

CHAPTER 53 Videoconferencing in International Arbitration and Mediation Proceedings*

Author's note: With the onset of the Coronavirus – COVID-19 pandemic in early 2020, videoconferencing has taken on new attention and importance for use in international arbitration proceedings as well as in mediations coming from disputes in international arbitration or elsewhere. The original material for this article comes from a chapter by the author on this subject which was based on his experience arranging and participating in the world's first international commercial mediation conducted by videoconference in 2006. Updated in this article which discusses a mix of historical and current videoconferencing practices, the original material is reprinted from Chapter 53, "Videoconferencing in International Arbitration and Mediation Proceedings," of International Commercial Arbitration Practice: 21st Century Perspectives with permission. Copyright 2020 Matthew Bender & Company, Inc., a LexisNexis company. All rights reserved.

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*This chapter was prepared by Paul E. Mason, International Counsel, Arbitrator and Mediator. Mr. Mason serves as arbitrator and mediator with the AAA, ICDR, ICC, WIPO, the Beijing Arbitration Commission, the Hong Kong International Arbitration Centre, and the Brazil-Canada Chamber of Commerce in São Paulo among other institutions. As counsel in an ICDR arbitration involving a Brazilian party and U.S. multinational, Mr. Mason suggested, helped arrange, and participated in the world's first international mediation conducted by videoconference in 2006, which settled the arbitration. More information is available at www.paulemason.info.

§ 53.01 Introduction: Videoconferencing in International Arbitration and Mediation Cases: COVID-19, etc.

This chapter explores the use of videoconferencing in international arbitration and mediation. Its goal is to briefly introduce the technology, discuss videoconferencing's current status in international arbitration and mediation practice, provide an example of its usage via a recent international arbitration-mediation in which the author of this chapter participated, and finally summarize its benefits and shortcomings, noting which circumstances are most appropriate for its best use.

The videoconferencing option is attracting more attention at this time (March 2020) because of the outbreak of the COVID-19 virus, which is causing travel to be restricted by carriers, governments, other organizations and individuals. This will be discussed further along in this chapter.

§ 53.02 Use of Videoconferencing in International Arbitration and Mediation Cases

Videoconferencing involves the use of video and audio equipment located at one or more remote sites to connect participants in meetings or other sessions, both visually and aurally.

This technique has grown rapidly since its inception in the mid 1990s. Videoconferencing is now an attractive alternative to live organizational meetings of all kinds because of corporate cost containment measures following the steep telecom, dot-com and stock market declines of 2001, a corresponding oversupply of inexpensive long distance communication capacity, and the rising cost of fuel, post 9/11 security measures, and more recently the COVID-19 virus pandemic which have complicated all kinds of travel. These factors, together with more cost-effective video technology, have created a new recipe for conducting meetings.

Back in 1993–94, a typical set of videoconferencing equipment cost about U.S. \$100,000. The equipment and lines delivered poor quality images with pregnant pauses in audio transmission. Today, all aspects of video technology (equipment, software, communications networks) have evolved so much that the equipment can be purchased or rented for a fraction of its former cost, and with vastly improved video and audio quality. This development mirrors the general trend in information and communications technology: substantially increasing price-performance ratios over relatively short periods of time in product development.

With these improvements, videoconferencing made its debut in mediation around 2002. A number of articles have been written on the use of videoconferencing in domestic U.S. mediations,¹ however articles or other discussions exploring its use and advantages to resolve international commercial disputes appear to be much more limited.

More recently, ahead of the Coronavirus pandemic, in September 2019, the Korean Commercial Arbitration Board (KCAB), with inputs from the Seoul International Dispute Resolution Centre (SIDRC) created the Seoul Protocol on Videoconferencing in International

¹See, e.g., “Mediation by videoconferencing—nothing is lost,” by Michelle Lore, *Minnesota Lawyer*, Nov. 15, 2004; “Judicial Council of California Model Self-Help Centers Pilot,” dealing with use of videoconference mediation sessions in cases involving child custody, visitation, and domestic violence, www.courtinfo.ca.gov/reference/rfp/documents/pgmdesc.pdf.

Arbitration (“the Seoul Protocol”). The Seoul Protocol covers both operational and technical aspects of use of videoconferencing in international arbitration. The operational aspects deal with basic requirements for the facility to be used, positioning of witnesses and interpreters, role of the tribunal, etc. The technical aspects differ between traditional ISDN-based video and web-based video¹.

