. This novel and unprecedented challenge has brought about myriad opportunities and challenges. On the one hand, it has accelerated the integration of ICTs into arbitration proceedings and compelled parties, counsel, arbitral institutions and tribunals to explore the virtual hearing option that was previously not tolerated for hearings on the merits. On the other hand, the newly imposed migration to the virtual world has challenged certain existing arbitration practices and established procedural norms and caught the arbitration community by surprise.

However, all stakeholders within the global arbitration community (including institutions, arbitrators, counsel and parties) have pooled their efforts to explore, examine and adapt practices to proceed as efficiently as possible with arbitration proceedings and in consideration of any due process concerns. Hitherto, the global arbitration community has been successful in adapting to this novel crisis during this interim phase of transition towards a new post-COVID-19 reality. Nevertheless, much remains uncertain and to be done to revolutionize the way to conduct arbitration proceedings.

The global arbitration community will need to rethink the approach to international arbitration and its tools, methods, procedural specificities and how best to integrate technology therein and to balance the requirements of efficiency and due process.

Amongst the novel practices that will likely take place in the near future are: (i) the building and offering of interactive virtual platforms for administering arbitration proceedings wholly or partially online by arbitral institutions; (ii) incorporating directions on the use of certain technologies and a virtual hearing option in procedural order no.1 at the beginning of the proceedings; (iii) incorporating protocols on virtual hearings and on the use of technology in the parties' arbitration agreements; (iv) enacting amendments to arbitration laws and amending arbitration rules to cater to the possible use of technology and virtual hearings; (v) developing new and innovative procedural paths for arbitrations which may include, for example, virtual hearings after each round of submissions to narrow down the issues in dispute and make proceedings more cost effective, efficient and less time consuming; (vi) adopting hybrid proceedings

involving documents' only, virtual and physical hearings; (vii) issuing more and more dedicated online arbitration rules; (viii) resorting to more tech-savvy arbitrators and counsel; (ix) increased recourse to purely online arbitration proceedings; and (x) increased use of artificial intelligence throughout arbitration proceedings, including resorting to multi-variable resolution optimization programs and predictive justice applications.

By and large, the above proposed pathway to virtual hearing considerations in international arbitrations is intended to serve as a modest roadmap and checklist of issues that ought to be addressed, considered and analyzed by the parties, counsel and tribunals when confronted with the momentous question of whether to hold virtual hearings or not.

The author also predicts that the longer the period during which physical (non-virtual) hearings cannot take place, the more receptive people would be to virtual hearings and the more likely virtual hearings will become conventional, especially that physical (non-virtual) hearings are simply born out of tradition and not necessity. As rightly voiced by Lucius Annaeus Seneca (Rome's leading intellectual figure in the mid-1st century), more than 20 centuries ago, "It is not because things are difficult that we do not dare; it is when we do not dare that they become difficult." It is in this spirit that the new realism (be it interim or lasting), brought about by the COVID-19 crisis, calls for innovation in the manner we perceive and conduct arbitral proceedings.

## Endnotes

1. The author appreciates that ever since the COVID-19 pandemic, the word "remote" is being used to describe hearings taking place online, and that 'remote hearings' is the term sometimes used to refer to such hearings. However, the author submits that 'virtual hearings' is a more accurate and precise term. Linguistically, the word 'remote' has the following meanings: far away in place and time, located away from the centres of population, society, etc. and/or distantly related. It finds its origins in the Latin word 'remotus' (i.e. remove or withdraw). However, the word 'virtual' has the following pertinent meaning in computing: not physically existing as such but made by software to appear to do so, or occurring or existing primarily online, and it finds its origins in the Latin word 'virtualis.' See DK Illustrated Oxford Dictionary (1998), (Oxford University Press, Oxford); Lexico English Dictionary <<https://www.lexico.com/definition/virtual>>; and Merriam Webster Dictionary <<https://www.merriam-webster.com/dictionary/virtual>>. Ever since the emergence of the Online Dispute Resolution (ODR) field in the 1990s, the word 'virtual,' not 'remote,' has been consistently used (even in the USA) to refer to certain online activities. Moreover, the common term used for online courts is 'virtual courts' not 'remote courts'. Furthermore, 'remote hearings' as a term does not lend itself to hearings exclusive conducted online; it may well include to physical hearings taking place in distant locations/territories. 'Virtual hearings' denote hearings taking place online or via electronic means, and participants may indeed be appearing in person on screens, but the proceedings themselves are taking place in a virtual setting. Additionally, the term 'virtual hearings' has been consistently used throughout the following international arbitration texts and guidance notes: the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the

COVID-19 Pandemic (May 2020); the AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties (April 2020); the Virtual Hearings ICSID Services and Technology; the Africa Arbitration Academy Protocol on Virtual Hearings in Africa (April 2020); the JAMS Videoconference Guide (April 2020).

2. For a useful compilation of resources on virtual hearings, see Delos Resources on Holding Remote or Virtual Arbitration and Mediation Hearings (May 2020), available at <<https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>>; More specifically, see the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (March 2020), available at <<https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>>; and the Africa Arbitration Academy Protocol on Virtual Hearings in Africa (April 2020), available at <<https://www.africaarbitrationacademy.org/protocol-virtual-hearings/>>.
3. The first version of the Abdel Wahab Pathway appeared in a news story by Alison Ross in the *Global Arbitration Review* on 06 May 2020. See Alison Ross, *What if Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway*, the *Global Arbitration Review*, 06 May 2020.
4. Article 33(3) of the UAE Federal Arbitration Law No.6 of 2018 reads: "Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing." See also Article the Jordanian Arbitration Law No. 31 of 2001 as amended by Laws no.16 and 41 of 2018 provided under Article 32 (i) that: "The arbitral tribunal may accept hearing the statements of witnesses using various technological means of communication, including tele-conference or closed circuit. In all cases, the arbitral tribunal has the right to decide the witness's appearance before the tribunal for examination"; paragraph (f) of Appendix IV of the ICC Arbitration Rules (2017), which reads "Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential (...);" Article 33 of the CIETAC 2009 Online Arbitration Rules, which reads: "Where an oral hearing is to be held, it shall be conducted by means of online oral hearings such as video conferencing or other electronic or computer communication forms. The arbitral tribunal may also decide to hold traditional oral hearings in person based on the specific circumstances of each case"; and Article 23(2) of the SCIA 2019 Online Arbitration Rules, which reads "An arbitral tribunal may, however, where it deems it necessary, hear a case through online video hearings, online exchange of information, teleconferences, and other appropriate means, or may decide to hold offline hearings while the other processes are still conducted online."
5. Bahraini International Arbitration Law No. 9 of 2015.
6. Egyptian Arbitration Law No. 27 of 1994. Article 33 of the Arbitration Law is silent on the form/format of hearings, and makes no reference to virtual or physical hearings. However, in the specific context of judicial proceedings, Law No. 146 of 2019 was enacted to amend Law No. 120 of 2008 establishing the Economic Courts, and amongst the innovative amendments introduced by the 2019 Law is the possibility of conducting the proceedings before the Economic Courts electronically.
7. Kenyan Arbitration Act No.4 of 1995. However, Law No.19 of 2014 has amended the Kenyan Evidence Act and added Section 63A, which reads: "(1) A court may receive oral evidence through teleconferencing and video conferencing. (2) The Chief Justice may develop regulations to govern the use of teleconferencing and video conferencing", noting that Section 2(1) of the Evidence Act expressly states that "This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator."
8. Nigeria Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18). However, it is worth noting that the 2012 Judicial Information Technology Policy of the Nigerian Judiciary (JITPO) provides in paragraphs 2.5.5 that: "The use of video-conferencing technology is greatly encouraged in the Judiciary. Video-conferencing can be used to connect people in different physical locations especially for critical meetings and discussions. Video conferencing systems can also be used to enable testifying witnesses appear in court without having to travel to the courtroom [...] Videoconferencing in the court system offers significant cost savings and improved security by reducing the need for high-security prisoner transport. The entire courtroom experience will be made shorter, safer and more cost-effective."
9. Qatari Arbitration Law No. 2 of 2017.
10. Saudi Arabia Arbitration Law No. 34 of 1433 Higri Year (2012).
11. South Africa International Arbitration Act No. 15 of 2017.
12. Tanzanian Arbitration Act of 2020.
13. See Articles 25 of the Egyptian Arbitration Law (1994), 25 of the Saudi Arbitration Law (2012), 19 of the Qatari Arbitration Law (2017), 19 of the Bahraini International Arbitration Law (2015), 15 of the Nigerian Arbitration and Conciliation Act (1988), 19 of the South Africa Arbitration Act (2017), and 20(2) of the Kenyan Arbitration Act (1995).
14. Articles 26 of the Egyptian Arbitration Law (1994), 27 of the Saudi Arbitration Law (2012), 18 of the Qatari Arbitration Law (2017), 18 of the Bahraini International Arbitration Law (2015), 14 of the Nigerian Arbitration and Conciliation Act (1988).
15. Articles 18 of the South Africa Arbitration Act (2017), 19(2) of the Kenyan Arbitration Act (1995), and 35(1)(a) of the Tanzanian Arbitration Act (2020)
16. Very recently, on 28 February 2020, the Supreme Court of Singapore held that "[T]he Court observed that the right to be heard – which refers to each party's right to present its case and respond to the case against it – was a fundamental rule of natural justice enshrined in Art 18 of the Model Law. However, the Art 18 right to a "full opportunity" of presenting one's case was not an unlimited one, and was impliedly limited by considerations of reasonableness and fairness. What constituted a "full opportunity" was a contextual inquiry to be undertaken within the specific context of the particular facts and circumstances of each case. The proper approach for the court to take was to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done". See *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC* and anor [2020] SGCA 12.
17. Most of the arbitration rules and laws do not make hearings mandatory. See for example, Articles 33 of the Egyptian Arbitration Law (1994), Article 33 of the Saudi Arbitration Law (2012), Article 24 of the Qatari Arbitration Law (2017), Article 24 of the Bahraini International Arbitration Law (2015), Article 20 of the Nigerian Arbitration and Conciliation Act (1988), Article 24 of the South Africa Arbitration Act (2017), Article 25 of the Kenyan Arbitration Act (1995), and 36(2)(h) of the Tanzanian Arbitration Act (2020).

# Remote Hearings in Arbitration and What Voltaire Has to Do With It

Maxi Scherer

*Dans ses écrits un sage Italien  
Dit que le mieux est l'ennemi du bien;  
Non qu'on ne puisse augmenter en prudence,  
En bonté d'âme, en talents, en science;  
Cherchons le mieux sur ces chapitres-là;  
Partout ailleurs évitons la chimère.  
Dans son état heureux qui peut se plaire,  
Vivre à sa place, et garder ce qu'il a !*

These are the opening lines of the poem “La Béguéule” from 1772 by the French philosopher Voltaire. This poem is the reason why the saying “the best is the enemy of the good” is often attributed to Voltaire, even though the origin seems to be the Italian “*Il meglio è l'inimico del bene*.”<sup>1</sup> The proverb is often cited as meaning that “people are ... unhelpfully discouraged from bringing positive change because what is proposed falls short of ideal” and “[i]f we want to make progress, we should ... seek improvement rather than perfection.”<sup>2</sup> However, put in context, Voltaire’s poem suggests quite the opposite. In “La Béguéule” Voltaire tells the story of a woman who is perpetually unhappy. According to the first lines of the poem, when it comes to prudence, goodness, talent, or science, one should strive for excellence. Yet, for other matters, one should avoid falling for the illusion of constant improvement. Instead, one should stay put and “remain in one’s place,” the value of which is not to be underestimated.

The tension between the two meanings—the one typically attributed to the proverb and the other originally intended by Voltaire—is interesting. It highlights two rather opposing human approaches to uncertainty: on the one hand, a proactive approach aiming for improvement and embracing unknown situations even if they are not perfect; on the other hand, a conservative approach avoiding progress for the mere sake of it and at the risk of making matters worse. In current times of uncertainty due to the COVID-19 pandemic, we are facing many novel issues and often have to choose between being proactive or cautious. International arbitration is no exception. Among other things, parties, counsel and arbitrators must assess whether and to what extent physical hearings that cannot be held due to the above-mentioned pandemic should (proactively) be held remotely using modern communication technologies, or (conservatively) be postponed.

Remote hearings are nothing new, but the COVID-19 crisis has forced international arbitration out of its comfort zone. Most steps in an international arbitration are done remotely nowadays, including holding case management conferences at the outset and/or mid-stream (often organized as telephone or videoconferences rather than as physical meetings) and exchanging written submissions via document share platforms. Possibly the last “piece of the puzzle” that typically remains as physical meetings are hearings, either on the merits or on major procedural issues. But the current COVID-19 pandemic forces international arbitration practitioners to reconsider this point and assess whether those hearings, too, can be held remotely. Depending on its length, the current crisis has the potential of being a real game-changer if international arbitral tribunals, as well as national courts around the globe, become used to holding hearings remotely.<sup>3</sup> Such a paradigm shift might be something that many arbitration users have wanted for some time.<sup>4</sup>

It is important to distinguish between different types of remote hearings. For instance, fully remote hearings, in which every participant is in a different location, raise additional questions compared to semi-remote ones, in which a main venue is connected to one or several remote venues. Moreover, remote legal arguments might require a different analysis from remote evidence taking.<sup>5</sup> In the post-COVID-19 world, hearings might combine these different forms, with some parts of a hearing being held semi-remotely or fully remotely and others with physical meetings.

For all possible forms of remote hearings, parties and tribunals must assess the relevant regulatory framework, including in particular the law of the seat of the arbitration and the arbitration rules, if any. Some national laws or arbitration rules contain specific provisions on remote

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hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely.<sup>6</sup> Others do not contain specific provisions, and remote hearings will therefore be assessed against the backdrop of other provisions, such as the parties' right to a hearing<sup>7</sup> and the tribunal's broad power to determine procedural matters.<sup>8</sup> Irrespective of these differences, arbitral tribunals typically have the power to decide on remote hearings – either as granted under a specific rule, or as part of the tribunals' general broad power to conduct the arbitral proceedings as they deem appropriate.

However, the tribunal's power to decide on remote hearings is not without limits. One important limit is the parties' agreement. If the parties agree on certain conduct (e.g. whether or not to hold a remote hearing), absent specific circumstances, arbitral tribunals should follow the parties' agreement. The opposite situation, e.g. where one party requests a remote hearing while the other insists on a physical hearing, also raises delicate questions. Arbitral tribunals must balance the parties' right to be heard and treated equally<sup>9</sup> with its obligation to conduct the proceedings in an efficient and expeditious manner.<sup>10</sup>

Arbitral tribunals typically have the power of ordering remote hearings over the opposition of one party, but the exercise of that power requires careful consideration. This balancing exercise must contain a multi-factorial approach, including, for instance, assessing the reason for, and content of, the remote hearing, as well as its envisaged technical framework. The envisaged timing for the hearing and any potential delay if it is held physically, and a comparison between the costs for a remote hearing and a physical one, might also be relevant.<sup>11</sup>

Among other things, a concern often raised in the context of remote witness and expert testimony is the alleged prejudice to the cross-examining party and the tribunal's supposed inability to assess the credibility of a remote witness or expert. However, a proper analysis of case law from around the world shows that these fears are often overblown and typically can be counterbalanced by appropriate technological solutions. For instance, as early as 2001, a Canadian court downplayed the alleged risks of remote testimony, while warning against the overstated usefulness of the witness' demeanor and body language.<sup>12</sup>

The previous point emphasizes the importance of careful planning and organization of remote hearings. Existing soft law instruments on remote hearings provide guidance for the actual set-up of remote hearings,<sup>13</sup> but the planning thereof may start much earlier. This includes considering specific language regarding remote hearings in the parties' arbitration agreements or the tribunal's first procedural order.<sup>14</sup>

Finally, the ultimate test is whether awards based on remote hearings withstand potential challenges in recognition/enforcement or set aside proceedings. The author

is aware of no reported cases in which such challenges were successful. The most likely grounds for challenges are the parties' right to be heard and treated equally, for instance, under Article V(1)(b) of the New York Convention. However, absent specific circumstances, remote hearings in and of themselves do not violate any of these principles.

For instance, in *China National Building Material Investment v. BNK International*,<sup>15</sup> a Texas district court dealt with a party's objection to the enforcement of an arbitral award, among other things, on the basis of Article V(1)(b) of the New York Convention. The party argued in particular that the arbitral proceedings were "fundamentally unfair" because one of its witnesses suffered from a medical condition and could not attend the hearing.<sup>16</sup> The court noted that the arbitral tribunal had offered to hear the witness remotely via videoconference, but the party insisted on a physical hearing. In those circumstances, the courts found no breach of Article V(1)(b), stressing that "Mr. Chang failed to personally appear – either in person, via videoconferencing, or through his Hong Kong attorneys – at a hearing at which every reasonable accommodation was made for him, and he did so at his own peril."<sup>17</sup> Had the court found that the remote hearing of a witness was in and of itself a breach of the party's right to be heard, it would not have listed it as a possible alternative to a physical hearing.

Similarly, in 2016, a Virginia district court confirmed that remote hearings in and of themselves are no issue under Article V(1)(b) of the New York Convention. In *Research and Development Center v. Ep International*,<sup>18</sup> a party resisted enforcement of an award on the basis that it was not physically present at the hearing. In this context, the court noted that "[w]hen a party asserts that its physical presence at arbitration is prevented, it is generally unable to prevail on such a defense if there are available alternative means of presenting its case."<sup>19</sup> In the case at hand, the applicant had not demonstrated that it was unable to present its case before the arbitral tribunal because the relevant institutional arbitration rules specifically allowed appearance by videoconference – something the application had failed to request, according to the court.<sup>20</sup> This makes clear that participation by videoconference would have satisfied the parties' right to be heard (as did the mere possibility to be able to request it).<sup>21</sup> Case law from other jurisdictions confirms this trend.<sup>22</sup>

In Voltaire's poem, cited at the outset of this article, the discontent woman eventually returns to her husband and lives a happy life, but not without taking a secret lover. Leaving aside questions of morality, and pushing the interpretation of the poem to its limits, it shows that solutions cannot be found by imposing a principled approach, but are better if they are specific to each individual case, taking into account all relevant circumstances. In any event, the fact that many arbitral tribunals, as well as national courts, are growing their experiences with

remote hearings is an opportunity that should not be underestimated. It allows users of international arbitrations—parties, counsel, and arbitrators alike – to increase their toolbox and find the best-suited solution for any given case.

## Endnotes

1. Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* 389 (OUP 2011).
2. Richard Susskind, *Online Court and the Future of Justice* 89-90, 182 *et seq.* (OUP 2019).
3. On remote hearings in national courts generally, see e.g. <https://remotecourts.org/>.
4. Queen Mary School of International Arbitration Survey, *The Evolution of International Arbitration* chart 36 (2018) (89% of the survey participants expressed the view that videoconferencing should be used more often as a tool in international arbitration; 66% said the same about virtual hearing rooms).
5. See e.g. Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeal* (Federal Judicial Center 2006).
6. See e.g. Dutch Civil Procedure Code, art. 1072b(4); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules, s. 30.6; London Court of International Arbitration (LCIA) Rules, art. 19.2; United Nations Commission on International Trade Law (UNCITRAL) Rules 2010, art. 28(4).
7. See e.g. German Civil Procedural Code (ZPO), s. 1047(1); Swedish Arbitration Act, s. 24(1); People's Republic of China Arbitration Law, art. 47; International Chamber of Commerce (ICC) Rules, art. 25(6); Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Rules, art. 32(1); Singapore International Arbitration Centre (SIAC) Rules, art. 24.1; UNCITRAL Rules, art. 17(3).
8. UNCITRAL Model Law, art. 19(2); English Arbitration Act, s. 34(1); Swiss Private International Law Act, art. 182(2); Hong Kong International Arbitration Centre (HKIAC) Rules, arts. 13.1, 22.5; ICC Rules, arts. 19, 22(2); International Centre for Dispute Resolution (ICDR) Rules, art. 20.1; LCIA Rules, art. 14.5; SCC Rules, art. 23(1); SIAC Rules, arts. 19.1, 25.3; UNCITRAL Rules, arts. 17(1), 28(2).
9. See e.g. Dutch Civil Procedure Code, art. 1036; English Arbitration Act, s. 33(1)(1); French Civil Procedure Code, art. 1510; German Civil Procedure Code ZPO, art. 1042; Hong Kong Arbitration Ordinance, s. 46; Swiss Private International Law Act, art. 182(3); UAE Federal Law, art. 26; UNCITRAL Model Law, art. 18; HKIAC Rules, art. 13.1; SCC Rules, art. 23(2); UNCITRAL Rules, art. 17(1).
10. See e.g. HKIAC Rules, art. 13.5; ICC Rules, arts. 22.1, 25.1; ICDR Rules, art. 20.2; LCIA Rules, art. 14.4(ii); SCC Rules, art. 23(2); SIAC Rules, art. 19.1; UNCITRAL Rules, art. 17.1; Vienna International Arbitration Centre (VIAC) Rules, art. 28(1).
11. For a more detailed analysis of the various factors, see Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) *J. Int'l Arb.* 407-488. (2020).
12. *Pack All Manufacturing Inc. v. Triad Plastics Inc.*, [2001] O.J. No. 5882, ¶ 6 (Ontario Super. Ct. Just.). For further case law analysis, see Scherer, *supra* n. 11.
13. See e.g. AAA-ICDR, *Virtual Hearing Guide for Arbitrators and Parties*; Delos, *Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19* (Mar. 20, 2020); HKIAC, *Precautionary Measures in Response to COVID-19* (Mar. 26, 2020); ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic* (Apr. 9, 2020); ICSID, *A Brief Guide to Online Hearings at ICSID* (Mar. 24, 2020); KCAB, *Seoul Protocol on Video Conferencing in International Arbitration* (2020); Africa Arbitration Academy, *Protocol on Virtual Hearings in Africa* (Apr. 2020); American Chamber-Peru, *Virtual Arbitration Guide* (May 2020); Chartered Institute of Arbitrators, *Guidance Note on Remote Dispute Resolution Proceedings* (2020).
14. For sample clauses, see Scherer, *supra* n. 11.
15. *China Nat'l Bldg Mat. Inv. Co., Ltd. v. BNK Int'l LLC*, 2009 WL 4730578, at \*7 (W.D. Tex. Dec. 4, 2009).
16. *Id.*
17. *Id.*
18. *Research & Dev. Ctr "Teploenergetika," LLC, v. Ep Int'l, LLC*, 182 F.Supp.3d 556 (E.D. Va. 2016).
19. *Id.* at 566, referring to *Rive v. Briggs of Cancun, Inc.*, 82 F.App'x 359, 364 (5th Cir. 2003); *Empresa Constructora Context Limitada v. Iseki, Inc.*, 106 F.Supp.2d 1020, 1026 (S.D. Cal. 2000).
20. *Research & Dev. Ctr., "Teploenergetika," LLC, supra* n. 19, at 570.
21. See also for participation by telephone, *China Nat'l Bldg Mat. Inv., supra* n. 15, at \*7.
22. For further analysis, see Scherer, *supra* n. 11.



# Virtual Arbitration Hearings When A Party Objects: Are There Enforcement Risks?

By Grant Hanessian and J. Brian Casey

Arbitral tribunals and counsel in international arbitrations sited in the United States and Canada have used telephone and video conferencing for many years for procedural and case management conferences and, occasionally, for taking testimony of witnesses unable or unwilling to travel to the hearing situs. Restrictions on travel and physical gatherings due to the COVID-19 pandemic have resulted in tribunals conducting entire evidentiary arbitration hearings by such means, sometimes over the objection of one of the parties. Given the efficiencies, economies and environmental benefits of virtual evidentiary hearings, the authors believe that such hearings are very likely to continue—perhaps in hybrid form with physical hearings—after the pandemic is over.

This article explores the legal issues that arise from virtual hearings, and, particularly, whether international awards that result from such hearings conducted over the objection of a party may be vulnerable to enforcement challenges at the place of arbitration and, under the New York Convention, the place of enforcement. We start with the arbitration rules agreed by parties and then consider national arbitration law (the *lex arbitri* or *curial law*) and the New York Convention. If consent is the bedrock of arbitration, national arbitration law its *terroir*—no arbitration innovation can flourish if the *lex arbitri* does not permit it.

## Arbitration Rules Regarding Virtual Hearings

Knowingly or not, many parties have consented to virtual hearings by agreeing to arbitration rules that either expressly provide for such hearings or give the arbitral tribunal discretion to order them.

The American Arbitration Association (AAA) Commercial Rules,<sup>1</sup> the London Court of International Arbitration (LCIA) Rules<sup>2</sup> and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,<sup>3</sup> the most popular rules for *ad hoc* arbitration, all expressly provide for virtual hearings.

Other popular international institutional rules give the arbitral tribunal discretion to hold virtual hearings:

- The rules of the AAA's International Centre for Dispute Resolution (ICDR) provide that "the arbitral

tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality. . . . [i]n establishing procedures for the case, the tribunal and the parties may consider how technology . . . could be used to increase the efficiency and economy of the proceedings."<sup>4</sup>

- The International Institute for Conflict Prevention and Resolution (CPR) Arbitration Rules state "the Tribunal may conduct the arbitration in such manner as it shall deem appropriate while giving each party a fair opportunity to present its case and according the parties equality of treatment" and "[t]he Tribunal shall determine the manner in which the parties shall present their case."<sup>5</sup>
- The Stockholm Chamber of Commerce (SCC) Arbitration Institute Rules provide the "Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties."<sup>6</sup>
- The Singapore International Arbitration Centre (SIAC) Rules<sup>7</sup> authorize tribunals to "direct any party or person to give evidence by affidavit or in any other form"<sup>8</sup> and that "[a]ny witness who give oral evidence may be questioned . . . in such manner as the Tribunal may determine."<sup>9</sup>
- The Hong Kong International Arbitration Centre (HKIAC) Rules state that the tribunal should consider "the effective use of technology" when adopting procedures for the conduct of the arbitration.<sup>10</sup>

However, the rules of one leading institution may give arbitrators reason for pause if a party objects to

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virtual hearings.<sup>11</sup> Article 25(2) of the Rules of the International Chamber of Commerce (ICC) provides: “After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.”<sup>12</sup>

On April 8, 2020, the ICC issued a “Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic” which states that the language of Article 25(2) of the ICC Rules “can be construed... not to preclude a hearing taking place ‘in person’ by virtual means if the circumstances so warrant.”<sup>13</sup> The ICC’s Guidance Note states:

While Article 25(2) of the Rules provides that after studying the written submissions of the parties and all documents relied upon, the tribunal “shall hear the parties together in person if any of them so requests,” this language can be construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place “in person” by virtual means if the circumstances so warrant.

Article 25(1) broadly provides that the tribunal “shall proceed within as short a time as possible to establish the facts of the case by all appropriate means” (emphasis added). In context, Article 25(2) is structured to regulate whether the tribunal can decide the dispute based on written submissions and documents only or whether there should also be a live hearing. The French version of Article 25(2) reflects this meaning, providing: “Après examen des écritures des parties et de toutes pièces versées par elles aux débats, le tribunal arbitral entend contradictoirement les parties si l’une d’elles en fait la demande; à défaut, il peut décider d’office de leur audition”. Hence the Secretariat’s Guide to ICC Arbitration notes that “whether the arbitral tribunal construes Article 25(2) as requiring a face-to-face hearing, or whether the use of video or teleconferencing suffices, will depend on the circumstances of the case.”<sup>14</sup>

The legal effect of such institutional “guidance” will depend on applicable national law. In the U.S., it would be expected that courts would defer to the expertise of the arbitrators to interpret and apply arbitration rules.<sup>15</sup> As the U.S. Supreme Court stated in *Howsam v. Dean Witter Reynolds*, “arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. . . . And for the

law to assume an expectation that aligns (1) decision-maker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike.”<sup>16</sup>

## National Law Regarding Virtual Hearings

The authors are not aware of any court decision in the United States or Canada vacating or declining to enforce an arbitral award because a tribunal took testimony remotely over objection. There is case law in both countries affording arbitrators broad discretion to conduct of arbitral proceedings, including the ability to render an award without a hearing or to permit otherwise unavailable witnesses to appear by teleconference. Thus, a challenge to an award based solely on the fact that it resulted from a remote evidentiary hearing—without some showing that the circumstances of the hearing rendered the proceedings unfair to one party—is unlikely to succeed.

The law in the United States and Canada appears to be similar to that in other leading arbitration jurisdictions, and some countries have recently enacted laws specifically providing for virtual hearings.

### The United States

Under the U.S. Federal Arbitration Act (FAA),<sup>17</sup> arbitrators are required only to treat the parties with equality and allow each party an “adequate opportunity to present its evidence and argument.”<sup>18</sup> Absent contrary agreement by the parties, U.S. courts have held that an arbitral tribunal is not required to hold an evidentiary hearing; so long as each party is afforded an opportunity to present its evidence and argument, the “choice to render a decision based solely on documentary evidence is reasonable,”<sup>19</sup> and “the lack of a formal, oral hearing . . . and is not fundamentally unfair.”<sup>20</sup> Thus, it does not violate the FAA, or due process principles, to issue a decision or award based on written submissions.

New York state courts have adopted the FAA’s “fundamental fairness standard”—which is met when the parties are provided with notice and opportunity to be heard—and thus, New York law also does not require oral hearings in arbitration.<sup>21</sup> New York law provides few constraints on the conduct of an arbitral hearing, so long as parties are able to present evidence and cross-examine witnesses.<sup>22</sup>

In the U.S., courts decline to adjudicate procedural matters “that grow out of a dispute and bear on its final disposition [which] are presumptively not for a judge, but for an arbitrator, to decide.”<sup>23</sup> Courts defer to arbitrators on questions of procedure, because arbitration rules are “intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation.”<sup>24</sup> It is highly unlikely that a U.S. court would draw a negative inference from the silence of

institutional rules on the scope of the arbitrator's powers, including the ability to hold a hearing remotely over objection.<sup>25</sup>

Moreover, U.S. courts have been receptive to arbitrators' use of videoconferencing where witnesses are unavailable, e.g., because of illness or accident. The U.S. District Court for the Southern District of New York refused to vacate an award where the tribunal rendered an award after a party physically unable to attend a hearing

650. Thus, Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator . . .<sup>30</sup>

The court stated that it would look beyond the "plain language of a statute" only if such language produced an absurd result. This was not the case here, the court said, since its reading of Section 7 would require parties requesting third

***A challenge to an award based solely on the fact that it resulted from a remote evidentiary hearing—without some showing that the circumstances of the hearing rendered the proceedings unfair to one party—is unlikely to succeed.***

for medical reasons refused to appear remotely.<sup>26</sup> A U.S. District Court in Los Angeles upheld a tribunal's decision, over strenuous objection, to permit cross-examination of otherwise unavailable witnesses over telephone.<sup>27</sup> Outside of the arbitration context, U.S. courts frequently allow witnesses to testify at trial by videoconference over objection.<sup>28</sup>

However, arbitrators' discretion to take testimony remotely may not extend to subpoenaed third parties. Last year, in a case of first impression, the Eleventh Circuit Court of Appeals interpreted Section 7 of the FAA to preclude arbitrators from compelling third parties to bring documents to a videoconference hearing.<sup>29</sup> Section 7 states that an arbitrator "may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case." Interpreting the language of the statute as of 1925, the year the FAA was enacted, the Eleventh Circuit held that "attendance before" a tribunal required physical presence:

Looking to dictionaries from the time of Section 7's enactment makes clear that a court order compelling the "attendance" of a witness "before" the arbitrator meant compelling the witness to be in the physical presence of the arbitrator. In 1925, "attendance" meant the "[a]ct of attending," and "attend" meant "be present at." See, e.g., H.W. Fowler & F.G. Fowler, *The Concise Oxford Dictionary of Current English* 52 (1926). Similarly, "before" meant "in [the] presence of." *Id.* at 74. And "presence" meant "place where person is," while "present" meant "[b]eing in the place in question." *Id.* At

party documents to consider whether the documents were sufficiently important "to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed."<sup>31</sup>

## Canada

In Canada, under the Model Law Article 19, if the parties have not agreed on a procedure, the arbitral tribunal "may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate." The provincial domestic arbitration Acts all have similar provisions. Simply put, unless there is some other provision of the Model Law that would prevent it, the arbitral tribunal has jurisdiction to conduct the arbitration by way of videoconferencing. This implicates Article 24, which provides an oral hearing must take place if any party requests it, and Article 18, which provides that the parties must be treated with equality and each party given a full opportunity to present its case.

