Paperless Arbitration

The New Trend?

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Abstract

A webinar organized by Laura Canet and William Brillat-Capello, with Gillian Carmichael Lemaire, Yulia Mullina, Sebastián Partida, Sarah Tulip, Sergey Alekhin as speakers

This webinar, organized by the associates of the Paris-based firm Betto Perben Pradel Filhol, was held at the beginning of the COVID-19 pandemic. Since then, arbitral practice and procedure have evolved considerably because of the increase in the number of paperless arbitrations and paperless hearings. The issues and challenges discussed below are still relevant to assess whether this trend will become the normal way of conducting arbitrations after the end of the current global health crisis or will simply constitute one of the tools available to practitioners. As the world is still dealing with this unprecedented crisis, the transcription of this webinar offers a snapshot of some of the earliest conclusions reached about how the pandemic is changing arbitration as we knew it.

Keywords: paperless arbitration, arbitral practice and procedure, cybersecurity, new technology.

On Friday, 24 April 2020, William Brillat-Capello and Laura Canet, associates at Betto Perben Pradel Filhol in Paris, gathered together five distinguished arbitration practitioners – Gillian Carmichael Lemaire (Independent Arbitration Practitioner), Yulia Mullina (Russian Arbitration Center), Sebastián Partida (Hewlett Packard Enterprise), Sarah Tulip (3VB) and Serghei Alekhin (Willkie Farr & Gallagher LLP) – and some 100 attendees to discuss, on an all virtual basis, whether paperless arbitration is becoming the new trend and how the Covid-19 health crisis, in particular, is impacting the way arbitration proceedings are and will be conducted. Among the questions raised were the following: what obstacles and challenges does paperless arbitration raise? What are arbitration users' expectations in the conduct of arbitral proceedings? What is the role of the arbitral institutions in the introduction of new technologies in arbitral processes?

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Are paperless proceedings efficient in court proceedings abroad? What cybersecurity precautions should be taken?

1 Introduction

William Brillat-Capello:

As William noted in his opening remarks, the unprecedented 2020 global health crisis has forced arbitration practitioners, like many others, to adapt to new workstyles, in particular to working remotely and to finding alternative solutions to in-person hearings and meetings.

However, paperless arbitration is hardly a new topic. Steps have been taken in the past few years to facilitate the emergence of paperless arbitration. Arbitration institutions have adapted their rules to allow e-filings and hearings via videoconferencing. States have amended their laws to address technological changes in litigation and arbitration. The arbitration community has also issued protocols and best practices to introduce new technologies in the arbitral process, which could very well be a first step towards a widely accepted international practice in the field.

Lastly, William emphasized that paperless arbitration goes beyond logistics: cost-efficiency, data security and protection of the environment are key aspects that must be taken into account. He also underlined the generational gap between practitioners and the difficult access to the internet and technology in some countries that could prevent paperless arbitration from becoming the new trend.

2 What Obstacles and Challenges Does Paperless Arbitration Raise?

Gillian Carmichael Lemaire:

Gillian was asked to make some introductory remarks in the light of her earlier explorations of paperless arbitration.[1]

She first commented on the extent to which paperless arbitration or virtual processes have been used until now. For a long time, there have been various ways in which international and domestic arbitrations, or at least parts of them, have been conducted virtually, as well as a plethora of assistance in the form of books, articles, guidelines and checklists. One obvious long-standing example is arbitration conducted through online dispute resolution platforms, which has been used successfully in areas such as consumer disputes. In large commercial and investor-state cases, technology has also been used extensively, but usually for parts of the arbitration process. Taking evidence by phone or videoconference from clients, witnesses and experts is standard. A large number of case

1 G. Carmichael Lemaire, 'Paperless arbitrations – where do we stand?', *Kluwer Arbitration Blog*, 19 February 2014; Programme Committee Member for the conference on Equal Access to Information and Justice – *ODR* 2017, Paris 12-13 June 2017, and speaker on 'Challenges Facing ODR and Future Application of ODR'.

management conferences take place remotely and very satisfactorily. Witnesses are cross-examined via videoconference when they cannot be physically present. Electronic hearing bundles are the norm even if hard copy backups are still used by some.

