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Taking disputes online in a pandemic-stricken world: Do we necessarily lose more than we gain?

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23. Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain?

Dorcas Quek Anderson⁶³²

Introduction

*The court process is more important than simply being an administrative adjudication. It's a very human set of interactions. My role as a judge is absolutely dependent on the humane administration of a very, very complex interactive process.*⁶³³

In the past decade, the dispute resolution landscape has been steadily transformed by constant experimentation with technology. The potential for technology to decrease the cost of litigation as well as radically re-design the justice system has resulted in the growth of online courts and tribunals such as the Civil Resolution Tribunal in British Columbia.⁶³⁴ In the mediation field, platforms have been created for the mediator to facilitate negotiations using a range of communication modes. Other more sophisticated tools such as SmartSettle have been developed to assist parties in negotiating a settlement through double blind bidding and game theory.⁶³⁵ Blockchain-based arbitration services have been offered by platforms including Kleros.⁶³⁶ The varied efforts to harness technology to change the nature of dispute resolution have resulted in the development of a specific field known as Online Dispute Resolution (ODR).⁶³⁷

Nonetheless, these innovations have been sporadic and of varying intensity across the globe. While cutting-edge decision-making tools have emerged in some countries, there have also been more mundane application of technology in other places, such as using Skype for mediation to bridge physical distances or introducing electronic filing systems in the courts. ODR has generally been a secondary feature within dispute resolution. However, the COVID-19 pandemic has very abruptly compelled the courts and other dispute resolution practitioners to shift face-to-face processes to

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⁶³³ Ryan et al., 'Remote hearings in the family justice system: a rapid consultation' (*London: Nuffield Family Justice Observatory/The Legal Foundation*, 2020) <<https://www.judiciary.uk/wp-content/uploads/2020/05/remote-hearings-rapid-review.pdf>> at p 10.

⁶³⁴ Civil Resolution Tribunal <<https://civilresolutionbc.ca>> accessed 15 July 2020.

⁶³⁵ SmartSettle <<https://www.smartsettle.com>> accessed 15 July 2020.

⁶³⁶ Sara Hourani, 'Access to Justice and Blockchain-Based Arbitration' (*Dispute Resolution Magazine*, 8 June 2020) at p 20.

⁶³⁷ See generally Dorcas Quek Anderson, 'The Convergence of ADR and ODR within the Courts: The Impact on Access to Justice' (2019) 38(1) CJK 126.

the online environment on a large scale. Although the change has largely related to using videoconferencing rather than more ODR systems, the widespread and involuntary shift of dispute resolution to the virtual world across the globe has caused considerable disruption.

The rapid migration of dispute resolution to the virtual sphere has given the dispute resolution field little time to thoughtfully consider the impact of this shift on the overall delivery of justice. Given that the pandemic may be with us for some time, it is more crucial than ever to reflect on the fundamental principles undergirding the delivery of justice in the courts, in mediation and arbitral tribunals, and to consider how they are impacted by the shift from the physical to the online realm. As evident from the above quotation, this is also an opportune moment to reflect on the intangible but profoundly significant role played by human interaction within dispute resolution. Drawing upon the latest social science and dispute resolution research, this article discusses the gains and losses brought about by taking dispute resolution online. It focuses principally on the courts, and briefly discusses the issues arising in mediation and arbitration.

The physical trappings of justice in the courts

The rapid shift to remote justice

During many countries' lockdown periods, the courts were compelled to adjourn pending proceedings, while also determining which types of cases were sufficiently urgent to be heard remotely. A wide range of practices have emerged, many of which have been collated in the Remote Courts website created by Richard Susskind.⁶³⁸ The Singapore courts have relied heavily on the Zoom videoconferencing platform to hear a wide range of matters, including trials on maintenance for family matters, appeals, sentencing for guilty pleas, delivery of the courts' judgments and court-connected mediations.⁶³⁹ The US courts have utilised both audio and video conferencing technologies such as Skype for Business and Cisco to hear oral arguments, preliminary hearings and misdemeanour sentencing.⁶⁴⁰ The US Supreme Court heard oral arguments for the first time in May by telephone, and allowed tens of thousands members of the

⁶³⁸ Remote Courts Worldwide <<https://remotecourts.org/>> accessed 15 July 2020.

⁶³⁹ Chief Justice Sundaresh Menon, 'Message from the Chief Justice: The Judiciary's Response to the Extension of the Circuit Breaker Period' (*Supreme Court, Singapore*, 24 April 2020) <<https://www.supremecourt.gov.sg/docs/default-source/module-document/message-from-chief-justice---the-judiciary's-response-to-extension-of-circuit-breaker-period.pdf>> accessed 15 July 2020.

⁶⁴⁰ Paul Hastings 'US Court Closings, Restrictions, and Re-Openings Due to COVID-19' (*Paul Hastings LLP*, 14 July 2020) <<https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-COVID-19>> accessed 15 July 2020; United States Courts, 'Coronavirus (COVID-19): Response and Recovery' (2 July 2020) <<https://www.uscourts.gov/news/2020/07/02/coronavirus-COVID-19-response-and-recovery>> accessed 15 July 2020.

public to observe through live streaming.⁶⁴¹ The UK judiciary issued practice directions empowering courts to direct proceedings to conduct wholly as video or audio proceedings, and directed its courts to make remote hearings public as far as possible through relaying the proceedings to an open court room, live-streaming or allowing a media representative to log into the remote hearing platform.⁶⁴² Most recently, the Canada Supreme Court heard several civil and criminal appeals via Zoom with simultaneous interpretation, giving the public and media an unspecified number of observer spots in Zoom while also livestreaming the appeals on its website.

Jury trials were suspended in many countries. To deal with the backlog of such cases, the Australian states of Victoria and ACT passed legislation to introduce judge-only trials on a short-term basis, prompting a constitutional challenge.⁶⁴³ The UK conducted studies for remote jury trials, but very recently announced plans to pass similar legislation to temporarily allow trials without jury.⁶⁴⁴ On a related note, there have been varying opinions on whether remote trials for civil and family cases could be conducted fairly. The Federal Court of Australia rejected two applications to adjourn civil trials, finding that the Microsoft Teams software allowed the assessment of witness credibility and better focus on witnesses than in the physical setting. The New South Wales Supreme Court took a different view in a trial involving alleged fraud in the transfer of shares, deciding that there would be unfairness if the plaintiffs were not given full opportunity to ventilate their issues in the conventional way.⁶⁴⁵

The overall sentiments on the shift to remote justice have been equally diverse. Studies in the UK reflect divergent views across different types of proceedings. 71.5% of respondents surveyed by the Civil Justice Council had a positive experience with remote hearings, whereas the response to a consultation on family justice was more equivocal, reflecting grave concerns about the difficulties caused by lack of face-to-face interaction.⁶⁴⁶ By contrast, Singapore lawyers who participated in

⁶⁴¹ Adam Liptak, 'Supreme Court Hears First Arguments via Phone' (*The New York Times*, 4 May 2020) <<https://www.nytimes.com/2020/05/04/us/politics/supreme-court-coronavirus-call.html>> accessed 15 July 2020.

⁶⁴² Judiciary of England and Wales, 'Civil Justice in England and Wales: Protocol Regarding Remote Hearings' (26 March 2020) <https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf> accessed 15 July 2020.

