INTERNATIONAL COUNCIL FOR
COMMERCIAL ARBITRATION

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

THE ICCA REPORTS NO. 10

ICCA is pleased to present the ICCA Reports series in the hope that these occasional papers, prepared by ICCA interest groups and project groups, will stimulate discussion and debate.

INTERNATIONAL COUNCIL FOR
COMMERCIAL ARBITRATION

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

THE ICCA REPORTS NO. 10

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Foreword

Lucy Reed

I am honored to have been invited to write the Foreword to volume 10 of the ICCA Reports Series, *Does a Right to a Physical Hearing Exist in International Arbitration?*

In August 2020, only a few months into the Covid-19 pandemic, Co-editors James Hosking, Yasmine Lahlou and Giacomo Rojas Elgueta approached ICCA with the idea for the project that led to this volume. With the necessary advent of online rather than in-person hearings due to the public health constraints on gatherings and travel, they effectively offered to serve the international arbitration community by clarifying as much as possible the risks, if any, to the status of resulting awards. I immediately accepted the offer on behalf of ICCA.

The importance of the Right to a Physical Hearing project for arbitrators, counsel, academics and the judiciary was evident from the beginning. The skills and dedication of the Co-editors and the 130 national reporters they engaged has produced work product, in several forms, that has more than justified our initial faith in the project.

For readers learning about the Right to a Physical Hearing project for the first time through this volume, I encourage you to start by reading the Co-editors' General Report, and then to explore the underlying data in more detail through one or more of the seventy-eight national reports posted on ICCA's website throughout the pandemic.

For those who have followed the project since its inception, this volume adds to the highly practical empirical work published on the ICCA website with a series of essays by eminent practitioners and academics, firmly positioning the question of the right to a physical hearing in arbitration in the broader context of public and private international law – considering the basic requirements of due process in hearings, the risks of the online environment in terms of both cybersecurity and the quality of decision-making, as well as the observed and potential impact of online hearings on the diversity of participants.

On behalf of ICCA, I commend this volume to you and extend our gratitude to the Co-editors, rapporteurs, essay authors and national reporters for their timely and important work.

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Introduction

The ICCA Project "Does a Right to a Physical Hearing Exist in International Arbitration?" arose out of an empirical observation: the global Covid-19 pandemic changed the way in which international arbitration proceedings were conducted.

While various forms of technology were already routinely used in arbitration hearings to allow the non-physical attendance of at least some participants, fully "remote" hearings – once a rarity – suddenly (and of necessity) became standard operating procedure.

This shift in practice raised many new legal questions, all revolving around one core dilemma: whether a right to a physical hearing exists in international arbitration and, if not, what are the circumstances in which holding a hearing remotely, particularly an evidentiary one, would be sufficiently juridically sound so as not to threaten the validity and enforceability of the resulting award.

While international arbitration scholars and practitioners had already made an invaluable contribution to this debate by positing the framework for a transnational analysis, the Co-editors perceived the need for a jurisdiction-specific survey, capable of identifying the specificities of each jurisdiction in which the validity of such an arbitral award may be challenged, or its enforcement be resisted. The survey aimed to provide to arbitrators, counsel, institutions and others in the international arbitration community, an accessible and practical resource that would guide future practice.

The first half of the project, which took place from August 2020 to May 2021, consisted in the collection and publication of 78 national reports, drafted by some 130 national reporters, from New York Convention States. Since its initial publication, several reports have been updated to reflect recent developments. The Co-editors commend readers to refer to this treasure trove of information, all available at <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

The present volume of the ICCA Reports Series, intended as the continuation and completion of the project, on the one hand, records the key findings of the jurisdiction-specific survey and, on the other, includes a set of essays addressing the interplay between remote hearings and key conceptual and practical issues in international arbitration.

More specifically, this volume consists of a General Report and three parts.

The General Report illustrates the background and methodology adopted in the survey and offers high level substantive conclusions, drawn from the national reports.

Part I includes three essays discussing different international law perspectives on remote hearings. In the first essay, Leonardo V.P. de Oliveira discusses the background surrounding the meaning of access to justice and ponders how access to justice can be secured in international arbitration. In the second essay, Chester Brown and Anuki Suraweera, drawing from the right to a fair hearing in international human rights law and the practice of international courts and tribunals, assess whether there are international minimum standards that are inherent in the notion of a "hearing" in international arbitration and which may in turn provide guidance on this issue in the

arbitration context. In the third essay, Maria Beatrice Deli considers the content of the right to a fair hearing according to both the most relevant instruments of public international law and international customary law. After describing how international courts adapted to the Covid-19 pandemic, the author assesses whether the customary principle of international law of the right to a fair trial is fulfilled when the oral phase of the proceedings is conducted remotely.

Part II, which is comprised of three essays, explores the intersection of remote hearings with data protection and cybersecurity, cognitive psychology, and diversity. In the first essay, Niccolò Landi explores the complex issue of cybersecurity and data protection in the wake of the generalized digitization of the arbitral process. The essay offers an in-depth analysis of the soft law instruments and institutional rules addressing cybersecurity and data protection in international arbitration and of the impact of EU regulation. In the second essay, Leslie Ellis and Giacomo Rojas Elgueta look at the interplay between psychology and international arbitration and discuss how remote hearings may affect the way the different players in arbitration proceedings think and behave. In the third essay, Yasmine Lahlou, after examining what diversity means and why it matters in international arbitration, assesses how the increased reliance on remote hearings may impact diversity in the practice of international arbitration.

Part III, which consists of two essays, offers practical and empirical considerations on remote hearings. In the first essay, Hussein Haeri and Camilla Gambarini, set out practical considerations that stakeholders in international arbitrations should consider when deciding whether remote hearings are suitable. In the second essay Giacomo Rojas Elgueta and Benedetta Mauro, display the data related to the use of remote hearings in cases administered by various arbitral institutions that were surveyed by the Co-editors. The essay also presents what may be, according to those institutional representatives interviewed, the way forward for remote hearings in international arbitration.

The Co-editors wish to thank the many people at ICCA who contributed in so many ways to the project and to the publication of this volume. Without in any way being exclusive, special thanks goes to Lucy Reed, Lise Bosman, Lisa Bingham, Lucy Burns, Araba Acquaisie-Maison and Melanie Rawlins. The Co-editors are also deeply indebted to their extraordinary colleagues Benedetta Mauro and Marcel Engholm for their invaluable assistance throughout the project. Finally, a heartfelt thank you to the diverse roster of national reporters and essay authors who contributed to this project – their work proves that whatever differences may exist between jurisdictions, we have much in common and a great deal to learn from each other.

Giacomo Rojas Elgueta	James Hosking	Yasmine Lahlou
Rome	New York	Los Angeles

24 July 2022

GENERAL REPORT

General Report

Giacomo Rojas Elgueta[*]
James Hosking[**]
Yasmine Lahlou[***]

I. Introduction

The year 2020 brought many challenges associated with the global Covid-19 pandemic. While paling in the face of the serious health and economic impacts of the wide-ranging lockdowns initiated across the globe, these disruptions to everyday life also wrought changes to the way in which international arbitration proceedings were conducted. While the arbitration community had for some time used various forms of technology to allow for remote attendance of witnesses, counsel or arbitrators, suddenly "remote" hearings – also referred to as "virtual" or "non-physical" hearings – became the overwhelming norm.

At the same time, it became apparent that some parties – whether out of genuine concern about the integrity of the process or for strategic purpose of delay – resisted agreeing to remote evidentiary hearings, and instead insisted on waiting until a physical evidentiary hearing would be possible. In such a scenario, many practitioners and arbitrators found themselves in uncharted territory: at the core of the dilemma was the question of whether a party had the right to insist on a physical hearing and, closely related, how any such right may impact the arbitrators' discretion over procedural issues, including whether to order a remote evidentiary hearing.

This project arose out of the foregoing dilemma and the perceived need for multi-jurisdictional guidance. The resulting survey – the detailed results of which were posted over the last eighteen months on the ICCA website[1] – is an attempt to provide such a tool. The purpose of this "General Report" is to summarize the background and methodology of the project (section II), provide some high-level conclusions on the questions posed in the survey (section III), and to offer some concluding remarks (section IV). As will be evident in reading this report, the law is still developing and close attention should be paid to developments in specific jurisdictions. In particular, regard should be had to how the legal principles may be impacted once the "emergency" nature of the Covid-19 crisis subsides.

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1. *See* <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration> (last accessed 28 March 2022).

II. Background and Methodology of the Project

A. Genesis of the Project

As described in the Introduction, the project arose out of concerns expressed about the legal basis for ordering a remote hearing over the objection of one or more parties. While the issue could be approached from different perspectives, the ultimate question is whether there exists a right to a physical hearing in international arbitration. This in turn raised the need for a jurisdiction-specific survey on the right to a physical hearing, based on the methodological assumption that there cannot be a single, transnational answer to this question. The co-editors concluded that in the absence of such a transnational approach, arbitrators would look to the law of the seat of the arbitration and/or of the place where recognition and enforcement of the award may be sought.[2]

Having decided that a survey was the appropriate vehicle for assessing the issue, the co-editors turned to considering how best to attract high-caliber contributors so as to ensure quality and consistency. For this purpose, the co-editors happily partnered with the International Council for Commercial Arbitration ("ICCA"). With its track record of intellectual rigor, neutrality and credibility, the institution offered an excellent platform as well as access to leading practitioners from throughout the global arbitration community.[3]

After a series of planning calls in August 2020, the co-editors and ICCA agreed to a series of tight milestones, the result of which was to publish a first batch of country reports within five months and by May 2021 to have published seventy-eight national reports. Below are the project's key milestones:

- 4 September 2020: call for expressions of interest;
- 25 September 2020: deadline for expressions of interest;
- 25 October 2020: e-mail to national reporters with the survey questionnaire;
- 8 November 2020: second e-mail to national reporters with amended survey questionnaire and model U.S.A. and Italy reports;
- 27 November 2020: deadline for submission of national reports;
- 17 December 2020: publication of a "teaser", with national reports from Australia, Italy, the U.S.A. and Vietnam;
- 8 February 2021: publication of the first batch of national reports;
- 18 March 2021: publication of the second batch of national reports; and
- 26 May 2021: publication of the third and final batch of national reports.

2. Professor Rojas Elgueta deserves credit for identifying this methodological foundation, which the other co-editors readily adopted.
3. The co-editors thank the many people at ICCA who contributed in so many ways. Without in any way being exclusive, special thanks goes to Lucy Reed, Lise Bosman, Lisa Bingham, Lucy Burns, Araba Acquaisie-Maison and Melanie Rawlins.

Given this ambitious timetable, the co-editors secured the assistance of two extraordinary colleagues: Benedetta Mauro and Marcel Engholm.[4]

B. Founding Principles

The co-editors adopted five founding principles, in order to ensure the survey's utility and also to distinguish it from other existing and excellent publicly available international arbitration surveys.

First, the survey would be *focused* on whether there is a right to a physical hearing in international arbitration (not litigation) and what the consequences would be if such right was violated primarily on the validity or enforcement of the award.

Second, the project had to offer *comprehensive coverage* of jurisdictions and not be limited just to the dozen or so major international arbitration seats that had been analyzed to date. This decision was based not only on faith in the continued growth of new and important regional arbitral centers but also to distinguish the project from the excellent book co-edited by Scherer, Bassiri and Abdel Wahab containing such a survey addressing sixteen jurisdictions.[5]

Third, it was decided to identify a *diverse* selection of jurisdictions and reporters, at a minimum in terms of geography, gender and the type of law practice represented. This was borne of a desire not only to foster inclusiveness but also to take the opportunity to shed light on the arbitration law of less well-known jurisdictions.

Fourth, the survey had to be *relevant***,** which drove the fast pace of the project to make sure that the subject-matter of the survey would still be a "front burner issue" on the date of publication.

Finally, the reports would have to be *robust and consistent*, addressing thoroughly and comprehensively the same questions with consistency and academic rigor. At the same time, the co-editors and ICCA agreed that the project should offer a practical tool, not an academic treatise, upon which arbitrators, counsel and judges could easily rely.

C. Selecting the Jurisdictions and the Reporters

In order to be faithful to the five founding principles described above and to give the project as much visibility as possible, rather than selecting reporters directly, a call for

4. Benedetta is an Associate at D|R Arbitration & Litigation and a Ph.D. candidate at Roma Tre University. *See* <www.linkedin.com/in/benedetta-mauro-42a794186> (last accessed 28 March 2022). Marcel, a graduate from both Universidade de São Paulo and New York University, is an Associate at Chaffetz Lindsey LLP. *See* <https://www.chaffetzlindsey.com/our-team/marcel-engholm-cardoso/> (last accessed 28 March 2022).
5. Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the Covid-19 Revolution* (Kluwer Law International 2020).

expressions of interest was published. The response was overwhelming: more than 150 candidates, covering eighty-two New York Convention jurisdictions.

In those cases where there were multiple candidates, the co-editors ranked applications and chose reporters based on the five founding principles discussed above. In this respect, the primary objective was to select reporters that would guarantee the high quality of the national reports, demanding that the national reporters be highly qualified and have a solid expertise in international arbitration. However, this was also balanced with the objective of giving a younger generation of academics and practitioners the chance to become involved in the project (in part, a reaction to the enthusiastic response from Young ICCA members) as well as encouraging diversity, both in terms of gender and geographic balance. In this respect, the gender split between all reporters (as some jurisdictions had more than one) was 55% male and 45% female, but with the "primary" reporter being a near 50/50 split between women and men. As to geographic diversity, for example, the seventy-eight reports included nineteen MENA jurisdictions and thirteen from the Asia-Pacific region.

D. Designing the Survey Questionnaire

Before discussing the details of the survey, it is necessary to take a step back and ask why the co-editors considered the survey the most effective way to collect jurisdiction-specific information.

In this regard, the project draws from the classic toolbox of comparative law and its methodology, and in particular from the experience of the Cornell Project directed by Professor Rudolf B. Schlesinger in the 1960s. The Cornell Project was a ten-year research project conducted at the Law School of Cornell University. It was launched by Schlesinger with the aim of ascertaining, in the area of formation of contracts, to what extent there existed a "common core" (i.e., common ground) among a majority of the world's legal systems.[6]

An equally important goal of the Cornell Project was to verify the feasibility and effectiveness of the research method that was developed and employed throughout the project itself. This method consisted, first, of the teamwork of a number of selected lawyers – each an expert in the doctrine and practice of the legal systems considered – capable of collecting and providing the necessary raw information for comparison. Second, to obtain such raw information, Schlesinger (as the project director) prepared

6. The Cornell Project resulted in the publication of a two-volume book in 1968: Rudolf B. SCHLESINGER, *Formation of Contracts – A Study of the Common Core of Legal Systems* (New York-London 1968). *See* Rudolf B. SCHLESINGER, "Formation of Contracts – A Study of the Common Core of Legal Systems: Introduction", 2 Cornell Int'l L.J. (1969) 1. On the "common core" approach, *see also* Mauro BUSSANI and Ugo MATTEI, "The Common Core Approach to the European Private Law", 3 Columbia J. Eur. L. (1997/1998) 339.

and circulated a set of questions to be answered, in response to which every participant would prepare a national report.

The Cornell Studies showed for the first time that surveys are the best tool to obtain comparable pieces of information from different legal systems. They also evidenced, however, a preliminary challenge posed by this method: that identical survey questions can only elicit comparable answers insofar as they are formulated in such a way that they are identically understood by lawyers belonging to different legal traditions.

Based on the lessons from the Cornell Project, the co-editors of this project were aware that a careful survey design would be essential. In this respect, the objective was to formulate the survey questions in a manner as plain and simple as possible, and to purge them of any references to doctrines belonging to one or another legal system. In addition, questions were formulated in a way that would elicit self-sufficient answers from national reporters, i.e., without any additional explanations. Finally, adopting an approach used in other comparative law surveys, every reporter was required to include a short answer alongside the extended answer, allowing readers to immediately find the relevant piece of information and to permit easier comparison across jurisdictions.

E. Editorial Process

The co-editors' core task was to manage the reporters' timely delivery of their drafts, and more importantly review and edit the reports to ensure consistency in quality, substance and readability.

Crucial to this task was adopting the suggestion of ICCA President Lucy Reed to provide the reporters with "template" reports prepared by the co-editors with respect to each of Italy and the U.S.A. These were intended to ensure the reporters' common understanding of the meaning of the questions, as well as to offer a baseline of consistency in terms of expected scope and depth of the national reports.

Though the survey consisted of ten focused questions on a narrow issue, answering it would be far from simple as it dealt with an issue of first impression in nearly all of the jurisdictions but raised complex questions on the significance of, and interplay between, fundamental principles such as party autonomy, due process, discretion and the authority of arbitrators to manage the process to achieve both closure and efficiency. As a result, the reporters would have to engage with the substance of local arbitration principles to offer reliable analysis on an issue that might not yet have been the subject of any court judgments.

On timing, a fairly strict deadline was imposed so as to allow time to review and edit each of the *seventy-eight reports* and get the authors' further input while making sure the national reports would be both consistent and timely. As to the editing process, this was a function of the quality of the reports and not all reports are created equal. We had to strike a balance between ensuring accuracy, consistency in the approach of the issues, as well as readability on the one hand, and respecting the authors' control over the substance of their reports and style on the other.

One of the emergent complexities concerned how to address those jurisdictions where the law was less developed or simply had an insufficient volume of arbitrations or awards from which to formulate a comprehensive answer. While the approach differed as between jurisdictions, the co-editors generally encouraged the reporters either to argue based on assumptions derived from analogous circumstances (e.g., from the litigation context) or extrapolate from what is done in closely connected influential jurisdictions (e.g., where an historical jurisprudential connection exists – such as in the Commonwealth – or where dealing with a fellow adopter of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended) – the "Model Law").[7]

As the subject matter of the survey was often an issue of first impression, which was also being litigated while the survey was in the works, the co-editors had to make several judgment calls and have sensitive discussions with the authors, to maintain the academic integrity of the project and offer a reliable work product. In this respect, the co-editors were particularly cautious of outliers, namely those reports finding that a right to a physical hearing existed in international arbitration, which was not the case in the vast majority of jurisdictions. Publishing a report finding that such a right existed when the law was in fact not explicit in that respect was bound to, and did, elicit at times angry reactions from local practitioners, who disputed the existence of that right.

At times, the co-editors had to decide how authoritative were some commentaries by leading academics or commentators positing that such right existed. For a few jurisdictions, this required obtaining an informal "second opinion" from local practitioners. In one jurisdiction, it resulted in publishing an "alternative viewpoint" so the readers could reach their own conclusions.[8]

Given the project's founding principles, the co-editors resolved to begin publishing the reports as soon as possible so as to maximize their relevance. After the teaser issuance of four reports in December 2020, the first batch of reports was released on 8 February, the second one on 18 March and the third and final one on 26 May 2021. In selecting the reports for these releases, the co-editors continued to encourage geographic diversity, while also making sure that jurisdictions of particular relevance were given prominence. Each of the batches was accompanied by a summary from the co-editors that contained highlights of the covered jurisdictions as well as observations on commonalities and divergences. Those initial summaries provided the starting point for the analysis contained in this General Report.

7. UNCITRAL, Model Law on International Commercial Arbitration, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> (last accessed 28 March 2022).
8. *See* Ylli DAUTAJ and Per MAGNUSSON, "National Report Sweden" in ICCA *Does a Right to a Physical Hearing Exist in International Arbitration?* (henceforth *Does a Right to a Physical Hearing Exist?*) and the counterarguments provided by Kristoffer Löf.

III. High Level Substantive Conclusions from the Project

A. Analysis of the Answers to Questions 1-2: Parties' Right to a Physical Hearing in the *Lex Arbitri*

Most obviously, the first section of the survey concerns whether parties have a right to a physical hearing under the surveyed jurisdiction's rules applicable to arbitration, either expressly (Question 1) or by way of inference (Question 2):

> 1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*[9]
>
> 2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's* lex arbitri *(e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Most importantly, the responses to Question 1 disclose that none of the surveyed jurisdictions' laws governing arbitration proceedings contains an express provision granting parties to an arbitration the right to a physical hearing.

Consequently, all the national reporters proceeded to answer Question 2. Here, the survey responses evidenced a great variance, with subtle nuances between the two opposite alternatives that a right to a physical hearing should be inferred or rather that its existence can be excluded.

1. The Existence of a Right to a Physical Hearing Can Be Excluded

The majority of reporters concluded that the right to a physical hearing should be considered as excluded by a systematic interpretation of the relevant jurisdiction's *lex arbitri*. It is interesting to note that the indicia used to support this conclusion were largely the same.

First, the authority recognized by many arbitration laws as vested in the arbitral tribunal to exercise a broad discretion in organizing the hearing has been commonly understood to include the decision as to the format (physical, remote or hybrid) of the hearing.

9. An explanatory note was added to this question in the clarified survey that was sent to national reporters: "Please note that in this questionnaire the expression *lex arbitri* is used to refer to the specific law governing arbitration proceedings. To the extent there is any distinction between domestic and international arbitration in this respect, please indicate and focus on the latter".

Second, where the *lex arbitri* allows the arbitral tribunal to decide not to hold a hearing unless it considers it necessary for deciding the case, it has been considered that remote hearings are *a fortiori* compatible with the law, given that they provide a stronger opportunity for parties to present their respective cases than the mere exchange of written submissions.

It should be noted, however, that in most jurisdictions each of the parties has a right to oppose the decision to conduct a documents-only arbitration, or in other words, has a right to request that a hearing take place. Whether this translates into the right of the parties to request a *physical* hearing depends on whether the notion of hearing adopted in those jurisdictions encompasses remote hearings.

Notably, this is not an issue in Switzerland. A consistent line of decisions from the Swiss Federal Supreme Court has ruled out the idea that parties to an arbitration have a right to a hearing *tout court*, even if they submitted their dispute to arbitration rules providing for a right to a hearing or if the hearing was expressly agreed upon in the terms of reference. In this case, the above *a fortiori* argument is obviously much stronger.[10]

Third, provisions in the arbitration rules of the most relevant institutions in surveyed jurisdictions expressly allowing arbitral tribunals to order remote hearings – although not having the force of law – were identified as reinforcing the conclusion that a right to a physical hearing should be excluded in a given jurisdiction.[11]
According to the national reporters putting forward this argument, if it was not accepted that under the *lex arbitri* remote hearings are permitted, the paradoxical consequence would be that the arbitration rules of the main arbitral institution operating in that jurisdiction would include a provision that could not be applied to any arbitration seated there.

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10. Paolo MARZOLINI and Daniel DURANTE, "National Report Switzerland" in *Does a Right to a Physical Hearing Exist?*, pp. 3 ff.
11. These include Art. 24, para. 3, of the CEPANI Arbitration Rules (Olivier VAN DER HAEGEN and Claire LARUE, "National Report Belgium" in *Does a Right to a Physical Hearing Exist?*, p. 3); Art. 24, para. 6, of the Arbitration Rules of the Bulgarian Chamber of Commerce and Industry (Assen ALEXIEV, "National Report Bulgaria" in *Does a Right to a Physical Hearing Exist?*, p. 5); Sect. 28a of the Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (Miloš OLÍK and Margarita KAREŠOVÁ KUCHARČUK, "National Report Czech Republic" in *Does a Right to a Physical Hearing Exist?*, p. 7); Art. 19, para. 2, of the LCIA Rules (Angeline WELSH and Akash SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*, p. 3 f.); Art. 27, para. 2, of the CAM Arbitration Rules (Giacomo ROJAS ELGUETA and Benedetta MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 3 f.); Art. 43, para. 1, of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Yuliya CHERNYKH, "National Report Ukraine" in *Does a Right to a Physical Hearing Exist?*, p. 6).

Fourth, provisions of the *lex arbitri* granting the arbitral tribunal discretion to determine the "location" (also "place" or "venue", depending on the authors' translations from their languages) have been used to support both an interpretation of the law excluding a right to a physical hearing, and an interpretation inferring such right.

This divergent interpretation of the same concept became evident as early as the publication of the teaser. While the provision of Italian law setting forth that the arbitral tribunal may decide to hold the hearing in any *location* (including other than the seat of the arbitration) has been understood to extend the arbitral tribunal's discretion to holding hearings remotely,[12] the provisions of Vietnamese law that require the arbitral tribunal to determine the *location* of the hearing have been interpreted to impose that the hearing be held at a physical venue (see further section III.A.2 below).[13]

Such divergence may derive from the fact that this concept was evaluated in conjunction with – and understood in light of – the other indicia found in the respective *lex arbitri*, in order to conduct a systematic interpretation thereof.

In light of the above, the conclusion reached by most national reports is that parties do not have a right to a physical hearing in international arbitration, as the format of the hearing falls within the scope of the arbitral tribunal's procedural discretion.

It should be kept in mind that in all surveyed jurisdictions the arbitral tribunal's procedural discretion (including to order remote hearings) is limited by due process considerations, as the discretion must be exercised in such a way that the parties are guaranteed a reasonable opportunity to present their respective cases. Due process concerns are the object of a different question, analyzed in section III.D.2 below.

Finally, two national reports reported a scenario not expressly envisaged in the survey questionnaire, i.e., that the *lex arbitri* in their jurisdiction *expressly excludes* a right to a physical hearing. These two jurisdictions were the Netherlands[14] and the United Arab Emirates (with the exception of the Dubai International Financial Centre),[15] the arbitration laws of which each expressly vest the arbitral tribunal with the power to order remote hearings.

2. The Existence of a Right to a Physical Hearing Can Be Inferred

The methodological assumption of this project (i.e., that there cannot be a single, transnational answer to whether a right to a physical hearing exists in international

12. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 2.
13. Hew R. DUNDAS, Nguyễn Thị Thu TRANG and Nguyễn Thị MAI ANH, "National Report Vietnam" in *Does a Right to a Physical Hearing Exist?*, p. 2.
14. Bas VAN ZELST, "National Report The Netherlands" in *Does a Right to a Physical Hearing Exist?*, p. 2 f.
15. Thomas R. SNIDER, John P. GAFFNEY and Malak M. NASREDDINE, "National Report United Arab Emirates" in *Does a Right to a Physical Hearing Exist?*, pp. 3 ff.

arbitration) proved to be correct as there are few jurisdictions where the national reporters answered that a right to a physical hearing should be inferred by way of interpretation of the *lex arbitri*.

Those jurisdictions are Ecuador, Tunisia, Venezuela (although limited to the first procedural hearing), Vietnam, Zimbabwe and – reflecting a minority view – Sweden. In Ecuador and Tunisia, the parties' right to a physical hearing reportedly derives from the application of the rules of civil procedure to arbitration proceedings. This scenario will be analyzed further in section III.B.3 below.

In Venezuela, the right to a physical hearing of the parties to an arbitration is limited to the first procedural hearing, which is the only mandatory hearing regulated by the Commercial Arbitration Law of 1998. The primary source for the conclusion that such a right can be inferred is use of the word "place" in the applicable provision of the *lex arbitri*.[16] According to the Venezuela national report:

> "The requirement set forth in article 23 [of the Commercial Arbitration Law] requiring the tribunal to notify the parties about the place 'where [the first hearing] is to be held' seems to suggest that the first hearing must be physical, or at least, in hybrid mode but cannot be fully remote".[17]

The same source concept is relied upon in the Vietnam national report:

> "Even though [Articles 11(2) and 54(1) of the Law on Commercial Arbitration] do not strictly refer to in-person [i.e., physical] hearings, as these provisions require the arbitral tribunal to determine both the time and *the location* of hearings, they can be read that unless otherwise agreed by the parties, the arbitral tribunal must always conduct physical hearings".[18]

There are two further indicia that lead to inferring the existence of a right to a physical hearing in international arbitration seated in Vietnam. First, the *lex arbitri* only allows the arbitral tribunal to decide the case on documents insofar as the parties so request. Second, the rules of the most important Vietnamese arbitral institution (the Vietnam International Arbitration Centre) provide that hearings can only be held by videoconference upon the agreement of the parties.[19]

16. Interestingly, the power of the arbitral tribunal to determine the "location" of the hearing has been interpreted elsewhere as an index towards *excluding* the existence of a right to a physical hearing: *see* section III.A.1 above.
17. Manuel A. GÓMEZ, "National Report Venezuela" in *Does a Right to a Physical Hearing Exist?*, p. 6 f.
18. DUNDAS, TRANG and MAI ANH, "National Report Vietnam" in *Does a Right to a Physical Hearing Exist?*, p. 2.
19. *Ibid. See* Art. 25, para. 1, of the Rules of Arbitration of the Vietnam International Arbitration Center.

In Zimbabwe, the right to a physical hearing is not inferred directly from the interpretation of the *lex arbitri* (which incorporates the UNCITRAL Model Law), but rather from its interpretation "within the current Zimbabwean context".[20] As will be seen in further detail below, the legal debate around remote hearings in Model Law jurisdictions focuses on the Model Law provision granting the parties the right to an *oral* hearing, and whether this translates into the right to request a *physical* hearing. According to the Zimbabwean reporters:

> "[…] it is impossible as a practical matter to hold virtual [i.e., remote] hearings in Zimbabwe at the moment, so the right to an oral hearing established under Article 24(1) of the Model Law is arguably a right to a physical hearing. Pursuant to that Article, it can be inferred that until it is practically feasible to hold virtual hearings in Zimbabwe, a party has a right to a physical hearing, unless the parties have agreed that no hearings shall be held".[21]

Finally, in Sweden the reporters take a strong position that the right to a *physical* hearing must be inferred from Sect. 24 of the Swedish Arbitration Act, which (reflecting the abovementioned provision of the UNCITRAL Model Law) provides that, if one party so requests, the arbitral tribunal has a duty to hold an *oral* hearing prior to deciding an issue referred to it for determination.

According to the reporters, the logic that the provision granting the parties a right to an *oral* hearing translates into the right to a *physical* hearing is mainly based on two comments found in the accepted preparatory work of the Swedish Arbitration Act. First, the relevant part of the preparatory work relates to the possibility to "use written witness testimony and hearings through phone or a TV-monitor". Second, the relevant provision "means that a party cannot be denied an oral hearing on the main issue, if he so requests" and therefore "contains the important limitation that a party cannot request an oral hearing in e.g. procedural issues or other issues that cannot be described as the main issue".

According to the Swedish national reporters:

> "The fact that witnesses are explicitly mentioned, but not the overall right to an oral hearing, and the fact that a party cannot be denied an oral hearing but can be forced to deliberate certain procedural issues remotely, should, through the principle of *expressio unius est exclusio alterius*, lead to the conclusion that the right to a physical hearing is an integral and vital right pursuant to the SAA".[22]

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20. Davison KANOKANGA and Tafadzwa PASIPANODYA, "National Report Zimbabwe" in *Does a Right to a Physical Hearing Exist?*, p. 3.
21. *Ibid.*, p. 2 f.
22. DAUTAJ and MAGNUSSON, "National Report Sweden" in *Does a Right to a Physical Hearing Exist?*, p. 4.

To support this conclusion, the national reporters also quote the commentary to the Swedish Arbitration Act authored by former Supreme Court Chief Justice Stefan Lindskog, according to whom "a hearing held through [videoconference] is not to be regarded as oral in the sense referred to in section 1, 2nd sentence in paragraph 24 in the Swedish Arbitration Act".

It must be stressed, however, that this national report has raised some controversy in the Swedish arbitration community,[23] with the majority of Sweden's international arbitration scholars and practitioners supporting the view that the parties do *not* have a right to a physical hearing under Swedish law.[24]

To address the concern that only the minority view would be represented in the project, a leading Swedish arbitration practitioner has provided an Addendum to the Swedish national report, setting out the majority view that a right to a physical hearing does not exist in Sweden.[25]

According to the author of the Addendum, the right to a physical hearing in international arbitrations seated in Sweden can be excluded in light of (i) a literal reading of Sect. 24 of the Swedish Arbitration Act and of the *travaux préparatoires*; (ii) two State court decisions which, although applying the Code of Judicial Procedure and the Extradition Act, respectively, have ruled that a remote hearing may qualify as a hearing (thus supporting the idea that a remote hearing also qualifies as a hearing under the Arbitration Act); and (iii) the fact that the European Court of Human Rights has accepted videoconferencing as an adequate means to fulfil the right to a fair trial under Art. 6 of the European Convention on Human Rights ("ECHR").[26]

After the release of the Addendum in March 2022, on 30 June 2022 the Svea Court of Appeal ruled that the right to an *oral* hearing under Sect. 24 of the Swedish Arbitration Act is technology neutral and allows for remote hearings.[27]

As reported by the Arbitration Institute of the Stockholm Chamber of Commerce:

> "In its reasoning, the Court of Appeal noted that the SAA does not define the term oral hearing and that it follows from the preparatory works that the relevant article - Section 24 of the SAA - is based on the right to a fair trial enshrined in the Swedish Code of Judicial Procedure and the European Convention on

23. Further, one of the drafters of the Sweden national report appeared as counsel in a case before the Svea Court of Appeal in which an arbitral award was challenged on grounds related to the remote hearing (*see* below).
24. *See* Giacomo ROJAS ELGUETA and Benedetta MAURO, "Remote Hearings: The Arbitral Institutions' Perspective" in this Volume, p. 268.
25. Kristoffer LÖF, "Addendum" in DAUTAJ and MAGNUSSON, "National Report Sweden" in *Does a Right to a Physical Hearing Exist?*, p. 17.
26. *Ibid.*, pp. 18 ff.
27. Svea Court of Appeal, 30 June 2022, Case No. T 7158-20 <https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=4730001&propId=1578> (last accessed 21 July 2022).

> Human Rights. Considering the background and purpose of Section 24 of the SAA, the Court of Appeal found that Section 24 is technology neutral and that the provision does not exclude the possibility of remote participation in a hearing. The Court of Appeal made the same finding as regards Article 32 of the SCC Arbitration Rules. Therefore, the Court of Appeal found that, if not otherwise agreed by the parties, it falls within the mandate of an arbitral tribunal to decide if participants in a hearing shall participate remotely, regardless of party objections to such participation. The Court of Appeal noted that arbitral tribunals should determine if a hearing with remote participation is appropriate on a case-by-case basis, taking into consideration the right of the parties to adequately present their case, the impartiality, efficiency and expeditiousness of the proceedings and that the technical elements must enable adequate communication".[28]

3. *Whether the Existence of a Right to a Physical Hearing Can Be Excluded or Inferred Is Unsettled: UNCITRAL Model Law, Article 24(1)*

Finally, there are a number of jurisdictions where the question whether parties have a right to a physical hearing remains unsettled.

This is the case, first, in the People's Republic of China. There, the answer depends on whether one adopts the minority view that the rules of civil procedure (which encompass such right) are applicable to arbitration proceedings, and it will thus be analyzed more in detail in section III.B.3 below.

The other jurisdictions where it is unsettled whether the right to a physical hearing can be inferred or excluded are Bahrain, Denmark, Germany and Norway. What these jurisdictions have in common is that their arbitration laws are all based on the UNCITRAL Model Law.

This is unsurprising, given that (as anticipated in the previous section) the provision of the Model Law that regulates hearings (i.e., Art. 24) has given rise to controversy in many jurisdictions. In particular, Art. 24(1) provides:

> "Subject to any contrary agreement by the parties, *the arbitral tribunal shall decide whether to hold oral hearings* for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, *the arbitral tribunal shall hold such hearings* at an appropriate stage of the proceedings, *if so requested by a party*" (emphasis added).[29]

28. *See* SCC, "Swedish Ruling Allows Remote Hearings" (8 July 2022) at <https://sccinstitute.com/about-the-scc/news/2022/swedish-ruling-allows-remote-hearings/> (last accessed 21 July 2022).
29. UNCITRAL, Model Law on International Commercial Arbitration, Art. 24, para. 1.

In particular, this provision has prompted a debate on whether the parties' right to request an *oral* hearing translates into the right to request a *physical* hearing. While all the other surveyed Model Law jurisdictions (except for Zimbabwe and Sweden) have answered in the negative, in the four jurisdictions listed above the question is unsettled.

In the Bahraini *lex arbitri*, there are reportedly no indicia that aid in the interpretation of Art. 24(1) (which is integrally annexed to the 2015 Arbitration Law). Therefore, it is not possible either to infer or exclude the right to a physical hearing in arbitration proceedings seated in Bahrain.[30]

In Denmark, whether a right to a physical hearing may be inferred from the parties' right to request an oral hearing (as transposed in Sect. 24(1) of the Danish Arbitration Act) is said to be unsettled due to (i) the lack of case law on this subject matter; and (ii) the absence of any guidance in the preparatory works of the *lex arbitri* as to what constitutes an "oral" hearing.[31]

Relying on case law predating the enactment of the Danish Arbitration Act, the Danish national reporter however mentioned that "the courts have also generally allowed wide discretion to arbitral tribunals", which "opens the possibility for a tribunal to decide that the oral hearing should take place remotely", provided that the parties are treated equally and are given a full opportunity to present their respective cases.[32]

In Germany, while the national reporters take the position that the parties' right to request an oral hearing (as per Sect. 1047, para. 1, of the Code of Civil Procedure) is satisfied by a hearing via videoconference, they also report a minority view that, based on considerations of expediency, "the term 'oral argument' can only be understood to require a physical hearing".[33]

In Norway, the interpretation of Sect. 26, para. 1, of the Norwegian Arbitration Act is made more complex by the contrast between Norwegian sources and legal tradition, which indicate that there exists a right to a physical hearing in arbitration, and the international legal framework, which does not entail any prohibitions against remote hearings.[34]

On the one hand, the right to a physical hearing could be inferred from two indicia. First, the rules of civil procedure have unofficially functioned as a gap-filling *lex arbitri* in Norwegian law, and physical hearings have historically been an integral part of Norwegian court proceedings. Second, the wording of Art. 24(2) of the Model Law

30. Aysha MUTAYWEA and Supritha SURESH, "National Report Bahrain" in *Does a Right to a Physical Hearing Exist?*, p. 5.
31. Jacob SKUDE RASMUSSEN, "National Report Denmark" in *Does a Right to a Physical Hearing Exist?*, p. 4.
32. *Ibid.*, p. 5.
33. Barbara MAUCHER and Anke MEIER, "National Report Germany" in *Does a Right to a Physical Hearing Exist?*, pp. 4 ff.
34. Ola Ø. NISJA and Per A. TØNNESSEN, "National Report Norway" in *Does a Right to a Physical Hearing Exist?*, pp. 3 ff.

was slightly modified in its transposition into Sect. 26, para. 2, of the Norwegian Arbitration Act, in such a way that it "clearly implies a physical hearing".[35]

According to the Norwegian national reporters, this is so if one considers that Sect. 26, para. 2, of the Arbitration Act provides that parties shall be given reasonable advance notice not only "of any oral hearing", but also "of any meeting which the parties are entitled to attend", whereas Art. 24(2) of the Model Law refers to "any hearing and […] any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents".

On the other hand, the adoption of the new Model Law-based arbitration law in 2004 has led to international legal sources (pushing towards the exclusion of a right to a physical hearing) playing a greater role in the interpretation of the Norwegian *lex arbitri*. Further, the Covid-19 pandemic has challenged the existence of such right even in State court proceedings.

According to the Norwegian national reporters:

> "The uncertainty is illustrated by the fact that even though some scholars have argued for increased use of remote hearings in arbitral proceedings during the ongoing pandemic, the general advice continues to be that practitioners should err on the side of caution and not impose them on unwilling parties, […]".[36]

The widespread uncertainty created by the wording of Art. 24(1) of the Model Law is also confirmed by the fact that, in two cases, slight differences in the text of the corresponding provision of the *lex arbitri* from the original text of the Model Law were interpreted as evidence supporting exclusion of the existence of a right to a physical hearing.

This is the case in Hungary, where a recent reform removed the qualifier "oral" from the text of Sect. 36, para. 1, of the Arbitration Act,[37] and in Thailand, where Sect. 30, para. 2, of the Arbitration Act uses the expression "has the power" (instead of "shall"), indicating that the arbitral tribunal is not obliged to comply with a party's request to hold a hearing at all.[38]

B. Analysis of the Answers to Questions 3-4: Parties' Right to a Physical Hearing in Litigation and Its Potential Application to Arbitration

The following questions were originally drafted to address the eventuality that a conclusive answer could not be given to Questions 1 and 2, with the intention to

35. *Ibid.*, p. 4.
36. *Ibid.*, p. 5.
37. Richard SCHMIDT, "National Report Hungary" in *Does a Right to a Physical Hearing Exist?*, p. 5.
38. Amnart TANGKIRIPHIMARN, "National Report Thailand" in *Does a Right to a Physical Hearing Exist?*, p. 3.

investigate whether the rules of civil procedure could shed light on whether a right to a physical hearing exists in arbitration:

> 3. *In case the* lex arbitri *does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*
>
> 4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

This notwithstanding, it was not only the jurisdictions where the answers to Questions 1 and 2 were unsettled (see section III.A.3 above) that answered Questions 3 and 4. Rather, all national reporters commented on whether a right to a physical hearing exists in State court proceedings, mainly to confirm their conclusion in Questions 1 and 2 that such right does or does not exist in arbitration.

1. The Existence of a Right to a Physical Hearing Is Excluded in Litigation

A good number, although a minority, of jurisdictions report that the existence of a right to a physical hearing is excluded in litigation, either expressly by the rules of civil procedure or because, as a matter of practice, physical hearings were not a necessary part of the proceedings even prior to the pandemic.

First, a group of jurisdictions (including prominent ones such as Germany as well as England and Wales)[39] report that the rules of civil procedure expressly grant State courts the discretionary power to order a remote hearing where appropriate, without the court being bound by a party's objection. In Croatia and Hungary this is the result of recent reforms (of 2019 and 2018, respectively).[40] A similar reform was prompted by the pandemic in New Zealand.[41]

Second, some national reporters conclude that the existence of a right to a physical hearing is excluded in litigation because remote hearings were already available as an admissible procedural tool prior to the pandemic. For example, the South African national reporter quotes a 2017 court opinion:

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39. *See* WELSH and SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*, p. 7; MAUCHER and MEIER, "National Report Germany" in *Does a Right to a Physical Hearing Exist?*, p. 7 f.
40. SCHMIDT, "National Report Hungary" in *Does a Right to a Physical Hearing Exist?*, p. 8 f.; Nikola BOŽIĆ, "National Report Croatia" in *Does a Right to a Physical Hearing Exist?*, p. 6 f.
41. Anna KIRK, "National Report New Zealand" in *Does a Right to a Physical Hearing Exist?*, p. 4.

> "It is now almost trite that video conferencing 'is an efficient and an effective way of providing oral evidence both in chief and in cross examination' and that this is 'simply another tool for securing effective access to justice' […]".[42]

Third, in some jurisdictions it is argued that the same conclusion should be reached because, as a matter of practice, State court proceedings in civil matters are mainly conducted in writing (including the taking of witness testimony). Notably, in Iran:

> "In other words, in the search for factual, objective truth, exchanging written arguments and official evidence in each party's brief meets the necessary standard for a fair hearing. Thereby, less weight has been attributed to oral submissions and the presentation of evidence and hearings are not regarded as crucial part of the proceedings. To this end, a synchronous exchange of arguments (physically or remotely) was never a cardinal part of hearing".[43]

While in none of these jurisdictions do the rules of civil procedure directly apply to arbitration (or, in dualist systems, to international arbitration), the significance of the conclusion that a right to a physical hearing does not exist in litigation is twofold.

On one hand, it carries an *a fortiori* argument. Given the rationale of arbitration as a flexible and efficient alternative to State court proceedings, it would be paradoxical if arbitral tribunals were not granted the same discretion to order remote hearings as State courts. According to the Hungarian national reporter:

> "However, even if the rules of civil procedure cannot be extended to arbitration directly, the existence of remote hearings in civil procedure indirectly supports the view that remote hearings can be validly held in arbitral proceedings in Hungary, since […] one of the main objective of the legislator with the adoption of the new Arbitration Act was to create a real alternative to litigation in front of state courts, so that business actors can resolve their disputes faster, and on high level of proficiency. In case remote hearings, which are cost-effective and can speed-up the procedure, were permitted in state court proceedings, but they were excluded in arbitration, the purpose of the legislator would be jeopardized".[44]

On the other hand, it also confirms that remote hearings are not *per se* incompatible with the fundamental notions of due process, natural justice, fairness, etc. that permeate procedural law in modern legal systems. Rather, as stated by the Australian national

42. Sarah MCKENZIE, "National Report South Africa" in *Does a Right to a Physical Hearing Exist?*, p. 6.
43. Naimeh MASUMY, "National Report Iran" in *Does a Right to a Physical Hearing Exist?*, p. 9.
44. SCHMIDT, "National Report Hungary" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 10.

reporters: "each case will turn on its individual facts, with focus on procedural fairness".[45]

In some jurisdictions, this conclusion has also been confirmed by domestic courts faced with the question of the legitimacy of remote hearings in State court proceedings:

> "[…] the issue of remote hearings was considered by the Court of Appeal in April 2020 (*CSFK v HWH*). In this case, the entire substantive hearing was held via video conferencing […]. The Court of Appeal found that […] 'whilst normally a hearing will take place with all participants physically present in the courtroom, there is no rule prohibiting other modes of hearings if the dual requirements for fairness and openness are satisfied'".[46]

> "For example, in *Arconti v. Smith*, the Ontario Superior Court of Justice ordered that an examination of a witness proceed by way of videoconference, or not at all. […] The Court, while recognizing legitimate concerns about the use of technology, responded by stating: 'It's 2020... We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back'".[47]

Even though these decisions were rendered in the context of litigation, the fact that remote hearings are not *per se* incompatible with fundamental concepts of fairness and due process is equally important in arbitration, given that these concepts (translated into the arbitration arena) also limit arbitral tribunals in the exercise of their procedural discretion to order a remote hearing (see section III.A.1 above).

2. The Right to a Physical Hearing Exists in Litigation but Does Not Apply to Arbitration

In most surveyed jurisdictions, in litigation, either parties have a right to a physical hearing or, in any case, hearings are physical as a matter of practice. In any case, this does not have any repercussions on arbitration.

First, in a handful of jurisdictions (including, notably, France)[48] the parties' right to a physical hearing derives from a provision of the rules of civil procedure that subjects the possibility to hold remote hearings to the parties' consent.

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45. Lucy MARTINEZ and Jay TSENG, "National Report Australia" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 10.
46. James ROGERS and Annie BIRCH, "National Report Hong Kong" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 5.
47. Robert WISNER and Paola RAMIREZ, "National Report Canada" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 3.
48. Valentine CHESSA, Nataliya BARYSHEVA and Arianna CAMILLACCI, "National Report France" in *Does a Right to a Physical Hearing Exist?*, p. 6 ("However, in the

In most jurisdictions, the parties' right to a physical hearing derives from the general principles of civil procedure that regulate hearings, providing, e.g., that they must be "public" or held "in open court". In Switzerland, the Federal Supreme Court relied on the provision mandating that parties "attend" the main hearing to deduce that it must be physical.[49]

In none of these cases, however, does this conclusion have a bearing on arbitration proceedings.

To understand whether these rules can nonetheless have a bearing on the interpretation of the *lex arbitri*, the next question is whether they must be considered as a requirement posed to safeguard fundamental procedural rights of the parties (or rather as a relic of the past, when the rules of civil procedure were drafted).[50] This question is relevant because if physical hearings were considered a due process requirement, this would apply (*mutatis mutandis*) to arbitration proceedings, as well.

To answer this question, many national reporters observed that the Covid-19 pandemic has prompted legislative and court practice directives that promote the use of remote hearings regardless of the rules arguably mandating physical ones. This has been considered as evidence that excludes physical hearings as a due process requirement.

According to the Austrian national reporters:

> "In the context of the COVID-19 pandemic, the Austrian legislature has enacted provisions that even allow for complete remote hearings to ensure continued access to justice despite lockdowns, travel restrictions, and social distancing. Even though these rules have only been enacted for a limited time […], *these legislative measures do show that remote hearings are generally compatible with the fundamental procedural principles governing state court proceedings* – and may be preferable under certain circumstances" (emphasis added).[51]

A further test used by some national reporters to assess whether the existence of the right to a physical hearing in litigation could impinge on the interpretation of the *lex arbitri* was to investigate whether physicality must be considered part of the minimum threshold requirements for a "hearing" in their jurisdiction.

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only case expressly contemplating the possibility of remote hearings, the consent of the parties remains a requirement. This suggests the existence of an inferred right to a physical hearing").

49. MARZOLINI and DURANTE, "National Report Switzerland" in *Does a Right to a Physical Hearing Exist?*, p. 5.
50. In the Dominican Republic, the question is pending before the Constitutional Tribunal: Eléonore CAROIT and Eugénie CAROIT, "National Report Dominican Republic" in *Does a Right to a Physical Hearing Exist?*, p. 8.
51. Franz SCHWARZ and Helmut ORTNER, "National Report Austria" in *Does a Right to a Physical Hearing Exist?*, p. 13 f.

In summary, this analysis invokes the principles of orality and immediacy; and, in some cases, the additional principle of publicity of the hearings. Importantly, all these requirements have been found not to be *per se* incompatible with a hearing being held remotely:[52]

> "It can also be said that remote hearings would not breach the principle of orality, as long as all procedural actions, statements and arguments are made orally during the remote hearing, and the principle of immediacy, as long as the videoconference link used for the hearing allows for a simultaneous exchange of arguments or evidence, […]".[53]

> "That the hearing should be public and oral does not in and of itself necessitate a physical hearing. As has been seen in several jurisdictions, live streaming of court meetings could be a means for accommodating these principles. However, the AJA [i.e., the Danish Administration of Justice Act] seems to be built on a preconception of an oral [i.e., physical] hearing, likely owing to the relics of being written before the advent of modern technology".[54]

In conclusion, physicality has been found not to be an intrinsic component of what constitutes a "hearing" in litigation. That remote hearings can satisfy the minimum threshold requirements for a hearing in litigation has been used to support the conclusion that – *a fortiori* – remote hearings satisfy the requirements of a hearing in arbitration.

3. The Right to a Physical Hearing Exists in Litigation and Applies to Arbitration

In three of the covered jurisdictions the reporters concluded that the existence of a right to a physical hearing in litigation implies (or may imply) that such right also exists in arbitration.

The first of these jurisdictions is Ecuador, where the rules of civil procedure provide that, as a default rule, hearings are physical, and that they can only be held via videoconference "when personal [i.e., physical] attendance is not possible". This provision also applies to arbitration, given that (i) the *lex arbitri* contains an express

52. *See also* Maxi SCHERER, "Remote Hearings in International Arbitration: An Analytical Framework", 37 J. Int'l Arb. (2020) p. 408 at p. 416 f.
53. ALEXIEV, "National Report Bulgaria" in *Does a Right to a Physical Hearing Exist?*, p. 8.
54. SKUDE RASMUSSEN, "National Report Denmark" in *Does a Right to a Physical Hearing Exist?*, p. 6.

provision that the rules of civil procedure serve a gap-filling function in arbitration, and (ii) the *lex arbitri* does not contain any regulation of hearings.[55]

Second, in the People's Republic of China, the right to a physical hearing in litigation derives from the requirements imposed upon the use of remote hearings in State court proceedings, including the need for the parties' consent. The national reporters consider it "unlikely" that such right could be extended to arbitration, but at the same time this possibility cannot be totally excluded:

> "While some courts have ruled that the rules of civil procedure should not be extended to arbitration, still a minority of courts held that they can be relied on and applied as supplement in case of any ambiguity or inadequacy of the *lex arbitri*".[56]

The third and last jurisdiction in this group is Tunisia. Here, unlike in the jurisdictions analyzed in section III.B.2 above, the right to a physical hearing in litigation is considered to be a due process requirement, given that it is inferred from the provision of the Tunisian Constitution that hearings shall be public. Therefore, such right also applies to arbitration by virtue of the provision in the *lex arbitri* referring to "the fundamental principles of civil and commercial procedure, and in particular the rules relating to due process".[57]

C. Analysis of the Answers to Questions 5-6: Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

In this section, the questions raised the issue of party autonomy in the presence of a right to a physical hearing (Question 5), and the tension between party autonomy and the arbitrators' discretion to order remote hearings (Question 6):

> 5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*
>
> 6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal*

55. Javier ROBALINO ORELLANA, Maria Teresa BORJA, Juan Carlos DARQUEA and David TOSCANO, "National Report Ecuador" in *Does a Right to a Physical Hearing Exist?*, p. 3 f.
56. Tim Yimin LIU and Iris Tingting YANG, "National Report People's Republic of China" in *Does a Right to a Physical Hearing Exist?*, p. 6.
57. Sami HOUERBI, "National Report Tunisia" in *Does a Right to a Physical Hearing Exist?*, pp. 3 and 6.

decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Given the response to Questions 1 and 2 above, finding no right to a physical hearing exists, Question 5 was moot in the vast majority of covered jurisdictions.

For the few jurisdictions in which the reporters found a right to a physical hearing, such as Vietnam or Ecuador, such right does not trump party autonomy. Therefore, a right to a physical hearing can generally be waived by agreement of the parties.

On the other hand, the answers to Question 6 revealed some interesting divergences. Preliminarily, this question raises the threshold interpretive question of what constitutes an agreement to hold a physical hearing because the parties are unlikely to have plainly stated it.

For example, tribunals may have to decide whether the *lex arbitri* creates an agreement that either party may request an "oral" hearing, consistent with Art. 24(1) of the UNCITRAL Model Law, and what the significance is of that right. As such, the tribunal will also have to assess its own authority to interpret the parties' agreement and the courts decide what deference to pay to such an interpretation.

Where the parties' agreement to hold a physical hearing is established, interesting nuances emerge as to both its interplay with the arbitral tribunal's discretion – in other words, the question on whether the arbitral tribunal has the power to order a remote hearing over the parties' agreement to hold a physical one – and the potential consequences of its violation by the arbitral tribunal.

1. The Parties' Agreement to Hold a Physical Hearing Is Binding Upon the Arbitral Tribunal

In the vast majority of cases, the answer to Question 6 is a plain no: arbitrators may not ignore the parties' agreement to have a physical hearing.[58]

In some cases, the answer was more nuanced and differed depending on the *time* when the parties agreed to have a remote hearing. Thus, in France, Indonesia and Italy, the arbitrators are bound by the parties' agreement on procedure made before the constitution of the arbitral tribunal, but not after, on the basis that arbitrators can only be bound by the rules of procedure that existed at the time they accepted their appointment – unless they agree otherwise.[59]

58. This result is consistent with responses to the arbitral institutions' survey: *see* G. ROJAS ELGUETA and B. MAURO, "Remote Hearings", fn. 24 above.
59. *See* CHESSA, BARYSHEVA and CAMILLACCI, "National Report France" in *Does a Right to a Physical Hearing Exist?*, p. 7 f.; Daniel PAKPAHAN, "National Report Indonesia" in *Does a Right to a Physical Hearing Exist?*, p. 12 f.; ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, pp. 9 and 11.

Similarly, in Portugal, the arbitrators are only bound by the parties' agreement made prior to the appointment of the first arbitrator, after which the authority to decide the rules of procedure is transferred to the tribunal.[60] As to the rationale for this rule, in Italy, it is arguably "to let the appointed arbitrators know 'the rules of the game' before they accept the appointment",[61] while in France, commentators argue that the arbitrators cannot be bound by every agreement between the parties affecting their powers made after their appointment, because this would otherwise constitute an encroachment on the jurisdictional function of the arbitrators.[62]

Finally, in the Netherlands, the question is unsettled. The answer depends on whether the Dutch provision expressly granting the arbitral tribunal the power to order a remote hearing (see section III.A.1 above) is considered mandatory or not, i.e., whether it is accepted that the parties' agreement can override the tribunal's authority and bind the arbitral tribunal to hold a physical hearing.[63]

2. Consequences of the Violation of a Parties' Agreement to Hold a Physical Hearing

While the law in most jurisdictions is clear that arbitrators are bound by the parties' agreement, different consequences attach to holding a remote hearing in breach of that agreement.

In some jurisdictions, a breach of party agreement could well in and of itself result in the annulment of the award, on the basis that the arbitrators exceeded their mandate or otherwise violated the parties' agreement. For example, in the U.S.A.:

> "The U.S. Supreme Court has consistently ruled that 'arbitration is a matter of contract' and arbitration agreements must be enforced according to their terms. […] Therefore, if the arbitration agreement requires a physical hearing, either expressly or by reference to arbitration rules, an arbitral tribunal could not order a remote hearing contradicting the parties' agreement. An order under such circumstances could well lead to vacatur for excess of authority".[64]

60. Maria Camila HOYOS and Carolina BOTELHO SAMPAIO, "National Report Portugal" in *Does a Right to a Physical Hearing Exist?*, p. 8 f.
61. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 9.
62. CHESSA, BARYSHEVA and CAMILLACCI, "National Report France" in *Does a Right to a Physical Hearing Exist?*, p. 7 f.
63. VAN ZELST, "National Report The Netherlands" in *Does a Right to a Physical Hearing Exist?*, p. 7 f.
64. James HOSKING, Yasmine LAHLOU and Marcel ENGHOLM CARDOSO, "National Report U.S.A." in *Does a Right to a Physical Hearing Exist?*, p. 10.

In most others however, an annulment requires a showing of prejudice, reflected in either a violation of due process rights (or of natural justice) and/or proof that the violation affected the outcome:

> "[…] if any award is made in the arbitration, the parties would have the right to seek to set aside that award under Section 68 of the Arbitration Act 1996. Such a challenge will only succeed in very limited circumstances, and it would be necessary to persuade the court that substantial injustice has been caused by the decision to hold a remote hearing".[65]

> "To sum up, if a party bases the action for annulment on Article 41.1 d) [i.e., the arbitral procedure was not in accordance with the agreement of the parties], in theory he will only have to prove that there was a valid agreement between the parties providing for either the right to a physical hearing or the prohibition to hold remote hearings and that such agreement was not respected. However, it should be noted that in practice, Spanish courts place importance on the materiality of the breach of the agreement to grant the annulment of the award".[66]

Given the ubiquity and improvement of remote hearing technology, establishing that conducting a remote hearing in and of itself deprived a party of its opportunity to present its case would be an onerous burden to discharge.

As a further requirement, in Italy, the parties must have expressly elevated their agreement to a basis for setting aside the award. Thus, if the parties agreed that the violation of their pre-arbitration agreement to conduct a physical hearing may result in the setting aside of an award, this will be enforced. In other, probably more common, situations, if the parties have not defined by contract the consequences of their agreement's violation, the sanction would normally be limited to replacing the tribunal.[67]

In Austria, while a party agreement to hold a physical hearing would in principle be binding upon the arbitral tribunal and thereby reduce the arbitrators' scope of discretion, a violation of such agreement by the tribunal in ordering a remote, instead of physical, hearing would of itself be inadequate to set aside the award:

> "As a general rule, tribunals should take such a party agreement seriously, unless there are compelling reasons to deviate from such an agreement in a

65. WELSH and SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*, p. 10.
66. Gillian CAHILL and Carlos HERNÁNDEZ DURÁN, "National Report Spain" in *Does a Right to a Physical Hearing Exist?*, p. 12.
67. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 10.

> particular case. However, Austrian arbitration law generally does not provide for any specific legal consequences if a tribunal disregards such a procedural agreement of the parties".[68]

In a few jurisdictions, setting aside would not be the only possible consequence of a breach of the parties' agreement. In Finland, the parties could revoke the arbitrators' authority,[69] and in the Bahamas they could additionally seek to have the arbitrators judicially removed.[70] Interestingly, in Scotland a court may order that the arbitrators are not entitled to payment of their fees and expenses.[71]

3. The Parties' Agreement to Hold a Physical Hearing Is Not Binding Upon or Can Be Superseded by the Arbitral Tribunal

In a few jurisdictions, national reporters argue from the starting point of arbitrators' power to override a parties' agreement to hold (or not to hold) an oral hearing, that the tribunal would not be bound by a parties' agreement to hold a physical hearing.

For example, in Switzerland:

> "[…] the Federal Supreme Court held that the parties' agreement to present their case before the arbitrators orally and to ask questions orally to witnesses does not produce the effect of rendering such activities mandatory within the meaning of Article 182(3) FPILA (due process). Considering the Federal Supreme Court's position described above, it is fair to conclude that no negative consequences would affect the award if the arbitral tribunal were to convene a remote hearing despite the parties' agreement to hold a physical hearing".[72]

Further, in a significant number of jurisdictions, national reporters argue that there can be circumstances in which the parties' agreement to hold a physical hearing could be overridden by the arbitral tribunal, as the result of the need to undertake a balancing exercise with other competing interests that may be at stake in the specific case:

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68. SCHWARZ and ORTNER, "National Report Austria" in *Does a Right to a Physical Hearing Exist?*, p. 17.
69. Kirsi KANNASTE and Julius JAUHIAINEN, "National Report Finland" in *Does a Right to a Physical Hearing Exist?*, p. 15.
70. Theominique D. NOTTAGE, "National Report The Bahamas" in *Does a Right to a Physical Hearing Exist?*, p. 6.
71. Brandon MALONE, "National Report Scotland" in *Does a Right to a Physical Hearing Exist?*, p. 7.
72. MARZOLINI and DURANTE, "National Report Switzerland" in *Does a Right to a Physical Hearing Exist?*, p. 7. *See also* OLÍK and KAREŠOVÁ KUCHARČUK, "National Report Czech Republic" in *Does a Right to a Physical Hearing Exist?*, p. 8.