Other than these areas, however, until the outbreak of the Covid-19 pandemic, there had been a somewhat half-hearted drive for technology to be used more frequently. Revisiting the use of technology now that we are in this crisis coincides with our endeavours in relation to the environment. Last year our colleague Lucy Green launched the Green Arbitration Pledge,[2] which, among other things, asks dispute resolution practitioners to commit to discouraging the use of hard copy bundles in hearing rooms and to consider using videoconferencing for fact-finding or interviews with witnesses, eliciting witness evidence at hearings and arbitrator deliberations.

There are, nevertheless, reasons why technology has not been used more frequently. Access to technology may not be possible, e.g. in a country in conflict. Different time zones may make it complicated (but usually not impossible) to organize hearings. There may even be legal restrictions on hearing witnesses remotely. Some users have held back from using certain technology because of cost, even though this may balance out against the cost of travel, accommodation, etc. The imposition of certain technology could, in some instances, interfere with the parties' right to an equal and reasonable opportunity to present their cases and with due process being respected.

As we have now been catapulted into a situation where fully virtual hearings may have to be organized, one of the first questions that parties are likely to ask their counsel is whether they should agree to a virtual hearing. Whether or not a virtual hearing is appropriate depends on the individual case and the prejudice that might be suffered if a case were to be suspended for a lengthy period. There are differing views, considering that the main part of a virtual hearing will likely be the cross-examination of witnesses. Some parties may not be keen to give up the chance to cross-examine a witness in person. Others clearly support the view that while cross-examination of a witness virtually may not be as good as in person, it works reasonably well. Indeed, it can work very well provided the technology is good. For procedural matters, as well as openings and closings, there seems to be little hesitation in a move towards more frequent virtual processes.

Tribunals will be faced with whether or not they may or should order a virtual hearing even if the parties do not want one. Again, every case will have different circumstances to take into account. Parties should not necessarily think that everything they agree will meet with the approval of a tribunal. Most tribunals are likely to be under a duty to conduct the arbitration expeditiously and cost-effectively, either under statute or applicable institutional rules. It is therefore not certain that a tribunal would agree to postpone an in-person hearing if it would be prejudicial to do so, and it could therefore order parties to organize a virtual hearing.

2 www.greenwoodarbitration.com/greenpledge.

As far as case preparation and management of the hearing itself are concerned, whether or not we are faced with the immediate prospect of organizing and preparing for a virtual hearing, the present situation is an opportunity to think about what changes we need to make to the way we prepare and manage cases and conduct advocacy.

The topic of virtual hearings has been trending in social media and all kinds of online arbitration events, and there is no shortage of resources. Many institutions and others have issued guidance and checklists. Looking at how the courts in some countries are running virtual proceedings is also helpful, even though the challenges are different (principally, the need for most court proceedings to be made public rather than conducted in privacy and confidentiality generally required in arbitrations).

One important area is how to better focus on the main issues and present them to a tribunal in the most effective way in a virtual setting. A first step as regards focus would be to get in touch with opposing counsel to see what can be agreed, e.g., undisputed issues and presentations that will help the tribunal such as agreed chronologies. Depending on the case, much can be agreed, even in advance of the first Procedural Order (PO1) and certainly in advance of a hearing, all of which will make counsel's and the tribunal's job easier and will save cost.

Preparing the technological aspects of the hearing is a key area where the types of protocols that will be put in place further to discussions between the parties and tribunals is likely to develop quite considerably. More detailed pre-hearing case management meetings will be held with tribunals, in the presence of IT experts, and there will be additional meetings for testing all the issues likely to arise during the hearing. A myriad of issues, such as cybersecurity, and a plan B to deal with things that go wrong, will need to be planned into a technology protocol.

More detailed protocols will also be needed for the taking of evidence from witnesses of fact and experts. A witness giving evidence from his or her home will need to have very clear instructions for every step of the process, including the set-up of the room where he or she is present, how documents are to be referred to, what to do if the technology fails, etc. A strong tribunal chair will be necessary to give directions to the witness during the hearing.

