CHAPTER 7

COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration

Matthew Saunders

§7.01 INTRODUCTION

The signs of the Black Death pandemic of the fourteenth century can still be seen across Europe, in the surviving names of long-abandoned medieval villages and religious institutions. The death rate in England and across much of Europe was thought to be between 40% and 60% of the population; every facet of life continued to be impacted by the event for many decades. The disruptive economic impact on the availability of labour was profound, with many historians arguing that the changed balance of power between employer and labourer accelerated the end of feudal societal structures. This encouraged greater mobility of labour and higher wages and contributed to the notion of organised labour that underpins much social and economic change in post-medieval Europe.

Comparisons between the closing decades of the fourteenth century and COVID-19 of the third decade of the twenty-first century are clearly not the work of international arbitration lawyers. However, one parallel that can be drawn, even now before the full repercussions can be known, is the extent of the disruptive effect on working practices across Europe. The effective ban on international travel and the move to 'working from home' has been almost universal.

Few senior international arbitration lawyers are without 'gold card' frequent flyer status on at least one major airline and, not infrequently, hotel chains too. It has been suggested – largely with a 'straight face' – that the first and business class lounges at London's Heathrow Airport are one of the prime spots for international arbitrator 'networking'. While movements such as the 'Green Pledge' (now the Campaign for

Greener Arbitrations) have highlighted the environmental impact of avoidable travel, for many practitioners – and certainly many tribunal members – the default position has always been a preference for 'in person' hearings. Usually held at the seat of arbitration, in a city chosen as 'neutral' by parties who are not based there, and attended by witnesses, experts and advocates for very often several weeks. The costs of such an exercise are unsurprisingly high, but incurring them has – in the authors' experience – seldom been seen as avoidable, and very seldom been subject to meaningful scrutiny when legal costs come to be awarded. In essence, it has for many years been accepted that extensive travel to facilitate 'in person' meetings is an unavoidable – even desirable – element of the practice of international arbitration.

It is of course the case that use has increasingly been made of video technology. Reliable technology has been available for a decade, and cheap reliable technology for five years or so (Apple's 'FaceTime' product was first launched in 2010). Its use in international arbitration has however largely been limited to situations where a witness was unable to participate in person, or where the relative cost and inconvenience of travel as against the significance of their evidence was such that use of videoconferencing was considered acceptable. Approaches have varied between international arbitration centres and indeed legal cultures – with least adoption being on the part of those cultures where cross-examination of witnesses is 'most sacrosanct'. (In the authors' experience, practice in Scandinavia has been relatively accommodating but in London greatly less so.)

§7.02 IMPACT OF COVID-19

COVID-19 changed all that. The government-mandated 'lockdowns', aimed at slowing the virus' spread, introduced an effective prohibition on international travel and non-essential domestic travel, as well as closure of offices and many factories. The impact on economic activity of lockdowns has been dramatic; for example, in the UK, the Bank of England forecast the largest single drop in economic activity since 1706 (when poor harvests combined with the economic impact of a war with France saw a 15% drop in economic output).[1]

By the end of March 2020, tens of millions of office workers were working from home, making extensive use of remote working technology. Chief among the tools utilised have been videoconferencing tools such as Zoom, Google Hangouts, GoToMeeting, Microsoft Teams and BlueJeans. Allowing for occasional impromptu appearances by family pets and young children, experiences have been positive, at least gauged by the impact on the share price of Zoom which was approximately USD 68.8 at the start of 2020 but had risen to USD 166.75 as of 15 May 2020.[2]

1. The Guardian, *War and the Weather: What Caused the Huge Economic Slump of 1706?*, https://www.theguardian.com/business/2020/may/07/what-caused-the-economic-slump-of-1706-#maincontent (accessed 28 May 2020).
2. Zoom Video Communication Inc's website, *Stock Quote & Chart*, https://investors.zoom.us/stock-information/stock-quote-chart (accessed 18 May 2020).

The legal sector has been no different, with extensive adoption of videoconferencing, including rapid application to mediations and hearings. Commercial operators of arbitration hearing centres have moved swiftly to offer online hearing options and 'hybrid' offers of partial online hearings. Many of those who were previously sceptical of extensive use of videoconferencing have had little alternative but to embrace it. Whether those who believe that cross-examination of witnesses can only ever be conducted when 'you can see the whites of their eyes' want it or not, the technology 'genie' is now 'out of the bottle'. The question now is whether arbitral institutions – and the international community more widely – will seize and build upon the opportunities that this disrupting event has offered.

