

# VIRTUAL ARBITRATION IN INDIA

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A PRACTICAL GUIDE



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Maharashtra National Law University (MNLU) Mumbai is a premier law university in India established in 2015. It is a University committed to providing the finest legal education. Under the able guidance of the Chancellor, Justice S.A. Bobde, Chief Justice of India, Vice-Chancellor Prof. (Dr.) Dilip Ukey and Registrar Sh. Vivek B. Gavhane (Judge), the University continues to set benchmarks for legal education across the country. A number of research centres have been established by the University that carry out the highest quality of legal research contributing to the development of the legal practice and aiding government institutions on policy formulation.

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MNLU Mumbai's Centre for Arbitration and Research (CAR) seeks to carry out research in arbitration law and practice, contribute to policy discussion, and provide a platform for the training of arbitration professionals. CAR wishes to emphasise research and training in contemporary and emerging issues of arbitration law, specifically in niche practice areas, often unexplored by academia, but highly relevant for practitioners, such as construction arbitration, maritime arbitration, investment arbitration, sports arbitration, etc.

CAR was founded under the patronage of Vice-Chancellor Prof. (Dr.) Dilip Ukey. CAR's Faculty Coordinator is Chirag Balyan, Assistant Professor of Law at MNLU Mumbai. Yashraj Samant is the General Secretary, and Aditya Gupta & Natasha Kavalakkat are Research Associates at CAR.

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## **A PRACTICAL GUIDE**

CENTRE FOR ARBITRATION AND RESEARCH  
MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

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## Foreword

It is my privilege to present 'Virtual Arbitration in India: A Practical Guide', researched and prepared by the Centre for Arbitration and Research, Maharashtra National Law University Mumbai.

The unprecedented times created by the COVID-19 pandemic have forced our courts to conduct remote hearings. It is no wonder that arbitration, as a flexible and party-friendly mode of dispute resolution must follow suit in India. Undoubtedly technology is the future, and this guide will be useful to all stakeholders in the arbitral process, to embrace the desired changes. The scepticism and concerns about virtual arbitrations are intended to be attenuated through this guide. It is my hope that the legal analysis in the guide will further Maharashtra National Law University Mumbai's vision of actively aiding the legal practice in India, by acting as an impetus for a still more detailed study of issues in virtual arbitration, as this practice gains popularity.

I am delighted that industry experts from around the globe have given their support in this academic research initiative of the Centre. This kind of collaboration between academia and the industry is the need of the day. I am optimistic that this guide will have relevance far beyond India. I congratulate the team at the Centre for Arbitration and Research for creating this highly relevant and practical guide.



*Prof. (Dr.) Dilip Ukey*

*Vice Chancellor, MNLU Mumbai*

## Preface

Arbitration as a dispute resolution method aims to provide private justice within the boundaries of the public realm. The core principles of private justice such as party autonomy, consent, equal treatment, confidentiality, bias, due process, fair hearing, etc. remain the same in both physical and virtual arbitration. These core principles lie at the heart of both the substantive rights and the procedural safeguards under any arbitration regime.

The virtual arbitration mainly affects the mode of justice delivery. Therefore, the extent to which virtual arbitration may affect the procedural and substantive rights of the parties needs scrutiny. This is necessary to obviate any due process challenge in the future. If the requirements of due process in physical proceedings and virtual proceedings aren't same, what should they be and how are they going to affect the validity of the award? This guide hopes to address concerns of this nature. It also hopes to address concerns of arbitrators with regard to technology and thereby attempts to break the mental barriers to the use of technology-driven arbitration. While examining the technological aspects of arbitration, the guide discusses its implications on the rights of the parties and procedural fairness.

This guide thus aims to familiarise arbitrators, lawyers, parties and courts with the techno-legal aspects of the virtual arbitration. The parties and their lawyers will find it particularly relevant in taking an informed decision to choose virtual arbitration. It is hoped that pre-virtual hearing agreement and case management conference can play a great role in enhancing the efficacy and credibility of virtual arbitration.

Though the pandemic might have increased our reliance on technology, even after we resume normalcy, technology will play a significant role in arbitrations worldwide. Hence, this guide has been prepared keeping in mind not just the current situation, but also the future of arbitration.

*Chirag Balyan*

*Assistant Professor of Law, MNLU Mumbai*

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# I Introduction

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“Technology has facilitated advances in speed, accessibility and connectivity which enable the dispensation of justice to take place in diverse settings and situations without compromising the core legal principles of adjudication.”

- Supreme Court of India<sup>1</sup>

The COVID-19 pandemic has compelled the world to reconceptualise dispute resolution in a matter of days. The international arbitration community has been proactive in formulating standards for virtual arbitral proceedings to accommodate parties in these difficult times. This is a reflection of the emphasis on party autonomy and flexibility in arbitral practice. The compulsion to consider these options has made the workability of such arbitrations increasingly evident. Parties and practitioners are realising that the adoption of virtual procedures in their arbitrations is cost-effective and convenient. However, there is also a realisation, that the parties’ procedural rights are simply inviolable. The question therefore is – can we reap the benefits of virtual arbitration, while maintaining adequate standards of due process?

To consider virtual options for dispute resolution, either partially or even entirely, parties need to be able to place confidence in virtual arbitral processes. Robust protocols and proactive case management can guarantee a fair and efficient process. This research has been undertaken to provide a comprehensive guide to analyse the swiftly emerging practices being developed and discussed around the world. The guide is a reference for arbitration practitioners on various aspects of virtual arbitrations, from their technological requirements, their administration and management to the legal issues involved.

In 2014, the Law Commission of India encouraged the use of technology such as video-conferencing and teleconferencing to aid the efficiency of arbitral proceedings.<sup>2</sup> However, these recommendations have not found much popularity in India, due to a resistance from arbitrators and counsel, for a lack of technological exposure. While the guidelines and strategies discussed here are relevant internationally, the guide seeks to address the specific needs of Indian arbitration. Since the vast majority of Indian arbitrations happen *ad hoc*, without institutional support, it wishes to familiarise *ad hoc* tribunals with virtual arbitrations and facilitate their conduct. On the other hand, Indian institutions may refer to best practices

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<sup>1</sup> In *Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic*, Supreme Court, *Suo Motu Writ (Civil) No.5/2020*, ¶ 3.

<sup>2</sup> Law Commission of India, *Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014)*, ¶ 16.

and consider the legal analysis present here in developing their institutional mechanism, including procedural rules and infrastructure, to gain favour with Indian and international parties.

This guide looks at virtual options for all stages of the arbitration including case management conferences, oral arguments, document exchanges, witness examination and document discovery. Virtual arbitration, as referred to in the title of this guide, includes arbitrations that have used technological processes in part or for the entirety of the arbitration. The adoption of the technological processes will depend on its appropriateness as determined by the parties and the tribunal, using the guidance provided here.

The guide analyses three key aspects of virtual arbitration – the technology involved, the procedure to be adopted and the legality of the process. Part II deals with the technological and logistical arrangements required to set up a virtual arbitration. It provides a breakdown of the platforms, software and equipment available, and the considerations to be made in selecting technologies to optimise virtual arbitrations. Part III deals with the various methods available to parties and tribunals to ensure the smooth administration of proceedings. It includes a discussion on various guidelines and protocols that can be devised to optimise the presentation of arguments and collection of evidence, while ensuring procedural fairness. Part IV is a legal analysis of issues that could arise in virtual proceedings under the Indian Arbitration and Conciliation Act, 1996 (“IACA”). This analysis is significant in a transnational context, given that India is a UNCITRAL Model Law jurisdiction and a Contracting party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. It presents an analytical framework to explore the transnational debate on due process and the legality of awards in virtual arbitrations. Part V concludes with some remarks on the challenges for the Indian arbitration community and a projection for the way forward.

The arbitration community in India has been working proactively for the development of India as an arbitration-friendly jurisdiction, and the acceptance of virtual arbitration could play a prominent role in this movement. This guide hopes to be a meaningful participant in this movement.

## I

### **Introduction**

## II

### **Technological Arrangements**

#### **A. Selecting the technology**

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## II Technological Arrangements

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The primary driver of any virtual arbitral process is undoubtedly the technology that underpins it. The administration of the proceedings can significantly be enhanced by the correct choice of technology, and more importantly, it can significantly be obstructed by the use of inappropriate technology. Therefore, parties, arbitrators and arbitral institutions must be deliberate in the selection of the technology, and the manner in which it is to be deployed.

### A. Selecting the technology

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#### 1. Who selects

The parties, in exercise of their autonomy, must come to a consensus on the software to be used. In case there is agreement between the parties, this matter should fall squarely outside the tribunal's procedural powers. In the absence of such agreement, the tribunal must come to a decision on the technology to be used.<sup>3</sup> Arbitral institutions such as the SIAC,<sup>4</sup> PCA,<sup>5</sup> and ICC,<sup>6</sup> and organisations such as CIArb<sup>7</sup> and CPR,<sup>8</sup> recommend a similar approach, allowing the tribunal to determine the platform to be used, in consultation with the parties. However, certain institutions have compelled parties to use a particular platform for reasons of effectiveness and security. ICSID, for instance, has mandated parties to use Cisco WebEx, as the institution has found it to be a secure platform with end-to-end encryption.<sup>9</sup>

#### 2. Practical considerations

The choice of the platform will determine the mode of engagement for the entire proceeding and should be decided with some deliberation. The following considerations may steer the discussion on the selection of the technology:

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3 Maxi Scherer, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series (29 April 2020). Available at: <https://vimeo.com/414726437>.

4 Gary B. Born, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series (May 5, 2020). Available at: <https://www.youtube.com/watch?v=6J4dbPI-17c&t=2704s>.

5 Martin Doe, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

6 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, Annex II.

7 2020 CIArb Guidance Note on Remote Dispute Resolution Proceedings, ¶ 1.2.

8 CPR Model Procedural Order for Remote Proceedings, p. 2.

9 Jara Minguez Almeida, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

### a. Participants' technical abilities

Tribunals, counsel and parties may find it cumbersome to manage the various moving parts of the technology along with the arbitration, especially when they are not tech-savvy. This is often an inhibiting factor to include technology in arbitration. The technology should align with the parties' technical abilities and comfort of use to preclude any due process objections that may arise at a later stage.<sup>10</sup> The technical abilities of the arbitrators are equally important, as they are not only required to participate in the proceedings but also to conduct them. Lack of technical abilities should not be considered insurmountable.

Familiarity can be established with orientation and training sessions with experts. Furthermore, assistance can be provided to participants, including the tribunal, through tribunal assistants and technical secretaries. Parties may also explore the option of retaining third-party service providers that supervise and facilitate the entire proceedings from start to end. These options have been discussed in detail below.<sup>11</sup>

### b. Technological efficiency

**Uninterrupted high-quality audio and video:** The seamless transition from in-person hearings to virtual hearings can be ensured by a software that enables participants to communicate with high quality audio and video. To maximise the benefits of virtual hearings, it would be best to opt for a video-conferencing software that would not require infrastructural requirements that are ordinarily unavailable to working professionals.

