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# **Living in a Virtual World: New Developments and Best Practices for Dispute Resolution in the COVID Era**

■  
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# Presenters



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# Agenda

1 Introduction and recent trends

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2 COVID-19 and international arbitration

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3 COVID-19 and civil litigation

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4 Challenges and considerations of virtual dispute resolution

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5 Trials and hearings during the crisis

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6 Virtual discovery and remote depositions

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7 Effective use of technology in virtual litigation

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8 COVID-19 and courts: what will the new normal be?

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1

# Introduction and recent trends

# Introduction and recent trends



1. Current situation (supply chain disruptions, liquidity struggles, employment issues)



2. Initial measures in response to COVID-19

3. Old and new sources of disputes



4. Rise of online dispute resolution

5. Transition to virtual hearings and key concerns (cross-examination, juries, security and confidentiality, privilege concerns)



6. Potential benefits (cost savings, efficiencies)



7. Future outlook



# Court and tribunal operations during COVID-19

## COVID-19 and courts



**COVID-19 impact on courts vary by jurisdiction, but general trends are:**

- Hearings deferred or conducted by phone/video
  - Hearings proceed in emergency matters
- Trials suspended
- Statutes of limitations tolled/filing deadlines extended
- Case filings diminished
- Some courts are beginning to resume limited operations and others are embracing live stream technology

# Due process and fairness concerns in civil cases and arbitration

## Divergent views among the courts and among litigants on the use of video technology for contested proceedings

- “Confrontation” via cross-examination of the witness?
- Are hearings required to be in person?
- How to balance fundamental Constitutional rights with public health imperatives?
- “Justice delayed is justice denied”



The background features a series of glowing blue lines that form a wave-like pattern, resembling a digital signal or data flow. The lines are composed of small dots and connect to form a mesh-like structure that flows across the frame.

2

# COVID-19 and international arbitration

# Virtual hearings in international arbitration

## Considerations and concerns

- Balance between procedural fairness and conducting arbitration in an expeditious manner
- Pandemic has brought an evolution in mind-set: “due process paranoia” vs a potentially indefinite adjournment
- Virtual hearings are not novel in international arbitration
  - Innate procedural flexibility
  - Case management conferences
- Most institutional rules had already allowed virtual hearings to a certain extent

# Virtual hearings in international arbitration

## Considerations and concerns

- Is a virtual hearing allowed?
- Is a virtual hearing appropriate?
- Guidelines by arbitral institutions set out the best practices and guidance for conducting a virtual hearing, and set out the procedures for involving the arbitral institution in a virtual hearing
- Model procedural order and procedures for a virtual hearing
- Establish a virtual hearing protocol to minimize risks of challenge to and enforcement of the award

ICC (2017)	ICC (2021)	HKIAC (2018)	SIAC (2016)	LCIA (2020)
<b><i>Refers to an “in person” hearing</i></b>	<b><i>Virtual or physical hearing</i></b>			
<p><b>Art. 25.2:</b> “After studying the written submissions of the parties and all documents relied upon, <b>the arbitral tribunal shall hear the parties together in person</b> if any of them so requests or, failing such a request, it may of its own motion decide to hear them.”</p>	<p><b>GAR:</b> “A new Article 26 [...] will clarify that if a hearing is to be held, the arbitral tribunal has the power to decide whether it should take place physically or remotely, using video conference or other electronic means.”</p>	<p><b>Art. 13.4:</b> “The arbitral tribunal shall decide whether to hold hearings for presenting evidence or for oral arguments [...] In the event of a hearing, the arbitral tribunal shall give the parties adequate advance notice of the relevant date, time and place.”</p>	<p><b>Rule 24.1:</b> “[T]he Tribunal shall , if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including any issue as to jurisdiction.”</p>	<p><b>Art. 19.2:</b> “[A] hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).”</p>

