

## Videoconferencing in International Arbitration and Mediation Proceedings

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

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

This article explores the use of videoconferencing in international arbitration and mediation. Its goal is to briefly introduce the technologies, discuss videoconferencing's past and current status in international arbitration and mediation practice, provide an example of its usage from an early international arbitration-mediation in which the author of this article participated, provide updates on video technology and its impact on the process, provide some links to helpful contemporary articles, and finally summarize its benefits and shortcomings, noting which circumstances are most appropriate for its best use.

The videoconferencing option is attracting more attention at this time (March 2020) because of the outbreak of the COVID-19 virus, which is causing travel to be restricted by airlines and other carriers, governments, other organizations and individuals. This will be discussed further along in this article<sup>1</sup>.

## §2 Use of Videoconferencing in International Arbitration and Mediation Cases

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

This technique has grown rapidly since its inception in the mid 1990s. Videoconferencing is now an attractive alternative to live organizational meetings of all kinds because of corporate cost containment measures following the steep telecom, dot-

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<sup>1</sup> For a wider view of the effect of COVID-19 on international arbitration, see (1) "How Will the Coronavirus Affect International Arbitration?" by Gary Benton, on the Kluwer Arbitration Blog, March 13, 2020, at

<http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/>

and (2) "What the Coronavirus Means for Arbitration and Mediation" by Jeff Benz, *Law360*, March 4, 2020 at

[https://www.law360.com/internationalarbitration/articles/1249725/what-the-coronavirus-means-for-arbitration-and-mediation?nl\\_pk=c4528b46-ebd4-4a37-9fed-45284f8e5f60&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=internationalarbitration&read\\_more=1](https://www.law360.com/internationalarbitration/articles/1249725/what-the-coronavirus-means-for-arbitration-and-mediation?nl_pk=c4528b46-ebd4-4a37-9fed-45284f8e5f60&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&read_more=1)

com and stock market declines of 2001, a corresponding oversupply of inexpensive long distance communication capacity, and the cost of fuel, post 9/11 security measures, and more recently the COVID-19 virus pandemic which have complicated all kinds of travel. These factors, together with more cost-effective video technology, have created a new recipe for conducting meetings.

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

With these improvements, videoconferencing made its debut in mediation around 2002. A number of articles have been written on the use of videoconferencing in domestic U.S. mediations,<sup>2</sup> however articles or other discussions exploring its use and advantages to resolve international commercial disputes were much more limited.

Let's fast forward to just ahead of the 2020 Coronavirus pandemic. In September 2019, the Korean Commercial Arbitration Board (KCAB), with inputs from the Seoul International Dispute Resolution Centre (SIDRC) created the Seoul Protocol on Videoconferencing in International Arbitration (“the Seoul Protocol”). The Seoul Protocol covers both operational and technical aspects of use of videoconferencing in international arbitration. The operational aspects deal with basic requirements for the facility to be used, positioning of witnesses and interpreters, role of the tribunal, etc. The technical aspects differ between traditional ISDN-based video and web-based video<sup>3</sup>. This represents a significant step forward in attempting to set uniform standards across borders for videoconferencing in international arbitration. Although the technical standards required for videoconference mediations would probably be similar, some of the operational aspects required might be even stricter, given the heightened need to perceive non-verbal cues by the parties, counsel and mediator during mediation sessions, which are usually based more on negotiation and psychology than law.

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<sup>2</sup> See, e.g., “Mediation by videoconferencing—nothing is lost,” by Michelle Lore, *Minnesota Lawyer*, Nov. 15, 2004; “Judicial Council of California Model Self-Help Centers Pilot,” dealing with use of videoconference mediation sessions in cases involving child custody, visitation, and domestic violence, [www.courtinfo.ca.gov/reference/rfp/documents/pgmdesc.pdf](http://www.courtinfo.ca.gov/reference/rfp/documents/pgmdesc.pdf).

