

## ARBITRATION & ALTERNATIVE DISPUTE RESOLUTION

### DISPUTE RESOLUTION IN THE CLOUD

The rapid spread of the Covid-19 pandemic gatherings has inflicted a seismic shock on the conventional, civil administration of justice. There are extremely encouraging signs that the courts are responding swiftly and innovatively to the imposition of strict governmental restrictions on movement to create infrastructure for remote hearings, though it will be exceedingly challenging to match the routine workload of the civil courts. Many commentators are predicting that it may be Autumn before ordinary court listings resume.

Arbitration and Alternative Dispute Resolution, meanwhile, are well positioned to embrace tech-solutions and offer an agile response to the exceptional necessities of the current pandemic.

Arbitration and other forms of Alternative Dispute Resolution are eminently suited to online platforms and video-conferencing technology. Indeed, the continuation of dispute resolution by other modes over the coming months is hugely important, if the potentially severe economic toll of a very human health crisis is to be mitigated. As private processes, arbitration and ADR are unburdened by the requirement to facilitate open justice, and the parties have the freedom to choose from a wide variety of technological platforms for remote hearings that accommodate their needs and budgets.

In the first part of a two-part article, we focus on arbitration and in the second part we consider the implications for mediation.

In the context of remote arbitrations, we identify some headline considerations which parties and arbitrators may wish to consider and provisionally suggest certain recommendations around protocols that they may need to address:

#### A. FACILITIES

1. Whilst some directions hearings can be conducted using simple conventional teleconferencing, more substantive hearing will benefit significantly from video-conferencing with document - sharing capacity. The following requirements are essential for most effective remote arbitrations:
  - Party and representative computer access with high quality broadband internet connection;
  - Microphone (ideally with echo cancellation) and video/web camera;
  - Video Conferencing software (more developed remote hearing software/platforms are optional);

See the Seoul Protocol below for further recommendations on optimal technical specifications.

2. The Parties should use best efforts to ensure that the connection and the facilities are in working order. Some person with technological know-how should be available on-call at the respective venues if difficulties arise during the hearing.
3. A test-hearing should be convened in advance of any scheduled hearing.
4. Parties should also make arrangements to minimise disturbances at their dial-in venues.

#### B. PLATFORMS

1. There are a wide variety of platforms available which can be divided into two broad categories:
  - *Standard Video-conferencing platforms*

- *Remote Trial/Dispute Resolution Platforms*

2. **Standard Videoconferencing:** There a wide variety of easily accessible web and app-based video-conferencing systems available such as *Zoom Pro, Microsoft Teams, Cisco TelePresence, Skype for Business, Webex, Blue Jeans, Loopups, and Google Hangouts.*

The following functionalities are strongly desirable:

- Screenshot;
- White-boarding;
- Chat functionality;
- Waiting Room pending the convening of the arbitration/mediation;
- Breakout rooms to allow parties conduct internal discussions (this can also be implemented by use of a parallel video-conferencing platform.)

If using standard videoconferencing, using an agreed E-bundle is very important.

3. **Digital Hearing Platforms:** These are enhanced party-paid software applications for digital presentation and conduct of remote hearings. Most offer integrated video-conferencing functionality. They can offer significant enhanced functionality from the alternative combinations of videoconferencing and pdf file sharing options. *TrialView* is a Dublin-based remote hearing solution with integrated videoconferencing and e-bundling, and *Opus 2 Magnum* also offers a digital trial platform. *Arbisolve* is another Dublin-based online arbitration service and other platforms include *Modron*, and specifically for mediation, *Immediation*.

### C. HEARING BUNDLES

4. Many digital hearing platforms integrate indexation and hyperlinking of presentation materials. If a digital hearing platform is not being used, it is important that there should be consistent protocols around preparation of E-bundles to ensure all parties and representatives are using common materials.
5. Separate PDF Booklets might be directed at the arbitrator's discretion for Pleadings, Authorities, Core Booklets, or each Witness.
6. Pagination and indexation should be essential (and the pagination should match the PDF document) and bookmarking and hyperlink should be strongly encouraged.

### D. PRE-TRIAL PREPARATION

1. The hearing platform or video-conferencing tool should be agreed between the parties and approved by the Tribunal, or in default of agreement, be directed by the Tribunal.
2. The Tribunal should direct the appropriate form and format of E-bundles in consultation with the parties.
3. Parties should agree E-Bundles and submit them to the Arbitrator in good time in advance of the hearing in accordance with directions. Alternatively, parties may use a data room or secure remote server to upload E-Bundles. Alternative directions may be made for subsequent advance circulation of individual witness bundles.

4. The Tribunal will normally wish to carry out a series of pre-trial directions hearings. These can be conducted by teleconferencing if preferred, but some should probably involve using the intended hearing platform or videoconferencing tool to familiarise participants with usage.
5. *Recording Facilities:* recordings of the video conference shall be taken without leave of the Tribunal, but arrangements should be made for official recording of the arbitration if appropriate.
6. *Participants:* The intended participants for the remote hearing and all who will be present at remote venues should be notified to the Arbitrator and the parties and circulated no later than 24 hours in advance of the hearing. Where multiple persons are located at one venue, the seating arrangements should be organised in advance to ensure all participants are visible.
7. *Hearing Invites:* The Tribunal or a designated assistant will be responsible for circulating Hearing Invites to the identified parties. Consideration should be given to passwords or other login requirements to control access to the venue.
8. *Witnesses:* Parties should make preparation for the attendance of, or remote access for, any witnesses. Any persons who will be in the same room as a Witness should be identified in advance and only permitted in accordance with the arbitrator's directions.
9. *Back-Up Plan:* The parties should submit a back-up plan to the arbitrator for approval in the event there are communication or technological difficulties. This may include cancelling video functionality when not required, to reduce bandwidth drain.

#### **E. WITNESSES**

10. The venue at which any Witness is giving evidence should allow a reasonable part of the interior of the room in which the Witness is located to be shown on screen.
11. Oath or Affirmations should be administered remotely.
12. The Witness may give evidence at an empty desk or standing at a lectern, the Witness's face and upper body should be clearly visible during testimony.

#### **F. THE HEARING**

13. *Initiation:* The Tribunal or designated individual will log-in to the remote venue in good time for the scheduled hearing time. The parties will have been previously invited to the hearing, and once they have all joined the remote Venue, the hearing will convene.
14. *Right of Audience:* At the Tribunal's discretion, only the lead advocates will have a right to address the hearing, save where the Tribunal directs.
15. *Active Speaker:* The active speaker at any one time can be displayed/highlighted on screen. This is useful to identify who is actively communicating, and to limit accidental interruptions.
16. *Document Display:* If possible, any document being referred to should be displayed on screen at the same time as a witness is being examined or a representative is making submissions. All digital

trial platforms facilitate this, and this can be achieved with screen sharing on many video-conferencing applications.

17. *Recording*: The hearing may be recorded by Tribunal or at its direction. The parties and their legal representatives would not be permitted to record the hearing save with express permission.
18. *Stenography*: Arrangements might be made for private stenography services with the Tribunal's permission.

#### **FURTHER RESOURCES**

Seoul Protocol on Video Conferencing in International Arbitration

Chartered Institute of Arbitrators, Consultation Document on Witness Conferencing Guidelines

IBA Technology Resources for Arbitration