The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration

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Commercial arbitration, like litigation, was forced by the pandemic to resort to remote proceedings. The arbitration community had both the capacity and the motivation to go remote, and did so at remarkable speed. However, it is unclear how durable these emergency adaptations will be—are remote hearings a new normal, or a crisis response that will fade along with the pandemic? The author argues that remote hearings are indeed here to stay. The experience of commercial arbitration in 2020 shows that the cost and accessibility benefits provided by remote hearings are significant, and that most of the concerns either have practical fixes or evaporate with greater familiarity. Remote hearings neither will nor should become universal, but will likely be a default option in arbitration, especially for international disputes.

Nevertheless, planning, vigilance, and a commitment to expend sufficient resources are needed to make remote hearings accessible, effective, and fair. The author concludes by listing five lessons that other forms of dispute resolution, in particular litigation, can learn from the experience of commercial arbitration during the pandemic: (i) attention to the technical setup is vital, (ii) the necessary infrastructure is not cheap and the costs are ongoing, (iii) remote hearings are not an all-or-nothing matter, (iv) their greater flexibility makes it possible to customize procedures for each dispute, and (v) frequent breaks are necessary.

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Introduction

If any phrase has become overused during the COVID-19 pandemic, it's "the new normal". Yet I cannot help returning to this tiresome cliché. Note the lack of the customary question mark; I do not posit that remote hearings *may become* the new normal in commercial arbitration, but rather assert that they *already are*.[1] The change has been fast, largely smooth, and—I argue—permanent. It will have lasting effects for commercial arbitration and for dispute resolution more generally.

This article considers the impact of the COVID-19 pandemic on commercial arbitration. As in so many areas, the pandemic has accelerated pre-existing trends: remote arbitration hearings pre-date COVID-19, and parts of arbitral proceedings (such as case management conferences) have routinely been conducted remotely for more than a decade. Nevertheless, the pandemic marks a clear turning point. There have been other impacts of the pandemic on commercial arbitration, but the field's rapid shift to nearly ubiquitous remote hearings is the most notable and pervasive, and the most likely to endure. As a recent blog post put it, 2020 was "the year of virtual hearings".[2]

1. Hearings conducted other than in-person have been given various labels: virtual, remote, online, distant, and so on. Some commentators draw distinctions between these terms and, for that reason, I will not use them interchangeably in this article. Here, I will use the term "remote" to refer to any procedure in which a hearing is conducted using any form of communications technology, without hearing participants being all in the same room at the time they participate. It includes everything from simple telephone conference calls—as have existed for decades—to the most sophisticated live videoconference technology. A remote hearing is "semi-remote" if it employs one main venue where some participants gather in the same physical location but one or more participants attend remotely, and it is "fully remote" if all participants join from separate locations and there is no main venue, for example if each participant joins from their home office. I will use the term "in-person" to describe hearings where all the participants are gathered in the same physical location. This typology is taken from Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" (2020) 37:4 J Int'l Arb 407 at 410–14.

2. Maria Fanou & Kiran Nasir Gore, "2020 in Review: The Year of Virtual Hearings" (2 February 2021), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2021/02/02/2020-in-review-the-year-of-virtual-hearings>.

The speed of the shift is in some ways unsurprising. For many commercial disputes, delays are so costly that, although at first most people expected the lockdowns to pass within a few weeks, waiting for in-person hearings to restart was not a viable option. Moreover, the participants (business lawyers and their clients) have the means to purchase the necessary hardware, software license, enterprise licenses for videoconference software, headsets, ring lights, and other hardware for their staff, and bear other necessary costs. For at least a decade, some case management conferences, minor procedural meetings, and tribunal deliberations have been held at least partly by teleconference or videoconference, so there was a broad familiarity with the technology at a basic level. An underrated factor may also be that many practitioners participated as arbitrators in the Willem C Vis International Commercial Arbitration Moot and the Vis East companion moot, which were held remotely in late March and early April 2020, respectively.[3] In short, the commercial arbitration community had the motivation, the capacity, and the willingness to "go remote".

