

# Kluwer Arbitration Blog

## Think Arbi: Has Technology Worsened the Conduct of Arbitrations?

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In the 1970s, when my father left India to study abroad, trunk calls home were rare and expensive, requiring shouting into the phone. In 2020, we have all exasperatedly repeated “*You’re on mute*” and “*Am I audible?*” into our screens on an almost daily basis. As public spaces became off-limits, those with access to technology moved their personal and professional lives into the virtual world.

In most legal systems, [technology was integral to dispute resolution well before the pandemic](#). However, Covid-19 accelerated the use and implementation of technology solutions on an unprecedented scale because in 2020, this became the *only* way for us to continue working and litigating. It propelled us to adapt because we had no choice. While the initial shock of this tectonic shift is wearing off, I believe that technology has and will continue to improve the conduct of arbitrations.

Technology is only a tool and its value depends on how it is used. Unlike domestic legal systems which are entrenched in tradition, arbitration has the flexibility to use technology advantageously. I am optimistic that technology can aid arbitration in its primary purpose: that of providing efficient and cost-effective dispute resolution. Further, technology can also address issues with arbitration itself, such as its lack of diversity, environmental impact, and transparency, all of which have a bearing on the conduct of arbitration.

### Due process concerns

During the initial phase of the pandemic, there was a [wave of webinars](#) about videoconference hearings. The effective conduct of virtual cross-examination, cybersecurity, maintenance of confidentiality, and potential due process challenges were common concerns across jurisdictions. Arbitral institutions rose to the challenge, [updating their rules](#) and [publishing guidelines](#) to address these concerns with virtual hearings.

Virtual cross-examination has been the subject of the most debate and logistical difficulty, but the idea is not new. In 2003, the [Supreme Court of India](#) allowed [virtual testimony](#) of a witness and held that advances in science have “*shrunk the world*” and that by video conferencing, the demeanor of the witness is clearly visible.<sup>1)</sup> Several Indian High Courts have followed, holding that courts must take a pragmatic view to avoid inconvenience and to save time.<sup>2)</sup>

In the early months of the lockdown, creative solutions were required to monitor unsupervised witnesses. As lockdowns have eased, these ethical concerns are easily addressed by arranging for an [invigilator](#). Another concern with virtual testimony is the limited cues of the witness' body language. However, [according to Dr. Ula Cartwright-Finch](#), a neuroscientist and formerly an arbitration lawyer, the results are not conclusive but there doesn't seem to be a difference in our ability to detect lies online or in person, possibly because "*people generally aren't very good at detecting deception*".

Although virtual hearings are more cost and time efficient, the increased cognitive load of such hearings makes it difficult to pay attention for the same duration as when participating in physical hearings. Having to engage in a constant gaze with the screen, deal with imperfections in technology, and keep track of multiple things at once, saps our attention. That concern became more pronounced during lockdown where the screen was our only means of interaction. However, as we return to having the option of traditional hearings, and are not overloaded with "Zoom fatigue," the additional option of online hearings will be beneficial.

### **Efficiency and cost effectiveness**

The use of technology extends beyond arbitration hearings to every stage of the process. There are automated tools for conflict checks, data and document management, outcome prediction, research, e-discovery, translation, and arbitrator selection.

The increased use of technology in the legal profession has also [resulted in an increase in productivity and a lower cost burden on clients](#), as remote working has cut down commutes and unproductive time spent waiting for hearings and meetings.

The shift from paper bundles and files to electronic documents, catalysed by the pandemic, likewise reduces costs. This is apparent in India, where until the pandemic, solicitor firms would have briefs and drafts printed and hand-delivered to barristers' chambers or homes, and porters would ferry bags full of files for meetings and hearings. Most senior barristers correct hard copy drafts by hand, and firms employ stenographers to type out these corrections on a computer, all resulting in mounting costs to the client. The reluctance of the system to turn to technology was such that at the peak of the lockdown in India, many of us lawyers had to violate curfew and risk arrest to deliver papers for urgent hearings.