Other ADR institutions have likewise issued protocols, guidelines, guidance notes and model procedural orders for virtual hearings by videoconference etc. These include the ICDR, Delos the SIAC, HKIAC and ICC among others. Several including the LCIA are producing series of webinars providing advice on conducting virtual hearings and how they differ from in-person hearings. The virtual hearing idea has spread so widely that one prominent international arbitrator has remarked that we should not be trying to adapt videoconference technology to our in-person hearing habits, but rather the other way around.

§ 53.03 Videoconferencing and International Arbitral Institutions

Videoconferencing is being used to some extent now for witness testimony in international arbitration hearings. For more information regarding the frequency of use of videoconferencing in international arbitration cases (both institutional and *ad hoc*), the author of this chapter consulted the ICDR, ICC, CPR/New York, and the LCIA. While we did not receive any statistics, Anne-Marie Whitesell, then Secretary-General of the ICC International Court of Arbitration in Paris in 2008, responded by informing us that the ICC published a Special Supplement to the ICC International Court of Arbitration Bulletin in 2004 entitled “Using Technology to Resolve Business Disputes,” which includes information on the work of the ICC Arbitration Commission’s Task Force on IT, and contains videoconferencing as one element. She also sent us a most informative article by Erik Schaefer entitled “Videoconferencing in Arbitration,” published in the ICC International Court of Arbitration Bulletin, Vol. 14/No. 1, Spring 2003.

Mr. Schaefer’s article explores the subject—as it relates to arbitration, but not mediation—in detail. It covers cost and technical aspects and explores several different situations in which videoconferencing can be used in arbitrations—for a distant arbitrator, a distant party, or a distant witness.

In addition, the article expresses concerns about the cost and technical quality of videoconferencing as well as its drawbacks as compared to live communication: difficulty perceiving non-verbal cues, limitations to what the camera and microphone can capture, and possible violation of confidentiality in arbitration by unauthorized eavesdropping. The article concludes that videoconferencing is a second-best alternative to live meetings. While the cost and technical quality of videoconferencing have improved substantially since 2003 when the article was written, the other concerns are still valid ones. Savings in time and cost must still be balanced against the greater richness achieved in live, face-to-face encounters.

For the author of this chapter, as an arbitrator in an AAA/ICDR case involving Brazilian and U.S. parties, our panel heard testimony by videoconference from witnesses in Brazil and New York who were being questioned by attorneys sitting in Miami with us. The image and sound

¹ For a press release from the KCAB and the full Protocol text, see http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024

quality from both São Paulo and New York were equally excellent, aided, in part, by good equipment and pre-testing from the Miami sites of large law firms which have their own in-house equipment. Accordingly, in another ICDR case from India, our panel considered taking testimony by videoconference from the principal witness who resides there.

In still another IDR arbitration involving witnesses in China, our panel was prepared to take their testimony via videoconference connection to the AAA office in Miami. However, a snowstorm in China prevented the witnesses from accessing their videoconference center located several hundred miles away. As a result, our panel had to hear the witnesses by telephone, a highly unsatisfactory method to evaluate credibility.

It is worth noting here that many offices of the AAA have installed their own videoconferencing equipment available for use on-site. Previously, these offices only had hookups available for parties who brought in their own equipment. With the outbreak of the COVID-19 pandemic, however, events appear to have passed this development by, necessitating use of videoconference equipment at home or other remote, separate locations.

Videoconferencing has even been explicitly authorized in some arbitration legislation. Colombia's Law 1563 on Arbitration which took effect in October 2012 provides for use of new technologies in arbitration proceedings such as virtual hearings and digital records.²

Additionally, we have learned that at least one justice at Brazil's Superior Court of Justice (STJ) has been using Skype video for hearings. The STJ is Brazil's highest non-constitutional court and is the court responsible for high-level judicial decisions dealing with arbitration. Another judge in the interior of the state of São Paulo has also begun using Skype video for court hearings.³

Reacting to the COVID-19 virus, ADR institutions such as the AAA/ICDR have made announcements to their rosters of neutrals explaining what measures are being taken to minimize risk of virus transmission in arbitration and mediation proceedings. To this end, the AAA has sent out a questionnaire to its roster of mediators inquiring about their experience conducting mediations online, by videoconference or telephone.

