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## ONLINE DISPUTE RESOLUTION: AN OPTION FOR TIMES OF CRISIS AND CALM

To Our Clients and Friends:

Courts around the world have responded to the COVID-19 outbreak by delaying or suspending proceedings. While some courts have attempted to use technological solutions such as remote appearances by videoconference to mitigate delays,<sup>[1]</sup> others have opted to postpone all proceedings deemed non-essential.<sup>[2]</sup> The status of matters pending before courts is changing on a daily basis, in most cases providing little clarity about when or how they will be addressed.

Yet, disputes continue to arise, including disputes relating to the disruption and delays caused or exacerbated by the COVID-19 crisis.<sup>[3]</sup> To minimize further disruption in an increasingly uncertain economic climate, many parties may seek avenues to resolve such disputes immediately and efficiently. Though not a panacea, these parties may consider entering post-dispute arbitration or mediation agreements that tend to provide greater flexibility to the parties to resolve disputes remotely and in an expedited manner. Last week, Gibson Dunn published certain best practices to consider when entering such agreements.<sup>[4]</sup> In this client alert, we outline key features of online arbitration and mediation options which are particularly attractive not only for times of calm, but particularly in times of crises such as this. In this regard, many arbitration institutions have expressly confirmed that they remain open for business despite the global pandemic.

### I. Considerations for Online Dispute Resolution

Online Dispute Resolution (“**ODR**”) broadly refers to dispute resolution practices that take advantage of the convenience and efficiency of the internet and online communications. The term encompasses everything from the electronic filing of submissions and exchange of documents to online hearings.

Like any avenue for dispute resolution, companies must weigh a number of considerations to determine whether ODR is appropriate for their situation. With respect to filing and exchanging documents, electronic filing is generally more efficient, economical, environmentally friendly, and less burdensome. Moreover, remote hearings, which avoid travel time, expenses, and other fees associated with in-person hearings, should typically be more efficient to schedule and less costly for the parties.

ODR also allows parties to present their case from anywhere in the world, including from their homes or offices. This option is particularly important given that COVID-19 has currently reached more than 150 countries in the world, many of which have placed their citizens on lock down and/or have temporarily shut down the courts leaving little recourse for parties requiring immediate assistance. Of course, companies and counsel may have concerns about whether they will be able to effectively present their case without in-person interactions with the arbitrators, witnesses, experts, opposing parties, and

even members of their own party.[5] But as a growing number of legal practitioners develop experience with ODR, advocates are growing increasingly comfortable with conducting oral arguments remotely. There are also studies which raise doubts as to the extent to which face-to-face contact actually assists in assessing credibility.[6]

There are other potential risks and downsides associated with ODR. Electronic document exchange and communication are not error-proof and may present technical problems and cybersecurity risks. However, these issues are capable of management, as shown by the robust cybersecurity measures recommended for use in international arbitration by the International Council for Commercial Arbitration, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution.[7] Similar technological and cybersecurity concerns, and remedies, exist for remote hearings.

Crucially, the successful use of ODR requires access to a basic modern technological infrastructure, including a reliable internet connection and computers, which may not always be available to parties, particularly in less developed economies. Many of these issues are, however, being addressed by technological innovations and creative procedures.

In the context of arbitration proceedings, Gibson Dunn has successfully conducted cross-examination of witnesses, participated in procedural conferences and emergency application hearings virtually. While there is likely to be a learning curve for all participants using new technology, the potential benefits may prove well-worth the effort and many new technologies have developed user-friendly interfaces.

Of course, in many instances, in-person hearings will be preferable to remote hearings. But companies should know that in-person hearings are not always necessary, or—as we have come to appreciate in recent weeks—possible.

## **II. Arbitration and ODR**

While any ODR proceeding, whether in court or in arbitration, can face the challenges described above,[8] international arbitration practitioners have developed particular expertise in resolving these issues and using technology to their advantage.[9] This is because arbitrators and practitioners have long dealt with international parties, often separated by large geographical distance, for whom travel may not always be convenient or even possible. For example, it is relatively common for witnesses to provide testimony over videoconference if that witness is unable to attend the hearing as a result of visa regulations, government restrictions, or even for business or convenience purposes. Additionally, for cost and efficiency reasons, sessions involving procedural or interlocutory issues are often held over telepresence or videoconference rather than in-person.

