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Virtual Practice Makes Virtually Perfect – Practical Considerations for Virtual Hearings Identified through Simulations with Experienced Counsel and Arbitrators

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Why We Decided to Organize Simulated Virtual Hearings.....	1
The Courts Lead the Way.....	2
The Simulated Virtual Hearings	12
What We Learned	19
(1) Managing technology to maintain a fair and smooth-running hearing	19
(2) Practice and advocacy observations.....	23
Conclusion.....	29

Why We Decided to Organize Simulated Virtual¹ Hearings

1. Beginning in March 2020, COVID-19 related restrictions on travel and in-person gatherings halted the operation of the Courts across North America and, for arbitrations, limited the options available to participants. With proceedings delayed indefinitely until in-person hearings could resume, participants could either undertake only limited, non-evidentiary virtual hearings or continue with full evidentiary hearings virtually – the second option being something with which few participants were experienced or comfortable. Frequently expressed concerns with virtual evidentiary hearings included that arbitrators would find it difficult to assess witness credibility by video or counsel would have difficulties cross-examining witnesses particularly if the questioning involved technical issues or a large volume of documents. Some expressed concern that the solemnity of the process of giving evidence could be lost on witnesses if they testified from the comfort of their own homes.
2. Guidance available for those considering a virtual evidentiary hearing despite these concerns was limited. Initially, several checklists and “*listicles*” concerning virtual hearings began to circulate on the

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¹ Some insist on distinctions between “*virtual*”, “*remote*”, “*online*” and “*distant*” to refer to hearings conducted using videoconferencing platforms. For the purpose of this article, we use “*virtual*”.

internet. Webinars on virtual hearings followed. They ranged from listicle panel discussions to a more instructional approach presenting best practices and resources based on often limited anecdotal experience. Some “*watch-me-do-it*” webinars provided viewers the opportunity to observe a simulated virtual hearing.

3. While many of these resources proved quite useful, to our knowledge, none offered the opportunity to gain an understanding of the challenges and opportunities of a virtual hearings through hands-on experience. Given this, we decided to undertake a series of simulated virtual hearings to learn from doing as opposed to simply watching or listening. We wanted to learn not only from our own mistakes but those of the other participants and to do so without creating expense for clients or causing any real harm (except, perhaps, to our egos).

4. As arbitrators, we wanted to learn as much as possible about how different people engage in a virtual hearing. We also wanted to understand which aspects of a virtual hearing had the potential to affect the fairness of a virtual hearing. This would allow us to produce enforceable awards.

5. We concluded the use of video conferencing for hearings appeared to be inevitable going forward, at least until COVID-19 restrictions eased and likely beyond. Court decisions imposing remote questioning or a virtual hearing over the objections of a party, usually based on natural justice arguments, reinforced this conclusion. While acknowledging some difficulties with video conferencing, Courts consistently appeared to take the view that there was nothing inherently unfair about proceeding virtually. It appeared to us that the Courts had already moved on and, in some instances, moved ahead of the arbitration community in this area.

6. Some arbitration practitioners have expressed concern about whether proceeding by way of a virtual hearing might lead to an unenforceable award. They should realise that the very decision makers called upon to recognize and enforce or set aside awards, for the large part, have already accepted virtual hearings for themselves.

The Courts Lead the Way

7. Cases began to surface revealing the Courts’ acceptance of video conferencing and their willingness to impose it as a fair and efficient way to move proceedings forward in the face of the pandemic. An early example was [Arconti v. Smith, 2020 ONSC 2782](#) (“Arconti v. Smith”) which contains this oft-quoted passage:

[19] *In my view, the simplest answer to this issue is, “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.*

[20] *That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs’ desire to conduct an examination for discovery in person.*

8. In that case, Mr. Justice Frederick L. Myers concluded that “*due process concerns*” were not inherent to video conferencing and those raised by the resisting party “*are soluble either by creative alternatives or by increased familiarity with the technology*”. Myers J. did not accept that anything would be lost by proceeding virtually that was not more than offset by the proportionality of proceeding efficiently and affordably. Remote questioning was ordered.

9. Even in some criminal and penal matters with higher stakes for the accused and higher procedural safeguards, Courts were allowing virtual hearings. In [R v. Roberts, 2020 ABPC 99](#), Madam Justice Donna Mildred Groves stated that, despite the “*odd hiccups*” the participants “*maneuvered through the process with relative ease*”.²

10. Courts across Canada, including Ontario³, Alberta,⁴ New Brunswick⁵ and British Columbia,⁶ have ordered remote questioning or virtual hearings, in one case commenting that “*COVID-19 has changed the judicial landscape*”.⁷ In [Rovi Guides, Inc. v. Videotron Ltd, 2020 FC 596](#), the Federal Court directed that a trial of a patent infringement action was to continue virtually. The trial had been suspended after four (4) days of a scheduled twenty (20) day hearing had been completed. At a subsequent case management

² See also [R. v. D. \(R.S.\), 2020 ONSC 4030](#), para. 3.

³ [Miller v. FSD Pharma, Inc., 2020 ONSC 3291](#).

⁴ [Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta, 2020 ABQB 359](#);
[Gomravi v Suite Excel Collections Canada Inc, 2020 ABPC 210 \(CanLII\) \(Gomari v. Suite Excel Collections Canada\)](#);
[Mostafa Altalibi Professional Corporation v Lorne S. Kamelchuk Professional Corporation, 2020 ABQB 673 \(CanLII\)](#).

⁵ [Rodrique Levesque et al v. Syngenta Canada Inc. et al, 2020 NBQB 209 \(CanLII\)](#).

⁶ [Hudema v Moore, 2020 BCSC 1502](#).

⁷ [Gomari v. Suite Excel Collections Canada, para. 4](#)

hearing, the parties agreed to, and the Court endorsed, a protocol for the virtual hearing which included “best practices described in the handout for witnesses attached as Schedule ‘A’”.⁸

11. At least one court has expressly dismissed the suggestion that a denial of in-person questioning is unconstitutional. Master James R. Farrington in [Mostafa Altalibi Professional Corporation v Lorne S. Kamelchuk Professional Corporation, 2020 ABQB 673](#) stated

[7] I do not think that the submissions on behalf of the respondent were meant to suggest that not being entitled to conduct Part 5 questioning in person is unconstitutional, but if that was the intended submission, I reject that argument. This is a private law dispute between two dentists who are at odds about their former practice arrangements. As a matter of the principles of fairness and justice and the rule of law, there is no question that the parties are entitled to a fair process and a fair hearing and equal benefit of the law. Nothing constitutionally guarantees a certain type or quality of Part 5 questioning in a civil dispute.

