

The Impact of COVID-19 on International Arbitration

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ABSTRACT

On 11 March 2020, the World Health Organization categorised the global outbreak of COVID-19 as a pandemic and implored countries to take effective and immediate measures to prevent it from spreading further. Nationwide lockdowns, travel restrictions and physical distancing measures were subsequently effected in several countries, causing many businesses to close down. In turn, many courts found themselves limiting their operations and postponing most hearings save for urgent matters.

Whilst different courts were functioning at limited capacity and litigants were struggling to figure out how to make changes to their procedural timetables and deal with the uncertainties brought on by the pandemic, major arbitral institutions intimated their intention to proceed with new and ongoing disputes. The position adopted by these institutions can be attributed to the inherent flexibility and consensual nature of the international arbitration dispute resolution process.

Being a consensual and flexible process, international arbitration is well placed to allow cases to advance amidst the pandemic as its procedures can easily be tailored to meet the needs of disputing parties who may be across various jurisdictions. Despite its flexibility, international arbitration has not been impervious to the disruption which has been occasioned by the COVID-19 pandemic.

DEDICATION

This dissertation is dedicated to my late father, Professor Martin Kamwengo, who has been a constant source of inspiration in my educational life and taught me to never give up no matter what life throws at you.

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CHAPTER ONE

THE CHALLENGE PROVIDED BY COVID-19 TO INTERNATIONAL ARBITRATION

I. BACKGROUND

In December 2019, a novel infectious respiratory disease broke out in Wuhan, China. This disease, which later came to be known as COVID-19, stems from severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), a virus that brings about respiratory illnesses in humans and is primarily spread through droplets emitted when persons infected by it sneeze, cough, or speak.¹

Following its outbreak in China, COVID-19 began to rapidly spread to other countries causing the World Health Organisation (WHO) to issue an alert on 30th January 2020, declaring it ‘a public health emergency of international concern’.² By 11th March 2020, at least 118,319 infections were recorded in 114 countries and 4292 people had died from the virus.³

Recognising the severity and alarming rate of infections worldwide, the WHO made the decision to categorise the COVID-19 outbreak as a pandemic and countries were urged to take effective and immediate measures to prevent the virus from spreading further.⁴ Strategies adopted by world governments to contain the virus include active testing, restrictions on international and domestic travel, national border closures, curfews and stay-at-home orders.

‘Unprecedented in its scale, reach, and economic impact in the history of the modern world,’⁵ the COVID-19 pandemic has had wide-ranging effects on the global community. To date, millions of lives have been lost to the virus and the measures implemented by countries to prevent

¹ WHO ‘*Origin of SARS-CoV-2*’, available at <https://www.who.int/publications/i/item/origin-of-sars-cov-2> and WHO ‘*Coronavirus*’, available at https://www.who.int/health-topics/coronavirus#tab=tab_1, both accessed on 22 February 2021.

² WHO ‘*Novel Coronavirus (2019-nCoV) Situation Report – 11* (Data as reported by 31 January 2020), available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200131-sitrep-11-ncov.pdf?sfvrsn=de7c0f7_4, accessed on 9 January 2021.

³ WHO ‘*Coronavirus disease (COVID-19) Situation Report – 51*’ (Data as reported by 11 March 2020), available at <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf>, accessed on 9 January 2021.

⁴ WHO ‘*WHO Director-General’s opening remarks at the media briefing on COVID-19*’, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020#:~:text=We%20have%20therefore%20made%20the,to%20unnecessary%20suffering%20and%20death.>, accessed on 16 June 2020.

⁵ Emad Hussein, ‘*The COVID-19 Pandemic and Arbitration in the UAE: A Tale of Challenges and Opportunities*’ (2020) Vol.7, No.2 *SOAS Law Journal* at 105.

it from spreading caused economic devastation in many countries and threatened the existence of various businesses thereby leaving employees across the world without jobs.⁶

Besides the massive casualties and economic devastation, the pandemic has radically altered our daily lives in numerous ways.⁷ In effect, the pandemic established an entirely new way of life characterized by the wearing of masks, social distancing and a general downscale of routine activities so as to minimise physical contact between individuals and prevent transmission of the virus.⁸ Inevitably, the world was forced to reconsider several things including the way people work, conduct business and even how they resolve disputes.

International arbitration is frequently regarded as one of the more flexible methods of resolving disputes as it is able to adapt to the needs of disputing parties who may be across various jurisdictions.⁹ Despite its flexibility, international arbitration has not been impervious to the disruption which has been occasioned by the COVID-19 pandemic. This paper attempts to examine the impact of this pandemic on international arbitration.

a) Statement of the Problem

In international arbitration, it is fairly common for preliminary hearings to be held without having tribunals and parties at one location. Final hearings are, however, generally conducted face-to-face with arbitrators, lawyers, witnesses and experts gathered in one room.¹⁰ Thus, while the procedural flexibility of international arbitration renders it suitable to address the unforeseen hurdles which have been created by COVID-19, the different locations arbitral participants may be in entails that the arbitral proceedings can be affected by restrictions imposed in all those locations.¹¹

⁶ Stephen Wilske 'Impact of COVID-19 on International Arbitration – Hiccup or Turning Point' (2020) Vol.13, No. 1 *Contemporary Asia Arbitration Journal* at 9. See also WHO 'WHO Coronavirus (COVID-19) Dashboard', available at <https://covid19.who.int/>, accessed on 24 June 2022.

⁷ John Pierce 'Predicting the Future: International Arbitration in the Wake of COVID-19' (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer* at 64.

⁸ Kariuki Muigua 'Virtual Arbitration Amidst Covid-19: Efficacy and Checklist for Best Practices' *A Discussion Paper for the CIArb Kenya Branch Webinar ADR Series 8 held on 28th May 2020* at 3.

⁹ John McElroy and Samantha Hewitt 'COVID-19 - Impact on International Arbitration', available at <https://www.lexology.com/library/detail.aspx?g=e019fb55-7720-4c20-a359-f3b936dcbelc>, accessed on 16 May 2020.

¹⁰ Sophie Nappert and Paul Cohen 'The Practitioner's Perspective' in Maud Piers and Christian Aschauer (eds) *Arbitration in the Digital Age: The Brave New World of Arbitration* (2018) at 126.

¹¹ Alex Lo 'Virtual Hearings and Alternative Procedures in the COVID-19 Era: Efficiency, Due Process and Other Considerations' (2020) Vol.13, No.1 *Contemporary Asia Arbitration Journal* at 88.

For instance, international arbitration usually entails arbitral participants travelling to hearing venues abroad but with the enforcement of travel restrictions globally, the conduct of physical hearings among persons from different countries has not been feasible for participants in some locations.¹² Whereas one party might be able to participate fully, the other would presumably have to communicate via video conferencing or telephone conference calls, and the arbitrators themselves may want to prevent the gathering of all the participants in a single room for fear of infection.¹³ The use of videoconferencing and other remote access technologies may also pose problems given the risks of technical failure.

b) Purpose of the Study

The aim of the study is to establish the extent of the pandemic's effect on the conduct of international arbitration proceedings.

c) Research Objectives

i. General Objective:

To determine how international arbitration may proceed efficiently despite the effects of the COVID-19 pandemic.

ii. Specific Objectives:

- To identify the challenges posed by COVID-19 and its effect on the arbitral process.
- To find out the measures which have been implemented by the arbitration community to address these challenges.
- To explore the concept of virtual arbitration and examine its efficacy amidst COVID-19.

d) Research Questions

- i. What challenges have been raised by the COVID-19 pandemic in international arbitration?
- ii. What effect have these challenges had on the arbitral process?
- iii. What actions are being taken globally to minimise the effects of the pandemic on international arbitration?
- iv. What does virtual arbitration entail?
- v. What is the effectiveness of virtual arbitration?

¹² Mark Baker 'Doing justice in the face of a global pandemic' (2020) 14 *International Arbitration Report* at 4.

¹³ David Singer 'Conducting the Evidentiary Hearing Remotely' (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer* at 32.

e) Significance of the Study

The COVID-19 pandemic is like no other public health emergency encountered in the world to date.¹⁴ Although there have been outbreaks of contagious diseases that have crossed international borders in the past, such as the Swine flu and SARS, these diseases only affected specific countries whereas the current crisis has had a worldwide effect.¹⁵ The significance of the research conducted in this dissertation is that its results will serve not only to document the pandemic's impact on international arbitration but will also suggest means of handling any potential disruptions to international arbitration proceedings should another global health crisis arise in future.

f) Scope of the Study

This study will be limited to the procedural impact of the pandemic on international arbitration.

g) Methodology

As the study is literature based, it will employ the qualitative research design. Materials such as books, journal articles, reports, soft law instruments, institutional rules, papers presented on the subject and online sources will, therefore, be identified and reviewed.

h) Structure of the dissertation

The paper is divided into four chapters. The first chapter will examine the challenges that have been posed by the COVID-19 pandemic for the practice of international arbitration and discuss the solutions that have been proffered to deal with these challenges. Chapter two will evaluate the response to the pandemic by various arbitral institutions. It will also outline a number of resources that have been promulgated by arbitral institutions to support arbitral proceedings conducted during the pandemic.

Chapter three will explore the concept of virtual arbitration and examine the efficacy of virtual processes in international arbitration proceedings. It will also highlight some concerns arising from the use of virtual hearings in arbitration proceedings and how these can be addressed. Chapter four will review the lessons which have emerged from the pandemic regarding the practice of international arbitration. It will also make recommendations around the future conduct of international arbitration in view of the pandemic.

¹⁴ Joan Grossman 'International Arbitration Experts Discuss The Major Challenges For Arbitration In 2020' (2020) Vol.35, No.4 *Mealey's International Arbitration Report* at 2.

¹⁵ *Ibid.*

II. CHALLENGES

The COVID-19 pandemic has raised special challenges for all dispute resolution mechanisms including international arbitration. Many of these challenges have arisen as a result of the various measures implemented by national governments to curb the spread of the virus which in the immediate wake of the pandemic brought a halt to many sectors.

While these measures are intended at limiting the level of physical contact among people, they have also had the effect of disrupting international arbitration proceedings. The challenges which the COVID-19 pandemic has created for international arbitration proceedings are discussed below.

a) Health risks for arbitral participants

Much as any other person in the world, arbitrators, parties, lawyers, and other arbitral participants have not been immune to the coronavirus. While the virus is believed to affect people of any age, available data indicates that persons over 60 years old and those with pre-existing health conditions such as cancer, diabetes and heart disease are at higher risk of severe illness and that this risk increases progressively from the age of 40.¹⁶

Notably, many of the most sought-after arbitrators appointed to sit on international arbitration tribunals are relatively advanced in age rendering them susceptible to the virus and its accompanying disease.¹⁷ With younger persons, symptoms are usually less severe when exposed to the virus but the possibility of them transmitting it to elderly and other vulnerable arbitral participants exists.¹⁸

It has been crucial, therefore, for all participants to protect themselves from the virus so that others may also be protected. This has meant limiting face to face contact among participants through the adherence to COVID-19 protocols such as social distancing. As several vaccines against COVID-19 have now been developed and are currently being distributed across the world, there is hope that most contact limitations among arbitral participants will be put to an end.

¹⁶ World Health Organisation op cit note 3.

¹⁷ Wilske op cit note 6 at 32.

¹⁸ Alison Ross 'The coronavirus: what impact?', available at <https://globalarbitrationreview.com/coronavirus/the-coronavirus-what-impact>, accessed on 19 April 2021.

b) Difficulties arranging in-person hearings.

The risks posed by the virus on human health has had serious implications for arbitration where hearings are concerned. Like many other dispute resolution mechanisms, hearings in arbitration have traditionally been conducted in person with all participants gathered in one room at an appointed time.¹⁹ With the ongoing pandemic, in-person hearings are no longer the norm owing to contact limitations, travel restrictions, lockdowns and other precautionary measures imposed by governments globally which have made it difficult for participants to physically attend hearings.