Finally, on the question of whether advocacy will be conducted differently, the crisis has afforded us an opportunity to review what is really required in terms of advocacy and how we might make some adjustments. For example, it will be critical to have user-friendly, preferably agreed and streamlined electronic hearing bundles. Tribunals may ask for skeleton arguments, which could prove especially useful in a virtual hearing context and possibly take the place of openings. Traditional openings may be kept shorter, dispensed with or dealt with in writing beforehand. We should go back to the basics of cross-examination and think carefully about whom we really need to cross-examine, why and to what extent. Oral closings may be replaced, as frequently happens anyway, by written post-hearing briefs, which may be assisted by the tribunal fixing a prompt deadline for their submission and indicating what it would particularly like the parties to address. More hearings may take place in slices rather than all at once.

In conclusion, this is a good time for everyone to reassess their practice and make some adjustments, whatever their role in international arbitrations. As individuals, we need to get to grips with the technology and ensure we have the hardware and software needed to function remotely. Various balancing acts now need to be fine-tuned: finding an equilibrium between human contact, on the one hand, and virtual communications and processes, on the other, and between the need for prompt and efficient resolution of a case versus respect for due process.

3 What Are Arbitration Users' Expectations in the Conduct of Arbitral Proceedings?

Sebastián Partida:

Arbitration procedures nowadays have largely been standardized. This is because of the harmonization of national laws, of the institutional rules and, finally, of practice, which has led to the formation of commonly accepted technical standards. The consequence of the foregoing is that now most arbitrations follow the same 'rituals': systematic use of Redfern schedules, cross-examination, discovery procedures in civil law jurisdictions, etc. However, the results of this ritualization can be seen in relation to costs, which have earned arbitration the reputation of being an expensive and constraining method of dispute resolution.

In view of the crisis we are facing today, and the eventual decrease in budgets dedicated to in-house legal departments in many companies (as we experienced after the 2008 crisis), it is very important that lawyers and arbitral institutions take the necessary measures to ensure that the procedures are efficient and less costly. As the global response to Covid-19 has pressured companies to rapidly implement and expand remote work options for their organizations, making office work and physical meetings almost obsolete, Sebastián suggested that this is the perfect moment for lawyers to reinvent the way they do their work, namely by trying all the technological tools available, from legal technologies to, more broadly, all the instruments that dematerialize the business and streamline relationships between partners.

Although it can be difficult to change habits, and even more difficult to innovate when most of the legal technology solutions proposed have not reached maturity yet, Sebastián emphasized that, from the client's perspective, cost reduction, speed and, of course, a well-drafted and convincing arbitral award will always be the top priorities.

According to him, the current crisis should also be seen as a chance to address and engage new industries. During the last stock market collapse, some industries were more affected than others, including the oil and gas, aeronautics or even construction sectors. The problem is that these industries are traditionally the largest users of arbitration. It is thus fundamental for arbitration practitioners to adapt to this new economy, no longer dominated by the petroleum industry but by the tech giants.

He noted that the five biggest American IT companies, whose combined value exceeds the GDP of France, almost never use arbitration, reserving its use only for big-money disputes, e.g. M&A disputes. He explained this with reference to the fact that many disputes in which they are involved are not arbitrable, e.g. tax or competition disputes, or had no legal definition until recently, e.g. neighbouring rights. He also explained that for cultural reasons, as in the US, arbitration is often seen as a mere option but not as *the most common dispute settlement mechanism*, as it is often described in France.

According to him, this is probably going to change in the coming years with the diversification of the tech industry, notably with edge computing and the growing demand for supercomputers. Moreover, the situation is a bit different in Asia, as in some countries, such as India or China, tech companies already go to arbitration more easily – but this is because parties distrust their national courts.

It is thus very important for arbitration practitioners to be interested in these players even if they are not frequent users yet, and, therefore, making arbitration paperless is very relevant.

Sebastián also urged counsel, arbitrators and institutions to truly undertake the ecological transition. To that end, he qualified paperless arbitration as a very suitable response to settle disputes, since this reduces the carbon footprint and is in line with the commitments made by companies to ensure the sustainability of their business, especially if they have decided to become carbon negative.

He finally pointed out that, as for many other evolutions in arbitration, arbitral institutions should take the lead by insisting on paperless proceedings and discouraging physical hearings when video hearings are sufficient.

He concluded by saying that (1) addressing new industries as potential arbitration users, (2) ensuring that costs remain reasonable at all times and (3) encouraging paperless arbitration in order to undertake the ecological transition are three keys to arbitration's survival of the Fourth Industrial Revolution.

