

Arbitration Proceedings In The Age Of Virtual Hearing Rooms

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The alarming rise in the number of confirmed cases of COVID-19 internationally prompted the World Health Organization to declare the spread of coronavirus a global pandemic last month.[1] As countries around the world implement and extend lockdowns, governments, companies and international institutions everywhere are forced to make significant adjustments to the normal course of business.

International arbitral institutions administering arbitration, mediation and conciliation procedures are no exception. Arbitral forums and their users across the globe must contend with current constraints, including restrictions on travel and stay-at-home orders, and reconcile typical procedure with the modern conveniences of technology. In this current climate caused by the COVID-19 emergency, can users of international arbitration effectively progress currently pending arbitrations by using virtual technology?

International Arbitration Rules on Virtual Arbitral Proceedings

Various international arbitral tribunals permit virtual arbitral proceedings. We surveyed the rules of the following international arbitration centers (including the five most preferred institutions according to Queen Mary University's 2018 survey):[2]

1. The International Chamber of Commerce's International Court of Arbitration, or ICC;
2. The London Court of International Arbitration, or LCIA;
3. The Singapore International Arbitration Centre, or SIAC;
4. The Hong Kong International Arbitration Centre, or HKIAC;
5. The Arbitration Institute of the Stockholm Chamber of Commerce, SCC;
6. The International Centre for Dispute Resolution, or ICDR; and

7. The International Centre for Settlement of Investment Disputes, or ICSID.

Though the use of videoconference and virtual hearing rooms historically has not often been used, a cursory glance at the arbitration rules and procedures for these institutions reveals that their rules do, in some form or another, permit the use of videoconferencing and virtual hearings.

The London rules explicitly reference the use of videoconference during arbitral proceedings. Article 19.2 of the LCIA Arbitration Rules grants the arbitral tribunal the fullest authority to establish the conduct of an arbitral hearing, and permits hearings at any appropriate stage of the arbitration to “take place by video or telephone conference or in person (or a combination of all three).”[3] The London court thus envisages any type of hearing to proceed by videoconference.

Unlike the London rules, the ICDR’s International Dispute Resolution Rules & Procedures contemplate virtual hearings specifically during an expedited procedure. Article 9 of the Expedited Procedures provides that “[h]earings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator.”[4]

Notably, the ICDR’s nonexpedited procedure does not include a similar rule. Instead, Article 20(1) of its International Arbitration Rules provides that the tribunal “may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.” This language is found in most all international arbitral rules, as evidenced below. By granting the tribunal with the authority over the conduct of the proceedings, international arbitrations rules implicitly permit tribunals to conduct virtual arbitral proceedings.

The ICC Rules of Arbitration’s approach to videoconferencing in arbitral proceedings is similar to that of the ICDR. The ICC rules explicitly permit the use of videoconferencing and virtual hearings for case management conferences, [5] hearings in an emergency arbitration,[6] and hearings in an expedited procedure[7]. At the same time, the rules mandate that the tribunal “shall be in full charge of the hearings” and permits the tribunal to “adopt such procedural measures as it considers appropriate,” so long as they are not contrary to the parties’ agreement.[8]

In other words, the ICC too implicitly acknowledges that arbitral proceedings may be conducted by videoconference. According to the Brazilian press, at least one ICC tribunal has opted to continue with virtual hearings on Zoom Video Communications in light of restrictions imposed by COVID-19[9] because, presumably, postponing the hearings would have been disruptive to the expeditious resolution of the dispute.

Although the arbitration rules of the Singapore, Hong Kong and Stockholm arbitration centers provide no explicit mention of the use of videoconference, the rules nevertheless grant tribunals with the authority over the conduct of the proceedings, so long as they are fair, expeditious and effective. For instance, both the SIAC’s Rules and Investment Rules, under Rules 19.1 and 16.1, respectively, afford the tribunal the authority to “conduct the arbitration in such manner as it considers appropriate, after consulting with the Parties, to ensure the fair, expeditious, economical and final resolution of the dispute.”[10]

Similarly, Article 23 of Stockholm’s Arbitration Rules indicate that a tribunal “may conduct the arbitration in such manner as it considers appropriate, subject to the[] Rules and any agreement between the parties.”[11] Hong Kong’s Administered Arbitration Rules, under Article 13, also acknowledge the arbitral tribunal’s authority to employ “the effective use of technology, ... provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.”[12] To this end, the Hong Kong center is already offering “e-hearing services,” which include IP-based and cloud-based videoconferencing systems.[13]

Finally, Rule 19 of the ICSID Arbitration Rules states that the “[t]ribunal shall make the orders required for the conduct of the proceeding,”[14] and Rule 36 grants the tribunal the authority to set the procedure to be followed for the examination of witnesses and experts.[15] In fact, in 2017, the tribunal in BSG Resources Ltd., BSG Resources (Guinea) Ltd. and BSG Resources (Guinea) SÀRL v. Republic of Guinea,[16] permitted several witnesses and counsel to appear via videoconference and by setting various procedures to implement the use of virtual technology, including the process for simultaneous translations.

