

## Client Alert

15 June 2022

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## International Arbitration Update No. 12

### Virtual hearings in arbitration and mediation: trends, protocols and practical tips

During the past few years, due partially to the COVID-19 pandemic (the "**Pandemic**"), the use of technology in international arbitration and mediation practice — together with other forms of alternative dispute resolution ("**ADR**") — has increased fairly rapidly. This increase is attributable not only to necessity given global circumstances, but to an ongoing overwhelming need for more efficient and cost-effective dispute resolution.

In this client alert, we will consider one key area in which technology has advanced by leaps and bounds in recent years in dispute resolution — so-called virtual hearings — in the context of international arbitration and mediation.

#### 1. Introduction

A virtual or remote hearing may be defined as follows.

...a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate[.]<sup>1</sup>

Commonly, virtual hearings are conducted using one of the myriad online platforms, such as Zoom, Microsoft Teams or Blue Jeans.

For certain jurisdictions, including Singapore and the UK, the idea of online hearings was not particularly novel prior to the Pandemic, though their use may have been somewhat limited in practice to lower value disputes, case management conferences and interlocutory hearings. Recently, there has been an evolution in mindset from the "due process paranoia" connected with holding hearings in any setting other than in person, to weighing this risk against potentially indefinite adjournment or suspension of proceedings. As such, virtual hearings are now becoming the "new normal" in international arbitration and mediation.

By way of illustration as to the popularity of virtual hearings in arbitration, the Japan Commercial Arbitration Association ("**JCAA**") has released statistics on the use of this method. In 2019, 94% of meetings were held on a face-to-face basis, while, in 2021, 76% were held online, 12% were hybrid and only 12% were held face-to-face.<sup>2</sup> The JCAA anticipates that online meetings, which reduce parties' expenses and time burdens, will continue to be used commonly after the Pandemic.

<sup>1</sup> International Bar Association, "IBA Rules on the Taking of Evidence in International Arbitration," December 17, 2020 (available at

<https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>).

<sup>2</sup> [https://www.cas.go.jp/jp/seisaku/kokusai\\_chusai/kanjikai/dai14/gijisidai.pdf](https://www.cas.go.jp/jp/seisaku/kokusai_chusai/kanjikai/dai14/gijisidai.pdf) (in Japanese).



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On a related note, a recent survey of companies conducted by Baker McKenzie in collaboration with KPMG, "The Future of Disputes: Are Virtual Hearings Here To Stay?"<sup>3</sup> produced a number of intriguing findings:

- The majority of respondents (~70%) had attended a virtual hearing since the Pandemic began and the vast majority had a positive experience (only 5.8% had an unsatisfactory or very unsatisfactory experience).
- A large majority of respondents (~70%) would prefer a virtual hearing for the next interim application in which they are involved, and 65% believed that all hearings of less than one day, not involving a jury or cross-examination, should be virtual.
- The majority of respondents (~55%) were in favor of "hybrid" hearings (i.e., some participants are present in the hearing room while others participate remotely).
- The majority of respondents (~65%) were not in favor of virtual mediation, yet only 21% had participated in a virtual mediation session. Of those respondents who had participated in a virtual mediation, most reported a positive experience.

## 2. Pros and cons

As with any relatively new technology, virtual hearings have their benefits and drawbacks. While by no means exhaustive, in this section we will consider certain of the pros and cons of virtual hearings.

### (i) Pros

- **Access to justice**

Virtual hearings have an important role to play in the administration of, and access to, justice, especially for small and medium-sized enterprises (so-called "SMEs").

- **Efficiency**

Given that parties do not have to attend in person, it is often the case that hearings can be arranged at considerably shorter notice than in-person hearings.

- **Cost savings**

There are obvious savings to be made, not least due to the elimination of travel costs and consequent reduction in the associated time.

- **Environmental impact**

As the parties will not be attending using flights or other means of transport and virtual hearings tend to be less paper-heavy than in-person hearings, there is an associated reduction in the environmental impact of these hearings.

<sup>3</sup> Baker McKenzie & KPMG, "The Future of Disputes: Are Virtual Hearings Here To Stay?" is available at: [https://www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--bakermckenzie-and-kpmg-report\\_010221.pdf](https://www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--bakermckenzie-and-kpmg-report_010221.pdf)



## **(ii) Cons**

- **Confidentiality issues**

There is a risk of data leakage to third parties through communication devices used during hearings and sensitive information shared during hearings.