> "In conclusion, it is difficult to avoid a case-by-case analysis: within the cautious approach adopted herein, the arbitrators should render a reasoned decision balancing the different interests, rules and principles at stake in the specific case".[73]

For example, in the United Arab Emirates and in Bolivia, arbitrators may override the parties' agreement if respecting it would delay the conclusion of the arbitration beyond the statutory time limit.[74] Similarly, in Croatia, Hong Kong, Iran and Qatar the principle of party autonomy must be balanced against the arbitral tribunal's duty to conduct the proceedings without undue delay:

> "Accordingly, the powers conferred on the tribunal by the parties (i.e., including an instruction to hold a physical hearing) are subject to the requirements that the arbitrator be independent, act fairly and use expedient procedures. This means that the tribunal should not sacrifice all efficiency in order to accommodate unreasonable procedural demands, even if such demands are made by way of an earlier agreement of the parties. This allows some procedural flexibility to tribunals if faced by an unreasonable demand by one of the parties to hold a physical hearing based on an earlier agreement in circumstances where a physical hearing is no longer possible due to, for example, COVID-related travel restrictions".[75]

Further possible justifications for the arbitral tribunal's decision to override the parties' agreement to hold a physical hearing include the parties' right to due process and the need to hold a remote hearing to obtain crucial evidence in Bolivia;[76] the integrity of the arbitral process and the equal treatment of the parties in Venezuela;[77] as well as

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73. Rafael F. ALVES, "National Report Brazil" in *Does a Right to a Physical Hearing Exist?*, p. 10.
74. SNIDER, GAFFNEY and NASREDDINE, "National Report United Arab Emirates" in *Does a Right to a Physical Hearing Exist?*, p. 11. *See also* Lindsay SYKES, Andrea LIZÁRRAGA and Emiliano HERNÁNDEZ, "National Report Bolivia" in *Does a Right to a Physical Hearing Exist?*, p. 6 f.
75. ROGERS and BIRCH, "National Report Hong Kong" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 8. *See also* BOŽIĆ, "National Report Croatia" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 9; MASUMY, "National Report Iran" in *Does a Right to a Physical Hearing Exist?*, p. 11; Thomas WILLIAMS, Ahmed DURRANI and Umang SINGH, "National Report Qatar" in *Does a Right to a Physical Hearing Exist?*, p. 4.
76. SYKES, LIZÁRRAGA and HERNÁNDEZ, "National Report Bolivia" in *Does a Right to a Physical Hearing Exist?*, p. 5 f.
77. *See* GÓMEZ, "National Report Venezuela" in *Does a Right to a Physical Hearing Exist?*, p. 9 f.

consideration of principles of independence, impartiality, concentration, publicity, immediacy and access to justice in Ecuador.[78]

As a practical matter, the situations should be rare in which an arbitral tribunal sees it appropriate to ignore an agreement between the parties to have a physical hearing, and may be limited to those cases in which a party is having second thoughts due to a change in circumstances (such as a pandemic) since it agreed to hold a physical hearing. One situation, fairly specific to the Covid-19 crisis but unlikely to subside so soon, is the arbitrators' reluctance to travel and expose themselves to any potential infection.

D. Analysis of the Answers to Questions 7-9: Setting Aside Proceedings

In this section, after looking at the issue of waiver of the right to a physical hearing and the extent to which the tribunal may be bound by an agreement to hold a physical hearing, we sought to capture the various potential postures in which the parties may argue that the arbitral tribunal's decision to conduct a remote hearing may jeopardize the validity of the award, whether a right to a physical hearing was recognized or not. The questions posed were the following:

> 7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*
>
> 8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*
>
> 9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Starting from Question 7, although it was drafted keeping in mind those jurisdictions where a right to a physical hearing exists, all national reporters followed the example of the model reports and responded even if such right does not exist in their jurisdiction, setting forth the hypothetical scenario that the same right was recognized under certain circumstances (e.g., as a consequence of the parties' agreement: see section III.C.1 above).

78. *See* ROBALINO ORELLANA, BORJA, DARQUEA and TOSCANO, "National Report Ecuador" in *Does a Right to a Physical Hearing Exist?*, p. 5.

The response to Question 7 showed interesting convergences. In the vast majority of the jurisdictions surveyed, the answer to the question is yes: a party must object at the time of the tribunal's order to hold a remote hearing if it is to preserve that objection as a basis to challenge the award in court. This is consistent with Art. 4 of the Model Law, signaling the wide acceptance of this principle even in non-Model Law jurisdictions.

The responses to Questions 8 and 9, on the other hand, were more nuanced and will be dealt with in the following subsections. For present purposes, however, an important result emerging from these survey questions is that, to date, there has been no reported case in which an arbitral award has been set aside due to a remote hearing being held as a consequence of the Covid-19 pandemic.

1. Order to Hold a Remote Hearing as a Ground for Setting Aside Where the Right to a Physical Hearing Exists

As was the case for Question 5 above, Question 8 was moot in the vast majority of jurisdictions as the reporters concluded that the right to a physical hearing does not exist.

Looking at the jurisdictions where such right does exist, its violation would not amount *per se* to a ground for setting aside the award in any of those, with the exception of Vietnam. In other words, in most of these jurisdictions setting aside the award would require the violation of the right to a physical hearing "*plus*" something.

The threshold for this "plus" is, however, not the same in all jurisdictions. For example, in Tunisia and Venezuela this would be a breach of due process:

> "The failure to conduct a physical hearing would not *per se* constitute a basis to set aside an award. Rather, it is the failure to safeguard due process and fundamental rules of procedure, for instance, a failure to provide the Parties a reasonable time to present their case, a failure to communicate the dates of a hearing and most importantly a failure to notify the Parties of important procedural rules that they should be aware of in order to defend their case timely and duly before the Arbitral Tribunal".[79]

> "As a result, any potential challenge to an award based on a purported breach of the right to a hearing would only be possible regarding the first hearing, and the affected party would have to prove that such breach violated the fundamental right to due process guaranteed by articles 49 of the Constitution and 15 CCP. […] This could happen when, for example, the tribunal's decision to eliminate

79. HOUERBI, "National Report Tunisia" in *Does a Right to a Physical Hearing Exist?*, p. 12.

> physical hearings impedes one of the parties from effectively presenting their case or from being treated with equality".[80]

In Zimbabwe, principles of natural justice and fundamental fairness become relevant, and Zimbabwean courts have established a high threshold for violations thereof. This notwithstanding, there has been a case where the failure to hold an oral hearing was deemed to meet such high threshold:

> "Nevertheless, in *Diamond Mining Corporation v Forster Mukwada & 2 Others*, the Labour Court of Zimbabwe set aside an arbitral award on the basis that it was grossly irregular for the arbitrator to have proceeded to issue the award without an oral hearing. The court specifically noted that the absence of a hearing had prejudiced the appealing party, and explained how: 'An oral hearing was clearly necessary as applicant *in casu* had not had an opportunity to respond to the alleged evidence. […] I believe that it was grossly irregular for the arbitrator to proceed to issue the award without the oral hearing, or at least an explanation as to why it was not necessary in the circumstances'".[81]

Considering that, as highlighted in the response to Question 2 above, an oral hearing in Zimbabwe must be conducted physically, it seems that a Zimbabwean court could possibly accept an argument that the failure to conduct a physical hearing meets the high threshold required to vacate an award.

Vietnam also stands out, as a breach of the parties' right to a physical hearing under the *lex arbitri* may constitute *per se* a ground for setting aside an award. Although the Vietnam Supreme People's Court has clarified that only "serious" violations of procedure may lead to vacatur (which would entail that the breach of the right to a physical hearing would not be *per se* sufficient to annul an award), such "plus" requirement is in practice nullified by Vietnamese courts' application of this ground for annulment.[82]

2. Order to Hold a Remote Hearing as a Ground for Setting Aside Where the Right to a Physical Hearing Does Not Exist

As to the vast majority of jurisdictions where the right to a physical hearing does not exist, the national reporters analyzed the circumstances under which the failure to conduct a physical hearing could nonetheless lead to the vacatur of an award.

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80. GÓMEZ, "National Report Venezuela" in *Does a Right to a Physical Hearing Exist?*, p. 10 f.
81. KANOKANGA and PASIPANODYA, "National Report Zimbabwe" in *Does a Right to a Physical Hearing Exist?*, p. 7 f.
82. DUNDAS, TRANG and MAI ANH, "National Report Vietnam" in *Does a Right to a Physical Hearing Exist?*, p. 9 f.

Leaving aside cases in which vacatur could be the consequence of the violation of the parties' agreement to hold a physical hearing (see section III.C.2 above), in almost all jurisdictions the question of setting aside will ultimately be determined by whether there has been some kind of due process violation:

> "A second scenario where it is likely that the above-mentioned question will arise is where, in the exercise of its default procedural discretion, the arbitral tribunal orders a remote hearing over one party's objection. This is so if one considers that the arbitral tribunal's discretion in procedural matters is not limitless, as it must be exercised within the boundaries set by the observance of the due process principle".[83]

Although it will generally require a case-by-case and fact-specific evaluation of key elements of the dispute, including a close analysis of the challenging party's opportunity to present its case, the question of what constitutes a due process violation entails an analysis that must be conducted on a jurisdiction-specific basis. That different standards of review and concrete procedural requirements are applied to due process questions across jurisdictions was also shown by a recent volume edited by Ferrari, Rosenfeld and Czernich.[84]

In the U.S.A., for example, the analysis would likely be under Sect. 10(a)(3) of the Federal Arbitration Act on arbitrator misconduct or Sect. 10(a)(4) on excess of authority. According to the courts, under a Sect. 10(a)(3) analysis, the minimum requirements of fundamental fairness are (i) adequate notice, (ii) an impartial decision-maker and (iii) a hearing on the evidence. Courts in the U.S.A. are unlikely to second guess a tribunal's decision to hold a remote hearing as long as the parties were given a fair opportunity to present material evidence.[85] The failure to conduct an evidentiary hearing is not *per se* tantamount to a due process violation.[86] Instead, in most federal circuit courts, the arbitrators' evidentiary and hearing-related decisions are unlikely to lead to vacatur of the resulting award unless they in fact prejudiced the rights of a party, e.g., where the evidence that was excluded turned out to be material to the arbitrators' decision. Courts are otherwise generally indifferent to the format of the hearing or how evidence is presented.[87]

Arguing that the failure to conduct a physical hearing constituted a due process violation is even more difficult in a jurisdiction like Switzerland, in which the Federal

83. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 14.
84. Franco FERRARI, Friedrich ROSENFELD and Dietmar CZERNICH, eds., *Due Process as a Limit to Discretion in International Arbitration* (Kluwer Law International 2020).
85. HOSKING, LAHLOU and ENGHOLM CARDOSO, "National Report U.S.A." in *Does a Right to a Physical Hearing Exist?*, p. 13 f.
86. *Ibid.*, p. 12.
87. *Ibid.*, p. 14.

Supreme Court has consistently held that the minimum requirements of due process do not include the right to a hearing.[88]

Also, in some jurisdictions, courts asked to vacate an award on the basis of a challenge of the arbitrators' hearing-related decisions will not only look at due process, but also balance that interest with other ones critical to arbitration. For example, in Singapore:

> "The court [i.e., the Singapore Court of Appeal in the *CBS v CBP* case] held that in accordance with Article 18 of the Model Law, the 'full opportunity' to present one's case is not an unlimited one and should be balanced against considerations of reasonableness, efficiency and fairness, and that the threshold for finding a breach is therefore a high one".[89]

In this case, the Singapore Court of Appeal was ultimately satisfied that the arbitrator's denial of one party's application to present witness evidence, and insistence instead on a documents-only arbitration, constituted a breach of natural justice and, as such, the trial court had been correct to set aside the award.

In Australia, domestic courts have highlighted that these considerations are even more compelling in the context of arbitration, stating that:

> "If a procedural fairness type challenge has been made, the context and practical circumstances and consequences are all important. […] One adds to that context that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition. The normative evaluation involved in deciding whether a party has been given a reasonable opportunity to put its case must necessarily be undertaken in that context".[90]

It can be concluded that the exigencies of the Covid-19 pandemic have heavily influenced reviewing courts' balancing of the principle that the parties be afforded a reasonable opportunity to present their respective cases with the principles associated with efficiency of the proceedings. In short, where a remote hearing is the only tool that would allow proceedings to move forward and avoid indefinite postponements, courts have been highly deferential. Of course, this may well change in a post-pandemic world where justifications for remote hearings will be less straightforward.

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88. MARZOLINI and DURANTE, "National Report Switzerland" in *Does a Right to a Physical Hearing Exist?*, p. 9.
89. Rachel Xi'en TAN, "National Report Singapore" in *Does a Right to a Physical Hearing Exist?*, p. 9. *See also* Sally EL SAWAH and Dalia HUSSEIN, "National Report Egypt" in *Does a Right to a Physical Hearing Exist?*, p. 20; Kingshuk BANERJEE and Ritvik KULKARNI, "National Report India" in *Does a Right to a Physical Hearing Exist?*, p. 13.
90. MARTINEZ and TSENG, "National Report Australia" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 5.

For example, in Australia (although in the context of litigation):

> "The FCA [i.e., the Federal Court of Australia] noted that technological challenges involved with remote hearings were 'tiresome' and 'aggravating' but 'tolerable' and 'not insurmountable', and concluded: 'Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances […]'".[91]

A similar reasoning is offered by the Austrian national reporters based on Art. 6 of the ECHR:

> "In situations in which a party's access to justice pursuant to Article 6 ECHR (which is of constitutional weight in Austria) would be impaired by insisting on a physical hearing (as may be the case during the COVID-19 pandemic), the risk that holding a remote hearing would violate any fundamental procedural principles is even further reduced".[92]

Consistent with this approach, in July 2020, Austria's highest court, the *Oberster Gerichtshof*, issued a decision in which it concluded that, as a general rule, a remote hearing will comply with the fundamental procedural principles of Austrian arbitration law just as well as a physical hearing as long as the technology is adequately handled:

> "[…] the OGH has confirmed this conclusion in its recent decision of July 2020, holding that, as a matter of principle, holding a remote hearing instead of a physical hearing does not *per se* violate the party's right to be heard or his or her right to be treated fairly and equally. Rather, only in circumstances in which conducting a remote hearing would violate fundamental procedural principles (including the right to be heard or the right to fair and equal treatment) in the specific circumstances of the case, may such a decision of the tribunal endanger the award".[93]

The persistence of the Covid-19 pandemic has undoubtedly influenced the balance of equities considered by reviewing courts in favor of remote hearings. This fact as well as the supposition that in a post-pandemic world it may be more difficult to justify ordering a remote hearing over a party's objection, has recently been considered in Qatar, where State courts have rejected an annulment request based (among other

91. *Ibid.*, p. 8.
92. SCHWARZ and ORTNER, "National Report Austria" in *Does a Right to a Physical Hearing Exist?*, p. 24.
93. *Ibid.*

grounds) on the objection that, by holding a remote evidentiary hearing, the arbitral tribunal had violated the arbitration agreement.

In its reasoning, the Qatari Court of Appeal considered that the Covid-19 pandemic was a force majeure event capable of justifying the remote hearing:

> "Whereas the objector's decry, regarding violation by the arbitral award of the arbitration clause which requires that the arbitration venue to be in the State of Qatar alleging that the arbitral tribunal has held virtual sessions, is not founded, whereas by perusal of the objected arbitral award, it is indicated that all arbitration case procedures have been made in the State of Qatar as stated in the agreed arbitration clause, and that due to the Corona Pandemic and its involved force majeure and emergency, the arbitral tribunal has held the witnesses hearing session remotely following taking the related procedural order by the arbitral tribunal, and despite challenge of the objector, he has attended the said session and was fully aware of what made therein".[94]

It should be noted that, according to the Court of Appeal, in this case the objection would have been baseless anyway, given that the parties had agreed upon application of the ICC Arbitration Rules, which expressly allow the arbitral tribunal to hold remote hearings since 1 January 2021.[95] It remains to be seen what would be the attitude of State courts once Covid-19 can no longer be considered a force majeure event, and the rules applicable to the proceedings do not expressly provide for remote hearings.

Within the group of jurisdictions where there is no right to a physical hearing, Indonesia stands out as it is unsettled whether a due process violation would amount to a ground for setting aside an award. As a matter of fact, the relevant provision of the *lex arbitri*, which does not expressly include due process violations among such grounds, has been interpreted by some Indonesian courts as an exhaustive list and by others as being capable of including fundamental procedural guarantees.[96]

94. Court of Appeal, Civil Court, Third Commercial Civil Circuit of Appeal, Case No. 2021/1105/Appeal/Arbitrators' Awards/Plenary, 27 December 2021 (Qatar).
95. According to the Qatari Court of Appeal: "In addition, the International Chamber of Commerce's rules have allowed the arbitral tribunal in ensuring the continuous effective management of the case to take the procedural measures required following consultation with the parties which has been made by the tribunal, and it is also allowed to hold its meetings via the video means, in addition, it is allowed in establishing the case facts to hear the witnesses via any means either in presence or absence of the parties, which makes this objection as baseless and should be rejected".
96. PAKPAHAN, "National Report Indonesia" in *Does a Right to a Physical Hearing Exist?*, pp. 14 ff.

E. Analysis of the Answers to Question 10: Recognition/Enforcement

Finally, we inquired with national reporters about the possible repercussions of holding a remote hearing on the enforceability of the award in their jurisdiction, based on the domestic courts' interpretation of the grounds for refusal provided by Art. V of the New York Convention.

In particular, we asked the following question:

> *10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

In relation to this question, we circulated an explanatory note in order to make sure that national reporters clarified the following two points: (i) whether, when called upon to assess a breach of due process or a violation of public policy under Arts. V(1)(b) and V(2)(b) of the New York Convention, domestic courts would treat as relevant the existence of the right to a physical hearing at the seat of the arbitration or not; and (ii) whether, in case the right to a physical hearing existed and was violated, this would amount *per se* to a ground for refusing recognition and/or enforcement or, instead, evidence of an actual prejudice would be required.

First, it must be noted that in most (if not all) surveyed jurisdictions, domestic courts reportedly adopt a "pro-enforcement" approach and consequently construe the grounds for refusal under Art. V of the New York Convention in a narrow fashion.

Second, when analyzing the domestic courts' interpretation of Art. V(2)(b) of the New York Convention,[97] the national reporters generally agree that this ground for refusal requires showing that enforcing the foreign award would run contrary to the forum's (rather, e.g., than the seat's) notion of public policy, and that the threshold for such showing is very high.

To the contrary, interesting divergences emerge in relation to the domestic courts' interpretation of Arts. V(1)(b) and V(1)(d) of the New York Convention. These will be analyzed below.

97. Art. V(2)(b) of the New York Convention reads as follows: "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […] (b) The recognition or enforcement of the award would be contrary to the public policy of that country".

1. Article V(1)(b) of the New York Convention: Would Domestic Courts Look at Whether a Right to a Physical Hearing Existed at the Seat?

Art. V(1)(b) of the New York Convention reads as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; […]".

The answers prompted by the first point of the explanatory note mentioned above show an interesting divergence in the domestic courts' interpretation of this ground for refusal.

In the first group of jurisdictions, Art. V(1)(b) is interpreted as a safeguard of the forum's due process standards, meaning that any opposition based on this ground will be assessed against the forum's notions of due process, natural justice, etc.:

> "It has been held that that provision [i.e., Section 103(2)(c) of the Arbitration Act 1996, giving effect to Article V(1)(b) of the New York Convention] is engaged where the procedure adopted has been operated in a manner contrary to the rules of natural justice, and that in applying those principles the court must apply its own concept of natural justice".[98]

> "Since it is part of German law, German courts will examine Art. V(1)(b) of the New York Convention by taking the viewpoint that German law as *lex fori* will determine the standard to be applied to Art. V(1)(b) of the New York Convention, […]. The standard of the *lex arbitri*, therefore, is irrelevant with regard to a review of Sec. 1061 of the ZPO in connection with Art. V(1)(b) of the New York Convention".[99]

> "Generally speaking, U.S. courts will not focus on whether a right to a physical hearing existed at the seat, but will apply U.S. notions of due process and assess

98. WELSH and SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*, p. 13. *See also* BANERJEE and KULKARNI, "National Report India" in *Does a Right to a Physical Hearing Exist?*, p. 19.
99. MAUCHER and MEIER, "National Report Germany" in *Does a Right to a Physical Hearing Exist?*, p. 15.

> whether the challenging party was given 'an adequate opportunity to present its evidence and arguments'".[100]

Therefore, in case a party objects to the recognition and enforcement of an award based on Art. V(1)(b), alleging that it was unable to present its case due to the hearing being held remotely, the courts will look at their own due process standards, and it will be inconsequential whether a right to a physical hearing existed under the law of the seat.

In another group of jurisdictions, on the other hand, domestic courts will determine whether the opposing party was given a fair opportunity to present its case based on the procedural rules of the law of the seat:

> "In the first place, it must be noted that, according to the majority of Italian scholars, the violation of the parties' right to present their case (as a ground to refuse in Italy recognition and enforcement of a foreign award) must be assessed against the *lex arbitri* (and not against the Italian arbitration law)".[101]

> "Under Article V(1)(b) of the New York Convention, Egyptian courts examine the law of the seat or the applicable arbitration rules to determine whether the impugned conduct constitutes a ground for the annulment of the award under the *lex arbitri*. If so, Egyptian courts will not grant the exequatur".[102]

Therefore, in this latter group of jurisdictions, if the law of the seat encompassed the right to a physical hearing as a due process requirement, this may lead to a domestic court refusing recognition and enforcement of the award.

2. Article V(1)(d) of the New York Convention: If a Right to a Physical Hearing Existed at the Seat, Would Its Violation Amount Per Se to a Ground for Refusal?

Art. V(1)(d) reads as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such

100. HOSKING, LAHLOU and ENGHOLM CARDOSO, "National Report U.S.A." in *Does a Right to a Physical Hearing Exist?*, p. 16 f.
101. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 17.
102. EL SAWAH and HUSSEIN, "National Report Egypt" in *Does a Right to a Physical Hearing Exist?*, p. 21.

> agreement, was not in accordance with the law of the country where the arbitration took place; […]".

In this regard, the survey results evidenced a variety of nuances as to whether the violation of a procedural rule of the law of the seat (including a breach of the right to a physical hearing, if it existed) would amount *per se* to a ground for refusal.

First, it should be noted that in Croatia, due to the different wording of the provision incorporating Art. V(1)(d) into Croatian law, irregularities in the arbitration procedure are assessed based on the Croatian *lex arbitri*, rather than in accordance with the law of the place where the arbitration was seated.[103]

Second, in some jurisdictions the violation of a procedural rule of the law of the seat would lead domestic courts to refuse recognition and enforcement, without any additional showing. Notably, these include important jurisdictions such as England and Wales and also Nigeria.[104]

In most surveyed jurisdictions, however, the violation of a procedural rule of the seat alone would not amount to a ground for refusal, as an additional showing would be required, e.g., that such violation caused actual prejudice, that it had a material impact on the outcome of the case, or in any case that it was not a minor derogation from the applicable rules of procedure:

> "In addition, according to leading Egyptian scholars commenting on Article V(1)(d), a State court should deny recognition or enforcement only in case of a significant material breach of the parties' agreement or of the applicable law that amounts to a violation of the rights of defense".[105]

> "According to Italian scholarship, in order to refuse recognition and enforcement of the award, the violation of the *lex arbitri* must result in an actual prejudice of the party opposing the recognition".[106]

> "With respect to a defense premised on Article V(1)(d), […] mere lack of compliance with the procedural rules is not sufficient, of itself, to justify non-

103. BOŽIĆ, "National Report Croatia" in *Does a Right to a Physical Hearing Exist in International Arbitration?*, p. 14 f.
104. WELSH and SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*, p. 13 f.; Harry O. UKAEJIOFOR, "National Report Nigeria" in *Does a Right to a Physical Hearing Exist?*, p. 11.
105. EL SAWAH and HUSSEIN, "National Report Egypt" in *Does a Right to a Physical Hearing Exist?*, p. 22.
106. ROJAS ELGUETA and MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*, p. 20.

enforcement. Rather, U.S. courts require the party resisting enforcement to show that non-compliance caused it substantial prejudice".[107]

IV. Concluding Comments

The foregoing analysis of the survey permits drawing some big picture conclusions on the questions posed at the outset of the project.

Perhaps unsurprisingly, no jurisdiction expressly recognizes a right to a physical hearing in international arbitration, and only a handful recognize such a right by inference and, even then, it is typically circumscribed. In most jurisdictions, party autonomy will be respected to allow parties to agree to a physical hearing. But in several States, tribunals will be allowed to override such an agreement if it undermines the integrity of the arbitral process, causes unfairness, or otherwise interferes with due process protections.

As to an award being set aside in the face of an arbitral tribunal's decision to proceed with a remote, rather than physical, hearing, the risk of this outcome is very low. There is no reported case in which an award has been vacated solely on the basis of a hearing being held remotely, nor is there any reported decision of an arbitrator being disqualified for such conduct. The case law suggests that a successful challenge to an award would require some "plus" factor that transforms the remote hearing into something truly egregious, such that a party was unable to present its case or was otherwise subjected to unequal treatment. In this respect, cases to date show that reviewing courts give little weight to the sort of logistical challenges that may characterize remote hearings. Drawing on precedents from the litigation context and citing to the exigencies of the Covid-19 pandemic, courts have rejected arguments premised on such issues as technological imperfections, time zone differences, possibilities for abusive behavior, or arguments based on the need to "eyeball" a witness.

Finally, and as noted in the Introduction, the legal issues examined are undoubtedly still evolving. Some of the conceptual and practical questions identified in the survey are the subject of further discussion in the essays contained in the present Volume. Other issues associated with remote hearings – e.g., court assistance in aid of remote hearings, the treatment of "hybrid" hearings, and equal access to technology – are likely only to be resolved as our experience with remote hearings deepens and the volume of influential case law and commentary grows. In this respect, the brave new world of remote hearings will only be truly tested in a post-pandemic world in which arbitration users have a real choice between physical and non-physical hearings. This project hopefully will go some way towards contributing to that important debate.

107. HOSKING, LAHLOU and ENGHOLM CARDOSO, "National Report U.S.A." in *Does a Right to a Physical Hearing Exist?*, p. 18.

PART ONE

INTERNATIONAL LAW PERSPECTIVES ON REMOTE HEARINGS

Access to Justice and the Right to a Hearing in Arbitration

Leonardo V.P. de Oliveira[*]

I. Introduction

The right to a fair trial is a fundamental right that has been given constitutional character in different jurisdictions.[1] It guarantees that parties in an adjudicative process will have the right to be heard or the right to present a defence. Such right can be materialized by presenting written arguments in the form of documents or by verbally arguing your case. For the latter option, the moment in which the parties have the right to be heard will be in a hearing. Thus, the hearing is an event that assures the parties their right to be heard. Consequently, having the right to be heard secures fairness in adjudicative processes.

In arbitration, although the right to a hearing might be waived,[2] the hearing is considered a cornerstone of the arbitral process.[3] It is when parties clarify matters related to written submissions by presenting their case and, also, when parties have the opportunity to cross-examine witness. It is at the hearing, and not only the evidentiary hearing, where parties can make oral submissions to discuss matters related to the arbitral procedure.

Access to a court or a dispute mechanism is an essential part of access to justice. In addition to opting for physical or virtual access, the procedure established to settle the quarrel must guarantee procedural justice to the parties. The right to be heard is paramount to guaranteeing procedural justice. Thus, access to justice requires access – the so-called day in court – and a process employed to solve the dispute, which will be substantiated by procedural justice. It brings the fairness to the dispute that is necessary to establish that justice has been properly served. However, is it essential for the arbitral procedure to provide for a hearing, in the absence of which there would be no

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1. *See* for instance: Art. 69(3) and (4) of the Constitution of Dominican Republic; Art. 103 of the German Constitution; Art. 5 LV of the Brazilian Constitution; Art. 120 of the Moroccan Constitution; and Art. 36 of the Turkish Constitution.
2. *See* section III below.
3. Gary B. BORN, *International Commercial Arbitration*, 2nd edn. (Kluwer Law International 2014) p. 2264 ("In many respects, the oral hearing is the centre-piece of the arbitral process and will have enormous importance in the parties' respective presentation of their cases").

access to justice? And if there is a remote hearing, can access to justice be guaranteed? This essay answers these questions by assessing the connection between hearings and access to justice in arbitration.

The research will first explain the connection between access to justice and arbitration. It will establish that access to justice means the possibility of accessing a form of adjudication, be it physical or virtual, where procedural justice is guaranteed. This will include explaining what parameters for access to justice must be secured in arbitration. From that perspective, the function of a hearing in arbitration will be examined to finally assess if a right to a hearing safeguards access to justice in arbitration. In the end, the conclusion will be that depending on the context of the arbitration, having a physical hearing, a remote hearing or no hearing at all does not necessarily limit the parties' access to justice. If the conduct employed during the hearing, or the fact of not having a hearing, removes the parties' right to be heard, access to justice may be curtailed.

II. Access to Justice and Arbitration[4]

Access to justice is not a new theme in legal theory and practice; it has been a topic of extensive academic and policy debate.[5] The study of access to justice in arbitration, on

4. This section presents a summary of the framework developed in Leonardo V.P. DE OLIVEIRA, "To What Degree Should Access to Justice Be Secured in Arbitration?" in Leonardo V.P. DE OLIVEIRA and Sara HOURANI, eds., *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International 2020) p. 7.
5. For academic work *see* Mauro CAPPELLETTI and Bryant GARTH, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", 27 Buff. L. Rev. (1978) p. 181; Deborah L. RHODE, "Whatever Happened to Access to Justice", 42 Loy. L.A. L. Rev. (2009) p. 869; Hazel GENN, "What is Civil Justice For? Reform, ADR, and Access to Justice", 24 Yale J.L. & Human. (2012) p. 397; Catherine R. ALBISTON and Rebecca L. SANDFUR, "Expanding the Empirical Study of Access to Justice", Wis. L. Rev. (2013) p. 101; Tom CORNFORD, "The Meaning of Access to Justice" in Ellie PALMER, Tom CORNFORD, Audrey GUINCHARD and Yseult MARIQUE, eds., *Access to Justice Beyond the Policies and Politics of Austerity* (Hart 2016); and Jill I. GROSS, "Arbitration Archetypes for Enhancing Access to Justice", 88 Fordham L. Rev. (2020) p. 2319. For policy debate *see* Harry WOLF, *Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996); Vivek MARU, "Access to Justice and Legal Empowerment: A Review of World Bank Practice", Justice&Development Working Paper Series 9/2009 (The World Bank 2009) available at <https://openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWP0Acce10Box342050B01PUBLIC1.pdf?sequence=1&isAllowed=y> (last accessed 21 December 2021); Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. GAOR 70th Sess., Goal 16, U.N.

the contrary, has recently been in vogue either by looking at specific types of arbitration[6] or through an overview of the topic.[7] To understand how access to justice can be secured in arbitration, the following subsections will focus on the overview of access to justice in arbitration by providing the background surrounding the meaning of access to justice before contextualizing the role of access to justice in arbitration.

A. Access to Justice

Historically, features of access to justice, such as the right of access to court, can be found in early legal instruments, going all the way back to the Magna Carta.[8] Other features, such as the right of an individual to effectively challenge a criminal charge in court, were secured in the Sixth Amendment of the U.S. Constitution in 1791.[9] By the twentieth century, however, both the place of justice within legal systems and its substantive requirements have shifted. In England, for instance, guarantees of legal representation to those unable to afford it were provided for in four pieces of legislation: (i) the Poor Prisoners' Defence Act 1903, (ii) the Poor Prisoners' Defence

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Doc. A/RES/70/1 (21 October 2021) available at <https://sdgs.un.org/goals/goal16> (last accessed 21 December 2021) ("Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"); the Office for Access to Justice in the U.S. Department of Justice was established in 2010 with the aim to "help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status", *see* <https://www.justice.gov/archives/atj> (last accessed 21 December 2021).

6. *See* Jonnette WATSON HAMILTON**,** "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?", 51 McGill L.J. (2006) p. 693; Francesco FRANCIONI, "Access to Justice, Denial of Justice and International Investment Law", 20 Eur. J. Int'l L. 3 (2009) p. 729; Mark D. GOUGH, "Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?" in David LEWIN and Paul GOLLAN, eds., *Managing and Resolving Workplace Conflict* (Emerald Group Publishing Limited 2016) and Omri BEN-SHAHAR, "The Paradox of Access Justice, and Its Application to Mandatory Arbitration", 83 U. Chi. L. Rev. (2016) p. 1755.
7. *See* Leonardo V.P. DE OLIVEIRA and Sara HOURANI, eds., *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International 2020).
8. Clause 40 of the Magna Carta stated that: "To no one will we sell, to no one deny or delay right or justice".
9. The full wording of the amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

Act 1930, (iii) the Summary Jurisdiction (Appeals) Act 1933, and (iv) the Legal Aid and Advice Act 1949. This last Act created a system of legal aid in civil courts and civil proceedings in magistrates' courts, which the prior three Acts had not done as they applied solely to criminal proceedings. From 1948 to 1981, several international instruments regulating human rights were enacted, all of them providing for the right of access to court.[10] These instruments presented a modern view that such access requires a fair trial, and that justice is served through the substantive outcome of the disputes, but also through the procedural path leading to the outcome. As such, fairness required an independent and impartial tribunal, a public hearing, the right to present your case, the right to be heard and the right to be assisted by legal counsel. This led the way to more fully defining what, exactly, access to justice as a right required and under what circumstances.

The first modern assessment of access to justice was made by The Florence Access to Justice Project, led by Mauro Cappelletti.[11] The project started in 1971 and was concluded in 1979,[12] with the publication of a book comprised of four volumes exposing the results of the project.[13] This project provided a world survey about access to justice, with reports from twenty-three jurisdictions.[14] When defining access to justice, Cappelletti argued that it "serve[d] to focus two basic purposes of the legal system",[15] being equal access to all and "results that are individually and socially just".[16] Proper access to justice – that is, an equal and just access – emerged from a

10. *See* Universal Declaration of Human Rights, G.A. Res. 217A(III), Arts. 8-9, U.N. GAOR, 3rd Sess., 1st plen. Mtg., U.N. Doc. A/810 (12 December 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 November 1950, Art. 6, 213 U.N.T.S. 221 (*entered into force* 3 September 1953) ("ECHR"); American Convention on Human Rights, *opened for signature* 22 November 1969, 1144 U.N.T.S. 123, Art. 8(1) (*entered into force* 18 July 1978); African Charter on Human and Peoples' Rights, *opened for signature* 27 June 1981, 1520 U.N.T.S. 217 (*entered into force* 21 October 1986).
11. M. CAPPELLETTI and B. GARTH, "Access to Justice", fn. 5 above.
12. Bruno MAKOWIECKY SALLES and Paulo MÁRCIO CRUZ, "The Florence Access-To-Justice Project: Descriptive Aspects", 22 Rev. Der. (2020) p. 178 at p. 179.
13. The four volumes were published by Sijthoff and Giuffrè in 1978-1979. Their titles and editors are: Volume I. *Access to Justice: A World Survey* (edited by Cappelletti and Garth); Volume II. *Access to Justice: Studies of Promising Institutions* (edited by Cappelletti and John Weisner); Volume III. *Access to Justice: Emerging Perspectives and Issues* (edited by Cappelletti and Garth); and Volume IV. *Patterns in Conflict Management: Essays in the Ethnography of Law. Access to Justice in an Anthropological Perspective* (edited by Klaus-Friedrich Koch).
14. M. CAPPELLETTI and B. GARTH, "Access to Justice", fn. 5 above, p. 182.
15. *Ibid*.
16. *Ibid*.

new class of "social rights"[17] which "presupposes mechanisms for their effective protection".[18] These mechanisms are, however, not necessarily clear or always just.[19] Therefore, Cappelletti looked at barriers to access to justice gathered from the collected data and identified common obstacles. These included "costs of litigation", "relative party capability" and "the special problems of diffuse interests".[20] To overcome these barriers, he proposed three major steps, called waves of access to justice. The first wave was to foment access to justice for the poor.[21] If society was to secure equality of arms, access to legal remedies must be affordable to all. With legal aid, everyone, in theory, could have their day in court. However, this does not suffice. It is also necessary to have an adequate representation so a party could obtain a fair result to their claims. The second wave looked into improving access to justice in relation to the "problem of representing group and collective – diffuse – interests other than those of the poor".[22] This was to be done through procedures encompassing several parties, such as class actions, in which collective rights are examined at the same time instead of each individual having to start a claim on its own. The third wave, named the access to justice approach,[23] analyses the implementation of the first two waves, but goes further. For the two waves to be effective, new legal procedures are required to facilitate disputes, and even prevent them from materializing. The proposals were to overhaul litigation with more specialized courts and alternative dispute resolution (ADR) mechanisms, such as arbitration.[24]

Cappelletti's study opened the door to understanding access to justice beyond the simple right of access to a court. Access to justice embodies proper and fruitful access

17. Such rights were reflections of the acceptance and positive consolidation of the international human rights instruments enacted before the production of the report.
18. Mauro CAPPELLETTI, "Access to Justice: Comparative General Report", 40 RabelsZ (1976) p. 669 at p. 672.
19. *Ibid*., p. 673. The meaning of effectiveness in this context is to provide a "complete equality of arms", which is utopian.
20. M. CAPPELLETTI and B. GARTH, "Access to Justice", fn. 5 above, pp. 186-196. In explaining relative party capability, at pp. 190-193, Cappelletti and Garth explain that some parties have strategic advantages over others. Such advantages are described in three tiers: "financial resources", "competence to recognize and pursue a claim or defense" and "'one-shot' litigants v. 'repeat-player' litigants". At p. 194, Cappelletti and Garth state that "'Diffuse' interests are collective or fragmented interests such as those in clean air or consumer protection. The basic problem they present-the reason for their diffuseness-is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action".
21. *Ibid*., p. 197.
22. *Ibid*., p. 209.
23. *Ibid*., p. 223.
24. *Ibid*., p. 232.

to a body with a procedure that ensures certain fundamental conditions for justice. Effective access to justice requires a mechanism to provide justice in a fair manner. Other guarantees, such as due process, the right to present one's case, and to defend oneself are paramount to assure access to justice and are, thus, its implicit components.

The development of the right of access to justice consolidated the view that such a right is fundamental to promote democracy and fairness. A society cannot be just if its members are not able to seek remedies for the violation of their rights. By recognizing justice as an entitlement owed to everyone, access to justice became an essential element of the rule of law.[25] In explaining the requirements deriving from the rule of law, Lord Bingham argued that access to a procedure was the sixth principle of the rule of law because "means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve".[26]

Consequently, it can be asserted that access to justice has two main areas of concern: first, an access to some form of procedure for dispute resolution; and, second, conditions that such procedure will, as far as possible, produce a just outcome. Starting with the first area of concern, access to justice secures the parties' access to a dispute resolution forum. This means that parties must have access to courts, whether physically or digitally. The adjudication process should be available to all. The second area of concern deals with procedural conditions to assure a just outcome. Here access to justice involves a number of basic rights which are essential for justice to be achieved. There is, initially, a requirement of a legal system conforming to the rule of law. As ramification of the rule of law, the procedure must deliver guarantees of natural justice and the right to a fair trial. In that sense, due process must be in place by giving the parties the opportunity to have participation rights such as the right to be

25. H. GENN, "What is Civil Justice For?", fn. 5 above, p. 411. The assessment of access to justice and the rule of law is also employed by the U.N. in United Nations and the Rule of Law, "Access to Justice", available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last accessed 7 January 2022).

26. Tom BINGHAM, *The Rule of Law* (Penguin Books 2011) p. 85. All the other principles of the rule of law described by Bingham are: "The law must be accessible and so far intelligible, clear and predictable; questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion; the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purposes for which the powers were conferred, without exceeding the limits of such powers unreasonably; the law must afford adequate protection of fundamental human rights; the state must provide a way of resolving disputes which the parties cannot themselves resolve; the adjudicative procedures provided by the state should be fair and the rule of law requires compliance by the state with its obligations in international law as well as national law".

heard, the right to call witnesses, the right to challenge any charges against oneself, the right to have an impartial adjudicator, the ability to understand the process (transparency) and, in a timely manner, the right to have a decision for their dispute. Access to justice involves the support of access to courts, financial care for legal representation, the rule of law and due process. A legal system providing these things through its adjudication processes, therefore, would meet the requirements of access to justice for those making use of this avenue of dispute resolution.

B. Arbitration and Access to Justice

Access to justice and arbitration are not incompatible. Access to justice is not just being given the opportunity to have a dispute decided by a third party, be that an adjudicator belonging to a judiciary or an arbitrator. It is having the "day in court" together with guarantees that the procedure to be followed will assure procedural justice and, from that, a just outcome. As arbitration is a procedure used to obtain justice, when the discussion about access to justice is taken within arbitration, procedural justice becomes a foundation to evaluate the degree to which access to justice can be guaranteed in arbitration. Consequently, the assessment of how access to justice is applicable in arbitration requires an understanding of how it relates to different theories regarding procedural justice.[27] Therefore, in this essay, the examination of access to justice in arbitration will concentrate on how two theories about procedural justice assist in the understanding of access to justice in arbitration. This will be done through Rawls' perspective of pure procedural justice[28] and Lin and Tyler's relational model.[29]

Under Rawls' perspective of pure procedural justice, the procedure will make the result just, as long as the parties have agreed and have followed it. Rawls excludes the independent standard for the outcome in this analysis; "instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that such procedure has been properly followed".[30] This can be seen, for example, with gambling, where several individuals will make a bet and the distribution of money, when the game ends, is fair, or at least not unfair, because the rules of the game were followed and the established procedure was carried out rigorously.[31] In other words, "[i]t is as if the procedure by itself makes the outcome just".[32] This perspective works

27. This approach is presented in L.V.P. DE OLIVEIRA, "To What Degree Should Access to Justice Be Secured?", fn. 4 above.
28. John RAWLS, *Theory of Justice* (Harvard University Press 1971) pp. 85-86.
29. Tom R. TYLER and E. Allan LIND, "Relational Model of Authority in Groups" in Mark P. ZANNA, ed., *Advances in Experimental Social Psychology*, XXV (Academic Press 1992).
30. J. RAWLS, *Theory of Justice,* fn. 28 above, p. 86.
31. *Ibid*.
32. *Ibid*.

well in the delocalization of international arbitration.[33] In arbitration, parties might have an option to choose the procedure to be adopted, but this choice is not unlimited; there are laws guaranteeing features of access to justice even when the procedure is private.[34] Moreover, if parties have chosen an arbitral institution, the rules of such institutions will assure features of access to justice such as the right to be heard and an independent and impartial tribunal.[35]

If the parties have freely agreed on the method for selecting the procedure they will follow, and such method is considered fair, the outcome should be fair because the procedure would be fair. This could be seen in traditional commercial arbitration. If parties are financially able to be represented by a counsel who clarifies the implications of arbitrating disputes, parties will be aware of the ramifications generated by removing the exclusive jurisdiction of courts. In doing so, if parties follow a procedure they have established and accept that in this procedure access to justice is not secured in the same way as it is in court litigation, the result is seen to be fair. This will not necessarily generate unfairness in how justice is being delivered. On the contrary, it will respect the parties' intention and freedom of contract which is translated into the method that the parties have contracted to solve a dispute. It will be imperative that minimum principles of access to justice be present, such as having an impartial adjudicator and the parties being able to present their case, but at the same time, parties can agree on how strict the application of such principles will be. The main aspect of a fair process here is that the parties decided on the procedure to be adopted together.

The relational model works with the idea of group values. Lind and Tyler,[36] when explaining the concept of the group-value model, asserted that a procedure should be

33. For an understanding of delocalization in arbitration *see* Jan PAULSSON, "Delocalisation of International Commercial Arbitration: When and Why It Matters", 32 Int'l & Comp. L.Q. 1 (1983) p. 53, Renata BRAZIL-DAVID, "Harmonization and Delocalization of International Commercial Arbitration", 28 J. Int'l Arb. 5 (2011) p. 445 and Zaherah SAGHIR and Chrispas NYOMBI, "Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application", 8 Int'l Company & Comm. L. Rev. (2016) p. 269.
34. For instance, Sect. 33(1) of the 1996 English Arbitration Act that imposes the tribunal to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"; Art. 594(2) of the Austrian Code of Civil Procedure which states that "parties shall be treated fairly. Each party shall have the right to be heard"; and Art. 18 of the Chilean International Arbitration Act (Ley 19971/2004) which guarantees that parties should be treated equally and that "each one of them should be given full opportunity to assert their rights".
35. *See*, among others, SCC Arbitration Rules 2017, Arts. 18 and 23(2), and SIAC Rules 2016, Rules 14 and 24.1.
36. E. Allan LIND and Tom R. TYLER, *The Social Psychology of Procedural Justice* (Springer Science+Business Media 1988).

created on the basis of the values adopted by a group.[37] As the procedure is based on the values of the group, the procedure will be accepted as fair, even though the parties in the procedure will not take an active role in the decision-making. Thus, an individual would be more concerned about the procedure in itself as opposed to the outcome obtained by the procedure.[38] The relational model therefore suggests that as the procedure will have its sources in the group's values, the group transfers the power to an authority to make decisions. The procedure in itself will give a structure for the authority to decide, thus, the authority to decide moves from the group to one individual.[39] This signifies that fairness in the procedure is linked by perceptions between the authority and the parties subject to the authority's decision. This relation is based on features of the procedure such as "judgments of neutrality, trust and dignity".[40] The focus is on how the participants in the procedure perceive the process used to achieve justice. If the participants believe that the procedure was just, they will recognize that the outcome is fair. This view would work better in cases when arbitration is imposed on the parties; very common when there is inequality of bargaining power between the parties. All parties in such conflicts might not be familiar with arbitration and for them to trust the system, a strong guarantee of procedural justice should be made. Therefore, the fairness in the procedure should be based on the relationship between the authority and the parties. In arbitration, parties will contribute to the process used to solve the dispute. Nonetheless, if there is no equal footing between the parties, they need to trust that the system being used by the individual who was given authority will mitigate this. If parties can participate in the procedure by presenting their case, having an impartial tribunal, being heard and treated cordially, the likelihood will be that they will see the process as fair. Inequality of arms does not necessarily mean that if the parties submit a dispute to arbitration there is no access to justice. Yet, to ensure that access to justice is provided in such cases, access to justice cannot be subjected to much procedural discretion – it will need safeguards in place like those that seek to achieve access to justice in court. When arbitration is imposed, the weaker party must be able to understand what arbitration is and how access to justice is being provided in the arbitral process.

Both theories are employed to explain access to justice in arbitration because they clarify procedural justice through different perspectives. Pure procedural justice is about the outcome being fair as long as the procedure has been followed. Therefore, when parties freely agree to have their dispute arbitrated, they will follow the procedure that they elect to guide the dispute and, as a result, they will accept the outcome as fair. The relational model, in contrast, looks at how people perceive the procedure as opposed to simply following it. When parties transfer the power to an authority in order to settle their dispute, trusting the authority is essential. As a

37. *Ibid*., p. 231.
38. *Ibid*., p. 1.
39. T.R. TYLER and E.A. LIND, "Relational Model", fn. 29 above, p. 117.
40. *Ibid.*, p. 143.

consequence, if arbitration is imposed, for parties to perceive the process as fair, they will need to trust the authority deciding their dispute.

Access to justice in arbitration can have a flexible approach depending on how parties decide to have their disputes submitted to arbitration. On the one hand, if arbitration is imposed, guarantees related to access to justice should not be subject to much flexibility. On the other hand, if parties freely agree on having their dispute submitted to arbitration and they understand the ramification of ousting the exclusive jurisdiction of courts, they might waive some "dogmas" related to access to justice as long as they agree that the procedure to be followed preserves the essential components of access to justice.

III. The Hearing and Arbitration

The possibility of having a hearing in any type of dispute resolution mechanism derives from the right to be heard, that is, in litigation, parties have the right to present their case. The right to be heard is one of the requirements of due process. According to Kurkela and Turunen, in relation to litigation in court, due process "refers to the idea that no one should be deprived of his rights without due process of law"[41] and it "is seen as a set of criteria that protect a private person in relation to the State and authorities".[42] In arbitration, the same view is not shared because arbitration originates from the agreement of the parties; therefore, the influence of the State and authorities does not occur in a similar manner as in court litigation.[43] However, because the arbitral award cannot be enforced by an arbitral tribunal, the State entrusts arbitral tribunals to settle disputes but it retains the power to oversee the arbitral decisions before authorizing their enforcement. In doing so, the State imposes certain procedural standards that must be followed in arbitration for arbitral awards to be valid.[44] The standards, similar to those applied in court, are due process requirements such as "procedural fairness, opportunity to be heard, and equal treatment as well as access to justice".[45]

41. Matti S. KURKELA and Santtu TURUNEN, *Due Process in International Commercial Arbitration*, 2nd edn. (Oxford University Press 2010) p. 1.
42. *Ibid*.
43. *Ibid*.
44 *Ibid.,* p. 2.
45. *Ibid*. Although Kurkela and Turunen see access to justice as part of due process, this view is not shared in this essay. Due process, according to Kurkela and Turunen, is a procedural standard, which in this essay is presented as a feature of procedural justice. Thus, as procedural justice is part of access to justice, due process is part of access to justice and not the other way around.

The right to be heard, consequently, is a due process requirement and its breach is also a reason for refusing enforcement of an arbitral award.[46] It can manifest itself in two different ways. The first is through written submissions presented by the parties. When providing the statement of the claimant, statement of the respondent, skeleton arguments, witness statements etc., the parties are exercising their right to be heard by presenting their case, including witness testimony, and arguing their points in writing. The second method is an oral presentation of arguments and the production of evidence through witnesses' verbal statements. For that to materialize, a hearing must be held.

The right to have a hearing is not written in stone. For instance, in court litigation, the European Court of Human Rights ("ECtHR") already established that the obligation to have a hearing is not absolute. In *Jussila v. Finland*,[47] the ECtHR understood that in a proceeding related to a dispute over tax surcharges, where there was no opportunity for an oral hearing, there was no violation of the right to an oral hearing enshrined in Art. 6 of the ECtHR.[48] The view was that "[t]here may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials".[49] In *Döry v. Sweden*[50] the ECtHR stated that: "A hearing may not be necessary due to the exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties' written observations".[51]

It is not out of the ordinary to find in the arbitration literature a reference to documents-only arbitration,[52] nonetheless, the view is that in practice, it is not a

46. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* 10 June 1958, 330 U.N.T.S. 3, Art. V(1)(b) (*entered into force* 7 June 1959) and UNCITRAL Model Law on International Commercial Arbitration, Art. 34 (2)(a)(iii).
47. *Jussila v. Finland*, No. 73053/01, ECHR 2006-XIV.
48. Art. 6(1) of the ECHR says: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".
49. *Jussila v. Finland*, No. 73053/01, para. 41, ECHR 2006-XIV.
50. *Döry v. Sweden*, No. 28394/95, 12 November 2002.
51. *Ibid*., para. 37.
52. *See* Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KRÖLL, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) p. 535; G.B. BORN, *International Commercial Arbitration*, fn. 3 above, pp. 2264-2267; and Ilias

common choice.[53] Moreover, the rules of leading arbitral institutions involved in commercial arbitration tend to provide for the possibility of documents-only arbitration if the parties agree to it.[54] However, the same rules also establish that hearings can be held at the request of one of the parties.[55] Precisely, there are two situations with different requirements. The first scenario is the arbitration being settled without holding a hearing and solely through the analysis of documents. This demands the agreement of both parties. The second is holding a hearing on the request of one of the disputing parties.

The purpose of a hearing in arbitration is the same as in court litigation, that is, to guarantee the parties' right to be heard. Different perspectives consolidate this idea, for instance: Park stated that "[i]n most commercial arbitrations the purpose of the hearing will be to find out what the parties' shared expectations were at the time they entered the contract";[56] Escobar asserts that "[a] full hearing on the merits has essentially two objectives: to hear live testimony from witness and experts, and to hear the oral submissions of the parties";[57] and last, Born approaches the hearing as a necessary part of adjudication, and declares that "the opportunity to present its case, in person, and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected".[58] Such outlook is not

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BANTEKAS, *An Introduction to International Arbitration* (Cambridge University Press 2015) p. 180.

53. *See* Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER, *Redfern & Hunter: Law and Practice of International Commercial Arbitration*, 6th edn. (Oxford University Press 2015) p. 400: "It has been said that the only thing wrong with 'documents only' arbitrations is that there are not enough of them. […] However, in mainstream international arbitration, it is unusual for the arbitral proceedings to be concluded without at least a brief hearing at which the representatives of the parties have an opportunity to make oral submissions to the arbitral tribunal, and at which the arbitral tribunal itself is able to ask for clarification of matters contained in the written submissions and in the written evidence of witnesses". Similar opinion can be found in Margareth MOSES, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) p. 160.
54. *See* ICC Arbitration Rules 2021, Appendix VI – Expedited Procedure Rules, Art. 3(5); LCIA Arbitration Rules 2020, Arts. 14(6)(v) and 19(1); SCC Arbitration Rules 2017, Art. 32; SIAC Rules 2016, Rule 24(1); and HKIAC Arbitration Rules 2018, Art. 22(4).
55. *See* ICC Arbitration Rules 2021, Art. 26(1); LCIA Arbitration Rules 2020, Art. 19(1); SCC Arbitration Rules 2017, Art. 32; SIAC Rules 2016, Rule 24(1); and HKIAC Arbitration Rules 2018, Art. 22(4).
56. William W. PARK, *Arbitration of International Business Disputes: Studies in Law and Practice*, 2nd edn. (Oxford University Press 2012) p. 522.
57. Alejandro A. ESCOBAR, "The Relative Merits of Oral Argument and Post-Hearing Briefs" in Albert VAN DEN BERG, ed., *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15 (Kluwer Law International 2011) p. 221.
58. G.B. BORN, *International Commercial Arbitration*, fn. 3 above, p. 2266.

unconditional and the fact that parties are able to waive their right to have a hearing indicates that such right is not fundamental.[59]

Case law in different jurisdictions supports the view that a right to a hearing in arbitration is not unrestricted. In the U.S.A., a State court in California indicated that rules of evidence, which might require a hearing, do not necessarily apply to arbitration. In *Schlessinger v. Rosenfeld Meyer & Susman*,[60] the California Court of Appeal, Second District, analysing a dispute through the Californian Arbitration Act, stated that: "The arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required".[61] Other cases emphasized that the rules of evidence applied in court do not necessarily apply to arbitration.[62] In *Springs Cotton Mills v. Buster Boy Suit Co.*[63] it was clarified that: "The arbitrators are not hampered in the discharge of their duty by rules of evidence, or the body of case and statutory law governing the prosecution of actions".

Not in the same manner as the U.S.A., in Switzerland, case law has also affirmed that the right to be heard is not absolute. In an arbitration arising out of a services contract for the operation of a warehouse and logistics, a party unsuccessfully challenged the award based on a violation of the right to be heard before the Swiss Federal Tribunal.[64] The key question did not relate to the right to a hearing but the fact that the award was not reasoned and did not address all the questions raised by the

59. David J.A. CAIRNS, "Oral Advocacy and Time Control in International Arbitration" in Albert VAN DEN BERG, ed., *Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15 (Kluwer Law International 2011) p. 189. Cairns expressed: "Indeed, the very fact that an oral hearing can be waived by the parties suggests an oral hearing is not a fundamental right but merely an optional element inside a larger process. If the right to be heard does not necessarily require an oral hearing, it follows that nor is any particular element of an oral hearing ipso facto indispensable to the right to be heard".
60. 40 Cal. App. 4th 1096.
61. This passage was also endorsed in *Heimlich v. Shivji*, 7 Cal. 5th 350.
62. In *Henneberry v. ING Capital Advisors, LLC.*, 37 A.D. 3d 353, the court said: "An arbitrator is not bound by principles of substantive law or by rules of evidence", but "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement". In *Silverman v. Benmor Coats, Inc.*, 61 N.Y. 2d 299, the court stated: "Moreover, absent provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or by rules of evidence […]. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties".
63. 275 A.D. 196. *See also Slaney v. The Intern. Amateur Athletic Federation*, 244 F. 3d 580.
64. Bundesgericht [BGer] [Federal Court] 7 February 2017, 4A_478/2016 (Switzerland).

parties.[65] One of the arguments was that one of the findings made by the arbitrator had not been shared with one of the parties and as a result, the party was not able to comment on it.[66] In response to this point the Swiss Federal Tribunal addressed the question of the right to a hearing as follows:

> "The principle of the right to be heard does not give the parties a right of a special hearing regarding the legal analysis of the facts introduced by the parties, except where the Court intends to base its decision on a legal rule to which none of the parties had referred and the significance of which could not reasonably have been anticipated by the parties.
> In the arbitration at hand, the question of the Appellant's liability under the Parties' contractual relations was a disputed point. According to the Award, both the Respondent and the Appellant made submissions to the Arbitral Tribunal regarding their respective positions on this. The Respondent disputed that it had the capacity to be sued. It argued that the Parties' agreement was that Defendant 2 was solely liable for payment of the invoices, and, furthermore, that the Appellant had not furnished any guarantee for payment of Defendant 2's obligations to the Respondent ('[...] Respondent 1 has never issued any guarantee for Respondent 2's payment obligations towards the Claimant.'). If the sole Arbitrator did not adopt this view, but rather, after a detailed analysis, reached the conclusion with respect to the head of claim 'Unpaid Invoices' that the Appellant had implicitly guaranteed Defendant 2's payments (within the meaning of Art. 111 OR10), this does not constitute surprise in terms of the Arbitrator's application of the law. The grievance of a violation of the Appellant's right to be heard in this respect is thus unfounded".

65. *Ibid.* In regard to this point, the Swiss Federal Tribunal said: "By contrast and under well-established case law, the right to be heard in international arbitration does not include the right to a reasoned arbitral award. However, there is a minimal duty on the part of arbitrators to review and deal with the issues that are important to their decision. That duty is violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party. However, this does not mean that the arbitral tribunal is required to address each and every submission of the parties" (Bundesgericht [BGer] [Federal Court] 26 April 2016, 142 BGE III 360, para. 4.1.1; Bundesgericht [BGer] [Federal Court] 22 March 2007, 133 BGE III 235, para. 5.2 with references).
66. *Ibid*. The Swiss Federal Tribunal said: "Furthermore, the Appellant regards it as a violation of its right to be heard that the Arbitrator found that there had been 'an assumption of a guarantee by the Appellant for [Defendant 2]'s contractual liability to make payment', but did not first 'alert [the Appellant] to this legal assessment and did not first afford it an opportunity to comment thereon'".

In another challenge against an arbitral award, the Swiss Federal Tribunal was of the view that the arbitral tribunal's refusal to hear a witness, as it deemed the testimony unnecessary, did not violate the right to be heard.[67] The Swiss Federal Tribunal considered that the right to hear this witness was not absolute: "In arbitral proceedings the right to be heard is not unlimited. Thus the arbitral tribunal is not barred from finding the facts only on the basis of the evidence it considers as pertinent and relevant".[68]

In Germany, the Higher Regional Court in Naumburg affirmed that if a party does not challenge the decision made by an arbitrator to decide the dispute solely based on the documents, it cannot do so later under the auspices of an offence to the right to be heard.[69] The arbitrator had decided that there was no need to hold a hearing and established a deadline for the respondent to make written submissions, which the respondent failed to do. When challenging the award, the respondent asserted that the lack of a hearing violated the right to be heard. The Court rejected the argument. It asserted that the right to a hearing established in Sect. 128 of the German Code of Civil Procedure does not apply to arbitration in the same manner as it applies to court litigation.[70] Moreover, as the respondent had not challenged the decision made by the arbitrator during the arbitration, it waived the right to do so later in court.[71]

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67. Bundesgericht [BGer] [Federal Court] 23 January 2012, 4A_526/2011 (Switzerland).
68. *Ibid*. The Swiss Federal Tribunal went on to say: "The arbitral tribunal may therefore dispense with hearing evidence when the corresponding submission of evidence concerns an irrelevant fact, when the proof offered is obviously impractical or when the arbitral tribunal has already established its opinion on the basis of the evidence already gathered and may conclude by way of an anticipated assessment of the evidence that it would not change with additional evidence".
69. Oberlandesgericht Naumburg [OLG Naumburg] [Higher Regional Court] 21 February 2002, 10 Sch 8/01 (Germany).
70. Sect. 128 expresses: "Principle of oral argument; proceedings conducted in writing (1) The parties shall submit their arguments regarding the legal dispute to the court of decision orally. (2) The court may give a decision without hearing oral argument provided that the parties have consented thereto; such consent may be revoked only in the event of a material change to the litigation circumstances. The court shall determine, at its earliest convenience, the deadline for written pleadings to be submitted, and shall determine the date of the hearing on which the decision is to be pronounced. A decision given without a hearing for oral argument is inadmissible should more than three (3) months have lapsed since the parties granted their consent. (3) Should nothing but the costs remain to be ruled on, the decision may be given without a hearing for oral argument being held. (4) Unless determined otherwise, decisions of the court that are not judgments may be given without a hearing for oral argument being held".
71. This decision was based on Sect. 1027 of the German Code of Civil Procedure: "Insofar as a provision of the present Book, from which the parties to a dispute may deviate, has not been complied with, or a requirement agreed in the arbitration proceedings has not been met, a party that has failed to object to this irregularity without undue delay, or

Although the right to have a hearing is not invariable, refusing to hold a hearing when one is requested by a party may give rise to a serious violation of due process;[72] "only in exceptional circumstances and for material grounds should the panel refuse to hold a hearing if one is requested by a party".[73] This was the case in Austria where the Supreme Court addressed a challenge to an arbitral award based on the fact that the arbitrator had ignored the defendant's express request to have an oral hearing and proceeded to solely rely on the parties' written submissions to issue an award. The Supreme Court held that the award violated the parties' right to be heard and the award should be set aside.[74] According to that Court, this constituted a violation of Sect. 589 of the Austrian Code of Civil Procedure which reflects the right to be heard.[75]

There is no denying that a hearing in arbitration is relevant and not having it can lead to a violation of due process. The UNCITRAL Model Law on Arbitration, in Art. 24(1), makes it almost compulsory to have a hearing in arbitration if the parties do not agree otherwise.[76] But as the right to a hearing can be waived, how does it relate to the parties' right of access to justice in arbitration? Is the hearing a fundamental feature of access to justice in arbitration? The next section will try to answer both questions.