The devastating societal and economic impact of COVID-19 is undeniable. However, there are positives that can be found in this new way of working, not least the environmental impact, the savings in terms of cost and efficiency, and the potential to make international arbitration more accessible to those who lack the resource to properly engage in the process. In this chapter we look at those positives, and what needs to be done to ensure that we build on them going forward into a post-COVID-19 era.

§7.03 WHAT THE ARBITRATION COMMUNITY CAN LEARN FROM THE COVID-19 PANDEMIC

Arbitration has, on various occasions, been hailed as an efficient and economical means of dispute resolution. While such factors have been lauded by its promoters, widespread criticism has been levied at the international arbitration community for failing to manage costs effectively and adopting the delay-inducing practices, such as extensive document production, that national courts are now moving away from. Costs of arbitration are now consistently rated as the '*worst characteristic*' of arbitration, followed closely by a lack of speed.[3]

Institutions have taken the lead in seeking to bring about change by amending arbitral rules to introduce procedures such as for summary dismissal of claims[4] and have also published guidance on how technology may be used to save time and costs in arbitration.[5]

Although a majority (61%) of arbitration users are of the view that '*increased efficiency, including through technology*' is the factor that is most likely to have a significant impact on the future evolution of international arbitration,[6] use of technology in the conduct of arbitration has remained limited, not least due to lack of familiarity.[7] It has been suggested that such lack of familiarity is due to the high cost of

3. Queen Mary University of London, *2018 International Arbitration Survey* ('*2018 Survey*'), pp. 7–8.
4. *See*, e.g., SIAC Arbitration Rules, Rule 29 (2016).
5. *See*, e.g., ICC Commission Report, *Information Technology in International Arbitration*, International Chamber of Commerce (ICC, 2017).
6. 2018 Survey, p. 29.
7. 2018 Survey, p. 32.

technology which is still relatively new[8] (although a dispassionate analysis might well suggest that such arguments ceased to have currency a good few years ago). However, the COVID-related experience has clearly demonstrated not only that technology exists that can make the arbitral process more efficient, but also that the technology is affordable (and in some cases free).

Experience of compulsory 'working from home' has had an obvious effect on familiarity with conferencing technology. There are also other technology tools that could have a particular effect on access to 'know how' that has historically been the preserve of 'insiders' practising in the major international arbitration centres. We look at these below.

[A] Choosing the Right Arbitrator

Experienced arbitration practitioners know very well that one of the most important decisions they ever take is whom to nominate as arbitrator in a dispute. Much effort is typically expended on sourcing views and information from colleagues and contacts as to relevant characteristics of a potential appointee. For all its significance, the most used sources of information for choosing an arbitrator have been demonstrated to be word of mouth and internal colleagues.[9] Historically, tech-based harnessing and analysis of data have played little role.

The 'resource gap' is one dimension of the justice gap and refers to the deterrent effect that costs of legal services have on the pursuit of legal solutions.[10] A further example of this gap would appear to exist where parties without the ability to sound out experienced colleagues and 'ask around' need to take decisions as to whom they will appoint. Technology is ideally placed to bridge this 'resource gap' and ensure a more level playing field.

Arbitrator Intelligence and Global Arbitration Review's Arbitrator Research Tool are two platforms that collect information about arbitrator decision-making on issues such as case management, document production, interim relief etc. Such information is eagerly sought by parties seeking to appoint arbitrators as it provides them with insight as to the course that may be taken by a potential arbitrator.[11] The online nature of such resources means that they are accessible globally and do not require pre-existing knowledge of a potential arbitrator's preferences as to approach or access to individuals with such knowledge. (The cynic would observe that where significant subscriptions need to be paid to access the databases, one form of exclusion is simply swapped for another.)

