

**Guidelines on Remote Hearing for Dispute Settlement for Trade Agreements
in Times of Crises**

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Type of Contribution: Research Paper

Word count: 9, 986

Keywords: Trade facilitation, Dispute settlement, Virtual hearing

**A contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis
and Pandemic in Regional and other Trade Agreements**

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UNITED NATIONS POLICY HACKATHON

8 JUNE 2020 - 24 JULY 2020

Team: University College London

Title: GUIDELINES ON REMOTE HEARINGS FOR VIRTUAL DISPUTE SETTLEMENT FOR TRADE AGREEMENTS IN TIMES OF CRISES

Abstract

An efficient and resilient dispute resolution mechanism is the cornerstone for trade facilitation and liberalisation. It is an imperative, especially in times of uncertainties and crises. Out of the concern on the effect of COVID-19 on the trade dispute resolution landscape, this research recommends provisions on the procedures for leveraging technology for dispute resolution in times of crisis and pandemic. We propose the inclusion of virtual hearing clauses as additional provision in multilateral and regional trade agreements to cater for times when physical hearing will be practically impossible. We consider the specific challenges and circumstances that may arise in relation to remote hearing in these periods at different categories of developed, developing and least developed countries. This contribution seeks to lay the groundwork for the incorporation of virtual hearing protocols at different levels for trade agreements Disputes Settlement.

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ABA	American Bar Association
AfCFTA	Africa Continental Free Trade Area
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
COVID-19	Coronavirus Disease 2019
CPR	International Institute for Conflict Prevention and Resolution
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DIS	German Arbitration Institute
DSB	Dispute Settlement Body
EFTA	European Free Trade Association
EPE	Electronic Presentation Of Evidence
GDPR	General Data Protection Regulations
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce's International Court of Arbitration
ICCA	International Council for Commercial Arbitration

ICDR	The International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IFCIA	International Federation of Commercial Arbitration Institutions
IISD	International Institute for Sustainable Development
ISDS	Investor–State Dispute Settlement
ISP	Internet Service Provider
KCAB	Korean Commercial Arbitration Board International
LCIA	London Court of International Arbitration
MCA	Milan Chamber of Arbitration
NYC Bar	New York City Bar Association
PCA	Permanent Court of Arbitration
RTA	Regional Trade Agreement
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitration Centre
WTO	World Trade Organisation

EXECUTIVE SUMMARY

Born out of the concern about the ongoing effect of COVID-19 on the trade dispute settlement landscape, we recommend the provisions for leveraging technology for dispute resolution in times of crisis and pandemic. We recommend the inclusion of Virtual Hearing Protocol for Trade Disputes Settlement at all levels in trade agreements to cater for times when physical hearing will be practically impossible. We consider the specific challenges and circumstances that may arise in relation to remote hearing in these periods and propose guidelines that contribute to consolidate virtual hearings as an efficient and egalitarian tool for trade disputes settlement. An efficient dispute resolution mechanism that ensures fairness is the cornerstone for trade facilitation and liberalization.

In this research, we argue that suspension of the trade and investment dispute mechanism is not a sustainable solution for trade facilitation in times of crises. Also, the dispute settlement protocols of various Regional Trade Agreements and other Agreements must leverage technology to survive in ordinary times and in times of crises and pandemic. In testing the efficiency of our technology solution proposal of virtual hearing, we conducted preliminary reviews of trade agreement, empirical research of current practices from experts before and during the Covid-19 crises, examined and highlighted the challenges and proposed our recommendation as explained in the following paragraphs.

First part of this research reviews existing regional and multilateral trade agreements across various categories of Developed, Developing and Least Developed Countries based on the United Nations categorization. Considering the review and the gap in these Trade agreements, this part proceeds to present the solution of virtual hearing with an illustration of how virtual hearing can be incorporated in existing agreements and future agreements. This section further goes to outline examples of recent model protocols on virtual hearing to serve as a guide in this regard.

The second part of the research presents an outcome of an empirical study carried out on how virtual hearing has thrived during the Covid-19 pandemic and the associated drawbacks. Drawing from the findings from the survey, the sequel chapters address some concerns on cost, security, data protection and concerns on conduct of the hearing raised in our empirical study.

Based on the findings and analysis of the previous sections, the third part of this research presents recommendations on the model provision for trade agreements for dispute settlement through virtual hearing in times of crises and pandemic. The research ultimately concludes that incorporation of virtual hearing for dispute settlement in trade and investment agreements is the solution to "build back" better for trade efficiency.

We recommend that leveraging technology in order to achieve greater transparency and improve legitimacy of the multilateral and regional trade institutions as an international organisation governing global trade is paramount to its very survival in times of crises. We have demonstrated through research into existing protocols of virtual hearings and our empirical study that virtual hearings have the potential to overcome some of the already existing obstacles and build trust

between contracting parties. Therefore, we recommend that virtual hearings play a significant role in resolving international trade disputes.

The aim of this research paper is to provide an innovative approach to improve the dispute settlement methods under RTAs by presenting common considerations in adopting virtual hearings to overcome the extraordinary challenges presented by the recent global pandemic. In approaching this task, we identify several issues including the added complexity due to specific regional factors as well as the varying effect of the pandemic on contracting parties. We therefore recommend that the compendium of resources on virtual hearings which have been provided throughout this work should be leveraged by states, trade institutions and dispute settlement bodies to amend their dispute resolution mechanisms and processes to suit the demands of challenges arising during times of crises.

1. VIRTUAL DISPUTE RESOLUTION THROUGH REMOTE HEARING FOR TRADE FACILITATION IN TIMES OF CRISES

1.1. INTRODUCTION

A resilient dispute settlement mechanism is the cornerstone of multilateral trade facilitation and fundamental to promoting international investment relations. The COVID-19 global crisis has put to test the resilience of the dispute resolution regime of existing trade agreements in international trade and investment during the past months as a result of this global crisis. The pandemic has exposed a lacuna in leveraging technology in the general dispute resolution landscape, as well as dispute settlement mechanisms of international trade agreements. Moreover, the unprecedented disruption caused by the recent pandemic has led to the sudden emergence of varied trade policy responses by different international organizations, such as the World Bank¹ and the United Nations.²

This crisis will potentially give rise to a plethora of trade and investment disputes across the globe arising from legal issues as a result of delays and performance failure, liability for breach of contracts, frustration, as well as uncertainties relating to triggering force majeure clauses. Settlement of these disputes will require urgent attention, so that trade facilitation will remain unhampered by the aforementioned disruptions. Though an example of trade policy intervention is the United Nations' recent draft agreement³ on the suspension of Investor-State Disputes Settlement, it is apposite to state that such an intervention is not a sustainable solution and States will likely not be willing to be bound by such an agreement for a long time. Learning from past disputes in times of crisis, States' public interest measures such as health, trade, or finance-related can come under challenge from investors, including measures taken in times of severe national crises. Investors can challenge these measures using investor–state arbitration provided for under the investor–State dispute settlement (ISDS) provisions found in most Bilateral Investment Treaties (BITs) and investment chapters of trade agreements.⁴ A case in point is the social and political upheaval of the Arab Spring in 2011–2012, which was followed by a spike in ISDS claims

¹ Trade and COVID-19 Guidance Note: Do's and Don'ts of Trade Policy in the Response to COVID-19 <<http://documents1.worldbank.org/curated/en/509521585605825305/pdf/Do-s-and-Don-ts-of-Trade-Policy-in-the-Response-to-COVID-19.pdf>> accessed on 17 July 2020.

