

BOOM AND BUST?

Users' views on the post-pandemic potential of remote hearings in international arbitration

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The widespread use of remote hearings in international arbitration is of recent vintage and evolved out of necessity to respond to the disruptions caused by the COVID-19 pandemic. Despite initial misgivings, remote hearings have now become well entrenched in international arbitration practice, but will they continue to be popular even after the pandemic as in-person hearings return? This article focuses on the findings of a recent empirical study on the views of international arbitration users (external counsel, in-house counsel and party representatives) in relation to this question. Overall, users appear enthusiastic about future applications for (fully or semi-) remote hearings, especially in low-value disputes, so long as they are able to reap the potential time and costs savings while managing the new logistical, due process and cybersecurity challenges presented by this format.

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I. Introduction

1 The use of remote hearings (also known as “virtual hearings”) in international dispute resolution practice is of recent vintage and evolved out of necessity to respond to the disruptions

caused by the COVID-19 pandemic. Despite initial uncertainty about whether scheduled dispute resolution proceedings should proceed as planned, be postponed or conducted wholly by digital means in the light of global travel restrictions and social distancing measures introduced to curb further transmission of COVID-19,¹ remote hearings were swiftly adopted by courts and arbitral tribunals all around the world. This was especially apparent in international arbitration, where arbitral institutions reported that a majority of hearings were conducted remotely in 2020: 80 out of 117 hearings hosted by the Hong Kong International Arbitration Centre were fully remote or semi-remote;² and all hearings and sessions in cases administered by the International Centre for Settlement of Investment Disputes (“ICSID”) were held remotely by telephone or videoconference between 15 March and 15 December 2020.³ Similarly, a survey conducted by Gary Born, Anneliese Day QC and Hafez Virjee between June and July 2020 (“Remote Hearings Survey”) showed that fully remote hearings in international arbitration were ten times more common in the second quarter of 2020 than they had been at any time previously.⁴

2 In contrast, the 2018 Queen Mary International Arbitration Survey conducted just two years earlier found that 78% of respondents had “never, or rarely participated” in remote hearings.⁵ This surge in demand for remote hearings was also

1 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 139.

2 Hong Kong International Arbitration Centre, “2020 Statistics”.

3 International Centre for Settlement of Investment Disputes, “Hearings and Sessions Held in ICSID Cases from March to December (2019 vs. 2020)”.

4 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 138. The data set involved 106 respondents across 43 jurisdictions in six continents, comprising 92 participants (arbitrators, tribunal secretaries, counsel, experts) (87%) and 14 providers (hearing centres, technology providers and arbitral institutions) (13%).

5 Queen Mary University of London, “2018 International Arbitration Survey: The Evolution of International Arbitration” at p 32. The data set involved 922 respondents across six continents, comprising private practitioners
(cont’d on the next page)

accompanied by a flurry of arbitral rules, guidelines, protocols and other instruments created by various arbitral institutions, professional associations and counsel to provide guidance on best practices in this new medium.⁶ However, looking ahead, will remote hearings continue to be popular even after the pandemic, or will they fade into obscurity as in-person hearings return?

3 To determine the attitudes of users (namely external counsel, in-house counsel and party representatives) towards this question, selected participants of Singapore International Dispute Resolution Academy's ("SIDRA") inaugural 2019 International Dispute Resolution Survey⁷ ("SIDRA Survey") were invited to share their views on remote hearings in a series of interviews conducted between November to December 2020⁸ ("SIDRA Interviews"). In total, 18 users from 11 different countries covering five continents were interviewed ("Interviewees").

4 This article sets out the SIDRA Interview findings, which can be summarised as follows:

- (a) users regarded the increased efficiency and costs savings of remote hearings as important advantages over in-person hearings;
- (b) extensive logistical co-ordination and due process concerns were cited by users as serious disadvantages of remote hearings, while cybersecurity and confidentiality concerns appeared to be a neutral factor; and

(47%), full-time arbitrators (10%), in-house counsel (10%), "arbitrator and counsel in approximately equal proportion" (12%) and others (21%).

6 See Delos Dispute Resolution, "Resources on Holding Remote or Virtual Arbitration and Mediation Hearings" <<https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>> (accessed 22 April 2021).

7 Singapore International Dispute Resolution Academy, "SIDRA International Dispute Resolution Survey: 2020 Final Report".