3

# COVID-19 and civil litigation

# Federal courts' response to COVID

Remote proceedings encouraged in civil matters, as safety is top priority

## **NDTX began conducting the first in-person jury trials in Texas in June, but later suspended**

- Relying on Section 15002 of the CARES Act, NDTX authorized the use of video- or teleconferencing for criminal proceedings through December 14, 2020

## **SDTX deciding when to resume jury trial on division by division basis**

- Because community conditions differ, each division is separately deciding when to resume jury trials
- The Houston Division resumed jury trials on October 13, 2020



# Texas State courts' response to COVID

Remote proceedings encouraged in civil matters, as safety is top priority

## **Texas Supreme Court Emergency Order regarding COVID State of Disaster**

- No in-person jury proceedings in justice and municipal courts until December 1, 2020
- District courts are prohibited from conducting in-person jury proceedings after October 1, 2020 unless the administrative law judge for the county submits an operating plan to conduct jury proceedings

## **Harris County District and County Courts moving ahead**

- Harris County is conducting in-person proceedings at NRG Arena, with safety measures and protocols in place

**Dallas County aiming to have a plan completed in time to resume trials in November.**



# Trials and hearings during the crisis

## Harris County back in business

### COVID-19 Precautions at Jury Service



The Harris County District Clerk's Office appreciates you serving in these challenging times. We know you have concerns and we are implementing stringent protocols to protect you as you serve.

[Watch a video about jury service at NRG](#) ▶



Everyone must pass a temperature check and answer questions about symptoms and exposure when entering the NRG Park complex.

Everyone must wear a face covering/mask. Those without a face covering/mask will be provided a mask.

Jurors who ride the jury shuttle have previously undergone the aforementioned health check when entering the NRG Park complex.

Social distancing is observed inside the shuttle and the seats are sanitized between runs.

Floor markers provide a visual reference for social distancing.

Seating is set at a minimum separation of six feet inside both NRG Arena and the room where voir dire takes place.

Prospective jurors are provided face shields in the room where voir dire takes place.

NRG cleaning staff continuously sanitize NRG facilities.

The juror check-in kiosks are separated by plexiglass. Gloves are provided to type on the keyboards.





4

# Challenges and considerations of virtual dispute resolution

# Considerations in remote proceedings

## Factors to take into consideration



- Type of proceedings
- Benefits / necessity of confrontation
  - Credibility determination
- Benefits of in-person hearings
- Effective representation
- Technology / Security
- Privilege
- Cost and preparation



5

# **Trials and hearings during the crisis**

# Trials and hearings during the crisis

## Courts pioneer remote proceedings

### Texas Court Pioneers Trial By Zoom In Atty Fee Dispute

By *Daniel Siegal*

Law360 (April 22, 2020, 10:05 PM EDT) -- A Texas state court judge charted a new path for trials during the coronavirus pandemic Wednesday when he held a one-day bench trial through videoconferencing service Zoom, overcoming technical difficulties to hear a dispute over roughly \$96,000 in attorney fees stemming from an insurance case.



### Litigant Seeks Mistrial Citing Covid-19

SESHADRI KUMAR Saturday, 28 March, 2020, 12:00 AM

A well-known businessman in Houston who lost a jury trial in Harris County has filed a petition in the court asking for mistrial because "the jury was improperly influenced and operated under a specter of the Coronavirus."

#### BREAKING STORY



### Sherman Federal Courthouse Closed, Jury Trial Halted After Coronavirus Outbreak

A federal judge in Sherman has halted a jury trial underway in his courtroom in which multiple people involved in the trial, including two jurors, tested positive for COVID-19, according to court records and multiple sources. In response, the Paul Brown federal

courthouse will be closed the rest of the week for a deep cleaning. Natalie Posgate has the scoop.