² Agreement for the Co-ordinated Suspension of Investor-State Dispute settlement with respect to Covid-19 related Measures and Disputes: Texts and Commentaries (International Institute of Sustainable development, 18 June 2020). <<https://www.dropbox.com/s/q3v3lokjns453c4/ISDS-suspension-COVID-EN-updated.pdf?dl=0>> accessed on 17 July 2020.

³ Trade and COVID-19 Guidance Note (n1)

⁴ Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments (International Institute of Sustainable development, April 2020) <<https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf>> accessed on 18 July 2020.

against North African and Middle Eastern governments, some of which stemmed from state measures taken to address the impacts of the crisis.⁵

This therefore calls for a sustainable solution for settlement of disputes in times of crises, like the COVID-19 pandemic, in order to ensure dispute settlement processes can be carried out without any hindrance through the leverage of virtual technology and remote hearing alternatives. For this to be effective, these provisions should be included in trade related agreements from the outset, at the stage of negotiation of the trade agreements, to ensure that the decisions reached in the instance of such remote dispute resolution processes are binding and enforceable.

In light of this development and desire, a number of protocols and innovative solutions on virtual hearings have been developed by various dispute resolution institutions, investment dispute settlement institutions, law firms, and academic institutions.⁶ The focus of this research work is to present a model of how these protocols could be included in existing and future Regional Trade Agreements (RTAs) and other trade agreements. The Covid-19 pandemic has introduced the world to a new normal which has placed technology at the centre to keep the world going and building back better after the crisis. Thus, the dispute resolution landscape for international trade and investment must embrace this development, for trade and investment to thrive.

In the alternative dispute resolution landscape, for example in Arbitration, various global arbitral bodies have issued protocols and guidance notes to govern remote arbitration hearings. For instance, the International Chamber of Commerce has issued a guidance note outlining a range of possible measures to be adopted to help mitigate the effects of COVID-19 on arbitral proceedings, which includes, amongst other things, a checklist for a protocol on virtual hearings, suggested clauses for cyber-protocols and procedural tools available to mitigate delays occasioned by the pandemic.⁷ Also on the 23rd of March 2020, the International Centre for Settlement of Investment Disputes (ICSID) made a release on remote hearing stating that before the crisis, there had been a growing interest at the Centre on online hearing alternative for settlement of disputes, reporting that 60% of cases before the Centre at that time were conducted remotely.⁸ The release points to the fact that the COVID-19 pandemic has further led to a rise in the use of online hearing for disputes brought before it.⁹

Another innovation in this regards is the African Arbitration Academy Protocol on Virtual Hearing¹⁰ with the following overarching objectives; (a) to provide guidelines and best practices for arbitrations within Africa, where a physical hearing is impracticable due to health, safety, cost,

⁵ Ibid.

⁶Innovative protocol developed for Virtual hearing in Africa (Baker Mckenzie, 25 June 2020) <<https://www.bakermckenzie.com/en/insight/publications/2020/06/protocol-developed-for-virtual-hearings-in-africa>> accessed 18 July 2020.

⁷ Ibid.

⁸ A Brief Guide to Online Hearing at ICSID (ICSID News Release, 23 March 2020) <<https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>> accessed on 18 July 2020.

⁹ Ibid.

¹⁰ African Arbitration Academy, 'Protocol on Virtual Hearing' (April 2020) <<https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf>> accessed on 18 July 2020.

or other considerations; (b) to encourage African institutions and governments to make express references to virtual hearings in arbitration rules and laws; and (c) to serve as guiding standards, principles, and provisions to be adopted by arbitral institutions or governments in Africa when drafting their arbitration rules and laws.¹¹ It is noteworthy that such an innovation is coming at a time when the continent is set to implement the newly negotiated Continental Free Trade Area (AfCFTA)¹² which will facilitate trade liberalization among member states on the continent.

From the foregoing, it is apparent that necessity is the mother of invention and the multilateral trading system must, as a matter of urgency, embrace technology with full arms in resolution of trade disputes. It is on this premise that this research provides various models of virtual hearing protocols that can be incorporated in current and future Trade Agreements. This research identifies the strengths and weaknesses of remote hearing options, putting into consideration the challenges that may be encountered and how these could be addressed at different levels of categorisation of contracting state parties¹³ to Trade Agreements in the regional and the multilateral trading system.

¹¹ Africa Arbitration Academy Takes over the Baton on Thought Leadership...Launches Virtual Hearing protocol in Africa, for Africa (Kluwer Arbitration Blog, May 7 2020)
<http://arbitrationblog.kluwerarbitration.com/2020/05/07/africa-arbitration-academy-takes-over-the-baton-on-thought-leadershiplaunches-virtual-hearing-protocol-in-africa-for-africa/?doing_wp_cron=1595165833.3538899421691894531250> accessed on 18 July 2020.

¹² Agreement Establishing Africa Continental Free Trade Area.
<https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>
accessed on 20 July 2020.

¹³ Developed, Developing and Least Developed Countries.(Country Classification, United Nations),
<https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed on 20 July 2020.

2. REVIEW OF EXISTING REGIONAL AND OTHER TRADE AGREEMENTS

The unprecedented measures taken by governments around the world in response to the coronavirus pandemic have disrupted global supply chains and hindered the trade of goods and services. The legal implications of these measures on trade agreement could lead to increased trade-related disputes occurrence of trade-related disputes which need to be resolved efficiently. Significantly, they also present a threat to the resolution of investor-state disputes.¹⁴

To make valuable recommendations on how trade-related disputes can be effectively resolved during times of crisis or pandemic, this paper makes an initial review of the dispute resolution provisions of existing regional and other trade agreements. Specific trade agreements have been examined in detail and reviewed below. They are; 2002 Convention establishing the European Free Trade Association (EFTA);¹⁵ 2016 Comprehensive Economic and Trade Agreement (CETA),¹⁶ 2019 Agreement establishing the African Continental Free Trade Area (AfCFTA);¹⁷ and the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).¹⁸ Through the review of the dispute settlement articles in the aforementioned trade agreements, a common feature was identified; the lack of specific provisions addressing dispute settlement in times of crisis, pandemic, or other situations that preclude the use of in-person hearings.

Chapter XVII (Consultations and Dispute Settlement), Article 48 of the Convention establishing the European Free Trade Association (EFTA) 2002 makes provision for the use of arbitration in disputes between member States. Annex T of the Convention establishing the EFTA,¹⁹ which governs the establishment and functioning of the arbitration tribunal and the implementation of arbitral awards, does not specify about procedures to be used in times of crisis or pandemic. Notably, Article 6 of Annex T states that unless the disputing parties agree otherwise, ‘the Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration (PCA), effective October 1992, shall apply’. These Optional Rules of the PCA provide rules for arbitral proceedings but makes no reference to the need for and use of virtual arbitral proceedings. As such, procedural changes may be needed to accommodate virtual arbitration especially in cases where oral hearings cannot be conducted in-person.