Even given this context, the speed and pervasiveness of the shift to remote hearings has been spectacular. According to a survey that ran from June 10 to July 20, 2020, more than three times more fully remote hearings were held or scheduled in the second quarter of 2020 than in the whole time before March 15, 2020.[4] On an annualized basis, fully remote hearings were eleven times more numerous after March 15 than ever before. In forty per cent of the cases where fully remote hearings were held, the hearing date was not postponed, and the scheduled hearing was simply converted from in-person to remote.[5] The Seoul International Dispute Resolution Centre reported in May 2020 that the number of hearings it administered that involved remote hearing services had

3. As Douglas Harrison, a senior Canadian commercial arbitrator, observes, "[f]or many in the field, participating as a volunteer arbitrator in the Vis and Vis East moots in the spring provided an early opportunity to become accustomed to conducting hearings online". See Douglas Harrison, "Arbitration Community Didn't Rest During Pandemic: 2020 Roundup", *The Lawyer's Daily* (22 December 2020), online: <www.thelawyersdaily.ca/articles/23204/arbitration-community-didn-t-rest-during-pandemic-2020-roundup>. This year's Vis Moot problem deals, in part, with an arbitral tribunal's power to order remote hearings over the objections of one party. See "The Problem", online (pdf): *Willem C Vis International Moot* <vismoot.blob.core.windows.net/messageattachment-6bf91f06-be18-4671-a6f9-50ff4525321b/28th_Willem_C_Vis_Moot_Problem.pdf>.

4. See Gary Born, Anneliese Day & Hafez Virjee, "Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views" in Maxi Scherer, Niuscha Bassiri & Mohamed S Abdel Wahab, eds, *International Arbitration and the COVID-19 Revolution* (Kluwer Law International, 2020) 137 at 140–41.

5. See *ibid* at 142.

grown five hundred per cent compared with 2019.[6] In Canada, Arbitration Place, a Toronto-based hearing venue and service provider, reports that the hearings it hosts went from over ninety-five per cent in-person before the pandemic to over ninety-five per cent semi- or fully remote by early 2021.[7]

Arbitration Place exemplifies the rapidity of commercial arbitration's turn to remote hearings. It came out with an advertising blitz in March 2020, just two days after the first lockdowns were announced, saying, essentially, that "business as usual" could be restored through remote videoconferencing technology and its services.[8] That publicity, along with an intensive investment in personnel and equipment for what is now called Arbitration Place Virtual (APV), has paid off for the company. Its caseload has skyrocketed, hosting not only remote arbitration hearings but also court and regulatory proceedings in Canada and abroad.

At the same time, there were good reasons to believe that the commercial arbitration community would hesitate to embrace remote hearings. Arbitration harbours a particular concern for procedural fairness, defined largely in terms of equality of arms. This is partly a matter of necessity, as arbitral awards may be annulled or refused enforcement if the losing party did not have an adequate opportunity to make its case.[9] But ensuring parity between the parties in the implementation of their chosen procedure is a preoccupation of the field bordering on obsession. "Due process paranoia" is alleged to be prevalent, especially in international arbitrations, where recalcitrant parties who do not want to pay an adverse award are notorious for latching onto any opportunity to seek annulment or non-enforcement of the award.[10]

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6. See "Seoul IDRC Virtual Hearing Services-Recent Updates" (25 May 2020), online: *Seoul International Dispute Resolution Centre* <www.sidrc.org/idrc/en/bbs/board_view.do?bo_table=news_en&wr_id=863>. The Hong Kong International Arbitration Centre reported a similar rise. See "Virtual Hearings at HKIAC: Services and Success Stories" (6 May 2020), online: *Hong Kong International Arbitrartion Centre* <www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories>.

7. See Interview of Kimberley Stewart, founder and CEO of Arbitration Place (17 January 2021) [unpublished, on file with author].

8. *Ibid*.