In Canada, as in the U.S., the word "hearing" has become a "generic label to describe trials, appeals, and a host of interlocutory [court] proceedings" and "contrary to the intuitive sense of the word, the "hearing" need not be an auditory experience; the evidence can assume the form of affidavits, transcripts or other documentary material."<sup>32</sup> A "hearing" has come to mean the right to present one's side of the case<sup>33</sup> or, as expressed in the French legal word for a hearing, an "audience." The various provincial arbitration acts and the Model Law acknowledge this broad definition by stating a party may require an *oral* hearing, not simply a hearing. With a two-way video link, witnesses and counsel may orally present evidence and argument and the arbitrator can hear and control the process. The Canadian cases confirm<sup>34</sup> a video conference proceeding is a *viva voce* hearing.

Putting aside the fact that cross examination for the purpose of undermining credibility based on a witness' demeanor alone is rare in commercial arbitrations, the Canadian cases confirm that there is little basis with today's technology, for arguing that seeing the demeanor of the witness will be impaired. In *R. v. Gibson*,<sup>35</sup> the judge observed that not only could he see and hear the witness, the video actually accentuated the expressions of a witness under cross-examination and some judges have commented that a video can actually enhance the ability to evaluate demeanor<sup>36</sup> and does not adversely affect procedural fairness.<sup>37</sup>

## Other Countries

The authors are not aware of any national law that specifically requires party consent to remote evidentiary hearings, and there are some recent examples of states explicitly permitting remote hearings in their *lex arbitri*.<sup>38</sup> As a general proposition, this should not be an issue in civil law countries, where there is typically no right to physically confront adverse witnesses. Successful challenges would likely result only if a party were unable to make its case due to (as an example) lengthy technical failures, e.g. disruption of sound and image transmission, or in case of gross inequalities in the use of the technology selected by the arbitral tribunal.

As to common law countries, the prevailing sentiment may have been expressed earlier this year by the Supreme Court of Singapore:

"[T]he Court observed that the right to be heard—which refers to each party's right to present its case and respond to the case against it—was a fundamental rule of natural justice enshrined in Art 18 of the Model Law. However, the Art 18 right to a "full opportunity" of presenting one's case was not an unlimited one, and was impliedly limited by considerations of reasonableness and fairness. What constituted a "full opportunity" was a contextual inquiry to be undertaken within the specific context of the particular facts and circumstances of each case. The proper approach for the court to take was to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done."<sup>39</sup>

## New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The New York Convention") permits its 163 state parties to refuse to recognize and enforce arbitral awards made in the territory of other state parties only on very limited grounds. A party

seeking to avoid recognition or enforcement of an award rendered after a remote hearing conceivably could invoke the following provisions of the Convention:

- a party was "unable to present his case" (Article V(1)(b)),
- the arbitral procedure did not comply with the agreement between the parties or was not in accordance with the law of the country where the arbitration took place (Article V(1)(d)), or
- the award was contrary to the public policy of the country in which recognition and enforcement is sought (Article V(2)(b)).

As to Article V(1) grounds, courts will usually deny enforcement only where the non-compliance was material or substantially prejudiced the rights of the objecting party.<sup>40</sup> As to Article V(2)(b), "public policy" has been construed quite broadly in very few signatory states as a means to refuse enforcement of a foreign award. The tendency in most countries has been to construe public policy narrowly, by reference to "fundamental notions of international public policy." In a number of jurisdictions, in both of common law and civil law systems, courts have taken the position that public policy considerations that apply in purely domestic cases do not necessarily apply to international arbitrations.

## Conclusion

Absent a showing of particular unfairness to a party under the circumstances, it is very unlikely that a U.S. or Canadian court would set aside an arbitral award solely because the tribunal held evidentiary hearings by videoconference. But there is no question that fairness and equality of treatment trump the need for efficiency and economy. Best practice requires that a tribunal hear, in a formal way, any application that a hearing proceed by video conferencing where one party objects, with particular emphasis on how, precisely, the use of technology would prejudice the party, rather than vague statements regarding the need to assess the demeanor of witnesses generally.

## Endnotes

1. AAA Commercial Arbitration Rules, effective October 1, 2014, R-32(c) ("When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination").
2. LCIA Arbitration Rules, effective October 1, 2014, Article 19.2 ("The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video

or telephone conference or in person (or a combination of all three)").

3. UNCITRAL Arbitration Rules, as revised in 2010, Article 28(4) ("The arbitral 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 videoconference)").
4. ICDR Arbitration Rules, effective June 1, 2014, Article 20(1) and (2); *see also*, ICDR's virtual hearing guides and model order [https://go.adr.org/covid-19-virtual-hearings.html?utm\\_source=website&utm\\_medium=featurebox&utm\\_campaign=website\\_covid-19-virtual-hearing&utm\\_ga=2.116769798.1284314368.1591704659-2099710686.1591704659](https://go.adr.org/covid-19-virtual-hearings.html?utm_source=website&utm_medium=featurebox&utm_campaign=website_covid-19-virtual-hearing&utm_ga=2.116769798.1284314368.1591704659-2099710686.1591704659)
5. 2019 CPR Rules for Administered Arbitration of International Disputes, effective March 1, 2019, Rule 9.1 and 12.1.
6. SCC Arbitration Institute, 2017 Arbitration Rules, in force as of January 1, 2017, Article 23(1).
7. SIAC Arbitration Rules, dated August 1, 2016, Rule 19.1; *see also*, SCC Arbitration Institute, COVID-19: Information and Guidance in SCC Arbitration, March 27, 2020, <https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/> (encouraging use of "audio and visual meeting facilities in the proceedings" when determined to be "necessary and deemed possible").
8. *Id.*, at Rule 27(h).
9. *Id.*, at Rule 25.3.
10. 2018 HKIAC Administered Arbitration Rules, effective November 1, 2018, Article 13.1.
11. The Rules of the International Centre for Settlement of Investment Disputes ("ICSID") provide that "[w]itnesses and experts shall be examined before the Tribunal by the parties under the control of its President" and that "the Tribunal may... with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself." ICSID Arbitration Rules 35(1) and 36(b). ICSID has a sophisticated platform for virtual hearings and recently noted that in 2019 "about 60 per cent of the 200 hearings and sessions organized by ICSID were held by video-conference" but ICSID has not reported whether any of these "hearings and sessions" took place over objection of a party. A Brief Guide to Oral Hearings at ICSID, March 24, 2020, <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>.
12. ICC Rules, in force as from March 1, 2017, Article 25(2).
13. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated April 9, 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").
14. ICC Guidance Note, paras. 23, 24.
15. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002).
16. *See id.* at 84. *See also Allen v. RBC Dain Rauscher, Inc.*, 2006 U.S. Dist. LEXIS 27974, at \*13-\*14 (W.D. Wash. May 9, 2006) ("it is up to the arbitration panel to interpret the NASD Code of Arbitration Procedure and apply it to the proceedings"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jordan*, 2017 U.S. Dist. LEXIS 63749, \*10-\*11 (D. Del. 2017) (FINRA arbitrator "is in the best position to interpret application of [FINRA] rules").
17. 9 U.S.C. § 1, et seq.
18. *See Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2nd Cir. 1997). The section of the FAA dealing with vacatur, 9 U.S.C. §10(a)(3), provides in relevant part:

the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
19. *In re Arbitration between Griffin Indus. and Petrojam*, 58 F Supp 2d 212, 220 (SDNY 1999).
20. *See* 9 U.S.C. §10(a)(3); *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 204, 209-10 (S.D.N.Y. 2002).
21. *Wise v. Marriott Int'l, Inc.*, 2007 U.S. Dist. LEXIS 70512, \* 10 - \* 13 (S.D.N.Y. 2007) (petitioner failed to cite any case where an arbitration award was vacated under New York law because it was issued without an evidentiary hearing).
22. NY CPLR § 7506(c) ("The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.") *See also* 2 Weinstein, Korn & Miller CPLR Manual § 31.07.
23. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002).
24. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998); *see also* S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: a Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 140 (2012).
25. *See, e.g., Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 710 (7th Cir.) (Posner, C.J.) (affirming award after failing to draw a negative inference from the failure of the NASD's Code of Arbitration Procedure to say anything about the scope of the arbitrators' powers to award punitive damages).
26. *See Bisnoff v. King*, 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001).
27. *See Al-Haddad Commodities Corp. v. Toepfer Int'l Asia Pte, Ltd.*, 485 F. Supp. 2d 677, 685-686 (E.D.Va. 2007).
28. *See* Fed. R. Civ. P. 43(a) (if "good cause in compelling circumstances" is shown "the court may permit testimony in open court by contemporaneous transmission from a different location"); *Ever Win Int'l Corp. v. Prong, Inc.*, 2017 U.S. Dist. LEXIS 84560, \*2-\*4 (C.D. Cal. Jan. 6, 2017) (citing cases permitting telephonic and audiovisual testimony).
29. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160-1161 (11th Cir. 2019).
30. *Id.*, at 1161.
31. *Id.*, at 1161, quoting *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004).
32. *Catholic Children's Aid Society of Metropolitan Toronto v. O* [1995] O.J. No. 3971 ¶ 30. Also see *Children's Aid Society of London and Middlesex v. A.L.* 2018 ONSC 4569.
33. *See Burnley v. University of New Brunswick* (1992).
34. *R. v. Dix* (1998) ABQB 370 (CanLII), 125 C.C.C. (3d) 377. (Alberta court of Queen's Bench). Also see *Duverger v. 2553-4330 Que bec Inc. (Aéropro)*, 2018 CHRT 12 (CanLII).
35. (2003) B.C.J. No. 812 (B.C. Supreme Court).
36. *R. v. Heynen* (2000) Y.J. No.6 (Yukon Territorial Court).
37. *Gonzales v. Canada (Minister of Citizenship and Immigration)* 2002 FCT1229 (CanLII)
38. Article 33(3) of the UAE Federal Arbitration Law No.6 of 2018, Art. 33(3); Jordanian Arbitration Law No. 31 of 2001 as amended by Laws no.16 and 41 of 2018, Article 32 (i). The authors are indebted to Mohamed S. Abdel Wahab for these citations.
39. *See China Machine New Energy Corp v Jaguar Energy Guatemala LLC and anor* [2020] SGCA 12.
40. *See, e.g., K Trading Co v Bayerische Motoren Werke AG* (Higher Court of Appeal, Bavaria), *Yearbook Commercial Arbitration 2005 - Vol XXX*, at p. 568; *Werner A Bock KG v N's Co Ltd* [1978] HKLR 281.

# Considering Video Conference Arbitration Hearings in the U.S.: Ensuring Due Process

By Steven Skulnik

## Basis for Remote Arbitration Hearing

Restrictions on travel and in-person meetings are expected to persist for many months, if not longer. This presents special challenges and opportunities for the parties to a dispute. While many courts have suspended proceedings including trials, arbitral tribunals may use video conferencing and other tools to keep cases moving through merits hearings and final awards because arbitrators are not bound by court rules and rules of evidence. This is in keeping with parties' expectations that arbitration will be more efficient and expedient than court litigation.<sup>1</sup>

Indeed, the rules of the major arbitral institutions that administer arbitrations in the U.S. authorize arbitrators to take evidence and hear evidence by audio or audio-visual means. The American Arbitration Association's (AAA) Commercial Arbitration Rules (AAA Rules) provide for the presentation of evidence by alternative means including video conference, internet communication, and telephone conference, as long as the methods used afford the parties a full opportunity to present material and relevant evidence.<sup>2</sup> Similarly, the International Dispute Resolution Procedures (IDR Procedures), administered by the AAA's international division, the International Centre for Dispute Resolution (ICDR), authorize arbitrators to conduct the arbitration in whatever manner they consider appropriate, including consideration of how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings, as long as parties are treated equally, have the right to be heard, and are given a fair opportunity to present their case.<sup>3</sup> By incorporating these and similar rules into their arbitration agreement, the parties have agreed to authorize arbitrators to order the taking of evidence remotely.<sup>4</sup>

Apart from the relevant rules, U.S. courts recognize that procedural flexibility, which is a hallmark attribute of arbitration, allows for oral evidence to be taken by electronic means. Although there are few reported cases, challenges to arbitral awards based on the arbitrator hearing remote testimony by electronic means have failed.<sup>5</sup>

Users of arbitration have expressed frustration with arbitrators who have been reluctant to act decisively for fear that the arbitral award would be challenged on the basis of a party not having had the chance to fully present its case.<sup>6</sup> These users note that the risk of successful challenges to arbitral awards is insufficient to justify arbitrators' overly cautious decision-making and, consequently, arbitrators should be willing to more decisively manage their cases.<sup>7</sup>

## Due Process Concerns Regarding Remote Hearings

The principle that parties to an arbitration are entitled to have the opportunity to present pertinent and material evidence derives from section 10(a)(3) of the Federal Arbitration Act, which instructs US courts to set aside an arbitral award where arbitrators were guilty "in refusing to hear evidence pertinent and material to the controversy."<sup>8</sup> For international awards, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a court may refuse to recognize and enforce an arbitral award where a party to the arbitration was "unable to present his case."<sup>9</sup> In essence, the reviewing court applies the forum state's standards of due process.<sup>10</sup> This does not mean, however, that a party has the right to uncover and submit every piece of evidence it seeks.<sup>11</sup> This means merely that a party must have an opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>12</sup>

Remote hearings taking place due to COVID-19, in which every participant is in a different location, present a new paradigm and have not been tested in court. That said, courts do not vacate or refuse enforcement of awards solely based on the arbitrators rulings regarding technology.<sup>13</sup> A party that objected to proceeding by remote electronic methods and had its objection overruled, may claim that the arbitrators were not impartial. Dissatisfaction with a procedural ruling, however, is not a basis to challenge the impartiality of the arbitrators or the fundamental fairness of the proceedings.<sup>14</sup>

Arbitrators should keep due process in mind when deciding both whether to proceed by remote hearing, and if so, what procedures should be implemented. Regarding whether to proceed by remote hearing, the arbitrators should consider at what stage the request has been made. In cases in which the parties have made all their written submissions and the hearings are already scheduled, it may not be reasonable to put everything on hold for a

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year or more until everyone can convene in one room. In that sense, the party requesting the remote hearing (usually the claimant) arguably has a due process right to proceed without inordinate delay. In newer cases, the parties may not be ready for the merits hearing for some time. The tribunal can defer on the manner of taking oral testimony and oral argument until all written submissions have been made.

### Solutions that Comport with Due Process

For those cases that are ready for disposition, and the arbitrators have rejected waiting for the COVID-19 crisis to end, steps should be taken to minimize the disadvantages of remote hearings. Parties and tribunals should ensure as much evidence and argument as feasible are submitted in written form, where there are no technological challenges. The arbitrators should assist the parties in identifying whether the case, or discreet issues within it (such as questions of law), can be resolved without a hearing. Parties and counsel should also take advantage of procedures allowing for early disposition of claims and defenses.<sup>15</sup>

As for the merits hearing itself, reasonable steps to ensure due process include the parties' equal access to and familiarity with the digital platform; the use of an outside vendor to ensure smooth operation of the technology; providing that if all parties cannot be at the same location as the arbitrators, none should be; making back-up arrangements in advance addressing what happens when a participant is disconnected from the video conference; ensuring the parties have the opportunity to prepare adequately for the hearing where there are travel restrictions; and considering mechanisms to ensure that no party gives improper assistance to a witness or expert testifying remotely during the hearing.

In international cases, arbitrators should not require any party to participate in a hearing at an unreasonable time based on that party's time zone. Arbitrators should also allow for a sufficient gap between the end of one session and the start of another. In an appropriate case, the tribunal should consider commencing the hearings at different hours of the day so that no one side will always have the more convenient start time for its time zone.

### Conclusion

Absent a peculiar provision in the parties' arbitration agreement, both institutional rules and U.S. arbitration law give arbitrators wide latitude in deciding how to conduct an arbitration. Employing fair procedures, and using technology appropriately, ensures that parties may present their case at a meaningful time and in a meaningful manner, which is the standard courts look to in deciding whether due process has been satisfied.

### Endnotes

1. See Roy Weinstein, *Arbitration Offers Efficiency and Economic Benefits Compared to Court Proceedings*, New York Dispute Resolution Lawyer (Fall 2017).
2. Rule 32 (c).
3. Article 20. See also JAMS Comprehensive Arbitration Rules & Procedures (JAMS Rules), Rule 22(g) ("The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator"); CPR Administered Arbitration Rules (CPR Rules), Rule 12.1 ("The Tribunal shall decide the manner in which the parties shall present their cases"); 12.2 ("Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate"); 12.4 ("The Tribunal shall determine the manner in which witnesses are to be examined").
4. At the outset of the COVID-19 crisis, the International Chamber of Commerce (ICC) Rules of Arbitration gave arbitrators and practitioners some pause. Article 25(2) of those rules provides that arbitrators "shall hear the parties together in person." The ICC interprets this rule, however, "as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place 'in person' by virtual means if the circumstances so warrant." ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, ¶23 (April 9, 2020).
5. *Eaton Partners, LLC v. Azimuth Capital Mgmt. IV, Ltd.*, 2019 WL 5294934, at \*4 (S.D.N.Y. Oct. 18, 2019), citing *Bisnoff v. King*, 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001)).
6. School of International Arbitration at Queen Mary, University of London (QMUL) 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, sponsored by White & Case LLP, at 10.
7. *Id.*
8. 9 U.S.C. § 10(a)(3).
9. 9 U.S.C. § 201, Art. V(1)(b).
10. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992)
11. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 304 (5th Cir. 2004) ("denial of a continuance and additional discovery did not prevent [the award debtor] from presenting its case, so as to deprive it of a fair hearing")
12. *Iran Aircraft*, 980 F.2d at 146; see *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (Rakta)*, 508 F.2d 969, 975 (2d Cir.1974).
13. See footnote 5 *supra*; see also *LLC Komstroy v. Republic of Moldova*, 2019 WL 3997385, at \*8 (D.D.C. Aug. 23, 2019) (rejecting argument that the losing party was unable to present its case because the arbitrators did not provide the parties the full audio recordings of the hearings); *China Nat. Bldg. Material Inv. Co., Ltd. v. BNK Intern. LLC*, 2009 WL 4730578, at \*7 (W.D. Tex. Dec. 4, 2009) (noting that a party's inconvenience in attending hearings held in Hong Kong does not amount to a denial process rights, when that party was invited to appear by videoconference); but see *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (interpreting the phrase "before them" in section 7 of the FAA to require a nonparty witness to "appear in the physical presence of the arbitrator," which would exclude audio or videoconferencing).
14. See *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26 (D.D.C. 2016).
15. The rules of the major institutions provide for the making of dispositive motions. See AAA Rule 33; JAMS Rule 18; CPR Rule 12.6. IDR Procedures Article 20(3) empowers arbitrators to decide preliminary issues, bifurcate proceedings, direct the order of proof, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case. Courts confirm awards granted by dispositive motion where the parties had the opportunity to submit their arguments and evidence. See *Cuker v. Berezofsky*, 2019 WL 689592, at \*6 (E.D. Pa. Feb. 19, 2019); *ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 264 (D.D.C. 2013); *Brooks v. BDO Seidman, LLP*, 917 N.Y.S.2d 842 (Sup. Ct. N.Y. Co., 2011), *aff'd*, 942 N.Y.S.2d 333 (1st Dep't 2012).

# Conducting the Evidentiary Hearing Remotely

By David C. Singer

The COVID-19 pandemic has resulted in the expanded use of technology in arbitration, including conducting arbitration evidentiary hearings remotely. During the pandemic, conducting evidentiary hearings in person had not been possible, at least for certain participants and in certain locations. Postponing the hearing, perhaps indefinitely, was problematic since doing so is inconsistent with one of the hallmark features and benefits of arbitration, namely, the efficient administration of the process and the relatively prompt resolution of disputes that are submitted to arbitration. Even in the absence of a pandemic, or other special circumstances, the challenges of scheduling blocks of mutually convenient dates for the evidentiary hearing among busy practitioners, arbitrators and parties, especially when people are required to travel from far distances within the United States or from abroad, can cause delay that may contribute to party dissatisfaction with arbitration generally, and may be unfair to one or more of the parties specifically. In addition, conducting the hearing in person but socially distanced may impose other problems.

The alternative is to conduct the evidentiary hearing remotely, using computers and online platforms that are designed or can be adapted for such purpose.

One of the benefits of arbitration is that it is a flexible process. It has not been uncommon for testimony to be received via videoconference or even by telephone when the physical presence of a witness at the location of the hearing is impossible or impracticable. In such circumstances, everyone else – the parties, their counsel, the arbitrators, the court stenographer—have been together at the physical location of the hearing. Only the witness, perhaps with the witness' counsel, is remote.

When conducting a hearing remotely—through Zoom or another online platform – everyone may be physically separated and participating remotely from each other. Conducting remote evidentiary hearings can achieve greater efficiencies—in both time and expense—than waiting for in-person evidentiary hearings. This is especially true when participants live far away from the designated hearing location. With clear audio and video that permit the arbitrator to assess credibility of the witnesses, counsel can conduct their witness examinations. It may become more common to use remote evidentiary hearings even after the pandemic is behind us.

When conducting remote hearings, the parties and their counsel should meet and confer in advance and agree upon protocols to the extent possible regarding the conduct of the hearing. The parties must agree upon the software platform and type of equipment that will be used. In preparation for the evidentiary hearing, coun-

sel and the parties must be responsible for insuring the quality of their own and their witnesses' computer and other equipment, as well as the adequacy of lighting so that witnesses can be seen clearly and are not in shadow. All computer equipment and internet services that will be used should be tested in advance.

Shortly prior to the hearing, counsel and the arbitrator should conduct a pre-hearing video conference, in order to do a test "dry run." At such time, the agreed protocol for handling the technology can be practiced. Also, any unresolved issues can be raised, and questions answered as would typically occur at any pre-hearing conference.

During the hearing, no one should participate from a public location or where a non-invitee could hear, see or otherwise participate in any portion of the hearing. Each party and his or her counsel are responsible for their own respective witnesses, including the use of their equipment and making them available for their timely testimony.

The arbitrator, or an agreed technology or other designee, assumes responsibility as "host" for controlling the evidentiary hearing, including the technology involved in muting and unmuting, screen sharing, passing control, segregating people into breakout rooms, utilizing the waiting room, allowing participants into the meeting, and other functions. If there is an arbitration service provider, a representative of that provider could perform that function. Court reporting services can also perform such services.

Maintaining confidentiality of the evidentiary hearing is critical. The invitation to the hearing is sent to participants in the hearing by the host—and only the host. Such invitation should be password protected. All recipients should be told that they must not forward the invitation to anyone or share the hearing link or password associated with such invitation. In order to circulate the invitation, the contact information of the participants must be exchanged in advance. Backup contact information for the participants so they may be reached by text or phone, and backup contacts for reporting technology issues to the host, also need to be provided.

At the commencement of the evidentiary hearing, all participants must verify their attendance and disclose

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if anyone else is in the room with them. Virtual backgrounds should not be used because that could facilitate the presence of people who cannot be seen by other participants. Participants and witnesses could be asked to sign an acknowledgment of any witness or participant protocols.

The matter of recording the hearing also raises issues concerning confidentiality. Online platforms may allow for recording of the hearing, both audio and visual. It is important that control be maintained over such recordings so that they cannot be forwarded or duplicated. There should be no independent recording of the hearing or taking of screenshots of the online proceedings, other than by the court reporter or as otherwise designated.

For the presentation of live testimony, the witness should be in full view of the camera. The witness should confirm that no one is in the presence of the witness. (Again, no virtual background should be permitted for the witness.) The arbitrator maintains the right to confirm during the course of the testimony that the witness is alone, and even ask the witness to provide a 360-degree visual of the room in which the witness is located.

The arbitrator can confirm that the witness is not referring to any notes or any other writings or materials, and that the witness has before him or her only the hearing exhibits. The witness should be advised to turn off any cellphone or other electronic devices that would enable the witness to communicate with others during the course of the testimony.

At the outset of any testimony, the witness should be sworn in by the arbitrator or court reporter. The parties should agree that the form of oath is satisfactory in the jurisdiction where the witness is located and the remote administration by court reporter or arbitrator is proper. The arbitrator may emphasize that the testimony given is under oath, as if testifying in a court of law, and that the witness' testimony is being recorded as part of the official record of the hearing. The witness and counsel should be advised to be particularly mindful not to interrupt the speaker so that the testimony can be recorded accurately by the court reporter. This includes the handling of objections. It is also advisable that all participants who are not actively engaged in the witness examination mute their audio, in order to eliminate background noise and reduce the use of bandwidth.

Exhibits must be circulated to the arbitrator and opposing counsel in advance of the evidentiary hearing. In this regard, the mailing address, email and other contact information must be circulated to all participants so that they can receive the exhibits in advance of the hearing. Exhibits can be delivered either in hard copy or on a flash drive or distributed by email or other method. Exhibits can also be made available electronically with an exhibit repository that parties agree is sufficiently secure and access to the repository or to individual exhibits in the repository provided as appropriate. In contrast to in-person evidentiary hearings, the arbitrator must receive the witness exhibits in advance, not on the first day of the hearing.

Witness exhibits can be displayed online through screen sharing which can be used by counsel. The use of screen sharing is most effective if the participants have multiple screens in front of them, which would enable them to view exhibits on one screen and the witness on another screen. The use of screen sharing presents risks associated with the use of the technology, relating both to the clarity of the documents as well as the ability of counsel to retrieve the documents as needed.

Exhibits used for cross-examination or rebuttal can be circulated to the witness, opposing counsel and the arbitrators immediately prior to the examination, either by email or other electronic means. Screen sharing can also be used for this purpose as well.

The arbitrators and counsel may also wish to consider ways to shorten the remote evidentiary hearing. One way to do so is the use of written witness statements as the direct examination of a witness. Such statements, typically in the form of sworn affidavits, can significantly shorten the amount of time that is required to present the direct examination of a witness. When using witness statements, counsel for the witness can still present an abbreviated direct examination, which would include confirming the accuracy and completeness of the content of the witness statement. The direct examination would be followed by a full cross-examination and, thereafter, rebuttal, as would occur in the absence of witness statements.

Concerns regarding witness statements may include that credibility of the witness cannot be assessed. However, given the live examination through the abbreviated direct testimony and full cross-examination and rebuttal, there can be ample opportunity to observe and assess the credibility of the witness. In addition, online platforms enable the viewer to show the face of the testifying witness on the full screen, in close proximity, thereby facilitating the view of the witness and her or his facial expressions. Going forward, the use of witness statements may become increasingly common in domestic arbitration, as they are the norm in international arbitration.

Major arbitration service providers, including the American Arbitration Association, JAMS and The International Institute for Conflict Prevention & Resolution, and other interested parties, including Thomson Reuters, have issued guidance with regard to conducting remote evidentiary hearings, and such guidance can be accessed on their respective websites.

# Online Mediation in a Time of Coronavirus

Simeon H. Baum

## Necessity Is the Mother of Invention

We are living in strange times. COVID-19 has locked down the world, bringing unthinkable harm—the death of loved ones, colleagues and community members; disease; unemployment; and disaster for many businesses. Yet just as the plagues in Egypt were a harbinger of liberation for the Hebrews, today’s coronavirus homestay has combined with other social forces to offer a boom time for mediation.

A year prior to coronavirus, Chief Judge DiFiore commissioned a task force on increasing used of ADR processes in the New York State court system. Incorporating the task force recommendations in her State of the Judiciary and subsequent orders, Chief Judge DiFiore called for a significant increase in ADR use throughout the state court system. Administrative Judges were charged with creating ADR plans by September 2019. Since then, new ADR Coordinators have been hired, mediation and other dispute resolution trainings have ramped up, and an extensive increase in the use of a variety of creative dispute resolution processes—with a spotlight on mediation—is upon us.

Then came coronavirus. With courts shut down, many litigators were having tea and biscuits at home, with little else to do. Many of their business clients were facing major losses, with stores closed and a dramatically reduced workforce. Both commercial landlords and tenants have been suffering. With ensuing cash shortages, plaintiffs have even greater needs for immediate recoveries; and parties on both sides of the adversarial equation would prefer not to spend a fortune on litigation.

At least at its inception—prior to the deeply unfortunate and nation rending events of recent weeks in the wake of the George Floyd tragedy—COVID-19 was a unifying force. We were all in this disaster together. From the standpoint of case resolution, we were seeing the Christmas spirit on steroids. The time has been overripe for mediation.

The fundamental question facing mediators when lockdown began was whether it is possible to continue mediation while we are all at a social distance. Mediation, at core, is a process of bringing people together in a manner that enables us to recognize and address one another in our wholeness, as complete persons. It offers a confidential session where empathy, recognition, attention to body language, enhanced communication, the communal meal (whether coffee and danish, or the

later lunch) work their magic. Through interpersonal interbeing (to steal a phrase from Thich Nhat Hanh),<sup>1</sup> we are enabled to cut through positional bargaining and adversarial postures, to enhance understanding, augment free exercise of choices on many levels, and engage in productive deal making. We mediators work to create an environment where safe disclosures may occur. Even for complex business matters this is a zone of possible intimacy, where personal touch and insight matter.