The real excitement perhaps lies in getting into the 'real meat of the matter' and deploying trend analysis and 'big data' tools to predict how an arbitrator might

8. 2018 Survey, p. 32.
9. 2018 Survey, p. 20.
10. Sundaresh Menon, *Technology and the Changing Face of Justice*, in Maxi Scherer (ed.), Journal of International Arbitration (© Kluwer Law International; Kluwer Law International 2020, Volume 37 Issue 2) pp. 167–190.
11. 2018 Survey, p. 21.

approach substantive legal decisions. Users of international arbitration have certainly indicated that they would like more information about how a prospective arbitrator has previously dealt with substantive issues and whether an arbitrator is likely to adopt a 'black letter' or a more commercial approach.[12] Such information could be available in the near future through analysis of awards which are increasingly publicly available and might perhaps go further by analysing a prospective arbitrator's digital profile to uncover unconscious bias. This is likely to give rise to an increasingly lively debate as to the ethics of such approaches.

[B] Improving Efficiency in Document Production

Nothing provokes heated debate along the civil law/common law divide in international arbitration quite like the issue of document production. Its utility may be debated, but the degree to which it can add to the costs of a dispute is beyond debate.

Properly applied, advances in information technology and machine learning can make the processes of collection, review and production of electronic documents more efficient and cost effective. The IBA Arb40 Subcommittee's guide to Technology Resources for Arbitration Practitioners lists currently available technological advances that can be used to augment or assist an international arbitration.[13]

Software applications can be used with document review platforms to further assist document collection, review and production. As regards document collection, software can assist with the review of documents in unstructured data formats (such as chats, MMS and SMS messages) by grouping the messages into a coherent format that can be read sequentially. Software can also help visualise data by, for example, providing a bird's-eye view of the flow and volume of email or email timelines. As regards document production, auto-redaction tools can reduce the time needed for the linear review of documents containing privileged and sensitive information. Technology such as continuous active learning and predictive coding can also assist in the actual review of documents by categorising and coding large volumes of documents in a shorter period of time.

These technologies that improve efficiency in document production have been in existence for some time. However, the extent to which they are routinely adopted in international arbitration remains limited. Now that COVID-related travel restrictions have made it impossible for clients and lawyers physically to visit client offices to collect documents for the purposes of review, increasing reliance has necessarily been placed on technology to bridge the physical gap. Even cases with relatively small populations of documents for review and production now require the use of electronic review platforms if teams working remotely are to function effectively.

The variety of document management and review technologies available highlights once again the 'resource gap' in international arbitration. In order to avoid an 'arms race' in the adoption and application of review technology, the development and

12. 2018 Survey, pp. 21–22.
13. IBA, *Technology Resources for Arbitration Practitioners*, https://www.ibanet.org/technology-resources-for-arbitration-practitioners.aspx (accessed 16 April 2020).

promulgation of 'industry standards' with up-to-date procedural protocols is needed. With the exception of the Chartered Institute of Arbitrators' Protocol for E-Disclosure in International Arbitration, there remains little available.

[C] Increase in Virtual Hearings

Arbitral institutions have long recognised that certain disputes can be resolved perfectly satisfactorily without a hearing, especially those within a particular trade or profession. Although documents-only arbitration has been commonplace in commodity and trade disputes, it has not been widely adopted in commercial disputes more broadly. In the absence of an agreement between the parties, the default position remains that parties are entitled to have an oral hearing. For example:

(1) Article 19.1 of the LCIA Arbitration Rules 2014 provides that '[a]*ny party has the right to a hearing before the Arbitral Tribunal on the parties' dispute at any appropriate stage of the arbitration (as decided by the Arbitral Tribunal), unless the parties have agreed in writing upon a documents-only arbitration*'.
(2) Article 32.1 of the SCC Arbitration Rules 2017 states that '[a] *hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate*'.
(3) Article 25.6 of the ICC Arbitration Rules 2017 gives the arbitral tribunal discretion to '*decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing*'.

The importance that parties have historically placed on a hearing, and the satisfaction they derive from having ventilated their case in front of an arbitral tribunal, makes it unlikely that the frequency of documents-only arbitrations will greatly increase in the foreseeable future. However, the success of videoconferencing technologies in working from home is certain to expedite the transition to virtual hearings in circumstances where, pre-COVID, 78% of users had never or rarely utilised '*virtual hearing rooms*' yet 66% took the view that '*virtual hearing rooms*' are a form of technology that is worth using more.[14] In so far as COVID-related travel restrictions mean that physical hearings cannot proceed, then conducting virtual hearings will, in any event, amount to 'making a virtue out of necessity'.