9. This standard derives from Article V(1)(b) of the New York Convention. See *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS art V(1)(b) (entered into force 7 June 1959). This standard is codified in all federal and provincial arbitration legislation in Canada. See e.g. *Arbitration Act, 1991*, SO 1991, c 17, s 46(1)(6); *International Commercial Arbitration Act, 2017* SO 2017 c 2, sched 5 at sched 2, arts 34(2)(a)(ii), 36(1)(a)(ii).

10. Klaus Peter Berger & J Ole Jensen, "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32:3 Arb Intl 415.

Accordingly, arbitrators may desire to order remote hearings, but will hesitate to do so if one party objects. Hearings are optional in arbitration, but most arbitral rules of procedure provide that if either party requests a hearing, the tribunal must hold one. Most such rules do not specify whether that hearing has to be in-person. The issue rarely arose before the COVID-19 pandemic, since it would not have occurred to most arbitrators to try to impose a remote hearing on an objecting party. As of April 2020, it was an entirely open question whether tribunals have the power to order remote hearings.

I. Remote Arbitration Hearings in 2020: The Legalities and the Practicalities

Only a year later, this question is largely settled. Parties, arbitral institutions, and even courts have collaborated to ensure the viability of remote hearings and the enforceability of awards arising from them. Most parties accept remote hearings as a matter of course. Rules of procedure have been amended to provide for remote hearings, including expressly empowering tribunals to order that proceedings be held remotely. Courts in several jurisdictions have enforced arbitral awards issued following remote hearings, or have signalled their willingness to do so by ordering remote hearings in court proceedings over the objections of one party.

A telling example is that of the International Chamber of Commerce (ICC), which recently amended its Arbitration Rules (the "Rules").[11] Under the version of the Rules in place when lockdowns began, Article 25(2) provided that the tribunal "shall hear the parties together in person if any of them so requests".[12] This could reasonably be read to mean that parties arbitrating under the ICC Rules had a right to request an in-person hearing, and consequently that ICC tribunals could not order remote hearings over the objections of a party. The Rules thus posed serious risks: for arbitrations in progress, they gave parties seeking to delay or derail the proceedings a powerful weapon, and for cases where tribunals had already issued awards following a remote hearing, they threatened the enforceability of those awards.

The ICC took immediate action. On April 9, 2020, it issued a "Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic".[13] The Guidance Note deals with several matters relating to

11. See "ICC Arbitrations Rules 2017 & 2021—Compared Version" (2021), online (pdf): *International Chamber of Commerce* <iccwbo.org/publication/icc-arbitration-rules-2017-and-2021-compared-version>.

12. *Ibid*, art 25(2).

13. See "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" (9 April 2020), online (pdf): *International Chamber of Commerce*

pandemic adaptation, but takes particular aim at this potential hindrance to remote hearings. It states that Article 25(2) should be "construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place 'in person' by virtual means if the circumstances so warrant".[14] The Guidance Note concludes that a tribunal may order remote hearings over the objections of a party "as it exercises its authority to establish procedures suitable to the particular circumstances of each arbitration and fulfills its overriding duty to conduct the arbitration in an expeditious and cost-effective manner".[15]

Any lingering uncertainty was removed by the new version of the ICC Arbitration Rules that came into force on January 1, 2021. What is now Article 26(1) provides that "[t]he 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".[16] Similar amendments were implemented by the London Court of International Arbitration[17] and, closer to home, the Vancouver International Arbitration Centre (VanIAC).[18]

Court actions put these new procedural frameworks to the test. A decision of the Austrian federal Supreme Court of Justice, issued in July 2020, received particular attention as the first decision of an apex court reviewing a tribunal's decision to hold a remote hearing despite one party's objections.[19] The court held that the ordering of a remote hearing is not in itself sufficient to trigger due

<iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

14. *Ibid* at para 23. There were good textual reasons to interpret Article 25(2) in that manner, which I omit here only for the sake of brevity.

15. *Ibid*.