4 What Is the Role of the Arbitral Institutions in the Introduction of New Technologies in Arbitral Processes?

Yulia Mullina:

At the time of the lockdowns, the majority of arbitration institutions have closed their doors temporarily and, while they received papers, they encouraged working entirely remotely using digital tools. Most arbitral institutions prefer using email for online submissions. Despite its common use, email has some significant weaknesses, especially for large disputes with a great number of documents.

Meanwhile, many arbitration institutions have recently launched new tools for paperless arbitration, for instance, online filing systems. To give an example, Yulia cited the London Court of International Arbitration's use of LCIA Online Filing,[3] which allows parties to file requests, responses and other applications and

3 https://onlinefiling.lcia.org/.

even to pay fees via the website, as well as maintain access to the filings made online. Otherwise, such tools usually do not provide an opportunity to exchange documents with other parties and arbitrators and to see their submissions online.

Several arbitration institutions have started to develop and use online digital platforms. For example, in Autumn 2019, the Arbitration Institute of the Stockholm Chamber of Commerce presented the SCC Platform[4] for communication and file sharing between the institution, the parties and the tribunal. Such platforms allow arbitration to be commenced, submissions to be filed, all documents to be uploaded and downloaded and developments in proceedings to be followed entirely online.

The Russian Arbitration Center (RAC), according to Yulia, might be called a pioneer in online arbitration, as it has been using its own digital platform – the Online System of Arbitration[5] – in all cases since 2018. The system consists of web-browser-accessible software that provides parties, arbitrators and RAC's case managers with tools to commence arbitration, monitor its progress online, upload and download documents at any time, including via mobile devices, and add new representatives to the arbitration. Every case file in the system contains information on parties, their representatives and the tribunal, a list of uploaded documents, tasks for parties and arbitrators and a fees calculator.

The use of digital platforms by all parties to arbitration, a tribunal and an arbitration institution in tandem with written proceedings (without oral hearings) allows a procedure to be not only 'paperless', but also fully online. In this context, for online arbitration Yulia also recommended considering expedited procedures instead of standard arbitration rules with hearings, especially since expedited arbitrations tend to be faster and cheaper.

According to Yulia, however, the issue of cybersecurity must not be underestimated, and arbitration institutions must keep their platforms safe and secure. As an example, for the Online System of Arbitration that has been put in place by the RAC, every case file in the System is totally confidential, and before giving access to any representative the RAC verifies his or her power of attorney.

Summing up, Yulia mentioned that the digital platforms for arbitration would certainly continue to be in demand even after the Covid-19 pandemic, as they help parties to reduce arbitration costs and increase the efficiency of their proceedings.

5 Are Paperless Proceedings Efficient in Court Litigation Proceedings Abroad?

Sarah Tulip:

England has been quick to adapt to virtual hearings in response to the Covid-19 crisis. The Business and Property Courts of England and Wales

4 https://sccinstitute.com/scc-platform/.

5 https://my.centerarbitr.ru/landing/?locale=en.

responded rapidly to the need to undertake hearings remotely, and it is reported that in the 12 weeks since lockdown, it undertook nearly 85% of usual business.

As for the practicalities and procedures, in addition to necessary amendments to its Civil Procedural Rules, the judiciary of England and Wales very promptly issued guidance in the form of the 'Civil Justice Protocol for Remote Hearings' (the 'Protocol').[6] The Protocol is applicable to all civil hearings and provides guidance on conducting remote hearings. Of particular note, paragraph 12 of the Protocol provides that "[i]t will normally be possible for short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings." The Protocol provides practical guidance on conducting such remote hearings.

Sarah discussed the practice of remote hearings in England and shared her knowledge of two particular cases of interest, which provide an insight into the approach of the English Commercial Court.

The first case was *National Bank of Kazakhstan v Bank of New York Mellon* [2020] EWHC 916 Comm.) This was a seven-day commercial court trial that was to involve hearing evidence from four witnesses of fact and two expert witnesses, with a counsel team from 3 Verulam Buildings, representing the National Bank of Kazakhstan. The hearing was due to begin during the first week of the UK 'lockdown'. The judge (Mr Justice Teare) directed that the trial proceed as planned, subject to a short (two-day) adjournment. He observed that

> [t]he court has to be optimistic, rather than pessimistic. It is the duty of all of the parties to seek to co-operate to ensure that a remote hearing is possible.