'Virtual hearings' also further contribute to bridging the 'justice gap' that can exist in dispute resolution. The burden on parties to converge physically and temporally for the purposes of a hearing ('physical gap') has been cited as the second dimension of the justice gap.[15] By removing this requirement and the significant travel and accommodation cost that accompany it (the world's major arbitral venues are among the most expensive cities to stay in), virtual hearings can further democratise

14. 2018 Survey, p. 32.
15. Sundaresh Menon, *Technology and the Changing Face of Justice*, in Maxi Scherer (ed.), Journal of International Arbitration (© Kluwer Law International; Kluwer Law International 2020, Volume 37 Issue 2) pp. 167–190.

arbitration. International arbitration, unconstrained by the requirements of transparency that dictate court hearings to be open to the public, should be a leader in this area.

[D] Videoconferencing in Arbitration

Arbitral institutions have long recognised the importance of virtual hearings and have incorporated provisions in their arbitral rules allowing for the use of technology for such hearings. For example:

(1) Article 24(4) of the ICC Arbitration Rules 2017 allows the arbitral tribunal to conduct case management conferences through videoconference, even in the absence of agreement between the parties. Appendix IV to the ICC Rules sets out case management techniques that include '[u]*sing telephone or video conferencing for procedural and other hearings where attendance in person is not essential*'.
(2) Article 19.2 of the LCIA Arbitration Rules 2014 vests the arbitral tribunal with the '*fullest authority* […] *to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)*'.
(3) Article 28(2) of the SCC Arbitration Rules 2017 allows the case management conference to be conducted '*in person or by any other means*' which would naturally include a videoconference.

Although institutional rules provide expressly for the use of videoconferencing for case management conferences and procedural hearings, the COVID-19 pandemic has shown a general lack of such clarity in the rules for a merits hearing which, as explained in the next section, may be exploited by unwilling parties who may contend that the absence of specific permission for virtual hearings must mean that they are impermissible, absent the full consent of all parties.

Reduced costs and increased efficiency are not the only benefits of virtual hearings. Eliminating international air travel also benefits the environment and conforms with the Campaign for Greener Arbitrations which requires that arbitrators suggest, and counsel consider '*that witnesses or experts give evidence through videoconferencing facilities, rather than attend hearings in person*'.[16]

There are a number of videoconferencing technologies already available that have been usefully applied in arbitration. The ICC has licensed access to Microsoft Teams, VidyoCloud and Skype for Business, and ICC technical support is available

16. Greenwood Arbitration, *The Campaign For Greener Arbitrations Guiding Principles*, https://www.greenwoodarbitration.com/greenpledge (accessed 24 April 2020).

remotely to assist tribunals with using such platforms.[17] Other platforms include Zoom, BlueJeans and Cisco TelePresence.[18]

A key historical justification for limiting the use of virtual hearings has been the belief in common law jurisdictions that there is no substitute for a physical cross-examination of a witness and the keen insight into the truthfulness of the testimony it allegedly provides. This perception, coupled with common law arbitrators coming from the (relatively) tech-unfriendly worlds of the judiciary or the bar, has resulted in the use of videoconferencing being limited to circumstances where specific conditions, such as incapacity to travel, inhibit attendance in person.

Even in the common law world there has been considerable debate on the importance of being able to assess a witness' demeanour by requiring their physical attendance. In *Hanaro Shipping v. Cofftea Trading* [2015] EWHC 4293 (Comm), the High Court of England and Wales rejected an argument that there was a procedural imbalance between one party's witnesses giving evidence in person while the counterparty's witnesses gave evidence only by videoconference. The judge held as follows:[19]

> […] Finally I should say in relation to the video link Mr Buckingham suggested that there would be an imbalance between witnesses who have to give evidence by video link and witnesses who give evidence in person. I am not persuaded that there is such a risk. Perhaps in the early days of video link when the quality of the video link was poor and it was a novelty, perhaps that might have been said, but these days I do not consider that that can be said.