As a result, arbitral institutions have adopted procedural rules and guidelines that allow parties to rely on technological solutions that reduce or even eliminate the need for paper filings and in-person hearings. And the international arbitration community has developed specific guidelines and protocols to manage ODR that are available for parties to use in any dispute. Venues for arbitration hearings, particularly in the international context, often provide assistance with technology and are well-versed in

assisting parties to conduct virtual aspects of their arbitrations.[10] We describe some of these features below.

## **A. Arbitration Institutions and ODR**

As a general matter, arbitral institutions' rules, particularly international ones, have long provided for a great degree of flexibility that allows hearing and procedural conferences to be conducted virtually. Several major arbitration institutions have developed rules and platforms to better enable online or remote arbitrations. Some have developed platforms enabling arbitration proceedings that can be fully remote—*i.e.*, where submissions are filed exclusively by electronic means and no in-person hearings are required. Alongside arbitral institutions, specialized service providers have developed virtual platforms that enable remote hearings and other sessions.[11] For instance, the procedural rules of the International Chamber of Commerce (“ICC”) enable expedited and emergency arbitration proceedings to be held by “videoconference, telephone or similar means of communication.”[12]

In response to the COVID-19 crisis in particular, the ICC, the American Arbitration Association (“AAA”), the AAA’s international division, the International Centre for Dispute Resolution (“AAA-ICDR”),[13] JAMS,[14] the International Center for the Settlement of Investment Disputes (“ICSID”),[15] and the Singapore International Arbitration Centre (“SIAC”)[16] have all issued guidance on the use of videoconferencing for remote participation in hearings. These institutions have highlighted the growing number of online hearings even before the crisis began, and have therefore developed robust systems and staff who are trained to handle such processes.[17]

In addition to videoconferencing, arbitral institutions such as the Stockholm Chamber of Commerce (“SCC”)[18] and the London Court of International Arbitration (“LCIA”)[19] have also recently issued guidance on using fully digitized case management systems.[20]

A recent ICC arbitration between J&F Investimentos SA and Paper Excellence demonstrates the flexibility offered by arbitration institutions to resolve disputes online. The hearing in that arbitration was originally scheduled to start this month in São Paulo, Brazil and take place for two weeks.[21] After the first week of in-person hearings, guidance from authorities in various countries prohibited further in-person hearings due to the COVID-19 outbreak. Instead of delaying the remainder of the hearing, the parties chose to hold their second week of hearings on the online video platform Zoom with all 70 participants, located in Spain, Singapore, London, and New York, as well as Brazil.[22] This immediate transition from in-person to online hearings during the midst of the COVID-19 outbreak demonstrates the capacity and benefits of choosing a dispute resolution option that has robust and developed ODR capabilities.

## **B. ODR Guidance and Protocols**

In addition to arbitration institutions that have developed the technological capabilities to conduct proceedings online, there are at least two sets of salient protocols available for use by arbitration practitioners in ODR proceedings.

First, the Seoul Protocol on Video Conference in International Arbitration (“Seoul Protocol”)—developed with input from a broad number of arbitration users—offers guidelines on videoconferencing in international arbitrations.[23] While the Seoul Protocol focuses on witness testimony, its guidelines are informative for remote arbitrations generally. The Seoul Protocol provides detailed provisions on, among other matters, the conditions under which witnesses must provide testimony, which services are used, technical requirements, troubleshooting and planning, cybersecurity, presentation of documents, and use of interpretation services.[24]

Second, the Protocol on Cybersecurity in International Arbitration (“Cybersecurity Protocol”) provides guidance on reasonable information security measures that the parties and arbitrators can take, particularly in light of increasingly virtual hearings and paperless document transfer.[25] The Cybersecurity Protocol was developed by a working group, established by the International Council for Commercial Arbitration, the New York City Bar Association and the International Institute for Conflict Prevention & Resolution, which recently released the 2020 edition of the Protocol. The Cybersecurity Protocol includes procedural and practical guidance on how to assess security risks and identify appropriate solutions.