- **Procedural fairness**

There may be a question of fairness with regard to the implementation of a virtual hearing in the event that one party objects to a virtual hearing where the other party insists on the same. Also, since the parties may be effectively prevented from presenting or challenging an argument and presenting evidence at an appropriate time during the hearing, procedural fairness may be hindered.

- **Witness coaching**

During a virtual hearing, situations ordinarily arise where you may only be able to see the face and immediate surroundings to the rear of a witness, depending on the position of the camera. As such, there is an inherent risk that the witness may be "coached" by counsel away from the camera's gaze.

- **Risk of technological failures**

While the internet, hardware and software used in virtual hearings tend to be very stable, there is a risk of technology failing, thereby causing disturbances.

## **3. Protocols from certain institutions**

Since evidence is necessary in fact finding during an arbitration procedure, matters related to the submission, admissibility and method of examination of evidence in international arbitration proceedings are all fundamental. Also, it is widely acknowledged that cybersecurity is of importance in formal dispute resolution proceedings, along with the use of technology.

With this in mind, the rules and guidelines of certain dispute-related bodies, such as the IBA, play critical roles in helping parties navigate how to conduct virtual hearings.

In this section, we will consider the rules and guidelines of a few selected organizations in this respect.

### **(i) International Bar Association ("IBA")**

On February 15, 2021, the IBA announced its second amendment to the IBA Rules on the Taking of Evidence in International Arbitration ("**2020 IBA Rules**").

With respect to virtual hearings, the 2020 IBA Rules state that an evidentiary hearing may take place by way of a remote hearing at the request of a party or on the motion of the arbitral tribunal itself.<sup>4</sup>

Further, the arbitral tribunal is required to consult with the parties on whether to prepare a "remote hearing protocol" in advance, which may include:

- Technology to be used;

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<sup>4</sup> Article 8.2 of the 2020 IBA Rules.



- Advance testing or training in the use of the technology;
- The start and end times for the hearing, taking into account the time zones of the participants;
- How documents may be placed before a witness or the arbitral tribunal; and
- Measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

Additionally, prior to the Pandemic, the ICC released its Cybersecurity Guidelines.<sup>5</sup> This document provides guidance with respect to several items, including cybersecurity and training.

### **(ii) International Chamber of Commerce ("ICC")**

While the ICC International Court of Arbitration's Arbitration Rules 2021 allow for a great deal of procedural flexibility with respect to arbitration procedures, the ICC also released the "Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings" ("**ICC Protocol**")<sup>6</sup> to provide further guidance.

By way of Annex I of the ICC Protocol, parties are encouraged to come to an agreement regarding:

- A pre-hearing plan, including scope and logistics;
- Technical issues, specifications, requirements and support staff;
- Confidentiality, privacy and security;
- Online etiquette and due process; and
- Presentation of evidence and examination of witnesses and experts.

Further, Annex II of the ICC Protocol goes on to suggest clauses for cyber-protocols and procedural orders that may be included in an agreement dealing with the organization of a virtual hearing.

### **(iii) Japan Association of Arbitrators ("JAA")**

On December 9, 2019, the JAA held a seminar entitled, "Cybersecurity in International Arbitration and Mediation," in which the JAA acknowledged the critical importance of cybersecurity in ADR.<sup>7</sup>

During the session, the JAA referenced and summarized several steps taken — or publications released — by other ADR-related institutions from around the world. In particular, the JAA focused on describing the International Council for Commercial Arbitration ("**ICCA**") - New York City Bar ("**NYC Bar**") - International

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<sup>5</sup> IBA, "Cybersecurity Guidelines," October 2018 (available at <https://www.ibanet.org/MediaHandler?id=2F9FA5D6-6E9D-413C-AF80-681BAFD300B0>).

<sup>6</sup> International Chamber of Commerce Court of Arbitration, "Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings," January 1, 2021 (available at: <https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/>).

<sup>7</sup> JAA, "Cybersecurity in International Arbitration and Mediation," December 9, 2019 (materials available at: [https://idrc.jp/wp-content/uploads/2020/11/cybersecurity\\_arbitration\\_mediation.pdf](https://idrc.jp/wp-content/uploads/2020/11/cybersecurity_arbitration_mediation.pdf)) (in Japanese).