⁶⁴³ Felicity Gerry QC, 'Jury is out: why shifting to judge-alone trials is a flawed approach to criminal justice' (*The Conversation*, 5 May 2020) <<https://theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397>> accessed 15 July 2020.

⁶⁴⁴ John Hyde, 'Legislation to abolish some jury trials could be passed within weeks' (*The Law Society Gazette*, 24 June 2020) <<https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article>> accessed 15 July 2020.

⁶⁴⁵ Michael Legg and Anthony Song, 'The courts and the pandemic: the role and limits of technology' (*Law Society Journal*, 1 May 2020) <<https://lsj.com.au/articles/the-courts-and-the-pandemic-the-role-and-limits-of-technology>> accessed 15 July 2020, referring to the Federal Court cases of *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 (Perram J) and *ASIC v GetSwift Limited* [2020] FCA 504, and the New South Wales case of *David Quince v Annabelle Quince* [2020] NSWSC 326.

⁶⁴⁶ Civil Justice Council, *The Impact of COVID-19 Measures on the Civil Justice System* (May 2020) paras 1.19, 5.1 and 5.64.

judge-led mediation in the Family Court via Zoom gave positive feedback, noting that the distance between parties made for a less hostile environment.⁶⁴⁷

There are now fears that remote justice will be here for much longer than expected because of the lingering pandemic. Some commentators deem this a positive development that is long overdue in some courts, while others have bemoaned the loss of important values through a more impersonal way of delivering justice. To make an accurate and sound assessment, it is first necessary to explore the core aspects of delivering justice that are connected with the court's physical setting.

Is it essential for a court to be a place?

Long before the current pandemic, the increasing use of video facilities and technology in the courtroom prompted academic discussion on the role played by the physical courtroom. The UK Civil Justice Council, when considering the future development of ODR, asked the pertinent question of whether the court was a service or a place. Many ODR proponents favoured the former, arguing that technology helps to refine and expand the courts' functions. Others emphasised the important role of place in the administration of justice, turning to legal anthropology to explore the impact of the spatial aspects of the courtroom. Their research have underscored important insights on the role played by the courtroom space in the delivery of justice.

One fascinating aspect of the courtroom space is its symbolic and ceremonial function. Scholars have highlighted how the setting creates a formal atmosphere, marking the courtroom as 'out-of-the-everyday', thus conveying a sense of gravitas and seriousness to the proceedings.⁶⁴⁸ The courtroom space 'shapes understandings of the legitimacy and purposes of law' and therefore generates disciplinary power.⁶⁴⁹ This atmosphere, coupled with the spatial distance between courtroom participants, helps underscore the legal rituals and encourage participants to conform

⁶⁴⁷ KC Vijayan, 'Family Court Cases via Zoom the New Normal' (*The Straits Times*, 29 June 2020) <<https://www.straitstimes.com/singapore/family-court-cases-via-zoom-the-new-normal>> accessed 15 July 2020.

⁶⁴⁸ Emma Rowden, 'Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?' (2018) 14(2) *Law, Culture and the Humanities* at pp 263, 265; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP, 2002) at p 11; Linda Mulcahy, *Legal Architecture: Justice, Due Process, and the Place of Law* (London: Routledge, 2011) at p 17; P Branco, 'Courthouses as Spaces of Recognition, Functionality and Access to Law and Justice: A Portuguese Reflection' (2016) 6(3) *Onati Socio-Legal Series* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812699>; R Mohr, R. & F Contini, 'Reassembling the legal: "The wonders of modern science" in court-related proceedings' (2011) 20(4) *Griffith Law Review* 994.

⁶⁴⁹ A Jeffrey, 'Legal geography II: Bodies and law' (2019) *Progress in Human Geography* 1, at p 7; Hynes et al., 'In Defence of the Hearing? Emerging Geographies of Publicness, Materiality, Access and Communication in Court Hearings' (2020) *Geography Compass* 1 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/gec3.12499>>, at pp 4-5.

to the norms of these rituals with appropriate behaviour.⁶⁵⁰ It has been argued that the use of videoconferencing results in participants missing these displays of justice and behavioural cues. Remote hearings may then 'alter the representation of the judge as the embodiment of law, weakening the symbolic and cultural dimensions and undermining the gravity and decorum of court proceedings'.⁶⁵¹

There are a few ramifications arising from a dilution of the 'place' of the court. The most evident consequence is the loss of the court's coercive authority and formality, which could result in diminution of respect shown by the litigants. However, informality *per se* need not constitute a negative consequence, as it has been pointed out that less formality may make litigants feel less intimidated and more able to exercise their 'voice', which is an integral element of procedural justice.⁶⁵² The more damaging impact relates to the dignity element of procedural justice. The loss of the symbolic significance of the courtroom may cause participants to feel that their concerns are not being treated seriously, and that they are not being respected.⁶⁵³ This sense of displacement could potentially result in disengagement, which could in turn have a negative impact on the substantive outcome. This is a particularly grave concern for vulnerable litigants. Two studies on remote immigration detention hearings in the US found that the litigants did not take full advantage of procedural safeguards because they perceived the process to be less legitimate.⁶⁵⁴ A more recent study in the UK found that defendants appearing in court via video were less likely to be legally represented, despite the availability of free legal advice.⁶⁵⁵ In sum, the loss of the ceremonial and larger-than-life aspects of the court should not be easily disregarded; what is lost from the 'place' potentially has a detrimental impact on the court's functions.

⁶⁵⁰ Rowden (n 648) at p 274; Dorcas Quek Anderson, 'Court-Annexed Mediations within Singapore: A Complex Interface Between Individual Place and the Court Environment' in Pauline Collins, Victor Igreja and Patrick Alan Danaher (eds), *Conflict, Place and Communication*, at pp 275 – 293 (Palgrave Macmillan: 2019).

⁶⁵¹ Wallace et al., 'Judicial engagement and AV links: judicial perceptions from Australian courts' (2018) 26(1) *International Journal of the Legal Profession* 51, 55; Rowden (n 648) at pp 272-273.

⁶⁵² See generally Nancy Welsh, 'Perceptions of Fairness in Negotiation' (2003-2004) 87 *Marq L Rev* 753; Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 *Wash U L Q* 787, at pp 817-838; Tom R Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform', (1997) 45 *J Am J Comp L* 871; Steven J Schulhofer, Tom R Tyler and Aziz Z Huq, 'American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative' (2011) 101 *J Crim L & Criminology* 335; Rebecca Hollander-Blumoff & Tom R Tyler, 'Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential' (2008) 33 *Law & Soc Inquiry* 473; Allan Lind, Tom R Tyler & Yuen J Huo, 'Procedural Context & Culture: Variation in the Antecedents of Procedural Justice Judgments' (1997) 73 *J Personality & Soc Psychol* 767.

⁶⁵³ Ryan et al. (n 633) at p 10; Rowden (n 648) at p 275.

⁶⁵⁴ N Byrom, 'What we know about the impact of remote hearings on access to justice: a rapid evidence review' (Briefing paper, London, Nuffield Family Justice Observatory/The Legal Education Foundation, 2020) 2; IV Eagly, 'Remote adjudication in immigration' (2015) 109(4) *Northwestern University Law Review* 2015; D Thorley and J Mitts, 'Trial by Skype: a causality-oriented replication exploring the use of remote video adjudication in immigration removal proceedings' (2019) 59 *International Review of Law and Economics* 82

⁶⁵⁵ N Fielding et al, *Video enabled justice evaluation* (Sussex Police and Crime Commissioner and University of Surrey, May 2020), referred to in Ryan et al. (n 633) at p 2.

