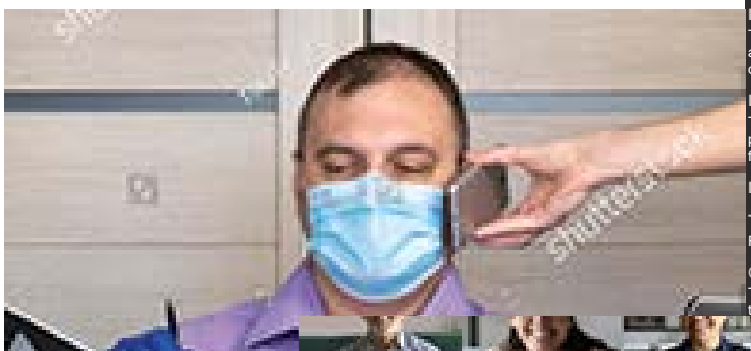
NYSBA

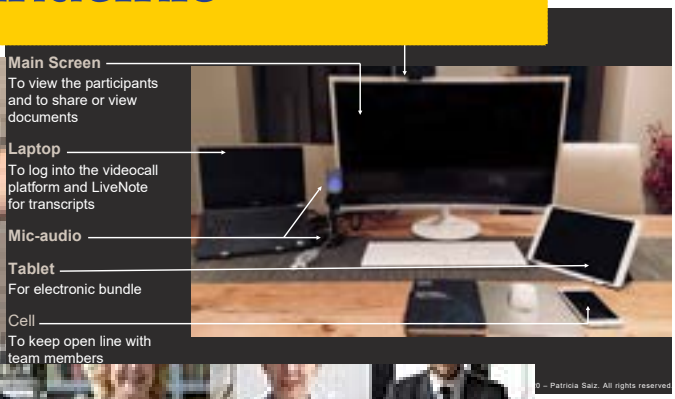
Summer 2020 I Vol. 13 I No. 2

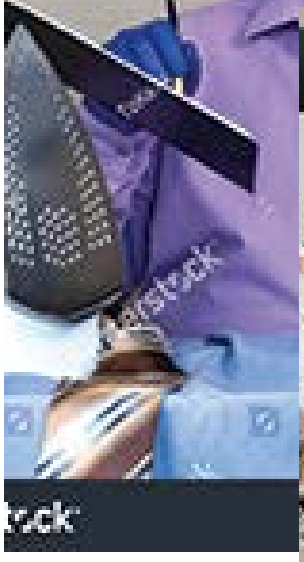
New York Dispute Resolution Lawyer

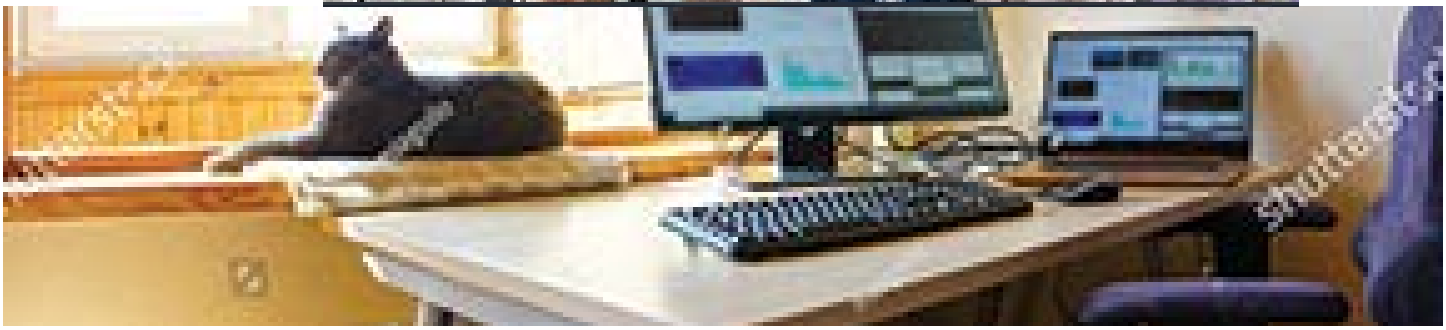
A publication of the Dispute Resolution Section
of the New York State Bar Association