### **III. Online Mediation Procedures**

In addition to arbitration, businesses may also look to mediation[26] as an alternative dispute resolution mechanism that offers many of the same technological advantages as arbitration—either as an independent or initial step in the dispute resolution process. Online mediation is already popular for a host of disputes, especially in circumstances where the parties are located in different geographic areas, the dispute originated in an online transaction, or the parties have other reasons to avoid meeting in person.[27] The process offers significant flexibility as mediations may be conducted exclusively through email or chat rooms, subject to the parties’ preferences, where mediators can communicate with the parties, separately and simultaneously, and where documents can be shared only by electronic means.[28]

### **IV. Next Steps**

In light of the current crisis, parties may wish to consider ODR options to resolve their disputes. A number of considerations, including the type of dispute, amount in dispute, the opposing parties, and the urgency for resolution will need to be considered. While most dispute resolution mechanisms employed today will inevitably involve some online element, the relevant question for the parties may be to what extent the proceeding can take place online in the interest of saving time and cost.

Assuming a party determines it is necessary and feasible to resolve a dispute through ODR, it need not already have a pre-existing arbitration agreement. Rather, it can enter into a post-dispute ODR agreement, tailored to the specific requirements of the parties and the dispute. Companies not currently facing a dispute may also consider whether to add ODR clauses for future disputes in their contracts. Such clauses can preserve the option not just for any future crises but also for disputes that can more efficiently be resolved by virtual means. As today’s reality has shown, businesses are becoming increasingly comfortable, as they must, to the use of online tools to manage their day-to-day

operations. In the same way, parties should consider the potential for using these same online tools as viable platforms for resolving disputes.

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[1] For example, on March 24, 2020, the highest appeals court in the United Kingdom conducted a case entirely by video link for the first time in its history, following the imposition of a nationwide lockdown as a result of the COVID-19 pandemic. Richard Crump, *Top UK Court Hears Cases Via Video As Country Locked Down*, Law360UK, Mar. 24, 2020, [https://www.law360.co.uk/commercial-litigation-uk/articles/1256347/top-uk-court-hears-cases-via-video-as-country-locked-down?nl\\_pk=d9ba0ccc-104a-4e48-92db-314cec1778be&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=commercial-litigation-uk](https://www.law360.co.uk/commercial-litigation-uk/articles/1256347/top-uk-court-hears-cases-via-video-as-country-locked-down?nl_pk=d9ba0ccc-104a-4e48-92db-314cec1778be&utm_source=newsletter&utm_medium=email&utm_campaign=commercial-litigation-uk).

[2] Debra Cassens Weiss, *SCOTUS delays arguments while other courts suspend trials or close over COVID-19 concerns*, Aba Journal, Mar. 16, 2020, <https://www.abajournal.com/news/article/supreme-court-delays-arguments-while-other-courts-through-country-suspend-trials-or-close>. Likewise, US state courts have largely responded to the COVID-19 outbreak by restricting or ending jury trials, and generally suspending in-person proceedings. National Center for State Courts, *State courts are responding to the coronavirus to protect the public, while maintaining access to justice*, National Center for State Courts, Mar. 24, 2020, <https://www.ncsc.org/Newsroom/Public-health-emergency.aspx>. For example, on March 23, 2020, the New York Supreme Court issued an administrative order putting a stop to all filings, both electronic and paper, deemed non-essential. Chief Administrative Judge of the Courts, Administrative Order AO/78/20 (N.Y., Mar. 22, 2020), <http://nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>; Chief Administrative Judge of the Courts, Administrative Order AO/71/20 (N.Y., Mar. 19, 2020), <http://nycourts.gov/whatsnew/pdf/AO71-20.pdf>.