One recent remote hearing in the UK Court of Protection illustrates the feelings of alienation that can be experienced by the court user who is unable to grasp the gravitas of the court proceedings. This was a hearing to decide on the appropriate medical treatment for the litigant's father. A volunteer providing support to the litigant made a poignant observation that the gravitas of the courtroom hearing provides 'reassuring evidence of the seriousness attached to the case and the ceremonial impartiality of justice', which is what the family members need because the question of whether the loved one should receive life-sustaining medical treatment is often discussed in more informal settings without the family feeling that they have been heard. The litigant felt that the casual atmosphere and attire, the distracting pets and the domestic backdrops detracted from the formal 'theatrical' elements of the courtroom, thus undermining the seriousness of the issue being considered. The litigant was also uncomfortable by the informal conversations between bench and bar before the start of proceedings, which was fully heard by her. It made her feel excluded as an outsider. The volunteer further commented that this display of levity threatened the formal justice process, diminished the legitimacy of the court and could work to undermine the impartiality of the process by showing how friendly the professionals were with each other and making the rest feel like not 'one of them'.⁶⁵⁶

Notwithstanding the significance of place, it is important to have a contextual understanding of its potential impact. Commentators have cautioned against being nostalgic about the physical courtroom, and failing to see how it too may not have fulfilled the functions it is meant to symbolise.⁶⁵⁷ In addition, whether there is a loss ultimately depends on the type of court proceedings. There needs to be a considered understanding of the types of cases in which the coercive power and gravitas of the court have to be prominent. While it may be important for certain serious criminal offences or family matters, it may not be as crucial in other kinds of proceedings. Furthermore, once the courts are more cognisant of the loss of the court's symbolic functions, it could design the remote court process to emphasise the legitimacy and formality of the court process. Some courts have devised ways of conveying a sense of gravitas, including having an appropriate courtroom virtual background for the judge and maintaining the opening ritual to signal that the court is in session. As evident from the case described above, the courts also need to be mindful of maintaining formality by minimising domestic disruptions and refraining from broadcasting informal conversations between the bench and bar. Hence, the loss of a physical place could be replaced by creative ways of conveying a formal atmosphere and distinguishing the proceedings from mundane videoconferencing conversations. However, these gains may be reaped only if there is first an acknowledgement of the significance played by the courtroom space.

⁶⁵⁶ Celia Kitzinger, 'Remote Justice: A Family Perspective' (*The Transparency Project*, 29 March 2020) <<http://www.transparencyproject.org.uk/remote-justice-a-family-perspective>> accessed 15 July 2020

⁶⁵⁷ Pat Carlen, *Magistrates' Justice* (London: Martin Robertson & Co. Ltd, 1976); Mulcahy (n 648); Rowden (n 648) at p 272.

Is human interaction an indispensable part of delivering justice?

The impact of media richness on mutual understanding

Another intangible yet significant aspect of the physical courtroom is face-to-face interaction. Human interaction plays an integral role in conferring dignity and respect on all participants, as well as facilitating mutual understanding. Several theories have been advanced to explain how human engagement is disrupted in non-face-to-face settings. One helpful concept is media richness, which refers to the degree to which a communication channel can convey information that can change understanding within a limited time period.⁶⁵⁸ Compared to the face-to-face setting, the video-conferencing medium is considered a less rich medium as it allows less immediate feedback, has limited visual and audio channels (only 'talking heads'), and is unable to convey non-verbal cues. The time lag in video-conferencing – even if only in milliseconds – results in less synchrony in the communicated messages.⁶⁵⁹ This delay disrupts the usual habits of speech, resulting in frequent interruptions and uncertainty as to when to speak.⁶⁶⁰ Some researchers have also suggested that the differences in reciprocity and feedback results in reduced spontaneity and interactivity.⁶⁶¹ In sum, while video-conferencing seems to most closely approximate a face-to-face conversation, it may still compromise mutual understanding and human engagement. The situation is further exacerbated if there are technological difficulties such as a slow internet connection, or if a less rich medium such as audio communication is utilised.

Procedural justice is often achieved in the courts through giving participants an opportunity to exercise their voice, and the sense that they have been understood and listened to.⁶⁶² These elements of procedural justice are potentially jeopardised by communication media that disrupt the achievement of mutual understanding. In this regard, there have been empirical studies suggesting that defendants who are not physically present during sentencing may not fully understand the consequences of their penalty.⁶⁶³ Because of this risk, several Australian judges commented that sentencing by audio-visual channels detracts from the ability to achieve the necessary level of

⁶⁵⁸ RL Daft and RH Lengel, 'Information richness: a new approach to managerial behaviour and organization design' (1984) 6 Res Organ Behav 191; RL Daft and RH Lengel, 'Organization information requirements, media richness, and structural design' (1986) 32 Manag Sci 554; Noam Ebner, 'Negotiation via Videoconferencing' in Honeyman & Schneider (eds) *The Negotiator's Desk Reference* (DRI Press, 2018), 154

⁶⁵⁹ SG Straus, JA Miles and LL Levesque 'The Effects Of Videoconference, Telephone, and Face-to-Face Media on Interviewer and Applicant Judgments in Employment Interviews' (2001) 27(3) *Journal of Management* 363; Mark Federman, 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' (2006) 19(4) *Journal of Refugee Studies* 431, at p 439

⁶⁶⁰ Johnson, 'Why Zoom meetings are so dissatisfying' (*The Economist*, 16 May 2020) <<https://www.economist.com/books-and-arts/2020/05/16/why-zoom-meetings-are-so-dissatisfying>> accessed 15 July 2020

⁶⁶¹ A Sellen, 'Remote Conversations: The Effects of Mediating Talk with Technology' 10 *Human Computer Interaction* 401, at pp 439-440; Federman (n 659) at p 441

⁶⁶² Tyler (n 652)

⁶⁶³ Wallace et al. (n 651) at p 57

engagement and assurance of the defendant's understanding of the sentence, and generally agreed that remote sentencing should be done only for less serious offences.⁶⁶⁴ In addition, a recent study of UK civil cases described how some lawyers felt that their clients were not properly understanding or being engaged with the court process, and faced significant stress while dealing with frequent interruptions during the remote hearings.⁶⁶⁵ The lack of understanding is likely to be more severe for vulnerable litigants, who may have poorer technological equipment or internet connection. In the criminal justice context, the consequences of litigants' lack of understanding may be accentuated by their difficulty in privately communicating with their lawyers during the court hearing, particularly if no breaks were given for their lawyers to take instructions.⁶⁶⁶

Social presence and dignity

Other theories concerning communication media have focused on the impact of the mode of communication on the building of relationships, rapport and trust. The term 'social presence' has been coined to describe how certain modes of communication result in one feeling that the other person is less proximate and tangible, leading to greater psychological distance and weaker interpersonal bonds, as well as less transmission of social emotion and rapport.⁶⁶⁷ Studies have consistently shown that trust formation and accurately assessing the other party's emotions are more challenging in other channels compared to face-to-face settings.⁶⁶⁸

The lower degree of social presence in remote courts is potentially damaging to the sense of dignity that is essential to procedural justice and public confidence in the courts. A recent consultation study in the UK family courts reflected many sentiments related to such loss. Respondents noted the difficulty in conducting hearings with the level of empathy and humanity that they thought was an essential element of family justice. Judges remarked that they found the remote hearings

⁶⁶⁴ *ibid.*

⁶⁶⁵ Civil Justice Council (n 646) at p 67

⁶⁶⁶ Ryan et al. (n 633) at p 11; M Terry, S Johnson and P Thompson, *Virtual court pilot: outcome evaluation* (Ministry of Justice Research Series 21/10, 2010); N Byrom (n 654) at p 3.

