



ISSN : 1875-4120
Issue : Vol. 18, Issue 3
Published : April 2021

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2021
TDM Cover v9.0

Transnational Dispute Management

www.transnational-dispute-management.com

Summary of Young-OGEMID Symposium No. 11: "Alternatives to In-Person Arbitration: Pandemics and Beyond (Mar 18 - 25 2020)" by E.Z. Everson and S. Aiyanna

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 11: “Alternatives to In-Person Arbitration: Pandemics and Beyond (Mar 18 - 25 2020)”

by Elisabeth Zoe Everson* and Siddharth Aiyanna**

Executive Summary

Young-OGEMID’s eleventh virtual symposium (“Symposium”) was focused on the possibility of proceedings being held online. The arbitral community has been considering and – at least partially – implementing online dispute resolution for years, so as to increase efficiency, save costs and address the environmental impacts associated especially with long-distance travel. However, the real push appears to have come with the COVID-19 pandemic.

The panellists covered a range of diverse topics, from real life experience to implications of the current situation on moot competitions, while Prof. S.I. Strong acted as moderator.

Below is the list of speakers who kindly agreed to share their insights on each day of the Symposium:

- 1) *Wednesday, Mar 18*
Prof. Ben Davis¹ – University of Toledo
- 2) *Thursday, Mar 19*
Colin Rule² – Tyler Tech
- 3) *Friday, Mar 20*
Chris Campbell³ – Center for International Legal Studies
- 4) *Monday, Mar 23*
Paul Cohen⁴ – 4-5 Gray’s Inn Square

* Elisabeth Zoe Everson is a trainee lawyer currently preparing for admission in Geneva, Switzerland. You can reach her at <https://www.linkedin.com/in/ezeverson/>

** Siddharth Aiyanna is a student at the NALSAR University of Law and an editor of the Indian Journal of Constitutional Law. You can reach him at <https://www.linkedin.com/in/siddharth-aiyanna-385843129/>

¹ Ben Davis is Professor of Law at the University of Toledo College of Law. He is the former Chair of the ABA Section of Dispute Resolution and the Founding Member of the International Council for Online Dispute Resolution. Prior to joining the academy, he was an ICC counsel for 10 years and organizer of online negotiation, mediation, arbitration, and litigation moot courts for five years.

² Colin Rule is Vice President for Online Dispute Resolution at Tyler Technologies. Tyler Technologies acquired Modria.com, an ODR provider Mr. Rule co-founded, in 2017. From 2003 to 2011, Mr. Rule was Director of Online Dispute Resolution for eBay and PayPal. He is also a co-author, with Amy Schmitz, of “*The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*” (2017).

³ Chris Campbell works as the director of the Center for International Legal Studies in Salzburg, Austria, and is a director the Foreign Direct Investment International Arbitration Moot. He is also an active contributor to the Young-OGEMID discussions.

⁴ Paul Cohen is a barrister and US-trained lawyer. He has focused for several years on technology and issues relating to technology in arbitration. He is based in the San Francisco Bay Area and keeps chambers in London.

5) Wednesday, Mar 25

Ian Macduff⁵ – University of Auckland and National Centre for Technology and Dispute Resolution

Speaker 1: Prof. Ben Davis – University of Toledo

Prof. Davis' contribution was titled "*An introduction to online dispute resolution in real life and in moots: experience from the ODR community*". In his first post of the day, after he outlined the differences between synchronous and asynchronous communication and his experience with the International Competitions for Online Dispute Resolution ("**ICODR**"), Prof. Davis introduced two points of discussion.

First, Prof. Davis contemplated the concept of a "*blurred image*", which is to be understood as a cause of uncertainty or mistrust. Especially in the context of the current pandemic outbreak, he floated the idea that our image of a person can get blurred based on said person's age, and thus whether they fall into the at-risk category or how far into this category they are. In a more general setting, Prof. Davis wondered what gender one would attribute to him if his name were "*Gabriele*". He pondered whether the counterpart would assume that there was a typo in the name and an "l" was missing. Finally, he questioned whether one could truly know that he is who Prof. Strong said he was when introducing him earlier in the day.

He then explained that when confronted with this problem within the ICODR, it would be up to the coach to vouch for their team and eliminate the mistrust that could result from the "*blurred image*" as illustrated above. This would have a direct impact on those evaluating the competitions.

Prof. Davis concluded this first point by prompting the following question: "[W]hat are your markers that give you confidence you are dealing with who you think you are dealing with?"

Second, Prof. Davis addressed the necessity of keeping technology simple. With reference to ICODR, he said that he viewed the competition as a good way for students to familiarize themselves with online dispute resolution ("**ODR**") platforms while in law school. One year, however, the participants were provided with some nine platforms to choose from, a choice that – he explained – resulted in unsatisfactory results. Indeed, in Prof. Davis' opinion, the faculties felt the necessity to master all of these platforms, which put an enormous pressure on them.

The lesson learned was therefore to "*keep it simple*". Each additional feature of any given platform also adds to its complexity and might, albeit unintentionally, make someone look stupid, which should naturally be avoided. Prof. Davis raised the following questions as a basis for discussion: "*How much can you depend on your IT resources? How good is a*

⁵ Ian Macduff is a Teaching Fellow and Director of the Centre for ICT Law at Auckland Law School in New Zealand and was, until June 2016, Associate Professor of Law and Director of the Dispute Resolution Initiative at Singapore Management University. Ian has been a practicing mediator for over 30 years, in commercial, environmental, policy, intercultural, family, online mediation and other fields, and is a Fellow of the National Center for Technology and Dispute Resolution. Among other things, he is editor of "*Essays on Mediation: Dealing with Disputes in the 21st Century*" (Alphen aan den Rijn 2016).

provider's customer assistance if there is a problem? How about the counterpart now working remotely?".

Later in the day, **Prof. Davis** followed up with his second post. In this entry, he addressed the potential impact of the current pandemic on arbitral tribunals and other actors involved in arbitration proceedings, as both the pre-hearing and the post-hearing phases of arbitration consist of different challenges.

When preparing the case, the client's team and counsel might now be forced to work remotely, which, despite the technology available, could result in making meeting the schedule difficult. At a minimum, such a schedule might need to be revised. Moreover, Prof. Davis noted that if any of the key players in the proceedings fall under the COVID-19 at-risk category, due to their age or a pre-existing medical condition, they are subject to even stricter measures of social distancing. If one or multiple members of the arbitral tribunal or even a key witness or expert are in this category, it is very likely that *"their preoccupation is elsewhere than on the arbitration"*. When faced with such a situation, Prof. Davis pointed out that it might be wise to suspend the proceedings for a few months based on the projections made for the progression of the pandemic.

"Make speed, not haste", was the concluding remark of this second post.

In his third post of the day, **Prof. Davis** answered three questions put before him.

The author of the *first question*, **Salua Kamerow**, a lawyer from Colombia, inquired whether the mistrust as explained in Prof. Davis' first post could stem from a lack of experience, which she considered herself to have due to her age. She wondered whether the older generation had a disadvantage as compared to the younger one, who has *"an integrated circuit for online navigation"*. Along these lines, she raised the question of how could the alternatives to in-person dealings *"affect a non-sophisticated party that is not prepared to deal with the consequences of the COVID-19 outbreak"*.

In response, **Prof. Davis** referred to his personal experience of putting in place of the first electronic Case Management System at the International Chamber of Commerce Court in 1989-1993 as well as his more current experience with technology. In his opinion, greater age does not necessarily equal being less confident when it comes to using technology or being less *"tech savvy"*. While the younger generation might have *"a fluency with the tech if they have had access to [it]"*, the factor of how experienced one is with law must also be taken into consideration in the current setting. In this context, Prof. Davis reminded the participants of how important it was that more experienced lawyers invested time in the younger lawyers, helping them to acquire the fundamental skills. He continued by stating that the younger lawyers should definitely *"jump on the tech tsunami"* and increase their competency in the area. In conclusion, Prof. Davis' view was that *"while it is likely [that] as a group the younger folks are more tech savvy, they still may need to ripen as lawyers. On the other hand, the more experienced who are good lawyers, may have a smaller percentage open to tech than those young ones"*.

As to the second part of the first question, Prof. Davis compared one's savviness with technology to someone expressing themselves in their native tongue; while ordering a beer might be fairly easy, one needs more confidence in their skills to be able to have a proper discussion. Indeed, *"[t]he simpler the tech the easier it is to be understood"* and *"[t]he more*

complex the tech, the more lack of experience with it becomes apparent". In his concluding remark, Prof. Davis' wrapped up the question as follows: "*Someone is not stupid or unsophisticated, someone is merely higher up the learning curve with the new features for them. Some sail down that learning curve quick and some don't*".

The author of the *second question*, **Suyay Chiappino Pepe**, a PhD candidate at the Sorbonne University in Paris, opined that ODR could no longer be viewed as merely an option but a necessity, at least in the short term. She wondered whether we were now facing a somewhat forced transition into ODR, without a true freedom of choice. She further inquired whether this would change how we view justice and whether justice systems around the world were ready for such a change. She also noted the quick reaction which came from the Stockholm Chamber of Commerce, putting in place a fully online dispute resolution environment.

In response, **Prof. Davis** referred to his recently published paper titled "*ODR and Social Justice: Technology not Trickology*".⁶ The abstract of this paper reads as follows:

"Reducing barriers to a system of justice that may be experienced as unequal is providing access to that unequal justice, but no social justice. When one thinks of online dispute resolution being asked to do more than better provide the justice the system provides – something that many experience already as very hard in the various polities – it seems a bridge too far in my view. It should be quite obvious that online dispute resolution cannot be the magic bullet to get us to social justice. At most, it can assist the providing of justice if its forms protect the kinds of norms we have described above. Put another way, it would be wonderful if online dispute resolution did not exacerbate social injustice that may be endemic to the laws and norms of a given polity. To ask online dispute resolution to cause that polity to change those unequal laws and norms is to require a methodology to impact powerful groups in a polity and change them. That kind of change being a movement derived from online dispute resolution as opposed to some other wellspring of discontent would appear unlikely".

In Prof. Davis' opinion, there might indeed be a forced shift towards ODR due to the pandemic, comparable to the shift that occurred within the United States following the 2001 anthrax attacks, and which resulted in an increase in e-filings. However, even prior to COVID-19, the courts in the United States had held hearings remotely, going back as far as the early 2000's. In this context, he also provided the example of the defendant participating in a hearing through a video conference directly from jail, which greatly decreases the cost of justice.

Prof. Davis further quoted the Giuseppe Tomasi di Lampedusa's dictum, underlining that "*everything must change so that everything can stay the same*".⁷ Against this background, he noted that the dispute resolution as such, meaning the respect of the norms and judicial forms, would remain. If these were not respected, "*then we [would] have more customer service dispute resolution*".

⁶ Paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527545 (last accessed on 13 April 2020).

⁷ Giuseppe Tomasi di Lampedusa, *The Leopard chronicles (Il Gattopardo)* (Milan 1958).