8 The SIDRA Interviews (conducted by Dr Nadja Alexander, Rachel Tan, Vakhtang Giorgadze, Allison Goh and Samantha Clare Goh from Singapore International Dispute Resolution Academy ("SIDRA") and Michael Peer from PwC) aimed to contextualise and elaborate on the findings of the SIDRA Survey published in July 2020. The interviewees were also invited to share their observations on recent developments in international dispute resolution practice generally and many noted new practices and sensibilities shaped by the effects of the COVID-19 pandemic, such as the use of remote hearings.

(c) generally, users were enthusiastic about the use of fully or semi-remote hearings after the pandemic, especially for lower value disputes.

5 In this article, a remote hearing refers to one “conducted using communication technology to simultaneously connect participants from two or more locations”; a hearing is semi-remote if it “use[s] one main venue, and one or several remote venues”, and is fully remote if “all participants are in different locations, with no existing main hearing venue”.⁹ The “hearings” concerned here refer to “arbitration hearings dealing with major procedural issues and/or the merits of the case” rather than case management conferences and minor procedural meetings¹⁰ that have commonly been conducted over telephone or other electronic communication in international arbitration.¹¹ This is distinguished from asynchronous hearings, where participants are not physically or remotely present together at the same time and submit communications separately;¹² and online dispute resolution, which broadly refers to alternative dispute resolution and court proceedings that have as its main feature the use of technology to facilitate communication and the settlement of disputes between parties.¹³

II. Promise of time and cost efficiencies

6 In the SIDRA Survey, speed and costs were regarded by survey respondents as the aspects of international arbitration that

9 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 410.

10 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 139.

11 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 408–409.

12 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 411.

13 See the definition in American Bar Association, “Addressing Disputes in Electronic Commerce. Final Report and Recommendations” (2002) 58(1) *The Business Lawyer* 415 at 419.

they were least satisfied with.¹⁴ It is difficult, if not impossible, to determine whether the costs and length of international arbitration proceedings are generally unreasonable, given the varying complexity of the dispute, quality of counsel or arbitrator appointed and procedural conduct of parties in each case. However, the fact remains that users are demanding a more cost-effective and efficient process.

7 Greater efficiency and costs savings offered by remote hearings were therefore highly attractive to the Interviewees and regarded as key advantages over in-person hearings. They noted that, consistent with travel restrictions, remote hearings have reduced or eliminated the need for hearing participants (including counsel, witnesses, experts, arbitrators and translators) to travel from different, and increasingly far-flung, locations to meet at a single hearing venue. As one Interviewee explained, this has contributed to an overall improvement in the scheduling of hearings:

It's become easier for arbitrators to parcel out their time because you don't have to be in a particular venue for two weeks ... you can give up two or three days a week to be part of one hearing, and you can give up one day to be in another hearing ... I think that's led to generally more hearings for everybody.

8 Interviewees also noted that these time savings usually translated to costs savings as well, since travel and accommodation expenses which would normally have been incurred for in-person hearings were now redundant.

9 However, there is debate over the extent to which remote hearings in fact promote time and costs savings for users. First, while hearing participants no longer need to travel to meet at a single venue, they must nonetheless participate from their various locations at the same time. This means that it is not uncommon for shorter hearing days to be scheduled over longer periods of time to accommodate time zone differences between

14 Only 30% and 25% of survey respondents were “very satisfied” or “somewhat satisfied” with speed and costs, respectively: Singapore International Dispute Resolution Academy, “SIDRA International Dispute Resolution Survey: 2020 Final Report” at para 6.1.3.

participants, which qualifies the view that remote hearings are always more efficient and lead to an improvement in scheduling compared to in-person hearings.

10 Second, an Interviewee contended that costs savings in remote hearings could be rather limited given that the main difference with in-person hearings was travel, which was often the “smallest item of costs” in international arbitration proceedings compared to other costs such as counsel and arbitrator fees that were generally “much more expensive”.

