

Offline or Online? Virtual Hearings or ODR?

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"Alice again enters a fantastical world, this time by climbing through a mirror into the world that she can see beyond it. There she finds that, just like a reflection, everything is reversed"...and "walking away from something brings you towards it" (Alice's Adventures in Wonderland, Lewis Carroll).

The current worldwide outbreak forced by Covid-19 has led the international dispute resolution community to consider other means of proceeding with their arbitrations. Opinions differ: some practitioners have already started utilising what technology has been offering for many years; others are still discussing whether virtual hearings may be an option; another group of people, reluctant to move online, considers that online hearings are not adapted to their arbitrations. Is everything reversed like Alice in Wonderland, or is the mirror showing us what we have neglected or refused to see? Walking away from the current reality will inevitably bring us towards it.

When we moved from *snail mail* to telex, and later to telefax and then to email, such changes did not create a buzz. This sudden viral outbreak may well be the triggering event that is generating popularity for virtual hearings. The unexpected noise has had many benefits including bringing to light issues that we have kept ignoring because the models we had adopted were comfortable. There was no reason to change unless we were compelled. The disruption caused by Covid-19 has justified us to think differently. This triggering event is a positive aspect,

despite the very sad situation of contamination, death, confinement and the catastrophe of the worldwide economy, which is impacting every sector, firm and individual.

Virtual Hearings or ODR?

Virtual hearings have become the centre of discussion among the dispute resolution community. Webinars are being organised around the globe to examine to what extent virtual hearings may replace in person hearings in a physical location, and to consider procedural and technical issues.

I had the opportunity to speak on 16 April 2020 at a webinar organised by the American Bar Association on “Progressing Arbitrations in the New Global Reality”, moderated by **Ana Sambold**. With my fellow panellists, **Mohamed Abdel Wahab** and **Michael McIlwrath**, we presented the spirit of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic (“Guidance Note”), dated 9 April 2020, and the practical solutions being adopted by the ICC International Court of Arbitration (“ICC”).

The panellists indicated that virtual hearings need not replicate online what is being done offline and that practitioners need to consider new methods. For example: are many witnesses necessary? Do hearings need to last weeks, as is often the case in common law countries? Or will fewer days, more often applied in civil law countries suffice? Does an ability to manage or overcome Covid-19 problems factor into thinking about which arbitrators to nominate at this moment?

It is worth clarifying that virtual hearings is not the same as online dispute resolution (“ODR”). The use of technology to hold hearings remotely is meant to connect people, affording an opportunity to replace the real world, offline space, which may not be available to them for some reason (such as difficulty to travel, illness), by an online space. The procedure, however, is not conducted online. ODR consists in using information and communication technology to negotiate, mediate, arbitrate, conduct proceedings, and settle disputes exclusively or primarily online. When platforms used make a significant contribution to resolving disputes, such online resolution equates to ODR. Using a platform for virtual hearings does not meet that purpose, unless other parts of the procedure are conducted online through a dedicated dispute resolution platform. The UNCITRAL Technical Notes on

Online Dispute Resolution issued in 2016 defined ODR as *“a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology”*. Many mediation procedures are conducted exclusively online, such as on SeeYouOutOfCourt that **Graham Ross** uses for his mediations. We hope that in the future arbitrations may be entirely conducted online, without necessarily excluding face-to-face meetings or hearings where necessary.

My second remark concerns using technology in arbitration. **Colin Rule**, one of the two fathers of ODR with **Ethan Katsh**, posted a message on LinkedIn at the beginning of April, quoting **Tom Clarke** from the National Center for State Courts (NCSC), who wrote that it is *“immensely ironic that the coronavirus crisis will do more for virtual courts than decades of work by NCSC. I’m glad to see it come, even if this is not the way I would wish it to happen.”* This is so true! Probably few people are aware of the work we have been doing in the last twenty years with all fellows from the National Center for Technology in Dispute Resolution (NCTDR), the International Council for Online Dispute Resolution (ICODR) and NCSC. We have been strongly urging moving public and private justice online in order to benefit from the many advantages offered by resolving disputes that way (see *“What does it take to bring justice online”*). The three panellists of this webinar have been involved in technology in arbitration for twenty years and agree that ODR has been lagging behind.

It is said that need is the mother of innovation. However, in this instance, innovation is rather about changing our traditional way of working as opposed to innovation in tools that already exist. Perhaps we needed this outbreak to discover that hearings may be conducted online, and hopefully to start considering going further in applying such technology. From every misfortune good things may derive. We are living in fascinating times!

ICC Tools to Ensure Effective Case Management

Virtual hearings may be a new subject generated by the pandemic. What is not new is the fact that ICC had already several tools available to assist parties, their representatives and arbitrators in effectively managing arbitrations. ICC was at the forefront ever since 2000 including its NetCase platform. The Guidance Note is now

reiterating the practical insights that users need to remember.