§ 53.04 Example of Use of Videoconferencing in an International Arbitration/Mediation Case

The advantages and disadvantages of the use of videoconferencing in international arbitrations and/or mediations are well illustrated by discussion of a case in which the author of this chapter was personally involved where videoconferencing was used. The case began as an ICDR arbitration between the Claimant and this author's client, a Brazilian business executive, and the Respondent, a U.S.-based multinational in the energy sector. Although originating as an arbitration, it was settled by mediation using international videoconferencing.⁴

²“The New National and International Arbitration Statute for Colombia” by Laura Lozano in the Association for International Arbitration (AIA) bulletin *In Touch*, November 2012, pp. 3–5.

³See the article in Portuguese “Juiz do interior de SP passa a atender advogados pelo Skype” (“Judge in the interior of the state of São Paulo begins to hear attorneys via Skype”) in the legal journal *CONJUR*, 22/01/14.

⁴It is this author's understanding that this case marked the first time videoconferencing was used for a complete, successful mediation of an international commercial case administered by one of the major

The subject of the claim was the right to an executive severance bonus. The case contained elements of both a commercial and employment nature, including some relatively complex project finance issues to which the bonus was tied.

Claimant filed a demand for arbitration with the ICDR pursuant to the arbitration clause in his underlying severance agreement with the Respondent. After the Response was filed, the attorneys began to negotiate but the talks stalled. Detecting certain underlying emotional issues, both sides agreed to mediation. An attempt to schedule an in-person mediation session did not work because the parties' travel schedules did not match.

As the attorneys representing the Claimant, we proposed videoconferencing and Respondent's attorney reacted very positively to the idea. There was very little or no resistance, primarily because the parties could not arrange their schedules for a personal meeting. The ICDR was very positive as well.

The videoconference session was arranged by the ICDR between three sites—in New York, another U.S. city, and São Paulo—one site for Claimant, one for Respondent, and the third for the mediator. The Claimant and his attorney were in São Paulo, Respondent's attorneys were in an east coast U.S. city, and the mediator was at the ICDR site in New York. As this international mediation by video was a new experience that could prove educational, the ICDR asked both parties for approval to have two silent observers at the New York site—the case manager and a Brazilian intern. The parties agreed and, as it turned out, this aspect worked well.

The suggestions in the sections below derive directly from our experience with videoconferencing in this particular case.

§ 53.05 Preparing for Arbitration or Mediation Sessions by Videoconference

[1] Considering Logistics of Videoconferencing

At that time, arranging arbitration or mediation sessions by videoconference required a certain amount of administrative and technical support. For this reason, it was recommended that an administering organization or body be used to coordinate all the items necessary for an arbitration or mediation by videoconference.

Indeed, for an international hearing or session there may be time zone differences to consider. As the communications must be run at precisely the same time between all sites, this likely means coordinating several different time zones. If sites from Europe or Asia are involved, the time differences will be greater, and a time that is comfortable for everyone must be arranged carefully.

The technical compatibility of the videoconference hardware, software and communication lines had to be coordinated between all sites, as described more fully below and in the Seoul Protocol at §53.02 *supra.*

arbitral institutions, the ICDR. Indeed, William Slate, then President of the AAA, announced this fact in his keynote speech at the November 2005 Triple Colloquium (AAA/ICDR—ICC—ICSID) in New York.

[2] Considering Technical Aspects of Videoconferencing

#Comment Begins

Note: These technical aspects were more important when this article was originally written. However, with the advent of Skype video, Meeting Place, Zoom, WebEx and other PC-based internet teleconferencing technology, this issue has become less important—*see* § 53.05[5] *below*.

[a] System Compatibility

An important issue at that time was that all sites needed to have system compatibility. This included both the type of communication systems being used and the videoconferencing equipment (hardware and software). Now that most people use PCs or Macs as hardware platforms, this issue has become moot.

[b] Communication Lines

Partly because more facilities used it, ISDN was considered a more convenient communication system to utilize than IP, although it is advisable to use a conference center which has both capabilities just in case, if a special videoconference center is used at all. Again, the advance of internet web-based communication technology has largely taken care of this issue.

[c] Equipment Compatibility Between Sites

In our case, for our equipment and videoconference center, we used the facilities of a Brazilian company called Estado da Arte (“State of the Art”) in São Paulo with very good results. This company also had sites in other large Brazilian cities. With the growth of videoconferencing worldwide, it is not difficult to locate companies like this in major cities. However, now it can be done from one’s own home or office with a PC and high-speed internet for web-based connectivity.