11 Third, as discussed in the next section of this article, Interviewees reported that scheduling remote hearings involved considerable logistical planning and organisation. While this may threaten to discount or possibly negate the time and costs savings accrued, it was suggested by participants in a webinar convened by ICSID on 4 May 2020 that this could become more economical over time, as counsel and arbitrators became more familiar with and competent in the technical aspects of remote hearings.¹⁵

12 With international arbitration facing strong criticism for being too long and costly a method of resolving cross-border disputes, the promise of costs and time savings (albeit to a limited extent) through the use of remote hearings is an attractive proposition to users and will be an important consideration in whether remote hearings will continue to be used beyond the pandemic.

III. Extensive logistical planning and organisation of remote hearings

13 In remote hearings, communication between arbitration participants is facilitated largely, or exclusively, by digital means and prior logistical co-ordination of all aspects of the hearing

15 See comments made by participants in the webinar entitled “The Art and Science of a Virtual Hearing” in Chester Brown, Mark McNeill & Jeremy K Sharpe, “First Impressions of a Virtual Hearing at ICSID” (2020) *ICSID Review - Foreign Investment Law Journal* 1 at 9.

– especially the technical aspects – is crucial for the smooth conduct of proceedings. This would usually include matters such as the selection of appropriate hardware (computers, screens, microphones, webcams) and software (remote hearing platforms, fast and stable internet connection, platforms for counsel team’s communications internally or with clients) for remote hearings. When respondents of the Remote Hearings Survey were asked to identify their greatest concerns prior to participating in their first remote hearing, two-thirds of the answers related to technology issues, technology proficiency and internet stability.¹⁶ However, these issues apparently did not materialise in their actual remote hearing experiences.¹⁷ In contrast, the SIDRA Interviews found that it was not unusual for users to face significant technical and logistical issues in remote hearings.

14 One Interviewee recalled that one of his first remote hearing experiences was marred by having to use four different remote hearing platforms due to technical issues encountered with each one. This led to severe delays and, according to him, the hearing which concerned a minor procedural application took four full days to conclude when it should ordinarily have taken only around an hour to complete in person. Technical difficulties are expected to become less of a problem, however, as better-quality remote hearing platforms are developed to respond to growing demand. Nonetheless, the issue that remains is how users should go about choosing the best platform suited to their needs. A checklist produced by the Singapore International Arbitration Centre illustrates the various considerations in choosing an appropriate remote hearing platform, most notably whether to choose a platform offered by a hearing centre or

16 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at pp 149–150.

17 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at pp 149–150.

arbitral institution, or a third-party provider;¹⁸ key technical requirements (for example internet bandwidth and speed, and video and audio quality); cybersecurity and confidentiality concerns (chat functions, recording functions and breakout rooms); and availability of technical support prior to and during the hearing.¹⁹ Other guidelines such as para B.4 of the CPR Model Procedural Order for Remote Video Arbitration Proceedings and Art 6.1 of the Seoul Protocol on Videoconferencing in International Arbitration (“Seoul Protocol”) also recommend the testing of remote hearing platforms and equipment well in advance of the hearing.²⁰

15 Another issue is the difficulty of controlling and standardising the various settings in which the participants engage in fully remote hearings, which may affect how effectively hearings are conducted. For example, while counsel are usually able to secure sufficiently good hardware and software for these hearings, the same could not be assumed of other hearing participants, such as witnesses and experts, as noted by one Interviewee:

The challenge has been actually where witnesses are dialling in from remote locations where you don’t have an office, so you can’t control their tech[nology] or the equipment they have ... a lot of time is just spent coordinating with them to make sure that they have the right tech[nology], the right set-up, the right mic[rophones], the right lighting.

18 Examples of platforms offered by institutions include the International Chamber of Commerce’s Virtual Hearing Solution for fully and semi-remote hearings and the Global Hybrid Hearings solution developed by the International Arbitration Centre Alliance (formed by Arbitration Place of Toronto and Ottawa, Canada; the International Dispute Resolution Centre of London, UK; and Maxwell Chambers of Singapore). Third-party providers include Opus 2 and Epiq.

19 Singapore International Arbitration Centre, “Release of the SIAC Guides – Taking Your Arbitration Remote” (31 August 2020).

20 International Institute for Conflict Prevention & Resolution, “Model Procedural Order for Remote Video Arbitration Proceedings”; KCAB International, “Seoul Protocol on Videoconferencing in International Arbitration” (18 March 2020) <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> (accessed 22 April 2021).