By way of example, on 23 March 2020, the President of South Africa made a declaration that the country would be placed on a nationwide lockdown which would limit the general movement of the populace. In particular, the lockdown prohibited individuals from leaving their homes save for essential purposes such as buying food or seeking medical care.²⁰ The only persons exempt from the lockdown were those employed in security services, health workers, utility company workers and other essential personnel.²¹

The lockdown regulations also prohibited the entry of foreign nationals from countries which at the time were hardest hit by the pandemic such as China, the United Kingdom, the United States, Italy, Germany, Spain, South Korea, and Iran.²² The regulations further directed that all foreign nationals that had arrived from these countries before the lockdown would have to undergo self-quarantine for 14 days.²³ In addition, any citizens of South African coming in from those countries would automatically be quarantined for the same time period.²⁴

Precautionary measures of this kind have greatly affected arrangements for in-person hearings owing to the location of key arbitral participants. Tribunal members, parties, lawyers, and witnesses might reside in different countries and, therefore, face restrictions travelling to the venue for arbitration or find themselves being subjected to mandatory quarantine at the venue; or worse

¹⁹ Nappert op cit note 10.

²⁰ See 'Statement by President Cyril Ramaphosa on escalation of measures to combat the Covid-19 epidemic', 24 March 2020, available at <http://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-escalation-measures-combat-covid-19-epidemic%2C-union>, accessed on 25 April 2021.

²¹ Ibid.

²² See 'Statement by President Cyril Ramaphosa on measures to combat the COVID-19 epidemic', 15 March 2020, available at <https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020-0000>, accessed on 25 April 2021.

²³ Supra note 20.

²⁴ Ibid.

still, being stranded at the venue once the hearing is concluded should a sudden lockdown be effected.²⁵

In the case where the participants are based in the same country, conducting in-person hearings could still prove to be a challenge where states have enforced rules prohibiting large gatherings and requiring people to physically distance themselves from others.²⁶ Given that so many people are typically involved in international arbitration proceedings, in-person hearings of any kind would not, in this context, be feasible.²⁷

c) Deciphering how to move forward with disputes.

Amidst the challenges of convening in-person meetings, arbitral participants were confronted with the issue of how they would deal with prospective and on-going cases. With the imposition of stricter lockdown measures in many countries, conducting lawyer-client meetings and evidence gathering was becoming more difficult for parties seeking to commence arbitral proceedings.²⁸

Some matters, for instance, required interviews to be conducted with witnesses located in distant places and others called for access to documentary evidence existing only in physical form which was unlikely to be achievable until lockdown measures were eased.²⁹

The holding of site inspections had also been affected by the pandemic. These inspections are carried out by tribunals in the course of arbitral proceedings for purposes of viewing the subject of dispute, where this involves a physical object.³⁰ No doubt, visiting places where the subject of dispute is located to undertake such inspections was no longer practical in view of the travel restrictions parties and tribunals were facing globally.

As a result of these and other government-imposed restrictions, many scheduled arbitrations were abruptly disrupted forcing tribunals to make quick decisions as to how disputes would proceed. At the onset of the COVID-19 crisis, hearings scheduled to be held in countries

²⁵ Lo op cit note 11.

²⁶ Ibid.

²⁷ Ibid at 89.

²⁸ Hussein op cit note 5 at 110 –111.

²⁹ Supra note 27.

³⁰ Huala Adolf 'The Impact of Pandemic on Legal System: The Impact on Arbitration Law' (2020) Vol.13, No.2 *Indonesian Law Journal* at 144.

like China were being moved to locations that were considered to be safer.³¹ Subsequently, when it became difficult for arbitral participants to travel and physically come together, many arbitral hearings were either cancelled or postponed to later dates.³²

At the Cairo Regional Center for International Commercial Arbitration (CRCICA), for instance, most hearings scheduled for March 2020 were postponed to May 2020.³³ One of the evidentiary hearings was cancelled and replaced with further written submissions, while a procedural hearing was held by way of teleconference with individual participants phoning in from different locations.³⁴

An intentional effect of arbitral hearings being postponed is that procedural timetables had to be adjusted including the rendering of arbitral awards by tribunals. As tribunals are generally paid their fees upon delivery by them of final awards, the postponement of hearings would entail a delay in the payment of their fees.³⁵

Hafez contends that such delays could pose problems for arbitrators, some of whom work on full-time basis and would be required to pay staff salaries, especially that a great deal of time may have already been spent by them preparing for an evidentiary hearing only for it be suspended suddenly for several months.³⁶

d) Disruption of courts

It is widely accepted that courts play a pivotal role in supporting arbitral proceedings. The stages of the arbitral process at which there may be involvement by courts are prior to the arbitration, during the arbitration and after the arbitration. The role of courts prior to the commencement of arbitral proceedings includes appointing the arbitral tribunal,³⁷ determining challenges to the

³¹Tola Adeseye 'How COVID-19 might affect international arbitration', available at <http://arbitrationblog.practicallaw.com/how-covid-19-might-affect-international-arbitration/>, accessed on 16 May 2020.

³²Mohamed Hafez 'The challenges raised by COVID-19, its impact on the arbitral process and the rise of video conferencing' (2021) 1 *International Business Law Journal* 85.

³³CRCICA 'CRCICA Recent Caseload – Hearing at the CRCICA' CRCICA Newsletter 1-2020 available at <https://crica.org/news/tag/crica-newsletter-1-2020/>, accessed on 5 May 2021.

³⁴ *Ibid.*

³⁵ *Supra* note 32.

³⁶ *Ibid* at 86.

³⁷ See the UNCITRAL Model Law on International Commercial Arbitration 2006 at Article 11.3.

jurisdiction of the tribunal,³⁸ staying legal proceedings commenced in breach of an arbitration agreement³⁹ and ordering interim relief⁴⁰.

During the arbitral proceedings, the court, in addition to granting interim measures, may assist in taking evidence.⁴¹ It also has the power to remove an arbitrator in particular circumstances.⁴² Following the proceedings, the court may be approached to set aside an award⁴³ and to enforce the award where a party to the dispute is unwilling to comply with any orders made by the tribunal in the award⁴⁴.

Much like arbitral tribunals, state courts have not escaped the effects of the pandemic. Following the global outbreak of COVID-19, most courts were disrupted in some way by government directives intended to reduce the spread of the virus. Courthouses were regarded as potential hotspots for the spread of the virus due to the multitudes of people who frequent the premises.⁴⁵ To protect judicial staff and court users from infection, most courts scaled down their operations and suspended court proceedings.

In Kenya, for instance, court activities were suspended on 16 March 2020 for a period of two weeks to enable the country's judicial authorities to devise suitable measures to combat the spread of the virus after the country recorded its first case.⁴⁶ Similarly, in Australia, it was resolved in mid-March 2020 that appeals in the High Court would not be heard by the full court and that cases listed in the Federal Court up to June would be suspended except for urgent matters.⁴⁷

³⁸ Ibid at Article 16.

³⁹ Ibid at Article 8. In terms of Article 7, an arbitration agreement is defined as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.

⁴⁰ Ibid at Article 9. These reliefs include interim injunctions and orders for the preservation of assets or evidence relevant to the determination of the dispute.

⁴¹ Ibid at Article 27.

⁴² Examples include instances where the arbitrator does not hold the requisite qualifications set out by the parties in the arbitration agreement; where there are justifiable doubts regarding the independence or impartiality of the arbitrator; and where the arbitrator fails or is incapable of performing his or her functions. See Articles 11, 12, 13 and 14 of the UNCITRAL Model Law 2006.

⁴³ Ibid at Article 34.

⁴⁴ Ibid at Articles 35 and 36.

⁴⁵ Muigua op cit note 8.

⁴⁶ Judiciary of Kenya 'Press Statement: Administrative and Contingency Management Plan to Mitigate COVID-19 in Kenya's Justice Sector', available at <https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector/>, accessed on 3 January 2021.

⁴⁷ Joe McIntyre et al 'Civil Courts and Covid-19: Challenges and Opportunities in Australia' (2020) Vol.45, No.3 *Alternative Law Journal* at 196.

The same approach was taken in Singapore, where between 7 April 2020 and 1 June 2020 matters not deemed as urgent and essential were adjourned.⁴⁸ To reduce any risk of transmission at courthouses, judges and court staff began working on a rotational basis and restrictions were placed on how many parties and advocates could appear per case.⁴⁹

Some courts in other jurisdictions were not as proactive in enforcing such measures. Take for example, the Brooklyn Supreme Court in the U.S. where on 12 March 2020, one Judge, in responding to a lawyer who complained about the non-adherence to social distancing requirements in the jumpacked courtroom, stated: ‘If you don’t like it, you can leave’ and carried on with the court session.⁵⁰ As fate would have it, the judge succumbed to the virus two weeks later.

When the pandemic eventually reached its peak in the U.S, most courthouses began to suspend the filing and hearing of non-essential matters.⁵¹ Physical access to the courts was restricted only to urgent applications, criminal cases, and certain domestic issues.⁵² As commercial matters were not deemed to be essential, they were postponed.⁵³

The consequence of courts limiting their operations in this manner is that it created a huge backlog of cases on court calendars in many countries. As of May 2020, the backlog in UK courts stood at over 500,000 and was projected to cause case delays of at least six months.⁵⁴ The likelihood that arbitration applications would be among the matters requiring the immediate attention of such courts when normal operations resumed is low as pending criminal cases would most certainly take precedence over civil ones.⁵⁵

⁴⁸ Lau Kwan Ho and Daryl Xu ‘Hearing essential and urgent court matters during the COVID-19 pandemic’ in Aurelio Gurrea-Martinez et al (eds) *Law and COVID-19* (2020) at 237.

⁴⁹ Ibid.

⁵⁰ Noah Goldberg ‘A Brooklyn Courthouse Was Still Packed as Coronavirus Spread. Judges, their Staffs and Lawyers Are Paying the Price’ available at <https://www.nydailynews.com/coronavirus/ny-coronavirus-brooklyn-supreme-court-civil-covid-19-judges-attorneys-20200409-byebigdbpbcv3he7wf5hxombju-story.html>, accessed on 4 February 2021.

⁵¹ Shira Scheindlin ‘Commercial Litigation and Post COVID-19 Court Backlog’ (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer* at 68.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Dorcas Quek Anderson ‘Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain’ in Aurelio Gurrea-Martinez et al (eds) *Law and COVID-19* (2020) at 227.

⁵⁵ Supra note 51 at 69.

III. SOLUTIONS PRESENTED TO DEAL WITH THE CHALLENGES RAISED BY THE PANDEMIC

In the midst of all these challenges, it became clear to the arbitration world that the virus causing COVID-19 would not be going away for the foreseeable future and, therefore, something had to be done to ensure that international arbitration proceedings continued.⁵⁶ Realising that considerable hardship would result if arbitral proceedings were indefinitely postponed, the arbitration community began to look for means of resolving arbitral disputes. In a short space of time, they developed modes of functioning amid the pandemic to ensure a timely, fair, and efficient resolution of ongoing and future disputes.⁵⁷ These will be discussed below.

a) Virtual proceedings

One of the options presented to arbitration users to address the disruption brought on by the pandemic in international arbitration has been to conduct proceedings virtually. Virtual proceedings were regarded by many as the only chance parties had at moving forward with previously planned hearings during the pandemic. Several arbitral institutions, therefore, spearheaded an ‘unanticipated and expedited shift’ from physical hearings to virtual hearings to maintain hearing dates.⁵⁸

As a result, several proceedings were resumed within weeks of being suspended leaving arbitral participants with no option but to quickly adapt themselves to the changed circumstances. Fortunately, various protocols and guidance notes on virtual hearings have been made available by arbitral institutions to facilitate the migration from in-person hearings. Certain arbitral rules have also been revised by arbitral institutions to accommodate virtual hearings, as will be seen in the next chapter.

Many courts have also embraced virtual hearings to facilitate the speedy disposal of cases during the pandemic. In the UK, for instance, a High Court Judge in April 2020 declined to grant an adjournment of a trial on account of the COVID-19 crisis and instead ruled that ‘the parties should co-operate to explore ways in which a remote trial, involving an internet-based video communication platform and an electronic trial bundle, might proceed’.⁵⁹ The judge found that

⁵⁶ Wilske op cit note 6 at 16.

⁵⁷ Hussein op cit note 5 at 146.

⁵⁸ Ibid at 117.