Eventually, however, the pandemic compelled everyone to adapt, and many senior lawyers began declining printed briefs from fear of catching an infection. When the lockdown lifted, many lawyers returned to the Courthouse with tablets in place of files. In a curious reversal of power, junior lawyers can now be seen explaining technology to senior counsel and ensuring that the microphone (and cat filter) is switched off when it should be. As law firms burnout nearly as many printers and copiers as they do associates, the shift from hard copies to soft copies is undoubtedly a positive change that will make the conduct of arbitrations more cost efficient.

### **Impact on the environment**

Moving arbitrations to virtual platforms can also mitigate their environmental impact. While

electronic devices do leave a carbon footprint in their production, use, and disposal, legal systems globally go through entire forests of files and gallons of printing ink, and law firms and Courthouses in India spend a fortune storing decades-old records. In fact, a [preliminary study](#) by the Campaign for Greener Arbitrations projected that nearly 20,000 trees would be required to offset the total carbon emissions from just one medium-to-large-scale arbitration, with long-haul flights contributing to 75% of the total carbon emissions. Virtual hearings provide an efficient alternative, which most people were reluctant to even consider or imagine until the pandemic.

### **Technology can address inequalities in international arbitration where the [lack of diversity is so pervasive](#)**

For practitioners outside Europe and North America, technology is helping to navigate the high barriers of entry into international arbitration. Discourse around diversity in international arbitration ignores gaping disparities in cross-border mobility, the cost and effort required to procure travel and work permits for lawyers from the developing world, and the frequent requirement for proficiency in more than one European language – all of which affect access to opportunities and ultimately leads to a lack of diversity. With the onset of the pandemic, opportunities and events have shifted to a virtual world, allowing us to interact with practitioners we may never have met, and promoting access to talent and perspectives beyond those in our local jurisdictions.

Admittedly, many technology tools available today are themselves very Eurocentric. Language tools are still unable to process non-Western accents and cannot accurately translate several Asian languages such as Hindi or Persian, which rely heavily on context to communicate meaning. However, as machine learning advances, these tools will improve and benefit arbitration which, unlike domestic litigation, often requires a multi-cultural approach. Translation tools, presentation software, and video conferencing with live captions and teleprompter functions can greatly improve communication, not just across cultures but also for those with disabilities or who process information differently. Implementing these technology-based solutions will potentially make arbitration a more inclusive dispute resolution mechanism than traditional courts.

The unavoidable shift to online platforms will also help firms to retain talent and mitigate the invisible but high costs and disruption from attorney turnover. The pandemic has normalized remote work and flexible hours. Until now, employees, [particularly women](#), who requested these options were seen as less committed and their work taken less seriously. The pandemic has forced companies to find solutions to the drawbacks of remote working that they would otherwise not have bothered investing in and, more importantly, compelled them to change their mindset.

### **Conclusion**

The pandemic has warped time. Days dragged out, but a whole year quickly disappeared. Since the 2000s, technology has been accelerating change faster than we can keep up with but in 2020, the pandemic compelled decades of change within a matter of weeks.

The pandemic has been a trial run for all arbitrations adopting this new, heavily technology-reliant format, and anything unfamiliar always feels worse until it gets better. Unequal access to

infrastructure such as telephone, electricity and internet connectivity, and disparate tech literacy, has posed challenges to the smooth running of arbitrations. But unlike legal systems which cling to centuries of tradition and forget the end user, i.e. the litigant, technology focuses on the needs of the end user and constantly improves based on their feedback.

Perhaps decades from now, holograms of ourselves might still be frustratedly shouting “*Can you hear me,*” but technology, like arbitration, focuses on efficient problem solving and so will undoubtedly continue to improve the way we conduct arbitrations.

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## References

?1 *State of Maharashtra and P.C. Singhi v. Dr. Praful B. Desai & Ors* (2003) 4 SCC 601

See *Twentieth Century Fox Film Corporation and Ors. v. NRI Film Production Associates Pvt. Ltd.*

?2 (AIR 2003 Kar 148); *Amitabh Bagchi v. Ena Bagchi* (AIR 2005 Cal 11); and *International Planned Parenthood Federation v. Madhu Bala Nath* (AIR 2016 Del 71).

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