Finally, Prof. Davis noted that another concept or layer when it comes to technology is national security. Arbitral institutions, no matter how experienced and well known, are unlikely to be able to prevent national security establishments from accessing their data and therefore guarantee total confidentiality.

The author of the *third question*, **Mark Kantor**, an independent arbitrator from Washington D.C., asked for further details regarding the pre-hearing preparation by counsel and clients. In his opinion, this issue is potentially even more difficult to deal with than the handling of the hearing itself. He also raised the point of whether arbitral proceedings might be suspended as a result of “*proffered difficulties faced by one of the opposing sides in pre-hearing prep*”.

In response, **Prof. Davis** agreed that the pre-hearing preparation phase could present a significant challenge. Based on his recent experience with an *amicus* for the United States Supreme Court, he noted that the current situation has had a great influence on different actors’ working methods, which must generally be adapted to this new environment. He summarized the challenge we are faced with as follows: “[T]he body of work is exploding while the methodology for doing work is being reworked”. In this context, and apart from the need to adapt one’s working method, the schedules might also need to be amended, as “*trying to finish on an outmoded time schedule in this situation of truly changed circumstances is artificial and not smart but rather absurd*”. Moreover, having a close family member get sick is an additional burden and one that many of the actors of arbitration might be currently dealing with.

Further, **Prof. Davis** shared, in his fourth post of the day, some examples of how courts across the globe are dealing with the pandemic:

- “[A]ll New Zealand Parole Board hearings would be held by video-link from tomorrow onwards;
- *Court trial goes online in China amid virus outbreak*;⁸
- *State, federal jury trials in South Carolina put on hold due to coronavirus*;⁹
- *Coronavirus: No jury trials longer than three days in England and Wales*;¹⁰ and
- *Coronavirus: New Zealand jury trials suspended for two months*”.¹¹

Prof. Davis expanded further on the courts’ responses to the current events in his fifth post by forwarding a message by the National Center for State Courts’ CIO, **Paul Embley**. By way of introduction, Mr. Embley noted that “[t]hose who were testing out online courts, on the path with ODR, and had the infrastructure in place to hold remote hearings have just reached out to vendors, expanded their capacity overnight and moved on with hearings.

⁸ Article available at http://www.xinhuanet.com/english/2020-02/04/c_138755155.htm (last accessed on 13 April 2020).

⁹ Article available at <https://www.thestate.com/news/coronavirus/article241241056.html> (last accessed on 13 April 2020).

¹⁰ Article available at <https://www.bbc.com/news/uk-51935320> (last accessed on 13 April 2020).

¹¹ Article available at https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12317894 (last accessed on 13 April 2020).

Those who were glued to the traditional way of court processes are just a mess”. Pertaining more specifically to the situation in New Jersey, the concrete measures taken were explained as follows:

“In [New Jersey] we shut down for Monday and Tuesday as a pause to get people ready (only emergent matters). We were fortunate that we already had a virtual courtroom set up for first appearances in criminal and working with our vendor took that from 40 public streams (Scopia) to 190 (using Zoom). We were also fortunate that we had a project to complete a Teams rollout by 4/15. And by 4/15 I meant this past Saturday. We moved all 12000 users Saturday and pushed the install. That will allow us to do non streaming events where needed. Plan right now is to run all court events from the courtrooms and use the court recording software already there and bring litigants in remotely. We also got very lucky that last year we spent a few \$ on video conference equipment for courtrooms so we were a little bit ahead across the state.

We’ve also moved a ton of people off site to work remotely. Increased our VPN from 2500 to 7500 (we asked for another 2500 and Cisco was awesome and just gave us 5000 to get us through this). We had a VDI project in place for people to connect via their own devices. We had 150 sessions and VMWare gave us as many as we could bring in on the server (we are bumping to 1000 and maybe will go to 2000)”.

Mr. Embley concluded by noting that he appreciated seeing everyone cooperating and the service-providers being of great aid with the switch to operating remotely.

Drawing on Prof. Davis’ first post, **Prof. Strong** turned back to arbitrators’ online identity. She noted that the difficulty or even impossibility of determining one’s identity simply from the information available online might lead to “*flattening out existing biases toward the appointment of arbitrators*”. Indeed, not having access to a person’s gender, age, race, etc. could result in a greater reliance on their academic and/or professional merits. She concluded by outlining how interesting it was to see that “*times of social crisis [could] lead to social change – we saw it in the world wars, when women were given unprecedented opportunities to work outside the home – could e-justice in the time of pandemics provide similar opportunities for lawyers who may be considered outsiders in some way?*”.

In his sixth post of the day and in response to Prof. Strong, **Prof. Davis** expressed his pessimism towards a potential reduction of biases in an online setting. He noted that some internal biases might exist already on the institutional level and therefore not come from the users themselves; such would be the case of an arbitral institution providing its users with a list of arbitrators, which does not contain the names of any women. Speaking thereafter of implicit bias, Prof. Davis explained that many people believe him to be “*the son or grandson of Brigadier General Benjamin O. Davis, Jr.*”, which has lead, throughout his life, to many comments and questions and even preferential treatment:

“I am in no manner related to General Benjamin O. Davis, Jr. and so have no reason to talk about him. But, and this is where it goes even farther, because I do NOT talk about him, I can imagine there are people who think, “What a nice man. He is the General Benjamin O. Davis, Jr.’s grandson and yet he never mentions it. He is so modest! Let me help him!” I have wondered if any of my modest success can be attributed to people thinking I am the General’s grandson!”.

In this context, Prof. Davis also made reference to another one of his papers, titled “*American Diversity in International Arbitration: A New New Arbitration Story or Evidence of Things Not Seen*”.¹² He shared the abstract of this paper:

“I was drawn to the idea of having a longer view of diversity by focusing on the presence of black people in international trade. 1609 then becomes a way station in a process that started over 150 years before that date of Africans being objects in international trade. The best way I found to capture this flow of humans and their labor out of Africa to the New World is in a short video entitled “Transatlantic Slave Trade in Two Minutes, 315 years, 20,528 voyages, millions of lives” which I encourage the reader to watch now before reading further.

Once in the New World, the labor of these enslaved Africans was extracted to create wealth which in turn flowed back to international trade in goods such as cotton. I imagine every time there was a dispute between merchants on an American wharf about the quality of the cotton being loaded with an arbitrator coming in to resolve the dispute, some unseen enslaved African picked that cotton, baled it, and put it on some means of transportation to get to that port where the dispute has arisen. This article suggests that the unseen presence of blacks and other underrepresented groups in the shadows of development of international arbitration law in the United States helps us see that diversity – while unrecognized – has been inherent to American international arbitration for hundreds of years”.

Prof. Davis’ seventh post was focused on virtual hearings. With reference to his previous posts in which he shared how different courts had addressed the necessity of social distancing following the outbreak of the virus, Prof. Davis reflected on the difference between court and arbitral virtual hearings. He reminded the participants that the courts act with the authority of a State and as such, imposing virtual hearings will likely not be questioned within their jurisdiction. The situation might, however, be different when a party wishes to enforce such a judgment in a foreign country, which might be less open to resorting to technology in the context of deciding disputes. In international arbitration, the parties could agree to an online procedure already in their arbitration agreement or subsequently within the terms of reference. In such a case, a recording of the proceedings might also be possible and even prudent, although it could impact – whether positively or negatively – on potential challenges to the award. Prof. Davis further noted having experienced witness examinations over video in practice and wondered what the participants thought about the possibility of video depositions.

Prof. Davis continued with some thoughts on enforceability, which he divided into nine main points:

1. *First*, imagining a hypothetical in which parties agreed to online proceedings in their arbitration agreement but changed their minds once the dispute arose, Prof. Davis raised the question whether the tribunal would still be able to proceed with an online hearing and, if so, whether this could influence the enforceability of the resulting award.

¹² Paper available at <https://ssrn.com/abstract=3518891> (last accessed on 13 April 2020).

2. *Second*, Prof. Davis noted that the parties wishing to conduct arbitration in an online setting need to be mindful when selecting their panel and ensure that the chosen arbitrators are comfortable with the idea.
3. *Third*, Prof. Davis referred to the “*Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006)*”,¹³ aimed at recognizing electronic arbitration clauses and signing, which also needs to be put into perspective with the requirements of the different national laws with regards to electronic documents.
4. *Fourth*, and against the background of the current pandemic, Prof. Davis opined that the most prudent solution for arbitrations already commenced would be finding an agreement between the parties and the tribunal as to the hearing being held online, or, in the alternative, holding the arbitration in abeyance until the originally agreed upon procedure could be carried out.
5. *Fifth*, regarding the hearing itself, Prof. Davis emphasized the importance of understanding the technology that is being used. He recommended to “[m]ake sure that one is comfortable with the possibilities of the technology so that the technology does not get in the way but assists the advocacy and arbitral tribunal work”.
6. *Sixth*, the parties and the tribunal alike should consider what to do in case they experience technical difficulties.
7. *Seventh*, Prof. Davis wondered about the actual physical set-up behind the screens. He pondered whether a three-member panel would be physically sitting together in one room or whether they would be sitting together only virtually, and how each solution could impact on the dynamics of the whole hearing.
8. *Eighth*, along the same lines, Prof. Davis considered whether having one party physically present before the tribunal while the other would be joining only virtually would be conceivable or if this could be considered as an “*uneven playing field*”.
9. *Ninth*, and as his final point, Prof. Davis highlighted the importance of understanding technology where it is used as evidence. He illustrated this referring to his experience with a case in which one party used a video as an exhibit, an obscure aspect of which was picked up by an expert of the opposing party. In Prof. Davis’ view, however, the majority of us would not have been able to spot this aspect.

In his last post, the eighth post of the day, **Prof. Davis** addressed the arbitral deliberations, awards, and questions of enforceability. He stated that even where work is done remotely, upon the request of at least one of the members of the tribunal, a face-to-face meeting should remain possible. He linked this to the question of enforceability, commending the receipt of the parties’ consent to proceed in such a way.

¹³ Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a2e.pdf> (last accessed on 14 April 2020).

Following the virtual deliberations, Prof. Davis shared his belief that “*a physically signed award is essential – electronic signature might work [in] some places and not [in] others but physical signature should work pretty much everywhere*”, thus opting against an electronically signed award. He also wondered whether electronic notifications may be sufficient, turning the attention once again to the ultimate *Leitmotif* of enforceability.

He noted one positive outcome of the pandemic, *viz.* the loosening up of some of the attitudes of the courts, and shared the following final observation:

“[T]he fundamental of making sure judicial norms and forms are respected are inherent to humankind’s sense of justice and so I do not believe can ever be made virtual. Rather their contours have to be reimagined but always striving for neutral dispute resolution”.

Prof. Strong brought to the attention of those following the Symposium the release of the Seoul Protocol on Video Conferencing in International Arbitration by the Korea Commercial Arbitration Board (“**Seoul Protocol**”).¹⁴ She encouraged the participants to discuss the text with the panellists.