The question we have faced is how this can be done when we are stuck at home. And then came Zoom.<sup>2</sup> Although many of us are technosaurs, we soon found ourselves functioning like the sage of the *Tao te Ching*:

Without leaving his door  
He knows everything under heaven.  
Without looking out of his window  
He knows all the ways of heaven.  
For the further one travels  
The less one knows.  
Therefore the Sage arrives without going,  
Sees all without looking,  
Does nothing, yet achieves everything.<sup>3</sup>

While contrary to the essential and calmly contemplative message of this passage, the reality of the past months has been nearly frenetic interactivity with the world while we conduct full lives remotely from a computer desk at home. We have linked into our office computers with TeamViewer or the like; had Zoom cocktails and dinners with family and friends; ordered all personal household needs via Amazon, Fresh Direct, or other providers; and generally lived with tremendous interactivity while staying at home.

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Similarly, thanks to online videoconferencing technology, over the last few months there has been a dramatic shift to online mediation.

In this article, we will consider online mediation, with a focus on Zoom in particular. In order to assess the utility or effectiveness of this medium, we must consider what it is we are seeking to accomplish. Thus we will first take a brief look at mediation itself to flesh out the sensibility used to assess the use of this modality. We will then turn to a nuts and bolts review of key Zoom features as used in mediation. Then follows a consideration of broader issues with the Zoom platform as they relate to mediation: confidentiality, security and the management of parties in a manner consistent with one's mediation orientation. Having addressed core features of Zoom *sub specie mediationis*, we then consider how to integrate Zoom into our mediation practice. This starts with introducing Zoom to parties and counsel, to aid in their shift to this modality. It then moves to practical considerations of Zoom use at various stages of the mediation process. Then, based on this user's experience and reports from other mediators and users, we will offer practice tips, and reflect on new opportunities and challenges with Zoom. Finally, we will look to the future with questions of how this will impact the practice of mediation once we all return to our offices and are free again to hold mediation sessions in person.

### **If the Medium Is the Message, What Question Does It Answer?**

As we consider whether Zoom or other versions of online mediation are effective for mediation, we might keep in mind that our understanding of mediation and its potential determines the answer to the question of the utility of this modality. We enter the Zoom zone now after decades of experience with mediation. We have seen how in person mediations sessions function, had dialogue in the mediation field on a variety of orientations and approaches to mediation, and are aware the promise of mediation and its potential. We take this awareness with us into online mediation as critique and aspiration for this new mode. Beyond this, ideally, we might keep our eyes open to new possibilities.

Use of technology itself generates choice points from which we encounter our choices and are given an opportunity to question what, in fact, we are seeking – which reveals something about our orientation. It offers us reflective opportunities to assess how those choices and capacities impact, influence, and serve participants (parties and representatives); and whether there are new possibilities from this modality which have value.

As we make these choices, we are also called upon to keep in mind the deepest potential of mediation, and to seek ways to maximize this potential. Let us now briefly review expressions of this potential.

### **Core Mediation Orientations—Who Do the Voodoo That You Do So Well?**

In an article of this kind, we will make just summary observations about major expressions of mediation orientation.

#### **Facilitated Problem Solving or Evaluative Process?**

Since the emergence of Riskin's Grid for the Perplexed<sup>4</sup>, the mediation field has been sensitive to the question of whether mediators offer parties evaluations of their case strengths and weaknesses, the benefit or detriment of a deal or even broader considerations of the appropriateness of process moves, past behavior, community impact or potential outcomes.<sup>5</sup> Do mediators tell parties what to do? Or are mediators fundamentally facilitators of the parties' own dialogue, negotiation and reflection?

Centrists in the field train using insights from *Getting to Yes*<sup>6</sup>, viewing the role of mediator as a facilitator—one who helps the parties help themselves in working through a process characterized by joint, mutual gains, cooperative problem solving. Mediators grease the wheels of the parties' own negotiation, guided by the Fisher Ury model. Negotiators are encouraged to be soft on the parties and hard on the issues. We use active listening—validating, empathizing, clarifying, and summarizing—to enable parties to feel heard and to encourage productive disclosure of information that can serve as the medium of exchange in the negotiation process. We help parties shift from rigid positional bargaining to uncovering and disclosing their interests, and cultivate development of options to meet the parties' needs and interests. We use standards to move the talk away from a battle of wills to constructive consideration of jointly held principles or criteria that might help with distribution of assets, assessing values in transactions, or determination of appropriate outcomes. And we use the "BATNA"—the best alternative to a negotiated agreement – to consider where the existing or potential in the parties' life context suggest that it is better to walk away than take the deal proposal on the table.

As a process, mediations guided by this model are confidential sessions in which the parties typically hold talks jointly and also break out into private meetings, or "caucuses," with the mediator. Caucuses offer a good opportunity to develop rapport; hear and express empathy for stories that might be difficult to express in the presence of the other parties who are perceived as adversaries; uncover interests that might otherwise be withheld for reasons of strategy or simply lack of reflection; gain understanding of perspectives from the other room without the risk of strategic loss through acknowledgement or loss of "face"; encounter case or deal risks; brainstorm to develop options for deal proposals; and assess proposals made by the other parties.

## Understanding-Based Model

For roughly 40 years, Jack Himmelstein and Gary Friedman, through their Center for Understanding in Conflict, have promoted an approach to mediation that sees Understanding as its foundation and goal. As people in conflict gain a better sense of themselves and the others, digging beneath the “v” in *Jones v. Smith*, they come to recognize commonality, appreciate differences, recognize that we are all in this world together, and work through their common situation to a deeper understanding and acceptance of the life reality that is and embraces them.

The mediator and others engaged in this process employ a mode of listening that Himmelstein and Friedman coin as “looping.” This is an iterative process in which the listener, with a genuine intent of encouraging full expression and gaining understanding, feeds back to the speaker reflective expression of what has been said, with openness to adjustment, correction, modification, and amplification, until the speaker—feeling more deeply understood—expresses, in effect, with satisfaction, that the looping listener has got it.

Parties engaged in this mode of mediation have gone through a process of contracting and convening, where they buy into the notion that looping and the entire mediation process will be conducted openly, in joint session. The view is that the mediator brings peace into the room and does not reinforce barriers between the parties by use of caucus. The mediator here is not a power person, toting messages and deal proposals from room to room. Rather, understanding is cultivated through transparent looping in the view that as all are mirrored, collective understanding—and acceptance—will deepen; and resolution will ensue.

## Transformative Mediation

In 1994, Bush and Folger published *The Promise of Mediation*,<sup>7</sup> a clarion call for the school known as transformative mediation. Emerging from their experience with community mediation—of matters found in New York’s Community Dispute Resolution Centers (CDRCs), such as landlord tenant, neighbor/neighbor, family, and minor criminal court matters—Bush and Folger made a stunning pronouncement. The purpose of the mediator is not to settle the matter. Nor is it to cultivate joint, mutual gains problem solving. Rather, the purpose of the mediator is twofold: fostering party empowerment and recognition.

This is rooted in the transformative theory of conflict as a crisis in the parties’ relationship, as manifested in their mode of communication. A transformative insight is that parties in conflict are deeply uncomfortable with this condition. They are hunkered down. The conflict feels ugly. The parties’ feel at risk and are defensively enmeshed in self-concern. This limits the capacity to

recognize the other party’s reality—feelings, perspective, needs, interests, or legitimacy. Through raising up opportunities for parties to make choices at the mediation table, the mediator fosters party empowerment. As a party recognizes the capacity to make process choices, to speak or not to speak, what to say, to make proposals or not, how to respond to expressions or proposals by the other party, what deal to accept—in short a host of possible choices the party gains a greater sense of freedom and control. This party empowerment enables parties to feel more secure, to relax a bit, and for the first time to find the freedom to look beyond their ambit of self-concern to recognize the other. This ensuing growth in empathy is the moral transformation from which the transformative mediation school derives its name.

The mediator’s attitude in the transformative model is that of pure facilitation. The parties drive the car of the process. The mediator sits in the back seat raising up opportunities for empowerment and recognition. The mediator has no macro criteria—such as interests, options, standards and BATNA—to ring bells to be captured as communication ensues. Rather, the mediator listens with a microfocus, with plain reflection back of immediate party expression in the moment.

Transformative mediation accommodates caucuses as well as joint session.

## Protean Shape Shifters—the 360-Degree Mediator

For many mediators and users, the above problem-solving facilitation, understanding based, and transformative models of mediation might serve as ideal types offering guidance and a sense of rich potential in mediation, while not limiting the approach taken in a given mediation. Rather one might take the approach recommended by Peter Adler in his piece on *Protean Negotiation*,<sup>8</sup> and do what is appropriate under the circumstances.

As a set of general observations, characteristics of mediation can include creating a forum where parties can express themselves with authenticity and find potential for empathy. It is a zone where mediators work to bridge the trust deficit found in disputes, and engage all present in a collective effort towards enhanced communication and resolution. Your current author tends to turn to the *Tao te Ching*, of Lao Tzu, as a bible for mediators, as it were, encouraging deep listening, relatedness, receptivity, participation, flexibility, and waiting in patience and humility to let the process happen and enable parties to work things out.<sup>9</sup> It can be seen as a forum for the integration of the norms of justice and harmony.<sup>10</sup>

At core for this author, after 30 years laboring at the mediation vines, parties gain productive guidance in seeing mediation as flexible process, accommodating any configuration of groups, in an effort at building understanding and deal-making.

## Now to Zoom in on Zoom

With the forgoing questions and sense of mediation's scope, depth and potential in mind, let us take a closer look at online, video-conferenced mediation. Prior to the onset of coronavirus, over the years, this office has had experience bringing parties to the table using Skype or other videoconferencing platforms. Typically, though, this was occasioned by the difficulty of bringing a particular party from a distant venue. The absent party would take a seat at the conference table—by laptop or on a videoscreen—where the rest of us were gathered in person. Following coronavirus homestay, however, all parties and the mediator have been gathering together on the two-dimensional format of the laptop's screen; and this author's experience has been in using the Zoom platform. For this reason, and with no intended denigration of other applications and platforms, this piece will focus on Zoom.

### Nuts and Bolts of Zoom Features of Use in Mediation

Zoom presents a fairly stable online platform offering a handful of key features that are very useful in mediation. For mediators, the Zoom Pro plan makes sense because it permits meetings of up to 24 hours for groups of up to 100 participants. The Zoom account holder who sets up the meetings is known as the Host.

### Invitations and Settings

Zoom enables the Host to schedule meetings and to manage the meeting environment in advance through the Settings feature. Once scheduled, the Host can copy a hyperlink and password for the meeting and transmit it to the invited guests. Links can be streamlined to embed passwords for a single click feature for use by the invited guests, although security is heightened by requiring separate entry of the password. Further enhancing security and control, the Host is given the option of having guests wait in a "Waiting Room" prior to entering the meeting, until they are "admitted" by the Host.

### Basic Video and Audio Display

Parties are able to speak together on a single screen. Their video images appear in boxes, with their names at the bottom. Parties may click the "rename" option offered through the ellipsis displayed on their image in order to change the name shown under their video image. The Host also has the power to rename parties shown on screen.

Where users lack video camera capacity, they are also able to call into the Zoom meeting and join in solely audio form.<sup>11</sup>

### Audio and Video "Muting"

Using two of various icons that appear typically at the bottom of the user's screen, participants have the power to mute themselves and to shut their video cameras, at which point a screen appears displaying that participant's name. The Zoom Host (typically the mediator who has set up this Zoom meeting), also has the power to mute or stop the video of any party. The Host can also unmute the parties whom the Host has muted, but must ask permission to return to video from any party whose video the Host has stopped.

### Participants Screen

A "Participants" screen is available to all participants, showing the number of participants and the names of all participants in the Zoom meeting room. Depending on the features selected by the Host in Settings, this can also display polling features (with "yes" or "no" choices) a raise hand function (also to gain views on a given question from a large group), and certain other features. The Host's Participants window offers other features, including the notorious "Mute All" button. More on that later.

### Speaker or Gallery Display

Each user can choose whether to display just the "Speaker" on screen, by selecting the "Speaker" button typically seen at the top right of the screen, or to display equally sized images of all participants by choosing the Gallery setting, instead.

### The Magic of Breakout Rooms

Of notable significance to mediations, the Zoom Host is also able to create and assign parties to breakout rooms ("Breakout Rooms") for private discussions. The Host can assign participants manually – more appropriately for mediation—and may rename the rooms from "Breakout Room 1" to, e.g., "Smith Breakout Room." A party can be assigned to only one room at a time. Once the assignments are set, when it is time to move to caucus, the Host "Opens" the Breakout Rooms, automatically sending an invitation to join the specified Breakout Room to each assigned party. Once the party accepts the invitation, Zoom sends that party to his or her Breakout Room. At any time, parties are free to click "Leave Breakout Room" on the bottom right of the screen and Return to Main Session. From that point forward, unless Breakout Rooms are recreated, users may shuttle back and forth from Main Session to Breakout Room simply by clearing the Breakout Room box-shaped icon at the bottom right-hand section of their screen.

The Host has the magical power of being able to move to and from any Breakout Room or the Main Session in less than a second at any time. Should users within a given Breakout Room seek to speak with the Host (mediator) or need assistance, they may click the "Help" icon displayed in their Breakout Room. This sends a message to the Host, which the Host may accept – taking him or

her to the Breakout Room requesting Help—or decline at the moment by selecting “Later.” The Host might also prearrange a text message or cellphone contact for each room to “knock” on the door, either seeking permission to join the room, or simply advising the parties that the Host will be joining them.

As a general practice, it is wise for mediators to create extra Breakout Rooms. This enables the Mediator to create special caucus formations—say, principals speaking with principals, or attorney-only meetings, or any other form of mix and match.

The Host has the capacity at any time to invite parties back from the Breakout Rooms to rejoin the Main Session. The Host also has the power simply to click “Close Breakout Rooms.” This sends a notification to all participants in all Breakout Rooms to return to the Main Session. Should they fail to do so, in 59 seconds the Breakout Rooms automatically close, bringing all parties back to the Main Session. This directive process move, like exercising the Mute or Mute All feature, raises transformative and pure facilitative questions worthy of further consideration.

### **Documents, Whiteboards and Chat Feature**

In both the main session (the mediation’s joint session) and in the Breakout Room (the mediation’s caucus), participants can share documents, pull up a Whiteboard to capture information, and send text messages to other participants through the “Chat” feature. Those in a given room—whether Breakout Room or Main Session—can “Chat” only with others in the same room, not those in any other room. Documents, Whiteboard displays, and Chats that are shared in a Breakout Room are private; they cannot be accessed by users outside that breakout room.

Documents and the Whiteboard are accessed through the green “Share Screen” icon at the bottom of one’s screen. In order to be shared, a document or any file—such as an image, expert’s report, deposition or hearing transcript, pleading, decision, motion papers, contract, email or other correspondence, insurance policy, spreadsheet, PowerPoint presentation, or even video or film clip—must first be open on the user’s computer screen.<sup>12</sup> Even if the document is not yet open at the time it is needed, the user is free moderately to exit the “full screen” mode; click another icon usually found at the bottom of one’s screen (e.g., the file folder, Outlook, Google Chrome, Word, or other usual icons); and then open the needed document or file. Once selecting “Share Screen” one can see all open files—including a Whiteboard option—on one’s screen, select the desired file, and share it.

The Host has control in Settings of whether parties other than the Host may share their screens. While barring sharing is a security guard against unwanted Zoom bombers who are fabled to share pornography in

public meetings or high school gatherings, it is wise for mediations—which involve a limited number of specially invited participants—to enable all users to share their screens. Typically, through Settings, the Host will gain primacy—being the first to share and retaining the power to take down documents or files shared by other participants, when needed.

It is good to keep in mind that parties in Breakout Rooms may make good use of the Share Screen feature privately to consider materials that they prefer not to share with other parties, or which they would like to analyze in private. Mediators entering party Breakout Rooms may opt to signal ahead of time that they are coming, in order not to surprise parties who are sharing documents in confidence.

As suggested by the enumeration of possible documents or files above, the Share Screen’s uses in mediation are myriad. It can be very helpful enabling parties to focus on information in common during a joint session (Main Meeting). The Whiteboard feature—or a blank Word document—can be used to capture the terms of a deal proposal. Similarly, parties or the mediator can post a form Memorandum of Understanding, Settlement Agreement, or Letter of Intent, and use it as a working Camp David accord type document to nail down, clarify, or modify the open terms in a nascent deal.

More than even in person mediations, documents or files displayed through the Share Screen feature are up close and personal. One can really drive home a point, or foster genuine and contemplative analysis, by displaying a blown-up paragraph of a tricky contractual provision, complex damages or financial spreadsheet, or errant email for all to see. It is much sharper, and equally available to all eyes on the screen than any document viewed over the shoulders while crowding around one seated party at an in person mediation session – however much secondary bonding value there might be in the experience of that shared viewing effort. For those interested in decision tree-based risk analysis, a common chart or tree could be considered by all on screen.

Of course, in addition to documents shared on screen, nothing stops parties and counsel from simultaneously emailing documents for consideration during the Zoom session. It is amazing how much can be done contemporaneously and remotely.

The Chat feature can be useful, as well. It is accessed by clicking the “Chat” icon at the bottom of one’s screen. This then brings up a template with that user’s prior Chat history towards the top, and a label for “Everyone” at the bottom. In a Main Session, e.g., one may share comments with all present, by clicking the “Everyone” button, entering the text message below, and then transmitting it. One can also send messages privately by first clicking on the “Everyone” tab, which, in turn, displays the names of all others present in that meeting room. One should be sure

that the intended name is selected so that the private message gets delivered to the intended recipient. By planning ahead, users can anticipate sending messages to one another in this manner. For instance, counsel could Chat with the client: “stop talking. That mediator’s a fool. Do not give away the ship.” Or something to that effect.

Rest assured. From what this author has gleaned, even the Host has no access to private Chats between parties, whether held in the Main Session or in their Breakout Room. Should this be otherwise, we invite comments by the vigilant reader.

### **Confidentiality**

The Host has the power to record meetings and can set up a feature enabling other users to record as well, after first seeking and receiving permission to record from the Host. A simple approach to ensuring the confidentiality of the mediation session is for the Host to select the Settings feature that eliminates the recording option by anyone, including the Host. Providing the parties with the option of recording the meeting after first obtaining the Host’s permission makes the recording issue more likely to arise.

This approach exemplifies a choice that triggers considerations affected by one’s mediation philosophy. To the extent one is transformative, there is an open question whether even process design effected through a Settings selection should be a conscious party choice rather than an implied decision by the mediator. A similar question might arise applying the Understanding-based school’s philosophy of transparency, which might call for this issue to be raised at the phase of contracting and convening. It would be interesting to learn the views of Messrs. Himmelstein and Friedman on this issue.

### **Echoes of the Marathon Man—Is It Safe? Zoom Security**

With the advent of coronavirus lockdown, Zoom use proliferated. Not long after, concerns about Zoom security hit the blogosphere; and certain law firms and other users shied away. The chief expressed concerns were Zoom bombing, where random participants share unwanted materials on screen during Zoom meetings. As mentioned above one Security feature of Settings can prevent this: blocking Screen Share by anyone other than the Host.

Since the initial bomber scare, Zoom has ramped up its Security features. There is now a Security icon at the bottom of the Host’s screen. It enables the Host to lock the meeting and to enable the Waiting Room. It also permits the Host to grant or deny to other users the following powers: Share Screen, Chat, Rename themselves and Unmute themselves. Locking the meeting has its risks. A participant might fall off due to technical issues or inadvertently leave the locked meeting. The Host must

then enter Settings, unlock the meeting, return to the main room, and allow the participant back in from the Waiting room.

Where mediations are not widely publicized and invitations tend to go only to a few select parties, there is little risk of Zoom bombing. Use of an individualized link and password can also enhance security. Having users first go to a Waiting Room before they are admitted to the meeting by the Host further enhances security. Blocking the Rename feature impedes imposters. And to enhance control over the mediation session, where needed, Screen Sharing and Unmuting can be denied.

Overall, in this mediator’s experience to date, there has been no known intrusion or Security challenge. Now that the NYSBA House of Delegates has passed a recommendation that one Cybersecurity credit be part of the four required Ethics credits for biennial registration, we hope that future instruction on this issue with shed greater light on this area of concern.

### **Integrating Zoom Mediation into One’s Mediation Practice: Practical Tips and Considerations**

At least during the foreseeable future, in the midst of continuing coronavirus concerns, Zoom mediations are a growing part of the dispute resolution landscape. Mediation practitioners would be wise to seize this opportunity to bring more matters into mediation, to gain competency in Zoom, and to grow sensitized to the subtleties of this medium.

Following are some practical tips and observations stemming from this practitioner’s experience with Zoom mediations and informed by some of the questions and views on the nature of mediation raised at the outset of this piece.

### **Easing Parties and Counsel into the Virtual Mediation Environment**

As with any new modality, many of us are change averse. Mediators should give thought to ways to describe the Zoom platform and its functions so that parties and counsel can see the ways in which it flexibly mirrors the in-person mediation process. During early days of coronavirus lockdown, one approach to supporting this change was to have a Zoom meeting invitation accompany the initial joint pre-mediation conference call. Counsel could then shift during that call to a Zoom meeting for the balance of that initial conference. This offered the opportunity to show counsel how to use the Share Screen and Chat features, to get familiar with icons and other functions—such as Mute/Unmute; Stop Video; and Rename, to mention a few— and to take a test run of the Breakout Rooms.

Over time counsel have grown more secure. With Zoom, there may be increased meetings with counsel and

one party in advance of the mediation session, again in order to acquaint them with Zoom and assuage concerns. This is a wonderful opportunity for developing trust and rapport in advance of the first mediation session. It can also open up opportunities for pre-mediation caucuses on substantive and significant procedural considerations.

Now that Zoom has taken further hold of the scene, it has become more natural for initial joint pre-mediation conferences to be scheduled as Zoom meetings from the outset. Again, this offers the mediator an opportunity to help counsel feel secure, and enhance their Zoom competence, again building trust and rapport.

Holding and publicizing Zoom mediation webinar and spreading articles on Zoom mediation can further encourage the transition of counsel and parties into use of the modality.

In addition, success stories can help. One early foray into Zoom mediation involved a complex, high-stakes class action with parties and counsel having planned to fly into New York City from various states across the U.S. This would have generated substantial travel costs for airfare, meals, and hotels, and a definite commitment of at least one or two business days in New York.

During the initial joint session, this mediator inquired whether these experienced, professional and highly sophisticated counsel would be interested in discussing damages together. As a result of that conversation, counsel realized that there was a significant divergence in their views. This produced a need for private breakouts, where the bargaining teams could huddle. It took only seconds to place them in their Breakout Rooms. In the rooms, counsel and their clients were able to review documents via the Share Screen feature and identify a zone where further investigation was merited. As a result, the participants and the mediator next reconvened in a joint session and determined to reschedule the mediation for a time when further study and assessment of the damages picture would be completed.

The entire mediation session took less than a half an hour. Throughout the process, perhaps not only because of their professionalism, but also because they had not incurred the sunk cost of travel from all across country to New York, counsel and parties were remarkably non-plussed by this development. Perhaps it was also a result of being able to see everyone's face equally facing forward together on the screen, knowing that one was being seen, and also having the screen as a mirror of one's own appearance and behavior. In short, rather than spend a day in New York and substantial funds on the trip, the parties efficiently cut their most and moved forward admirably in problem solving mode.

This clearly highlights some advantages that stemmed uniquely from this Zoom mode of mediation.

## **Preparation for Zoom Mediation**

In many respects, preparing for Zoom mediations is similar to preparation for in person mediations. There continues to be a need for pre-mediation statements. As always, it is important to extract a commitment that parties with full authority to resolve the matter will be present and available throughout the mediation session until the matter is resolved. It is helpful to be sure that one is available to conduct pre-mediation conferences to the extent they can be helpful in preparing the mediator and the parties for a fully productive mediation session.

The chief differences are that these initial pre-mediation conferences can now be conducted via Zoom.

## **Avatars and Appearance**

One tip that mediators can share with counsel and parties is to consider how they will present themselves in the Zoom environment. While we are conducting conferences by Zoom, participants have varying awareness of the way they might appear in the Zoom environment. As we have all been working from home, there has grown an increased tolerance for variations in presentation. During the pre-COVID days, counsel, and many parties, would appear at mediations in business attire. These days, however, we see a wide variety in appearance. During the class action mediation, male attire ranged from a jacket and tie, to collared shirt and sports jacket to a lawyer from Florida dressed in shorts and a hoodie. In one insurance coverage mediation, some party representatives participated from their office, others from impressive home scenes, and another from his home basement.

To adjust for environmental differences, some participants take advantage of Zoom's Virtual background. This enables one to select from a library of backgrounds or from photo images available from one's own photo files or from databases online. For many, who lack a "green screen" or newer computers, these backgrounds appear more like hallucinogenic imagery, in which the subject blends and disappears into the virtual background. It would be wise for users to acquaint themselves with the availability and effectiveness of these virtual backgrounds to create the image with which they are comfortable before entering the Zoom mediation. Nevertheless, these variations, including the presence of spouses, children and pets parading across the background actually have a humanizing effect as we all adopt to the new reality of working from home.

## **Wait, Wait . . . Don't Tell Me!**

One question for mediators is whether to hold parties in the waiting room until all are present before bringing folks into the initial joint session, in the Meeting Room. Another option is to admit participants as they arrive and engage in small talk until all are assembled. Yet another option is to move parties into their assigned Breakout



Rooms, permitting them to prepare until all parties have arrived and are ready for the opening joint session.

Depending upon one's mediation orientation, the choices here might differ. To offset the loss of the personal touch afforded by in person mediations, one might consider permitting parties and counsel to enter as soon as they arrive, and engage in small talk, unless there have been reasons to move parties directly into caucuses. These choices present opportunities for sensitive mediators to reflect on their practice style, principles, and orientation.

### **Overcoming Depersonalization**

Regardless of their orientation and style, most mediators find ways to express empathy and cultivate trust and rapport with parties and counsel. Gathering on a two-dimensional computer screen presents the risk that parties will operate at a distance from one another and that the humanizing magic of mediation, which affirms the whole person, might be lost.

As we increase the use of Zoom for mediations, mediators will be on the lookout for ways to continue catching and reflecting back party emotions and perceptions. We will continue to find ways to engage in effective active listening—validating, empathizing, clarifying and summarizing party expressions. Mediators should be alert to these challenges and seek ways to bridge the gap to restore or find different ways to acknowledge the personal dimension and humanistic orientation of mediation.

Good listening includes attention to body language. How can mediators and parties attend to body language when we are made flat by the screen? This should be an ongoing question prodding mediators to a higher degree of attention. Interestingly, with everyone equally displayed in Gallery view, Zoom at times offers an even greater sense of parties' reactions with all faces front and center.

Today, many of us have a second monitor that has us face away from the camera eye. Mediators must be careful to make virtual eye contact and show interactivity even while we might be taking notes or consulting a mediation statement displayed on screen number two. It might even be wise to let the parties know that one is shuttling between screens during the mediation session, so that actually attention not be taken as disengagement as a consequence of turning towards the second monitor.

### **Opening Statements in Joint Session**

Over the last several years, there has been a growing tendency initiated on the West Coast to move away from significant communications in joint session. Counsel have expressed the concern that substantive opening statements will mimic openings as trial, freeze parties into hard and fast positions, and create negative reactions in response to openings by adversaries. Adherents of the Understanding-based orientation towards mediation are

not alone in the sense that something important is being lost with the vanishing joint session.

For Zoom, as with in-person mediation sessions, representatives might be guided by the twin goals of building understanding and deal making. If one's presentation in the joint session is made in a manner that enhances understanding rather than shutting it down, and keeps people at the bargaining table rather than pushing them away, one is advancing the process goals and moving towards maximizing the potential of mediation.

An ideal for representatives or parties in mediation is the dual image of the open hand and the iron fist in the velvet glove. With open hand, one communicates that one is at the bargaining table in the hope of sharing information and welcoming information from the other party, all in the hope of arriving at a better understanding and a deal. The iron fist in the velvet glove suggests the ability to communicate one's strengths—the legal, deal and life BATNA—in a manner not designed to provoke reactivity, but rather in a way that still shows consideration for the other party and a disposition to make peace, if possible.

With all this in mind, one might observe, nevertheless, a tendency in Zoom mediations that seems to pull harder away from protracted joint sessions. It is not clear what is at the root of this, but it is worth keeping tabs on this development.

### **New Opportunities and Patterns in Zoom Mediation**

With people not needing to travel, attendance on Zoom is actually easier than ever. There seems to be an increasing pattern of mediations continuing for several sessions over a number of days. It is easier to start and stop Zoom sessions. Conversely, it is easy to leave the Zoom screen open while the mediator is in caucus with the other parties and move onto other productive work. Then, when the mediator returns, the parties are already on screen and ready to recommence. One tip for Zoom mediation practitioners is to be sure to get cellphone numbers for all participants. That way, if there is a technical difficulty, or if someone is kicked off the session, there is a lifeline to bring them back.

It is possible to schedule Zoom caucuses through emails over a period of days. In pre-COVID mediations, it was not unusual to follow up with parties by telephone after the first in person mediation session. Often, matters were resolved through telephonic shuttle diplomacy.

Today, Zoom offers the chance for what would have been telephone follow up to be conducted with videoconferencing. This offers major advantages in enhanced capacity to read party body language, direct participation of the principals, and in continuing development of rapport.

In one matter involving two substantial family businesses, repeated Zoom caucuses, conducted over a period of several weeks were effective in bringing this significant commercial matter to closure. Thanks to Zoom, rather than follow up calls with counsel, each successive Zoom conference was attended not only by outside counsel but also by the principals, their business colleagues, and their in-house counsel. Zoom enabled the mediator to read facial expressions and body language throughout these discussions. It produced a deepening sense of rapport as family members remained involved – and direct access to the ultimate decision makers. It also enabled parties, counsel, and the mediator to develop and review through document sharing spreadsheets on sales and other financial information that were pertinent to assessing risk, deal value and leading to resolution.

One additional observation applies. With everyone together on screen, the impressions of everyone in the group could be read at once. This produces a much better sense of collective reaction than might be possible even in a common room, where people face in a number of directions at any time.

## Zoom Challenges

Having considered some advantages, we may now take a look at some challenges of Zoom mediation

### Zoom Burnout

Where previously the mediator would walk from caucus room to caucus room gathering one's thoughts, now one is able to fly between caucus rooms in the space of seconds. After a while, this can get exhausting. Of course, there is a natural impulse to get to the next caucus room as soon as possible to maintain momentum and address the building frustration of parties who have been waiting for the mediator to return. Nevertheless, mediators are human. We need a break and the opportunity to gather our thoughts and impressions and let them settle and integrate into a solid sense of the next appropriate development. Mediators will need to learn to take breaks—returning to the main session or to a separate Breakout Room—in order to stay fully effective.

Similarly parties too can burn out. We all must be attentive to this phenomenon. Burnout is made more likely when parties are required nonstop to stare straight ahead at a screen, as opposed to the freedom of looking at various angles around a three-dimensional room. Mediators must be alert to the need to give parties a break.