IV. Access to Justice and the Right to a Hearing in Arbitration

From the parameters prescribed above, access to justice in arbitration can be achieved if there are means for a party to have access to a dispute resolution mechanism (arbitration) and if the method used to solve the dispute (arbitration proceedings)

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within a period set for such objections, may not assert this objection later. This shall not apply where the party was not aware of the irregularity".

72. Simon SLOANE, Daniel HAYWARD and Rebecca MCKEE, "Due Process and Procedural Irregularities: Challenges" in J. William ROWLEY, Emmanuel GAILLARD and Gordon E. KAISER, eds., *The Guide to Challenging and Enforcing Arbitration Awards* (Law and Business Research 2019) p. 59.
73. M.S. KURKELA and S. TURUNEN, *Due Process*, fn. 41 above, p. 157.
74. Oberster Gerichtshof [OGH] [Supreme Court] 30 June 2010, 7 Ob 111/10i (Austria).
75. Sect. 598 states: "Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted in writing. Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party".
76. Art. 24(1) states: "Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party".

assures procedural justice.[77] The hearing is a ramification of the right to be heard, which is an essential element of procedural justice. Without the right to be heard, the procedure used to solve a dispute is unfair, resulting in lack of procedural justice.

The hearing in itself is not considered a cornerstone of the right to be heard. The right to be heard can be guaranteed if a party has the opportunity to present their case, which can be done in writing. Nonetheless, it appears that in commercial and investor-state arbitration, there is an emphasis on the hearing, almost as if it were essential to hold one in the arbitration setting. So, does excluding a hearing restrict the parties' right of access to justice? The answer to this question is not straightforward. On the one hand, a pro forma hearing in which a party cannot present their case will restrict their right of access to justice. Also, having no hearing when a party requests one to produce evidence can limit the party's right of access to justice. On the other hand, if the parties agree not to have a hearing, that does not offend the right of access to justice. Moreover, a documents-only arbitration will not necessarily limit access to justice provided the parties are aware from the beginning that this is the procedure to be employed and as long as the parties can be secured the right to be heard. To assess the connection between access to justice and the right to a hearing, this section will examine three contexts: access to justice in physical hearings, access to justice in remote hearings and access to justice when there is no hearing.

A. Physical Hearings and Access to Justice

As seen above, institutional rules on arbitration provide that the right to a hearing can be waived by parties' agreement. However, the literature on commercial arbitration and also international instruments, such as Art. 24(1) of the UNCITRAL Model Law on Arbitration, treat the hearing as a substantial part of the arbitral procedure. Not having a hearing does not necessarily deprive a party from access to justice, but how the hearing is conducted might provide bases for a claim of absence of access to justice.

If the arbitration is imposed on one party, the arbitral procedure must guarantee a rigid form of procedural justice to guarantee access to justice. If the parties freely decided to submit their dispute to arbitration, it is still necessary to ensure procedural justice but it does not necessarily need to be as strict as when arbitration is imposed. With that in mind, there are some problems in a hearing that can be prejudicial to the parties' access to justice. Let us take an example witness evidence.

If witness testimony is fundamental to a party's case, excluding the right to hear the witness may be a limitation to that party's right to be heard. It is always possible for the witness to present a written statement, but in such scenario, the witness will not be cross-examined, which might limit the parties' right to defend themselves.

The question between having a hearing and guaranteeing access to justice will depend on how the right to be heard is preserved. A hearing that treats the parties

77. *See* section II above.

equally and gives them the opportunity to present their case in a reasonable manner, does not exclude the right to be heard. If the right to be heard is protected, procedural justice will be assured and, as a result, proper access to justice will be secured.

B. Remote Hearings and Access to Justice

The question about remote hearings and access to justice touches two aspects of access to justice: the access to adjudication and procedural justice. If the hearing is remote – that is, it does not occur through the physical presence of the parties and some form of technology is employed for the parties and the tribunal to communicate with each other – it does not automatically create a situation where there is no access to justice. Again, it will depend on how the hearing is conducted. If, through this technology, the parties' right to be heard is somehow diminished, yes, a claim for lack of access to justice can be made. Nonetheless, if the procedure employed secures procedural justice, access to justice can be assured when a hearing is done remotely.

In court proceedings, remote hearings are not novel. For instance, in England, the Civil Procedure Rules provide that witnesses can be heard via a video link,[78] and since the Covid-19 pandemic started, remote hearings have been commonplace.[79] In *Polanski v. Conde Nast Publications Limited*,[80] the House of Lords interpreted the rule about video link for witnesses and authorized Mr. Polanski to be heard via video link. Mr. Polanski had started a libel claim in English courts against the magazine Vanity Fair in

78. Rule 32.3: "The court may allow a witness to give evidence through a video link or by other means".
79. Practice Direction 51Y came to force and it states: "This Practice Direction supplements Part 51 1. This practice direction, made under rule 51.2 of the Civil Procedure Rules (CPR), makes provision in relation to audio or video hearings. It ceases to have effect on the date on which the Coronavirus Act 2020 ceases to have effect in accordance with section 89 of that Act. 2. During the period in which this Direction is in force, where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice. 3. Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings. In such circumstances it will not be necessary to make an order under paragraph 2 and such an order may not be made. 4. Any hearing held in private under paragraph 2 must be recorded, where that is practicable, in a manner directed by the court. Where authorised under s.32 of the Crime and Courts Act 2013 or s.85A of the Courts Act 2003 (as inserted by the Coronavirus Act 2020), the court may direct the hearing to be video recorded, otherwise the hearing must be audio recorded. On the application of any person, any recording so made is to be accessed in a court building, with the consent of the court".
80. [2003] EWCA Civ 1573.

relation to a publication in the July 2020 edition of the magazine. Because there was a risk that he might be extradited to the U.S.A. if he travelled to the U.K.,[81] he requested to be heard via video link. The Court of Appeal refused his request but the House of Lords was of the view that the use of video link had to be granted. Despite the fact that Mr. Polanski was a fugitive in criminal proceedings, he could still seek, in the U.K., a remedy in a civil claim with the same rights guaranteed to any person pursuing a remedy in court.[82] The Court considered that restricting the right to be heard through technology would be a violation of access to justice. Baroness Hale of Richmond said that:

> "New technology such as VCF [videoconference] is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not".[83]

In the U.S.A., Rule 43(a) of the Federal Rules of Civil Procedure provides that: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location". In Brazil, the Code of Civil Procedure, in Art. 236, Sect. 3, expresses that procedural acts can be done through videoconference or other technological means where sound and images can be transmitted. Moreover, witnesses that do not reside where the trial court is located can be heard through videoconference.[84]

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81. In the U.S.A. he has been a fugitive of justice since 1977 when he pleaded guilty in a Californian court to a charge of unlawful sexual intercourse with a girl aged thirteen years.
82. [2003] EWCA Civ 1573. Lord Nicholls said at para. 31: "I understand that. But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive. To regard the one as acceptable and the other as not smacks of inconsistency. If a fugitive is entitled to bring his proceedings in this country there can be little rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which is now readily available to all litigants. For obvious reasons, it is not a facility claimants normally seek to use, but it is available to them. To withhold this facility from a fugitive would be to penalise him because of his status".
83. *Ibid*., para. 68.
84. *See* Brazilian Code of Civil Procedure, Art. 385, Sect. 3, and Art. 453, Sect. 1.

In arbitration, institutional rules have a similar approach. The ICC 2021 Arbitration Rules provide that hearings can be remote via "videoconference, telephone or other appropriate means of communication";[85] the LCIA 2020 Arbitration Rules assert that "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)";[86] and the American Arbitration Association 2013 Commercial Arbitration Rules and Mediation Procedures allow "the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation".[87]

In terms of access to adjudication in arbitration through remote hearings, problems can arise in relation to the technology used. If the technology causes a severe imbalance in the parties' capacity to access arbitration, this can be a limitation to the parties' access to justice. So, if an instantaneous form of communication is adopted, it has to be one that all parties can use. The same infrastructure should be available to both parties and if this is not possible, parties should agree on how they can overcome such difficulties. It is understandable that the infrastructure for telecommunications around the world does not present a homogeneous quality; be that as it may, such imbalance cannot be employed to disadvantage one of the parties in the dispute. If that is the case, there is a likelihood that access to justice in the dispute will be restricted. Parties and the tribunal should try to predict possible problems with the technology used and agree on alternatives so everyone is treated equally.

The second obstacle to access to justice is whether sufficient procedural justice can be provided in a remote hearing. During the Covid-19 pandemic, the view that remote hearings would limit the parties' right to present their case has been proved to be inaccurate.[88] The requirements made to safeguard the individuals during the pandemic such as social distancing, circulation of air in rooms, constant disinfection of the venue where the hearing will take place, wearing a mask and travelling abroad when several countries require quarantine periods for individuals arriving in their territory, do not facilitate access to justice – in reality, they might delay it. Moreover, they might render the hearing more costly, which also weakens the right of access to justice.

85. ICC Arbitration Rules 2021, Art. 26(1).
86. LCIA Arbitration Rules 2020, Art. 19(2).
87. AAA Commercial Arbitration Rules and Mediation Procedures 2013, Rule 32(c). The Rule also states that: "Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination".
88. Niuscha BASSIRI, "Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders" in Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) p. 96.

As long as the parties are given the right to be heard in the remote hearing, including the guarantee to present their case and provide evidence through witnesses, just like in a physical hearing, procedural justice can be secured. There are obviously some problems when doing things remotely. Cross-examining a witness is not the same because using an instantaneous form of communication might make it harder to perceive body language cues and social behaviour. Additionally, witnesses can try to avoid questions claiming they have technical problems. At this moment, the tribunal and the parties should act to circumvent such problems. However, if technology prevents hearing a witness, be it remotely or face-to-face, this might be a limitation on access to justice.

The U.S.A. case law has addressed the use of instantaneous form of communication in arbitration. In *Nuyen v. Hong Thai Ly*[89] the Court of the District of Columbia considered that a witness heard by phone did not defeat the petitioner's right to cross-examination. In that case, there was an agreement to cross-examine the witness via Skype and when the connection did not work, they did it via telephone.[90] In Austria, the Supreme Court heard a challenge to an arbitral award because the tribunal had decided to conduct a remote hearing via videoconference over the respondents' objection.[91] According to the respondents, the conduct of a remote hearing had violated their right to be treated equally and fairly. The Austrian Supreme Court rejected the challenge because using videoconference does not violate Art. 6 of the ECHR even if one of the parties does not agree to the remote hearing. In guaranteeing the right to be heard in Art. 6, courts must also ensure that this right can be enforced through proper remedies. Thus, the use of videoconference is a manifestation of the right to be heard and as a result, secures the legal remedies. The Austrian court also stated that videoconference offers an option based on the rule of law when a pandemic brings the administration of justice to a standstill.

Remote hearings in arbitrations, where the arbitration was freely accepted by sophisticated parties, do not *per se* restrain access to justice. If the arbitration is imposed on the parties a balance must be struck on the means of conducting remote hearings. It is evident that remote hearings can be useful to reduce costs and facilitate access to adjudication but they can also produce the opposite effect if there are no rules to protect the parties against the lack of infrastructure to allowing the use of technology for remote hearings.

C. No Hearings and Access to Justice

The absence of a hearing will not automatically deprive the parties of their right to access justice. It is not unusual for arbitration rules to allow parties to opt for

89. *Nuyen v. Hong Thai Ly*, 74 F. Supp. 3d 474, 482 (D.D.C. 2014).
90. In *Lunsford v. RBC Dain Rauscher, Inc*, 590 F. Supp. 2d 1153, a similar argument was raised and the court stated that: "The arbitration agreement gave the Panel the ultimate authority to determine the location of the evidentiary hearing and plaintiffs were not prejudiced by testifying telephonically".
91. Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, ONc 3/20s No. 18 (Austria).

documents-only arbitration, they are free to proceed this way. The right to be heard is not excluded by the simple fact that there is no hearing. Parties may waive their right to a hearing because they believe that a decision can be made on the basis of the documents provided to the arbitral tribunal. A distinction must be made between waiving a right to an oral hearing before the dispute is triggered and waiving it once the dispute has started.[92] If a party waives the right to a hearing before the dispute arises, such conduct might be in conflict with procedural justice as the party is still setting up its case. If the party waives the right once the dispute has started, there is a strong argument that the waiver has a different impact because at this stage, parties are more or less aware of what they need to do to present their case.[93]

In small claim cases such as consumer disputes, where there is unequal bargaining power, there are examples of arbitrations without a hearing. The Association of British Travel Agents (ABTA) has an arbitration scheme to solve consumer disputes in contracts concluded with its members.[94] According to the rules for arbitration, once a claim is triggered by a consumer, the use of the scheme is mandatory for ABTA members.[95] There is no hearing under the scheme, but in terms of presenting your case, the rules guarantee that after the respondent presents its defence, the claimant has the right to reply as long as its reply does not raise a new claim or new evidence.[96] The rules also give the arbitrator wide discretion to allow the parties to provide more

92. Mauro RUBINO-SAMMARTANO, *International Arbitration Law and Practice*, 3rd edn. (Juris Publishing 2014) p. 842.
93. *Ibid*.
94. *See* ABTA, "Resolving Disputes", at <https://www.abta.com/help-and-complaints/customer-support/resolving-disputes> (last accessed 8 January 2022). The system is approved by the Government under the rules of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015 and it is provided by Hunt ADR. *See* Hunt ADR, "Arbitration with Hunt ADR", at <https://www.huntadr.com/arbitration> (last accessed 8 January 2022).
95. ABTA's Arbitration Scheme 2018. The Rules, available at <https://www.abta.com/sites/default/files/media/document/uploads/ABTA%20Arbitration%20Rules%202018%20%2811%20July%202018%29_0.pdf> (last accessed 8 January 2022). Rule 1.3 states: "The Scheme is supported and promoted by ABTA as a cost-effective and speedy alternative to the courts. Use of the Scheme is mandatory for ABTA Members ('Members') where an application is made against it by a customer within 18 months of completion of return date".
96. ABTA's Arbitration Scheme 2018. The Rules, Rule 3.3.3 states: "On receipt of the Respondent's Defence Documents (if any), Hunt ADR will acknowledge receipt and send a copy of the Defence to the Claimant, who shall submit a Reply to Defence, prepared in accordance with 4.5 below, within a further 7 days. Such Reply to Defence must be restricted to points arising from the Respondent's Defence and shall not include any new claim, assertion or evidence".

evidence and allow the parties to appeal the award.[97] In terms of access to justice, under the scheme, the rules allow the parties to be heard by presenting their case in written form; thus, as long as such right is present, it is hard to envisage that no hearing is contrary to the right of access to justice. To the extent that some argue that not having a hearing excludes the right to hear a witness, the rules provide that witnesses can provide a written statement and, to the extent there are questions to be posed to the witness, the arbitrator has discretion to address that. The scheme appears to fairly allow parties to present their case, but this does not mean that it is free from criticism.[98]

Moving away from consumers, in maritime arbitration at the London Maritime Arbitration Association (LMAA), its 2021 rules, that are coined "Terms", set the default position that if the parties do not ask for an oral hearing, it is "for the tribunal to decide whether and to what extent there should be oral or written evidence or submissions in the arbitration".[99] However, the Terms of the LMAA encourage the parties to agree at the start of the arbitration whether it will be documents-only or if there will be a hearing.[100] In the LMAA Small Claims Procedure rules 2021, limited to claims up to USD 100,000, having a hearing is the exception and it cannot take longer

97. ABTA's Arbitration Scheme 2018. The Rules, Rules 3.1 and 3.1.1 state: "3.1 The Arbitrator shall have the widest discretion permitted by law to resolve the dispute in a final manner in accordance with natural justice. In particular, he has the power to direct the procedure of the Arbitration, including varying time limits and other procedural requirements, and to: 3.1.1 allow the parties to submit further evidence and/or amend the Claim Documents or the Defence Documents". Rule 8.1 states: "8.1 If any party considers that the Award is one which no Arbitrator should have reasonably made on the basis of the documents presented by the parties, they may write to Hunt ADR applying for the Award to be appealed to an independent Arbitrator under the ABTA Arbitration Appeals Procedure ('the Procedure'), a copy of which is provided below".
98. The fees charged to make a claim and to appeal can be considered an impediment to access to justice. The fee depends on the amount of the claim. Claims from £1.00 to £7,500 will cost £108.00 and claims from £7,501 to £25,000 will cost £135.00. *See* ABTA, "Resolving Disputes. Arbitration", at <https://www.abta.com/help-and-complaints/customer-support/resolving-disputes> (last accessed 8 January 2022). ABTA's Arbitration Scheme 2018, The Rules, Rule 9.3.3 states: "The Appeal Procedure fee £350.00 plus VAT made payable to Hunt ADR".
99. The LMMA Terms 2021. The Terms are available at <https://lmaa.london/wp-content/uploads/2021/04/LMAA-Terms-Procedures-2021-FINAL.pdf> (last accessed 8 January 2022). Rule 15(b) states: "In the absence of agreement it shall be for the tribunal to decide whether and to what extent there should be oral or written evidence or submissions in the arbitration. The parties should however attempt to agree at an early stage whether the arbitration is to be on documents alone (i.e. without any oral hearing) or whether there is to be such a hearing".
100. *Ibid*.

than five hours in one working day.[101] The absence of a hearing is not necessarily a restriction of the right to be heard. The parties can present their case through written submissions, it is likely that they understand the format of the LMAA arbitration procedure and that a hearing is not essential.[102]

V. Conclusion

The right to be heard is an essential feature of access to justice. Through this right, parties are able to present their case. If parties are treated equally and their right to be heard is preserved, one aspect of procedural justice will be secured. To assure the protection of the right to be heard in arbitration, parties should be able to present their case through a hearing or through documents. The connection between access to justice and a physical or a remote hearing lies on the guarantee that the conduct of the hearing will adopt a process that safeguards procedural justice. In the case of remote hearings, besides procedural justice, the access to the hearing has to be done in such a manner that all parties to the dispute are not disadvantaged by the use of the instantaneous form of communication, otherwise there can be a violation to the parties' right of access to justice.

In arbitration, not having a hearing, whether physical or remote, does not automatically mean that the parties' right of access to justice will be curtailed. Parties can still be heard, defend themselves and present their case without a hearing. The question of hearings and access to justice is relevant when it addresses the manner in which the hearing is conducted. The procedure adopted in the hearing or a restriction to access a hearing can result in lack of access to justice as opposed to having or not having a hearing at all.

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101. The LMAA Small Claims Procedure 2021, Rule 5(k) and (l) states: "(k) There shall be no hearing unless, in exceptional circumstances, the arbitrator requires this. (l) In the case of an oral hearing the arbitrator shall have the power to allocate the time available (which shall be limited to one working day of 5 hours) between the parties in such a manner that each party has an equal opportunity in which to present its case". *See also* LMAA Small Claims Procedure 2021, Rule 1(b).

102. It is very common in the shipping industry that contracts will provide for an arbitration clause. Moreover, maritime arbitration is very popular, with the LMAA having, in 2020, 1775 cases referred to arbitration. *See* <https://lmaa.london/wp-content/uploads/2021/02/Statistics-2020-For-Website.pdf> (last accessed 8 January 2022). The number is much higher than for arbitration cases in other institutions. For instance, in 2020 the ICC had 946 cases referred to arbitration. *See* ICC, "ICC Announces Record 2020 Caseloads in Arbitration and ADR", at <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> (last accessed 8 January 2022).

Beyond Domestic Law: What Constitutes a "Hearing" in International Arbitration?

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I. Introduction

The outbreak of novel coronavirus was declared a Public Health Emergency of International Concern by the WHO's Emergency Committee on 30 January 2020,[1] and Covid-19 continues to maintain that status in July 2022.[2] The onset of the Covid-19 pandemic and the ongoing spread of the virus has not only caused widespread suffering and the tragic loss of life, but it has also seen the adoption of various government measures which have wrought significant disruption to many aspects of life as we knew it, including of course the administration of justice. In this respect, parties to dispute settlement proceedings, counsel, judges, arbitrators and court staff have had to work remotely on the preparation of their cases, often without the assistance which would have been available if they had been able to continue working in their offices.[3] Participants in dispute settlement proceedings have also had to wrestle with the issue of whether the hearing should be adjourned to a time when a physical hearing might be possible, or to proceed with a remote hearing by the use of videoconferencing technology.[4] Certain national courts have considered objections to remote hearings and

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1. WHO, "Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCov)" (30 January 2020) at <https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)> (last accessed 16 December 2021).
2. "Statement on the Twelfth Meeting of the International Health Regulations (2005) Emergency Committee regarding the Coronavirus Disease (COVID-19) Pandemic" (12 July 2022) at <https://www.who.int/news/item/12-07-2022-statement-on-the-twelfth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic> (last accessed 26 July 2022).
3. *See*, *e.g.*, Chester BROWN, Mark MCNEILL and Jeremy SHARPE, "First Impressions of a Virtual Hearing at ICSID", 35 ICSID Rev. (2020) p. 214 at p. 214.
4. *Ibid*.

applications for adjournments, and some have given such objections short shrift. In April 2020 – while the first wave of the pandemic was sweeping through many countries – Perram J of the Federal Court of Australia observed that holding a remote hearing entailed certain difficulties, and was not entirely satisfactory, but that it would not be "unfair or unjust".[5] As Perram J noted with some prescience:

> "If I could be sure that the crisis would have passed by October I would not hesitate to adjourn all the trials in my docket (save urgent cases) and then begin a process of relisting my entire docket from October 2020. The effect of that would be a postponement of six months with all cases being reallocated thereafter. However, there is simply no guarantee that the situation will be any better in six months' time".[6]

Perram J continued to note that it may well be that the state of affairs would "persist for a year or so", and that in the circumstances, it was "not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period".[7] He added that such a prolonged cessation of business activity would not be "healthy for the economy", and concluded that "[t]hose who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be".[8]

The use of videoconferencing technology in the administration of justice has provided the impetus for the publication of this collection of essays and national reports on whether there is a right to a "physical hearing" in dispute settlement proceedings. At issue is not the occasional use of videoconferencing technology in order for a particular witness or expert to present their oral evidence and be subject to cross-examination; this has become almost unexceptional where a witness has a valid reason for being unable to attend the hearing, or the parties agree for a witness to give their testimony remotely to conduct proceedings as efficiently as possible.[9] Rather, the

5. *Capic v. Ford Motor Company of Australia Ltd (Adjournment)* [2020] FCA 486, paras. 13-15.
6. *Ibid.*, para. 23.
7. *Ibid*., para. 23.
8. *Ibid*., para. 23.
9. *See*, *e.g.*, Chester BROWN and Patrick STILL, "The Status of the Testimony of the Non-Appearing Witness in International Arbitration", 35 ICSID Rev. (2020) p. 369 at pp. 375, 395, noting, *e.g.*, IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 8(1), and cases such as *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2), Procedural Order No. 5 (7 February 2017), para. 20; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award (4 April 2016), para. 109; and *Metal-Tech Ltd v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013), para. 115.

question is whether the hearing *in its entirety* can be moved to an online platform. With particular reference to international arbitration proceedings, can an arbitral tribunal impose a remote hearing on a party against its wishes, as Perram J did in the case of representative proceedings (*i.e.*, a class action) before the Federal Court of Australia? Or would such a decision result in the related award being successfully challenged (or its enforcement resisted) because, for instance, that party was unable to present its case, or the parties were not treated with equality, or the arbitral procedure was not in accordance with the parties' agreement?[10] The purpose of this chapter is not to examine this issue from the perspective of a domestic legal system (which is done in the various national reports prepared as part of this project and summarized within this Volume), but to look beyond domestic law in order to assess whether there are international minimum standards that are inherent in the notion of a "hearing" and which provide guidance for arbitral tribunals faced with this problem.

This chapter proceeds as follows. After this introduction, Part II considers the right to a fair hearing in international human rights law, and investigates its content as articulated by human rights courts and treaty-monitoring bodies. This analysis reveals that although relevant international human rights treaties are essentially in agreement on the existence of the right to a "fair and public hearing" (as it is put, for instance, in Art. 10 of the Universal Declaration of Human Rights), this does not necessarily include the right to a physical hearing for the determination of civil claims, although there is more support for such a right in criminal trials. Part III then considers the question from the perspective of the practice of international courts and tribunals, and examines whether there is a right to a physical hearing (or a hearing at all) for parties to proceedings before international adjudicatory bodies. This shows that though the constitutive instruments of the bodies which determine inter-State disputes typically provide for a physical hearing, there are many instances (before human rights treaty monitoring bodies) where claims are usually determined on the papers. Part IV then turns to the existence of the right in conventions and instruments relating to international arbitration. This shows that though parties will typically have a right to a hearing, there is in general no right to a physical hearing, and parties are unlikely to succeed in challenging enforcement of an award solely on the grounds that proceedings were conducted remotely. In Part V, it is concluded that the convening of a remote hearing in international arbitration proceedings is not necessarily incompatible with the content of international human rights law, the practice of international courts and tribunals (both in inter-State disputes as well as in claims brought by individuals against States), and the provisions of relevant instruments which govern the conduct of international arbitration. However, an arbitral tribunal considering scheduling a remote hearing against the wishes of one or both of the parties must carefully examine the

10. On the basis of, *e.g.*, UNCITRAL Model Law on International Commercial Arbitration, Arts. 34(2)(a)(ii), Art 34(2)(a)(iv); and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* 10 June 1958, 330 U.N.T.S. 3, Arts. V(1)(b), V(1)(d), V(2)(b) (*entered into force* 7 June 1959).

particular facts and circumstances of the parties in order to ensure that the award is not then susceptible of being set aside or annulled, or its enforcement successfully resisted.

II. The Content of the Right to a "Fair and Public Hearing" in International Human Rights Law

It is possible to find guidance on the minimum characteristics of a "hearing" under international human rights law concerning the right of access to justice and to a fair and public hearing by an independent and impartial tribunal. The (modern) starting point on the right to a fair hearing is Art. 10 of the Universal Declaration of Human Rights, which was adopted by the U.N. General Assembly in 1948. This states that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[11] Art. 10 does not provide further content for this right, although Art. 11 makes particular provision for persons charged with criminal offences, such as the right to be presumed innocent.

The right to a fair trial is however given further content in subsequent international instruments. Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which was adopted by the Member States of the Council of Europe in 1950,[12] enshrines the right to a fair trial in both civil and criminal proceedings. It provides in relevant part that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[13] It goes on to provide that the court's judgment "shall be pronounced publicly", but the press and public may be excluded from all or part of the trial "in the interests of morals, public order or national security" or "where the interests of juveniles or the private life of the parties so require, or […] where publicity would prejudice the interests of justice".[14]

To similar effect, Art. 14(1) of the International Covenant on Civil and Political Rights ("ICCPR"), which was adopted by the U.N. General Assembly in 1966, provides that "[a]ll persons shall be equal before the courts and tribunals", and that in

11. Universal Declaration of Human Rights, G.A. Res. 217A(III), Art. 10, U.N. GAOR, 3rd Sess., 1st plen. Mtg., U.N. Doc. A/810 (12 December 1948).
12. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 November 1950, 213 U.N.T.S. 221 (*entered into force* 3 September 1953) ("European Convention").
13. *Ibid.*, Art. 6(1).
14. *Ibid.*, Art. 6(1). Arts. 6(2)-(3) enshrines protections specifically for parties in criminal proceedings including the right to defend themselves in person or through legal assistance.

both civil and criminal proceedings "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[15] Art. 14(1) goes on to provide that the hearings should in principle be public, subject to exceptional grounds on which the press and the public may be excluded (such as reasons of morals, public order – *ordre public* – or national security). Art. 14(2)-(7), of the ICCPR contains further protections for the accused in criminal proceedings, including the accused's right to be tried in their presence.[16]

Regional human rights instruments contain materially identical provisions. For instance, Art. 8(1) of the American Convention on Human Rights ("American Convention"), which was adopted by the Organization of American States in 1978, states that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law" in both civil and criminal proceedings.[17] Art. 7(1) of the African Charter of Human and Peoples' Rights ("African Charter"), which was adopted in 1981 under the auspices of the (then) Organisation of African Unity, protects the right to a hearing as follows: "Every individual shall have the right to have his cause heard", which is defined as including "the right to an appeal to competent national organs against acts of violating his fundamental rights", "the right to defence, including the right to be defended by counsel of his choice", and "the right to be tried within a reasonable time by an impartial court or tribunal".[18] And Art. 13 of the Arab Charter on Human Rights, which was adopted by the Council of the League of Arab States in 2004, provides in similar terms that "[e]veryone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations", and the trial "shall be in public".[19]

It is evident that these international human rights instruments do not specify whether the right to a hearing includes the right to a physical hearing in the context of civil proceedings, or whether States would be in compliance with their obligations by the convening of a remote hearing. In contrast, it is typically made explicit that

15. International Covenant on Civil and Political Rights, *opened for signature* 16 December 1966, 999 U.N.T.S. 171, Art. 14(1) (*entered into force* 23 March 1976) ("ICCPR").
16. *See* especially ICCPR, Art 14(3)(d).
17. American Convention on Human Rights, *opened for signature* 22 November 1969, 1144 U.N.T.S. 123, Art. 8(1) (*entered into force* 18 July 1978) ("American Convention"). Arts. 8(2)-(5) make provision for protections specific to criminal prosecutions.
18. African Charter on Human and Peoples' Rights, *opened for signature* 27 June 1981, 1520 U.N.T.S. 217 (*entered into force* 21 October 1986) ("African Charter").
19. Arab Charter on Human Rights, *adopted on* 22 May 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893, U.N. Doc. CHR/NONE/2004/40/Rev.1 (*entered into force* 15 March 2008).

criminal prosecutions must take place in person, and provide that the accused has the right to defend him- or herself and have legal representation.[20]

In order to ascertain whether the right to a "fair and public hearing" includes the right to a physical hearing in civil proceedings, it is instructive to consider the decisions of the relevant court or tribunal. In the case of the European Convention, the European Court of Human Rights ("ECtHR") has frequently reiterated that the right to a fair and public hearing is not an absolute right. As the ECtHR Chamber explained in *Yevdokimov v. Russian Federation*, Art. 6(1) "does not guarantee the right to personal presence before a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights".[21] The ECtHR has drawn a distinction between, on the one hand, criminal proceedings (where the accused should in principle be tried in a physical hearing),[22] and on the other, civil and criminal appeal proceedings (where the accused's physical presence is considered to be less critical), in determining whether States have latitude in making use of videoconferencing technology.[23] The practice of the ECtHR indeed indicates that remote participation in a hearing by video link is an acceptable alternative to an applicant appearing in person in civil and criminal appeal proceedings.[24] However, the ECtHR has held that where proceedings are held by video link it is incumbent on the Court "to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are

20. *E.g.*, European Convention, Art. 6(2)-(3); ICCPR, Art. 14(3)(d).
21. *Yevdokimov v. Russia*, No. 27236/05, para. 22, 16 February 2016; *Siwiec v. Poland*, No. 28095/08, para. 47, 3 July 2012; *Larin v. Russia*, No. 15034/02, para. 35, 20 May 2010; *Artyomov v Russia*, No. 14146/02, 27 May 2010; *see also Krčmář and Others v. Czech Republic*, No. 35376/97, paras. 39, 201-202, 3 March 2000.
22. There have however been cases in which the ECtHR has considered videoconferencing to be an appropriate alternative to outright exclusion from a trial if the applicant is unable to be physically present: *Tomov and Others v. Russia*, No. 18255/10, para. 162, 9 April 2019; *Yevdokimov v. Russia*, No. 27236/05, paras. 41-43, 16 February 2016.
23. William SCHABAS, *The European Convention on Human Rights: A Commentary* (Oxford 2015) p. 287 f.; *Sardón Alvira v. Spain*, No. 46090/10, para. 50, 24 September 2013; *see also Dombo Beheer B.V. v. The Netherlands*, 27 October 1993, para. 32, Series A No. 274.
24. *E.g.*, *Dijkhuizen v. The Netherlands*, No. 61591/16, para. 56, 8 June 2021; *Yevdokimov v. Russia*, No. 27236/05, paras. 40-43, 16 February 2016; *Vladimir Vasilyev v. Russia*, No. 28370/05, para. 84, 10 January 2012; *see also* International Commission of Jurists, "Videoconferencing, Courts and COVID-19: Recommendations based on International Standards" (November 2020) at <https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf> (last accessed 17 December 2021).

compatible with the requirements of respect for due process".[25] As the Grand Chamber of the ECtHR explained in *Sakhnovskiy v. Russia*:

> "[…] Article 6 does not always entail a right to be present in person. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant".[26]

The Grand Chamber of the ECtHR held for separate reasons in that case that the applicant had been denied the right to effective legal assistance contrary to Art. 6(3)(c) of the European Convention. However, the Grand Chamber of the ECtHR added with respect to the use of a video link in the applicant's criminal appeal proceedings:

> "As regards the use of a video link, the Court reiterates that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for […]".[27]

As a consequence, whether a remote hearing breaches Art. 6(1) in civil proceedings or criminal appeals will depend on whether the applicant has been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party, and to present their case without a substantial disadvantage *vis-à-vis* their opponent.[28]

For example, the domestic court may validly refuse to provide a physical hearing to a civil applicant (who happens to be imprisoned) due to difficulty in transporting them from penal facilities to a courtroom, provided the applicant receives legal representation and the claim is not based on the applicant's personal experience.[29] Alternatively, where the nature of the dispute relies on the applicant providing evidence based on their personal experience, such as in a claim stemming from ill-treatment in a prison setting, the applicant's personal presence may be necessary.[30] The domestic court must consider whether the party's physical presence is necessary to the

25. *E.g.*, *Dijkhuizen v. The Netherlands*, No. 61591/16, para. 53, 8 June 2021; *Marcello Viola v. Italy (No. 1)*, No. 45106/04, para. 67, ECtHR 2006-XI; see also *Bivolaru v. Romania (No. 2)*, No. 66580/12, para. 138, 2 October 2018.
26. *Sakhnovskiy v. Russia* [GC], No. 21272/03, para. 96, 2 November 2010.
27. *Ibid.*, para. 98.
28. *See*, *e.g.*, *Yevdokimov v. Russia*, No. 27236/05, para. 22, 16 February 2016.
29. *Ibid.*, para. 24; *Siwiec v. Poland*, No. 28095/08, para. 48, 3 July 2012; *Mukhutdinov v. Russia*, No. 13173/02, para. 115, 10 June 2010.
30. *Siwiec v. Poland*, No. 28095/08, para. 49, 3 July 2012.

fairness of the particular hearing, what options exist apart from total exclusion from proceedings, and what compensating measures would be necessary to counterbalance any prejudice to the relevant party.[31] Failure to consider these questions may constitute a contravention of Art. 6(1) of the European Convention.[32] In practice, the viability of conducting civil proceedings remotely may depend on related factors such as the effectiveness of legal representation during a remote hearing, given the broad scope of a general right to a fair hearing as in Art. 6 of the European Convention.[33] The Austrian Supreme Court's rejection of a challenge to an arbitral tribunal in Case No. 18 ONc 3/20s indicates that a remote hearing alone will not constitute a violation of the parties' rights under Art. 6 of the European Convention.[34]

We turn now to the practice of the Human Rights Committee ("HRC"), which is the treaty monitoring body of the ICCPR, Art. 14 of which protects the parties' right "to a fair and public hearing", and specifically protects a defendant's right "to be tried in his presence" in criminal proceedings pursuant to Art. 14(3)(d). Similar to the European Convention, the right to a physical hearing in civil proceedings is far more limited than the right in criminal proceedings.[35] In a case which predated the widespread availability of videoconferencing technology, the HRC considered that an applicant's inability to attend a civil hearing may not constitute a violation of Art. 14(1), for example, when the party's legal representatives do not request a postponement to enable the party to attend in person.[36] There appears to be no case in which the HRC has held that a party's participation in a hearing by video link was insufficient to permit that person to participate fully in a civil proceeding. In one instance of an alleged breach of Art. 14(1) of the ICCPR, the complainant participated in his (criminal) appeal hearings by videoconference rather than in-person, but challenged the hearings

31. *Yevdokimov v. Russia*, No. 27236/05, paras. 22-26, 33-35, 16 February 2016; *Vladimir Vasilyev v. Russia*, 28370/05, paras. 75-90, 10 January 2012; *Polyakova and Others v. Russia*, 35090/09, para. 127, 7 March 2017.
32. *Polyakova and Others v. Russia*, 35090/09, paras. 128-131, 7 March 2017; *Tomov and Others v. Russia*, 18255/10, paras. 160-163, 9 April 2019.
33. A party may also waive their right to attend the hearing of their case and there will be no breach of Art. 6 of the European Convention if waiver has been established in an unequivocal manner: *Yevdokimov v. Russia*, No. 27236/05, para. 30, 16 February 2016.
34. Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, ONc 3/20s No. 18, para. 11.2.4 (Austria).
35. Sarah JOSEPH and Melissa CASTAN, "Right to a Fair Trial – Article 14" in Sarah JOSEPH and Melissa CASTAN, eds., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edn. (Oxford University Press 2013) p. 468.
36. *Ben Said v. Norway*, HRC Comm. 767/1997, para. 11.3, U.N. Doc. CCPR/C/68/D/767/1997 (26 April 2000).

on the basis of other factors including the alleged falsification of records.[37] The HRC addressed the videoconferencing model of the hearing and commented that "[b]oth the author and his co-defendant were able to clearly state their position".[38] It appears from the HRC's report that it was unclear whether the author of the communication had been physically present at any of the hearings, or if the hearings were all conducted by videoconference.[39]

In relation to the present pandemic, some State Parties to the ICCPR have responded to Covid-19 by derogating from their obligations under the ICCPR by taking emergency measures pursuant to Art. 4. Derogations of this kind are of an exceptional and temporary nature; therefore, current practice provides limited guidance on whether remote hearings would be a viable replacement for physical hearings outside of emergency circumstances.[40]

There does not appear to have been any case before either the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights which has considered whether the right to a hearing in Art. 8(1) of the American Convention refers to a physical hearing.[41] As for the African Charter, Art. 7(1) does not confer an express right on a party to proceedings to have a physical hearing. The African Court on Human and Peoples' Rights ("ACtHPR") has in the past refused to provide access to proceedings by videoconference technology where the applicant was unable to be personally present during non-criminal proceedings.[42] In making the decision, the Court distinguished between a right to be personally present and the applicant's participatory right, the latter of which was satisfied by the applicant's counsel representing her in the proceedings.[43] A physical hearing only appears to be mandatory in criminal proceedings, with the African Commission on Human Rights and Peoples'

37. HRC, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 2059/2011*, para. 6.5, U.N. Doc No. CCPR/C/116/D/2059/2011 (13 May 2016).
38. *Ibid.*, para. 6.8.
39. *Ibid.*, para. 6.8, fn. 14.
40. HRC, *General Comment No. 29, Article 4: Derogations During a State of Emergency*, para. 2, U.N. Doc. CCPR/C/21/Rev. 1/Add.11 (31 August 2001); HRC, *CCPR Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, paras. 1-2, UN Doc No. CCPR/C/128/2 (30 April 2020).
41. James L. CAVALLARO, Claret VARGAS, et al., *Doctrine, Practice and Advocacy in the Inter-American Human Rights System* (Oxford University Press 2019) pp. 450-504; Amaya ÚBEDA DE TORRES, "The Right to Due Process" in Laurence BURGORGUE-LARSEN and Amaya ÚBEDA DE TORRES, eds., *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) pp. 641-671.
42. *Ingabire Victoire Umuhoza v. Republic of Rwanda* (order), ACtHPR No. 003/2014, paras. 56-58, 3 June 2016.
43. *Ibid.*, para. 55.

Rights ("ACHPR") indicating in its 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa that "[i]n criminal proceedings, the accused has the right to be tried in his or her presence" and "[t]he accused has the right to appear in person before the judicial body".[44] Further, in proceedings before the African Court of Human and Peoples' Rights, the Court retains the discretion to determine whether oral proceedings will be held and whether it will choose to hear witnesses at those hearings.[45]

III. Is There a Right to a Physical Hearing Before International Courts and Tribunals?

We now turn to the practice of international courts and tribunals on the existence of a right to a physical hearing in their own statutes and rules of procedure. In summary, the constitutive instruments of various international adjudicatory bodies provide for the right to a hearing in the form of an oral exchange of evidence or submissions, although there are other international dispute settlement bodies before which there is no requirement to hold an oral hearing at all – whether physical or remote – and applications are routinely determined on the papers.

Beginning with the International Court of Justice ("ICJ"), Art. 43(1) of the ICJ Statute provides that "the procedure shall consist of two parts: written and oral".[46] With respect to the oral procedure, Art. 43(5) goes on to provide that "[t]he oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates". The ICJ's Rules of Court make further provision for the oral proceedings, with Art. 54(1) stating that the case is ready for hearing "upon closure of the written proceedings", although the ICJ "may also decide, if occasion should arise, that the opening or the continuance of the oral proceedings be postponed".[47] In an amendment introduced on 25 June 2020 in response to the Covid-19 pandemic, Art. 59(2) of the ICJ Rules of Court states that "[t]he Court may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link", and the ICJ is

44. ACHPR, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" (2003) p. 15, available at <https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf> (last accessed 17 December 2021); *see also Alex Thomas v. United Republic of Tanzania*, ACtHPR No. 003/2014, para. 96, 24 November 2017; *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, ACHPR Comm. 231/99, para. 28, 24th Activity Report 2000-2001 (6 November 2000).
45. ACtHPR Rules of Court, Rule 30(1); *Ingabire Victoire Umuhoza v. Republic of Rwanda* (order), ACtHPR No. 003/2014, para. 56, 3 June 2016.
46. ICJ Statute, Art. 43(1).
47. ICJ Rules of Court, Art. 54(1).

to consult the parties about organizing such a hearing.[48] The ICJ has also issued Guidelines for the Parties on the Organization of the Hearings by Video Link.[49]

As for disputes brought under the dispute settlement system of the World Trade Organisation ("WTO"), the procedures are governed by the WTO Dispute Settlement Understanding ("DSU") and the DSU's Working Procedures, which are contained in the DSU's Appendix 3.[50] Art. 4 of the Working Procedures provides that, before the first substantive meeting of the Panel and the parties, the parties are to transmit their written submissions, and under Art. 5, the parties then attend the substantive meeting of the Panel, at which they make oral submissions.[51] Formal rebuttals can also be made orally at a second substantive meeting of the Panel, and written rebuttals submitted prior to that meeting.[52] There is also a right of appeal to the WTO Appellate Body with respect to "issues of law" covered in the Panel Report and "legal interpretations developed by the Panel".[53] The Appellate Body functions in accordance with the DSU and the Working Procedures for Appellate Review; these provide that there shall be written submissions and an "oral hearing".[54] The Appellate Body may also address questions orally or in writing to the participants or third parties during the appellate proceeding.[55]

Turning to the International Tribunal for the Law of the Sea ("ITLOS"), which is established under Annex VI of the United Nations Convention on the Law of the Sea ("UNCLOS"),[56] the ITLOS Statute provides in Art. 27 that the ITLOS "shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence"; this stops short of making hearings for contentious cases mandatory, although Art. 26(2) of the ITLOS Statute provides that "[t]he hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted".[57] The Rules of the Tribunal make it clear in Art. 44(1) that proceedings

48. *Ibid.,* Art. 59(2).
49. ICJ, "Guidelines for the Parties on the Organization of the Hearings by Video Link" (13 July 2020) at <https://www.icj-cij.org/en/other-texts/guidelines-videolink> (last accessed 17 December 2021); *see* especially Maria Beatrice DELI, "Remote Hearings and the Right to a Fair Hearing in Public International Law" in this Volume, p. 119.
50. DSU, Art. 12.
51. DSU, Appendix 3, Working Procedures, Arts. 4-5.
52. *Ibid.*, Art. 7.
53. DSU, Art. 17(6).
54. *Ibid.*, Art. 17; Working Procedures for Appellate Review, Art. 27(1).
55. WTO, Working Procedures for Appellate Review, Art. 28.
56. United Nations Convention on the Law of the Sea, *opened for signature* 10 December 1982, 1833 U.N.T.S. 3, Art. 287(1)(a) (*entered into force* 16 November 1994) ("UNCLOS").
57. UNCLOS, Annex VI, ITLOS Statute, Arts. 26-27.

will include the "hearing of agents, counsel, advocates, witnesses and experts".[58] The hearings must be public, and in another Covid-19 inspired amendment to its Rules, the ITLOS may decide, "as an exceptional measure, for public health, security or other compelling reasons to hold the hearing entirely or in part by video-link".[59]

Arbitral tribunals constituted under Annex VII of the UNCLOS would appear to have greater flexibility as regards the holding of a hearing, with Art. 5 of Annex VII providing that unless the parties to the dispute agree otherwise "the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case".[60] Nevertheless, it appears that all arbitrations conducted under Annex VII of the UNCLOS have held hearings, even in cases where one of the parties did not appear.[61]

In the case of the ECtHR, the European Convention is silent on the need for an oral hearing. Art. 38 of the Convention provides that "[t]he Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation […]".[62] Art. 40(1) of the European Convention however provides that "[h]earings shall be in public unless the Court in exceptional circumstances decides otherwise".[63] But this does not mean that a hearing is held in respect of every application made to the ECtHR. The ECtHR's practice on holding hearings differs depending on whether the application in question is an individual application (brought under Art. 34 of the European Convention), or an inter-State application (brought under Art. 33 of the European Convention). With respect to individual applications, consistently with Art. 27 of the European Convention, Art. 52A of the Rules of Court provides that a single judge may "declare inadmissible or strike out of the Court's list of cases an application […] where such a decision can be taken without further examination".[64] Where an application is instead forwarded to a Committee of three judges, the Committee may, acting under Art. 28 of the European Convention and Art. 53 of the Rules of Court, declare the application inadmissible or strike it out of its list of cases,[65] or alternatively "declare it admissible and render […] a judgment on the merits, if the underlying question in the case […] is already the subject of well-established case-law of the Court".[66] If the Committee does not adopt a decision or

58. ITLOS Rules of the Tribunal, Art. 44.
59. *Ibid.*, Art. 74.
60. UNCLOS, Annex VII, Art. 5.
61. *See*, *e.g.*, *The Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)* (PCA Case No. 2014-02) Award on the Merits (14 August 2015) para. 56; see also *The South China Sea Arbitration (The Philippines v. The People's Republic of China)* (PCA Case No. 2013-19) Award (12 July 2016) para. 69.
62. European Convention, Art. 38.
63. *Ibid.*, Art. 40(1); *see also* EctHR Rules of Court, Rule 63.
64. EctHR Rules of Court, Rule 52A.
65. European Convention, Art. 28(1)(a); *see also* ECtHR Rules of Court, Rule 53.
66. European Convention, Art. 28(1)(b); *see also* ECtHR Rules of Court, Rule 53.

judgment, the application is then to be forwarded to a Chamber of the Court.[67] The Chamber may likewise declare the application inadmissible or strike it out of the list of cases; alternatively, the Chamber, or the President of the Section, may request factual information, documents or other material from the parties,[68] or hold a hearing on admissibility and, unless it exceptionally decides otherwise, a hearing on the merits of the application.[69] As for inter-State applications, however, Rule 51 of the Rules of Court states that a hearing on admissibility "shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion".[70]

Proceedings before the Court of Justice of the European Union ("CJEU"), in Luxembourg, also have both a written and oral procedure.[71] The oral procedure consists of the hearing by the CJEU "of agents, advisers and lawyers and witnesses and experts". The General Court of the CJEU has the discretion to dispense with hearings if it considers, based on the written part of the procedure, that it has sufficient information to give a ruling.[72] The General Court also has the power under its Rules of Court to adopt "measures of inquiry", which are essentially evidence-gathering powers, which include "(a) the personal appearance of the parties" and "oral testimony".[73]

We turn now to the inter-American human rights institutions, namely the Inter-American Commission on Human Rights (which is an autonomous organ of the Organisation of American States, and is headquartered in Washington DC),[74] and the Inter-American Court of Human Rights (which has its seat in San José, Costa Rica).[75] Beginning with the Inter-American Commission, it can determine the question of admissibility of petitions in writing, but it does have a discretionary power to invite further observations in writing or in a hearing.[76] When considering the merits, it may convene a hearing "if it deems it necessary in order to advance its consideration of the case".[77] As for the Inter-American Court of Human Rights ("IACHR"), its Statute provides that "hearings shall be public",[78] and its Rules of Procedure appear to require

67. European Convention, Art. 29(1); EctHR Rules of Court, Rule 53(6).
68. EctHR Rules of Court, Rule 54(2).
69. *Ibid.*, Rule 54(5).
70. *Ibid.*, Rule 51(5).
71. Statute of the Court of Justice of the European Union, Art. 20.
72. Rules of Procedure of the General Court, Art. 106.
73. *Ibid.*, Art. 91.
74. Statute of the Inter-American Commission on Human Rights, Art. 16(1).
75. Statute of the Inter-American Court of Human Rights, Art. 3(1).
76. Inter-American Commission on Human Rights Rules of Procedure, Art. 30.
77. *Ibid.*, Art. 37(5). The provisions governing the convening of hearings and the presentation of oral and written submissions and evidence are found in Rules of Procedure, Arts. 61-65.
78. IACHR Statute, Art. 24(1).

the hearing of oral arguments and witness testimony.[79] Evidence and statements can, however, be received by electronic audio-visual means.[80]

The review of the statutes and rules of procedure of the above-mentioned international courts and tribunals indicates that there is a general practice of such bodies to hold oral hearings, other than in respect of individual applications before the ECtHR and petitions before the Inter-American Commission on Human Rights, where hearings would appear to be the exception rather than the rule, particularly regarding admissibility of the claim. There is a contrasting practice before the U.N. human rights treaty monitoring bodies (which is considered below), where there is only very limited scope for there to be a hearing at all.

The first of the U.N. human rights treaty monitoring bodies which we take for examination is the HRC, which is established under Art. 28 of the ICCPR, and its jurisdiction to consider individual communications is established under the ICCPR's Optional Protocol.[81] Individual communications are examined on the papers, with the individual providing written communications and the State concerned submitting written explanations or statements.[82] Although the Optional Protocol and the HRC's Rules of Procedure do not provide for oral proceedings, the HRC has decided "that it would consider, in appropriate cases raising complex issues of fact or domestic law or important questions of interpretation of the Covenant, inviting the parties to provide their comments orally before the Committee".[83] However such a meeting would only take place "if both parties accept the invitation and agree to make the arrangements necessary to participate in the meeting".[84] The parties may participate in the meeting in person, or may join the meeting "through reliable means of telecommunication".[85]

Art. 41 of the ICCPR also provides for the submission of inter-State complaints, but State parties to the ICCPR must declare that they recognize the competence of the HRC "to receive and consider communications to the effect that a State party claims that another State party is not fulfilling its obligations" under the ICCPR.[86] If the matter is not resolved, the HRC may consider the matter, and the State parties concerned "shall have the right to be represented when the matter is being considered

79. IACHR Rules of Procedure, Arts. 45-51.
80. *Ibid.*, Art. 51(11).
81. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* 16 December 1966, 999 U.N.T.S. 171, Art. 1 (*entered into force* 23 March 1976) ("ICCPR Optional Protocol").
82. ICCPR Optional Protocol, Arts. 2, 4-5; *see also* HRC Rules of Procedure, Rules 88-106, U.N. Doc. CCPR/C/3/Rev.12 (4 January 2021).
83. HRC, *Guidelines on Making Oral Comments Concerning Communications*, para. 2, U.N. Doc. CCPR/C/159 (21 December 2017).
84. *Ibid.*
85. *Ibid.*
86. ICCPR, Art. 41.

in the Committee and to make submissions orally and/or in writing".[87] If the HRC is not able to resolve the dispute, it may, with the consent of the State parties, appoint an *ad hoc* Conciliation Commission to consider the matter and submit a report.[88]

The Committee on the Elimination of Racial Discrimination ("CERD"), which is established under the International Convention for the Elimination of All Forms of Racial Discrimination ("ICERD"),[89] may consider individual complaints communicated in writing if the State party responsible for the alleged violation has made the necessary declaration under Art. 14. Where an individual communication is made, the CERD may establish a Working Group to decide on the admissibility of the communication,[90] and the CERD (or, if relevant, the Working Group) may exercise a discretionary power to seek further "written information or clarifications relevant to the question of admissibility" from the author of the communication or from the State party concerned.[91] When the CERD considers the merits of an individual communication, however, it "may invite the presence of the petitioner or its representative and the representatives of the State party concerned in order to provide additional information or to answer questions on the merits of the communication".[92] The CERD can also consider inter-State disputes, under Art. 11; this provides that a State party to the Convention may bring a failure to give effect to the Convention by another State party to the Committee's attention in writing.[93] If the dispute is not resolved, the Chair of the CERD shall appoint an *ad hoc* Conciliation Commission comprising five persons, who may or may not be members of the CERD. The Conciliation Commission shall have substantive meetings, but it is not clear if these are "hearings" at which oral submissions are made and evidence is presented.[94] Nor do the CERD Rules of Procedure which deal with the establishment of a Conciliation Commission shed any light on this matter.[95]

The Committee on Economic, Social and Cultural Rights ("CESCR") is established under the Optional Protocol to the International Covenant on Economic, Social and

87. *Ibid.*, Art. 41(1)(g); *see also* HRC Rules of Procedure, Rule 85, U.N. Doc. CCPR/C/3/Rev.12 (4 January 2021).
88. ICCPR, Art. 42.
89. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* 21 December 1965, 660 U.N.T.S. 195 (*entered into force* 4 January 1969) ("ICERD"). Art. 22 provides for the settlement of inter-States concerning the interpretation or application of ICERD, including the submission of such disputes to the ICJ.
90. CERD Rules of Procedure, Art. 87, U.N. Doc. CERD/C/35/Rev.3 (1 January 1989).
91. *Ibid.*, Art. 92.
92. *Ibid*, Art. 94(5).
93. ICERD, Art. 11(1).
94. *Ibid.*, Art. 12(4).
95. CERD Rules of Procedure, Arts. 72-79, U.N. Doc. CERD/C/35/Rev.3 (1 January 1989).

Cultural Rights ("ICESCR Optional Protocol").[96] It may receive individual complaints alleging a violation of rights protected by the International Covenant if the State concerned is a party to the Optional Protocol.[97] The procedure for dealing with individual communications is limited to the submission of "written explanations or statements" by the State party concerned.[98] The ICESCR Optional Protocol also contains a procedure for inter-State communications, pursuant to which States parties may send written communications to the Committee that other State parties are not fulfilling their obligations.[99] The States parties have the right to be represented and to make submissions orally and/or in writing when the communication is being considered by the CESCR.[100] State parties can also declare that they recognize the competence of the CESCR to carry out a fact-finding inquiry under Art. 11 of the ICESCR Optional Protocol, which can include a visit to the State concerned with that State's consent, as well as hearings.[101]

As for the Committee on the Elimination of Discrimination Against Women ("CEDAW"), this body was established by Art. 17 of the Convention on the Elimination of All Forms of Discrimination Against Women.[102] The CEDAW may consider communications submitted by or on behalf of individuals if the State party in question is a party to the Optional Protocol to the Convention.[103] In such cases, the CEDAW's procedure is limited to written communications from individuals or groups of individuals, and written replies from State parties.[104] The Optional Protocol also

96. International Covenant on Economic, Social and Cultural Rights, *opened for signature* 16 December 1966, 993 U.N.T.S. 3 (*entered into force* 3 January 1976) ("ICESCR"); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *opened for signature* 24 September 2009, U.N. Doc. A/63/435, Art. 2 (*entered into force* 5 May 2013) ("ICESCR Optional Protocol").
97. ICESCR Optional Protocol, Art. 2.
98. *E.g.*, Provisional Rules of Procedure Under the ICESCR Optional Protocol, U.N. Doc. E/C.12/49/3, Rules 10(3), 10(4), 10(6) (15 January 2013).
99. ICESCR Optional Protocol, Art. 10.
100. *Ibid.*, Art. 10(1)(g).
101. *Ibid.*, Art. 11 (*entered into force* 5 May 2013); *see also* Provisional Rules of Procedure under the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/49/3, Rule 31 (15 January 2013).
102. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* 1 March 1980, 1249 U.N.T.S. 13, Art. 17 (*entered into force* 3 September 1981). Art. 29 of the Convention provides for the resolution of inter-State disputes, including the submission of such disputes to the ICJ.
103. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* 10 December 1999, 2131 U.N.T.S. 83, Art. 2 (*entered into force 22 December 2000*) ("CEDAW Optional Protocol").
104. CEDAW Optional Protocol, Art. 3; CEDAW Rules of Procedure, U.N. Doc. HRI/GEN/3/Rev.3, Rules 69, 71-73 (28 May 2008).

empowers the CEDAW to conduct an inquiry if it receives "reliable information indicating grave or systemic violations by a State party of the rights set forth in the Convention",[105] and in the event of such an inquiry, the CEDAW's Rules of Procedure permit for site visits and hearings to be held to determine facts or issues relevant to an inquiry, with the consent of the State party concerned.[106]

The Committee Against Torture ("CAT") is constituted under Art. 17 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[107] The CAT can initiate an inquiry if it receives "reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party".[108] In the event of such an inquiry, the CAT can carry out site visits and hold hearings.[109] State parties to the Convention can make a declaration that they accept the competence of the CAT to consider inter-State communications to the effect that the State is not complying with its obligations (under Art. 21), and they can also make a declaration accepting the CAT's competence to receive written communications from individuals subject to their jurisdiction (under Art. 22).[110] In the event of an inter-State communication under Art. 21, the States concerned "have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing".[111] In the event of an individual communication, decisions on admissibility appear to be made on the papers,[112] but in the event that a communication is examined on the merits, the CAT may decide to hold a hearing at which oral submissions can be made.[113] The State concerned can then submit written explanations or statements, and the CAT makes its determination on the papers.

Other human rights monitoring bodies (such as the Committee on the Rights of the Child, the Committee on the Protection of the Rights of Migrant Workers, the Committee on the Rights of Persons with Disabilities, and the Committee on Enforced Disappearances) have similar procedures to those outlined above, with hearings being exceptional in the procedures for the examination of communications and complaints.[114]

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105. CEDAW Optional Protocol, Art. 8.
106. CEDAW Rules of Procedure, U.N. Doc. HRI/GEN/3/Rev.3, Rule 87 (28 May 2008).
107. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* 10 December 1984, 1465 U.N.T.S. 85, Arts. 17, 22 (*entered into force* 26 June 1987) ("Torture Convention").
108. Torture Convention, Art. 20.
109. CAT Rules of Procedure, U.N. Doc. CAT/C/3/Rev.6, Rule 87 (1 September 2014).
110. Torture Convention, Arts. 21-22.
111. CAT Rules of Procedure, U.N. Doc. CAT/C/3/Rev.6, Rule 100 (1 September 2014).
112. *Ibid.*, Rules 111-115.
113. *Ibid.*, Rule 117(4).
114. *E.g.*, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, *opened for signature* 28 February 2021, U.N.G.A. Res.

Whether parties have a right to a hearing before international adjudicatory bodies will depend on the constitutive documents and procedural rules of each institution. International courts and tribunals typically provide for a right to an oral hearing, with two notable exceptions being the ECtHR and Inter-American Commission on Human Rights. By comparison, U.N. human rights treaty bodies have very minimal hearing requirements and exercise significant procedural discretion. Overall, there appears to be a lack of common practice among international dispute resolution bodies that hearings must take place in the form of physical hearings. Covid-19 amendments to rules of procedure, such as those introduced by the ICJ and ITLOS, have further limited any existing rights to a physical hearing before international courts and tribunals.

IV. International Arbitration Conventions and Instruments and the Right to a Physical Hearing

Having considered the content of the right to a fair and public hearing in international human rights law, and the practice of international courts and tribunals in conducting hearings, we come to the conventions and other instruments which govern international arbitration proceedings. A review of these instruments reveals a dearth of persuasive support for the existence of an absolute right in international arbitration to a physical hearing. In particular, challenges to awards under the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"),[115] and efforts to resist enforcement of awards under the New York Convention appear to be unlikely to succeed solely on the basis that a party was denied a physical hearing. As for the ICSID Convention and the ICSID Arbitration Rules, these encourage the practice of holding remote hearings. Other arbitral institutions have also amended their rules of

66/138 , Rule 19 (*entered into force* 14 April 2014); CRC Rules of Procedure, U.N. Doc. CRC/C/4/Rev.5, Rules 38-39 (1 March 2019) (regarding the holding of hearings in the CRC's fact-finding inquiry procedure); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* 18 December 1990, 2220 U.N.T.S. 3, Arts. 74, 77 (*entered into force* 1 July 2003); Convention on the Rights of Persons with Disabilities, *opened for signature* 30 March 2007, 2515 U.N.T.S. 3 (*entered into force* 3 May 2008); CRPD Rules of Procedure, U.N. Doc. CRPD/C/1/Rev.1, Rules 70-72, 87 (10 October 2016); International Convention for the Prevention of All Persons from Enforced Disappearance, *opened for signature* 6 February 2007, 2716 U.N.T.S. 3, Arts. 31-32 (*entered into force* 23 December 2010); CED Rules of Procedure, U.N. Doc. CED/C/1, Rule 95 (22 June 2012).

