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International Arbitration Report

International Arbitration Experts Discuss The Impact Of Remote Proceedings

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**A commentary article
reprinted from the
December 2021 issue of
Mealey's International
Arbitration Report**



Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on the impact of remote proceedings and video conferencing on how international arbitrations are resolved. We would like to thank the following individuals for sharing their thoughts on this important issue:

- Jeffrey Benz, arbitrator and mediator, JAMS, London and Los Angeles
- Lisa Houssiere, Principal, McKool Smith, Houston
- Tai-Heng Cheng, Partner, Sidley Austin LLP, Singapore
- Marinn Carlson, Partner, Sidley Austin LLP, Washington, D.C.
- Albert Bates Jr., Partner, Troutman Pepper Hamilton Sanders, LLP, Pittsburgh
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- Ben Love, Partner, Boies Schiller Flexner, New York
- Michael Goldstein, Senior Counsel, Mound Cotton, New York

Mealey's: What impact, if any, do remote proceedings and video conferencing have on how international arbitrations are resolved?

Benz: Cheaper. Faster. Easier. These themes resonate when you consider international arbitration and remote proceedings and videoconferencing as practiced since roughly March 2020. We are more efficient; hearings are less formal; and parties have access, subject only to time zone differences, to arbitrators of their choice around the world. Gone are the panel dinners and breakfasts and lunches, as well as the joy of deliberating in person, but the pandemic has shown us that hearings may take many forms while still remaining effective.

Many of us are familiar with the benefits. Arbitration customers save money by not having to move people around the world, and arbitrators are able to schedule more flexibly and more often as a result of not having to travel. Witnesses have had to be better prepared because when they are onscreen, the focus is entirely on them, specifically their shoulders and face/head. Lawyers have had to be adept at presenting documents online and ensuring smooth transitions between witnesses and with their arguments, and arbitration support services have reached their heyday now. With everyone focused on them onscreen, arbitrators must demonstrate that they are focused and listening to the parties' presentations, and that they have sufficient technical savvy to effectively manage the online hearing environment.

Remote proceedings and videoconferencing have forced all of us to become better at our jobs, to adapt, to learn new ways of doing things and to stay focused on our ultimate product: as lawyers, to present the most effective case for clients, and as arbitrators, to deliver a binding award that parties can live with. And we can all spend less time traveling and more time on what matters to us.

Houssiere: The concept of virtual proceedings is nothing new for international arbitration practitioners. Most steps in an international arbitration were already conducted remotely pre-pandemic from submitting the arbitration demand to holding case management conferences to conducting pre-hearing conferences on minor procedural issues. Oftentimes, the only step that was conducted in-person was the actual hearing or pre-hearing conferences on major procedural issues. Of course, the pandemic has served as a catalyst for more international arbitration hearings to take place virtually. The paradigm shift in attitude is likely here to stay, at least for certain types of international arbitrations. The impact of resolving matters virtually means that arbitrations can be resolved more expeditiously and efficiently and with an increased focus on the evidence.

Witness presentation and examination are different when conducted virtually, but one potential benefit is that the arbitral tribunal can better assess evidence when they are not distracted or persuaded by a witness' body language and non-verbal cues. During in-person witness examination, there is an increased potential for evidence to be filtered by a witness' verbal and behavioral cues. In the virtual setting, arbitrators are forced to focus on the evidence itself, unfiltered through any unconscious bias they may have towards a certain witness.

If an in-person hearing is not feasible, conducting the hearing virtually is often preferable to postponing the hearing altogether. Virtual hearings not only usually result in significant cost savings, but also align with parties' interests in resolving matters expeditiously.

Clients will be the primary drivers of change with regard to the future of virtual hearings. Faced with mounting costs and the desire to resolve matters quickly, clients and their counsel should weigh the risks and benefits of each option. At a minimum, a hybrid approach involving some virtual components should be considered as a feasible and pragmatic solution.

Cheng and Carlson: Remote proceedings and video conferencing have had a positive impact but also present challenges.

On the positive side, proceedings are being resolved more efficiently and at lower cost. Research (and our own experience) indicates that online hearings are

shorter, more focused, and in the majority of circumstances cheaper — particularly where international travel can be avoided (and its adverse environmental impact can be avoided, too).