The machine we used in São Paulo was a Polycom View Station LAN H.323, 512 MP “EASP” system. The respondent used a Polycom View Station FX. The equipment provided by the AAA in New York was tested and found to be technically compatible with ours. While not possible in our case, using sites which are in different branch offices of the same organization (law firm, arbitral institution, etc.) may help facilitate technical compatibility.

Certain equipment models do not allow for three-way vision, *i.e.*, a given site can see only one other site and not two other sites. This may be good for private caucusing, or for witness examination by an arbitral panel, but certainly not for the opening group session of an arbitration or mediation. Therefore, it will be important to check the features and capabilities of the equipment being offered beforehand, and to let the video center know that capability to view all other sites is necessary.

Again, now with web-based PCs and Macs now in widespread use for videoconferencing, compatibility is all but assured. And platforms like Zoom offer multi-site conferencing.

[d] Transmission Speed

In our case, we were advised in São Paulo that one other site was restricted to only 128

KBS/second for some reason (by deliberate choice, or technical limitations we were not sure), which is considered quite low for videoconferencing. Our technician warned us not to make any “brusque movements” which could upset the video. The minimum is supposed to be 256 KBS/second for good images.

This is still very much an issue, especially when dealing with developing countries or areas which do not enjoy high-speed internet service. In these situations images can blur or freeze on the screen, making the videoconference difficult to run. The videoconference can also be disrupted by storms or other external conditions outside the control of the parties, although some storm-related disruption can be reduced if underground fiber optic cable is being used by the internet service provider (ISP). For these reasons it is highly advisable to check the speed and quality of your video transmission in advance of your videoconference.

[e] Pre-Testing

At the time of our first videoconference, because of all the technical factors requiring coordination and compatibility, it was – and still is - advisable to conduct a pre-test between all the sites well in advance, possibly several days ahead, to iron out any technical problems so as not to interrupt the flow of the hearing or session. The pre-test from São Paulo only included two sites. New York ran a test with each site separately, but not with all three simultaneously, which is the preferred mode of testing. It took two hours for the hub New York site to discover the best way to connect all three sites (Mediator, Claimant, Respondent), so sufficient time must be allotted for the pre-test.

[f] Technical Assistance

It was advisable for each site to have a technically qualified person on hand for the mediation, at least during the initial hook-up phase for the sites, and be close by in case problems arise afterward. For this reason, it was also wise to coordinate scheduling of the session with the technical staff for each site.

[3] Your Video Image Quality

These ideas will seem simple or obvious, but are quite important. Your images of the other parties and their images of you and the neutral play a key role in shaping mutual attitudes of the parties and determining whether the session or hearing is successful or not. This is especially crucial in mediations.

One simple way to improve image quality is to cut glare from sunlight coming through conference room windows by lowering blinds and/or adjusting participants’ positions at the table. Participants should be instructed to look directly into the camera and its monitor light when speaking. If the transmission speed is slow with time delays, then quick movements should also be avoided. Like a photo taken from a camera, the best illumination for a video conference will have the light source shining on the faces of participants, and coming from behind your webcam or phone camera.

To replicate the atmosphere of an in-person arbitration hearing, negotiation or mediation to the extent possible, a full image of each speaker—rather than just his or her face—is important to show hand movements and other body language. A large screen can help, as well as a co-called “Owl camera” with a 360o view of the room. This will also let arbitrators know that the witness is indeed alone in the room and is not being coached there.

[4] Cost Factors

Overall costs of the videoconference session can be handled in a variety of ways.

In our case, each party paid for its own site. The Respondent had its own in-house facilities and equipment, the Claimant rented a facility, and the AAA used its own site. An alternative is to simply divide the total costs evenly between the parties if all equipment is expected to be rented from outside facilities.

The primary cost components were rental of the conference room and equipment. Sometimes these are fixed, in-house costs. This was the case for the AAA and Respondent sites in our particular situation. The outside facility in São Paulo used by Claimant cost the equivalent of U.S. \$147 per hour to rent for a four-hour session, which Claimant paid directly.