⁵⁹ Re One Blackfriars Ltd (In Liquidation) [2020] EWHC 845 (Ch).

remote hearings should be pursued wherever possible, provided that they can be carried out properly.⁶⁰

Virtual hearings have offered an effective alternative to in-person hearings in both arbitration and litigation amid the pandemic owing in part to the existence of videoconferencing platforms such as Zoom, Microsoft Teams, Blue Jeans, WebEx, and Skype whose video calling services are not only easy to use but also easily accessible and cheap.⁶¹ As valuable as they may be, hearings conducted by videoconferencing and other remote access technologies may not be suitable for all arbitral cases.

Such hearings are, for instance, not ideal for matters involving many participants or where the resolution of the dispute is dependent on the tribunals' general impression of a material witness such that in-person observation of the witness would be required.⁶² They may, however, be well-suited for arbitrations where the parties give greater attention to documentary material than oral evidence that the hearings are entirely sufficient even where the oral evidence adduced is inconsequential.⁶³

b) Documents-only procedure

As an alternative to virtual hearings, parties could agree for their dispute to be settled on a documents-only basis. This is where a tribunal bases its decision on pleadings, documentary evidence and written arguments, with no oral hearing.⁶⁴ The concept of a documents-only arbitration is not one that is new. Many arbitral rules do in fact allow for disputes to be resolved in the absence of an oral hearing.⁶⁵

Like virtual hearings, proceedings of this kind do not work well for all cases. This is particularly true in instances where expert or other witness evidence is involved, as is the case in high value claims and complex matters.⁶⁶ In such cases, an opportunity should be given to parties to cross-examine the witnesses.⁶⁷

⁶⁰ Ibid.

⁶¹ Hafez op cit note 32 at 88.

⁶² Wilske op cit note 6 at 29.

⁶³ Lo op cit note 11 at 90.

⁶⁴ David Bateson 'Virtual Arbitration: The Impact of COVID-19' (2020) Vol.9, No.1 *Indian Journal of Arbitration Law* at 159.

⁶⁵ Supra note 62.

⁶⁶ Supra note 63 at 94.

⁶⁷ Ibid.

Broadly speaking, a documents-only arbitration is mostly suitable for low value claims and matters where parties place a heavy reliance on documentary evidence.⁶⁸ They are also well suited for matters where the determination of the dispute depends entirely on legal issues.⁶⁹

c) Bifurcated proceedings

A further option available to parties to counter the effects of the pandemic on arbitral proceedings is to bifurcate the arbitration. What this means is that the arbitration proceedings would be split into different phases whereby certain issues are heard and determined before others.⁷⁰ This splitting of proceedings is commonly employed in large or complex cases where it may be practical from a procedural and factual standpoint for specific issues to be heard first.⁷¹

One example is where an objection is raised by a respondent to a tribunal's jurisdiction. In such a case, it may be desirable for the tribunal to determine the objection as a preliminary issue so as to save parties the inconvenience and costs of prepping for the merits of the case, should the objection succeed.⁷² Where the matter is heard on its merits, proceedings may be further split by having a determination made on liability first, deferring the quantum to a later stage.⁷³

With the exception of the International Centre for Dispute Resolution (ICDR) Rules, most international arbitration rules do not expressly provide for bifurcated proceedings but empower tribunals to apply whatever procedures are deemed appropriate for a given case.⁷⁴ In the face of the pandemic and the challenges encountered by some parties in accessing certain evidence for their cases, tribunals may see it fit to determine certain issues first and defer the rest for some other time.⁷⁵

Given the flexible nature of arbitral procedures, it is possible for proceedings to be bifurcated in such a way that part of the dispute is determined on a documents-only basis whereas

⁶⁸ Ibid at 93.

⁶⁹ Wilske op cit note 6 at 29.

⁷⁰ Lucy Greenwood 'Does Bifurcation Really Promote Efficiency' (2011) Vol.28, No.2 *Journal of International Arbitration* at 105.

⁷¹ Lo op cit note 11 at 94.

⁷² This view is reflected in the case of *Mesa Power Group v Canada* [PCA Case No.2 2012-17, Procedural Order No. 2, 18 January 2013] where the tribunal held that: 'It is good...to let the parties "know where they stand"...at an early stage and not to impose the burden of full-fledged proceedings on a party that disputes being subjected to arbitration'.

⁷³ Supra note 70 at 110.

⁷⁴ Ibid at 108.

⁷⁵ Supra note 71.

other aspects would be dealt with by means of a virtual hearing.⁷⁶ Where it may not be suitable to convene a virtual hearing, issues that have not been addressed in the documents-only procedure could be deferred to a time when it is feasible to conduct in-person hearings if the circumstances so require.⁷⁷

One potential drawback of this procedure is that it may be difficult to separate the issues to be dealt with on a documents-only basis and those that could be resolved through a virtual or physical hearing when the facts in dispute are so connected. In such a case, it might not be suitable to decide these issues independently from each other as there may be a possibility that the issues determined by way of the documents-only procedure could be reopened at the hearing.⁷⁸

IV. CONCLUSION

At the onset of the pandemic, the challenges affecting international arbitration proceedings appeared somewhat insurmountable. Fear of infection and restrictions on gatherings and travel had brought arbitral proceedings to a halt causing many of them to be postponed to unknown dates. Postponements of this nature were problematic as they ran counter to a key advantage of arbitration which is ‘the efficient administration of the process and the relatively prompt resolution of disputes’ referred to it.⁷⁹ Fortunately, the global arbitration community has worked actively to ensure that disputes continue to be resolved through timely and efficient methods in the face of the pandemic.

⁷⁶ Ibid at 93.

⁷⁷ Ibid at 94.

⁷⁸ Ibid.

⁷⁹ Singer op cit note 13.

CHAPTER TWO

OVERVIEW OF THE RESPONSE BY INTERNATIONAL ARBITRATION INSTITUTIONS TO THE PANDEMIC

Institutional bodies are one of the key players in international arbitration. Besides issuing rules to regulate procedural aspects of an arbitration, institutional bodies perform the function of providing administrative support to parties and arbitrators engaged in arbitration proceedings. This includes facilitating the appointment of arbitrators, determining applications challenging arbitrators, ensuring payment by parties of fees and expenses incurred by arbitrators in the arbitration, and assisting in the general organization and running of the proceedings.⁸⁰

The global outbreak of COVID-19, as seen from the previous chapter, has brought on a considerable amount of disruption to international arbitration proceedings. Arbitration institutions have by no means been spared from such disruption, thus, compelling them to make certain adjustments to how they operate and administer arbitral disputes. This chapter highlights some of these adjustments. It also outlines the resources that have been made available by major arbitration institutions to support arbitrations carried out during the pandemic.

I. OPERATIONAL AND ADMINISTRATIVE SUPPORT ADJUSTMENTS

In facing the COVID-19 pandemic, many institutional bodies have implemented measures to protect their staff and users from the virus.⁸¹ At the start of the pandemic, the majority of arbitration institutions shut down their facilities and took refuge in home offices.⁸² The closure of these facilities was, in many cases, also necessitated by the imposition of physical and social contact restrictions and stay at home orders by governments across the world, which at that time had brought the activities of most businesses to a halt.

Arbitration users were, however, assured by the respective institutions that they would continue functioning in spite of their offices being closed.⁸³ For safety purposes, many institutions

⁸⁰ Nigel Blackaby et al *Redfern and Hunter on International Arbitration* (2015) at 31 and Emilia Onyema 'Arbitration Institutions in Africa', in Emilia Onyema (ed) *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (2016) at 30.

⁸¹ Mark Shope 'The International Arbitral Institution Response to COVID-19 and Opportunities for Online Dispute Resolution' (2020) Vol.13, No.1 *Contemporary Asia Arbitration Journal* at 68.

⁸² Wilske op cit note 6 at 12.

⁸³ Ibid.

announced that no hand-delivered documents would be received by them at that time.⁸⁴ Additionally, parties and tribunals were advised to suspend pressing procedural deadlines and to postpone all in-person hearings and meetings that were to be convened at institutional facilities.⁸⁵

After securing the safety of their users and staff, several arbitral bodies recognised the need for collaboration and cooperation among arbitration service providers to ensure the continued resolution of disputes in the midst of the pandemic and its control measures. To that end, a group of prominent institutions released a joint statement in April 2020, committing themselves to work together in addressing the adverse effects of the pandemic on international arbitration proceedings.⁸⁶

These institutions also pledged to take advantage of ICT tools providing for remote working and urged tribunals and parties to fully utilise the relevant arbitral rules and case management techniques tools that would enable proceedings to advance in a timely manner.⁸⁷ In furtherance of this pledge, various institutions began to make a number of adjustments to their operations and services. These adjustments are highlighted below as follows:

- *American Arbitration Association - International Centre for Dispute Resolution (AAA-ICDR)*

As early as January 2020, some AAA-ICDR offices began to conduct virtual meetings after precautionary advisories were issued by local authorities.⁸⁸ By mid-April, most AAA-ICDR staff were working remotely until June when the centre resumed limited onsite operations.⁸⁹ In an effort to ensure disputes move forward, the AAA-ICDR has promoted, among other things, the online filing and management of case documents, online selection of arbitrators and the holding of remote hearings.⁹⁰ In addition, the centre has invested in a multi-camera and voice activated video conferencing system which enables participants

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ ICC 'Arbitration and Covid', available at <https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/>, accessed on 18 May 2021.

⁸⁷ Ibid.

⁸⁸ AAA-ICDR '2020 Annual Report and Financial Statements' at 4 and 27, available at https://www.adr.org/sites/default/files/document_repository/AAA_2020_AnnualReport_and_Financial_Statements.pdf, accessed on 12 June 2021.

⁸⁹ Ibid.

⁹⁰ Ibid.

from all over the world to engage remotely.⁹¹ The centre has also launched a mobile app containing standard arbitration clauses, its rules of arbitration and other useful information meant to simplify the dispute resolution process for its users.⁹²

- *Arbitration Foundation of Southern Africa (AFSA)*

From the start of the pandemic, hearings in AFSA arbitrations have been held remotely in order to comply with COVID-19 restrictions in South Africa and other countries.⁹³ AFSA currently offers its users various facilities to aid them in conducting arbitral proceedings through remote means such as hearings rooms with high speed internet access and fitted with the essential video and audio equipment for remote hearings.⁹⁴ Other services offered to users include an online filing system called ‘Matter Manager’ which was launched in November 2020 to streamline the management and submission of cases administered by the institute.⁹⁵

- *Arbitration Institute of Stockholm Chamber of Commerce (SCC)*

The SCC has mainly responded to the pandemic by conducting its operations offsite.⁹⁶ Having digitalized its case management in 2013 and launched an online filing and communication platform in 2019, the SCC has transitioned smoothly to remote working.⁹⁷ The use of SCC’s online platform is not limited to arbitrations administered by the institute but is also available to parties to ad hoc arbitrations.⁹⁸ As a means of promoting the administration of proceedings online, the SCC has provided this service at no fee for ad hoc arbitrations initiated amid the pandemic.⁹⁹ In view of the travel bans and restrictions on the holding of in-person hearings enforced by governments across the globe, the SCC

⁹¹ AAA-ICDR ‘Significant Tech Investment Enhances AAA-ICDR’s Facilitation of Virtual, In-Person & Hybrid ADR Hearings’, available at https://www.adr.org/sites/default/files/document_repository/AAA-Virtual-Event-Data-Press-Release-8Jun2021.pdf, accessed on 12 June 2021.

⁹² AAA-ICDR ‘The App for AAA-ICDR Rules and Clauses’, available at <https://go.adr.org/aaa-icdr-rules-app.html>, accessed on 12 June 2021.

⁹³ AFSA ‘Remote Hearing Protocol’ at 1, available at <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>, accessed on 30 June 2021.

⁹⁴ AFSA ‘AFSA @Work June/July Newsletter’ at 10, available at https://arbitration.co.za/wp-content/uploads/2020/07/AFSA-Newletter_JUNE-JULY-2020.pdf, accessed on 30 June 2021.

⁹⁵ AFSA ‘Online Filing’, available at <https://arbitration.co.za/>, accessed on 30 June 2021.

⁹⁶ SCC ‘COVID-19: Information and guidance in SCC arbitrations’, available at <https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/>, accessed on 17 June 2021.