In-person sessions have Oslo accord moments with the morning danish or the afternoon lunch or dinner. Mediators now need to be on the lookout for ways to substitute other humanizing activities to compensate for the deficits of solo interactions from each party's own home. At the very least, when lunchtime rolls around, it is wise for the mediator to attend to natural party needs by

recommending that everyone hit the kitchen and return with some sustenance. Whether through unstructured opening small talk on how everyone is faring in this homestay time; or introduction of parties to the housecat that crosses one's screen; or other opportunities for "free play," we mediators should look for chances to rehumanize the participants to offset the distancing impact of indirect communication.

Further challenges include hyperactivity and distraction, and challenges to spontaneity. Mediators can make creative use of silence. There is an open question on whether Zoom permits the same use of silence, or whether, on the screen, people tend to jump in sooner to fill the void before the creative impact of silence can have its effect.

## Zoom: A New Party at the Bargaining Table

One thing today is clear. There is a new party at the mediation table today. When parties and counsel are working out technical kinks, when audio fails to kick in, Zoom itself has become a topic of discussion. Beyond Marshall McLuhan's insight that the medium is the message, Zoom has taken another seat at the bargaining table. As with many realities, we make greater headway recognizing this than ignoring it. Participants and mediators can use the Zoom topic to develop a sense of commonality, as we all struggle with our shared plight.

Technology has us talking. It has us increasingly reflective about the process by which we negotiate and mediate. It presents us with a range of choices that raise questions about our mediation orientation. It challenges us to break through the I-It described by Martin Buber in his groundbreaking *I and Thou*, and struggle to maintain a sense of interpersonal dialogue and encounter. Remembering Marshall McLuhan, Zoom challenges us to question the extent to which it is a tool, and the extent to which it controls the message.

We are left, like the futurist McLuhan himself, wondering whether, once we return to our offices, mediation will return to old ways or to what extent our field will be forever altered.

## Endnotes

1. See, e.g., Thich Nhat Hanh, *Interbeing* (1987); later republished as *Interbeing: Fourteen Guidelines for Engaged Buddhism* (1993).
2. This author's experience with online video-conferenced mediation has been with Zoom. Accordingly this article focuses on Zoom as a means of videoconferencing. In years past, we have used Skype to bring parties from Italy, Germany, and a number of other locations into the mediation conference room. We have not, however, conducted mediations with all parties appearing at first instance through the virtual platform until the onset of coronavirus. These have been conducted with the benefit of Zoom's fairly stable platform, its flexible breakout rooms offering the capacity to caucus. Focus on Zoom here, is simply a reflection of this author's experience and not a statement against any other videoconferencing applications or services. Thus, this is not intended to be a Zoom infomercial.
3. Waley, Arthur, trans., *The Way and Its Power: Lao Tzu's Tao Te Ching and Its Place in Chinese Thought*, Chapter 47 (1934).
4. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996).
5. Kimberlee K. Kovach, Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, Harvard Negotiation Law Review, (Vol. 3, No. 71, 1998).
6. Roger Fisher, William Ury, and 2d Edition with Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (1st edition, Houghton Mifflin 1981).
7. Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994).
8. Adler, Peter S., Protean Negotiation, from *The Negotiator's Field Book: The Desk Reference for the Experienced Negotiator*, Andrea Kupfer Schneider and Christopher Honeyman, Editors (American Bar Association, 2007).
9. See, e.g., Baum, Simeon H., The Technique of No Technique: A Paean to the Tao-Te Ching and Penultimate Word on Breaking Impasse, Ch. 19 in *Definitive Creative Impasse-Breaking Techniques in Mediation*, Klapper, Molly, editor, (NYSBA 2011).
10. See, e.g., Baum, Simeon H., Hawking Our Wares in the Marketplace of Values: Sell Quality, Not Cost, When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum, from *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers* (2011).
11. A useful workaround, if there are problems with sound, includes the ability of a user both to attend by video (and mute one's computer sound) and also attend by phone.
12. If the user has a second monitor, Zoom allows the user to choose the monitor screen the user wishes to share.

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# COVID-19: Force Majeure and Common-Law Contract Defenses Under New York Law

By Tai-Heng Cheng and Daniel R. Perez

The COVID-19 outbreak and government measures to combat the virus are causing widespread disruptions throughout the economy. Parties unable to perform contractual obligations due to COVID-19-related disruptions should consider whether contractual force majeure provisions or New York common-law defenses of impossibility and frustration of purpose may provide a means of limiting liability for non-performance. Parties struggling to perform contractual obligations due to pandemic related circumstances should carefully analyze any relevant force majeure clauses, the potential applicability of any common-law defenses to performance, and the available dispute resolution mechanisms. A careful analysis of the available defenses and dispute resolution provisions may better enable parties to renegotiate their obligations and defend themselves against claims for non-performance.

## Force Majeure Under New York Law

Under New York law, a party seeking to invoke a contractual force majeure provision must generally establish that a specific occurrence rendering performance impossible constitutes a force majeure event under the contract, that the occurrence was beyond the party's reasonable control, that the occurrence was unforeseeable, and that the invoking party has satisfied any applicable notice requirements under the contract.

Unless the parties provide otherwise, an occurrence will only constitute a force majeure event if the occurrence renders performance under the contract impossible. "New York law is absolutely clear that 'where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused . . .'"<sup>1</sup>

New York courts generally construe force majeure clauses narrowly. However, the analysis of whether an occurrence constitutes a force majeure under a contract largely depends on whether the relevant clause specifically enumerates categories of occurrences constituting a force majeure event. Where the parties have specifically provided for the types of occurrences constituting force majeure events, the invoking party must establish that the occurrence preventing performance falls within one of these categories.<sup>2</sup> In certain cases, force majeure provi-

sions contain catch-all provisions in addition to a list of specific occurrences constituting force majeure events. In order to benefit from such a catch-all provision, the invoking party must establish that the occurrence preventing performance is "similar in nature" to the types of occurrences enumerated in the contract.<sup>3</sup> In contrast, where the parties do not enumerate types of occurrences constituting force majeure events, courts will typically focus on whether the occurrence preventing the invoking party's performance was beyond the parties' reasonable control.<sup>4</sup> In addition, New York courts may reject a force majeure defense unless the occurrence preventing performance was unforeseeable to the parties even if the occurrence would otherwise constitute a force majeure event under the contract. For example, one New York court found that, where a force majeure clause was silent on the issue, it "must be interpreted as if it included an express requirement of unforeseeability or lack of control."<sup>5</sup>

Where a contract specifically enumerates occurrences constituting force majeure events, a party's ability to successfully invoke force majeure due to COVID-19-related circumstances may depend on whether the contract provides that "epidemics," "pandemics," "Acts of God," or similar occurrences constitute a force majeure event. Alternatively, where performance is constrained by government closures or other public health measures instituted to combat the virus, suppliers may be able to rely on provisions defining force majeure events to include "government prohibitions," "government actions," or other analogous events.<sup>6</sup> Where a contract does not enumerate specific categories of force majeure events, a party seeking to invoke force majeure due to COVID-19-related circumstances must establish that its inability to perform both resulted from the COVID-19 crisis and was beyond its control.

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Finally, when invoking force majeure, parties must carefully comply with any applicable notice requirements under the contract. Deficient notice may not prevent a party from successfully invoking force majeure; however, improper notice will generally constitute a breach of contract.<sup>7</sup> As a result, parties invoking force majeure should document all communications with the counterparty regarding the force majeure event. Evidence of these communications may establish the immateriality of any deficiencies in the force majeure notice.

Generally, a successful invocation of force majeure will relieve the contract parties of their obligations under the agreement.<sup>8</sup> However, the parties may specifically provide for the effect of a force majeure declaration by contract.<sup>9</sup> Accordingly, parties considering whether to invoke force majeure should closely examine contractual language governing the effect of a successful invocation.

## Common-Law Contract Defenses Under New York Law

In the absence of a force majeure provision, New York common-law doctrines such as frustration of purpose, impossibility, and impracticability may provide defenses to liability resulting from COVID-19-related disruptions.

### The Doctrine of Impossibility

Under New York law, a party may assert the doctrines of impossibility or impracticability as an affirmative defense to non-performance under a contract. The impossibility doctrine may permit the non-performing party to postpone performance or avoid the obligation entirely. Whether the obligation to perform will be postponed or excused depends on whether the supervening event rendering performance impossible is temporary. “Where the ‘means of performance’ have been nullified, making ‘performance objectively impossible,’ a party’s performance under a contract will be excused.”<sup>10</sup> In contrast, “where a supervening act creates a temporary impossibility, particularly of brief duration, the impossibility may be viewed as merely excusing performance until it subsequently becomes possible to perform rather than excusing performance altogether.”<sup>11</sup>

In one case, *Bush v. Protravel Int’l, Inc.*,<sup>12</sup> the party asserting impossibility as a defense was unable to timely cancel a travel booking (by telephone or by reaching the agency’s Manhattan office) due to the chaos following the events of September 11, 2001. The court ultimately found that impossibility was a question of fact. The court explained that on “September 12, 13 and 14, 2001, New York City was in the state of virtual lockdown with travel either forbidden altogether or severely restricted” and that the impossibility doctrine excuses performance “when unforeseeable government action makes . . . performance objectively impossible.”<sup>13</sup>

## The Frustration of Purpose Doctrine

Under New York law, the frustration of purpose doctrine applies “when a change in circumstances makes one party’s performance virtually worthless to the other.”<sup>14</sup> “In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.”<sup>15</sup> New York courts also require the party asserting the defense to establish that the frustrating event was not reasonably foreseeable. For example, the Appellate Division has held that the doctrine “is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence.”<sup>16</sup>

In light of the fact that a frustration of purpose defense, unlike an impossibility defense or a force majeure declaration, does not require the asserting party to establish the impossibility of performance, the doctrine may provide an alternative means of limiting its contractual obligations.

### Multiple Contracts

Parties unable to perform fully their obligations under multiple contracts face additional challenges in successfully invoking force majeure or establishing impossibility defenses. Performing under certain contracts at the expense of others may undercut a claim that performance under a separate contract was impossible. In contrast, partially performing multiple contracts on a pro-rata basis breaching each of the partially performed contracts. In such situations, a solution negotiated with all counterparties is preferable to limit liability and claims later. However, parties that cannot meet their obligations under multiple contracts may also consider proactively seeking a judicial declaration (if the relevant courts are open) holding that a force majeure event has occurred and specifying how goods or services should be allocated amongst various contracts.

### Dispute Resolution

Parties considering whether to invoke force majeure or assert an impossibility or frustration of purpose defense should also consider the potential dispute resolution mechanisms available under the relevant contract(s). For example, contracts may either require or permit parties to arbitrate or mediate disputes, allowing the parties to seek a confidential resolution. Many leading arbitral institutions remain open and most have instituted special procedures in response to the pandemic. In addition, the rules of many leading arbitral institutions provide for the appointment of emergency arbitrators that permit the institutions to address COVID-19-related disputes on an expedited basis.<sup>17</sup>

## Endnotes

1. *Barclays Bus. Credit, Inc. v. Inter Urban Broad. of Cincinnati, Inc.*, No. 90 CIV. 2272 (MJL), 1991 WL 258751, at \*8 (S.D.N.Y. Nov. 27, 1991) (quoting *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968)); see also *Macalloy Corp. v. Metallurg, Inc.*, 728 N.Y.S.2d 14, 14-15 (N.Y. App. Div. 2001) (force majeure provision inapplicable to a voluntarily plant shutdown due to financial considerations brought about by environmental regulations, as “financial hardship is not grounds for avoiding performance under a contract”).
2. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902-03 (1987) (“Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.”); see also *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (N.Y. App. Div. 2009) (“[O]nly if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.”).
3. See *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (N.Y. App. Div. 2007) (“When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, the precept of ejusdem generis as a construction guide is appropriate—that is, words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.”) (internal quotations omitted).
4. For example, in *Vitol S.A., Inc. v. Koch Petroleum Group, LP*, the force majeure clause only specified “by ‘force majeure’ or any other cause of any kind not reasonably within its control.” In *Vitol*, the court held that the shutdown of a terminal was not a force majeure event that caused the delay of a delivery because the party did not even have the necessary cargo ready for delivery. See *id.*
5. *Goldstein v. Orensz Events LLC*, 44 N.Y.S.3d 437, 438 (N.Y. App. Div. 2017).
6. For example, in *Harriscom Svenska, AB v. Harris Corp.*, the parties entered into a contract to supply radio and spare parts to a distributor who sold to Iran. Subsequently, the United States government prohibited all sales of goods categorized as military equipment to Iran. The supplier was excused from performance because the force majeure clause contained “governmental interference.” 3 F.3d 576 (2d Cir. 1993)
7. Compare *Toyomenka Pac. Petroleum, Inc. v. Hess Oil V.I. Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991) (“Because the forty-eight hour notice provision creates a duty to be performed by the party invoking force majeure, and not a condition precedent, only a material breach of this duty can affect the right to invoke force majeure.”) with *Vitol S.A., Inc. v. Koch Petroleum Grp., LP*, 2005 WL 2105592, at \*11 (S.D.N.Y. Aug. 31, 2005) (holding force majeure defense failed because “defendant did not provide plaintiff with notification of the force majeure event as defendant was required to do under the parties’ contract.”).
8. See *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475, 482 (S.D.N.Y. 2001) (“A declaration of force majeure relieves both seller and buyer of their contractual obligations.”).
9. See *id.* (“Parties may . . . broaden[] or narrow[] excuses of performance and attach[] conditions to the exercise and effects of a force majeure clause.”).
10. *Bush v. Protravel Int’l, Inc.*, 746 N.Y.S.2d 790, 793 (N.Y. Civ. Ct. 2002) (citations omitted).
11. *Id.* at 797.
12. 746 N.Y.S.2d 790 (N.Y. Civ. Ct. 2002).
13. *Id.* at 795.
14. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 924 N.Y.S.2d 391, 394 (N.Y. App. Div. 2011).
15. *Warner v. Kaplan*, 892 N.Y.S.2d 311, 314 (N.Y. App. Div. 2009).
16. *Id.*
17. See generally David Roney et. al., *Int’l Arbitration Continues Apace Despite Pandemic*, Law360 (Apr. 28, 2020, 5:02 PM EDT), <https://www.law360.com/articles/1267714/int-l-arbitration-continues-apace-despite-pandemic>.

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# COVID-19 Force Majeure Notices Under English Law: What Comes Next?

By Ben Giaretta

## COVID-19 and Force Majeure

As well as terrible health impacts, the COVID-19 pandemic has caused extraordinary economic convulsion. A major part of that has been the disruption of the performance of contractual obligations, and this has led many contract parties to trigger, where they can, clauses that provide force majeure relief.<sup>1</sup>

The pandemic has created unusual dynamics in the operation of force majeure clauses. Where many previous disputes over such clauses concerned the threshold question of whether the relevant circumstances fell within the force majeure clause,<sup>2</sup> there appears to have been near universal acceptance that the operation of such a clause is justified if the pandemic has affected a contract. On the other hand, the extended duration of the pandemic and the uncertainty over how the world will move to a post-COVID state has meant that other parts of force majeure clauses are being tested as never before. Yet the drafting of such clauses insofar as they relate to the period after the force majeure notice typically leaves much to be desired.

## Overview of Force Majeure Under English Law

There are two points to note here about force majeure under English law. The first is that, at its root, the purpose of a force majeure clause is to provide an alternative to the rigours of the doctrine of frustration. Force majeure keeps the contract alive in circumstances where frustration would bring it to an end. But after it has served that purpose, there are limits on what a force majeure clause can achieve. In the absence of express contractual wording the English courts cannot use it to adapt the contract to the new environment.<sup>3</sup>

The second, related, point is that force majeure is a creature of contract under English law. The English courts have stated that “force majeure” is not a term of art,<sup>4</sup> and the task of the courts is to interpret and apply whatever the parties have agreed. As the English High Court said in one case, “a ‘force majeure’ clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.”<sup>5</sup>

The issues described below cannot be addressed by courts or tribunals, therefore, without there being appropriate contractual wording. However, force majeure

clauses are usually boilerplate clauses added in at the end of a contract, without much thought given to how they might operate in practice. The parties may have simply not turned their minds to what might happen.

## Interpretation of Force Majeure Clauses

To the extent that the force majeure clause covers the relevant situation, courts and tribunals must interpret the words used. The U.K. Supreme Court has recently said that task of a court when interpreting a contract is to “ascertain the objective meaning of the language which the parties have chosen to express their agreement,” which is an iterative process that involves comparing different meanings and considering the context of the relevant clause.<sup>6</sup> In addition, while force majeure clauses are not treated in the same manner as exclusion clauses,<sup>7</sup> the approach under English law has been to interpret them narrowly.<sup>8</sup>

It is also relevant to note that there has been a tendency in recent years towards English judges finding a duty of good faith in certain, “relational” contracts.<sup>9</sup> If such a contract is under consideration, a court or tribunal may take the view that, when operating the force majeure clause, the obligation of good faith means that “parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people.”<sup>10</sup> This may colour the court or tribunal’s view on the proper way that the force majeure clause should be implemented.

## A Force Majeure Scenario

It may be helpful for these purposes to sketch a scenario to illustrate the points that follow. English lawyers usually refer to the sale of hypothetical “widgets” in such scenarios but, in honour of the N.Y. State Bar Association, apples are used here instead. Party A is in a contract with Party B for the sale and purchase of apples.

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The contract is governed by English law and contains a force majeure clause. As a result of the pandemic, Party A cannot deliver the apples to Party B in accordance with its contractual obligations. The parties agree that this falls within the force majeure clauses, and Party A serves a valid force majeure notice. What comes next?

### Mitigation

The typical force majeure clause in our scenario contains an obligation on Party A to use reasonable efforts to mitigate the impact of the force majeure event.<sup>11</sup> Even absent this wording, such an obligation might be implied into the force majeure clause.<sup>12</sup>

Here is where the first problem arises. While a short-lived force majeure period might be mitigated relatively easily—by offering a new delivery slot a short time later, for example—mitigation during the extended period of the pandemic is more complex and may require different strategies as the public health restrictions evolve.

Moreover, what is “reasonable” in these circumstances? What factors should be taken into account and, in particular, can Party A favour its own interests over the interests of Party B? The latter question becomes even more acute in a situation where Party A has multiple buyers and has to decide how to divide up limited resources. The Court of Appeal has said that this may be done in a number of different ways, provided the allocation is reasonable and does not mean that the shortage is the result of the actions of one of the parties.<sup>13</sup> Party A might allocate the supplies between the buyers on a *pro rata* basis, therefore.<sup>14</sup> But what if there are factors that distinguish between the buyers – most obviously, the selling price in each contract—and what if Party A is cash-strapped as a result of the lockdowns, and needs to receive as much revenue as possible in order to stay in business? Would it be reasonable then for Party A to divert more supplies to higher priced contracts, or must it still ensure that each buyer receives an equal or *pro rata* share?

This problem may be compounded if the force majeure clauses in the various contracts are worded differently. One contract may contain priority rights for the particular buyer, for example, while the others may just require the seller to behave “reasonably.” The English courts have found that a party is not required to break its contracts with another party in a force majeure situation,<sup>15</sup> but that may just leave the party caught up in a web of competing obligations.

### Information

A further problem arises with the requirement in many force majeure clauses for the party invoking force majeure to provide information to the counterparty. It is sensible for Party B to be kept informed, so that it can arrange its business during the period in which Party A is not performing and prepare for the restart of the supply chain. But to what extent can Party B use this information

right to question Party A’s decisions—its decisions about mitigation and allocation of resources? Party A might resist the other side’s enquiries, since it may feel that its commercial decisions are no business of Party B’s. On the other hand, Party A may need to justify its decisions at a later stage, in legal proceedings, which may suggest it should forestall any dispute by providing more information than it is comfortable with. However, there may be another complication if Party A is bound by confidentiality obligations in other contracts that restrict what it can tell Party B.

### When the Force Majeure Period Comes to an End

The COVID-19 presents a particular problem over how to assess when the force majeure period comes to an end. With no vaccine yet in sight, but with countries removing lockdown restrictions in order to restart their economies, when can it be said that the force majeure has concluded? Further, the public health guidance varies from country to country, as do the stages by which restrictions are lifted. Party A and Party B might dispute whether the circumstances do in fact permit normal performance to be resumed. Party A may say that, regardless of the actions of the government, it cannot resume performance because of the threat that is still posed to the health of its employees.

Some contracts allow a route out of this problem by providing a termination right after a specified period of time has elapsed following the force majeure notice. As a variation on this, a clause may allow a party to trigger a renegotiation (although such a clause may be unenforceable).<sup>16</sup> Alternatively, the clause may specify an adjustment of the contract by reference to certain standards, which can be referred to arbitration if needed.<sup>17</sup> But many clauses are open-ended; or else a party might for its own reasons choose not to exercise its termination or renegotiation right.

Moreover, even once the force majeure period comes to an end, difficulties may remain. A contract may contain special make-up rights for a buyer, for example, but that may not be possible when the normal supply obligations resume. There may in practice be no way for the buyer to reorganise its supplies without the co-operation of all buyers, and such co-operation might not be forthcoming.

### Conclusion

The COVID-19 pandemic is likely to generate considerable demand to make sense of its consequences, through renegotiation, arbitration and litigation. One area that will require special attention is the operation of force majeure clauses. Such clauses may set out clearly when force majeure relief can be claimed, but not what happens after the notice is filed. Contract drafters may have assumed that the conclusion of a force majeure period would be straightforward but it seems likely the restarting of contracts after the pandemic will be highly complex.



## Endnotes

1. For example, it was reported in March 2020 that the China Council for the Promotion of International Trade has issued 5,600 *force majeure* notices: <https://www.reuters.com/article/health-coronavirus-china-force majeure/china-force majeure-certificate-issuance-pass-5600-amid-virus-outbreak-trade-body-idUSL4N2B43CK>
2. For example, *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102.
3. *British Movietonews Ltd v London & District Cinemas Ltd* [1952] AC 166.
4. *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm) at para. 43; also *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280, where the phrase “*force majeure conditions*” was found to be too uncertain to be enforceable.
5. *Lebeaupin v. Richard Crispin & Co* [1920] 2 KB 714 at 720.
6. *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 at para. 10.
7. *Fairclough, Dodd & Jones Ltd. v. J. H. Vantol Ltd* [1957] 1 WLR 136 (HL).
8. *The Angelia* [1973] 2 All ER 144.
9. See Patrick Green, *Good Faith and Relational Contracts in the UK*, New York Dispute Resolution Lawyer, Spring 2020 (Vol. 13, No. 1), p. 26.
10. *Bates v. Post Office* [2019] EWHC 606 (QB).
11. As, for example, in *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd* [2018] 2 Lloyd’s Rep. 628 where the parties were obliged to “use their reasonable endeavours to mitigate, avoid, circumvent, or overcome the circumstances of force majeure.”
12. *Channel Island Ferries Ltd v. Sealink UK Ltd* [1988] 1 Lloyd’s Rep 323: “a party must not only bring himself within the clause but must show that he has taken all reasonable steps to avoid its operation, or mitigate its results” (Parker LJ at p. 327).
13. *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd’s Rep 509.
14. *Bremer Handelsgesellschaft mbH v. Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd’s Rep 109.
15. *Tennants (Lancashire) Ltd v. CS Wilson and Company Ltd* [1917] AC 495.
16. *Walford v. Miles* [1992] 2 AC 128: “The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty.”
17. *Vosper Thornycroft v Ministry of Defence* [1976] 1 Lloyd’s Rep 58.



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# COVID-19 and Force Majeure Under the Vienna Convention on Sales and in Civil Law

By Giuditta Cordero-Moss

## Introduction

If COVID-19-related lockdown measures affected performance of a commercial contract, the party who could not perform its obligations will seek to avoid being held liable for breach of contract.

Many commercial contracts contain a force majeure clause—a clause excusing a party’s non-performance if certain requirements are met. Contract clauses may vary from each other, but force majeure clauses often are quite standardised and inserted into contracts without adjustment to the particular circumstances. Therefore, with the proviso that each clause has to be individually read, it is possible to make some general considerations on force majeure clauses in the COVID-19 emergency.

Failing a force majeure clause, the applicable law will determine whether the affected party is excused or whether it is in breach of contract. Contracts are subject to the law chosen by the parties. Failing choice by the parties, the applicable law is determined by the court’s conflict rules. In case of arbitration, the applicable arbitration rules and arbitration law will determine how the arbitral tribunal is to select the governing law. Statutory rules may contain various nuances from country to country. However, within the same legal family, there is a common basis.

Below follow some general considerations on the applicability, in the COVID-19 emergency, of force majeure clauses, as well as of corresponding principles contained in the civil law (exemplified here by the laws of France, Germany, Italy and Norway), and in the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG)—which applies (unless the parties agreed otherwise) to sales contracts between parties belonging to 93 states, including the US and the four countries discussed here.

## No need to have a force majeure clause

If the contract is subject to the CISG or one of the mentioned laws and the performance has become impossible due to a force majeure event, a party is excused by operation of law even though the contract has no force majeure clause. As a matter of fact, the CISG- and statutory regulations are quite similar to the force majeure clauses usually found in many commercial contracts.

## Influence of the applicable law on force majeure clauses

Even if a contract contains a force majeure clause, the applicable law may have significance.

Admittedly, contracts may deviate from the applicable law’s force majeure rules. However, the scope and effects of the applicable law’s rules on force majeure may influence the interpreter’s understanding of the contract clause. The interpreter may, more or less consciously, assume that the parties have intended to regulate the matter in a way compatible with the regime of the applicable law—unless the contract terms very clearly deviate from them. Force majeure clauses are usually quite vague in their terminology and leave therefore ample room for the interpreter to superimpose the applicable law on the agreed terms. Therefore, depending on the applicable law, clauses with identical wording may be given different effects. A company with international activity that uses the same force majeure clause in all its contracts will not necessarily achieve a uniform regime if the contracts are not all subject to the same law.

## Requirements for excusing non-performance

The common basis, for most contract clauses, the CISG and the civilian laws discussed here, is that a party is excused for non-performance if an external, unforeseeable and irresistible event prevents fulfilment of that party’s contract obligations.<sup>1</sup> The affected party has to give timely notice to the other party, and it has to mitigate the consequences of the force majeure event.

In the context of the COVID-19 pandemic, this means that a party is excused for non-performance of its obligations if it notifies timely the other party and it proves that the pandemic was (i) an event beyond that party’s control, (ii) not foreseeable, (iii) whose effects could not be overcome, and (iv) that prevented fulfilment of the contract.

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## **Event beyond the control of the affected party**

Some contract clauses contain a list of events that qualify as force majeure. Some of these lists explicitly mention epidemics or pandemics. That pandemics are listed in the force majeure clause, however, does not mean that non-performance in COVID-19 times is automatically excused. For the clause to apply, the remaining requirements must be met. On the other hand, that the force majeure clause does not explicitly list pandemics has significance only if the list of force majeure events is exhaustive. Usually, these lists are not exhaustive. Therefore, for the force majeure clause to apply, it is sufficient that non-performance is due to an event that meets the requirements set forth in the clause—which usually correspond to the four requirements discussed here.

In some states, special laws qualified the COVID-19 pandemic as an extraordinary circumstance and suspended terms for the performance of various contracts. Also, legislation was passed authorising chambers of commerce to issue certificates to be used as evidence of the occurrence of the pandemics. Even without this special legislation, it should be relatively uncontroversial to qualify the COVID-19 emergency as an event beyond the affected party's control.

Therefore, if the production facilities of a party were subject to lockdown, making it impossible to produce the goods that were the object of the contract, the first requirement for invoking force majeure is met.

Less clear is a situation in which the pandemic affects a party's performance further up in its production chain—for example, delivery of raw materials. The pandemic is an external event, but the choice of how to procure raw materials is within the control of the affected party. Assume that delivery of raw materials becomes impossible because the affected party's country closed the borders to deliveries from the supplier's country: will supplier failure due to the pandemic qualify as force majeure? There is no unitary answer to this question, not even within the civil law family.

According to the prevailing (but not the only) interpretation of the CISG, the choice of supplier falls within the sphere of risk of the producer: "In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform; for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods."<sup>2</sup> Therefore, a party who did not receive its raw materials due to delivery restrictions imposed in the COVID-19 emergency will not be able to invoke force majeure under the CISG – at least not as long as there are alternative suppliers. The first requirement for invoking force majeure, therefore, is not met under the prevailing interpretation of the CISG.

However, there is in some states another, less objective allocation of risk between the contract parties.

In Germany<sup>3</sup> and in Norway,<sup>4</sup> for example, the affected party may be excused if it proves that it has not acted negligently, even though the event affected that party's own procurement risk. This may affect the application of the CISG or the interpretation of force majeure clauses in other types of contract. If a party can prove that it has acted diligently when it chose the supplier, it will not be considered liable if the supplier fails to deliver the raw materials. The first requirement for invoking force majeure, therefore, is met.

## **The event must be unforeseeable**

Unforeseeability will be assessed on a case-by-case basis, taking into consideration the specific circumstances. In the case of the COVID-19, it is fair to assume that the lockdown was foreseeable if the contract was entered into after the WHO international crisis declaration or the pandemic declaration. However, the specific circumstances of the case may lead to consideration that the event was foreseeable even before that date, for example, if the contract was to be performed in a region that was already hit by the virus prior to the WHO declarations.

## **The consequences may not be reasonably overcome**

A party is excused only if it has made reasonable efforts to overcome the effects of the event. In the example of procurement of raw materials disrupted by transport restrictions, this means that the affected party will have to pursue alternative sources of procurement, even though this means an increase in procurement costs. The affected party, however, is only expected to overcome the effects of the event as long as this requires reasonable efforts. If the effects may be overcome, but this requires a disproportionate effort, non-performance will be excused. Depending on the contract, this may mean that the affected party must fulfil its obligations even if this entails taking losses – as long as the losses are not unbearable.

## **Performance must be prevented**

Under German and Norwegian law, force majeure is triggered if performance has become excessively burdensome for that party, or if the effort required to perform is not proportionate to that party's interest in the contract. In other systems, such as in France and in Italy, it is necessary that performance has become physically or legally impossible. In these systems, if performance has become excessively burdensome (which is sometimes defined as hardship), but is still possible, force majeure is not applicable. A different mechanism is available for hardship, with different effects.

## **Effects of force majeure on contracts**

The effects of a force majeure situation are, generally, that performance of the contract is suspended without liability for any of the parties. This is quite relevant to the COVID-19 emergency, as lockdown has temporary effects. In practice, performance of the contract shall be resumed after the lockdown measures no longer are in force, and

each party will bear the consequences that the delay had on that party's interests. However, the contract may be terminated if the other party loses interest in the belated performance of the contract. Generally, both parties are under an obligation to perform in good faith and thus attempt to overcome the effects of the force majeure event. This means that the parties may need to renegotiate the contract, for example, modifying volumes and time of performance, to reflect the changed interests after the suspension ceases to have effect.