The other main cost component was the cost of videoconference call time, often paid by the site originating the call. In our case, the call was originated by the AAA in New York at a very reasonable cost. International video calls have dropped considerably in price so now they are more affordable and practically free of charge when using platforms like WhatsApp. Originating the call from the U.S. is usually the most economical way, especially if a U.S. party, arbitral panel or mediator is involved. While not yet at the bargain levels of international voice calls, these video call costs are extremely low compared with airfare, hotel and other associated travel expenses and loss of time, etc. Travel expenses tend to rise with oil/fuel prices, but telecommunications expenses have been dropping due to network overcapacity.

[5] Recent Impact of PCs with VOIP, , WebEx, Meeting Place, Zoom, etc.

Our videoconference mediation was conducted in 2005. Since that time, the trend towards faster, cheaper and more effective communications technology has continued with an effect on videoconferencing. For our med-arb in 2005, it was necessary to utilize the services of special videoconferencing facilities at a cost and with a need to pre-test to check system compatibilities at all ends of the videoconference call. Now with VOIP technology, it is possible to have videoconferencing over the internet practically free of charge and with reasonable quality from one's own home or office via ,Zoom, WebEx, Meeting Place, Skype or a similar online service. These services allow for multiple connections using video and also incorporating features such as real-time document sharing. Further, now that Skype and some of these other services are also offered on smartphones, videoconferencing can also be mobile and is no longer tied either to a videoconference center or even to a specific computer location. And there is no need to check or make adaptations for systems compatibility. So the videoconferencing process has become decentralized and very inexpensive, with very low cost.

§ 53.06 Effect of Videoconferencing on Proceeding Itself

There are several factors that come into play here—among them, cultural and language issues, informality, time restrictions, visual privacy, and complexity of the case.

In our case, there were no language issues. The mediation was conducted in English, as the Claimant was fluent in English and quite familiar with U.S. business practices. However, this may not always be the case, so care needs to be taken that video sessions are culturally acceptable in your locale. If different languages are spoken by the parties and the arbitral panel or mediator, then much more time needs to be allocated for interpretation, extending the period required for the videoconference session.. At the same time, we cannot forget that body language and image

may play more important roles in the process, so image quality and viewing size must really be top-notch.

For mediation in particular, a key ingredient to success is setting a more open atmosphere of trust, communication, and give-and-take. This is often done, in the American culture at least, through informality, including use of first names, more casual attire, etc. We did not lose much informality with video, which was a pleasant surprise.

Time restrictions on the use of equipment did have an impact on our mediation in an indirect but important way. The Respondent had in-house equipment which another department in their company had reserved for the morning of the mediation. Thus, we were restricted to a single four-hour session in the afternoon. The positive aspect was that everyone felt the need to make decisions within that constricted time frame which expedited the process. However, this approach is not generally recommended.

A negative was that certain things were compressed or overlooked to save time. The opening statements by the parties and the mutual introductions around the table from site to site, including the name, position and role of each participant, were skipped over. This affected the way the mediation unfolded, since one participant's prior role in the underlying transaction had never been disclosed and only came out midway through the mediation session, after the other side had made critical comments about how that transaction had been conducted earlier. The criticism, which may not have been made in the same way if there were prior knowledge of that participant's role, produced a reaction which altered the tone of the mediation. Accordingly, it is very important not to rush the beginning of the mediation, even if there are time constraints on use of the equipment or peoples' schedules. **Fortunately today, time restrictions on the equipment no longer poses an issue, since it is no longer necessary to rent or use special equipment. On the contrary, today it is even possible to hold asynchronous videoconference sessions if there are time zone or other timing issues for one or more of the parties.**

Visual privacy is another important aspect, especially during the caucus. Although we could not hear the mediator caucusing with the other party, we did view the caucus on our screen. From their facial expressions, body language and movements, we could sense the other side's reactions to our proposals and suppose that the same was true during our own caucus sessions. This viewing feature is not desirable, and can probably be turned off with the right technical touch and prior agreement by both sides. **Again, today this issue can be resolved in any number of ways, including moving a laptop transmitting the videoconference from one room to another where different participants are located. Platforms like Zoom offer such "breakout rooms" which are necessary for mediation caucuses as well as breaks for each side to confer with its counsel.**

After both sides briefly argued over whether the severance package was triggered by the proper events, the issues negotiated in the mediation came down to the amount of money to settle the matter. After arguing the merits back and forth to each other and then separately to the mediator, the parties reverted to pure positional bargaining on the numbers. This bargaining consumed much of the four hours allotted to Respondent for use of its video equipment. If there had been more complex issues, then more time would have been needed for the equipment. For instance, the U.S.-Argentine mediation referred to earlier in this article, which had numerous participants and issues, took twelve uninterrupted hours to reach a settlement. In cases with parties having limited access to video equipment and busy travel schedules, it is recommended to reserve extra blocs of time for the equipment in the event any new, unexpected issues crop up during your mediation or arbitration session. **Once again, as special videoconference**

equipment is no longer required, special reservations would not be necessary.