Also noteworthy are the rules promulgated by the United Nations Commission on International Trade Law, or UNCITRAL. Created for the purposes of ad hoc arbitration, the United Nations rules also vest the tribunal with the power to “conduct the arbitration in such manner as it considers appropriate,” provided that the conduct of the proceedings is formulated “so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”[17]

The UNCITRAL rules go further in Article 28(4), which additionally provides that the tribunal “may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).”[18]

Looking to the Guidance Provided by the Seoul Protocol and Other International Institutions on Videoconferencing and Virtual Hearings

Although the arbitration rules of various institutions (as well as the United Nations rules) permit parties and tribunals to conduct virtual proceedings, few institutions have addressed the practicalities or best practices for planning and conducting videoconferences in international arbitration.

At present, arbitral tribunals, users of international arbitration, and arbitral institutions alike might reference the Korean Commercial Arbitration Board’s, or KCAB’s, 2018 Seoul Protocol on Video Conference in International Arbitration,[19] which addresses the use of videoconference in arbitral proceedings and provides practical guidance for users of international arbitration to consider.

This protocol discusses best practices for organizing, testing and performing videoconferencing, and addresses the appropriate method by which to introduce evidence virtually and the required technical specifications for video and audio. Significantly, the protocol contemplates the difficulties faced by witnesses who are unable to attend hearings in person, and takes into account advances in technology that allow for effective videoconferencing during arbitration hearings. In a March 18 press release, the KCAB noted:

Given the global nature of international arbitration, witnesses are often required to travel great distances to provide testimony during a hearing. When such witnesses are unable to attend in person, the parties and the Tribunal are often left in the difficult position of determining how much weight to afford certain evidence (including, for example, witness statements). However, with the advent of new powerful technologies, parties are increasingly turning to remote video conferencing as a solution to this problem.[20]

As set out in its introduction, the protocol is meant to serve as a guide, listing nine articles on best videoconferencing practices and addressing some of the main concerns about the use of videoconference. We have identified the following four overarching themes of the protocol’s enumerated articles, which provide guidance to parties, tribunals and institutions using virtual hearings:

- Certain logistical and technological specifications must be met in order for a proceeding to be carried out seamlessly and efficiently.
- The conduct of the virtual proceeding must be fair to both parties.
- Presentation of evidence by witnesses must be closely monitored and efficiently displayed via computers at all venues to ensure security of the documents and efficiency of the proceedings.
- In order to maintain the integrity of the proceeding, observers at a remote venue should be limited to the witness providing evidence, interpreters, paralegals and legal representatives.

Those engaging in virtual arbitral proceedings should also be mindful of other “soft-law” sources that provide helpful guidance.

The Hague Convention Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention, for example, outlines best practices for the use of video technology during remote proceedings and guidelines to address the primary practical issues that typically arise in such proceedings. Article A1.1(c)(i) further considers the continuously evolving nature of technology, stating that “[n]either the spirit nor letter of the Convention constitutes an obstacle to the use of new technologies and the operation of the Convention can benefit from their use.”[21] The Hague Convention, however, places less emphasis on the actual technical requirements of a virtual hearing.

The ICC Commission Report on Information Technology in International Arbitration, in Article 3, addresses concerns about confidentiality and data integrity, including the transmission and organization of data to ensure that the data does not become compromised at any stage.[22] To this end, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration may also be instructive.[23]

Notably, Article 10 of the Chartered Institute of Arbitrators, or CI Arb, Guidelines for Witness Conferencing in International Arbitration appears less favorable to the use of videoconference for witnesses, stating that the “dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated” and that a “witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.”[24]

Nevertheless, Article 10(c) of the CI Arb Guidelines offers a number of factors for a tribunal to consider when electing to use videoconference, such as the venue of the videoconference, observers present other than the witness, and the methods by which to present evidence.

Practical and Legal Implications

The acceptance of virtual dispute resolution is not unanimous. While the use of videoconference and virtual hearings provides a viable alternative to international travel and in-person attendance at an arbitral hearing, many note that videoconference is not a perfect substitute for a live hearing with arbitrators, counsel and witnesses appearing in person.