Special Issue: Viral Changes in ADR During the Pandemic









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Special Issue: *Viral Changes to ADR in the Pandemic*

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

Mohamed S. Abdel Wahab

Introduction

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

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

The Proposed Pathway to Virtual Hearings

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

Second, if the applicable lex loci arbitri or the governing procedural rules (including any institutional rules) expressly refer to the possible use of technology or virtual hearings, then there is no issue and the arbitral tribunal can proceed virtually,[4] as it deems fit after careful consideration of the circumstances and the ability of the parties to reasonably present their cases. No consent would be required from the parties, unless the parties have agreed otherwise or opted out of such provisions (assuming opting out therefrom is permissible).

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

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

Reflections and Observations on the Pathway to Virtual Hearings

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

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

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

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

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

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

(b) whether the applicable law/rules refer to the parties' "*full*"[14] or "*reasonable*"[15] opportunity to present their case, and whether both terms have different legal implications or connotations under the applicable law/rules;[16]

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

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

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

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

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

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

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

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

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

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

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

Concluding Remarks

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

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

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

Amongst the novel practices that will likely take place in the near future are: (i) the building and offering of interactive virtual platforms for administering arbitration proceedings wholly or partially online by arbitral institutions; (ii) incorporating directions on the use of certain technologies and a virtual hearing option in procedural order no.1 at the beginning of the proceedings; (iii) incorporating protocols on virtual hearings and on the use of technology in the parties' arbitration agreements; (iv) enacting amendments to arbitration laws and amending arbitration rules to cater to the possible use of technology and virtual hearings; (v) developing new and innovative procedural paths for arbitrations which may include, for example, virtual hearings after each round of submissions to narrow down the issues in dispute and make proceedings more cost effective, efficient and less time consuming; (vi) adopting hybrid proceedings involving documents' only, virtual and physical hearings; (vii) issuing more and more dedicated online arbitration rules; (viii) resorting to more tech-savvy arbitrators and counsel; (ix) increased recourse to purely online arbitration proceedings; and (x) increased use of artificial intelligence throughout arbitration proceedings, including resorting to multi-variable resolution optimization programs and predictive justice applications.

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

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

Endnotes

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

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

2. For a useful compilation of resources on virtual hearings, see Delos Resources on Holding Remote or Virtual Arbitration and Mediation Hearings (May 2020), available at <https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>; More specifically, see the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (March 2020), available at <https://cms.iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>; and the Africa Arbitration Academy Protocol on Virtual Hearings in Africa (April 2020), available at <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/>.

3. The first version of the Abdel Wahab Pathway appeared in a news story by Alison Ross in the Global Arbitration Review on 06 May 2020. See Alison Ross, What if Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway, the Global Arbitration Review, 06 May 2020.

4. Article 33(3) of the UAE Federal Arbitration Law No.6 of 2018 reads: "Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing." See also Article the Jordanian Arbitration Law No. 31 of 2001 as amended by Laws no.16 and 41 of 2018 provided under Article 32 (i) that: "The arbitral tribunal may accept hearing the statements of witnesses using various technological means of communication, including tele-conference or closed circuit. In all cases, the arbitral tribunal has the right to decide the witness's appearance before the tribunal for examination"; paragraph (f) of Appendix IV of the ICC Arbitration Rules (2017), which reads "Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential (…)"; Article 33 of the CIETAC 2009 Online Arbitration Rules, which reads: "Where an oral hearing is to be held, it shall be conducted by means of online oral hearings such as video conferencing or other electronic or computer communication forms. The arbitral tribunal may also decide to hold traditional oral hearings in person based on the specific circumstances of each case"; and Article 23(2) of the SCIA 2019 Online Arbitration Rules, which reads "An arbitral tribunal may, however, where it deems it necessary, hear a case through online video hearings, online exchange of information, teleconferences, and other appropriate means, or may decide to hold offline hearings while the other processes are still conducted online."