### Effects of hardship on contracts

In France and in Italy, the force majeure rule only applies when performance is fully prevented. If performance become excessively burdensome, the mechanism of hardship is available. Many contracts contain hardship clauses. Failing a contract regulation of hardship, statutory rules may be applicable. In case of hardship, the obligation to perform is not suspended, but the affected party may request that the terms of the contract be renegotiated. In case renegotiation fails, ultimately the affected party may request the court to adjust the terms of the contract,<sup>5</sup> or to terminate the contract.<sup>6</sup> Considering that the affected party is under the obligation to perform pending negotiations, and that the threshold for court adjustment is quite high, the statutory hardship regulation does not seem to give an immediate relief in case of lockdown.

### Conclusion

The effects of the lockdown on performance of commercial contracts are determined by the contract and the applicable law. In civilian systems and under the CISG, results similar to those of a force majeure clause may be achieved even in the absence of a contract clause. Moreover, the applicable law may influence the interpretation of the clause.

### Endnotes

1. Article 79 of the CISG, article 121 of the French Civil Code, § 275 of the German Civil Code, article 1256 of the Italian Civil Code and § 27 of the Norwegian Act on Sales Contracts.
2. CISG-AC Opinion No. 7, adopted on 12 October 2007, para 2.2(a). Article 79(2) excuses non-performance if the force majeure event affects both a contract party and its sub-contractor. Suppliers of raw material, however, fall within the scope of Article 79(1): See United Nations Secretariat's Commentary to UNCITRAL Draft Convention (A/CONF./97/5), p. 172 .
3. § 276 of the BGB.
4. Viggo Hagstrøm, *Obligasjonsrett*, 2d ed. (2011), section 19.4.2. See, however, the Supreme Court decision in Rt. 2004 p. 675.
5. Article 1195 of the French Civil Code.
6. Article 1467 of the Italian Civil Code.

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# The New York Court of Appeals Overturns the Appellate Division's Ruling Regarding *Functus Officio*

By Mark J. Bunim

On April 30, 2020, New York's highest court delved into the ancient realm of *functus officio* in *American International Specialty Lines Insurance Company v. Allied Capital Corporation* (AISLIC).<sup>1</sup> This Court had not closely examined this doctrine in 130 years.<sup>2</sup> In this re-examination of *functus officio*, the Court overturned the Appellate Division First Department's earlier ruling in this case.<sup>3</sup>

AISLIC began as an arbitration before a three-arbitrator panel in which each side had selected a party arbitrator (non-neutral) and the two arbitrators selected a neutral Chair. It was an insurance coverage case in which the insured sought [reinsurance?] coverage for a settlement Allied had entered. The policy contained a mandatory arbitration clause but specified no provider and no provider's rules to apply.

The parties had both moved for summary disposition on the question of liability. The arbitration panel issued a partial final award (PFA 1) in favor of the Claimant insurer (AISLIC) by a 2-to-1 vote, leaving for subsequent determination the question of the quantum of defense costs to be awarded after a separate evidentiary hearing. There was no clear-cut order of bifurcation of defense costs by the Panel; however, the Claimant had agreed prior to the summary judgment ruling that "the quantum of attorney's fees need not be decided on this motion but could be the subject of a separate evidentiary process . . ." The Respondent's position was not clearly set forth.

Before the evidentiary hearing on defense costs took place, the Allied moved the panel to reconsider its ruling on liability. The panel, again by a 2 to 1 vote (with the Chair switching positions) reversed its prior ruling and this time found for the insured (PFA 2). Following PFA 2, an evidentiary hearing on defense costs occurred and a Final Award was issued.

The insurer brought a motion in N.Y. Supreme Court to set aside PFA 2 based on *functus officio*; arguing that PFA 1, even though a partial final award, dispensed with the issue of liability and was not subject to re-visitation. The lower court judge denied the motion, upholding the validity of PFA 2. The Appellate Division reversed, in a 4-to-1 vote, finding that PFA 1, even though a partial final award, had to be treated as *functus officio*.

The Appellate Division ruling was by a panel of five judges. The majority held that:

[W]hen the panel reconsidered the PFA, it exceeded its authority based on the common law doctrine of *functus officio*. The doctrine of *functus officio* provides that absent an agreement to the contrary, after an arbitrator renders a final award, the arbitrator may not entertain an application to change the award, "except . . . to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted" . . . [citations omitted]." In order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them". . . " Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages." However, "the submission by the parties determines the scope of the arbitrators' authority. Thus, "if the parties agree that the [arbitration] panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so . . . [and] once [the] arbitrators have finally decided the submitted issues, they are, in common-law parlance, 'functus officio,' meaning that their authority over those questions is ended" [Citations omitted].

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[A]lthough the parties initially submitted both issues of liability and calculation of defense costs to the panel for a determination, there is no question that during the arbitration proceedings, the parties agreed to an immediate determination solely as to liability, which they expected would be final.<sup>4</sup>

The policy behind the *functus officio* doctrine lends further support to our finding that the panel was *functus officio* with respect to the PFA. “Functus officio” means “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished” (*Black’s Law Dictionary* 787 [10th ed 2014]). The doctrine “presumes that an arbitrator’s final decision on an issue strips him of authority to consider that issue further” (*Employers’ Surplus Lines Ins. Co. v. Global Reins. Corp.-U.S. Branch*, 2008 WL 337317 \*4 [S.D. N.Y. 2008]). Indeed, under this doctrine, when parties request that an arbitrator finally determine an issue and the arbitrator has done so, the parties must be confident that the determination cannot and will not be revisited by the arbitrator and that the award determining such issue is final. Here, the panel finally determined the issue of AISLIC’s liability under the policies and determined that Allied was entitled to defense costs. There is nothing in the record that remotely suggests that the parties or the panel believed that the PFA would be anything less than a final determination of such issues and under the *functus officio* doctrine, it would be improper and in excess of the panel’s authority for such final determination to be revisited.<sup>5</sup>

The dissent argued that there was no specific agreement by the parties to bifurcate liability and defense costs. The dissenting judge found that *functus officio* only prohibits an arbitrator from revisiting an award after a final award is made, which did not occur until after PFA 2 was promulgated.

The Court of Appeals did not agree with the Appellate Division majority. It took a more narrow view, limiting its reasoning for reversal to the unusual facts at issue in this case and its procedural history, especially how the arbitral panel handled the process; and the lack of agreement in the record by both parties to be bound by a partial final award. In fact, the Court stated right at the beginning of its ruling that “inasmuch as the record is devoid of any evidence that the parties to the arbitration

mutually agreed to the issuance of a partial decision that would have the effect of a final award, we hold that the arbitration panel acted within the bounds of its broad authority by reconsidering the Partial Final Award.” (PFA 1)<sup>6</sup> Thus, it is clear from the start of the Court’s reasoning that it was the vacuum in the record relating to the parties’ consent to a partial final award that negated the applicability of *functus officio* to PFA 1.

Since the AISLIC arbitration was an “ad hoc” arbitration and no provider rules applied (which itself is not common), as the Court of Appeals duly noted (at footnote 4), the Court scrutinized the record to determine if the parties had stipulated to be bound by a partial final award, and found they had not.

The opinion explains that *functus officio* is limited to a “final award” (“Under the common law rule, arbitrators relinquish all powers over the parties to the arbitration upon issuance of a final award and therefore are precluded from modifying or reconsidering that award.”). The Court found that since the first award [PFA 1] did not resolve the entire arbitration, but left the fees and costs issue for later, it was not “final.” The Court held, however, that “partial determinations may be treated as final awards where the parties expressly agree both that certain issues submitted to the arbitrators should be decided in separate partial awards and that such awards be considered final” (emphasis added).<sup>7</sup> The Court found that here the parties did not reach such an agreement. “Absent any express mutual agreement between the parties to the issuance of a partial and final award, the *functus officio* doctrine would have no application in this case.”<sup>8</sup>

There are a few key points that readers must consider in an analysis of this ruling. First, AISLIC was an ad hoc arbitration, chaired by a JAMS arbitrator but in which the parties had rejected application of the JAMS rules. Had the JAMS rules applied (R 24[j]) the panel could not have reversed its ruling after PFA 1 and had it done so, the courts below would have in all likelihood enforced the JAMS rules since the parties would have agreed to their application. If the American Arbitration Association rules applied, R-50 would have precluded the panel’s issuance of PFA 2. So, the lack of any applicable arbitration rules in this case was the clear impetus for this *sui generis* Court of Appeals ruling. This fact also severely constrains the AISLIC ruling from being cited a precedent in other cases, since the Court makes clear that this opinion is limited to the facts before it, and some provider’s rules apply in most arbitrations. Second, the arbitral panel’s failure to obtain a clear and precise consensus from both sides, on the record, regarding the scope of the first partial award before its issuance triggered the domino effect that resulted in this Court of Appeals ruling. A simple stipulation on the record as to the intent of the parties would have prevented this long litigation and subsequent appeals. As the Court opined (and lamented) “. . . [T]here was no discussion [in AISLIC]

regarding whether any such 'partial summary disposition' would be a 'final' award deciding some, but not all, of the issues submitted to the panel."<sup>9</sup>

Going forward, arbitrators and counsel should take note that best practices dictate that if there is going to be the issuance of a partial final award, which occurs frequently in arbitration, absent rules clearly addressing the matter, there certainly should to be a clear and unmistakable agreement on the record as to whether the partial ruling will be final and oust the arbitral panel from further jurisdiction on that issue. For example, counsel could easily agree that "this partial final award dealing with XYZ will be *functus officio* when issued."

## Endnotes

1. 2020 WL 2066743 (NY April 2020).
2. *Flannery v. Sahagian*, 134 NY 85 (1892).
3. 167 A.D.3d 142 (1st Dept. 2018)
4. *American International Specialty Lines Insurance Company v. Allied Capital Corporation*, 2020 N.Y. Slip Op. 02529; 2020 WL 2066743 (N.Y. Ct. of App. April 30, 2020).
5. 167 A.D. 3d 142, 149..
6. 2020 WL 2066734\*1.
7. 2020 WL 2066743\*4.
8. 2020 WL 2066743\*5.
9. 2020 WL 2066734\*1.

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# The AAA Mandates Good Cyber-Hygiene for Arbitrators

Sherman Kahn

At the time of this article's preparation, the United States is undergoing a period of "social distancing" during which a variety of activities usually performed in person have moved online. This move to increased electronic communication further enhances the need for online personal hygiene practices, i.e., cybersecurity.

Fortunately, the AAA has been working toward ensuring better cybersecurity for some time now. This article discusses some of those developments and some things arbitrators and mediators can and should be doing to improve their cybersecurity practices.

It has been clear for some time that taking reasonable steps to promote cybersecurity is a necessary part of doing business. Cybersecurity is ever more important for professionals such as attorneys, arbitrators and mediators who are routinely entrusted with the confidential information of others. Moreover, law firms, and even arbitrators, have become targets, making it even more important to take due care.

## Legal and Ethical Background

Legal requirements for cybersecurity first arose in the United States with respect to specific subject areas that presented risk of loss of personally identifiable information about individuals. For example, the Graham-Leach-Bliley Act (GLBA) mandated that financial institutions such as companies providing financial products or services like loans, financial or investment advice, or insurance to consumers to explain their information-sharing practices and safeguard sensitive data.<sup>1</sup> The Health Insurance Portability and Accountability Act of 1996 (HIPAA) created a similar set of requirements for covered entities in the healthcare field.<sup>2</sup>

These requirements are not binding directly on arbitration (although they may implicate arbitration if covered entities are participants) and are limited to personally identifiable data in certain subject matter areas. Nonetheless, as discussed further below regarding the GLBA Safeguards Rule, they can help ADR practitioners think about how to secure data.

The necessity for data protection has also been addressed as a matter of professional responsibility for attorneys. The ABA addressed securing communication of protected client information in a formal opinion dated May 11, 2017.<sup>3</sup> This opinion, Formal Opinion No. 477 concludes that "[a] lawyer generally may transmit infor-

mation relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."<sup>4</sup> "However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."<sup>5</sup>

ABA Formal Opinion No. 477 reached this conclusion by analyzing the duty of competence under Model Rule 1.1 and the duty of confidentiality under Model Rule 1.6. Comment [8] to Model Rule 1.1 was modified in 2012 to require that maintaining the requisite knowledge and skill to provide competent representation includes keeping abreast of the benefits and risks of associated with relevant technology.<sup>6</sup> The 2012 amendments to Rule 1.6 also added a duty to be reasonably familiar with technological issues. Model Rule 1.6, as revised requires that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>7</sup> Amended Comment [18] to Model Rule 1.6 provides, however, that "[t]he unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure."<sup>8</sup>

As demonstrated above, the ABA standards reject rigid requirements for specific security measures in favor of a reasonableness standard. Comment [18] to Model Rule 1.6 lists a set of factors to guide a lawyer in making reasonable efforts, including the sensitivity of the information, the likelihood of disclosure if safeguards are not employed, the cost of employing additional safeguards, and the extent to which safeguards adversely affect the lawyer's ability to represent clients.<sup>9</sup>

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ABA Formal Opinion 477 suggests ways in which a lawyer can meet his or her obligation to enact reasonable data security practices. First, a lawyer should understand the nature of the threat, including consideration of the sensitivity of a client's information and whether the client's matter is at higher risk for cyber intrusion.<sup>10</sup> "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.<sup>11</sup> Second, a lawyer should understand how client confidential information is transmitted and where it is stored.<sup>12</sup> Third, a lawyer should understand and use reasonable electronic security measures in accordance with the facts and circumstances of each case.<sup>13</sup> Fourth, a lawyer should determine how electronic communications about client matters should be protected, depending on the type of communication and the circumstances under which it is made.<sup>14</sup> Fifth, lawyers should label client confidential information appropriately to ensure that both intentional and inadvertent recipients understand where the information is privileged and confidential.<sup>15</sup> Sixth, the lawyer should train staff in technology and information security.<sup>16</sup> Seventh, the lawyer should conduct due diligence on vendors providing communication technology.<sup>17</sup>

The FTC's GLBA Safeguards Rule, applicable to financial institutions and mentioned above, also is a helpful reference for understanding these issues. Like the ABA Model Rules and Formal Opinion, the FTC's GLBA Safeguards rule emphasizes reasonableness under the circumstances.<sup>18</sup> The GLBA Safeguards Rule provides that covered financial institutions must develop, implement, and maintain a comprehensive information security program that contains administrative, technical and physical safeguards that are appropriate to the size and complexity of the business, the nature and scope of its activities and the sensitivity of the customer information at issue.<sup>19</sup> The safeguards should be designed to achieve the objectives of ensuring the security and confidentiality of protected information (in this case customer information); to protect against anticipated hazards or threats to the protected information; and protect against unauthorized access that could result in substantial harm or inconvenience to the information owner.<sup>20</sup> The elements of the information security program include designation of an employee to coordinate the program, training of personnel as appropriate to their role and proper oversight of service providers.<sup>21</sup> Again, as can be seen from the discussion above, the GLBA Safeguards Rule sets up a standard of reasonableness under the circumstances after giving due attention to the issue.

The standards discussed above are not directed specifically at the ADR practice. Arbitrators, even if attorneys, are not representing clients. Nor would most arbitrators qualify as financial institutions. However, the parties might be financial institutions or HIPAA covered entities and arbitrators who are also lawyers are bound by the rules of ethics in their role as an arbitrator.

Moreover, the arbitrator has a responsibility to protect the process.<sup>22</sup>

## What Should a Neutral Do? The AAA's Guidance

So, if arbitrators need to address cybersecurity, what needs to be done? All of this can be reduced to a single sentence directive: Use reasonable measures to ensure the level of security appropriate under the circumstances given the sensitivity of the information and how it is to be used. But how?

The AAA has provided guidance to neutrals to assist with determining what are reasonable security measures as a general practice and whether enhancements are necessary in a given matter. With respect to general practice, the AAA has released a single-page cyber-security checklist which provides bullet point advice regarding security practices that all neutrals should consider, which is reprinted following this article.<sup>23</sup> The checklist is divided into four sections: (1) general best practices; (2) PC/laptop/mobile devices; (3) email; and (4) password hygiene. In each of these areas, the checklist presents simple things that a neutral can do to improve security practices. If a neutral follows this advice, he or she has gone a long way towards adopting a baseline of reasonable security practices.<sup>24</sup>

While the document generally is straightforward enough to speak for itself, this article calls out a few items on the checklist for further discussion. The first item on the checklist is arguably the most important: "[I]mit requests for and acceptance of sensitive information."<sup>25</sup> A person with no access to sensitive information has no ability to lose or reveal the information and cannot be the source of a compromise. Arbitrators and mediators should think about whether they need information in connection with a matter before accepting it from the parties. This is particularly important where information (e.g. sensitive personal information) may, if held, lead to special storage or disposal requirements, or if compromised, lead to breach notification requirements.

In most cases, there is no conceivable need for a neutral to review a list of unmasked social security numbers, credit card credentials, user passwords or other such data. If the parties to an arbitration do need to present such information, they should alert the arbitrator and discuss enhanced security for the information. It is helpful to discuss this issue at the preliminary hearing and to address the issue in the first procedural order in an arbitration. Some suggested language is set forth below:

**Privacy and Information Security:** The Parties are instructed to jointly consider methodologies to protect sensitive confidential and private data that may be exchanged in the arbitration and/or submitted to the Tribunal. Such methodologies should take into account the

Parties' need for information in the arbitration and whether such information must be provided to the Tribunal or exchanged among the parties in light of the sensitivity of the information, and its relevance to the proceedings. The Parties shall redact from information provided to the Tribunal

ever available.<sup>30</sup> Again, these are steps easily taken that once taken improve security immensely.

All the security in the world is ineffective when the user gives away the keys. In fact, many of the most serious security breaches are caused by "phishing" or social engineering attacks in which users are induced to give

*The [AAA] Best Practices Guide recognizes that the level of cybersecurity that should be implemented during arbitration ultimately rests with the parties and counsel.*

any sensitive personal identifiers such as social security numbers (or other national identification numbers), dates of birth or financial account numbers, but may submit partially masked versions of such data if such masking is generally accepted for public use of such data (e.g., last four digits of credit card or social security numbers). The Parties shall not submit to the Tribunal unredacted documents containing personal identifying numbers, individual health information or financial information unless there is a demonstrated need for the Tribunal to have such information due to the matters at issue in the Arbitration.

Another general best practice included on the checklist is to take regular security awareness training.<sup>26</sup> This is excellent advice. The cybersecurity landscape is constantly changing and regular training will provide access to the latest information and techniques. With this in mind, the AAA is requiring all neutrals to take a security webinar to satisfy the ACE requirement this year.<sup>27</sup> In addition, the Technology Committee of the New York State Bar Association just proposed a periodic Cybersecurity CLE that was accepted by the House of Delegates.

The checklist is also packed with simple steps that any user can and should take to ensure better security. For PCs and mobile devices, for example, the checklist recommends locking the device with a password or a PIN and turning on full disk encryption.<sup>28</sup> These are steps that any user can accomplish in a few minutes to improve security. For email, the checklist suggests avoiding free email services.<sup>29</sup> Business email services offer much more robust security for a minimal cost. With respect to passwords, the checklist suggests using complex passwords, varying passwords across accounts and using two factor authentication when-

away their credentials through fraud. The checklist thus recommends that users "[c]onfirm sender before opening attachments and clicking on links."<sup>31</sup> Make sure that the people sending you things are who they say they are and if something looks suspicious, don't open it before confirming it is legitimate. And it is important to seek confirmation from the sender by a different medium than the one from which you got the suspicious message. Use the telephone or a text message to check on a suspicious email. If you are an arbitrator and something suspicious comes from a party, ask the case manager to contact the sending party on your behalf to make sure the message is legitimate.

The AAA has also issued a Best Practices Guide for Maintaining Cybersecurity and Privacy.<sup>32</sup> The Guide recognizes that the level of cybersecurity that should be implemented during arbitration ultimately rests with the parties and counsel.<sup>33</sup> The Best Practices Guide provides that, in accordance with the ABA ethical guidance discussed above in this article, legal counsel in consultation with their clients should perform a risk assessment of the information to be shared during arbitration and the potential impact of a cybersecurity breach on their client's business.<sup>34</sup> Notably, the Best Practices Guide suggests that parties to a case with a heightened need for cybersecurity may elect to screen potential arbitrators for cybersecurity practices.<sup>35</sup>

The Best Practices Guide provides that the parties and the arbitrator should be prepared to discuss the information security needs of the arbitration at the Preliminary Hearing with reference to the specific circumstances.<sup>36</sup> The Best Practices Guide then sets out a list of specific cybersecurity items to consider as part of this discussion.<sup>37</sup> The Guide provides that the arbitrator should set a deadline for the parties to agree how to handle sensitive information and that, where the parties disagree, the arbitrator may decide the issue after receiving

input from the parties.<sup>38</sup> The arbitrator is also empowered to determine what action should be taken if a participant is unable to comply with the cybersecurity requirements.<sup>39</sup> Conversely, if a party objects to continued service of an arbitrator due to the arbitrator's alleged inability to comply with required security measures, the issue may be submitted to the AAA's Administrative Review Council.<sup>40</sup>

## Conclusion

In these times of uncertainty and increased need to communicate electronically, the importance of cybersecurity is heightened. Fortunately, the AAA has been ahead of the curve and is available to help neutrals keep up with this constantly changing landscape.

## Endnotes

1. See 15 U.S. Code § 6801 (providing for financial institutions to issue privacy policies and that agencies with supervisory authority over financial institutions issue regulations mandating safeguards for sensitive personal information); 16 C.F.R., Ch. I, Subch. C, Part 314 (FTC Safeguards Rule).
2. 42 U.S. Code § 1320d-2 (HIPAA data protection and safeguards requirements; 45 C.F.R., Parts 160, 162, and 164 (HHS Regulations enacting HIPAA privacy, security and enforcement rules.).
3. ABA Formal Opinion 477 (May 11, 2017).
4. *Id.*, Conclusion, p.11.
5. *Id.*
6. *Id.*, § 2, at p.2; Model Rule 1.1, Comment [8].
7. *Id.*, § III, at p. 3; Model Rule 1.6(c).
8. *Id.*, § III, at p. 3; Model Rule 1.6, Comment [18].
9. *Id.*, § III, at p. 4; Model Rule 1.6, Comment [18].
10. *Id.*, § III.1, at p. 5.
11. *Id.*
12. *Id.* at p.6.
13. *Id.* The ABA has also issued a formal opinion regarding the responsibilities of a lawyer in the case of a data breach. ABA Formal Opinion No. 483, October 17, 2018. The details of this opinion are beyond the scope of this article, but the opinion is a helpful discussion of the responsibilities faced by a party who is the victim of a data breach.
14. *Id.* at p. 7
15. *Id.* at p. 8.
16. *Id.*
17. *Id.*, at p. 9
18. 16 C.F.R. Part 314.
19. 16 C.F.R. § 314.3.
20. *Id.*
21. 16 C.F.R. § 314.4.
22. For a detailed discussion of the arbitrator's responsibility for Cyber Security see: Stephanie Cohen & Mark Morril, *A Call to Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion*, Fordham International Law Journal, Vol 40, issue 3 (2017). While directed to international arbitration specifically, the discussion in the article is easily adapted to domestic practice.
23. AAA-ICDR Cybersecurity Checklist (distributed by AAA at the opening of each case). (Reprinted on p. 60, *infra*.)
24. Security requirements are constantly evolving and every person's situation is different, so it is possible that certain of the specific recommendations on the checklist might be inappropriate under some circumstances. It would be best to obtain advice from a person with knowledge of technology and security before deviating from the recommendations, however. For additional guidance, see the ICCA-New York City Bar-CPR Cybersecurity Protocol for International Arbitration, which provides detailed guidance for cybersecurity in an international arbitration context.
25. AAA-ICDR Cybersecurity Checklist.
26. *Id.*
27. ACE 20 - Cyber Security: A Shared Responsibility (Available at no cost to satisfy the ACE requirement for 2020).
28. AAA-ICDR Cybersecurity Checklist.
29. *Id.*
30. *Id.*
31. *Id.*
32. AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy ("Best Practices Guide"). [https://www.adr.org/sites/default/files/document\\_repository/AAA258\\_Best\\_Practices\\_Cybersecurity\\_Privacy.pdf](https://www.adr.org/sites/default/files/document_repository/AAA258_Best_Practices_Cybersecurity_Privacy.pdf).
33. Best Practices Guide, P. 1.
34. *Id.*
35. *Id.*
36. *Id.*, Best Practices 1, 2.
37. Best Practices Guide, Best Practice 3.
38. Best Practices Guide, Best Practices 5, 7.
39. Best Practices Guide, Best Practice 10.
40. Best Practices Guide, Best Practice 8.



# AAA-ICDR® Cybersecurity Checklist



## General Best Practice

- Limit requests for and acceptance of sensitive information
- Avoid using free WiFi; use a personal hotspot instead
- Use a Virtual Private Network (VPN) service if using free WiFi cannot be avoided
- Report security incidents
- Take regular security awareness training
- Implement a document retention and destruction policy
- Back-up your critical data
- Buy cybersecurity insurance

## PC/Laptop/Mobile Devices

- Lock PC, laptop and mobile devices with a password or pin
- Turn on full disc encryption on all devices
- Encrypt thumb drives (*password required*) and any other removable drives
- Use anti-virus software; update regularly
- Set-up and consistently accept automatic updates for PC, laptop and mobile devices
- Do not use PC/laptop administrative logon account for daily work; create a separate, limited-privilege account instead
- Turn on mobile device Wi-Fi only when needed
- Turn off Bluetooth when not in use
- Use a privacy screen

## Email

- Avoid using free/personal email for case communications
- Don't email sensitive documents; use cloud storage or secure file transfer services instead
- Confirm sender before opening attachments or clicking on links

## Password Hygiene

- Use complex passwords or pass phrases
- Keep passwords private (*do not write down or share*)
- Use different passwords for different accounts; consider using a password manager
- Opt NOT to have your browser save passwords
- Use multi-factor authentication whenever offered for all your accounts

# Civility Standards for Mediation

By Norman Feit

The New York Courts' recent update to the New York State Standards of Civility had already provided a good impetus to consider civility standards more specifically in the context of mediation. But the advent of the coronavirus pandemic, and the corresponding severe backlogs and congestion it is causing in court systems, magnifies the need for legal practitioners to step up their civility in pursuit of amicable dispute resolution.

The New York Standards, adopted originally in 1997 as a set of guidelines rather than enforceable disciplinary rules of professional or judicial conduct, seek to confirm and encourage the legal profession's "rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course." While the original Standards focused on civility exclusively in litigation, the recent update, in addition to refining those original precepts, breaks out standards of civility across broader transactional and non-litigation settings. Many other state courts and bar associations have adopted similar hortatory principles of civility.<sup>1</sup> At least one state has even included a commitment to civility as part of its attorney admission oath.<sup>2</sup>

To the extent that mediation is considered part of the litigation "process," it is arguably already subject to these litigation-related civility standards in New York and elsewhere. Certainly, the most general standards enunciated in many of these civility formulations set the most general and fundamental bar, such as being "courteous and civil in all professional dealings with other persons"<sup>3</sup> and being "mindful of the need to protect the standing of the legal profession in the eyes of the public."<sup>4</sup> But the more granular standards applicable to inherently adversarial litigation and courtroom proceedings do not necessarily pertain to the more nuanced intricacies of mediation. Many of these standards address litigation tactics calculated to disrupt or harass an opponent in the heat of battle – such as ignoring calls or correspondence, failing to cooperate on non-controversial matters, intentionally running up expenses, badgering witnesses and the like. While such standards are not typically enforceable, litigants and lawyers who thwart them must be prepared at least to explain their conduct to a supervising judge.

Mediation is, by contrast, typically less adversarial, often a creature of agreement and/or contract, and in no sense a phase of litigation subject to the oversight of a

court. There are no trials, witnesses, motions, or discovery requests in mediation; instead, mediation ideally consists of information sharing to explicate each side's position, reasoned discussion, and meaningful negotiation. Moreover, when civility and decorum break down in the mediation process, no appeal lies to a judicial forum or professional conduct committee. Indeed, the mediation process, embodied in mediation agreements and mediator engagement letters, is a solemnly confidential process typically insulated entirely and protected by the settlement privilege.

Yet, if anything, civility and decorum are even more critical to the mediation process than in the litigation and courtroom environment. The entire point of mediation is to pursue amicable resolution, meaning that conduct should facilitate compromise and avoid antagonizing the adversary. And given that the vast majority of disputes settle at some point, all sides should logically recognize that their demeanor and conduct during mediations will likely have longer lasting ramifications on the continuing settlement dialogue even if an immediate resolution is not achieved.<sup>5</sup>

Regrettably, sometimes these overarching mediation ideals are lost. Too often, mediation participants approach mediation as if the mediator were a fact finder and legal arbiter, spinning facts and twisting law for perceived advantages. Mediation submissions can read like litigation briefs, declaring certainty of victory and demeaning the other side. Plenary mediation sessions frequently devolve into rhetorical commentary, indignant or self-righteous lectures and histrionics. On occasion, some participants simply storm out of the room or truncate the process altogether. Hopefully, the mediator is adept enough to defuse any inappropriate conduct using a combination of cajoling, exhortation and simply letting conduct run its course if the

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mediation process is not threatened or compromised. Otherwise, the participants are simply left to fend for themselves with corresponding visceral feelings and possibly a counterproductive experience.

Many ideas and initiatives have emerged to encourage civility in the mediation context, including a plethora of blogs, decorum and anger control tips, and training.<sup>6</sup> But there is no single and well accepted convention of civility specifically applicable to mediation. Such a convention would be no more enforceable or subject to sanctions than broader litigation related civility standards. But if a widely respected convention were adopted, and mediation participants committed to abide by it in their agreements or mediation protocols, the mediation process would hopefully operate in a much more constructive manner without the temptation for counterproductive tactics, and the participants and mediator at least could bring departures to a quick head and hopeful end.

Against that backdrop, and particularly at a time when amicable resolution is all the more critical to obviate the growing judicial burdens and delays caused by the ongoing pandemic, the following concepts present a starting place for such a uniform convention of mediation civility, recognizing that a comprehensive set of standards will require input, development and ultimately consensus from respected mediators and practitioners:

1. **Do not misuse the mediation process.** The mediation process should be reserved for genuine and sincere efforts to resolve disputes, and not for other tactical purposes, such as litigation delay or to gain free information from an adversary. Abusing the process will make a future authentic mediation process less tenable, and will waste enormous resources of the participants and mediator.
2. **Foster an atmosphere of politeness, constructiveness, and efficiency.** Participants in a mediation should strive to create the most positive atmosphere possible to facilitate the common goal of exploring a mutually acceptable resolution. A combative atmosphere and difficult demeanor will defeat that objective. Whether or not a resolution is in the cards, the best way to give it a chance is to be polite, constructive, and keep the process moving apace.
3. **Maintain a reasonable and realistic tone in submissions and presentations.** There is no place in mediation for declarations of victory or incredulity as to the opponent's positions. The facts and legal analysis can be presented and discussed in a clinical and even-handed manner, with concession where appropriate that risks

exist, the law is not settled, and fact finders may differ.