115. UNCITRAL Model Law on International Commercial Arbitration.

arbitration to more explicitly permit remote hearings, particularly in the context of the Covid-19 pandemic.[116]

Beginning with the UNCITRAL Model Law, its provisions are obviously relevant if it is the *lex arbitri* for the international arbitration proceedings, *i.e.*, if the arbitration has its seat in a country which has implemented the UNCITRAL Model Law as its national legislation on international arbitration. Art. 34 of the Model Law contains grounds on which a party to international arbitration proceedings can apply to the courts of the seat to have the award set aside. The grounds which appear to be most relevant are that the remote hearing has resulted in a party being unable to present its case due to, for instance, technical difficulties (within the meaning of Art. 34(2)(a)(ii)); or that the remote hearing has resulted in the parties not being treated with equality, *e.g.*, if there is a difference in quality of technology being used by each party, or only one party is able to meet with its lawyers, or the time difference means that one party is more inconvenienced than the other party, or the arbitral procedure was not in accordance with the parties' agreement if they had agreed to a physical hearing (within the meaning of Art. 34(2)(a)(iv)), or that the remote hearing was somehow contrary to natural justice and public policy (within the meaning of Art. 34(2)(b)(ii)).

Parties will of course have a right to a hearing under Art. 24(1) of the UNCITRAL Model Law. Unless the parties have agreed otherwise, the arbitral tribunal is compelled to hold such hearings at an appropriate stage, if requested by a party. However, Art. 24(1) does not specify the procedural characteristics of the oral hearing, including whether it must be a physical hearing.[117] Art. 24 of the UNCITRAL Model Law was drafted to give the tribunal considerable procedural discretion and, except where the parties have specified detailed and stringent rules of procedure, to enable the tribunal to select "the most suitable procedure when organizing the arbitration, conducting individual hearings […] and determining the important specifics of taking and evaluating evidence".[118] The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) also evince a lack of a right to a physical hearing, providing non-binding guidance that hearings may be held in-person or remotely via technological means.[119] Parties to international arbitration proceedings also have a right to due process as set

116. *E.g.*, LCIA Arbitration Rules, Art. 19(2); ICC Rules, Art. 26(1).
117. UNCITRAL Secretariat, "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006" in Howard HOLTZMANN, Joseph NEUHAUS, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) p. 793 at p. 803.
118. The Secretary-General, *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, p. 45, UNCITRAL, 18th Sess. (Vienna, 3-21 June 1985), U.N. Doc. A/CN.9/264 (25 March 1985).
119. UNCITRAL Notes on Organizing Arbitral Proceedings (2016), para. 122.

out in Art. 18 of the UNCITRAL Model Law, which includes the right to "be treated with equality and […] given a full opportunity of presenting his case".

An argument that an arbitral award should be set aside due to alleged failings in the use of videoconferencing technology was made in *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd*, a challenge to an arbitral award before the Federal Court of Australia.[120] Sino Dragon sought an order setting aside the award, relying on Arts. 34(2)(a)(ii) and 34(a)(iv) in arguing that it could not properly "present its case", and on Art. 34(2)(b)(ii) on the basis that the award was in conflict "with the public policy of this State".[121] In the course of the arbitral hearing (part of which had to be conducted by use of an audio-visual link, using the Chinese platform "WeChat", which then failed to function properly), there were numerous issues with the conduct of proceedings, including technical difficulties with presenting submissions and evidence.[122] As Beach J explained, Sino Dragon argued that it had been unable to present its case, and that it had been denied natural justice, because:

> "[T]here was an inability to provide evidence by virtue of 'the partial exclusion of witness[es] through technical faults causing confusion and hampering effective examination or mistranslation of evidence'. […] Its central complaint turns on evidence given by its witnesses on a video link, which had technical difficulties and was replaced by even less satisfactory technology. It is said that the evidence was affected by an inability to properly present a case on a critical point".[123]

There were also issues with witness sequestration, and difficulties in providing documents and evidence to witnesses.[124] Beach J of the Federal Court of Australia noted that "the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce 'real unfairness' or 'real practical injustice'".[125] He concluded that the technological difficulties had not resulted in unequal treatment of the parties, were not

120. *Sino Dragon Trading v. Noble Resources International* [2016] FCA 1131.
121. *Ibid.,* para. 6.
122. Maxi SCHERER, "The Legal Framework of Remote Hearings" in Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) p. 65 at p. 98.
123. *Sino Dragon Trading v. Noble Resources International* [2016] FCA 1131, para. 127.
124. *Ibid.*, para. 149; Claire SHERIDAN, "Is It Appropriate to Conduct a Remote Hearing under the Swiss Rules of International Arbitration?", Am. Rev. Int'l Arb. Blog (7 January 2021) at <http://blogs2.law.columbia.edu/aria/is-it-appropriate-to-conduct-a-remote-hearing-under-the-swiss-rules-of-international-arbitration/> (last accessed 19 December 2021).
125. *Sino Dragon Trading v. Noble Resources International* [2016] FCA 1131, para. 154.

contrary to natural justice and that Sino Dragon had not been unable to present its case.[126]

As for whether arguments can be made to resist enforcement of an arbitral award, it does not appear that the substitution of a remote hearing for a physical hearing provides particularly strong grounds for doing so under Art. V(1)(b) of the New York Convention.[127] Art. V(1)(b) allows a court to refuse recognition of an award where the party against whom enforcement is sought "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case".[128] In practice, however, courts have rarely accepted alleged due process violations as a ground for non-enforcement.[129] They have instead adopted a narrow construction of the words "unable to present his case", supporting the view that remote hearings do not in principle contravene the requirements of Art. V(1)(b).

In particular, courts have rejected objections to enforcement that are solely based on the fact that the party objecting was not afforded a physical hearing. For example, the U.S. court in *Consorcio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (United States)* noted that the respondent could have participated effectively in proceedings remotely without being physically present.[130] In another example, in *China National Building Material Investment v. BNK International*, the U.S. court found that Art. V(1)(b) was not breached despite a witness being unable to attend proceedings in person, because remote hearings were proposed and the party resisting enforcement had rejected that as an alternative to non-attendance.[131] The presentation of evidence and cross-examination of witnesses by videoconference does not appear to have succeeded as grounds for refusal to enforce an arbitral award under Art. V(1)(b) in the past.[132]

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126. *Ibid.*, paras. 161-179.
127. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* 10 June 1958, 330 U.N.T.S. 3 (*entered into force* 7 June 1959) ("New York Convention").
128. *Ibid.*, Art. V(1)(b).
129. Maxi SCHERER, "Violation of Due Process, Article V(1)(b)", in Reinmar WOLFF, ed., *New York Convention: Article-by-Article Commentary* (Bloomsbury 2019) at p. 291; Maxi SCHERER, "Remote Hearings in International Arbitration: An Analytical Framework", 37 J. Int'l Arb. 4 (2020) p. 407 at p. 438.
130. *Consorcio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (U.S.)*, 82 F App'x 359, 364 (2003).
131. M. SCHERER, "Remote Hearings", fn. 129 above, pp. 439-440; *China National Building Material Investment Co. Ltd. v. BNK International LLC*, 2009 WL 4730578, at 6, p. 13 (W.D. Tex. 2009); *see also Research & Development Centre "Teploenergetika", LLC, v. Ep Int'l, LLC*, 182 F. Supp. 3d 556 (E.D. Va. 2016).
132. *China National Building Material Investment Co. Ltd. v. BNK International LLC, District Court*, 2009 WL 4730578, at 6 (W.D. Tex. 2009); Sue H. LIM and Lars MARKERT, "Rethinking Virtual Hearings", Kluwer Arb. Blog (19 July 2020) at

The pro-enforcement bias of courts applying the New York Convention and the limited likelihood of remote hearings contravening Art. V(1)(b) is even clearer when looking beyond the context of remote hearings. In some circumstances, a party's non-attendance will not breach their right to due process even without the alternative of a remote hearing.[133] For example, U.S. courts have held that there was no violation of Art. V(1)(b) where the party's representative was unable to attend physical hearings, provided that the party's legal counsel were present.[134] In *Jiangsu Changlong Chemicals Co. (China) v. Burlington Bio-Medical & Scientific Corp. (United States)*, Wexler J concluded despite Burlington's representatives being unable to enter China to present its defence that:

> "There is no evidence, or question of fact raised, regarding the fundamental fairness of the arbitration. The procedures employed by the Tribunal satisfied Burlington's due process rights to notice and the opportunity to be heard".[135]

There is also some discussion of whether Art. V(2)(b) of the New York Convention could be used to decline enforcement on public policy grounds.[136] As noted by Maxi Scherer, there is an ongoing debate regarding whether the parties' right to be heard under the New York Convention should be defined in reference to national law or international standards as a consideration informing whether remote hearings may be accepted as a viable alternative to physical hearings.[137]

<http://arbitrationblog.kluwerarbitration.com/2020/07/19/rethinking-virtual-hearings/> (last accessed 19 December 2021).

133. *See*, for example, Oberlandesgericht Karlsruhe [OLG Karlsruhe] [Higher Regional Court] 27 March 2006, 9 Sch 02/05 (Germany); *Ukraine Kryukovskiy Car Building Works v. Shenyang Changcheng Economic and Trade Company*, Shen Min Zi No. 16 (Shenyang Intermediate People's Court, 22 April 2003).
134. *See Jiangsu Changlong Chemicals Co. (China) v. Burlington Bio-Medical & Scientific Corp. (United States)*, 399 F. Supp. 2d 165 (E.D.N.Y. 2005); *Budejovicky Budvar, N.P. v. Czech Beer Importers, Inc*., District Court, District of Connecticut, 10 July 2006, 1246 (JBA) (D. Conn. 2006).
135. *Jiangsu Changlong Chemicals Co. (China) v. Burlington Bio-Medical & Scientific Corp*., 399 F. Supp. 2d 165, 169 (E.D.N.Y. 2005).
136. *See* Zena PRODROMOU, "The Public Policy Exception under Article V(2)(b) of the New York Convention in the Time of Covid-19", Kluwer Arb. Blog (17 February 2021) at <http://arbitrationblog.kluwerarbitration.com/2021/02/17/the-public-policy-exception-under-article-v2b-of-the-new-york-convention-in-the-time-of-covid-19/> (last accessed 19 December 2021).
137. M. SCHERER, "Remote Hearings", fn. 129 above, p. 443; M. SCHERER, "Violation of Due Process", fn. 129 above, p. 296.

Finally, the ICSID Convention provides that parties have a right to attend hearings, but does not provide expressly for the right to a physical hearing.[138] In this respect, Arts. 62 and 63 of the ICSID Convention (which provide that conciliation and arbitration proceedings are to be held at the seat of ICSID, unless the parties agree otherwise subject to certain conditions), can be interpreted as being concerned with the location of a physical hearing (if one is held), rather than necessarily excluding the possibility of a remote hearing. The ICSID Arbitration Rules provide for a right to an oral hearing under Rule 32, including reference to hearing witness and expert testimony. However, there is no express requirement in the Rules that this must happen in the form of a physical hearing. Past and present practice of ICSID supports the view that remote hearings may easily be held as a substitute for physical hearings. Even prior to the current pandemic, 60% of the approximately 200 hearings and sessions held by ICSID in 2019 were held remotely.[139] Following the outbreak of Covid-19, all ICSID hearings heard between 15 March 2020 and 15 December 2020 were heard remotely.[140] ICSID has issued guidance on its remote hearing platform as an alternative to physical hearings, and there is evidently now a large body of ICSID practice in holding remote hearings.[141]

Additionally, following the outbreak of Covid-19, two challenges to ICSID tribunals for ordering or proposing to order remote hearings despite a party's objection have failed.[142] The challenged arbitrators in *Landesbank Baden-Württemberg v. Kingdom of Spain* argued that they were striving to conduct proceedings "in a way

138. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*opened for signature* 18 March 1965) 575 U.N.T.S. 159 (*entered into force* 14 October 1966) ("ICSID Convention").

139. ICSID, "A Brief Guide to Online Hearings at ICSID" (24 March 2020) at <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid> (last accessed 19 December 2021).

140. ICSID, "Hearings and Sessions held in ICSID Cases from March to December (2019 vs. 2020)" (20 December 2020) at <https://icsid.worldbank.org/news-and-events/news-releases/hearings-and-sessions-held-icsid-cases-march-december-2019-vs-2020> (last accessed 19 December 2021).

141. ICSID, "A Brief Guide", fn. 139 above; *see*, for example, *NEPC Consortium Power Limited v. Bangladesh Power Development Board* (ICSID Case No. ARB/18/15), Award (12 April 2021); and for a review of early ICSID experience with remote hearings, *see* C. BROWN, M. MCNEILL and J. SHARPE, "First Impressions", fn. 3 above.

142. *Vattenfall AB and Others v. Federal Republic of Germany* (ICSID Case No. ARB 12/12), Recommendation on the Second Proposal to Disqualify the Tribunal (6 July 2020); *Landesbank Baden-Württemberg and Others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), Decision on the Proposal for Disqualification (15 December 2020); Sebastian PERRY, "Spain Fails to Unseat ICSID Panel over Refusal to Travel", Global Arb. Rev. (12 August 2020) at <https://globalarbitrationreview.com/spain-fails-unseat-icsid-panel-over-refusal-travel> (last accessed 19 December 2021).

which both ensures due process […] and recognizes the need to conduct the proceedings as expeditiously as possible".[143] In rejecting the proposal to disqualify the tribunal members, the Chair of the ICSID Administrative Council accepted that the Tribunal itself was best placed to make this assessment.[144]

V. Concluding Remarks: Is There a Right to a Physical Hearing?

This article has reviewed the minimum standards for a hearing in international human rights law, the practice of international courts and tribunals, and procedural requirements in international arbitration, which broadly support the view that remote hearings are satisfactory alternatives to physical hearings. In particular, there does not appear to be any prohibition *per se* on the holding of a remote hearing, whether from the perspective of international human rights law, in the practice of international adjudicatory bodies, or in the main international conventions and instruments governing international arbitration. It therefore seems that any decision to hold remote hearings in international arbitration would not in general contravene any fundamental rights; and that awards rendered in remote hearings are not inherently more prone to successful challenges than those issued after physical hearings.

Having established that there is no general prohibition against convening remote hearings in place of physical hearings, the question of whether any particular hearing satisfies international minimum standards requires a tribunal to undertake a factual analysis of the proceedings at hand. The holding of a remote hearing must be viewed in the broader context of the guarantees provided by the right to a fair hearing and to equal treatment. For example, where one party experiences difficulties in presenting its case due to the unavailability of adequate technology, the remote hearing may well breach international minimum standards and the right to equal treatment.[145] Similarly, a remote hearing may undermine equal treatment of the parties where one party faces additional logistical challenges such as unfavourable time zone differences, an inability for that party's counsel to join from the same location, or more onerous Covid-19 restrictions than those applicable in the other party's jurisdiction.[146] Tribunals must

143. *Landesbank Baden-Württemberg and Others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), Decision on the Proposal for Disqualification (15 December 2020), paras. 94, 137.
144. *Ibid.*, para. 137.
145. *See*, for example, *Marcello Viola v. Italy (No. 1)*, No. 45106/04, para. 74, ECtHR 2006-XI; *Gorbunov and Gorbachev v. Russia*, Nos. 43183/06 and 27412/07, para. 27, 1 March 2016.
146. *See* C. BROWN, M. MCNEILL and J. SHARPE, "First Impressions", fn. 3 above, p. 217.

exercise their powers over arbitral procedure to prevent such issues from producing inequalities between the parties in presenting their respective cases.[147]

Following the outbreak of Covid-19, remote hearings became the sole alternative to delaying many proceedings indefinitely, and as a consequence were readily adopted by both domestic and international adjudicatory bodies. As the need for urgent and extraordinary measures (hopefully) declines, it is appropriate to assess whether remote proceedings are consistent with minimum requirements for a hearing in international law. Importantly, where the alternative to a remote hearing is the indefinite postponement of proceedings, the right of parties to be heard without undue delay may in fact weigh in favour of holding remote hearings.[148] The Austrian Supreme Court, in Case No. 18 ONc 3/20s, framed the right to a fair hearing as including considerations of the cost and time taken to resolve the dispute and the need for effective enforcement of claims, which justified the holding of remote hearings.[149] Though the convening of remote hearings may require greater care than the convening of physical hearings, for which procedure and best practice are more well established, remote hearings are not generally in contravention of minimum standards in international law.

147. Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, ONc 3/20s No. 18, paras. 11.2.5-11.2.7 (Austria).
148. *Kabwe v. The United Kingdom* (dec.), Nos. 29647/08 and 33269/08, 2 February 2010.
149. Oberster Gerichtshof [OGH] [Supreme Court] 23 July 2020, ONc 3/20s No. 18, para. 11.2.4 (Austria).

Remote Hearings and the Right to a Fair Hearing in Public International Law

Maria Beatrice Deli[*]

I. Introduction

The pandemic has represented a considerable challenge that had strong impacts on the calendars and management of hearings, in terms of physical appearance of the parties, their counsel, members of the courts and personnel of the institutions. Similarly to what has occurred at the domestic level, where national courts were forced to adopt new procedures for guaranteeing the parties access to justice, also international courts had to adapt to the situation, finding alternative ways to grant the parties access to the judicial mechanisms provided for in the circumstances or to maintain the regular course of justice, especially in cases involving international criminal law.

In times of pandemic, however, respect for recognized human rights and rule of law principles becomes crucial, with the consequence that emergency measures taken by states cannot have the effect of subverting the international human rights order as provided in international instruments.

The present essay will try to determine whether the recourse to remote hearings, made necessary by the strict public health measures adopted worldwide, is in compliance with the right to a fair hearing as it is intended in the context of public international law.[1]

The work will first analyze the content of the right to a fair hearing according to the most relevant instruments of public international law, the qualification of said right as a principle of international customary law and the specific content of two essential components of the right to a fair hearing which assume great relevance in the present perspective: the "public" character of the hearing and the right of the parties to attend the trial "in person".[2] The practice of international tribunals dealing with the right to a fair trial, raised by defendants before the emergency situation determined by the pandemic, will be considered in order to verify whether the basic principle and these related elements can be derogated from and under which circumstances.

The work will then describe the arrangements and the amendments that the most important international courts have put in place to adapt their working methods to the public health crisis, and guarantee the fundamental principle of access to justice. This

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1. *See* OSCE Office for Democratic Institutions and Human Rights, "The Functioning of Courts in the COVID-19 Pandemic: A Primer" (2 November 2020) at <https://www.osce.org/files/f/documents/5/5/469170.pdf> (last accessed 2 August 2021) pp. 9 ff.
2. It is to be noted that in the present essay attendance "in person" also appears as attendance "in presence" depending on the context.

last part of the work will eventually try to assess if, in consideration of the practice of the international courts and the parallel wide acceptance by national States of remote hearings as an alternative equivalent to physical hearings in particular situations, the customary principle of international law of the right to a fair trial can be considered fulfilled also when the oral phase of the proceeding is conducted by video link and video broadcasting and not in the presence of the parties.[3]

II. The Principle of the Right to a Fair Trial in International Law

The right to a fair trial is one of the core principles of human rights protection.

The essence and the starting point of the right to a fair trial can be identified in Art. 6 of the European Convention of Human Rights (hereinafter also "ECHR") and in Art. 14 of the International Covenant on Civil and Political Rights of 1966 (hereinafter "ICCPR"), applicable to both civil and criminal proceedings.

The right to a fair trial is a keystone of the ECHR and it is extensively expressed in the three paragraphs of its Art. 6, which in pertinent part provides that "[i]n the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[4] According to a consistent interpretation, this provision enunciates different rights together, all forming the overall principle of the right to a fair trial, and the right to a fair hearing represents the core provision.[5]

Art. 14 of the ICCPR states that:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order

3. The present essay will not discuss the issue of fair hearing in relation to international courts whose mandate is the settlement of disputes in international commercial or investment cases but will be limited to analyzing whether the remote hearing mode can be considered a legitimate alternative to physical hearings, and therefore in compliance with the right to a fair trial, in the practice of some international courts more focused on international human rights.
4. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 November 1950, 213 U.N.T.S. 221, Art. 6 (*entered into force* 3 September 1953) ("ECHR").
5. *See* Paul LEMMENS, "The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR" in Eva BREMS and Janneke GERARDS, eds., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014) pp. 294 ff.

> (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".[6]

Before the ICCPR and ECHR, the Universal Declaration of Human Rights of 1948, under Arts. 10 and 11, also recognized the right to a fair trial. In particular, in the interest of the present perspective, Art. 10 provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Art. 10, which assesses the general right, has then to be coordinated with Art. 11 in relation to criminal proceedings.[7]

Subsequently, other international human rights instruments have provided similar prescriptions regarding due process, access to justice and a fair trial.

The American Convention on Human Rights, also known as the Pact of San José, adopted in Costa Rica in 1969, provides at Art. 8(1) that:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".[8]

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6. International Covenant on Civil and Political Rights, *opened for signature* 16 December 1966, 999 U.N.T.S. 171, Art. 14 (*entered into force* 23 March 1976) ("ICCPR").
7. Art. 11 states that: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed". Universal Declaration of Human Rights, G.A. Res. 217A(III), Art. 10, U.N. GAOR, 3rd Sess., 1st plen. Mtg., Arts. 10-11, U.N. Doc. A/810 (12 December 1948).
8. The remaining paragraphs of the provision are mainly focused on criminal proceedings. Only few paragraphs are relevant in the present perspective: "2. […] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused

A more general principle on the right to a fair trial is admitted by the African Charter on Human and Peoples' Rights, adopted in Nairobi in 1981 and also known as the Banjul Charter, which under Art. 7 states that "[e]very individual shall have the right to have his cause heard", indicating the four components of the principle: the right to appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; the right to be presumed innocent; the right to defense, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial court or tribunal. Further paragraphs are more focused on criminal proceedings.[9]

A more modern version is offered by the Arab Charter on Human Rights, in its amended version of 2004-2008, which under Art. 13 states that "[e]veryone has the right to a fair trial in which sufficient guarantees are ensured".[10]

The right to a fair trial is then also recalled in the Principles and Guidelines on the Right to a Fair Trial elaborated by the African Union, where Chapter A, No. 1 states that "[i]n the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body".[11] This provision is followed by a long and articulated rule fixing the essential elements of the

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to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; […] 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice". American Convention on Human Rights, *opened for signature* 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, Art. 8 (*entered into force* 18 July 1978.

9. African Charter on Human and Peoples' Rights, *opened for signature* 27 June 1981, 21 I.L.M. 58, 1520 U.N.T.S. 217 (*entered into force* 21 October 1986).
10. "1. Everybody has the right to a fair trial, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations. State Parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights. 2. The hearing shall be public other than (except) in exceptional cases where the interests of justice so require in a democratic society which respects freedom and human rights". Arab Charter on Human Rights, *adopted on* 22 May 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893, Art. 13, U.N. Doc. CHR/NONE/2004/40/Rev.1 (*entered into force* 15 March 2008).
11. *See* African Union, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" (2003) available at <https://www.achpr.org/legalinstruments/detail?id=38> (last accessed 20 December 2021).

right to a fair hearing and the equality of arms between the parties, in civil, criminal or administrative proceedings.

The International Criminal Court (hereinafter "ICC") Statute contains a long and complete articulation of rules, which from Art. 63 fix the procedure to be applied, essentially inspired by the right to a fair trial. It is to be noted that, according to Art. 8 of the Statute, willfully depriving a prisoner of war or another protected person of the rights to a fair and regular trial constitutes a war crime.[12]

Among so many international human rights declarations, Art. 14 ICCPR and Art. 6 ECHR are possibly the most direct and meaningful evolutions of the 1948 Universal Declaration of Human Rights with regard to the right to a fair trial. It is to be added that Art. 14 can be considered the cornerstone for this fundamental principle, due to the large number of State ratifications received by the Covenant and the activity of the Human Rights Committee (hereinafter "HRC"), the permanent body created to "supervise compliance" with the Covenant's provisions.

Art. 14 is a long and detailed provision. After its opening statement that "[a]ll persons shall be equal before the courts and tribunals", the Covenant continues by addressing the various elements forming the right to a fair trial: presumption of innocence, the right to prepare the defense, to communicate with counsel, to have an interpreter, to examine witnesses and other technical and substantial aspects of the trial. The boundaries of the right to a fair trial can be summarized as follows: a trial should be held in public and the court's judgment with its reasons must be given in public; a defendant has a right to a lawyer and the right to confront the prosecution's witnesses and to test the evidence said to prove his or her guilt. All those rights should extend to the whole course of the proceeding.

This rich enumeration of fair trial standards indicated under Art. 14(1) refers to a set of rights which maybe do not even represent an exhaustive list and could possibly be expanded.[13]

It has been generally acknowledged that the right to a fair trial should be evaluated as a whole, considering all the circumstances of the case, even if in the progress of interpretation by the HRC more and more concrete single guarantees have been added to the general principle of the right to a fair trial.[14]

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12. Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, 2187 U.N.T.S. 38544 (*entered into force* 1 July 2002) ("ICC Statute").
13. Amal CLOONEY and Philippa WEBB*, The Right to a Fair Trial in International Law* (Oxford University Press 2020) pp. 14 ff.; William A. SCHABAS, *Nowak's CCPR Commentary: U.N. International Covenant on Civil and Political Rights*, 3rd edn. (N.P. Engel 2019) p. 371 ("The right to a fair trial is, however, broader than the sum of these individual guarantees. This follows from Art. 14(3), which expressly refers only to the accused's 'minimum guarantees'").
14. OSCE Office for Democratic Institutions and Human Rights, "Legal Digest of International Fair Trial Rights" (26 September 2012) at <https://www.osce.org/files/f/documents/1/f/94214.pdf> (last accessed 20 December 2021) pp. 109 ff.

If compliance with the fair trial principle is given by fulfilling the overall sum of the single standards, also the violation of the right to a fair trial is determined by the cumulative effect of procedural defects, even if a single defect, taken separately, would not have rendered the proceedings unfair. A similar conclusion was also repeatedly affirmed in relation to Art. 6 of the ECHR, recognizing the role of international courts or domestic judges to assess whether the breach of a single element of the overall protection results in a violation of the fair trial principle.[15]

III. The Customary and Substantive Content of the Right to a Fair Trial

Before focusing on the issue of a remote hearing as a possible derogation from the general protection granted by the right to a fair hearing, attention should be given to the qualification of the principle, which is so clearly expressed by Art. 14(1) ICCPR, as a provision of international customary law. This kind of evaluation is needed in order to appraise whether the right to a fair trial not only is a fundamental right, but is a rule binding on all States regardless of whether they are parties to the ICCPR or similar international human rights instruments. Customary international law, in fact, deduced by repeated practice and behavior of States (*diuturnitas*), accompanied by the belief that such practice is legally obligatory (*opinio juris ac seu necessitates*), has a universal application.

It seems that such a right does exist as a matter of customary international law, especially taking into account what has been repeatedly affirmed by the various international courts interpreting Art. 14. Nevertheless, the practice of many international human rights courts, mainly dealing with international criminal law proceedings, shows that the principle might be derogated from in certain strictly applied circumstances. The most relevant cases will be recalled in order to ascertain the concrete substantive value of the principle and the limited situations in which a derogation can occur without creating a breach of a fundamental right.[16]

15. W.A. SCHABAS, *Nowak's CCPR Commentary*, fn. 13 above; A. CLOONEY and P. WEBB, *The Right to a Fair Trial*, fn. 13 above.
16. The Inter-American Commission on Human Rights has made it clear that "most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law". Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., para. 261 (22 October 2002). In relation to fair trial *see also* International Commission of Jurists, "Principle 7 – Fair Trial" in *Legal Commentary to the ICJ Berlin Declaration. Counter-terrorism, Human Rights and the Rule of Law* (2008) pp. 59 ff., available at <https://www.icj.org/wp-content/uploads/2012/04/Legal-Commentary-to-the-ICJ-Berlin-DeclarationNo.1-Human-Rights-Rule-of-Law-series-2009.pdf> (last accessed 20 December 2021).

In relation to the right of appearance, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereinafter "ICTY") declared that it is a component of the more general fair trial requirement set out in Art. 14 of the ICCPR, and that "[t]he right to a fair trial is, of course, a requirement of customary international law".[17]

The qualification of customary law could also reinforce the interpretation according to which the right to a fair trial is non-derogable, even for reasons of public emergency. This was affirmed by the Inter-American Commission, not only as an effect of the right to a fair trial as a whole, but also in relation to the single components indicated above.[18] A similar rigid position affirming the non derogability was taken by the African Commission with regard to the provisions of the African Charter, which "unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situation".[19]

Along the same lines, the revised Arab Charter on Human Rights under Art. 13 states that "[e]veryone has the right to a fair trial that affords adequate guarantees", and under Art. 4 clarifies that in "exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law", but it adds that no exception is possible for some specific prescriptions, including the right to a fair trial.

Even if the ICCPR, under its Art. 4(2), does not include the right to a fair trial in the list of the rights that qualify as absolutely non-derogable, nevertheless the HRC itself reaffirmed the character of peremptory provision beyond the list of non-derogable provisions as given in Art. 4(2). The HRC clarified that States can in no circumstances invoke Art. 4 of the Covenant "as justification for acting in violation of humanitarian

17. *The Prosecutor v. Aleksovski,* Case No. IT-95-14/1-A, Judgment, para. 104 (24 March 2000). Similarly, the Economic Community of West African States ("ECOWAS") Community Court of Justice, in a judgment rendered in 2016, affirmed that fundamental rights to fair trial and appellate review under Art. 7(1) of the African Charter on Human and Peoples' Rights are customary rules: *Obi v. Nigeria*, Suit No. ECW/CCJ/APP/25/15, Judgment No. ECW/CCJ/JUD/27/16, pp. 4 ff. (9 November 2016).
18. In case of emergency "the fundamental components of the right to due process and to a fair trial must nevertheless be respected". Report on Terrorism and Human Rights, fn. 16 above, paras. 245-247.
19. *Commission nationale des droits de l'Homme et des libertés v. Chad*, ACHPR Comm. No. 74/92, para. 21 (2-11 October 1995).

law or peremptory norms of international law, for instance […] by deviating from fundamental principles of fair trial".[20]

The character of mandatory norm of the provision on the right to a fair trial, recognized by many international treaties and covenants as described above, resulted in quite a high number of reservations to the ICCPR, granted by Art. 19 of the Vienna Convention on the Law of the Treaties of 1969.[21] The reservations, though, mostly concern specific constraints or the appellate procedure, and are not directed to the right to a fair trial as a whole.

Once the status of customary law for the right to a fair trial has been ascertained, it remains to analyze the actual content of the individual components of the right and whether they can be recognized as customary rules as well and, as a consequence, derogable only in exceptional circumstances.

IV. The Right to a Public Hearing and the Right to a Physical Hearing

Keeping Art. 14(1) as a main reference for the right to fair trial, in the present context, attention should be limited to the rule that "[…] everyone shall be entitled to a fair and public hearing […]" and this provision has to be considered in relation to the emergency situation determined by the Covid-19 pandemic, and the restrictions imposed by States worldwide, that rendered it substantially impossible to hold public physical hearings, whether in front of domestic or international courts.

The public character of the hearing is a major concern in the determination of a criminal charge, making it necessary to hold the criminal trial in public from the early phases of an indictment until the final judgment which is pronounced in public.[22] This right was enshrined in most constitutional charters and national laws, as well as in international instruments, entitling all parties to a trial – namely defendant, victims, witnesses – to benefit from a sort of sovereign control over the administration of justice achieved through its public character.

The level of "publicity" should, however, be proportionate and determined on a case-by-case basis, and might be applied in allowing, for instance, victims to be shielded for their protection, while keeping the defendant exposed to a public trial.

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20. HRC, *General Comment No. 29, Article 4: Derogations During a State of Emergency*, paras. 11 ff., U.N. Doc. CCPR/C/21/Rev. 1/Add.11 (31 August 2001); United Nations Counter-Terrorism Implementation Task Force, "Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism" (October 2014) para. 14, available at <https://www.ohchr.org/en/newyork/documents/fairtrial.pdf> (last accessed 20 December 2021).
21. Convention on the Law of Treaties, *opened for signature* 23 May 1969, 1155 U.N.T.S. 331, Art. 19 (*entered into force* 27 January 1980).
22. United Nations Counter-Terrorism Implementation Task Force, "Basic Human Rights Reference Guide", fn. 20 above.

Conditions for public access may vary, also according to the judicial institution, location, kind of attendees and possible security reasons. In addition, some international criminal courts, when physical access to the hearing room is limited for whatever reason, might provide for a video transmission/broadcast, with the effect of enlarging and extending the public character of the trial.

From all the above it seems possible to infer that the public character of the hearing does not constitute a non-derogable principle, and that the right to a fair trial is not violated when, for reasons adequately grounded and correctly evaluated, public access is limited or restricted. This conclusion has been shared by some human rights institutions that have considered that a derogation might be necessary for protecting lives, health, and the physical integrity of some of the parties involved in the proceeding.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,[23] with regard to the public character of the hearing, adopt a limitedly flexible approach, considering the possibility to derogate from the public form for reasons of security, but always recalling the need to adopt measures to prevent abuse and on a non-discriminatory basis.[24]

The ICC Statute, under Art. 67(1) provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, [and] to a fair hearing", adding that the accused is also entitled among other "minimum guarantees" to be present at trial.[25]

As already pointed out, in the context of the ECHR, the right to a fair trial is achieved through the imposition of a full and proper hearing both for civil and criminal proceedings and the public nature of the hearing is one of the rights which are explicitly imposed by Art. 6(1) of the ECHR. In providing for the right to a public hearing, the ECHR intends to protect litigants against the administration of justice without public scrutiny, and this is particularly relevant in criminal cases.

23. The Siracusa Principles represent the outcome of the meeting promoted in 1984 in Siracusa, Italy, by the American Association for the International Commission of Jurists ("AAICJ") to examine the limitation and derogation provisions in the Covenant, in order to identify: the legitimate objectives; the general principles of interpretation governing their application; and some of the main features of the grounds for limitation or derogation.
24. AAICJ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (April 1985) para. 70, available at <http://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (last accessed 20 December 2021) ("AAICJ Siracusa Principles"): "[…] (g) any person charged with a criminal offense shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial: […] – the right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse".
25. ICC Statute, Art. 67(1)(d).

Despite this recognition as a fundamental principle, however, the right to a fair hearing does not always imply the entitlement to an oral hearing, and the obligation imposed by Art. 6(1) is not to be considered as absolute. In its case-law the European Court of Human Rights (hereinafter also "ECtHR") has emphasized that there might be exceptional circumstances that justify dispensing with a public hearing. The legitimacy of a measure taken by the domestic authorities which has excluded a public hearing should be duly justified in light of the circumstances and evaluated on a case-by-case basis.[26]

Somehow linked to the right to have a public hearing is the right to attend the hearing in person. Physical presence during the trial allows defendants to present themselves to the court, to directly understand the case, to be confronted with the victims or the prosecution, to present their defense if permitted, to interact with counsel and possibly react to witnesses.

Art. 14(3) of the ICCPR, in relation to criminal trials specifies that "in the determination of any criminal charge against him […] everyone shall be entitled to […] be tried in his presence". The rule is articulated in order to grant the accused persons three different guarantees: (i) the right to be present during their trial, (ii) when defendants are assisted by a lawyer, the right to instruct him/her on the conduct of their case as well as to testify on their own behalf, and (iii) if not assisted by a lawyer, to conduct their defense personally.[27]

The HRC has repeatedly underlined that the right to be present represents an opportunity for the defendant to support the case,[28] but has always considered the possibility of admitting restrictions when the circumstances so require, provided that equality of arms is guaranteed.[29]

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26. *See Ramos Nunes de Carvalho e Sá v. Portugal*, Nos. 55391/13, 57728/13 and 74041/13, paras. 190, 208 ff., 6 November 2018. *See also* European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights. Right to a Fair Trial (Civil Limb)" (30 April 2021) at <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> (last accessed 4 August 2021) pp. 86 ff.
27. It has to be noted that the *travaux préparatoires* to the ICCPR recognized that the right to be tried in one's own presence was particularly conceived in relation to criminal proceedings.
28. A. CLOONEY and P. WEBB, *The Right to a Fair Trial*, fn. 13 above, pp. 448 ff.; OSCE Office for Democratic Institutions and Human Rights, "Legal Digest", fn. 14 above, pp. 133 ff., also distinguishing between the right to be present in criminal hearings and in non-criminal proceedings.
29. *See Wolf v. Panama*, HRC Comm. 289/1988, paras. 6.5 ff., U.N. Doc. CCPR/C/44/D/289/1988 (26 March 1992). The author of the complaint (the alleged victim) invoked violations of specific provisions of the ICCPR. With reference to Art. 14 of the Covenant he submitted that no public hearing took place, and that he was unable to attend court, since he was detained at the Isla de Coiba prison, in Panama. Mr. Wolf claimed that the State party has violated his right to a fair trial and to be tried in his

The HRC has also confirmed that the right to be present is required in appellate proceedings when the case involves aspects of both fact and law.[30]

The Statute of the ICC provides that "the trial is in presence of the accused".[31]

Not all international human rights instruments provide for physical presence as a distinct component of the right to a fair trial: the Universal Declaration of Human Rights and the American Convention on Human Rights do not mention the defendant's attendance in person and the Arab Charter of 2008 is not explicit on the point. Still, this could not lead to the conclusion that the defendant has no right to be present. On the contrary, the right to be present at one's trial may be considered inherent in the general right to a fair hearing, whenever the different rules provide for the possibility of the individual accused to present his/her arguments and defense.[32]

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presence. The State party denied this allegation by affirming that the proceedings against Mr. Wolf complied with domestic procedural guarantees. In the case the Committee recalled that "the concept of a 'fair trial' within the meaning of article 14, paragraph I, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where, as in the present case, the accused is denied the opportunity to personally attend the proceedings". *See also Orejuela v. Colombia*, HRC Comm. 848/1999, paras. 7.3 ff., U.N. Doc. CCPR/C/90/D/1347/2005 (23 July 2007); *Guerra de la Espriella v. Colombia*, HRC Comm. 1623/2007, para. 9.3, U.N. Doc. CCPR/C/98/D/1623/2007 (11 May 2010).

30. *See Karttunen v. Finland*, HRC Comm. 387/1989, para. 7, U.N. Doc CCPR/C/46/D/387/1989 (23 October 1992).

31. Its Art. 63 provides that: "1. The accused shall be present during the trial. 2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required".

32. *See The Prosecutor v. Karemera et al.* [Appeals Chamber], Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to Be Present at Trial, para. 11 (5 October 2007). In this case the issue at stake was whether the presence of an accused is required during the cross-examination of a witness by a co-accused or his counsel and the Appeals Chamber was not satisfied that the Trial Chamber properly exercised its discretion and therefore its restrictions on the appellant fair trial rights were unwarranted when proved with the proportionality test. *See also The Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, para. 32 (26 May 2004), which relates to a case of capacity to stand the trial, for physical and mental problems. *See also Milošević v. The Prosecutor* [Appeals Chamber], Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, para. 13 (1 November 2004). In this case, which dealt with the defendant's right to self-representation, the Appeals Chamber reaffirmed that, under the appropriate circumstances, the Trial Chamber

Nothing is said on the matter in the African Charter, while the right to be present is clearly affirmed in the Principles and Guidelines on the Right to a Fair Trial elaborated by the African Union. Chapter N, No. 6(c) in fact states that "[i]n criminal proceedings, the accused has the right to be tried in his or her presence".[33]

The right to be present at the hearing is not expressly included in the ECHR, but many judgments of the European Court of Human Rights demonstrate, as to the interpretation of Art. 6, that the opportunity for the applicant or the defendant to participate actively in the proceedings is central to the notion of a "fair hearing". Therefore, when the ECtHR considers whether proceedings concerning the applicant's rights have been "fair", what is emphasizes is whether the applicant had been afforded a satisfactory opportunity to participate, to be heard (even with the assistance of an interpreter if needed), and to communicate with his/her counsel. This is even more important when the applicant is the accused in a criminal proceeding.[34] The ECtHR has stated that "in the interests of a fair criminal process, it was of capital importance that a defendant should appear".[35]

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights clearly suggest that a fair trial has to be held in the presence of the defendant:

> "Although […] the right to a fair and public hearing in the determination of a criminal charge (Art. 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights

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had the power to restrict one of the rights which are "listed in the same string of rights" in relation to fair trial. Consequently, the Appeals Chamber in the Milošević case, reaffirmed that the defendant's right to be present for his trial may be restricted whenever his/her presence could determine a substantial trial disruption.

33. African Union, "Principles and Guidelines", fn. 11 above, Ch. N, No. 6(c), stating in the pertinent part: "In criminal proceedings, the accused has the right to be tried in his or her presence. (i) The accused has the right to appear in person before the judicial body. (ii) The accused may not be tried in absentia. (iii) The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing".
34. *See* Piero LEANZA, "Chapter 3. Particular Aspects of the Right to a Fair Trial" in Piero LEANZA and Ondrej PRIDAL, *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights* (Kluwer Law International 2014) p. 79 at pp. 101 ff.; Bernadette RAINEY, Pamela MCCORMICK and Clare OVEY, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 7th edn. (Oxford 2017) pp. 243 ff.
35. *See Neziraj v. Germany*, No. 30804/07, para. 47, 8 November 2012. The Court also noted that the right to be present could be interpreted in a more flexible way in cases on appeal, especially when the appeal concerns only matters of law and not of facts. *See Marcello Viola v. Italy (No. 1)*, No. 45106/04, para. 55, ECtHR 2006-XI. *See also Zhuk v. Ukraine*, No. 45783/05, para. 3221, 21 October 2010.

> fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular: […] the right to be present at the trial".[36]

If physical presence before the court is considered an individual's right, the right could also be waived by the defendant, who for whatever reasons decides not to appear. This point finds different solutions in the courts' statutes. The International Criminal Court, for instance, provides for cases in which the defendant is requested to attend the hearing and the relevant rule, Art. 63, is specifically titled "Trial in the presence of the accused".

However, trials *in absentia* are generally allowed by international courts, also international criminal courts, as far as basic standards of due process are granted to the defendant.[37] The reason why trials *in absentia* have been accepted and provided in the rules of procedure of international criminal courts is clearly due to the fact that individuals charged with international law crimes are often fugitives or otherwise fail to present themselves or to explain the reasons for their non-appearance.

In some circumstances proceedings *in absentia* may be permitted in the interest of the administration of justice, in order to proceed with the trial in a timely manner and anytime the accused has been informed as to the details of procedure, *i.e.*, date and place.

It is clear, though, that when the Siracusa Principles assess the non-derogability of the right to be present, the fundamental aim is to maintain international humanitarian guarantees particularly in cases of serious international criminal offences. Moreover, in the introduction to the Principles, the authors offer a list of general interpretative indications, stressing the necessity that all limitations to the prescribed rights be provided for by the law, in the light and context of the particular right concerned and that they respond to a "pressing public and social need".[38]

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36. AAICJ Siracusa Principles, para. 70.
37. On the trials *in absentia see* the observations of President Antonio Cassese for the Rules of Procedure and Evidence of the Special Tribunal for Lebanon. According to Cassese the case law of the ECtHR and the Human Rights Committee has repeatedly emphasized that trials *in absentia* are consistent with the principles of fair justice provided that a set of safeguards for the accused are employed. He also noted that the grounds militating against trials *in absentia* (especially in common law systems) cannot be applied to international criminal trials where "proceedings do not boil down to a contest between two parties. Rather, the main goal is the pursuit of truth and justice". Special Tribunal for Lebanon, "Explanatory Memorandum by the Tribunal's President to the Rules of Procedure and Evidence (as of 10 June 2009)" (5 June 2009) paras. 35 ff., at <https://www.stl-tsl.org/sites/default/files/documents/legal-documents/RPE/Explanatory_memorandum_100609_En.pdf> (last accessed 20 December 2021).
38. *See* AAICJ Siracusa Principles, paras. 1 ff.

V. Video Link as an Alternative to the Physical Hearings Before the Covid-19 Pandemic

A possible derogation from the defendant's right to physical presence during the trial is raised when his/her presence is admitted via video link. If accepted as an alternative method to satisfy the right to be present in trials before human rights courts, this may provide an analogy in relation to the emergency situation determined by the Covid-19 pandemic.[39]

Many international courts were confronted with cases in which the defendant or other subjects in the proceeding were unwilling or unable to be physically present in the hearing room. The possibility to have recourse to technology to allow the court to proceed with its duties is specifically admitted by some international court statutes and procedural guidance rules issued by international institutions.

The ICC Statute, although providing for the right of defendants to appear in person, admits that, in particular circumstances, "[i]f the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required".[40] Technology might therefore be used but only "in exceptional circumstances", "after other reasonable alternatives have proved inadequate" and "only for such duration as is strictly required". This solution was applied quite efficiently during the pandemic, when the ICC was forced to make recourse to this method and hold hearings via video link. In Art. 64(2), the ICC Statute reaffirms its attention to the respect of the basic principle, but also to the protection of the other subjects involved in the proceeding, and provides that the "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Still the ICC Appeals Chamber did not refrain from noting that the solution adopted was strictly determined by the Covid-19 emergency experienced worldwide.

It should be added that the Rules of Procedure and Evidence for the operation of the Rome Statute of the ICC,[41] regulating the trial procedure before the Court, also provide for the possibility that an accused may submit a request to the Trial Chamber to be allowed to attend the trial through video link. The request might be accepted by the

39. A. CLOONEY and P. WEBB*, The Right to a Fair Trial*, fn. 13 above, pp. 459 ff.
40. ICC Statute, Art. 63(2).
41. The Rules of Procedure and Evidence are instruments adopted in 2003 and amended in 2013 for the functioning of the International Criminal Court. ICC ASP, 1st Sess. at part II.A, U.N. Doc. ICC-ASP/1/3 and Corr.1 (3-10 September 2002).

Trial Chamber, which will decide on a case-by-case basis.[42] The Rule 134 *bis*, however, seems to have originated from the need to create an exception to the duty of the defendant to be present which is not complied with or as a consequence of his/her disruptive behavior, rather than as an alternative to the right to be present.

International criminal courts have in some cases experienced derogations to the physical presence of defendants. The elements which were considered for admitting the alternative of a video link served the purpose of substantially guaranteeing the proportionality between the derogation from a fundamental right and the benefits of the derogation itself and the reasonableness of the alternative. It should be added that the practice of using videoconferencing has been quite largely adopted as a protective measure for individuals (victims or witnesses) expected to give testimony in international criminal proceedings in relation to major crimes of international law. This was often allowed when the testimony was received from a country far from the seat of the proceedings or the premises of the criminal court.

Both the ICTY and the International Criminal Tribunal for Rwanda (hereinafter "ICTR") adopted similar guidelines on the matter, allowing video links in specific circumstances, which were clearly stated for the first time in the very complex *Tadic* case pending before the ICTY, particularly in the Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link.[43] According to said Decision, it had to be ascertained that (i) the testimony of the witness was essential for the trial (meaning that proceeding without it would have been contrary to the fair administration of justice) and (ii) the witness refused or was unable to reach the court premises. It can be added that in some cases the recourse to video link was used to protect victims from the public and the press.[44]

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42. ICC Rules of Procedure and Evidence, Rule 134 *bis*, as amended by Amendments to the Rules of Procedure and Evidence, ICC ASP, 12th Sess., 12th plen. mtg., U.N. Doc. ICC-ASP/12/Res.7 (27 November 2013).
43. *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (25 June 1996).
44. *See also The Prosecutor v. Delalic, Mucic, Delic and Landzo*, Case No. IT-96-21, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (28 May 1997). The Office of the Prosecutor had filed a Motion to Allow Witnesses K, L and M to give their Testimony by Means of Video-Link Conference. The Trial Chamber delivered an oral decision on that date, granting the Motion, recalling the previous decision in the *Tadic* case. In the Decision the Trial Chamber noted that three of the witnesses made a request to testify away from the seat of the ICTY in The Hague, because they feared potentially serious consequences to themselves and their families if they were obliged to testify at the seat of the International Tribunal. The Prosecution noted that the two conditions for the granting of leave to testify by video-link conference, established in the case of *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon

As a general rule, the intent of the courts was to use video broadcasting for witness testimony in a way as to replicate the same situation that the witness would have had in the hearing room of the court. It is also relevant to consider that international courts were aware of the possibility that technological glitches, like poor internet reception, video and audio drop out could occur. For this reason, they have been adopting appropriate legal and technological safeguards to allow the defendant to follow the proceedings, to see and be seen by other parties and counsel and the court and to hear without any impediments.[45]

In a 2006 case before the Appeals Chamber of the ICTR, the appellant raised the issue of a violation of his procedural right to be physically present[46] as guaranteed by Art. 20(4)(d) of the Statute of the Tribunal.[47] The Appeals Chamber affirmed that the physical presence of the accused before the court was "one of the most basic and common precepts of a fair criminal trial". The Chamber recalled that this was confirmed not only by the ICC Statute and by the Rules of Procedure and Evidence for the operation of the Rome Statute of the ICC, but also by the Rules of Procedure and

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and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (25 June 1996), were satisfied in the case ("The first of these conditions is that the testimony of these particular witnesses is sufficiently important to make it unfair to the Prosecution to proceed without it. The second condition is that the witnesses are unable or unwilling to come to the seat of the International Tribunal. Indeed, the Prosecution asserts that the testimony of witnesses K and L is essential to its case, and that for medical reasons these witnesses are unable and unwilling to travel to The Hague").

45. In relation to cases involving Russian defendants, *see* International Partnership for Human Rights, "Human Rights Impact Assessment of the Covid-19 Response in Russia" (August 2020) available at <https://afew.org/wp-content/uploads/2020/08/Covid-19-RU-upd.pdf> (last accessed 20 December 2021).

46. *Zigiranyirazo v. The Prosecutor* [Appeals Chamber], Case No. CTR-2001-73-AR73, Decision on Interlocutory Appeal, paras. 11-22 (30 October 2006). The appellant submitted that the Trial Chamber violated his fundamental right to be tried in his presence, due to the decision of the Trial Chamber to hear a witness testify in person in The Netherlands while the appellant was participating in the proceedings only by video link from Arusha. The appellant contended that the right to be present at trial cannot be satisfied by video link and instead requires physical presence.

47. Art. 20(4)(d) provides in its pertinent part: "Rights of the accused. 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing". Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Art. 20(4)(d), U.N. Doc. S/RES/955 (8 November 1994), *as last amended by* S.C. Res. 1717, U.N. Doc. S/RES/1717 (13 October 2006) ("ICTR Statute").

Evidence of the Special Court for Sierra Leone,[48] and by the Rules of the International Criminal Tribunal for the Former Yugoslavia.[49] For this reason, the Chamber noted that in the language of Art. 20(4)(d) of the Statute the term "presence" had to be interpreted as implying physical proximity. Only the occurrence of "substantial trial disruptions" could be considered as essential reasons to assess restrictions to be present at the trial.[50]

Moreover even if the Appeals Chamber observed that the right to be present could not be considered as "absolute", and that the Trial Chamber's failure to examine the accused's right to be tried in his presence was not "of significant consequence",[51] and that the objectives advanced by the Trial Chamber were of general importance (*i.e.*, witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial) nonetheless the Appeals Chamber declared itself not satisfied that, in the circumstances, the Trial Chamber had properly exercised its discretion in deciding to impose limitations on the right of the accused to be present at his trial.

The rationale for such decision, however, was not determined by any finding that video link, as an alternative to hearing in presence, was not adequate, but by the overall circumstances which did not justify the derogation from the fundamental principle of an in-person trial.

In conclusion it seems that in the practice of the international criminal courts, ICTY and ICTR, although with the occurrence of several conditions, the use of video technology is not considered *per se* as a violation of the right to a fair trial, and more specifically, of the right to a hearing.[52]

48. The Statute of the Special Court for Sierra Leone has a provision – Art. 17(4)(d) – which is very similar to Art. 20(4)(d) of the ICTR Statute, while the Rules of Procedure and Evidence of the Special Court for Sierra Leone envision the accused's participation in his other trial by video link only after he/she has been removed "for persistently disruptive conduct". Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 80(b) (*as last amended* 31 May 2012) available at <http://www.rscsl.org/Documents/RPE.pdf> (last accessed 20 December 2021).
49. Art. 65 *bis* (C) states: "With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted: (i) in his presence, but with his counsel participating either via teleconference or video-conference; or (ii) in Chambers in his absence, but with his participation via teleconference if he so wishes and/or participation of his counsel via teleconference or video-conference". ICTY Rules of Procedure and Evidence, Rule 65 *bis* (C), U.N. Doc. IT/32/Rev.50 (8 July 2015).
50. *See Zigiranyirazo v. The Prosecutor* [Appeals Chamber], Case No. CTR-2001-73-AR73, Decision on Interlocutory Appeal, paras. 11-22 (30 October 2006).
51. *Ibid.*, para. 15.
52. A. CLOONEY and P. WEBB, *The Right to a Fair Trial*, fn. 13 above, p. 459.

The practice of the ECtHR leads to a similar conclusion. Even if there is no doubt that the right to be present, as one of the components of the right to a fair trial, in the interpretation of the European Court means "to attend the hearing in person", nevertheless the European Court has accepted – in specific circumstances – the possibility for the applicant or the defendant to be present via video link.

The leading case was submitted to the ECtHR by an Italian citizen who was sentenced to life imprisonment in Italy for mafia-related criminal activities. During the appeal proceedings the Italian court adopted severe security measures and decided that the accused should not be brought to the hearing room, because it was not "unreasonable to consider that [mafia] members may, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, especially the victims and *pentiti* [former Mafiosi who had decided to cooperate with the authorities]".[53] The accused claimed before the ECtHR that his right to be present had been violated. The ECthR declared that a defendant could join the proceedings via video link as long as the restrictive measure "serve[s] a legitimate aim" and the measure is "compatible with the requirements of respect for due process". The ECtHR maintained that the participation of the accused in the appeal proceedings was necessary, but "the defendant's participation in the proceedings via videoconference [was] not as such contrary to the Convention".[54] In the opinion of the Court the arrangements for the videoconference respected the rights of the defense and the link with the hearing room allowed the defendant "to see the persons present and hear what was being said". Moreover, all other requirements were met: the defendant could be seen and heard by the other parties, the judges and the witnesses and make statements to the court. Therefore the Court concluded that there was no violation of the right to a fair trial, given that the defendant's participation by video link during the appeal did not constitute a substantial disadvantage.

This decision was confirmed in other cases by the ECtHR, maintaining that "the use of a video-link […] is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the [applicant] is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for".[55]

53. *Marcello Viola v. Italy (No. 1)*, No. 45106/04, paras. 63-77, ECtHR 2006-XI.
54. *Ibid.*, para. 67.
55. *Sakhnovskiy v. Russia* [GC], No. 21272/03, para. 98, 2 November 2010; *Bivolaru v. Romania (No. 2)*, No. 66580/12, paras. 138-146, 2 October 2018.

VI. The Experience of the International Courts During the Covid-19 Pandemic

With regard to the emergency situation generated by the pandemic, as a preliminary observation it can be noted that according to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reasons of public health can be invoked as a ground for adopting limitations to certain fundamental rights. This might occur whenever States are forced to take measures – of an emergency nature – to deal with a serious threat to the health of the population or individual members of the population. The Principles also add that "[d]ue regard shall be had to the international health regulations of the World Health Organization".[56] Such provision attributes to the World Health Organization (hereinafter "WHO"), as an objective international agency of the United Nations, the power of ascertaining the seriousness of the public health emergency, on which ground States could be allowed to derogate from some fundamental rights.[57]

For this reason, the Office of the High Commissioner for Human Rights published a Guidance note on Emergency Measures and Covid-19,[58] where it was clearly stated that the suspension or derogation of some civil and political rights was exceptional, due to an emergency situation able to threaten the life of people and that nevertheless States had to provide safeguard measures to guarantee the respect of fundamental rights that under no (other) circumstances could be suspended.

A few days later, on 30 April 2020, the United Nations HRC issued a Statement on Derogations from the Covenant in connection with the Covid-19 pandemic, urging all State parties to the Covenant to comply with Art. 4 of the Covenant and duly and

56. *See* AAICJ Siracusa Principles, para. 25.

57. The official declaration of the occurrence of a pandemic was released on 11 March 2020 by the Director General: "We have therefore made the assessment that COVID-19 can be characterized as a pandemic". WHO, "WHO Director-General's Opening Remarks at the Media Briefing on COVID-19" (11 March 2020) at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last accessed 20 December 2021).

58. The Guidance Note by the Office of the High Commissioner for Human Rights ("OHCHR") was released on 27 April 2020, in order to contribute to the management of the emergency situation presented by the Covid-19 pandemic which forced many countries to take extraordinary measures to protect health and well-being of the population. The purpose of the Guidance Note was to invite States to adopt emergency measures respecting the requirements of legality, necessity and non-discrimination, recalling that emergency powers and measures should be time-bound and exercised on a temporary basis until a state of normalcy is restored. Still the document does not make any explicit reference to remote hearings. OHCHR, "Emergency Measures and COVID-19: Guidance" (27 April 2020) at <https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf> (last accessed 20 December 2021).

formally notify the United Nations Secretary General of any emergency measures taken in connection with the pandemic which could imply a derogation from their obligations under the Covenant.[59]

As a consequence of the indications given by the High Commissioner for Human Rights and the HRC, many State parties to the Covenant and to other international instruments on human rights, reacted to the emergency situation created by the Covid-19 pandemic notifying reservations or other declarations, with the purpose of derogating from some of the provisions contained in the treaties, which could no longer be complied with due to the emergency measures adopted to curb the spread of the virus. Such derogations were however generally grounded in the presumption that the measures were, as far as possible, limited in duration, geographical coverage and material scope. The "predominant objective" was in any case the restoration of a state of normalcy.

It is to be noted, however, that the derogations or notifications submitted by some States, claiming the impossibility to comply with the obligations imposed by the human rights treaties because of the pandemic, were quite general, did not put into question the core elements of the right to a fair trial and did not contain any reference to the recourse to video-link management of hearings as a derogation to the fundamental principle protected by the international instrument.

Still the rapid increase in the recourse to technology and to video platforms to conduct hearings by national and international courts was one of the most discussed consequences of the impact of Covid-19 on the right to a fair trial.

All the elements of the right to a fair trial provided for by Art. 14(1) ICCPR and Art. 6 ECHR and analyzed in the previous subsections were confronted with the inevitable recourse to videoconference hearings, replacing the hearings in courtrooms made impossible by travel bans and social distancing. The need to provide adequate facilities to manage international civil and criminal proceedings became crucial also for international courts whose core mandate is the fair and expeditious administration of international justice, particularly when it involves the prosecution and trial of atrocity crimes.

With the purpose of soliciting national courts on the necessity to conduct a continuous assessment of the compatibility of the use of technology with human rights obligations, the Organization for Security and Co-operation in Europe (hereinafter "OSCE") recommended that "[t]he right to a fair trial must not be jeopardized by any technological solutions to the pandemic" and "[t]he physical presence of parties in court hearings should remain the rule, and recourse to remote proceedings should constitute an exception. Judiciaries should ensure that all hearings are held in person

59. HRC, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, U.N. Doc. CCPR/C/128/2 (30 April 2020). *See also* ICCPR, Art. 4, and HRC, *General Comment No. 29*, fn. 20 above.

where fair trial rights cannot otherwise be guaranteed".[60] Moreover OSCE also recommended that "[t]he consent of the parties, with limited exceptions, should be required for remote hearings".[61]

With particular regard to criminal trials, in early March 2020 Fair Trials, an international NGO active in the field of criminal justice, highlighted six major issues which could endanger human rights in relation to criminal proceedings when there are "strong justifications" that mandate the use of remote justice procedures. Among them Fair Trials observed that notwithstanding the technological developments in the use of videoconferencing, the defendant's absence from the hearing room could have an impact on his/her ability to effectively participate in the proceedings, thus violating the right to a fair trial. In this context, video link equipment should imitate courtroom participation as much as possible, offering reliable sound and video conditions and providing personnel able to fix any possible technical problems affecting the quality and reliability of audio-visual communications.[62]

A similar approach has been expressed by a briefing Note issued by the International Commission of Jurists (hereinafter "ICJ") in Fall 2020.[63] The ICJ identified some major criticisms of the recourse to videoconferencing as an alternative to the physical attendance at ordinary proceedings in courts both at national and international levels. In particular according to the Note, even in emergency circumstances, the imposition of videoconferencing technology on an individual (any individual party, but more often the accused) without his/her consent could result in a violation of the fundamental right to a fair hearing. Hence any decision to hold a remote hearing in lieu of an in-person hearing should be taken by the competent authorities, and only where such a measure is necessary, inevitable, and proportionate to the emergency situation and that all possible guarantees will be taken to ensure fairness and integrity of the proceedings.[64]

Not differently from what was happening at the level of the national judiciary, the majority of the international law courts demonstrated a prompt reaction to the health emergency, adjusting to the need to continue ongoing proceedings halted by the

60. OSCE Office for Democratic Institutions and Human Rights, "The Functioning of Courts", fn. 1 above, para. 8.
61. *Ibid*.
62. Fair Trials, "Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings" (30 March 2020) at <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf> (last accessed 20 December 2021).
63. International Commission of Jurists, "Videoconferencing, Courts and COVID-19. Recommendations Based on International Standards" (November 2020) available at <https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf> (last accessed 20 December 2021).
64. *Ibid.*, p. 9.

pandemic, while also guaranteeing the safety of staff, judges and personnel charged with courtroom activities, like collecting evidence and managing databases.