16. "2021 Arbitration Rules" (November 2020), online (pdf): *International Chamber of Commerce* <iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>.

17. See "Updates to the LCIA Arbitration Rules and LCIA Mediation Rules (2020)" (2020), online: *London Court of International Arbitration* <www.lcia.org/lcia-rules-update-2020.aspx>.

18. VanIAC promulgated new procedural rules (and changed its name from the British Columbia International Commercial Arbitration Centre) effective September 1, 2020. The new VanIAC Rules of Procedure for domestic arbitrations contain an extensive provision (Rule 21) empowering tribunals to "direct" that hearings be held remotely and providing extensive guidance on matters that tribunals and parties should consider in preparing for such hearings. See "Domestic Arbitration Rules" (2020), online: *VanIAC* <vaniac.org/arbitration/rules-of-procedure/domestic-arbitration-rules>.

19. See Oberster Gerichtsthof [Supreme Court of Justice], Vienna, 23 July 2020, 18 ONc 3/20s (Austria), online (pdf): <www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf>.

process concerns; however, it observed that careful planning is required to ensure that the remote hearing is fair.[20] Similar decisions followed from courts in the United States,[21] Egypt,[22] and elsewhere. The embrace of remote hearings has not been universal, although the contrary decisions mostly have not come in the context of arbitrations.[23] Curiously, even as they approve of remote hearings, some jurisdictions have continued to insist on registration of a hard copy of the arbitral award, signed by all members of the tribunal, as a precondition to enforcement.

No matter how permissive the legal framework, remote hearings could not have become widespread unless practitioners were willing to adopt them. A wide range of concerns were raised by practitioners, which fall roughly into three categories: concerns about the inherent impact on communication that comes with speaking to each other through screens, concerns about the impact of technological limitations or breakdowns, and concerns about security.

Most people appear to feel that "something is lost" when participants are unable to gather in person, arising from the inherent artificiality or impersonal character of remote communication, or from the realities of working from home. Arbitrators fear that they may not be able to accurately assess witness testimony or gauge reactions; counsel fear that they will be unable to cross-examine adverse witnesses effectively, especially if lags or connection problems

20. For a discussion of the case in English, see Maxi Scherer et al, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns" (24 October 2020), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns>.

21. See *Carlos Legaspy v Financial Industry Regulatory Authority, Inc*, 2020 WL 8509843 (ND Ill Dist Ct).

22. See Court of Cassation, Economic and Commercial Circuit, Cairo, 27 October 2020, Case No 18309/89 (Egypt). For an unofficial translation, see Zulficar & Partners Law Firm, "Informal English Translation of the Egyptian Court of Cassation Judgment of 27 October 2020" (22 December 2020), online (pdf): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2020/12/Informal-English-Translation-of-the-Egyptian-Court-of-Cassation-Judgment-of-27-October-2020.pdf>.

23. For example, the Swiss Federal Tribunal held that the COVID-19 pandemic was not sufficient justification to impose virtual hearings in state court proceedings without all parties' consent. See Swiss Federal Tribunal, Decision DFT 146 III 194 (6 July 2020). However, the court's reasoning is specific to state court proceedings, and it may not have prevented an arbitral tribunal from proceeding remotely over the objection of one party. See Niklaus Zaugg & Roxana Sharifi, "Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective" (14 January 2021), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2021/01/14/imposing-virtual-arbitration-hearings-in-times-of-covid-19-the-swiss-perspective>.

affect the pace and thrust of the cross-examination, or that advocacy will fall flat when conducted through a screen; and witnesses may fear testifying about emotionally charged or personal matters in such an impersonal manner. Everyone working from home fears that proceedings will be interrupted by children, pets, neighbours' lawnmowers, or the like. Parties may be less likely to reach amicable settlements (a common and largely positive occurrence during arbitrations) if they cannot establish rapport at in-person meetings, especially where meals might be taken together at a hotel or hearing venue.[24]

Some more pragmatic concerns that are inherent to remote hearings have also been raised. Members of the tribunal will be unable to adequately work through the (often voluminous) documentation that accompanies commercial arbitration hearings without a common set of hard copies. Attending online proceedings may be more exhausting than attending in person, or at least that it may be more difficult for parties to remain engaged during long hearing days—the now-familiar phenomenon often called "Zoom fatigue".