16 Even if these logistical considerations have been catered for, the risk of proceedings being disrupted by unforeseen technical difficulties cannot be completely eliminated in remote hearings. As an Interviewee explained, technology is not infallible:

The biggest problem with technology, frankly, is just making sure that it works, and works the whole time ... it is amazing how frequently there is a glitch ... the system somehow goes slow while [people are] speaking, their sound is distorted, or it cuts out, or it's faint.

17 It is clear from the SIDRA Interviews that users are keenly aware of the extensive logistical planning and organisation involved in remote hearings. As noted in the previous section of this article, teething issues with technical matters and logistical organisation are expected to improve generally as participants gain more experience and become more familiar with the medium. However, these practical concerns will continue to be an important part of remote hearing practice going forward since these considerations apply afresh for each hearing. Furthermore, significant implications on matters such as due process, cybersecurity and confidentiality, as discussed in the subsequent sections of this article, will be important factors for users in considering whether to use remote hearings after the pandemic.

IV. Due process challenges posed by remote hearings

18 Early on, the international arbitration community had recognised that the turn to remote hearings might attract due process concerns. One question is whether hearings ordered by an arbitral tribunal to proceed remotely, despite the objection of one party, may constitute a breach of that party's right to be heard. The consensus now appears to be that there is generally no right to an in-person hearing unless expressly provided for in the arbitration agreement, applicable law (*lex arbitri*) or governing procedural rules;²¹ an ongoing research project by the International Council for Commercial Arbitration ("ICCA")

21 See, eg, Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" (2020) 37 *Journal of International Arbitration* 407 at 439-441.

has found that no right to an in-person hearing exists for international arbitration under the *lex arbitri* of 26 jurisdictions surveyed thus far.²²

19 However, the SIDRA Interviews revealed that users were also concerned about the breach of parties' due process rights in the conduct of remote hearings. First, as mentioned above, the Interviewees were well aware of the risk of technical difficulties threatening to disrupt hearings. If proceedings continue despite severe disruptions, this may amount to a breach of a party's right to be heard.²³

20 Second, due to the remote nature of such hearings, there may be concerns about the conditions under which testimony is taken and the attendant risks of witness coaching, which may potentially breach a party's right to be treated equally.²⁴ An Interviewee recalled his experience with a remote hearing in which the tribunal worked closely with parties and counsel to alleviate such concerns by devising in advance detailed due process safeguards with regard to the taking of evidence. Nowadays, users have the benefit of referencing various protocols which have been developed by arbitral institutions and other arbitral bodies providing best practices guidance on preventing undue interference with witness testimony in remote hearings.²⁵

21 Third, Interviewees were concerned about being able to effectively present arguments or evidence during remote

22 International Council for Commercial Arbitration, "Right to a Physical Hearing Project: The Release of 22 New Reports Reveals Interesting Trends and Significant Convergences" (8 February 2021).

23 Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" (2020) 37 *Journal of International Arbitration* 407 at 441.

24 Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" (2020) 37 *Journal of International Arbitration* 407 at 444.

25 See, *eg*, KCAB International, "Seoul Protocol on Videoconferencing in International Arbitration" (18 March 2020) <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> (accessed 22 April 2021); International Chamber of Commerce, "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic 2020" (9 April 2020); and Africa Arbitration Academy, "Africa Arbitration Academy Protocol on Virtual Hearings in Africa 2020" (April 2020).

hearings. While they noted the advantage of being able to pull up clear, electronic copies of documents and broadcast these through a “screen-sharing” function, for example, they also noted that in contrast to in-person hearings, it was no longer possible to maintain direct eye-to-eye contact with the tribunal and witnesses, or properly detect “gesticulation” and other crucial non-verbal cues. This meant that it was easy to “lose their audience” since it was difficult to get immediate feedback on the points being made by counsel. This contrasts with the findings of the Remote Hearing Survey, in which a majority of respondents indicated that the effectiveness of advocacy was the “same” across fully remote, semi-remote and in-person hearings.²⁶ Moreover, the views on remote hearing advocacy are far from uniform. It is noteworthy that the Interviewees who raised the issue of remote hearings advocacy were from common law jurisdictions, where the theatre of cross-examination and oral advocacy is traditionally emphasised and exploited in litigation proceedings.²⁷ It has also been argued that remote hearings may actually enhance the ability of participants to see and hear each other, since it is possible to adjust the audio volume and zoom in on screens.²⁸ This requires fairly high-quality software and hardware, however, and given that sophisticated technology may be expensive, existing financial inequities between parties may be exacerbated.