By contrast, in *Jiangsu Shagang Group Co Ltd v. Loki Owning Company Ltd* [2018] EWHC 330 (Comm), the Court set aside an award of USD 68 million in damages observing that the tribunal had not appropriately assessed the credibility of one of the key witnesses. That witness did not speak English and gave evidence by an unreliable video link which may have led the tribunal to its conclusion as to the witness' credibility. The case highlights the fact that where videoconferencing technologies are used, then infrastructure of a minimum quality threshold must be deployed.

The High Court of England and Wales also made observations about the importance of a good video link in *PEC Ltd v. Asia Golden Rice Company Ltd* [2014] EWHC 1583 (Comm):

> 34. […] However, it is less clear whether anyone other than Mr Narang gave approval: Mr Mirchandani's evidence about this was not assisted because the video-link to India broke down while he was being cross-examined about this. I conclude on balance that Mr Mirchandani probably did not give approval in advance … .

17. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (9 April 2020).
18. IBA, *Technology Resources for Arbitration Practitioners Audio and Videoconferencing*, https://www.ibanet.org/technology-resources-for-arbitration-av.aspx (accessed 20 April 2020).
19. *Hanaro Shipping v. Cofftea Trading* [2015] EWHC 4293 (Comm), para. 16.

It will be readily noted that much has changed since this decision in terms of availability of reliable technology. Where sufficiently advanced technology is available, a virtual hearing has been found to be as effective as a physical one, with one arbitrator noting:

> The fact we were conducting a virtual hearing was almost forgotten as the matter got underway. Hearing oral argument was no different really from physical hearings. Much is said about how conducting cross examination of a witness over video-link is more difficult or less effective than in person. That might be true in the past with slow video feeds or where there is a poor quality connection but in our modern age, and based on listening to 6 witnesses over video-link in this case, and counsel for one party conducting the proceedings entirely by video-link, I think that concern needs reassessing. I would have no hesitation conducting more hearings in this format.[20]

§7.04 PRACTICAL ISSUES IN USING TECHNOLOGY

The overwhelming response of the arbitral community to COVID-19 has been 'business as usual'. In addition to driving the technical evolution of international arbitration, this focus on maintaining hearing arrangements in the event physical hearings cannot proceed has also highlighted issues of consent and availability of relevant protocols.

[A] Prior Consent to a Virtual Hearing: Preference or Prerequisite?

Can a tribunal issue directions for the hearing to be conducted virtually, despite one party's refusal to consent to a fully or partially virtual hearing? If the tribunal does issue such directions, is an arbitral award more susceptible to challenge? The rules of many institutions sadly lack clarity on this issue.

A notable exception is Article 19.2 of the 2014 LCIA Rules which gives the tribunal '*the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form* […]. *As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)* […]'.

The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic notes that where a tribunal decides to proceed with a virtual hearing without party agreement, or over party objection, an issue may arise as regards the enforceability of the award in circumstances where Article 25(2) of the 2017 ICC Rules (which provides that the tribunal '*shall hear the parties together in person if any of them so requests*') is construed as referring to a physical hearing. The Guidance Note, relying upon the French language version of the ICC Rules, suggests that such language refers to the parties having an opportunity for a live, adversarial exchange and does not preclude a virtual hearing. It has been suggested that at the time many institutional

20. GAR, *Covid-19: Participants in SIAC Case Share Success of Virtual Hearing*, https://globalarbitrationreview.com/article/1225832/covid-19-participants-in-siac-case-share-success-of-virtual-hearing, (accessed 4 May 2020).

rules were drafted, virtual merits hearings were not addressed simply because the technology was not available. Thus, it is not that they were excluded, merely not expressly contemplated by the rule-makers. This lacuna has resulted in requiring institutions, tribunals and practitioners to interpret the rules in a manner consistent with modern practice and technology that accommodates virtual merits hearings notwithstanding the absence of any express reference. Many might say that utilitarian and purposive interpretation represents simple common sense, but this lack of clarity in rules inevitably enables the counterargument to be run and creates potential problems for those wishing to progress arbitrations but having to deal with objections to a virtual hearing.

Even if institutional rules lack specificity on the issue of whether parties can expressly be obliged to conduct a virtual hearing, the institutional rules and curial laws do typically provide tribunals with wide powers as to the conduct of hearings which can be argued implicitly to accommodate virtual hearings partially or fully. For example, section 34 of the English Arbitration Act, 1996 states that it shall be for the tribunal to decide '*all procedural and evidential matters*', which include where the proceedings are to be held.[21] While it is arguable that the discretion to determine where the hearing is to be held would include the discretion to decide whether a hearing is to be held through videoconference, there remains the risk that a court or tribunal may construe party consent to a virtual hearing as a prerequisite in such circumstances.