The results of the mediation were positive in that the case was settled to each side's satisfaction. The mediator electronically shuttled back and forth between each side, probing for weaknesses in their legal positions and conveying tacitly what it would take to settle the case.

However, the videoconference did not allow time for nor anticipate the customary practice of having the parties sign a summary of the basic elements of their settlement agreement. This in turn could have reduced the parties' lengthy post-mediation negotiation of the text, since issues did arise after our video session regarding the scope of the agreement, *i.e.*, whether it went beyond what was agreed upon in the mediation session. **Again, this issue would likely not arise today where there are no longer time restrictions on use of the equipment.**

In May 2006, this author sat on a ICDR Panel of arbitrators for an international case with Brazilian and American based parties. A key witness, although not the principal witness, was located near São Paulo. Using an ISDN videoconferencing platform in São Paulo, the witness was able to testify via videoconference hookup to Miami where our hearings were held. The image and sound quality were excellent. The only area which needed some improvement was a two-second audio delay for the São Paulo site to hear our voices in Miami. There was no video delay or disruption. The attorneys noted that time on the line was expensive, so time must be used efficiently, but for many witnesses videoconference testimony will be far less expensive, time-consuming and stressful than international travel to testify abroad.

More recently, at the end of 2018 this author sat as sole arbitrator in an ICDR arbitration between U.S. and Swedish parties. Witnesses from the midwestern U.S. and The Netherlands were heard by videoconference. We used laptops with projection onto a screen furnished at the hearing site, with no impediments.

§ 53.07 Advantages and Disadvantages of Use of Videoconferencing in International Arbitrations or Mediations

Arbitration or mediation by videoconference has a number of advantages, especially in international cases. It saves substantial energy, time and money over international travel. In fact this author was requested recently by a Latin American client to prepare a dispute resolution clause in its distribution contract to explicitly provide for sessions by videoconference.

Virtual hearings and sessions offers the parties a wider geographical range from which to choose an arbitrator or mediator, sometimes necessary in international cases where geographical/cultural as well as substantive area expertise is needed. With videoconferencing, there are far fewer travel limitations on the arbitrator or mediator.. During periods where travel is restricted or avoided such as the coronavirus pandemic in early 2020, the advantages of videoconferencing increase manyfold. And in extremely emotional cases, video can be a useful tool to keep the parties physically separate while having them participate in a joint session at the same time.

To help the neutral selection process, a number of ADR institutions such as the AAA/ICDR and Singapore International Mediation Institute (SIMI) have offered their neutrals an opportunity to add a video to their neutral CVs, for a fee.

International arbitration or mediation by videoconference used to require extensive administrative and technical coordination, which is why an administered session used to be highly recommended. Extra time needed to be allocated for pre-testing the video equipment in order to conduct a successful mediation, including breaks requested by the parties or the neutrals. These disadvantages no longer apply.

In more complex cases, presentations made by Powerpoint and other computer aids and charts can be exchanged via email as a supplement during the hearing or session,.

The main disadvantages of videoconferencing are (1) it is not live, so body language and other non-verbal communication cues are more difficult to perceive, (2) it may be more difficult for arbitrators to detect improper witness coaching by someone not shown on the video screen; (3) videoconferencing does still depend on high quality, relatively high-speed internet access by all parties. This is not available everywhere and may disadvantage parties without quality access; and (4) videoconference sessions are said to be more tiring than live sessions, something which may be managed by offering more breaks for the parties and counsel and/or arranging for more but shorter video sessions.

Video transmissions – especially web-based ones, may even be **censored or monitored** in some countries.