The trial was successfully conducted via Zoom and live streamed on YouTube.

The second case was that of *Re One Blackfriars Ltd*, [2020] EWHC 845. This was a £250-million claim, listed for a five-week trial in June; there were to be four witnesses of fact and 13 expert witnesses. In April the claimants applied for an adjournment, citing safety restrictions imposed by Covid-19 and arguing that the nature of the trial was such that it could not be conducted fairly on a remote basis. The court disagreed and held that the trial should go ahead in June. In his judgment, the judge remarked that "the message is that as many hearings as possible should continue and they should do so remotely as long as that can be done safely."

Sarah also shared her experience of participating in a remote hearing that allowed her to provide practical tips from her own experience on the conduct of virtual hearings. She explained how her experience (and that of many of her colleagues) had been very positive.

It will be interesting to see whether the approach taken by the English courts in response to the Covid-19 crisis will lead to more wide-ranging changes in the English courts. In a recent (virtual) address to the Chancery Bar Association, the

6 https://www.judiciary.uk/wp-content/uploads/2020/08/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf.

Chancellor of the High Court, Sir Geoffrey Vos, explained that, in his view, while Skype or telephone hearings should not become the norm for all types of cases,

> we should make long-term use of what we have learnt and devise a new way of delivering justice in Business and Property cases; a way that is quicker, more cost-efficient and allows greater access to justice.[7]

6 What Cyber Security Precautions Should Be Taken?

Sergey Alekhin:

The current global health crisis is a 'trial by fire' of the remote work concept in quite a few industries, including the legal industry. Indeed, are lawyers (both as employees and as employers), their clients and numerous third parties (including, of course, arbitral institutions) ready to embrace this concept and to ensure continuity of services? At the same time, this crisis is a 'taste of things to come' in terms of remote work – if one is ready to embrace remote work, and maintain the same or comparable productivity levels for several weeks or months, should not one consider altering the 'fundamental paradigm'? In fact, a recent survey of over 300 CFOs and finance leaders revealed that 74% of respondents are planning to move at least 5% of their previously on-site workforce to permanently remote positions post Covid-19.

Evidence of an ongoing mindset shift can be found in the recent joint publication of twelve arbitral institutions, encouraging parties and arbitrators to discuss ways of addressing the current situation by "using to the fullest extent [] any case management techniques that may permit arbitrations to substantially progress without undue delay".

On the face of it, this can be achieved by removing (or downplaying) the 'physical' elements of hearings. Thus, for dispute resolution practitioners, remote work inevitably goes hand-in-hand with rethinking the traditional concept of a single-venue gathering of all actors. As Prof. Richard Susskind posits in his recent book titled *Online Courts and the Future of Justice*, if there is a better way to achieve the outcome of the legal process – which is a fair and binding resolution of a dispute – then this solution should be preferred. To Prof. Susskind, courts (and there is no obvious reason why the same would not apply to arbitration) should no longer be venues where judges, lawyers and litigants physically assemble. Rather, courts will inevitably become hybrid, combining the minimum required physical presence with virtual and online components.

Having set the stage, not without a futurological flair, we now move to a very practical aspect of technology-infused dispute resolution – cybersecurity.

For those few who might still be convinced that the danger is exaggerated, dry statistics are sobering: an attack happens every 39 seconds on the web; 75 records are stolen every second; 300,000 new pieces of malware are created daily;

7 Sir G. Vos, 'The new normal in the Business and Property Courts post Covid-19', *Chancery Bar Association Zoom Talk*, 3 June 2020.

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and 46% of web applications have critical vulnerabilities. World Economic Forum's Regional Risks in Doing Business Reports identify 'cyberattacks' as the most pressing risk for CEOs in Europe and North America (and one of the top risks elsewhere in the world) year after year.

The legal (and, more specifically, dispute resolution) industry is, of course, not immune from cyberthreats. Law firms, individual practitioners, arbitral institutions and third-party service providers are both desirable and easy targets – publicly known instances of data breaches abound.