5. Bahraini International Arbitration Law No. 9 of 2015.

6. Egyptian Arbitration Law No. 27 of 1994. Article 33 of the Arbitration Law is silent on the form/format of hearings, and makes no reference to virtual or physical hearings. However, in the specific context of judicial proceedings, Law No. 146 of 2019 was enacted to amend Law No. 120 of 2008 establishing the Economic Courts, and amongst the innovative amendments introduced by the 2019 Law is the possibility of conducting the proceedings before the Economic Courts electronically.

7. Kenyan Arbitration Act No.4 of 1995. However, Law No.19 of 2014 has amended the Kenyan Evidence Act and added Section 63A, which reads: "(l) A court may receive oral evidence through teleconferencing and video conferencing. (2) The Chief Justice may develop regulations to govern the use of teleconferencing and video conferencing", noting that Section 2(1) of the Evidence Act expressly states that "This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator."

8. Nigeria Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18). However, it is worth noting that the 2012 Judicial Information Technology Policy of the Nigerian Judiciary (JITPO) provides in paragraphs 2.5.5 that:"The use of video-conferencing technology is greatly encouraged in the Judiciary. Video-conferencing can be used to connect people in different physical locations especially for critical meetings and discussions. Video conferencing systems can also be used to enable testifying witnesses appear in court without having to travel to the courtroom […] Videoconferencing in the court system offers significant cost savings and improved security by reducing the need for high-security prisoner transport. The entire courtroom experience will be made shorter, safer and more cost-effective."

9. Qatari Arbitration Law No. 2 of 2017.

10. Saudi Arabia Arbitration Law No. 34 of 1433 Higri Year (2012).

11. South Africa International Arbitration Act No. 15 of 2017.

12. Tanzanian Arbitration Act of 2020.

13. *See* Articles 25 of the Egyptian Arbitration Law (1994), 25 of the Saudi Arbitration Law (2012), 19 of the Qatari Arbitration Law (2017), 19 of the Bahraini International Arbitration Law (2015), 15 of the Nigerian Arbitration and Conciliation Act (1988), 19 of the South Africa Arbitration Act (2017), and 20(2) of the Kenyan Arbitration Act (1995).

14. Articles 26 of the Egyptian Arbitration Law (1994), 27 of the Saudi Arbitration Law (2012), 18 of the Qatari Arbitration Law (2017), 18 of the Bahraini International Arbitration Law (2015), 14 of the Nigerian Arbitration and Conciliation Act (1988).

15. Articles 18 of the South Africa Arbitration Act (2017), 19(2) of the Kenyan Arbitration Act (1995), and 35(1)(a) of the Tanzanian Arbitration Act (2020)

16. Very recently, on 28 February 2020, the Supreme Court of Singapore held that "[T]he Court observed that the right to be heard – which refers to each party's right to present its case and respond to the case against it – was a fundamental rule of natural justice enshrined in Art 18 of the Model Law. However, the Art 18 right to a "full opportunity" of presenting one's case was not an unlimited one, and was impliedly limited by considerations of reasonableness and fairness. What constituted a "full opportunity" was a contextual inquiry to be undertaken within the specific context of the particular facts and circumstances of each case. The proper approach for the court to take was to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done". *See China Machine New Energy Corp v. Jaguar Energy Guatemala LLC* and anor [2020] SGCA 12.

17. Most of the arbitration rules and laws do not make hearings mandatory. See for example, Articles 33 of the Egyptian Arbitration Law (1994), Article 33 of the Saudi Arbitration Law (2012), Article 24 of the Qatari Arbitration Law (2017), Article 24 of the Bahraini International Arbitration Law (2015), Article 20 of the Nigerian Arbitration and Conciliation Act (1988), Article 24 of the South Africa Arbitration Act (2017), Article 25 of the Kenyan Arbitration Act (1995), and 36(2)(h) of the Tanzanian Arbitration Act (2020).