NOVEMBER 12, 2020 | NATALIE POSGATE

# Trials and hearings during the crisis

## Courts pioneer remote proceedings



### Technology is paramount

- Plan Ahead—both for you and your witnesses
- Think critically how your technology choices impact your presentation
- Practice, practice, practice
- Build redundancies

# Trials and hearings during the crisis

## Courts pioneer remote proceedings



### How advocacy is different in a remote setting

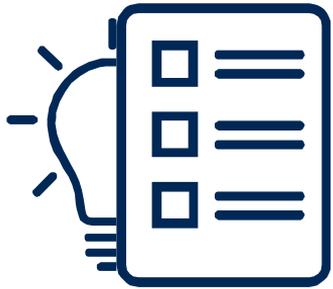
- Be as formal as possible
- Witness control tips for remote cross examination
  - Think about the medium: You are working with as small as a 12 inch screen, and you may have only 1 or 2 of those inches
  - You **are always on**.
  - Preparation, standing, eye contact, podium, gestures, shorter questions
- Interactions with court staff, clerks, court reporters—practice sessions



6

# Virtual discovery and remote depositions

# Virtual discovery, remote depositions, and written witness testimony



- Remote collection of evidence
- Remote depositions and strategies
  - Cost savings
  - Strategic, ethical and other considerations
- Declarations in lieu of appearing

# The implications of COVID-19 for depositions



- “Normal” practices will need to be reconsidered
- Issue: Travel may be restricted by law or company policy
  - Solution: Use of remote depositions
- Issue: In-person witness preparation
  - Solution: Skype, Zoom, BlueJeans, FaceTime videoconferencing capabilities (but may be harder to assess witness credibility/suitability and ensure confidentiality)
- Deposition specific protocols should be in place

# Stipulations and agreed protocol for remote depositions



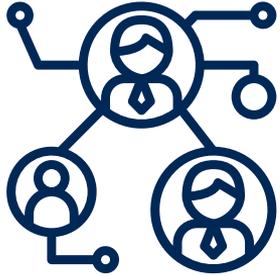
- Get a stipulation from all parties for virtual/remote video deposition, including virtual swearing in of witness
- Recommend additional stipulations:
  - virtual deposition transcript treated the same as a non-virtual deposition transcript, including for admissibility
  - exhibits to be shared electronically during the deposition v. hard copy in advance
  - confirm any inadvertent sharing of privileged/work product documents and/or communications (e.g., a virtual break-out room) do not waive the protections
  - anyone appearing in deposition may be recorded



7

# Effective use of technology in virtual dispute resolution

# Effective use of technology in virtual litigation



- Rate of change has dramatically accelerated. The world has been thrust into remote working and reliance on technology
- Courts are trying to become more adept at audio and video conferencing
- Considerations
  - video platform
  - exhibits
  - real-time

# Effective use of technology in virtual litigation



- Test, test, test: Know and respect the capabilities and limitations of the software
- Confirm reliable internet access, wifi coverage, webcam and audio at least two days before the trial, hearing or deposition
- Have a plan for presenting exhibits
- Do a dry run the day before – practice makes perfect!

# Virtual hearing platforms and options

## Elements of a virtual hearing – Platform

- Is the platform accessible to everyone?
- Test the platform in advance
- Functions to look for: screen share, breakout room, chat, recording, separate audio channels, security measures
- Back-up platform
- Neutral host



Webex Meetings

8

# COVID-19 and Courts: What will the New Normal be?

# COVID-19 and courts

What will the future be?



**Most likely we will see a hybrid of what it was before COVID-19 and what it is now:**

- Most courts will be open
- Remote proceedings will be available
- Civil vs criminal cases
- The world will continue to embrace technology

The image features a large white speech bubble on the left side, set against a dark blue background. The word "Questions" is written in a bold, dark blue font inside the speech bubble. On the right side of the image, there is a glowing blue particle trail consisting of many small dots connected by thin lines, creating a sense of motion and energy.

**Questions**

# Baker McKenzie.

An abstract graphic consisting of multiple overlapping, wavy lines of varying thickness and opacity in shades of blue and cyan. The lines create a sense of motion and depth, resembling a digital signal or a network of connections. The background is a dark, deep blue.

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