

CHAPTER 53

Videoconferencing in International Arbitration and Mediation Proceedings*

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§ 53.01 **Introduction: Videoconferencing in International Arbitration and Mediation Cases**

This chapter explores the use of videoconferencing in international arbitration and mediation. Its goal is to briefly introduce the technology, discuss videoconferencing's

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current status in international arbitration and mediation practice, provide an example of its usage via a recent international arbitration-mediation in which the author of this chapter participated, and finally summarize its benefits and shortcomings, noting which circumstances are most appropriate for its best use.

§ 53.02 Use of Videoconferencing in International Arbitration and Mediation Cases

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

This technique has grown rapidly since its inception in the mid 1990s. Videoconferencing is now an attractive alternative to live organizational meetings of all kinds because of corporate cost containment measures following the steep telecom, dot-com and stock market declines of 2001, a corresponding oversupply of inexpensive long distance communication capacity, and the rising cost of fuel and post 9/11 security measures which have complicated air travel. These factors, together with more cost-effective video technology, have created a new recipe for conducting meetings.

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

With these improvements, videoconferencing made its debut in mediation around 2002. A number of articles have been written on the use of videoconferencing in domestic U.S. mediations,¹ however articles or other discussions exploring its use and advantages to resolve international commercial disputes appear to be much more limited.

§ 53.03 Videoconferencing and International Arbitral Institutions

Videoconferencing is being used to some extent now for witness testimony in international arbitration hearings. For more information regarding the frequency of use of videoconferencing in international arbitration cases (both institutional and *ad hoc*), the author of this chapter consulted the ICDR, ICC, CPR/New York, and the LCIA. While we did not receive any statistics, Anne-Marie Whitesell, then Secretary-General of the ICC International Court of Arbitration in Paris in 2008, responded by informing us that the ICC published a Special Supplement to the ICC International Court of

¹ See, e.g., “Mediation by videoconferencing—nothing is lost”, by Michelle Lore, *Minnesota Lawyer*, Nov. 15, 2004; “Judicial Council of California Model Self-Help Centers Pilot”, dealing with use of videoconference mediation sessions in cases involving child custody, visitation, and domestic violence, www.courtinfo.ca.gov/reference/rfp/documents/pgmdesc.pdf.

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VIDEOCONFERENCE IN ARBITRATION PROCEEDINGS

§ 53.04

Arbitration Bulletin in 2004 entitled “Using Technology to Resolve Business Disputes”, which includes information on the work of the ICC Arbitration Commission’s Task Force on IT, and contains videoconferencing as one element. She also sent us a most informative article by Erik Schaefer entitled “Videoconferencing in Arbitration”, published in the ICC International Court of Arbitration Bulletin, Vol. 14/No. 1, Spring 2003.

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

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

For the author of this chapter, as an arbitrator in an ongoing AAA/ICDR case involving Brazilian and U.S. parties, our panel heard testimony by videoconference from witnesses in Brazil and New York who were being questioned by attorneys sitting in Miami with us. The image and sound quality from both São Paulo and New York were equally excellent, aided, in part, by good equipment and pre-testing from the Miami sites of large law firms which have their own in-house equipment. Accordingly, in another ICDR case from India, our panel considered taking testimony by videoconference from the principal witness who resides there.

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

It is worth noting here that many offices of the AAA have now installed their own videoconferencing equipment available for use on-site. Previously, these offices only had hookups available for parties who brought in their own equipment.

**§ 53.04 Example of Use of Videoconferencing in International Arbitration/
Mediation Case**

The advantages and disadvantages of the use of videoconferencing in international arbitrations and/or mediations are well illustrated by discussion of a case in which the author of this chapter was personally involved where videoconferencing was used. The case began as an ICDR arbitration between the Claimant and this author’s client, a Brazilian business executive, and the Respondent, a U.S.-based multinational in the

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energy sector. Although originating as an arbitration, it was settled by mediation using international videoconferencing.²

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

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

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

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

The suggestions in the sections below derive directly from our experience with videoconferencing in this particular case.

§ 53.05 Preparing for Arbitration or Mediation Sessions by Videoconference**[1] Considering Logistics of Videoconferencing**

Arranging arbitration or mediation sessions by videoconference is likely to require extensive administrative and technical support. For this reason, it is recommended that an administering organization or body be used to coordinate all the items necessary for an arbitration or mediation by videoconference.

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

² It is this author's understanding that this case marked the first time videoconferencing was used for a complete, successful mediation of an international commercial case administered by one of the major arbitral institutions, the ICDR. Indeed, William Slate, president of the AAA, announced this fact in his keynote speech at the November 2005 Triple Colloquium (AAA/ICDR—ICC—ICSID) in New York.

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The technical compatibility of the videoconference hardware, software and communication lines must also be coordinated between all sites, as described more fully below.