Institute for Conflict Prevention & Resolution ("CPR") Protocol on Cybersecurity in International Arbitration (2020 Edition).<sup>8</sup>

#### (iv) Chartered Institute of Arbitrators ("CIArb")

On April 8, 2020, CIArb released its "Guidance Note on Remote Dispute Resolution Proceedings," ("CIArb Note"),<sup>9</sup> which CIArb summarizes as offering, "concise, practical advice to parties and neutrals considering remote hearings."

The CIArb Note sets out guidance under three broad headings pertaining to virtual hearings:

- Technology and logistical matters;
- Legal matters and procedural arrangements; and
- Institutional and ad hoc proceedings.

Further, in the appendix to the CIArb Note, CIArb provides a checklist of items to consider prior to conducting remote dispute resolution proceedings.

#### 4. Practical tips

During recent years, a level of "best practice" has begun to develop within the conduct of, and preparation for, virtual hearings. In this section, we provide certain practical tips with respect to virtual hearings.

Prior to outlining these tips, however, we note that our practical guidance in this section presumes that a virtual hearing is permitted under the following laws and rules<sup>10</sup>:

- The governing law of the underlying contract;
- The law of the arbitration agreement;
- The applicable rules of the relevant arbitral institution;
- The law of the seat/place of arbitration; and
- The law of the jurisdiction in which enforcement is likely to take place.

Presuming the aforementioned elements are confirmed, we recommend the steps in the non-exhaustive list below based on our experience:

1. Establish a **virtual hearing protocol** between the parties as to how the virtual hearing will run, including rules and practical arrangements.

This may be best achieved by entering into a simple agreement for the conduct of the virtual hearing and will likely address the remaining items below.

2. Address **confidentiality**, including: (i) data storage and access; (ii) security settings on digital platforms; (iii) ensuring that only approved members

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<sup>8</sup> ICCA - NYC Bar - CPR, "ICCA - NYC Bar - CPR Protocol on Cybersecurity in International Arbitration," 2020 (available at: [https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/Report-6-icca-nyc\\_bar\\_cpr\\_cybersecurity\\_protocol\\_for\\_international\\_arbitration.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Report-6-icca-nyc_bar_cpr_cybersecurity_protocol_for_international_arbitration.pdf)).

<sup>9</sup> CIArb, "Guidance Note on Remote Dispute Resolution Proceedings," April 8, 2020 (available at: [https://www.ciarb.org/media/9013/remote-hearings-guidance-note\\_final\\_140420.pdf](https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf)).

<sup>10</sup> There may be overlap between certain of these laws.



attend hearings; (iv) considering any local government control mechanisms; and (v) ensuring that document sharing is secure.

3. Consider an **appropriate platform** for hearings, including: (i) the platform to be used; (ii) who will operate the software; and (iii) liability for costs where delays are caused by failures in technology.
4. Arrange the **provision of witness evidence** appropriately, including: (i) ensuring witnesses have a clear video and audio connection; (ii) taking steps to ensure the integrity of witness examination; and (iii) creating contingency plans for when technical issues occur.
5. Address the **presentation of documentary evidence**, including creating an e-hearing bundle with proper hyperlinks and considering how documents will be shared.
6. Establish how you will **communicate with your legal team** during the hearing, including: (i) confidentiality; and (ii) ensuring that the channel is open throughout the hearing for urgent instructions and clarification on issues.
7. Ensure a **suitable connection and bandwidth** exist, including confirming the robustness of technology to be used.
8. Consider **enforcement** in the event that one of the parties does not agree to holding a virtual hearing, including whether an arbitral tribunal has the power to order a virtual hearing and the relevant laws outlined above.

## 5. Conclusion

Throughout the Pandemic, there has been a necessary acceleration in the adoption of legal tech in international arbitration and mediation, chiefly in the area of virtual hearings. This adoption has not passed Japan by, with the public and private sectors taking steps such as the opening of facilities with state-of-the-art technology for remote hearings in Tokyo and Osaka.

It is without question that legal tech will play an invaluable role in the resolution of disputes moving forward and it is a common view that, in one form or another, virtual hearings are "here to stay." As such, parties will be well-served by ensuring that they are properly prepared for virtual hearings and by protecting themselves through steps such as those suggested in this alert.

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If you would like to discuss any of the issues raised in this alert, please contact us.