⁹⁷ SCC ‘COVID-19: How the SCC is responding’ available at <https://sccinstitute.com/about-the-scc/news/2020/covid-19-how-the-scc-is-responding/>, accessed on 17 June 2021.

⁹⁸ SCC ‘Ad Hoc Platform - Powered By the SCC’, available at <https://sccinstitute.com/case-management/ad-hoc-platform/> accessed on 17 June 2021.

⁹⁹ Ibid.

has encouraged tribunals and parties to maintain pre-agreed schedules by employing video and audio-conferencing facilities to conduct hearings, unless prevented by illness or other factors in the arbitration.¹⁰⁰

- *Australian Centre for International Commercial Arbitration (ACICA)*

In keeping with health guidelines, the ACICA secretariat shifted to remote working while maintaining its usual office hours in an effort to provide its clients with continued service.¹⁰¹ An electronic filing system has been set up by the centre for the filing of cases online and discounts of up to 25% have been offered to parties who registered cases between 1 May to 31 October 2020.¹⁰² The centre has also seen a significant shift towards the use of virtual tools in the conduct of hearings and other proceedings.¹⁰³

- *Hong Kong International Arbitration Centre (HKIAC)*

The HKIAC offices have remained operative and available for face-to-face meetings and hearings during the pandemic.¹⁰⁴ However, with the exception of essential operational personnel, most HKIAC staff are working remotely.¹⁰⁵ As a safety precaution, all staff and guests of the centre have had to submit themselves to temperature checks and fill in health declaration forms affirming, among other things, that they have not been in contact with sufferers of COVID-19 or travelled abroad within 14 days prior to the meeting or hearing in question.¹⁰⁶ In general, most HKIAC users have opted to conduct proceedings virtually or incorporate the use of virtual hearing tools into traditional hearing methods.¹⁰⁷ Accordingly, HKIAC has collaborated with IT specialists to provide its users with a wide variety of virtual arbitration facilities including ‘HD video and audio conferencing, online document repositories (including bundles and electronic presentation of evidence), and

¹⁰⁰ SCC op cit note 96.

¹⁰¹ ACICA ‘The ACICA Review Mid-Year Edition 2020 – Part 1 (COVID-19 Special Edition)’ at 3, available at https://acica.org.au/wp-content/uploads/2020/06/ACICA_Review_Jun-2020-FF1.pdf, accessed on 30 June 2021.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ HKIAC ‘Virtual Hearings at HKIAC: Services and Success Stories’, available at <https://www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories>, accessed on 24 June 2021.

¹⁰⁵ HKIAC ‘HKIAC Measures and Service Continuity during COVID-19’, available at <https://www.hkiac.org/news/hkiac-service-continuity-during-covid-19>, accessed on 24 June 2021.

¹⁰⁶ Ibid.

¹⁰⁷ Supra note 104.

transcription and interpretation services'.¹⁰⁸ These services are also available to arbitrations that are not administered by HKIAC.¹⁰⁹

- *International Centre for Settlement of Investment Disputes (ICSID)*

The ICSID secretariat has maintained its operations during the pandemic by having its staff work on a remote basis in close coordination with parties and tribunals to ensure minimum disruption to arbitral proceedings.¹¹⁰ From March 2020, electronic filing became the default procedure at ICSID for the submission of requests for arbitration, post award applications and other case related documents.¹¹¹ Hard copy documents may, however, be supplied at the request of any of the parties.¹¹² ICSID currently runs its own online hearing platform which is accessible for free to parties involved in arbitrations administered by the centre and at a nominal fee in ad hoc proceedings.¹¹³

- *International Chamber of Commerce (ICC)*

The ICC has adapted its operations to the progression of the COVID-19 situation in France. When the country entered a nationwide lockdown on 17th March 2020, the ICC released a statement informing its users that it would remain operable from remote workstations and that case management would be carried out via email.¹¹⁴ At that time, cases that were scheduled to be heard at the ICC premises until April were either cancelled and replaced by virtual hearings or postponed to late June when the ICC reopened its hearing centre for in-person hearings, in full respect of COVID-19 health guidelines.¹¹⁵ During its three-month closure, the ICC upgraded the technology and equipment at its hearing centre to meet the needs of users seeking to conduct hybrid and virtual hearings.¹¹⁶

¹⁰⁸ HKIAC op cite note 105

¹⁰⁹ HKIAC 'PRESS RELEASE - HKIAC Guidelines for Virtual Hearings', available at <https://www.hkiac.org/news/hkiac-guidelines-virtual-hearings>, accessed on 24 June 2021.

¹¹⁰ ICSID 'Message Regarding COVID-19 (Update)', available at <https://icsid.worldbank.org/news-and-events/news-releases/message-regarding-covid-19-update>, accessed on 14 June 2021.

¹¹¹ ICSID 'ICSID Makes Electronic Filing its Default Procedure', available at <https://icsid.worldbank.org/news-and-events/news-releases/icsid-makes-electronic-filing-its-default-procedure>, accessed on 14 June 2021.

¹¹² Supra note 110.

¹¹³ ICSID 'A Brief Guide to Online Hearings', available at <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid> and 'Virtual Hearings', available at <https://icsid.worldbank.org/services/hearing-facilities/virtual-hearings>, both accessed on 14 June 2021.

¹¹⁴ ICC 'Urgent COVID-19 message to DRS community', available at <https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/>, accessed on 17 June 2021.

¹¹⁵ Ibid.

¹¹⁶ ICC 'ICC Hearing Centre reopens doors for physical presence dispute resolution hearings', available at <https://iccwbo.org/media-wall/news-speeches/icc-hearing-centre-reopens-doors-for-physical-presence-dispute-resolution-hearings/>, accessed on 17 June 2021.

- *Kigali International Arbitration Centre (KIAC)*

In March 2020, KIAC announced that all arbitral matters that had been scheduled for hearing would be postponed to the month end and it urged parties, where feasible, to consider allowing tribunals to issue awards on a documents-only basis.¹¹⁷ In specific cases, proceedings were deferred until it was safe to carry out physical hearings.¹¹⁸ For the most part, however, parties elected to proceed with their matters using videoconferencing technology.¹¹⁹ To ensure the continued provision of its services, KIAC began to operate with its clients remotely.¹²⁰

- *Lagos Court of Arbitration (LCA)*

Like most arbitral institutions, the LCA has remained functional amidst the pandemic. Where the commencement of arbitration is concerned, parties are required to email scanned copies of their notices of arbitration and associated documentation to the LCA dispute resolution office.¹²¹ As for hearings, the LCA Rules 2018 allow for the examination of witnesses through video conferencing and other means of telecommunication where the physical presence of witnesses is not necessary.¹²² Pursuant to these Rules, audio and videoconferencing facilities have been used in LCA arbitration hearings to ensure disputes are resolved expediently during the ongoing pandemic.¹²³

- *London Court of International Arbitration (LCIA)*

To ensure the safety of its staff while maintaining its services, the LCIA has been conducting its operations remotely all through the pandemic.¹²⁴ Its users have accordingly been advised to submit any new requests for arbitration and case related documents using its online filing system or by way of email.¹²⁵ The LCIA has also directed that the delivery

¹¹⁷KIAC ‘16 March 2020: KIAC communique on Corona virus’, available at https://kiac.org.rw/new/IMG/pdf/kiac_communique_on_corona_virus.pdf, accessed on 24 June 2021.

¹¹⁸ KIAC ‘Annual Report July 2019 – June 2020’, available at https://kiac.org.rw/new/IMG/pdf/annual_report-2019-2020.pdf, accessed on 24 June 2021.

¹¹⁹ Ibid.

¹²⁰ KIAC ‘20 April 2020: KIAC communique on COVID-19 update - KIAC Arbitration Conference’, available at https://kiac.org.rw/new/IMG/pdf/kiac_communique-covid_19-conference.pdf, accessed on 27 June 2021.

¹²¹ LCA ‘Remote Hearings at the Lagos Court of Arbitration’, available at <https://www.lca.org.ng/remote-hearings-covid-19-update/>, accessed on 30 June 2021.

¹²² Ibid. See also Article 30(4) of the LCA Rules 2018.

¹²³ Ibid.

¹²⁴ LCIA ‘LCIA Services Update: COVID-19’, available at <https://www.lcia.org/lcia-services-update-covid-19.aspx>, accessed on 12 June 2021.

¹²⁵ Ibid.

of awards by arbitrators and all other correspondence to its offices be effected by email.¹²⁶ In terms of hearings, the LCIA Arbitration Rules which took effect in October 2020 give tribunals authority to conduct arbitral proceedings by teleconference, videoconference and other means of electronic communication as an alternative to in-person hearings.¹²⁷

- *Singapore International Arbitration Centre (SIAC)*

SIAC has remained fully functional throughout the pandemic, with its staff working remotely.¹²⁸ Its physical offices were initially closed in April 2020 in compliance with the Singaporean government's measures to combat the spread of COVID-19.¹²⁹ With effect from June, it began to operate twice a week to enable its users to deliver hardcopy documents.¹³⁰ Parties to SIAC arbitration are generally advised to file new cases and interim applications electronically.¹³¹ Tribunals are also required to submit their signed awards to the centre electronically.¹³² Where a party, as a result of the pandemic, is prevented from meeting any time limits in the arbitration stipulated by the SIAC Rules 2016, an application can be made by such party for extension of time.¹³³ In terms of hearings, parties are encouraged to consider virtual hearings if appropriate for the particular case.¹³⁴ In-person hearings may, however, be conducted at the SIAC premises provided that the relevant COVID-19 protocols are observed.¹³⁵

As is evident from the foregoing, continuity of service delivery has been of paramount concern to arbitration service providers across the globe since the pandemic began. Major international arbitration institutions have generally been operating smoothly despite the disruption to their operations and services brought on by the pandemic.

¹²⁶ Ibid.

¹²⁷ See Article 19.2 of the LCIA Arbitration Rules 2020.

¹²⁸ SIAC 'Enhanced COVID-19 Measures at SIAC', available at [https://www.siac.org.sg/images/stories/press_release/2020/\[ANNOUNCEMENT\]%20ENHANCED%20COVID-19%20MEASURES%20AT%20SIAC.pdf](https://www.siac.org.sg/images/stories/press_release/2020/[ANNOUNCEMENT]%20ENHANCED%20COVID-19%20MEASURES%20AT%20SIAC.pdf), accessed 21 June 2021.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ SIAC 'COVID-19: SIAC Case Management Update', available at https://www.siac.org.sg/images/stories/press_release/2020/ANNOUNCEMENT%20COVID-19%20SIAC%20Case%20Management%20Update.pdf, accessed on 21 June 2021.

¹³² Ibid.

¹³³ SIAC 'SIAC Covid-19 Frequently Asked Questions (FAQs)', available at <https://siac.org.sg/faqs/siac-covid-19-faqs>, accessed on 21 June 2021. See also Rule 2.6 of the SIAC Rules 2016 which provides that: 'Except as provided in these Rules, the Registrar may at any time extend or abbreviate any time limits prescribed under these Rules'.

¹³⁴ Ibid.

¹³⁵ Ibid.

The business-as-usual attitude adopted by these institutions towards the pandemic can largely be attributed to the inherent flexibility and consensual nature of the arbitration dispute resolution process. Being a consensual and flexible process, arbitration is well placed to allow cases to advance amidst the pandemic as its procedures can easily be tailored to meet the needs of the parties to the dispute.¹³⁶

In this vein, most arbitral institutions have adapted their administrative procedures to the pandemic world by employing ICT based tools providing for remote working, the conduct of virtual hearings, the electronic filing and management of cases as well as the electronic signing and delivery of awards. These tools have all worked well in ensuring that arbitral disputes are heard and resolved promptly in this period.

II. RESOURCES PROMULGATED BY ARBITRAL INSTITUTIONS IN REACTION TO THE PANDEMIC

a) *Revised Rules of Arbitration*

The emergence of the COVID-19 pandemic has not only seen operational and procedural adaptations by international arbitration institutions. It has also given rise to the release and promotion by these institutions of a wide range of resources intended to support proceedings conducted during the pandemic. Revised institutional rules of arbitration are among the many resources that have been promulgated by arbitration institutions in the wake of the pandemic.

The ICC, for instance, has amended its 2017 arbitration rules to make it possible for tribunals to hold virtual hearings where it deems it fit to do so after consultation with the parties. Article 26.1 of the 2017 rules stated as follows with regards to hearings:

‘When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.’