12. Master Farrington referred to the fact that remote questioning was routinely ordered even prior to COVID-19:

[11] Video conference questioning was routinely ordered at times well before the COVID-19 pandemic. In cases where it has been ordered, it has generally been directed in the interests of business efficacy and practicality and to reduce costs for litigants. It is difficult to argue against any of those objectives. There is no question that the COVID-19 pandemic is an important reason to also increase the use of remote questioning. It allows litigation to proceed effectively under controlled and safer conditions.

13. There are a number of examples of Courts ordering video conference proceedings prior to COVID-19. In 2009, in the case [Midland Resources Holding Limited v. Shtaif, 2009 CanLII 67669 \(ON SC\)](#) Mr. Justice (now Arbitrator) Frank Newbould observed that examination of witnesses by video conferencing is a “normal process” in “modern international litigation or arbitration” and that given the costs of

⁸ [Rovi Guides, Inc. v. Videotron Ltd., 2020 FC 637 \(CanLII\)](#). See also [Guest Tek Interactive Entertainment Ltd. v. Nomadix Inc., 2020 FC 860](#).

litigation the use of video conferencing should be encouraged rather than discouraged for other claims so long as the discretion to order it is exercised judicially.⁹

14. Even earlier, in 2000, the Alberta Court of Appeal specifically endorsed remote questioning on affidavits. The Court in [Alberta Central Airways Ltd. v. Progressive Air Services Ltd., 2000 ABCA 36](#) saw the issue as being one of “logistics” that fell within a case management judge’s discretion. It stated in its brief reasons:

We have not been shown that video conferencing is an ineffective or unfair way to cross-examine on these two affidavits.

We do not see this as a denial of the right to cross-examine, nor a matter of finding unusual circumstances, nor of reversed onus. It is simply a question of weighing practicality in the 21st century.

15. The Courts have now started to question the need and efficiency of proceeding in-person in some cases. Again, in *Mostafa Altalibi Professional Corporation v. Lorne S. Kamelchuk Professional Corporation*, Master Farrington states:

[12] One must also think about the end result of a questioning session. In the end, what is generated from a Part 5 questioning is a transcript whether the session is conducted in person or by video. Neither a master, nor a judge, nor counsel reading the transcript, see the demeanour of the witness when they read the transcript. Remote questioning may not be perfect, but it is a viable technique that has been used extensively in the past and will continue to be used extensively in the future.¹⁰

16. Similarly, Madam Justice Francesca V. Marzari in [Winchester Investments Ltd. v. Polygon Restoration Inc./Polygon Apres Sinistre Inc., 2020 BCSC 999](#) denied an application seeking an order that nominated representatives of a defendant attend in-person for examination for discovery.

[8] I am satisfied, having read all of the materials, that plaintiff counsel’s preference to travel to Montreal to conduct an in-person examination for discovery of the defendants representative at a reporter’s office, is an unnecessary and unwarranted imposition on

⁹ The Courts’ approach to virtual hearings will likely include cost consequences related to conducting the a virtual hearing including, at least initially, costs incurred where counsel requires extra preparation time as a result of the “learning curve associated with virtual hearings” [Niagara-On-The-Lake v. Tweed Farms Inc., 2020 ONSC 4248](#) paras 6 and 16; [Raki Holdings Inc. v. Lionheart Enterprises Inc., 2020 ONSC 6329](#) para. 40.

¹⁰ *Mostafa Altalibi Professional Corporation v. Lorne S. Kamelchuk Professional Corporation* para. 12.

the participants in the examination for discovery, not least of which for the defendant's counsel, who would then have to choose to travel from Vancouver to Montreal for this purpose, or not to be present with his client when opposing counsel is. In some cases, that might be necessary, but it is not here. Both counsel practice in Vancouver, and the technology exists through court reporting services in Vancouver to conduct remote examinations for discovery of a person located in Montreal.

*[9] The applicant says that it would be impossible through this process to introduce and show the examinee documents in the course of the discovery. I disagree. Most such documents will be listed documents, and proper organization will allow counsel and the party examined to refer to the same document. To the extent that the examinee is seeking to rely on unlisted documents, that should be the exception, and screen sharing and other technological platforms now exist to address that problem (see, for example, the guidance provided in *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359).*

17. Given the attitude of the Canadian Courts, lawyers' groups have also started publishing protocols and advice for best practices for remote hearings and questioning¹¹ and the Courts have issued their own protocols for the public wishing to participate in the judicial process by way of virtual hearings.¹² As Mr. Justice Calum MacLeod observed in [Scaffidi-Argentina v. Tega Homes Developments Inc, 2020 ONSC 3232](#), “[v]irtual hearings are likely to retain a permanent place in the judicial tool box”.

18. The Courts repeatedly note how their practice and processes have evolved due to the introduction of virtual hearings. For example, in [Louis v. Poitras, 2020 ONSC 5301](#), Mr. Justice Robert N. Beaudoin described the evolution of the Courts' process and the practice of counsel appearing before the Courts:

[60] Except for the occasional bifurcated trial, the practice of our court has been to offer continuous trials. Historically, a concern existed about the impact of the passage of time on the memories of all who were involved in the trial. This concern has been addressed to some extent by digital audio recordings of all testimony. Virtual hearings or hybrid hearings currently conducted by ZOOM and other technologies are similarly recorded.

¹¹ [Alberta Protocol for Remote Questioning; Best Practices for Remote Hearings; Consolidated COVID-19 Practice Direction \(June 25, 2020\)](#).

¹² [Québec's September 2020 guide for the conduct of hearings using Microsoft Teams “Hearings conducted through technological means – Microsoft Teams User Guide for the General Public”](#). See the [Barreau de Montréal's online sources for updates and resources](#) for the public and members of the bar.

Counsel typically attend trial with their own laptops and recording devices. In short, the ability to review the evidence and refresh the judge's memory as well as the memories of the parties and their counsel has vastly improved.

19. As early as August 2020, the Courts began to make reference to “the “usual” terms for virtual hearings”,¹³ the “standard approach” to delivery of documents¹⁴ and the “current norm of virtual hearings”.¹⁵

20. This view of virtual hearings is not unique to Canada. In [Eaton Partners, LLC, v. Azimuth Capital Management IV, Ltd., No. 18 Civ. 11112 \(ER\) \(S.D.N.Y., 2019\)](#) District Judge E. Ramos of the United States District Court Southern District of New York stated:

Even if the Arbitrator had in fact refused to adjourn the hearing and only allowed Montemurro to appear by video, this would not have constituted a deprivation of Azimuth's right to a fundamentally fair hearing. See Bisnoff v. King, 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001) (holding hearing was fundamentally fair even when arbitration panel refused to postpone hearing for unavailable witness when it provided witness with opportunity to appear by telephonic or video conference).