The benefits of in-person hearings are no doubt obvious, including the ability to assess a witness’s credibility by gauging nonverbal cues; delivery of more forceful and effective witness examinations; and the ability to take stock of the entire proceeding at once, as opposed to limiting one’s virtual perspective to a fixed screen. On the other hand, the advances in videoconferencing technology diminish (if not entirely eliminate) many of these concerns.

For instance, many videoconferencing software, including the widely used Zoom or WebEx, configure the virtual conference so that all participants can be viewed at the same time, thus allowing participants to gauge each other’s verbal and nonverbal reactions in real time. Such technology also allows evidence to be introduced in a streamlined manner so as not to detract from the virtual and visual exchange. Of course, should remote proceedings become the normal course, technology and the procedures to organize and utilize such technology will no doubt adapt to any difficulties faced along the way.

In addition to practical implications, the use of virtual technology to conduct remote proceedings raises some legal concerns, most notably, whether the use of virtual technology in arbitration proceedings will give rise to potential challenges to the legal enforcement of an arbitral award.

Per Article V(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, an arbitral award may be challenged if “a party against whom the award is invoked ... was otherwise unable to present his case,” or where “the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in agreement with the law of the country where the arbitration took place.”[25]

After all, the integrity of the arbitral award stems from a fair process based on party autonomy and a party’s reasonable opportunity to present its case. It is therefore unsurprising that the Seoul Protocol emphasizes that virtual proceedings must be fair to all parties in the dispute.

A recent decision from the U.S. District Court for the Southern District of New York may be instructive regarding whether virtual hearings may give rise to legitimate challenges to an arbitration award. In *Eaton Partners LLC v. Azimuth Capital Management IV Ltd.*,^[26] the respondent brought a motion to vacate an ICDR arbitral award, arguing that the arbitrator was guilty of misconduct for failing to postpone the hearing when the respondent's witness became unavailable.

The respondent argued, in part, that the arbitrator showed favor to the suggestion that the witness appear by video in favor of an adjournment of the proceedings. The court disagreed, noting that nothing in the facts corroborated such a suggestion, and finding in its dicta that even if the witness had appeared by video, such an appearance by video does not "constitute[] a deprivation of [the respondent's] right to a fundamentally fair hearing."

For now, in these tumultuous times, users of international arbitration, arbitral tribunals and administering institutions alike may rely on arbitration rules and guidance from international institutions to virtually proceed with their international disputes before arbitral tribunals. However, it is important that they do so thoughtfully, considering and evaluating the practical and legal challenges and implications of virtual proceeding, and strategically implementing the virtual hearing procedures to ensure an effective and efficient arbitral process that results in an enforceable arbitral award.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

[1] WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, World Health Organization (March 11, 2020).

[2] Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration.

[3] LCIA Arb. Rules, Art. 19.2.

[4] ICDR Int'l Expedited Proc., Art. 9.

[5] ICC Rules, Art. 24(4).

[6] ICC Rules, Appendix V, Art. 4(2).

[7] ICC Rules, Appendix VI, Art. 3(5).

[8] ICC Rules, Arts. 22(2), 26(3).

[9] Graziella Valenti, A Pandemia na Maior Arbitragem Societária do País, a Disputa Pela Eldorado, Exame. (March 22, 2020).

[10] SIAC Rules, Art. 19.1; SIAC Inv. Rules, 16.1.

[11] SCC Arb. Rules, Art. 23.

[12] HKIAC Administered Arb. Rules, Art. 13.

[13] Convenient and Efficient: HKIAC E-Hearings, Hong Kong International Arbitration Centre.

[14] ICSID Arb. Rules, Art. 19.

[15] ICSID Arb. Rules, Art. 36.

[16] ICSID Case No. ARB/14/22.

[17] UNCITRAL Arb. Rules, Art. 17(1).

[18] UNCITRAL Arb. Rules, Art. 28(4).

[19] 2018 Seoul Protocol on Video Conference in International Arbitration, KCAB International (March 18, 2020).

[20] [Press Release] Seoul Protocol on Video Conference in International Arbitration is Released, KCAB International (March 18, 2020).

[21] Hague Conference on Private International Law, Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention (December 8, 2018).

[22] Information Technology in International Arbitration—Report of the ICC Commission on Arbitration and ADR.

[23] ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2019).

[24] Chartered Institute of Arbitrators, Guidelines for Witness Conferencing in International Arbitration, Checklist, Art. 10, (2019).

[25] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958).

[26] Eaton Partners LLC v. Azimuth Capital Mgmt. IV Ltd. , 2019 WL 5294934, *11-12 (S.D.N.Y. Sept. 24, 2019).

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