¹⁴ International Institute for Sustainable Development, ‘Consultation Draft: Agreement for the coordinated suspension of investor-state dispute settlement with respect to COVID-19 related measures and disputes’ (IISD, 2020), p.1.

¹⁵ Accessible at <<https://www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf>>

¹⁶ Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2017:011:FULL&from=EN>>

¹⁷ Accessible at <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>

¹⁸ Accessible at <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>>

¹⁹ Accessible at <<https://www.efta.int/media/documents/legal-texts/efta-convention/annexes/AnnexTArbitration.pdf>>

Article 16 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States 1992²⁰ provides in part that the arbitral tribunal, ‘may hear witnesses and hold meetings for its members at any place it deems appropriate, having regard to the circumstances of the arbitration’. As the world has come to learn, circumstances of a pandemic or other crisis can impair the ability of arbitral tribunals to hold physical meetings. In such an event, Article 16 allows flexibility for arbitral tribunals to deem it appropriate to hold meetings virtually. Hence, as earlier mentioned, there needs to be a procedure for the conduct of virtual arbitral proceedings.

The Comprehensive Economic and Trade Agreement (CETA) 2016 between the European Union and Canada made detailed provision for dispute settlement.²¹ In Article 29.4, the agreement made provision for consultations between disputing parties. Specifically, in 29.4(7), the agreement stated that, ‘consultations shall take place in the territory of the responding party unless agreed otherwise by both parties’ and, ‘may be held in person or by any other means agreed by parties. Though this article did not directly address the use of remote hearings, its interpretation makes it clear that consultations do not have to be in person. In times of crisis, the parties could agree to hold consultations remotely and not just within a single territory. This way, consultations between disputing parties do not have to be halted in cases of global or nation-wide pandemic and other forms of crises.

Furthermore, Article 29(5) CETA 2016 provides the recourse to mediation, as it pertains to measures that adversely affects trade and investment between the disputing parties. The efficient resolution of trade-related disputes is essential to the promotion of trade, especially in times when trade has been affected by crisis. Similar to the provision on consultation, the rules for mediation in Annex 29-C provides flexibility of the mediation procedure. It allows parties to choose the location for the mediation or any other means to be used in conducting the mediation. In times of crisis such as a global pandemic, disputing parties may seek remote mediation procedures. Thus, there is a need for alternative dispute settlement institutes to implement guidelines for remote mediation.

Article 29(11) CETA 2016 provides that in ‘cases of urgency’, the arbitration panel and the disputing parties should, ‘make every effort to accelerate the proceedings to the greatest extent possible’. In times of pandemic and other crisis, where cities are put on lockdown and restrictions on movement have been placed, it would be extremely difficult to ‘make effort needed to accelerate proceedings’ if remote hearings are not used in such urgent cases. Suspension of trade-related dispute resolution hearings would not be ideal, especially when the exchange of desirable goods and services hangs on the balance.

Also, the CETA 2016 also provides detailed rules of procedure for arbitration in Annex 29-A. Rule 12 states that, ‘hearings shall take place in person’, however, ‘the arbitration panel may conduct its activities by any means’. Rule 22 also states the locations where hearings will take place, unless the parties agree otherwise. Unfortunately, the current coronavirus pandemic has made it impossible to strictly follow these rules of procedure because of the travel restrictions and

²⁰ Accessible at <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf>

²¹ Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (2016), Chapter 29.

lockdowns in different parts of the world. It is highly unlikely that arbitration hearings can be conducted in person during these present times. Hence, the CETA ought to provide that the arbitration panel should be able to conduct hearings remotely where necessary. Conducting remote hearings would mean that the disputing parties may not be in the same location as prescribed in rule 22.

Article 20 of the Agreement establishing the African Continental Free Trade Area (AfCFTA) provides for dispute settlement. This is to be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes. Similar reviews can be made about AfCFTA as was made of the RTAs above. While the AfCFTA agreement made detailed provision for the use of various dispute resolution mechanisms, no direct reference was made to the use of virtual hearings for the procedures. Notably, Article 4(2) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes acknowledged that dispute settlement mechanism as a ‘central element in providing security and predictability to the regional trading system’.

Article 9 of the AfCFTA Protocol on Rules and Procedure on the Settlement of Disputes provides for the establishment of a Panel to which disputes would be referred when parties cannot reach an amicable resolution by consultations. The Panel is to assist the Dispute Settlement Body (DSB) of AfCFTA in discharging its responsibilities under the agreement.²² The agreement does not specify whether the DSB or the Panel is required to meet physically. However, Article 15 of the said Protocol allows for the procedures of the Panel to be sufficiently ‘flexible to ensure an effective and timely resolution of disputes’. This provision gives the flexibility for the Panel to effect virtual proceedings in order to ensure effective and timely dispute resolution. This article can be applicable in times of crisis or pandemic. However, to ensure better security and predictability of regional trading systems, the Protocol can provide specificity of the use of virtual meetings in dispute settlement.

Lastly, Section 28 of the CPTPP (Dispute Settlement), Article 28(5) establishes that consultations between parties may be held in person or by any technological means available to the consulting parties. Unlike the other trade conventions, by making reference to the use of any technological means, the CPTPP expressly provides for the possibility to use remote hearings for consultations between parties.

Article 28(13) of the CPTPP which sets forth the rules of procedure for panels, indicate that disputing parties shall present their views orally before the panel and that hearings shall be held in the capital of the responding Party, unless otherwise agreed by the disputing parties. These two requirements do not determine nor entail that hearings must be held in-person, hence, in principle, hearings could be conducted remotely if agreed by the disputing parties. Notwithstanding, section (b) of Article 28(13) states that any hearing before the panel shall be open to the public, unless the disputing parties agree otherwise. This provision might complicate the remote conduction of a hearing if the parties have not agreed that it shall be private.

With regard to investor-State dispute settlement, Article 9(24) of Chapter 9 of the CPTPP (Investment), also provides that tribunals shall conduct hearings open to the public, but it expressly

²² Article 12, Protocol on Rules and Procedures on the Settlement of Disputes, Agreement establishing the African Continental Free Trade Agreement 2019.

states that the tribunal shall determine the appropriate logistical arrangements of the hearing in consultation with the disputing parties. Moreover, Annex 9-L (Agreement with selected international arbitration clauses) makes references to the application of several arbitration institutions' rules for settling investor-State disputes, such as ICSID Convention and Rules of Procedure for Arbitration and the UNCITRAL, ICC and LCIA Arbitration Rules. As described below, these arbitration institutions have issued or ascribed to a series of notes and protocols that provide guidance to conduct remote hearings for dispute settlement. Hence, these notes and protocols would be followed where a claim is submitted under any of these arbitration rules.

Although the CPTPP provides some useful tools to conduct hearings remotely for the resolution of trade-related disputes and particularly for investor-State disputes settlement, other types of disputes arising from the provisions of the CPTPP do not have a clear framework providing guidance on how to plan and conduct remote hearings for dispute settlement.