Nevertheless, virtual hearings can present challenges. Previously, arbitrators and counsel were reluctant to hold fully-remote hearings because of due process concerns — preferring to analyze the body language and non-verbal cues of witnesses during in-person cross-examination.

And while technology can bridge the physical gap, there still exists a digital divide. In certain locations, technology may not be as available or reliable as in others, which could create further delays or interfere with the presentation of witness evidence and virtual cross-examinations.

However, given that fully virtual and hybrid hearings are here to stay in one form or another, counsel will inevitably develop new skills to maximize their effectiveness in virtual hearings.

Counsel and witnesses should adjust their body language to account for cameras that pick up every micro-expression. The tone and tenor of speech should be modulated to account for sensitive microphones. Videos of effective cross-examinations can be embedded into closing argument demonstrative decks, which can have a far greater impact on the tribunal than transcript cites.

Whether remote proceedings and videoconferencing will have a positive or negative impact on the conduct of international arbitrations may well depend on how well counsel, arbitrators and the parties continue adapt to these technological idiosyncrasies.

Bates and Torres-Fowler: There seems to be little doubt that remote hearing technology has, and will continue to have, a profound impact on how international arbitrations are resolved. Indeed, while remote international arbitration hearings accomplish the same goals as in-person hearings, they do so using a varied format and different procedures that affect how the parties present their cases.

However, at a more fundamental level, remote proceedings and video technology have impacted how

international arbitrations are resolved because the rapid adoption of remote hearing technology has altered modern international arbitration practice by normalizing a hearing format that was, at least prior to the COVID-19 pandemic, widely perceived as unpalatable. Practitioners, arbitrators, and clients now view remote hearings in a much more favorable light because these parties have developed a familiarity with the relevant technology and experienced the economic and logistical advantages of remote hearings. While the third and fourth quarters of 2021 have seen some cases proceeding on an in-person or hybrid basis, the prevailing practice continues to be remote arbitration. The authors expect that as the COVID-19 pandemic slowly subsides a significant return to in-person hearings will occur; however, it is highly unlikely that remote hearings will entirely disappear.

Going forward, the question of whether the logistical and economic benefits associated with a remote hearing outweigh the perceived disadvantages will become a core procedural question that parties have to confront during an arbitration. Although remote hearings can save considerable expense and do away with the challenge of coordinating the travel schedules of busy counsel, witnesses, and arbitrators, remote hearings pose other unique challenges such as coordinating technology needs, addressing time zone conflicts, and zoom fatigue. Maybe most significantly, while remote hearings largely accomplish the goal of facilitating cross-examination and allowing a tribunal to assess a witness's or expert's credibility, remote hearing technology is still an imperfect substitute for an in-person hearing.

Thus, while much has been said about the pros and cons of remote hearing proceedings in international arbitration, perhaps the most meaningful impact remote hearings may have on how international arbitrations are resolved is the fact that they are likely to remain a fixture of modern international arbitration practice for the foreseeable future.

Love: The increased use of technology to facilitate remote proceedings since the advent of the Covid-19 pandemic has impacted international arbitration significantly. The very concept of holding an entire merits hearing, replete with witness and expert examination, remotely would have been scoffed at by most international arbitration practitioners before

the pandemic. That is no longer the case. Whatever preference arbitral participants express for in-person or remote hearings, a request from a party or suggestion from a tribunal that a hearing be held remotely through videoconferencing now presents a live issue for consideration when crafting the procedural schedule at the outset of an arbitration.

The option of holding a remote hearing presents opportunities for users of international arbitration. Chief among these is efficiency. Clients have applied increasing pressure on counsel fees in recent years, and remote proceedings offer one solution to reducing the time and cost that international travel requires. At the very least, holding remote hearings for early-stage hearings on issues of procedure (and sometimes jurisdiction) is likely to remain common practice long after the risks of the pandemic have subsided. It is also increasingly difficult to justify international travel for preparatory internal meetings and witness interviews that could take place by videoconference.