⁶⁶⁷ JA Short, 'Effects of medium of communication on experimental negotiation' (1974) 27(3) *Hum Relat* 225; M Citera, R Beaugard and T Mitsuya, 'An experimental study of credibility in e-negotiations' (2005) 22(2) *Psychol Mark* 163; AF Stuhlmacher and M Citera, 'Hostile behaviour and profit in virtual negotiation: a meta-analysis' (2005) 20 *J Bus Psychol* 69; R Spears and M Lea, 'Panacea or panopticon? The Hidden power in computer-mediated communication' (1994) 21(4) *Commun Res* 427; L Sproull L and S Kiesler, 'Reducing social context cues: electronic mail in organizational communication' (1986) 32(11) *Manag Sci* 1492; I Geiger, 'From Letter to Twitter: A Systematic Review of Communication Media in Negotiation' (2020) 29(2) *Group Decision and Negotiation* 207, at p 218

⁶⁶⁸ I Geiger (n 667) at p 239, referring to Citera et al (n 667); SC Lu, DR Kong, DL Ferrin and KT Dirks, 'What are the determinants of interpersonal trust in dyadic negotiations? Meta-analytic evidence and implications for future research (2017) 7 *J Trust Res* 22; V Arunachalam and WN Dilla, 'Judgment accuracy and outcomes in negotiation: a causal modelling analysis of decision-aiding effects' (1995) 61(3) *Organ Behav Hum Dec Process* 289; GA Giordano, JS Stoner, RL Brouer and JF George, 'The influences of deception and computer-mediation on dyadic negotiations' (2007) 12(2) *J Computer Mediat Commun* 362; C Laubert and J Parlamis, 'Are you angry (happy, sad) or aren't you? Emotion detection difficulty in email negotiation' (2019) 28(3) *Group Decis Negot* 377

impersonal and transactional, as they had no opportunity to look at the parties in the eye and convey to them the judges' own humanity.⁶⁶⁹ In the same vein, a study of Australian courts highlighted the de-humanising impact of using audio-visual channels in court. Some judges stressed the importance of judicial performance as a human process, and how the participants need to feel understood by those questioning them and to be able to directly communicate with those questioning or accusing them.⁶⁷⁰ Another Australian study interviewing judges and other participants using video link arrangements described the recurring themes of a sense of loss and dehumanisation. The respondents experienced the loss of full sensory engagement, and felt that video links made depersonalisation more intractable.⁶⁷¹ These studies underscore how the social and sensory aspects of the court process are inextricably linked to the advancement of the interpersonal aspect of procedural justice. They also indicate the importance of considering the crucial role played by social presence and human engagement in certain proceedings such as criminal and family matters. A failure to acknowledge these losses and actively find ways to ameliorate them in the remote court setting could lead to alienation of court users and more seriously, a drastic loss of confidence in the courts.

Although the difficulty in forming human connections may seem to be a loss for the courts, this is an opportune moment for the courts to develop new ways to display empathy and form connections in the virtual world. Knowing that the video-conferencing platform transmits very limited non-verbal cues, it is crucial to recognise the added importance of using one's words and voice more effectively to communicate meaning and emotion. Additionally, it is more critical to regularly ask questions to check on whether the other participants are being actively engaged and to confirm understanding. Furthermore, it has been pointed out that video-conferencing software gives us the advantage of observing facial expressions more closely and with greater amplification than the court can in the physical courtroom, when the litigant is probably seated far from the bench. This gives the court the opportunity to pay closer attention to these visual cues so as to be more attuned to other participants' state of mind. Gaining greater awareness of these cues will in turn enable the court to speak the most appropriate words. As such, the widespread use of new modes of communication offers an excellent opportunity to the courts to be more familiar with the latest communication research, and to adjust one's habitual communication practices to fit the new context.

⁶⁶⁹ Ryan et al. (n 633) at pp 10-11

⁶⁷⁰ Wallace et al. (n 651) at pp 56-57

⁶⁷¹ Rowden (n 648) at p 274. See also John Geddie, 'Man sentenced to death in Singapore on Zoom call' (*Reuters*, 20 May 2020) <<https://www.reuters.com/article/us-singapore-crime/man-sentenced-to-death-in-singapore-via-zoom-call-idUSKBN22W0I6>> (despite the accused's counsel not objecting to the remote delivery of the sentence and stating that the judge could be heard clearly, external observers expressed reservations about the appropriateness of using Zoom to pronounce capital punishment. While the human rights organisations' objections relate principally with disagreeing with death penalty, their reaction probably underscores the general sense of dehumanization during remote hearings) accessed 15 July 2020.

Assessment of witness demeanour and credibility

The media richness and social presence theories pose another conundrum to courts during the current pandemic – the difficulty in conducting trials with witnesses. Some empirical evidence on the impact of remote hearings on accurate assessment of witness credibility suggests that child witnesses in criminal trial are perceived as less believable when providing testimony over video link, due to the inability to fully see their demeanour and the distance created between judge or juror and witness that makes it less likely to elicit sympathy.⁶⁷² There are difficulties in simulating eye contact as it requires the person to intentionally speak into the camera. Cultural norms regarding body language and trustworthiness may be disrupted.⁶⁷³ However, not all studies concur. One UK study examining the impact of video-recorded evidence on mock jury deliberation in rape trials concluded that there was no consistent impact of using video, suggesting that some of the concerns may be overstated.⁶⁷⁴ Another study examining the use of video for processing bail observed little difference in the defendants' demeanour in video and non-video conditions.⁶⁷⁵ Anecdotally, one layperson participating in a mock jury trial through a virtual public gallery found no difficulty in observing the witness's full body language and assessing their veracity through the sound of their voice and consistency of what they said, noting that video communication is increasingly a part of everyday life.⁶⁷⁶

Despite the conflicting views on whether video-conferencing has an adverse impact on assessing credibility, many courts have suspended jury trials out of an abundance of caution, or temporarily converted them to judge-only trials. There are evidently many issues to consider in ensuring that remote witness testimony is done properly. Some recommended best practices include ensuring that the onscreen size of the witness's image is life-size; ensuring good audibility and internet connection; briefing the witness on appropriate dressing, having an appropriate and neutral backgrounds, minimising intrusions or disruptions and orientating the witness to the court; and

⁶⁷² N Byrom (n 654) at p 4, referring to Goodman, G. S. et al., 'Face-to-face confrontation: effects of closed-circuit technology on children's eyewitness testimony and jurors' decisions' (1998) 22(2) *Law and Human Behaviour*, 165–203; Lindsay, R.C., Ross, D.F., Lea, J.A., and Carr, C. 'What's fair when a child testifies?' (1995) 25(10) *Journal of Applied Social Psychology* 870- 888; O'Grady, C. *Child witnesses and jury trials: an evaluation of the use of closed circuit technology and removable screens in Western Australia*. (Perth: Western Australia Ministry of Justice 1996). See also Council of HM Circuit Judges, *Convicting Rapists and Protecting Victims: A Consultation Response of the Council of Her Majesty's Circuit Judges* (London, UK: Council of HM Circuit Judges, 2006); Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*' (HORS 283, London, UK: Home Office 2004); S Payne, *Rape: The Victim Experience Review* (London, UK: Home Office, 2009).