A. The International Criminal Court

In June 2020 the Presidency of the International Criminal Court, in consultation with the judges, published the ICC Guidelines for the Judiciary concerning the Holding of Court Hearings during the Covid-19 Pandemic.[65] The Guidelines, although non-binding, had as their purpose coping with the emergency situation and granting a wide discretion to the ICC Chambers to determine the method for holding hearings (through videoconferencing or in physical presence).

At para. 2 the Guidelines provide that due to the pandemic additional precautions are needed to ensure physical safety. Therefore "each Chamber may determine whether any hearings it deems necessary can take place by way of: physical hearing held in one or more of the ICC's courtrooms, a remote hearing facilitated through the use of communications technology not requiring physical presence in a courtroom or a combination thereof". Paras. 3 and 4 also provide that:

> "Each Chamber should consider the consistency of the proposed hearing format with the rights and protections guaranteed in the Rome Statute and the Rules of Procedure and Evidence, reaching its own independent conclusion in this regard, including in respect of the procedural steps to be followed during such consideration. In considering the appropriateness of physical hearing, remote hearing or combination thereof, each Chamber should give due consideration to the situation and restrictions in place in the State(s) in which parties and participants in the proceedings are located".

Actually, the Guidelines essentially appear as a technical support for judicial activity and there is no explicit mention of the need to comply with the fundamental right to a fair trial under those circumstances. On the other hand, they recall that:

> "The responsibility for the fair and expeditious conduct of proceedings rests entirely with the Pre-Trial Chamber, Trial Chamber or Appeal Chambers vested of a case […] Each Chamber should consider the consistency of the proposed hearing format with the rights and protections guaranteed in the Rome Statute and the Rules of Procedure and Evidence".[66]

65. ICC, "Guidelines for the Judiciary Concerning the Holding of Court Hearings During the Covid-19 Pandemic" (23 June 2020) at <https://www.icc-cpi.int/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf> (last accessed 20 December 2021).
66. *Ibid.*, paras. 1 and 3.

As a consequence of this, already in early Spring 2020 the Chambers started organizing the logistics for scheduled hearings on a case-by-case basis, taking into account the travel restrictions between the ICC premises in The Hague and the other States involved. From June 2020 various remote or semi-remote hearings took place before the ICC Chambers.

The language adopted in the various orders and acts issued by the Court, asking the parties involved to make concrete proposals for the holding of conferences, was "with the presence of the accused, physically or through the use of video technology", thus making the two forms – in person and remote – equally valid.[67]

The compliance with the right to a fair hearing when the hearing is held through video link was discussed in the case *Gbagbo and Goudé* before the Appeals Chamber in May 2020. The position of the Prosecutor was quite clear in affirming that the accused's right to be present is not restricted to physical presence but can include other forms when the person concerned is permitted to effectively and meaningfully participate in the hearing and privately communicate with counsel during the proceedings. A hearing where the defendant is connected with judges, his counsel and other parties and participants in the hearing through video link or other virtual technology "would not in principle violate his right to be present during the hearing pursuant to article 67(1)(d)".[68]

67. *See The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Order to Provide Information on Methods of Work to Minimize the Impact of Covid-19 and Related Measures on the Conduct of Proceedings (29 April 2020), which was aimed at reaching a suitable cooperation with the parties given that "travel between and within countries has been severely restricted in response to the COVID-19 pandemic, and various relevant countries, including the Host State and Mali, have imposed strict measures to contain the spread of the virus". Further to the mentioned Order, in May 2020, the Trial Chamber X issued its Decision on the Conduct of Proceedings, in which it provided directions on the conduct of proceedings and "noting the insignificant differences between in-court and video-link testimony" decided to hear witnesses via video link: *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Decision on the Conduct of Proceedings (6 May 2020). *See also The Prosecutor v. Yekatom and Ngaïssona*, Case No. ICC-01/14-01/18, Transcript (9 July 2020); *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Transcript (16 November 2020).

68. *See The Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Prosecution's Response to "Blé Goudé Defence Urgent Request for Postponement Pursuant to Art. 67 of the Statute", para. 22 (8 May 2020). *See also* at para. 19: "The Prosecution considers that holding a virtual hearing is not in principle incompatible with ensuring that these rights, insofar as they are applicable during appeals proceedings, are complied with. Ultimately, it will depend on the modalities and the practical arrangements that are put in place, so as to ensure that Mr Blé Goudé (and indeed Mr Gbagbo) will be able to fully exercise their rights, while participating in the hearing remotely and through virtual technology".

B. The Special Tribunal for Lebanon

Also the Special Tribunal for Lebanon (hereinafter "STL") had to cope with the need to grant a continuation of the proceedings due to the travel restrictions imposed by the pandemic.[69] In the case *The Prosecutor v. Ayyash et al.* partially remote hearings had to take place, before the Trial Chamber could render its final judgment.[70]

The right to a fair trial and the guarantee to a public hearing is provided both for the accused and for the victims under Arts. 16 and 17 of the Statute of the STL, yet this international court also considered that a virtual presence may be acceptable. Despite the fact that physical absence reduces the accused's ability to exercise the right to face witnesses or accusers in person, the practice of the Special Tribunal confirms that the right of the defendant and of other parties to attend the trial is not absolute and can be derogated from when other interests have to be protected. This was clearly true with the pandemic when the international judiciary became aware that there were risks deriving from physical attendance and indefinite postponement of trials could jeopardize the right to expeditious proceedings.

In the Judgment of the Trial Chamber of the STL, it was confirmed that, in compliance with all due guarantees and assessment of adequate technical settings, in evaluating the evidence there was no difference between testimony received by videoconference link as opposed to inside the courtroom.

69. Art. 16(2) of the Statute of the Special Tribunal for Lebanon provides that: "The accused shall be entitled to a fair and public hearing". Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (30 May 2007). It is to be noted that the Rules of Procedure and Evidence, in their last version of 2020, under Rule 105 allow participation of the defendant via video link: "Attendance of Hearings via Video-Conference Upon authorization of the Pre-Trial Judge or of the Trial Chamber, the accused may participate in hearings via video-conference provided that his counsel attends the hearings in person". STL Rules of Procedure and Evidence, Rule 105, STL-BD-2009-01-Rev.11 (*as last corrected* 18 December 2020).

70. *The Prosecutor. v. Ayyash, Merhi, Oneissi and Sabra*, Case No. STL/11/01/T/TC, Judgment, para. 292 (18 August 2020). In particular, fifty-three witnesses testified by videoconference from the office of the Special Tribunal in Beirut. The Trial Chamber decided that videoconference technology allowed an adequate assessment of their credibility and reliability ("The judges and counsel could follow a witness's testimony with high-definition image quality, and the witness could see the different speakers in the courtroom. Counsel and judges could effectively question the witness. Documents could be tendered and shown electronically to the witness, who could mark them in a manner that allowed them to be electronically captured and saved. The Trial Chamber has therefore not differentiated between testimony received by video-conference link and inside the courtroom when weighing the evidence").

C. The International Court of Justice

In June 2020 the International Court of Justice (hereinafter "ICJ") notified that some articles of the Rules of Court had been amended in order to comply with the health emergency and with the restrictions imposed by the Covid-19 pandemic. The new version of para. 2 of Art. 59 makes clear that "[t]he Court may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link. The parties shall be consulted on the organization of such a hearing".[71]

During the emergency period, the Court continued its judicial work, following what had been set forth in the Guidelines for the Parties on the Organization of Hearings by Video Link, adopted in July 2020.[72] The hearings in the Case *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, concerning the jurisdiction of the Court, were conducted via videoconference.[73] Due to the measures adopted by The Netherlands, some judges of the Court attended the hearing in person at the Peace Palace in The Hague, while others participated remotely, and the representatives of the State of Guyana addressed the Court by videoconference.

Considering the caseload of the ICJ from the outset of the pandemic until now, there is no information of any complaint alleging a violation of the fundamental principle of a right to a fair hearing as a consequence of the adoption of remote proceedings.

D. The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (hereinafter "ITLOS") reacted to the Covid-19 health emergency and on 25 September 2020 amended its Rules in order to provide that the Tribunal at its discretion – but due to compelling reasons of public health or security – could decide to hold hearings, meetings and readings of judgments by partial or total videoconference. In accordance with Art. 45 of the Rules, the President of the Tribunal may summon the parties involved in the case and consult them with regard to issues of procedure.[74] This allowed the ITLOS to regularly

71. ICJ Rules of Court (1978), Art. 59(2) (*as last amended* 25 June 2020).
72. ICJ Guidelines for the Parties on the Organization of Hearings by Video Link (13 July 2020) at <https://www.icj-cij.org/en/other-texts/guidelines-videolink> (last accessed 20 December 2021). The Guidelines fix the arrangements of numerous technical aspects as well as the etiquette for the parties involved to join and intervene during the hearings.
73. The Republic of Guyana requested the ICJ to confirm the legal validity and binding effect of the Award regarding the boundary between the Colony of British Guiana and the United States of Venezuela. The Award was rendered on 3 October 1899 ("1899 Award").
74. ITLOS Rules of the Tribunal, ITLOS/8 (*as last amended* 25 March 2021). In detail, the Tribunal added a new para. 7 to Art. 41, stating that "[u]pon consultation with the Members of the Tribunal, the President may decide, as an exceptional measure, for

continue its mandate while adhering to the protection measures and consequently the two administrative sessions in October 2020 and March 2021 were held in hybrid format, with some judges present in Hamburg and others participating via video link. [75]

The possibility of holding a hearing in a hybrid format was used in the preliminary objections phase of Case No. 28, the *Dispute Concerning the Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean*. In that case the Registrar, referring to the ongoing Covid-19 pandemic and the difficulties involved in organizing an in-person hearing due to health and safety concerns as well as restrictions determined by containment measures, informed the parties that the President of the Special Chamber was considering holding the hearing on the scheduled dates in hybrid format and asked for consent. The two States involved did not raise objections and this allowed the Tribunal to proceed.[76]

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public health, security or other compelling reasons, to hold meetings entirely or in part by video link". The same capacity for the Tribunal was repeated under Art. 74, adding para. 2, while Art. 112 was reformed with a new para. 5, concerning the possibility to read the judgment by video link. Similar amendments were enacted for Art. 135 with new para. 1 *bis*.

75. The Statute of the ITLOS provides under Art. 26(2) that the hearing should be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted. Statute of the International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea, *opened for signature* 10 December 1982, 1833 U.N.T.S. 397, Annex VI (*entered into force* 16 November 1994).

76. *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Preliminary Objections*, Case No. 28, Judgment, paras. 25-27 (28 January 2021) ("25. By separate letters dated 28 July 2020, The Registrar stated that a hearing in hybrid format would combine physical and virtual participation of members of the Special Chamber and representatives of the Parties. 26. The Maldives, by letter dated 4 August 2020, and Mauritius, by letter dated 6 August 2020, expressed their agreement that the hearing should be held in hybrid format. The Registrar transmitted a copy of each letter to the other Party on 7 August 2020. 27. By separate letters dated 13 August 2020, the Registrar informed the Parties that the President of the Special Chamber, having ascertained their views, had decided that the hearing would be conducted in hybrid format. On 19 August 2020, the Registrar informed the Parties by telephone of the intention of the members of the Special Chamber, including the judges *ad hoc*, to participate in the hearing in person or remotely"). In the Minutes of the Public Sitting which was held in a hybrid format in October 2020 the Special Chamber announced that it was "the first time in the history of the Tribunal" that a hearing was taking place by video link. *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Preliminary Objections*, Case No. 28, Minutes of the Public Sittings Held from 13 to 19 October 2020, p. 9 (13-19 October 2020).

There is only one other case presently pending before the ITLOS,[77] but the Covid-19 measures have not yet had an impact on the proceeding, which is going to approach the oral phase in the second half of 2021.

E. The ECOWAS Court of Justice

The Covid-19 health emergency had a remarkable impact also on the Economic Community of West African States ("ECOWAS") Court of Justice, which was forced to suspend its judicial activity for a three-month period. The suspension was decided by the Court's President, Justice Edward Asante and only in May 2020 did the Court adopt "Practice Directions on Electronic Case Management and Virtual Court Sessions"[78] which permitted the Court to resume activity according to its mandate.[79]

The practice of remote hearings (called "virtual" by the ECOWAS) seems to have been peacefully accepted by the parties involved in the matters before the ECOWAS Court and formally registered as equivalent to an in-person appearance. Moreover the right to a fair trial appears to be inherent in the recognized duty of the Court to administer justice in an expeditious way.[80]

F. The Inter-American Court of Human Rights

The American Convention on Human Rights, which is also known as the Pact of San José,[81] does not explicitly mention in-person attendance at the hearing, and the provision regarding the right to a fair trial makes reference only to the capacity of the

77. The pending case is *M/T "San Padre Pio" (No. 2) Case (Switzerland v. Nigeria)*, Case No. 29.
78. ECOWAS Court of Justice, Practice Directions on Electronic Case Management and Virtual Court Sessions (22 May 2020) at <http://www.courtecowas.org/wp-content/uploads/2020/05/PD_ENG.pdf> (last accessed 20 December 2021).
79. *See ibid.*, Art. 1 (Preamble), para. 5: "[…] it has become imperative for the Court to explore the use of Electronic Case Management System for electronic filing (e-filing) and Virtual Court Sessions […]. This Practice Directions therefore, sets out the guidelines to be adopted for caseload management, recognizing the urgent need for the ECOWAS Court of Justice to put in place measures to guarantee continued access to justice and expeditious disposal of cases, while minimizing the risk of transmission of Covid-19".
80. *See Dieng v. Republic of Senegal*, Suit No. ECW/CCJ/APP/50/19, Judgment No. ECW/CCJ/JUD/23/2020 (26 October 2020); *Ignace v. West African Power Pool*, Suit No. ECW/CCJ/APP/02/19, Judgment No. ECW/CCJ/JUD/12/2021 (3 June 2021).
81. American Convention on Human Rights, *opened for signature* 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (*entered into force* 18 July 1978).

accused to examine witnesses "present in the court" and states that the criminal proceedings should be public.[82]

The Rules of Procedure, approved by the Court in 2009, already contained a provision which allowed recourse to video links in order to protect witnesses, expert witnesses or alleged victims.[83]

The very first case to be decided "*por medio de sesión virtual*", applying the Rules of Procedure which admitted recourse to video link, was in June 2020.[84] From that moment on and until recently, all cases before the Inter-American Court were decided through video link and apparently without any objections from the parties involved in the cases.[85]

G. The European Court of Human Rights

The analysis of the recent practice of the international courts which had to cope with the health emergency, travel restrictions and social distancing determined by the Covid-19 pandemic and maintain their mandate to provide accessible and fair administration of justice is concluded with the examining of the practice adopted by the

82. American Convention on Human Rights, Art. 8(5) ("Criminal proceedings shall be public, except insofar as may be necessary to protect the interest of justice").
83. Art. 51(11) of the Rules of Procedure provides that "[t]he Court may receive the statements of witnesses, expert witnesses, or alleged victims through the use of electronic audio-visual means". Rules of Procedure of the Inter-American Court of Human Rights, IACtHR, LXXV Sess. (16-28 November 2009) available at <https://www.corteidh.or.cr/reglamento.cfm?lang=en> (last accessed 20 December 2021).
84. *Roche Azaña et al. v. Nicaragua*, Judgment (Merits and Reparations), p. 5, fn. 7, Series C No. 403 (3 June 2020), available at <https://www.corteidh.or.cr/docs/casos/articulos/seriec_403_ing.pdf> (last accessed 20 December 2021) ("Owing to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated [on 2-3 June 2020] and adopted during the 135th regular session, which was held virtually using technological means in keeping with the provisions of the Court's Rules of Procedure").
85. *See* more recently *Martínez Esquivia v. Colombia*, Judgment (Interpretation of the Judgment on Preliminary Objections, Merits and Reparations), Series C No. 428 (21 June 2021), available at <https://www.corteidh.or.cr/docs/casos/articulos/seriec_428_esp.pdf> (last accessed 21 December 2021); *Moya Solís v. Perú*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Series C No. 425 (3 June 2021), available at <https://www.corteidh.or.cr/docs/casos/articulos/seriec_425_ing.pdf> (last accessed 21 December 2021); *Guerrero, Molina et al. v. Venezuela*, Judgment (Merits, Reparations and Costs), Series C No. 424 (3 June 2021), available at <https://www.corteidh.or.cr/docs/casos/articulos/seriec_424_ing.pdf> (last accessed 21 December 2021); *Guachalá Chimbo et al. v. Ecuador*, Judgment (Merits, Reparations and Costs), Series C No. 423 (26 March 2021), available at <https://www.corteidh.or.cr/ docs/casos/articulos/seriec_423_ing.pdf> (last accessed 21 December 2021).

European Court of Human Rights. During the health crisis, the premises of the Court became no longer accessible to the public, and some of the regular time-limits imposed by the Court's rules were suspended. Still the Court's core activities continued and a set of Guidelines on Hearings by Videoconference (with technical annex) was promptly published. The Guidelines conferred on the President of the Grand Chamber or of the Chamber the capacity to decide on a case-by-case basis when proceedings had to be conducted through videoconference technology and in doing so the public health conditions prevailing in the Court's host State and those in the States involved in the proceeding were of primary reference.[86]

The Guidelines are intended to serve the basic purpose of offering the parties proceedings which, despite the exceptional circumstances, are as much as possible equivalent to the normal settings and with a strict adherence to the fundamental rights of the parties. Hearings by videoconference are conducted in accordance with the relevant provisions of the Rules of Court and as far as possible "in accordance with the Court's usual practice". The Guidelines also provide that in order to preserve the public character of the hearings, in compliance with the prescription of the ECHR, when held through video link, the whole proceedings are recorded and made available to the public by broadcasting on the Court website.[87]

The first hearing by videoconference was held ("for the first time in its history") by the Court on 10 June 2020. Since then, another six remote hearings took place before the ECtHR during 2020, with parties making their oral pleadings by video link and then broadcast as indicated by the Guidelines on the Court's website.[88]

VII. Conclusions

With the continuous and dramatic escalation of the Covid-19 pandemic worldwide, after a few months of suspensions and postponements caused by the uncertain development of the situation, international courts and tribunals were inevitably forced

86. *See* ECtHR, "Guidelines on Hearings by Videoconference" (22 December 2020) at <https://www.echr.coe.int/Documents/Guidelines_videoconference_hearings_ENG.pdf> (last accessed 21 December 2021).
87. The hearings are not transmitted by live streaming. As explained in ECtHR, "Background Paper for the Judicial Seminar 2021: The Rule of Law and Justice in a Digital Age" (1 July 2021) at <https://www.echr.coe.int/Documents/Seminar_background_paper_2021_ENG.pdf> (last accessed 21 December 2021), since the first weeks of the pandemic the Court maintained its calendar of hearings, but the physical presence of the public was certainly not possible. The Court made recourse to the webcast of the hearings, already used since 2007, making all hearings available the afternoon of the very day of the hearings.
88. *See* ECtHR Annual Report 2020, p. 152, available at <https://echr.coe.int/Documents/Annual_report_2020_ENG.pdf> (last accessed 21 December 2021).

to consider alternative solutions to ordinary in-person proceedings. Travel restrictions and social distancing rendered a typical "physical" access to justice absolutely impossible. Moreover, the international institutions involved were motivated by the need to comply with their mandate to guarantee not only a "fair" but also an "expeditious" administration of justice. All these factors led to a general transition of the international courts to the adoption of videoconferencing technology and the acceptance of remote hearings.

As examined in the subsections above, the right to a fair trial is a fundamental principle of human rights protection recognized as having the status of international customary law. The principle is enshrined in the most important international instruments in relation to both civil and criminal international proceedings and is intimately linked to the concept of a fair hearing and an in-person presence at the hearing. The recourse to remote hearings necessarily raised the issue of the legitimacy of a non-physical presence of the defendant in the hearing and consequently the possible violation of his/her right to a fair trial.

However, using videoconferencing technology for attendance of a defendant via video link was not new to some international courts that had already experienced such hearings, having already carefully considered all aspects of the situation and determined this was permitted.

For those international courts for which remote hearings were new, the exceptional circumstances that under international law could justify a derogation from the ordinary course for both civil and criminal proceedings to allow the presence of the defendant/accused (and all other parties involved) only via video link, seem to be amply presented by the pandemic and the obligation to respect emergency measures adopted by all States.

As already described, if compliance with the right to a fair trial is judged by the overall extent to which each standard is respected, similarly must the violation of the right to a fair trial be assessed by the cumulative effect of any procedural defects. Accordingly, a single defect, taken separately, cannot render the proceedings unfair. Remote presence via video cannot be considered *per se* a defect or a violation of the right to a fair trial under international law: all other conditions – like the possibility to hear and be heard, to be assisted by counsel with the opportunity to give instructions, and being an active party in the trial – should be taken into account, and should be capable of being guaranteed by improved technological requirements.

Moreover, international law cannot ignore that domestic courts all over the world are sharing the same experience and the majority of States are transitioning – with caution and a great attention to the rule of law – towards a new dimension in the administration of justice.

PART TWO

REMOTE HEARINGS AT THE INTERSECTION WITH DATA PROTECTION, PSYCHOLOGY AND DIVERSITY

Remote Hearings: Observations on the Problem of Personal Data Protection and Cybersecurity

Niccolò Landi[*]

I. Introduction

Information security and data protection have become key issues in international arbitration. In the wake of the generalized digitization of the arbitral process, the focus of attention has shifted to concerns about cybersecurity and data protection.

The extent to which international arbitration is far from immune to cybersecurity risks has become all too apparent; the cyberattacks brought to light in the *Libananco v. Turkey* case[1] and the hacking of the website of the Permanent Court of Arbitration in The Hague[2] are cases on point. More recently, all three members of an ICC arbitral tribunal were the subject of a challenge arising out of an alleged cyber-breach in a multibillion-dollar dispute over the sale of a Brazilian pulp maker.[3] On May 2021, the

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1. In *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), the claimant notified the tribunal that it "recently has learned of Turkish court orders requested and obtained by Respondent in 2007 and 2008, expressly to conduct intercepts of emails and MSN instant messages not only sent by and to persons associated with Claimant, but also approximately 1,000 privileged, private and confidential emails sent by, to and between Claimant's counsel of record in connection with this arbitration over the past year". *See* para. 19 of the Decision on Preliminary Issues (23 June 2008), available at <https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf> (last accessed 19 July 2021).
2. The incident occurred in 2015 in the course of the hearing of the territorial dispute in the South China Sea between the Philippines and China. *See* Luke E. PETERSON, "Permanent Court of Arbitration website goes offline, with cyber-security firm contending that security flaw was exploited in concert with China-Philippines arbitration", Inv. Arb. Rep. (23 July 2015) at <https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/> (last accessed 19 July 2021).
3. Cosmo SANDERSON, "Tribunal challenged over alleged cyber-attack in Brazilian pulp case", Global Arb. Rev. (29 April 2021) at <https://globalarbitrationreview.com/cybersecurity/tribunal-challenged-over-alleged-cyber-attack-in-brazil-pulp-case> (last accessed 19 July 2021). The respondent argued that evidence released by the Brazilian police confirmed that the claimants had illegally accessed over 70,000 privileged emails and thus the arbitral tribunal could not be impartial, because the evidence presented was tainted by the alleged hack.

ICC Court rejected that challenge.[4] Such episodes have raised awareness of cybersecurity issues and prompted all stakeholders to re-think ways to avoid such intrusions and to protect the confidentiality, integrity and availability of sensitive commercial and personal information routinely handled in the international arbitration context.

The current Covid-19 crisis has obliged the arbitration community to adopt increasingly sophisticated measures in order to maintain the efficient, timely and cost-effective resolution of disputes. It has served in particular as a catalyst to accelerate the wider acceptance and use of remote hearing technologies.[5] With this exponential growth in the digitization of the arbitral process, however, there has also arisen an increased cybersecurity risk that threatens the integrity of the institution of arbitration.

This paper considers: (i) the proliferation in the international arbitration market of instruments of soft law and institutional rules dealing with cybersecurity and data protection; (ii) the far-reaching impact on international arbitration of the regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("the GDPR"); (iii) the potential issues arising in respect of the misuse of an individual's image in remote hearings; and (iv) the cybersecurity issues to be borne in mind in the preparation and conduct of remote hearings.

II. An Overview of the Instruments of Soft Law and Institutional Rules on Cybersecurity and Data Protection in International Arbitration

Today, the debate on cybersecurity and data protection "is no longer limited to 'whether' and 'why' arbitral participants should pay heed to cybersecurity, but rather [it] has evolved to consider a series of (sometime contentious) questions about 'who', 'what' and 'how'".[6]

In answer to these compelling questions, a significant number of soft law instruments on cybersecurity and data protection, in the form of guidelines and

4. Cosmo SANDERSON, "ICC rejects challenge over alleged cyber-attack", Global Arb. Rev. (14 July 2021) at <https://globalarbitrationreview.com/arbitrator-challenges/icc-rejects-challenge-over-alleged-cyber-attack> (last accessed 23 July 2021).
5. *See* the Queen Mary University of London, School of International Arbitration and White & Case LLP 2021 International Arbitration Survey: "Adapting Arbitration to a Changing World", p. 21, available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2021-International-Arbitration-Survey-Adapting-arbitration-to-a-changing-world.pdf> (last accessed 9 August 2021). According to the survey, 72% of the respondents said that they used remote hearings at least "sometimes", if not "frequently" or "always".
6. Stephanie COHEN and Mark C. MORRIL, "Cybersecurity in International Arbitration – Introduction", Transnat'l Disp. Mgmt. 3 (2019) at <https://www.transnational-dispute-management.com/article.asp?key=2641> (last accessed 19 July 2021).

protocols, have been published in recent years. Some of them focus specifically on the conduct of remote hearings, such as the Seoul Protocol on Videoconferencing in International Arbitration,[7] the Chartered Institute of Arbitrators (CIArb) Guidance Note on Remote Dispute Resolution Proceedings,[8] the International Council for Online Dispute Resolution (ICODR) Video Arbitration Guidelines,[9] the International Institute for Conflict Prevention and Resolution (CPR) Annotated Procedural Order for Remote Video Arbitration Proceedings,[10] the Africa Arbitration Academy's Protocol on Virtual Hearings in Africa[11] and the Abu Dhabi Global Market Arbitration Centre's Protocol for Remote Hearings.[12]

Notably, on 17 December 2020, the International Bar Association (IBA) published a revised version of its Rules on the Taking of Evidence in International Arbitration ("the IBA Rules").[13] The 2020 Review Task Force expressly amended the IBA Rules to reflect the changes in the conduct of arbitral proceedings – and particularly that of physical evidentiary hearings – triggered by the global Covid-19 pandemic.[14] The updated IBA Rules include provisions that address the conduct of a remote hearing, defined as "a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate".[15]

7. Available at: <http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014> (last accessed 19 July 2021).
8. Available at <https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf> (last accessed 19 July 2021).
9. Available at <https://icodr.org/guides/videoarb.pdf> (last accessed 19 July 2021).
10. Available at <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings> (last accessed 19 July 2021).
11. Available at <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/> (last accessed 19 July 2021).
12. Available at <https://www.adgmac.com> (last accessed 19 July 2021). *See* John P. GAFFNEY and Malak NASREDDINE, "ADGM Protocol for Remote Hearings: An Overview", Kluwer Arb. Blog (20 June 2021) at <http://arbitrationblog.kluwerarbitration.com/2021/06/20/adgmac-protocol-for-remote-hearings-an-overview/> (last accessed 19 July 2021). For a comparative analysis of virtual hearing guidelines, see Sang J. LEE and Michael VAN MUELKEN, "Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future", Kluwer Arb. Blog (23 June 2021) at <http://arbitrationblog.kluwerarbitration.com/2021/06/23/virtual-hearing-guidelines-a-comparative-analysis-and-direction-for-the-future/> (last accessed 19 July 2021).
13. Available at <https://www.ibanet.org/resources> (last accessed 8 August 2021).
14. *See* the IBA Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, available at <https://www.ibanet.org/resources> (last accessed 19 July 2021).
15. In the context of cybersecurity issues, Art. 2.2(e) of the IBA Rules provides as follows: "The consultation on evidentiary issues may address the scope, timing and manner of

Further guidance in this respect is to be found, among other places, in the IBA Cybersecurity Guidelines ("the IBA Cybersecurity Guidelines")[16] and the International Council for Commercial Arbitration (ICCA) – New York City Bar Association – International Institute for Conflict Prevention and Resolution (CPR) Cybersecurity Protocol ("the Protocol").[17] Moreover, much needed guidance specifically on data protection issues is expected from the ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings ("the ICCA-IBA Joint Task Force") which last year released a Draft Roadmap to Data Protection in International Arbitration open to public consultation ("the Draft Roadmap"). The ICCA-IBA Joint Task Force is expected to publish the final version in the near future.[18] Given the authority of the issuing institutions and the scope of the work, these latter instruments are likely to set the standard and to influence the way in which arbitration adapts to the new reality and the threats that come with it.

A. The 2018 IBA Cybersecurity Guidelines

The IBA Cybersecurity Guidelines form part of the IBA Presidential Task Force on Cybersecurity's ongoing review. They are intended to outline best practices for law firms to protect themselves from cybersecurity breaches.[19] As such, they do not address issues unique to the international arbitration process, but rather, they offer general

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the taking of evidence, including, to the extent applicable: […] (e) the treatment of any issues of cybersecurity and data protection". Art. 8.2 of the IBA Rules reads as follows: "At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address: (a) the technology to be used; (b) advance testing of the technology or training in use of the technology; (c) the starting and ending times considering, in particular, the time zones in which participants will be located; (d) how Documents may be placed before a witness or the Arbitral Tribunal; and (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted".

16. Available at <https://www.ibanet.org/MediaHandler?id=2F9FA5D6-6E9D-413C-AF80-681BAFD300B0> (last accessed 19 July 2021).
17. Available at <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf> (last accessed 19 July 2021).
18. The draft is available at <https://www.arbitration-icca.org/icca-reports-no-7-icca-iba-roadmap-data-protection-international-arbitration> (last accessed 19 July 2021).
19. IBA Cybersecurity Guidelines, fn. 16 above, p. 4. *See also* IBA Cybersecurity Guidelines for law firms during the Covid-19 crisis, available at <https://www.ibanet.org/article/25FA3B61-C5EE-4EB7-A987-5C795B911DCD> (last accessed 19 July 2021).

practical recommendations, which are equally applicable in the specific international arbitration context.

The IBA Cybersecurity Guidelines are structured in three chapters, dedicated to technology, organizational processes and staff training respectively. The first addresses "security concepts" and suggests that, although help from IT professionals is essential in order to properly implement such concepts, it is critical that the lawyers involved themselves know which up-to-date measures should be put in place to protect their firm, which related questions are to be asked and when.[20] The second chapter takes as its starting point the fact that the vast majority of successful cyberattacks are facilitated by human error. It is accepted that it is not feasible to prevent all attacks. Accordingly, the IBA Cybersecurity Guidelines emphasize the importance of having clear corporate governance and well-defined organizational procedures in place to define how the law firm's activities, roles and documentation are used in order to mitigate the risks.[21] Finally, the third chapter stresses the point that cyber attackers exploit weak links and that regular staff training and establishing a "*cybersecurity-conscious culture*" within the law firm will help to build a strong first line of defence against cyberthreats.[22]

B. The 2020 ICCA – New York City Bar Association – CPR Cybersecurity Protocol

The principles outlined in the IBA Cybersecurity Guidelines have been further developed with specific regard to the requirements of international arbitration in the Protocol. The Working Group responsible for the Protocol has made clear its intent regularly to update the guidance in order to ensure that it keeps pace with technological developments.[23]

The Protocol has a two-fold purpose: first, it provides a framework to determine what are the reasonable information security measures – both cybersecurity and physical security – appropriate for a particular arbitration. Second, it aims to further increase awareness of the importance of information security in international arbitrations.[24]

The Protocol is aimed not only at law firms but at all arbitration stakeholders, while distinguishing the role of arbitrators and parties from that of other participants in consideration of their very different degrees of involvement in the process (see Principles 2 and 3).

Importantly, the Protocol recognizes that the increased digitization of the exchange and hosting of large datasets and information among participants means that they are largely digitally interdependent and "any break in the security of arbitral information by any one participant in the arbitration has the potential to affect all participants and

20. *Ibid.*, p. 6.
21. *Ibid.*, p. 13.
22. *Ibid.*, p. 18.
23. Foreword to the Protocol, fn. 17 above, para. III.
24. *Ibid.*, para. I.

compromise the security of the entire arbitration".[25] Accordingly, the Protocol recommends that all arbitration participants and those involved on their behalf who have access to arbitration-related information adopt at the very least a "baseline security" approach in their general business activity.[26]

Moreover, the Protocol recommends that cybersecurity issues should be raised as early as possible, preferably at the first case management conference (see Principle 10).[27] Far from proposing a one-size-fits-all solution, the Protocol suggests that security measures should be considered and adopted on a case-by-case basis, in accordance with a "reasonableness test"[28] that takes into account the particular circumstances of each arbitration, including the risk profile of the arbitration and the existing information security infrastructure (see Principles 6, 7 and 8).

Finally, the Protocol recognizes that cybersecurity is closely intertwined with data protection issues, as data protection laws typically mandate *inter alia* that reasonable information security shall be implemented when processing and storing personal data.[29] While the Protocol expressly provides that it does not supersede any applicable legal or other binding obligation (see Principle 4), it also notes that adherence to its

25. Protocol, fn. 17 above, p. 10. *See* S. COHEN and M.C. MORRIL, "Cybersecurity in International Arbitration", fn. 6 above.
26. It could be noted that the "minimum cybersecurity standard" approach has been adopted by Art. 18 of the newly proposed Directive on measures for a high common level of cybersecurity across the European Union, published by the European Commission on 16 December 2020, available at <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=72166> (last accessed 19 July 2021).
27. This concept has been taken up by many arbitral institutions in their new sets of rules (for instance, see Art. 30A of the 2020 LCIA Arbitration Rules and Art. 30A of the 2021 DIFC-LCIA Arbitration Rules) or practical notes, such as the 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, available at <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> (last accessed 19 July 2021).
28. Perhaps the leading case for a "reasonableness" approach to cybersecurity in the U.S.A. can be found in *LabMD, Inc. v. Federal Trade Commission*, F.T.C. No. 9357, 2016 WL 4128215 (F.T.C. July 29, 2016); see the Opinion of the Federal Trade Commission, p. 11, available at <https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf> (last accessed 20 July 2021): "[T]he Commission has made it clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law". It is to be noted that Rule 1.6(c) of Professional Conduct of the American Bar Association requires lawyers to exercise their confidentiality duty to protect information relating to the representation of a client from unauthorized access with reasonableness, and not perfection.
29. Foreword to the Protocol, fn. 17 above, para. II, b).

recommendations may facilitate compliance with such data protection laws.[30] Published as it was in late 2019, the Protocol refers to the above-mentioned work of the ICCA-IBA Joint Task Force and expresses an intent to incorporate it as a useful reference when available in its final form.

C. The ICCA-IBA Draft Roadmap to Data Protection in International Arbitration

As anticipated, the ICCA-IBA Joint Task Force, established in February 2019, has now released its Draft Roadmap, which was put out for public consultation in February 2020.

The Draft Roadmap aims to help international arbitration stakeholders to better understand and identify the data protection issues that may arise in the context of international arbitration proceedings, as well as to propose solutions that may be adopted to address them. Significantly, it acknowledges that data protection laws are generally of a mandatory nature and that non-compliance with them may trigger civil, if not criminal, liability. The Draft Roadmap notes that even if only one participant is subject to data protection obligations, this may have an impact on the conduct of the arbitration as a whole.

The Draft Roadmap is divided into two sections: the first describes the primary data protection principles potentially applicable in the international arbitration context, while the second section addresses how such principles may apply during the different stages of an international arbitration, and how they may affect those participating in it. The Draft Roadmap draws heavily on the guidance of the GDPR. The ICCA-IBA Joint Task Force acknowledges it as the most comprehensive and demanding data protection regulation in force, and one seen as setting a global standard.

The Draft Roadmap has so far been the subject of substantial feedback and interest from the international arbitration community. It has been suggested that it should also address the conduct of remote hearings and particularly the impact of the GDPR on videoconferencing in international arbitration proceedings.[31]

D. New Rules and Practice Guidelines from Certain Prominent Arbitral Institutions

Arbitral institutions around the globe have striven to meet users' expectations of procedural efficiency despite the pandemic emergency and – being aware also of the

30. *Ibid.*, para. II, b).

31. Andreas RESPONDEK and Tasha LIM, "Should the ICCA / IBA's Task Force on Data Protection 'Roadmap' address the impact of the GDPR on Video Conferencing in International Arbitration Proceedings?", Kluwer Arb. Blog (18 July 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/07/18/should-the-icca-ibas-task-force-on-data-protection-roadmap-address-the-impact-of-the-gdpr-on-video-conferencing-in-international-arbitration-proceedings/> (last accessed 19 July 2021).

effects on the competition among them – have quickly drawn up and issued new rules and practices aimed at dealing efficiently with the new way of doing business.

The London Court of International Arbitration (LCIA) released the latest version of its arbitration rules in October 2020.[32] The new Art. 30A on "Data protection" provides that the tribunal, in consultation with the parties and where appropriate with the LCIA, "at an early stage of the arbitration" shall consider whether it is proper to adopt "any specific information security measures to protect the physical and electronic information shared in the arbitration" and "any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation".

Furthermore, the new rules provide that the LCIA and the arbitral tribunal may issue directions addressing information security or data protection "which shall be binding on the parties" (and, in case of directions issued by the institution itself, on the tribunal too) in any case "subject to the mandatory provisions of any applicable law or rules of law", thus acknowledging the mandatory nature of data protection laws.

Other arbitral institutions have not yet revised their rules but a number of them have nonetheless issued practical guidelines to help users navigate safely through remote proceedings. For example, the Hong Kong International Arbitration Centre (HKIAC) released its "Guidelines for virtual hearings", suggesting practical measures to ensure confidentiality and security of remote hearings.[33]

The Singapore International Arbitration Centre (SIAC) has published a Guide entitled "Taking Your Arbitration Remote", which considers issues of confidentiality and data security as "*preliminaries*" to the holding of a remote hearing. It recommends that the parties and the arbitral tribunal shall use their best efforts to ensure security in the sharing or exchange of arbitration-related information, as well as taking the necessary measures "to ensure compliance with the applicable data protection laws and regulations of their countries".[34] This Guide also suggests that the arbitral tribunal and the parties should consider the utility of implementing a data protection / data retention protocol, particularly in cases involving proprietary information or trade secrets.[35]

Finally, the International Chamber of Commerce (ICC) published its 2021 Note to Parties and Arbitral Tribunals on the Conduct of Arbitration Under the ICC Rules of Arbitration, which dedicates two whole sections to remote hearings (paras. 95-108) and

32. Available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2030A> (last accessed 19 July 2021).
33. HKIAC Guidelines for virtual hearings, para. 9, available at <https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20for%20Virtual%20Hearings.pdf> (last accessed 19 July 2021).
34. SIAC Guide "Taking Your Arbitration Remote", para. A(16), available at <https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20(August%202020).pdf> (last accessed 19 July 2021).
35. *Ibid.*, para. A(16).

the protection of personal data (paras. 115-125).[36] Para. 101 requires the arbitral tribunal and the parties to consult with the aim of implementing a so-called "cyber-protocol" in order to comply with data privacy regulations and to deal with the privacy of the remote hearing and the confidentiality of electronic communications within the arbitration proceeding and any electronic document platform. In order to encourage compliance with these recommendations, the ICC provided its users with a "Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings".[37]

The above overview of the main available instruments and rules clearly shows the emergence of common principles across international arbitration, so far as the treatment of data security issues is concerned: it is a shared responsibility of all participants; it should be addressed at an early stage, preferably through the adoption of a cyber-protocol; and such arrangements must respect and be in conformity with existing mandatory data protection laws.

III. The Impact of the GDPR on International Arbitration

The significant increase in the amount and complexity of data processed in the course of an arbitration and the proliferation of potentially applicable data protection laws are already affecting the field, both from the perspective of roles and duties of stakeholders and from that of procedural issues related to evidence and disclosure.[38] The current

36. Available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf> (last accessed 19 July 2021).
37. Available at <https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/> (last accessed 19 July 2021). ICC Arbitration Rules state that the arbitral tribunal may decide, "after consulting the parties" and "on the basis of the relevant facts and circumstances of the case", whether any hearing is to be conducted by physical attendance or remotely by videoconference or other appropriate means of communication (Art. 26.1). Further, the "Case Management Techniques" in Appendix IV includes the use of videoconferencing for procedural and other hearings "where attendance in person is not essential", available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>. In February 2022, the ICC Commission issued a Report entitled "Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings", available at <https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf> (all last accessed 20 July 2022).
38. Kathleen PAISLEY, "It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration", 41 Fordham Int'l L.J. 4 (2018)

Covid-19 pandemic and consequent new modalities for the conduct of arbitration proceedings have augmented an already existing interest in the topic.

Undoubtedly, the impetus for change in the approach to data handling has been the entry into force of the European Union's GDPR on 25 May 2018. In practical terms, the GDPR has become the applicable legal framework in the majority of arbitration proceedings, regardless of the seat, thanks to its inherently extraterritorial scope.

A. Material Applicability of the GDPR to International Arbitration

International arbitration is not exempt from the application of the GDPR.

While the GDPR expressly recognizes the necessity for a partial exemption in favour of "courts and other judicial authorities […] in order to safeguard the independence of the judiciary in the performance of its judicial task" (Recital 20), and while it could be argued that such partial exemption could apply by analogy to arbitration proceedings, it cannot be overlooked that where the GDPR intends to refer to "out-of-court procedure" it does so expressly (for example, in Recital 52 and Recital 111).[39] On the other hand, there is no doubt that the GDPR may apply to the activities of counsel in arbitrations.

The material scope of the GDPR is widespread and includes "the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system" (with few exceptions, including processing by a natural person in the course of purely personal or household activity; see Art. 2 GDPR).[40] Indeed, arbitration proceedings at all stages typically involve the processing of a huge amount of data, including "personal data" as defined by Art. 4(1) GDPR of many individuals.[41]

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p. 841 at p. 845. *See also* Alberto ODDENINO, "International Arbitration and Data Protection in the context of new technological developments", Riv. arb. 4 (2018) p. 741.

39. Currently, Ireland is the only EU Member State that has relied upon Art. 23 GDPR partially to exempt "*out-of-court procedure*", including arbitration; *see* the Irish Data Protection Act of 24 May 2018 (No. 7 of 2018), Art. 60(3)(a)(iv).

40. David ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR) in International Arbitration – Practical Guidance", 37 ASA Bull. 4 (2019) p. 822 at p. 824, available at <http://www.rosenthal.ch/downloads/Rosenthal-Arbitration GDRP.pdf> (last accessed 19 July 2021): "Hence, any handling of e-mails, letters, contracts or other documents or piece of data that contains the name, an e-mail-address or other information that allows a reader to identify the individual mentioned (who is referred to as the 'data subject') is subject to the GDPR".

41. Nikos LAVRANOS, "The Need for a Data Protection Protocol for Arbitration Proceedings", Practical Law Arb. Blog (12 September 2019) at <http://arbitrationblog.practicallaw.com/the-need-for-a-data-protection-protocol-for-arbitration-proceedings/> (last accessed 19 July 2021). *See* the Arbitration Privacy Policy of the Vienna

Furthermore, it does not seem possible for the parties to choose a given national legislation as the applicable law to the arbitration proceedings, while at the same time requiring the arbitral tribunal to ignore the data protection and privacy rules that potentially pertain to that national legal order.[42] In fact, while the parties to an international arbitration have a certain degree of freedom in choosing the applicable law, they cannot disregard the mandatory rules that must be respected and applied by the arbitrators – including any data protection laws. That is undoubtedly the case within the EU legal landscape, where privacy and data protection are fundamental rights enshrined in both Art. 8(1) of the Charter of Fundamental Rights of the European Union (CFREU)[43] and Art. 16(1) of the Treaty on the Functioning of the EU (TFEU).[44] Moreover, express references to the mandatory nature of data protection rules can also be found in Member States' domestic legislation.[45] With specific regard to "out-of-

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International Arbitral Centre (VIAC), available at <https://www.viac.eu/en/privacy-statement> (last accessed 21 July 2021): "The data processing of VIAC is subject in particular to the provisions of the General Data Protection Regulation (EU) 2016/679 (in the following 'GDPR'), which is as a regulation directly applicable in all Member States of the Union. The scope and applicability of the GDPR are not determined by the seat of VIAC or the seat of the proceedings, but by whether the person responsible (e.g., party, arbitrator, other neutral third party, party representatives, translators, experts, etc.) is subject to the scope of application of the GDPR. Hence everyone participating in proceedings is obliged to verify if the GDPR is applicable to its data-processing and is to be qualified as a controller according to the rules of the GDPR. Please note that throughout proceedings it may occur that different data protection regimes are applicable. Each party involved in proceedings, no matter if they process data with or without the aid of automated processing, has to check which data protection regime applies to its data processing. Please note that where you provide any personal data relating to third parties with whom we have no direct relationship in the context of a VIAC proceeding, it is your duty to provide them with adequate notice that their data is being processed by VIAC and other data controllers".

42. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 745.
43. Art. 8 CFREU provides: "Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority". The CFREU is available at <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en> (last accessed 20 July 2021).
44. Art. 16(1) TFEU states that "[e]veryone has the right to the protection of personal data concerning them".
45. *See* for example Art. 19 of the 2002 Spanish Information Society Services and Electronic Commerce Act.

court procedure", the mandatory application of data protection rules is clearly spelled out in EU law and correspondent implementing national legislations.[46]

More generally, the core principles of the GDPR are rooted in the fundamental right to respect for private and family life and to the protection of dignity and personal identity, embodied within the European Convention of Human Rights (ECHR) and the jurisprudence of the Strasbourg Court.[47] Therefore, it has been noted that the GDPR shall be considered of mandatory application not only for natural and legal persons, but also for EU and national legislators and authorities.[48] Accordingly, the GDPR shall *a fortiori* be considered as mandatory rules for the purpose of international arbitration.[49]

B. The Extraterritorial Applicability of the GDPR to International Arbitration

Arguably, the biggest change to the regulatory landscape of personal data protection introduced by the GDPR comes with the extension of its territorial scope outside the borders of the EU.[50]

In fact, the GDPR applies to the processing of "personal data" carried out not only by entities established *within* the EU – regardless of whether the processing takes place in the EU or not – but also to the processing of personal data of natural persons ("data subjects") residing in the EU by entities established *outside* of the EU, provided that the processing is related either to: (i) the offer of goods or services, regardless of whether a payment is required; or (ii) the monitoring of their behaviour as far as their behaviour takes place within the EU (see Art. 3 GDPR). Therefore, while the GDPR undoubtedly applies to arbitration participants established or residing in the EU (for instance, to an arbitration involving documents containing "personal data" of an EU

46. *See* for example Recital 27 of the Regulation on Consumer ODR (Regulation EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC; *see also* Art. 141-*bis* of the Italian Consumer Code. On this point, *see* A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 747.
47. Art. 8(1) ECHR establishes that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". The ECHR (available at <https://www.echr.coe.int/documents/convention_eng.pdf>; last accessed 20 July 2021) has acknowledged that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, home and correspondence, as guaranteed by Art. 8 of the Convention (*see Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], No. 931/13, para. 137, ECHR 2017; *Z v. Finland*, No. 22009/93, para. 95, ECHR 1997-I).
48. Francesco G. VITERBO, "The Flow of Personal Data on the Internet: The Italian and European Google Cases", 1 Italian L.J. 2 (2015) p. 327 at p. 351.
49. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 746.
50. N. LAVRANOS, "The Need for a Data Protection Protocol", fn. 41 above.

citizen)[51] the application of the GDPR to foreign participants in an arbitration having its seat outside the EU is conditional.[52]

It should be noted that, in light of the approach normally followed by the EU institutions, and particularly by the European Court of Justice (ECJ), the work undertaken by arbitrators and arbitral institutions to the parties could be qualified as "services" pursuant to Art. 3 GDPR.[53] If this is the case, the activities performed by arbitral institutions and arbitrators would arguably be within the material and territorial scope of application of the GDPR, as long as the arbitral services are offered to at least one "data subject" established in the EU pursuant to Art. 2 and Art. 3 GDPR.[54] However, it must be anticipated here that – as will be seen below – parties to an international arbitration only rarely qualify as "data subjects" pursuant to Art. 4(1) GDPR, with the consequence that the data processing activities carried out by foreign arbitral institutions, panels and arbitrators in the course of providing their "services"

51. D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 823: "[…] each person with its seat or domicile in the European Economic Area (EEA) is subject to the GDPR. This is why the ICC in Paris is so interested in GDPR compliance: It is always subject to the GDPR. As opposed to that, the Swiss Chambers' Arbitration Institution is never subject to the GDPR".
52. Pierre BIENVENU and Benjamin GRANT, "Data protection and cyber risk issues in arbitration" in Norton Rose Fulbright, ed., *International Arbitration Report* (September 2019) at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea_15747_newsletter__international-arbitration-report-_issue-13.pdf?la=en-gb&revision=> (last accessed 19 July 2021), offer the following example: "[…] a witness based in the EU may in some circumstances import GDPR obligations into an arbitration, even if the arbitration is otherwise completely independent of the EU". Smriti SKUKLA and Yash RAJ, "International Arbitration: A Miscellany of Data Protection Regimes and its Impact on Secured Arbitration", American Rev. Int'l Arb. Blog (15 July 2020) at <http://aria.law.columbia.edu/international-arbitration-a-miscellany-of-data-protection-regimes-and-its-impact-on-secured-arbitration/> (last accessed 19 July 2021) point out that: "Another intersectional feature of the GDPR and arbitration is that the GDPR can be applicable to the party completely independent of the EU as it provides a wide scope of application. It can be applicable to the entities in the EU and also outside the EU for processing some data relating to EU based individuals. The whole process as to how the GDPR works is complex but in the area of international arbitration, it can be relevant even if the parties are not in Europe or the seat is not situated there. Therefore, it would not be far-fetched to say that GDPR impacts the arbitral process […]". D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 823, points out that: "The seat of the arbitration is usually not relevant to determine whether the GDPR will apply. Therefore, the question has to be answered with regard to each person involved in the arbitration separately, i.e., for every arbitrator, party, counsel, witness, expert and other individual or organization involved".
53. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 748.
54. *Ibid.*, p. 751.

are not automatically caught by the extraterritorial scope of the GDPR – basically because such "services" are not offered to a "data subject" who is in the EU.[55]

Practitioners in the field have sometimes looked at the GDPR as an impractical, onerous instrument merely adding complexity to the procedure.[56]

In *Tennant Energy v. Canada*,[57] the claimant raised the novel question of the application of the GDPR and the need to develop procedures accordingly due to the fact that one of the arbitrators, Sir Daniel Bethlehem QC, was resident in the United Kingdom (which at the time was a Member State of the EU).[58] The respondent argued that the GDPR did not generally govern the arbitration proceedings, because, *inter alia*, the claim was brought under a treaty to which neither the EU nor its Member States were parties, and thus the arbitration was outside the material scope of the GDPR.[59] The arbitral tribunal was of the opinion that:

> "On the potential application of the General Data Protection Regulation 2016/679 ('GDPR') to this arbitration, having carefully considered [the] Parties' submissions on this issue, the Tribunal finds that an arbitration under NAFTA Chapter 11, a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR. Accordingly, the Confidentiality Order makes no reference to the GDPR. This is without prejudice to the importance of ensuring a high level of data protection, and language to this effect has been added into the Confidentiality Order".[60]

55. *Ibid.*
56. *See* Lito DOKOPULOU, "Arbitration X Technology: A Call for Awakening?", Kluwer Arb. Blog (14 January 2019) at <http://arbitrationblog.kluwerarbitration.com/2019/01/14/arbitration-x-technology-a-call-for-awakening/> (last accessed 20 July 2021). Some respondents to the 2021 International Arbitration Survey (fn. 5 above) voiced their dissatisfaction with what they saw "as an unnecessary new layer of complexity added to the proceedings". D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 822, considers that: "Arbitration professional are usually unaware of data protection […]".
57. *Tennant Energy, LLC v. Government of Canada* (PCA Case No. 2018-54), *see* <https://www.italaw.com/cases/7250> (last accessed 20 July 2021).
58. Emily HAY, "The Invisible Arm of GDPR in International Treaty Arbitration: Can't We Make It Go Away?", Kluwer Arb. Blog (29 August 2019) at <http://arbitrationblog.kluwerarbitration.com/2019/08/29/the-invisible-arm-of-gdpr-in-international-treaty-arbitration-cant-we-make-it-go-away/> (last accessed 20 July 2021).
59. *Ibid.*
60. *Tennant Energy, LLC v. Government of Canada* (PCA Case No. 2018-54), Tribunal's Communication to the Parties (24 June 2019), available at <https://www.italaw.com/sites/default/files/case-documents/italaw10754.pdf> (last accessed 20 July 2021).

The arbitral tribunal's findings are difficult to reconcile with the above-mentioned provisions concerning the GDPR's territorial and material scope.[61] With specific regard to the latter, the arbitral tribunal seemingly relied on the exclusion in respect of the processing of personal data "in the course of an activity which falls outside the scope of Union law" (pursuant to Art. 2(2)(a) GDPR). However, "this proposed carve-out is difficult to square with the fact that Art. 2(2)(a) GDPR is geared at the internal competence of the EU under the EU treaties, and with the broad application of the GDPR generally".[62]

In contrast with the *Tennant* arbitral tribunal, a more proactive approach towards data protection issues has been recently addressed in another investment arbitration, *Elliott v. Korea*,[63] with regard to the transparency regime established in the Korea-U.S. free trade agreement (KORUS FTA). In *Elliott*, the Korean Ministry of Justice had redacted the names of individuals from the Claimant's Notice of Arbitration, the Respondent's Response to the Notice of Arbitration and the Claimant's Amended Statement of Claim "in order to comply with Korean law and thus to avoid any exposure to suit under that law" (para. 14). In fact, the Korean Ministry of Justice submitted, first, that it was legally required to comply with the Personal Information Protection Act (Act No. 10465 of 29 March 2011 – "the PIPA"), which provides the general legal framework for data protection in the Republic of Korea, and, second, that it qualified as a "personal information controller" within the meaning of the PIPA,

61. E. HAY, "The Invisible Arm of GDPR", fn. 58 above. Interestingly, from the 2021 International Arbitration Survey (fn. 5 above) it appears that there is "a lack of familiarity with the reach and applicability to international arbitration of many data protection regimes that are in place around the world" and that "the exact implications of existing data protection regulations are far from understood".
62. E. HAY, "The Invisible Arm of GDPR", fn. 58 above: "Article 2(2)(a) was intended to define the internal competence of the EU and its Member States, in particular with respect to national security. […] The specific subject matter of national security is one which 'falls outside the scope of Union law', in that it is not within the EU's competence under the treaties between the EU and its Member States". Recital 16 GDPR clarifies that the GDPR "does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. This Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union". On the interpretation of Art. 2(2)(a) GDPR *see also* Case C-272/19, *VQ v. Land Hessen*, 2020 EUR-Lex, para. 66 ff. (9 July 2020), available at <https://curia.europa.eu/jcms/jcms/j_6/en/> (last accessed 20 July 2021).
63. *Elliott Associates L.P. v. Republic of Korea* (PCA Case No. 2018-51), Procedural Order No. 4 (31 July 2019) paras. 35 and 39, available at <https://www.italaw.com/sites/default/files/case-documents/italaw10756.pdf> (last accessed 20 July 2021).

because it was "the responsible entity with respect to the publication of documents in this arbitration" (para. 18). The Korean Ministry of Justice also maintained that:

> "It follows that the Ministry of Justice is legally required to comply with the PIPA in respect of all personal information that it processes, including in relation to the Parties' submissions. This obligation, the Respondent argues, arises irrespective of whether the Claimant, the Tribunal, or the PCA are also 'personal information controllers' or whether the personal information is contained in 'personal information files.'" (para. 18).

The claimant disputed the contention that the PIPA applied in that arbitration. It argued that:

> "[T]he information that the Respondent seeks to redact is already in the public domain, and the PIPA does not require the Respondent to redact such information. The Claimant also contends that the Parties, the PCA and the Tribunal do not qualify as 'personal information controllers' under the PIPA, and that pleadings do not qualify as 'personal information files' under the PIPA" (para. 34).

The Tribunal concluded that the PIPA was of no application to the arbitration:

> "[U]nder Korean law, protection from disclosure extends to information that is already in the public domain in circumstances where the information has been disclosed by the press. […] [T]he Ministry of Justice (and more broadly, the Republic of Korea) must be considered under Korean law to be entitled to request the redactions that it is seeking in this arbitration, whether or not it qualifies as a 'personal information controller' under Korean law, and whether or not the information requested to be redacted is organized in the form of 'personal information files for official or business purposes.' What matters under Article 11.28 of the Treaty is that personal information is protected from disclosure under Korean law. In this connection, the Tribunal notes that the Ministry of Justice has redacted the personal information of the individuals concerned from the Parties' submissions published on its website, even if the information is in the public domain. The redacted versions of the NoA, the Response, and the ASoC published on the Ministry's website are the same as those that the Respondent proposes should be published (and are now provisionally published) on the PCA website. The Tribunal is therefore satisfied that the personal information that the Respondent requests to be redacted constitutes 'protected information' under Korean law" (paras. 35 and 39).

C. Data Transfer in International Arbitration

The transfer of the personal data of third parties within the context of an international arbitration proceeding undoubtedly falls within the notion of "processing" pursuant to Art. 4(2) GDPR. It is thus lawful under Art. 6(1)(f) GDPR – which, as explained below, seems to be the only viable legal basis for processing personal data in international arbitration – as long as the transfer is necessary to serve a "legitimate interest" of the "controller", and such interest is not overridden by the fundamental rights and freedoms of the "data subjects".[64]

Further issues arise where the arbitral institution, the arbitrator(s), or one of the parties is based in a country outside the EU that does not guarantee an *adequate* level of data protection – meaning, a level of protection that has not been the subject of an adequacy decision issued by the European Commission under Art. 45(3) GDPR.[65] In such a case, the submission of any document concerning third party personal data in the arbitral context has the potential to violate the GDPR.[66]

64. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 768. The GDPR deals with transfers of personal data to third countries or international organization in its Chapter V.
65. Art. 45(3) GDPR: "The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organization. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2)".
66. See the German Arbitration Institute (DIS) Privacy Policy for Arbitrations and Other Alternative Dispute Resolution Proceedings, available at <https://www.disarb.org/fileadmin/user_upload/Ueber_uns/DIS_Arbitration_Privacy_Policy_Version_2021-06.pdf> (last accessed 21 July 2021): "Countries outside of the European Union may not provide the same level of data protection as the European Union. We only transfer personal data to parties located in a country outside of the European Union as necessary to perform the arbitration or other alternative dispute resolution services you have requested. For example, if a party or an arbitrator or a third-party neutral is located in a country outside the European Union, then the Applicable Rules, such as DIS Arbitration Rules or DIS Mediation Rules, may require us to send case materials to such party or such arbitrator or such third-party neutral. If you want to make specific arrangements about data transfers with your chosen arbitrator or third-party neutral, please do so prior to nomination".

In certain cases, the problem has been overcome, because the EU has issued a formal decision attesting to the adequacy of the data protection regime in place in the country in question.[67] On 28 June 2021, the European Commission adopted two adequacy decisions for the United Kingdom, one under the GDPR and the other for Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (the so-called "Law Enforcement Directive").[68] Pursuant to these decisions, personal data can flow freely from the European Union to the United Kingdom where they benefit from an essentially equivalent level of protection to that guaranteed under EU law. The adequacy decisions also facilitate the correct implementation of the EU-UK Trade and Cooperation Agreement,[69] which foresees the exchange of personal information, for example, in the context of cooperation on judicial matters. Both adequacy decisions include strong safeguards in case of future divergence such as a "sunset clause", which limits the duration of adequacy to four years.

