WHAT TO DO WHEN PRESSING THE FLESH MEANS BREAKING THE BANK: TRADE-OFFS BETWEEN REMOTE AND IN-PERSON HEARINGS IN INTERNATIONAL ARBITRATION

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There has been much discussion recently regarding how technological developments such as e-filing, online dispute resolution (a.k.a. ODR), and electronic document production are changing the legal landscape, including in the field of international arbitration. As with most aspects of life in the 21st century, technology undoubtedly has a part to play—SharePoint sites and text-searchable pdf documents can be invaluable tools when it comes to sharing or sorting through large quantities of information conveniently and efficiently. Likewise, the very concept of video conferencing has revolutionized industries like international arbitration where, by definition, the players come from geographically-disparate locations. But what are the limits of technology? At what point does technology stop connecting us and begin rather to separate us? In this article, the authors argue that the limit lies in the parties' right to a *bona fide*, in-person arbitral hearing on the merits.

The benefits of conducting an in-person hearing are many-fold, and range from the mundane (like avoiding the IT problems that inevitably plague long-distance communication methods supposedly made "easier" by technology) to the amusing (who has not experienced seeing an arbitrator dozing off after the lunch break at a hearing—imagine the same arbitrator watching and listening to arguments on a television screen). They can also be quite substantive, however.

From the arbitrators' perspective, having an opportunity to meet counsel and parties face-to-face is critical to building a relationship of trust so that the parties feel as though they are getting a fair shake. No matter who the parties are or what the outcome of the dispute ends up being, it is absolutely critical that both parties feel as though they have "had their day in court."

This is important not only for the parties' sense of closure, but it also likely explains in some part the high rate of voluntary payment of awards that prevails in international arbitration and the relatively reasonable rate of challenges based on arbitrator misconduct and due process violations that arise.

On the flip-side, counsel to the parties also need to establish credibility with the tribunal, which is easiest to do in the context of an in-person hearing. How can the tribunal distinguish between a genuine, forthright advocate and a snake oil salesman (or saleswoman) if it cannot even make out the attorneys' faces on a pixelated screen? The same goes for witness examination and cross-examination. Physically placing a witness in front of the tribunal and the questioner is critical to ensuring that the tribunal is able to gauge that witness's credibility with as much accuracy as possible, as well to ensuring that the witness takes appropriate stock of the solemnity and seriousness of the legal proceeding.

One can, of course, imagine a not-too-distant future in which parties, counsel, arbitrators, experts, and witnesses are all linked by a Google Glass-style technology that allows them not only to communicate from different locations, but also to zoom in and out on one another's faces, or rewind testimony in a pop-up screen in the corner of the live feed. That future, however, is uncertain, and insofar as one *can* debate how such technology will impact international arbitration, the authors would prefer to cross that bridge when they come to it.

In short, while technology-driven trade-offs based on cost and convenience might be acceptable for some, even most, aspects of international arbitration, including for dealing with procedural matters and smaller hearings on discreet issues, the authors believe that such trade-offs are harder to accept when it comes to the hearing on the merits. Given that parties to an international arbitration will often have to invest significant resources in attorney's fees, expert fees, arbitrator fees, etc., in order to ensure that their dispute is handled and decided properly, why hold back on the most critical part of the process?

Fortunately for us skeptics, this particular concern may not be quite as pressing as we think—only 163 out 994 cases filed at the American Arbitration Association's International Centre for

Dispute Resolution (ICDR) in 2011 (the most recent year for which the authors could obtain relevant statistics) were done so electronically, compared to 47 out of 580 in 2005. The same goes for the International Chamber of Commerce (ICC)—only 43.24% of all Requests for Arbitration sent to the ICC in 2014 were done so by email, compared to 41.07% in 2013 (the rest were sent in hard copy). A growing trend, sure. But certainly not keeping pace with the growth of technology more generally in everyday life. If it took the arbitration community 5-10 years just to develop the trust, skills, and logistical capacity to digitize purely administrative issues like case filings, how long will it take for someone to convince practitioners and clients that it's a good idea to give up their day in court altogether for a digital substitute?

Probably a long time, but the future is wide open.