Speaker 2: Colin Rule – Tyler Tech

Mr. Rule presented a contribution titled “*Digitizing the Vis Moot 2020: insights from an insider*”. In his first post, Mr. Rule explained his role in this year’s edition of the Willem C. Vis International Commercial Arbitration Moot (“**Vis Moot**”), assisting the organizers with bringing the competition online. At the time of the Symposium, the decision to digitize this year’s edition of the Vis Moot was just in:

“27th Vis Moot - ONLINE HEARINGS decision

Dear Teams,

We are pleased to announce that the oral hearings will be conducted online during the period initially foreseen. The general rounds will take place from April 4-7 according to Vienna time. As usual, we will have 5 hearing slots per day (08:30, 10:30, 12:30, 14:30, 16:30). We will do our best to consider that many teams are currently located in a different time zone. However, we also ask you to be prepared to moot during night times. There will be the possibility of a separate login for team members that cannot plead at the same place. The main technical requirements will be a computer/phone, proper internet connection, headphones and an absolutely quiet place (no internet café or similar). If your team participates in the Vis East and in the Vis Moot, different pleaders are required. Rule 34 provides that ‘An individual student who has participated as an oralist in an argument in any elimination round hearing in a previous Moot, whether in Vienna or Hong Kong, cannot be an oralist

¹⁴ Press release available at 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 (last accessed on 13 April 2020); full text of the Seoul Protocol can be downloaded at <https://protect-au.mimecast.com/s/2oE7CQnMBZfXnxGniQY3OY?domain=kcabinternational.or.kr> (last accessed on 13 April 2020).

in this Moot; although they can be a member of the team.' will not be in place for the 28th Vis Moot. The restriction that teams who are scheduled against each other are not allowed to see in pre-moots will not be applied for the 27th Vis Moot online hearings due to the exceptional circumstances and the late release of the schedule (Rule 85)".

Against this background, Mr. Rule explained that he would like to use the Symposium as *"an opportunity to brainstorm with [the participants] about the online competition to make sure it's satisfying, comprehensive, and a compelling enough to serve as a stand-in for the face-to-face competition"*. He concluded his first entry by asking the following questions:

- "1. Should each room also have a "host," someone to manage the room, be in charge of the process, watch the time, mute and unmute speakers, etc.? What training should that host have in advance?*
- 2. Should we allow outside observers to join the room without approval? Will that distract competitors?*
- 3. Should we match teams (and arbitrators) in similar time zones, to avoid one team being in the middle of the day while the other team is either late at night or early in the morning? Or will that create some sort of selection bias?*
- 4. Do you think it is necessary to do pre-competition checks with each team and arbitrator to make sure their computer works, video is fine, audio is clear, etc.?*
- 5. Do you think the use of videoconferencing will advantage some teams over others? How can we better level the playing field?*
- 6. Should we add additional rules to the tournament in anticipation of some of the issues that may emerge from doing it online? (e.g. forbidding communication with outsiders for advice during the round). What should those rules be? How should they be enforced?*
- 7. Should we record all the rooms as an additional layer of monitoring and enforcement should a team be accused of a rule violation?"*

The first response to Mr. Rule's survey came from **Chris Campbell**, addressing the questions as follows:

- "1. Definitely (if at all possible). We ran the [Foreign Direct Investment International Arbitration] Moot All Africa Regional on Zoom last year, barely a fraction of the teams at the Vis (more like a small Vis Pre-Moot). The format generally and the application in particular will be unfamiliar for many. Besides have a "virtual tribunal secretary" to host [and] make sure the Directors are available to determine novel questions.*
- 2. Definitely not! If you want to permit an audience feed your hearing to a live-stream on Youtube or Facetime. Not sure rules against about scouting at the Vis though. [Foreign Direct Investment International Arbitration] Moot has these rules and only live streams final & 3rd place (of Regionals and Globals).*

3. *Both time-zones and selection bias are problems and only having done this on Regional level I have not had to deal with it so much – we only had out of Region arbitrators. To me timezone seems like the bigger problem, so address that.*
4. *Yes, if you can manage. It looks like you have some test call plans and having someone doing Q&A in that, not just IT aspects but also competition aspects and professional video-conference etiquette and decorum proved very valuable for us last year. You won't get everyone on a test call (certainly not all at once with 400 teams & 1000 arbitrators J), but the more you do, the fewer problems you will have while the hearings [are] actually happening.*
5. *Probably it will favour some teams. Beside infrastructure differences, e.g. internet stability & bandwidth, there will be a question of familiarity with the format in general and the app you use in particular. I see lots of teams Vis doing practice hearings now. Given the unusual situation and short amount of time, there is not a lot you can do. In part you pass it off as "that's life", I don't just mean things change [...], but going forward video-conference hearings are going to be professional life. The fact that many unis and their IT facilities and moot rooms will be closed throws an additional wildcard into the mix for you – some teams may have to resort to internet cafés.*
6. *I assume you have those rules (on outside help) already for the live rounds, but enforcement may seem different now. Truth be told with advocates using phones to monitor their time in live hearings, arbitrators don't know if someone is texting them answers. Such assistance may be a little easier to conceal online, but ...*
7. *If you have the storage, yes, but you also need some rules to restrict under which circumstances review can be requested and how it will take place".*

The author of the second response, **Jake Lowther**, referred to his experience arbitrating at the All Africa Regional of the 2019 Foreign Direct Investment International Arbitration Moot (“**FDI Moot**”) and noted the following:

1. *Yes, if possible there should be a session host or moderator to assist in the event of any problems. This is particularly useful for first-time users and most needed early on in the competition.*
2. *No, the hearings should not be publicly accessible until the final rounds, as it is difficult to police and could be distracting.*
3. *Time zones should be as similar as possible. At the time of the [All Africa Regional] I was sitting in Seoul and the time zone took a toll. I was very happy for the experience (thanks again Chris!), but I am sure all participants in the virtual Vis Moot would benefit from a schedule that fits into their standard business hours where possible.*
4. *Yes, do pre-moot IT checks where possible. I recently attended one of the Vis East Moot's IT checks and while it requires some patience, it can save all*

participants a lot of time.

5. *Videoconferencing will theoretically favour teams with a good, stable internet connection, decent lighting, suitable conference space, clear diction and good hearing. Yet participants who "tick all these boxes" may experience glitches or sudden IT issues. As Chris says, this experience will increasingly reflect real-life and is excellent practice. Arbitrators should do their best to be understanding of teams who experience difficulties, much as the students will have to be patient if an arbitrator suddenly drops out. Shall we put it down to being a part of the fun and drama of the competition?*
6. *Given the focus required of speakers during their rounds, I feel confident that the tribunal would pick up most signs of rule breaking. I have also been impressed by the use of an affirmation or promise that the students should take not to communicate with or receive help from coaches or team mates during rounds. This serves to remind everyone of their obligations and expectations and clearly sets the standard for the proceeding.*
7. *The recording of a hearing sounds a little more problematic. I think the opportunity to review on the basis of a complaint could lead to a lot of extra work. In my view, a recording should be made of the finals to show the best of the year's oral advocacy, rather than used for other purposes. Perhaps I am naive, but I really don't envisage much deliberate rule violation”.*

The third response, authored by **Joseph Matthews**, came with instructions as sent to the participants of the FDI Moot All Africa Regional, held over Zoom. These included preliminary testing of the Internet connection, selecting the right venue and computer emplacement, as well as tips regarding the choice of lighting. In response to Mr. Rule’s original post, Mr. Matthews made two comments:

- “1. *My colleague who was the initial author of the list below [N.B.: reference is made to the forwarded list of instructions as mentioned above], is helping the Virtual Dispute Resolution Project in its long term effort to host an open source development of user interfaces for dispute resolution providers to facilitate moving their processes online in a secure and easy to use format. We are in our infancy.*
2. *I thoroughly enjoyed my participation in the FDI [Moot] All Africa competition. I was in the U.S. (I happened to be traveling at the time and was in a hotel) and it started at 8 am Eastern time. I put a sign on the door to delay maid service from intruding and I wore a coat, tie and running shorts. Nobody saw the running shorts”.*

He also highlighted the importance of participating in test sessions.

Mr. Kantor then answered Mr. Rule’s questions 2 to 6:

- “2. *As you are surely aware, many virtual services such as Zoom and Webex offer an option whereby the observer can see and hear the speakers but the speakers cannot see or hear the observers. That option would prevent distracting the*

competitors.

3. *Yes, that will create a selection bias, especially for North American and Asian teams, who are then quite likely to be matched against their geographic/cultural counterparts. One of the great benefits of the Vis moot is to make students aware of the differing legal cultures in the world, with commonalities and differences on display for us all to learn. A time zone restriction would de facto create regional rounds for many in the general rounds. In my personal view, that would be unfortunate.*
4. *Yes, yes, oh yes.*
5. *I don't think we can predict in advance who will be advantaged and who will be disadvantaged. For example, are all Korean teams always at a strategic advantage because Korea is the most connected country in the world - <https://www.youtube.com/watch?v=VjJjtWTKsjY?> I doubt it, since I have no idea how comfortable anyone may be in the opposing team with virtual technology. I suspect the impact of any comfort levels with virtual tech depend on the particular individual more than on nationality.*
6. *At this late stage in the competition, I suspect the honor system is the most feasible way to go”.*

Prof. Strong widened the discussion by asking the readers, especially those participating in this year's Vis Moot, to raise any additional concerns they may have about the competition going online.

In the following post, **Prof. Strong** forwarded a post from the OGEMID discussion group, expressing its potential usefulness in the context of the current discussion. The author of the post, **Tony Cole** of JAMS, had shared an article written by Jed Melnick and Simone Lechuk on the topic of virtual mediation, along with a summary thereof:¹⁵

“For those who can't access [the article], it included this nice short list of potential complications:

1. *The investment is different when you are in the comfort of your own space without the inherent travel and the process of spending the day working on a problem with a group of people in person.*
2. *Participating remotely can mean that the remote party is not as focused. Instead of simply walking into a conference room, people have to be tracked down and digitally reconnected with. That person is almost certainly engaged in other work or activities in a way that they are not if they are in a conference room down the hall. A busy executive sitting in a conference room is likely much more focused than if she had remained at the office and participated remotely by dialing in sporadically throughout the day.*

¹⁵ Article available at <https://www.law.com/newyorklawjournal/2020/03/17/video-conferencing-and-mediating-complex-disputes-in-the-new-normal-settlements-dont-need-to-wait/?slreturn=20200318092323> (last accessed on 18 April 2020); N.B.: registration required.