<sup>3</sup> For a press release from the KCAB and the full Protocol text, see [http://www.kcabinternational.or.kr/user/Board/comm\\_notice\\_view.do?BBS\\_NO=548&BD\\_NO=169&CURRENT\\_MENU\\_CODE=MENU0025&TOP\\_MENU\\_CODE=MENU0024](http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024)

### § 3 Videoconferencing in International Arbitral Institutions and Legislation

#### a) Institutions

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

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

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

For the author of this article, as an arbitrator in a 2006 AAA/ICDR case involving Brazilian and U.S. parties, our panel heard testimony by videoconference from witnesses in Brazil and New York who were being questioned by attorneys sitting in Miami with us. The image and sound quality from both São Paulo and New York were equally excellent, aided, in part, by good equipment and pre-testing from the Miami sites of large law firms with their own in-house special videoconference equipment. As a result of this positive experience, in another ICDR case from India not long afterwards, our panel considered taking testimony by videoconference from the principal witness who resided there, although the case was resolved before this was necessary.

In still another IDR arbitration from 2008 involving witnesses in China, our panel

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

It is worth noting here that since then, many offices of the AAA have installed their own videoconferencing equipment available for use on-site. Previously, these offices only had hookups available for parties who brought in their own equipment. And as communications have become more web-based with the advent of low-cost fiber optic cable, the AAA/ICDR now offer access to decentralized videoconference platforms like Zoom where participants may conduct proceedings without going to the AAA/ICDR offices to do so.

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

Another recent document worth reviewing is the Delos Checklist on Holding Arbitration & Mediation Hearings in Times of COVID-19<sup>4</sup>. Among other suggestions, it advises the parties to discuss in advance of the videoconference **whether or not it will be recorded**.

#### b) Legislation and court practice – a brief note

Although it is not the purpose of this article to research all existing legislation and court practice worldwide regarding use of videoconferencing, we note that it has been explicitly authorized in some arbitration legislation. Colombia's Law 1563 on Arbitration which took effect in October 2012 provides for use of new technologies in arbitration proceedings such as virtual hearings and digital records.<sup>5</sup>

Additionally, we have learned that at least one justice at Brazil's Superior Court of Justice (STJ) has been using Skype video for hearings. The STJ is Brazil's highest non-constitutional court and is the court responsible for high-level judicial decisions dealing with arbitration. Another judge in the interior of the state of São Paulo has also begun using Skype video for court hearings.<sup>6</sup>

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<sup>4</sup> Available at <https://svamc.org/delos-checklist-covid-19/> or on the Delos website at <https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/>

<sup>5</sup> "The New National and International Arbitration Statute for Colombia" by Laura Lozano in the Association for International Arbitration (AIA) bulletin *In Touch*, November 2012, pp. 3–5.

<sup>6</sup> See the article in Portuguese "Juiz do interior de SP passa a atender advogados pelo Skype" ("Judge in the interior of the state of São Paulo begins to hear attorneys via Skype") in the legal journal *CONJUR*, 22/01/14.

#### § 4 Use of Videoconferencing in the First International Arbitration/Mediation

The advantages and disadvantages of the use of videoconferencing in international arbitrations and/or mediations are well illustrated by discussion of a 2006 case in which the author of this article was personally involved and where videoconferencing was used. The case began as an ICDR arbitration between the Claimant - this author's client Brazilian business executive - and the Respondent, a U.S.-based multinational in the energy sector. Although originating as an arbitration, it was settled by mediation using international videoconferencing.<sup>7</sup>

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

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

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

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

The original observations and suggestions in the sections below derive directly from our experience with videoconferencing in this particular case. A number of them

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<sup>7</sup> It is this author's understanding that this case marked the first time videoconferencing was used for a complete, successful mediation of an international commercial case administered by one of the major arbitral institutions, the ICDR. Indeed, William Slate, then President of the AAA, announced this fact in his keynote speech at the November 2006 Triple Colloquium (AAA/ICDR—ICC—ICSID) in New York.

have been superseded by technology changes and improvements since that time.

## § 5 Preparing for Arbitration or Mediation Sessions by Videoconference

### [1] Considering Logistics of Videoconferencing

At that time, arranging arbitration or mediation sessions by videoconference required a substantial amount of advance administrative and technical support. For this reason, it was recommended that an administering organization or body be used to coordinate all the items necessary for an arbitration or mediation by videoconference. Having technical support available – at least remotely – may still be useful, especially for a multi-site hookup. Pre-testing all sites would also still be advisable, although less advance time would probably be needed to iron out any wrinkles.