22 On the whole, the Interviewees’ comments suggested that effective advocacy in remote hearings required counsel to go beyond applying conventional approaches to in-person advocacy and adapt to the communication needs of the new digital medium so as to enhance the efficacy of remote hearings. For instance,

26 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at pp 145–146.

27 Jeffrey Maurice Waincymer, “Online Arbitration” (2020) 9 *Indian J Arb L* 1 at 1–2. Scherer describes the common law emphasis on cross-examination as the “Anglo-Saxon predilection for ‘seeing the witness’”: see Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 428.

28 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 428.

one proposed method of getting around the difficulty of reading cues from the tribunal as to their thinking is to “periodically ... pause to invite Tribunal questions or observations”.²⁹ The importance of paying attention to how information and graphics are represented on a screen was also highlighted by an Interviewee as a key tool for effective communication in remote hearings. In this regard, another Interviewee cautioned against unnecessary use of “screen-sharing” to display documents because it is harder to ensure that the tribunal is following the arguments being made by counsel when their attention is inevitably diverted to the text or images displayed on the screen.

23 As seen above, the due process concerns in remote hearings do not appear to be fatal. Notably, the Remote Hearings Survey found that:³⁰

[A] majority of respondents considered that fully remote hearings and in-person hearings were the same when it came to assessing the evidence of witnesses and experts, the effectiveness of advocacy, putting questions to counsel, and tribunals’ understanding of the case.

24 The question of whether users will take to remote hearings after the pandemic therefore appears to depend on their appetite for re-thinking established international arbitration practice and accommodating the needs of this new hearing format.

V. **Cybersecurity and confidentiality concerns as a neutral factor**

25 Confidentiality has long been perceived as one of international arbitration’s main virtues and continues to be valued by users, as recently confirmed by 69% of respondents of

29 See Chester Brown, Mark McNeill & Jeremy K Sharpe, “First Impressions of a Virtual Hearing at ICSID” (2020) *ICSID Review – Foreign Investment Law Journal* 1 at 6.

30 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 146.

the SIDRA Survey.³¹ As such, many Interviewees were concerned about the risks of confidentiality being compromised by potential cybersecurity breaches in remote hearings. An Interviewee noted troubling reports of videoconferencing platforms being hijacked and disrupted,³² resulting in several countries (and their courts) prohibiting their use for official functions. Interviewees were also concerned that if unauthorised third parties were able to access the remote hearing and transmit data outside the arbitral proceedings, this breach of confidentiality might carry risks of reputational damage or providing undue advantage to corporate competitors, especially if commercially-sensitive information is leaked.

26 Given these concerns, cybersecurity in remote hearings has been the focus of various remote hearing guidelines developed by arbitral institutions and other arbitral bodies. These guidelines have emphasised the importance of using secured remote hearing platforms, with Art 2.1(c) of the Seoul Protocol, for example, providing that cross-border connections should be adequately safeguarded by methods such as IP encryption so as to prevent unlawful interception by third parties. There are also platform-specific recommendations, such as the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Using Zoom.³³

27 Many guidelines, including Art 8 of the Seoul Protocol, Annex I(C) of the International Chamber of Commerce (“ICC”) Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic 2020³⁴ and Art 3.5 of the Africa Arbitration Academy Protocol on Virtual Hearings in Africa 2020,³⁵ have also highlighted the risk of unauthorised recording of remote hearings and provide that recordings should be prohibited except where parties have agreed to it or with the permission of the arbitral tribunal.

31 Singapore International Dispute Resolution Academy, “SIDRA International Dispute Resolution Survey: 2020 Final Report” at para 6.1.1.

32 See, eg, Kelly Zegers, “Shareholders Sue Zoom over Privacy, Hacking Concerns” *Law 360* (8 April 2020).

33 AAA-ICDR, “Virtual Hearings”.

34 9 April 2020.