3. *When a party participates via video conference, the personal connections are different. It is far easier for someone to act “tough” (i.e., stubborn and obstinate) via video, than it is in person. It can also be difficult to make eye contact and by extension much easier to watch ESPN while other people are talking. Body language, expressions, and reactions are blurred and remote. When parties are sitting across a table from each other their reactions to each other in real time can influence how each person will act and react. Needless to say, it is easier to hang up, than to walk out.*
4. *You can’t have a “hallway conversation.” Progress in a mediation is sometimes made by bumping into someone in the hallway (intentionally, or not) and cornering them to get information or seek compromise. Mediators will often “stop in” to each room during a longer caucus to check in and preview and test arguments. This doesn’t happen in the same way with video, where the tendency is to wait until a party is ready to communicate an official message (while also giving quick updates via email).*

And some potential (non-exhaustive) solutions:

1. *Be direct and tackle the focus issue as well as the challenges from the outset. Make sure that everyone will be available all day and will not have to be tracked down. For example, agree that the video “stays live” all day to better approximate in person participation. This will make it much easier for the mediator to “stop in,” to update, reduce the delays associated with re-connecting, and will reinforce the commitment of full participation. This exact approach used in a recent mediation meant that the lawyer was updated and engaged throughout the day more approximating an in-person session. A good discussion can lead to mindfulness and more focus, and by extension more investment.*
2. *Address the technological logistics both in advance of the mediation and at the beginning of the day. In “mediator school” we spend a lot of time talking about the structure of the room and seating arrangements for in-person sessions. The same consideration should be given to the inclusion of video participants. At the mediation, take the time to set up cameras to recreate the feeling of sitting across the table from someone. Make sure that the camera is zoomed in and that the video participant takes up most of the frame. How many times have we watched blurred figures that take up a small portion of the screen, but not taken the time to adjust the room set up? Also, make sure that participants are not back lit (negotiating with a silhouette doesn’t make things easier) and make sure that the microphones are set up so that everyone can hear each other clearly—sometimes a conference call put on speakerphone is a better option than the video’s audio. Connect with the parties in advance of the mediation to ensure that everyone has the correct downloads, plug-ins, and any other associated technology with the video conferencing software.*
3. *Get comfortable with the technology. Most kids today use FaceTime and other video chat apps extensively because they are comfortable with watching themselves and interacting via video. Some adults may have limited experience with this technology and may struggle with it at first. For those who may be*

distracted by seeing themselves on a monitor, it can be turned off. Additionally, it may be helpful for participants to have a few practice runs to help them get comfortable with the technology and its features”.

The fifth response came from a former “mootie” and now a frequent arbitrator in Vienna, **Ana Coimbra Trigo**. She referred to her previous experience as a Vis Moot participant during which her team had organized multiple practice pleadings with other teams online. She explained how helpful such practice rounds were in order to gather new arguments and see different styles of presentation. She also noted that while the pleadings might have been “awkward at first”, once they started, the pleaders would “focus on [their] arguments and other concerns [would] dissipate”. In this context, she also shared her view that “having someone hand [the pleader] “help” notes besides [their] co-counsel might be tempting, but [would] be noticeably disruptive”. Ms. Trigo concluded by stating that her main concern remained the familiarity with the platform, and encouraged testing where possible.

Prof. Davis then expressed his support for Prof. Strong’s and Mr. Kantor’s views and responded to Mr. Rule’s original enquiry as follows:

- “1. If random selection was done in physical space for team pairings, I would suggest that be done for the online version. Random.org has a random number generator that can be used. De facto regionalism causes bias. Might feel like a thumb on the scale.*
- 2. For arbitrators, same thing if done randomly. If time zone spacing ends up hard bring this up and adjust.*
- 3. I have done pre-moots remotely where teams were in the same room in Australia I think. Time difference can be worked out like [maximum] of 9 am to 9 pm worldwide for anyone in a session or 10 am to 10 pm for anyone. Just a thought.*
So a schedule with 1 pm to 1 am or 3 pm to 3 am puts someone in the middle of the night. Does not work well.
Arb[itrators] are at home and so think of low bandwidth use moments might also be something to factor in. But I think that is way to[o] second level.
- 4. Time frames for each session look very tight for me. Might suggest expanding the time per session by two to deal with tech craziness that would happen. Or double number of days and half the number of rounds per day. Issue will be the backup to keep all the balls rolling.*
- 5. One e-mail for reporting results per round to a central location: the god or goddess of results. Maybe works to ensure uniformity.*
- 6. Recording all sessions. Yes”.*

The author of the seventh response, **Derya Durlu Gürzumar**, had participated in the 15th, 16th and 17th editions of the Vis Moot and expressed her excitement as regards this “new version” of the moot, describing it as an “exciting opportunity [for the students] to test their skills before they graduate to apply them in real life”. She then shared her thoughts on Mr.

Rule's questions:

- “1. Most certainly, to avoid any unforeseen technical problem the arbitrators or the teams might encounter (eg. connection issues) and to ensure the efficient conduct of the proceedings. A “tribunal secretary” could be helpful (considering how this will be the first time the Vis Moot’s oral hearings will be virtually held). The host could ideally be trained by someone who knows the platform and has ample authority to manage the session. I do not know whether such a “host “can be arranged for every single session, so if this is not physically possible, then the presiding arbitrator should have sufficient written guidance/be trained prior to the session.*
- 2. For teams whose team members and coaches are isolated due to quarantine, it should be possible to join the session without approval (if a team is comprised of 6 students and 2 coaches, and all 8 individuals are in different locations due to quarantine, the session should enable all eight participants of one team to connect (with only two pleaders being visible), coupled with the opposing team, and the three arbitrators). For any other bystanders, who wish to simply listen, this should be subject to approval or not allowed at all (for the general rounds at least, unless the platform that will be used can accommodate such participation without distracting the arbitrators or the pleaders once the session commences).*
- 3. A 12-hour time array could be acceptable provided that this range is in the early 9 am-9 pm period, not disadvantaging a team or an arbitrator to stay up between 01:00 am-6 am.*
- 4. Definitely. Teams and arbitrators must be ensured that they are properly connected to the platform and technical delays are avoided when the real competition takes place. The Vis East test runs this week were very helpful in this case.*
- 5. Unfortunately, yes. Some teams might not be as adept as others in the use of virtual tools. Some teams will be together when pleading, while others will be separate, in different locations due to quarantine measures – one student pleader might be tech-savvy, but his/her co-counsel, who is pleading from a different location, is less so, bringing up potential technical issues to arise within the same team. Some teams have been already practicing online pleadings even before the announcement to proceed with virtual round, giving them an upper hand, while other teams will only have two weeks to practice and perfect their virtual pleading. I think the field can only be leveled if arbitrators, when scoring, take into consideration the “human” element of this process and not predominantly assess students by how well they “virtually” plead, but how well their argumentation and logic (ie. the substance of their pleading) is crafted. Of course, if both are excellent for a team, then they deserve a high score, but a team should not get a lower score just because they did not stylistically perform well before a camera.*
- 6. A pledge before the session/competition by each team (member) in writing/orally could be submitted to the arbitrators (formalistically speaking of course).*

7. *I think recording the sessions will be helpful (provided the recordings stay with the organizers only, and not publicly made available), especially for those instances where arbitrators have given conflicting scores that vary more than 15 points. In previous years, there has been considerable criticism for some sessions in the Vis where arbitrators scored the students in almost opposite sides of the scoring spectrum. So recording the virtual sessions could be a measure to enforce accountability on arbitrators' side”.*

Mr. Rule finally summarized the different responses received throughout the day as follows:

- “1. *Should each room also have a "host," someone to manage the room, be in charge of the process, watch the time, mute and unmute speakers, etc.? What training should that host have in advance? YES*
2. *Should we allow outside observers to join the room without approval? NO*
3. *Should we match teams (and arbitrators) in similar time zones, to avoid one team being in the middle of the day while the other team is either late at night or early in the morning? YES*
4. *Do you think it is necessary to do pre-competition checks with each team and arbitrator to make sure their computer works, video is fine, audio is clear, etc.? YES*
5. *Do you think the use of videoconferencing will advantage some teams over others? YES*
6. *Should we add additional rules to the tournament in anticipation of some of the issues that may emerge from doing it online? (e.g. forbidding communication with outsiders for advice during the round). YES*
7. *Should we record all the rooms as an additional layer of monitoring and enforcement should a team be accused of a rule violation? YES”.*

He went on to list some additional takeaways and *pistes de réflexion*, namely:

- the idea of including a “*virtual tribunal secretary*” and having a “*war room*” of people dealing with issues in real time;
- using a random number generator for pairing the teams;
- exploring the possibility, as offered e.g. by the popular platform Zoom, to have observers who cannot contribute to the discussion but merely observe the ongoing hearing, which could minimize any distractions;
- finding a balance between the selection bias and ensuring that the participants are able to plead at reasonable hours based on their respective time zones;
- dealing with any team dropping out of the video conference due to technical

issues by pausing the discussion and contacting the “war room”;

- coaching arbitrators “not to take technology-related stylistic issues into consideration”;
- getting the participants to take a pledge and adhere to the “spirit of the game”;
and
- recording the sessions but keeping the recordings private and deleting them a few weeks later, except for the final round.

To conclude, he highlighted the importance of the FDI Moot and the Vis East, also held online this year, both providing a valuable lesson for the digitization of the Vis Moot. He thanked all those who answered his survey for their “enormously valuable” feedback and time.

Speaker 3: Chris Campbell – Center for International Legal Studies

In his contribution, “*Online with International Intent: the experience of the all-Africa virtual arbitration moot*”, **Mr. Campbell** initiated the discussion by flagging that his experience with moot hearing-video conferencing was based on the All Africa Regional of the FDI Moot held online in 2019, which seemed ambitious at the time but which he said was a small feat compared to taking the Vis Moots online. He remarked that while planning the FDI Moot’s All Africa Regional online, the focus was to reduce associated travel costs, and that reducing the FDI Moot’s carbon footprint was a “nice side effect” or a “green fig leaf”.

He expressed appreciation for the consensus that was emerging through the responses in the Symposium, while noting that some of the comments revealed things that he did not know or had not considered (e.g. muting audio and video chat for a Zoom participant), or even prompted him to rethink his position on certain points (e.g. scoring guidance, allowances for technology, and related stylistic issues). With this, Mr. Campbell highlighted his takeaways (albeit “under construction”) from the discussion thus far:

- carbon impact and travel restrictions mean virtual hearings are now more necessary than optional or just a cost saver;
- the technology and infrastructure to make quality virtual hearings possible does exist;
- this technology is affordable;
- by and large people are comfortable with being on camera (although some “die-hards” continue to resist);
- standards, templates, protocols specific to online hearings are helpful;
- due process and fairness issues unique to the virtual format need to be taken into account; and finally,
- time zones are a headache.

Mr. Campbell proceeded to raise certain questions to take the discussion forward:

1. *“Will COVID-19, major moots like the Vis having competitive hearings by video-conference and arbitrators being generally comfortable with that, change a paradigm?”*
2. *Where do you still see infrastructure deficiencies? How much is “enough”?*
3. *Do universities need to invest more in video conferencing rooms and equipment – or can that be left to students and their notebooks/webcams, etc?*
4. *How do we include those uncomfortable with this new approach? My friends in New Delhi tell me that senior judges simply will NOT participate in video-conference hearings in real life or in moots.*
5. *How much do we have to put into standards “top down” or should we remain flexible, let them evolve, let the markets decide?*
6. *Is there enough consensus on what is acceptable for the honour system to work?*
7. *Will time-zones still give us an excuse to travel – WHEN WE REALLY WANT TO?*
8. *How will we maintain the human element, the networking, the socialising which are very important to moots but also, I believe to our real-life well-being?”*

Mr. Campbell concluded with a quote by Sophie Nappert: *“At the same time, online alternatives are being fast-forwarded to *now* as a tangible solution to the present crisis. What does this mean to the quality of the dispute resolution process as a forum for the dispensation of human justice? Will this herald the kind of fabricated personas and reality that one can witness on social media?”*. Her words had got him thinking about whether there was *“something about rich human interactions that video-conferencing cannot even remotely replace”*.