In summary, significant amendments to trade agreements are required to inject greater certainty for the Contracting Parties, especially in times of uncertainty caused by pandemic or crisis. Greater clarifications will be required based on a principled approach taking into account the various considerations of practitioners, judges and Contracting Parties in terms of providing guidance during these extraordinary times. Such recommendations will need to provide greater visibility in terms of dispute resolution.

3. PROPOSED SOLUTION – INCLUSION OF REMOTE HEARING PROVISION FOR DISPUTES SETTLEMENT IN REGIONAL AND MULTILATERAL TRADE AGREEMENTS

This research proposes the inclusion of remote hearing in dispute resolution clauses in Trade Agreements during the commencement stage of such trade agreements. Thus, at the stage when contracting parties are acceding to the agreements, they are also acceding to subjecting disputes that arise from such trade and investment relations to virtual hearing when it is impossible or impractical to hold a physical hearing. The decision from such remote hearing and resolution of disputes will have the same effect as if it were a physical dispute settlement hearing.

Such draft clause in Trade Agreements could exist in a similar format as seen below:

Any dispute, controversy, or claim arising out of or in relation to this agreement, including any question regarding its breach, existence, validity or termination of the legal relationships established by this agreement, shall be finally resolved by arbitration under the [insert Rules/Applicable Law]. It is agreed that:

a. The Seat of the Arbitration shall be [xxxx].

b. The Venue of the arbitration shall be [xxxx]

c. The Number of Arbitrators shall be [one or three].

d. The Language of the Arbitration shall be [xxxx].

e. Where a dispute can be determined fairly otherwise than by physical hearing, as determined by the arbitral tribunal, hearings in the arbitration shall be conducted virtually in accordance with the [xxxx] ... Virtual Hearing Protocol 2020 and any such procedural order as may be issued by the arbitral tribunal. It is hereby agreed that no objection shall be taken to the decision, order, or award of the arbitral tribunal on the ground that the hearing regarding the dispute was conducted virtually.²³

The above draft clause is an illustration that could be included under the Dispute Settlement Understanding or Sections of Trade Agreements. However, in drafting future RTAs or amending the current ones to incorporate this innovation, contracting state parties should reach a consensus at the stage of negotiating the agreements as to which of the existing Virtual Hearing Protocols they will rely on for dispute settlement. The regional or multilateral trading institutions can also develop their own virtual hearing protocol through their secretariat for this purpose. For example, in the case of the World Trade Organisation (WTO), the Dispute Settlement Body (DSB) of the WTO can design her own, and this can be incorporated as part of the reform to be incorporated in

²³ African Arbitration Academy Protocol on Virtual Hearing accessible at <<https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf>>

reviving the DSB and Appellate Body which is currently in crisis.²⁴ Also, in the case of the AfCFTA, the DSB of the Secretariat can design her own Virtual Hearing protocol. However, the various multilateral and regional trading institutions must ensure the availability of the technological infrastructure for conducting the procedures stated in the Protocols.²⁵

The following are examples of Protocols on virtual hearing that could be adopted as a guide for drafting the virtual hearing section and protocols for dispute settlement in trade agreement.

3.1 EXISTING PROTOCOLS FOR REMOTE HEARINGS

The current COVID-19 pandemic has challenged parties, arbitral tribunals and arbitration institutions to seek alternatives to in-person hearings. As a result, many arbitration institutions have issued a series of notes and protocols that provide guidance to arbitrators, parties, witnesses and experts on how to plan, test and conduct remote hearings.

Some examples of these notes and protocols are the following:

- Practical Checklist for Remote Hearings issued by the Vienna International Arbitral Centre.²⁶
- Technical Notes on Online Dispute Resolution issued by the United Nations Commission on International Trade.²⁷
- Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic issued by the International Court of Arbitration of the International Chamber of Commerce.²⁸
- The Seoul Protocol on Video Conference in International Arbitration of the Korean Commercial Arbitration Board.²⁹

²⁴ Gerhard Erasmus: The Crisis of WTO Dispute Settlement (Tralac Blog, October 1, 2019) <<https://www.tralac.org/blog/article/13530-the-crisis-in-wto-dispute-settlement.html>> accessed on 21 July 2020.

²⁵ Arbitration and Covid-19: Key Considerations in Holding a Virtual Hearing (Ashurst, 3 June 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19-key-considerations-in-holding-a-virtual-hearing/>>, <<https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>> accessed on 20 July 2020.

²⁶ Accessible at <https://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf>

²⁷ Accessible at <https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf>

²⁸ Accessible at <<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>>

²⁹ Accessible at <[https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf)>

- Virtual Hearing Guide for Arbitrators and Parties issued by the International Centre for Dispute Resolution – American Bar Association.³⁰
- Guidance Note on Remote Dispute Resolution Proceedings issued by the Chartered Institute of Arbitrators.³¹
- Checklist on holding arbitration and mediation hearings in times of COVID-19 issued by Delos Dispute Resolution.³²

These initiatives are complemented by the Joint Statement on COVID-19³³ issued by several leading arbitral institutions,³⁴ which encourages parties and tribunals to be constructive in their approach to the challenges presented by the pandemic. This Joint Statement also invites all participants to use the full extent of the institutions’ respective guidance and protocols for the conduction of remote hearings.³⁵

Below is a list of the main concerns we have identified in the majority of the notes and protocols for remote hearings, presented as a list of best practices:

- Decide whether to conduct semi-remote or fully-remote hearings based on case-specific due process, fairness, efficiency concerns and preferences.
- Carefully consider the technology, platform system, equipment and type of connection that best suit the needs and characteristics of the case.
- Procedural documentation for document sharing and storage.
- Use of electronic bundles.
- Permanent technical assistance.
- Audio and video recording.
- Access to the remote hearing.
- Data security and confidentiality.

³⁰ Accessible at <https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf>

³¹ Accessible at <<https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>>

³² Accessible at <<https://delosdr.org/wp-content/uploads/2020/03/Delos-checklist-on-holding-hearings-in-times-of-COVID-19-v2-as-of-20-March-2020.pdf>>

³³ Accessible at <<https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>>

³⁴ Joint Statement issued by the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the German Arbitration Institute (DIS), the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution – American Bar Association (ICDR/ABA), the International Centre for Settlement of Investment Disputes (ICSID), the Korean Commercial Arbitration Board International (KCAB), the London court of International Arbitration (LCIA), the Milan Chamber of Arbitration (MCA), the Hong Kong International Arbitration Centre (HKIAC), the Arbitration Institution of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Vienna International Arbitration Centre (VIAC) and the International Federation of Commercial Arbitration Institutions (IFCAI).

³⁵ A list of the specific offerings of several institutions is accessible at Delos Dispute Resolution webpage. See: <<https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/>>

- The level of cybersecurity and security technology required.
- The use of a second platform as a back-up solution.
- The use of a breakout room or separate meeting from the remote hearing.
- Pre-hearings preparatory measures, such as pre-hearing conferences, issuing remote hearing protocols for specific cases and test runs.
- Use of interpreters.
- Considerations for witness examination and expert testimony.