The second category of concerns arise from the limitations of communications technology, and of access to it. Unequal access to stable broadband internet will harm the fairness of hearings, especially where one party comes from a jurisdiction where the internet infrastructure is rudimentary or unreliable. Unequal access to hardware such as cameras and microphones, and unequal sophistication about matters like lighting and online advocacy best practices, may lead to a disparity in persuasiveness. Participants may not be understood or may be misunderstood due to poor sound quality, especially those whose native language is not that of the proceedings (but who do not need an interpreter) or who speak with an accent. Hearings may be interrupted by connectivity problems or other technical mishaps, leading to potentially lengthy delays if hearing days are lost.

Finally, a set of related concerns have been raised that fall under the heading of "security". Commercial arbitrations are usually confidential, and the hearings themselves are almost always private, restricted to the tribunal, the parties and their representatives, and any support staff such as reporters, interpreters, and tribunal secretaries. They may deal with commercially sensitive or privileged documents, and tribunals may be called upon to rule on the discoverability of such information during the course of proceedings. One party's sensitive information may be inadvertently disclosed during remote proceedings, and third parties may be more able to illicitly or inadvertently gain access to closed proceedings. A separate concern is that witnesses may be coached or tampered

24. See Amy J Schmitz, "Arbitration in the Age of Covid: Examining Arbitration's Move Online", Cardozo J Conflict Resol [forthcoming in 2021], online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3699778> (noting that "discussions around the importance of in-person interactions have been especially prevalent with respect to mediation and negotiation, especially when there is need for 'venting' and reliance on body language as part of the overall dialogue" at 35).

with by lawyers or others hovering off-screen or communicating with witnesses via a separate communications link.

These concerns are significant and should not be dismissed. However, most have been allayed by greater familiarity with remote hearings, or else have proven resolvable with sufficient planning and technical assistance. Indeed, a whole industry has arisen to provide practical advice and technical solutions to resolve them. Arbitration Place Virtual is perhaps the standard-bearer, although it is far from alone. It has developed "kits"—packaged sets of computers, monitors, speakers, and headphones—that it sends to parties or counsel who lack the necessary office hardware.[25] APV has even dispatched these kits to the Ontario courts.[26] If a party is located in a jurisdiction with inadequate internet infrastructure, satellite connections are an effective, albeit expensive, solution.

As the commercial arbitration field has grown used to remote hearings, guidelines and sample protocols have proliferated dealing with a range of issues necessary to ensure efficiency and fairness.[27] Some are specifically adapted to regions with uneven access to computer hardware and stable internet, such as the Africa Arbitration Academy's Protocol on Virtual Hearings in Africa.[28] These protocols provide valuable advice on matters like to how to manage electronic document bundles, how to choose times for hearings that are fair to parties in different time zones, how to choose among communications technology providers, and how frequently to take breaks.

At the same time, the more ineffable concerns about remote communication—its effects on advocacy, on assessment of witness testimony, and on the prospects for amicable settlements—have largely evaporated with experience.[29] Arbitrators may actually see witnesses better on a zoomed-in screen than they do in a large hearing room, and if the cameras are placed correctly, may

25. See Stewart, *supra* note 7.

26. See *ibid*.

27. For various sources of guidance that have been helpfully gathered in one place, see "Virtual Arbitration Guidance" (last visited 13 March 2021), online: *Virtual Arbitration* <virtualarbitration.info/guidance.htm>.

28. See "Protocol on Virtual Hearings in Africa" (April 2020), online (pdf): *Africa Arbitration Academy* <www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf>. Disclosure: I am a member of the Africa Arbitration Academy's Advisory Council and an instructor for its flagship training program. I played no role in the preparation of the Protocol. See also "The Vienna Protocol: A Practical Checklist for Remote Hearings" (June 2020), online (pdf): *Vienna International Arbitration Centre* <www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf>.