[3] See e.g. Gibson Dunn, *Coronavirus and Force Majeure: Addressing Epidemics in LNG and Other Commodities Contracts*, Gibson, Dunn & Crutcher (Feb. 12, 2020), <https://www.gibsondunn.com/coronavirus-and-force-majeure-addressing-epidemics-in-lng-and-other-commodities-contracts/>.

[4] See Gibson Dunn, *Practical Solutions to Resolving Commercial Disputes When the Courthouse Is Closed*, Gibson, Dunn & Crutcher (Mar. 25, 2020), <https://www.gibsondunn.com/practical-solutions-for-resolving-commercial-disputes-when-the-courthouse-is-closed/>.

[5] Remote hearings can also be more difficult to enforce protocols such as witness sequestration.

[6] See, e.g., Malcolm Gladwell, *Talking to Strangers: What we Should Know about the People We Don't Know* (Little Brown and Co. 2019) (discussing studies that challenge the notion that person-to-person contact is actually as informative as it is perceived to be).

[7] CPR, *CyberInsecurity: A New Protocol to Counter Cyberattacks in International Arbitration*, International institute for conflict prevention and resolution, (July 5, 2018),

<https://www.cpradr.org/news-publications/articles/2018-07-05-cyberinsecurity-a-new-protocol-to-counter-cyberattacks-in-international-arbitration>.

[8] Ering Coe, *Technical Difficulties: Courts Face COVID-19 Learning Curve*, Law360, Mar. 23, 2020, [https://www.law360.com/articles/1256124/technical-difficulties-courts-face-covid-19-learning-curve?nl\\_pk=e3a36347-a2b9-4d09-8c33-c3067f41fcc6&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=special](https://www.law360.com/articles/1256124/technical-difficulties-courts-face-covid-19-learning-curve?nl_pk=e3a36347-a2b9-4d09-8c33-c3067f41fcc6&utm_source=newsletter&utm_medium=email&utm_campaign=special).

[9] See e.g. Ihab Amro, *Online Arbitration in Theory and In Practice: A Comparative Study in Common Law and Civil Law Countries*, Kluwer Arbitration Blog, Apr. 11, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/> (noting that the 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federal allows for any party to request to participate in a hearing through videoconferencing); Program on Negotiation, *Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, Harv. L. Sch. Program on Negot., Jan. 27 2020, <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/> (noting that e-mediation and online mediation services have been offered since the late 1990s).

[10] See, e.g., Arbitration Place, *Arbitration Place Virtual: Dispute Resolution for the Digital Age* (Mar. 25, 2020), [https://mcusercontent.com/5b67e063012fb13aa8dff852a/files/904c774e-5f58-408c-91c5-2071d197d2ee/APV\\_Fact\\_Sheet\\_20\\_03\\_2020.pdf](https://mcusercontent.com/5b67e063012fb13aa8dff852a/files/904c774e-5f58-408c-91c5-2071d197d2ee/APV_Fact_Sheet_20_03_2020.pdf).

[11] *Id.*

[12] ICC Rules of Arbitration, App'x VI, art. 3(5) and App'x V, art. 4(2); see also App'x VI(f), available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>.

[13] AAA-ICDR, *COVID-19 Update*, American Arbitration Association- International Centre for Dispute Resolution (Mar. 20, 2020), [https://go.adr.org/covid19.html?\\_ga=2.128862348.1686453586.1584112272-260696787.1566227680](https://go.adr.org/covid19.html?_ga=2.128862348.1686453586.1584112272-260696787.1566227680).

[14] JAMS, *Coronavirus (COVID-19) Advisory for JAMS Visitors*, JAMS Mediation, Arbitration, ADR Services (Mar. 17, 2020), [https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors).

[15] ICSID, *A Brief Guide to Online Hearings at ICSID*, ICSID News Release (Mar. 24, 2020), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>.

[16] SIAC, *COVID-19 Information for SIAC Users*, Singapore International Arbitration Centre (No Date), [https://www.siac.org.sg/images/stories/press\\_release/2020/\[ANNOUNCEMENT\]%20COVID-19%20Information%20for%20SIAC%20Users.pdf](https://www.siac.org.sg/images/stories/press_release/2020/[ANNOUNCEMENT]%20COVID-19%20Information%20for%20SIAC%20Users.pdf).