Finally, and perhaps most importantly, sufficient time must be allocated for use of the equipment at all sites to allow for a successful session. We will explore this aspect in more detail below as well, as it can be very influential on the outcome of the arbitration or mediation itself.

[2] Considering Technical Aspects of Videoconferencing**[a] System Compatibility**

All sites must have system compatibility. This includes both the type of communication systems being used and the videoconferencing equipment (hardware and software).

[b] Communication Lines

Partly because more facilities use it, ISDN is considered a more convenient communication system to utilize than IP, although it is advisable to use a conference center which has both capabilities just in case.

[c] Equipment Compatibility Between Sites

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

The machine we used in São Paulo was a Polycom View Station LAN H.323, 512 MP “EASP” system. The respondent used a Polycom View Station FX. The equipment provided by the AAA in New York was tested and found to be technically compatible with ours. While not possible in our case, using sites which are in different branch offices of the same organization (law firm, arbitral institution, etc.) may help facilitate technical compatibility.

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

[d] Transmission Speed

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

§ 53.05[2][e] INT'L ARBITRATION: 21st CENTURY PERSPECTIVES**53-6****[e] Pre-Testing**

Because of all the technical factors requiring coordination and compatibility, it is advisable to conduct a test between all the sites well in advance, possibly several days ahead, to iron out any technical problems so as not to interrupt the flow of the hearing or session. The pre-test from São Paulo only included two sites. New York ran a test with each site separately, but not with all three simultaneously, which is the preferred mode of testing. It took two hours for the hub New York site to discover the best way to connect all three sites (Mediator, Claimant, Respondent), so sufficient time must be allotted for the pre-test.

[f] Technical Assistance

It is advisable for each site to have a technically qualified person on hand for the mediation, at least during the initial hook-up phase for the sites, and be close by in case problems arise afterward. For this reason, it is also wise to coordinate scheduling of the session with the technical staff for each site.

[3] Video Image Quality

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

One simple way to improve image quality is to cut glare from sunlight coming through conference room windows by lowering blinds and/or adjusting participants' positions at the table. Participants should be instructed to look directly into the camera and its monitor light when speaking. If the transmission speed is slow with time delays, then quick movements should also be avoided.

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

[4] Cost Factors

Overall costs of the videoconference session can be handled in a variety of ways.

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

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

The other main cost component is the cost of videoconference call time, often paid by the site originating the call. In our case, the call was originated by the AAA in New York at a very reasonable cost. International video calls have dropped considerably in

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price so now they are more affordable. Originating the call from the U.S. is usually the most economical way, especially if a U.S. party, arbitral panel or mediator is involved. While not yet at the bargain levels of international voice calls, these costs are still relatively low compared with airfare, hotel and other associated travel expenses. Travel expenses tend to rise with oil/fuel prices, but telecommunications expenses have been dropping due to network overcapacity.

§ 53.06 Effect of Videoconferencing on Proceeding Itself

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

In our case, there were no language issues. The mediation was conducted in English, as the Claimant was fluent in English and quite familiar with U.S. business practices. However, this may not always be the case, so care needs to be taken that video sessions are culturally acceptable in your locale. If different languages are spoken by the parties and the arbitral panel or mediator, then much more time needs to be allocated for interpretation, extending the period required for use of the video equipment. At the same time, we cannot forget that body language and image may play more important roles in the process, so image quality and viewing size must really be top-notch.

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

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

A negative was that certain things were compressed or overlooked to save time. The opening statements by the parties and the mutual introductions around the table from site to site, including the name, position and role of each participant, were skipped over. This affected the way the mediation unfolded, since one participant's prior role in the underlying transaction had never been disclosed and only came out midway through the mediation session, after the other side had made critical comments about how that transaction had been conducted earlier. The criticism, which may not have been made in the same way if there were prior knowledge of that participant's role, produced a reaction which altered the tone of the mediation. Accordingly, it is very important not to rush the beginning of the mediation, even if there are time constraints on use of the equipment or peoples' schedules.

Visual privacy is another important aspect, especially during the caucus. Although we could not hear the mediator caucusing with the other party, we did view the caucus on our screen. From their facial expressions, body language and movements, we could

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sense the other side's reactions to our proposals and suppose that the same was true during our own caucus sessions. This viewing feature is not desirable, and can probably be turned off with the right technical touch and prior agreement by both sides.

After both sides briefly argued over whether the severance package was triggered by the proper events, the issues negotiated in the mediation came down to the amount of money to settle the matter. After arguing the merits back and forth to each other and then separately to the mediator, the parties reverted to pure positional bargaining on the numbers. This bargaining consumed much of the four hours allotted to Respondent for use of its video equipment. If there had been more complex issues, then more time would have been needed for the equipment. For instance, the U.S.-Argentine mediation referred to earlier in this article, which had numerous participants and issues, took twelve uninterrupted hours to reach a settlement. In cases with parties having limited access to video equipment and busy travel schedules, it is recommended to reserve extra blocs of time for the equipment in the event any new, unexpected issues crop up during your mediation or arbitration session.