There is clearly a risk in the wake of a COVID-19 necessitated virtual hearing (whether fully or partially) that a recalcitrant party will seek to challenge an award on the basis that the virtual hearing was conducted without its consent, or that the virtual hearing somehow prevented it from presenting its case. Any supervisory court handling such a challenge would be well served by adopting an effects-based approach aimed at determining whether a virtual hearing has in fact had the effect of preventing a party from presenting its case (whether due to poor IT infrastructure or other reasons). The fact that either the relevant party or its counsel lacked the willingness to adapt to video technology should not carry weight.

At least in the UK, from a court litigation perspective, the position has been clear that the emergency regulations enacted as a consequence of the pandemic actively contemplate hearings continuing on a virtual basis. In *Re One Blackfriars Ltd, Hyde v. Nygate* [2020] EWHC 845(Ch), the judge held that sections 53–56 and Schedule 25 of the Coronavirus Act 2020, in making express provision for online trials, gave a strong indication that the Government expected the work of the civil courts to continue: '*The message is that as many hearings as possible should continue and they should do so remotely as long as that can be done safely*.' There is no reason why the same approach should not be adopted to arbitral hearings, unless the parties had expressly reserved the right to a physical hearing in their arbitration agreement. Those arbitral institutions whose rules do not clearly permit virtual hearings should rectify the position rapidly.

21. This power is subject to the right of the parties to agree any matter. *See* s. 34(1) of the Arbitration Act, 1996.

[B] Early Engagement on Issues of Technology

By engaging at an early stage with parties on issues relating to the use of technology (particularly in the context of a virtual hearing), arbitral tribunals can effectively ensure a level playing field and mitigate the risk of bona fide challenges to an award on the basis of breach of natural justice or due process arising from the use of technology. Such early engagement should address issues such as: (a) the technologies to be used and their availability to the parties; (b) responsibility for ensuring that the technologies function as intended; and (c) the tribunal's discretion in adapting the agreed-upon procedure to ensure equality of arms.

Practical Law has developed a draft procedural order for videoconference arbitration hearings[22] that addresses some of these issues and requires:

(1) all parties attending the hearing including counsel, arbitrators, parties and witnesses to have high-speed broadband sufficient to support the platform being used;
(2) a secondary method of connecting to the platform (such as telephone); and
(3) arbitrators and counsel to conduct a test session of the platform which will include a mock direct and cross-examination of the hearing.

Tribunals may also rely upon institutional guidance such as the Seoul Protocol on Video Conferencing in International Arbitration (*Seoul Protocol*)[23] published earlier this year which is intended to serve as best practice for conducting videoconferences in international arbitration. It sets out principles dealing with examination of witnesses generally (including requiring parties to ensure that the technological requirements are met[24] and giving the tribunal discretion to terminate the videoconference if it is '*so unsatisfactory that it is unfair to either Party to continue*'),[25] technical requirements,[26] test conferencing and audio backup,[27] interpretation[28] and other preparatory arrangements.[29]

The importance of engaging on such issues was noted by the High Court of England and Wales in *Re One Blackfriars Ltd, Hyde v. Nygate* [2020] EWHC 845(Ch) in the context of an application seeking to adjourn a trial on account of the pandemic and objecting to a virtual trial on account of technological challenges. The Court held as follows:

22. The draft procedural order can be accessed at: http://protect-eu.mimecast.com/s/4BXjClOxBcgkDwYUDWHoV (accessed 4 May 2020).
23. The Seoul Protocol can be downloaded from: http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014, (accessed 4 May 2020).
24. Seoul Protocol, Art. 1.1.
25. Seoul Protocol, Art. 1.7.
26. Seoul Protocol, Art. 5.
27. Seoul Protocol, Art. 6.
28. Seoul Protocol, Art. 7.
29. Seoul Protocol, Art. 9.