Mr. Lowther responded to questions 4, 6 and 8. Referring to question 4, he suggested that while he would have preferred to travel to Hong Kong or Vienna, *“this [was] simply not possible”*. He pointed out that against the background of the global crisis, we are forced to respond *en masse* and that such response is not simply about individuals, as much as he expressed his sympathies for those intimidated by new technology. Given that such developments are a *“fact”* of life in the 21st century, people need to be open to being adaptable at the very least. He added that this was a unique opportunity to show students *“just how collegiate the legal profession (and arbitration specialists in particular) can be”*.

In response to question 6, Mr. Lowther wondered if the *“honour system”* spoken of earlier could not be based on rules of ethics already developed. As for question 8, he added that he was enjoying his firm’s Friday evening *“post-work sundowner”* through the Microsoft Teams application. Alluding to *“on-nomi”*,¹⁶ a Japanese term for drinking with friends while

¹⁶ See a video by the World Economic Forum on *“on-nomi”*, available at https://www.linkedin.com/posts/world-economic-forum_covid19-coronavirus-activity-6646438962590162944-IaK9/ (last accessed on 18 April 2020).

isolating, he added that he and his coworkers felt it was important to maintain the social connection as usual in the current context.

Mr. Campbell's response to Mr. Lowther, was that he was certain virtual social gatherings could be made more interesting, and that it could lead to everyone being more comfortable with them. He suggested that the level of discomfort might, however, be a generational thing.

Prof. Strong suggested, in response to Mr. Campbell's post, that critics who said that "*arbitration can't EVER be virtual*" have now been silenced in light of the environmental crisis. When mediation for international commercial disputes was met with a similar response by naysayers, "*necessity, time and experience have shown that mediation was possible in appropriate circumstances*".

In Prof. Strong's opinion, the current situation is simply raising the learning curve. Although we would not shift 100% to an all-virtual arbitration by the end of the COVID-19 ordeal, many would have found ways to conduct business remotely and be comfortable implementing this in situations outside of the pandemic. The governmental measures, anticipated to last several months, undoubtedly have a positive influence on this accelerated rate of acceptance of virtual proceedings as well. Moreover, she noted that experience and practice with the new processes are critical to acceptance by the legal community – as was discovered with mediation. Further to this, Prof. Strong stated that reports of successful measures were vital to the spread of the process – such as that of the USD 400 million settlement award recently reported.¹⁷ This would also be facilitated by "*a critical mass*" of individuals and institutions joining in to promote the process – a phenomenon Prof. Strong anticipated with e-arbitration as well.

Prof. Strong also wondered to what extent senior judges who were not accepting the new mechanisms would be forced to accept this changed reality since a number of courts are going virtual at the moment. For those individuals for whom e-arbitration is not realistic, Prof. Strong recommended a "*blended approach*". In the context of senior judges and moot courts, she suggested that a compromise could be to keep the senior judges for final rounds and allowing them to have in-person hearings at the moot. This she thought would also be an incentive for the top teams to argue in-person having succeeded in virtual rounds. If a winning team did not want to "*use their carbon emissions in that way*", they would be able to request a virtual hearing, just as a party might, and the organisers could find other (equally prestigious) individuals to judge the final rounds.

Prof. Strong then shared a post from the OGEMID discussion group, which addressed the following two points.

First, an update that all 2nd Circuit Judges from New York City, Vermont and Connecticut had gone fully virtual,¹⁸ following an order that gave judges, appellate lawyers and their clients the option to plead virtually.¹⁹ *Second*, addressing how important the in-person factor is to the legitimacy of dispute resolution in a society, the author of the post suggested that

¹⁷ See e.g. Cosmo Sanderson, Billion-dollar Odebrecht dispute settled through mediation (2020), available at <https://globalarbitrationreview.com/article/1216389/billion-dollar-odebrecht-dispute-settled-through-mediation> (last accessed on 18 April 2020); N.B.: registration required.

¹⁸ Article available at <https://www.law360.com/articles/1254826/2nd-circ-judges-go-fully-virtual-as-nyc-mulls-travel-curbs> (last accessed on 18 April 2020).

¹⁹ Article available at <https://www.law360.com/articles/1253764> (last accessed on 18 April 2020).

teleconference platforms would be an apposite substitute. Indeed, they would allow judicial activities to continue without affecting legitimacy since the parties would have an opportunity to plead their case before an impartial judge. He further noted that this concern had already been raised and addressed by Richard Susskind:

*“In practice, court services of the future will be delivered as a blend of some or all physical courtrooms, virtual hearings, and online courts. It will become common practice, as a matter of case management, to disaggregate or decompose disputes to the most appropriate (efficient and just) process. In this way, in one case, part of the work might be undertaken online, some in a courtroom, and yet other tasks in a virtual hearing room. And, over time, I expect that more and more elements will be conducted online”.*²⁰

The author added that COVID-19 had certainly advanced the discussion and triggered Susskind’s vision of the future. However, he also noted that “[h]ad the judiciaries around the world set in place a blend of physical, virtual, and online courts, then we would not be experimenting the hurdles we have seen”.

Derya Durlu Gürzumar responded to the questions raised. Referring to question 1, she was of the view that moving the Vis Moot online would most certainly result in a changed paradigm. At the very least, law students and legal practitioners would become aware of the existence of an alternative to the traditional medium that is both cost and time efficient (if used correctly). In response to question 2, she stated that there would always be some deficiencies in technology that would lead to developments thereof. Against this background, she emphasized that “[t]he arbitration community must be well versed to adapt to this change quickly and make use of the best viable option at the time for the desired use”.

She addressed question 3 by juxtaposing the standpoints of both universities and students. For universities, the answer depended, in her opinion, on the public-private university divide – while some public universities do not even have the resources to build a library, private ones might give iPads to scholarship students. She concluded therefore that it would be up to each university to decide how much of its budget it would be willing to allocate to technology. From the students’ standpoint, she raised certain striking questions, such as what the situation would be of the students who do not own a computer. She cited examples of moot teams she had coached where senior year students had to use university facilities to complete the work. She wondered how this would have potentially been dealt with in grave situations such as a pandemic, forcing everyone to stay at home. The only option according to her was for universities to act: “Universities must, therefore, step-in and step-up, no matter what”.

Addressing question 4, Ms. Gürzumar expressed her belief that a change of mindset was required, as well as bridging the generational gap that might be present between more senior and junior members of the legal community. It would be hard to come up with a one-size-fits-all approach since both of these changes were shaped by legal culture and personal experiences. Turning to question 5, she advocated for a *laissez-faire*. Since the market would continuously evolve, flexibility and subsequent adaptability were paramount, and rigid standards would likely fail. Coming then to question 8, she suggested that technology would be the social network in legal practice generally, and not just in moot competitions or arbitrations. This was the direction, in her opinion, that the world had been taking anyway,

²⁰ Richard Susskind, *Online Courts and The Future of Justice* (Oxford 2019).

with the pandemic only accelerating the process. In this context, she developed further by stating that the human element would always be there, just not in the way we are used to at present.

Ms. Gürzumar then responded to the quote by Sophie Nappert (*see supra*), declaring that “*the screen is like a shield – it has a way of altering not just how someone is perceived from the other end but also how someone feeds the relevant data*”. She therefore acknowledged the possibility for dispute resolution processes to include “*fabricated personas*”. She suggested, however, that it was up to us to train ourselves to decipher what is genuine and what is not to ensure a high quality of ODR.

Prof. Strong was the first to react to Ms. Gürzumar’s point about fabricated personalities. She thought it difficult to pretend to be someone else, even in the online world – that one’s true self would leak through no matter what. She added that many judges and arbitrators were sceptical of lying witnesses and believed documents more than the “*performance at trial*”. Based on her own empirical research on legal reasoning, covering lawyers and judges from both common law and civil law traditions, she could say that “*contemporaneous documents*” were the most persuasive type of evidence: “[S]ome survey and interview respondents remarked on the usefulness of cross examination, but even they typically said contemporaneous documents were more important”.

Prof. Maurice Mendelson Q.C., in response to Prof. Strong, recalled an instance when he was invited to watch a video recording of his own lecture at Oxford with a few others, which he found helpful. Through this process he discovered that he walked up and down too much behind the podium, which could be distracting to the audience. Later, as Chair of International Law at University College London, he attended a course on dealing with the media, which was also instructive, especially when it came to things like “*how to react if you are “doorstepped” by an aggressive reporter with a camera*”. While agreeing that it is hard to successfully adopt a false persona, training can help with how one appears and acts on a screen; he suggested that if video hearings were to become more common, lawyers and law firms might need to invest in this sort of training.

While conceding that Prof. Strong was probably correct about the importance of contemporaneous documents, Prof. Mendelson Q.C. cautioned against underestimating the value of cross-examination, including of expert witnesses. From both personal experience and observing others, he suggested it could be “*absolutely devastating if done well*”. He disagreed with colleagues from civil law traditions who were dismissive of cross-examination, or tended to disparage the value of oral argument. From conversations with international judges and tribunal members, he had found that they were virtually unanimous in saying that “*if done well*”, oral arguments could make a big difference to the outcome of a dispute.

Mr. Campbell thanked Ms. Gürzumar for her thoughtful responses. He added that her point on disparate resources among universities was well taken. Recalling his experience during the All Africa Regional of the FDI Moot, he found that most teams had video conferencing facilities in the range that he had expected – in some cases, students were using their own notebooks in studies in their own homes, and, in a couple of cases, teams had beautifully equipped moot rooms with multiple cameras and professional lighting and acoustics. As to Ms. Gürzumar’s earlier question about how much arbitrators allowed technological considerations to influence their assessment, he confessed he did not know. He added that

video conference resources were probably also indicative of other resources (such as coaches, professors, or a mooting tradition) that the universities could make available to their students. He concluded that it would be good to “[use] *technology to flatten rather than exacerbate this disparity*”.

Mr. Campbell responded, in his following post, to Prof. Strong and Prof. Mendelson Q.C.’s points on the importance of contemporaneous documents. Instinctively, he said, he tended to agree with the pre-eminent importance of these documents. He was unsure, however, as to how much “*video-conferencing (basic) or telepresence (deluxe)*” would necessarily detract from the art of oral argument or cross-examination. He did agree with Prof. Mendelson Q.C. that we could all do with more camera training.

