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# International Arbitration Report

## International Arbitration Experts Discuss The Withdrawal Of COVID-19 Restrictions

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# Commentary

## International Arbitration Experts Discuss The Withdrawal Of COVID-19 Restrictions

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**Mealey's International Arbitration Report** recently asked industry experts and leaders for their thoughts on the withdrawal of COVID-19 restrictions and whether any practices from the pandemic should remain. We would like to thank the following individuals for sharing their thoughts on this important issue.

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- Tony Cole, FCI Arb, JAMS, New York
- Kevin D. Benish, Associate, Holwell Shuster & Goldberg, New York
- Viren Mascarenhas, Partner, Milbank's Litigation & Arbitration Group, New York
- Tomas Vail, London Arbitration Lawyer, Vail Dispute Resolution, London
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**Mealey's: As COVID-19-related restrictions are withdrawn worldwide, what, if any, procedural changes that were made to arbitration practice during the pandemic do you feel it would be beneficial to maintain?**

**Dominguez:** All of them. So long as parties are agreeable, the procedural changes that allow for arbitrations to be conducted and concluded virtually should be maintained. These procedures, including presentation of witnesses and expert testimony by video, and holding the final hearing virtually, save time

and money for the parties. Arbitration is considered to be a more efficient and timely conflict resolution process, however it's not necessarily the most cost efficient when compared to regular court procedures. Adding the virtual elements that the COVID-19 Pandemic obligated us to implement will add even more value to the arbitration process. These procedures avoid the significant costs incurred in cross-border arbitrations that traditionally require international travel and accommodations for the tribunal, the parties, attorneys, and staff.

An additional benefit of virtual proceedings is that they allow for greater flexibility in scheduling, which often has the effect of expediting the entire process. In order to ensure that virtual proceedings do not run afoul of due process considerations, it is helpful to include in the arbitration agreement provisions that govern the permissibility and scope of virtual proceedings. These provisions might also include an annex of specific virtual hearing protocols that will dictate the rules each party must adhere to in this setting.

Maintaining the various virtual procedures also ensures that arbitral institutions, tribunals, and parties remain ready to adapt to any number of issues that may hinder the ability to conduct arbitrations. These issues include additional or resurgent waves of COVID-19 variants, other pandemics, war, and natural disaster. Finally, there are policy benefits to maintaining procedures for virtual proceedings. Maintaining openness to virtual proceedings will ultimately open the doors of justice to a broader group of litigants that historically could not afford the costs of international arbitration.

**Cole:** The most prominent change to arbitration practice due to the pandemic was the move to virtual hearings, which have proven to be far more than just a “good enough” measure to be used to save money or when an in-person hearing creates challenges. These days, there is rarely a need for shorter hearings addressing individual issues to be held in person or even via conference call. Instead, virtual hearings bring the benefit of feeling almost “in person,” which is not the case with a telephone call, while avoiding the practical difficulties and expense of an in-person hearing.

Nonetheless, we humans are wired in such a way that being physically present with someone adds something to the interaction, and there are situations where an in-person hearing is preferred. For example, studies of online interviews during the pandemic indicate that in-person interviews are better at building rapport and thus generating more complex answers. In simple terms, one might say that when someone on a video call is asked a question, their brain receives it as “Here’s a question for me to answer” and then answers it, but once the response has been provided, the speaker stops. With an in-person questioner, though, there is more of a tendency for the speaker to continue, add more details and basically talk about the question rather than just answer it—to interact with the person in front of them. If this research is right, then whether or not to have a virtual hearing is more than a purely practical consideration. For cases where witness evidence is important or those that depend on generating empathy from the tribunal rather than just conveying a legal argument, a virtual hearing may not be the best option.

**Benish:** One procedural change that should remain is the rapid transition to electronic-only submissions (rather than paper filings) for international arbitral tribunals. Without a doubt, the practice of international arbitration necessarily involves many people, often based in multiple jurisdictions. Parties, their counsel, the arbitrators, witnesses, and support staff are all required to make the practice of arbitration work. Traditionally, these various individuals often found themselves convening together in the same place to participate in arbitration.

The COVID-19 pandemic presented an incredible challenge to this model. For at least some time, most of the international arbitration community was re-

quired to shelter at home, meaning that practitioners and arbitrators could not access offices, let alone travel internationally to participate in arbitration hearings. Nor could they access massive amounts of hard-copy pleadings and other submissions.

The international arbitration community responded to this challenge by accelerating its transition to electronic-only submissions for arbitral proceedings. The use of electronic submissions and other digital technology are not new (some arbitral institutions have used them for years now), but the COVID-19 pandemic forced the international arbitration community to embrace electronic submissions more fully. Whereas prior to the pandemic arbitration rules did not usually state that electronic submissions were preferred, COVID-19 changed that for many of the leading arbitral institutions.

This accelerated change not only made it possible for international arbitration to continue working as an effective dispute-resolution mechanism even during unprecedented times; the enhanced use of electronic submissions also delivered efficiencies to the international-arbitration process by reducing expenses for counsel and clients, and by making it faster for parties to make submissions. This change to the practice of arbitration is likely to remain, and for good reason considering these benefits.

Of course, cybersecurity issues and concerns over the need to provide adequate notice to opposing parties may increase as a result of the enhanced use of electronic submissions in arbitration. But these challenges can be overcome by approaching them with the same focus that the international arbitration community gave to the COVID-19 pandemic itself.