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

### [2] Considering Technical Aspects of Videoconferencing

For our pioneer mediation, the technical compatibility of the videoconference hardware, software and communication lines had to be fully coordinated between all sites, as described more fully below.

These technical aspects were more important when this article was originally written as a chapter in the Lexis-Nexis book cited at the beginning of this article. However, with the advent of Skype video, Meeting Place, Zoom, WebEx, Blue Jeans and other PC-based internet teleconferencing technology, this issue has become less important—*see* § 5[5] *below*. Certain platforms such as WebEx allow for transmission of accompanying documents, charts, etc. along with the video itself.

#### [a] System Compatibility

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

#### [b] Communication Lines

Partly because more facilities used it, ISDN was considered a more convenient communication system to utilize than IP, although it may still be advisable to use a conference facility which has both capabilities just in case. Again, the advance of broadband internet web-based communication technology has largely taken care of this issue today.

### [c] Equipment Compatibility Between Sites

In our case, for our equipment and videoconference center, we used the facilities of a Brazilian company called Estado da Arte (“State of the Art”) in São Paulo with very good results. This company also had sites in other large Brazilian cities. With the growth of videoconferencing worldwide since then, it was not difficult to locate companies like this in major cities.

However, now most videoconferencing can be done from one’s own home or office with a PC and high-speed internet for web-based connectivity.

The machine we used in São Paulo was a Polycom View Station LAN H.323, 512 MP “EASP” system. The Respondent used an in-house Polycom View Station FX. The equipment provided by the AAA in New York was tested and found to be technically compatible with ours.

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

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

### [d] Transmission Speed

In our case, we were advised in São Paulo that one other site was restricted to only 128 KBS/second for some reason (whether by deliberate choice or technical limitations, we were not sure), which speed is considered quite low for videoconferencing. Our technician warned us not to make any “brusque movements” which could upset the video. The minimum is supposed to be 256 KBS/second for good images.

Transmission speed is still very much an issue, especially when dealing with developing countries or areas which do not enjoy high-speed internet service. It is also becoming an issue in developed countries like the U.S. where social distancing from the COVID-19 pandemic has brought more people inside to work, communicate and entertain themselves online. This puts a strain on the internet and tends to slow down transmission speed<sup>8</sup>. In these situations, images can blur or freeze on the screen, making the videoconference difficult to run. The videoconference can also be disrupted by storms

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<sup>8</sup> See for example “Surging Traffic is Slowing Down our Internet”, at <https://www.nytimes.com/2020/03/26/business/coronavirus-internet-traffic-speed.html?action=click&module=Top%20Stories&pgtype=Homepage>



or other external conditions outside the control of the parties, although some storm-related disruption can be reduced if underground fiber optic cable is being used by the internet service provider (ISP). For these reasons it is highly advisable to check the speed and quality of your video transmission in advance of your videoconference, especially at international video locations.

### [e] Pre-Testing

At the time of our 2006 videoconference, because of all the technical factors requiring coordination and compatibility, it was advisable to conduct a pre-test between all the sites well in advance, possibly several days ahead, to iron out any technical problems so as not to interrupt the flow of the hearing or session. The pre-test from São Paulo only included two sites. New York ran a test with each site separately, but not with all three simultaneously, which is the preferred mode of testing. It took two hours for the hub New York site to discover the best way to connect all three sites (mediator, Claimant, Respondent), so sufficient time had to be allotted for the pre-test. Even today, it is probably wise to assume that technical glitches will crop up, so pre-testing in advance will still be a good idea.

### [f] Technical and Administrative Assistance

It was advisable for each site to have a technically qualified person on hand for the mediation, at least during the initial hook-up phase for the sites, and be close by in case problems arose afterward. For this reason, it was also wise to coordinate scheduling of the session with the technical staff for each site. Although technical compatibility is now the rule rather than the exception, technical assistance available at least remotely will continue to be helpful, as we must still expect the unexpected.