21. Further, in a recent case out of [Illinois](#), a judge refused to grant a temporary restraining order and a temporary injunction of a decision to proceed with a virtual hearing by an arbitration panel of the Financial Industry Regulatory Authority, Inc. where the Respondent had argued that “given the number of witnesses, the amount and nature of the documents, and the need for an interpreter and the complexity of the issues, a Zoom virtual hearing will deprive [the Respondent] of the ability to effectively defend against the claim being made”. The Court said in response:

He thus pits his conjecture against this court's experience holding several remote evidentiary hearings since the pandemic began (once with an interpreter), all of which permitted the parties to air their claims and defenses fully. Remote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses.

¹³ [Dr Kadri v. College of Physicians and Surgeons, 2020 CanLII 59805 \(ON SCDC\)](#) para. 8.

¹⁴ [Know Your City Inc. v. Brantford \(City of\), 2020 ONSC 5113](#) para. 11.

¹⁵ [Fontaine v. Canada \(Attorney General\), 2020 CanLII 64770 \(ON CA\)](#) para. 13.

22. A recent decision of the Federal Court of Australia, [Capic v. Ford Motor Company of Australia Limited \(Adjournment\) \[2020\] FCA 486](#) (“Capic v. Ford Motor”), is cited in a number of Canadian cases. In that case, Mr. Justice Nye Perram refused to adjourn a six (6) week trial, ordering that it proceed by using videoconferencing. The Respondent, in resisting a virtual trial and seeking an adjournment, raised a number of alleged difficulties including: (1) technological limitations including challenges with internet; (2) physical separation of legal teams; (3) difficulties briefing expert witnesses and the fact that they were to “hot tub” and were from different time zones; (4) lay witnesses, and in particular difficulties with cross-examination; (5) document management; (6) issues like the possibility of failing ill or the strain of having children at home while trying to conduct a trial; and, (7) that the virtual hearing would increase trial length and, therefore, expense. Perram J. concluded:

Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.¹⁶

23. Also in Capic v. Ford Motor, Perram J. expressed his expectation that counsel adjust their advocacy to the new environment, recognizing that technical issues may be “aggravating” but “tolerable”. Indeed, the courts also have begun to put the onus on counsel to be prepared. In [Scaffidi-Argentina v. Tega Homes Developments Inc, 2020 ONSC 3232](#), the Court stated:

[17] If the hearing proceeds in whole or in part by teleconference or videoconference, it will be the responsibility of counsel to have appropriate equipment and telecommunications equipment or internet connections and otherwise to follow the best practices and etiquette for virtual hearings found on the court web site at <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/remote-hearings/>.

24. Myers J. in Arconti v. Smith, concluded that some commonly raised concerns about virtual hearing result from a lack of experience with the technology.

[39] Two points are of note. First, the great fears expressed in case law by those who have never actually used the technology may not be as significant as feared. I agree with this view. However, I also agree with Perram J. and Mr. Bastien, that currently, it does

¹⁶ Capic v. Ford Motor, para. 25. Similar [decisions](#) have also issued from Europe.

appear that there is some loss of solemnity and personal chemistry in remote proceedings. What is not yet known however, is whether, over time, as familiarity with new processes grows, we will develop solutions to these perceived shortcomings.

...

[43] I agree but with this proviso. In my view, much of the hesitancy and concern that led to the conclusions that the process is “unsatisfactory” or raises “due process concerns” stems from our own unfamiliarity with the technology. As noted above, it is just a tool. It does not produce perfection. But neither is its use as horrible as it is uncomfortable. (our underlining)

25. Many Canadian administrative tribunals have also embraced the use of video conferencing. These range from the Canadian Human Rights Tribunal¹⁷, Ontario Securities Exchange Commission¹⁸, Ontario Labour Board,¹⁹ Ontario Law Society Tribunal²⁰, Ontario Financial Services Tribunal²¹ and the Horse Racing Alberta Appeals Tribunal.²² The Saskatchewan Labour Relations Board found an exception to its “presumption” that all hearings should proceed by video conference in the case of a self-represented party with technological limitations.²³

26. If the courts and administrative tribunals can evolve, then arbitration must keep pace. One of the promises arbitration offers is its potential to provide more flexible, informal processes and more timely decisions. Waiting for COVID-19 restrictions to ease before conducting hearings does not deliver on that promise. The courts have adjusted. Why not arbitration?

27. Some arbitral institutions already offer flexibility. Some existing rules can be interpreted to include virtual hearings as an alternative to in-person hearings. ICDR Canada’s Canadian Dispute Resolution Procedures’ Canadian Arbitration Rules²⁴ at Article 20 mentions “*technology, including electronic communications*” as options open to tribunals and the parties for consideration.

¹⁷ [Hugie v. T-Lane Transportation and Logistics, 2020 CHRT 25 \(CanLII\).](#)

¹⁸ [First Global Data Ltd \(Re\), 2020 ONSEC 23.](#)

¹⁹ [Ontario Nurses' Association \("ONA"\) v. St. Mary's General Hospital, 2020 CanLII 86670.](#)

²⁰ [Law Society of Ontario v. Regan, 2020 ONLSTA 15 \(CanLII\).](#)

²¹ [McHayle v. Ontario \(CEO of FSRA\), 2020 ONFST 10.](#)

²² [Dory-Kropp v. Horse Racing Alberta, 2020 ABHRAAT 15; Webster v. Horse Racing Alberta, 2020 ABHRAAT 17; Pick v. Horse Racing Alberta, 2020 ABHRAAT 16.](#)

²³ [Lapchuk v. Saskatchewan Government, 2020 CanLII 65812 \(SK LRB\).](#)

²⁴ [ICDR Canada’s Canadian Dispute Resolution Procedures’ Canadian Arbitration Rules.](#)

Article 20(2) The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.

A similar example is found at Article 25(4) of the Swiss Chambers' Arbitration Institution's [Swiss Rules of Arbitration](#).

28. Others have introduced rule updates, some already in effect. See, for example, the Vancouver International Arbitration Centre's ("VanIAC") Domestic Arbitration Rules effective September 1, 2020²⁵ introduced at the same time that B.C. updated domestic [Arbitration Act, SBC 2020, c 2](#). VanIAC's Domestic Arbitration Rules expressly provide for virtual hearings:

21. General

(a) Where the parties agree or are directed by the Arbitral Tribunal to proceed by way of Virtual Hearing, the Arbitral Tribunal may issue directions on:

(i) The video conferencing platform to be used for the arbitration that provides for:

(a) clear video and audio transmission;

(b) if necessary, allows for virtual breakout rooms for each party; and

(c) if necessary, allows witnesses, the Arbitral Tribunal, and the parties to simultaneously view documents.