Mike McIlwrath, Global Litigation Counsel at Baker Hughes, concluded this post by addressing how a common criticism of video conferencing for arbitration was that it failed to live up to the expectations of doing things in-person. He asked why this assumption was not being challenged and questioned why replicating what is possible in-person should even be the goal. He suggested that this was more a moment of social anthropology than technology and also raised questions as to why we were giving greater importance to the current means in this moment than the ends, which should be delivering a form of justice that is fair and predictable. To illustrate, he noted that while audiophiles maintain that vinyl recordings remain a superior format in terms of audio quality, most of us have gravitated towards digital collections of music on our phones anyway. This was possible because our objective was having access to music rather than focusing on the form in which it was stored.

Speaker 4: Paul Cohen – 4-5 Gray’s Inn Square

The fourth day was dedicated to **Mr. Cohen**’s contribution “*Real life perspectives on virtual arbitration*”. As a preliminary remark, he noted that the “*tl;dr version*” of his post was that remote dispute resolution was “*not that different to the ideas about how to conduct remote Vis [Moot]*”.

Mr. Cohen began by setting out five “*baseline assumptions*” that he would challenge in due course, many of which underlie the phenomenon of an “*optimal arbitration*” that was critiqued by Mr. McIlwrath earlier during the Symposium:

- “i) [T]he best way to conduct an arbitral hearing is with all the stakeholders – counsel, arbitrator(s), witness— in the same room;*
- ii) with everyone in the same room, the stakeholders can observe each other’s visual cues, learning about their views and mindset from non-verbal information (frowns, shrugs, tics, other “tells”);*
- iii) when in-person arbitration is not possible, it pays to have as few people outside the room as possible. For example, it’s ok (if not ideal) to cross examine a witness appearing by video, but only if both sets of counsel and the arbitrator(s) are themselves sitting in one room;*
- iv) the more people are separated by distance, the less practicable the arbitration becomes;*

- v) *at the point when the tribunal members cannot show up and hear the evidence in the same place, a proceeding becomes procedurally suspect and is best postponed*".

Through these assumptions, Mr. Cohen was able to paint a picture of how remote dispute resolution works today. The vast majority of hearings continue to occur in-person; when a witness is unavailable for one reason or another, it is increasingly deemed acceptable that he or she appeared by video. Mr. Cohen noted that an inordinate amount of ink had been spilled on how to guarantee that the witness is "*uncoached*". He submitted that the solution to this (i.e. having someone else in the room attest that there was no coaching, or simply moving the camera around periodically to show that the room is empty) was not worth the handwringing.

Mr. Cohen had participated in a number of hearings as counsel in which he was either directing or cross-examining a witness by video and he noted that these proceedings had generally gone off without incident, especially with the recent technological improvements. He also noted that any further subdivision into video hearings has been frowned upon and that he was not yet aware of a merits hearing in which either counsel or one or more arbitrators participated remotely. He imagined that this was likely to change given the current circumstances.

Before moving onto his second post, he invited the participants to share their thoughts on the assumptions he had set forth and asked whether he had accurately captured them. He also asked if the participants agreed with him and why they thought that we continue to prefer in-person arbitration when we have been able to conduct proceedings virtually for a long time.

Mr. Kantor, as an aside, questioned whether moving from in-person pre-hearing and hearing processes to video would implicate the European Union ("EU") General Data Protection Regulation ("GDPR") or raise other potential issues, related to privacy or otherwise. To him, the only apparent difference between the two was the preservation of a video record rather than an audio record, and the involvement of a third-party company providing these video services. He wondered whether – since all other things remained unchanged (*viz.* the cast of characters, their locations, and GDPR jurisdictional issues) – the move to video would create additional consent requirements under the applicable privacy laws. For instance, in jurisdictions where taping someone without consent is illegal, he wondered if it would be possible to resolve this controversy merely by arbitration rules or consent recorded in the first procedural order. Mr. Kantor had never seen this issue with stenographic records and thus wondered if video was different for some reason.

Mr. Cohen agreed that there should not be any difference between preserving a video and a transcript but did note that it "[felt] *different*". He also agreed with the suggestion that this should probably be addressed in the first procedural order. However, since he was not a GDPR expert, he sought inputs from those that might be better informed.

In his second post of the day, **Mr. Cohen** sought to impress upon readers that remote dispute resolution is neither something to fear, nor a phenomenon that heralds the end of procedurally fair arbitration as we know it.

He surmised that lawyers believe remote arbitrations might be unfair if too many stakeholders are not in the same room because they privilege the idea of in-person interactions. This leads them to assume that the experience is "*less fulfilling*" for people not

in the room. He admitted that there was some truth to this, if one imagines a situation in which he or she participates in a conference call remotely while all other participants are sitting at the same conference table – it would be easy to feel like a second-class participant. He gave two reasons why this may not apply to remote dispute resolution:

- “i) we're assuming unfairness in this scenario when one set of participants is in the room and the other is not, e.g. one set of counsel is participating remotely while the other set is in the same room with the tribunal and any witnesses; we can argue whether this is prejudicial, but the better hypothetical here is to imagine what happens when both sets of counsel are remote;*
- ii) the infirmities of a conference call, when you can only hear people (and often poorly at that), may not be duplicated in a scenario where you can both see and hear the other participants clearly [again, I assume for these purposes that your internet is fast, your camera is well-placed, and the link has been properly tested.]”.*

Therefore, with “*parties on an equal footing in terms of their remoteness*”, he pondered what the issue could potentially be. He then offered three plausible explanations for this skepticism:

1. Lawyers are a small “c” conservative bunch, “*trained to apply a fixed set of principles to ever-changing circumstances, to reason by analogy to past examples, and in the case of common lawyers, to adhere to the doctrine of precedent*”. The idea of doing things differently fills lawyers with fear and loathing.
2. Arbitrators are particularly “*leery of procedural diversions from the norm*”. This is because the risk of a challenge to an arbitral award is too great to entertain newfangled ways of doing things, in a challenge-happy climate.
3. There is a terrible failure of imagination among lawyers generally, and the arbitration community particularly, in “*conceiving disputes procedures that push the envelope*”.

He then invited thoughts on the potential reasons for lawyerly conservatism.

First to respond was **Mr. Lowther**. He noted that although adherence to precedent was fundamental in common law, judges were still able to revisit and adapt existing case law when necessary. While these adaptations are seldom radical, they do contribute to an important feature of the legal system – stability. That said he expressed his belief that lawyers did crave structure and rules, and what they feared most was perhaps the idea of a legal vacuum and corresponding chaos. He then cited the Seoul Protocol as an example of how “*innovative imaginative and bold*” legal practitioners could really be and expressed hope that similar initiatives help fill the perceived legal vacuum that exists.²¹

²¹ The Seoul Protocol is available online, *see supra* footnote 14.

Responding to Mr. Lowther, **Mr. Cohen** said that, being a cynic, he would not color the Seoul Protocol as “*terribly revolutionary*”. He found that, like much of arbitration’s baby steps towards technological progress, the formula is:

“*[common sense] + [name something a “protocol”] = soft law*”.

He clarified that he was saying this as a member of the ICCA-CPR-NYC Bar Task Force on protocols in cyber security and was not knocking the Seoul Protocol but was frustrated that the arbitration community was so timid about these things. He concluded with the following: “*If protocols are what it takes for us to venture forth without fear into the future (or indeed the present), I’m all for it*”.

Prof. Strong noted that, as an optimist, she believed there was a place for protocols for two reasons. *First*, they help people identify areas of interest/importance in the field. *Second*, they allow for some convergence or divergence among different subparts of an epistemic group, as people try to either improve on or copy the protocol. She noted that this certainly did not mean that she did not wish for the arbitral community to move quicker at times, or have more courage, but felt that there was some value in baby steps as well.

Abeer Sharma was next to address the question Mr. Cohen had raised. He began with the premise that the legal profession was conservative by both necessity and design, and that this was not necessarily a bad thing. He provided three justifications for this:

First, clients with freedom, family, or millions at stake would want to appoint a sober, down-to-earth person and not someone who acted like “*too much of a maverick*”. He developed this further by stating that while there is a place for creativity in the profession, clients expect it to be limited to the four corners of their case and would not want a lawyer who appears to challenge the existing legal order.

Second, the profession is strictly regulated by bar councils and associations which tend to have a monopoly on practising law and impose rules as to the acceptable conduct for their members, which often extend to trivial matters. He provided a few examples to illustrate this point: (i) there are restrictions on the business cards he is entitled to hand out or the shingle he could hang up, and (ii) some jurisdictions have imposed fines on lawyers for getting into Twitter fights and saying something purportedly offensive.

Third, with more experience, lawyers become more risk-averse, because that is the nature of their job. For instance, an in-house lawyer looks to decrease the exposure of the company. Mr. Sharma did, however, acknowledge that a lot of this could be attributed to self-conditioning.

Prof. Strong commended Mr. Cohen’s post for raising the point of technology and etiquette where one person was made to feel like a second-class participant, when other members were participating live in a conference. In her opinion, this problem would have to be addressed by technology, developing better ways for those participating online to intervene in the conversation. Moreover, people would need to do a better job of checking with people who are online. Prof. Strong then expressed her hopes that the current crisis and dependence on virtual classes and virtual business meetings would make lawyers more sensitive to this issue.

Mr. McIlwrath agreed that lawyers were conservative especially in regard to dispute resolution. He surmised that circumstances could foist changes upon a society, along with its unwilling participants and illustrated by example; he recalled an interview of Robert Carneiro²² for a podcast for the International Institute for Conflict Prevention & Resolution.²³ Mr. Carneiro is known for his theory on how States arise, also known as the “*Caneiro Circumscription Theory*”, which states that where populations are geographically circumscribed, conflict and conquest lead to the inevitable rise of governments as a way to address population pressures.²⁴ Mr. Carneiro pointed out to Mr. McIlwrath that “*laws and legal systems follow a similar path of cultural evolution as people need to adapt to changing circumstances*”. These evolutionary steps appeared to be inexorable, with all societies following more or less the same pattern of producing particular laws and methods of conflict resolution as they grew. Evolving legal systems appear to have been pushed by other forces of social change, not a gathering of lawyers and judges in a society.

This led Mr. McIlwrath to question, in light of recent events, whether it really mattered what lawyers wanted, as circumstances and new boundaries would anyway force them to adapt. This brought him back to the question he had raised earlier: “*Why should we assume that [reproducing in-person hearings through video] is an objective that should be maintained at a time when legal systems in general will need to adapt to the changing societies that they support?*”.

Mr. Campbell responded to Mr. McIlwrath’s question in agreement, noting that “*we should not blindly assume that replicating in person dispute settlement is the goal*”. He reiterated that there was no single form of in-person dispute settlement that served as a reference point. Picking up on Prof. Strong’s point on fabricated personas, and her advice to be true to oneself, he wondered if human advocacy always involved some element of playing to the adjudicator’s biases. He speculated that video conference dispute resolution may just be a long evolutionary process of Prof. Mendelson Q.C’s hologram not being driven by the man himself, but some artificial intelligence version of him, optimized and sanitized of what a team of programmers and ethicists thought were his undesirable biases.