This provision now reads as follows in its amended rules of 2021:

‘A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical

¹³⁶ Andrew Battison et al ‘Institutional responses to the COVID-19 pandemic’ (2020) 14 *International Arbitration Report* at 6.

attendance or remotely by videoconference, telephone or other appropriate means of communication.’

Pursuant to these amended rules, parties can also submit their pleadings and other case documents electronically.¹³⁷ Further, the submission of hard copies shall now only be required where a request is made for the same by either of the parties.¹³⁸

Likewise, the arbitration rules of the LCIA have been revised to enable tribunals to employ technology to ensure efficient and speedy conduct of the arbitral proceedings.¹³⁹ In this respect, Article 19.2 of the revised rules of 2020 now expressly provides for hearings to:

‘...take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).’

This is in contrast to the 2014 LCIA rules which stated that hearings ‘may take place by video or telephone conference or in person (or a combination of all three)’.

The revised LCIA arbitration rules have also imposed a mandatory requirement that requests for arbitration, responses and accompanying documentation be submitted electronically, unlike in the preceding rules where the same was optional.¹⁴⁰ Similar amendments have been made to the ICSID arbitration rules which come into force in July 2022.¹⁴¹

The arbitral rules of institutions like the AAA-ICDR, ACICA, HKIAC, KIAC, LCA, SCC and SIAC already allowed for the electronic submission of pleadings and other written communication prior to the pandemic.¹⁴² However, with the exception of the LCA, these institutional rules do not make any specific mention of virtual hearings.

For example, Article 23.5 of the 2014 ICDR arbitration rules merely empower tribunals to ‘direct that witnesses be examined through means that do not require their physical presence’.

¹³⁷ See Article 3.1 of the 2021 ICC Arbitration Rules which now refers to such documents being ‘sent’ and has removed the requirement for parties to supply a sufficient number of ‘copies’ of the said documents.

¹³⁸ Ibid at Articles 4.4 (b) and 5.3.

¹³⁹ See Article 14.6 of the LCIA Arbitration Rules 2020.

¹⁴⁰ Ibid at Article 4.1. Compare with Article 4.1 of the LCIA Arbitration Rules 2014.

¹⁴¹ See Rule 4.2 of the ICSID Arbitration Rules in the Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings.

¹⁴² See Article 10 of the ICDR International Arbitration Rules 2014; Article 4.1 of the ACICA Arbitration Rules 2016; Article 3.1 of the HKIAC Administered Arbitration Rules 2018; Article 4 of the KIAC Arbitration Rules; Article 2.1 of the LCA Arbitration Rules; Article 5.2 of the SCC Arbitration Rules 2017; and Article 2.1 of the SIAC Arbitration Rules 2016.

Accordingly, the AAA-ICDR has issued new arbitration rules in 2021 which under Article 26.2 explicitly provide for the option of hearings being held through virtual means as follows:

‘A hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process.’

Similarly, the ACICA arbitration rules which initially were completely silent on the issue of virtual hearings have been revised in the following way:

‘The Arbitral Tribunal shall organize the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority to under the arbitration agreement to establish the conduct of a hearing, including its date, duration, form content, procedure, time limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communication technology with participants in one or more geographical places (or in a combined form).’¹⁴³

The international arbitration rules of AFSA, on the other hand, only came into existence in 2021. Having been adopted in the pandemic era, the rules, as expected, contain provisions allowing for the possibility of conducting hearings virtually as well as the filing of case related documents through electronic means.¹⁴⁴

While the release of many of these new arbitration institutional rules may have been intended to address the pandemic’s disruption to international arbitration proceedings, they may well prove to streamline and expedite the resolution of arbitral disputes not only in the short term but even after the COVID crisis is over.

b) Guidance notes, protocols, checklists, and model procedural orders

Aside from amending their rules, leading international arbitration institutions have promulgated numerous guidelines to facilitate the conduct of arbitral proceedings amidst the pandemic. These guidelines cover, among other things, measures to assist arbitration users and tribunals in adapting to remote hearings and other related arbitral procedures as well as guidance on the use of specific digital platforms and the drafting of procedural orders.¹⁴⁵

The *ACICA Online Arbitration Guidance Note* is one such resource. In this note, ACICA highlights a variety of issues that must be resolved before arbitral proceedings are conducted

¹⁴³ See Article 35.5 of the ACICA Arbitration Rules 2021 and compare with Article 31 of the ACICA Arbitration Rules 2016.

¹⁴⁴ See Articles 5.1 and 21.6 of the AFSA International Arbitration Rules 2021, respectively.

¹⁴⁵ Maxi Scherer ‘Remote Hearings in International Arbitration: An Analytical Framework’ *Queen Mary School of Law Legal Studies Research Paper No.333/2020* at 24.

through online platforms.¹⁴⁶ These include choosing a remote hearing platform that is suitable for the proceedings in question, ensuring the concerned parties are acquainted with the selected platform and assessing the need to engage third-party online arbitration service providers.¹⁴⁷

Across the Pacific, the International Institute for Conflict Prevention and Resolution (CPR) has produced the *Annotated Model Procedural Order and Guidelines for Remote Video Arbitration Proceedings* which provides guidance on the drafting of arbitral procedural orders delivered by tribunals in remote video arbitration proceedings.¹⁴⁸ The model order also serves as a checklist of matters specific to such proceedings and is mainly designed for application in wholly remote proceedings but can also be adapted to hybrid proceedings.¹⁴⁹

Similarly, the AAA-ICDR has released its *Model Order and Procedures for a Virtual Hearing via Videoconference* for the use of parties and tribunals in virtual hearings as a template for procedural orders that may be modified to meet the particular needs of each case.¹⁵⁰ The AAA-ICDR has also issued a *Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom* which centers on the use of ZOOM as a video conferencing platform in arbitral proceedings administered by the institute.¹⁵¹

On the African continent, AFSA has published a *Remote Hearing Protocol* outlining best practices for parties engaging in remote and semi-remote hearings to ensure neither side enjoys any advantage in the proceedings.¹⁵² Relevantly, the protocol recommends that witnesses testify

¹⁴⁶See ACICA Online Arbitration Guidance Note, available at <https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf>, accessed on 5 July 2021.

¹⁴⁷ Ibid.

¹⁴⁸ See CPR's Annotated Model Procedural Order and Guidelines for Remote Video Arbitration Proceedings (Revised August 2021), available at https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings/_res/id=Attachments/index=0/Annotated%20Model%20Procedural%20Order%20for%20Remote%20Video%20Arbitration%20Proceedings%2008.26.2021.pdf, accessed on 24 September 2021.

¹⁴⁹ Ibid.

¹⁵⁰See AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference, available at https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf, accessed on 8 July 2021.

¹⁵¹See AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom, available at https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf, accessed on 8 July 2021.

¹⁵² AFSA op cit note 93.

from a hearing room equipped with the required remote hearing technology including cameras providing a good visual of the entire room to ensure unauthorized persons are not present.¹⁵³

Another useful resource offering support for remote hearings is the *Seoul Protocol on Video Conferencing in International Arbitration*. This protocol, which was released by the Korean Commercial Arbitration Board (KCAB) and the Seoul International Dispute Resolution Centre (SIDRC), reviews effective methods for organizing and holding remote arbitrations.¹⁵⁴ In particular, the protocol addresses issues such as video conferencing venues, witness examinations and observers as well as technical requirements for remote hearing proceedings.¹⁵⁵

Similar resources have been developed by the ICC, HKIAC and SIAC.¹⁵⁶ Arbitral institutions such as the SCC that have not issued any remote hearing guidelines have directed their users to specific resources promulgated by other organizations. In this respect, the SCC has posted on its webpage links to the Delos Dispute Resolution's *Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19*.¹⁵⁷

This checklist itemizes issues that must be considered in arbitral proceedings in view of the COVID-19 pandemic including adjourning physical hearings, relocating hearing venues and holding virtual hearings.¹⁵⁸ Parties and tribunals are generally recommended to hold conference calls to deliberate on the issues raised by the checklist.¹⁵⁹ In so doing, they must take into account

¹⁵³ Ibid paragraph 4.6.

¹⁵⁴ See Seoul Protocol on Video Conferencing in International Arbitration, available at [http://www.sidrc.org/static_root/userUpload/data/\[FINAL\]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf](http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf), accessed on 10 July 2021.

¹⁵⁵ Ibid at Articles 1 to 3.

¹⁵⁶ See ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, available at <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>; HKIAC Guidelines for Virtual Hearings, available at https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf; and SIAC Guides: Taking Your Arbitration Remote, available at [https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20\(August%202020\).pdf](https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20(August%202020).pdf), accessed on 10 July 2021.

¹⁵⁷ SCC 'Checklist on Holding Hearings in Times of COVID-19', available at <https://sccinstitute.com/about-the-scc/news/2020/checklist-on-holding-hearings-in-times-of-covid-19/>, accessed on 14 July 2021.

¹⁵⁸ Delos Dispute Resolution 'Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 (Version 2 of 20 March 2020)', available at <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>, accessed on 14 July 2021.

¹⁵⁹ Ibid.

disruptions that may arise from adopting certain measures and their effect on the participants to the proceedings.¹⁶⁰

Other notable external resources available to arbitration users and tribunals are the Chartered Institute of Arbitrators' *Guidance Note on Remote Dispute Resolution Proceedings*, the International Council for Commercial Arbitration - New York City Bar Association - International Institute for Conflict Prevention and Resolution's *Protocol on Cybersecurity in International Arbitration* and the *African Arbitration Academy Protocol on Virtual Hearings*.¹⁶¹

The above guidance notes, protocols, checklists, and procedural orders all generally seek to enhance the virtual hearing experience for arbitration users and ensure disputes are resolved in a fair, effective, and timely manner during the pandemic. For the most part, these guidelines have no binding effect¹⁶² and therefore the recommendations outlined in them may not bear much force unless parties, by agreement, decide that the relevant guidelines be applied to their particular case.

III. CONCLUSION

In the wake of the COVID-19 pandemic, international arbitration institutions have had to implement changes to the way they work in order to provide continuous service to their users. The majority of these institutions have been able to manage the impact of the pandemic and ensure minimal disruption to their operations and services by making use of technology-based tools including virtual hearing platforms and online case management systems.

A number of institutions have also made amendments to their rules of arbitration and released a broad range of guidelines meant to assist parties and tribunals in adapting to these new procedures. It remains to be seen as to whether these new procedures will remain in place after the pandemic. However, with the pandemic still raging in many parts of the world, it is expected that these procedures will continue to be applied for a significant period of time.

¹⁶⁰ Ibid.

¹⁶¹See CIARB Guidance Note on Remote Dispute Resolution Proceedings, available at <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf> and ICCA - NYC Bar - CPR Protocol on Cybersecurity in International Arbitration, available at <http://documents.nycbar.org/files/ICCA-NYC-Bar-CPR-Cybersecurity-Protocol-for-International-Arbitration-Electronic-Version.pdf>, accessed on 14 July 2021, accessed on 14 July 2021.

¹⁶² Shope op cit note 81 at 78.

CHAPTER THREE

VIRTUAL ARBITRATION

Since the advent of the COVID-19 pandemic, the arbitration world has witnessed a major shift towards the use of digital technology in international arbitration to facilitate the conduct of virtual arbitration proceedings. The need to ensure that the arbitral dispute resolution process carries on in the midst of the global pandemic and the control measures taken in its response has been a key driver for this shift.

This chapter seeks to explore the idea of international arbitration proceedings being conducted virtually. In so doing, an outline is provided of how the process works as well as its efficacy and the concerns that have arisen from its use during the pandemic. It then concludes by highlighting factors that need to be considered by arbitration users before the process is initiated so as to enhance its success.

I. OUTLINE OF VIRTUAL ARBITRAL PROCESS

Virtual arbitration has been defined as an arbitration that is held using an online platform or other means of communication technology.¹⁶³ The term has also been used to describe an arbitration in which the participants attend proceedings without being physically present at the hearing venue.¹⁶⁴ That is to say, the participants may put in an appearance in the proceedings, but these proceedings would be conducted in a virtual setting.