> I am not satisfied, however, that the technological challenges which no doubt will be presented are so great as to make it appropriate to adjourn now. In my judgment, co-operation and planning is essential if a remote trial in this case is going to be possible, and that is why I have ordered the parties to co-operate in seeking potential remote trial platforms and document handling systems. In light of the comments by Birss J cited above I would expect any proposed system to subject to robust testing from as many of the locations from which participants are likely to be giving evidence (or making submissions) not only to ensure adequate video and audio quality but to ensure that documents can be displayed quickly. In particular, careful attention must be paid to the Internet bandwidth available at the locations from which witnesses intend to give evidence.[30]

Additionally, tribunals must be cognisant of factors unique to their case that may necessitate a particular approach. For example: (a) where a majority of witnesses are providing evidence by videoconference it may be advisable for all witnesses to follow the same process even if some could attend in person; (b) is witness conferencing involved and are there any special arrangements – such as ensuring experts' meetings can take place remotely; (c) whether administration of the virtual hearing should be outsourced to a third party to ensure independence in the control of the technology (and the availability of independent technicians to sort out problems).

[C] Data Security and Confidentiality

Hacking and other cybersecurity breaches are not unknown in international arbitration. In 2015, during the course of the arbitration between China and the Philippines in relation to territory in the South China Sea, the websites of the Permanent Court of Arbitration, Philippines' Department of Justice and the law firm representing the Philippines were hacked.[31]

While the probability of such security breaches in private commercial arbitrations may be less than in the state arena, the increased use of technology, including significant use of domestic broadband connections, does increase the likelihood of such breaches. Infamously, Zoom has been the subject of much criticism when it was discovered that anyone with access to the video link for the conference could view the videoconference – and interrupt it with inappropriate material.[32]

Institutional rules do not typically address issues of cybersecurity and 'industry standards' of specific application to international arbitration are yet to emerge. Some limited guidance is found in the Seoul Protocol which requires cross-border connections to be safeguarded to prevent unlawful interception,[33] applies limits to the number

30. *Re One Blackfriars Ltd, Hyde v. Nygate* [2020] EWHC 845(Ch), para. 50.
31. Thomson Reuters, Practical Law Arbitration Blog, *Addressing Emerging Cyber Risks: Reflections on the ICCA Cybersecurity Protocol for International Arbitration*, http://arbitrationblog.practicallaw.com/addressing-emerging-cyber-risks-reflections-on-the-icca-cybersecurity-protocol-for-international-arbitration/ (accessed 4 May 2020).
32. The Guardian, *Singapore Bans Teachers Using Zoom after Hackers Post Obscene Images on Screens*; https://www.theguardian.com/world/2020/apr/11/singapore-bans-teachers-using-zoom-after-hackers-post-obscene-images-on-screens (accessed 28 May 2020).
33. Seoul Protocol, Art. 2.1(c).

of observers present during the videoconference to only necessary individuals, and requires the tribunal to verify the identity of the individuals present.[34] It also prohibits any recording of the videoconference without the permission of the tribunal.[35]

The 2020 ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (*Cybersecurity Protocol*) provides a framework to determine reasonable information security measures that can be applied in an arbitration. The Cybersecurity Protocol comprises fourteen principles but does not supersede any applicable law, arbitration rules or other binding obligations[36] that may deal with the same issues. In determining '*reasonable cybersecurity measures*' the Cybersecurity Protocol requires the parties and the tribunal to consider, among others, the risk profile of the arbitration by taking into account prescribed factors, existing information security practices and infrastructure, and proportionality of any measures relative to the size, value and risk profile of the dispute.[37] By avoiding a one-size-fits-all approach the Cybersecurity Protocol allows parties and the tribunals to make bespoke arrangements, taking into consideration the risks and impact of any cybersecurity breaches, that would ensure that arbitration remains an efficient and cost-effective process.

The coming months will likely see further progress, with law firms in a number of arbitral centres cooperating in the establishment of criteria for common electronic platforms for arbitral hearings.