Prof. Davis said that he was reminded of the words of Alberto Elisavetsky of ODRLatinOAmerica who said, in the context of mediation, that having one or both parties online with the mediator was not “*that big a deal*”. He further expressed his belief that practice may make perfect in this context as well.

Prof. Strong added two theories into the mix. *First*, she cited Alan Watson’s argument on the transplantation of legal ideas, norms and principles. *Second*, she recalled the theory of market competition. In an era where we can fly back and forth much faster than ever before, there is bound to be a certain amount of convergence of solutions. To her, market theory suggested that people will both copy ideas and innovate (to increase market share) or stay the same (to retain market share by sticking to old ways). Both approaches would lead to an increase in

²² Robert L. Carneiro is an American anthropologist and the head of South American Ethnology at the American Museum of Natural History.

²³ Podcast available for download at <https://www.imimmediation.org/download/1179/podcasts/48474/cpr-idn-26-from-stone-age-conflict-resolution-interview-by-michael-mcilwrath-with-anthropologist-robert-carneiro.mp3> (last accessed on 18 April 2020).

²⁴ For further information on the theory, the readers are invited to refer to a Wikipedia post on this topic, available at https://en.wikipedia.org/wiki/Circumscription_theory (last accessed on 18 April 2020), as included in the post.

options over the following months. She went further to disagree with the view that clients are passive passengers led by lawyers; the recent rise of in-house lawyers meant, in her opinion, that clients are often led by tech-savvy lawyers who are not afraid of innovation. Nowadays, the clients are therefore “*driven by the bottom line, and if a new option arises that can improve the bottom line, they’re going to try it, maybe not right away, but in time*”.

Mr. Kantor took the discussion forward by highlighting an additional concern that arose with online hearings – cyber security. He cited the American Arbitration Association (“AAA”) and International Centre for Dispute Resolution broadcast email, which encouraged arbitrators and mediators to support remote hearings, among other things. The email pointed out that they “*anticipate[d] an uptick in opportunistic cyber-hacking*”. He thought the AAA’s reminder on cyber security issues was thoughtful at this point. There was merit not only in encouraging curmudgeons to get a move-on, but also to proactively try and identify challenges so that adequate mitigation strategies might be developed. He proceeded by inviting comments on what other challenges might exist.

MARIS (the OGEL & TDM publisher) helpfully provided a link to TDM’s Special Issue on Cybersecurity in International Arbitration that was released in 2019, given the turn that the discussion had taken.²⁵

Mr. Cohen responded that Mr. Kantor’s concern was “*a bit more 2025 than 2020*”. However, he expressed that he would be concerned with the ease with which video information or testimony could be manipulated – the so-called “*deepfake phenomenon*”.²⁶ Mr. Cohen concluded by opining that deepfakes would only “*get better and cheaper in short order*”.

Mr. Kantor agreed that deepfakes were indeed a current issue. He wondered whether it was easier or harder to detect deepfakes of documents scanned to PDFs than deepfakes of documents on the photocopies that were usually seen.

Prof. Strong shared a link on how to prepare for an e-arbitration or e-mediation which she thought helpful for the discussion.²⁷

Prof. Mendelson Q.C. responded to Mr. Cohen’s second post and picked up on his point that discussions on virtual dispute resolution should consider parties on an “*equal footing*” in terms of their remoteness. *First*, he shared that in less developed countries or even in the remote parts of more developed ones, Internet connection was often far from ideal. *Second*, he said that there was understandably more pressure for remote arbitration during the present pandemic situation, but that this crisis was also putting a tremendous strain on the Internet. Taking his own example, he said that while in theory he had a top of the range British Telecom Business fibre connection that should have given him very high speed without problems, since everyone was cooped up at home, his connection speed was quite poor. He suspected strongly that his experience was not unique.

²⁵ Available at <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=85> (last accessed on 18 April 2020); N.B.: free excerpt available.

²⁶ The post included a link to a YouTube video titled “*Deepfakes: Is This Video Even Real? | NYT Opinion*”, available at https://www.youtube.com/watch?v=1OqFY_2JE1c (last accessed on 18 April 2020).

²⁷ Article available at <https://medium.com/@simonboehme/observations-in-online-dispute-resolution-as-covid-19-spreads-70f0f028869c> (last accessed on 18 April 2020).

He further recalled another instance, in an investment arbitration, where both parties agreed on document management by highly reputed companies, but where links broke down and other technical issues arose. While stating that he was all for progress, he cautioned that Mr. Cohen's assumption was a big one; *"it may work in normal times, when all the lawyers, witnesses etc. have access to really speedy and reliable communication systems, but that is a big-ish if"*.

Prof. Strong shared her thoughts on lawyers being conservative towards e-consultations and e-proceedings because *"we tout ourselves [...] as a profession"*. In Australia, taking the example of another field, viz. medicine, major changes were made recently in teleconsulting.²⁸ She explained that the new regulations recognized that some consultations must happen face-to-face. She wondered if a similar loosening-of-requirements in other professions would normalize the loosening-of-requirements in legal practice. She also stated that in her opinion, the difference was that doctors had been pushing for some form of *"telehealth"* for a while.

Prof. Davis then shared an update from the Ohio Supreme Court Dispute Resolution Services:

"We have moved our Supreme Court mediation services into an online or virtual platform, supported by our traditional advance pre-mediation preparation and communication, including phone calls and email correspondence. The online platform we are using is called "ZOOM Professional" which includes options for joint sessions, breakout rooms, caucuses, and confidentiality. The virtual breakout rooms allow the mediator to provide the parties and counsel (if any) to meet separately outside of the presence of the mediator. The platform we are using is one of numerous platforms that is available".

In his third post, **Mr. Cohen** sought to flesh out more thoughts on how the arbitral community was too timid with solutions such as remote dispute resolution, and how it overestimated the challenges to this kind of procedure. He raised four additional points:

- "i) Many objections to video arbitration proceed on the mistaken assumption that video has to be a fixed-camera, two-screen function -- thus limiting the viewer's perspective to one actor at a time. In actuality, as anyone who has used Zoom, Webex, or any other contemporary video system knows, the video can be configured to show all the participants at the same time. Nothing therefore is lost in terms of gauging everyone's non-verbal reactions;*
- ii) Counsel place a great deal of stock in being able to assess verbal cues from arbitrators and witnesses; but the sad truth is that most humans, even professional interrogators such as lawyers, police officers, and psychologists, score not much better than chance when evaluating truthfulness and non-verbal signals;*
- iii) Consequently, as Stacie has noted, arbitrators and judges place much less stock in witness testimony than they do in contemporaneous documents. Our obsession*

²⁸ Article available at <https://www.msn.com/en-au/news/coronavirus/telehealth-system-expanded-to-help-patients-get-help-during-coronavirus-pandemic-more-test-kits-and-masks-on-the-way/ar-BB11BIkX?ocid=spartandhp> (last accessed on 18 April 2020).

with extensive cross-examination opportunities may therefore overrated;

- iv) As courts feel the need to transition to video in these viral times (talk about a way to bring "viral" back to its original context!), they will become more accepting and understanding of remote proceedings. The potential for challenge of a video arbitration will accordingly diminish”.*

He noted that people like Mr. McIlwrath had been saying this without great effect for years. One would think that the arbitration community would have paid more attention to its clients, i.e. those who pay the bills. He questioned whether this was possibly an issue of the arbitrators being too removed from the ultimate sources of their revenue.

Further, he wondered why the discussion was being limited to video arguments and testimony at hearings. If the goal was to convince arbitrator(s), non-verbal shortcuts and other decision-making heuristics were known to sway even sophisticated decision makers. He therefore wondered why the community had not thought of incorporating more visceral presentations in the rest of the arbitral practice, such as video memorials.

In his fourth and final post, **Mr. Cohen** shared his closing thoughts. He began with a “[p]op-quiz: what year was video conferencing invented?”. Answering that it had been in 1964, he pointed out that it took 40 years for it to become generally viable, and another decade before it became mainstream. Despite this, he noted that the arbitration community was still leery of this “*new technology*”.

As regards the current social distancing norms, he noted that these were going to make video rather mainstream in the field, while technologically it was also becoming obsolete. He suggested looking at developments in the gaming industry to learn what is “*cutting-edge*”, with great strides being made in the realms of virtual and augmented reality. He explained that virtual reality entailed constructing a piece of cyberspace with a headset; Pokémon Go was a classic example of such augmented reality where an image is superimposed on top of the world around us.

He then noted that it did not require a great leap of imagination to see how virtual or augmented reality could transform the way we conduct arbitrations by 2030, making this discussion on video conferencing seem quaint in comparison. Hearing centres would be things of the past if we could all be seated in virtual hearing rooms. So would site visits, or slideshow reconstructions of construction mishaps when one could see a model right before them, upon donning a pair of glasses. Or perhaps this would not happen by 2030; just as it took half a century for one technology to go mainstream in arbitration, Mr. Cohen noted that it might similarly lag behind other technologies for decades. Signing off, he hoped, however, that the Young-OGEMID generation would prove him wrong on this point.

Thanking Mr. Cohen for his engaging contribution to the Symposium, **Prof. Strong** added that the idea of arbitration enhanced by virtual or augmented reality piqued her interest because it seemed to overcome all objections to not-in-person arbitrations and mediations.

Tanya Goddard responded that over the years, we have begun using technology in an incremental fashion, but certainly not to the extent that we were currently contemplating. She pointed out that people struggled with the lack of contemporaneity during e-arbitrations or e-mediations. Perhaps a virtual reality mode could address this issue of “*feeling in each other’s*

presence” when we are not. According to her, the same risks of maintaining integrity in the process would, however, continue to arise; “*how do lawyers present their case to the best of their ability and how do arbitrators ensure that their awards cannot be challenged?*”. She wondered if part of the issue was that technology was not where it needed to be, creating issues with how we trust the use of this mode of communication. She thought it might be interesting to consider what criteria the mode of technology should satisfy for it to be accepted.

Mr. Cohen replied to Ms. Goddard with a story he described as “*possibly apocryphal*”; “*in the early days of the telephone, there was robust disagreement about what it was appropriate to wear on a call*”, with some considering it unseemly to pick up the phone in attire that you would not conduct polite conversation in. Mr. Cohen estimated that the present hesitancy with virtual reality dispute resolution was at this same level, where we could not be certain about how the norms of in-person hearings would or would not apply. He expressed his belief that the technology did exist although it was not as cheap as it would become in due course. To him, virtual dispute resolution raised issues that were not germane to video alone; should one show up as themselves, or as an avatar of oneself? Should the avatar be the same race/sex/species? Should a virtual hearing room look like a real hearing room or something the arbitrators might prefer (such as the bridge of the Starship Enterprise)? He then explained that if these concerns sounded fanciful or silly, one only had to consider: (i) that we care little for what we wear when we are on a phone call compared to how much this question mattered in the telephony’s infancy; and (ii) what difference it ought to make to the substance of the advocate’s argument if they appeared as Scooby Doo as opposed to Ruth Bader Ginsburg.