In the writer's view, virtual arbitration can be best defined as an arbitration conducted through digital technologies that enable participants in multiple locations to communicate and interact with each other.¹⁶⁵ Examples of such technologies include email, electronic filing systems, video and audio-conferencing platforms, cloud storage systems, multimedia presentations and real-time electronic transcripts and artificial intelligence.¹⁶⁶

¹⁶³ Adolf op cit note 30 at 138

¹⁶⁴ Ibid.

¹⁶⁵ Scherer op cit note 145 at 6.

¹⁶⁶ Queen Mary University of London and White & Case '2018 International Arbitration Survey: The Evolution of International Arbitration' at 31 available at <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>, accessed on 9 January 2022.

The conduct of arbitral proceedings through virtual processes as those stated above is not a new practice in the field of international arbitration. Neither is it an innovation of the pandemic era. As an inherently flexible dispute resolution mechanism, international arbitration has often incorporated technological tools at various stages of the arbitral process as and when necessary.¹⁶⁷

Indeed, for several years preceding the pandemic, audio and video conferencing platforms have been used in certain procedural hearings and case management conferences to save costs especially where parties and their lawyers were not based in the same jurisdiction.¹⁶⁸ For example, it has not been uncommon for emergency arbitrator and expedited procedures to be conducted by way of audio and videoconference.¹⁶⁹

This is seen in Article E-9 of the ICDR Rules 2014 which in providing for international expedited procedures states that ‘hearings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator’. Similar provisions appear in Article 4.2 of Appendix V and Article 3.5 of the ICC Arbitration Rules 2017 in respect of emergency arbitrator appointments.

Aside from procedural hearings and case management conferences, audio and video conferencing technology have in past times been employed in evidentiary hearings to accommodate witnesses who on account of visa issues, health problems or other reasonable grounds were not able to appear at an in-person hearing.¹⁷⁰ In these instances, the other arbitral participants would be physically present at the venue of the hearing and only that particular witness would appear remotely.¹⁷¹

Institutional arbitration bodies such as ICSID have actually been conducting virtual hearings using its own video conferencing platform for a long time and these hearings have increased steadily year after year.¹⁷² In 2019 alone, 60 per cent of the hearings held in cases administered by the centre were conducted by way of videoconference.¹⁷³ Thus, it is not surprising

¹⁶⁷ Muigua op cit note 8 at 4.

¹⁶⁸ Pierce op cit note 7.

¹⁶⁹ Scherer op cit note 145 at 7.

¹⁷⁰ Supra note 168.

¹⁷¹ Singer op cit note 13.

¹⁷² ICSID op cit note 113.

¹⁷³ Ibid

that a survey conducted among international arbitration users in 2018 revealed that a substantial number of them had used videoconferencing technology.¹⁷⁴

While the use of videoconferencing and other IT tools in international arbitration has been a reality long before the outbreak of COVID-19, these tools have gained popularity during the pandemic owing to the control measures implemented globally by national governments in its response which have caused disruption to physical gatherings and travel and led to many arbitral proceedings being conducted entirely through virtual means with all or most participants being physically separated.

Where such arbitrations have been conducted, the proceedings generally begin with the issuance by the claimant of a notice referring to arbitration the dispute between the parties.¹⁷⁵ This notice would essentially be sent to the respondent through electronic mail, or an e-filing platform run by an arbitral institution.¹⁷⁶ The respondent would then issue its response which would be transmitted to the claimant and/or arbitral institution electronically.

The parties would then deal with the selection and appointment of the arbitral tribunal. A number of online resources currently offer parties information about arbitrators to assist them in the arbitrator selection process. These include Arbitrator Intelligence (AI), ArbiLex and GAR Arbitrator Research Tool.¹⁷⁷ Parties may also conduct online interviews with potential arbitrators to assess their qualifications, experience, and availability to deal with their cases.¹⁷⁸

Once the tribunal is appointed, it may organize one or several procedural meetings with the parties which would often be held through teleconference or videoconference.¹⁷⁹ Other communications between the parties and the tribunal may be effected through emails. The exchange of written statements and other submissions between the parties would also be done by email or through online document-sharing platforms.¹⁸⁰

¹⁷⁴ Queen Mary University of London op cit note 166 at 32.

¹⁷⁵ Muigua op cit note 8 at 4

¹⁷⁶ Scherer op cit note 145 at 4.

¹⁷⁷ More details on these resources can found at <https://arbitratorintelligence.com/>, <https://www.arbilex.co/welcome>; and <https://globalarbitrationreview.com/tools/arbitrator-research-tool>, accessed on 8 January 2022.

¹⁷⁸ In the wake of the pandemic, questions that may arise in these interviews may be linked to an arbitrator's track record in conducting virtual proceedings and their competency levels in using virtual platforms. See Catherine Rogers and Fahira Brodlija 'Arbitrator Appointments in the Age of COVID-19' at 61 available at <https://ssrn.com/abstract=3656620>, accessed on 8 January 2022.

¹⁷⁹ Supra note 176.

¹⁸⁰ Ibid.

In proceedings conducted on a documents-only basis, the tribunal would deliver its award on the basis of the documentation submitted by the parties electronically.¹⁸¹ Where, however, it is agreed by the parties that a hearing be held, the same would usually be conducted by videoconference. The tribunal's authority to hold these hearings virtually is generally governed by the arbitral laws of the seat of the arbitration and the applicable procedural rules of arbitration.

Where these laws or rules explicitly provide for the possibility of conducting virtual hearings, the tribunal may proceed to conduct the hearing in that manner unless otherwise agreed by the parties.¹⁸² Where no such provision is made, the tribunal would have to seek the consent of the parties before proceeding with a virtual hearing.¹⁸³ This is to avoid any challenge against the enforceability of the resulting award on grounds, such as for example, that the parties were deprived of their right to a fair hearing.¹⁸⁴

Should one party be opposed to the hearing being conducted virtually, the tribunal has authority to go ahead with the virtual hearing despite the objection where it deems it appropriate to do so after taking into account the facts of the matter.¹⁸⁵ At the conclusion of the hearings, the tribunal would issue its award to the parties in an electronic format or in a printed form sent by registered mail following any deliberations by it held either by phone, email or videoconference.¹⁸⁶

II. EFFICACY OF VIRTUAL ARBITRATION

The adoption of digital technologies to facilitate virtual proceedings in international arbitration has over the years evoked diverging views among arbitration experts.¹⁸⁷ For the traditionalists, the idea of witnesses being questioned from remote locations using virtual processes is 'fundamentally unsound'.¹⁸⁸ The enthusiasts, on the other hand, take the view that virtual processes may aid in eliminating the costs and time expended in conducting arbitral proceedings.¹⁸⁹

¹⁸¹ Muigua op cit note 8 at 6.

¹⁸² Mohamed Abdel Wahab 'Exculpating the Fear to Virtually Hear: A Proposed Pathway to Virtual Hearing Considerations in International Arbitration' (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer: Viral Changes in ADR During the Pandemic* at 18.

¹⁸³ Ibid.

¹⁸⁴ Bateson op cit note 64 at 161.

¹⁸⁵ Scherer op cit note 145 at 15.

¹⁸⁶ Ibid at 4.

¹⁸⁷ Nappert op cit note 10 at 132.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

This debate has continued during the pandemic in view of the increased use of videoconferencing platforms in arbitration proceedings during this time. However, as arbitrators, parties, lawyers, and other arbitral participants have adapted to using these technologies in facilitating the resolution of disputes amid the pandemic, the efficacy of virtual arbitration proceedings has been revealed. The scope to which these technologies enhance the efficient conduct of arbitration is discussed below.

a) Lower costs

Firstly, virtual arbitration proceedings, unlike those conducted in person, do not require arbitral participants to travel and physically meet at one location. Consequently, the logistical costs typically incurred in the organization of physical hearings such as air tickets fares, accommodation fees and hearing venue expenses are avoided.¹⁹⁰ These costs can be quite significant in proceedings where physical hearings are held over an extended period of time as the participants may have to make several trips to the hearing venue which can be quite costly.

The absence of physical travel in virtual arbitrations also has the effect of lowering the legal fees charged by lawyers in proceedings where hearings would ordinarily be held in other jurisdictions.¹⁹¹ In some arbitrations, these fees can reach millions of dollars thus driving up the costs of prosecuting and defending arbitral claims.¹⁹² For years, the international arbitration community has made attempts to bring down these costs, with little success.¹⁹³ Virtual proceedings have however proven useful in containing these expenses.

b) Saving of time

Aside from being cost effective, virtual proceedings offer the advantage of resolving arbitral disputes expeditiously. One reason for this is that virtual tools such as electronic mail and online filing systems enable parties to file and exchange pleadings and other case related documents instantly without any need of delivering numerous hardcopy documents to other participants in the case. This has the effect of saving time particularly in multi-party arbitration proceedings where many hours are often spent in preparing hearing bundles and other voluminous case materials.¹⁹⁴

¹⁹⁰ Hafez op cit note 32 at 94.

¹⁹¹ Ratan Singh and Gracious Timothy Dunna ‘Virtual Arbitration and Remote Advocacy’ at 2, available at <https://ssrn.com/abstract=3755435>, accessed on 2 January 2021.

¹⁹² Blackaby op cit note 80 at 25.

¹⁹³ Ibid.

¹⁹⁴ Supra note 190 at 1

Videoconferencing technology is another time-saving virtual tool in international arbitration proceedings as it has cut down on the time spent by arbitral participants who are in different countries to travel to one location for hearings. An illustration of the time typically lost on account of travel in international arbitration proceedings is set out below by one commentator:

‘A few years ago, I met a lawyer from San Francisco who had made twenty-four trips to Asia to participate in the resolution of a single dispute. He reported that the arbitrators would listen to one witness a week. The witnesses came from diverse places in Asia and North America. If a witness occupied the attention of the forum for more than a day or two, they would take a week off between witnesses so that the arbitrators could catch up on other work and decide which witness to hear next. Meanwhile, Counsel was free to return to California or stay in Asia at his client’s expense’.¹⁹⁵

With videoconferencing technology, such practices have now been rendered a thing of the past as it has eliminated the need to travel where the arbitral participants are in different countries.¹⁹⁶ The consequence of this is that parties and their lawyers have more time to prepare for their cases thereby making them more productive and enhancing the efficiency of the process.¹⁹⁷

c) Easier scheduling of hearings

Physical hearings come with the challenge of finding suitable hearing dates and times for busy arbitrators, lawyers, and parties who may be travelling from different parts of the world thus making it quite difficult to schedule hearings.¹⁹⁸ In virtual proceedings, hearings can, on the other hand, be easily arranged and attended by participants from any part of the world without having to plan around ‘travel time, hotel check-ins, jet lags, or such other time-consuming efforts’.¹⁹⁹

Difficulties may, however, arise when tribunals are required to coordinate numerous participants based in various time zones as it may be hard to come up with hearing times within regular working-day hours of each participant.²⁰⁰ Some participants may, therefore, find themselves having to sit during sleeping hours in order to attend hearings which in turn may cause disparities between the parties.²⁰¹

¹⁹⁵ Paul Carrington ‘Virtual Arbitration’ (2000) Vol.15, No.3 *Ohio State Journal on Dispute Resolution* at 669.

¹⁹⁶ *Ibid.*

¹⁹⁷ Singh *op cit* note 191 at 1.

¹⁹⁸ Singer *op cit* note 13.

¹⁹⁹ *Supra* note 197.

²⁰⁰ Hussein *op cit* note 5 at 128.

²⁰¹ Bateson *op cit* note 64 at 167.