We consider that drawing from these protocols and guidance on a case-specific base is appropriate in determining a procedural solution to overcoming the obstacles identified in chapter 2 of this research paper. It is important to note though that each dispute settlement procedure will have its own needs and will be underpinned by various complexities, which should be taken into account when implementing the above protocols and guidance. Moreover, we draw from the experiences of practitioners and those engaged in virtual hearings in order to support our recommendations in chapter 6.

4. EMPIRICAL STUDY: QUESTIONNAIRE ON VIRTUAL HEARINGS

4.1 METHODOLOGY: STRENGTHS AND WEAKNESSES

We conducted an empirical study in the form of a survey which can be found in annexed to this document. The purpose of the qualitative study is to ascertain whether there is an increase in demand for virtual hearings since the start of the global pandemic in 2020. It was also aimed at improving our understanding of the key themes relating to virtual hearings, in particular its strengths and weaknesses, from the perspective of those engaged in virtual hearings.³⁶ Our research strategy was to evaluate the experiences of practitioners after lockdown restrictions were imposed in various jurisdictions between 06 July 2020 and 19 July 2020. Therefore, it must be highlighted that the data was gathered under “extraordinary circumstances” and the data may not be appropriate to be extrapolated beyond the impact of lockdown measures on conducting hearings.

While the findings of this survey are not generalizable, they provide an in-depth understanding of the considerations that may need to be taken into account in order to create a policy framework that enables greater mitigation of risks.³⁷ We aim to grasp the issues faced by the participants when conducting remote hearings. We sent the survey to those who have experience in litigation or arbitration in various capacities in countries such as Peru, Ireland, Sri Lanka, the US, Mexico, Thailand, Nigeria and the UK.

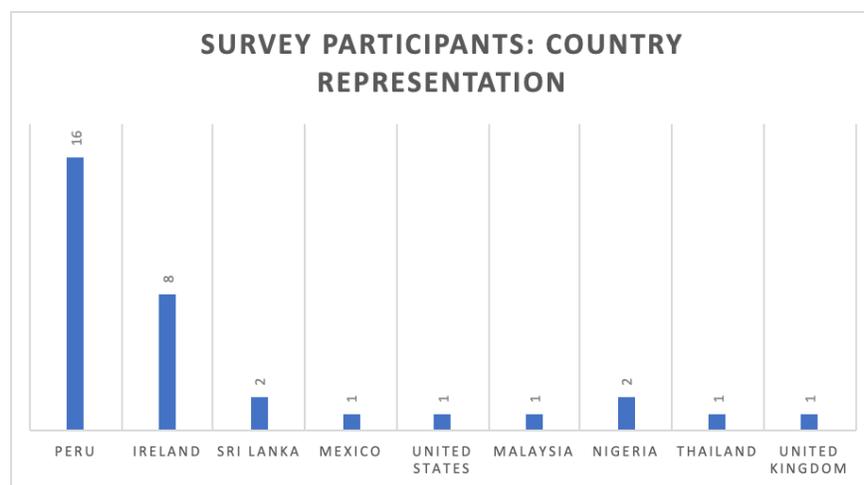


Diagram 1: This chart represents the participants of our survey based on the region they are based.

³⁶ L. Webley, "Qualitative Approaches to Empirical Legal Research", *The Oxford Handbook of Empirical Legal Research* (Oxford UP, 2010), p. 948.

³⁷ *Ibid*, p. 935.

In what capacity are you involved in arbitration hearings or other hearings?
33 responses

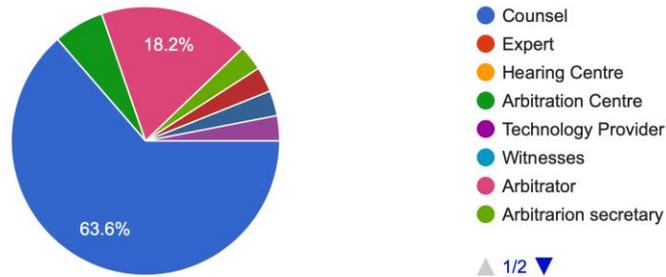


Diagram 2: This chart represents the capacity in which participants engaged in the survey.

We received 33 responses, and the majority of the responses were received from counsels as demonstrated above. We also received responses from arbitrators and representatives of arbitration centres. We asked both open-ended questions and close ended-questions in order to ascertain key experiences to shape our understanding of virtual hearings.³⁸ However, this survey does not represent the views of judges and we therefore, perceive this as a limitation of our survey. This is due to the fact that judges play a significant role under the Dispute Settlement Understanding of the WTO framework.³⁹

Another limitation of this survey is that it does not adequately represent Least Developed Countries categorized by the Committee for Development Policy, a group of independent experts that report to the Economic and Social Council of the United Nations.⁴⁰ However, we have used previous reports to inform our discussion, with a perspective from Least Developed Countries including Rwanda, Senegal, Tanzania, and Uganda.

4.2 QUESTIONS FROM THE SURVEY AND KEY FINDINGS

Have you experienced an increase in demand for virtual hearings since the start of the Covid-19 pandemic?

³⁸ U. Reja, K.L. Manfreda, V. Hlebec, and V. Vehovar, ‘Open-ended vs. Close-ended Questions in Web Questionnaires’ in *Developments in Applied Statistics*, Anuška Ferligoj and Andrej Mrvar (Editors) Metodološki zvezki (Ljubljana: FDV, 2003).

³⁹ T. Cottier and P. C. Mavroidis, *The Role of a Judge in International Trade Regulations: Experience and Lessons for the WTO*, (University of Michigan Press, 2003).

⁴⁰United Nations Conference on trade and Development, *The Least Developed Countries Report*, (United Nations Publications 2019) UNCTAD/LDC/2019 accesible at <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2571>>

88% of the responses indicated that they have experienced an increase in demand for virtual hearings since the start of the pandemic. Moreover, 64% of the responses indicated that there is an increase in demand for virtual hearings by more than 51% compared with pre covid-19 levels in demand. Therefore, while this does not explicitly mean that the pandemic is driving demand for virtual hearings, there is sufficient evidence to state that, based on the responses since the start of the pandemic, practitioners are increasingly considering virtual hearings.

Has your experience with virtual hearings been predominantly semi remote or fully remote?

For the purposes of this survey, "remote hearings" can be described as a hearing that is conducted by using technology to connect participants from various locations. It is a "fully remote" hearing if all the participants are from various locations with no main hearing venue. Additionally, "semi-remote" refers to a hearing with a main venue and other remote venues. According to the survey the participants experienced more fully remote hearings over semi remote hearings.

We also identified that the video conferencing platforms such as Zoom and Microsoft Teams were generally user friendly, accessible and flexible. A recurrent advantage identified was the ability to save costs for parties by using virtual hearings. This was in the form of having no transportation costs as well as through time savings.

The strengths and weaknesses of virtual hearings

It was revealed that participants had experienced issues relating to connectivity and clarity of images and audio. Moreover, the responses also included disadvantages relating to litigation strategies. For instance, participants found that the number of attendees that can participate is often an issue, as well as controlling the environment in which witnesses provide evidence to the court. Arbitrators also have obstacles in terms of recording sessions and greater preparation is required to ensure the sessions run smoothly. It can also be observed that wider skills are required to undertake virtual hearings. For instance, using Information Technology specialists and engineers, which can be costly and difficult in specific regions. The ability to cross-examine is impaired through the use of virtual hearings according to 55% of the participants of the survey. Therefore, it is apparent that the main concern in terms of virtual hearings, according to the survey, relates to overcoming technical issues, the impact on the process of conducting virtual hearings, and the need to take a more effective collaborative approach. Moreover, certainty of holding hearings was expressed to be important by the participants in participating in virtual hearings.