(ii) A backup system of communication.

(b) Unless otherwise agreed by the parties, the only persons entitled to access or attend a Virtual Hearing are:

(i) the parties;

(ii) the parties' legal representatives;

(iii) witnesses during their examination;

(iv) the Arbitral Tribunal;

(v) any Arbitral Tribunal secretary; and

²⁵ [VanIAC's Domestic Arbitration Rules](#).

(vi) third party service providers, including but not limited to interpreters and transcription service providers.

(c) Any party may request that the Arbitral Tribunal test the videoconferencing platform prior to a Virtual Hearing, provided that such party shall book necessary venues and coordinate with the parties and Arbitral Tribunal regarding arrangements relating to the test.

(d) Prior to the Virtual Hearing the Arbitral Tribunal shall consider and provide direction with respect to the procedures for the Virtual Hearing including:

(i) how witness statements, expert reports and other documents referenced in the Virtual Hearing will be shared with the Arbitral Tribunal, witnesses and counsel;

(ii) procedures for the examination of lay and expert witnesses, including: exclusion of witnesses prior to their examination, restrictions on communications with a witness, and excluding a witness during their examination to address objections;

(iii) any special restrictions or procedures for hearings that are held in part in person and in part virtually;

(iv) procedures for use of virtual breakout rooms for each party;

(v) procedures for the participation of interpreters; and

(vi) whether a recording or transcription of the Virtual Hearing will be made and who will have access to any recording or transcription.

29. For rules updated for institutions located outside of Canada, see also the 2021 LCIA Arbitration Rules:²⁶

19.2 The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal

²⁶ [LCIA Arbitration Rules](#), effective October 1, 2020.

may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed.

30. Others have adopted new rules which come into effect shortly. See the ICC's incoming Arbitration Rules,²⁷ Article 26.1, effective January 1, 2021:

26 (1) A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

The Simulated Virtual Hearings

31. Early in COVID-19, we concluded that virtual hearings were likely to be with us in one form or another for the foreseeable future. Inspired by the pedagogical approach based on the adage "*I hear and I forget. I see and I remember. I do and I understand*",²⁸ in April 2020, we began organizing a series of four (4) half-day simulated hearings held by videoconference. We held the simulations between May 22 and October 5, 2020. Julie served as panel chair while Daniel managed the overall process and provided IT support. We were assisted throughout by a dedicated Tribunal Secretary, Catherine Ou Jing, a talented lawyer in Montreal.²⁹

32. At the time we decided to organize the simulations, a number of useful draft procedural orders and protocols for virtual hearings were circulating.³⁰ Institutions like the ICC and AAA-ICDR Canada also

²⁷ [ICC Rules of Arbitration, effective January 1, 2021](#).

²⁸ The source of this quote, if any single source exists, is attributed to different individuals:

<https://quoteinvestigator.com/2019/02/27/tell/>.

²⁹ [Kalman Samuels](#).

³⁰ [CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings](#); [S. Cohen \(2020, forthcoming\) "Draft Zoom Hearing Procedural Order"](#)(TDM, ISSN 1875-4120) April 2020, www.transnational-dispute-management.com; [R.F. Ziegler \(2020, forthcoming\) "Draft Procedural Order to Govern Virtual Arbitration Proceedings"](#) (TDM, ISSN 1875-4120) April 2020, www.transnational-dispute-management.com; [Seoul Protocol on Video Conference in International Arbitration](#); [AAA-ICDR® Model Order and Procedures for a Virtual Hearing via Videoconference](#).

published guidance for virtual hearing for arbitrators and counsel.³¹ Articles³² and journal issues devoted to the topic soon appeared in increasing numbers.³³ Arbitration institutions such as [Delos](#) and online sources such as [Virtual Arbitration](#) helpfully compiled these resources on virtual hearings for use by practitioners. Recent articles have consolidated a year-to-date survey of some jurisdictions' responses and experiences, providing a helpful summary of trends and possibilities.³⁴

The platform

33. The biggest initial decision we had to make concerned which videoconferencing platform we would utilize for the simulations out of the most commonly used ones: [Microsoft Teams](#), [Zoom](#), [Webex](#), [Lifesize](#) and [BlueJeans](#). Zoom appeared to be the most intuitive but, at the time, its use raised security concerns for some organizations. Ultimately, we decided to use Microsoft Teams. We did so because it appeared to be the most secure platform and we were aware some organizations, like specific governments and banks, refused to agree to use any other platform. Further, because it appeared to be the hardest platform to learn, we anticipated it would provoke the most comment from participants and, if the participants could master it, then they likely could master any other platform. As well, Microsoft Teams offered a central document repository with its videoconferencing. As much of the point of the exercise explored the effective use of documents in a virtual hearing, we wanted to understand the usefulness of this functionality.

The goal – to identify “*must haves*”

34. In choosing Microsoft Teams, we sought to remain “*tech agnostic*”. It was not our goal to sell participants on its benefits. We hoped, instead, participants would take away an understanding of their own, individual “*must haves*”, that is, features or functionalities that they would require before agreeing to a virtual evidentiary hearing. These would be the minimum requirements that, if met, would allow them to accept a virtual hearing without being concerned that doing so would limit their acquired skills or approaches. We wanted each participant to identify for themselves the terms on which they would

³¹ [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#); [AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties](#); [AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM](#).

³² See for example, [J. Brian Casey and Grant Hanessian, Ordering Virtual Hearings over the Objections of a Party, ADRI Perspectives Vol.7 No.2 May 2020/mai 2020](#).

³³ [The New York State Bar Association, New York Dispute Resolution Lawyer, Summer 2020, Vol. 13 No. 2](#).

³⁴ See, for example, [The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months](#). The contributors provide their reviews of fifteen (15) jurisdictions: Australia, Brazil, China, Egypt, England and Wales, Germany, Hong Kong SAR, India, Nigeria, Kenya, Singapore, South Korea, Sweden, the United Arab Emirates (UAE) and the United States.

agree to a virtual hearing. By not imposing a “*one size fits all*” solution, it allowed us to include a wide range of participants whatever their individual experiences or comfort level with the technology.

35. For ourselves, we wanted to become more informed as arbitrators so that we could design and manage a virtual hearing based on the various skill levels and enthusiasm of participants. Not all participants will be tech-savvy or open to a virtual hearing nor can we expect that all will agree to a single platform. We needed experience to understand where the pitfalls were - which enthusiasms had to be calmed and which issues could be adequately addressed.