29. *Cf Arconti v Smith*, 2020 ONSC 2782 (where Meyers J notes that the due process concerns raised by remote hearings are not inherent to videoconferencing and "are soluble either by creative alternatives or by increased familiarity with the technology" at para 44).

be able to watch their body language. Advocacy style may need to be adapted for the remote environment, but persuasiveness is not inherently harmed. While differing time zones may necessitate early mornings or late nights, these may actually have less impact than jet lag from travel to an in-person hearing. Executives of the disputing parties are more likely to attend a remote hearing than an in-person one, and their direct involvement improves the chances that the parties will settle; this phenomenon mitigates the loss of opportunities for settlement at meals or during other breaks in in-person proceedings. Multiple-monitor setups may allow arbitrators to deal with complex document bundles effectively during hearings, especially since electronic documents can be cross-linked and made text-searchable.

However, the same experience has shown that inequalities in access to technology do exacerbate inequalities between the parties.[30] If one party's expert's testimony comes across clearly, seamlessly synchronized with accompanying slides, while the other party's expert's testimony glitches frequently and cuts out when the expert tries to answer questions from the tribunal, the second party is at a marked disadvantage. Even small differences in audio quality or lighting can impact the forcefulness of oral argument or the credibility of testimony.[31] The gap is not as significant as might be for family, consumer, or employment arbitrations; however, when counsel or witnesses join a hearing from their home, differential internet access, especially on the urban/rural divide, can impact procedural fairness and equality of arms.

Care must therefore be taken to ensure that both parties' counsel and witnesses are heard and seen equally by the tribunal. Moreover, the technological setups are finicky and can break down unpredictably, so multiple checks are needed before each hearing and backup plans should always be in place, in order to avoid one party being prejudiced or the whole proceeding grinding to a halt if a connection drops.[32] Still, with some planning and diligence, technical breakdowns can be avoided or their impact eliminated.

Security concerns, too, mostly have practical solutions. To protect against witness coaching or tampering, 360-degree cameras can be required in rooms where witnesses are located, or neutral observers can be engaged locally. Encryption can be used to protect sensitive information from release to an opposing party unless the tribunal orders its disclosure, and to prevent outsiders from snooping on the proceedings. APV and other providers have taken steps to obtain security clearances for staff who work on remote hearings dealing with military technology, terrorist removals, and the like. Online document management platforms can obviate the need for parties to develop their own

30. See Schmitz, *supra* note 24 at 33.

31. See *ibid*.

32. See Stewart, *supra* note 7.

secure means of exchanging documents.[33] No such system is foolproof, but data leaks more often arise from human error—such as using easily-guessed passwords or responding to phishing attempts—than from the technology.

The rapid shift to remote hearings has also brought some benefits, both expected and unexpected. The most obvious are cost and efficiency, with savings on transportation costs, travel time, hearing venue rental, and associated costs. But environmental benefits from diminished travel should not be dismissed. The Campaign for Greener Arbitrations, which predates the pandemic but has latched onto it, has published several "green protocols" for participants in commercial arbitrations, in which remote hearings figure heavily.[34] Arbitrators can benefit from being able to re-watch testimony after the proceedings, which is more effective for comparing or assessing witness testimony than reading a transcript. Arbitrator and counsel diversity—a preoccupation of the field in recent years—may be improved by the greater volume of arbitrations made possible by more efficient remote hearings, and by the opportunities provided to younger arbitrators who may be more comfortable with the technology. A proliferation of (mostly free) webinars and online conferences has brought high-level training to practitioners around the world, at the cost of a broadband internet connection. Remote hearings may also reduce some of the social pressures and power differentials that complicate in-person communication, encouraging more candid participation from counsel and witnesses who "fear stereotypes or biases based on appearance, voice or accent".[35]