**Mascarenhas:** The COVID-19 pandemic accelerated several procedural and technological innovations, some of which likely are here to stay permanently. That, by and large, is a good thing.

First, it is likely that the first session of an arbitration, which results in Procedural No. 1 that primarily dictates the procedure of an arbitration, will be conducted virtually. It used to be considered important for the representatives of the parties, their counsel, and the newly constituted tribunal to meet each other in person, for the parties to gain trust in the

tribunal who would decide their cases. As arbitral institutions and chairs of tribunals increasingly resort to well-developed procedural templates that serve as the basis for discussions, it is now more common for the parties to negotiate the procedural orders between themselves, and then participate in a virtual session with the tribunal that will decide disagreements and address any remaining concerns on their part. This is a positive development as it cuts down on travel, time, and costs, resulting in a greener and more efficient arbitration.

Second, there has been increased focus on cybersecurity, data privacy, and data protection, especially as counsel and arbitrators have been working from their home offices during the pandemic. Leading bar associations and arbitral institutions have developed protocols and best practices for tribunals, parties, and counsel to consider and implement as needed in their individual arbitrations. Issues include sharing of information electronically; storage of arbitration-related sensitive information; data breaches; and retention and destruction of sensitive case documents.

Third, while Zoom fatigue became a real phenomenon, the pandemic taught the arbitration community that many in-person events could be conducted virtually. While this reduced in-person networking and socializing, which have their own benefits, it allowed arbitration practitioners and students from all parts of the world to participate in events virtually that they would not have been able to attend otherwise (for time, costs, and travel reasons). Arbitration events were broadcast all over the world (and, sometimes, were recorded), allowing for diverse audiences of all ages, stages, and locations, to participate.

**Vail:** The post-pandemic world has seen an overhaul in the manner in which arbitration proceedings are conducted. Arbitral centres and courts alike have revamped their rules to facilitate remote hearings and their associated logistical needs.

Holding virtual hearings has many obvious benefits that make them an attractive alternative to in-person hearings. The White & Case-QMUL 2021 International Arbitration Survey reveals a seismic shift in the use of virtual/ remote hearing technology with a remarkable rise from 32% in 2018 to 72% in 2021 by respondents to the survey.

One of the most significant benefits is convenience. Virtual hearings allow parties to participate from anywhere in the world without the need for travel or accommodation expenses, which can save substantial resources and time.

Virtual hearings also offer greater flexibility in scheduling as participants can join from different time zones. Another advantage is increased efficiency. Virtual hearings are typically faster and more streamlined than in-person hearings since they generally eliminate the need for physical documentation. Furthermore, virtual hearings can be easily recorded, providing a clear and accurate record of proceedings that can be reviewed later. Virtual hearings can be more environmentally friendly, as they reduce the need for travel and thereby their associated carbon footprint.

Various institutions have published guidelines and checklists to address these issues, providing advice on matters including testing equipment, alternatives when technology fails, and the mechanism for holding virtual arbitral proceedings. For instance, the ICC issued a Guidance Note on the pandemic for virtual hearings.

Although virtual arbitration hearings have many benefits, there are also some challenges associated with this format. An associated challenge is ensuring the security and confidentiality of the arbitral proceedings. Parties and arbitrators must take steps to ensure that the virtual platform used for the hearing is secure and that confidential information and documents are adequately protected. Finally, virtual hearings may also present challenges related to cross-examination and witness credibility. It can be more challenging to assess a witness's demeanor and credibility over video conferences.

Interestingly, arbitral tribunals have started adopting "semi-virtual" hearings, which are hybrid arrangements in which the tribunal and lead counsels are physically present at a hearing centre while others attend virtually. This allows counsel to gauge and assess non-verbal cues from arbitrators, and helps in managing information overload. As virtual hearings have quickly become the norm in conducting arbitration proceedings due to the pandemic, they are another effective tool in the arbitral toolbox for the future.

**Bates and Torres-Fowler:** The rapid adoption of remote hearing technology has been and will continue to be the most enduring impact of the COVID-19 pandemic on international arbitration practice. Indeed, notwithstanding a general desire by most practitioners to return to in-person hearings as the COVID-19 pandemic has faded, there is a fairly broad consensus amongst practitioners, arbitrators, and institutions that the cost and logistical benefits associated with remote hearing technology are too significant to ignore.

For example, case management conference, expedited proceedings, and emergency arbitration hearings commonly rely on remote/virtual hearing technology for both cost and logistical reasons. Further, hybrid proceedings have become quite common. While the tribunal, counsel, and party representatives common-

ly gather together in-person for the merits hearing, it has become relatively common for tribunals to permit corporate representatives and experts physically located in other parts of the world to attend and observe the hearings remotely. In addition, while exceptions may exist, it has also become an accepted practice to selectively allow fact and expert witnesses to remotely appear at a merits hearing to account for the challenges and costs associated with schedules and travel.

Taken together, for even large and complex arbitration proceedings, selective use of remote hearing technology can enhance the efficiency of the international arbitration process. Perhaps more significantly, remote hearing technology can also, in appropriate circumstances, reduce barriers to entry and promote a more effective and equitable dispute resolution process in a given matter. ■

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