⁶⁷³ Rowden et al., *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (University of Western Sydney; Sydney, 2013) 9; Hynes et al. (n 649) 7; Federman (n 659).

⁶⁷⁴ L Ellison and VE Munro, 'A "Special" Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social & Legal Studies* 2

⁶⁷⁵ N Fielding et al. (n 655) at p 72.

⁶⁷⁶ M Paul, 'Is Criminal Justice Under Lockdown Remotely Possible' (*The Transparency Project*, 11 May 2020) <<http://www.transparencyproject.org.uk/is-criminal-justice-under-lockdown-remotely-possible>> accessed 15 July 2020.

providing capacity in the video-conferencing platform for self-views as well as turning off self-views where it is distracting to the witness.⁶⁷⁷ In addition, the nature of trial advocacy has certainly been altered, with perhaps less dramatic opportunity to confront the witness with more exaggerated body language and eye contact, or handing the witness the vital exhibit for his or her comments.⁶⁷⁸ There may well be novel ways of achieving the same effect in the online environment. As such, while technology makes the remote examining of witnesses possible, there is an urgent need to develop best practices, protocols when the technology fails, and more significantly, a modified framework for assessing witness credibility.

The public face of justice

Unlike private dispute resolution processes, justice administered by the courts is situated within the community. Publicity is thus a distinctive characteristic of the court process. In many common law countries, the principle of open justice has been highlighted as the most fundamental quality of the courts. As Lord Atkinson stated, the public trial offers the 'best security for the pure, impartial and efficient administration of justice [and] the best means for winning it public confidence and respect'.⁶⁷⁹ Scholars such as Resnik have further elaborated on how the public dimensions of the courts are integral to democracies as they encourage accountability and transparency, and confer an egalitarian aspect to the justice process by subjecting both the court and litigants to scrutiny.⁶⁸⁰ One illustration of the importance of publicity is the general practice of delivering a criminal sentence in open court with the public's ability to witness it. Open justice in these circumstances facilitates the public declaration of society's reaction to the offence and offender, and serves to galvanise collective consciousness and affirmation of social norms.⁶⁸¹

The COVID-19 pandemic has posed no small challenge to the courts' efforts to maintain open justice, while also giving due regard to safety and security concerns. Differing views and practices have emerged as to the degree of publicity allowed for remote hearings, and the appropriate technological tools to facilitate public viewing. In the UK, the Supreme Court had, before the pandemic, livestreamed its hearings. It adjusted to the pandemic by livestreaming the videoconferencing hearings. However, there was more uncertainty in relation to the lower courts' practices. In its protocol on remote hearings, the UK judiciary emphasised that remote hearings

⁶⁷⁷ Rowden et al. (n 673) at p 59.

⁶⁷⁸ M Paul (n 676).

⁶⁷⁹ *Scott v Scott* [1913] AC 417, 463. Former Chief Justice Spigelman explained in *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 that 'the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public ... is an essential quality of an Australian court of justice'. Only limited exceptions exist.

⁶⁸⁰ J Resnik, 'Uncovering, Disclosing, and Discovering how the Public Dimensions of Court-Based Processes are at Risk' (2006) 81(2) *Chi-Kent L Rev* 521, 530

⁶⁸¹ Wallace et al. (n 651) at p 55, referring to D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001).

should as far as possible remain public hearings. At the same time, the courts were empowered to direct that the hearing take place in public where it is not practicable to arrange for livestreaming. Following the issuance of these guidelines, a group of UK non-governmental organisations and journalists wrote an open letter to highlight inconsistent practices across courts on when the public and journalists could observe remote hearings, and urged the judiciary to provide observer access, not only media access.⁶⁸² While the Ministry of Justice also indicated that all members of the public should have access to the remote hearings, some judges disagreed due to the danger of disruption and unauthorised recordings. As a sign of compromise, the Chief Justice stated that members of the public who wished to observe could make a request to the courts. In the US, the federal courts are permitted to give public and media access to electronic civil proceedings and certain criminal proceedings conducted by phone or video-conferencing.⁶⁸³ Public access has generally been given through toll-free telephone lines.⁶⁸⁴ Varying practices exist in the US state courts, ranging from allowing the public to request for access to the videoconferencing platform, to allowing access to the audio hearings through telephone.⁶⁸⁵ In the Supreme Court of Singapore, hearings conducted using Zoom are streamed on courtroom screens for up to ten members of the public to observe in person. On the other end of the spectrum, the Canadian Supreme Court allowed access to appeals conducted via Zoom, in addition to providing livestreaming of the proceedings. Similarly, the Australian courts have been cognisant of the significance of open justice.⁶⁸⁶ The Federal Court considered livestreaming its proceedings on YouTube and several courts' protocols stressed that their arrangements would permit members of the public and media to attend remote hearings.⁶⁸⁷ The New South Wales Chief Justice added that if such access cannot occur, it might be a powerful consideration weighing against proceeding with the remote hearing.⁶⁸⁸

⁶⁸² 'Open letter from NGOs and academics on open justice in the COVID-19 emergency' (*The Justice Gap*, 29 May 2020) <<https://www.thejusticegap.com/we-need-to-protect-open-justice-during-the-COVID-19-emergency/>> accessed 15 July 2020.

⁶⁸³ 'Judiciary Provides Public, Media Access to Electronic Court Proceedings' (*United States Courts*, 3 April 2020) <<https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>> accessed 15 July 2020.

⁶⁸⁴ See e.g. 'Public Access for Arguments' (*United States Court of Appeals for the Federal Circuit*) <<http://www.cafc.uscourts.gov/public-access-arguments>> accessed 15 July 2020

⁶⁸⁵ Request for Courtroom Seating / Remote Access (*United States District Court District of Massachusetts*) <<https://public.mad.uscourts.gov/seating-signup.html>>; Public and Media Access to Court Proceedings During COVID-19 Emergency (*United States District Court, District of Columbia*) <<https://www.dcd.uscourts.gov/public-and-media-access-to-court-proceedings-during-COVID-19-emergency>> accessed 15 July 2020; Paul Hastings (n 640).

⁶⁸⁶ 'Frequently Asked Questions on Supreme Court Operations in the Immediate Post "Circuit Breaker" Period (from 2 June 2020)' (*Supreme Court Singapore*) <[https://www.supremecourt.gov.sg/quick-links/visitors/COVID-19/frequently-asked-questions-on-supreme-court-operations-in-the-immediate-post-circuit-breaker-period-\(from-2-june-2020\)](https://www.supremecourt.gov.sg/quick-links/visitors/COVID-19/frequently-asked-questions-on-supreme-court-operations-in-the-immediate-post-circuit-breaker-period-(from-2-june-2020))> accessed 15 July 2020.

⁶⁸⁷ Jennifer Robinson and Matthew Lewis, 'Open Justice in Australia: A Silver Lining to the COVID-19 Cloud?' (*Doughty Street Chambers*, 29 May 2020) <<https://insights.doughtystreet.co.uk/post/102g8dq/open-justice-in-australia-a-silver-lining-to-the-COVID-19-cloud>> accessed 15 July 2020.

