



Online Arbitration and Mediation

Purpose:	To provide guidance for barristers who are deciding whether to agree to conduct a hearing online
Scope of application:	All practising barristers
Issued by:	The Information Technology Panel
Last reviewed:	September 2021
Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

1. Arbitration and mediation are used regularly for dispute resolution. Technological developments are significantly changing traditional arbitral and mediation practices and procedures.
2. Prior to the coronavirus pandemic, parties and arbitrators/mediators would often agree to conduct some aspects of a case remotely for a variety of reasons, including convenience, cost savings, other efficiencies or out of necessity (when, for example, a witness/party was unable to attend a hearing in person).
3. During the pandemic the use of technology increased to unprecedented levels, with many cases proceeding by fully remote hearings/meetings, where most or all participants are located physically in different locations.
4. Arbitral institutions have also adapted to cater for remote hearings/meetings. In addition to individual responses to the crisis, early in the pandemic, a group of prominent arbitral institutions and the International Federation of Commercial Arbitration Institutions (IFCAI) issued a supportive joint statement promoting the effective use of arbitration during the coronavirus

pandemic¹. While this statement did not mandate use of online resources it said:

“Collaboration is particularly important as each of our institutions looks to ensure that we make the best use of digital technologies for working remotely.”

5. Although there is no prohibition on conducting online arbitration under English law, you should consider the legal issues and any possible challenges to the award within the relevant jurisdictions. In particular you will need to assure yourself that the award will be enforceable; as well as considering whether there are any specific requirements or limitations under the law of the seat of the arbitration. The purpose of this guidance is to give barristers a basic understanding of some of the practical and security concerns relating to online arbitration and/or mediation.
6. As well as the traditional video conferencing facilities provided by institutions (such as the [Bar Council](#), [CIArb](#), [IDRC](#)) which have well-equipped conference rooms, there is a wide variety of software available for web-based video-conferencing from various providers. These can offer facilities for screen sharing, presentation streaming and whiteboard tools in addition to the standard video streaming. You may like to compare different providers to consider whether web-based software would be suitable for the case in hand. The Bar Council does not recommend any specific provider but you may like to conduct your own research: see [here](#).
7. The CCBE Guidance on the use of remote working tools by lawyers and remote court proceedings issued on 27 November 2020² also provides useful guidance on two inter-related uses of remote video conferencing tools:
 - Consultations, and meetings by lawyers with their clients and others by remote means, which are private and confidential;
 - Remote participation in Court hearings, which in most cases are public.
8. You should also have an agreed backup plan to deal with any difficulties which may arise during the hearings, so that any interruption in transmission can be

¹ <https://sccinstitute.com/about-the-scc/news/2020/arbitration-and-covid-19-institutions-speak-with-one-voice/>

²

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20201127_CCBE-Guidance-on-the-use-of-remote-working-tools-by-lawyers-and-remote-court-proceedings.pdf

rectified promptly or an alternative platform or method is readily available, to ensure that all parties can continue to communicate effectively, and a fair hearing takes place.

9. Factors to take into consideration in choosing a platform are:
 - Accessibility: Whether the broadband speeds for all the users are sufficient for a stable connection in order to avoid interruptions and delays. Some software requires high broadband width for presentations and content sharing; you should consider doing a trial run.
 - Whether the participants have the hardware and devices required to participate properly (cameras, microphones and screens etc.)?
 - Are break out rooms available for private conversations?
 - How secure is the software facility in particular from unwanted third-party interruptions?
 - How easy is it to use?
 - Is the software GDPR compliant?
 - Is there any playback and/or record facilities (if so on what kind of file type (e.g., Windows Media Player or Quick Time Player)?)
 - Is there a document-sharing or screen-sharing facility?
 - Are any whiteboard facilities available?
 - Are live or real time transcription systems going to be used? (and if these are not stored locally are there any security and privacy issues with the offsite storage of such data?).
 - Is there any 'hand raising' facility? – or is has a protocol been agreed concerning how one party may intervene (if required) while another party is presenting?
 - What customer support is available if the users encounter difficulties?
 - Scheduling issues (time zones) and other factors that may affect the fairness of the hearing?
10. One of the major concerns with using video conferencing is whether witness evidence can be assessed properly, taking into account the body language and demeanour of the witnesses, and situational issues such as whether they are likely to be distracted while giving evidence. Some witnesses adapt very well to giving evidence by video streaming, while others may find it rather daunting (particularly when seeing themselves on screen).
11. Another practical consideration is how the presentation of documents and materials will take place during the arbitration.