It may also be helpful to have an administrative person – not necessarily a technical expert – to “moderate” the videoconference between different virtual “rooms”, coordinate the private chats, if any, etc. so that the mediator’s attention can be fully directed to the mediation dynamics themselves. This could be done by a mediator’s assistant or staff at the sponsoring ADR institution, for example.

### [3] Video Image Quality

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

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

To replicate the atmosphere of an in-person arbitration hearing, negotiation or mediation to the extent possible, a full image of each speaker—rather than just his or her face—is important to show hand movements and other body language.

For mediations, provision must be made for private caucus sessions with the mediator and each party. This can be done in several ways. Some video platforms such as Zoom provide for separate rooms with private chat capability.

#### [4] Cost Factors

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

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

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

#### [5] Recent Impact of PCs with VOIP/web connectivity via Zoom, WebEx, Meeting Place, etc.

Our videoconference mediation was conducted in 2006. Since that time, the trend towards faster, cheaper and more effective communications technology has continued with an effect on videoconferencing. For our med-arb in 2006, it was necessary to utilize the services of special videoconferencing facilities at a relatively high cost and need to pre-test to check system compatibilities at all ends of the videoconference call. Now with VOIP technology, it is possible to have videoconferencing over the internet practically free of charge and with reasonable quality from one's own home or office via Zoom, WebEx, Meeting Place, Skype or a similar online service. The Immediation platform has been recommended as purpose built for online mediation and arbitration. These services allow for multiple connections using video and also incorporating features such as real-

time document sharing. Further, now that many of these platforms are also offered on smartphones, videoconferencing can also be mobile - no longer tied either to a videoconference center or even a specific computer location. And there is less need to pre-test far in advance or make adaptations for systems compatibility. Indeed, the videoconferencing process has become decentralized and very inexpensive, at very low cost.

### § 6 Effect of Videoconferencing on the Proceeding Itself

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

In our 2006 video mediation, there were no language issues. The mediation was conducted in English, as the Claimant was fluent in English and quite familiar with U.S. business practices. However, this may not always be the case, so care needs to be taken that video sessions are culturally acceptable in your locale. If different languages are spoken by the parties and the arbitral panel or mediator, then much more **time needs to be allocated for interpretation**, extending the period required for the videoconference session. At the same time, we cannot forget that body language and image may play more important roles in the process, so **image quality and viewing size must really be top-notch, with good lighting and background**. The author's wife Prof. Nazareth Serpa, Brazil's first private mediator, has also suggested projecting **close-up images** of each person while he or she is speaking to capture full facial and body language. This feature is available, although still mostly from the neck up, with the "Speaker View" on Zoom, by clicking on the top right side of the screen. Otherwise this might be done using a large monitor screen for the session, while having a connected laptop moved around in front of each person when they speak, with screen positioned so as to capture a fuller body image.

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

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

A negative was that certain things were compressed or overlooked to save time. The opening statements by the parties and the mutual introductions around the table from site to site, including the name, position and role of each participant, were skipped over. This affected the way the mediation unfolded, since one participant's prior role in the underlying transaction had never been disclosed and only came out midway through the

mediation session, after the other side had made critical comments about how that transaction had been conducted earlier. The criticism, which may not have been made in the same way if there had been prior knowledge of that participant's role, produced a reaction which altered the tone of the mediation. Accordingly, it is very important not to rush the beginning of the mediation, even if there are time constraints on use of the equipment or peoples' schedules. Fortunately today, time restrictions on the equipment no longer pose an issue, since it is no longer necessary to rent or use special equipment.

However, technical issues may continue to arise at the start of or even during the videoconference. Therefore it will be wise to **schedule in more time** for the video session than would otherwise be required for a live session, providing a larger window to diagnose and fix any technical glitches.

**Visual privacy** is another important aspect, especially during the caucus. Although we could not hear the mediator caucusing with the other party, we did view the caucus on our screen. From their facial expressions, body language and movements, we could sense the other side's reactions to our proposals and suppose that the same was true during our own caucus sessions. This viewing feature was undesirable, and can today be turned off, especially when the mediator controls the video process. Nowadays confidentiality of one party's deliberations can be assured in any number of ways, such as (a) using a videoconference platform which provides separate virtual "rooms" and allows for side chats via chat box; (b) disconnecting the other party from the video call of the mediator caucusing with one party alone; or (c) moving the mediator's laptop transmitting the videoconference from one room to another where different participants are located.