But that approach has not been adopted universally by the EU. In the case of the United States, the EU-US Privacy Shield is no longer applicable.[70] Pursuant to Art. 46(1) GDPR, in the absence of an adequacy decision by the EU Commission pursuant to Art. 45(3) GDPR, a controller or processor may transfer personal data to a third country (in this particular case, the USA) only if it has provided appropriate safeguards, and on condition that enforceable rights and effective legal remedies for data subjects are available. Provision for such safeguards may be made by standard data protection clauses adopted by the EU Commission pursuant to Art. 46(2)(c) GDPR, but what is the position in the event that parties, arbitral institutions and arbitrators are neither eligible, nor willing, to abide by the additional safeguards and alternative means of data transfer contemplated by Art. 46 GDPR?[71]

67. To date, the European Commission has recognized Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United Kingdom as providing adequate protection.
68. The adequacy decisions for the United Kingdom are available at <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> (last accessed 19 July 2021).
69. The EU-UK Trade and Cooperation Agreement is available at <https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en> (last accessed 19 July 2021).
70. *See* <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en> (last accessed 9 August 2021).
71. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 769. *See* D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 829: "The first way is for the sender (e.g., the counsel, who wishes to send a submission to an arbitrator in Hong Kong) to require the recipient (e.g.,

The practical answer seems to be provided by the specific exceptions set out in Art. 49(1) GDPR. In particular, pursuant to Art. 49(1)(e), "a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only" in case "the transfer is necessary for the establishment, exercise or defence of legal claims".[72]

D. "Data Controllers", "Data Processors" and "Data Subjects" in International Arbitration

The precise identification of the obligations and related liabilities deriving from the GDPR in the international arbitration context requires an application of the categories envisaged by Art. 4 GDPR to arbitration participants. The task is not an easy one and a preliminary consideration might be of assistance.

A distinction should be drawn between data protection and confidentiality, long one of the pillars of arbitration and a contributor to its international acceptance as a means of resolving disputes and commercial disputes in particular. It has been noted that confidentiality means that the parties and the arbitrators shall not disclose to third parties what has occurred in the course of arbitration and this, in other words, means that the parties' rights to privacy are already protected by the arbitrators and the parties themselves through a duty of confidentiality.[73] It follows that what is left

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the arbitrator) to enter into a special kind of data protection agreement provided for by the European Commission and known as the 'EU Model Clauses' or 'Standard Contractual Clauses'. Under the GDPR, they have to be used as they are, with no changes. Although the EU Model Clauses are today widely accepted, we consider them as too complicated for most situations of an international arbitration". The European Commission recently adopted a new set of Standard Contractual Clauses for international transfer of personal data to third countries, *see* <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc/standard-contractual-clauses-international-transfers_en> (last accessed 20 July 2021).

72. *See* D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 830: "The second way forward is provided for by Art. 49(1)(e) GDPR. It permits transfers of personal data to countries without an adequate level of data protection insofar they are 'necessary for the establishment, exercise or defense of legal claims'. In our view, this is the preferred legal basis for sharing personal data among parties, counsel and arbitrators across borders and to provide personal data to witnesses, experts and other persons appearing in an international arbitration". A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 770, points out that: "[…] the insertion of the 'legitimate interests' legal basis among the justifications provided by Article 49 GDPR may be considered as an attempt to address precisely the possibility that documents concerning third parties' personal data may be transferred in the context of arbitration proceedings".
73. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 742.

outside the scope of confidentiality and is instead covered by data protection laws – specifically, the GDPR – is the right to privacy of subjects other than the parties themselves.[74]

This explains why it is rare for parties to an arbitration to be considered as "data subjects" under the GDPR.[75] It is instead more likely that they will take on the role of "data controllers" pursuant to Art. 4(7) GDPR[76] with regard to personal data belonging to other "data subjects", i.e., third party natural persons whose personal data are likely to be processed during the arbitral proceedings.[77]

So far as the role of arbitrators is concerned, a distinction should be made between *ad hoc* and administered arbitral proceedings. In the case of the former, the arbitrator(s) should indeed be considered as "data controllers" under Art. 4(7) GDPR, while in administered proceedings, a further distinction should be drawn between the arbitrators and the arbitral institution. It seems reasonable to say that, in administered arbitration, the arbitral institution plays the role of "data controller", while the arbitrator(s) are qualified as "data processors" under Art. 4(8) GDPR.[78]

The qualification of arbitral institutions, arbitrators and parties as "data controllers"[79] or "data processors" under the GDPR triggers numerous data protection

74. *Ibid.*, p. 744.
75. Art. 4(1) GDPR defines "data subjects" as "identified or identifiable natural persons".
76. Art. 4(7) GDPR: "'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law".
77. In most cases parties to an international arbitration are not natural persons and therefore do not qualify as "data subjects" pursuant to Art. 4(1) GDPR. Recital 14 provides that "[t]he protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data. This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person". However, an exception could arise in the case of arbitration proceedings concerning disputes between corporations and top executives.
78. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 750. Art. 4(8) GDPR reads as follows: "'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller".
79. *See* the German Arbitration Institute (DIS) Privacy Policy, fn. 66 above: "DIS is the responsible entity for the data processing activities described in this Privacy Policy, also known as the 'data controller.' Please note that arbitration proceedings and other methods of alternative dispute resolution involve various entities including the parties, third parties who may be involved in or affected by the dispute, the arbitral tribunal, and a third-party neutral, who, depending on the rules applicable to the alternative dispute

obligations – including, *inter alia*, the duty to provide transparent information to 'data subjects' (Arts. 12 to 14 GDPR), the duty to provide for the exercise of the rights of 'data subjects' (such as data access and data portability; Arts. 15 to 22 GDPR), the duty lawfully to regulate their relationship with the data processors involved (Art. 28 GDPR), the duty to keep records of data processing activities (Art. 30 GDPR), the duty to implement appropriate security measures for the avoidance of data breaches (Art. 32 GDPR) and the duty to notify any personal data breaches which arise to the concerned data subjects and the competent supervisory authority (Arts. 33 and 34 GDPR).

The qualification of participants in an arbitration as either "data controllers" or "data processors" entails that they are subject to the liabilities and penalties set out in Chapter VIII of the GDPR. In particular, the administrative fines for non-compliance with provisions of the GDPR can be significant, as they can go up to 4% of the worldwide annual turnover of the preceding fiscal year or EUR 20 million – whichever is greater – for the most serious infringements (Art. 83 GDPR).[80]

Where the role of "data controller" or "data processor" is played by an arbitral panel, further complications arise. In such cases, arguably each member of the panel shares the duties and the liabilities imposed by the GDPR upon the "data controller" or "data processor".[81] In *ad hoc* proceedings – where arbitrators are to be considered "data controllers" – even Art. 26 GDPR[82] on joint controllers arguably applies to the arbitral tribunal.[83] In any case, however, Art. 82(4) GDPR leaves no room for doubt that:

> "Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are […]

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resolution mechanism ("Applicable Rules"), such as DIS Arbitration Rules or DIS Mediation Rules), may also act as data controllers".

80. D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 823.
81. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 750.
82. Art. 26 GDPR: "1. Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects. 2. The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects. The essence of the arrangement shall be made available to the data subject. 3. Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers".
83. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 750.

> responsible for any damages caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject".

Therefore, either as a member of the "body" that qualifies as "data controller" or "data processor", or as an individual "data controller" or "data processor", the duties, obligations, and liabilities arising from the GDPR remain jointly and severally shared between the individual arbitrators.[84]

It has also been noted that arbitral participants routinely engage third parties, such as tribunal secretaries, e-discovery professionals, transcribers, interpreters and others, who would also be involved in the processing of personal data within the arbitration proceedings. Under the GDPR, these subjects would be identified as "data processors", with all due consequences.[85]

E. The Legal Bases for Processing Personal Data in International Arbitration

Pursuant to Art. 6(1) GDPR, "data controllers" and "data processors" cannot lawfully process personal data, unless: (i) "data subjects" have given their free consent; (ii) the processing is necessary to perform a contract to which the "data subject" is a party or in order to take steps at the request of the "data subject" prior to entering into a contract; (iii) to comply with a legal obligation to which the controller is subject; (iv) to protect the vital interests of the "data subject" or another natural person; (v) to advance the public interest or facilitate the exercise of official authority; or (vi) to achieve: "the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

It should be noted that, although consent is a cornerstone of arbitration, the consent of a "data subject" is not the most appropriate and practical basis upon which to process data within the context of international arbitration.[86] Indeed, the volume of data

84. *Ibid.*, p. 751.

85. S. SKUKLA and Y. RAJ, "International Arbitration", fn. 52 above: "This leads us to a puzzling question: *Are third-party funders included as service providers?* However, per Article 4(2) of the GDPR, the collection and storage of data is included in processing and, thus, if the third-party funders collect personal data from others, the data laws would be compulsory for them too. This issue is still to be settled".

86. D. ROSENTHAL, "Complying with the General Data Protection Regulation (GDPR)", fn. 40 above, p. 834: "We do not recommend relying on consent as a legal basis. Unfortunately, the use of consent in data protection has become highly problematic under the GDPR. Among other reasons, this is because consent can be withdrawn by the data subject at any time. Once this happens, many believe that is no longer permitted to use related personal data, even if another legal ground were available. Given that the consent is normally not required for processing data of individuals in an arbitration in the first

typically requested in disclosure proceedings makes it virtually impossible to procure the written consent of every person whose data might be affected. Moreover, the "data subjects" would in any case retain their right to withdraw their consent at any time, a possibility that effectively deprives consent of any utility as a legal basis for data processing in the context of an arbitration, since it would be impossible, for instance, to undo disclosure in a situation in which an individual has subsequently decided to withdraw consent.[87]

In practical terms, the only viable legal basis upon which to proceed for the purposes of international arbitration is "the legitimate interests pursued by the controller or by a third party", given that the production of information by the parties and analysis of that information by the appointed arbitrators in the context of an arbitration would indeed appear to satisfy the test of "legitimate interests" pursuant to Art. 6(1)(f) GDPR.[88]

In the context of civil litigation, the Art. 29 Data Protection Working Party has highlighted that it is possible to rely on the "legitimate interests" legal basis only if the processing of third parties' personal data is *proportionate*.[89] It is prudent to apply a similar test in the context of arbitration proceedings, such that the parties should liaise with the arbitral tribunal at an early stage in order to "take such steps as are appropriate (in view of the sensitivity of the data in question and of alternative sources of the information) to limit the discovery of personal data to that which is objectively relevant to the issues being litigated".[90] The arbitrators themselves should actively manage the arbitration process, as well as choose the appropriate technologies, thereby ensuring that any third party privacy interests that may be affected in the course of the activities carried out during the arbitral proceedings are sufficiently safeguarded, thereby avoiding the risk of a violation of Art. 6(1)(f) GDPR.

IV. The Misuse of an Individual's Image in Remote Hearings

The conduct of remote hearings through videoconferencing platforms naturally implies that images of arbitration participants are simultaneously transmitted, received and recorded – the more so as most soft law instruments expressly recommend using the

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place, it should not be used – not even as a standard statement in a witness statement. In fact, in order to avoid problems during the arbitration, the stakeholders should agree not to obtain consent from data subjects for submitting their information, where possible".

87. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 752.
88. *Ibid.*, p. 753.
89. Working Document 1/2009 on pre-trial discovery for cross border civil litigation, adopted on 11 February 2009, available at <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp158_en.pdf> (last accessed 19 July 2021).
90. *Ibid.*, p. 10.

highest possible quality of video connection available, capable of showing a full image of the persons involved, to enhance the efficient conduct of the remote hearing.[91]

It should be noted that a person's image is strongly connected to that individual's personality as the most immediate expression of his or her *persona* in the public domain and thus it entails several fundamental rights, the predominant of which is today the right to privacy.[92]

The GDPR expressly cites "facial images" as an example of "biometric data resulting from specific technical processing relating to the physical, physiological or behavioural characteristic of a natural person, which allow or confirm the unique identification of that natural person" (Art. 4(14)). The clear image of a participant, usually accompanied by their name, title and an indication of their location, indisputably constitutes "personal data" within the broad definition of Art. 4(1) GDPR.[93] It follows that all the principles and requirements seen above – especially with regards to data transfer and cybersecurity – apply *mutatis mutandis* when conducting the remote hearing.

Further issues are involved when one considers that popular videoconferencing platforms are usually equipped with a recording feature. There is no doubt that the recording of a hearing falls within the scope of "processing" personal data under the GDPR (Art. 4(2)).[94]

91. *See* for example the CIArb Guidance Note on Remote Dispute Resolution Proceedings, fn. 8 above, para. 1.4; or the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom, para. 5, available at <https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf> (last accessed 20 July 2021).
92. *See* Art. 8 of the ECHR (right to respect for private and family life) and Art. 8 of the CFREU (right to the protection of personal data).
93. Pursuant to Art. 4(1) GDPR: "[…] 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".
94. Pursuant to Art. 4(2) GDPR: "[…] 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

Most of the soft law instruments on the conduct of virtual hearings expressly deal with this issue. They generally provide that the hearing should *not* be recorded, unless the parties agree or the arbitral tribunal decides otherwise.[95] The CPR Annotated Model Procedural Order for Remote Video Arbitration expressly recognizes the troublesome aspects of recording. It notes that, on the one hand, recording the hearing technically reduces the security of the proceeding and, on the other, it requires the tribunal and the parties to address additional security measures to protect the recording, including where, and for how long, it is to be stored, who has the right to access it, and how possible clarifications or amplifications of the recording could be made and by whom.[96]

In any case, even beforehand, arbitration participants should consider the purposes and legal basis for recording and that, in accordance with the proportionality principle, recording is not by default a necessity when there are other means to achieve the underlying purpose.[97]

Streaming and recording a remote hearing covertly or in contravention of the principles outlined in the GDPR and/or any other applicable data protection laws may lead to a complaint from the concerned individuals about the way their personal data have

95. The ICODR Video Arbitration Guidelines, fn. 9 above, para. 3, recommends the arbitrators to "[l]et the parties know you will not record video or audio in your online arbitrations. Get a written commitment from the parties in advance that they will not record audio or video as well, nor take screen shots". Art. 8.1 of the Seoul Protocol on Video Conferencing in International Arbitration, fn. 7 above, suggests that "[n]o recordings of the video conference shall be taken without leave of the Tribunal". Moreover, the CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, fn. 10 above, para. 8, provides that "[n]o Participant may record any part of the proceeding without the advance, written authorization of the Tribunal. The Tribunal may record any or all of the proceeding provided it alerts the Parties in advance that it will do so" and that "[n]o Participant may take any screen shots of the video screens at any time during the proceeding absent express consent of the Parties and Tribunal". The only exception is the Africa Arbitration Academy's Protocol on Virtual Hearings in Africa, fn. 11 above, para. 3.5, which provides that "[a] full recording of the virtual hearing shall be made available to the arbitral tribunal and the parties unless otherwise agreed" in order to "produce hearing transcripts which shall be circulated to the Parties".
96. See the CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, fn. 10 above, note to para. 8.
97. An analogy in principles could be draw with the European Data Protection Board Guidelines 3/2019 on processing of personal data through video devices, available at <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32019-processing-personal-data-through-video_en> (last accessed 20 July 2021).

been treated and ultimately to the imposition of sanctions[98] – with all the consequent uncertainties regarding the liability regime among arbitral participants as "data controllers" or "data processors".

Furthermore, although the concept of "image rights" is not consistent in all jurisdictions,[99] at a national level, an individual's image is generally protected from misuse from two perspectives: that of a use detrimental to the dignity and reputation of an individual, and that of an abusive commercial exploitation of the image without the individual's consent.[100] Live streaming or recording a remote hearing arguably

98. On 26 January 2021, the President of the Polish Personal Data Protection Office (UODO) imposed a fine of PLN 25.000 (over EUR 5,850) on the Medical University of Silesia for erroneously making the recording of a student's examination in the form of a videoconference available not only to the examination candidates and those who had access to the system, but to third parties, without notifying such breach either to the Authority or to the students whose personal data had been compromised. The decision is available at <https://edpb.europa.eu/news/national-news/2021/polish-dpa-university-fined-lack-data-breach-notifications_en> (last accessed 20 July 2021).

99. For example, judicial authorities in the United Kingdom have expressly declined to acknowledge the category of "image rights" *per se*, *see Fenty v. Arcadia Group Brands Ltd* [2015] EWCA Civ 3, para. 29 ("[t]here is in English law no 'image right' or 'character right' which allows a celebrity to control the use of his or her name or image"); and para. 33 ("[a] celebrity seeking to control the use of his or her image must therefore rely upon some other course of action such as breach of contract, breach of confidence, infringement of copyright or, as in this case, passing off"). *See also Douglas and Anor v. Hello! Ltd and others* [2007] UKHL 21, para. 124 ("[t]here is in my opinion no question of creating an 'image right' or any other unorthodox form of intellectual property").

100. It is not feasible, nor is it the aim of the present paper, to analyse the image rights regime in each and every jurisdiction. However, by way of example, while not recognizing a distinct category of image rights, nonetheless in the United Kingdom, misappropriation of an individual's image and publicity rights – generally, those of celebrities – can be contested or precluded by establishing the tort of passing off, registering their names as trade-marks and enforcing these marks, opposing trade mark registrations of their names, establishing breach of confidence or an infringement of privacy, asserting copyright rights, and raising defamation claims. In contrast, in civil law jurisdictions image rights are usually statutory in nature. Under Italian law, an individual's image – whether a celebrity or anyone else – is protected at a constitutional level as a personality right (Art. 2 of the Italian Constitution), and at a lower legislative level both against misuse harmful to the individual's reputation by Art. 10 of the Civil Code, and by commercial exploitation without the person's consent and absent an overriding public interest in publication by Arts. 96-98 of Law 633 of 22 April 1941 on copyright. The Spanish Supreme Court (*Tribunal Supremo*) has also distinguished the moral aspect of the image rights from the commercial aspect under Law 1/1982 of 5 May 1982 on the Civil Protection of Honour, Personal

increases the risk of abusive misuse or infringement of the arbitral participants' images and connected rights, with all due consequences also in monetary terms.[101]

In practice, it is advisable that the parties and the arbitral tribunal agree on a "hearing protocol", which deals, *inter alia*, specifically with any video recording issue,[102] such as the "processing" of the video recording, its publication and "storage limitation" pursuant to Art. 5(1)(e) GDPR.[103] In the case of those other arbitration

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and Family Privacy and One's Own Image (Decision No. 152/2009 of 26 February 2009, available at <https://vlex.es/vid/-57206491>, last accessed 20 July 2021).

101. By way of example, the Italian Supreme Court's jurisprudence on the point is to award both moral and material damages, sometimes in the form of a sum equivalent to the price the person would have asked for agreeing to the use of her or his image (Cass. Civ., sez. III, 16 May 2008, n. 12433, available at <https://www.personaedanno.it/articolo/cass-civ-sez-iii-16-maggio-2008-n-12433-pres-fantacchiotti-rel-lanzillo-violazione-dellimmagine-risarcimento-e-prezzo-del-consenso>, last accessed 20 July 2021).
102. The following narratives can be inserted in the hearing protocol: "Access to the video-conference shall be restricted to the Members of the Tribunal, the Parties' representatives, the [arbitral institution] staff, the secretary, the court reporters and any further technical support personnel retained by the [arbitral institution] or the Parties in connection with the Hearing ('Participants'). All Participants in the hearing shall have an ongoing duty to warn the [arbitral institution] and the Arbitral Tribunal of the presence of any other unauthorised person on the video-conference. A final list of the Participants who will be attending the hearing is as follows: […] The video recording will not be made public or become part of the record of this arbitration. However, the video recording may be used to guide transcript corrections, and once transcript corrections have been completed, the transcript shall serve as the record of the Hearing. The Tribunal also may refer to the video recording, as it deems necessary. Except for the court reporters that will do an audio recording of the Hearing, the Tribunal and the Parties agree that the attendees will not otherwise record, via audio, video or screenshot the Hearing or any part of it. No Participants shall record (whether by video, audio or screenshot) any part of the Hearing, unless otherwise decided by the Tribunal".
103. Art. 5(1)(e) GDPR: "Personal data shall be: […] (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation') […]". See the German Arbitration Institute (DIS) Privacy Policy, fn. 66 above: "We protect the security and confidentiality of your personal data. In particular, we maintain appropriate administrative, technical and physical safeguards to protect the personal data we have about you, in accordance with applicable law. We restrict access to personal data on a

participants who do not themselves execute the "hearing protocol" (e.g., witnesses, experts, court reporters, tribunal secretary, etc.) especially when the GDPR applies and even where it is possible to rely on Art. 6(1)(f) GDRP – as indicated above –, it seems to be prudent to obtain their prior informed and voluntary consent to the "processing" of their images for the purposes of any remote hearing under the applicable law(s).

Finally on this point, the overall importance of exercising caution in using an individual's image in the context of remote hearings has been summarized in the Judgment of Mrs. Justice Sharp in a recent case in the English High Court, which, although made in a national court context, is just as apposite in the context of an international arbitration:

> "Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed".[104]

In an increasingly interconnected world, where every arbitration stakeholder can be the weak link against cyberthreats, the unauthorized diffusion of an image has the potential to become global.[105] The consequences for the individual(s) concerned and for the

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need-to-know basis. We may apply different security measures depending on the type of data, and how it is collected and stored. We will retain your personal data for the period necessary to fulfil the purposes outlined in this privacy policy, unless a longer retention period is required or permitted by law. In accordance with the statute of limitations on claims for damages under §199 Abs. 3 Nr. 1 BGB, DIS retains relevant case materials for 10 years after a case has ended. After that period, only arbitral awards as well as decisions and settlement agreements in other alternative dispute resolution proceedings are retained for research and statistical purposes".

104. See *Gubarev v. Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB), para. 52, available at <https://www.bailii.org/ew/cases/EWHC/QB/2020/2167.html> (last accessed 20 July 2021). The case concerned the conduct of solicitors acting for claimants in a libel trial, who disregarded a court order and made it possible for various individuals from outside the court premises and even beyond the Court's jurisdiction to access the trial video and audio without the Court's permission.

105. A recent, notorious, example is that of the recent video footage of the Texan lawyer, Rod Ponton, who was participating in a remote hearing by Zoom. He was unable to clear a picture of a cat on the screen saver of the screen that he was using. The

credibility and trustworthiness of the international arbitral process itself are unforeseeable and thus very difficult to manage.

V. Cybersecurity Issues in the Conduct of Remote Hearings

International arbitration proceedings are not immune from increasingly pervasive cyberattacks against its stakeholders – corporations, law firms, government agencies and officials, and others, are all custodians of large electronic data sets of sensitive information.[106]

In the specific context of international arbitration, cyberbreaches can be relevant at least at two discrete levels: first, as a violation of the applicable personal data protection laws and adopted protocols and, second, as a direct and serious threat to the integrity and legitimacy of the arbitration proceedings.

A. Cybersecurity in the Course of Remote Hearings as an Obligation Under the GDPR and Other Data Protection Laws

In the course of a remote hearing, there is a wide scope for personal data to be included in arbitration material which will be read or referred to, in addition to live cross-examination from witnesses and experts.[107]

The high level of personal data protection that the GDPR is intended to grant to EU "data subjects" can be achieved only if "data controllers" and "data processors" ensure that no personal data breaches occur, and accordingly – as mentioned above – the

resulting image was posted by the judge on Twitter and went viral in a matter of a few hours, although in the very recording, a disclaimer forbidding the streaming or recording of the hearing was visible for the whole duration of the video: available at <https://www.youtube.com/watch?v=TDNP-SWgn2w> (last accessed 20 July 2021). See Marili PARALIKA and Sonia MORTON, "COVID-19 and data protection in international arbitration", Impact Law. (8 July 2020) at <https://theimpactlawyers.com/articles/covid-19-and-data-protection-in-international-arbitration> (last accessed 20 July 2021): "Following the hearing, any recordings of the hearing should also be securely stored and where such recordings will need to be transferred, such transfer should take place securely and any necessary safeguards should be in place, particularly if the recipient is based in an unsecure third country".

106. *See* A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 754.

107. M. PARALIKA and S. MORTON, "COVID-19 and data protection", fn. 105 above.

GDPR imposes on "data controllers" and "data processors" *inter alia* an obligation to avoid personal data breaches (as defined by Art. 4(12)).[108]
Notably, the GDPR expressly provides that:

> "Personal data shall be […] processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures" (Art. 5(1)(f) GDPR).

It also requires that:

> "Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk" (Art. 32 GDPR).

Furthermore, it has been suggested that Recital 81 GDPR essentially confirms that the capability of arbitrators to avoid data breaches and intrusion into arbitration-related data and transmissions should be considered as a new criterion for the choice of arbitrators and arbitral institutions.[109]

Be that as it may, the obligations imposed by the GDPR mean that if arbitral institutions, arbitrator(s), and parties fail to take active steps to enhance the privacy and cybersecurity of third parties, they would be exposed to liability pursuant to Chapter VIII of the GDPR.[110]

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108. Art. 4(12) GDPR: "[…] 'personal data breach' means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed".
109. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 755. *See also* Carolina MAURO, "Cybersecurity and arbitration: implications of procedure and trends of substance", CyberArb (13 May 2021) at <https://cyberarb.com/webinar-cybersecurity-and-arbitration-implications-of-procedure-and-trends-on-substance/> (last accessed 20 July 2021). Recital 81 GDPR provides as follow: "To ensure compliance with the requirements of this Regulation in respect of the processing to be carried out by the processor on behalf of the controller, when entrusting a processor with processing activities, the controller should use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organisational measures which will meet the requirements of this Regulation, including for the security of processing".
110. Arbitrators cannot contract out of that liability, but they can mitigate the risk by, for example, obtaining insurance to cover the costs of non-compliance with the GDPR

More generally, the proliferation of data protection laws around the globe has revealed even more clearly the close interconnection between personal data protection and cybersecurity. Those participants in international arbitration who share sensitive information of others are now likely to be bound by statutory obligations to ensure that such information is safeguarded by complying with certain security standards.[111] Moreover, and increasingly, both participants and third-parties to an arbitration have legally enforceable rights and/or legitimate interests arising from the way in which documents incorporating such information, and which are now routinely electronically-exchanged, are secured and handled.[112]

Ultimately, the prevalence of data protection laws supports the notion that, in order to maintain user confidence in international arbitration, arbitrators and arbitral institutions in particular must not only be prepared and competent to handle sensitive information securely, but they must also be seen to be so prepared – in other words, they are now expected to take a proactive approach, and no longer be merely reactive, when dealing with cybersecurity.[113]

B. Cybersecurity in the Course of Remote Hearings Pursuant to Soft Law Instruments and Adopted Protocols

As seen above, many institutions around the world have now issued guidelines on the conduct of remote hearings, which are aimed at providing arbitration stakeholders with a suite of best practice measures. They all touch to different degrees on the subject matters of cybersecurity and data protection, demonstrating a remarkably uniform reliance upon common principles, despite a variety of different cultural and legal backgrounds.

The general theme of this guidance is that "[i]t is imperative to ensure that the technology used allows all participants to feel secure about the confidentiality of the information they disclose in a remote hearing" (Sect. 6 CIArb Guidance Note). The level of security technology required in any remote proceedings is a preliminary issue

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even if, with specific reference to fines, it has to be taken into consideration that "in the European Union, there is confusion about the insurability of fines imposed under the GDPR. The GDPR does not explicitly state whether fines are insurable and most national privacy regulators have not provided any clarity. The possibility that some GDPR fines would be considered criminal fines seems to be one source of the confusion" (OECD, "The Role of Public Policy and Regulation in Encouraging Clarity in Cyber Insurance Coverage", available at <https://www.oecd.org/finance/insurance/The-Role-of-Public-Policy-and-Regulation-in-Encouraging-Clarity-in-Cyber-Insurance-Coverage.pdf>, last accessed 9 August 2021).

111. S. COHEN and M.C. MORRIL, "Cybersecurity in International Arbitration", fn. 6 above, p. 24.
112. *Ibid*.
113. *Ibid*., p. 25.

that should be considered by arbitration participants at an early stage, and that should be agreed by the parties, or otherwise assessed by the tribunal (see Art. 2.1 Seoul Protocol, Sect. 1.5 CIArb Guidance Note; Art. 2.1.4 Africa Arbitration Academy's Protocol on Virtual Hearings; and Sect. A.1 CPR Annotated Model Procedural Order for Remote Video Arbitration). Notably, the Seoul Protocol requires the parties to the arbitration to use their "best effort to ensure the security of the participants of the video conferencing, including the witnesses, observers, interpreters, and experts, among others".

From a more technical point of view, both the Seoul Protocol and the ICODR Video Arbitration Guidelines recommend recourse to videoconference platforms that use end-to-end encryption in order adequately to safeguard cross-border connections from intrusion (Art. 2.1 and Sect. 5, respectively). Furthermore, the CPR Annotated Model Procedural Order for Remote Video Arbitration suggests that the videoconference platform to be used must be "appropriate" and provide at a minimum a "robust protection" for the confidentiality and data security of the arbitral proceeding and recommends that arbitration participants use only the professional version of that platform (Sect. A.1).[114]

Notably, as anticipated, the IBA has recently revised the IBA Rules to address the conduct of evidentiary hearings held remotely. The new Art. 2.2(e) of the IBA Rules extends the consultation on evidentiary issues to include, "at the earliest appropriate time", "the treatment of any issues of cybersecurity and data protection", aiming to highlight the need to consider data protection issues, including issues of data privacy and cybersecurity.[115]

Moreover, a new Art. 8.2 of the IBA Rules has been added to deal with the particular requirements of a remote evidentiary hearing. It outlines a procedure whereby the arbitral tribunal may order, either at the request of a party or on its own motion, and after consultation with the parties, that the evidentiary hearing be conducted remotely. Significantly, the new article encourages the arbitral tribunal to take a proactive approach. Moreover, the new provision states that, when the evidentiary hearing is to be conducted as a remote hearing, a protocol addressing the conduct of the remote hearing should be established, either by the parties or the arbitral tribunal.[116] Again, where the parties do not agree on the content of the protocol, it will be fixed by the arbitral tribunal, after consultation with the parties.[117]

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114. The same recommendation – to use business versions rather than basic, free options – is found among the "*baseline security*" measures listed by the Seoul Protocol (Schedule A, VII), fn. 7 above. *See* the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom, fn. 91 above.
115. The Commentary to the revised IBA Rules, fn. 14 above, suggests that the parties and the tribunal consult the ICCA-IBA Roadmap to Data Protection in International Arbitration and the Protocol.
116. The full article states: "At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing

C. Cybersecurity as an Inherent Duty Incumbent on the Arbitrator to Protect the Integrity and Legitimacy of the Proceedings

It is important to note that, regardless of which set of rules applies to the proceedings and the cultural and legal system in which they are to be conducted, arbitrators have a general duty to avoid unauthorized interference by third parties in accordance with well-established principles of international arbitration practice, which require arbitrators to safeguard the confidentiality, the legitimacy and the integrity of the proceedings.[118]

Cyberbreaches in the arbitral process, including intrusion into arbitration-related data and transmissions, pose a direct and serious threat to the integrity and legitimacy of the process.[119] As the integrity and legitimacy of international arbitration substantially depend on the role of the arbitrators,[120] it is clear that the arbitrator's duty to avoid such "digital technology" intrusion is not a new, independent obligation, but rather a natural extension in the digital age of well-established arbitral duties, and particularly: the duty to protect the confidentiality and privacy of the proceedings, which exists to some degree in all proceedings; the fundamental duty to preserve and

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be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address: (a) the technology to be used; (b) advance testing of the technology or training in use of the technology; (c) the starting and ending times considering, in particular, the time zones in which participants will be located; (d) how Documents may be placed before a witness or the Arbitral Tribunal; and (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted".

117. *See* Commentary to the revised IBA Rules, fn. 14 above, p. 25: "Where the evidentiary hearing is to be carried out in the form of a Remote Hearing, Article 8.2 provides that a protocol addressing the conduct of the Remote Hearing needs to be established. In the interest of flexibility, Article 8.2 leaves open the question who will prepare such protocol. Accordingly, either the parties or the arbitral tribunal may do so. Where the parties do not agree on the content of the protocol, the content will be fixed by the arbitral tribunal, after consultation with the parties".
118. A. ODDENINO, "International Arbitration and Data Protection", fn. 38 above, p. 755.
119. S. COHEN and M.C. MORRIL, "Cybersecurity in International Arbitration", fn. 6 above, p. 2.
120. *See* Catherine ROGERS, *Ethics in International Arbitration* (Oxford University Press 2014) p. 283: "[T]he authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate".

protect the integrity and legitimacy of the arbitral process; and the duty to be competent in the performance of an arbitrator's duties.[121]

To that extent, the formalization of express or implied cybersecurity obligations by virtue of attorney codes of conduct, national data protection laws or regulations, or agreements with the parties, only reflect an addition – at least, with regards to the arbitrator(s) – to an already existing, inherent duty.

However, it should be stressed once again that cybersecurity is a shared responsibility and all stakeholders in the arbitration have independent obligations as well.[122] Data security ultimately depends on the responsible conduct and vigilance of each individual stakeholder, whatever role they play in an arbitration, as they are largely digitally interdependent.[123] As a consequence, any breach in the safe custody of data can have an impact on all participants. Since participants will frequently hold not only their own sensitive data, but that of others, intrusion into data held by one

121. S. COHEN and M.C. MORRIL, "Cybersecurity in International Arbitration", fn. 6 above, p. 10.

122. Without considering data protection laws, party counsel are bound by ethical duties to protect client confidentiality and to keep abreast of the risks and benefits of technology related to their clients. Further, all actors in the process may have contractual or regulatory obligations to protect sensitive personal or commercial information. With reference to ethical rules on cybersecurity, *see* Sergey ALEKHIN, Alexis FOUCARD and Greg LOURIE, "Cybersecurity, International Arbitration and the Ethical Rules and Obligations Governing the Conduct of Lawyers: A Comparative Analysis", 16 Transnat'l Disp. Mgmt. 3 (2019) at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456732> (last accessed 20 July 2021), who state that "a minimum standard of cyber-security obligations incumbent on lawyers can be distilled into the following: An international principle of 'Data Minimization' – international/regional data protection laws have the common trait of restricting the collection and use of data to its strict purpose; An international ethical obligation for lawyers and law firms to ensure a minimum standard of protection for stored data. Lawyers and law firms are now expected to make reasonable investments in cybersecurity systems and adequate staff training in this sense, and there seems to be a consensus to define 'reasonable' by factoring in the size of the law practice and the sensitivity of information possessed and controlled; […] An international acknowledgement of the proprietary rights (of clients) attached to data – a data subject has a right to information about, control of and erasure of his or her data. […] Lawyers should therefore be aware that a minimum level of technical understanding can be expected today from every practitioner and therefore a deliberate refusal to take any measures against cyber-security threats may, in case of a successful data-breach, not only be sanctioned on the professional level, but also by criminal courts".

123. S. COHEN and M.C. MORRIL, "Cybersecurity in International Arbitration", fn. 6 above, p. 8.

participant may injure another or others as much as, if not more than, the party whose data security was initially compromised.[124]

One more signal of the collective effort required of all stakeholders to increase global cybersecurity is given by the European Union, which has sought to lead the way in this initiative, as it has been doing also for personal data protection. On 16 December 2020, the European Commission published its Proposal for a new Directive on measures for a high common level of cybersecurity across the European Union.[125] *Inter alia*, the Proposal anticipates the imposition of new obligations in terms of security risk management (Art. 18) and relevant information reporting/sharing duties (Arts. 20, 26, and 27) upon "essential" and "important" entities (as defined by Art. 4(25) and 4(26)). While in its current formulation, the draft Directive would be more likely to affect the parties to an arbitration rather than other participants, the impact of the Proposal could be even more significant, depending on the way in which it is ultimately implemented by Member States.[126]

VI. The Way Forward

A. The Open Question of Responsibility

As seen above, the available institutional rules and soft-law instruments are largely predicated upon the basis that arbitral tribunals will discuss the management of information security matters with the parties at an early stage, sometimes even giving the arbitrator(s) the power to bind disagreeing parties.[127]

However, the 2018 Bryan Cave Leighton Paisner International Arbitration Survey on "Cybersecurity in International Arbitration" revealed that 48% of respondents who sat as arbitrators felt that the parties themselves should take the lead in discussing

124. *Ibid*.
125. Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148, of 16 December 2020, available at <https://digital-strategy.ec.europa.eu/en/library/proposal-directive-measures-high-common-level-cybersecurity-across-union> (last accessed 9 August 2021).
126. See Wendy GONZALES and Carolina MAURO, "A New EU Directive on Cybersecurity is on the Way: New 'Cyber Obligations' for International Arbitration Stakeholders?", Arbitrate.com (January 2021) at <https://arbitrate.com/a-new-eu-directive-on-cybersecurity-is-on-the-way-new-cyber-obligations-for-international-arbitration-stakeholders/> (last accessed 20 July 2021).
127. For example, Art. 30A of the 2020 LCIA Arbitration Rules states that any specific information security measure – along with any means of processing personal data – should be considered at an early stage by the tribunal in consultation with the parties, and only "*where appropriate*" with the LCIA.

cybersecurity issues.[128] Arbitrators are seemingly unwilling to take on the burden, as after all they are not themselves IT specialists, while, on the other hand, big law firms and in-house counsel from sophisticated parties usually benefit from dedicated training and policies put in place by their respective IT departments.[129]

Arbitral institutions seem to be better placed than arbitrators to deal with cybersecurity and data protection issues.[130] Arguably, if arbitral institutions were to take the lead by imposing certain fundamental cybersecurity measures upon arbitration participants, one might anticipate an immediate, substantial and more or less uniform improvement in standards across international arbitration proceedings.[131]

Although not free from shortcomings,[132] such an approach would encourage the development of a systemic approach to the problem which would favour solutions based on an analysis of the international arbitration process as a whole, rather than on a case-by-case basis.[133] To some extent, this would relieve arbitrators – and the parties – from the burden of assessing the security risks and determining the appropriate measures despite their lack of technical know-how, in that they would be able to draw upon established and tested rules of general application.[134] More generally, a systemic approach to data security would provide arbitration participants with a degree of certainty that, in any given case, fundamental measures would apply in order to keep their valuable information safe.[135]

Given that it is not possible to guarantee full protection and security at all times, due to the continuous, fast-paced advancement of technology, and that technical

128. Available at <https://www.bclplaw.com/images/content/1/6/v2/160089/Bryan-Cave-Leighton-Paisner-Arbitration-Survey-Report-2018.pdf> (last accessed 9 August 2021).
129. C. MAURO, "Cybersecurity and arbitration", fn. 109 above.
130. 2018 Bryan Cave Leighton Paisner International Arbitration Survey on "Cybersecurity in International Arbitration", fn. 128 above, p. 5.
131. Claire MOREL DE WESTGAVER, "A Systemic Approach to Cybersecurity in International Arbitration: Imperative and Implementation", Transnat'l Disp. Mgmt. 3 (2019) at <https://www.transnational-dispute-management.com/article.asp?key=2644> (last accessed 20 July 2021). *See also* Claire MOREL DE WESTGAVER, "Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions", Kluwer Arb. Blog (6 October 2017) at <http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/> (last accessed 20 July 2021) and Diana S. ABDUL RAHMAN, "The Role of Arbitral Institutions in Cybersecurity and Data Protection in International Arbitration", Kluwer Arb. Blog (24 November 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/11/24/the-role-of-arbitral-institutions-in-cybersecurity-and-data-protection-in-international-arbitration/> (last accessed 20 July 2021).
132. C. MOREL DE WESTGAVER, "A Systemic Approach to Cybersecurity", fn. 131 above, p. 12.
133. *Ibid*., p. 10.
134. *Ibid*., p. 22.
135. *Ibid*.

consequences of data breaches cannot be entirely foreseen, international arbitration stakeholders should at least be in a position to draw upon best available practices in seeking to anticipate the legal consequences of any potential breach.[136]

Old and new solutions come to the rescue. For instance, contractual terms on liability could be included to anchor a potential claim for cyber-breach.[137] Given the obvious close connection between them, applicable data protection law requirements may also result in enhanced levels of information security and, where such laws are not applicable, similar obligations could be included contractually – e.g., an obligation to notify a breach, akin to the obligation arising under the GDPR.[138] Furthermore, law firms and companies can seek to recover any financial loss caused by cyber-breaches under specifically written insurance policies and, in some circumstances, even under professional liability insurance.[139] As international arbitration stakeholders become increasingly aware of the risks and the potentially significant consequences of data breaches, further developments in this field are inevitable.

B. The 2021 QMUL – White & Case International Arbitration Survey: The End and the Beginning

With an overwhelming number of 1,200+ respondents, the 2021 Queen Mary University of London (QMUL) – White & Case LLP International Arbitration Survey on "Adapting Arbitration to a Changing World" ("the Survey")[140] provides valuable data upon which to base an informed understanding of the current state of the art of international arbitration more than one year into the Covid-19 pandemic, while at the same time offering an indication of the likely trend of future developments.

It is hardly surprising that the increased use of technology and the development of remote hearings practice should have made cybersecurity and protection of personal data necessary subjects for inclusion among the four categories contemplated by the Survey reflecting the new course of international arbitration.

In fact, the Survey registered "a growing wish for seats to also have the judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness (for example, local courts being able to deal remotely with arbitration-related matters)".[141] Significantly, 80% of respondents would choose to "proceed at a

136. C. MAURO, "Cybersecurity and arbitration", fn. 109 above.
137. *Ibid*.
138. *Ibid*.
139. Peter A. HALPRIN, Grant BROWN and Wendy CHIAPAIKEO, "Cybersecurity Insurance for Law Firms", Transnat'l Disp. Mgmt. 3 (2019) at <https://www.transnational-dispute-management.com/article.asp?key=2650> (last accessed 20 July 2021).
140. The Survey, fn. 5 above.
141. *Ibid.*, p. 8.

scheduled time as a virtual hearing" in the event that a hearing could not be held physically,[142] and 38% of respondents to the survey considered "administrative/ logistical support for virtual hearings" the most significant adaptation which would make other sets of arbitration rules or arbitral institutions a more attractive option.[143]

More generally, there appears to be a growing expectation that remote hearings will become the default option for procedural hearings,[144] data that stresses once again the importance of dealing effectively with cybersecurity and personal data protection.

With regard to the former, however, the findings are striking: only a small minority of respondents said they had "frequently" (18%) or "always" (9%) seen cybersecurity measures being put in place in their international arbitrations in the last three-year period.[145] The majority (57%) encountered such measures in less than half of their cases and 16% had "never" even seen them in place.[146] Similarly, with regard to data protection issues, the Survey registered a general awareness of the potential financial consequences of non-compliance, but the exact implications of existing data protection regulations were nonetheless far from understood.[147]

Conclusively on the point, it was noted that: "Although there are encouraging signs that users are mindful of cybersecurity issues and the need to address them, there is nonetheless ample scope for more engagement on this front".[148]

VII. Concluding Remarks

The widespread use of remote hearings and adoption of the technologies developed to support them have been vital to allow arbitral tribunals to deliver justice in the ongoing global Covid-19 pandemic. Under these exceptional circumstances, new best practices have been rapidly established and successfully implemented to provide guidance on the organization of remote hearings.

However, as shown by the Survey, cybersecurity and data protection in the context of a remote hearing need to be further investigated and addressed by international arbitration stakeholders.[149] Participants in the arbitration process must be aware of the terms of any applicable data protection laws and of their impact on the persons

142. *Ibid*., p. 22.
143. *Ibid*., p. 11.
144. *Ibid*., p. 27.
145. *Ibid*., p. 31.
146. *Ibid*.
147. *Ibid*., p. 30.
148. *Ibid*., p. 3.
149. S. SKUKLA and Y. RAJ, "International Arbitration", fn. 52 above: "At this time, sadly, there is no adequate data protection and cybersecurity framework for arbitration and, with virtual hearings being necessary at this time, this will be a critical issue in the near future".

involved in any capacity in the remote hearing and of the need to take the preventive measures necessary to ensure full compliance. In addition, it is essential that cyber risk issues that may arise in the course of the remote hearing be identified whenever they arise and as early as possible.

In order to achieve this result and to avoid the imposition of sanctions and protect the integrity of the arbitral proceeding, it is suggested that arbitral tribunals and parties devote a pre-hearing case management conference to these issues with the aim of:

(i) Mapping all data protection laws applicable to the individuals involved in the remote hearing, the categories of data to be processed, the categories of recipients, any possible flow of data and any transfer of the data abroad;
(ii) Mapping all potential cyber risks (e.g., cyberattacks, hacked evidence, storage of documents and videos) and identifying appropriate technical and organizational safeguards;
(iii) Allocating among the members of the tribunal, the parties, the administrative secretary, the arbitral institution and any other participants the tasks necessary to put in place measures to mitigate these risks; and
(iv) Adopting a data protection agreement to deal with the processing of personal data at the hearing (e.g., data breaches and disclosure of personal data to third parties) and a cybersecurity protocol based on the output of the risk mapping exercises.

The Psychology of Remote Hearings

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Giacomo Rojas Elgueta[**]

I. Introduction

In the last decade, the international arbitration community has looked at the interplay between psychology and arbitration with great interest.[1]

While scholarship and empirical studies on this topic are still limited, there is now widespread awareness that arbitration proceedings are not immune to cognitive errors and that the decision-making processes of parties, counsel, witnesses, and arbitrators

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1. *See* Joseph M. MATTHEWS, "Identifying and Overcoming Arbitrator Bias", 5 Transnat'l Disp. Mgmt. (2008) available at <https://www.transnational-dispute-management.com/article.asp?key=1289> (last accessed 20 June 2021); Richard C. WAITES and James E. LAWRENCE, "Psychological Dynamics in International Arbitration Advocacy" in Doak BISHOP and Edward G. KEHOE, eds., *The Art of Advocacy in International Arbitration*, 2nd edn. (Juris Net 2010) p. 69; Giacomo ROJAS ELGUETA, "Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators", 16 Harv. Negot. L. Rev. (2011) p. 165; Philip K. ANTHONY and Les J. WEINSTEIN, "The Social Science Edge in Arbitration and Mediation", 5 N.Y. Disp. Res. Law. (2012) p. 17; James FREDA, "Heuristics and Arbitral Decision-Making: A Brief Discussion on How Arbitrators Make Decisions", 15 Asian Disp. Rev. (2013) p. 50; Edna SUSSMAN, "Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them", 24 Am. Rev. Int'l Arb. (2013) p. 487; Stavros BREKOULAKIS, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making", 4 J. Int'l Disp. Settlement (2013) p. 553; Kristina KLYKOVA, "Bias in Arbitral Decision-Making: Rescuing the Mentschikoff Archives from a Half Century of Oblivion", 31 J. Int'l Arb. (2014) p. 289; Edna SUSSMAN, "The Arbitrator Survey – Practices, Preferences and Changes on the Horizon", 26 Am. Rev. Int'l Arb. (2015), p. 517; Rebecca K. HELM, Andrew J. WISTRICH and Jeffrey J. RACHLINSKI, "Are Arbitrators Human?", 13 J. Empirical Legal Stud. (2016) p. 666; Tony COLE, ed., *The Roles of Psychology in International Arbitration* (Kluwer Law International 2017); Stefano AZZALI, Umberto MORERA and Giacomo ROJAS ELGUETA, eds., *Errori cognitivi e arbitrato* (il Mulino 2018); Ziya AKINCI, Umut TUĞA and Şeref C. ARAT, eds., *The Psychology of the Arbitration Hearing*, Istanbul Arbitration Centre (ISTAC) Publications – 3 (On İki Levha Yayıncılık 2020).

(like those of any other individual) may be negatively affected by mental shortcuts (so-called *heuristics*) or pre-comprehension mechanisms (so-called *biases*).[2]

The objective of this essay is to examine the psychology of remote hearings and to shed light on the psychological effects of using videoconferencing in arbitration proceedings.

Since the outbreak of Covid-19 in March 2020, videoconferencing has become the default modality for conducting arbitral hearings, allowing the arbitration community to promptly respond to social distancing and travel restrictions implemented by governments around the globe.[3]

2. The expression "cognitive errors" encompasses errors that fall into two subcategories: heuristics and biases. On the notion of "heuristic" *see* Chris GUTHRIE, "Misjudging", 7 Nev. L.J. (2007) p. 420 at p. 428 ("Psychologists have discovered that people do not make decisions based on a thorough accounting and rational calculation of all available information. Rather than behaving like fully rational actors, people use 'heuristics' or simple mental shortcuts to make decisions. These heuristics often lead to good decisions, but they can also create cognitive blinders that produce systematic errors in decision making"). *See also* Robert COULSON, "The Decisionmaking Process in Arbitration", 45 Arb. J. (1990) p. 37 at p. 38 ("'Heuristic' is not a commonly used term: it describes how the human mind uses learning from experience to shortcut the need for seemingly unnecessary calculations or data gathering. Heuristic systems are internalized strategies, adopted for reasons of operating efficiency, facilitating the ability to make complex decisions quickly, based upon a limited amount of data. Usually, such techniques result in reasonably accurate decisions, particularly when the decision maker is operating from a base of extensive practical experience"). On the notion of "bias" *see* Cass R. SUNSTEIN, *Behavioral Law and Economics* (Cambridge University Press 2000) p. 135 (biases are "aversions that can lead [people] to inaccurate perceptions of facts"). *See also* Amos TVERSKY and Daniel KAHNEMAN, "Judgment Under Uncertainty: Heuristics and Biases", 185 Science (1974) p. 1124 at p. 1127 f.
3. The replacement of physical hearings by remote hearings because of the Covid-19 pandemic is documented by a series of surveys conducted within the arbitration community. *See* "Queen Mary, University of London – White & Case 2021 International Arbitration Survey: Adapting Arbitration to a Changing World" (2021) available at <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> (last accessed 20 June 2021); Arbitration Institute of the Stockholm Chamber of Commerce, "SCC Virtual Hearing Survey" (October 2020) available at <https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf> (last accessed 20 June 2021); Allen & Overy, "A&O Cross-Border Surveys on Virtual Hearings", p. 2 (2020) available at <https://www.allenovery.com/en-gb/global/news-and-insights/virtual-hearings> (last accessed 20 June 2021). *See also* Hussein HAERI and Camilla GAMBARINI, "Remote Hearings: Practical Considerations" in this Volume, p. 219; Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020).

While it is indisputable that resorting to videoconferencing was crucial in order not to indefinitely postpone hearings and to allow parties and arbitrators to continue the proceedings without undue delay, it remains to be understood whether remote hearings affect the way the different players of an arbitration proceedings think and behave and, ultimately, to what extent remote hearings should be used in a post-pandemic world.

The following analysis is organized as follows: section II explains why remote hearings are so demanding for our brain and questions whether the "cognitive load" they produce can impair arbitrators' performance and their decision-making processes. section III explores whether the fact of not being in the same room alters how the various parties perceive the witnesses or each other and whether not having body language cues in a remote setting impacts arbitrators' assessment of a remote witness' credibility. Also, section III discusses whether remote hearings can neutralize or exacerbate some effects of individual attributes on credibility assessments. Sect. IV offers concluding remarks.

II. Effects of Using Technology

As experienced by hundreds of millions of people in the last year and a half, something about being on videoconferences for hours every day seems exhausting.

This is why behavioral scientists are now turning their attention to the psychological consequences of spending several hours per day on Zoom (or other equivalent videoconferencing platforms)[4] and on the potential negative decisions and behaviors generated by what is now referred to as "Zoom fatigue" (i.e., the tiredness

4. *See* Jeremy N. BAILENSON, "Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue", 2 Tech. Mind Behav. (2021) available at <https://doi.org/10.1037/tmb0000030> (last accessed 20 June 2021); Crawford HOLLINGWORTH, Leoné MESCAL and Liz BARKER, "The Rise of the Zoombie [Teambie] – A Behavioural Science Guide to Understanding and Combating the Potential Issues that Can Emerge in Virtual Meetings" (May 2021) available at <https://www.thebearchitects.com/assets/uploads/ip/rise-of-the-zoombie-teambie-e-book-and-toolkit-may-2021.pdf> (last accessed 20 June 2021); Géraldine FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue and Explain Why Women Experience Higher Levels than Men" (5 April 2021) p. 12, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820035> (last accessed 20 June 2021) ("As the research on Zoom fatigue is in its infancy, more research is needed to understand the causes and consequences of Zoom fatigue. First, video conferences are one of many types of meetings and as the population returns to increasingly hybrid workspaces it is important to study video conferences in comparison to face-to-face or phone meetings to uncover the benefits and drawbacks of each of these meeting types").

caused by the use of videoconferencing and the additional cognitive effort required in this context to efficiently interact with others).[5]

Given that anyone that has been involved in remote arbitral hearings is certainly familiar with Zoom fatigue,[6] it is worth examining its possible causes (II.A), and its potential consequences on the arbitrators' decision-making process (II.B).

A. Possible Causes for Zoom Fatigue

While the arguments submitted so far by behavioral scientists are based on previous academic theory and research, explanations for Zoom fatigue cannot be considered scientific findings and require further empirical studies to be confirmed.[7]

1. Technical Failures and Multitasking

The most obvious reason behind feeling cognitively tired in a remote setting are technical failures (e.g., a screen freeze for insufficient bandwidth; not being able to share a document on the screen; etc.).[8]

These difficulties, which are absent in a physical context, may cause frequent interruptions of the task performed remotely, leading to a phenomenon called "task-switching".[9]

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5. *See* G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, p. 2. As clarified by J.N. BAILENSON, "Nonverbal Overload", fn. 4 above: "The ubiquity of the software has resulted in genericization, with many using the word 'Zoom' as a verb to replace videoconferencing, similar to 'Googling'. Hence, I feel warranted in writing about 'Zoom Fatigue' as the brand name is getting traction as the semantic label for the product category".
6. *See* Allen & Overy, "A&O Cross-Border Surveys", fn. 3 above, p. 23, where among the material risks identified by the survey's respondents it is indicated that "[v]irtual hearings are more draining/tiring for all participants and breaks and length of hearing should be responsive to that – this may have an impact on concentration/the ability to communicate effectively".
7. *See* J.N. BAILENSON, "Nonverbal Overload", fn. 4 above.
8. *See* "A&O Cross-Border Surveys", fn. 3 above, p. 16 (where "connectivity or other IT related issue" is reported as being the most commonly experienced difficulty in remote hearings, while "difficulty in communicating intra-party" and "dealing with documents" are indicated as the second and third one, respectively).
9. *See* Ula CARTWRIGHT-FINCH, "Control, Alt, Judge", Justice Rebooted – Paper 1 (August 2020) p. 4, available at <https://www.cortexcapital.org/justicerebooted> (last accessed 20 June 2021) ("Technical glitches of this nature clearly interrupt the flow of submissions or questions in cross-examination. They also break our focus, requiring us to switch our attention. This mental process is cognitively expensive. It takes time for us to break focus from the original task, change focus to the interruption and then refocus on the original task"). *See also* Chiann BAO and Ula CARTWRIGHT-FINCH, "Trial

When a performance (e.g., delivering an opening statement; conducting a cross-examination; etc.) is disrupted by a technical failure, our brain is forced to switch from the main task to a different task (e.g., signing out of the video call and signing back in; exiting the "share screen" function and trying to share the screen again; etc.). Contrary to the myth of multitasking,[10] switching between tasks comes at the cost of losing accuracy in performing the main task (so-called "switch cost").[11]

The potential "switch cost" of remote hearings seems exacerbated by the fact that, in order to reproduce the logistics of a physical setting, the personal set-up of arbitrators and counsel may involve each of them having up to three or four devices (i.e., a device to see the documents; a second device that shows the live transcript; a third device to participate in the videoconference; a fourth device, typically a mobile phone, to keep a private group chat open among the legal team or arbitral tribunal).[12]

2. Size of Faces and Eye Gaze

In videoconferences there are two nonverbal dimensions that are significantly different from what would happen in a physical interaction: the size of faces and the disproportionate amount of attempted eye contact.

Even if the size of faces seen on Zoom may vary,[13] they are generally bigger than in physical conference rooms.[14] In physical interactions outside the arbitration setting, close-up face-to-face settings are typically reserved for intimate relationships, and

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by Zoom on Trial", Global Arb. Rev. (25 September 2020) at <https://globalarbitrationreview.com/virtual-hearings/trial-zoom-trial> (last accessed 20 June 2021).

10. *See* Dave CRENSHAW, *The Myth of Multitasking: How "Doing It All" Gets Nothing Done* (Jossey-Bass 2008).
11. *See* U. CARTWRIGHT-FINCH, "Control, Alt, Judge", fn. 9 above, p. 4. *See also* Daniel KAHNEMAN, *Thinking Fast and Slow* (Farrar, Straus and Giroux 2011) p. 37; Robert D. ROGERS and Stephen MONSELL, "Costs of a Predictable Switch Between Simple Cognitive Tasks", 124 J. Experimental Psychol. Gen. (1995) p. 207 at p. 209, where "switch cost" is defined as "an index of the extra difficulty associated with reconfiguring task-set".
12. *See* Peter CHAFFETZ, Yasmine LAHLOU and Andrew POPLINGER, "An Early Experience with Arbitration by Video", N.Y. St. B.A. (4 October 2020) at <https://nysba.org/an-early-experience-with-arbitration-by-video/> (last accessed 20 June 2021); Tan KEN HWEE, ed., "Virtual Hearings Without Tears", Singapore Academy of Law (2020) available at <https://covid.sal.sg/virtual-hearings/> (last accessed 20 June 2021) p. 5.
13. As explained by J.N. BAILENSON, "Nonverbal Overload", fn. 4 above, the size of faces on a screen depends on various factors such as "the size of the computer monitor, how far one sits away from the monitor, the view configuration one chooses on Zoom, and how many faces are in the grid".
14. *Ibid*.

otherwise generally avoided in other contexts (as clearly demonstrated by the fact that in an elevator, where people are closer than usual, individuals tend to look down).[15]

Also, videoconferencing forces people to have the eyes of other participants in their field of view for a long stretch of time (so-called "hyper gaze").[16] While on Zoom it is always possible to request non-speakers to turn off their video and to eliminate their squares,[17] a typical Zoom grid drastically reduces the difference between a speaker (who, in a physical setting, draws the gaze of others) and a listener, resulting in everyone feeling stared at during the entire videoconference.[18]

As shown by previous academic research, large appearances (as the size of faces seen on Zoom) and prolonged eye gaze cause the release of stress hormones and activate a "fight or flight" response.[19]

3. The Lack of Eye Contact and Self-Monitoring

Notwithstanding that participants in videoconferencing feel stared at the entire time, there is actually no eye contact. To simulate eye contact with others, it is necessary to look straight into the camera which, in itself, would preclude a participant from looking in the others' eyes.[20]

This difficulty in mutual gaze creates a further cognitive burden and decreases energy and motivation.[21]

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15. *Ibid*.
16. *See* G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, p. 2.
17. *See* Kirsten O'CONNEL and Kate DAVIES, "Virtual Hearings – Are They Here to Stay?", Allen & Overy – Virtual Hearings Interviews Series (January 2021) available at <https://www.allenovery.com/en-gb/global/news-and-insights/virtual-hearings/virtual-hearings-are-they-here-to-stay> (last accessed 20 June 2021), where it is suggested that during cross-examination only the three tribunal members and the witness should appear on the counsel's screen.
18. *See* G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, p. 2.
19. *See* C. HOLLINGWORTH, L. MESCAL and L. BARKER, "The Rise of the Zoombie", fn. 4 above, p. 18 ("Even though subconsciously we know we are safe, our system-1 thinking registers these large appearances and prolonged eye contact as intimidating, and it triggers a 'fight or flight' response which causes us to release stress hormones"); G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, p. 2.
20. *See* Jena LEE, "A Neuropsychological Exploration of Zoom Fatigue", Psychiatric Times (17 November 2020) at <https://www.psychiatrictimes.com/view/psychological-exploration-zoom-fatigue> (last accessed 20 June 2021).
21. *Ibid*. ("There is robust evidence on how eye contact improves connection – faster responses, more memorization of faces, and increased likeability and attractiveness. These tools that make interactions organically rewarding are compromised over video. On video, gaze must be directed at the camera to appear like making eye contact with an

The lack of eye contact also translates into the loss of a relevant tool for reading what the other person has in mind and what his/her emotional state is.[22]

If on Zoom we are not really looking into the eyes of our interlocutors, it is often the case that we indulge in looking at ourselves.

As shown by multiple studies that analyzed the effects of seeing oneself in a mirror, mirror image is not only distracting, but it increases self-evaluation, which results in stress and anxiety.[23]

4. The Deficiency of Non-Verbal Cues and Their Delay

In a survey conducted by Allen & Overy on remote hearings, two thirds of the respondents affirmed that the virtual environment impacted their ability to "read" witnesses, judges, or arbitrators.[24]

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observer, and during conferences with 3 or more people, it can be impossible to distinguish mutual gaze between any 2 people").