[D] Other Points of Practical Importance

Draft procedural orders such as that prepared by Practical Law operate as a checklist to ensure 'no surprises' at the virtual hearing. In addition, early consideration should be given to myriad issues that are more complex when not all parties are in the same room. These include:

(1) *Translation:* In an entirely virtual hearing (i.e., where none of the witness, translator, counsel or tribunal are physically together), simultaneous or real-time translation may be problematic as parties, counsel and arbitrators are required to listen to multiple audio streams. The position can be simplified by using technology that would give the option of allowing individuals to only listen to the interpreter's audio feed. Technologies such as Zoom allow the host to assign to participants the role of 'interpreters'. Such participants will see a different interface, intended to make switching channels easier. Alternatively, consecutive translation can be used in much the same manner as it would be at a physical hearing albeit without the interpreter being physically present in the same room as the witness. It will remain important that the interpreters have the ability to see the witness, given the importance for them in appreciating 'non-verbal' elements of an individual's communication.

34. Seoul Protocol, Art. 3.1.
35. Seoul Protocol, Art. 8.1.
36. Cybersecurity Protocol, Principle 4.
37. Cybersecurity Protocol, Principle 6.

(2) *Witness coaching:* The absence of a physical hearing means the tribunal has limited control over who is in the room with the witness. The Seoul Protocol deals with this risk by requiring the videoconferencing system to show a reasonable part of the interior of the room in which the witness is located[38] while also requiring the tribunal to verify the identity of each individual present.[39] Alternatively, parties could be asked to use a camera (or cameras) that show the entire room or the witness could simply be asked to rotate their laptop camera to show the whole room. Tribunals will need to be prepared to be robust in allaying concerns that witnesses might be utilising a 'phone a friend' approach to dealing with questions on cross-examination.

(3) *Sitting hours:* In a cross-border dispute with various time zones, some or all parties may be forced to sit at unsociable hours, which may adversely impact a party's ability to present its case (although arguably the issues are really not so different from those imposed by jet lag and the fatigue associated with long-distance travel with which international arbitration practitioners will be well aware).

(4) *Change in advocacy styles:* The nature of oral and written advocacy would also need to be adjusted to account for a virtual hearing. In relation to the former, it is potentially easier to judge the tribunal's reaction to arguments and respond to their questions in a physical hearing which may render oral advocacy more dynamic and allow for lengthier oral submissions. Capturing and holding the tribunal's attention in a virtual setting is likely to be more difficult. Interaction between tribunal members in a fully virtual hearing where the tribunal is not together in one place may also be restricted. One practical result of this challenge is likely to be a greater reliance on written memorials and submissions, and use of documents such as skeleton arguments that may give greater structure to oral submissions. It could be argued that this would be no bad thing in any event and that anything which serves to focus an advocate's attention on the important points, and encourages preparedness and forethought, is to be encouraged.

(5) *Changes in tribunal dynamics*: Many presiding arbitrators go to great lengths to ensure that their tribunals have a functioning dynamic, that arbitrators have every opportunity to engage with each other and to operate effectively as a collective, rather than three individuals. However, not all do so. Without the opportunity to 'gel' over dinner, coffee or however else, there is a risk that the influence of a presiding arbitrator increases and that of party nominees diminishes. Given the fundamental role of party influence over tribunal composition and functioning, this is a real challenge. It may be a greater challenge where tribunal members do not already have significant experience of the dynamics of videoconferencing, e.g., through law firm meetings or social Zoom calls. That said, this is likely to become less of a problem given the increasing familiarity with videoconferencing generally post-lockdown.

38. Seoul Protocol, Art. 1.2.
39. Seoul Protocol, Art. 3.1.

This is however an area where some degree of 'awareness raising' on the part of arbitral institutions may pay dividends.

§7.05 CONCLUSION

Throughout history, pandemics have changed the way society operates. By accelerating the adoption of flexible working (ironically, through mandating its use in a most inflexible fashion), the measures passed by governments globally in order to limit the transmission of COVID-19 provide a real opportunity for the international arbitration community to do things differently and to adopt ways of working that limit the need for the 'circus' of international arbitration hearings in London, Paris or Stockholm at vast expense to users. The potential benefits are not just as to cost, environment and overall efficiency but, more fundamentally, may go to narrowing the perceived 'justice gap' and encouraging the adoption of international arbitration as a process that is fair and accessible to users wherever they may be located, and however deep their pockets may be.

There is no 'silver lining' to the health emergency that COVID-19 has occasioned, but there are benefits that can come from having to do things differently. None of the technology that has been widely adopted was new, but attitudes to its utilisation are widely changed. The international arbitration community has an opportunity to adopt changed ways of working. It should be seized.