**Break-out rooms/subgrouping:** During arbitral proceedings, tribunals often need to deliberate and parties require private caucuses. It would be highly inefficient for participants to log in and out repeatedly in such case. Platforms that provide options such as 'breakout rooms' or similar subgrouping help make the proceedings more efficient and are recommended.<sup>12</sup> These private communications must be accessible, visible and audible only to the relevant participants.<sup>13</sup>

**Easy reference of documents:** The variety of documents referred to during an arbitration creates the need for a platform that allows for easy reference of documents, without interfering with participants' video images. It is essential that there is simultaneous access

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<sup>10</sup> See *infra* § IV[B][2].

<sup>11</sup> See *infra* § III[B][1]. For third-party management service options, see § II[A][3].

<sup>12</sup> CIArb Guidance Note on Remote Proceedings, ¶ 3.3; Guide on Use of Video-Link under Evidence Convention, ¶ 175; African Arbitration Academy Protocol on Virtual Hearings, ¶ 4.4.

<sup>13</sup> African Arbitration Academy Protocol on Virtual Hearings, ¶ 4.4.

to documents on the record that may be viewed through screen sharing functions.<sup>14</sup> This makes communications effective, compared even to in-person hearings, where participants are required to navigate voluminous documents.

### c. Data security and confidentiality

**Data security:** The use of technology raises concerns about data security and data protection. The Seoul Protocol on Video Conferencing in International Arbitration emphasises the need for connections to be protected from third-party interception by means such as 'IP to IP Encryption'.<sup>15</sup> Therefore, platforms that do not have end-to-end encryption must be avoided. Similarly, document-sharing software should be used which assures parties of adequate data security measures.<sup>16</sup> The technology selected must also be compliant with the applicable data protection laws.

**Confidentiality:** Parties value confidentiality in commercial disputes, and it is one of the characteristics that has made arbitration popular as a dispute resolution mechanism. Section 42A of the IACA mandatorily requires the arbitral proceedings to be confidential. Features like waiting rooms/lobbies, password requirements for entering meetings, etc. ensure that no unauthorised third party can access the proceedings.

### d. Costs

Most of the essentials of a virtual arbitration may be fulfilled with free versions of software having basic features. However, parties may wish to invest in sophisticated options to suit their concerns and make the proceedings more convenient and efficient. Therefore, a careful cost-benefit analysis is required in selecting technology. Costs also include those costs that are reasonably required to familiarise an unfamiliar tribunal and other participants with the technology.<sup>17</sup> The costs increase on a gradient and can increase substantially, especially when using third-party management services.

## 3. Technology available

A variety of technology solutions can be used in arbitrations for the purpose of conducting

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14 CI Arb Guidance Note on Remote Proceedings, ¶ 3.1. ICC, *Report of the ICC Commission on Information Technology in International Arbitration* (2017), p. 16. Available at: <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf>.

15 Seoul Protocol on Video Conferencing in International Arbitration, Art. 2.1 (c); EU Guide on Video Conferencing in Cross Border Disputes, p. 22.

16 Seoul Protocol on Video Conferencing, Art. 4.3; See *infra* §II[A][3].

17 *Report of the ICC Commission on Information Technology in International Arbitration*, p. 7.

virtual hearings. These include software for video-conferencing, document sharing, transcription and interpretation, and integrated management solutions from third-party service providers.

#### a. Video-conferencing platforms

A variety of video-conferencing platforms exist and have been used for business. However, the platforms in the following table are the ones most commonly used by parties in virtual arbitrations around the world. Their features have been summarised in the table below. A comparison of more software can be found [here](#).

	BlueJeans	Cisco WebEx	Microsoft Teams	Skype for Business	Zoom
Recommended Minimum Bandwidth	1.5 mbps	1.5 mbps	1.2 mbps	1.5 mbps	1.5 mbps
Total Participants	100	200	250	250	500
Video Quality	HD	VGA, HQ, HD	VGA, HQ	VGA, HQ, HD	HD
Breakout Sessions	✓	✓	✗	✗	✓
Gallery View (Maximum participants seen)	9	25	4	9	49
Screensharing	✓	✓	✓	✓	✓
Uploading .ppt/.docx/.pdf file	✓	✓	✓	✓	✓
Mobile Device Support	✓	✓	✓	✓	✓
Closed Captioning	✓	✓	✓	✓	✗
Recording Capabilities	✓	✓	✓	✓	✓
Password restricted access	✓	✓	✓	✓	✓
End to end encryption	✓	✓	✓	✓	✓
Waiting Room/Lobby	✗	✓	✓	✓	✓

Above information is as available on 25th May, 2020. Features are subject to the version used.

\* Dependent on number of participants online during a hearing

## b. Document-sharing software

Another technological requirement is of creating a streamlined channel to share documents and exchange communications, while ensuring participants' access to these throughout the arbitration. Documents would include parties' written pleadings, procedural orders, witness statements, exhibits, authorities, etc. This is ordinarily achieved through a common storage space onto which the digital documents are uploaded.<sup>18</sup> All participants must have access to this space as non-availability of the documents on record to either of the parties may raise due process concerns.<sup>19</sup>

Commercial cloud-based file sharing software such as Google Drive, Dropbox and Microsoft OneDrive are free and readily available options. However, these require proactive, and often cumbersome, file management. Furthermore, the data on these servers are often subject to general terms and conditions that give service providers many rights of use and analysis.<sup>20</sup> This may discourage parties that are particularly concerned about data security. Nonetheless, these have been commonly used by parties that value simplicity and familiarity.<sup>21</sup>

Software like [Knovos Arbicomm](#), [Nuix Discover](#), [TransPerfect](#) and [Epiq](#), are specifically designed for dispute resolution processes such as e-discovery. They facilitate document management by automatic pagination, electronic 'bundling', bookmarking, cross referencing, retrieval of documents, etc. They also provide higher standards of data security. Arbitral institutions have also developed such software, that manage files and additionally streamline and document all communications and filings between the parties. These include ICC's [NetCase](#), AAA's [WebFile](#), WIPO's [ECAFE](#) and the [JAMS Electronic Filing System](#). Notably, the SCC has recently launched the [SCC Platform](#) and the [Ad Hoc Platform](#) for institutional and *ad hoc* arbitrations respectively. It declared that any arbitration registered by December 31, 2020 will have all fees waived in relation to the use of the *ad hoc* platform in light of the COVID-19 pandemic.<sup>22</sup>

## c. Transcription and interpretation services

Parties might consider the need for additional software like live-transcription or simultaneous

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18 Seoul Protocol on Video Conferencing, Art. 4.3; Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ Art. 3.2(a); African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.3.2; CIArb Guidance Note on Remote Proceedings, ¶ 5.1.

19 See *infra* §IV[A][5].

20 *Ibid.*

21 *Report of the ICC Commission on Information Technology in International Arbitration*, p. 2.

22 See Kristin Campbell-Wilson, SCC Online Seminar: SCC Platform, 23 April 2020, SCC Online Seminar Recordings (May 12, 2020). Available at: <https://vimeo.com/417570361>.

interpretation, at an additional cost.<sup>23</sup> Most international arbitration hearings use live-transcription. However, the need for this facility is being felt in domestic arbitrations as well. Online transcription services are widely used by businesses and organisations, and are easily available. These are often built-in with the third-party management services or video-conferencing platforms. Simultaneous interpretation software, like [KUDO](#), can be used by multilingual participants to arbitrations.

#### d. Third-party management services

The tribunal should discuss with the parties, at the preparatory stage, the option of retaining third-party management services.<sup>24</sup> These services, tailor-made for dispute resolution, provide technical support to facilitate virtual proceedings and act as an interface between the participants and the technology. In the absence of a sophisticated institutional framework, parties and tribunals in *ad hoc* arbitrations may find such services as an efficient option, subject to cost considerations. Some of the facilities provided by them include:

- Appointment of a manager for each virtual hearing to provide real-time assistance
- File management and retrieval
- Assistance in testing and orientation
- Managing the access to virtual rooms, breakout room, etc.
- Recording proceedings, transcription
- Real time assistance to participants, including troubleshooting.

Some of these service providers include [Opus 2](#), [Arbitration Place Virtual](#), [XBundle](#), etc.

The market for online dispute resolution services is developing in India, with the establishment of organisations such as [Sama](#) and [CODR](#) that provide holistic services, and [CADRE](#) that provides services for low value disputes.

## B. Other Logistical Arrangements

Before a virtual hearing is organised, all participants must be in a position to partake effectively and equally. The basic requirements for participation include a stable internet connection, an appropriate venue for the hearing and suitable devices.

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<sup>23</sup> Seoul Protocol on Video Conferencing, Art. 7.

<sup>24</sup> CPR Model Procedural Order for Remote Proceedings, ¶ A(2).

## 1. Internet

Each participant should have adequate internet bandwidth to support the use of the selected platform. Any limitations in this regard should be notified in advance, and necessary adjustments may be made.<sup>25</sup> The Seoul Protocol recommends that 'minimum transmission speeds should not be less than 256 kbs/second, 30 frames/second'.<sup>26</sup> The protocol developed by the international law firm Hogan Lovells states that the recommended bandwidth should generally be 2.5 mbps for receiving and 3 mbps for sending.<sup>27</sup>

High speed internet is widely available at affordable costs in most major cities in India.<sup>28</sup> The Supreme Court of India in administering its virtual courts during COVID-19 pandemic has recommended litigants to have a bandwidth of 2 mbps and above, noting that '[s]uch expectation in the contemporary age cannot be called unjustified by any standard' and the arrangement is 'easily available through a dedicated 4G connection/Wi-Fi dongles'.<sup>29</sup> The Court further reported that internet connectivity has not acted as a barrier to ongoing court litigation.

## 2. Location for virtual hearing

The location chosen by a participant from which they will take part in virtual hearings is crucial for the smooth functioning of the proceedings. The COVID-19 pandemic has forced many persons to work from home. But even if operating from professional workspaces, participants should consider the following:

**Minimal disturbances:** Participants should try to use rooms with less external disturbances, such as sounds from traffic, etc. Additionally, sounds from ceiling fans can be disruptive disturbances, and thus, air-conditioned rooms may be preferred. For those working from home, the use of spaces where there is no movement in the background would be ideal.

**Adequate lighting:** Participants must ensure that the lighting is adequate,<sup>30</sup> to make facial

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25 *Id.*, ¶ B(1)(d).

26 Seoul Protocol on Video Conferencing, Art. 5.1.

27 Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings, ¶ 2.5.