II. Remote Hearings as the Present and Future of Commercial Arbitration

Putting together the trends described above, the arbitration community has proved to be remarkably nimble in shifting to remote hearings. Arbitrations were converted on the fly (with the consent of the parties) and rules were hurriedly amended to remove roadblocks. Arbitral institutions and outside vendors invested in necessary personnel and equipment. The institutions—which normally see each other as competitors—worked together, sharing

33. The sophisticated versions of these online platforms (such as those that permit onscreen markup of documents and have robust cross-linking capabilities) are expensive and may be inappropriate outside of high-stakes commercial cases. Some arbitral institutions are developing in-house secure document management platforms, access to which would be included with payment of the institution's administrative fees. Courts and regulatory tribunals are further behind the curve, but may in time develop similar platforms for public use.

34. See "Green Protocols", online: *Campaign for Greener Arbitrations* <www.greenerarbitrations.com/green-protocols>.

35. Schmitz, *supra* note 24 at 32.

best practices and hardware, and in some cases training each other's staff.[36] National courts have proved to be largely cooperative. A legal, technological, and logistical infrastructure now exists that will not simply evaporate when the pandemic finally recedes.

However, this new status quo must be seen in context as emergency measures taken in response to a sudden crisis.[37] It does not follow that the remote hearing phenomenon will continue with the same prevalence once the emergency is over. Nevertheless, I believe that fully or semi-remote hearings will continue to be a durable part of commercial arbitration, perhaps even the default option. The main reason is simply cost. At least for international or interprovincial cases, the cost savings represented by remote hearings will make in-person hearings hard to justify to the clients footing the bill, except for high-stakes cases or in particular circumstances (discussed below). Even where most hearing participants are located in the same city, witnesses or others based elsewhere or on the road will likely join remotely rather than fly in. Employing remote hearings also reduces delays, a central concern of commercial parties in dispute resolution. Counsel and arbitrators need to set aside less time in their schedules than if they all have to travel to the same city at the same time; this not only reduces travel costs and hourly billings, but also allows hearings to be scheduled closer together and in smaller gaps in the schedules of busy professionals. It may transpire that, once in-person hearings are again a readily available option, a party that insists on an in-person hearing may be required to advance the costs for it (although those costs may be recoverable upon ultimate disposition of the case).

The experience of 2020 has revealed to most practitioners that, so long as the logistical setup (technical and otherwise) is adequate, nothing indispensable is lost in terms of assessment of witnesses, advocacy, or document management. There is also reason to believe that remote hearings also do not inhibit settlements. Moreover, now that most commercial arbitration practitioners have experienced remote hearings, they are less likely to resist them in the future, except where tactical or practical considerations lead them to prefer an in-person hearing. Young practitioners who grow up as lawyers in remote hearings will be less resistant still.

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36. See "Arbitration and COVID-19" (17 April 2020), online (pdf): *International Chamber of Commerce* <iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> (where more than a dozen of the leading arbitral institutions issued a collective statement in April 2020 declaring their "joint ambition" to "support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay").

37. See *Arconti v Smith*, *supra* note 29 (where, as one Canadian court put it in May 2020, the "simplest answer" to a plaintiff's objection to court-ordered remote questioning of a witness was "[i]t's 2020" at para 19).

That said, remote hearings will not—and should not—become universal. Most people still prefer to conduct business in person where it is not unduly inconvenient, so localized arbitrations may revert to being mostly in-person. Where the parties are at a significant distance, such that time zones make it impossible to find a hearing time convenient for all participants, they may agree to hold hearings in person despite the higher cost. In some jurisdictions where the law has not been updated or courts have held that parties have a right to request an in-person hearing, parties may feel they must hold a hearing in person in order to preserve the enforceability of an eventual award, or at least may do so in an abundance of caution. If fostering settlement is a priority for the parties or the tribunal, especially where the procedure mixes arbitration and mediation, in-person hearings may be advisable. Finally, if one party lacks the financial, technical, or infrastructural wherewithal to participate in a remote hearing, or if witnesses and sensitive information cannot be safeguarded in a remote process, the hearing should be held in person.