22. *See* Ula CARTWRIGHT-FINCH, "Flying Cyber-Solo", Justice Rebooted – Paper 2 (October 2020) p. 3, available at <https://www.cortexcapital.org/justicerebooted> (last accessed 20 June 2021) ("Gaze cues are extremely difficult to read (if not entirely absent) in virtual hearings as a result of camera location and screen display. Assuming members of the same team or panel are sitting in physically different locations, exchanging those knowing glances during a critical cross-examination or an oral submission becomes impossible").
23. *See* J.N. BAILENSON, "Nonverbal Overload", fn. 4 above, where the author cites the pioneering work of Shelley DUVAL and Robert A. WICKLUND, *A Theory of Objective Self Awareness* (Academic Press 1972). *See also* G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, pp. 3 and 11, where the authors refer to research showing that women may be more affected than men by mirror anxiety.
24. *See* Allen & Overy, "A&O Cross-Border Surveys", fn. 3 above, p. 20. This experience is not shared by everyone involved in arbitral remote hearings. According to Kate Davies: "I actually think I had better access to [the witness'] body language as a result of the hearing being done virtually than I would have done in a hearing room. […] One of the benefits of a virtual hearing is that that witness – again, because I've got the right technology which I can organize so that that witness fills one of my screens – that witness is actually sitting right in front of me, looking at me when giving their answers, head and shoulders. I've got a full frontal image which is less than a metre away from me of that witness and I can observe all of their reactions to the questions that I'm asking" (*see* K. O'CONNEL and K. DAVIES, "Virtual Hearings", fn. 17 above). Also, according to the "SCC Virtual Hearing Survey", fn. 3 above, p. 5: "Prof. Maxi Scherer of WilmerHale dismissed the common view that cross-examinations would be hampered in virtual environments, noting that an HD screen creates an even more immediate impression of the witness than if he or she were sitting five metres away from the arbitrator in a conference room". In a report published in the summer of 2021, the Berkeley Research Group, LLC concluded that "improving technology and the

This result does not come as a surprise if one considers that in remote hearings many non-verbal cues are missed. This means that our brains are left with much less material to process – the most obvious example being the absence of hand gestures, that in video calls are often not seen – and struggle to make sense of the limited extra-linguistic information captured from the screen view.[25]

From the speakers' perspective, in addition to a less effective communication, the difficulty in noticing and processing the relevant non-verbal cues (and in understanding whether the listeners are still with you) generates fatigue possibly leading to cognitive errors.[26]

From the listeners' perspective, while they are able to subconsciously and effortlessly process multiple non-verbal cues in a physical setting thereby reaching a much more accurate understanding of what is communicated verbally,[27] in a remote

ability to zoom in on those undergoing cross-examination can heighten any telling facial expressions": *see* Berkeley Research Group, LLC, "The Psychological Impact of Remote Hearings" (2021) available at <https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf> (last accessed 16 September 2021).

25. *See* U. CARTWRIGHT-FINCH, "Control, Alt, Judge", fn. 9 above, p. 3. According to C. HOLLINGWORTH, L. MESCAL and L. BARKER, "The Rise of the Zoombie", fn. 4 above, p. 16, in a remote setting even silence is difficult to interpret ("In person, we often take silence and stillness to mean we have people's full attention. Whereas silence and switched off video cameras on the video platform can prompt us to wonder whether our colleagues have gone to make a cup of tea, leaving us less confident of their commitment to the work in hand").
26. *See* G. FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue", fn. 4 above, p. 2 f.; J. LEE, "A Neuropsychological Exploration", fn. 20 above. C. HOLLINGWORTH, L. MESCAL and L. BARKER, "The Rise of the Zoombie", fn. 4 above, p. 4 ("At a meta level, research suggests that in these more complex meetings on the video platform there is a greater demand for conscious processing. It becomes harder to see and process critical non-verbal cues which would have been blatantly evident in a face-to-face meeting. This can create increased cognitive load as people search for cues, encounter the inevitable technical issues and embrace the unnatural feel of the video platform which often leads to sub-optimal outcomes and negative behaviours").
27. *See* Leonhard SCHILBACH, "Eye to Eye, Face to Face and Brain to Brain: Novel Approaches to Study the Behavioral Dynamics and Neural Mechanisms of Social Interactions", 3 Current Op. Behav. Sci. (2015) p. 130. *See also* J. LEE, "A Neuropsychological Exploration", fn. 20 above ("These nonverbal cues are not only used to acquire information about others, but are also directly used to prepare an adaptive response and engage in reciprocal communication, all in a matter of milliseconds").

environment it is possible to lose the real message (particularly as the meaning of what is communicated often differs from what is said explicitly).[28]

Not only are non-verbal cues substantially lost on videoconferencing platforms, but the visible cues are perceived with a slight delay in transmission, creating in our brain a constant sense of uncertainty and further cognitive strain.[29]

Furthermore, the milliseconds gap between the vision and the sound interrupts the synchronicity of physical communication, leading the listeners to perceive the speakers less favorably and the speakers to think that they have lost the attention of the audience.[30]

This may be particularly relevant in a remote hearing where "reading" the entire room is particularly telling and helpful in making quick strategic decisions (e.g., in a cross-examination it is not only relevant to "read" the witness but also to have a sense of how the arbitral tribunal is perceiving the testimony). Lags between audio and video could lead counsel to miss or misread cues and take a wrong turn in cross-examination.

B. Zoom Fatigue and Arbitrators' Decision-Making Processes

While the analysis offered above explains why remote hearings are so demanding for our brain, the next question is whether the "cognitive load" they produce can

28. *See* J.N. BAILENSON, "Nonverbal Overload", fn. 4 above; U. CARTWRIGHT-FINCH, "Control, Alt, Judge", fn. 9 above, p. 3 ("When we speak to someone in person, there are masses of non-verbal signals that we take in automatically. These cues include subtle facial movements (a raised eyebrow or pursing of the lips), shifts in body position (crossing the legs towards or away from someone, or fidgeting during speech), hand and arm gestures, tone of voice and changes in our breathing (a sharp inhale and hold when we are preparing to speak). It takes no effort for us to process all of these cues and it largely takes place below our conscious awareness. These often-unintended signals lead us to a message different from the one being conveyed explicitly. The output of our subconscious processing therefore gives us a more accurate reading of the person speaking").
29. *See* C. HOLLINGWORTH, L. MESCAL and L. BARKER, "The Rise of the Zoombie", fn. 4 above, p. 13.
30. U. CARTWRIGHT-FINCH, "Control, Alt, Judge", fn. 9 above, p. 2; "Johnson – Why Zoom Meetings Are So Dissatisfying", The Economist (16 May 2020) at <https://www.economist.com/books-and-arts/2020/05/16/why-zoom-meetings-are-so-dissatisfying> (last accessed 20 June 2021). *See also* C. BAO and U. CARTWRIGHT-FINCH, "Trial by Zoom on Trial", fn. 9 above ("First of all, we have evolved to interact with one another in real life. Our brains are highly trained to process the information we receive from seeing a whole person in three dimensions, whose body language and speech are precisely synchronised. If you knock this synchronicity out even one millisecond, our brain has to run a different calculation to restore coherence").

overwhelm working memory[31] and impair arbitrators' performance and their decision-making processes.[32]

If remote hearings are here to stay in a post-pandemic world, this question seems to be key for the arbitration community, given that behavioral studies outside of the specific remote hearing context have shown that high cognitive load increases both "fast thinking" and reliance on cognitive heuristics and biases.[33]

A brief overview of these behavioral studies is necessary before offering – in the next subsection C – an answer to the above question.

1. System 1 and System 2

Empirical studies conducted by behavioral sciences have shed light on the fact that human decisions are the result of a complex interplay between two cognitive systems: System 1 and System 2.[34]

"System 1" identifies those decision-making processes which are intuitive, automatic and spontaneous, and that do not require a high degree of attention.

Being automatic, the "fast thinking" of System 1[35] tends to dominate the cognitive processes of individuals who, unconsciously, prefer to rely on the simplest and most

31. On "cognitive load theory" *see* Leslie ELLIS, "Inside the Black Box: How Psychology Informs the Arbitration Hearing" in Ziya AKINCI, Umut TUĞA and Şeref C. ARAT, eds., *The Psychology of the Arbitration Hearing*, Istanbul Arbitration Centre (ISTAC) Publications – 3 (On İki Levha Yayıncılık 2020) p. 31 at pp. 33-35 ("Cognitive Load Theory refers to the amount of information our working memory can process at any given time, and that there is a close relationship between the quality of instruction and level of cognitive load (Sweller, 1988). The clearer the instruction, the lower the cognitive load. Other research indicates people can process an average of seven new pieces, or 'chunks', of information at a time (Miller, 1956). Too much complex information at once can overwhelm working memory and impede not only current performance but also the ability to encode and retrieve the new information, which will affect future performance").
32. According to Allen & Overy, "A&O Cross-Border Surveys", fn. 3 above, p. 20, most of the survey's respondents felt that the ultimate result of the remote hearing was not impacted by the remote setting. This seems to suggest that in the arbitration community there is at the moment a general confidence that the ultimate outcome of an arbitration proceedings is not affected by what modality is chosen to conduct the hearings.
33. *See* L. ELLIS, "Inside the Black Box", fn. 31 above, p. 34.
34. Among others, *see* Chris GUTHRIE, Jeffrey J. RACHLINSKI and Andrew J. WISTRICH, "Blinking on the Bench: How Judges Decide Cases", 93 Cornell L. Rev. (2007) p. 1 at pp. 7-9.
35. This expression is now widely used thanks to the renowned book of D. KAHNEMAN, *Thinking Fast and Slow*, fn. 11 above.

intuitive answers, often stemming from the mechanical repetition of a deliberative process refined through experience.[36]

On the other hand, "System 2" identifies deductive cognitive processes, guided by "slow thinking" which, contrary to the "fast" one, relies on effort, motivation, attention and application of knowledge.[37]

If System 1 allows individuals to decide rapidly and without effort, most often reaching the correct outcome (an outcome consistent with the assumptions of *rational choice theory*),[38] problems arise every time System 1 determines suboptimal cognitive processes from which stem choices and decisions that deviate from the assumption of perfect rationality.[39]

A typical scenario where System 1 produces suboptimal mental processes, leading to possible cognitive errors, is brain exhaustion and cognitive load. In this scenario, the scrutiny of System 2, and the subsequent deductive cognitive process, are not properly activated with the risk that possible errors of System 1 are not discarded or corrected.[40]

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36. *See* C. GUTHRIE, J.J. RACHLINSKI and A.J. WISTRICH, "Blinking on the Bench", fn. 34 above, p. 9; Robin M. HOGARTH, *Educating Intuition* (University of Chicago Press 2001) pp. 14 and 22.
37. *See* Shane FREDERICK, "Cognitive Reflection and Decision Making", 19 J. Econ. Perspect. (2005) p. 25 at p. 26.
38. "Rational choice theory" is the dominant theoretical paradigm in microeconomics, which assumes that individuals choose the action that will maximize their benefits and minimize their costs. *See* Milton FRIEDMAN, *Essays in Positive Economics* (University of Chicago Press 1953) p. 15; Richard POSNER, *Economic Analysis of Law*, 5th edn. (Aspen 1998) p. 3; Thomas S. ULEN, "Rational Choice Theory in Law and Economics" in Boudewijn BOUCKAERT and Gerrit DE GEEST, eds., *Encyclopedia of Law and Economics* (Edward Elgar 1999). For a critique of the "rational choice theory" *see* Martha C. NUSSBAUM, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics", 64 U. Chi. L. Rev. (1997) p. 1197.
39. In behavioral studies, cognitive deviations from an idealized concept of perfect rationality are also referred to as "bounded rationality". The expression "bounded rationality" has been first used by Herbert A. SIMON, "Rational Choice and the Structure of the Environment" in *Models of Man: Social and Rational* (Wiley 1957) pp. 270-271.
40. *See* D. KAHNEMAN, *Thinking Fast and Slow*, fn. 11 above, p. 25 f. ("The division of labor between System 1 and System 2 is highly efficient: it minimizes effort and optimizes performance. The arrangement works well most of the time because System 1 is generally very good at what it does: its models of familiar situations are accurate, its short-term predictions are usually accurate as well, and its initial reactions to challenges are swift and generally appropriate. System 1 has biases, however, systematic errors that it is prone to make in specified circumstances. As we shall see, it sometimes answers easier questions than the one it was asked, and it has little understanding of logic and statistics. One further limitation of System 1 is that it cannot be turned off. […] One of the tasks of System 2 is to overcome the impulses of System 1. In other words, System 2 is in charge of self-control").

2. *Arbitrators' Cognitive Heuristics and Biases*

To simplify the most complex decision-making processes (for example, the calculation of probabilities), studies show that individuals resort to a series of mental shortcuts (so-called *heuristics*) and are victims of pre-comprehension mechanisms (so-called *biases*), which can lead to a distorted perception, an inaccurate judgment or an illogical interpretation.[41]

Through a series of empirical studies, cognitive psychology has proposed a taxonomy of cognitive errors that are systematically favored by System 1. This taxonomy is possible given that cognitive errors are a systematic phenomenon, which is therefore observable, measurable and, most importantly, predictable.[42]

Empirical studies also show that judges and arbitrators, like all other human beings, are exposed to systematic cognitive errors[43] and that they arrive at hasty conclusions,

41. *See* E. SUSSMAN, "Arbitrator Decision Making", fn. 1 above, p. 494 f.
42. *See* Dan ARIELY, *Predictably Irrational*: *The Hidden Forces That Shape our Decisions* (HarperCollins 2008); C. GUTHRIE, "Misjudging", fn. 2 above, p. 421; S. BREKOULAKIS, "Systemic Bias", fn. 1 above, p. 564 ("For scholars taking an empirical approach to judicial decision-making, bias is an observable and measurable phenomenon, despite its abstract and latent nature").
43. *See* R.K. HELM, A.J. WISTRICH and J.J. RACHLINSKI, "Are Arbitrators Human?", fn. 1 above, p. 686 f. ("These results show that arbitrators are not superior to judges in terms of their ability to avoid common cognitive errors in judgment. The arbitrators relied heavily on intuition to answer the CRT questions, overwhelmingly committed the conjunction fallacy, expressed large framing effects, and failed to respond well to the confirmation bias problems. Although in objective terms the arbitrators performed poorly on some of the experiments reported in this article, it is important to keep that in perspective. Their performance was no worse than, and in fact fairly typical of, judges and lawyers who responded to identical or similar problems and tests. Therefore, the proper conclusion is not that arbitrators are poor decisionmakers as measured by our experiments, but that they share the same susceptibility to cognitive illusions and excessive reliance on intuition that plague other experienced and accomplished professionals, such as judges and lawyers"). A similar conclusion has been reached by J.M. MATTHEWS, "Identifying and Overcoming", fn. 1 above, p. 1 ("Lawyers, judges and even internationally famous arbitrators carry their own biases with them as they take on the task of resolving disputes between people or institutions. While we may be more educated and have a broader range of experiences than a typical domestic judge and certainly are more worldly-wise than the jurors who are entrusted under the U.S. system of justice with enormous responsibilities for resolving disputes, international arbitrators nonetheless are also human beings"); *see also* P.K. ANTHONY and L.J. WEINSTEIN, "The Social Science Edge", fn. 1 above, p. 17 ("Whether your case is being heard by a jury, a trial judge, an arbitrator, or is being mediated, people are people. Even 'neutrals' striving to be fair minded will have a world view, a cultural and legal frame of reference, biases, prejudices, and predispositions like everyone else").

resulting from the automatic activation of System 1.[44] Indeed, it is precisely their expertise that tends, over time, to transform "slow thinking" (deductive and deliberative) into "fast thinking" (automatic and intuitive) and to expose their decision-making processes to the risk of committing cognitive errors.[45]

3. Story Model and Confirmation Bias

It would be beyond the scope of this essay to describe the various heuristics and biases that affect arbitrators' decision-making processes.[46]

For the purposes of this work, it is worth focusing on two correlated psychological phenomena that remote hearings do not seem well-equipped to resist and correct: the "story model" and the "confirmation bias".

According to the "story model", judges and arbitrators start their decision-making process by summarizing the facts of the case into a coherent narrative story.[47]

The process of creating a story starts as soon as the arbitrators read the pre-hearing submissions. Therefore, assuming that arbitrators discharge their role diligently, they already have a dominant narrative in mind when they participate in evidentiary hearings.[48]

The "story model" is particularly relevant if one considers that individuals (including arbitrators) tend to stick to the first conclusion they have reached (a phenomenon called "confirmation bias" or "biased hypothesis testing").[49] In other

44. *See* C. GUTHRIE, J.J. RACHLINSKI and A.J. WISTRICH, "Blinking on the Bench", fn. 34 above, pp. 9 and 13.
45. *Ibid*., p. 30 f. ("This conversion of deliberative judgment into intuitive judgment might be the hallmark of expertise. Nevertheless, there is reason to be suspicious of intuitive decision making in court. As Tversky and Kahneman observed, intuitive thinking also can 'lead to severe and systematic errors'").
46. For an overview of the cognitive heuristics and biases affecting arbitrators, *see* R.K. HELM, A.J. WISTRICH and J.J. RACHLINSKI, "Are Arbitrators Human?", fn. 1 above, pp.671-686; E. SUSSMAN, "Arbitrator Decision Making", fn. 1 above, pp. 491-504; Paolo MARZOLINI, "A Shortcut to Arbitrators' Mind" in Ziya AKINCI, Umut TUĞA and Şeref C. ARAT, eds., *The Psychology of the Arbitration Hearing*, Istanbul Arbitration Centre (ISTAC) Publications – 3 (On İki Levha Yayıncılık 2020) p. 117 at pp. 126-139.
47. *See* R.C. WAITES and J.E. LAWRENCE, "Psychological Dynamics", fn. 1 above, p. 81; L. ELLIS, "Inside the Black Box", fn. 31 above, p. 40; P. MARZOLINI, "A Shortcut to Arbitrators' Mind", fn. 46 above, p. 124.
48. *See* L. ELLIS, "Inside the Black Box", fn. 31 above, p. 40; P. MARZOLINI, "A Shortcut to Arbitrators' Mind", fn. 46 above, p. 125.
49. *See* R.K. HELM, A.J. WISTRICH and J.J. RACHLINSKI, "Are Arbitrators Human?", fn. 1 above, p. 681. *See also* L. ELLIS, "Inside the Black Box", fn. 31 above, p. 42 ("Over the course of a lifetime, everyone develops a set of beliefs, attitudes and

words, once they have created a story, arbitrators seek out and favor the information that supports their story, while avoiding and disfavoring counter-information.[50]

According to the 2012 Arbitrator Survey conducted by Edna Sussman, almost all the surveyed arbitrators (more precisely 88% of them) admitted that they formed a preliminary view of the merits of the case at least once every four proceedings (25% of the time) after only receiving the pre-hearing submissions, while 60% of the arbitrators changed their preliminary determination 30% or less of the time.[51]

This susceptibility of arbitrators to "confirmation bias" seems particularly worrisome since "it subverts the essence of adjudication – a reasoned decision based on the submissions of the parties – because it means that the mind of the adjudicator is closed (or at least less than fully open) when proofs or arguments are being presented".[52]

C. Conclusions

If it is hard for arbitrators to change their mind after having read pre-hearing submissions and formed their own story, hearings should not be intended merely as the occasion to put "meat on the bones", but as a fundamental opportunity to test and challenge those very same bones (i.e., the original story).

It is in this context that the cognitive load caused by remote hearings should concern the arbitration community.

Consistent with the findings of behavioral academic research, in order for arbitrators to challenge their own narrative and overcome confirmation bias, it is crucial for them to engage System 2 and to participate in hearings with the utmost effort, motivation and attention.[53]

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expectations about how the world works. […] Those beliefs, attitudes and expectations work as a set of filters through which all new information is processed. Information that is consistent with those beliefs, attitudes and expectations is more likely to be believed, encoded into memory, and retrieved later. Information that is inconsistent is distorted to become consistent or is rejected as being inaccurate and possibly not even encoded into memory, as though it never existed").

50. *See* L. ELLIS, "Inside the Black Box", fn. 31 above, p. 41; P. MARZOLINI, "A Shortcut to Arbitrators' Mind", fn. 46 above, p. 126.
51. *See* E. SUSSMAN, "Arbitrator Decision Making", fn. 1 above, p. 502.
52. *See* R.K. HELM, A.J. WISTRICH and J.J. RACHLINSKI, "Are Arbitrators Human?", fn. 1 above, p. 686.
53. *Ibid.*, p. 682 ("Testing a belief requires engaging in an effortful 'System 2' process involving assimilating contrary information. It is far easier to rely on intuition, which will seek out, remember, and emphasize consistent information while ignoring, forgetting, or reinterpreting inconsistent information. Even though a falsifying test strategy usually yields superior results, people are disinclined to adopt it").

While this is already challenging in physical hearings, it seems even more problematic in remote hearings where Zoom fatigue and cognitive load not only impair effective advocacy (which is itself crucial to challenge arbitrators' prejudgments), but fuel exactly those intuitive and automatic dynamics of System 1 that a functional hearing should counter and limit.

Additionally, information presented via video is perceived to be less "rich" than information presented in face-to-face communications.[54] This could make it even more difficult to overcome the impact of the preconceived story in a remote arbitration setting.

Awareness and further investigations into the new challenges posed by the remote setting, alongside technological advancements aimed at reducing the sources of Zoom fatigue and cognitive load, will be pivotal to avoid turning arbitral hearings into idle tributes to procedural tradition, rather than allowing them to be a truly effective part of the arbitrators' decision-making processes.

III. A View from a Screen

One significant distinction between remote and physical hearings is the mode of giving evidence. In physical hearings, witnesses predominantly give evidence in the same room as the tribunal, counsel and the parties. In remote hearings, the witnesses are in their homes or offices, with everyone on other sides of computer monitors from each other. Does not being in the same room alter how the various parties perceive the witnesses, or each other?

A. "A View from a Screen": Research on Outcomes

One way to assess the impact of giving evidence remotely versus physically is to compare outcomes of proceedings that included remote or physically present participants. This comparison has been done in several contexts outside of the arbitration setting, and findings on both whether there is an impact or what the cause may be of any impact are inconclusive. One set of studies looks at whether litigants appearing remotely versus being physically present affects the decisions of judges or other court officials.[55] Other studies have looked at perceptions of witnesses who,

54. *See* Frank M. WALSH and Edward M. WALSH, "Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings", 22 Geo. Immigr. L.J. (2008) p. 259 at p. 268 ("[…] multiple studies have found that VTC communication is not as rich as face-to-face communications and diminishes the ability to generate positive feelings among participants").

55. *See* Shari S. DIAMOND et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions", 100 J. Crim. L. & Criminology (2010) p. 869. *See also* F.M. WALSH and E.M. WALSH, "Effective Processing or Assembly-Line Justice?", fn. 54 above; Ingrid V. EAGLEY, "Remote Adjudication in Immigration", 109 Nw. U.L.

because of the nature of the allegations, are sometimes given the opportunity to testify remotely rather than being required to testify in the same room as their accused abuser or assaulter.[56] Finally, some researchers investigating the feasibility of completely remote proceedings, pre-pandemic, conducted mock remote and physical "hearings" and compared perceptions of participants in both types of proceedings.[57]

The first set of studies has shown that criminal defendants appearing remotely in bail hearings received, on average, higher bonds to be posted,[58] were more likely to receive custodial sentences, and longer sentences, as opposed to community sentences,[59] were less likely to be granted asylum (even when controlling for

Rev. (2015) p. 933; United States Government Accountability Office, "Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges" (2017) available at <https://www.gao.gov/assets/690/685022.pdf> (last accessed 20 June 2021). These researchers have assessed opinions of court officials, such as experts, translators and other "stakeholders" as well as decision makers in measuring the effect of remote testimony on outcomes.

56. *See* Sara LANDSTRÖM, "CCTV, Live and Videotapes: How Presentation Mode Affects Evaluations of Witnesses", Dissertation (Ph.D.), University of Gothenburg (2008); I.V. EAGLEY, "Remote Adjudication", fn. 55 above.
57. S. LANDSTRÖM, "CCTV, Live and Videotapes", fn. 56 above; David TAIT and Vincent JAY, "Virtual Court Study: Report of a Pilot Test 2018", Western Sydney University (2019) available at <https://researchdirect.westernsydney.edu.au/islandora/object/uws:53063/> (last accessed 10 July 2021) (in an attempt to "develop the technological infrastructure for a virtual court or tribunal" the authors first created a proof of concept, with participants sitting in a triangle, using a green screen room, then set up an experiment with 20 teams participating in a mock civil case physically present with each other, and 20 participating virtually, using individual technological stations that streamed video to each other). *See also* Matthew TERRY, Steve JOHNSON and Peter THOMPSON, "Virtual Court Pilot – Outcome Evaluation", Ministry of Justice Research Series 21/10 (December 2010) available at <https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report> (last accessed 20 June 2021) (the authors measured the impact of having defendants in two magistrates' courts in London and North Kent make their initial court appearance remotely via secure video link rather than being physically present in the courtroom).
58. S.S. DIAMOND et al., "Efficiency and Cost", fn. 55 above, p. 893 (in a study of bail hearings before and after Cook County, IL (U.S.) began using closed-circuit television ("CCTV") to allow defendants to participate in their bail hearing remotely, the authors found that bail was not granted at different rates when the defendant participated remotely, but average bond amounts increased between 54%-90%, when they had been decreasing prior to the use of CCTV).
59. *See* M. TERRY, S. JOHNSON and P. THOMPSON, "Virtual Court Pilot", fn. 57 above.

unrepresented asylum applicants),[60] and were more likely to be deported,[61] due to inadequate assessments of the subjects' demeanor or cognitive abilities, compared to defendants appearing in person.[62]

Possible explanations for the different outcomes were or could be functional (e.g., counsel believed they were less able to communicate effectively with their client, the respondents were less likely to be represented by counsel[63] or take advantage of all remedies when counsel was not physically present to advise them to do so, or language challenges were greater with remote appearances) or technological (e.g., the judges' monitors were small, or had poor picture and sound quality with older systems). However, researchers also reported important differences in the judges' abilities to assess credibility. For example, there was a limited ability for the defendant/applicant/respondent and judge to make eye contact or defendants might have had difficulty understanding when they could break into the proceedings to speak,[64] the video transmission "may exaggerate or flatten […] affect" or narrow the audible tone of voice, the video-transmitted communications simply are not as rich, positive, or emotionally connected as physically present communications,[65] or the officials were not able to fully assess the demeanor or credibility of the respondents and witnesses.[66]

Several studies of reactions to testimony of children delivered via closed-circuit television (i.e., CCTV – a direct feed of the video from the remote location to the courtroom) as opposed to being physically present found both a negative and positive impact, as well as no impact at all. Laypeople, judges, legal representatives, and other court personnel found children who testified via CCTV to be both *less* believable,

60. F.M. WALSH and E.M. WALSH, "Effective Processing or Assembly-Line Justice?", fn. 54 above, p. 271 (immigration judges who held physical hearings were twice as likely to grant asylum (44.9% grant rates) than judges who held remote hearings (21.9% grant rates)).
61. I.V. EAGLEY, "Remote Adjudication", fn. 55 above, p. 996 (respondents appearing remotely in deportation proceedings were more likely to be deported than those who were physically present at the hearing. However, the authors determined that, when engagement in the litigation system was controlled for, the difference in deportation rates disappeared).
62. United States Government Accountability Office, "Actions Needed", fn. 55 above, p. 55 (immigration officials from half of the immigration courts studied reported changing their assessments of the respondents after seeing them in person, and one was unable to identify cognitive difficulties remotely, difficulties that were clearly evident when the respondent was physically present).
63. M. TERRY, S. JOHNSON and P. THOMPSON, "Virtual Court Pilot", fn. 57 above, p. 25.
64. S.S. DIAMOND et al., "Efficiency and Cost", fn. 55 above, p. 898.
65. F.M. WALSH and E.M. WALSH, "Effective Processing or Assembly-Line Justice?", fn. 54 above, p. 268.
66. United States Government Accountability Office, "Actions Needed", fn. 55 above, p. 55.

honest, intelligent, confident, forthcoming with details, and accurate, but also as being *more* relaxed, resistant to leading questions, and accurate.[67] Despite the differences in perceptions of the child witness, there were no consistent differences in outcome and any negative perceptions of the children testifying via CCTV dissipated over time, in deliberations, or a combination of both.[68] The authors concluded that live testimony was more immediate and had a greater emotional impact on the other participants than CCTV testimony, which then translates into increased credibility, but that the increased immediacy also resulted in more stress for the child, which could also negatively impact testimony.[69]

Finally, simulated experiments have also resulted in conflicting findings. Landström found that the same witness was rated as more eloquent and pleasant when physically present than when seen on video but attempts to remotely replicate a physical hearing resulted in some participants perceiving tribunal members and witnesses differently in the two settings and other participants perceiving no differences at all.[70]

While the research indicates that appearing remotely, rather than in person, at the hearing is more likely to work to the detriment of the person appearing, it can also lead to benefits, particularly when being physically present would create other disadvantages. Further, many of the negative perceptions are the product of factors that can either be avoided once identified or that are unlikely to be a factor in international arbitrations (e.g., self-representation or antiquated audio-video equipment).

67. *See* S. LANDSTRÖM, "CCTV, Live and Videotapes", fn. 56 above, and I.V. EAGLEY, "Remote Adjudication", fn. 55 above, for fulsome summaries of this large body of research (empirical studies measured laypersons' reactions to children "testifying" via one-way CCTV (the child could not see the trial participants) about an event that occurred in a laboratory. Field studies in the UK and Australia measured reaction of actual trial participants (e.g., judges, legal representatives, police officers, social workers and other court personnel) to real-life testimony of children using two-way CCTV (all parties can see and hear each other)). *See also* Holly J. ORCUTT et al., "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Trust in Open Court and Closed-Circuit Trials", 25 L. Hum. Behav. (2001) p. 339.
68. *See* H.J. ORCUTT et al., "Detecting Deception in Children's Testimony", fn. 67 above, p. 360.
69. S. LANDSTRÖM, "CCTV, Live and Videotapes", fn. 56 above, p. 15.
70. *See* D. TAIT and V. JAY, "Virtual Court Study", fn. 57 above (using green rooms and individual pods with monitors and speakers, the authors created a virtual reality-like hearing experience, which was dissimilar to the remote hearing experience of Zoom or other remote meeting platforms).

B. "A View from a Screen" and Arbitrators' Decision-Making Processes

1. Body Language and Other Cues

Earlier sections of this essay address the fact that the remote setting makes evaluating body language and eye contact more difficult than in physical hearings. However, the impact extends beyond increasing cognitive load. In two surveys, a research group called the Global Deception Detection Team asked over 4,800 people in over sixty countries how they determine whether someone is lying.[71] Eye contact or averted gaze was the most commonly cited indicator, but respondents also mentioned body language or movement, shifting posture, and self-touch as other strong indicators. Other studies have also found eye contact and body movement are some of the most heavily relied-upon indicators of credibility.[72]

Even if they are not accurate indicators of honesty,[73] most people rely on them to conclude that avoiding eye contact, shifting posture, and excess or exaggerated body movements are indicia of deception. If viewing witnesses in a remote hearing obscures these indicators, it is likely that not having those trusted cues will impact observers' assessments of a remote witness' credibility. Remote international arbitration participants have experienced this difficulty firsthand.[74]

On the other hand, wearing masks while giving in-person evidence in a pandemic has made other aspects of assessing credibility challenging.[75] It is difficult to determine

71. *See* Global Deception Detection Team, "A World of Lies", 37 J. Cross-Cult. Psychol. (2006) p. 60.
72. *See* Marcus T. BOCCACCINI, "What Do We Really Know About Witness Preparation?", 20 Behav. Sci. & Law (2002) p. 161; Tess M.S. NEAL and Stanley L. BRODSKY, "Expert Witness Credibility as a Function of Eye Contact Behavior and Gender", 35 Crim. Just. & Beh. (2008) p. 1515; Siegfried L. SPORER and Barbara SCHWANDT, "Moderators and Nonverbal Indicators of Deception: A Meta-Analytic Synthesis", Psychol. Pub. Pol'y & Law (2007) p. 1.
73. *See* S.L. SPORER and B. SCHWANDT, "Moderators and Nonverbal Indicators of Deception", fn. 72 above, p. 2 (citing another meta-analysis indicating some of the most commonly relied-upon indicators of deception had no statistical relationship with actual deception.)
74. *See* Allen & Overy, "A&O Cross-Border Surveys", fn. 3 above, p. 21 ("[…] physical hearings involved 'physical performance', body language, facial expressions, volume of the voice. These elements are missing in a virtual setting, which may have an impact").
75. *See* Claus-Christian CARBON, "Wearing Face Masks Strongly Confuses Counterparts in Reading Emotions", 11 Front Psychol. (25 September 2020) at <doi:10.3389/fpsyg.2020.566886> (last accessed 10 July 2021) (after being shown photos of masked and unmasked faces expressing six emotions, participants were worse at identifying four of the six emotions and were more likely to mistake emotions with masked faces as compared to unmasked faces).

if one type of blindfold (observing a witness give evidence remotely versus physically present but behind a mask) is more or less detrimental than the other to the ability of adequately assessing credibility, while physical hearings can risk participants' personal safety. This has been a regular struggle for tribunals, counsel and parties.

Camera angle can also impact assessments of credibility and blame. Studies have shown that a tighter camera angle that focuses on the primary person of interest increases the extent to which others attribute cause to personal factors (such as the person's choices, behavior or motivation) rather than situational factors that might cause those choices, behavior or motivation. For example, confessions were perceived to be more voluntary, perpetrators were perceived to be more culpable,[76] and witnesses were perceived to be less credible[77] when the camera angle included just the alleged perpetrator (versus perpetrator and interrogator) or a neck-up (versus chest-up) camera frame. This is caused by illusory causation, in which "people assign unjustifiable causality to a stimulus because it is more prominent than other stimuli".[78]

Lassiter and colleagues also found those with a wider camera angle engaged in more complex thinking[79] and that camera angle affects credibility assessments of experienced judges as well as laypeople.[80] Depending on their view, observers will assign more or less responsibility to individuals for their actions based simply on how much of them and their surroundings are visible and more salient.[81]

This has obvious implications for remote hearings, particularly in light of the fact that many remote arbitration participants laud the fact that remote hearings give them a

76. *See* G. Daniel LASSITER et al., "Accountability and the Camera Perspective Bias in Videotaped Confessions", Analysis of Soc. Iss. & Pub. Pol'y (2001) p. 53; G. Daniel LASSITER and Audrey A. IRVINE, "Videotaped Confessions: The Impact of Camera Point on View of Judgments and Coercion", 16 J. Appl. Soc. Psychol. (1985) p. 268.
77. *See* Shannon HAVENER, "Effects of Videoconferencing on Perceptions in the Courtroom", Master's Thesis, Arizona State University (2014).
78. *See* S. LANDSTRÖM, "CCTV, Live and Videotapes", fn. 56 above, p. 30.
79. *See* G.D. LASSITER et al., "Accountability and the Camera Perspective Bias", fn. 76 above, p. 61 (as measured by both a self-reported scale of how much effort respondents put into their assessment of the confession's validity and analyses of a written description of "which aspects of the videotaped confession were most important to them and why").
80. *See* G. Daniel LASSITER et al., "Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect", 18 Psychol. Sci. (2007) p. 224 at p. 225 (the authors showed a sample of judges and law enforcement officers videotaped confessions that included just the suspect, just the detective, or both and asked them to rate how voluntary the confession was).
81. *See* G.D. LASSITER et al., "Accountability and the Camera Perspective Bias", fn. 76 above, p. 54 ("[…] observers of an interaction overestimate the causal role of the individual who is most visually salient […]").

much more "up close" view of the witnesses than in a physical setting.[82] Having a closer view of the witness' faces can be both a blessing and a curse.

2. Individual Attributes

Remote hearings can both neutralize and exacerbate some effects of individual attributes on credibility assessments. For example, taller people earn higher salaries, social esteem and performance ratings.[83] However, some physical cues such as size are less discernible on screen, and any advantages (or disadvantages) are likely to dissipate in a remote setting.

Several other individual characteristics similarly act as cues. For example, research indicates people associate wearing glasses with both positive characteristics (e.g., intelligence, competence, success, dependability) and negative characteristics (less likeable, attractive or dominant), and even with a greater chance of winning an election.[84] In an Economist poll of over 1,500 people in 2018, 15% of survey respondents said they would have a less favorable impression of a man with facial hair, and more respondents said they would find clean-shaven men more trustworthy and intelligent than those with facial hair.[85]

In addition to being knowledgeable and trustworthy, expert witness credibility and persuasiveness are also associated with confidence, likeability,[86] eye contact and

82. For example, *see* K. O'CONNEL and K. DAVIES, "Virtual Hearings", fn. 17 above, p. 7 of the transcript, where K. Davies says, "[…] that witness is actually sitting right in front of me, looking at me when giving their answers, head and shoulders. I've got a full frontal image which is less than a metre away from me of that witness and I can observe all of their reactions to the questions that I'm asking".
83. *See* Timothy A. JUDGE and Daniel M. CABLE, "The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model", *J. Appl. Psychol.* (2004) p. 428.
84. *See* Alexandra FLEISCHMAN et al., "You Can Leave Your Glasses On: Glasses Can Increase Electoral Success", 50 Soc. Psychol. (2018) p. 38.
85. *See* Tim MARCIN, "Clean-Shaven Vs. Bearded: People Trust, Are More Attracted to Men With No Facial Hair, Poll Shows", Newsweek (29 March 2018) at <https://www.newsweek.com/clean-shaven-vs-beard-people-trust-more-attracted-men-no-facial-hair-poll-866327> (last accessed 1 July 2021).
86. *See* Stanley L. BRODSKY, Michael P. GRIFFIN and Robert J. CRAMER, "The Witness Credibility Scale: An Outcome Measure for Expert Witness Research", 28 Behav. Sci. & Law (2010) p. 892 (statistical analyses of responses to forty-one questions measuring expert witness credibility showed expert witness credibility was a function of four factors – likeability, believability, intelligence and trustworthiness, and characteristics).

gender,[87] and other peripheral cues such as hourly rate and where they earned their advanced degrees.[88]

In remote settings, several of these cues may become more apparent or salient when participants are viewed on a screen rather than from across a room, for the same reason camera angle impacts credibility assessments – we make decisions based on what is in front of us.

As discussed earlier, there are many reasons for why participating in a remote arbitration hearing can increase the cognitive effort necessary to fully evaluate the credibility of the incoming information. Arbitrators under the increased cognitive load are therefore relying more heavily on System 1, heuristic processing, rather than System 2, deliberative processing. Relying more heavily on heuristic information processing in a setting that makes some of those heuristics more salient results in the heuristics having an increased impact on decision making.

A field study conducted at medical education seminars illustrates this point well.[89] Remote attendees of the seminars adopted more information presented by likable presenters than from high-quality arguments, while those attending the seminars in person adopted more information from the higher quality arguments than from likable presenters. Analyses showed this was because remote attendees were also under higher cognitive workload. Their limited cognitive function prevented the remote attendees from fully processing the higher quality arguments, so they defaulted to relying on information from the likable source rather than the trustworthy source.[90]

When under a higher cognitive workload, due to "Zoom fatigue", technology failures, self-monitoring, or other factors, arbitrators are likely to rely more heavily on heuristics such as the likability of counsel or the witnesses, physical cues as to

87. *See* T.M.S. NEAL and S.L. BRODSKY, "Expert Witness Credibility", fn. 72 above (finding that male experts exhibiting high levels of eye contact were rated as more credible than experts with moderate or low levels of eye contact, while the same effect was not seen with female experts).
88. *See* Joel COOPER and Isaac NEUHAUS, "The 'Hired Gun' Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony", 24 L. & Hum. Behav. (2000) p. 149 (finding that, when expert evidence is provided using simple, conversational language, peripheral cues such as hourly rates and credentials did not affect assessments of the expert's credibility, but they did affect credibility when the testimony was complex and difficult to understand).
89. *See* Carlos FERRAN and Stephanie WATTS, "Videoconferencing in the Field: A Heuristic Processing Model", 54 Manage. Sci. (2008) p. 1565 (the authors compared the persuasiveness of presentations viewed either remotely or in person at medical education seminars and measured the cognitive workloads and information adoption of those viewing remotely or in person).
90 *Ibid.*, p. 1753 f. (describing the mediation and moderation analyses that showed the effect of source likability is due to an increased cognitive workload – those two effects were not operating independently of each other).

trustworthiness, or other peripheral cues that are easier to process than complex evidence, and the most salient heuristics are likely to have the largest impact on their decision making.

C. Conclusions

Witnesses may be at a disadvantage giving evidence remotely as compared to giving evidence in a physical hearing, but in a fully remote arbitration hearing all witnesses are at the same disadvantage. Arbitrators may also be at a disadvantage in that they are likely looking for trusty but missing credibility cues while also seeing other cues in more detail than usual, resulting in a higher cognitive workload and increased susceptibility to particularly salient extra-legal peripheral cues and heuristics. The key is cognitive workload. Understanding how to manage and reduce it will work to all participants' advantage.

IV. Practical Implications and Concluding Remarks

Our review does make remote hearings sound disadvantageous, but there are numerous other advantages to holding remote hearings. For example, personal safety, minimal travel, reduced costs, and lower barriers to participation in the hearing are all significant advantages, many of which are very attractive to the parties involved in an international arbitration. For many reasons, remote hearings are here to stay. Are parties facing too steep an uphill battle to achieve equally fair and unbiased physical and remote hearings?

No, all is not lost. Rather, a better understanding of how remote proceedings can affect decision making will help parties, counsel, witnesses and arbitrators prepare more effectively. Recall that cognitive load acts as the middleman between the setting (remote or physical) and the type of information processing (System 1 or System 2). In many proceedings, one party has the "simpler" story. Those parties are unlikely to be disadvantaged by a tribunal working under a higher cognitive load and more heuristic or peripheral processing. They should not make efforts to increase the arbitrators' cognitive load beyond what it would be otherwise, but the increased cognitive stress is likely to be less of a negative, and possibly a positive, for them.

The fact that evidence presented in remote hearings can be less vivid than in physical hearings means early impressions developed by reading the submissions are less altered by the hearing itself, which puts a greater burden on written submissions to carry the burden of persuasion. Utilize the brief's structure and headings to help the arbitrators follow along, tell your story in the submissions, use visuals, and checklists, etc. to make the story told in the submissions as persuasive as possible.

If prevailing depends on the tribunal members having a deeper understanding of the evidence, the biggest goal will be to simplify as much as possible. Doing what is in

counsel and the witnesses' power to reduce cognitive load will make the other factors less problematic. Counsel and witnesses should avoid overly technical language and jargon. Utilize visuals in the hearing. Request opening statements to create an opportunity to provide the narrative once more at the beginning of the hearing. Make sure there are both systematic (System 2) and peripheral (System 1) components to your case – multiple "hooks" for those who think differently and are under different levels of cognitive stress.

Proceed with the hearing when necessary or appropriate but maximize your chances of persuasion by simplifying and streamlining when possible. Keeping things simple and streamlined is important anytime you are trying to persuade an audience with complex information (e.g., most international arbitrations), but it is even more important when the setting itself is adding to the complexity.

Remote hearings have proven their value over the last eighteen months and will remain a tool in the arbitration toolbox after the pandemic. Some of the effects of participating remotely, such as seeking out missing credibility cues, may dissipate over time as we, and our brains, get more and more used to dealing with substantive matters via a video monitor. Others, such as an increased reliance on System 1 information processing when under stress, will remain constant. Keeping in mind how a remote setting can affect decision making will help counsel, arbitrators and witnesses alike be more prepared and more effective in remote hearings moving forward.

As personal safety becomes less of a primary concern and other factors begin to push arbitrations back into physical settings, another useful but untested (as to these considerations) tool is the hybrid hearing, where some participants are physically together while others participate remotely. At first blush, hybrid hearings seem like the ideal solution – participants gain the benefits of being together when possible and practical, but the remote component can solve logistical difficulties and concerns about expense. Does a witness who will give evidence for forty-five minutes really need to fly halfway around the world to do so?

Research is still catching up to fully remote hearings and has not yet addressed hybrid hearings, and the multiple permutations of how hybrid hearings can occur may make rigorous empirical study difficult. However, one can look at the research discussed and cited above to begin to think about how hybrid hearings may differ from fully remote or fully physical hearings, and how counsel will need to make strategic decisions about what and who to present remotely or in person.

For example, it may be that witnesses who can give evidence in person are generally more impactful and persuasive than those who give evidence remotely. All things being equal, it would not be recommended to have an important witness present remotely while most other witnesses are giving evidence in person. However, if that witness is unlikable, has a strong tendency to bounce their legs, or has some other negative characteristic that is muted when presenting by video, giving evidence remotely may be preferable. Hybrid hearings are likely to provide new opportunities that can be both advantageous and disadvantageous, all of which should be considered when making decisions about what evidence to present in what format.

Outside the scope of this research, there is also another important component of understanding how the remote setting can impact the hearing itself. This is understanding how being dispersed and communicating virtually (be it by video, phone, or email) instead of physically together alters the dynamics and outcome of that communication. When tribunal members participate only remotely, how does being dispersed affect their relationships, group dynamics, and deliberations? Does participating remotely impact the tribunal's decision-making process or outcome? What about if two tribunal members are physically together and one is participating remotely? These are important questions that, based on the current broad range of literature addressing the subject, does not yet have a clear answer but, as remote arbitration proceedings become more and more common and will, in some form, remain after the pandemic, the research is starting to catch up and deserves attention by the arbitration community.[91]

91. *See* Jean R. STERNLIGHT and Jennifer K. ROBBENNOLT, "High-Tech Dispute Resolution: Lessons from Psychology for a Post-Covid-19 Era", Clifford Symposium on Tort Law and Social Policy, DePaul University College of Law (3 June 2021) (a well-written, comprehensive review of several areas of literature relevant to remote arbitrations, including how being dispersed might affect a tribunal's decision-making process).

Remote Hearings and Diversity: Some Preliminary Thoughts

Yasmine Lahlou[*]

"What's diversity gotta do with it?"[1]

"Everything that we think is going to be an equalizer turns out not to be".[2]

I. Introduction

What does diversity have to do with remote hearings? And how is any accidental confluence between the two relevant to the development of international arbitration?

Because technology and necessity have shown that remote evidentiary hearings in international arbitration are not only feasible but consistent with due process in the right circumstances, remote hearings have proved an irreversible game-changer in the conduct of international arbitration. At the same time, given the ongoing efforts and commitments from all actors towards diversity in international arbitration, it seems necessary to assess what impact the increased reliance on remote hearings could have on diversity in the practice of international arbitration.

This analysis needs rely on more than anecdotal evidence or speculation, to provide responses that can in fact inform our policy choices. We are otherwise left with first impressions and easy shortcuts.

Though there is now tangible analysis on the impact of remote or hybrid work on diversity and inclusion, and a lot has been said on the topic of the confluence between remote hearings and diversity, the research remains, to my knowledge, scarce and inconclusive on the specific topic of this essay. For example, the rigorous and systematic 2021 White & Case International Arbitration Survey, entitled "Adapting Arbitration to a Changing World", compellingly reflects the international arbitration users' aspiration that "[t]he current global mood, coupled with the changes that we have adopted during the pandemic to how we work and conduct arbitrations, are the

* Partner, Chaffetz Lindsey LLP. I express my gratitude to James Hosking and Professor Giacomo Rojas Elgueta, whose creative ideas and encouragement made this thought piece a thoughtful piece.

1. When Tina Turner will care about international arbitration.
2. Deborah Tannen, professor of linguistics at Georgetown University, quoted in Alisha HARIDASANI GUPTA, "It's Not Just You: In Online Meetings, Many Women Can't Get a Word", New York Times (14 April 2020) at <https://www.nytimes.com/2020/04/14/us/zoom-meetings-gender.html> (last accessed 1 April 2022).

perfect springboard for us to build a more inclusive and equal arbitration community".[3] As such, the respondents offered suggestions on best practices of remote working but little hard data is offered, nor could it have been at that time, and nothing is said on remote hearings. The reason for the absence of reliable data and research may go back to the opening question in the introduction, which in Tina Turner's slightly distorted words, is: "What's diversity got to do with it?".

Therefore, the reader is left unfortunately with this Author's attempt to capture meaningful observations and test her own more or less thoughtful musings on the topic. Though it draws on existing scholarship, this article is intended to provide a basis for further analysis and discussion once the impact of remote working and remote hearings has a longer track record.

Before we start, a few words of clarification: remote hearings are not new in international arbitration. Much of the procedural business of an international arbitration has routinely been dealt with virtually, either by phone or through other remote or virtual platforms. It has also been fairly common for a witness or an expert to give evidence remotely. What is (or was) less common is for all participants, including the tribunal, to work remotely and appear virtually during the course of an entire evidentiary, and not only procedural, hearing.

In this essay, we first examine what diversity means and why it matters in international arbitration (section II), before tackling our task, starting from a review of the significance of remote working on diversity among international arbitration practitioners, in general (section III), and then zooming in on what remote arbitration hearings, in particular, have done or can do to diversity, with respect to access to technology (section IV.A), geographic and national diversity (section IV.B), gender diversity (section IV.C) before then examining the diverse sensitivity to non-verbal cues in a remote setting (section IV.D).

II. The Diversity Imperative: What It Means and Why It Matters in International Arbitration

A. Diversity in International Arbitration

Diversity is a fact, namely the range of human differences. Though the spectrum is as broad as humanity itself, contemporary legal, political and societal discussions focus on race, ethnicity, gender, sexual orientation, age, social class, physical ability and

3. Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration to a Changing World", pp. 15-19 (2021) available at <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> (last accessed 1 April 2022) (the "White & Case 2021 Survey").

attributes, religious and ethical values system, national origin, and political beliefs. A diversity-focused body from the University of California at Berkeley explains:

> "For the Greater Good Science Center, 'diversity' refers to both an obvious fact of human life – namely, that there are many different kinds of people – and the idea that this diversity drives cultural, economic, and social vitality and innovation […].
>
> In North America, the word 'diversity' is strongly associated with racial diversity. However, that is just one dimension of the human reality. We also differ in gender, language, manners and culture, social roles, sexual orientation, education, skills, income, and countless other domains. In recent years, some advocates have even argued for recognition of 'neurodiversity', which refers to the range of differences in brain function".[4]

Diversity is also an aspiration, to neutralize the impact of those differences on an individual's rights, freedom and opportunities, to effectively enforce Art. 1 of the Universal Declaration of Human Rights, that "[a]ll human beings are born free and equal in dignity and rights".

International arbitration, with its cross-border disputes and increasingly global reach, should be a substantively and structurally diverse field. Though it is in some aspects a more diverse area of legal practice than others, diversity within the arbitration community is imperfect. This affects all involved in international arbitration, especially counsel, and some research focused on the appointment of arbitrators shows that gender, nationality, and age diversity is still lacking.[5] Many acknowledge however significant improvements on the gender diversity front:

> "More than half of respondents agree that progress has been made in terms of gender diversity on arbitral tribunals over the past three years. However, less than a third of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity".[6]

4. The Greater Good Science Center, "What Is Diversity?" at <https://greatergood.berkeley.edu/topic/diversity/definition> (last accessed 1 April 2022).
5. *See* for an overview of the available literature and a statistical analysis on the issue, SCC, "Diversity in Arbitrator Appointments – In SCC Cases 2015-2019" (March 2021) available at <https://sccinstitute.com/media/1792483/rapport_diversity-7.pdf> (last accessed 1 April 2022), a report published by the Arbitration Institute of the Stockholm Chamber of Commerce.
6. Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration", fn. 3 above, p. 15.

One critically important, and recent, resource on the topic is the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (the "Gender Diversity Report"), which was released on 28 July 2020 and published by the International Council for Commercial Arbitration ("ICCA").[7] While focused on gender diversity, that report is undoubtedly relevant to analyzing and tackling all forms of non-diversity in international arbitration, including the failure of law firms, large and small, to retain and promote minorities, and the relative disparity in the appointment of minorities as arbitrators.

According to the Task Force, the gender diversity imperative in international law primarily stems from Goal 5 of the U.N. Sustainable Development Goals ("SDGs") to "achieve gender equality and empower all women and girls", recognizing that sustainable development requires the full and equal participation and leadership of women in all areas, as well as Art. 8 of the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, in which the signatory States undertook to "take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level".[8]

As such, arbitration should be a tool to meet the goals of global economic sustainable development, and must as such address discrimination:

> "[Arbitration's] practice should reflect the norms and standards adhered to by its stakeholders and reflected in international law more generally. This means that if gender discrimination exists in international arbitration, including in the

7. The Task Force was chaired by Carolyn Lamm, partner at White & Case and member of ICCA's Diversity and Inclusiveness Committee, and consisted of representatives from most leading institutions and organizations, including the American Bar Association ("ABA"), ArbitralWomen, the Equal Representation in Arbitration Pledge ("ERA Pledge"), the German Arbitration Institute ("DIS"), the Hong Kong International Arbitration Centre ("HKIAC"), the International Bar Association ("IBA"), ICCA of course, the International Centre for Investor State Dispute ("ICSID"), the International Centre for Dispute Resolution of the American Arbitration Association ("ICDR"), the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the Stockholm Chamber of Commerce ("SCC"), and the Vienna International Arbitration Centre ("VIAC").
8. ICCA, "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings", p. 9 f. (2020) at <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf> (last accessed 1 April 2022) (the "Gender Diversity Report"). The report also cites the so-called "gender chapters" and references to the UN SDGs that have appeared in more recently negotiated trade agreements. Public international law is naturally relevant given its ranking in the hierarchy of norms in domestic regimes and as a governing law in investor-state arbitration.

> context of arbitral appointments, there is an imperative for the arbitration community to address it".[9]

Gender diversity may also enhance the legitimacy of investor-state arbitration.[10] Drawing on examples from international courts and tribunals' rules of procedure that contain gender representation requirements,[11] some have suggested that the public interest nature of investor-state arbitration requires diversity of the decision-makers.[12] To some, diversity may enhance the perception of a tribunal's impartiality:

> "Respondents are divided as to whether there is any connection between diversity on a tribunal and their perception of the arbitrators' independence and impartiality. Just over half of the respondents (56%) stated that diversity across an arbitral tribunal has a positive effect on their perception of the arbitrators' independence and impartiality, but more than one third (37%) took a neutral view. Others consider the enquiry redundant, on the basis that the call for more diversity does not require further justification".[13]

9. ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, p. 11.
10. ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, p. 12 f. The Task Force quotes Professor Nienke Grossman of the Baltimore Law School, for whom "any area of international law concerns both men and women equally, regardless of its subject matter jurisdiction. […] It affects both men and women equally, and both groups should be represented". *Ibid.*, p. 13.
11. *See*, *e.g.*, Regulation 15 of the International Criminal Court's Regulations of the Court on Replacements ("1. The Presidency shall be responsible for the replacement of a judge pursuant to rule 38 and in accordance with article 39 and shall also take into account, to the extent possible, gender and equitable geographical representation").
12. Some advance that "diversity can improve the quality of group reasoning and decision-making because '[w]orking with people who are different from you may challenge your brain to overcome its stale ways of thinking and sharpen its performance'". ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, p. 13, quoting David ROCK and Heidi GRANT, "Why Diverse Teams are Smarter", Harv. Bus. Rev. (4 November 2016) at <https://hbr.org/2016/11/why-diverse-teams-are-smarter> (last accessed 1 April 2022). *See also* Richard CHEN, "The Substantive Value of Diversity in Investment Treaty Arbitration", 61 Va. J. Int'l Law (2021) p. 431; Jonathan BONNITCHA, Lauge N. SKOVGAARD POULSEN and Michael WAIBEL, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017); Michael WAIBEL and Yanhui WU, "Are Arbitrators Political? Evidence from International Investment Arbitration" (January 2017) available at <http://www.yanhuiwu.com/documents/arbitrator.pdf> (last accessed 1 April 2022).
13. Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration", fn. 3 above, p. 15.

The Gender Diversity Report is focused on diversity in arbitral tribunals but the unfulfilled objectives of diversity affect the broader community of all users and actors of international arbitration, which in part and ultimately manifests itself in the profile of available arbitrators.

Research has shown that diversity improves decision-making, problem solving, creativity, innovation and productivity as well as an organization's credibility. On a more prosaic level, greater diversity even translates to enhanced financial returns and greater ability to compete in the global marketplace.[14]

B. An Overview of the Causes of, and Proposed Solutions to, Lack of Diversity in International Arbitration

According to the 2021 Report on Diversity by the National Association of Law Placement ("NALP"), a U.S. organization, the gains in the representation of women, people of color and LGBT gave cause to celebrate, especially at the summer associate level, but "[c]losing the outcome gaps in the pipeline from summer associate to law firm partner remains the biggest talent challenge facing the profession".[15] That gap in representation in U.S. law firms is reflected in the NALP's numbers reported by their survey, as follows:

14. Erik LARSON, "New Research: Diversity + Inclusion = Better Decision Making at Work", Forbes (21 September 2017) at <https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/?sh=29005e9d4cbf> (last accessed 1 April 2022); Jeff DESJARDINS, "How Gender Diversity Enhances the Bottom Line", Visual Capitalist (23 January 2018) at <http://www.visualcapitalist.com/gender-diversity-bottom-line> (last accessed 1 April 2022); Scott E. PAGE, *The Diversity Bonus: How Great Teams Pay Off in the Knowledge Economy* (Princeton University Press 2017); Vivian HUNT, Dennis LAYTON and Sara PRINCE, "Why Diversity Matters", McKinsey & Company (January 2015) <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/why-diversity-matters> (last accessed 1 April 2022); Marcus NOLAND and Tyler MORAN, "Study: Firms with More Women in the C-Suite Are More Profitable", Harv. Bus. Rev. (8 February 2016) at <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable> (last accessed 1 April 2022); Kali HAYS, "GCs Spend More with Diverse Legal Teams, Study Finds", Law360 (12 May 2016) at <http://www.Law360.com/corporate/articles/79544> (last accessed 1 April 2022); IBA, "IBA Diversity and Inclusion Policy", available at <https://www.ibanet.org/Diversity-and-Inclusion-Council> (last accessed 1 April 2022).
15. NALP, 2021 Report on Diversity in U.S. Law Firms, p. 2 (January 2022) at <https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf> (last accessed 1 April 2022). This essay is not intentionally U.S.-centric but most of the available data is focused on that market, given its size and the reality that this is where many conversations have started.

- Women: (i) 55.06 % of summer associates; (ii) 48.21 % of associates; (iii) 36.87 % of all partners; and (iv) 22% of equity partners.
- People of color: (i) 41.34 % of summer associates; (ii) 27.60 % of associates; (iii) 10.75 % of all partners; and (iv) 9% of equity partners.
- Women of color: (i) 25.14 % of summer associates; (ii) 15.94 % of associates; and (iii) 4.08 % of all partners.

Looking at the leaders in the international arbitration field, these so-called "outcome gaps in the pipeline" are not limited to the United States. And diversity requires improvement beyond law firms.[16]

Beyond recruiting, the law firms' biggest challenge is to retain, train, develop and promote their diverse pool of new lawyers so that "5 years from now the associate ranks as a whole reflect similar diversity and representation, and 10 or 15 years from now we can celebrate a partnership class that is similarly diverse".[17] As the American Bar Association noted:

> "All of this is to say that the legal profession has hit the point where it should be recognizing that diversity at the recruitment stage is necessary but not sufficient to create long-lasting diversity in the profession. Further, the legal profession needs to look beyond diversity toward inclusion to fully address the continuing lack of diversity in the profession, particularly beyond the first few years of one's legal career. Our study and past studies have highlighted that while representation matters to women of color, that is seeing others like them, having access to mentors or role models who look like them, what they want is not just a handful of faces that look like theirs but workplace and professional cultures that value and incorporate them".[18]

One critical shift for law firms, and organizations in general, is to ensure that their efforts to address diversity acknowledge the role of implicit biases and incorporate specific solutions to such biases. Implicit biases can be broadly defined as the process by which the brain uses mental associations that are so well established as to operate

16. According to the preliminary results of AlixPartners' International Arbitration Expert Witness Gender Survey published in March 2021, 53% of respondents had seen zero female quantum experts in the previous three years and 20% had seen one woman. Having finished a twelve-day hearing with zero women among seventeen expert witnesses, the Author is both disappointed and not surprised.
17. NALP, 2021 Report on Diversity in U.S. Law Firms, fn. 15 above, p. 2.
18. Destiny PEERY, Paulette BROWN and Eileen LETTS, "Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color", ABA Commission on Women in the Profession, p. 23 (2020) at <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf> (last accessed 1 April 2022).

without awareness, intention of control.[19] According to the ABA's Commission on Women in the Profession:

> "Most of the focus on recommendations for addressing the attrition of women, women of color, and diverse attorneys more broadly focuses on examining workplace practices for inequities, including asking who gets access to which resources and opportunities and on the basis of what criteria. In other words, interventions are increasingly focused, as they should be, on examining the structure of decision-making processes and the distribution of opportunities and resources and the outcomes they produce. […]
>
> The need to address these decision-making processes is highlighted by previous research that has shown that high levels of subjectivity in promotion standards, selection for assignments, compensation decisions, and performance appraisals are often colored by stereotypes and serve as institutional and structural barriers to the advancement of women of color and other underrepresented attorneys".[20]

One of the Commission's primary recommendations is thus to adopt best practices to reduce biases in decision-making and mentions "increased monitoring of work distributions, randomization of work assignments, equitable distributions of the prime assignments, and more standardized, less subjective decision-making processes".[21] Other recommendations include improving access to effective, engaged mentors and sponsors, to overcome the "barriers to advancement because of the importance of relationships in building business and the importance of being assessed positively and supported by superiors as one advances in their careers".[22]

On the diversity of arbitrators, in the United States, on 9 February 2018, the American Bar Association adopted Resolution 105, urging providers of dispute resolution services to offer more diverse arbitrators (or so-called "neutrals") as

19. *See* resources and definitions from Project Implicit, which has devised the Implicit Association Test ("IAT") to measure "the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)": Project Implicit, "About the IAT", at <https://implicit.harvard.edu/implicit/takeatest.html> (last accessed 1 April 2022).
20. D. PEERY, P. BROWN and E. LETTS, "Left Out and Left Behind", fn. 18 above, p. 20 f.
21. *Ibid.*, p. 21, citing to the ABA Commission on Women in the Profession and the Minority Corporate Counsel Association ("MCCA") Report, "You Can't Change What You Can't See: Interrupting Racial & Gender Biases in the Legal Profession" (2018) at <https://mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf> (last accessed 1 April 2022).
22. D. PEERY, P. BROWN and E. LETTS, "Left Out and Left Behind", fn. 18 above, p. 22.

candidates to parties and, acknowledging the central role of the parties in choosing an arbitrator, inviting the parties "to select and use diverse neutrals". The reporters for the ABA Resolution 105 and the members of ICCA's Task Force on Gender Diversity flagged unconscious bias as another obstacle, limiting the representation of underrepresented groups on tribunals. The Task Force noted, in the context of gender representation:

> "An example of unconscious bias is the 'tendency of individuals to appoint successors (and arbitrators) 'in their own image,'' also known as 'affinity bias,' or the tendency to 'gravitate toward people like ourselves in appearance, beliefs, and backgrounds' and/or 'to avoid or even dislike people who are different from us.' In circumstances where men are in the position of nominating or appointing arbitrators (which is likely to be the predominant position), affinity bias may influence the notion of the best candidate in favor of male candidates because of an implicit association between 'male' qualities with those of a successful arbitrator, such as 'gravitas,' 'assertiveness,' or the ability to influence other arbitrators who are most likely to also be male".[23]

Besides the parties' preferences and other factors influencing their choices, a key limiting factor to improving diversity on arbitral tribunals is the so-called "pipeline issues" and can be summarized as follows:

> "Broadly, these constitute limitations on the availability of sufficiently experienced female arbitrators today (what have been called 'leaks' in the pipeline of qualified arbitrators) and impediments to the appointment of already-experienced female arbitrators ('plugs' in that pipeline)".[24]

Law firms' inability to retain and develop diverse talent also naturally reverberates beyond gender, with fewer diverse senior and leading attorneys at the top. This, in turn, has a knock-on effect in limiting the pipeline of diverse arbitrators because experienced practicing arbitration attorneys are a key pool of arbitrator candidates. These arbitrator candidates are part of that pool because they have in fact developed the necessary experience but also because they are or were part of a law firm, whose name may, rightly or wrongly, give them the recognized "street cred".