28 An estimate in 2018 stated that more than 85 % Indians would have access to high-speed internet by 2020. See Nirmalya Behera, 650 mn Indians to have internet access by 2020, high-speed for 85%: BCG, Business Standard (July 23, 2018). Available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-374180.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-374180.pdf)

29 Supreme Court of India, *Press Note On Virtual Court System*, 2 May 2020, Available at: [https://images.assettype.com/barandbench/2020-05/06c7b93c-c27a-4702-9b16-5a47841aa88f/Note\\_on\\_Open\\_Court\\_Hearing.pdf](https://images.assettype.com/barandbench/2020-05/06c7b93c-c27a-4702-9b16-5a47841aa88f/Note_on_Open_Court_Hearing.pdf)

30 CPR Model Procedural Order for Remote Proceedings, ¶ B(1)(e).

expressions discernible and prevent shadowing around the eyes.<sup>31</sup> They should place the camera against a neutral background that does not create interferences in the recording.<sup>32</sup> They must also ensure that the background is not bright, such as a window, which may reduce the visibility of the participant.<sup>33</sup>

**Specialised hearing rooms:** State-of-the-art dispute resolution facilities have been set up in commercial centres across the world such as at the Maxwell Chambers, Singapore, and the Abu Dhabi Global Market Arbitration Centre. These venues provide all the necessary facilities including sophisticated infrastructure, high-end videoconferencing facilities and end-to-end management collaborations with third-party managers. Similar commercial centres in India as well as Indian arbitral institutions can consider providing such high-tech hearing rooms. This could be a significant factor in promoting institutional arbitrations in India.

### 3. Hardware requirements

**Audio:** Headphones with embedded mics are preferable for clear incoming and outgoing audio.<sup>34</sup> Users may also use separate speakers and high quality microphones.

**Large/Multiple screens:** Participants should be encouraged to use devices with screens of sufficient size so that all participants' faces are clearly seen. Therefore, use of smartphones for the purpose of participating in the hearings should be discouraged as far as possible.<sup>35</sup>

Participants need to not only be visible in the virtual proceedings, but also simultaneously refer to documents. They must thus be encouraged to use a large screen or multiple screens, in the form of tablets or other monitors.<sup>36</sup>

**Multiple cameras/360° camera:** Particularly in the case of witness examination there is a need for a full view of the room the witness is in to ensure they are not being coached.<sup>37</sup> 360° or wide-angle cameras provide such views of the room, however these may not be easily

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31 EU Guide on Video Conferencing, p. 19.

32 *Id.*; CPR Model Procedural Order for Remote Proceedings, ¶ B(1)(e).

33 *Id.* ¶ B(1)(e); AAA-ICDR Virtual Hearing Guide p. 1, ¶ 3.

34 Seoul Protocol on Video Conferencing, Art. 5.2; CPR Model Procedural Order for Remote Proceedings, ¶ B(1)(c); EU Guide on Video Conferencing, p. 20; CI Arb Guidance Note on Remote Proceedings, ¶ 6.3.

35 *Id.*, ¶ B(1).

36 CPR Model Procedural Order for Remote Proceedings, ¶ B(1)(b); EU Guide on Video Conferencing, p. 18; AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties, p. 1, ¶ 2(a); Seoul Protocol on Video Conferencing, Art. 4.4.

37 See *infra* § III[D][1].

available or may be incompatible with the video-conferencing platform. A simpler solution could be to place another camera device such as a mobile phone or tablet at a distance to see the witness' surroundings to ascertain that no one else is present.<sup>38</sup>

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<sup>38</sup> Africa Arbitration Academy Protocol, p. 8, ¶ 3.2.2; CIArb Guidance Note on Remote Proceedings, p. 5, ¶ 6.3. See *infra* § III[D][1].

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### III Case Management in Virtual Proceedings

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When it comes to virtual proceedings, there is a general lack of familiarity with the technology, amongst both arbitrators and counsels, especially in India. Additionally, there are various other inconveniences associated with operating from remote locations. Effective case management by the tribunal mitigates these challenges, while ensuring the most optimal presentation of the case. The tribunal is thus, tasked with safeguarding the integrity of the arbitration proceedings while resolving the dispute at hand.

#### A. Case management conferences

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Establishing an effective channel of communication between the tribunal and the other participants becomes particularly important when participants are operating remotely. Conventional tools such as case management conferences are instrumental in bringing all participants to the same page. The object of these conferences is mainly three-fold: (i) to determine the modality of the proceedings in a virtual format, with appropriate modifications to the standard approaches to oral hearings and collection of evidence; (ii) to issue directions on the use of technology for the smooth conduct of the virtual hearings; and (iii) to assess and address party concerns at the earliest.

Early case management conferences are regular practice in international arbitrations, and have also been recommended in India,<sup>39</sup> to increase the efficiency of arbitrations.<sup>40</sup> Tribunals may schedule further conferences in the course of the proceeding to ensure continued effective management of the case.<sup>41</sup> Tribunals must encourage party agreement at these conferences, and create familiarity of the parties with the technology being used and the risks involved. The conclusions of these conferences would then ideally be incorporated in procedural orders, separate agreements or any such expression of consent.

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39 Indian Arbitration Forum Arbitration Protocol, Art. 8.

40 ICC Arbitration Rules, Art. 24.1; LCIA Arbitration Rules, Art 14.1; ICC, *Report of the ICC Commission on Techniques for Controlling Time and Costs in Arbitration* (March 2018), p. 9. Available at: <https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf>; DIS-Arbitration Rules, Art. 27.2.

41 ICC Guidance Note on Measures for COVID-19, ¶ 8; *Report of the ICC Commission on Techniques for Controlling Time and Costs in Arbitration*, ¶ 33.

## B. Protocols to manage technology

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As discussed in the previous section, there are multiple technological options that may be used for the proceedings, for e.g. the video-conferencing platform, document-sharing software, etc. These must be determined and agreed upon at the earliest.<sup>42</sup> It is likely that further discussions may be necessary if the proposed technology creates any technical issues, or if the nature and complexity of the dispute requires additional technology. Setting certain protocol at the outset is important in virtual hearings to make sure that the parties are not overwhelmed by technology in use. The following can be discussed at the case management conferences and integrated into the procedural orders, in the interest of efficiency.

### 1. Assigning technical responsibilities

Virtual hearings create an additional requirement to manage the technology in use. This management includes simple tasks like booking online video sessions, keeping record, keeping time, maintaining the databases, etc. as well as tasks that require some technical experience, such as testing and orientation, supervising the connection, troubleshooting and resolving technical issues, assisting participants with the technology, etc.<sup>43</sup> The Seoul Protocol mandates one on-call individual with adequate technical knowledge to assist in planning, testing and conducting the video conference.<sup>44</sup> Parties may appoint their own representatives as technical support, let the tribunal take responsibility of this function<sup>45</sup> or employ third-party technical support.<sup>46</sup>

#### a. Tribunal assistants/secretaries

Traditional roles of tribunal assistants and secretaries become more emphasised in the context of virtual hearings. These assistants now need experience and understanding of the technologies being used and the issues commonly faced.<sup>47</sup> Institutions have been taking measures to ensure the tribunal assistants and secretaries are well versed with these technological processes. For instance, the SIAC has initiated the training of their Counsels, by technical officers of various firms that use these technologies regularly.<sup>48</sup> These Counsels are

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<sup>42</sup> Report of the ICC Commission on Information Technology in International Arbitration, p. 4

<sup>43</sup> EU Guide on Video Conferencing, p. 14; *Id.*, p. 22.

<sup>44</sup> Seoul Protocol on Video Conferencing, Art. 2.1 (b).

<sup>45</sup> CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 3, ¶ A.3.

<sup>46</sup> *Id.* ¶ A.2.

<sup>47</sup> Gary Born, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

<sup>48</sup> *Ibid.*

now on call with SIAC tribunals facilitating virtual hearings and have been effective in assisting the tribunals with the logistics and management of the proceedings.

*Ad hoc* tribunals, and counsel generally, may take a similar approach and ensure that their assistants and office personnel are equipped to play this new role in virtual hearings. The parties may also designate representatives to assist with these technical responsibilities.

#### b. Third-party technical support

Alternatively, parties can hire technical experts on a case-by-case basis. This includes the retention of an individual expert for such support, or a third-party management service provider. The latter provides holistic solutions for the management of hearings, which in the absence of a sophisticated institutional framework, parties in *ad hoc* arbitrations might find efficient and convenient.<sup>49</sup>

#### c. Testing and orientation

The participants' lack of familiarity with virtual hearings could lead to confusion and inefficiencies. Testing of the technology and orientation of the participants is essential for the participants to familiarise themselves with the various aspects of the virtual hearings.<sup>50</sup> Although most software and hardware is designed to be widely compatible to contemporary business standards that are adequate for virtual hearings, unexpected glitches and disturbances can be prevented if foreseen at an earlier stage. Institutions such as the ICC, ICSID, PCA, SCC and SIAC have been very proactive in testing the videoconferencing system and orienting participants in their arbitrations.<sup>51</sup> In *ad hoc* arbitrations, the technical support appointed will assume this role.

It is essential that these sessions be conducted as early as possible, and more than once, if required. While the CPR recommends it happen at least 48 hours earlier,<sup>52</sup> the Seoul Protocol suggests they be conducted 72 hours before the start of the proceedings.<sup>53</sup> The ICC recommends two test sessions,<sup>54</sup> though some other institutions such as the ICSID have had rigorous testing before fully remote hearings.<sup>55</sup>

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49 See *supra* § II[B][3][d].

50 ICC Guidance Note on Measures for COVID-19, Annex I, ¶ B (iii); CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 5, ¶ B.2; Seoul Protocol on Video Conferencing, Art. 6.1.

51 Gary Born, Jara Minguéz Almeida and Martin Doe, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series; *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series.

52 CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 4, ¶ B (1).

53 Seoul Protocol on Video Conferencing, Art. 9.1.

54 ICC Guidance Note on Measures for COVID-19, Annex I, ¶ B (v).

55 Jara Minguéz Almeida, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

**Testing sessions:** At these testing sessions, it must be ensured that all participants' equipment is compatible with the chosen platform,<sup>56</sup> and that the internet bandwidth is suitable for the size of the hearing. Parties have the responsibility to ensure that all their witnesses and representatives have undergone this process of testing and have suitable equipment.<sup>57</sup> Further, counsels are recommended to have preparatory runs with witnesses, confirming whether they can access exhibits while giving testimony.<sup>58</sup> In case any incompatibilities arise, the parties must ensure these persons are provided with the equipment needed.<sup>59</sup> If that is not possible, alternatives must be determined. Additionally, participants must also ensure that the location they are operating from is appropriate.

**Orientation and training:** These sessions should also ensure participants familiarise themselves with various features of the platform, such as 'break-out rooms' and screen-share mode.<sup>60</sup> The technical support should supervise this process and provide a brief tutorial on the different moving parts of the technology being used.

### 3. File-management system

A system to organise documents will be instrumental in assisting participants with navigating and accessing information referred to. This is especially important if large numbers of documents are exchanged, or if multiple claims are involved in the dispute. With party consultation, tribunals may arrive at formats for naming and organising files, pagination, bookmarking, cross referencing, etc. For instance, files can be designated with an exhibit number (e.g. C-... for claimant's exhibits and R-... for respondent's exhibits) and a document control number could be provided on each page of a particular document.<sup>61</sup> Certain software mentioned earlier facilitate file management, and may be used.<sup>62</sup>

### 4. House-keeping rules

Tribunals must establish certain house-keeping rules to attempt to best replicate the experience of an in-person hearing while making sure there is minimum interference. Methods

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56 Seoul Protocol on Video Conferencing, Art. 6.1.