The results of the mediation were positive in that the case was settled to each side's satisfaction. The mediator electronically shuttled back and forth between each side, probing for weaknesses in their legal positions and conveying tacitly what it would take to settle the case.

However, the videoconference did not allow time for nor anticipate the customary practice of having the parties sign a summary of the basic elements of their settlement agreement. This in turn could have reduced the parties' lengthy post-mediation negotiation of the text, since issues did arise after our video session regarding the scope of the agreement, *i.e.*, whether it went beyond what was agreed upon in the mediation session.

The mediator will need to shepherd the parties more actively to ensure a settlement in cases mediated by videoconference, where the parties are not able to sign a settlement agreement at the close of their video session. If there is sufficient time, the parties can go offline for a short break while the mediator drafts a brief summary settlement statement which can then be exchanged via simultaneous email or fax for mutual approval, including electronic signatures of the parties. Having a scanner available for digital signatures will be helpful. A full settlement agreement can then be developed more easily from this summary statement.

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

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§ 53.07**§ 53.07 Advantages and Disadvantages of Use of Videoconferencing in International Arbitrations or Mediations**

Arbitration or mediation by videoconference has a number of advantages, especially in international cases. It saves substantial energy, time and money over international travel. It offers the parties a wider geographical range from which to choose an arbitrator or mediator, sometimes necessary in international cases where geographical/cultural as well as substantive area expertise is needed. With videoconferencing, there are far fewer travel limitations on the arbitrator or mediator—only access to a videoconference facility. And in extremely emotional cases, video can be a useful tool to keep the parties physically separate while having them participate in a joint session at the same time.

On the other hand, international arbitration or mediation by videoconference requires extensive administrative and technical coordination, which is why an administered session is recommended. Extra time needs to be allocated for use of the video equipment in order to conduct a successful mediation, including breaks requested by the parties or the neutrals. In more complex cases, presentations made by Powerpoint and other computer aids and charts can be exchanged via email as a supplement during the hearing or session, in which case the videoconference facility will need broadband internet access as well. Video is easier for cases with fewer complex issues, especially if there are time limitations on the parties or use of the equipment.

Many, but not all large cities have access to videoconferencing equipment. A more flexible alternative may be soon be on the way, combining webcams and VOIP telephony, which already provide inexpensive internet-based two-way video telephone conversations from PCs with ever-improving quality.

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

1. The use of videoconferencing in international arbitrations and mediations will likely continue to grow. As a technology, its price-performance ratio has dramatically improved over the past several years. It is more economical in terms of time and cost, and also more physically secure than personal travel—a factor which cannot be ignored these days.
2. If videoconferencing can work well to resolve disputes such as our international arbitration-turned-mediation case, it can certainly be used to good advantage in a wide variety of international arbitration settings. Videoconferencing has even better prospects to succeed in international arbitrations than in international mediations. Arbitration does not require the same level of subtle communication skills as does mediation, and has less wide-ranging communication dimensions. Mediation is a non-binding process grounded entirely on the mediator's ability to gain the trust of and communicate with the parties in order to convince them to settle their differences. Arbitration, on the other hand, is a private, quasi-judicial process where the arbitral panel does not need to gain trust of the parties or convince the parties of anything, even though this may sometimes be desirable. The main communication

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challenge in arbitration is for the parties and their attorneys to present their case coherently to convince the arbitral panel.

In this sense, it is more of a one-way communication process than is mediation, which is at minimum a three-way communication process. As such, the drawbacks of video (*see below*) will usually have less impact in arbitrations than in mediations.

3. Whether used in arbitration or mediation, videoconferencing does have some shortcomings, a number of which have already been touched upon in this chapter (i.e., need for administrative and technical support, time restrictions imposed, visual privacy).

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

4. Of course, videoconferencing does not have the same quality as face-to-face meetings, but in arbitration this is less of a problem than in mediation, for the reasons explained above. Using videoconferencing can bridge a gap when the parties are unable to convene in the same location, or when travel schedules or visa restrictions make it difficult for parties or witnesses to appear in physically. Video can also keep parties or witnesses apart in cases with high emotional risk. And of course, it can also cut costs, save time, and reduce travel security problems as well.

Balancing these various factors, the international aspects of arbitration and mediation relate, on one hand, to legal system, cultural and communication issues which may be better addressed in a face-to-face encounter. On the other hand, international travel economy and security factors may weigh in favor of using video instead at times, especially with its vastly improved quality in recent years.