III. LIMITATIONS OF VIRTUAL ARBITRATION

While virtual processes undoubtedly come with a number of benefits for arbitration users, the conduct of virtual proceedings is not without its shortcomings. Indeed, concerns have been raised by some arbitration users and arbitrators as to the difficulties associated with the use of virtual technology in international arbitrations particularly with regard to hearings.²⁰² Potential problems that might arise from the use of this technology in arbitration are:

a) Technical difficulties

A key concern arising from the conduct of virtual arbitrations is the possibility of proceedings being disrupted on account of technical failure.²⁰³ Such is the case where hearings are held using videoconferencing technology. In these hearings, it is not unusual for participants to experience internet outages, image freezing, audio distortion and disconnections from video calls in the course of proceedings.²⁰⁴

Technical issues like these have the potential to affect the flow of evidence during witness examination and also lead to delays in the proceedings. As participants in virtual hearings are typically in separate locations, addressing these technical issues may be quite challenging thereby making the arbitral process less efficient.²⁰⁵ Generally, the more remote participants involved, the greater the likelihood of technical glitches occurring.²⁰⁶

b) Loss of human element

The virtual conduct of arbitral proceedings has also raised concerns with regard to the evaluation of witness testimony during hearings. It is asserted that the set-up of virtual hearings limits the ability of tribunals and cross-examining parties to properly observe the body language, tone and demeanor of witnesses and assess their credibility.²⁰⁷

²⁰² Albert Bates Jr and Danielle Volpe ‘Zooming Ahead: Challenges and Consideration for Virtual International Arbitration Proceedings in the Wake of Covid-19 Pandemic’ (2020) Vol.35, No.8 *Mealey’s International Arbitration Report* at 2.

²⁰³ Muigua op cit note 8 at 10.

²⁰⁴ Tania Sourdin and John Zeleznikow ‘Courts, Mediation and COVID-19’ (2020) Vol.48, No.2 *Australian Business Law Review* at 156.

²⁰⁵ Supra note 203.

²⁰⁶ Scherer op cit note 145 at 23.

²⁰⁷ Supra note 203.

A reading of caselaw reveals, however, that these concerns are not quite valid. In the Canadian case of *R. v Gibson*²⁰⁸, for instance, it was found that the virtual hearing technology employed did not only enable the judge to hear and see the witness, but it also magnified the witness' expressions during cross examination and enhanced the judge's ability to gauge their demeanor.²⁰⁹

Indeed, most videoconferencing technology currently available are able to display close-up images of witnesses on the video screen as they testify enabling participants to view the faces and full frames of witnesses and pick up on their non-verbal cues.²¹⁰ With this technology, the ability of the tribunal to view and listen to testifying witnesses is in some cases as good as or even better than in an in-person hearing so long as there is good transmission.²¹¹

c) Witness Coaching

Another shortcoming of virtual arbitration proceedings is the risk of a testifying witness being guided on how to answer questions during evidentiary hearings by persons off screen or through a hidden script, computer, or phone.²¹² This was the concern in a virtual hearing held in the UAE where one witness was constantly glancing to his left side each time he was asked a question, giving the impression that there may have been someone coaching him away from the view of the camera.²¹³

d) Loss of focus and concentration

In virtual arbitrations where hearings are lengthy, participants may find themselves easily losing concentration due to the prolonged use of computer screens, cognitive overloading, and the inability to move around from having to remain within the view of the webcam.²¹⁴ Their attention

²⁰⁸ (2003) B.C.J. No. 812 (B.C. Supreme Court).

²⁰⁹ Grant Hanessian and Brian Casey 'Virtual Arbitration Hearings When a Party Objects: Are There Enforcement Risks?' (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer: Viral Changes in ADR During the Pandemic* at 28.

²¹⁰ Scherer op cit note 145 at 20.

²¹¹ Ibid

²¹² Bateson op cit note 64 at 167.

²¹³ Hussein op cit note 5 at 142.

²¹⁴ Ian Mackenzie 'Are Virtual Hearings the Same as the Real Thing', available at <http://www.slaw.ca/2021/05/06/are-virtual-hearings-the-same-as-the-real-thing/>, accessed on 15 February 2022.

may also easily be shifted to other activities during virtual hearings causing them to act less efficiently.²¹⁵

Further, participants in environments that are crowded or plagued with many distractions such as background noises may find it harder to focus on the proceedings. For testifying parties, such distractions are likely to affect the quality of their evidence and place them at a disadvantage against parties participating from places where distractions are fewer.²¹⁶

e) Loss decorum and formality

Concerns have also been expressed about virtual proceedings not providing the same solemnity as proceedings conducted in person.²¹⁷ As virtual arbitration proceedings allow for participants to take part in hearings from the comfort of their homes it is natural that they may feel more relaxed than they would in a formal hearing setting.²¹⁸ In certain instances, participants may become so relaxed in their home setting such that they lose sight of the need to conduct themselves with the same decorum and formality expected of in physical arbitration proceedings.

It is reported, for example, that one witness who was testifying from his home in a Zoom virtual arbitration, decided to log out of the hearing session whilst under cross examination.²¹⁹ In another case, a male attorney had to be reminded of the need to dress appropriately after appearing in a virtual hearing without a shirt while his female counterpart appeared in her beddings.²²⁰ Such acts of indiscipline are normally seen in virtual hearings where many participants are involved some of whom may feel the tribunal has no direct control over them.²²¹

f) Information security threats

A further concern raised in respect of virtual arbitration proceedings relates to the confidentiality and security of information exchanged by participants during the arbitral process. Virtual arbitration tools, like many other forms of information technology, are not free from cyber threats

²¹⁵ Paul Mason 'Videoconferencing in International Arbitration and Mediation Proceedings' in Horacio A. Grigera Naón and Paul Mason and *International Commercial Arbitration Practice: 21st Century Perspectives* (2020) at 270.

²¹⁶ Amy Schmitz 'Arbitration in the Age of Covid: Examining Arbitration's Move Online' (2021) 22 *Cardozo Journal of Conflict Resolution* at 290.

²¹⁷ Scherer op cit note 145 at 22.

²¹⁸ Wilske op cit note 6 at 15.

²¹⁹ Hussein op cit note 5 at 142.

²²⁰ *Supra* note 218 at 43.

²²¹ *Ibid.*

and data breaches especially where proper safeguards are not in place to ensure protection against them.²²²

For instance, email systems used for the filing and exchange of case documents and other communications may be subject to hacking thereby allowing third parties to access personal information about the parties and other private data.²²³ Further, in hearings conducted via videoconferencing technology, there are risks that unauthorized individuals may acquire the log-in credentials for the conference and disrupt the proceedings.²²⁴

Such was the case with a videoconference held in 2020 through Zoom which was invaded by a hacker who shared footage of child pornography on the virtual platform causing the conference to abruptly end.²²⁵ Although security measures to prevent such intrusions have since been implemented by Zoom, there is still a risk that operators of the platform and other videoconferencing service providers may use or share data stored and transmitted on the platforms with third parties which would have damaging consequences for arbitral parties that have exchanged sensitive information on the platform.²²⁶

IV. PRELIMINARY CONSIDERATIONS IN VIRTUAL ARBITRATION PROCEEDINGS

Following on from the concerns highlighted above, there are certain factors that must be considered by parties and tribunals in planning for virtual arbitration proceedings to ensure the process succeeds. Below are some of the preliminary considerations that must be taken into account:

a) Choice of technical framework

In preparation for virtual proceedings, it is necessary that the parties agree on the technology to be used in the matter, including the online platform through which hearings shall be conducted.²²⁷ An ideal platform must be able to support as many participants as required; provide for breakout meetings for tribunal deliberations; enable the use of electronic hearing bundles; permit the sharing

²²² Hafez op cit note 32 at 94.

²²³ Muigua op cit note 8 at 10.

²²⁴ Ibid.

²²⁵ BBC News 'Zoom support meeting hacked with child abuse images' available at <https://www.bbc.com/news/uk-england-bristol-52412845>, accessed on 16 March 2022.

²²⁶ Scherer op cit note 145 at 27.

²²⁷ Supra note 223 at 7.

of documents; and offer features for language interpretation.²²⁸ Gaining access to such platforms well beforehand is important for ensuring that participants familiarise themselves with their functioning.²²⁹

b) Technical capabilities

Employing technology in arbitral proceedings presupposes that the participants to the proceedings are technologically literate.²³⁰ However, not all participants will possess such competencies which could hinder them from effectively taking part in the proceedings thereby frustrating the process. To eliminate the likelihood of lapses occurring at hearings on account of having participants with limited technological skills, tribunals are advised to arrange a practice session with participants in advance of the hearing to assist them in adapting to the relevant technology.²³¹

c) Access to proper internet connectivity and equipment

The participants to the virtual arbitration proceedings must also have access to fast and reliable internet connectivity and other recommended hardware for conducting virtual hearings such as webcams, speakers and microphones.²³² The parties are generally responsible for arranging the equipment which they and their witnesses will use during hearings.²³³ Should this prove challenging, a request can be made by the parties to use the virtual hearing facilities of an arbitral institution.²³⁴

d) Minimising disruptions brought on by technical failures

As technical glitches are a common challenge in virtual proceedings, it is crucial that all technology and equipment that participants will use at hearings are tested beforehand. Such tests may be done at a virtual pre-hearing conference where all participants are present.²³⁵ At that stage, a backup plan with options of alternative channels of communication should be put together in the event of a technical breakdown at the hearing.²³⁶

²²⁸ James Hosking and Marcel Engholm Cardoso 'Practical Considerations for Holding a Remote Arbitration Hearing' (2020) Vol.13, No.2 *New York Dispute Resolution Lawyer* *Viral Changes in ADR During the Pandemic* at 15.

²²⁹ *Ibid.*

²³⁰ Petra Butler 'International Commercial Arbitration Put to the Test in the Commonwealth' (2020) Vol.51, No.3 *Victoria University of Wellington Law Review* at 373.

²³¹ Muigua *op cit* note 8 at 7.

²³² Lo *op cit* note 11 at 89.

²³³ Singer *op cit* note 13.

²³⁴ Battison *op cit* note 136 at 7.

²³⁵ *Supra* note 233.

²³⁶ Hafez *op cit* note 32 at 92.

Arrangements should also be made to have IT technicians on standby to assist participants with any technical issues that might arise in the course of the proceedings.²³⁷ A number of arbitral institutions that offer virtual hearing services to users do in fact include the provision of such technicians as part of the services.²³⁸

e) Hearing hours

Where participants attending a virtual hearing are located in different jurisdictions with different time zones, adjustments must be made to the hearing schedule to accommodate the time differences between them. This may include having shorter hearing sessions, calling fewer witnesses in the matter, splitting hearings into sessions with several short breaks between each session.²³⁹ Having such regular breaks during hearings is important as it enables participants to refresh their minds when proceedings are lengthy.²⁴⁰

Tribunals may also consider the possibility of starting the hearing sessions at different times of the day in order to ensure that neither party continuously enjoys more favourable sitting hours.²⁴¹ Alternatively, the parties may agree to appear before the tribunal separately to argue their cases in a virtual hearing which is recorded and uploaded online for the opposing party after which a joint hearing would be convened to deal with any remaining issues.²⁴²

f) Data protection and privacy

To minimise potential information security breaches in virtual proceedings, arbitration users are encouraged to use encrypted electronic mail services during email communications in which sensitive information is exchanged.²⁴³ Where hearings are concerned, users are advised to choose virtual hearing platforms secured with password protection and end-to-end encryption.²⁴⁴

Invitations to the hearing should be sent directly to participants who must be warned against sharing the log-in credentials for the hearing with third parties.²⁴⁵ It is also recommended

²³⁷ Muigua op cit note 8 at 8.

²³⁸ Bateson op cit note 64 at 166.

²³⁹ Lo op cit note 11 at 90.

²⁴⁰ Hosking op cit note 228.

²⁴¹ Steven Skulnik 'Considering Video Conference Arbitration Hearings in the US: Ensuring Due Process'(2020) Vol.13, No.2 *New York Dispute Resolution Lawyer: Viral Changes in ADR During the Pandemic* at 31.

²⁴² Battison et al op cit note 136 at 7.

²⁴³ Muigua op cit note 8 at 9.

²⁴⁴ Scherer op cit note 145 at 27.