57 AAA-ICDR Virtual Hearing Guide, p. 3, ¶ 1(d).

58 CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 5, ¶ B.3; Kent Phillips, *Strategies for Effective Oral Advocacy & Cross-Examination for Virtual Hearings: A Guide for Counsel*, SIAC Webinar Series (May 2, 2020). Available at: [https://www.youtube.com/watch?v=f7gjopr8u\\_k](https://www.youtube.com/watch?v=f7gjopr8u_k).

59 CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 5, ¶ B (3).

60 AAA-ICDR Virtual Hearing Guide, p. 2, ¶ 1.

61 *Id.* p. 10.

62 *See supra* § II[B][3][b].

for confirming attendance and identifying all participants and their roles; directions on how to interrupt each other and object to questions; muting oneself when not speaking; assigning overriding controls to 'hosts'; directions on when participants may use features of the platforms; protocol for private communications between arbitrators; protocol for requesting breaks; dressing etiquette, etc. are small but significant in facilitating a smooth virtual hearing.

## 5. Maintaining a record of the proceedings

Parties must come to agreement on how the proceedings must be recorded, either by video recording or written transcription or both,<sup>63</sup> and when this record must be circulated to the participants.<sup>64</sup> Parties must consider the advantage of the accuracy in video records and live-transcripts. These could help preclude due process challenges, as parties that get offline could be provided a record of the missed hearing. Video playbacks are useful to correct errors in comprehension and revisit records. For instance, with respect to witness examinations, written record can lessen the value of testimony. Many Indians speak English as a second language and therefore transcripts may reflect a miscommunicated phrasing. Videos may be essential in reading the body language to clarify vague or inappropriate phrasing when interpreting their testimonies.<sup>65</sup>

If a video recording is preferred, the tribunal must ensure that the video-link is secure and encrypted. Furthermore, specifications can be made regarding the storage of the video record during the arbitration, and subsequent deletion post a certain period after the conclusion of the arbitration.

## 6. Contingency plans

Technical errors may occur, in the course of the hearing, such as the loss of connectivity with a participant. Contingency procedures must be devised by the tribunal, in consultation with the parties.<sup>66</sup> Participants must make a prompt notification of the issue to the technical support or such other person as decided earlier (such as the presiding arbitrator), through means such as a text message or phone call.<sup>67</sup> Additionally, arbitrators must stay vigilant and

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<sup>63</sup> The Hague Conference on Private International Law, *Guide to Good Practice on the Use of VideoLink under the Evidence Convention* (December 2018), p. 98; African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.5.1.

<sup>64</sup> Hogan Lovells Protocol for Use of Technology in Virtual Hearings, Art. 2.6(d).

<sup>65</sup> K.G. Raghavan, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0 (May 20, 2020). Available at: <http://www.youtube.com/watch?v=d3BBU1QP4Og>;

<sup>66</sup> ICC Guidance Note on Measures for COVID-19, Annex I, ¶ B (v).

<sup>67</sup> Seoul Protocol on Video Conferencing, Art. 6.2; Guide on Use of Video-Link under Evidence Convention, ¶ 206.

request technical support to immediately report the matter, so the proceedings can be temporarily halted.

Alternatively, the arbitrator may, in the interest of time, decide to continue the hearings in such cases, and make available to the disconnected party later a recording or transcript of what is missed. This is improper if the nature of proceedings requires for a response in real-time from the disconnected party.

For non-essential participants, the parties may assign a separate contingency plan within its legal team, and the lead counsel may, if it deems necessary, request the tribunal to halt the proceedings while the issue is resolved.<sup>68</sup>

## 7. Confidentiality and data security

Confidentiality and data security are some of the primary concerns of parties engaging in virtual proceedings, and it follows that they must be raised and addressed at the first case management conference.<sup>69</sup> According to the ICCA-NYC Bar-CPR Cybersecurity Protocol, the tribunal should be prepared to:<sup>70</sup>

- engage the legal representatives in a discussion about reasonable information security measures;
- discuss the ability and willingness of its members to adopt specific security measures;
- address any disputes about reasonable information security measures;
- express its own interests in preserving the legitimacy and integrity of the arbitration process, taking into account the parties' concerns and preferences, the capabilities of any administering institution, and other factors in this Protocol; and
- address any other issues related to information security that it considers relevant to the proceeding.

Parties need to be aware of the risk of even unintended transmission of information shared. Any party that is concerned with the continuing security of information it shares with the other party or the tribunal and wishes to restrict access to that information should raise this concern at the earliest. Tribunals may also instruct parties not to individually record or capture the proceedings,<sup>71</sup> and to not permit persons not privy to the proceedings into the hearing

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68 CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 9, ¶ C.4.

69 ICCA-NYC-CPR Protocol Cybersecurity in International Arbitration, Principle 10.

70 *Id.* p. 26-27.

71 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, Art. 2.6(c).

rooms. Additionally, the tribunal should administer agreements binding all participants in the proceedings, including third-party assistants and service providers, to maintain confidentiality and data security.

Admittedly, there may be no foolproof solution to party concerns on confidentiality and security.<sup>72</sup> Most risks to confidentiality are not mutually exclusive to virtual hearings and can occur in in-person hearings as well.<sup>73</sup> The tribunal must initiate the discussion, issuing protocol to highlight the gravity of the concern and ensure parties are wary in their conduct.

### C. Strategising proceedings

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Traditional arbitrations have been criticised globally as being plagued with excessive rounds of hearings and lengthy submissions.<sup>74</sup> There is general consensus on the need to tailor and limit procedure in arbitrations as per requirement. This approach must all the more be adopted for virtual arbitrations.

Virtual hearings are generally born of necessity, either due to unexpected circumstances like the COVID-19 pandemic, or time, money or travel constraints. Depending on the dispute, there are inarguable risks and challenges that exist in conducting an online hearing. The need to manage a host of variables ranging from potential technical issues, to coordination amongst participants, adds incentive for tribunals to adapt the proceedings to minimise reliance on virtually conducted oral hearings.<sup>75</sup> The tribunal in doing so should be cautious of interfering with the parties' rights to equal treatment and right to be heard.<sup>76</sup>

In consultation with the parties, tribunals must explore options for finding the most efficient procedure.

***Identifying issues:*** At the outset, the tribunal can request the parties to present an agreed chronology of facts, issues and other documents that can be jointly submitted to aid with the identification and delineation of the issues in dispute.<sup>77</sup>

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<sup>72</sup> Emmanuel Gaillard, *Will COVID-19 Revolutionize Arbitration? What's Next for Business and Arbitration?*, TGS Baltic Webinar (May 11 2020) Available at: <https://youtu.be/EfZfbjSTxag>.

<sup>73</sup> Wendy Miles and Paul Cohen, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series.

<sup>74</sup> Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018), p. 26.

<sup>75</sup> Michael Hwang, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

<sup>76</sup> *Report of the ICC Commission on Information Technology in International Arbitration*, p. 7; See *infra* § IV [B][2].

<sup>77</sup> ICC Guidance Note on Measures for COVID-19, ¶ 8.

**Eliminating oral hearings:** Once this is done, the tribunal may find if the entire dispute, or at least certain issues, can be resolved solely with the exchange of documents or by agreement between the parties, and no oral hearings.<sup>78</sup>

**Limiting written submissions:** Tribunals may also consider setting guidelines for limiting the length and number of written submissions to make the virtual hearing less cumbersome and easier to handle.<sup>79</sup> The Delhi High Court has observed that with brief, coherently structured written submissions, lesser time is consumed and there is lesser likelihood of error".<sup>80</sup>

**Limiting oral hearings:** The tribunal should limit oral submissions to issues that are dispositive of the whole case or determinative of particular stand-alone claims, as these have the most significant impact on the outcome of the case.<sup>81</sup> Examples could include jurisdictional claims, requests for early dismissals, or orders to freeze assets.

**Limiting evidence:** Similarly, certain issues can be decided either without or with a highly limited production of documents, such as the application of a contractual limitation of liability or the inclusion of a non-signatory in the proceedings.<sup>82</sup> The tribunal may also determine if witness and/or expert evidence is either unnecessary, or replaceable by written testimonies and interrogatories.<sup>83</sup>

**Innovating options:** Tribunals can capitalise on the flexibility offered by arbitration and innovate rather than replicate conventional arbitrations.<sup>84</sup> In fact, even virtual courts in the lockdown have not shied away from breaking away from traditional methods. An order passed recently by the Delhi High Court, directed parties to file and exchange 3-page submissions, accompanied with 15-minute video clips of oral argument within one week; following which, they could file and exchange 2-page written replies with a 10-minute video of oral arguments in response.<sup>85</sup> Such asynchronous proceedings are a recognition of the need for change, and arbitral tribunals can take similar steps in innovating efficient procedures.<sup>86</sup> Such procedure would allow the tribunal to understand arguments and hold a final hearing with a specific

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78 Justice Raveendran, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0; ICC Guidance Note on Measures for COVID-19, ¶ 8.

79 Toby Landau, *Minimising the Impact of COVID-19 on Arbitrations: A Guide for Counsel and Arbitrators*, SIAC Webinar Series (April 17, 2020). Available at: <https://www.youtube.com/watch?v=HMFtvghxiUs>.

80 *Kiran Chhabra v. Pawan Kumar Jain*, 178 (2011) DLT 462.

81 Michael Hwang, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

82 ICC Guidance Note on Measures for COVID-19, ¶ 8.

83 Justice RV Raveendran, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0; ICC Guidance Note on Measures for COVID-19, ¶ 8.

84 Michael McIlwrath, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series.

85 *Sat Prakash Soni v. Union of India & Ors.* CrI.M.A. 6348/2020 in W.P. (Crl) 3034/2019, Delhi High Court (June 1, 2020).

86 Michael Hwang, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

discussion on questions by the tribunal and final responses. This eliminates the need to manage lengthy and cumbersome virtual hearings with multiple participants.

## D. Gathering evidence

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While conducting proceedings, most *ad hoc* tribunals in India often restrict themselves to the rules of civil procedure and evidence used in India courts. However, they have the power and flexibility to determine admissibility, relevance, materiality and weight of any evidence in the manner they deem appropriate.<sup>87</sup> This gives them the ability to modify the evidence collection to suit the circumstances and requirements of the case.<sup>88</sup> Tribunals arbitrating during the COVID-19 pandemic are faced with having to conduct the entire arbitration remotely. Today, thanks to the technology available, we are able to collect all evidence electronically. However, tribunals must be cautious in allowing electronic collection of evidence, keeping in mind the due process guarantees of traditional offline arbitrations.

### 1. Witness examination

The examination of witnesses is one of the most critically analysed aspects of virtual hearings, and rightfully so. The value of the immediacy of an in-person hearing is most felt in a cross-examination, where the credibility of the witness needs to be assessed, interventions and objections are required, and witness coaching needs to be monitored. However, with appropriate protocol, a virtual cross-examination can provide the same if not better results for evidence collection.