⁶⁸⁸ Legg and Song (n 645).

The prominence of open justice, and the ambit of its limitations, will vary across jurisdictions and will invariably have to be adjusted according to the relative severity of the unfolding pandemic. Concerns about potential security breaches, disruptions and unauthorised recordings have to be given due weight, but also balanced against the fundamental need to maintain public confidence through giving open access to hearings whenever feasible. The emerging consensus seems to favour livestreaming of proceedings over giving external parties access to the remote hearing platform. The increased use of livestreaming may have a positive impact, as courts that did not use such facilities prior to the pandemic may start doing so and continue to do so even when the crisis has abated. Nonetheless, the effectiveness of livestreaming is also limited by the available technology and the courts' familiarity with the relevant platforms. For instance, there were multiple technical glitches plaguing the New South Wales court's attempt to livestream a criminal trial on YouTube, necessitating an adjournment of a few months. One journalist commented that all the parties and their legal teams were logging in from different locations and computers, the internet connection was frequently interrupted and the sound did not work. Hence, while technological tools are good enablers of open justice, they require considerable adjustment and refinement of infrastructure to positively portray the public face of the court. The awareness of these limitations is helpful for the courts to work towards modernising and refreshing their technological infrastructure to keep abreast of the society's preferences and practices, thus ensuring that the public and communal aspect of the delivery of justice is preserved.

Mediating and arbitrating at a distance

While most of the current academic discourse during the pandemic has focused on the impact of justice within the courts, there have also been significant implications on out-of-court processes. This section briefly examines the salient developments in the mediation and arbitration fields.

The shift towards out-of-court processes

The most significant trend in the past months has been the dramatic shift within the dispute resolution ecosystem from adjudication to mediation and arbitration. Processes such as mediation used to be regarded as 'alternatives' to the mainstream process of litigation, despite concerted efforts by judiciaries to encourage private settlements. However, the huge backlog in courts caused by adjournments has created an unprecedented demand by both the courts and litigants to use more speedy processes. The backlog in the UK courts amounting to more than half a million cases could result in delays of up to six months and spending of around 220 million pounds.⁶⁸⁹ Mediators

⁶⁸⁹ M Fouzder, '220m pounds needed to clear Covid-10 court backlog' (*The Law Society Gazette*, 29 April 2020) <<https://www.lawgazette.co.uk/news/220m-needed-to-clear-COVID-19-court-backlog/5104063.article>>; L Dearden, 'Court backlog rockets to more than half a million cases in England and Wales during coronavirus'

across the world have thus been more busy than before.⁶⁹⁰ Judges have also more actively prompted litigants to try these processes in a bid to alleviate the limited court resources.⁶⁹¹ Special arbitration and mediation schemes with subsidised rates have been created by dispute resolution bodies in efforts to ease the court's burden.⁶⁹² Even the pace of settlements via mediation has been accelerated amidst the uncertainty over when the courts would re-open; a class action involving Bayer AG and around 100,000 litigants did not settle at during mediation in 2019, but eventually reached a settlement because, as the mediator noted, they were in the middle of a pandemic with no trials being scheduled.⁶⁹³

There are several ramifications of this shift within the dispute resolution ecosystem. First and foremost, it appears that out-of-court processes may increasingly be the preferred mode of resolving disputes, which may result in mediation and arbitration being regarded as primary instead of secondary modes of dispute resolution. It remains to be seen whether this will be a permanent change, or merely a transient one that will dissipate with the resumption of more face-to-face court activity. Secondly, while greater interest in processes outside the court is a positive development, it becomes correspondingly more vital to understand the limitations and benefits of these processes. In a pre-pandemic world, when litigants could choose from a suite of processes, there were guidelines and considerations to help 'fit the forum to the fuss' and opt for the most appropriate dispute resolution processes. The ability of lawyers to discern when mediation and arbitration are inappropriate for their clients' disputes – despite their client's strong desire to settle a matter – is all the more crucial in these days. These could include situations in which public scrutiny and accountability are essential (such as criminal matters, or accusations of fraud), or where there are severe power imbalances between the parties (such as one party lacking legal representation and being unable to make an informed choice during mediation). More acute awareness of these matters could also ensure that suitable measures could be taken within

(*Independent*, 20 June 2020) <<https://www.independent.co.uk/news/uk/home-news/court-case-delay-england-wales-coronavirus-lockdown-cps-a9577006.html>> accessed 15 July 2020

⁶⁹⁰ Angela Morris, 'Business is Booming for Mediators as COVID-10 Cools Courts' (*Law.com*, 2 April 2020) <<https://www.law.com/texaslawyer/2020/04/02/business-is-booming-for-mediators-as-COVID-19-cools-courts/>> accessed 15 July 2020; Robert Storace, 'Mediations Are on the Rise, and Experts Expect Them to Continue After Courthouses Reopen' (*Law.com*, 22 June 2020) <<https://www.law.com/ctlawtribune/2020/06/22/mediations-are-on-the-rise-and-experts-expect-them-to-continue-after-courthouses-reopen/>> accessed 15 July 2020; Kohe Hasan and Teh Joo Lin, 'Firms should consider mediation to settle rows amid COVID-19 disruptions' (*The Straits Times*, 23 May 2020) <<https://www.straitstimes.com/opinion/firms-should-consider-mediation-to-settle-rows-amid-COVID-19-disruption>> accessed 15 July 2020.

⁶⁹¹ Angela Morris (n 690).

⁶⁹² Jemma Slingo, 'Dispute resolution giants create pandemic service to ease court burden' (*The Law Society Gazette*, 19 June 2020) <<https://www.lawgazette.co.uk/news/dispute-resolution-giants-create-pandemic-service-to-ease-court-burden/5104702.article#:~:text=Dispute%20resolution%20giants%20create%20pandemic%20service%20to%20ease%20court%20burden,-By%20Jemma%20Slingo&text=Two%20major>>. ; Kohe Hasan and Teh Joo Lin (n 690).

⁶⁹³ Joe Nocera, 'It Took Coronavirus Pandemic to Settle Bayer's Roundup Suits; Viewpoint' (*Insurance Journal*, 10 July 2020) <<https://www.insurancejournal.com/news/national/2020/07/10/575125.htm>> accessed 15 July 2020.

mediation and arbitration to deal with these concerns. Such acumen will guard against an undiscerning shift to embrace out-of-court processes without duly considering the implications. Finally, there is not only a shift towards out-of-court processes, but also towards virtual mediation and virtual arbitration. To add another layer of complexity, there is the further option of have partially remote processes, with some parties participating virtually and others being present in person. This trend is likely to grow in countries where lockdowns are cautiously lifted and stringent measures are still put in place to limit face-to-face meetings. In other words, the full suite of dispute resolution options have now expanded greatly, requiring virtual and partially virtual out-of-court processes to be seriously considered. The legal advisor's ability to fit the dispute and parties' needs to the most suitable process is all the more vital in the future. It will mean that legal advisors should gain awareness of the practical implications of the use of technology on the process and the outcome of the relevant mode of dispute resolution.