Speaker 5: Ian Macduff – University of Auckland and National Centre for Technology and Dispute Resolution

In his opening post to his contribution titled “*Best practices in virtual dispute resolution*”, **Mr. Macduff** sought to highlight observations about the growing practice of mediation online, and comment on the different contexts in which this might be done. Rather than prescribing best practices, he explained hoping to suggest some guiding principles. He held back from taking a prescriptive approach given that the fundamentals of mediation have always been flexibility in design and party autonomy. Moreover, he recalled an instance from 15 years ago when a group of negotiation trainers had sought to “*teach ‘global best practice’*” in a country and a culture very different to their own. This formed a negative image in the minds of the trainees who considered it to be a “*form of cultural imposition*”. The risk lies in creating a perception – amongst the trainees – that they are seen as “*‘raw material’ without a negotiation culture*” – a predicament best avoided.

At the outset, Mr. Macduff flagged a piece documenting online mediation that took place in 1992, between a party on the United States west coast and the other in western Canada, with him mediating from New Zealand, even before the process had a name or an acronym.²⁹ The mediation took place over email and in chatrooms.

His *first* point on developing best practice was that “*context matters*” when it comes to online

²⁹ Ian Macduff, *Flames on the Wires: Mediating from an Electronic Cottage*, in *Negotiation Journal* (1994), available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1571-9979.1994.tb00002.x> or <https://www.semanticscholar.org/paper/Flames-on-the-wires%3A-Mediating-from-an-electronic-Macduff/485e58e4529db5bf8570b7f6bf97dfcf3c830ca0> (last accessed on 19 April 2020).

mediation. He added that the design of the mediation process would “*be bound to take into consideration the circumstances of the parties, not just in terms of what the substance of the dispute is but also what feeds and shapes their perception of the dispute*”.³⁰ He highlighted five settings in which online mediation developed as a response to different needs and imperatives:

1. *First* was the “*burgeoning reality of online communication, in which things can and do go wrong*”. He referenced Ethan Katsh who had observed that the Internet was not always a peaceful place, and that there is indeed a need for tools to overcome distance, anonymity and animosity. He then cited a pioneer of alternative dispute resolution (“**ADR**”), Prof. Frank Sander, who had commented that the virtue of mediation was in being able to go where the disputants are; although Mr. Macduff doubted that Prof. Sander had anticipated digital tools being involved.
2. *Second* was the arrival of commerce on the Internet from around 1995. Against this background, there was a need to develop tools to respond to inevitable disputes over delivery, payment and quality, and to respond to the incapacity of national courts to deal with issues of jurisdiction, applicable law and enforcement.
3. *Third* were the emerging tools of online communication and the necessary spread of infrastructure, which allowed for participation in dispute resolution processes where regular processes were challenged by physical distance or remoteness.
4. *Fourth*, Mr. Macduff explained that the parties are often separated by risk and conflict and an inability or unwillingness to meet in the same space. They might also want to avoid the perception that they are “*engaging directly with ‘the enemy’*”. One of online resources and communication’s biggest promises is that it allows parties to communicate at a distance.
5. *Fifth*, and only recently added to this list, he noted that parties might be separated by risk of viral contagion and/or government edicts that they do not venture forth and engage face-to-face with others. This has forced arbitrators and mediators to continue their work online. Moreover, as courts have begun to close for business, parties may increasingly turn to non-judicial forms of dispute settlement. The recent crisis has also caught the judicial system in New Zealand by surprise and has exposed the cost of not having made progress on digital strategies in courts.

The *second* factor that would shape best practice were the levels of digital engagement, i.e. how digital technologies are being used. Again, this would necessarily depend on what technology was available to the mediator and the parties, as well as their comfort and familiarity with said technology. Three levels of digital engagement were thus identified:

1. Supplementary: where the use of digital technology is ancillary to regular practice – for file storing, communication, etc.

³⁰ See Orna Rabinovich-Einy & Ethan Katsh, Technology and the Future of Dispute Systems Design, in Harvard Negotiation Law Review (2012), available at <https://pdfs.semanticscholar.org/7c9b/ad7916f7e4de1b2ae7acb1058b1dd4cf236a.pdf> (last accessed on 19 April 2020).

2. Imitative: where digital technology is used to migrate normal practice to online practice. At its simplest, it is an exercise of carrying out work in the same way, but at a distance, through the use of tools like Zoom, Skype, or WhatsApp. The risk with imitative use of digital resources is that “*little attention is given to what might need to change by way of engagement and communication, nor to the kinds of questions raised in earlier conversations about security, document sharing, privacy and so on*”.
3. Transformative: the stage that we find ourselves at now and which involves working out how digital resources can supplement, and also radically transform the ways in which we work – which is where the idea of design previously referred to comes into the picture.³¹ Modern history of negotiation and mediation practice had recorded from a very early stage that this was a chance to “*fit the forum to the fuss*”.

Mr. Macduff then went on to document some of the principles that might shape best practice:

1. Inclusion: “*ensuring digital inclusion in order to ensure communication inclusion, noting that a current concern, apart from dispute resolution itself is the level of digital exclusion in any jurisdiction, not just as a matter of infrastructure bandwidth, but also language, digital literacy*”.³²
2. Confidence: in one’s capacity to use technology, as well as in the mediator and the integrity of all parties.
3. Confidentiality: of communications, shared documents, files that might be stored (including video). It must be borne in mind that parties may not have their own devices and may need to use public or borrowed facilities. Moreover, in some settings it may be important for parties to have families present to support them during proceedings.
4. Transparency: digital access requires us to go beyond the normal demands of transparency about how online mediation works, especially if parties feel less in control of the technical elements of the process.
5. Trust: thought must be put into what additional trust mechanisms might be useful to ensure confidence in the process and the people.³³

Critical to cultivating best practices was to also ensure that the requisite technology was set up. Mr. Macduff highlighted the need to ensure technical compatibility, such as choosing, when creating a document, between Word and Pages. Technology would have to be kept

³¹ See *supra* footnote 30.

³² The author made reference to The Digital Inclusion Blueprint, the New Zealand’s Government vision for digital inclusion, available at <https://www.digital.govt.nz/digital-government/digital-transformation/digital-inclusion/digital-inclusion-blueprint/> (last accessed on 19 April 2020).

³³ Amy J. Schmitz & Colin Rule, The New Handshake: Where We Are Now, *in* International Journal of Online Dispute Resolution (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991821 (last accessed on 19 April 2020).

simple for the participants while ensuring that all necessary features are available. Shared platforms would have to be set up. It would also become necessary to identify and be familiar with software platforms that were frequently used and offering pre-mediation assistance. There might also be other IT requirements like encryption, secure document exchange, single document/multi author facilities, file repositories and video.

Some additional concerns that he identified included the difficulties with synchronous or asynchronous communication, time zone management, managing a speaker order and ensuring that parties not currently in any conversation were offline and that proceedings were being kept confidential.

The bigger question that Mr. Macduff sought to raise was: “[H]ow might this change or contribute to changing modes or civic and public discourse?”. This question was inspired by Douglas Rushkoff: “*In short, the interactive mediaspace offers a new way of understanding civilisation itself, and a new set of good reasons for engaging with civic reality more fully in the face of what are often perceived (or taught) to be the many risks and compromises associated with cooperative behaviour*”.³⁴

Prof. Strong thanked Mr. Macduff for his excellent post. It struck her that he had hearkened back to early pioneers of ADR and observed that they probably did not envision the social and technological realities we face today. To her, it seemed that Mr. Macduff was suggesting that while we should keep their views on optimal practices in mind, we must also consider the changed circumstances.

During her involvement with the Singapore Convention on Mediation (“**Singapore Convention**” or “**Convention**”), she recalled that there had been some discussion on whether to even submit a proposal because of pushback from the American counterparts who believed that any form of legalized support for mediation “*would somehow ‘ruin’ it*”. She wondered if, in this context, the pushback could be attributed to people being locked in on a view of how things should be versus how they are, or how they could be.

Her second takeaway was that the creation of a concept of global best practices often involved a few countries grabbing hold of reform movements and creating a mechanism that may not be appropriate for all societies. Since there had not been significant discussion on what these distinctions might be, she wondered if Mr. Macduff could share his thoughts on the same. One issue that Prof. Strong saw arising was the difference between monochronist and polychronist societies³⁵ – where the former were all about deadlines and efficiency and would probably be happy with e-arbitration to get the job done, the latter were more particular about relationships and might prefer to do things in-person, although they were also more amenable to change.

In response to Prof. Strong’s observations, **Mr. Macduff** raised the following question: “[I]s it possible to trace the differences between European and US responses to the Singapore Convention proposal to deeply ingrained cultural and constitutional values: what is perceived to be protected by different perceptions of such a Convention – liberties; or rule

³⁴ Douglas Rushkoff, *Open Source Democracy: How Online Communication is Changing Offline Politics* (2004), available at <http://library.um.edu.mo/ebooks/b17781486.pdf> (last accessed on 19 April 2020).

³⁵ See Giancarlo Duranti & Olvers Di Prata, *Everything is about time: does it have the same meaning all over the world?* (2009), available at <https://www.pmi.org/learning/library/everything-time-monochronism-polychronism-orientation-6902> (last accessed on 19 April 2020).

of law values?”. To him this contrast appeared too stark, but it came up as such in a workshop in Singapore, addressed by the Singaporean chair of the Working Group. While this might take the symposium off the topic of ODR, and onto the topic of the Singapore Convention, he drew attention to a thread of concern with ADR (and now ODR), which rests on primacy of rule of law and protection of values of public norms. A cautionary note to this end had been struck by the Chief Justice of New Zealand.³⁶

Prof. Strong, speaking as a person who was “*in the room where* [the Singapore Convention] *happened*”, disagreed with how the dichotomy with respect to the said Convention had been framed. *First*, she noted that some EU members were against the Convention because of political reasons and pressure from the EU, which had to do with internal timing of EU legislation that needed to be kept a priority. *Second*, she explained that the division was more along the lines of those who saw mediation as a process and those who saw it as just another form of negotiation resulting in a standard contract (i.e. the settlement agreement) “*that had no reason to be benefitted like an arbitral award, which was akin to a judgment*”. There was no discussion on rule of law or liberties per se. Prof. Strong expressed her belief, however, that e-mediation and e-arbitration may face a similar dichotomy but that the Singapore Convention would go a long way in making mediation more of a process.

* * * * *

³⁶ See Dame Helen Winkelmann, A Framework for The Future: Technology and the Rule of Law [Speech to Australasian Supreme and Federal Court Judges Conference, Canberra 20 January 2020].

Transnational Dispute Management is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration.

This article was made available as a free download from www.transnational-dispute-management.com

Young professionals and students with an interest in transnational disputes, international investment law developments and related issues, are hereby invited to join the Young-OGEMID discussion group. Membership is free.

Simply visit www.transnational-dispute-management.com/young-ogemid/ and fill in the registration form. Other summaries of our Young-OGEMID virtual seminars focussing on career development can also be found there.