After both sides briefly argued over whether Claimant's disputed severance package was triggered by the proper events, the issues negotiated in the mediation came down to the amount of money to settle the matter. After arguing the merits back and forth to each other and then separately to the mediator, the parties reverted to pure positional bargaining on the numbers. This bargaining consumed much of the **time restriction** of four hours allotted to Respondent for use of its video equipment. If there had been more complex issues, then more time would have been needed for the equipment. For instance, a U.S.-Argentine commercial dispute which this author also mediated, had numerous participants and issues, and took twelve uninterrupted hours to reach a settlement. In cases with parties having limited access to video equipment and busy travel schedules, it would have been recommended to reserve extra blocs of time for the equipment and/or space in the event any new, unexpected issues were to crop up during your mediation or arbitration session. But as special videoconference equipment is no longer required, those extended reservations would not be necessary.

The results of our mediation were positive in that the case was settled to each side's satisfaction. The mediator electronically shuttled back and forth between each side, probing for weaknesses in their legal positions and conveying tacitly what it would take to settle the case. However, the videoconference did not allow time for the customary

practice of having the parties sign a summary term sheet of bullet points of the basic elements of their settlement agreement. This in turn could have reduced the parties' lengthy post-mediation negotiation of the text, since issues did arise after our video session regarding the scope of the agreement, *i.e.*, whether it went beyond what was agreed upon in the mediation session. This issue would likely not arise today where there are no longer time restrictions on use of the equipment. With screen sharing features on today's videoconference platforms, it should not be difficult for counsel to draw up a term sheet and scan/email it for parties' signatures then and there.

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

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

A worthwhile article to read with down-to-earth advice on how to prepare the participants and setting for a videoconference mediation is "Tips for Online Mediation in the Age of Social Distancing", by Sidney Kanazawa in Law360.com, March 24, 2020<sup>9</sup>. The article provides practical pointers in the areas of video images, dress, background, posture, camera angle and distance, microphone & audio reception, virtual breakout rooms, screen sharing of relevant materials, side chats, keeping participants engaged and civil, and maintaining contact. It points out important differences in these areas between video and in-person encounters and how to deal with them effectively.

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

Arbitration or mediation by videoconference has a number of **advantages**, especially in international cases. It saves substantial energy, time and money over international travel with all its issues of visas, jet lag, airport security, etc. During

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<sup>9</sup> See [https://www.law360.com/internationalarbitration/articles/1256112/tips-for-online-mediation-in-the-age-of-social-distancing?nl\\_pk=c4528b46-ebd4-4a37-9fcd-45284f8e5f60&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=internationalarbitration](https://www.law360.com/internationalarbitration/articles/1256112/tips-for-online-mediation-in-the-age-of-social-distancing?nl_pk=c4528b46-ebd4-4a37-9fcd-45284f8e5f60&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration)

periods where travel is restricted or avoided such as the coronavirus pandemic in early 2020, the advantages of videoconferencing increase many fold. And in extremely emotional cases, video can be a useful tool to keep the parties physically separate while having them participate in a joint session at the same time.

Videoconference hearings or mediation sessions offer the parties a wider geographical range from which to choose an arbitrator or mediator, sometimes necessary in international cases where geographical/cultural as well as substantive area expertise is needed. With videoconferencing, there are far fewer travel limitations on the arbitrator or mediator, meaning a larger number of qualified neutrals may be considered if the sessions are held by video. To help the neutral selection process, a number of ADR institutions such as the AAA/ICDR and Singapore International Mediation Institute (SIMI) have offered their neutrals an opportunity to add video statements to their neutral CVs, for a fee.

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

In more complex cases, presentations made by Powerpoint and other computer aids and charts can be exchanged via email as a supplement during the hearing or session, or even online via screen sharing offered by some of the higher-end videoconference services like WebEx and Zoom.