III. Beyond Commercial Arbitration

None of the above should be taken to suggest that commercial arbitration has been uniquely welcoming of remote hearings, which have bloomed in courts and regulatory proceedings as well. As soon as the first lockdown orders were announced, Canadian courts started issuing orders broadly accepting of videoconferencing and other remote hearing technologies.[38] However, the rest of the dispute resolution world can learn from the experience of commercial arbitration during the pandemic. At minimum, it has shown that remote hearings should remain a viable option even when in-person hearings are available. Indeed, the potential of remote hearings to promote access to justice through efficiency and cost-reduction alone ought to make them common. It also shows that drastic changes in legal practice can be accomplished quickly if there is widespread buy-in.

The commercial arbitration experience yields some important practical lessons for the public court system and other groups seeking to expand their use of remote hearings. There are five main takeaways, although this list is far from comprehensive.

38. See the list of citations and quotations collected in Julie G Hopkins & Daniel Urbas, "Virtual Practice Makes Virtually Perfect – Practical Considerations for Virtual Hearings Identified through Simulations with Experienced Counsel and Arbitrators" (27 Novmber 2020) Transnational Dispute Management [forthcoming in 2021] at 3–19, online (pdf): <urbas.ca/wp-content/uploads/2020/11/Virtual-Practice-Makes-Virtually-Perfect-%E2%80%93-Julie-G.-Hopkins-and-Daniel-Urbas-November-27-2020-2.pdf>.

First, and perhaps most important, detailed attention to the technical particularities is necessary. If both parties and the court do not have access to the right communications hardware and reliable internet connections, a remote hearing should not go ahead. Parties and adjudicators should discuss and plan for every aspect of remote hearings in advance; if they do not have sufficient experience, an off-the-shelf protocol ought to be used. At minimum, courts should establish a checklist (and consult it in every single case) to ensure that all participants will be aware of how each aspect of the remote hearing will be handled, from the timing of hearing sessions to technical minutiae of document management, to transcription and recordings. Connections must be tested and re-tested prior to every hearing.

Second, none of this technical infrastructure comes cheap. If not properly managed, remote hearings can exacerbate inequalities or enrage parties who have to endure technical breakdowns. Proactive management is required, as are training and familiarization for all participants. The temptation to cut corners on equipment and service providers must be resisted. If the courts or other public dispute resolution venues like the human rights commissions want to drastically expand the use of remote hearings—which there are good reasons to do—they must accept the cost in terms of money, time, training, and personnel to do so properly. Remote hearings will save money overall, but only if a sufficient investment is made up-front and there is continuing commitment to proper tech support.

Third, remote hearings are not an all-or-nothing matter. As the pandemic has dragged on, semi-remote proceedings have become increasingly common. For example, APV is, as of the time of writing, in the midst of administering a high-stakes divorce litigation in an Ontario family court.[39] Both parties have agreed to appear at APV's facility in Toronto, but the judge will remain in the courthouse and most witnesses will testify remotely. These kinds of arrangements have become popular in commercial arbitrations, particularly where the parties' counsel are based in the same major city but witnesses are scattered. Semi-remote proceedings achieve many of the cost savings and other practical benefits of remote hearings (in particular getting around travel restrictions during the pandemic) while also retaining some of the benefits of in-person proceedings. Flexibility is needed to find the right protocol for each dispute.

Fourth, the shift to remote hearings provides an opportunity to rethink other aspects of procedure. For instance, remote proceedings allow parties to divide up one main hearing into multiple mini-hearings, for example to hear counsel's opening statements then take a pause before the evidentiary hearing for adjudicators to pose questions for comment. Court rules are more rigid

39. See Interview of Kimberley Stewart, *supra* note 7.

than arbitral rules of procedure, but still present opportunities for creative procedural customization.

And fifth, take regular breaks. Zoom fatigue is real, and it is vicious.