The ICC Commission on Arbitration and ADR issued a few reports that provide users the means to conduct procedures in an effective and cost-efficient manner, some of which are useful for virtual hearings. The first one, published in 2004 and updated in 2017, concerns the “Use of Information Technology in International Arbitration” and provides helpful standards on issues to be considered, such as common technical ability, electronic exchange of documents, data integrity issues, and issues to be considered for videoconferencing including directions that the tribunal needs to give to the parties after consulting them. The second one, published in 2007 and re-issued in 2012, addressed “Techniques for Controlling Time and Costs in Arbitration”. That report recommended already at that time, that telephone and videoconferencing may be considered, as well as whether witnesses may be heard by video link so as to avoid the need for them to travel to an evidentiary hearing. Appendix IV of the ICC Arbitration Rules (Rules) clearly reminds us that one of the recommended case management techniques is precisely the use of telephone or videoconferencing for procedural and other hearings where attendance in person is not essential. Some of the techniques proposed in the report were included as Appendix IV to the 2012 Rules, which introduced, among others, an important provision related to an early case management conference. Another very helpful report, issued in 2015, provided further guidance for “Effective Management in Arbitration”, such as early case management, maintaining realistic schedules, and raising awareness about potential settlement opportunities. “Techniques for Managing Electronic Document Production”, published in 2011, is another useful report. Finally, the “Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under ICC Rules of Arbitration” (“Note”) reminds us of many techniques and also provides new solutions, such as the possibility of signing terms of reference and awards in counterparts, subject to any mandatory requirements of relevant applicable laws.

Some of the measures for effective management of which the Guidance Note reminds us include the possibility to dispose expeditiously of certain claims or defences, resolve issues in dispute in stages by rendering partial awards, identify whether some issues may be resolved on the basis of documents only, organise mid-stream procedural conferences to assess the most relevant issues and consider focusing on most efficient means to resolve them, identify issues that may be resolved without witness and/or expert evidence, use of audio or

videoconferencing for hearings, and to consider whether parties would agree to opt in to the ICC Expedited Rules Provisions.

It is hoped that the Guidance Note, which reminds users of the many existing tools and measures available, will help parties and arbitrators consider all opportunities available to them to move arbitrations forward. Subject to any constraints of legal requirements, the uncertainty of the pandemic situation should be considered seriously to avoid adjournments and further disruptions.

ICC Guidance Note on the Organisation of Virtual Hearings

The second practical aspect of the Guidance Note is the assistance provided to arbitrators and parties about issues they need to consider when organising a virtual hearing. The Guidance Note first reminds tribunals to take into account all circumstances, including those caused by the pandemic, the nature and length of the conference or hearing, the complexity of the case and number of participants, any need to proceed without delay, whether rescheduling the hearing would entail unwarranted or excessive delays, and the need for the parties properly to prepare for the hearing. Should a meeting be necessary in a single physical location, parties and arbitrators should make efforts to reschedule in a way that minimises delays, and should discuss the appropriate sanitary measures to ensure the safety of all participants. If it is decided to proceed with a virtual hearing, arbitrators and parties should discuss and plan for special features of proceeding in that manner.

If a tribunal decides to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider all relevant circumstances: assess whether the award will be enforceable at law, and provide reasons for that determination. After consulting the parties, arbitrators may take into account their broad procedural authority under Article 22(2) of the Rules, to “*adopt such procedural measures as [the tribunal] considers appropriate, provided that they are not contrary to any agreement of the parties.*” The tribunal “*shall proceed within as short a time as possible to establish the facts of the case by all appropriate means*” (Article 25(1)) and “*shall hear the parties together in person if any of them so requests*” (Article 25(2)). The Guidance Note further indicates that Article 25(2) is structured to regulate whether the tribunal can decide the dispute based on written submissions and documents only or whether there must also be a

live hearing. It does not preclude a hearing taking place “in person” by virtual means if the circumstances so warrant. The French version of Article 25(2) reflects this meaning in providing that: *“Après examen des écritures des parties et de toutes pièces versées par elles aux débats, le tribunal arbitral entend contradictoirement les parties si l’une d’elles en fait la demande; à défaut, il peut décider d’office de leur audition.”* The Secretariat’s Guide to ICC Arbitration also notes that *“whether the arbitral tribunal construes Article 25(2) as requiring a face-to-face hearing, or whether the use of video or teleconferencing suffices, will depend on the circumstances of the case.”* Moreover, virtual hearings were progressively acknowledged as mentioned above, including in Article 24(4) of the Rules with respect to case management conferences, Article 3(5) of Appendix VI of the Rules with respect to Expedited Arbitration, and paragraph 77 of the Note with respect to dispositive issues.

The Guidance Note further provides that to ensure that parties are treated equally and given full opportunity to present their case during a virtual hearing, the tribunal should consider several issues, such as the different time zones in fixing the hearing dates, logistics of the location of participants, use of real-time transcript and interpreters, identification of all participants, use of demonstratives and electronic hearing bundles. Furthermore, parties and arbitrators need to agree on the selection of platforms for videoconferencing and document sharing.

Finally, the Guidance Note provides a checklist and a draft procedural order which will be hugely useful for the dispute resolution community. In addition to issues to consider during the pre-hearing plan, including scope and logistics provided in the checklist, the checklist and the procedural order deals with issues in four sections related to: technical issues, specifications, requirements and support staff; confidentiality, privacy and security; online etiquette and due process considerations; and presentation of evidence and examination of witnesses and experts.

To conclude, the game changer is positive and we need to build on it. The benefits of virtual hearings include saving time and costs of travelling, and saving the environment, seeing that climate change is at the centre of the world’s preoccupation today. The way people now interact with technology has removed barriers which were difficult to remove before the outbreak. Virtual hearings will, in the near future, become the norm. The sooner we start practicing virtual hearings, the easier it will be to move procedures online. Many practitioners wish and hope

that the arrangement during the pandemic will prove that we are capable of working differently. It is the ideal opportunity to revisit some of our current practices and streamline procedures.

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