How have your perceptions about virtual hearings changed having participated in them?

Participants generally expressed that virtual hearings are advantageous, provided that technical issues are managed in advance. Moreover, since the start of the pandemic, the increasing

emergence of virtual hearings has been welcomed, despite the perceived disadvantages observed above due to the level of certainty it provides under lockdown conditions.

The discussion and recommendations of this essay will be based on overcoming the issues observed through the above empirical survey and our findings from various protocols for remote hearings. We identify key considerations relating to costs, cybersecurity and strategic litigation below. While these issues are not exhaustive, we believe that they are key in building a dispute resolution mechanism that enhances parties to build trust in the process improving legitimacy for dispute settlement frameworks of the multilateral and regional trading system.

5. DISCUSSION AND ANALYSIS OF KEY CONSIDERATIONS

This section will explore three of the most commonly cited concerns regarding remote hearings from the above empirical study and discusses the extent to which these remain relevant barriers to effective virtual dispute resolution.

A. COSTS

A key consideration underpinning the implementation of virtual hearings is its effect on the overall dispute resolution costs. Costs have been a significant factor impacting arbitration growth and development in certain regions, with developing countries seeing this as a barrier. A report by the International Bar Association (IBA) in 2015 noted the extent to which cost plays a role in choosing to engage in arbitration. The IBA results indicated that the increasing costs of arbitration could be described as a hurdle to growth. In Europe and North America, this was observed through the, “burdensome processes in arbitration, such as extensive disclosure and lengthy submissions”, while in Africa and in certain parts of Asia-Pacific, “the cost of arbitration was seen as one of the factors that inhibited its growth, especially where court fees were likely to be lower”.⁴¹

Traditional litigation, as a form of dispute resolution, remains more favourable in African regions, due in part to its lower cost, especially in relation to the settlement of lower-value disputes. This concern, described by respondents to the 2015 survey as a “perennial complaint” was seen as detrimental to the “attractiveness [of arbitration] to users”.⁴²

Five years later, concerns regarding costs remain prevalent. The results of our survey indicated that one attractive element of virtual dispute resolution mechanisms was its potential for reducing costs. 17 of the experts and professionals who took part in the survey indicated cost saving as a benefit, while 3 respondents noted cost saving as the only or most important benefit to virtual hearings.

In the IBA responses, however, some practitioners indicated that costs were not a significant factor, with Poland, Finland and England, for example, indicating that arbitration costs were seen as, “a neutral factor when compared to relatively expensive litigation costs”.⁴³ However, in a time of crisis during trade disputes, there may not be the option to pursue traditional litigation or arbitration.

In assessing the effect of virtual hearings on costs, it is important to evaluate what costs may be incurred through a virtual hearing format. Virtual hearings require additional technology, including but not limited to; computers, cameras, microphones, online software, and access to the internet. The accessibility and costs associated with virtual hearings may also differ depending on the region in question. However, Damian Honey notes that, “Parties may be concerned about the cost of a remote hearing, and it is true that setting up the technology will involve additional costs. However, this is easily balanced against the savings made by the parties in terms of travel and

⁴¹ International Bar Association, ‘The Current State and Future of International Arbitration: Regional Perspectives’, (UK, IBA Arb 40 Subcommittee, August 2015), p.10.

⁴² Ibid, p.48.

⁴³ Ibid, p.9.

accommodation. In most cases, the cost may not be significantly (or any) higher than a physical hearing”.⁴⁴ The IBA echoed this stance, noting that, “Video- or telephone-conferencing technology has the potential to reduce cost and time in appropriate cases. In fact, the high quality of some of the videoconferencing technology is making remote cross-examination not only technologically possible, but substantively effective”.⁴⁵

Hyemin Park further notes that any costs incurred as a result of virtual hearings may be limited in scope, compared to traditional arbitrations. Once a party has obtained all of the necessary technology to conduct a virtual hearing, this technology can be used in later hearings, while travel expenses would be incurred for each subsequent in-person hearing.⁴⁶ Further, any parties who have already conducted virtual hearings, which have been in place since before COVID-19 broke out, would already have incurred much of the expected cost.

Virtual hearings may also facilitate a reduction in accommodation and carbon emissions. A Global Arbitration Review article speaks to the idea that, “The necessary technologies are available sometimes at minimal expense and at a fraction of the cost of travel and accommodation for multiple participants in distant hearings[...]One must also consider the reduced harm to the environment that will result from less long-distance travel”.⁴⁷ However, the empirical evidence as to the environmental benefit of virtual hearings has not been clearly established.

This potential for cost-saving has already been noted in institutional settings. Cleary Gottlieb reports that arbitral institutions are doing their best to support arbitral tribunals and arbitration users to, “ensure hearings are able to proceed in an efficient, secure and cost-effective manner, even as physical hearings remain impossible in many jurisdictions”.⁴⁸ However, this has been seen even before COVID-19, where the ICC Commission on Arbitration and ADR, in their 2012 revised report on *Techniques for Controlling Time and Costs in Arbitration*, considered “whether witnesses may be heard by video link so as to avoid the need for them to travel to an evidentiary hearing”.⁴⁹

⁴⁴ D. Honey & N. Gare, ‘Questions And Answers On How Best to Deal with International Arbitration In The Face Of Covid-19’, (Holman Fenwick Willan), accessed 16 July 2020 <<https://www.hfw.com/Questions-and-answers-on-how-best-to-deal-with-International-Arbitration-in-the-face-of-COVID-19-March-2020>>

⁴⁵ International Bar Association, ‘The Current State and Future of International Arbitration: Regional Perspectives’, (UK, IBA Arb 40 Subcommittee, August 2015), p.101.

⁴⁶ H. Park & J.H. Kwon, ‘Virtual Hearing in International Arbitration’, (Kim & Chang, Newsletter, 3 March 2020), accessed 16 July 2020 <https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=21549>

⁴⁷ Global Arbitration Review, ‘Virtual hearings – the new normal’, (GAR, 27 March 2020), accessed 16 July 2020 <<https://globalarbitrationreview.com/article/1222421/virtual-hearings---the-new-normal>>

⁴⁸ C. Gottlieb, ‘International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions’, (Alert Memorandum, 10 July 2020), accessed July 16 2020. <<https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf>>

⁴⁹ ICC Commission on Arbitration and ADR, ‘Techniques for Controlling Time and Costs in Arbitration’, (Paris, Publication 861-2 ENG, 2012), p.14.