The participants

36. We wanted to assemble a diverse group so we could benefit from as many different perspectives as possible. We sought participants who were subject to their firms’ IT protocols and so had little discretion as to the IT they used, participants who were comfortable with technology and those with an aversion to virtual hearings. We decided to involve only seasoned practitioners who could bring their skills, experience and opinions to the exercise. We also wanted to have a mix of participants with different approaches to dispute resolution including those with a civil law and common law background and, also, those who practiced domestic and international commercial arbitration. As well, we wanted to ensure that the participants for each simulation were gender balanced and regionally diverse.

37. We succeeded each time. We invited between ten and twelve experienced arbitration counsel and arbitrators from across North America to participate in each simulation. They consisted of practitioners from leading regional, national and international firms, senior government legal counsel, academics and independent neutrals. We drew participants from across Canada (Vancouver, Calgary, Edmonton, Regina, Toronto, Ottawa and Montreal) and the United States (Denver, Houston, Chicago, New York City, Philadelphia, Boston and Washington, D.C.). For each simulation, we purposely mixed and matched participants with different IT comfort and skill levels, obliging them to realise that their own skill levels were not the only consideration in determining whether to agree to a virtual hearing. By forcing mismatched participants to prepare together or, if not mismatched, to face another team or panel member with less or more IT comfort or skills, we believed the takeaways would be more marked.

38. The value of the simulation rested on having participants with strong opinions about arbitration and advocacy, informed by lengthy experience and study. We sought to identify how participants interacted with the technology, where technology could be manipulated to serve existing

approaches/styles and where existing approaches might have to yield or adjust to the technology. The simulations did not disappoint.

The design of the simulation

(a) Roles

39. For the simulations, participants agreed to take on one of the following roles:

- A member of an arbitration panel comprised of a chair and two (2) party appointed panel members
- A tribunal secretary
- Two (2) counsel for Claimant
- Two (2) counsel for Respondents
- Representatives/witnesses
- At least one (1) understudy who could step in and take over a role on short notice if necessary (and in one instance who cameoed as a surprise witness)

(b) Task Checklist

40. We structured the three (3) hour hearing using a chess clock format so we could get through all the exercises in the allotted time. We used a detailed “Task Checklist”, circulated to participants in advance, to schedule the tasks which participants would perform. The Task Checklist set out exercises with a number of transitions between speakers and documents. A transition involves a change, planned or unplanned, which occur naturally in in-person hearings. Each transition involved a specific role during a hearing and required that participants all engage in undertaking a specific task. For example, a transition between documents involved locating and displaying a document on-screen or, at the request of a witness, a panel member or objecting opposing counsel, locate and display another document. The Task Checklist anticipated those transitions which participants would likely face in a real hearing and ensured that they were actually rehearsed as part of the simulation.

41. The Task Checklist comprised three (3) main phases. Phase one gave Claimant’s and Respondent’s counsel an opportunity to cross-examine the other party’s witness on their respective witness declaration. This required counsel to put documents to the witness and the witness, in giving evidence under cross-examination, to require counsel to locate and display other documents. Panel members were tasked with

interrupting and requiring counsel or a witness to source another part of the document or another document altogether.

42. Phase two involved a contested application to admit into evidence a pair of late-produced documents. To complicate matters, we added a solicitor-client privilege issue putting both redacted and unredacted versions of the documents in play. This exercise required counsel to puzzle through the logistics of how to manage the contested document in redacted and unredacted forms in a virtual hearing. It also required the arbitration panel to virtually “leave” the hearing to caucus for deliberations on the contested documents and then return to the hearing to deliver a decision.

43. Phase three required that Claimant’s and Respondent’s Counsel make oral submissions on the merits using written argument and case law provided. This phase required them to lead the panel through various cases and exhibits as part of their argument and respond to questions from the arbitration panel about other exhibits or cases.

44. In relation to the application to enter disputed documents into evidence, we noted that some procedural orders or commentaries on best practices require that all parties agree that no new documents can be submitted during a hearing. Even so, in our view, it is impractical and unrealistic to expect the production of new documents would not arise even on consent of the parties. We chose to practice what would happen in such a case and how to handle it.

(c) Materials

45. We generated a modestly complex fact pattern that concerned a *force majeure* claim alleged to have resulted from COVID-19. The issue involved a multi-year distribution agreement for transborder delivery of food products for use in cruise line ships with minimum, annual purchase requirements. Respondents issued a notice of force majeure in January 2020 to excuse non-performance and Claimants initiated arbitration to enforce the terms of the distribution agreement.

46. The document set was typical of a commercial arbitration and substantial enough so that all participants had enough evidence and issues to generate their positions. We sought to organize a genuine hearing on the merits with live testimony with cross-examinations, contested documents, a panel caucus and pleading.

47. Having a document set created in advance allowed busy practitioners to agree to participate without having to draft anything. The full scope of the materials also allowed them to choose, much like

a buffet, from what interested them and not from an overly-limited range of materials. The document set included:

- Notice of Arbitration
- Response
- Arbitration Protocol
- Procedural Order for Virtual Hearing
- Statement of Claim
- Statement of Defence
- A variety of admitted, privileged and/or contested exhibits
- Detailed witness statements for Claimant and Respondents
- Written argument and case law for Claimant and Respondents

(d) Procedural Order

48. The Procedural Order concerned the mechanics of the virtual hearing. It adopted a straightforward, condensed approach compared to some of the more intricate versions circulating on the internet. It covered topics like:

- Equipment and venue requirements
- Pre-hearing equipment test
- Lodging of records in the document repository
- The use of electronic document bundles prepared for cross-examination purposes
- The hearing procedure (including provisions prohibiting witnesses accessing documents or materials other than their witness statement or documents put to them by counsel and the obligation on witnesses to disclose the presence of others while they give evidence)
- A technical failure plan

(e) No tourists

49. A key aspect of the simulations involved closing them to non-participating observers. We reasoned that if everyone had some “*skin in the game*” they would know the effort and difficulty involved

when they watched others struggle with some task or exercise. We wanted the participants to feel free to take risks and share insights without concern for being judged by passive observers. To preserve this objective, we declined requests from non-participants seeking access to observe.

(f) Pre-hearing technical meetings

50. The Procedural Order required all participants to attend at least one (1) and preferably two (2) pre-hearing technical meetings. The purpose of the meetings was to check everyone's connectivity to Microsoft Teams and the adequacy of their internet speed as well as their equipment. The meetings also allowed us to ensure that each participant had a basic understanding of Microsoft Teams and its functionality. By engaging in the pre-hearing technical meetings, participants realised the importance of verifying the equipment and connectivity which they and their clients would use when the actual hearing date arrived. Though many listicles and draft procedural orders list such meetings as key elements, most participants realised their importance only once they engaged in them.