Online Dispute Resolution

More importantly, the dispute resolution community should realise that videoconferencing is but a small part of the burgeoning field of ODR. In fact, some ODR scholars would not consider Zoom mediation and the like to be ODR processes. The concept of technology as the fourth party was discussed as early as 2011 to creatively depict how different technological tools may assist or even replace the third-party decision-maker, mediator or arbitrator.⁶⁹⁴ Using a videoconferencing or teleconferencing platform for a dispute resolution process has been considered a very early and mundane iteration of ODR.⁶⁹⁵ Since then, ODR tools and systems have been developed to do much more than provide a communication channel. Ethical principles have been developed to guide the design and implementation of ODR systems and tools.⁶⁹⁶ In the last few years, many courts have swiftly introduced ODR systems. These are end-to-end systems that allow the court user to accurately understand the problem, negotiate virtually with the other party, attend virtual mediation or arbitration, and, as a last resort, have an online hearing. Apart from videoconferencing tools, the systems utilise chat systems, and have customised answers to court users' queries. In the future, some of these systems could well be enhanced with decision-making and prediction tools, and negotiation support tools that can assist parties to reach a resolution of their dispute more easily.⁶⁹⁷ In short, the use of online audio- and video-conferencing tools is probably skimming the surface of the entire suite of ODR options. Still, ODR proponents are hopeful that this is a positive start to the greater embracing of other ODR processes. It may well be a catalyst

⁶⁹⁴ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, San Francisco 2001).

⁶⁹⁵ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) at pp 33-36

⁶⁹⁶ See e.g. International Council for Online Dispute Resolution Standards for Online Dispute Resolution <<https://icodr.org/standards/>> accessed 15 July 2020

⁶⁹⁷ Dorcas Quek Anderson (n 637)

to shift the entire dispute resolution field to make a long-lasting paradigm shift to give greater prominence to both alternative dispute resolution and ODR.

Virtual mediation

Turning back to the use of online modes of communication, this section will consider the notable issues brought about by the growth of online mediation. One key concern relates to maintaining confidentiality of the mediation process. Confidentiality is a quintessential characteristic of mediation that is protected by many countries' mediation legislation, and articulated as a key ethical principle. At the start of the pandemic, the mediation community was most preoccupied with choosing the best videoconferencing that was flexible enough for mediation and yet has sufficient security features. Many private mediators initially favoured the Zoom software because of it offered users flexibility to customise functions to suit the particular needs of the mediation, and it allowed the mediator to create breakout rooms to convene private sessions with certain parties. However, some mediators were alarmed after news of 'zoom bombing' and the lack of end-to-end encryption surfaced.⁶⁹⁸ In the past few months, security updates made by Zoom and improvements in other videoconferencing tools have assuaged the fears about breach of confidentiality. Mediators who use Zoom are now protected by the latest security functions of having a waiting room by default to admit participants, requiring the host to specify whether a password is required when scheduling new meetings, and allowing the host to lock the meeting once started to prevent any external party from entering.⁶⁹⁹ Nevertheless, some mediators still have reservations about using this popular platform because there is no end-to-end encryption. Given that the differences between Zoom and other software's functions will potentially be narrowed in the future, mediators will have a greater choice of platforms to use to ensure the greatest level of security. Mediators have also been showing greater interest in online mediation systems created by companies like Crek and Modron.⁷⁰⁰ These systems usually offer a higher level of security and a complete suite of services to mediators including case management, sharing of documents and online execution of mediated settlement agreements. Instead of relying solely on video-conferencing for the mediation, they also

⁶⁹⁸ Rick Weiler, 'Is Zoom Good Enough for Mediation?' (*Kluwer Mediation Blog*, 6 April 2020) <http://mediationblog.kluwerarbitration.com/2020/04/06/is-zoom-good-enough-for-mediation/?doing_wp_cron=1594954384.9748320579528808593750> accessed 15 July 2020.

⁶⁹⁹ Don Philbin, 'Tailoring Zoom to Mediation for the Moment' (*ADR Toolbox*, 31 March 2020) <<http://www.adrtoolbox.com/2020/03/tailoring-zoom-to-mediation-for-the-moment/>> accessed 15 July 2020; John Grant, 'Zoom is safe for Lawyers (if you use it right)' (*Agile Attorney Network*, 26 March 2020) <https://agileattorney.com/zoom_is_safe_for_lawyers/> accessed 15 July 2020; Will Chalmers, 'Zoom is safe and secure for mediation' (*Mediator Network*, 9 April 2020) <<https://www.mediatornetwork.org/zoom-is-safe-and-secure-for-mediation>> accessed 15 July 2020.

⁷⁰⁰ Crek ODR <<https://crekodr.com>>; See You Out of Court <<https://www.seeyououtofcourt.com>>; Alan Limbury, 'Mediating Online – is it Time to Move from Improvising to a Dedicated Platform' (*Kluwer Mediation Blog*, 22 April 2020) <http://mediationblog.kluwerarbitration.com/2020/04/22/mediating-online-is-it-time-to-move-from-improvising-to-a-dedicated-platform/?doing_wp_cron=1594954878.2749938964843750000000> accessed 15 July 2020; Modron Spaces <<https://www.modron.com>> accessed 15 July 2020.

offer allow the mediator to facilitate the negotiations using text messaging, an asynchronous mode of communication that can complement the use of video-conferencing. Confidentiality and security is therefore likely to assume greater prominence within the mediation field with the increased use of online tools and systems.

In addition, mediators have been grappling with adjusting to the different dynamics of human interaction on video-conferencing platforms. As alluded to in the preceding section, human engagement and mutual understanding are more difficult to achieve in this setting compared to face-to-face mediations. In comparison to adjudication, a large part of the mediator's role involves managing conversations, active listening and building relationships with the parties. Mediators are accustomed to 'reading the room' and the body language of all participants carefully. However, these non-verbal cues and social presence are less readily grasped during videoconferencing. Consequently, the mediator is less able to discern the participants' state of mind and to intervene appropriately.⁷⁰¹ Research concerning negotiation has also consistently reflected challenges in building trust and assessing the partner's emotions accurately when negotiating online.⁷⁰² Notwithstanding these constraints, some mediators have found that they are better able to build intimacy with the participants, because the more informal setting results in everyone being more relaxed. For instance, one mediator found that the parties displayed more candour in the online setting and seemed more aware of the effect of their online conduct, as if 'this electronic distancing enables a different kind of intimacy or openness'.⁷⁰³ Indeed, as more people are accustomed to working and communicating via video-conferencing, they may be increasingly comfortable with this mode of communication, and may develop unique ways of building relationships in the virtual environment. In this respect, it is notable that the available research has shown conflicting results on whether parties tend to be more cooperative or adversarial in their online negotiations.⁷⁰⁴ It is thus unwise for mediators to make generalised conclusions that intimacy is necessarily reduced in the online setting. Much will probably depend on the familiarity of the specific parties with the technology, and their default behaviour in the online setting.

Moving mediation to the online realm has created new opportunities for mediators to develop best practices and techniques to conduct online mediations effectively. Some mediators have highlighted the greater importance of verbalising thoughts and emotions, and asking frequent

⁷⁰¹ Greg Bond, 'Feeling the Non-Verbal: Analogue and Digital Communication in Mediation, Facilitation and Training' (*Kluwer Mediation Blog*, 24 June 2020) <http://mediationblog.kluwerarbitration.com/2020/06/24/feeling-the-non-verbal-analogue-and-digital-communication-in-mediation-facilitation-and-training/?doing_wp_cron=1594955031.5964748859405517578125> accessed 15 July 2020.