#### a. Allowing witness testimony

In permitting witnesses to testify through a video-conference, tribunals can consider the importance of the evidence to the determination of the issues in the case, the need to determine the credibility of the witness, the quality of the virtual hearing in light of the technology available, the reason for the witness' inability to attend in person, amongst other factors. Once permitted, each party must take on the responsibility of ensuring their witness attends the virtual hearing as per schedule, with the adequate technological arrangements as specified.<sup>89</sup>

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<sup>87</sup> Sec. 19(4) IACA; *Union of India v. Reliance Industries Ltd. & Ors.* 2018 SCC OnLine Del 13018.

<sup>88</sup> *Satpal P. Malhotra v. Puneet Malhotra*, 2013 SCC OnLine Bom 689.

<sup>89</sup> African Arbitration Academy Protocol on Virtual Hearings, Annex IV.

## b. Referring to documents

Physical copies of exhibits and documents used for the witness examination should ideally be made available prior to the hearing and must be properly marked, identified and paginated.<sup>90</sup> These can be delivered in a sealed package, to be opened at the time of the hearing in front of all parties.<sup>91</sup>

If physical copies cannot be made available, parties can use the screen-sharing feature or a document sharing platform for the witness to refer to during questioning.<sup>92</sup> For this purpose it might be optimal to have two screens, one to view the documents and the other for the video transmission.<sup>93</sup>

## c. Witness coaching

At no point during the examination must the witness receive any input from the party counsels.<sup>94</sup>

**Oaths/disclosures:** Before proceeding with the examination, the witness must confirm if they are alone in the room they are testifying from, or make disclosures as to persons present, and affirm that they are not receiving any directions or assistance while providing testimony.<sup>95</sup> This is in addition to the witness oath traditionally administered, affirming the accuracy of their testimony.<sup>96</sup>

**Examining party's representative:** In the most ideal scenario, a representative of the examining party or a designated neutral individual must be present at the venue where the witness is testifying.<sup>97</sup> This is the most effective way to assure the examining party that the witness testimony is truthful and *bona fide*.

**Visual of the witness:** It might not always be feasible to have a representative supervise the witness examination from the venue. In these cases, the visual of the witness and the location

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90 *Id.* Art. 4.1; African Arbitration Academy Protocol on Virtual Hearings ¶ 3.3.1; Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.2(b).

91 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.2(f).

92 Seoul Protocol on Video Conferencing, Art. 4.4; African Arbitration Academy Protocol on Virtual Hearings ¶ 3.3.1; Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.2(b).

93 Seoul Protocol on Video Conferencing, Art. 4.4.

94 African Arbitration Academy Protocol on Virtual Hearings, ¶ 2.2.4.

95 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.1(b); African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.2.3.

96 Seoul Protocol on Video Conferencing, Art. 1.6.

97 *State of Maharashtra v. Praful B Desai*, (2003) 4 SCC 601 ¶126; Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.2(c).

they are in is crucial for the examination. The tribunal and examining counsel must be able to confirm at all times that the witness is alone in the room and not being coached.<sup>98</sup> The witness should therefore be clearly visible to the other participants,<sup>99</sup> while seated on an empty table with their hands placed on the table. The witness should not be permitted to use features like “virtual backgrounds”<sup>100</sup> and a sizeable view of the room they are seated in must be visible.<sup>101</sup>

Additionally, the tribunal could request the witness to direct the camera around the room before the commencement and at any time during their testimony. It is also possible to have another camera device streaming the surroundings of the witness<sup>102</sup>. Parties can also consider using 360° cameras that can provide a full view of the room, and can be controlled by the tribunal.<sup>103</sup>

**Screen-sharing:** Another concern could be that the witness is being coached by a live feed on their screen, invisible to the other participants. For instance, pop-up notifications from messaging services, like WhatsApp. A simple way to avert this would be to require the witness to enable their screen-sharing function, so that any notification that comes up on their screen is visible to the other participants.<sup>104</sup>

#### d. Raising objections

The ability to properly intervene is necessary for raising objections during cross-examination. The tribunal must provide appropriate guidelines for the same.<sup>105</sup> Counsels and witnesses may be instructed to maintain a pause to lend opposing counsel the opportunity to object. Alternatively, tribunals can allot time at the end of the cross-examination, to record all objections. The tribunal must also foresee protocol for chaotic exchanges between participants.

#### e. Terminating the witness examination

If at any point the tribunal is of the opinion that the virtual examination is so unsatisfactory that it is unfair to either party to continue, it must terminate the proceedings.<sup>106</sup> This could be due

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98 African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.2.2.

99 Seoul Protocol on Video Conferencing, Art.1.3; Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶3.1(c).

100 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.1(d); CPR’s Annotated Model PO for Remote Video Arbitration Proceedings, p. 5, ¶ B(1) (e).

101 Seoul Protocol on Video Conferencing, Art. 1.2.

102 Wendy Miles, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series.

103 Paul Cohen, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series; Jara Minguez Almeida, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

104 Vikas Mahendra, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0.

105 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 3.4.

106 Seoul Protocol on Video Conferencing, Art. 1.7; African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.2.5.

to technical glitches that affect the smooth presentation of witness testimony, a finding that the witness was being coached, or any other issue that compromises the continuance of the collection of the witness testimony.

## 2. Virtual discovery

Virtual discoveries or electronic production of documents is a common practice internationally, that hasn't yet gained popularity in India. Generally, the need for virtual discovery is independent of the need to conduct virtual hearings. However, as a result of the restrictions during the ongoing pandemic, we are dealing with a time when production of physical documents is impossible, and therefore, may have to be conducted electronically. The parties and tribunal should, at the earliest, consider issues relating to the electronic production of documents, such as whether there are to be any document requests at all, and if so, what procedure is to be followed.<sup>107</sup> The tribunal may then provide the parties with evidentiary and procedural rules that will govern both parties' e-discovery obligations.<sup>108</sup>

### a. Managing document requests

The tribunal must set guidelines for the document requests at the earliest, before the commencement of the hearing. The objective of these guidelines should be to limit requests to specific documents that are directly relevant to determining important issues in the case.<sup>109</sup> Document requests must describe how the documents are material to the outcome of the case.<sup>110</sup> They must contain "search terms" specifying file location, date range, individuals and key words designed to identify specific categories of relevant documents, limiting the scope of production.<sup>111</sup> Parties can use the Redfern Schedule<sup>112</sup> in order to manage requests for document production.

Document requested	Relevance / materiality of the document	Responses/objections to the request	Reply to response/ Objection	Decision of the arbitral tribunal
All emails b/w dates X and Y containing search terms A, B & C				

107 ICC, *Report of the ICC Commission on Managing E- Document Production*, 2012. Available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf>, ¶ 5.5, p. 9; CI Arb Protocol for E-Disclosure in International Arbitration, Art 1; Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle 3.

108 Daniel B. Garrie, *Optimizing E-Discovery with Arbitration*, 2017, p. 2-3; CI Arb E-Disclosure Protocol, Art 1.

109 JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases, p. 4; Sedona Principles, Principle 4.

110 IBA Rules on the Taking of Evidence in International Arbitration, Art.3(b); CI Arb E-Disclosure Protocol, Art. 2.

111 CI Arb E-Disclosure Protocol, Art. 2.

112 The Redfern Schedule is a tool devised by Alan Redfern for doing away with extraneous hearings in an arbitration.

### b. Granting document requests

In deciding on allowing virtual discoveries, the tribunal should pay heed to the reasonableness and proportionality of the requests, by balancing various considerations like associated costs of the discovery, the nature and complexity of the dispute, amount in dispute, relevance and materiality of the evidence and convenience.<sup>113</sup> Additionally, the tribunal must be mindful of due process concerns.<sup>114</sup>

The conclusions of these deliberations will vary on a case-by-case basis. For instance, with specific reference to the ongoing pandemic, the cost and inconvenience associated with converting voluminous texts to an electronic form during a lockdown could outweigh the benefits of resolving the dispute at the earliest. The tribunal must consider these factors in making adverse inferences as well.

### c. Preservation of documents

The tribunal should lay down guidelines for the preservation of documents, keeping in mind the parties' document management system and data retention policies.<sup>115</sup> The parties are best suited to assist the tribunal with the method and technology to ensure the security of their information. In the interest of reasonableness this must be a duty of good faith and best efforts.<sup>116</sup>

## E. Pre Hearing Agreement

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The parties should enter into an agreement before the hearings begin, stating that they have agreed to conduct the proceedings, including the oral arguments and the collection of evidence, over video-conferencing and other electronic means. The agreement should stipulate that they will not seek the annulment or non-enforcement of the award on the ground that the arbitral proceedings were not held in-person.<sup>117</sup> Therefore, no challenge would arise in such situations, solely on the ground that the proceedings were held virtually and not in person. However, such an agreement would not preclude a challenge of the award on due process concerns that may arise during the virtual proceedings.

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113 JAMS Discovery Protocol, p. 5; CI Arb E-Disclosure Protocol, Art. 3.1; Sedona Principles, Principle 2.

114 CI Arb E-Disclosure Protocol, Art. 3.1. See *infra* §IV[A][3].

115 *Id.* Art.1.3 (iii).

116 *Ibid.*; Sedona Principles, Principle 5.

117 Hogan Lovells Protocol for Use of Technology in Virtual Hearings, ¶ 2.10; African Arbitration Academy Protocol on Virtual Hearings, Annex III.

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In opting for arbitration, parties expect a binding legal remedy in the form of a final and enforceable award. Therefore, we must deliberate on the legal issues with virtual arbitration to design a fair arbitral procedure that preserves the sanctity of the award. The fate of virtual arbitration in India will be determined against the touchstone of the IACA. Awards passed in arbitrations that have used virtual processes are yet to be tested before Indian courts. However, pre-existing judicial attitudes towards arbitral procedure, in addition to the treatment of virtual procedures in court litigation, may inform us of what to expect.

The most significant concerns related to due process are the inability of a party to present its case and the unequal treatment of parties. Non-fulfilment of due process requirements would form grounds for the challenge of an award.<sup>118</sup> Parties should also note that the legal discourse on challenges to awards in India is heavily influenced by courts' interpretation of public policy. One cannot predict the sustenance of challenges on the ground that virtual hearings categorically violate public policy.<sup>119</sup> However, the recent trends of restrictive interpretation of "public policy",<sup>120</sup> in addition to the acceptance of virtual proceedings in court procedure are reassuring signs for parties.

The following section addresses due process concerns and other legal issues that may play a part in determining a fair procedure and ensuring the finality and enforceability of the award.

### A. The right to properly present one's case

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Section 18 of the IACA, states that, 'each party shall be given a full opportunity to present its case'. This includes the parties' right to properly respond to the opposing party's submissions, evidence and arguments with its own. The violation of a party's right to present its case is a ground for challenge under Sections 34(2)(a)(iii) and 48(b) of the IACA. The question that then arises is whether a virtual hearing accords the party a "full opportunity" to present its case.