This requires cybersecurity guidance, and the October 2018 IBA Cybersecurity Guidelines, the November 2019 ICCA / CPR / New York Bar Association's Protocol for Cyber Security in International Arbitration, and the most recent March 2020 Seoul Protocol on Video Conferencing in International Arbitration do provide both practical tips and guiding principles. What these instruments do not (and perhaps cannot) offer is a comprehensive framework for cybersecurity in arbitration. Perhaps a better understanding of how each dispute resolution actor may be exposed to cyber risks will assist in collectively adapting the working practices and habits to the 'new normal'.

Parties and counsel generate and exchange most of the data. (1) An initial joint cybersecurity risk evaluation/risk map by the client and its counsel is advisable. Relevant factors are: (i) sensitivity of the information that might be shared with other actors (weighting on the safe side, as one, of course, cannot foresee at the initial stages of a dispute what information might require disclosure); (ii) types of data, i.e. personal or medical, which may require additional compliance steps; (iii) cyberattack risk level; and (iv) breach implications. (2) The risk evaluation may then lead to the establishment and implementation of a specific cybersecurity protocol for counsel-client information exchanges. The evaluation may also affect the choice of arbitral tribunal members and, if feasible, arbitral institution (as either of them may not satisfy a cybersecurity checklist that the party had in mind). (3) Upon constitution of the tribunal, the risk map could serve as a basis for agreeing on a cybersecurity protocol covering the arbitration proceedings in question, with implementation costs, reporting obligations and mitigation steps in mind.

Some commentators have advocated that a duty to preserve and protect the integrity and legitimacy of the arbitral process extends to ensuring that adequate cybersecurity measures are adopted in each specific arbitration proceeding. Another (rather obvious) point is that no matter how comprehensive the cybersecurity protocol agreed for a specific arbitration proceeding is, it can hardly cover individual cyber-hygiene, i.e. password complexity, device encryption, backups, regular software updates and even use of privacy screens. Adherence to cybersecurity protocols for arbitral tribunals and secretaries is perhaps also a 'trial by fire'.

Arbitral institutions are the first to receive data from the parties, are often copied on all correspondence and submissions, and more and more frequently provide file sharing/case management platforms. Multiple questions remain open for debate: (i) should institutions propose or impose cybersecurity protocols, i.e. language for Procedural Orders or Terms of Reference? (ii) Should institutions

offer training to arbitrators? (iii) Should institutions require arbitrators to regularly confirm that they are implementing appropriate cybersecurity measures? (iv) Should institutional rules be amended to expressly record that the parties and the tribunal are to consider what steps may be appropriate to safeguard information security?

Coming back to the file sharing/case management platforms that some arbitral institutions provide, the trust one has in the stability of the institutions and the versatility of the arbitration rules cannot be extended by default to the institutions' IT platforms. External and continuous audits are required. A cursory overview of available IT solutions shows that at least several well-known arbitral institutions either use outdated (and/or custom-built) cloud-based file sharing platforms or are not transparent about their IT audit policies.

Lastly, service providers are an often-forgotten group of actors – and this extends both to those present at hearings, i.e., court reporters and translators, and those assisting in the course of the arbitration proceedings. Evidently, the same cybersecurity requirements need to be imposed on third-party service providers, or else they become the weakest link in the cybersecurity perimeter.

By way of conclusion, cybersecurity issues should not deter dispute resolution actors from embracing hybrid (or even paperless!) hearings, nor should these issues contribute to hostility or indifference to new technologies. Technological awareness, continuous (self-) education and concerted actions are all required to keep up with the new challenges.

7 Conclusion

Laura Canet:

Participants in the conference asked online questions relating to security, virtual platforms and the way forward for paperless arbitration.

Laura concluded the discussion, listing some of the takeaways of the webinar. She recalled, notably, that the use of virtual tools must be balanced with human contact as well as efficiency with due process and that paperless arbitration can raise issues that should not be ignored. Although virtual hearings are associated with lower costs, they might also, in some cases, be associated with less effective cross-examination.

While we have many virtual resources at hand, we may only be seeing the beginning of these. Legal practitioners and arbitral institutions should be prepared to rethink and even reinvent the way they work. They should adapt to a new economy and new industries as well as take part in increasing cybersecurity awareness. Arbitral institutions play a major role in this shift to virtual hearings, and we are already witnessing more available options as online platforms develop.