⁷⁰² I Geiger (n 667).

⁷⁰³ John Sturrock, 'Mediations, using Zoom – a revelation?' (*Kluwer Mediation Blog*, 29 May 2020) <http://mediationblog.kluwerarbitration.com/2020/05/29/mediations-using-zoom-a-revelation/?doing_wp_cron=1594955202.0290949344635009765625> accessed 15 July 2020

⁷⁰⁴ I Geiger (n 667) at p 240

questions to assess the parties' state of mind. Others have noted the importance of building rapport with participants prior to the mediation by having pre-mediation conversations and walking the lawyers and parties through the technological details to allay any fears about using an unfamiliar platform for mediation. Hence, it is highly likely that the mediation profession will adjust their skills in the analogue world to the virtual world, and that the parties become increasingly adept with communicating effectively with video-conferencing. As observed in one news report, the playing field between face-to-face mediation and remote mediation has been levelled because of the pandemic.⁷⁰⁵

Virtual arbitration

Like private mediators, arbitration institutions have also been updating their rules and practices to accommodate remote arbitrations. Making the transition may not be as difficult, as many steps in an international arbitration such as case management conferences and exchange of submissions have been routinely done virtually. It has been suggested that current pandemic could be a game changer for the international arbitration industry, as shifting hearings to the virtual world would be meeting many arbitration users' preferences and cutting down on substantial costs of travel.⁷⁰⁶

Nevertheless, several unique questions arise for remote arbitrations. The most fundamental issue relates to whether hearings can be validly held remotely without the parties' agreement. The answer will depend on the relevant law of the seat of arbitration. Some commentators have suggested that the tribunal has such powers under rules such as the International Chamber of Commerce (ICC) Rules that expressly allow the tribunals to hold remote hearings, or under the tribunal's general power to conduct the arbitral proceedings as they see fit.⁷⁰⁷ However, others take the view that such a power should be exercised very cautiously, so as to give regard to the parties' right to be heard and be treated equally. It is highly likely that party autonomy, a distinguishing feature of arbitration compared to litigation, will be given great regard and that the power to order remote hearings against the parties' wishes will be exercised sparingly. The second issue concerns the enforceability of arbitral awards arrived through remote hearings. A party may

⁷⁰⁵ Angela Morris (n 690).

⁷⁰⁶ Maxi Scherer, 'Remote Hearings in International Arbitration – and What Voltaire Has to Do with It?' (*Kluwer Arbitration Blog*, 26 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1594955445.2844650745391845703125> accessed 15 July 2020; Francois Lassalle, 'The Real "Arbitration 2.0" – How a Pandemic Rocked the Arbitration Boat' (*LinkedIn*, 9 June 2020) <<https://www.linkedin.com/pulse/real-arbitration-20-how-pandemic-rocked-boat-francois-lassalle/>> accessed 15 July 2020.

⁷⁰⁷ Maxi Scherer, 'Remote Hearings in International Arbitrations: An Analytical Framework' (Queen Mary University of London, School of Law Legal Studies Research Paper No. 333/2020, forthcoming in *Journal of International Arbitration* 2020); Mireze Philippe, 'Offline or Online Virtual Hearings or ODR?' (*Kluwer Arbitration Blog*, 26 April 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/>> accessed 15 July 2020.

seek to set aside or resist recognition of the award based on a breach of right to a physical hearing or the right to be heard due to being unable to effectively present arguments. Scherer notes that remote hearings in themselves have generally not been found to breach the parties' rights in case law.⁷⁰⁸ However, severe technical difficulties faced during the hearing has been raised in the Australian court in an attempt to set aside the award. Although the court refrained from setting the award aside, this case underscores the palpable risk of technical difficulties severely disrupting the arbitration hearing.⁷⁰⁹ A related concern arises with regard to partially remote arbitration hearings. It has been pointed out that the tribunal has to be mindful of how it treats both the party appearing physically and the party participating remotely, so as to prevent allegations of unequal treatment.⁷¹⁰

Following from the above three issues, many practical considerations concerning planning for the arbitration hearing have emerged, many of which have also surfaced for court hearings. Many arbitrators have made reference to the Seoul Protocol on Video Conferencing in International Arbitration which was most presciently discussed prior to the pandemic.⁷¹¹ It gives useful recommendations such as providing technical support to the witness, ensuring minimum technical standards are in place to avoid poor quality feed or delay, testing the video conferencing prior to the arbitration and having teleconferencing backup plan. Several other institutions including the ICC and the Chartered Institute of Arbitrators have formulated comprehensive guidelines on preparation for and conduct of the arbitration. Useful safeguards have been suggested such as requiring witnesses to be alone when testifying, or getting the witness to open a sealed box of documents in front of the camera.⁷¹² These guidelines could form the basis of an agreed protocol for the remote arbitration.

⁷⁰⁸ Maxi Scherer (n 707) p 31

⁷⁰⁹ *Sino Dragon Trading v Noble Resources International* (2016) FCA 1131 (Federal Court of Australia), referred to in Maxi Scherer (n 706) p 31

⁷¹⁰ Maxi Scherer (n 706) at pp 33 -34

⁷¹¹ Alexander Fawke, 'Conducting arbitration remotely in the wake of COVID-19: the Seoul Protocol on Video Conferencing in International Arbitration' (*Linklaters*, 23 March 2020) <<https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/march/conducting-arbitration-remotely-in-the-wake-of-covid19>> accessed 15 July 2020; Jessica Sabbath and Brianna E. Kostecka, 'INSIGHT: Best Practices for Conducting Remote Arbitration Hearings' (*Bloomberg Law*, 21 April 2020) <<https://news.bloomberglaw.com/us-law-week/insight-best-practices-for-conducting-remote-arbitration-hearings>> accessed 15 July 2020; Crag Tevendale, Charlie Morgan and Vanessa Naish, 'Update [7]: "Necessity is the Mother of Invention": COVID-19 Dramatically Accelerates Digitalisation of Arbitration Processes' (*Herbert Smith Freehills*, 26 June 2020) <<https://hsfnotes.com/arbitration/2020/06/26/update-7-necessity-is-the-mother-of-invention-COVID-19-dramatically-accelerates-digitalisation-of-arbitration-processes/>> accessed 15 July 2020.

⁷¹² Sabbath and Kostecka (n 711); Chahat Chawla, 'International Arbitration During COVID-19: A Case Counsel's Perspective' (*Kluwer Arbitration Blog*, 4 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-COVID-19-a-case-counsels-perspective/?doing_wp_cron=1591731619.7565040588378906250000> accessed 15 July 2020.

Reaping more gains than losses for dispute resolution

It has been common for consultation studies on remote courts and dispute resolution practitioners to indicate a palpable sense of loss as dispute resolution is involuntarily being taken online. However, this sense of loss could help underscore the critical values of the relevant dispute resolution process. It is an opportune time for the dispute resolution community to ponder afresh on and articulate these fundamental values. At the same time, it is vital that we do not simply lament what has been lost. Nimbleness and creativity are needed to imagine how the underlying values of each justice system may be fulfilled in the virtual environment, and to recognise the unparalleled opportunities accorded by technology to reap substantial gains. A considered analysis of these issues will ultimately enable the dispute resolution landscape to reap more gains than losses in the post-pandemic world.