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118 IACA, ss. 34(2)(a)(iii) and 48(b); IACA, ss. 48(d).

119 Ss. 34(2)(b)(ii), 48(2)(b), IACA.

120 *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131.

## 1. The right to an oral hearing

Section 24 of the IACA grants parties a right to an oral hearing, for both the presentation of evidence and oral arguments. Traditionally, oral hearings have been physical, in-person hearings. However, as most national laws, the IACA is silent on whether this is a mandatory characteristic of the right to oral hearing. Physical proximity need not be necessary for oral hearings, and oral arguments or witness examinations conducted on video-conferencing platforms may be just as effective in fulfilling the objectives of in-person oral hearings. The tribunal, therefore, may conduct virtual oral hearings, even in the absence of party consent.

### a. Is there a right to an in-person hearing?

Virtual hearings are not perfect substitutes for in-person hearings, as they lack direct immediacy with the tribunal. This raises the question of whether the IACA grants parties a right to in-person hearings. Though the IACA does not explicitly mention “in-person hearings”, it recognises the parties’ right to an oral hearing under Section 24. With appropriate procedural safeguards, virtual hearings provide both parties with the opportunity to present their case as they would in an in-person hearing.<sup>121</sup> The Supreme Court’s ruling in *State of Maharashtra v. Praful B. Desai*,<sup>122</sup> observes that video-conferencing satisfies the requirements of ‘presence’ during proceedings under Section 273 of the Criminal Procedure Code, 1973,<sup>123</sup> since one can “hear and observe as if the party is in the same room”. Therefore, the objectives of in-person hearings, those of allowing the explanation of arguments orally and of making available an opportunity to respond immediately to the opposing party’s allegations, are fulfilled in video-conferencing hearings.<sup>124</sup>

### b. Specific concerns about virtual witness examinations

Virtual oral arguments have not faced as much resistance as virtual witness examination. Concerns about witness examination are amongst those most commonly raised in all discussions on virtual hearings. Even the Supreme Court of India has been cautious by not allowing witness examinations in virtual courts during the pandemic in states until the respective High Courts lay down requisite guidelines.<sup>125</sup>

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121 Gary Born, *Virtual Hearings: Contemporary Perspectives – Part 1*, SIAC Webinar Series.

122 *State of Maharashtra v. Praful B. Desai*, (2003) 4 SCC 601 ¶¶ 19-20.

123 Section 273 CrPC requires that all “all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused”.

124 See Kaufmann-Kohler and Schultz, *Information Technology in International Arbitration*, p. 38; Thomas Schultz, *Information Technology in International Arbitration: A Practitioners’ Guide* (2006), p. 113; O. Cachard, *Electronic Arbitration*, 2003, p. 35. Available at: [https://unctad.org/en/Docs/edmmisc232add20\\_en.pdf](https://unctad.org/en/Docs/edmmisc232add20_en.pdf).

125 *In Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic*, Supreme Court, Suo Motu Writ (Civil) No.5/2020, ¶ 6(vi).

The primary concern is that a tribunals view on the credibility of the witness during examination would be affected for a lack of perception of the witness' body language and demeanour. These considerations are arguably less significant in arbitration given the commercial nature of the disputes that more dependent on records than witness credibility.<sup>126</sup> Nevertheless, even in the context of criminal proceedings, the Supreme Court of India concluded that witness' demeanour is clearly visible and that credibility can adequately be assessed, when technology works effectively.<sup>127</sup> An identical opinion has been shared by arbitrators that have conducted virtual examinations regularly.<sup>128</sup> Virtual witness examinations have been permitted by Indian Courts in the past.<sup>129</sup> Therefore, the right to an oral hearing under Section 24 of the IACA, for the presentation of evidence or for oral argument may be satisfied by virtual hearings.

### c. Compelling virtual hearings

Parties may, for *bona fide* due process concerns or as dilatory tactics, object to virtual hearings. As discussed, there is no recognised right to an in-person hearing that would exclude a virtual hearing found necessary by the tribunal. Therefore, a request for an oral hearing could be granted in the absence of opposing party's consent. In the absence of mutual party agreement, the tribunal can certainly determine the appropriate method to conduct the hearing per its powers under Section 19(3) read with Section 24 of the IACA.<sup>130</sup> However, in the face of opposition by both parties, this would be ill advised.

In directing a virtual hearing despite the objection by a party, the tribunal must view the dispute holistically to decide if it can be heard virtually, either entirely or partially. The tribunal must carefully consider the nature and complexity of the dispute.<sup>131</sup> For instance, while it might be convenient in simple contractual disputes, it might not be as optimum for complex construction disputes that include multiple parties, multiple claims and voluminous evidence.<sup>132</sup> Similarly, cases in which the outcome of the dispute is heavily dependent on the

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126 Justice RV Raveendran, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0. The Supreme Court has similarly examined the nature of the dispute before it, when determining the suitability of videoconferencing in hearings. It distinguished previous cases, stating that the case before it was a matrimonial dispute requiring the physical presence of the disputing couple. See *Santhini v. Vijay Venkatesh*, (2018) 1 SCC 1 ¶ 33.

127 *State of Maharashtra v. Praful B Desai*, (2003) 4 SCC 601 ¶ 20.

128 Justice RV Raveendran, *Arbitration in the New Normal*, Launch of Indian Arbitration Forum Guidelines 2.0; Maxi Scherer, *Virtual Arbitration*, 4-5 Podcast (6 May 2020). Available at: <https://www.youtube.com/watch?v=wK-zi17GtNQ&feature=youtu.be>

129 *IPPF v. Madhu Bala Nath*, AIR 2016 Del 71; *20th Century Fox Films Corp. v. NRI Film Production*, ILR 2003 KAR 789.

130 *Sahyadri Earth Movers v. L & T Finance Ltd and Anr.*, 2011 SCC OnLine Bom 434, ¶ 6.

131 Yas Banifatemi, *Will COVID-19 Revolutionize Arbitration? What's Next for Business and Arbitration?*, TGS Baltic Webinar.

132 Tadas Varapnickas, *Will COVID-19 Revolutionize Arbitration? What's Next for Business and Arbitration?*, TGS Baltic Webinar.

credibility of a witness have been considered inappropriate.<sup>133</sup>

Additional considerations include delays caused and costs incurred in coordinating in-person hearings. In the context of the pandemic, delays could last for months until travel restrictions are completely relaxed.<sup>134</sup> The severe economic impact of the COVID-19 pandemic could necessitate cost-effective virtual solutions.<sup>135</sup> However, the tribunal must not take for granted the ability of all the participants, necessary to the hearing, to connect to and avail the required technical facilities.<sup>136</sup> The tribunal must exercise caution and exercise discretion by carefully balancing the parties' rights.

## 2. Complexity of the videoconferencing platform

Concerns may be raised by a party that the complexity of the technology (such as the videoconferencing platform or the document sharing software) being used is inhibiting its ability to allege facts, submit arguments, or produce evidence.<sup>137</sup> However, these technologies are widely and regularly used for commercial and business meetings and their popularity has led to developers ensuring they are highly user-friendly interfaces, even for individuals who are not especially tech-savvy. Most lawyers and arbitrators would have a basic understanding of these software. This is more so the case in the COVID-19 era where everyone has been compelled to use this software. The UK Insolvency and Company Court recently, ruling on an adjournment application, rejected the argument that the legal team had no experience with the video-conferencing platform Skype, and that there was insufficient time to learn and be able to participate fully and fairly. The Judge stated that the lawyers can and must equip themselves with the experience and practise of using the platform.<sup>138</sup>

The lack of technical know-how may be a graver concern among arbitrators and parties in India. However, the ease of use should be a matter for consideration at the time of selection of the technology. Parties' agreement on the technology to be used, when sought at the time of the case management conference, would in principle prevent such concerns for the parties

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133 Alastair Henderson, *Minimising the Impact of COVID-19 on Arbitrations: A Guide for Counsel and Arbitrators*, SIAC Webinar Series; Nish Shetty, *Strategies for Effective Oral Advocacy & Cross-Examination for Virtual Hearings: A Guide for Counsel*, SIAC Webinar Series.

134 Maxi Scherer, *Online Hearing Against the Wish of One Party*, SCC Online Seminar Series.

135 Emmanuel Gaillard, *Will COVID-19 Revolutionize Arbitration? What's Next for Business and Arbitration?*, TGS Baltic Webinar.

136 *Capic v. Ford Motor Company of Australia Limited (Adjournment)*, [2020] FCA 486.

137 Kaufmann-Kohler and Schultz, *Information Technology in International Arbitration*, p. 38; Thomas Schultz, *Information Technology in International Arbitration: A Practitioner's Guide*, p. 108.

138 *Re: Smith Technologies* (Unreported 26th March 2020), cited in *Municipio de Mariana & Ors v. BHP Group PLC & Ors* [2020] EWHC 928 (TCC); *National Bank of Kazakhstan v. Bank of New York Mellon* (Unreported), 19 March 2020.

would have consented to the technology to be used, which would naturally reflect their comfort with the technology.<sup>139</sup>

In the case that the tribunal directs the use of a particular technology, it must keep in mind the technical abilities of all participants and the user-friendly character of the technology. The tutorials and orientation by the appointed technical support will play a significant role in this context. This phase should be used by the parties to raise concerns relating to their right to be heard, which may result in the tribunal requesting additional help to a party by the technical support, or a replacement of the technology.

### 3. Limitations on the opportunity to present one's case

The shortcomings of virtual hearings require arbitrators to reduce procedure by limiting discovery, witness testimony and oral arguments per necessity.<sup>140</sup> However such power to conduct and simplify the proceedings is subject to the arbitration agreement.<sup>141</sup>

It is in the absence of such agreement, specifying the procedure, that requires discussion. In such cases the tribunal has the discretion to conduct the proceedings as it deems appropriate.<sup>142</sup> The parties are required to comply with the procedural orders and directions from the tribunal, including those imposing limits on the time and content of submissions and evidence.<sup>143</sup>

The tribunal must be cautious in exercising its procedural discretion, and ensure that the parties have a full opportunity to present their case.<sup>144</sup> In this regard, the tribunal must pay attention to the specific facts of a case and adopt a flexible approach as the needs of the case dictate.<sup>145</sup>

#### a. Limiting oral hearings

The tribunal may wish to have a documents-only procedure, or at least impose limitation on the length of the oral arguments and oral evidence, since those will be conducted over videoconferencing, which are subject to variables outside the control of the participants. The parties may still request for an oral hearing. In such a situation, can the tribunal refuse or limit

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139 Thomas Schultz, *Information Technology in International Arbitration: A Practitioner's Guide* (2006) , p.109.

140 See *supra* § III[C].

141 IACA, ss. 19 and 24.

142 IACA, s. 19; *Sukhbir Singh v. Hindustan Petroleum Corp.*, 2020 SCCOnLine Del 228; (2020) 266 DLT 612 ¶ 28.

143 *Narendra Kumar Anchalia v. Krishna Kumar Mundhra*, (2003) 3 ICC 49 (Cal) (DB) ¶ 35.