4. **Avoid lectures, ad hominem remarks, and finger pointing.** Attacking the other side, particularly on a personal level, will inevitably create defensiveness, retaliation and possibly an abrupt end to the mediation. If a participant takes issue with the opponent's legal or factual points, the differences should be expressed on the merits without demeaning rhetoric, commentary or name-calling.
5. **Communicate in a calm and poised manner without vitriol or emotions.** While mediations can involve heated emotions, losing one's cool and histrionics tend to diminish the constructive dialogue and stifle engagement. If temperatures or emotions rise, it is best to take a break – even to the point of suspending the process – rather than introduce vitriol or emotions to the communications.
6. **Approach negotiations without undue posturing, and without waiting until late in the process to become realistic.** A convention of civility should not supplant or compromise bona fide negotiating strategy or substantive positions. But mediations are often quickly undermined by posturing which has little or no constructive benefit, or stratospheric/miniscule negotiating positions that have no chance of attracting interest or frustrating refusals to enter a realistic resolution zone until very late in the session. Getting mutually “real” as soon as possible will create momentum and positive energy.
7. **Do not make threats.** Threats back opponents into a corner and encourage digging in heels, not compromise. Mediation should be a consensual, not extortionate, process.
8. **If settlement does not occur, leave on good terms and do not storm out or truncate the process.** Not every mediation produces a resolution. But often, an unsuccessful mediation is just part of a longer settlement process. A good and persistent mediator may wait a bit for the participants to cool down, and then begin testing waters and working telephone diplomacy. A mediation which ends on a sour note, however, may actually make resolution less likely. Mediations which fail to produce resolutions should end on a positive and amicable note, with appreciation for participating in the process and hope that there may be a future occasion to try again.

A convention of civility standards requires not only industry consensus, but ultimately some form of promulgation or adoption. Unlike the New York Standards

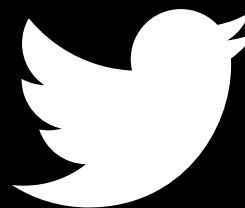
of Civility, which were adopted by a joint order of the Departments of the New York State Supreme Court, Appellate Division, there is no single court system that can impose mediation global civility standards on lawyers or parties. But there are leading ADR platforms and bar associations that can and should establish committees to convene, confer, and ultimately agree upon a single convention. Leading law firms can endorse the convention and commit to adhere to its principles. And the convention can be referenced in mediation agreements and mediator protocols, as well as by court-sponsored mediation programs, embodying the standards as guideposts for all participants.

To be sure, such a civility convention for mediation would not necessarily eliminate all uncivilized conduct. But it would set a threshold standard of consciousness for participants, and provide a critical tool for mediators to cut off much of the unpalatable behavior through the simple expedient of reminding participants about their commitment to abide by the convention. Indeed, the pandemic has made such a heightened consciousness imperative to give amicable resolution the best chance of success to relieve the growing judicial backlogs.

## Endnotes

1. California counties have widely adopted civility standards and guidelines, including Contra Costa County Standards of Professional Courtesy, Los Angeles County Bar Association Code of Civility Guidelines, Marin County Bar Association Code of Civility, Orange County Bar Association Standards for Professionalism and Civility Among Attorneys, Riverside County Bar Association Guidelines of Professional Courtesy and Civility, Sacramento County Bar Association Standard of Professional Conduct, San Bernardino County Bar Association Civility Code, San Diego County Bar Association Attorney Code of Conduct, Association of Business Trial Lawyers of San Diego Ethics, Professionalism and Civility Guidelines, Santa Clara County Bar Association: Code of Professionalism, Santa Cruz County Bar Association Civility Code, Ventura County Bar Association Guidelines on Professional Conduct and Civility, ABOTA Professionalism Ethics and Civility, Superior Court of California County of Los Angeles Guidelines for Civility in Litigation, U.S. District Court Central District of California Civility and Professionalism Guidelines, U.S. District Court Northern District of California Guidelines for Professional Conduct, U.S. District Court Southern District of California Civil Rule 83.4 Professionalism.
2. Florida Oath: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."
3. NY Standards of Civility, Section I.
4. NY Standards of Civility, Section X.
5. Indeed, the notion of mediation civility is arguably embodied in rules of professional ethics, which require lawyers to exercise "independent judgment" and "render candid advice," "not only on the law but also as to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." American Bar Ass'n Model Rules of Prof. Conduct, Rule 2.1. That broad mandate means that lawyers must evaluate approaches in the client's best interests, including whether settlement negotiation or mediation would serve the client and, if so, the most effective manner in which to participate in a mediation process.
6. In connection with 2017 ABA Mediation Week, the CPR Institute's Mediation Committee convened a forum, "Open Forum on (in) Civility in Mediation," led by neutral and CPR panelist, Jack P. Levin.

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# Predicting the Future: International Arbitration in the Wake of COVID-19

By John V.H. Pierce

The COVID-19 pandemic has had a profound impact on all of us. Most tragically, it has already resulted in the deaths of more than 400,000 people around the world,<sup>1</sup> including more than 100,000 Americans,<sup>2</sup> of whom more than 30,000 were our fellow New Yorkers.<sup>3</sup> The pandemic—and the global stay-at-home orders put in place to control it—have also caused widespread economic destruction, with businesses failing and millions in America and around the world out of work on a scale not seen since the 1930s.<sup>4</sup> In addition to this devastating human and economic toll, the pandemic has fundamentally changed, in countless ways, the manner in which we live our lives: the way we socialize, the way we educate our children, and, of course, the way we work.

For those of us who practice in the field of international arbitration, the pandemic has accelerated certain trends that began before its arrival—particularly with respect to the use of technology to conduct aspects of the arbitration process remotely, via videoconference or telephone. Like lawyers in many other fields, international arbitration practitioners are fortunate to be able to conduct much of their work armed only with a computer and a telephone. Indeed, by virtue of the global nature of the practice, international arbitration practitioners have always been a step ahead of their litigator colleagues when it comes to working remotely and using video technology to conduct witness examinations and other aspects of the arbitral process.

Nevertheless, the COVID-19 pandemic has changed the way in which international arbitrations are conducted in fundamental ways. By necessity, international arbitrations in the age of COVID-19 are being conducted entirely (or almost entirely) virtually.<sup>5</sup> This “virtualization” of arbitration proceedings in the age of COVID implicates a host of legal and practical issues that are the subject of other articles in this publication and elsewhere.<sup>6</sup> But what about the future of international arbitration in a post-COVID world? Assuming an effective coronavirus vaccine is developed, and made widely available, will the practice of international arbitration then revert to its pre-pandemic ways? Or has the pandemic—and the arbitration community’s responses to it—changed the practice of international arbitration in ways that are durable and that will persist after the pandemic is behind us?

There is obviously no way to know with certainty what the future will bring, but a reflection on the ways

in which international arbitration, and the arbitration community, already have changed in the age of COVID-19 permits some predictions.

## The Use of Video Technology for Some Aspects of the Arbitration Process Is Here to Stay

As noted, the use of video- or teleconference technology for certain aspects of the arbitral process is not a new phenomenon. Prior to COVID-19, certain pre-hearing steps in the arbitral process—such as initial case management conferences and pre-hearing conferences with the tribunal—were often held by teleconference or videoconference, particularly when the parties and their counsel were in different jurisdictions. In addition, it was not unusual, pre-COVID-19, for certain witnesses to appear at hearings via video in instances where physical attendance was not possible due to health or visa issues, or other circumstances. Indeed, the IBA Rules on the Taking of Evidence in International Arbitration expressly provide for such virtual appearances of witnesses at evidentiary hearings at the discretion of the tribunal,<sup>7</sup> as do various institutional arbitration rules.<sup>8</sup>

What is new in the post-COVID-19 world is that parties, counsel and arbitrators are now accustomed to, and generally skilled at, using Zoom, Webex and other video platforms to conduct meetings, conferences and even hearings in a virtual format. By necessity, the “barriers to entry” for these technologies in the international arbitration world appear largely to have been overcome. Whereas, before COVID-19, there was often a resistance by some counsel and arbitrators to the use of videoconference technology—due to concerns about whether it would

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function properly and a general reluctance to spend the time necessary to learn how to use it—counsel and arbitrators have now been forced to adopt and become familiar with these technologies. Although it is difficult to generalize, most counsel and arbitrators appear comfortable that these technologies may be used effectively in lieu of in-person meetings, at least for some aspects of the arbitral process. This growing comfort and competence in using video technology likely means that the trend toward virtual meetings and hearings will persist, and continue to grow, even after the COVID-19 pandemic has passed.<sup>9</sup>

One of the drivers for this continuing trend will likely be the ultimate users of the arbitration process—our clients. Having lived through a period, during COVID-19, in which all aspects of the arbitral process, including witness hearings, were conducted virtually (to the extent they were not simply postponed), clients are likely to

be used on their own or in combination with more traditional, in-person approaches.<sup>11</sup>

Arbitration practitioners are also likely to continue making use of video technology outside of the presence of the tribunal—in the preparation of their cases. For example, while there may be occasions on which fact witness interviews must take place in person, it will often be the case that fact witness interviews, including for purposes of preparing witness statements, can take place via videoconference. This will depend on the number and location of witnesses, and other circumstances. The same holds true for expert witness and client meetings, all of which, if organized and prepared properly, may be good candidates for a virtual, rather than in-person, format, thereby leading, in many cases, to substantial savings of time and cost.

*[T]he experience of arbitrators during the COVID-19 pandemic is likely to lead—at the very least—to more creative and flexible thinking by tribunals about ways that the arbitral process may be structured more efficiently...*

ask, once the pandemic has passed, why counsel and arbitrators cannot continue using video technologies like Zoom or Webex for at least certain aspects—or even the entirety—of the arbitration process. Doing so would save the substantial sums that otherwise would be spent on airfare and hotels, and associated travel-related time and costs.<sup>10</sup> It may also mean that certain kinds of meetings and hearings may be scheduled more expeditiously, since they would not require that all arbitrators and counsel be physically present in the same place.

Those factors are likely to lead to more widespread use of video technology to conduct at least certain aspects of the arbitration process virtually, even after the pandemic has passed. The most likely candidates for such virtual treatment include initial case management conferences, pre-hearing conferences, and oral argument on discrete procedural or legal issues. To the extent arbitral tribunals are hesitant to adopt such virtual measures wholesale, the experience of arbitrators during the COVID-19 pandemic is likely to lead—at the very least—to more creative and flexible thinking by tribunals about ways that the arbitral process may be structured more efficiently, taking into account the broader availability of, and familiarity with, various video platforms, which can

### **Many Arbitrators and Counsel Will Seek to Conduct Other Aspects of the Arbitration Process, Such as Evidentiary Hearings, in Person Whenever Feasible**

While arbitration in the age of COVID-19 has demonstrated that many aspects of the arbitral process may effectively be conducted virtually, it is likely to remain the case that some arbitrators and counsel will want to conduct other aspects of the process in person whenever feasible and justified in the circumstances. For example, many counsel and arbitrators are likely to seek a return to in-person evidentiary hearings as soon as it is safe and practical to do so.

While examination of witnesses over video may be acceptable for particular witnesses whose in-person participation is not possible, many counsel and arbitrators—particularly those from common law traditions—are likely to prefer that witness examination take place in person. While there is a debate in the arbitration community about the real evidentiary value of live witness testimony, some counsel and arbitrators will take the view that, no matter how well designed the video system, it will never be able to fully replace the dynamic of a hearing room in

which counsel and arbitrators sit face-to-face with a witness being cross-examined.

Counsel are well aware of the challenges of controlling a witness on cross-examination when the examination is conducted virtually, and most would strongly prefer to conduct such examinations in person. Many arbitrators, too, are likely to favor in-person hearings for the purposes of witness examination. For those arbitrators, seeing the reactions of a witness first-hand is perceived as essential to assessing the witness's credibility. That perception is particularly strong in cases where different cultures and languages are implicated, and where a witness's body language during examination may speak as loudly as her testimony.

There are other aspects of in-person hearings that are difficult, if not impossible, to replicate virtually. For example, the consensus-building process among arbitrators is often advanced through informal caucusing at the hearing site, comparing notes during breaks about the evidence just elicited, and conferring with one another about the evolution of the case. Although virtual hearings offer the possibility of offline texts, chats and calls, it is difficult for those formats to replace the personal interaction available at an in-person hearing. It is also more difficult for counsel and parties to get a "read" of the tribunal, and the opposing side, when hearings are conducted virtually. Such informal observations can often be helpful in determining strategy or even driving parties toward settlement.<sup>12</sup> All of these factors are likely to push many arbitrators and counsel toward the resumption of in-person evidentiary hearings once the pandemic has passed.

### **Arbitral Institutions Are Likely to Develop, Refine and Formalize Provisions on the Virtual Conduct of Proceedings**

After the emergence of the COVID-19 pandemic and the measures put in place by governments across the world to restrict travel and enforce stay-at-home orders, some arbitral institutions issued guidelines to assist parties and tribunals in the management of virtual arbitrations. For example, in April 2020, the ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.<sup>13</sup> The note was aimed at reminding parties and arbitrators of the procedural tools available to them under the current ICC Rules to mitigate pandemic-created delays, and also to provide guidance on the organization of virtual hearings and conferences. Similarly, the ICDR has produced a Model Order and Procedures for a Virtual Hearing via Video-conference, which includes detailed proposed provisions on best practices for conducting virtual hearings.<sup>14</sup> Other arbitral institutions have issued similar guidance for the conduct of virtual hearings.<sup>15</sup>

There is no reason to think that such protocols will disappear once the COVID-19 pandemic is behind us. On the contrary, one can expect that, as virtual meetings and hearings become more widespread and more deeply ingrained in arbitration practice, such protocols will be further developed, refined and formalized. It is likely that such protocols will ultimately become permanent fixtures of institutional rules or guidelines, to be used whenever the parties and/or the tribunal determine that virtual proceedings should be undertaken.

### **There Will Likely Be a Wave of COVID-Related Commercial and Investor-State Arbitration**

Finally, in addition to these procedural features of international arbitration post-COVID-19, it is reasonable to expect that the pandemic will give rise to a wave of pandemic-related commercial and investor-state arbitration. Although it is difficult to predict whether this will really be a wave—or more of a ripple—there is every reason to expect an uptick in such cases. For example, on the commercial arbitration side, one can expect to see disputes brought to arbitration in which one party has sought to rely on *force majeure*, hardship or similar clauses and/or legal doctrines such as impossibility, impracticability, frustration, *imprévision*, or *clausula rebus sic stantibus* to escape contractual obligations of performance. Whether such claims will be successful will of course depend heavily on the contractual language at issue, the governing law and the surrounding circumstances.<sup>16</sup>

On the investor-state side, international investors have already begun to threaten claims against various states arising from domestic measures assertedly put in place in response to the pandemic. This is the case, for example, in Peru, which passed a law suspending the collection of tolls in response to the COVID-19 outbreak.<sup>17</sup> Similarly, investors have threatened claims against Mexico, which placed restrictions on renewable energy production, purportedly on the basis of a drop in demand caused by the pandemic.<sup>18</sup> One can expect to see claims in arbitration brought by investors in these and similar circumstances, where claimants will likely argue that the costs of such measures should be placed on the society as a whole and not forced upon international investors to bear alone.

## Endnotes

1. See *Coronavirus disease (COVID-2019): Situation Report – 142*, WORLD HEALTH ORGANIZATION, June 10, 2020, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports>.
2. See *Coronavirus in the US: Latest Map and Case Count*, THE NEW YORK TIMES (June 12, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.
3. See *New York Coronavirus Map and Case Count*, THE NEW YORK TIMES (June 12, 2020), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.
4. See generally OECD Economic Outlook, Volume 2020 Issue 1: Preliminary Version, OECD (2020), <https://doi.org/10.1787/0d1d1e2e-en>, at 12.
5. Although the term “virtual” as applied to arbitration proceedings has been criticized by some as connoting “an artificial substitute for something real,” see CPR’s *Annotated Model Procedural Order for Remote Video Arbitration Proceedings* (2020), <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>, it is widely used in the arbitration community to refer to an event that is conducted in a manner—such as via video—in which the participants are not physically present in the same place.
6. See generally Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework* (May 13, 2020), 37(4) J. OF INT’L ARB. (2020) (forthcoming), available at <http://www.kluwerarbitration.com/document/kli-joia-370401>; John Fellas, *International Arbitration in the Midst of COVID-19*, 37 YOUNG ARB. REV. (2020).
7. IBA Rules on the Taking of Evidence in International Arbitration, at Article 8(1) (“Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.”).
8. See, e.g., LCIA Arbitration Rules (2014), Article 19.2 (“As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three.”); UNCITRAL Arbitration Rules (2013), Article 28(4) (“The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunications that do not require their physical presence at the hearing (such as videoconference).”). See also ICC Arbitration Rules (2017), Appendix IV(f) (listing use of “telephone or videoconferencing for procedural or other hearings where attendance in person is not essential” as a case management technique to control time and cost); ICDR International Arbitration Rules (2014), Article E-9 (International Expedited Procedures) (providing that “[h]earings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator”).
9. Cybersecurity is also a growing concern in the international arbitration community, and the continued use of video formats to conduct arbitrations will require attention to these concerns in the context of virtual hearing technology. See generally ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (2020), available at <https://www.arbitration-icca.org/projects/cybersecurity-in-international-arbitration.html>.
10. In addition, the reduction in air travel resulting from more virtual arbitrations would have the benefit of lowering flight-generated environmental costs—a goal of the “flight shaming” movement that had begun to gain momentum well before the pandemic took hold. See, e.g., *Airlines scramble to overcome polluter stigma as ‘flight shame’ movement grows*, REUTERS (June 3, 2019), <https://www.reuters.com/article/us-airlines-iata-environment-analysis/airlines-scramble-to-overcome-polluter-stigma-as-flight-shame-movement-grows-idUSKCN1T4220>.
11. Although parties may raise objections to virtual hearings on the basis of denial of the right to be heard or unequal treatment, such challenges to virtual hearings are unlikely to be successful in most cases. See, e.g., Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework* (May 13, 2020), 37(4) J. OF INT’L ARB. (2020) (forthcoming), available at <http://www.kluwerarbitration.com/document/kli-joia-370401>.
12. It is likely too that, after COVID-19, many settlement meetings and mediations will continue to be held in person, to the extent possible, given the importance of in-person dialogue in those contexts and the logistical challenges of organizing effective breakout rooms and facilitating the kind of “shuttle diplomacy” frequently employed in those settings.
13. *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, INTERNATIONAL CHAMBER OF COMMERCE (April 9, 2020), <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.
14. *AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference*, INT’L CENTRE FOR DISPUTE RESOLUTION (2020), <https://go.adr.org/covid-19-virtual-hearings.html>.
15. See, e.g., *HKAC Guidelines for Virtual Hearings*, HONG KONG INT’L ARB. CENTRE (2020), <https://www.hkiac.org/content/virtual-hearings>; CPR’s *Annotated Model Procedural Order for Remote Video Arbitration Proceedings* (2020), <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>; CI Arb’s *Guidance Note on Remote Dispute Resolution Proceedings* (2020), <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>. KCAB’s Seoul Protocol on Video Conferencing in International Arbitration (available at <http://www.kcabinternational.or.kr>) which was produced in 2018, prior to the outbreak of COVID-19, is also frequently cited as a source for such guidance.
16. See generally, John A. Trenor and Hyun-Soo Lim, *Navigating Force Majeure Clauses and Related Doctrines in Light of the COVID-19 Pandemic*, 37 YOUNG ARB. REV. 13 (2020).
17. See Cosmo Sanderson, *Peru threatened over coronavirus emergency measure*, GLOBAL ARB. REV. (June 5, 2020), <https://globalarbitrationreview.com/article/1227546/peru-threatened-over-coronavirus-emergency-measure>.
18. See Cosmo Sanderson, *Mexico faces potential claims over pandemic response*, GLOBAL ARB. REV. (May 22, 2020), <https://globalarbitrationreview.com/article/1227136/mexico-faces-potential-claims-over-pandemic-response>.

# Commercial Litigation and Post-COVID-19 Court Backlog

By Hon. Shira A. Scheindlin

All 50 states closed their courthouse physical doors during the height of the COVID-19 pandemic as did most courts throughout Europe and Asia. Now the courts have slowly begun to re-open but very cautiously. During the closures, while the details differed from state to state, and from state courts to federal courts, the outline of closure were remarkably similar. Most states suspended all tolling deadlines; only essential matters could be filed—electronically of course—but no non-essential matters could even be filed. Essential hearings were held remotely, via phone or videoconference, but once again, this occurred only in essential matters. The use of Zoom or Zoom-like platforms became suddenly ubiquitous. As judges and lawyers adjusted to the use of remote hearings, the pros and cons of such hearings were revealed.

While the use of remote hearings for essential matters, such as criminal cases, emergency applications, domestic violence and custody matters became widespread, the run of the mill commercial cases were essentially stayed. As a result, there is now a vast backlog of such cases. Briefing may have continued on previously filed motions, and some decisions were issued, but very few such cases were heard at oral argument or even at a status conference. It is this backlog that will have to be addressed as the courts slowly re-open.

This article will address several issues. The first will be a look at what the courts have been able to handle during the “stay-at-home” period and what can be expected from the courts in the future. The next focus will be on the issues raised by virtual or remote hearings and how those issues can be handled differently by courts as opposed to ADR. Finally, predictions as to what the future may hold for both courts and ADR may be worthy of consideration.

While physically closed, courts have focused on the most essential matters. In order to do that, technology has been embraced as never before. E-filing is now not only standard but is the only way in which written submissions may be made. While telephone conferences were widely used by some courts, video conferences were rarely used. Now courts are suddenly equipped to handle both and did so routinely during the past few months. For the first time in its history, for example, the United States Supreme Court, live streamed oral arguments which were available to be viewed by the public in real time. Judges all learned to work remotely setting

up home offices with computers, printers, scanners, and access to video platforms like Zoom.

The greatest difficulty has been encountered with respect to criminal matters. In this context there are constitutional concerns, particularly the right to counsel. Typically a defendant and his or her counsel are together in the courtroom where they can easily speak and consult during proceedings such as bail hearings, suppressions hearings, plea allocutions or trials. The remote platform makes such interactions very difficult. Furthermore, there is little or no public access to remote proceedings. It is axiomatic that courtrooms are open to the public—particularly in criminal cases. Defense lawyers have complained that they are unable to effectively represent their clients unless they are present in the same space. And, once the client is released on bail, it is likely that he or she will not have access to the technology to participate remotely in a hearing or trial.

On the other hand, arguments in civil cases have generally gone smoothly. All courts have handled civil matters remotely with little difficulty, assuming that the parties and their counsel all have access to the necessary technology. However, until June there have been almost no trials that have been held by courts using a remote platform. Of course civil matters involving a pro se litigant present unique problems as once again the pro se litigant may not have the necessary technology or technological competence to fully participate in the proceedings.

What are some of the issues raised by virtual proceedings? In addition to the right to counsel issues discussed above with respect to criminal proceedings there is also the constitutional right to confront witnesses. Concerns have been expressed that the confrontation clause may present a barrier to virtual criminal trials. Moreover, criminal trials are almost always jury trials. It is difficult to envision live jury trials in the near future. Large panels must be summoned to court for jury selection. This generally means that hundreds of people are gathered in jury

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assembly rooms. It is doubtful that citizens will be willing to respond to jury notices and gather in large groups.

The jury trial problem is as true in civil cases as criminal cases. A civil trial was recently held remotely by a Texas state court. Right in the middle of testimony, a juror left the trial to take a phone call! Such behavior will be difficult to police. Not only can the juror's movements not be controlled remotely, but there is no way to observe whether a juror is paying attention (rather than surreptitiously checking emails on cellphones), which can be easily observed by a judge in the courtroom. Moreover, there is already a problem with jurors doing internet research or using social media during a trial, which will only be exacerbated by jurors hearing evidence in the relaxed surrounding of their own home.

Do the same problems exist in the context of ADR? Because ADR is usually a voluntary process, and a flexible one, the answer is no. Participants in ADR are often quite sophisticated. They will likely be familiar with the technology needed for remote hearings and are well aware of the privacy and confidentiality concerns that differentiate ADR from court proceedings which are presumptively public proceedings. Many ADR providers have issued detailed protocols that address all of the procedural hurdles that might occur during remote hearings, including attorney-client conferences, witness sequestration, cybersecurity, and audio-visual testing and troubleshooting during the proceedings. ADR providers are capable of helping the parties to achieve efficient virtual hearings. The courts may not have the resources to ensure the same. The current reality may lead to a wave of post-dispute arbitration agreements as parties seek to resolve their disputes with the expertise available in ADR and without the lengthy delays they may now find in the courts for many civil matters.

What does the future hold? No one has a crystal ball. However, certain predictions can be made with confidence. There will be a large backlog of civil cases when the courts fully reopen. The courts will have to prioritize those matters that will require the most immediate attention. This will not likely include business to business commercial disputes such as disputes regarding contracts, insurance coverage, real estate, intellectual property, and construction, among others. And, as noted earlier, the last procedural mechanism to return will likely be jury trials, which do not lend themselves easily to remote hearings for many of the reasons already noted. That may mean that many complex civil matters will be in for long delays unless the parties choose an alternative forum, or unless the court requires the parties to retain a special master to resolve all pre-trial disputes so that the courts can focus solely on dispositive motions and trials. Another alternative, of course, is court-annexed media-

tion, which has already become a requirement in the New York state court system, but not yet in all state courts.

In some states this may require legislation. For example, New York empowers the "Chief Administrator of the Courts [to] authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court."<sup>1</sup> Similarly, the Commercial Division of the Supreme Court of New York County created a pilot program to determine whether special masters could be useful in resolving discovery disputes in complex commercial cases.<sup>2</sup> These kinds of initiatives should be considered and implemented by state courts around the country to help ensure that commercial cases are not delayed to the point where justice is denied.

## Endnotes

1. 22 N.Y.C.R.R. 202.14.
2. See <https://www.nycourts.gov/Legacy/PDFS/RULES/comments/orders/AO120-SpecialMasters.pdf>.

# COVID-19 and the Permanent Judicial Emergency: Is Arbitration the Answer?

By Joseph V. DeMarco

The decision to file a civil complaint in federal or state court is typically preceded by a careful assessment of the time and resources required to obtain relief compared to other forms of dispute resolution. The COVID-19 pandemic has substantially altered that calculus, crucially, even for litigants who are *already in court*. This article explores whether litigants should, in the face of serious backlogs in federal and state courts, consider voluntarily moving their disputes, in whole or in part, to arbitral proceedings. It also discusses some potentially special considerations litigants should keep in mind when doing so and highlights the role that referees, and special masters can play in these scenarios. Finally, and simultaneously, it recommends that inside and outside counsel would be well-advised to consider whether existing contractual agreements should be revised to include arbitration clauses to govern future disputes.

## COVID-19 and the Courts

Even prior to the onset of the COVID-19 crisis, the federal judiciary had 44 declared “Judicial Emergencies” arising from backlogs on district and circuit courts with significant backlogs of cases.<sup>1</sup> To pick even a “non-emergency” jurisdiction as an example, as of the last quarter of 2019, the median civil case in the Southern District of New York took over 30 months between filing and trial.<sup>2</sup> COVID-19 only made things worse. In March 2020, as pandemic cases began to spike in the New York City metropolitan area, District Courts in the region substantially curtailed courthouse operations, limiting physical access to courthouse facilities to essential emergency and criminal matters. Although judges have attempted to move matters along by allowing parties to make remote appearances for minor proceedings when possible, significant delays across the entire litigation ecosystem have become the norm. Parties may not, for example, be able to safely access needed discovery or be able to travel because of stay-at-home orders. To add to the problem for civil litigants, state and federal courts will almost certainly need to prioritize delayed criminal proceedings over civil cases when the pandemic subsides. Civil trials that were *already* on an inevitable slow calendar will likely be pushed off for many months—if not longer.

Compounding the above situation, there is almost universal expectation among litigators that the courts will be facing an entirely new wave of new disputes resulting from the pandemic itself and the unprecedented disruptions to the economy it has caused. Put simply, even absent a “second wave” of the virus in the fall, the

cascading effects of COVID-related logjams will likely be felt for many years, and this new reality will undoubtedly change how parties in commercial disputes approach litigation strategy.

The news is not, however, uniformly grim. Although the pandemic has affected the operations of arbitral institutions, the inherent flexibility of arbitration proceedings has made the disadvantages of formal litigation more salient. Even before the crisis, the ADR community was already discussing how to design procedures to better leverage technology to make arbitration proceedings more efficient and convenient for practitioners. In late 2019, for example, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution (CPR) published a Cybersecurity Protocol<sup>3</sup> that provides a framework for reasonable information security measures in arbitration matters. The American Arbitration Association and its International Centre for Dispute Resolution had already been providing the option of “virtual” hearings for many years. Indeed, shortly after the COVID-19 crisis began, the AAA,<sup>4</sup> CPR,<sup>5</sup> the ICC,<sup>6</sup> FedArb,<sup>7</sup> JAMS,<sup>8</sup> SVAMC<sup>9</sup> and other entities in the ADR ecosystem around the world<sup>10</sup> updated their rules and/or issued guidance for how to conduct virtual hearings.

Once these twin realities are understood with reference to each other, it becomes clear that a solution is hiding in plain sight: A party that decided against arbitration of a dispute at the outset of the controversy may understandably reconsider whether continuing “stasis” in court is optimal. Fortunately, with the consent of the other party, it *is* possible to change course.

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## Moving a Case from Litigation to Arbitration

Although not every litigant can easily move an active litigation to an arbitral proceeding, there are some scenarios when it makes eminent sense. Almost every general counsel has had the experience of finding oneself at the beginning of what will almost certainly be a protracted *Bleak-House-style*<sup>11</sup> litigation that will take years to reach the trial stage. It quickly becomes apparent that the parties will spend months upon months exchanging rolling productions of documents that are responsive to civil subpoenas—but are largely not essential to resolving the underlying dispute. While some litigants undoubtedly benefit from delay, this is not always true. Sometimes, *both* parties realize that there may be external business imperatives to resolving a dispute in months as opposed to years. Corporations now often insist that general counsels budget litigation expenses on a yearly or quarterly basis, which is difficult when litigation stretches on for years. Plaintiffs may also wish to monetize the case, which requires a forecast in spending that does not go out to 2023.

Other factors may also align in favor of converting selected aspects of the dispute, or the entire controversy, to arbitration or other forms of ADR. The parties who seemed bullish on court litigation pre-filing may be dissatisfied with the judge or magistrate to whom they were assigned, for example, and decide that they would be better off with a panel selected by themselves that has subject matter expertise in the object of the dispute.