²⁴⁵ Singer op cit note 13.

that a list of the participants be submitted by the parties ahead of time so that admission into virtual hearing rooms may be controlled to prevent unauthorised access to the same.²⁴⁶

For purposes of data protection, parties are advised to assess the privacy policies of the chosen virtual hearing platform to see the extent to which users grant the service provider permission to collect and use data exchanged on the platform and whether the said provider has rights of ownership over that data.²⁴⁷ Generally, parties are encouraged to opt for platforms that do not have any standing access to this data.²⁴⁸

g) Safeguards for preserving the integrity of hearings

To avert the risk of off camera coaching, tribunals should request witnesses to confirm whether other persons are present in the room from which they will give their testimony.²⁴⁹ Witnesses may also be ordered by tribunals to do a 360-degree rotation of their webcams so as to provide a full view of the said room.²⁵⁰ In other cases, the opposing party may assign someone to sit in the same room as the testifying witness while they are being examined.²⁵¹

During their testimony, witnesses should be made to sit at a clean desk that gives a good visual of their faces, and should they be required to refer to any documents, the tribunals should be allowed to request the witness to display the same before it to confirm it has no annotations.²⁵² To prevent any communications between witnesses and other participants, tribunals may restrict the chat function in videoconferencing platforms and direct witnesses to switch off mobile devices.²⁵³

V. CONCLUSION

The COVID-19 global health crisis has caused a need for users of international arbitration proceedings to adapt to the idea of conducting arbitrations through virtual means. At the time the pandemic struck, the concept of virtual arbitration was already in existence but not being utilised fully. With the imposition of physical contact limitations, stay-at-home orders, travel bans and

²⁴⁶ Hosking op cit note 228.

²⁴⁷ Bateson op cit note 64 at 167.

²⁴⁸ Ibid.

²⁴⁹ Singer op cit note 13 at 33.

²⁵⁰ Nappert op cit note 10 at 137.

²⁵¹ Singh op cit note 191 at 3.

²⁵² Battisson op cit note 136 at 8.

²⁵³ Supra note 250.

other COVID-control measures, the benefits offered by virtual proceedings to arbitration users began to be valued.

While the conduct of virtual proceedings appears to promote efficiency in the resolution of arbitral disputes, it also has its own limitations. Hearings by way of videoconferencing technology pose the greatest challenges. Where parties are unable to effectively present their cases on account of such challenges, the resulting award may be annulled or set aside. Fortunately, most of the challenges associated with the use of the said technology can be addressed if tribunals and parties take the time to properly plan for the virtual arbitration proceedings.

CHAPTER FOUR

LESSONS AND RECOMMENDATIONS EMERGING FROM THE PANDEMIC

Since its initial outbreak, COVID-19 has continued to spread throughout the world as new strains of the virus causing the disease keep emerging and mutating. In recent months, however, many countries have begun to ease the restrictions that were introduced at the onset of the global health crisis as way of embracing and adapting to the new normal.

The response of the arbitration community to the pandemic and its effect on arbitral proceedings thus far has yielded several important lessons regarding the field of international arbitration. This chapter will discuss some of the key lessons that may be drawn from the pandemic and its effect on international arbitration. It will also offer recommendations for the future conduct of international arbitration proceedings in the wake of the pandemic.

I. LESSONS

a) Flexibility

International arbitration has for a long time been a preferred method for resolving cross-border disputes due in large part to its flexible nature. The significance of international arbitration as a flexible dispute settlement process has been brought to light as the arbitration world has grappled with the COVID-19 pandemic and its disruption to the conduct of arbitral proceedings. One of the benefits this flexibility has provided during the current pandemic is that it has allowed parties to design their arbitrations in a manner that ensures all cases materials are submitted and exchanged in an electronic format as opposed to being done physically.²⁵⁴

It has also enabled adjustments to be made to procedural timetables during proceedings such as for example the scheduling of hearing times as well as timelines for the submission of case materials and the delivery of awards.²⁵⁵ Parties have also been able to agree that hearings be held virtually²⁵⁶ thereby making it possible for arbitral participants in different locations to connect and

²⁵⁴ Myriam Seers et al 'Moving Disputes Forward During COVID-19: The Arbitration Option' (2020) *Emerging Areas of Practice Series - COVID-19 (Coronavirus)* 2 at 2

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid* at 1.

conduct proceedings in the midst of travel bans, stay-at-home orders, contact limitations and other COVID restrictions so that cases continue.

The field of international arbitration has actually seen an increasing number of new arbitration cases since the start of the pandemic. The ICC, for instance, reports that it received 956 referrals in 2020 representing an 8 per cent increase from 2019 when it recorded 869 new case filings.²⁵⁷ SIAC, on the other hand, recorded 1080 new cases in 2020, rising from the 479 cases that had been received by the centre in 2019 and the 402 cases recorded in 2018.²⁵⁸

This surge in cases has proven that arbitration is still the preferred method of resolving many cross-border disputes despite the numerous challenges brought on by the pandemic and its restrictions. The great flexibility international arbitration has shown in its procedures during the pandemic is expected to enhance its attractiveness over other forms of dispute resolution such as litigation.

b) Adaptability

The COVID-19 pandemic has also demonstrated just how well the arbitration community is able to adapt to changing environments and situations. When different courts around the world were functioning at limited capacity and litigants were struggling to figure out how to make changes to their procedural timetables and deal with the uncertainties brought on by the pandemic,²⁵⁹ major arbitral institutions had intimated their intention to proceed with new and ongoing disputes.

Through the adoption of digital technologies, arbitrations were quickly moved online in order to avoid delays in the resolution of disputes. To facilitate this shift, amendments were made to institutional rules of arbitration to allow for the conduct of virtual arbitration. Many arbitration service providers also released guidelines on virtual arbitration and acquired technological equipment that would enable a smooth transition from in-person proceedings.

²⁵⁷ ICC ‘ICC announces record 2020 caseloads in Arbitration and ADR’, available at <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/>, accessed on 15 March 2022.

²⁵⁸ SIAC ‘SIAC Annual Report 2020’ at 16, available at https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf, accessed on 15 March 2022.

²⁵⁹ Crowell & Moring LLP ‘Amid Court Closures and COVID-Related Chaos, Arbitration Goes On’, available at <https://www.crowell.com/NewsEvents/AlertsNewsletters/International-Dispute-Resolution-Alert/Amid-Court-Closures-and-COVID-Related-Chaos-Arbitration-Goes-On>, accessed on 17 May 2020.

The swiftness within which the shift to virtual proceedings took place was hardly surprising owing to the fact that some of the digital technologies adopted were already being used at certain stages of the arbitral process and as such, there was already some form of familiarity with these technologies.²⁶⁰

In any case, at the time the shift was made, nationwide lockdowns had been imposed in many countries making it difficult to conduct physical hearings. Holding off these hearings until a time when it would be possible to meet in person would have had serious cost and time implications for disputing parties and their cases.²⁶¹

c) Acceleration of existing trends

Although digital technologies were previously being explored in arbitral proceedings, the pandemic has helped in expanding their use. In particular, the pandemic has led to an increased use of video conferencing technologies which, prior to the pandemic, were mostly employed in case management conferences and procedural hearings.

Since the pandemic began, there has been wider use of these technologies in evidentiary hearings. Previously, evidentiary hearings were mostly held in person, and it was only witnesses who, for well-founded reasons, were unable to appear in person that would participate in the proceedings remotely.

However, most evidentiary hearings conducted during the pandemic have been held either partially or entirely through remote means, with all or most of the attendees joining in from far and wide places. The pandemic has, therefore, aided in fast tracking the adoption of digital technologies in the arbitration dispute resolution process, a trend that was already underway before the pandemic hit.²⁶²

This increase in the use of technology in international arbitration proceedings is actually one of the most significant impacts of the pandemic in international arbitration thus far and has shown that the arbitration community is in fact receptive to the application of new techniques and tools in the conduct of arbitral proceedings.

²⁶⁰ Joshua Karton, 'The (Astonishing) Rapid Turn to Remote Hearings in Commercial Arbitration' (2021) 46 *Queen's Law Journal* 401.

²⁶¹ *Ibid.*

²⁶² Pierce *op cit* note 7.

d) Procedural innovation

Ultimately, the COVID-19 pandemic has required arbitrators, parties, lawyers and other arbitral players to reassess the way international arbitrations are conducted. What has been revealed during the crisis is that arbitral hearings need not be conducted in person but can successfully be conducted remotely with the aid of virtual technology.

It therefore comes as no surprise that one arbitration service provider reported that more than 95 per cent of the hearings it hosted before the pandemic were held physically whereas at the start of 2021, more than 95 per cent of the hearings it administered were either wholly or partly virtual.²⁶³ Accordingly, while some members of the arbitration community have expressed misgivings about the adoption of virtual hearing platforms in arbitral proceedings, others appear to have embraced the use of these technologies as a suitable alternative to the conduct of in-person hearings.

The crucial question is whether virtual hearings are merely a short-term emergency response to the pandemic or whether their use will carry on even after the pandemic is over. At present, most countries have made efforts to get back to normal activity and have since opened their borders for travel and relaxed on physical contact limitations and other COVID restrictions, thus allowing for in-person hearings to be held. Nevertheless, some countries are still reporting high COVID-19 infection rates and therefore virtual hearings are still being used.

Experts believe that the longer the pandemic lasts, the more accustomed arbitration users and tribunals will become to the conduct of virtual hearings.²⁶⁴ According to them, such increased comfort with virtual hearings and the technology behind it is in turn likely to enhance the use of virtual hearings and make them a regular procedural practice even if the pandemic came to an end as the time and cost efficiencies of virtual hearings are unlikely to be given up by users and tribunals.²⁶⁵

In that sense, the pandemic has had the effect of increasing the procedural choices available to arbitration users in the arbitral process, enabling them to pick out the option that is best suited

²⁶³ Karton op cit note 260 at 402.

²⁶⁴ Pierce op cit note 7 at 65

²⁶⁵ Ibid.

for their case. It is hoped that with the increase of virtual hearings in international arbitrations, proceedings will become more cost-effective and time efficient.

II. RECOMMENDATIONS

It is evident that the COVID-19 pandemic has brought about procedural innovation in the conduct of international arbitration. As the pandemic and pandemic-like occurrences may reoccur in the future, the practice of international arbitration is likely to call for more such innovation and greater reliance on digital technologies that provide efficient means of resolving arbitral disputes.

Given that the field of international arbitration has for many years received heavy criticism over its failure to resolve disputes in a speedy and cost-effective manner, it is imperative that the arbitration community remains open to the use of digital technologies such as virtual hearing platforms which have the potential to cut down on the time and costs normally spent conducting in-person hearings.

Admittedly, virtual hearings may not be ideal for every type of case. Parties and tribunals must, therefore, give careful thought as to whether these hearings will serve as an acceptable substitute to in-person hearings and cater to the particular needs of the given case. If appropriate, consideration must be given to the best practices outlined in the various guidelines issued by arbitral institutional bodies to ensure that the hearings are conducted in an efficient and fair manner.

Where parties are uncomfortable with conducting virtual hearings and are unable to hold physical hearings, they may wish to consider the documents-only procedure particularly where the dispute hinges on straightforward questions of law and fact.²⁶⁶ In this way, the technological and security concerns that often arise in the conduct of virtual hearings can be avoided.²⁶⁷

As the use of technology in international arbitration increases so will the demand for technically competent arbitrators.²⁶⁸ It is, therefore, crucial that arbitrators gain the necessary technical skills to enable them to effectively conduct case management and hearings through virtual means. Arbitrators must purposely acquaint themselves with online filing and document

²⁶⁶ Muigua op cit note 8 at 13.

²⁶⁷ Ibid.

²⁶⁸ Rogers op cit note 178 at 10

management systems, electronic signature technology as well as audio and video conferencing platforms which are all relevant in the successful conduct of virtual arbitral proceedings.²⁶⁹

Additionally, while some of the major arbitration institutions have amended their rules of arbitration to provide for virtual hearings, others are yet to undertake these efforts. Those institutions whose rules have not yet been amended to make provision for virtual proceedings should consider doing so as parties are likely to turn to institutional rules that specifically provide for the conduct of virtual hearings as the use of such hearings increases.²⁷⁰

III. CONCLUSION

The COVID-19 pandemic has, undoubtedly, impacted the field of international arbitration in many significant ways. On one hand, it has brought on different challenges for the arbitration world that have disrupted what was previously viewed as normal arbitration practice. On the other hand, it has presented several opportunities for the field of international arbitration including technological innovations in the conduct of arbitral proceedings.

As the pandemic is still going on, many of the procedural practices initiated by the arbitration community in its response have remained in effect. However, because these procedural practices were implemented as emergency measures at the onset of the pandemic, it is imperative that the future conduct of international arbitration proceedings should build on the strengths of these practices and address the things that have not worked.

²⁶⁹ Ibid.

²⁷⁰ Hussein op cit note 5 at 163.

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