[17] See e.g., ICSID, *A Brief Guide to Online Hearings at ICSID*, ICSID News Release (Mar. 24, 2020), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362> (“Year-on-year, ICSID has seen a

steady uptick in its number of online hearings. In fact, last year about 60 per cent of the 200 hearings and sessions organized by ICSID were held by videoconference.”)

[18] Arbitration Institute of the Stockholm Chamber of Commerce, *COVID-19: How the SCC is Responding*, Stockholm Chamber of Commerce (Mar. 18, 2020), <https://sccinstitute.com/about-the-scc/news/2020/covid-19-how-the-scc-is-responding/>.

[19] LCIA, *LCIA Service Update: COVID-19*, London Court of International Arbitration (Mar. 18, 2020), <https://www.lcia.org/lcia-services-update-covid-19.aspx>.

[20] Certain less-utilized institutions are now exclusively online. Though not widely used outside of China, the China Guangzhou Arbitration Commission (“CGAC”), founded in 1995, transformed itself into an online arbitration institution in October 2015 by launching a proprietary arbitration cloud platform and associated procedural rules to run arbitrations entirely online. See Chen Zhi, *The Path of Online Arbitration: A Perspective on Guangzhou Arbitration Commission’s Practice*, Kluwer Arbitration Blog, Mar. 4, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/03/04/the-path-for-online-arbitration-a-perspective-on-guangzhou-arbitration-commissions-practice/> (highlighting the China Guangzhou Arbitration Commission as an online arbitration institution with a proprietary cloud-based arbitration platform for all portions of the arbitration, including filing, delivery of material, hearings, and rendering awards). Domain name disputes handled by the World Intellectual Property Organization and the Hong Kong International Arbitration Center’s (“HKIAC”) are also dealt with exclusively online. See Internet Corp. for Assigned Names & Numbers (“ICANN”), *Uniform Domain Name Dispute Resolution Policy* (2015), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (note these are promulgated by ICANN and adopted by HKIAC).

[21] Graziella Valenti, *A Pandemia na maior arbitragem societária do país, a disputa pela Eldorado*, Exame, Mar. 22, 2020, <https://exame.abril.com.br/negocios/a-pandemia-na-maior-arbitragem-societaria-do-pais-a-disputa-pela-eldorado/>.

[22] *Id.*

[23] KCAB International, *Seoul Protocol on Video Conference in International Arbitration is Released*, Mar. 18, 2020, [http://www.kcabinternational.or.kr/user/Board/comm\\_notice\\_view.do?BBS\\_NO=548&BD\\_NO=169&CURRENT\\_MENU\\_CODE=MENU0025&TOP\\_MENU\\_CODE=MENU0024](http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024).

[24] The full text of the *Seoul Protocol on Video Conference in International Arbitration* can be found here:

[http://www.kcabinternational.or.kr/user/Board/comm\\_notice.do?BD\\_NO=172&CURRENT\\_MENU\\_CODE=MENU0015&TOP\\_MENU\\_CODE=MENU0014](http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014).

[25] The full text of the *Protocol on Cybersecurity in International Arbitration* (2020) can be found here: [https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc\\_bar-cpr\\_cybersecurity\\_protocol\\_for\\_international\\_arbitration\\_-\\_print\\_version.pdf](https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf).

[26] Mediation, as opposed to litigation and arbitration, provides a mechanism for private parties to discuss and resolve a dispute with the guidance of a neutral third person.

[27] Derric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, Kluwer Arbitration Blog, Mar. 29 2018, <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>; Program on Negotiation, *Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, Harv. L. Sch. Program on Negot., Jan. 27 2020, <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>.

[28] *Id.*



*Gibson Dunn lawyers have extensive experience in alternative dispute resolution, including drafting alternative dispute resolution clauses, and conducting arbitrations and mediations, both online and through traditional means. If you have any questions about how your company can formulate a creative procedural mechanism to resolve an ongoing or future dispute, we would be pleased to assist you.*

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