Even if it is not appropriate or feasible to remove the entire litigation out of the courts and into arbitration, there may be instances where the parties identify some subset of the controversy that would be more appropriate for non-judicial disposition. Although not an arbitral proceeding, the parties may, for example, find it appropriate to ask the court to allow them to refer the entire discovery process (including disputes) to the oversight of a special master or a referee they select so that discovery can be completed more expeditiously and economically. In this scenario, the dispute would then be returned to the court at the close of fact discovery for motion practice and trial on the merits. Another scenario might involve the referral of the claim construction hearing in a patent dispute (the “Markman Hearing”), or other disputes requiring experience in the technical issues involved for an expert determination<sup>12</sup> to a third party for binding resolution. Often, these neutrals are quite comfortable with, and well-versed in, secure application of remote and “virtual” hearing platforms using arbitration association guidelines noted above. Of course, the parties, could also seek to stay or dismiss the case entirely from court in favor of binding arbitration—perhaps using the discovery taken to date in the court process to use in that proceeding.

Once the parties agree in principle to move the case or some phase of the case out of court, in consultation with arbitration counsel, they will naturally need to draft

an arbitration submission agreement that in effect operates much like an arbitration provision in a contract. Like all arbitration agreements, the submission agreement must define, among other things, the scope of the dispute and decide on a forum and how to select arbitrators.

The institutions provide standard clauses for submission agreements, but these clauses need to be customized with care, particularly if the submission relates to a submission of a phase of ongoing litigation to ADR.

Bespoke clauses appropriate to a conversion to arbitration following litigation should be considered in developing the submission agreement. For example, it would be useful to record in the agreement how discovery from the litigation can be used in the arbitration, what if any further discovery would be allowed in the arbitration, the timeline for the arbitration, what process tools might be employed in the arbitration, etc. Developing the arbitration agreement at this later juncture can provide the parties, now with greater knowledge of the case, the ability to develop a more nuanced and more appropriate process.

## Special Considerations in Transitioning to Arbitration

Because it is fairly uncommon so far—for parties to switch to arbitration after commencing a civil lawsuit, there are several special considerations in doing so. Given federal policy in favor of arbitration, judicial opposition to a submission agreement mutually agreed to by both parties is unlikely. As noted above, however, once a litigation has commenced, the parties may have already exchanged a significant amount of discovery and the judge may have issued rulings on a number of key issues. As a result, in proposing ADR options to the court the parties should:

- Emphasize the resources that will be saved by submitting the entire dispute, or parts of it, for determination by a third-party neutral;
- Carefully consider whether, and if so, how protective orders or confidentiality agreements should be reflected in the submission agreement, and
- Consider whether the court action will be dismissed with prejudice at the end of the arbitration.

## Reassess Existing Contracts Before Disputes Arise

With both federal and state courts likely facing a long road before returning to normal operations, it will surely pay dividends to reassess *now* any dispute resolution provisions in existing contractual agreements. It is likely that many inside and outside litigation counsel made strategic decisions to avoid arbitration clauses entirely without anticipating the current reality of greatly increased court delays.

As noted above, the recession that resulted from the COVID-19 pandemic will almost certainly give rise

to a torrent of new disputes. As a result, inside counsel and outside counsel would be well advised to be more creative and proactive in thinking through the optimal means of dispute resolution. In drafting any dispute resolution clauses in new contracts or negotiating revisions to any such clauses so as to select arbitration instead of litigation, it is important to remember basic drafting principles and draft thoughtfully and with care.<sup>13</sup>

## Conclusion

Although eschewing arbitration may have been the sensible decision at the time of entry into a commercial agreement, existing—and increasingly worsening—judicial backlogs may cause some of those who previously chose litigation over arbitration to reconsider. Even if a party has already filed a complaint and has begun discovery and motion practice, it is not too late, in consultation with arbitration counsel, to move the dispute to an ADR venue that will likely result in a less costly, more flexible and more efficient resolution.

## Endnotes

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3. “Protocol on Cybersecurity in International Arbitration,” [https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc-bar-cpr-cybersecurity\\_protocol\\_for\\_international\\_arbitration\\_-\\_print\\_version.pdf](https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc-bar-cpr-cybersecurity_protocol_for_international_arbitration_-_print_version.pdf).
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# When the Numbers Are Not So High; Justice Nigh— Seeking Justice from an Imperfect Justice System

By Bart J. Eagle and Adam J. Halper

## Introduction

Anyone who regularly practices in state or federal court knows that money figures prominently in how cases are resolved. Often, parties with legitimate claims or defenses have to decide whether it is worthwhile to continue with their arguments given the cost of having good attorneys make them. Consideration of cost leads to very real and psychically challenging results. For example, a plaintiff may forgo bringing a “just” claim because the cost of pursuing it is greater than what they might recover in the end. A defendant will pay to get rid of an unmeritorious claim to avoid expending further litigation costs. As a result, settlements often bear no relationship to the actual merits of a dispute.

Because of litigation costs, cases that involve modest sums are often cost prohibitive.<sup>1</sup> Let’s look at two examples:

Jane loans Dick<sup>2</sup> \$30,000. Dick gives Jane a promissory note, which contains a payment schedule. Dick defaults on his obligations. Let’s assume that there are no factual disputes: there is no question that Jane paid the money to Dick, that Dick signed and delivered the note to Jane, and that Dick defaulted. Why shouldn’t Dick repay the loan?

Or, so that we do not display plaintiff bias, consider:

Jane agrees to sell a specific piece of jewelry to Dick for \$30,000. The jewelry that Jane delivers was not the piece that had been agreed upon, and Dick refused to accept it. Jane then sues Dick for \$30,000. Again, let’s assume that there are no factual disputes: there is no question that the piece of jewelry Jane proffered to Dick was not what had been agreed upon, and that Dick did not accept the piece of jewelry proffered. Why should Dick pay Jane anything?

In both scenarios, we have a dispute over \$30,000. Can either party go to court and obtain justice in a cost-effective way? In both scenarios, the party who is quite clearly “right” would have to spend a significant amount of money to get relief. So, what are Jane and Dick to do? Walk away from a legitimate claim; pay a frivolous one? Many lawyers might advise them that, in the end, this is a business decision; given the amount in dispute, the parties should consider accepting a part of what is due or paying a part of a frivolous claim. This advice would

have little to do with the merits of the dispute; instead, it may have much to do with cost.

In this article, we make suggestions that can be implemented in our justice system so that these lesser value commercial disputes<sup>3</sup> can be resolved in a cost-effective way. Thus, Jane and Dick might have the opportunity to obtain justice.

## Early Neutral Evaluation (ENE): In the Land of Money and Litigation, Sooner Is Better Than Later

Early neutral evaluation (ENE) is a form of Alternative Dispute Resolution. It has particular value in modest dollar cases. While it would not require the parties to give up a trial if the matter is not settled, if administered properly, it would provide parties with the chance to receive the full amount they claim or avoid paying simply to resolve a frivolous lawsuit; or at least achieve a reasonable settlement.

Here’s how this would work. Shortly after a case is filed, the parties are required to appear before an “early neutral evaluator” (“Evaluator”). The Evaluator’s job, in the first instance, is to hear the essential arguments of both sides. This isn’t a trial or arbitration. Flexibility would be a key component of this process. For example, the Evaluator can meet with the parties and counsel jointly or meet separately, confidentially, to probe specific facts and positions.<sup>4</sup>

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## Roll the Dice at Your Peril: The ENE Proposal

At the conclusion of the ENE, if the parties do not arrive at a settlement, the Evaluator should provide a written proposal reflecting his or her evaluation of the case. We propose that if, for example, Jane agrees to the proposal and Dick does not and Dick gets a judgment that is no better than the proposal after trial, Dick pays a penalty. The penalty is that Dick pays Jane's reasonable attorney's fees.<sup>5</sup> Thus, the ENE proposal has a highly motivating component—a *stick* attached to it.

The award of attorney's fees serves two purposes. First, the award acts as an incentive to both parties to settle the case. Second, the award acts as a disincentive to bad behavior. To be clear, not agreeing to a settlement proposal is not necessarily "bad behavior," especially if there is a reasonable dispute as to law or fact. Bad behavior takes many forms. Typical examples— (1) One party continues litigation even where their claims or defenses

are without merit because they think that the other side will eventually fold for economic reasons; (2) One or both parties are motivated by deep personal animus *and* can afford the costs of losing; or (3) One party thinks litigating is fun! (Yes, this happens). Bad behavior would likely change if, early on, there was a neutral evaluation and a penalty if a party thumbed their nose at it.

We understand that awarding attorney's fees to the party who accepted the ENE's proposal and did no worse after trial (the "Prevailing Party") would be a sea change in American jurisprudence and require action by the New York State legislature. However, statutes already exist that provide payment of attorney's fees to a prevailing plaintiff, often where doing so would act to level the playing field between parties and/or as a disincentive to bad behavior. For example, an employee who prevails in a discrimination case would be able to recover her attorney's fees from her employer. The employer, who may have

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significantly greater financial wherewithal than the employee, cannot simply bleed a plaintiff into submission.

Still, an award of attorney's fees should be justified and the threat thereof should not be used to prevent a party from proceeding simply out of fear of losing. And the court would provide an important check on the applicability of the stick.

So, how would this work in practice?

First, *after* the case is decided, the Evaluator's proposal would be presented to the judge.

Second, if the judge finds that there is a Prevailing Party, the judge would then determine whether the proposal was reasonable *at the time made*.<sup>6</sup> In deciding on the reasonability of the ENE proposal, the Judge would consider the positions of both sides at the time the proposal was made. For example, if the applicable law was in flux or otherwise unsettled, the parties should not have been expected to accept an Evaluator's proposal that does not take that into account. If the Judge believes that the proposal was not reasonable, the inquiry would end.

If the Judge determines that the proposal was reasonable, the Judge would then decide on the amount of legal fees to award the Prevailing Party. This may sound harsh, but think about how such a result would, at the outset, incentivize Dick, in our first scenario, and Jane, in the second, to accept the Evaluator's reasonable proposal.

The ENE should be time limited—perhaps three hours or fewer. If successful, the parties would not be required to invest the time and incur the costs that would go into further litigation.<sup>7</sup> In essence, our proposal is to insert evaluation into the litigation process early and incentivize parties (and their attorneys) to consider it carefully.

The ENE proposal outlined above is designed to level the playing field in a way that recognizes the critical role that a party's resources play in litigation. Most everyone agrees that litigation takes too long and is too costly. In any cost benefits analysis, the benefit decreases exponentially as the costs add up; this is especially true for disputes over relatively small amounts of money. ENE builds on the good practices that currently exist to resolve disputes, including the recent undertaking of "Presumptive ADR" in New York courts.

Every attorney has come across Dick and Jane at some point in their careers. They may be a potential client, friend, neighbor or family member. Every attorney has also walked away or advised a Dick and Jane to consider walking away from a dispute because the economics of achieving justice simply do not add up. In ENE, we suggest a process by which they can achieve justice much quicker than by taking the route of traditional litigation. Adoption of these processes might incentivize parties coming to court for lower dollar amount disputes, which

are, after all, what our courts are for; but it will also incentivize early resolution. Dick and Jane, by having more to lose, would have much to gain. So too would our courts, bar and clients.

## Endnotes

1. For the purposes of this article, this is assuming that there is not a fee shifting clause in a contract, or a statutory provision, such as exists in federal and state labor laws, that might relieve one of the parties from the burden of paying legal fees. This also assumes that the case is not being handled on a contingency fee basis.
2. We reveal our ages by making "Dick" and "Jane" our hypothetical parties.
3. What is a "lesser value"? \$25,000? \$30,000? \$50,000? It may vary from county to county throughout the state, where the costs of litigation—including the fees lawyers charge—are different.
4. Flexibility should include the scheduling of hearings and the ways hearings are conducted. Emerging virtual technology, such as Skype for Business, Zoom and other platforms that are now being used in our court system for court conferences, oral arguments, and mediations, could be used so that that these conferences can take place, where necessary, after normal court hours. In this way, the parties themselves, and not just their attorneys, could participate without having to take time off from work.
5. The penalty would be more than an award of court costs, as provided for in CPLR 3219 and 3221, or even "expenses" as provided for in CPLR 3220 with respect to contract claims, which may include legal fees related to proving damages from the time an offer of judgment is made.
6. One cannot evaluate the reasonableness of the ENE proposal as if it was made at a later date after new information, which was not available or presented to the evaluator, is uncovered.
7. The parties could also proceed to mediation, which would likely be more efficient than litigating the dispute to judgment. However, mediation would also involve investments of time and resources.

# As Businesses Reopen, the Lawsuits Begin: The Landscape for the Post-COVID-19 Deluge of Lawsuits, the Intersection of Insurance and Using ADR for Expedited Resolution

By John S. Diaconis, Mark J. Bunim, Jeffrey T. Zaino, Peter A. Halprin and Deborah Masucci

*Note: The content of this article was discussed during a NYSBA webinar of the same name delivered on June 16, 2020 that was recorded and can be found in the NYSBA CLE offerings.*

There's no way to predict whether, and if so, how many cases will actually arise out of the COVID-19 pandemic. Initially, disputes may arise about the scope of closures and the authority of states to order the closures. Other disputes might arise after the states open their economies when opening might be considered, by some, to be too early. Compounding the problem, in May 2020, the death of an African American man at the hands of police in Minneapolis resulted in protests and rioting during government enforced stay-at-home orders. Lawsuits over property and personal damage will rise because of the protests and riots, and COVID-19 may spread further to the extent that demonstrators did not follow Center for Disease Control (CDC) social distancing and face covering recommendations

Those matters not subject to pre- or post-dispute resolution clauses will be filed in court unless the parties agree to pre-litigation alternative dispute resolution

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(ADR). In 2019, the New York State courts adopted a presumptive ADR initiative for civil cases. That means that all cases filed in New York state courts will be subject to individual court rules that require the parties to use an ADR process soon after the filing of the case. Even federal courts that have not adopted a presumptive ADR program will develop case management programs to address the influx of cases. These case management programs will likely include many aspects of ADR.

What types of disputes are likely to arise? Will there be immunity from liability for specific classes of providers? In what forum will the cases be filed? Will the parties seek early resolution? The scope and depth of the types of disputes that will arise is unknown, but the following are predictable.

## Business Interruption Insurance

The first wave of pandemic-related disputes involves disputes over first-party business interruption. Three months after the lock-down started close to three thousand insurance coverage lawsuits, including class actions, had been filed.<sup>1</sup> Many more will follow. The lawsuits will arise if a carrier determines that an exclusion precludes coverage under a particular insurance policy. The next wave will likely involve third-party claims.

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Under the terms of business interruption insurance policies, coverage is extended to the insured for loss of business, income, and extra expenses to continue, or resume, business resulting from direct physical damage or loss to property. Coverage may also include losses due to business interruption from an act or order of a “civil authority” that prohibits access to the insured’s premises or coverage for lack of ingress to or egress from the premises.

Another coverage that may be afforded is “contingent business interruption.” This coverage applies to lost business sustained by the insured as a result of losses suffered by critical suppliers and customers. This occurs in situations where the underlying cause of damage to the supplier or customer is covered by the insured’s policy. Supply chain or trade disruption typically covers business interruption due to supply chain disruption or breakdowns in transportation. These coverages are triggered only by “direct physical loss of or damage” to relevant property.

Issues that will be in dispute between a policyholder and carrier include whether: a class action or multidistrict litigation is available to provide relief, as a procedural matter; SARS-COV-2 or COVID-19 causes “direct physical loss or damage”; exclusions, including the “Exclusion for Loss Due to Virus or Bacteria,” are applicable; and Sublimits.

Down the line, there may also be issues with regard to the calculation of business interruption damages, some of which could end up in appraisal, an arbitration-like procedure.

Reinsurance disputes are likely to follow. Reinsurance claims will arise when it is alleged that a ceding company<sup>2</sup> paid claims outside the coverage of the policy or made claims determinations that could be considered allegedly unreasonable.

A number of states have proposed legislation that would, if passed, require insurers to afford coverage for COVID-19 business interruption claims as a result of the Pandemic on a retroactive basis, notwithstanding policy wording. These proposed bills are generally limited to an insured with fewer than 250 employees. There has been some discussion of enacting federal legislation, but that effort generally seems to be prospective towards the next crisis. Most discussion has centered on the Pandemic Risk Insurance Act<sup>3</sup>, a form of the Terrorism Risk Insurance Act.

Businesses affected by COVID-19 may, on top of that, be facing claims for coverage in connection with recent reports of vandalism or looting. In addition, businesses forced to suspend operation due to rioting may have coverage for business interruption. There may be disputes in relation to the calculation of damages arising out of the confluence of COVID-19 and the recent reports of loot-

ing as insurers may argue that there was no income since businesses were already closed due to COVID-19.

## **Cyber-Security Related Claims**

In order to comply with social distance requirements, employers moved their workforces out of office campuses with secure networks to home offices. If employees are not working on company sanctioned laptops or networks, there could be an increase in other security breaches as employees use their home computers. Such attacks compromise confidential information maintained by companies. There has been a rise in ransomware attacks on COVID-19 related medical facilities.

There may also be cyber insurance implication where policyholders seek to recover for these losses under cyber and other responsive insurance policies.

## **Directors and Officers (D & O) Liability Claims**

Shareholders might bring suits against the officers and/or boards of publicly held companies alleging a failure to properly prepare for the pandemic and the precipitous drop in stock prices as a result of such alleged negligence.<sup>4</sup> Allegations might extend to not properly valuing into financial projections the impact that COVID-19 would have and its effect on profitability and share prices. Certain industries that have been hard hit, i.e. airlines and manufacturing, could be exposed to more specific industry directed D&O actions based on significant impact to shareholder value.

## **Representation and Warranty Claims**

Investors might allege claims over representations made in the course of an acquisition about the profitability or viability of the company being sold or the stability of its workforce that turned out not to be accurate due to what happened during the COVID-19 crisis.

## **Securities Disputes**

As they see the value of their brokerage accounts go down, investors will question the suitability of trading and holdings in their accounts. Claims may be brought against their brokerage firms for fraud and misrepresentation with respect to suitability of the investment as well as other claims. Many broker dealers are self-insured for losses incurred but there may be other applicable insurance policies.

The vast majority of cases naming brokerage firms and their registered representatives are subject to pre-dispute arbitration agreements and will be required to be filed at the Financial Industry Regulatory Association or FINRA. Investors who assert claims against their investment advisors, however, will have broader options for where to file claims. If there is a pre-dispute arbitration agreement, the parties might elect the American Arbitra-

tion Association or another forum. In all instances, the parties can voluntarily agree to mediation.

### **Contract and Commercial Disputes**

There will be a burst of breach of contract and commercial disputes that arise because people and businesses are not able to perform on contracts. The disputes might involve leases, delivery of services or goods, or other performance issues. While these disputes will be initially filed in court or arbitration, these types of disputes are excellent candidates for mediation because parties might be very open to alternative terms for resolution that cannot be achieved in court or arbitration.

### **Student Disputes**

When the pandemic hit, many colleges and universities sent students home for fear of massive spread within the student body. The schools quickly converted to online classes.

There have been a number of class actions already filed by students against colleges and universities seeking to recover tuition reimbursements or rebates on the ground that the quality of online courses is not the same as in person classes. Other actions demand reimbursement of housing fees and other costs because students were sent home mid-semester.

### **Cruise Line Disputes**

Early newspaper reports told stories about passengers who were taking the vacation of their dreams but instead were quarantined on ships after an outbreak of coronavirus. On March 9, 2020, the first dispute was filed for passengers on the Grand Princess.<sup>5</sup> This and subsequent lawsuits allege negligence on the part of cruise lines for not providing safe lodgings. The success of these lawsuits will turn on the type of harm and whether the carrier exercised reasonable care.

### **Investor State Disputes**

There have been past instances where overwhelming circumstances have triggered a series of lawsuits or investor claims against governments. In these cases, investors seek to avoid financial commitments no longer possible to pay or benefits that were lost because of restrictions placed by governments to protect the public health. Investors will look to investor/state arbitration to secure this relief. Investment tribunals will grapple with the reasonableness of the challenged state action. Mediation may provide an alternative to arbitration since many of these cases are time sensitive.<sup>6</sup>

### **Bankruptcy Claims**

Bankruptcy filings due to the coronavirus business closures are on the rise. These may be related to D&O claims. Bankruptcy courts are using mediation to settle creditor claims.

### **Employment Disputes**

Employment disputes may arise in a variety of contexts related to COVID-19 including workers' compensation claims, discrimination, and whistleblower cases.

Employees who go back to work and find out that their co-worker(s) have or had the virus, and then get the virus, might bring a worker's comp claim based on negligence. Employees who contracted COVID-19 from a co-employee before a shutdown, or who were forced to work during the shutdown and got COVID-19, will allege failure to provide a safe place to work. Employees working from home during the pandemic may also sustain injuries due to poor ergonomics or trips and falls, with the home determined to be the employees' prime office.

Worker's compensation claims normally are addressed through state workers compensation systems. Some states such as California permit workers and contractors to establish an ADR compensation program for injuries on the job.<sup>7</sup>

Workers brought a lawsuit against Smithfield Foods, Inc. for failure to provide adequate workplace safety. That lawsuit was dismissed by a U.S. district judge in Missouri<sup>8</sup> on the ground that federal agencies are more equipped to determine whether the company complied with adequate health standards during the COVID-19 crisis. It is unclear whether this decision will impact other similar cases filed elsewhere.

Many employers were forced to make difficult decisions to terminate employees when business dried up. Some employees may bring claims under federal and state anti-discrimination laws. The former employee might challenge the reason the employee was terminated and argue that the loss of business was solely a pretext for a discriminatory reason. Discrimination claims might also arise as employers determine who to hire first once businesses start to rehire employees.

In another twist, employees have filed several complaints alleging whistleblower retaliation on the ground that the employees were terminated for expressing concerns about the adequacy of safety precaution steps taken by their employer.<sup>9</sup>

### **Consumers**

Consumers might bring claims against storeowners for unsafe conditions when another shopper or an employee coughs and the complaining customer then gets coronavirus. These are hard cases to prove because the customer must show that the store is where he/she got the virus.

## Medical Providers

Claims against medical providers will be subject to a new Article 30-D of the Public Health Law, which is entitled the Emergency or Disaster Treatment Protection Act (EDTPA). This act immunizes medical providers for COVID-19 related claims in the absence of gross negligence or recklessness. Congress and states are also considering legislation to protect health care providers.

Medical malpractice claims might arise where surgeries or other procedures considered non-essential are delayed because of the virus. Malpractice might be alleged because a medical provider did not raise urgency of the procedure. Medical providers face a double-edged sword. For example, someone being treated for cancer with chemotherapy might have had treatment halted to avoid compromised immunity but might also die from not receiving treatment.

## Nursing Homes

Nursing home residents who get sick or die from coronavirus can no longer raise health and safety claims alleging negligence in New York. The nursing homes and their staff will be exempt by virtue of the EDTPA unless a claimant can prove gross negligence or recklessness by the nursing home.

## Care Providers Bring Action Against Hospitals

On April 20, 2020, the New York State Nurses Association filed three lawsuits challenging the failure of the New York State Department of Health (DOH) and two hospitals, Montefiore Medical Center and Westchester Medical Center, to protect the health and safety of nurses treating COVID-19 patients.<sup>10</sup>

The lawsuit against DOH was filed in New York Supreme Court, New York County, under Article 78 – seeking an injunction for multiple failures to protect the health of nurses, patients and the public.

Montefiore was sued in the United States District Court for the Southern District of New York on behalf of the 3,000 RNs at the hospital, seeking injunctive relief under the Labor Management Relations Act to honor its contractual obligations. This injunctive action seeks to restore safe working conditions for nurses and their patients.

The action against Westchester Medical Center was filed in New York Supreme Court, Westchester County, on behalf of the 1,600 RNs seeking an injunction against hazards that cause or are likely to cause death or serious physical harm to nurses. Among the causes of action: intimidation of RNs who have spoken out publicly about deficiencies in the hospital's responses to COVID-19.

The lawsuits seek protective respirators, gowns that are fluid resistant, as well as testing for COVID-19 and antibodies.

Ordinarily the actions would be brought in arbitration because the nurses union and the hospitals are subject to collective bargaining that covers the requirement of hospitals to provide safe conditions but, in this case, the nurses sought court intervention on the ground that there is an urgent need to prevent irreparable harm. One issue that the courts will explore is the obligations of the hospitals to provide safe work conditions.

## Immunity from Legal Liability

There is a movement from business for legal protection against negligence claims. It is generally not an adequate defense to negligence that you did what the law required. There are some examples where Congress/legislatures have created protections. The September 11th Victim Compensation Fund<sup>11</sup> was adopted by Congress to compensate the victims of the September 11th attack, or their families, in exchange for their agreement not to sue the airline corporations involved. The fund was expanded to provide for funds to compensate first responders for illnesses related to the attack. In 1986 the National Childhood Vaccine Injury Act<sup>12</sup> was passed to eliminate the potential financial liability of vaccine manufacturers due to vaccine injury claims. The intent of the legislation was to ensure a stable market supply of vaccines and to provide cost-effective arbitration for vaccine injury claims. Most recently, Congress provided liability protection to volunteer health care professionals providing health care services during the current public health emergency under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").<sup>13</sup> The CARES Act exempts volunteer health care professionals from liability under federal or state law for any harm caused by an act or omission, unless the harm was caused by willful or criminal misconduct, gross negligence, reckless misconduct, conscious flagrant indifference, or being under the influence of alcohol or intoxicating drugs, in providing health care services during the public health emergency with respect to the coronavirus. This provision preempts state or local laws that provide such volunteers with lesser protection from liability.

Congress chose not to extend liability protection to non-volunteer health care professionals, affording no widespread federal protection to those employed or contracted professionals treating patients during the emergency. Good Samaritan laws adopted in some states might protect these medical providers, but such laws are not uniform. Some states have extended liability protection to employed or contracted health care professionals through state orders. For example, the New York State legislature passed a bill that waived specific state laws to provide immunity from civil liability to certain health care professionals, hospitals, nursing homes professionals and nursing homes for any injury or death alleged to have been sustained directly as a result of any COVID-19 related treatment act or omission by such professional in providing medical services during the pandemic, unless

such injury or death was caused by the professional's gross negligence.

How about liability immunity around testing? Sen. Benjamin Sasse, R-Neb., introduced a bill that would grant broad legal immunity for those health care providers who provide testing or treatment outside of their specialties to patients with COVID-19 for the duration of the national health emergency.<sup>14</sup> The legislation protects health care providers from federal, state and local civil liability if they are: (1) using or modifying a medical device for unapproved use or indication; (2) practicing without a license or outside of an area of specialty if instructed to do so by an individual with such a license or within such an area of specialty; or (3) conducting the testing of, or the provision of treatment to, a patient outside of the premises of standard health care facilities. Regulators at both the state and federal level are also likely to take steps to address liability concerns to help ensure that available health care providers, regardless of specialty, are encouraged to step forward to assist in caring for COVID-19 patients.

### Will Early Settlement Occur?

New York Governor Andrew Cuomo issued Executive Order 202.39<sup>15</sup> on March 7, 2020. The Executive Order, among other things, suspends statutes of limitations during the health emergency. This order and the statute of limitations provision was extended to July 6, 2020. One impact of the suspension of the statute of limitations is permitting delay in filing lawsuits arising because of COVID-19 related injuries.

In the insurance coverage context, carriers seek delays in cases for several reasons. Insurance coverage is based on the contract between policyholders and carriers. Ambiguities in contracts might require court intervention on critical contract interpretation before settlement negotiations or mediation can start in related cases. Under the terms of insurance contracts notice is required to initiate the claims process. The completeness or lack thereof of notice, will either accelerate or delay the resolution of a claim including early settlement. In third-party insurance cases there is a strong possibility of mediation being successful with insurers at the table.

Will lawyers look for early settlement? In the commercial setting where money is short, there might be a desire to delay resolution. But it is hard to predict whether lawyers would look for early settlement if a workplace experienced a huge number of employees or customers' sickness. In some cases, the employer will seek early resolution to avoid damage to its brand that would occur because of extended litigation. The needs of the litigant should be paramount and, if that is the case, there would be a motivation for early resolution through mediation.

## Conclusion

This article attempts to summarize the types of disputes that have or may arise from the COVID-19 and the civil unrest that followed shortly thereafter. It is difficult to predict how successful these cases will be or whether legislation will limit liability. What we do know is that ADR will be part of the dispute resolution continuum addressing these cases.

## Endnotes

1. See Hunton Andrew Kurth COVID-10 complaint tracker for the latest data at <https://www.huntonak.com/en/covid-19-tracker.html>.
2. A ceding company is an insurance company that passes a portion or all of the risk associated with an insurance policy to another carrier. The ceding company passes the risk against undesired exposure to losses.
3. See HR 7011 Pandemic Risk Insurance Act of 2020.
4. Peter A. Halprin, Pamela Woods and Vincent Xu, *The Coming COVID-19 Coverage Fight: Insured Versus Insured Exclusions and Collusion*, New York Law Journal (May 21, 2020).
5. <https://www.mercurynews.com/2020/04/09/grand-princess-passengers-sue-cruise-line-for-negligence-over-covid-19-outbreak/>.
6. For a further discussion including comparable past action see <https://www.imimmediation.org/2020/06/03/covid-19-and-mediation-of-investor-state-disputes-a-way-forward/>.
7. See [https://parma.com/sites/default/files/files/images/conference/c3\\_alternative\\_dispute\\_resolution.pdf](https://parma.com/sites/default/files/files/images/conference/c3_alternative_dispute_resolution.pdf) for the history of the California workers compensation ADR program.
8. <https://www.law360.com/articles/1270737/attachments/0>.
9. See <https://leftcoastlaw.com/files/2020/04/Kristopher-King-v-Trader-Joes-East.pdf> and <https://leftcoastlaw.com/files/2020/04/Norris-v-Schoppenhorst-Underwood-Brooks-Funeral-Home-LLC.pdf>.
10. See <https://www.nysna.org/press/2020/nys-nurses-association-files-three-lawsuits-protect-nurses-health-and-safety#.Xtux9mpKjyU>.
11. See <https://www.justice.gov/civil/vcf#:~:text=SEPTEMBER%2011TH%20VICTIM%20COMPENSATION%20FUND,%3A%20www.vcf.gov>.
12. See <https://www.hrsa.gov/vaccine-compensation/index.html>.
13. See <https://www.govtrack.us/congress/bills/116/hr748>.
14. <https://www.law360.com/articles/1258473/attachments/0>.
15. <https://www.governor.ny.gov/news/no-20239-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.



# Understanding the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties

By Karen Jalkut, Luis Martinez, Charlie Moxley and Jeffrey Zaino

*On May 11, 2020, the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section put on a program by videoconference entitled, "Understanding the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties." The featured speakers were Karen Jalkut, Vice President of the AAA-ICDR Commercial Division, and Luis Martinez, Vice President of the ICDR. Charlie Moxley and Jeffrey Zaino, the Co-Chairs of the Committee, put together this program and served as moderators. The following is a transcript of the discussion they had.*

**Jeffrey Zaino:** *The AAA-ICDR a few weeks ago issued some pretty extensive procedures and guidelines for virtual hearings. Prior to the pandemic, were there other guidelines in place and how often did the AAA-ICDR conduct virtual hearings?*

**Karen Jalkut:** In the past the AAA-ICDR used video conferencing for witnesses, be it for location, health, or weather issues. Prior to the pandemic, Rule 32C on conducting hearings was not utilized that often. Since the pandemic, it is now being invoked and arbitrators are opting into virtual hearings, and the practice is far more acceptable now. As of today, approximately 150 AAA-ICDR cases have gone virtual and the number is growing.