35 April 2020.

28 However, as an Interviewee noted, confidentiality of international arbitration proceedings is rendered “more vulnerable” with the use of digital communication generally, and remote hearings are by no means the only weak link in cybersecurity.³⁶ Going forward, users will benefit from adopting a principled and holistic approach in considering cybersecurity safeguards. As pointed out in Principle 6 of the 2020 ICCA–NYC Bar–CPR Protocol on Cybersecurity in International Arbitration, parties and tribunals are urged to consider factors such as the risk profile of the arbitration; the available cybersecurity capabilities of the parties, arbitrators, and the administering institution; the financial costs of implementing cybersecurity measures; the proportionality of adopting cybersecurity measures considering the size, value, and risk profile of the dispute; and the efficiency of the arbitral process.³⁷ Cybersecurity safeguards should also be complemented with adequate data protection measures, concerning the storage and management of personal data, which is the focus of the draft ICCA–IBA Roadmap to Data Protection in International Arbitration addressing data protection obligations (in particular, the European Union’s General Data Protection Regulation³⁸) and their impact on international arbitration proceedings.³⁹

29 Evidently, the need to take into account information security issues transcends the use of remote hearings and cannot be avoided by international arbitration users so long as digital communications are employed. It therefore appears to be a neutral factor for users deciding whether to continue using remote hearings after the pandemic.

36 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 436.

37 International Council for Commercial Arbitration, “The ICCA Reports No. 6: ICCA–NYC Bar–CPR Protocol on Cybersecurity in International Arbitration” (2019) <<https://www.arbitration-icca.org/icca-reports-no-6-icca-nyc-bar-cpr-protocol-cybersecurity-international-arbitration>> (accessed 22 April 2021).

38 (EU) 2016/679; entry into force 25 May 2018.

39 International Council for Commercial Arbitration, “ICCA–IBA Joint Task Force on Data Protection Releases Consultation Draft of ICCA–IBA Roadmap to Data Protection for Public Comment” (2 March 2020) <<https://www.arbitration-icca.org/icca-iba-joint-task-force-data-protection-releases-consultation-draft-icca-iba-roadmap-data>> (accessed 22 April 2021).

VI. Users' cautious optimism for remote hearings in post-pandemic international dispute resolution practice

30 As mentioned above, there was a spike in fully remote hearings in international arbitration around mid-2020. This was apparently the result of in-person or semi-remote hearings being converted into fully remote ones out of sheer necessity, rather than users and arbitral tribunals suddenly expressing preference for fully remote hearings for other reasons.⁴⁰ Indeed, as one Interviewee noted, remote hearings made it possible for international arbitration proceedings to continue during the pandemic – cross-border disputes involving parties, counsel, witnesses and arbitrators located in different countries did not have to be “adjourn[ed] until the end of [the pandemic]” or otherwise come to an indefinite standstill in the light of existing global travel restrictions and social-distancing measures. However, once such measures are relaxed and the need for remote hearings accordingly diminishes, will international arbitration users continue to opt to conduct hearings in this fashion?

31 In May 2020, some commentators maintained that in-person hearings were “the ideal” format⁴¹ and others speculated that in-person hearings would return once they become possible again.⁴² In fact, the Remote Hearings Survey found that despite there being more fully remote hearings than in-person and semi-remote hearings scheduled between 15 March and 30 June 2020, the reverse was true for the period

40 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 141.

41 Chester Brown, Mark McNeill and Jeremy K Sharpe, “First Impressions of a Virtual Hearing at ICSID” (2020) *ICSID Review - Foreign Investment Law Journal* 1 at 9.

42 Erica Stein, “Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at pp 176–177. See also comments by speakers in the webinar held on 10 September 2020 entitled “GAR Interactive: Europe” in Jack Ballantyne, “Virtual Hearings: Just a Stop-Gap?” *Global Arbitration Review* (24 September 2020) <<https://globalarbitrationreview-com/virtual-hearings/virtual-hearings-just-stop-gap>> (accessed 5 March 2021).

of 1 January 2021 onwards, where there were more in-person and semi-remote hearings than fully remote hearings scheduled. It was suggested that this showed a prevailing preference for in-person hearings amongst the respondents, which comprised of arbitrators, tribunal secretaries, counsel and counsel teams, in-house counsel and experts.⁴³ The Remote Hearings Survey, conducted between June and July 2020, does not, however, take into account any hearings that are only scheduled after this period to take place from 1 January 2021 onwards.