144 *Sukhbir Singh v. Hindustan Petroleum Corp.*, 2020 SCCOnLine Del 228; (2020) 266 DLT 612 ¶ 26.

145 *Narendra Kumar Anchalia v. Krishna Kumar Mundhra*, 2002 SCC OnLine Cal 485: (2003) 3 ICC 49 (Cal) (DB) ¶ 35.

oral arguments and evidence?

Section 24(1) of the IACA permits the tribunal to determine whether to hold oral hearings or not. The proviso to Section 24(1), however, states that the tribunal shall hold oral hearings, if a party requests for it. The mandatory text of the provision confirms that the tribunal cannot refuse oral arguments and oral evidence in such cases.<sup>146</sup>

Though the parties have a right to an oral hearing to present their case, this right is not unfettered, and the tribunal may impose limitations on the time and content of evidence and arguments when managing the hearing.<sup>147</sup> As the Delhi High Court has stated in *Sukhbir Singh v. Hindustan Petroleum Corp.*:<sup>148</sup>

The right granted in Section 24 does not require an Arbitral Tribunal to countenance unending cross-examination or oral arguments. It is always open to the arbitrator to determine the length and scope of oral hearings, which would necessarily depend upon the facts and circumstances of each case. If a party seeks oral evidence, for example, the Tribunal may be able, after hearing the parties, to determine the points on which evidence is to be led. Similarly, arbitrators can set appropriate time limits for oral arguments. The arbitrators can require an application to be filed by the concerned party, setting out the necessary material to enable the Tribunal to determine these matters. [...] These matters remain squarely in the domain of the Arbitral Tribunal.

The tribunal therefore, in limiting the proceedings, must ensure that the parties' right to be heard is preserved. It would be safest to seek party agreement on the mode and scope of the hearing at the appropriate stages so as to preclude any challenges to the award by way of estoppel.<sup>149</sup>

#### b. Limiting document discovery

Similarly, it is recommended that discovery be limited in its scope to increase the efficiency of the proceedings.<sup>150</sup> The tribunal has the discretion to determine how evidence will be gathered and submitted to it in the absence of the parties' agreement, as long as it ensures that the parties have been given a full opportunity to present their case.<sup>151</sup>

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146 *Sukhbir Singh v. Hindustan Petroleum Corp.*, 2020 SCCOnLine Del 228, ¶ 44; *ADV Consultant v. Pioneer Equity Trade (India) Pvt. Ltd.*, (2009) 8 Mad LJ 1578; *Vinay Bubna v. Yogesh Mehta & Ors.*, (1998) 4 Bom CR 849 ¶ 59; *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, UNCITRAL Y.B. 1985(XXV), p. 54.

147 *Narendra Kumar Anchalia v. Krishna Kumar Mundhra*, 2002 SCC OnLine Cal 485; (2003) 3 ICC 49 (Cal) (DB) ¶ 35; *Sohan Lal Gupta v. Asha Devi Gupta*, (2003) 7 SCC 492 ¶ 22.

148 *Sukhbir Singh v. Hindustan Petroleum Corp.*, 2020 SCCOnLine Del 228, (2020) 266 DLT 612 ¶ 46.

149 *Jagjeet Singh Lyallpuri v. Unitop Apartments and Builders*, (2020) 2 SCC 279 ¶ 14.

150 See *supra* § III[D][2].

151 *Thyssen Krupp Werkstoffe GmbH v. SAIL*, (2011) 123 DRJ 724 (DB), ¶¶ 3, 6-7.

The Delhi High Court, in *Union of India v. Reliance Industries Ltd. and Ors.*<sup>152</sup>, stated that dismissal of a request for discovery by the arbitrator was not violative of the parties' rights under Section 18 of the IACA. The arbitrator's reasoning in the case, that received approval from the court, emphasised that when deciding on a request for electronic discovery, the tribunal must examine whether the documents are necessary to decide the matter in issue. While exercising its discretion, the tribunal must pay heed to "expediency, justness and relevance of the documents keeping in mind the matter in issue."<sup>153</sup> Therefore, the tribunal may exercise its discretion in limiting the scope of discovery to strictly what it finds necessary.

#### 4. Disconnections and ex-parte communications

Disconnections or poor connections can lead to a party being unable to hear or 'be present' during the submission of opposing counsel or while other participants are speaking, which would inhibit its ability to react and respond to developments in the proceeding. This could lead to a violation of a party's right to present its case properly. Each party has a right to remain present at the hearing<sup>154</sup> and the arbitral tribunal is not to exclude either party even from a portion of hearing without the consent of such party.<sup>155</sup>

Prof. Schultz states that the right to be heard in this context would be violated, if the following two conditions are fulfilled: firstly, that sufficiently substantial information is exchanged while one party did not have access to the hearing, and secondly, that the tribunal refused to replay or provide a transcript of the submissions, allowing the opposing party to respond.<sup>156</sup>

The contingency measures discussed above will ensure that the presiding arbitrator either halts the proceedings till the party's connection is restored, or ensures that the proceedings are recorded, to allow the opposing party to respond at a later time.

#### 5. Inaccessibility to the record

The right to be heard includes equal access to all the documents that are shared with the tribunal, to protect the parties' right to comment on evidence and other written submissions.<sup>157</sup>

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152 *Union of India v. Reliance Industries Ltd. and Others*, 2018 SCC OnLine Del 13018 ¶41-2.

153 *Ibid.*

154 *Lohia Jute Press (P) Ltd. v. The New India Assurance Co. Ltd.* AIR 1998 Calcutta 174 ¶ 18.

155 *Rudramuni Devaru v. Shrimad Maharaj Niranjan Jagadguru*, AIR 2005 Karnataka 313 ¶ 21.

156 Thomas Schultz, *Information Technology in International Arbitration: A Practitioners Guide*, p. 115 (2006).

157 *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131 ¶51.

Under Section 24(3) of the IACA, all statements, documents, or other information supplied by one party to the arbitral tribunal shall be communicated to the other party. Where materials are taken in the absence of either parties' knowledge by the tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) of the IACA would be made out.<sup>158</sup> Therefore, it must be ensured that all documents are uploaded onto the database and that the database is accessible to both parties. However, no party should misuse its access to the database, and tamper with the record.

## B. Equal treatment

Section 18 of the IACA, states that 'the parties shall be treated equally'. The right to equal treatment ensures that both are at an equal footing and neither party is disadvantaged vis-à-vis the other party during the proceeding.

### 1. Inequality in technological means

An inequality in the available technology (internet connection, camera quality, etc.) are objections to virtual hearings that have been raised for many years now.<sup>159</sup> These concerns are legitimate, since the poor quality of audio and video during the proceedings would act as a disadvantage during the proceedings, and violate the equality of the parties. Such impediments in participation cannot be remedied by procedural measures, and in cases where it is found during the testing of the technology that the parties are unable to fully participate for a *bona fide* lack of technical means, the tribunal may be compelled to discard the idea of virtual hearings altogether.

However, the right to equal treatment does not provide parties with right to be treated identically, but only such that no party is at a disadvantage. Tribunals, therefore, may reject objections that are based on trivialities that do not substantially disadvantage the parties, and are merely raised for dilatory purposes.

### 2. Restrictions on travel

Virtual hearings are a creature of compulsion, in times of lockdown and otherwise. Such

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<sup>158</sup> *Id*, ¶152 citing Reinard Wolff, *New York Convention on the Recognition and Enforcement of Awards – Commentary* (2012); *Rudramuni Devaru v. Shrimad Maharaj Niranjana Jagadguru*, AIR 2005 Karnataka 313 ¶ 21.

<sup>159</sup> O. Cachard, *Electronic Arbitration*, p. 35.

circumstances could cause peculiar situations where a certain group of the participants are able to meet while others are not.

**One party in-person while other remote:** Would a party's right to equal treatment be affected if it cannot appear in-person while the other party can? As discussed earlier, there are no impediments on a party's ability to present its case in the case of virtual hearings, and therefore, there should be no inequality if one party is present physically while the other participates over video conferencing. However, according to the CI Arb Guidance Note on Remote Dispute Resolution Proceedings, unless the parties agree otherwise, '[i]n the interests of equality, it is preferable that if one party must appear to the tribunal remotely, both parties should do so'.<sup>160</sup>

**Restrictions on particular participants:** Limitations on movement, for instance due to the ongoing lockdowns, could provide the legal team of one party the luxury of being together, in the same room, while the other party's legal team is compelled to argue from remote locations. This may be seen to provide one party with an advantage in arguing their case, and therefore a violation of the equality of the parties.<sup>161</sup> Similarly, two of the three tribunal members may be in a position to meet and deliberate while the third arbitrator might not. This too could raise questions as to the propriety of the deliberations within the tribunal, with the underlying assumption that greater comradery develops between the two arbitrators that deliberate in physical proximity while the third arbitrator joins meetings virtually.<sup>162</sup> However, to request all participants, regardless of any pressing need, to operate remotely seems to be an inefficient solution to the problem.

## C. Other procedural issues

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### 1. Confidentiality

Even in the absence of express terms in the agreement, confidentiality is an implied requirement in arbitration.<sup>163</sup> Section 42A of the IACA states in mandatory terms that the 'the arbitrator, the arbitral institution and the parties to the arbitration agreement shall

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<sup>160</sup> CI Arb Guidance Note on Remote Proceedings, p. 3-4, ¶ 1.6.

<sup>161</sup> Kent Phillips, *Strategies for Effective Oral Advocacy & Cross-Examination for Virtual Hearings: A Guide for Counsel*, SIAC Webinar Series.

<sup>162</sup> Sheila Ahuja, *Strategies for Effective Oral Advocacy & Cross-Examination for Virtual Hearings: A Guide for Counsel*, SIAC Webinar Series.

<sup>163</sup> *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anr.*, [2008] 5 MLJ 254.

maintain confidentiality of all arbitral proceedings'. This obligation is therefore not applicable to other participants such as the witnesses, the technical support, tribunal assistants, secretaries, transcribers, and other persons that are involved in the virtual arbitration.

The mandatory text of Section 42A seems to suggest that a violation of this obligation would lead to the single consequence of the annulment of the award under Section 34(2)(a)(v), which states that an award may be set aside if the arbitral procedure is not in accordance with a non-derogable provision of law. There are no judicial precedents on this provision, since it was recently introduced, and courts may find it to be directory and not mandatory despite the wording of the provision.<sup>164</sup>

However, tribunals should prevent any opportunistic behaviour this may promote for parties wishing to annul the award in bad faith. It must do so by addressing this issue at the very start of the proceedings, as recommended above, and imposing sanctions for a breach of confidentiality on all the participants in the confidentiality agreement.<sup>165</sup>

## 2. Data protection

Complex issues of data protection arise when there is an excessive exchange of data. In a virtual arbitration, this includes the sharing of names, addresses and email addresses, recording of video calls, maintaining a record of the proceedings, exchanging and storing of documents, and a lot more.