**Zaino:** *Have you seen improvements in virtual technology over the last few years?*

**Jalkut:** Yes, most definitely. There is no lag time, and a lot of the past technology issues have disappeared. There are

many setting options, breakout rooms and safeguards in place. It seems like the technology improves daily.

**Charlie Moxley:** I agree entirely with Karen. Technology today is immeasurably better. In the past a lot of issues occurred with virtual platforms, mostly with connectivity, where the technology often did not work to any reliable extent. Since the pandemic, with the widespread move to Zoom, it is working quite well. The technology is better and there are virtually no issues of connectivity. There are things to be aware of and look out for. We will get into that later in this program. We need to get the word out about the intuitiveness and effectiveness of this technology. It can be counted on as an efficient way to conduct hearings, but there is a learning curve. It takes a couple days of practice to get comfortable with the technology and then one needs a lot of practice.

**Zaino:** *Are you comfortable with the fact that the platforms were not specifically designed for arbitration and mediation hearings?*

**Luis Martinez:** Prior to the pandemic, we only used virtual platforms occasionally for witness testimony. Functionality and security had been a concern in the past. These issues are being addressed as we are seeing greater usage of these platforms. While these platforms generally work well, we are at this stage seeing 50% of ICDR clients opting in and 50% opting to postpone. Some of our U.S. offices will take longer to open up for in-person hearings and virtual-hearing platforms will offer possible options,

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especially now with many improved and useful features. These virtual hearings can be used successfully in place of the in-person hearings to a degree if we have prior testing, training and an understanding of the virtual platform, its proper settings and limitations.

**Zaino:** I find myself using Zoom even in place of what could be a phone call. It now seems to be the preferred platform now for meetings, etc.

**Audience:** *Does having arbitrations and mediations conducted virtually expand the selection of neutrals to those outside the area of the particular proceeding?*

**Zaino:** Yes, it does. AAA-ICDR has an arbitration search link that offers a selection of neutrals from anywhere worldwide.

**Martinez:** I note that some arbitrators are becoming proficient with Zoom and adding it to their CVs.

**Zaino:** *If you could design the perfect virtual platform, what would it contain?*

**Jalkut:** What I would like to see is a locked screen view to make it similar to an actual physical hearing room. Claimants on the left side, respondents on the right side, and the arbitrators at the top of the screen. It is important to be able to lock that view because now when others come in and out of the virtual rooms they get moved around and all participant views are different. It would be better with a locked gallery and speaker view.

**Zaino:** That is a good idea. The technology is certainly evolving.

**Moxley:** Functionally what Karen mentioned is something we're going to need to develop—getting the screen to look like the rooms in which we conduct live proceedings, with people sitting around a conference table. It's also important in conducting virtual hearings and mediations to have multiple screens, including one for the proceeding itself, one for taking notes, one for pulling up documents from the pre-arranged data base of exhibits that we'll have in most cases, and perhaps one for LiveNote in what may be the much smaller percent of cases in which we'll have that at a hearing. We also need to develop a surround-view camera setup so at all times everyone in the proceeding can see who is in all of the "rooms" of the various participants, all generally with real-world, not virtual backgrounds. I know such technology exists in the automotive area as a parking aid, but I haven't seen it offered yet for our purposes.

**Zaino:** I have heard that some don't like that a mediator can just pop up in a breakout room without notice.

**Moxley:** There is a problem that we might hear things a party would have preferred we not hear. I've developed the practice of texting or calling counsel in advance when I'm ready to change rooms to see if they're ready to have me come into their breakout room.

**Zaino:** *There are many virtual hearing guidelines out there—JAMS, CPR, ICC, ABA, to name a few. What distinguishes the AAA-ICDR guidelines, if anything, from the others?*

**Jalkut:** A few things. First, we already discussed pre-determined settings. Second, we have a trained staff, the most strategic factor, to help the parties optimize their experience, with security considerations, with test runs, and to set the ground rules for the actual virtual hearing. There are a host of benefits we can contribute to the virtual hearing process.

**Zaino:** *The AAA-ICDR also included a proposed Model Order and Procedures for a Virtual Hearing via Video Conference. How is that being approached and implemented, and what are some of the key issues and the considerations for the arbitrators and the process?*

**Martinez:** This is an important document to review. It provides a range of issues arbitrators and parties should consider while setting the ground rules for the hearing, and it includes sample language to memorialize the outcome of those discussions. All parties need to be clear on how the virtual hearing will occur. The order should cover all logistics. It is important to consider the examples set forth in this document, offering options as early as the AAA-ICDR's administrative conference call. We inform the parties that Zoom is not the only platform they can use and that they will need to conduct their own due diligence as to the selected platform's suitability and security. It is a party decision. The Model Order goes through a number of important points to consider.

**Audience:** *What is the AAA's position when one party objects to the use of a videoconference platform?*

**Martinez:** The issue is raised in the Model Order's first section and Article 20 of the ICDR's International Arbitration Rules (IAR), which provides the arbitrators with additional guidance. If the parties have not agreed to the use of virtual hearings the arbitrator should consider reasons as to whether they should proceed or not. Factors to consider include the impact of COVID-19, stay-at-home orders and travel limitations. Is it a reasonable alternative? Will delay be prejudicial? International arbitrators have a duty to conduct the proceedings with a view to expediting the resolution of the dispute and may consider how technology could be used to increase the efficiency and economy of the proceedings, see Article 20 (1), (2) of the ICDR's IAR.

Other factors raised for discussion in the proposed Model Order include: Will the use of a court reporter be necessary? How will the recording feature be used?

Technical aspects to consider: Who sends the invitation? Who gets invited? Password protections and authorizing attendees are also discussed. Advance testing is raised and should be conducted one week before and earlier if possible. The Model Order deals with technical

issues and covers witness and exhibit testimony. Virtual backgrounds should be avoided so everyone can see the actual room being used for the testimony and the parties should discuss the document repository for these virtual hearings in advance. The goal is to limit any surprises.

**Audience:** *What if both parties disagree to a virtual hearing? Can an arbitrator then compel a virtual hearing?*

**Jalkut:** Under Rule 32 of the Commercial Rules, the arbitrator sets the time and place. The arbitrator can schedule the in-person hearing, but if that cannot be met, the automatic default is a virtual hearing. It is the ruling of the arbitrator; we have had a cases where the arbitrator listened to both sides objecting and determined a virtual hearing will take place.

**Moxley:** If both sides want to put it off, I would agree to wait. I would respect the wishes of the parties. Arbitrators do have the discretion, but it is a hard judgement call. I agree that in-person hearings are not going away. It also seems likely that, where virtual hearings are held, there may thereafter be vacatur applications by losing parties challenging awards on the ground of the virtual nature of the hearing. This makes it important, as the Model Order provides for arbitrators to be attentive to the need to provide their reasons for ordering a virtual hearing when one side has objected to proceeding that way.

**Audience:** *If both sides object, won't they just find another arbitrator?*

**Zaino:** That could happen, and they have the right to do that.

**Audience:** *Where can we find the model order?*

**Zaino:** It is on our AAA-ICDR web page.

**Zaino:** *Luis, you oversee international cases; are there additional issues that concern parties in an international arbitration?*

**Martinez:** On the international front, there are a few additional things to consider. Time difference—different time zones are important. How do you schedule a time that works for everyone? Access to technology and Wi-Fi speeds are not universal and in certain countries, the Wi-Fi capabilities may be limited. The arbitrators are required to treat the parties with equality (see Article 20 (1) of the ICDR's International Arbitration Rules. ) The language of the arbitration may pose additional issues. Do you need a translator to join the virtual hearing? Is the translation being considered sequential or simultaneous and how will that be incorporated in the virtual hearing platform? That can be a challenge.

**Audience:** *The Zoom tutorials cover many areas. Are there videos or sources that can teach Zoom?*

**Jalkut:** You can find a number of options out there. Just Google Zoom tutorials. Live chat sessions work, too. The Zoom Help Center has both live and recorded training sessions. The AAA-ICDR also just put together a Zoom tutorial for arbitrators and mediators.

**Zaino:** *What are some of the key issues and the considerations for the arbitrators and the process?*

**Martinez:** Reminding the parties and arbitrators that the rules provide that the tribunal may conduct the proceedings in any manner deemed appropriate, provided the parties are treated with equality and each side is given a fair opportunity to present their case. Therefore, the challenge for the tribunal will be to consider not only whether the parties have relatively equal access to the proper technology, but also are both sides equally competent with the technology selected? Another factor to consider is how tiring these virtual hearings end up being. It takes a great deal of mental energy and focus to pay attention to body language, facial expressions (your own and the other participants) and any glitches that may cause a delay and which can impact the perception of the speaker's testimony. In addition, advocates must now test their advocacy skills, adapt to the virtual hearing environment and understand its limitations, thereby fine-tuning their presentations for the virtual hearing setting.

**Zaino:** *With fatigue in mind, how long do you think these virtual hearings should go?*

**Martinez:** There is not enough empirical data, but from personal experience, just doing two of these meetings a day is very exhausting. Maybe half the time of an in-person meeting should be the rule of thumb.

**Moxley:** My sense is that there will be a learning curve. Arbitrators should let the parties know it is okay to say a break is needed, as we would do in a live hearing anyhow. We should be open and communicative. And we should be attentive, as Luis suggested, to any inequalities in technical capability of the parties that have the potential to affect the fairness of the proceeding.

**Martinez:** Absolutely right. Three hours on Zoom arguably is equivalent to nine hours in person.

**Jalkut:** I haven't heard any complaints but agree with what is being said. More breaks need to be built in. Maybe two in the morning and two in the afternoon. However, I don't encourage people to sign out; let the system run. You don't want issues logging back in.

**Zaino:** *The AAA-ICDR, in addition to doing general guidelines for any platform, also did a specific one for Zoom. Why is that, and is Zoom the preferred platform of the AAA-ICDR? What are three useful Zoom tips?*

**Jalkut:** A few years ago, The AAA-ICDR instituted cybersecurity policies. When looking at other platforms, Zoom was way out ahead of everyone else. In December 2019, Zoom had 10 million meetings per day; in April 2020 this had increased to over 300 million per day. With this growth they have increased their security protocols. I like the password protection, waiting room and breakout rooms.

Also, check your version to make sure you have the most recent Zoom version so you will receive the security updates. Version 5.0 or above is what you should have, and with a paid subscription it automatically updates for you. This is a user-friendly platform; the more you use it the more comfortable you become.

**Zaino:** *The Zoom guidelines reference Zoom technical support. Have you been happy with the support? Are they easily available, notwithstanding the high demand worldwide for using this platform?*

**Jalkut:** Whenever I am helping clients during a session, I keep Zoom running so parties can reach me and get an immediate response.

**Audience:** *How do you know what version of Zoom you have?*

**Jalkut:** You should use 5.0 or above. This is listed in your account information (whether basic or pro); it is in your settings.

**Audience:** *When AAA sets up a virtual hearing, does the administrator stay on for the duration of the hearing or is it turned over the arbitrator? Is there some training provided to the arbitrator on how to operate the platform?*

**Martinez:** Internally we are looking at that. The AAA-ICDR will be driven by the wishes of the parties. Perhaps we can have the case managers on standby mode where they can be called or texted to rejoin the virtual hearing or stay on for the duration. The cost has to be evaluated. Arbitrators must act in some co-host capacity and will work with the case manager and have access to internal AAA-ICDR trainings that have been prepared.

**Zaino to Moxley:** *What are your thoughts on Zoom as an arbitrator? You have been using it a lot?*

**Moxley:** The AAA and ICDR require arbitrators to provide the parties with equality of treatment. That is a touchstone that will have to be central to our thinking and planning now. We will have to be alert to problems with Zoom, issues with different devices that don't have equal technical capabilities, and audio issues—perhaps the need to have some parties or witnesses dial in rather than proceed through the Zoom audio. We will also have to work on our comfort level working with documents

in conducting Zoom hearings and also on controlling any recording of the proceeding. Most importantly, we'll have to make sure parties and witnesses are brought up to speed as to the technology in advance of the hearing.

**Audience:** *Have the panelists experienced problems with time zones? If the parties have a six-hour difference, does this require shorter hearing days, more hearing days?*

**Martinez:** I would think so. It depends on which side is taking advantage of morning testimony; they of course would have an advantage over the side joining in the evening hours and that would be exacerbated the longer the hearing runs. Perhaps one side has the morning one day and the other side gets the morning on another day. Same for witnesses.

**Audience:** *Have all case managers received Zoom training?*

**Jalkut:** No, they haven't. We have designated virtual champions across the country.

**Audience:** *It was mentioned that AAA offices are opening at different times. When has that been determined for N.Y.? Are the dates going to be reviewed again and updated?*

**Zaino:** New York hearing facilities are now set to open on October 1st. However, this could be reevaluated in a few months.

**Zaino:** *The guidelines specifically discuss the recording feature of the platforms. What are your thoughts on recording the proceeding?*

**Martinez:** Start looking at the Model Order early. Parties and arbitrators will have to decide what will be the official version—the Zoom recording or court reporter? You should not record without it being in compliance with the order. In addition, if using Zoom platforms, is the recording being downloaded to the parties or arbitrators' computers, or are you using the cloud? You must be sensitive to cybersecurity and to compliance with data protection laws. All should be discussed and agreed to in advance.

**Audience:** *What if halfway through a hearing the party that hasn't presented objects to switching to a virtual hearing, claiming inequality of treatment. What would you do?*

**Moxley:** That is very tough case. That would be fact specific. It would take a lot of thought and argument. It would be very dependent on the facts of the case.

**Zaino:** *The guidelines state that all participants should be "in view of the camera." Is that hard to enforce, especially with participants that do not have cameras? What about virtual backgrounds? Does the AAA-ICDR discourage that?*

**Martinez:** None of this would happen in an impromptu fashion. This is why we talked about advance testing and a well-drafted procedural order. What have the parties agreed to in advance of the virtual hearing? How will testimony be conducted and who will be speaking and in what order are important details that should not be left

for the day of the virtual hearing. Importantly, everyone will have to comply with the Procedural Order, which parties do not normally disregard. Virtual backgrounds are discouraged. There is a concern of possible coaching so the tribunal would want to see the actual room that is being used for the testimony and they may ask the speaker to pan the camera around the room to ensure that there is no one off camera providing any guidance.

**Zaino:** *How does sharing documents work? Does the host (tribunal) control that process? Should the host be the only person to share documents?*

**Jalkut:** Usually hard copies of exhibits are provided to the panel prior to the hearing. Documents are then screen shared for everyone. The benefits of screen share are, sections can be highlighted, the document can be drawn on, pointed to, or you can make comments to hit home what the document says.

**Zaino:** *So you have seen it used and the panelists are comfortable with it?*

**Jalkut:** Most definitely.

**Zaino:** *Charlie, do you have some experience with that? How has it been?*

**Moxley:** Eventually we may move to mostly electronic exhibits in hearings. However, today, many arbitrators and counsel still prefer to have hard copies to use at hearings. In such instances, exhibits need to be exchanged in advance in both hard copy and PDF or the like. Such documents should be available to the arbitrators and counsel by the time of the hearing both in hard copy and electronically. The challenge is with documents that an attorney wants to use on cross-examination, perhaps for credibility, that have not been produced in advance, and documents that otherwise first become important in the course of the hearing. We'll always need a process for that kind of thing. Some such documents can be provided in advance in sealed envelopes or through court reporters or the like. Others will have to be provided at the hearing, whether through being pulled up on the screen or being emailed to the participants—hence the need for multiple screens for arbitrators, counsel, and, at times, where possible, for witnesses.

**Audience:** *With virtual hearings, has there been a greater use of written direct witness testimony?*

**Moxley:** Sure, but we don't have enough experience yet to see how this will work out. There are all the same concerns as to witness statements, including that they are mostly written by the attorneys (the witnesses sometimes only barely know what they say), that something can be lost in assessing credibility issues, and that sometimes counsel want such extensive redirect that it's

not clear how much time is saved, if we end up permitting that to any significant degree. Witness statements are much more normal in international cases, although they can also be helpful and efficient in domestic cases, and, with more virtual hearings, we may see U.S. counsel more comfortable with them.

**Audience:** *Given that we are expecting another wave in the fall, is there a date when the opening of AAA-ICDR hearing facilities will be reviewed again?*

**Zaino:** I cannot answer right now; not sure. We will re-evaluate things in a couple months, but right now we have no in-person hearings until September 1st, and for the hotspots, October 1st.

**Zaino:** *The guidelines state that "[a]ll counsel shall endeavor to speak one at a time and not while another is speaking, other than as may be required to interpose an objection to a question asked or to alert other participants of technical difficulties." How would you recommend an arbitrator control this? Must counsel use a raise hand feature or chat feature to ask to speak?*

**Moxley:** It depends on the size of the group. If it is just two primary parties, we would allow counsel to just speak up as we would in a live hearing.

**Zaino:** *Will that be challenging?*

**Moxley:** I don't think so. We will adapt. I don't think most of us will have a problem maintaining the order of proceedings.

**Zaino:** *Do you think people should use the raise hand feature or just go through the chat?*

**Martinez:** That is a point to be identified beforehand. Witnesses not giving testimony should be sequestered. You must decide how testimony will be given and by whom. The arbitrators who are co-hosts have the ability to mute everyone including speakers. You can limit this to the particular witness that is giving testimony, like the raise hand feature. You should identify this beforehand. You limit it while testimony is being given to not interrupt. The best practice is to avoid surprises and apply the rules and procedures equally to the participants.

**Audience:** *Should the arbitrator always be the host so s/he is in control of all the features, breakout rooms, and muting?*

**Jalkut:** Yes, I make it a point to have the arbitrator be the host or co-host.

**Zaino:** *What are the top takeaways for parties and arbitrators contained in the guidelines?*

**Jalkut:** A lot of headaches come from connectivity [issues], especially internet speeds. If you have the option to plug your device directly to the Wi-Fi router, then you should do so.

**Jalkut:** Power: Make sure laptop is plugged in and powered up.

Etiquette: Speaking on top of each other and hearing shuffling of papers is very distracting. You should always mute when not speaking.

Having a chime when someone is entering the waiting room is of tremendous benefit.

When starting a virtual hearing, I always post my direct AAA number and cell phone number in the chat box, so if there is a technological issue, I can be reached.

**Audience:** *Is the AAA exploring alternate locations outside of hotspots?*

**Zaino:** No, but [we] may re-evaluate that later this year.

**Zaino:** *What is the future of virtual hearings post pandemic? Will this be the norm? Are you seeing any trends regarding the use of virtual hearings in your international cases?*

**Martinez:** It makes sense in certain circumstances. We still have to recognize the importance of the in-person meeting and that human contact is essential. This will not in my opinion replace in-person hearings as there are still too many variables; however, virtual hearings will be in our toolbox and an option that may be more readily acceptable in the future, as we have all been forced to become more proficient in its usage as a consequence of the pandemic.

**Jalkut.** Yes, [virtual hearings] will be part of our ADR toolbox. A lot will depend on the complexity, dollar amount, number of parties. Not one size fits all. Depends on the situations.

**Moxley:** You need to make a distinction between the final evidentiary hearing and the pre-hearing phases of cases. Post-pandemic, I anticipate that counsel will still largely want to conduct evidentiary hearings in person, when possible. However, as parties get more comfortable with the technology and see how well it works, I think considerations of time and cost and convenience will lead to virtual hearings in many cases, including cases below certain monetary thresholds and cases where expedition is particularly important to the parties. At the same time, something is lost with the loss of the in-person element, so it'll be a balancing of pluses and minuses. As to the pre-hearing phases of cases, it is just the opposite. Parties and arbitrators are discovering that virtual preliminary hearings and oral arguments are a real value-added, as compared to the old-fashioned telephonic conducting of such proceedings. This will be transformative, but it will be important for case managers to raise the possibility of Zoom preliminary hearings and oral arguments and the like early in cases during their administrative phases.

**Martinez:** One of the limitations I have found in my personal experience is that when you are doing a live presentation you can gauge how it is going by seeing the audience reaction and adjust accordingly. You just cannot seem to get that type of feedback during a Zoom conference and perhaps a Zoom virtual hearing.

**Audience:** *Do you think that the in-person is more even important for Latin American or Asian jurisdictions?*

**Martinez:** Differences in culture is an important issue that we may encounter, and again the ability to gauge these differences is certainly easier when you are conducting an in-person meeting or hearing.

# ***Handbook on Third-Party Funding in International Arbitration***

Edited by Nikolaus Pitkowitz (JurisNet, 2018)

Reviewed by Christof Siefarth

A “handbook” is generally considered to be a reference work but is often too bulky to be kept in one hand. This book is different: hard copy, but not heavy, 570 pages, but still almost the format of a paperback. Edited by the renowned international arbitration specialist Nikolaus Pitkowitz of Austria, the book contains a wealth of details, but is still precise and very much to the point.

But this is not the only praise; rather, the handbook has a good chance of becoming the standard reference, hopefully with future updates. *Third-Party Funding* (TPF) has not yet shaped the legal landscape in international arbitration, but has received increased attention in many jurisdictions in the last ten years, including through changes in the law, both statutory changes (e.g. Singapore) and major court decisions (e.g. Switzerland).

The 570 pages are divided into seven general reports (pages 1–97), 25 country reports (with an average of 15 pages per country) plus a country report on “United States - General” as well as individual reports on six U.S. states, all of which are quite significant for international arbitration.

Nikolaus Pitkowitz, the editor, had the idea of forming a working group on TPF within the International Arbitration Committee of the American Bar Association’s Section of International Law (ABA SIL) and started the task in 2014. Only four years later, the handbook was published. All 55 authors of the publication had to follow quite a strict regime and outline. There are nine general categories and up to four sub-categories, such as the question if and to what extent TPF is commonly used, whether there are any legal restrictions, explanations on the cost regime and cost shifting rules as well as general recommendations on duties of counsel, confidentiality and disclosure, preservation of privilege etc. Despite the fact that 55 authors have contributed, it is amazing how perfectly these many authors complied with the outline allowing a fast, but comprehensive, comparison of the various systems. Given the wealth of information provided, it seems almost impossible to give an overview or to try to find some common principles. However, there are three particular contributions the handbook makes, which are outstanding:



Chapter 1 of the General Reports (The TPF Handbook, pages 3–21), authored by Nikolaus Pitkowitz, contains a very precise and very readable summary of the current state of the law on TPF;

Chapter 7 of the General Reports (Conduct of the Arbitration, pages 89–97), authored by Peter Rees, succeeds in finding some general guidelines on this important topic;

United States–General (pages 449–473), authored by Glenn P. Hendrix and Gonzalo S. Zeballos, contains a very readable summary with lots of footnotes and good references on the quite diverse legal situation all over the United States.

One may expect that common law jurisdictions are more willing to allow TPF. However, the various country contributions refute this hypothesis: Rather, litigation funding as well as international arbitration TPF is already quite common in central European countries, such as Austria, France, Switzerland and Germany. Switzerland, traditionally one of the most important venues for international arbitration, removed legal impediments as early

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as 2004. While some common law countries were early adopters (Australia, Canada as well as England and Wales), other governments, such as Hong Kong's and Singapore's, only permitted TPF in 2016 and 2017 (see page 7). Ireland is the only country (apparently still as of today) among the 25 (non-U.S.) jurisdictions discussed that still prohibits TPF.

In addition to answering questions about the extent and type of impediments TPF faces, one of the most important issues addressed by the book is confidentiality and duties of disclosure relating to TPF by counsel in international arbitration. Only a few jurisdictions impose a specific duty to disclose the existence of any TPFs. For example, in 2017 Singapore created legislation imposing a duty to disclose TPF while the law in many other jurisdictions is not yet settled. However, all authors agree that the important issue of confidentiality should be covered by individual NDAs.

A quite interesting suggestion is made by the renowned arbitration specialist Clifford J. Hendel in his report on Spain (pages 374 s.): Both the initial client and the funder could be considered "partial holder of the claim," and both may (individually) become a "client" of counsel. The conflict of having two clients could then be avoided by suggesting that both clients specifically agree to this scenario. This is certainly a good recommendation and it has to be seen whether this will be accepted in other jurisdictions.

Another interesting question is whether the law firm (representing the client in the international arbitration) may act as the funder. It should be noted that, pursuant to the general definition given at the very beginning of the handbook (page 4), a contingency fee arrangement is generally not considered to fall under the definition of TPF used here. However, some authors try to derive general principles applicable to TPFs from the treatment of contingency fee arrangements. Again, the dividing line is neither geographical nor common law versus civil law. Rather, diverse jurisdictions, such as China, England and Wales, France (with regard to international arbitration), Hong Kong, Nigeria, Russia and South Korea, permit law firms to act as a funder. Interestingly, even within the United States there are differences: California and the District of Columbia allow a law firm to act as a funder while this is not possible in Georgia and New York.

Very practical and good advice is given by Duarte Henriques in his report on Portugal: Even if a law firm may not officially act as a funder, law firms in most countries may, either directly or indirectly, lend money to their clients, pay/prepay expenses necessary to pursue the claim or simply delay invoicing the client. It remains to be seen (and is certainly a topic for a possible second edition) whether the trend will favor allowing law firms to act as a funder or not. It will also be interesting to see the development of the law in the various jurisdictions

on the issue whether an attorney is permitted to refer a client to a particular funder or not. In the United States, the ABA Ethics 2020 Report provides that, even if no fee is received, but the attorney acts as a repeat player with the same funder, he or she may be obliged to disclose this fact to the client (page 473).

The diversity of the authors (55 authors, 25 non-U.S. jurisdictions plus U.S. General plus reports on six U.S. states) does not affect the readability, thanks to the good structure (and probably extensive work by the editor) in compiling this one of a kind handbook. Since TPF will become more important, probably faster than expected after COVID-19, it will be good to see a second edition in a few years that may be able to include even more country reports, and updates on the jurisdictions already covered. Then, it will also be interesting to see whether Ireland, the sole country prohibiting TPF covered by this book, has (finally) changed its position.

In the meantime, *The Handbook on TPF in International Arbitration* is a must-have for every practitioner, not only as a source of many different laws and approaches, but also in order to further the discussion on this increasingly important topic. Combined with its reasonable price and the good format, I highly recommend putting this handbook close to your work desk.



# Case Note

By Sherman Kahn

## ***GE Power Energy Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC, et al*, No. 18-1048, 2020 WL 2814297 (U.S. Supreme Court, June 1, 2020)**

A unanimous Supreme Court has held that the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) does not bar non-signatories from asserting arbitration agreements under principles of domestic law.

The underlying dispute in *Outokumpu* concerned a contract for the construction of a steel mill in Alabama. The predecessor in interest to *Outokumpu* had entered into a contract with a contractor for the construction of a cold-rolling mill which contained a broad arbitration clause providing for ICC arbitration in Dusseldorf, Germany. The contract referred to the contractor as “Seller” and further provided that “[w]hen Seller is mentioned it shall be understood as Sub-contractors included except if expressly stated otherwise.” The contractor sub-contracted with GE Energy to supply motors for the mill. After some of the motors failed, Outokumpu sued GE Energy in Alabama state court. GE Energy removed the action to federal court and sought to compel arbitration in reliance on the arbitration agreement between Outokumpu and the contractor. The district court granted the motion to compel arbitration and dismissed the action.

The Eleventh Circuit reversed the district court. In reaching this result, the Eleventh Circuit focused on language from Article II, Paragraph 2 of the New York Convention, stating that an agreement in writing under the Convention includes “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” The Eleventh Circuit reasoned that the New York Convention only applies to agreements in writing (Article II, paragraph 1) and that Article II, paragraph 2 limits agreements in writing only to parties who actually signed the agreement. Thus, according to the Eleventh Circuit, GE Energy could not invoke the agreement even though it was included in the definition of “Seller” because GE Energy had not itself signed the agreement.

GE Energy filed a petition for certiorari with the Supreme Court on the question of whether the New York Convention permits a non-signatory to an arbitration agreement to compel arbitration on the basis of equitable estoppel. GE Energy cited a circuit split on the issue with the First and Fourth Circuits having held that non-signatories may compel arbitration under the New York

convention and the Ninth and Eleventh Circuits having held that they may not. *c.f. Sourcing Unlimited v. Asimco Int’l, Inc.* 526 F.3d 38 (1st Cir. 2008) and *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d (4th Cir. 2000) with *Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017) and *Outokumpu*, 902 F.3d 1316 (11th Cir. 2018).

The Supreme Court granted GE Energy’s petition and resolved the Circuit split by deciding that non-signatories may compel arbitration under the New York Convention based upon domestic arbitration law. However, the Supreme Court did not base its decision on Article II, Paragraph 2. Instead, the Supreme Court based its decision on Article II, Paragraph 3, which provides “[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” The Supreme Court reasoned that the New York Convention is primarily directed to the recognition and enforcement of arbitral awards with only Article II, Paragraph 3 providing for enforcement of arbitration agreements. The Court found that because Article II, Paragraph 3 does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances, it does not bar the application of equitable estoppel and other domestic law that may enable non-signatories to invoke arbitration.

The Supreme Court also briefly addressed the negotiation and drafting history of the New York Convention and found nothing to displace the application of local law doctrines to enable arbitration by non-signatories. The Supreme Court similarly found that the weight of authority regarding post-ratification understanding of other contracting states suggests that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements.

The Supreme Court remanded the case for further proceedings to determine whether GE Energy could enforce the agreement under principles of equitable estoppel or which body of law governs that interpretation. In a concurrence, Justice Sotomayor noted that the application of domestic non-signatory principles might be unnecessary because the contract at issue defined sub-contractors, including GE Energy’s predecessor in interest, as party of the Seller, a contracting party.

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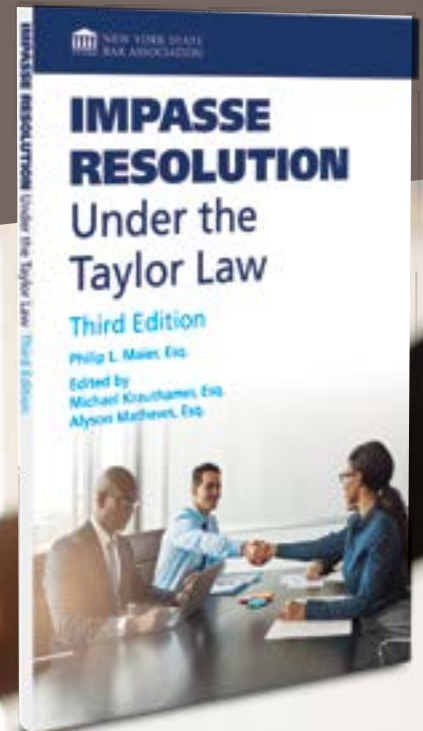
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