However, the global impact of COVID-19 has had a drastic effect on travel, and many countries have pivoted in recent years to encourage further access to internet services. The EU, for example, has pioneered the WiFi4EU initiative, which promotes free internet access in public spaces including parks, squares, public buildings, libraries, health centres and museums in municipalities throughout Europe.⁵⁰ This programme provides municipalities with the opportunity to apply for €15,000 vouchers to install Wi-Fi equipment in public spaces. Equally, when considering developing regions which may have limited access to technology and internet services, GAR notes that, “the quality and reliability of the sound and picture will lag behind that in better-serviced areas. But internet connectivity is likely to be given greater priority by governments as a result of covid-19 and as remote working increases across a range of businesses. And, like any new technology, virtual hearing technologies are bound to improve still further in reliability, ease of use and overall quality with increased deployment”.⁵¹

Advancements in technology, reduced travel and accommodation expenses, and the development of virtual hearings as a common practice in dispute resolution hearings, are all factors affecting the extent of cost reduction, and the overall attractiveness, of virtual hearings.

B. CYBERSECURITY AND DATA PROTECTION

While a virtual hearing model may have clear benefits for travel, costs, expediency, and even the environment, as discussed above, there are potential concerns regarding its suitability with regards to confidentiality, cybersecurity and data protection.

A 2015 International Bar Association report on the future of arbitration indicated the extent of these fears. Compiling their respondents’ views, the IBA noted that, “Many saw technology as aiding aspects of arbitration rather than replacing the current status quo[...] some raised concerns over data protection and storage”.⁵² Since this report was published, there has been further developments regarding data protection in the technology sphere, given the introduction of the General Data Protection Regulations (GDPR) across the EU. *Tennant Energy vs. Canada* recently directed that, “a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR”.⁵³ However, many trade agreements operate between parties bound by GDPR, and the arising implications may complicate virtual hearing regulations.

Advancements in technology may have reduced the immediacy of this concern. Our survey respondents did not raise any concerns regarding cybersecurity or data protection in relation to

⁵⁰ Europa Policy, ‘WiFi4EU | Free Wi-Fi for Europeans’, accessed July 16 2020 <<https://ec.europa.eu/digital-single-market/en/wifi4eu-free-wi-fi-europeans>>

⁵¹ Global Arbitration Review, ‘Virtual hearings – the new normal’, (GAR, 27th March 2020), accessed 16 July 2020 < <https://globalarbitrationreview.com/article/1222421/virtual-hearings---the-new-normal>>

⁵² International Bar Association, ‘The Current State and Future of International Arbitration: Regional Perspectives’, (UK, IBA Arb 40 Subcommittee, August 2015), p.74.

⁵³ *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-5.

virtual hearings. This standpoint is well-founded, given that virtual hearings have been in place for many years. ICSID has extensive procedures in place in order to conduct virtual hearings. They note that, “ICSID provides comprehensive services and technology for virtual hearings. These are provided free-of-charge in ICSID administered arbitrations, conciliations, mediations and fact-finding proceedings. They are also available in ad-hoc proceedings under UNCITRAL and other non-ICSID sets of rules at competitive rates”.⁵⁴ In assessing cybersecurity concerns, ICSID notes that, “All ICSID virtual hearings benefit from end-to-end encryption that meets the World Bank Group’s stringent security and risk requirements”.⁵⁵

It should be noted that many institutions already permit the adoption of virtual hearings, including: The International Chamber of Commerce's International Court of Arbitration (ICC); The London Court of International Arbitration (LCIA); The Singapore International Arbitration Centre (SIAC); The Hong Kong International Arbitration Centre (HKIAC); The Arbitration Institute of the Stockholm Chamber of Commerce (SCC); The International Centre for Dispute Resolution (ICDR); and ICSID.⁵⁶ Article 20(1) of ICDR’s International Arbitration Rules provides that a tribunal, “may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case”.⁵⁷ Ricardo Ugarte argues that, “This language is found in most all international arbitral rules [and by] granting the tribunal with the authority over the conduct of the proceedings, international arbitrations rules implicitly permit tribunals to conduct virtual arbitral proceedings”.⁵⁸

Guidelines for such virtual hearings have been produced through the Hague Convention Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention, the ICC Commission Report on Information Technology in International Arbitration, and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration. These provide outlines for best practices for the use of video technology during remote proceedings and guidelines to address the primary practical issues that typically arise in such proceedings. Art.3 of the ICC report provides guidance for confidentiality and data security, noting that virtual hearing restrictions may, for example, “rule out the use of a commercial internet service provider (ISP) that would host the data in a way that would violate applicable data privacy and other relevant laws”.⁵⁹ It goes on to indicate that parties may want to consider:

(i) Will the tribunal and the parties use electronic versions of the exhibits and other documents instead of, or in addition to, hard copies?

⁵⁴ ICSID, ‘Virtual Hearings ICSID Services and Technology’, accessed 18 July 2020
<https://icsid.worldbank.org/en/Documents/Virtual_Hearings.pdf>

⁵⁵ Ibid.

⁵⁶ R. Ugarte, ‘Arbitration Proceedings In The Age Of Virtual Hearing Rooms’, (Law360, 9 April 2020).

⁵⁷ International Centre for Dispute Resolution, ‘International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)’, (2016), p.24. accessed 18 July 2020
<https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf>

⁵⁸ (n 56).

⁵⁹ ICC Commission Report on Information Technology in International Arbitration, p.10.

(ii) Will a specific software program be used to retrieve and project images of or otherwise show the exhibits at the hearing? If so, does the program have any special requirements? For example, if audio or video recordings will be played, will it also be necessary to have portable speakers so that those in attendance can hear?

(iii) May one side use electronic versions of exhibits if the other side does not wish to use electronic versions at all?⁶⁰

However, it goes on to note that:

How relevant are such issues in known practice?

Based on available anecdotal evidence, data integrity issues are rarely identified in arbitration proceedings, and usually do not cause any substantial disruption of proceedings. Nonetheless, this is a potentially critical aspect of IT use, and users need to be alerted to the possible risks, to which they sometimes surrender too readily in exchange for the ease and convenience of IT use.⁶¹

Our survey results echo this anecdotal evidence under ‘weaknesses of virtual hearings’.

The ICCA-NYC Protocol provides guidance to parties by examining the elements of a virtual hearing which may be affected by cybersecurity concerns. These concerns can be grouped as:

- (a) asset management;
- (b) access controls;
- (c) encryption;
- (d) communications security;
- (e) physical and environmental security;
- (f) operations security; and
- (g) information security incident management.⁶²

However, each virtual hearing will face differing concerns in relation to cyber security. This may be, as discussed above, due to regional data laws, such as GDPR, or due to the format by which data will be transferred. However, these concerns can be addressed on a case-by case basis, as the ICCA-NYC Protocol notes, “In some cases, it may be reasonable to tailor the information security measures applied to the arbitration to the risks present in different aspects of the arbitration”.⁶³

In practice, virtual hearings have potential for data breaches, just as physical or semi-remote hearings do. Evidence indicates that the reality of these breaches has, to date, been minimal, and future virtual hearings can look to pre-existing protocols and guidelines for minimizing the potential for cybersecurity issues and data breaches. A set of guidelines for virtual hearings in trade disputes during times of crisis would act to promote uniformity and digital security in the virtual hearings that many institutions already provide for.

⁶⁰ Ibid, p.11.

⁶¹ Ibid, p.11.

⁶² ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration.

⁶³ Ibid.