These issues have been discussed in the context of international arbitration, where supranational legal frameworks such as the EU General Data Protection Regulation ('GDPR') create significant compliance requirements. With the recent tabling of the Personal Data Protection Bill, 2019, these issues will become highly relevant not only in virtual arbitration, but in Indian arbitration as a whole. This is clear from the Justice B.N. Krishna Report on Data Protection, which categorically lists the IACA as a legislation likely to be affected by the newly introduced data protection principles.<sup>166</sup>

Therefore, arbitrators and parties must be very careful in ensuring mechanisms of data

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164 See Tejas Karia, Avlokita Rajvi and Ameer Rana, *NPAC's Arbitration Review: New Confidentiality provision in the Indian Arbitration Act*, Bar and Bench, September 30, 2019. Available at: <https://www.barandbench.com/columns/npac-arbitration-review-confidentiality-provision-indian-arbitration-act>.

165 See *supra* § III[B][6].

166 Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *Committee Report on Draft Data Protection Bill, 2018*, Annexure C, ¶ E.

protection that are compliant with the new law.

While an extensive analysis of the data protection bill is beyond the scope of this guide, we have briefly outlined a few principles adopted in the Personal Data Protection Bill from the GDPR that can help arbitrators ensure effective data protection in India. In this regard, it would be advisable to include these principles in an agreement signed by all participants, as mandatory compliance requirements. The ICCA-NYC Bar-CPR Cybersecurity Protocol in International Arbitration can also be referred to in the specific context of arbitration.

**Processing of data:** Processing includes collection, recording, organisation, storage, adaptation, alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, erasure or destruction of data.<sup>167</sup> Therefore, any such process in the arbitral process will be subject to the applicable principles of data protection. These could include storage of documents in the document sharing platform, storing and recording content of witness testimony or oral arguments, recordings of participants during the proceedings, etc.

**Fair and Reasonable Processing:** This principle emphasises the fair and reasonable processing of data. Therefore, all participants must process data commonly accessible to them in a manner that is in the best interest of the privacy of the data principal, i.e. the participant to whom the personal data relates.<sup>168</sup> All matters not expressly addressed will be tested against the fair and reasonable standard.

**Purpose Limitation and Data Minimisation:** This principle emphasises firstly, that the purpose for which the data is processed must be clearly specified, and secondly that the data should be used only for purposes that have been consented to by the data principal.<sup>169</sup> The data minimisation principle is related, and states that the collection of data should be limited to the minimum required to fulfil the specific purpose consented to.

If the purpose of recordings of the proceedings is not specified, parties may use such recordings for unacceptable, non-consensual practices like behaviour analysis. For instance, to track the attention of an arbitrator to aid the challenge of an award,<sup>170</sup> to guide argument strategy by studying arbitrator or opposing party reactions with predictive technology, or to aid arbitrator selection. With the advancement in artificial intelligence, the possibilities are

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167 Personal Data Protection Bill, 2018, s. 3.

168 Personal Data Protection Bill, 2018, s. 5; *Committee Report on Draft Data Protection Bill, 2018*, p. 52-3.

169 *Ibid.*

170 See Ben Giaretta, *Thoughts on Virtual Hearings*, LinkedIn Article (May 5, 2020). Available at: <https://www.linkedin.com/pulse/thoughts-virtual-hearings-ben-giaretta/>.

endless. That said, these concerns need not be overstated at this juncture.

**Storage limitation:** The principle of storage limitation is closely related to that of purpose limitation. No data should be stored for a time period longer than is necessary for the fulfilment of its specified purpose. The concerns raised about the misuse of recordings could certainly be avoided if the storage of all data is in a centralised database, and all relevant information is deleted once the arbitration has concluded, or after a specified period after which a challenge cannot be pursued.

**Transparency:** Any processing that takes place must be transparent to all data principals.<sup>171</sup> Participants must be aware of what data is being processed, and how it is being processed. For instance, it must be known to all participants if they are being recorded, where such footage is being stored, and when it will be deleted.

**Exceptions:** Section 36 of the Personal Data Protection Bill partially exempts compliance with the above principles when:

- (b) disclosure of personal data is necessary for enforcing any legal right or claim, seeking any relief, defending any charge, opposing any claim, or obtaining any legal advice from an advocate in any impending legal proceeding;
- (c) processing of personal data by any court or tribunal in India is necessary for the exercise of any judicial function;

It is yet to be seen whether these exceptions would apply to arbitration.<sup>172</sup> Regardless, arbitrators should include data protection measures in line with the above to address widespread concerns about data security and increase the legitimacy of virtual arbitration. In ensuring express party consent, tribunals are also being respectful of party autonomy.

### 3. Costs

The involvement of technology could be because of a request by one party, by mutual agreement between the parties, or on the direction of the tribunal. In each scenario, the question of costs arises. The costs of the virtual hearings and the technology are included in the arbitration costs, and finally allocated as per the costs regime of the applicable procedural

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<sup>171</sup> Personal Data Protection Bill, 2018, s. 23; *Committee Report on Draft Data Protection Bill, 2018*, p. 58.

<sup>172</sup> See Tarun Krishnakumar, *Data Protection in India and Arbitration: Key Questions Ahead*, Kluwer Arbitration Blog (April 16, 2019). Available at: <http://arbitrationblog.kluwerarbitration.com/2019/04/16/data-protection-in-india-and-arbitration-key-questions-ahead/>.

law, i.e. Section 31A of the IACA. The tribunal has the discretion to allocate costs and will, as a general rule, allot the costs to the party that loses, though it may rule otherwise. Therefore, a tribunal's direction or the mutual agreement of the parties on the use of particular technology would ordinarily require the losing party to pay costs.

However, circumstances may arise where a party requests for technology that the other objects to for reasons of significant cost. While parties enjoy the right to fully present their case, this should not make the other party's participation in the proceedings onerous.<sup>173</sup> The tribunal in exercise of its procedural discretion may dismiss such request on the basis of a cost-benefit analysis,<sup>174</sup> or compel the requesting party to bear the extra costs of the technology, if any.<sup>175</sup>

#### 4. Recognition of electronic submissions

The legal relation between participants during the arbitration are governed by communications sent entirely over electronic mediums. These entail legal force by virtue of their recognition under Section 4(a) of the Information Technology Act, 2000 which states that where any law requires any information or other matter in a written form, it may instead be produced in an electronic form. Therefore, this provision lends legitimacy to all exchanges in a virtual hearing, including notices, submissions, procedural orders, evidence and the final award.

#### 5. Good faith

Virtual arbitration will raise larger issues of professional ethics and good faith. It cannot be denied that the numerous variables in a remotely conducted arbitration are often beyond supervision. Parties could engage in disruptive practices, like feigning a loss of connection. In these circumstances, the ethical behaviour of counsel, and their obligation to arbitrate in good faith takes on a whole new meaning. Arbitration as a means of dispute resolution would have failed if it suffered from a systemic lack of good faith, and therefore, these concerns should not be exaggerated. In any event, even if some acts of bad faith do go unnoticed, tribunals will inevitably recognise active attempts at dilatory tactics, and draw adverse inferences. Technology in this area will also evolve and better assist tribunals. Until then, a tribunal's responsibility is to assure parties to the maximum extent reasonably possible that party interests will be protected.

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173 *Report of the ICC Commission on Information Technology in International Arbitration*, p. 22.

174 *Id.* p. 6.

175 See Seoul Protocol on Video Conferencing, Art. 9.1. Seoul Protocol applies to cost of video-conferencing alone. However, the allocation of costs may be applied by analogy to all technology.

## V Conclusion

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Tribunals and parties are being forced to consider options like virtual hearings, to meet the necessities of these times. However, the COVID-19 pandemic might just be the push that comes to shove arbitrations in India towards greater efficiency and cost-effectiveness. The pandemic has caused a severe economic downturn and in its aftermath, businesses will be considerably more cost-sensitive. Counsel will be expected to offer the most efficient options for dispute resolution. There will, in turn, be a much greater emphasis on tribunals' obligation to conduct proceedings efficiently. Virtual procedures adopted even partially, if not for the entire arbitration, could significantly reduce the costs of travel, and of organising physical hearings.

For the practice of virtual arbitration to outlive the pandemic in India, the undeniable challenges that come with conducting virtual hearings must be addressed. If change is a constant, so is resistance to change. Admittedly, counsel would have to make great efforts to adapt to virtual procedures. For instance, the Chairman of the Bar Council of India recently expressed his apprehensions towards the adoption of virtual court hearings after the lockdown, stating that a large majority of the judges and lawyers lack technical know-how.<sup>176</sup> Unfamiliarity with technology seems to be the major concern for arbitration as well. The Indian arbitration community thus, would have to acquaint itself with the technology and management of virtual arbitrations. Most procedural anxieties can be cured with the selection of the right tools, along with hands-on case management and effective protocols. It was with this objective that this guide was prepared.

As discussed in Part II, parties will have to identify their interests and concerns before making any choices of technology to be used in the arbitration. There are a variety of choices, be it individual options for each step of the arbitration, or third-party services that provide a one-stop shop solution. While virtual arbitrations are generally cost-effective, costs accrued will increase depending on the sophistication of the technology employed. As one may observe from the guide, there is a lot of infrastructural and administrative support required to oversee an efficient virtual arbitration. Thus, institutions are in a better position

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<sup>176</sup> Shruti Mahajan, *Continuing Virtual Hearings after lockdown "impractical", 90% lawyers, judges unaware of technology: BCI Chairman writes to the CJI*, Bar and Bench (28 Apr 2020). Available at: <https://www.barandbench.com/news/continuing-virtual-hearings-after-lockdown-impractical-90-lawyers-judges-unaware-of-technology-bci-chairman-writes-to-the-cji>.

to equip themselves to administer and provide the necessary facilities. An *ad hoc* tribunal in comparison may find it a lot more challenging while balancing their existing duties of deciding the dispute. Institutions in India may use this opportunity to become more attractive to parties by promptly preparing themselves with the infrastructure to administer virtual arbitrations.

While most due process concerns in virtual arbitration are surmountable with the appropriate technology, these should not be understated. Part III shows that tribunals and parties must be proactive in ensuring that the procedure and protocol in their arbitrations are appropriately adapted to accommodate the technology. This includes protocol to manage technology, oversee the hearings and even administer the collection of evidence. Effective communication between tribunals and parties via case management conferences will go a long way in identifying party interests and strategising the proceedings to place the specific circumstances of the dispute in the virtual arbitration framework.

Most importantly, the protocols and case management strategies must be mindful of the parties' procedural rights under the applicable law. Part IV has discussed the likely due process challenges that may undermine the award given the technological framework and case management strategies mentioned in the previous parts. It has also addressed other procedural considerations, like data security and the lack of good faith, that could threaten the legitimacy of virtual arbitration.

The beauty of private justice is that it is uninhibited in its endeavour for tailor-made efficiency. The participation of technology will only further this endeavour. Virtual arbitration is certainly going to play a role in the future of arbitration. The question is, to what extent? One must always be mindful of the circumstances that permit a virtual arbitration, and not opt for these solutions indiscriminately. This guide has been designed to help parties, arbitrators and counsel make an informed choice in their pursuit of efficient justice.



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