Security

12. Maintaining the secrecy of any arbitrations/mediation is essential for their effectiveness. In addition, the ability to share information securely and speedily between multiple parties, institutions, and organisations across a variety of platforms (and in international cases, multiple jurisdictions too), cybersecurity and compliance with relevant data protection laws is integral to the success of arbitration/mediation.
13. As a result, there is a growing consensus that participants must give greater attention to cybersecurity in order to minimise the risks of a successful attack. A cyberattack may compromise the integrity of the arbitration/mediation process and the subsequent enforcement of any award.
14. In addition to the IT Panel Guidance on ‘Video conferencing and data protection’, you may like to consider:
 - The guidance on cybersecurity by the National Cyber Security Centre (NCSC)³:
 - a. [Small Business Guide: Cyber Security](#);
 - b. [Video conferencing service: using them securely](#)
 - c. [Phishing attacks: defending your organisation](#);
 - d. [Securing home working on personal IT](#).
 - Presidential Task Force on Cyber Security of the International Bar Association issued Cyber Security Guidelines on October 2018 ([the IBA Cybersecurity Guidelines](#))
 - The International Council for Commercial Arbitration (ICCA) [Cybersecurity Protocol](#)
 - The [CyberArb Toolkit](#) including a pro-forma precedent for your Procedural Order
15. Consider having a secure connection between the parties and the tribunal or mediator. If an open connection is used, it is possible that a third party might hack the connection and obtain access to what is said or to documents passing between the participants. This has become known as “Zoombombing” after a well-known platform. Such an attacker might be in a position to disclose or otherwise make improper use of the information obtained. This can result in a loss of trust and wasted costs.

³ <https://www.ncsc.gov.uk/section/advice-guidance/all-topics>

16. Secure connections, in essence, comprise an encrypted link between the points of the communication. This could be a virtual private network (also called a VPN), which can be set up by the video organiser. Another method is to have a secure link using the https model.
17. Some practical problems may occur as a result of having a secure connection, because the amount of bandwidth used when establishing and maintaining an encrypted connection will be greater than with an open connection. As a result, you may notice the images taking longer to pass between connections, and the speed at which speech is transferred may also slow down as well. These problems can be overcome by ensuring you have appropriate bandwidth to cope with the increased activity required when using an encrypted link. Testing in advance is recommended. The physical demeanour and tone of voice of the participants needs to be observable, so that the credibility of witnesses and/or experts giving evidence can be assessed. The video conferencing platform provider should be able to advise you of the costs of providing such a secure link. Most arbitral institutions are able to provide adequate services to meet the requirements.
18. It is worth observing that, depending on the cryptographic algorithms used, encrypting the communications does not introduce a great deal more traffic into the link for something as bandwidth-intensive as video conferencing. The main requirement relates to the capabilities of the devices at each end of the communication link. What is relevant is to ensure that all required compression of outbound streams is carried out before encryption takes place.

Recording the proceedings

19. You ought to give thought to whether the proceedings can be recorded by either or both sides. You may think that because you are not recording the hearing, therefore the other side is also not recording the hearing. But this assumption may be wrong (whether or not they may have given assurances that they will not do so)?
20. If recording of the session is to be allowed, this will, of course, raise issues if the parties' eventual copies of the hearing are not identical because of the bandwidth issues, which might result from data loss. However, from a practical point of view, if the communication links are bi-directionally authenticated cryptographically, this will provide additional assurance to both parties, in that neither can infer that the recording was altered in any way.

21. To avoid disappointment and wasting time preparing for the hearing on the day itself you should check the IT facilities of the venues in advance to ensure they meet the requirements. It is not safe to assume that a particular venue chosen for the hearing will automatically have the facilities to display electronic materials and be able to accommodate the manner in which you or your witnesses have produced evidence. For example, it is becoming more common for parties to rely on PowerPoint presentations and/or drawings to the tribunal to explain particular issues or for video footage to be shown of matters relevant to the issues in dispute (e.g., defects on a construction site before rectification). The parties should identify in advance the facilities required including any translation services and access to other practical needs (e.g., photocopying etc.) when booking the rooms.

Passing of documents between parties

22. Usually, the documents each side relies upon will have been passed between the parties before the hearing, and the documents may also be in electronic format. However, in the event that either party wishes to introduce additional documents during the course of the hearing, it might be useful to set out the protocol in advance for the exchange of further documents.
23. Also, it will be useful to establish in advance how each party is to deal with the documents. If it is agreed that the proceedings will be conducted over an open connection, consideration to be given to providing for some elementary protection. You should also consider your obligations on the processing and/or transfer of personal data under the relevant data protection laws. You may find the Bar Council's guidance on the General Data Protection Regulations 2016/679 (GDPR) useful.
24. You should also consider the risks of disclosing any confidential information and/or trade secrets.

During the hearing

25. Invariably, both clients will wish to discuss matters with their respective lawyers during the course of the hearing. This is why you ought to make yourself familiar with the video conferencing facilities. For instance, and depending on the equipment used, one or both sides may be able to move the camera around the room remotely. So, if you are in London and the other side in Buenos Aires, it may be possible for you to move their camera around the room to see who else is in view, and what else they might have in the room. This can work both ways. In addition, again, depending on the facilities you are using, you may also be

able to set the voice controls to mute and temporarily switch off the camera, thus ensuring you can have a private conversation with your client.

26. Whether you are conducting online arbitrations and mediations now or intend to conduct them in the future, it is suggested that you consider the points raised above, if only to demonstrate you have sufficiently considered your professional duties, in case the client decides to complain after the event.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of IT. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor bodies regulating information security nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise - and cannot be relied on as giving - legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).