(g) Real-time feedback

51. During the hearing itself, we would frequently pause proceedings to highlight things as they happened. Doing so allowed us to point out in-the-moment innovations or alternatives and to discuss in real-time what emerged as being important to presentation and advocacy or to the smooth running of a virtual hearing. We believed that many such insights risked being forgotten or overlooked if only considered at the end of the simulation.

(h) Post-hearing debriefing

52. First, immediately following each hearing, we scheduled a short group de-brief. Having just completed their simulations, participants had top-of-mind takeaways which varied by their own background and their role in the simulations. Second, we followed up individually with the participants days or weeks later. We generated a list of questions about the process and recorded the participants' "takeaways" including any spontaneous comments. We either meet with each participant by video conference or gave them the opportunity to provide written feedback to the questions. In addition to asking open-ended questions seeking feedback of any sort, the questions targeted the following:

- Their views on Microsoft Teams before and after the simulation and how Microsoft Teams compared with their experiences with other platforms
- What they found the biggest limitations were for a virtual hearing
- Whether they would they agree to one and what would they require in order to agree

What We Learned

53. Through our own observations and the feedback received from participants, we identified a number of considerations, some minor and some major, for participants engaging in virtual hearings. These fall into two general categories: (1) considerations related to maintaining a fair and smooth-running virtual evidentiary hearing; and (2) other practice and advocacy considerations.

(1) Managing technology to maintain a fair and smooth-running hearing

54. Preparation and planning by counsel and the arbitration panel emerged as the number one imperative not only for a smooth-running hearing but, importantly, to ensure the ability of everyone to participate in the hearing in a meaningful way. As top-of-mind advice for those involved in a virtual hearing, one participant said: “*prepare, prepare, prepare*”.

55. We learned early on that a virtual evidentiary hearing will only run as smoothly as the least technologically prepared or adept participant. We believe that the arbitration panel is responsible, prior to and following an order to conduct a virtual hearing, for anticipating potential problems and asking key questions to identify those weaknesses or worry spots.

56. Further, the limitations of an individual’s equipment and technological skills can create barriers to his or her full engagement in the process. The arbitration panel must be prepared to identify and address these issues to avoid natural justice issues that have the potential to undermine the integrity of the process and resulting award.

57. Consistent with many protocols and recognized best practices, our experience, and the feedback we received, suggests the following.

(a) Expect problems

58. Any number of factors beyond the control of participants can and will sidetrack a virtual hearing - from power outages to construction noise. The likelihood of these disruptions occurring during a virtual

hearing as compared to an in-person hearing seems to increase significantly with the number of participants and locations involved.

59. At the same time, virtual proceedings avoid problems that delay in-person hearings such as if a participant's flight is missed or cancelled or a participant has visa issues or cannot travel for other reasons. Advocates for virtual hearings do not promise hearings will run glitch-free. Rather, they may avoid problems familiar to in-person hearings but trade them for different problems. In comparison, however, technical issues, while causing delay, can often be resolved within hours if not minutes.

(b) Adequate connectivity

60. A single participant's slow internet speed or device with inadequate processing power will materially impact a virtual hearing. The panel must ensure that the participants establish and test minimum requirements prior to the hearing.³⁵ This includes requiring participants to check their internet speeds prior to the hearing. Participants can readily do so by going to websites like www.fast.com or www.speedtest.net and verifying their transfer speeds. Sitting closer to the wireless modem/router, limiting use of bandwidth by others at the same address or using a cable connection can help alleviate slowness. Be aware that the use of VPN causes connectivity issues and participants should disconnect VPN access during a hearing. If use of a VPN remains necessary, due to the anticipated location from which a participant may join for the actual hearing, advise the other participants well in advance of such use and not during the hearing.

(c) Adequate devices

61. Older laptops do not have sufficient RAM to handle incoming video. Adequate internet speed is of little use if a participant's device is older or not powerful enough to process incoming video at an acceptable speed. Despite their flexibility, tablets such as iPads can also lack the necessary processing power and likewise should not be used. Too often, participants agree to engage in virtual hearing but, in good faith, misunderstand the technical minimums required to ensure that all, not just they, are able to participant and see the other participants. One participant in our simulations, as an arbitration panelist,

³⁵ Examples include: [Seoul Protocol on Video Conferencing in International Arbitration](#); Section 2.5 [Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings](#); [Part I of the Recommendatory Standard for Internet Arbitration \(Guangzhou Standard\)](#); ["Appendix B" to the Best Practices for Remote Hearings prepared by the joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association.](#)

assumed his device with limited processing power sufficed. The technical meeting challenged this assumption by demonstrating that his brand-new tablet was inadequate for the purpose. He subsequently upgraded his kit.

(d) Full function videoconference platform

62. All participants should have downloaded the version of the videoconferencing platform being used before the pre-hearing test. Doing so makes sure there are no restrictions preventing its use. Multi-site, large, national/international firms and organizations which have pre-set, less-than-nimble IT protocols often limit the choice of platforms a participant can accept or join without special authorization. Further, in the case of platforms like Microsoft Teams, the app has much greater functionality than the web version.³⁶ Participants who do not use the app are disadvantaged in their ability to participate in the virtual hearing. Each videoconferencing platform provides online guides and FAQs designed to allow users to get the most out of their platform.

(e) Headphone Use

63. Headphone use by all participants should be required. First, their use prevents ambient noise from interfering with the hearing. While the participant that is the source of the noise can be muted, that solution is only effective for as long as the person does not have to speak. Second, perhaps even more importantly, headphone use prevents proceedings from being overheard by others and so protects confidentiality. This is of particular concern as many participants will attend hearings from outside a more secure office location. Note that many of the standards set for Courts do not concern themselves with confidentiality as the default of the Courts is open access. In contrast, protocols developed for arbitrations must consider measures which respect confidentiality if and when the parties, rules and/or *lex arbitri* impose confidentiality.

(f) Two (2) screen minimum

64. Two screens are a minimum requirement for each participant to allow them to review exhibits or other documents while still maintaining visual contact with the other participants. Consider the second screen as an electronic version of a tabbed binder while the original or main screen serves as the visual connection to the hearing and other participants. It is also advisable for all participants to have access to

³⁶ See for example: <https://docs.microsoft.com/en-us/microsoftteams/unsupported-browsers>.

email, or some more secure method of document sharing if necessary, and have access to a printer at their location. If all else fails, paper still works.