The challenges of remote hearings should not be discounted, however. International arbitration practitioners are now accustomed to remote hearings that require at least some of the participants across the globe to take part at odd hours of day or night. Preserving the integrity of remote witness examination is another challenge. And most traditional advocates will continue to prefer the setting of an in-person hearing to maximize their ability to read the room and convey their points to the tribunal.

Goldstein: It would be difficult, if not possible, to say what impact remote proceedings have had on how international arbitrations are resolved if one is referring to the substantive outcomes of such proceedings one way or the other. But it cannot be disputed that the manner in which both international and domestic arbitrations have been conducted via remote/virtual hearings has had a substantial impact over the last 18-20 months.

The arbitration community encompassing domestic and international practitioners and arbitration service providers has been quite busy drafting and distributing model protocols for conducting remote virtual hearings. While videoconference testimony of a limited number of hearing or deposition witnesses has, for some years, been a common occurrence, the con-

duct of an entire hearing with live witness testimony using remote video conference software was probably unusual. In fact, the software for conducting such remote hearings is comparatively new. For most of my experience, videoconference technology suffered from both spotty video and audio quality and the ability to show the witness documents marked into evidence was cumbersome at best.

It cannot be gainsaid, using an old but valid cliché, that necessity is the mother of invention. Videoconferencing technology seemed to accelerate and improve exponentially as remote conferencing became a necessity, although international and domestic arbitration ground to a crushing pandemic-induced halt.

While business video conferences have been common for years, conducting an entire arbitration hearing from multiple remote locations was rare, posing a host of technical and due process problems. With the pandemic, the existing technology on platforms such as Zoom, Webex, Microsoft Teams, Bluejeans, and GoToMeeting have improved greatly in the last 18-20 months. Along with the use of those platforms for webinars, business conferences, and simple multi-party business meetings, these platforms have become the essential tool allowing arbitration hearings to proceed in a time of global lockdowns and severe travel restrictions.

The fundamental theme through the last 20 months of the continued success of alternative dispute resolution, when the entire world was under extreme duress, has been integrity and due process for disputants. It is eloquent testimony to the strength of the global westernized capitalist system that business people and practitioners joined together in multiple diverse venues to develop protocols, both legal, procedural, and technological, to ensure that alternative dispute resolution continued, notwithstanding the world economy slowing down dramatically.

In addition to the Seoul Protocol on Video Conferencing in International Arbitration (available [here](#)), offered by the Seoul International Dispute Resolution Center in March 2020, a number of other arbitration service providers have enacted video conferencing protocols and guidelines in varying degrees of detail. These include the [American Arbitration Association-International Center for Dispute](#)

[Resolution](#), [ARIAS-U.S.](#), [JAMS-Video Conferencing Guide](#), and [International Institute for Conflict Prevention & Resolution Annotated Model Procedural Orders and Guidelines for Remote Video Arbitration Proceedings](#).

The Seoul Protocol provides minimum standards for video conferencing location and camera positions so that all participants can be viewed simultaneously. Critically, it also provides that the witness shall testify while sitting or standing at an empty desk or lectern with his/her hands and face clearly visible. There are rules concerning who is permitted in the room with the witness, and how documentary evidence is to be handled. Security from hacking must be ensured and a dedicated IT professional should be available prior to and during the hearing to help plan, test, and conduct the remote hearing. Adequate interpretation services must be provided, if needed. The Protocol, as well as others, provides specific technical requirements. A neutral Remote Video Service Provider, such as a court reporting, service is advisable, as is the use of breakout rooms.

Fairness to all parties is paramount so that no party is at a disadvantage due to technological limitations in a particular location.

Finally, the American Arbitration Association provides some useful video hearing tips on its [AAA-ICDR Blog](#) under Lessons Learned; some of these include:

- Agree on a detailed set of protocols well in advance of the hearing;
- Carefully plan how exhibits are marked, distributed, and projected; screen sharing works best if the inquiring lawyer has dedicated tech help at all times;
- Counsel, tribunal members, and witnesses should each have two screens;
- Have an IT/admin person available at all times to address tech problems/issues;
- Conduct pre-hearing training/test sessions with all participants;
- Set up a group chat message room to address technical non- substantive issues. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT

edited by Samuel Newbouse

The Report is produced monthly by



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ISSN 1089-2397