The main **disadvantages** of videoconferencing are (1) it is not in-person with a fuller range of vision, so with video, body language and other non-verbal communication cues are more difficult to perceive; (2) it may be more difficult for arbitrators to detect improper witness coaching by someone not shown on the video screen; (3) as noted by some U.S. litigators who have cases mediated, clients and their counsel will have far less coordinated teamwork in video, and their attention can be diverted more easily to other activities during the videoconference<sup>10</sup>; (4) videoconferencing does still depend on high quality, relatively high-speed internet access by all parties. This is not available everywhere; and (5) use of video may be more accepted in some cultures than others, *ie* the “social distancing” practiced in this era of COVID-19 has become easier to carry out in certain places like the U.S. where virtual communications have already been replacing interpersonal contact for some time.

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<sup>10</sup> “The Era of Video Mediation Is here – Or Is It?”, by Jeff Kichaven, *International Arbitration 360* online, April 7, 2020, at [https://www.law360.com/internationalarbitration/articles/1259828/the-era-of-video-mediation-is-here-or-is-it-?nl\\_pk=c4528b46-ebd4-4a37-9fcd-45284f8e5f60&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=internationalarbitration&read\\_more=1](https://www.law360.com/internationalarbitration/articles/1259828/the-era-of-video-mediation-is-here-or-is-it-?nl_pk=c4528b46-ebd4-4a37-9fcd-45284f8e5f60&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&read_more=1)

Also, in this day and age we must note that video transmissions – especially web-based ones, may even be **censored or monitored** in or by some countries.

**Cybersecurity** has also become a key issue nowadays, so arbitration and mediation sessions undertaken online must also pay close attention to cybersecurity matters by taking steps to keep their transmissions secure from hacking etc. Several ADR institutions have issued protocols and/or summaries of best practices in the cybersecurity area.

**Privacy** has become a concern as well. Certain videoconference services offer a public use option, without password entry. This has allowed entry of unauthorized persons who have in some cases virtually invaded the conference and projected their own material – some of questionable taste – onto the screen<sup>11</sup>. Almost needless to say, password entry into the videoconference for all authorized participants should be required.

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

1. The use of videoconferencing in international arbitrations and mediations will continue to grow. As a technology, its price-performance ratio has dramatically improved over the past several years. It is more economical in terms of time and cost, and also more physically secure than personal travel—a factor which cannot be ignored these days.

2. If videoconferencing can work well to resolve disputes such as our 2006 international commercial mediation case, it can certainly be used to good advantage in a wide variety of international arbitration settings. Videoconferencing has even better prospects to succeed in international arbitrations than in international mediations. Arbitration does not require the same level of subtle communication cues and skills as does mediation, and has less wide-ranging communication dimensions. Mediation is a non-binding process grounded entirely on the mediator’s ability to gain the trust of and communicate with the parties in order to convince them to settle their differences. Arbitration, on the other hand, is a private, quasi-judicial process where the arbitral panel does not need to gain trust of the parties or convince the parties of anything, even though this may sometimes be desirable. The main communication challenge in arbitration is for the parties and their attorneys to present their case coherently to convince the arbitral panel in what is considered a fair proceeding with all sides having an equal opportunity to be heard.

In this sense, arbitration is more of a one-way communication process than is mediation, which is at minimum a three-way communication process. This may be even more so when the arbitration is conducted using procedures based on the civil law system (as

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<sup>11</sup> See “‘Zoombombing’: When Video Conferences Go Wrong”, NYTimes.com, March 22, 2020 at <https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html?searchResultPosition=1>

opposed to the common law system), where written statements are often substituted for witness examinations by counsel. As such, the drawbacks of video (*see below*) will usually have less impact in arbitrations than in mediations.

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

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

4. We realize that videoconferencing does not have the same quality as face-to-face meetings. Even so, videoconferencing can bridge a gap when the parties are unable to convene in the same location, or when travel schedules, visa or health restrictions make it difficult for parties or witnesses to appear physically. Video can also keep parties or witnesses apart in cases with high emotional risk. And it will also cut costs, save time, stress and reduce travel and health security problems as well.

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