(g) Pre-hearing technical meetings requirements

65. Many of the procedural orders presently circulating for virtual hearings provide for a pre-hearing technical meeting. The purpose of this meeting is to check the adequacy of the equipment being used and the participants ability to use the platform. Participants found that these meetings were indispensable to heading off many technical issues that could have derailed the hearing.

66. The pre-hearing meeting were most effective when all participants, including third-party witnesses, attended from the location from which they planned to attend the hearing and used the equipment, internet connection and version of the platform they intended to use at the hearing. Unless the importance of these dress rehearsal requirements were made clear, participants frequently attended using an iPad, for example, or from their cottage, or they signed in using the web version of the platform as opposed to the app. The session, while still useful, was not as helpful as it could have been.

(h) Hands-on Practice

67. In addition to a providing a technology check, we also used the pre-hearing technical meeting to demonstrate the functionality of the platform and provide participants with an opportunity to practice using it. This was so they could figure out what functionalities they found useful and which did not suit their purposes. In some cases, we offered participants further individual support. We heard repeatedly from participants that they found this invaluable and we have also found it useful in real hearings where a panel member or a third-party witness or counsel with a specific issue may require increased support.

68. In the case of Microsoft Teams, users cannot practice using the platform on their own but must always meet with someone else over the platform which, for the simulations, limited practice opportunities.

(i) Third Party IT Support

69. Many participants were of the opinion that having some kind of designated third-party technical support available for the hearing was important. They suggested the support might come in many different forms depending on the resources and needs of the parties including: IT professionals from the firms involved; technological support from arbitral institutions; a third party provider such as a court

reporting service or the arbitration panel engaging a “Tech Secretary” were all identified options. Independent professional service providers such as [Arbitration Place](#)³⁷ can provide reliable, tested videoconferencing platforms, with or without a document repository, and include simultaneous translation and real time transcripts. Institutions like ICDR Canada provide similar services as part of their service offerings.

(j) Scheduling

70. Despite everyone’s best efforts, it seems almost inevitable that delays will occur either to address technological issues or other disruptions and many participants were of the view it would be prudent to build extra time into a hearing schedule to take into account these possible delays. Also see the comments on “Overstimulation” below.

(2) Practice and advocacy observations

71. Our observations and the feedback we received from participants also confirmed that a virtual hearing impacts advocacy and practice in various ways:

(a) Oath/affirmation

72. For virtual hearings, an arbitration could be seated in one jurisdiction while the witness is located in another and the arbitrator is located in a third. That situation raises a law school exam-type question about the appropriate oath or affirmation to be administered. Whatever the correct answer to the question may be (we leave that to the gentle reader to determine), to avoid later disputes and risks to the enforceability of the award, the issue should be raised with the parties upfront. In the absence of agreement, the arbitration panel can identify other solutions to ensure the award is enforceable. See below under the heading “*Loss of Control of the Witness Environment*” about oaths that incorporate directions as to witness conduct.

(b) Deemed Virtual Hearing Location

73. Related to the above, by agreement, the procedural order should contain a provision deeming that the virtual hearing took place at the arbitration seat or the agreed hearing location if there is one.

³⁷ An experienced supplier for counsel and arbitral tribunals located in Canada and elsewhere, [Arbitration Place](#) offers a suite of services and resources for arbitrations, including its own Virtual Protocol Applicable to Virtual Hearing which arbitral tribunals and parties can adapt for their purpose.

(c) Hearing Preparation

74. Many participants observed that they required greater preparation for the hearing, both to understand how to use the platform and how it would assist or hinder their presentation of the case. One set of counsel estimated their preparation time was as much as two and a half to three times longer than it would have been otherwise. Participants' experience with preparation time varied depending their (i) role during the hearing, (ii) ease with technology, and (iii) experience with a particular platform.

(d) Camera Placement

75. Typical advice about camera placement includes that one should raise the height of the camera and avoiding backlighting. In addition, participants should consider how close a participant's camera should be to the subject. The ideal placement may vary according to a participant's role and even the different phases of a hearing. For example, counsel might choose a closer camera placement when cross-examining a witness and then move it back when making oral submissions to allow gestures to be observed. During oral argument, some counsel chose to make submissions from a lectern. One participant stated he considered that the arbitration panel should mandate camera position as he found it distracting if someone's face was too close to the camera. Another participant advocated for the use of two cameras for witnesses: the computer camera and then another video camera positioned to the side and further away from the witness that showed the entire room including the witness and computer screen.

76. Camera placement considerations also include where to situate a second (or third) screen and where a participant will be placing his or her notes. Many participants commented that their attention wandered if the speaker was always looking away from the camera at their notes or at documents displayed on an adjacent screen. One solution is to have that participant view his or her documents from the screen on which his or her camera captures the image but that can interfere with that person's ability to view others in the virtual hearing room.

77. Be extra aware of facial expressions as they become more obvious to others when on camera. If you are concerned about appearing your best, you can also take a lesson from the Instagram/Tik Tok crowd and buy a [ring light](#).

(e) Opportunities for the litigation team to react in real time

78. One participant pointed out that virtual hearings provide opportunities for members of a litigation team who are not in a speaking role to continue to monitor the hearing while responding to issues as they arose in real time instead of waiting for a break or the end of the hearing day as they might during an in-person hearing. They could still observe proceedings while caucusing, reviewing documents and conducting legal research which allowed for a more efficient and timely response.

(f) Screen settings

79. One participant found that the way that the tiles on the screen shuffled when people talked distracting which she equated to more like *“mingling at a cocktail party”* than being at a hearing. She advocated for a set tile placement that would appear on all participants screens which would include the tiles for the panel members, the witness, questioning counsel and witness counsel so everyone was seeing the same thing. Another participant suggested that tile movement could be mitigated by requiring all attendees without a current speaking role to sign in with their cameras turned off and microphones muted. Microsoft Teams does have a function that allows users to *“pin”* tiles in place although each user is free to set their own configuration.

(g) Backgrounds

80. Backgrounds caused a surprising number of distractions. Glass framed pictures caused a glare and sometimes reflected movement from passing vehicles. Light from uncovered windows changed over time and eventually interfered with visibility. Breeze through an open window caused drapes to move. While these might seem like small matters, over the course of a day they can becoming very distracting for others, so it is worthwhile to check and be aware of how a background appears on screen.

81. Some participants expressed a strong preference for virtual backgrounds. However, because virtual backgrounds are designed to obscure the room and therefore the presence of other people, others thought they could provide the opportunity for witness coaching or raise issues of confidentiality. For proponents, these risks appeared overblown. A panel must be prepared to address the situation where one party disputes the other party’s use of a virtual background. Such matters are not currently addressed in rules issued before the prevalence of virtual hearings. The panel can look to grounds for setting aside awards in domestic arbitration legislation or recognition and enforcement criteria in international

commercial arbitration legislation when deciding how to resolve procedural disputes which one party may frame as affecting equal treatment, natural justice or ability to make one's case.