32 More recent studies examining attitudes towards remote hearings suggest a warmer view, especially amongst international arbitration users (as opposed to arbitrators, tribunal secretaries and other third parties). In the SIDRA Interviews, conducted between November to December 2020, many Interviewees shared the view that the remote hearing is “here to stay” since it has proved to be a format that “does work”. An Interviewee pointed to the revision of arbitral rules incorporating provisions for remote hearings as evidence of their status being cemented in international arbitration practice. For example, Art 19.2 of the 2020 London Court of International Arbitration Rules and Art 26(1) of the 2021 ICC Rules of Arbitration give tribunals the discretion to decide on the appropriate format of hearings, in-person or otherwise.⁴⁴

33 There is good reason to believe that remote hearings will continue to be a popular option after the pandemic. Despite the reported drop in fully remote hearings scheduled for 1 January 2021 onwards in the Remote Hearings Survey, the authors of the study noted that this did not definitively spell the end of remote hearings after the pandemic, explaining that the “true picture is more nuanced” and that “smaller value cases and/or cases with fewer witnesses and experts to examine are more likely to

43 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 144.

44 London Court of International Arbitration Rules (effective 1 October 2020); International Chamber of Commerce Rules of Arbitration (entry into force 1 January 2021).

be conducted as fully or semi-remote hearings, not least given the benefits that can be achieved in terms of time and cost”.⁴⁵ The views of users surveyed by SIDRA echo this observation. The SIDRA Survey found that users’ decisions to use online processes in arbitration was largely influenced by the dollar value of disputes⁴⁶ and Interviewees were confident that remote hearings would remain attractive at the very least for lower-value disputes which stood to gain the most from the time and costs savings afforded by this format. Interviewees also recognised that there could be circumstances in which it was preferable to have counsel and witnesses present in in-person hearings, to avoid issues of witness coaching, for example, but they pointed to semi-remote hearings as a possible solution, rather than avoiding remote hearings altogether.

34 With the overall trend towards embracing technological platforms in international dispute resolution practice generally, it is perhaps inevitable that remote hearings enter the mainstream in international arbitration. Indeed, it has been suggested that this “paradigm shift might be something that many arbitration users have wanted for some time” already.⁴⁷ The SIDRA Survey found that the remote hearing was ranked by respondents as the second most valuable technological tool in international arbitration,⁴⁸ and in the 2018 Queen Mary International Arbitration Survey, 89% of the survey participants believed that videoconferencing should be used more often as a tool in international arbitration and 66% said the same about virtual hearing rooms.⁴⁹

45 Gary Born, Anneliese Day & Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users’ Views” in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 150.

46 Singapore International Dispute Resolution Academy, “SIDRA International Dispute Resolution Survey: 2020 Final Report” at para 6.4.5.

47 Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework” (2020) 37 *Journal of International Arbitration* 407 at 409.

48 Singapore International Dispute Resolution Academy, “SIDRA International Dispute Resolution Survey: 2020 Final Report” at para 6.4.2.

49 Queen Mary University of London, “2018 International Arbitration Survey: The Evolution of International Arbitration” at p 36.

VII. Conclusion

35 Remote hearings have now become well entrenched in international arbitration practice, despite initial misgivings. Whether the warm reception by the international arbitration community will endure beyond the pandemic ultimately comes down to the users' experiences with it. As examined above, this depends on whether they are able to reap the potential costs and time savings offered by remote hearings while managing new logistical, due process and cybersecurity challenges presented by this format. For now, users generally appear enthusiastic about future applications for remote hearings, especially in low-value disputes, or at the very least, incorporated with in-person sessions as semi-remote hearings.

36 Adjustment difficulties are to be expected with any paradigm shift, and remote hearings, which have forced the re-evaluation of the conduct of international arbitration proceedings, are no different. Remote hearings can either be seen as a unique opportunity to reform and improve international arbitration, or an unwelcome disruption to a tried-and-tested model. As Patricia Shaughnessy puts it:⁵⁰

The world of international arbitration is going through a major transformative event that has accelerated technological integration and innovation. It will not return to 'normal'; the pre-pandemic 'normal' is the past and the future is now being forged.

50 Patricia Louise Shaughnessy, "Chapter 2: Initiating and Administering Arbitration Remotely" in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Bassiri Niuscha & Mohamed S Abdel Wahab eds) (Kluwer Law International, 2020) at p 47.