Additionally, from the legal perspective there may be some jurisdictions where an arbitral award arising from virtual hearings may not be recognized as fulfilling basic due process requirements, especially if one party is reluctant to consent to a virtual process. In any event, case status conferences conducted by video may help even without a final video hearing. The English common law may favor cross-examination in person, especially if one party is cross-examined in person and the other by video. In arbitration this would refer especially to expert witnesses,

Cybersecurity has also become a key issue nowadays, so arbitration and mediation sessions undertaken online must also pay close attention to cybersecurity matters by taking steps to keep their transmissions secure from hacking etc. Arbitral institutions such as the ICDR and CPR have provided cybersecurity training for their arbitrators and mediators as well as lists of best practices in this area. **Privacy** has also become a concern. Certain videoconference services offer a public use option, without password entry. This has allowed entry of unauthorized persons who have in some cases projected their own material – some of questionable taste – onto the screen². Almost needless to say, individualized password entry into the videoconference for all authorized participants should be required.

To summarize, here are some key points to bear in mind:

1. The use of videoconferencing in international arbitrations and mediations will likely continue to grow, probably beyond the current pandemic period, for reasons of efficiency in time and cost reduction. As a technology, its price-performance ratio has dramatically improved over the past several years. It is more economical in terms of time and cost, and

² See “‘Zoombombing’: When Video Conferences Go Wrong”, NYTimes.com, March 22, 2020 at <https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html?searchResultPosition=1>

also more physically secure than personal travel—a factor which cannot be ignored these days.

2. If videoconferencing can work well to resolve disputes such as our international arbitration-turned-mediation case, it can certainly be used to good advantage in a wide variety of international arbitration settings. Videoconferencing has even better prospects to succeed in international arbitrations than in international mediations. Arbitration does not require the same level of trust building and subtle communication skills as does mediation, and has less wide-ranging communication dimensions. Mediation is a non-binding assisted negotiation process grounded entirely on the mediator's ability to gain the trust of and communicate with the parties in order to convince them to settle their differences. Mediation is more client-party focused. Arbitration, on the other hand, is a private, quasi-judicial legal process which is more counsel-focused, where the arbitral panel does not need to gain trust of the parties or convince the parties of anything, even though this may sometimes be desirable. The main communication challenge in arbitration is for the parties and their attorneys to present their case coherently to convince the arbitral panel.

In this sense, it is more of a one-way communication process than is mediation, which is at minimum a three-way communication process. As such, the drawbacks of video (*see below*) will usually have less impact in arbitrations than in mediations.

3. Whether used in arbitration or mediation, videoconferencing does have some shortcomings, a number of which have already been touched upon in this chapter (i.e., need for reliable broadband internet, , visual privacy and freedom from snooping, monitoring or hacking by governments, tech companies or other entities).

However, the lack of person-to-person contact to establish trust may be more important in a mediation than an arbitration proceeding, as noted above. For those not familiar with the process, when sitting for a videoconference, you see yourself on the screen as well as the participants at the other video site(s), and *vice-versa*. And there is eye contact, which can of course be a key factor in an arbitral panel's assessment of a witness' creditworthiness, for example, at least in the Anglo-American culture.

4. Of course, videoconferencing does not have the same quality as face-to-face meetings, but in arbitration this is less of a problem than in mediation, for the reasons explained above. Using videoconferencing can bridge a gap when the parties are unable to convene in the same location, or when travel schedules, visa or health restrictions make it difficult for parties or witnesses to appear physically. Video can also keep parties or witnesses apart in cases with high emotional risk. And of course, it can also cut costs, save time,

and reduce travel and health security problems as well³. Recommendations have been made to lean more towards video hearings for smaller cases and/or those with fewer witnesses.

Balancing these various factors, the international aspects of arbitration and mediation relate, on one hand, to legal system, cultural and communication issues which may be better addressed in a face-to-face encounter. On the other hand, international travel, economy, health and security factors may weigh in favor of using video instead at times, especially with its vastly improved quality and low cost.

³ For a wider view of the effect of COVID-19 on international arbitration, see (1) “How Will the Coronavirus Affect International Arbitration?” by Gary Benton, on the Kluwer Arbitration Blog, March 13, 2020, at <http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/> and (2) “What the Coronavirus Means for Arbitration and Mediation” by Jeff Benz, *Law360*, March 4, 2020 at https://www.law360.com/internationalarbitration/articles/1249725/what-the-coronavirus-means-for-arbitration-and-mediation?nl_pk=c4528b46-ebd4-4a37-9fcd-45284f8e5f60&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&read_more=1