(h) Pauses

82. Each participant's presentations included pauses. Some were planned but others were self-inflicted or imposed by another's intervention. Planned pauses allowed a participant to manage the break, giving the speaker the ability to deftly share a screen or drag-and-drop without loss of speaking focus. However, questions or objections created interruptions that were more difficult for counsel to handle as they generally struggled, on the spot, to decide how to search for a document and maintain speaking clarity. One solution was for a second person (colleague, tech assistant) to handle the document presentation while the speaker kept on with the presentation. This allowed the speaker to maintain focus on the content of the presentation and not the mechanics.

83. Participants noted that their attention easily wandered during these pauses. One solution tried by some participants was to fill the silence and attempt to maintain attention by describing out loud the steps they were taking as they were sourcing a document by saying things like, *"I am just going to locate a copy of Exhibit 1. I am now opening the agreed exhibits file. I am now going to share my screen..."* This seemed to help mask the pause and hold attention at least for the short term. This solution serves best for one-person litigation teams or for only brief or sporadic searches. Otherwise, having a second person handle the document search and display allows the speaker to maintain attention in a more meaningful way. It may be that these pauses will shorten as users become more adept with the technology.

(i) Delays in objections

84. In a hearing, if a participant wants to intervene, object or comment, the ability to be noticed by the panel in real-time can be essential. Platforms now offer features like hand raising icons so participants can communicate their desire to intervene. Participants quickly noted that such features were not as effective for getting the panel's attention as objecting orally. In our simulations, interventions made using the hand raising function or even raising one's hand were often not recognized in a timely manner by the panel chair.

85. Although oral objections were more effective, a natural delay still existed from counsel having to unmute themselves. This delay gave new justification to the typical advice to witnesses at in-person hearings that they should pause before answering a question to allow time for an objection. It should be

noted that this delay might be less problematic in platforms like Zoom which have a “*push to talk*” button, the space bar, which allows you to speak while muted for as long as it is depressed. Nothing as easy to use as that is yet available on Microsoft Teams to our knowledge.

(j) Loss of control of the witness environment

86. In a virtual hearing, a witness does not testify from the controlled environment of a hearing room. To address this, a number of procedural orders currently circulating on the internet provide admonitions to witnesses not to communicate with others and not access unauthorized documents while testifying.

87. Some “*expanded*” oaths/affirmations circulating on the internet ask the witnesses as part of the oath to swear or affirm that there is no one else in the room with them or to swear or affirm they will not communicate with an unauthorized person and the like. In our view, these types of questions are better asked of the witness after they have been sworn or affirmed rather than as part of the oath or affirmation itself. Including these instructions with the oath/affirmation has the potential to undermine the solemnity, purposes and legal effect and recognition of the oath/affirmation itself.

88. It is likely best practice to remind each witness of the requirements in terms of accessing people and documents while testifying prior to their testimony and again after any break just as one reminds a witness that they continue to be under oath. Even so, as was ably demonstrated by one understudy who impressed us with what appeared to be an encyclopedic knowledge of onions that he was actually reading from a Wikipedia page he opened on his laptop moments after being called as a surprise witness, there is scope for an unscrupulous witness to take advantage of the environment.

89. As mention above, some suggest using a 360-degree video camera or a second camera in the room showing the witness from the side along with the computer screen to deal with this. It could also be addressed as it was previously. In our experience, when a witness was questioned remotely, a third-party law firm was retained to attend with the witness at a video conferencing facility. The documents for questioning were provided to the third-party lawyer in advance who gave them to the witness at the time of the testimony (usually opening the package on camera). The third-party lawyer served as a reliable, impartial control over what occurred in the room from which the witness testified, could usually administer an oath and could retrieve the confidential documents at the end of the testimony.

(k) Secure communication plans

90. Counsel need to have a secure, unobtrusive mode of direct communication with co-counsel and the client during the hearing. Most advocates were uncomfortable with using the in-platform chat features or confidential break out rooms offered as part of the virtual hearing platform. Inadvertence or a lack of skill could result in a message being sent well beyond its intended recipients.

91. Likewise, the arbitration panel will also want to set up a way to communicate securely. Further, the panel may want to consider setting some ground rules for themselves in relation to in-hearing communication such as limiting all platform chat functions to eliminate the risk of unintended sharing and to keep email/text/communication to hearing process for both reasons of confidentiality and to limit distraction. The informal nature of text/chat communications can cause people to be less careful about what they put in writing than they might otherwise be.

(l) Overstimulation

92. Many participants commented that they felt overstimulated at the end of the three-hour simulation. Some felt this was caused by the feeling that “*you always have to be on*” during the hearing. Some participants felt the strain came from the need to monitor so many sources of information, from the screen with multiple tiles to documents, to messaging from team members. Others commented that the number of people on the screen itself made it exhausting. During parts of some hearings we experimented with having all non-speaking participants turn off their cameras, with the exception of the arbitration panel, which seemed to help.

93. Most participants thought that shorter hearing days should be scheduled for virtual hearing to ensure that participants could maintain their focus. Video exhaustion prompted us to suggest that brief breaks occur every seventy minutes to allow participants to refresh and reset. Doing so allowed hearings to track the longer in-person hearings without loss of focus and without need to cut hearing days into shorter times to manage exhaustion.

(m) Support

94. Many participants said that greater administrative and third-party technological support is required to free participants (particularly advocates, witnesses and the panel chair) to focus on the proceedings instead of being focussed on the technology. This support could include everything from co-counsel or a junior being responsible for broadcasting and navigating within exhibits during cross-

examination, to someone monitoring co-counsel/client communications; to third-party platform providers or IT support dealing with technical issues as they arise.

Conclusion

95. There are many examples from the case law where Courts have proceeded with remote questioning or virtual hearings even over the objections of a party. While the Courts do acknowledge some difficulties with video conferencing, they consistently appear to take the view that there is nothing inherently unfair about proceeding virtually. Counsel and arbitrators engaged in arbitration can anticipate a tolerant welcome if and when the Courts are asked set aside arbitral awards based on virtual hearing.

96. To address fairness concerns and ensure a smooth running and efficient hearing, arbitrators and counsel must be aware of the common difficulties that arise in a virtual hearing and be prepared to meet them. It is hoped that the above list of considerations drawn from our experience and feedback from four (4) simulated virtual hearings with senior arbitration practitioners will provide a useful guide for those venturing into the virtual.

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