C. CONCERNS ON CONDUCTING REMOTE HEARINGS

There have been mixed impressions about the effect of conducting remote hearings. The majority of people are of the opinion that remote hearings represent a great advancement for arbitration, others are not entirely convinced of their advantages.⁶⁴

One of the main disadvantages of remote hearings is that they limit personal connections between participants. In remote hearings, one simply cannot see people as clearly as you can in in-person hearings. A large amount of the way people communicate is non-verbal, and with remote hearings many people have realized just how much they rely on body language to conduct themselves.

In connection to this, assessing a witness' credibility appears to be a common concern in remote hearings. Many are of the opinion that the tribunals and counsels ability to assess witness credibility⁶⁵ is significantly impaired in remote hearings, simply because they are not able to look him or her in the eye.⁶⁶ Many protocols have created procedures for the taking of evidence from witnesses to ensure that the integrity of the testimony is preserved. For instance, the Seoul Protocol on Video Conference in International Arbitration⁶⁷ states that the video conferencing system at the venue shall allow a reasonable part of the interior of the room in which the witness is located to be shown on screen, while retaining sufficient proximity to depict the witness so his or her face is clearly visible.

Another important concern is the parties' limitation to consult with their counsel in real time.⁶⁸ Although most of the protocols issued by the arbitration institutions recommend the use of breakout rooms, many clients and counsels consider that the exchange of information takes too long.

To address these and other concerns related to the virtual environment of remote hearings, several protocols have also developed etiquette and due process considerations. The Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic⁶⁹ provides a list of best practices for safeguarding the rights and obligations of all participants in remote hearings. This includes the need for the tribunal and the parties to establish some rules for the examination of witnesses and experts, specifically with regard to communications between witnesses, parties and counsel in chat rooms, as well as the interaction between the examiner and the witness or expert in an online environment.

⁶⁴ Butcher & Barlow LLP, 'Lockdown and Remote Court Hearings' (April, 2020).

⁶⁵ Debevoise & Plimpton, 'Conducting International Arbitrations During the COVID-19 Pandemic' (April, 2020).

⁶⁶ Butcher & Barlow LLP (n 64).

⁶⁷ Accessible at < [https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf)>

⁶⁸ Korean Commercial Arbitration Board (n 29).

⁶⁹ International Court of Arbitration of the International Chamber of Commerce (n 28).

6. ISSUES FOR CONSIDERATION & RECOMMENDATIONS

6.1 ISSUES

In conducting our research, we identified the following recurring issues relating to RTAs.

1. Trade issues are complex due to economic, political and cultural reasons.
2. Regional impact of trade issues differs significantly.
3. The impact of the global pandemic is regionally different.
4. The access to technology varies from region to region.

We also consider that the following variables will have a significant impact on the implementation of recommendations:

1. The number of parties involved.
2. The complexity of the aspects involved in the dispute.
3. Types of dispute settlement mechanism.
4. The level of confidentiality of the dispute.

The recommendations given below which are a set of guidelines are shaped by the above challenges and complexities in order to provide a general set of guidelines.

We recommend a protocol containing a number of options for conducting remote hearings according to the needs and complexity of various disputes, instead of a limited checklist of steps to be followed. Checklists may assume that certain aspects of virtual hearings are uniformly implemented in different countries and for different disputes.

6.2 RECOMMENDATIONS

Our recommendation injects flexibility into this process of dispute settlement, and in doing so improves upon current practices.

- A) This research paper therefore proposes the inclusion of remote hearing provisions in the use of virtual dispute settlement in regional and multilateral trade agreements as;
 - i) a necessity in times of pandemic and crisis,and;
 - ii) an alternative to physical hearings in circumstances where contracting States mutually agree to do so.

B) In more specific terms, this research paper also proposes the following guidelines in order to provide several virtual hearing options to contracting parties;

i) Existing RTAs and other trade agreements should be amended to incorporate recent protocols on remote hearings in the dispute settlement sections.

ii) Regional and Multilateral Trading institutions like the WTO, AfCFTA and others, could use the format and models outlined in this research to design a tailored protocol through their secretariats to serve as protocol guide for virtual hearing under their dispute settlement process.

iii) The remote hearing provision should adhere to the best practices identified for remote hearings by the above mentioned protocols, on a case-specific base that ensures compliance with the principles of due process, fairness, efficiency and transparency.

iv) We recommend an implementation process that incorporates wider consultation with judges and practitioners to ensure that a principle-based approach drawing from best practices is taken into account.

7. CONCLUSION

The dispute settlement landscape in international trade and investment faces imminent threat in times of crises as evident in the case of the Covid-19 pandemic. Therefore, it is important to find a multilateral approach to resolving this challenge not just in the short term but with a long term approach that is sustainable. The introduction of remote hearing which facilitates virtual dispute resolution in existing Trade Agreements and Investment Treaties is a multilateral technological solution that will aid long-term trade liberalisation. With this, there will be no impediment and breakdown of dispute settlement systems occasioned by the impossibility of disputing parties to meet physically or for the Disputes settlement bodies under the various trade agreements and investment to conduct physical hearing. The absence of inhibition to trade facilitation in times of crises such as a pandemic will increase trade flow, promote economic activities and trading, spur quick recovery from such crises and help the multilateral trading system to build back better and stronger.

ANNEXURE

Survey on Virtual Hearings

The following questions were included in our questionnaire.

1. In what capacity are you involved in arbitration hearings or other hearings?
2. How many remote hearings have you been involved in?
3. Have you experienced an increase in demand for virtual hearings since the start of the Covid-19 pandemic?
4. In your opinion/experience, what is the percentage increase in demand for virtual hearings since the start of the Covid-19 Pandemic?
5. Has your experience with virtual hearings been predominantly:
 - A. Fully Remote
 - B. Semi Remote
6. How would you rate your experience with the following videoconferencing applications/software? (1 is 'poor' and 5 is 'excellent')
 - A. MS Teams
 - B. Zoom
 - C. GoTo Meeting
 - D. Cisco WebEx
 - E. Adobe Connect
 - F. Other
7. In your view what were the main advantages of the above video conferencing platforms?
8. What challenges have you faced using the above video conferencing platforms and how problematic were they for virtual hearings?
9. How would you rate your experience of the following electronic presentation of evidence (EPE) providers. (1 is 'poor' and 5 is 'excellent')
 - A. Epiq
 - B. Law In Order
 - C. Opus 2
 - D. Other
10. What were the main advantages of the above EPE providers?

11. What challenges have you faced using the above EPE providers and how problematic were they for virtual hearings?

12. What do you consider to be challenges of a fully remote hearing and how problematic are they?

- A. Technical issues
- B. Difficulty to collaborate
- C. Concerns about structure of the hearing
- D. Affecting strategic litigation

13. Do you believe that virtual hearings impair your ability to effectively cross-examine?

14. What do you consider to be the benefits of virtual hearings in the context of trade related disputes?

- A. Preserving the hearing dates during the pandemic period
- B. Cost saving
- C. Environmental benefits
- D. Other

15. How have your perceptions about virtual hearings changed having participated in them?

16. What are the obstacles presented by the World Trade Organization (WTO) framework, any other legal framework or protocol when conducting remote hearings?

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