Some solutions for the inclusion of underrepresented groups in the pool of candidates are: (i) to enable them to achieve the proper degree of training and experience through professional development; and (ii) "addressing factors that limit

23. ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, p. 52.
24. ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, pp. 43 ff.

professional development and reduce the rate of retention of women [and other underrepresented groups] in senior professional positions".[25]

The Report prepared in support of the ABA's Resolution 105 highlights that, besides the insufficient number of diverse arbitrators in the pool of available arbitrators, there remains a bias causing "diverse" arbitrators to be less frequently appointed than their "non-diverse colleagues".[26]

III. Remote Work and Diversity in International Arbitration

Before we examine the impact of remote hearings on diversity, we first look at the effects of practicing international arbitration remotely, or in a hybrid model, on diversity, as it is in that space that much of the discussion on diversity and inclusion has taken place. When examining the ways in which the professional lives of arbitrators, counsel and other actors have been transformed by the Covid-19 pandemic, questions abound as to whether remote work, or work from home, has had a different impact on women and minorities, what the exact nature of such impact is, and whether it has been on balance beneficial or not.

Thanks to the ubiquitous access to high-quality cloud and online videoconferencing technology, the international arbitration community barely skipped a beat when the pandemic began, as lawyers and arbitrators were able to immediately transition from working in their offices or hearing rooms into working from their homes. This was facilitated by technological tools offered by vendors, which allowed seamless experiences to mirror a physical hearing such as presenting witness testimony, using

25. *Ibid*. *See* push by artist Jay Z to expand the pool of diverse arbitrators available to decide on a pending dispute: Jonathan STEMPEL, "Jay-Z Wins Fight for African-American Arbitrators in Trademark Case", Reuters (30 January 2019) at <https://www.reuters.com/article/us-people-jayz-lawsuit-idUSKCN1PO32T> (last accessed 1 April 2022).

26. ABA Resolution 105, Summary and Actions Steps, p. 1, available at <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf> (last accessed 1 April 2022) ("Both issues arise from the network-based and confidential nature of the profession, which undermine potential efforts to address the roster issue and results in selection of neutrals in relative obscurity, enabling implicit bias to play a greater role in the selection process. The limited prospects for selection in turn discourage minority attorneys from applying for acceptance on institution rosters. The lack of transparency also minimizes public awareness of lack of diversity in the field, thus reducing the incentive of stakeholders such as clients, outside counsel, institutional service providers and established neutrals to take proactive steps").

documents and incorporating interpreters, all accessible and useable by even the least tech savvy and most resistant Luddites.[27]

The adaptability was extraordinary. Those in the middle of a hearing when the stay-at-home and other lockdown mandates were imposed adjusted overnight to preparing and delivering their cross-examinations or opening and closing arguments from their homes, more often than not with their kids in tow. Even in the most complex cases requiring extensive fact finding from numerous fact and expert witnesses, parties and counsel quickly adapted to the new reality and stuck as best as they could to the existing schedule. We all adjusted to huge meetings staring at dozens of faces on screen, and adapted to this perpetually awkward setup, at the mercy of the whims of technology, connectivity and domestic life.[28]

This development not only concerned client work. The entire profession moved online, bringing down geographic and physical barriers in many aspects of our practice. Remote conferences mushroomed, and so did remote workshops and trainings.

In international arbitration, where traveling for work and marketing is a central part of building one's career and developing one's business, this means that parents and caretakers who skip traveling for family reasons are no longer at a disadvantage of missing meetings or conferences abroad and can, in other words, continue building their careers and practicing without the persistent pressure to travel. But is this a sustainable alternative? It is far from clear that, in a post-Covid world, in which in-person interactions resume, in-person and remote interactions will continue to offer equivalent advantages.

A. Double Jeopardy or Liberation

Remote work during and after the strict lockdown imposed to contain the COVID-19 pandemic has proven both freeing and punishing.

With public schools closed, child-care support and other help confined to their homes and children at home all day, parents, especially mothers, and caregivers were overnight put on double-duty. The pressure was all the more acute that, for many, the workload became relentless, and the geographical and temporal dividers between work and everything else, which we previously took for granted, became blurrier than ever.

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27 "International Arbitration Experts Discuss the Impact of COVID-19 on Arbitration in 2020 and Beyond", Mealey's Int'l Arb. Rep. (May 2020). *See also* Peter CHAFFETZ, Andrew POPLINGER and Yasmine LAHLOU, "An Early Experience with Arbitration by Video", Chaffetz Lindsey LLP News (10 April 2020) at <https://www.chaffetzlindsey.com/news/an-early-experience-with-arbitration-by-video/> (last accessed 1 April 2022).

28 PwC's US Remote Work Survey, "It's Time to Reimagine Where and How Work Will Get Done" (12 January 2021) at <https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html#content-free-1-cbb3> (last accessed 1 April 2022).

As policy makers and vaccines allow schools to reopen and restored institutional childcare and other support, remote work can prove a game changer for parents of younger children and those in charge of elderly or sick relatives, who happen to be mostly women. They no longer face the tension between their need to be in the office for the longer part of the day and that of attending to relatives: rid of the commute, they can organize their workdays and other obligations with much more flexibility while remaining as efficient and available.

With high housing costs and deteriorating infrastructure in many large metropolitan centers, the access to remote work enables many to just work or be eligible for a broader range of positions, freed of a time-consuming and expensive commute. As a blogger aptly noted: "When geographical barriers are removed, location bias and relocation costs can be eliminated".[29] Remote work can also expand the options of people with physical disabilities, whose mobility limitations are alleviated by remote work.[30] The counter-narrative is that many minority employees and employees with disabilities do not have jobs that can be performed remotely.

Technological developments have not only allowed work from home, instead of the office, but they have also dramatically decreased the need for travel for client meetings and conferences. Clients and firms alike are not only relishing the costs savings but have come to the realization that a lot of business dealings need no longer be in person.

To many, remote work has improved work-life balance for women and caretakers. This may be so or, more likely, it has improved flexibility to juggle work and non-work responsibilities on a schedule not confined to regular business hours. The lack of flexible working arrangements is an important factor in the failure of law firms and more generally the legal profession to retain women:

> "[T]he shift to technology-enabled remote working should hopefully facilitate retention of women (often shouldered with a disproportionate share of family duties) and other minorities for whom physical attendance may be a challenge. These changes in how we work represent opportunities for firms to accelerate building inclusive and agile cultures where office 'face-time' is no longer required".[31]

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29. Samantha MCLAREN, "Why the Rise of Remote Work May Help Companies Become More Diverse — and More Inclusive", LinkedIn Talent Blog (3 February 2021) at <https://www.linkedin.com/business/talent/blog/talent-acquisition/why-remote-work-may-help-companies-become-more-diverse> (last accessed 1 April 2022).
30. Steven T. HUNT, "How Hybrid Remote Work Improves Diversity and Inclusion", Forbes (12 May 2021) at <https://www.forbes.com/sites/sap/2021/05/12/how-hybrid-remote-work-improves-diversity-and-inclusion/?sh=6246714f321f> (last accessed 1 April 2022).
31. Sara PARADISI, "Harnessing the 'New Normal' to Improve Diversity in International Arbitration", Bryan Cave Leighton Paisner LLP (14 July 2020) at <https://www.bclplaw.com/en-US/insights/harnessing-the-new-normal-to-improve-diversity-

This is all the more problematic for female practitioners in international arbitration, as one's availability for extensive and lengthy travel, whether for marketing, client meetings or hearings, is very much part and parcel of the international arbitration practitioner's life and progression. One may hope remote work mitigates the perception or reality that traveling is a necessary condition to practicing and progressing. That said, as people return to the office and a hybrid model settles in, the question returns whether and how much face-time in the office may, consciously or not, allow some to get more opportunities and support for advancement.[32] A related issue is how remote and hybrid work has affected employers' ability to maintain and nurture useful and dynamic training, development and mentoring relationships.

B. New Places, New Faces

As discussed, broader access to trainings and conferences is part of the solution to the pipeline issue. As noted in the White & Case 2021 Survey:

> "Many respondents feel that opportunities to increase the visibility of diverse candidates should be encouraged through initiatives such as 'education and promotion of arbitration in jurisdictions with less developed international arbitration networks' (38%), 'more mentorship programmes for less experienced arbitration practitioners' (36%) and 'speaking opportunities at conferences for less experienced and more diverse members of the arbitration community' (25%). Building visibility is particularly important in light of the perception that users prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience".[33]

Technology and the limitations imposed by the pandemic forced a simple and yet radical change when it pushed the conference circuits into the virtual sphere. Not only did the "regular" attendees no longer have to travel in order to attend, but many who simply could not have hoped to attend many conferences in person gained access to the best training and knowledge almost overnight. Indeed, the price tag of many conferences went to zero. The transition to a virtual world broke down the financial and geographical barriers to training and certifications, giving any practitioner at any

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in-international-arbitration.html> (last accessed 1 April 2022); *see also* ICCA, "Report of the Cross-Institutional Task Force", fn. 8 above, p. 47.

32. Alexandra SAMUEL and Tara ROBERTSON, "Don't Let Hybrid Work Set Back Your DEI Efforts", Harv. Bus. Rev. (13 October 2021) at <https://hbr.org/2021/10/dont-let-hybrid-work-set-back-your-dei-efforts> (last accessed 1 April 2022) (laying out suggestions to enable employers to "ensure [they]'re tracking the right metrics to help [them] align [their DEI goals and hybrid strategy").
33. Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration", fn. 3 above, p. 15.

location unprecedented access to in-demand training, provided they had a stable internet connection and a desire to engage. As two African practitioners have observed:[34]

> "As new methods of engagement and keeping continuity of activities crop up, arbitration webinars and courses have increased immensely […]. Through these incredible opportunities and many more, young arbitrators in Africa are getting opportunities to upskill".[35]

Although many are itching to resume traveling and long for in-person gatherings, remote conferences are here to stay:

> "These virtual alternatives, including use of ever more sophisticated means of video-conferencing, will remain suitable following the pandemic and should continue to be adopted in the longer term".[36]

Institutions, such as the SCC, have made clear that remote conferences have offered them extraordinary opportunities to specifically follow their mandate, by reaching out to a broader audience:

> "As the SCC's aim is to maintain an active and value-creating dialogue with our stakeholders in the business world and the legal communities around the globe we continuously will offer a series of online seminars".[37]

Some have however expressed a concern that such transition to remote practice and networking will create other sources of inequality:

> "The general consensus amongst respondents is that caution should be exercised when exploring whether adaptations in arbitral practice experienced during the

34. Ibrahim GODOFA and Mercy OKIRO, "The Dark Cloud of the Global Pandemic: Silver Linings for Young Arbitrators in Africa", Kluwer Arb. Blog (4 July 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/07/04/the-dark-cloud-of-the-global-pandemic-silver-linings-for-young-arbitrators-in-africa/> (last accessed 1 April 2022).
35. *Ibid.*
36. Corina LEFTER, "Are We Ready for the Brave New World of Virtual Arbitrations? Insights from the 32nd Annual ITA Workshop", Kluwer Arb. Blog (25 August 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/08/25/are-we-ready-for-the-brave-new-world-of-virtual-arbitrations-insights-from-the-32nd-annual-ita-workshop/> (last accessed 1 April 2022).
37. SCC, "Update – Our Activities During the Pandemic" (10 September 2020) at <https://sccinstitute.com/about-the-scc/news/2020/update-our-activities-during-the-pandemic/> (last accessed 1 April 2022).

> COVID-19 pandemic may have an impact on promotion of diversity objectives, as it can go both ways. Virtual events, meetings and hearings may facilitate participation by more diverse contributors, but this may be hindered by unequal access to technology and the challenges of building relationships remotely".[38]

While true, the better cannot be the enemy of the good. The reality is that many from countries with poor internet access are also unlikely to travel and attend in-person trainings and conferences away from home. Moreover, on a macroeconomic level, overcoming that technological challenge seems a much more realistic and accessible goal than overcoming the cost and visa obstacles of attending conferences abroad.

Moreover, besides the technological convenience, the broader availability of training through online platforms is bound to bring about the realization that someone's location is no longer a good reason for them to be deprived of key training and networking opportunities and to challenge the common wisdom that one should travel to so-called arbitration "hubs" to have access to such opportunities. This may in turn unleash the imagination of local and regional leaders to make trainings available and increasingly interactive in emerging jurisdictions, whether in-person or remotely. Indeed, the increased use of remote technology does not exclude in-person meetings and trainings where that is the only, or more appropriate, alternative.

Remote conferences have also allowed a more diverse pool of practitioners speaking opportunities that thereby raise their profile internationally, which will contribute to widening the pool of arbitrator candidates, as institutions and (outside and in-house) counsel inevitably see potential candidates they simply never saw before.[39]

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38. Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration", fn. 3 above, p. 15. *See also* C. LEFTER, "Are We Ready for the Brave New World of Virtual Arbitrations?", fn. 36 above ("However, transitioning proceedings to a fully virtual setting is not a panacea. This transition also runs the risk, as further explored below, of leaving behind or preventing access to a large pool of skilled practitioners who do not have access to the technological infrastructure required to make these virtual proceedings a success").
39. *See, e.g.*, the program of the 2021 London International Disputes Week, available at <https://2021.lidw.co.uk/programme/> (last accessed 1 April 2022). *See also* Maguelonne DE BRUGIERE and Cherine FOTY, "Sustainability and Diversity in the Newly Virtual World of International Arbitration", Kluwer Arb. Blog (9 December 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/12/09/sustainability-and-diversity-in-the-newly-virtual-world-of-international-arbitration/> (last accessed 1 April 2022) ("Virtual conferences, webinars, and networking events have also opened the door to new participants and speakers who might not otherwise have been able to make the time and travel commitment required, for example parents with young children, or individuals for whom the costs associated may have been prohibitive. Indeed, many conference organizers have acted upon the virtual availability of a wider pool of candidates to field more diverse panels and seek speakers from farther jurisdictions").

Some practitioners' enthusiasm for the virtual setting as the vector for change is evident:

> "This important context must be taken into account when recognizing that the virtual setting may also positively result in increased visibility of underrepresented women and minorities. Indeed, the breakdown in geographical barriers, the increased ease of international virtual networking, and the new norm of virtual communications can contribute to the diversity of international arbitration. It may result in increased appointments of arbitrators from more diverse jurisdictions and of younger ages, and more diverse sized clients may be empowered to bring claims of varying sizes as costs become more manageable. Virtual hearings may allow for greater diversity of languages as new digital features such as simultaneous translation become available and further developed".[40]

To some, however, remote conferences may in fact have impeded the diversification of arbitrators because the "great and good" arbitrators do not need to travel to be identified and picked, whereas any new faces require extensive exposure to be considered as potential candidates, which allows the more familiar names to get appointed on proportionately more tribunals.

IV. Remote Hearings and Diversity in International Arbitration

In this last section, we focus on the effects remote hearings have had and can have on diversity and try to contrast our aspirations with empirical observations.

A. The Peril of Unequal Access to Technology

Unequal access to technology takes a different dimension in the context of remote hearings, and may raise due process issues. There is no easy or unique answer to that issue, as each case will raise unique challenges and offer unique solutions. As the ICCA survey on a Right to a Physical Hearing in International Arbitration has shown, arbitral tribunals generally enjoy broad discretion to define the procedure of an arbitration, including by deciding whether to hold a remote hearing, so long as the parties are afforded an opportunity to present their case. Whether it only means all the parties must have the same access to the internet or must also enjoy access to the same technological tools, number of terminals, screens etc. is unclear. That said, in some cases, this may mean that the parties must have a physical hearing.

40. M. DE BRUGIERE and C. FOTY, "Sustainability and Diversity", fn. 39 above.

B. Dreams or Reality: Remote Hearings as the Catalyst of Greater National and Geographic Diversity

On 1 September 2021, Global Arbitration Review, or GAR, organized one of its so-called "GAR Connect events" focused on diversity, "Breaking In: How International Arbitration Becomes More Diverse", in which a representative from the Ministry of Justice of Cameroon deplored the lack of regional and national diversity in international arbitration, notably the failure to appoint African arbitrators in cases that do not necessarily involve African parties.[41]

Over the past months, some have expressed views or hopes that remote hearings could in fact further the goal of improving such geographic diversity.

Remote hearings have been lauded for the beneficial impacts they have had or may have on diversity. First, some hope or expect that remote hearings will enable young arbitrators to be appointed in cases where they could not have been appointed before due to the difficulty and cost of travel.[42] In other words, to some, absent remote evidentiary hearings as a viable option, the parties or the institutions would only consider candidates located at or near where the evidentiary hearing is most likely to be held. This may well be true, but this is unlikely the main reason for selecting an arbitrator. Instead, beside their skills, arbitrators are generally chosen, like any lawyer, because they are tethered to jurisdiction(s), where they know the culture, the law, the language as well as possibly the arbitration community, or because of their familiarity with the subject matter or industry of the dispute. Thus, while it is true that institutions may now be able to more easily look beyond the seat or the likely hearing place for potential arbitrator candidates (as an arbitrator could conduct the hearing remotely without the need to travel), that candidate would also have to tick other boxes. That said, as remote hearings rely to a larger extent on technology, the most adept arbitrators, including younger ones, start with a clear comparative advantage.[43] The

41. Nusaybah MUTI, Soma HEGDEKATTE and Atie BABAIE, "Breaking In: How International Arbitration Becomes More Diverse – A Report from the GAR Connect Event", Kluwer Arb. Blog (16 October 2021) at <http://arbitrationblog.kluwerarbitration.com/2021/10/16/breaking-in-how-international-arbitration-becomes-more-diverse-a-report-from-the-gar-connect-event/> (last accessed 1 April 2022).
42. C. LEFTER, "Are We Ready for the Brave New World of Virtual Arbitrations?", fn. 36 above ("It may result in increased appointments of arbitrators from more diverse jurisdictions and of younger ages, and more diverse sized clients may be empowered to bring claims of varying sizes as costs become more manageable. Virtual hearings may allow for greater diversity of languages as new digital features such as simultaneous translation become available and further developed").
43. *See* generally on the use of technology in international arbitration, ICC Arbitration and ADR Commission Report, "Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings" (February 2022) at <https://iccwbo.org/publication/

younger "hustling" practitioners will also greatly appreciate that remote hearings are less disruptive, and require that they spend less time out of the office, allowing them to maximize their ability to not lose ground on their counsel work.

In reality, this discussion begs the question of what it means to have more geographically, culturally or nationally diverse tribunals. The true concern is beyond having arbitrators from an African or Middle Eastern country to decide disputes that have no connections with their jurisdiction or region. The disconnect is that for some users, they are not represented on tribunals.[44] In other words, some deplore that they cannot have their cases decided by arbitrators from their own region, but instead arbitrators from Europe or the United States. This disconnect however, points to a larger diversity issue, having to do with the national or geographic origin of the users of arbitration, as well as the development of local arbitration laws and bars. According to the ICC's 2020 Dispute Resolution Statistics, parties from North and Sub-Saharan Africa accounted only for 6.8% of the parties involved in cases filed that year.[45] Were this to expand, this would in turn greatly increase the need for arbitrators from more geographically and nationally diverse backgrounds. Moreover, leading arbitrators do not appear in a vacuum but are the product of the dynamism of their jurisdiction of origin. The success stories of jurisdictions such as Brazil or Egypt in developing a home-grown arbitration community, are perfect examples of the multi-faceted solution to the emergence of a viable new national or regional arbitration hub and community.[46]

That said, the role of regional arbitration centers, and their broader reach afforded by technology, in appointing a larger number of regional arbitrators should not be overlooked. While the emergence of new, regional arbitration centers predated the pandemic, remote connectivity and technology have supported their continued emergence and greater reach. This is reflected in the growth of so-called international arbitration weeks beyond the traditional arbitration centers, which were recently held in Dubai or Cairo and will soon be organized in Rome, and a larger number of regional conferences discussed above. This is made possible because the ability of regional centers to attract global speakers and participants to virtual conferences is now unlimited. As local institutions become the preferred choice of the regional users, they clearly have a role to play in supporting the rise of regional arbitrators.

Second, and relatedly, hoping to broaden the scope of arbitration users, various institutions have looked for formulas to help the parties control the costs of the arbitration, by proposing simplified and expedited procedures for smaller cases, and

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icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/> (last accessed 1 April 2022).

44. N. MUTI, S. HEGDEKATTE and A. BABAIE, "Breaking In", fn. 41 above.
45. ICC Dispute Resolution Statistics: 2020, p. 10 (August 2021) at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (last accessed 1 April 2022).
46. N. MUTI, S. HEGDEKATTE and A. BABAIE, "Breaking In", fn. 41 above.

limiting the fees of the arbitrators or the institution.[47] Those efforts have found in remote hearings a natural tool to further those goals of broadening the "socio-economic" and geographic origin of arbitration users. To the extent they need a hearing, the parties can largely avoid the costs of travel of the arbitrator(s), the fact and expert witnesses, counsel or the client, and that of the hearing and breakout rooms, etc. if they opt for a remote hearing. In fact, many institutions have provided logistical and technical support for remote hearings at a minimal cost, although remote hearing vendors' prices have noticeably been on the rise. While those do not constitute the lion's share of the costs in an arbitration, compared with the defense costs, hearing costs are not insignificant, especially for users with a devalued currency – and can be the decisive factor between having a hearing or not. Broadening the scope of arbitration users (also through a broad recourse to remote proceedings) will certainly have a positive impact on arbitrators' national and geographic diversity.

C. Sex Wars or Guerrilla Tactics: Remote Hearings as Gender Equalizers?

Expanding on the potential benefits of remote work, some have pointed to anecdotal and systematic ways in which remote hearings can enhance gender diversity, by bolstering work-life balance:

> "The shift to virtual hearings and the resulting elimination of unrelenting travel schedules should help to create a more flexible environment for women (and men) with young families, thus helping to improve the representation of women and younger practitioners in arbitration".[48]

Of course, remote hearings in theory alleviate the need to travel away from home for many days or weeks at a time in order to prepare for and attend a hearing, which in turn means that counsel can be home every night at a minimum. In reality, however, hearings are disruptive and all-consuming for reasons independent from travel: the evidentiary hearing is generally the case's most dramatic point, giving counsel an occasion to build a rapport with the tribunal, and score critical points through skilled cross-examination. Hearings as such also have a theatrical dimension, with a unity of time and place, which leaves no room for any reality other than the hearing. Whether the remote hearing is done at home or not, counsel hardly sleep for its duration. For the same reasons, for the duration of the hearing, counsel does not have control over their schedule, negating any possibility of a work life balance during that time. As such, the key features of remote work that have alleviated the specific pressures on women are in most likelihood absent during remote hearings.

47. For example, the rules of the ICC, ICDR or SCC contain rules for expedited procedures, for smaller size disputes.
48. S. PARADISI, "Harnessing the 'new normal'", fn. 31 above.

Gender differences or inequities can arise from interactions between men and women, notably during meetings, and research suggests that many such inequities in fact reflect gender differences in conversation styles and conventions.[49] Those differences include speaking time, the length of pauses between speakers, the frequency of questions and the amount of overlapping talk.[50] Those differences have unsurprisingly shifted from the "real life" workplace into new shapes online.[51]

That said, such dynamic may be contained in the context of remote hearings specifically. For example, while research has shown that U.S. Supreme Court female justices have historically disproportionately been interrupted by their male colleagues and advocates during oral argument,[52] rules have been implemented for the Supreme Court's remote telephonic hearings to alleviate those disruptions. As the Supreme Court began conducting remote hearings at the start of the pandemic, which it does telephonically, Chief Justice Roberts imposed a new rule that allows justices to ask questions individually, in order of seniority, after an attorney's time is up – instead of the prior free-for-all questioning. According to Justice Sotomayor, this change has had

49. A. HARIDASANI GUPTA, "It's Not Just You", fn. 2 above ("Countless studies have shown that workplace meetings are riddled with inequities. One study by the Yale psychologist Victoria Brescoll found that when male executives spoke more often, they were perceived to be more competent, but when female executives spoke more often, they were given lower competence ratings. The annual McKinsey and LeanIn.org Women in the Workplace report, which in 2019 surveyed 329 companies and more than 68,000 employees, found that half of the surveyed women had experienced being interrupted or spoken over and 38 percent had others take credit for their ideas […]. And according to a review of more than 7,000 employee feedback surveys on 1,100 female executives, when women expressed passion for an opinion or an idea in meetings, their male counterparts perceived them as being too emotional").
50. *Ibid.*
51. M. DE BRUGIERE and C. FOTY, "Sustainability and Diversity", fn. 39 above ("Some of the difficulties traditionally experienced by women in male-dominated workspaces may worsen in the digital environment. Some studies suggest that women may have the length of their speaking time cut short, problems with being interrupted (more common in the virtual environment with lag time), difficulty getting a word in, or having their statements ignored or co-opted. Others suggest that networking in the virtual setting is more difficult for women, claiming that women may be more reluctant to make virtual networking requests than their male counterparts, as they do not feel comfortable asking someone for something without having forged a closer connection with them. In its Gender Insights Report, LinkedIn reported that men are 26% more likely to ask for a referral on LinkedIn to a job they are interested in and recruiters are 13% less likely to click on a woman's profile when she shows up in a search and 3% less likely to send her a message after viewing her profile").
52. Tonja JACOBI and Dylan SCHWEERS, "Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments", 103 Va. L. Rev. (2017) p. 1379.

an "enormous impact" and made her male colleagues self-conscious and apologetic when they now interrupt their colleagues.[53]

While such observations or initiatives are important, the issue is likely less tangible in international arbitration evidentiary hearings, which tend to be more structured and organized than court trials, with more surgical cross-examinations. Moreover, for the same reasons Supreme Court justices may be self-conscious when interrupting their colleagues on the phone, very unscientific observations indicate that interruptions would be even less frequent in the context of remote hearings, where interruptions would likely seem more obnoxious, as the awkwardness caused by the delay and discrepancy between image and speech of multiple speakers operates as an echo chamber, making interruptions much more intolerable.

For some, the issue is real and a judicious use of the mute button could contain the most disruptive conduct, or some men's propensity to speak over others. That said, to the extent that counsel's misconduct is so egregious that a tribunal is required to go so far as muting counsel, which is arguably an extreme move that could raise due process issues, the problematic misconduct is likely much larger than counsel's verbal interruptions. Moreover, the concern here is that such behavior raises counsel misconduct, not diversity, issues, which should have their own solutions.

D. Poker Face: Remote Hearings, Diversity and Non-Verbal Cues

Finally, focusing on the psychology of the arbitrators' decision-making and the influence of various cognitive biases,[54] some have argued that gender diversity on arbitral tribunals can have a positive impact on the perception of arbitration and mitigate cognitive biases.[55] In the context of the limited focus of this essay, non-verbal cues may take an outsize importance in remote hearings. Indeed, it could be that there is a gender-specific response to such cues. However, some have shown that the

53. Maya YANG, "Let Her Finish: Interruptions of Female Justices Led to New Supreme Court Rules", The Guardian (15 October 2021) at <https://www.theguardian.com/law/2021/oct/15/us-supreme-court-female-justices-interruptions-sonia-sotomayor> (last accessed 1 April 2022). Some researchers contend that Chief Justice Roberts is using this new rule to favor his ideological allies on the Supreme Court. *See* Tonja JACOBI, Timothy R. JOHNSON, Eve RINGSMUTH and Matthew SAG, "Oral Argument in the Time of Covid: The Chief Plays Calvinball", 30 S. Cal. Interdisc. L.J. (2021) p. 399.
54. *See* Leslie ELLIS and Giacomo ROJAS ELGUETA, "The Psychology of Remote Hearings" in this Volume, pp. 167 ff.
55. Ula CARTWRIGHT-FINCH, "Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role in Ensuring Diversity?" (August 2019) available at <https://9e04526d-bb9a-4e71-ac6a-486a9d684115.filesusr.com/ugd/92060d_c0f194d8b22c4fefa325b4ede64770e1.pdf> (last accessed 1 April 2022).

complexity of the information generally processed in an arbitration evidentiary hearing will generally make it harder to process non-verbal cues.[56]

An astute observer on the issue has explained packing an entire hearing into a screen may disrupt our perceptions:

> "I start off talking about the environment itself, the virtual hearing environment, the cognitive load factor, the fact that we are kind of squeezing the whole universe of a hearing room onto one screen and how that is quite difficult for our cognitive processing abilities. We have limited capacity to process information, and looking at a screen that is very busy, that has lots of visual clutter, makes it then harder for us to process not just what is going on the screen but what we are actually hearing, so impacts of the environment on the decision maker's ability to process information, for example".[57]

Because of the setting of a virtual hearing, in which only the participants' face or upper body are visible, facial, non-verbal clues, can take special importance and may have more impact than in person. In turn, focusing on facial expressiveness, research shows that adult women's faces were significantly more expressive than men's, and women

56. *See* L. ELLIS and G. ROJAS ELGUETA, "The Psychology of Remote Hearings", fn. 54 above, pp. 173 ff. and 185 ff., citing Géraldine FAUVILLE et al., "Nonverbal Mechanisms Predict Zoom Fatigue and Explain Why Women Experience Higher Levels than Men", p. 2 f. (5 April 2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820035> (last accessed 1 April 2022); Jena LEE, "A Neuropsychological Exploration of Zoom Fatigue", Psychiatric Times (17 November 2020) at <https://www.psychiatrictimes.com/view/psychological-exploration-zoom-fatigue> (last accessed 1 April 2022); Crawford HOLLINGWORTH, Leoné MESCAL and Liz BARKER, "The Rise of the Zoombie [Teambie] – A Behavioural Science Guide to Understanding and Combating the Potential Issues that Can Emerge in Virtual Meetings" (May 2021) available at <https://www.thebearchitects.com/assets/uploads/ip/rise-of-the-zoombie-teambie-e-book-and-toolkit-may-2021.pdf> (last accessed 1 April 2022) ("At a meta level, research suggests that in these more complex meetings on the video platform there is a greater demand for conscious processing. It becomes harder to see and process critical non-verbal cues which would have been blatantly evident in a face-to-face meeting. This can create increased cognitive load as people search for cues, encounter the inevitable technical issues and embrace the unnatural feel of the video platform which often leads to sub-optimal outcomes and negative behaviours").
57. Anna MASSER and Ula CARTWRIGHT-FINCH, "Virtual Hearings – The Psychological Aspects of Virtual Hearings", Allen & Overy Virtual Hearings Interview, p. 6 (2021) at <https://www.allenovery.com/germany/-/media/allenovery/2_documents/news_and_insights/campaigns/virtual_hearings/episode_4_transcript.pdf> (last accessed 1 April 2022).

engage in more expressive movements, especially hand, or hand and arm gestures, than men.[58]

Women allegedly noticed or were more influenced by nonverbal cues than men were. Focusing on decoding nonverbal cues, research has showed that:

> "Females' advantage was very evident and was relatively constant across a variety of cultures and age groups of perceivers, as well as across the gender of the people whose cues were judged. The greater accuracy for females tended to be more pronounced for visible than for vocal cues".[59]

As an observation that can apply to both arbitrator and counsel, such a marked hyper or higher sensitivity to nonverbal cues may offer a strategic advantage not only to women but more broadly to minorities in adapting and taking the most advantage of the remote hearing setting. Indeed, some research shows that differences between men and women have less to do with gender, than with "gender differences in power, status, and dominance".[60] One author posited that: "Women's behaviors, therefore, are tied more to lower social status than to being female per se".[61]

Such extra sensitivity and adaptability may translate into a strategic advantage for advocates, who can better pick up and express the appropriate cues in the new setting of remote hearings.

V. Too Soon to Tell

Even if we were to accept that remote hearings can have a positive impact on diversity in specific circumstances, it is too early to tell what impact remote hearings have on diversity in international arbitration, and there are just too many balls in the air to know what the future will look like… This is all the more so because diversity is much broader than remote hearings and remote hearings affect more than just diversity.

58. Judith A. HALL, "Women's and Men's Nonverbal Communication: Similarities, Differences, Stereotypes and Origins" in the Valerie MANUSOV and Miles L. PATTERSON, eds., *The SAGE Handbook of Nonverbal Communication* (SAGE Publications 2006) p. 4 f.
59. *Ibid.*, p. 6 f.
60. *Ibid.*, p. 8 f.
61. *Ibid.*, p. 9. *See also ibid.*, p. 10 ("[T]he weight of the evidence points away from a power-based explanation and toward a sociocultural theory based on social norms, expectations, roles, and associated affective experiences").

PART THREE

PRACTICAL AND EMPIRICAL CONSIDERATIONS ON REMOTE HEARINGS

Remote Hearings: Practical Considerations

Hussein Haeri[*]
Camilla Gambarini[**]

I. Introduction

The possibility of holding remote arbitration hearings is not in itself novel – the frameworks and mechanisms to do so have antecedent form (albeit usually latent). However, the prevalence of such hearings in the context of the Covid-19 pandemic represents a sea-change in the practice of international arbitration.

If necessity is the mother of invention (or more accurately, in this context, of innovation), the impossibility (sometimes legal, sometimes logistical) or practical unworkability of physical hearings in 2020-2021 was the clear catalyst for this change in practice. The general permissiveness of legal frameworks on this matter, the adaptability of arbitral mechanisms, the flexibility and resourcefulness of the international arbitration community and the technological improvements all combined to ensure that due and legal processes largely continued remotely notwithstanding the dearth of physical hearings.

Leading arbitral institutions, arbitrators and law firms have issued numerous checklists, statements and materials to provide practical advice for the organization of remote hearings during the Covid-19 pandemic in order to maintain "stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay".[1]

Paramount to the efficacy of remote hearings is that they are conducted in a way that respects due process and the opportunity for each party to be heard and treated equally. These matters permeate the practical considerations considered in this note on remote hearings. Beyond these requisites, other practical considerations go to speed, efficiency, cost-management and environmental considerations, all of which are of more general relevance to international arbitration and each of which is potentially enhanced by remote hearings being organised and conducted well. Since remote hearings are likely to remain a feature of international arbitration practice even as physical hearings resume where feasible, practical considerations for remote hearings are likely to remain of continued salience, even as they evolve.

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1. Arbitration and COVID-19, Arbitral Institutions (April 2020) <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> (last accessed 18 July 2022).

This article is structured as follows. Following the introduction in section I, section II sets out practical considerations that stakeholders in international arbitrations should consider when deciding whether remote hearings are suitable and for their effective conduct. This includes considerations for the arbitral tribunal and the parties involved, and suggestions for the counsel team. Finally, section III provides some conclusions.

II. Practical Considerations for Remote Hearings

A. When Is It Suitable to Hold a Remote Hearing?

A predicate question that the parties to an international arbitration should consider before setting in train practical arrangements for a remote hearing is whether it is suitable to hold a remote hearing, as opposed to a physical hearing. This includes ensuring that in doing so parties are accorded an opportunity to be heard.

The New York Convention provides that the award debtor may successfully challenge the recognition and enforcement of an award if it proves that it did not have an opportunity to be heard.[2] It is therefore important that consideration is given to ensuring that in proceeding with a remote hearing, and in its conduct if one proceeds, all sides have a meaningful opportunity to put their case. Provided this is done, the risk that a court in a New York Convention jurisdiction will refuse enforcement because the hearing took place remotely should (subject to legal restrictions in applicable law(s)) be relatively low.[3]

In practice, the parties will have to take into account the specific circumstances of the arbitration, including, among others, the type of hearing, the locations of the different actors involved in the proceedings (which may trigger time zone and technology issues) and the number and location of factual and expert witnesses to be cross-examined.

Remote hearings may be particularly suitable when, for example, the hearing is a procedural one, such as hearings on case management or pre-hearing conferences, or on matters of admissibility and jurisdiction (particularly where no or limited factual or

2. New York Convention, Art. V(1)(b): "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; […]"; in England & Wales, *see Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] CLC 647; in the U.S.A., *see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298, 99 (5th Cir. 2004).
3. *See* Giacomo ROJAS ELGUETA, James HOSKING and Yasmine LAHLOU, "General Report" in this Volume, pp. 38 ff.

expert witnesses are required). Indeed, even before the Covid-19 pandemic, it was commonplace to hold procedural hearings by telephone conference. There do not seem to be reported cases of challenges to awards for alleged breaches of due process where a procedural hearing was held remotely. Therefore, it should be relatively uncontroversial to continue this trend through videoconferencing – which has become more prevalent – where there is visibility of the parties and the tribunal to each other in addition to the opportunity for the parties to make oral submissions, albeit not a physical congregation of the tribunal and the parties in one location. However, changing practices on remote hearings during the Covid-19 pandemic show that their feasibility and utility are by no means confined to procedural hearings and extend to full hearings dealing with merits and quantum issues, including cross-examination of witnesses and experts.

Parties may also consider whether a combination of a remote hearing and physical hearing is appropriate for their case.[4] Outside of the arbitration context, in *Re A*, the English Court of Appeal held that a proposed hybrid hearing including in person and remote hearings would not have given one of the parties a fair hearing.[5] Conversely in the case of *C*, the Court of Appeal dismissed an argument that a hybrid hearing in which one side's leading counsel would attend remotely was unfair.[6] Accordingly, a case specific analysis is recommended in light of all the circumstances.

Factors (other than necessity) that can militate in favour of remote hearings include efficiency and costs considerations, including whether a remote hearing is a more cost-effective option compared to a physical hearing. Environmental concerns may also prompt the parties to hold remote hearings to minimize the impact of carbon emissions associated with international travel (typically by flights) to and from the venue for a physical hearing.[7]

B. Remote Hearing Planning: Is Prior Agreement Necessary?

Holding remote hearings requires preparation and the ability to anticipate the needs of the parties and the tribunal, as well as any potential issue that may arise during the course of a remote hearing including with witnesses and experts. Moreover, it is good

4. SIAC Secretariat, "SIAC Guides: Taking Your Arbitration Remote" (August 2020) at <https://www.siac.org.sg/images/stories/documents/siac_guides/SIAC%20Guides%20-%20Taking%20Your%20Arbitration%20Remote%20(August%202020).pdf> (last accessed 3 March 2021).
5. *(Children)(Remote hearing: care and placement orders)* [2020] EWCA Civ 583.
6. *(Children: Covid-19: Representation)* [2020] EWCA Civ 734.
7. This is part of the goals of the Green Pledge and the Campaign for Greener Arbitrations which promotes "[w]here possible and appropriate, [that] pre-hearing conferences, procedural or substantive hearings should be conducted remotely, in whole or in part, via telephone or video conferencing". See Campaign for Greener Arbitrations, Green Protocol for Arbitral Proceedings (2021) at <https://www.greenerarbitrations.com/green-protocols/arbitral-proceedings> (last accessed 3 March 2021).

practice for the parties to seek to agree in advance the procedures and schedules to be followed during the remote hearing.[8] Such an agreement is typically enshrined in a procedural order of the arbitral tribunal regulating the practical aspects of the remote hearing.[9]

Proceeding in this way with the prior agreement of the parties to a remote hearing can also help to mitigate the risk of challenges to arbitrators or to the award. This can be done by way of signing an agreement that: (i) videoconferencing constitutes an acceptable means of communication permitted by the applicable rules, including those at the juridical seat of the arbitration; (ii) the use of videoconferencing as the means for

8. Africa Arbitration Academy, Protocol on Virtual Hearings in Africa (April 2020) at <https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf> (last accessed 3 March 2021).
9. AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference, available at <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf> (last accessed 15 September 2021); ACICA, Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations (16 August 2016) at <https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf> (last accessed 3 March 2021); Niuscha BASSIRI, "Initiating and Administering Arbitration Remotely" in Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the Covid-19 Revolution* (Wolters Kluwer 2020); Stephanie COHEN, "Draft Zoom Hearing Procedural Order", Transnat'l Disp. Mgmt. (14 April 2020) at <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1815> (last accessed 3 March 2021); CPR, Annotated Model Procedural Order for Remote Video Arbitration Proceedings (April 2020) at <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings> (last accessed 3 March 2021); ICC, Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic (9 April 2020) at <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (last accessed 3 March 2021) (*see* Annex II for "Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings"); Practical Law Arbitration, Procedural Order for Video Conference Arbitration Hearings, available at <https://uk.practicallaw.thomsonreuters.com/w-025-0244?view=hidealldraftingnotes&transitionType=Default&contextData=(sc.Default)&firstPage=true> (last accessed 15 September 2021); SCMA, Procedural Order and Directions for Conduct of a [*Virtual/Hybrid Virtual*] Hearing (6 October 2020) at <https://scma.org.sg/SiteFolders/scma/387/Virtual%20Hearings/Specimen%20Directions%20for%20Virtual%20Hearings%20Final.pdf> (last accessed 3 March 2021); Richard F. ZIEGLER, "Draft Procedural Order to Govern Virtual Arbitration Proceedings", Transnat'l Disp. Mgmt. (9 April 2020) at <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1814> (last accessed 3 March 2021).

conducting the arbitral hearing; and (iii) no party will seek to vacate any resultant arbitral award on the basis that the arbitral hearing was not held in person.[10] After the parties have signed such an agreement, it can be presented to the tribunal at the pre-hearing conference.[11]

In *Gabriel v. Romania*, the parties had agreed to hold the hearing virtually due to the Covid-19 pandemic. Procedural Order No. 33 records that the parties "agree not to challenge the Tribunal's Award in any subsequent proceeding solely on the basis that the hearing was held virtually rather than in person". However, this provision "will not bar a Party from challenging an award based upon the manner in which a remote video proceeding was actually conducted".[12] The order records the agreed video platform for the hearing and the protocol for the virtual hearing, and refers the parties to the ICSID Secretariat's Guidelines for Remote Hearings.[13]

Similar approaches can be seen in other arbitration cases such as *Omega v. Panama*,[14] *Astrida v. Colombia*[15] and *Unión Fenosa Gas v. Egypt*.[16] In the ongoing case of *Landesbank v. Spain*, Spain has reportedly challenged the tribunal regarding its proceeding with a virtual hearing.[17]

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10. Hogan Lovells, Protocol for the use of technology in virtual international arbitration hearings (April 2020) at <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_04_09_hogan_lovells_international_arbitration_digital_hearing_protocols.pdf> (last accessed 3 March 2021).
11. *Ibid*.
12. *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/15/31), Procedural Order No. 33 (18 September 2020) para. 9.
13. *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/15/31), Procedural Order No. 33 (18 September 2020) paras. 24 and 36. Referring to the ICSID Secretariat's Guidelines for Remote Hearings.
14. *Omega Engineering LLC and Oscar Rivera v. Republic of Panama* (ICSID Case No. ARB/16/42), Procedural Order No. 4 (6 October 2020) paras. 4-6 and Annex C.
15. *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5), Procedural Order No. 3 (Organization of the Hearing by Videoconference) (24 September 2020), para. 50 in which the tribunal adjusted the logistical arrangements to facilitate public access to the remote hearings.
16. *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Procedural Order No. 3 Concerning the Hearing on Annulment (3 July 2020) para. 45. The tribunal considered a number of reasons why the hearing should go ahead remotely: restrictions on travel, poor access to technology, nationwide curfews and lockdown limiting access to resources, scheduling conflicts and whether the parties would suffer prejudice. The applicant requested a postponement of the original hearing dates to allow it to prepare, but noted this request would be made whether the hearing was in person or virtual.
17. *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45). *See* Cosmo SANDERSON, "ICSID panel challenged over decision to hold virtual hearing", Global Arb. Rev. (14 August 2020) at <https://globalarbitrationreview.com/arbitrator-challenges/icsid-panel-challenged-over-decision-hold-virtual-hearing> (last

In *Vattenfall v. Germany*, the tribunal proposed to the parties that the hearing go ahead by videoconference. The claimants agreed, but the respondent opposed it on the basis that the issues were too complex and involved too many witnesses.[18] The respondent threatened to disqualify all members of the tribunal. One of the reasons for this was that a videoconference hearing was said to be evidence that the tribunal could not be "relied upon to exercise independent judgment". The respondent submitted that it had a right to a physical hearing and that the ICSID Rules "do not allow holding a hearing online against the will of one party", as online hearings are not expressly provided for in the Rules. According to the respondent, videoconference hearings may be appropriate for some hearings, such as those without witnesses or experts, or with smaller amounts at stake. The claimants submitted that the hearing would be a limited supplemental evidentiary hearing, and that the ICSID Rules neither allow nor prohibit the possibility of an oral hearing by videoconference. The Secretary-General of the PCA held this fell under *kompetenz-kompetenz*, and that such a procedural disagreement was not a reasonable basis for an inference of bias.[19] Ultimately, ICSID's Chairman of the Administrative Council rejected the challenge because the respondent's allegations did not meet the standard set forth in Art. 57 of the ICSID Convention for the disqualification of an arbitrator.[20]

Some tribunals have considered whether refusing to conduct a remote hearing might significantly postpone the resolution of the case, potentially for an undetermined timeframe. This delay might harm one of the parties in such a way that its right to present its case in a meaningful manner is affected.[21]

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accessed 5 February 2021). On 15 December 2020, the Chair of the ICSID Administrative Council rejected Spain's proposal to disqualify the members of the Tribunal, *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45), Decision on the Respondent's Second Proposal to Disqualify all the Members of the Tribunal (15 December 2020).

18. *Vattenfall AB and Others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12), Recommendation Pursuant to the request by ICSID Dated 8 May 2020 on the Respondent's Proposal to Disqualify All Members of the Arbitral Tribunal Dated 16 April 2020 (6 July 2020) paras. 69 and 130.
19. *Vattenfall AB and Others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12), Recommendation Pursuant to the request by ICSID Dated 8 May 2020 on the Respondent's Proposal to Disqualify All Members of the Arbitral Tribunal Dated 16 April 2020 (6 July 2020) para. 139.
20. *Vattenfall AB and Others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12), Decision on the Respondent's Proposal to Disqualify All Members of the Arbitral Tribunal Dated 16 April 2020 (8 July 2020).
21. *Coal & Oil Co. LLC v. GHCL Ltd.* [2015] SGHC 65, para. 73 and *PT Central Investindo v. Franciscus Wongso* [2014] SGHC 190, para. 68 are both cases in which the Singapore High Court discussed whether any delay in rendering the award is a sign of tribunal bias. In *Lao v. Lao Holdings and Sanum*, the tribunal stated in Procedural

C. Remote Hearing Planning: Key Practical Aspects

The 2020 IBA Rules on the Taking of Evidence in International Arbitration (the "2020 IBA Evidence Rules") suggest the advantages of an arbitral tribunal consulting with the parties to establish a remote hearing protocol, which may address:

> "(a) the technology to be used;
> (b) advance testing of the technology or training in use of the technology;
> (c) the starting and ending times considering, in particular, the time zones in which participants will be located;
> (d) how Documents may be placed before a witness or the Arbitral Tribunal; and
> (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted".[22]

Order No. 8 that "[e]xamination by video-conference may be permitted at the discretion of the Tribunal, if the requesting party provides justified reasons", *Lao People's Democratic Republic v. Lao Holdings N.V. and Sanum Investments Limited* (ICSID Case No. ARB (AF)/16/2), Procedural Order No. 8 (16 November 2018) para. 19.3. Ultimately, in *Lao Holdings v. Lao*, the respondent requested examination of three witness to take place via video link. The claimant opposed this request for two of the witnesses (being two government ministers) on the basis that the ministers' statements consisted of "denials of various statements attributed to each of them". The claimant stated that, "as the Tribunal in 2014 rejected the Government's application to have these Ministers testify by video-link, the Tribunal should do so again". The tribunal noted that, because the 2018 hearing was considerably shorter than the 2014 hearing, the cross-examinations would be more compressed and that video link technology had greatly improved in the four years since the last decision. There was "little to show real prejudice to the Claimants" and therefore the video link was permitted. The tribunal noted in the order that the parties should "ensure appropriate arrangements are made for the video link". At the hearing, a member of the PCA, some members of the claimant's and respondent's counsels respectively, and a number of the respondent's witnesses, testified by video link, *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Award (6 August 2019) paras. 55-56. In *Bear Creek v. Peru,* Procedural Order No. 8 stated that "[e]xamination by video-conference may be permitted for justified reasons at the discretion of the Tribunal", *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB 14/21), Procedural Order No. 8 (4 August 2016) para. 19.7. In a broader context, *see also* Art. 6(1) of the European Convention of Human Rights: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". On the application of Art. 6 of the European Convention of Human Rights to arbitral proceedings, see the recent case *BEG S.p.A. v. Italy*, No. 5312/11, 20 May 2021.

22. IBA Rules on the Taking of Evidence in International Arbitration (2020), Art. 8(2).

The 2020 IBA Evidence Rules capture important aspects for consideration by parties and arbitral tribunals. However, there are many other practical aspects of remote hearings for consideration and potential inclusion in a procedural order.

Some notable ones are as follows: (i) the choice of the platform, including considerations of data security; (ii) internet connection and IT devices; (iii) the determination of an administrator of the remote hearing; (iv) recording of the remote hearing; (v) the creation of a participant list; (vi) the organization of testing sessions; (vii) etiquette for the remote hearing; (viii) the schedule and allocation of time; (ix) the use of bundles; (x) the provision of rules for the cross-examination of factual and expert witnesses; and finally (xi) the use of interpreters and real-time transcripts. These points are addressed in turn below.

1. Platform and Data Security

The choice of the platform to be used to hold the remote hearing is one of the first questions that the parties should consider when organizing a remote hearing. During the Covid-19 pandemic, arbitral institutions, parties and arbitrators have used, among others, Zoom, Kudo and Webex. Arbitral institutions can play a role in recommending the platform to be used and may have specific arrangements with the providers of platforms.

When choosing the relevant platform, parties and tribunals should not only look at the technical set-up (including suitability for issues such as real-time translation, if needed), but also consider data security and privacy issues.[23] These matters have been considered in international arbitration independently from remote hearings.[24] A concern in holding remote hearings is that third parties may unlawfully gain access to the platform hosting the remote hearing. It is therefore advisable to consider whether the platform selected to host the hearing provides for end-to-end encryption and password protection.[25]

2. Internet Connection

There cannot be a remote hearing, at least not by videoconference, if all the parties involved do not have access to the internet with a connection that works appropriately.

23. Maxi SCHERER, "Remote Hearings in International Arbitration: An Analytical Framework", 37 J. Int'l Arb. (2020) p. 435. *See also* ICCA-NYC Bar-CPC *Protocol on Cybersecurity in International Arbitration (2020 Edition)*, available at <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_electronic_version.pdf> (last accessed 3 March 2021).
24. *Ibid*.
25. Niccolò LANDI, "Remote Hearings: Observations on the Problem of Personal Data Protection and Cybersecurity" in this Volume p. 159.

This can be relevant when those attending the remote hearing are based in jurisdictions with particular internet connectivity issues, but the same approach applies to remote hearings in any location of the world.

To overcome any connectivity issues, the parties and the arbitral tribunal should ensure that they are able to connect to the remote hearing through a stable internet connection offering sufficient bandwidth and may even consider using a wired Ethernet connection instead of Wi-Fi where suitable.

It is advisable that the parties and the arbitral tribunal should consider having a back-up internet service provider and an alternative virtual platform.[26] This can be particularly relevant for "essential participants" to the hearing, such as the arbitral tribunal, the host of the remote hearing, the secretary of the tribunal, counsel conducting oral advocacy and any witness or expert that may be cross-examined.

A dial-in telephone audio option can be offered as a backup option for participants experiencing difficulties with computer audio. Counsel should also appoint a person within their respective team acting as a contact for the purposes of addressing any technical incidents that arise during the remote hearing, such as advising the other participants if an essential participant from their side is disconnected so that the arbitral tribunal can pause the remote hearing and minimize the disruption to the proceedings.[27]

Connectivity is not necessarily limited to practicalities as it can potentially also pertain to fairness and due process.[28] This is suggested in the 2020 IBA Evidence Rules at Art. 8, which provides that a remote hearing should be held "efficiently, fairly, and, to the extent possible, without unintended interruptions".[29]

In *SC v. University Hospital Southampton*, the English High Court noted that a circumstance where a remote hearing will not be fair is "where one of the parties is unable to access or effectively utilize the technology necessary to conduct a remote hearing".[30]

3. Administrator of the Remote Hearing

To facilitate the smooth running of the remote hearing, there should be an administrator who will host the remote hearing. This will be the person controlling the access to the platform and, depending on the platform selected, the administrator may have different "administrative rights", such as controlling recording functions, the chat

26. Africa Arbitration Academy, Protocol on Virtual Hearings in Africa, fn. 8 above.
27. SIAC Secretariat, "SIAC Guides: Taking Your Arbitration Remote", fn. 4 above.
28. M. SCHERER, "Remote Hearings in International Arbitration", fn. 23 above, p. 438 ("The ultimate test for any remote hearing is whether the resulting award withstands a challenge in recognition/enforcement or set aside proceedings").
29. IBA Rules on the Taking of Evidence in International Arbitration (2020), Art. 8.
30. *SC v. University Hospital Southampton NHS Foundation Trust* [2020] EWHC 1445 (QB), para. 17.

function, muting or unmuting the participants, setting up break-out rooms, as well as dividing the participants into the correct break-out rooms.[31]

The administrator should be a neutral party and, in practice, may be a case manager working on the case if the arbitration is administered by an arbitral institution/arbitration centre, the tribunal secretary, or an external vendor. If the parties agree, a paralegal for the claimant's team may fulfil this role. Where that is not possible or in the case of an *ad hoc* arbitration, the participants may consider relying on external vendors which are able to assist with this activity. Due to potential connectivity issues, it is recommended to appoint a backup "host" to ensure continuity of the remote hearing.

4. Recording

Audio recording of arbitration hearings has long been an option, particularly where court reporters are involved. Host platforms of remote hearings can also provide the option of recording the hearing, not only the audio – as is standard practice in physical hearings – but also the video recording of the remote hearing. It is important that the parties agree in advance whether they want the remote hearing to be recorded, if so who shall record the hearing, and whether a video recording would be made available to the parties in any circumstances. In this respect, the parties may agree that a video recording will not be made available to the parties unless a specific issue arises for which the tribunal deems it necessary to have resort to the video recording.

5. Participant List

To avoid any breaches of confidentiality and allow the tribunal to be aware of those who will attend the hearing, the parties should provide a pre-approved list of participants, as well as a schedule of when participants are allowed access to the remote hearing, which should be agreed upon in advance. This will ensure that only authorised persons are allowed access into the remote hearing and at the correct time.[32]

A participant list may not be created when hearings are streamed live. Remote hearings in investment treaty arbitrations can be open to the public and streamed live.[33] The same does not necessarily apply to commercial arbitrations where confidentiality is still paramount. In this respect, the English High Court in *PetroSaudi v. PDVSA* had

31. SIAC Secretariat, "SIAC Guides: Taking Your Arbitration Remote", fn. 4 above.
32. SIAC Secretariat, "SIAC Guides: Taking Your Arbitration Remote", fn. 4 above.
33. *Westmoreland Mining Holdings, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3), Procedural Order No. 2 (Hearing Protocol) (21 September 2020) paras. 12, 14 and 38. The hearing on bifurcation was live-streamed on the ICSID website. The practice of ICSID live-streaming hearings in an effort to increase transparency in investor-State arbitration dates back to the first case on this, namely *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12).

to consider an application for joinder in the context of parallel injunction proceedings that PDVSA commenced in London to prevent the operator of an escrow account from making any payments to Petro Saudi, the award creditor of the underlying commercial arbitration.[34] Whilst hearings of the High Court are normally open to the public, the High Court in *PetroSaudi v. PDVSA* ruled that, because the remote hearing related to a commercial arbitration claim, it should be heard in private.[35]

6. Testing

Before the commencement of the sitting days of the remote hearing, it is advisable to set up a test with the participants involved in the remote hearing, including the administrator of the platform. The testing is useful to cover basic features of the platform, such as the display, control panel features, screen sharing, passing control, muting and unmuting, protecting meeting passwords, and moving between the various breakout rooms.[36] To get the most out of the testing, the participants should join the test using the same equipment that they will use on the remote hearing day.

Participants to remote hearings may agree to run a (typically more streamlined) test every sitting day, thirty minutes before the commencement of the hearing, in order to check that all participants are in attendance and their devices work properly.

7. Etiquette

It is good practice for participants to agree to the etiquette to follow at the remote hearing. For example, all participants (excluding tribunal and lead opposing counsel) without an active role at any given moment should mute their own audio and turn off their video. The participants may further agree that, during openings and closings, only members of the tribunal and the speaker, as well as lead opposing counsel, should keep their video connection on. During the examination of witnesses and experts, in addition to the members of the tribunal and the witness or expert, only counsel leading on the direct and the cross-examination of that witness should keep their video connection on. These measures also reduce the risk of incurring connectivity issues, as fewer participants will be attending using their video actively.

34. *PetroSaudi Oil Services Ltd. v. PDVSA Servicios SA* [2020] EWHC 2322, paras. 5-9.
35. *PetroSaudi Oil Services Ltd. v. PDVSA Servicios SA* [2020] EWHC 2322, paras. 2-3 (noting, in the alternative that "[h]ad I not considered that this was an arbitration claim under CPR 62, I indicated that I would, as an alternative, have applied the more general provisions of CPR 39.2(3)(c) and ordered the hearing to be held in private on the basis that this was an application which involved confidential information relating to a private arbitration, and publicity would damage that confidentiality").
36. AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties, available at <https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf> (last accessed 3 March 2021).

It is also advisable to consider the visible background when parties are on video. Cluttered backgrounds, personal effects, and visible third parties moving in and out of sight can be distracting both to the speaker and to the other hearing participants. To ensure the screen is free from distractions, some software includes filters that blur a participant's background, or produces a virtual background to surround the participant, both of which work best against a blank contrasting wall. While these are useful tools, it is important to ensure that blurring technology and virtual backgrounds do not distort the features of the person on screen.

Finally, etiquette may also include rules as to the requirement of sitting in a location without background noise and with adequate lighting, as well as a dress code for essential participants and non-essential participants.

8. Schedule and Allocation of Time

One of the main challenges of remote hearings is finding suitable time slots to ensure all stakeholders' participation. Whilst this is not a problem where the participants to the remote hearing are in the same time zone, practical issues may arise when members of the arbitral tribunal and the parties are not. Determining the appropriate schedule of the remote hearing can present challenges. One may consider the situation of having the parties, counsel, and the tribunal attending the remote hearing in different locations with a fifteen-hour difference – such situations are far from uncommon in international arbitrations.

It is therefore advisable that counsel considers in advance the effective times of the remote hearing sitting days in the different time zones.[37] Depending on the locations of the participants, the parties may agree to hold the remote hearing for less than the usual six to seven daily sitting hours and extend the sitting days with a reduced daily schedule. Not only can this be a practical means to ensure that all participants can attend in fair conditions, but it also can overcome video-screen fatigue that may result from being connected in front of a screen for many hours. In this respect, it is also advisable to introduce short breaks throughout the daily schedule of the hearing to ensure the consistent attention span of the tribunal, as well as assisting court reporters in their important function.[38]

As in any hearing, the parties should agree the allocation of time in advance, and the tribunal maintains the power to resolve any disagreements as to the allocation of time. Given the potential interruptions and IT issues that may occur during a remote hearing, the parties may agree to include a provision in the remote-hearing protocol

37. A useful tool is World Clock Meeting Planner, which helps to find the best time across multiple time zones, available at <https://www.timeanddate.com/worldclock/meeting.html> (last accessed 3 March 2021).
38. CEPANI, "Oral Hearings in Times of Covid-19. Flexibility First!", CEPANI Newsletters (May-June 2020) at <https://www.cepani.be/wp-content/uploads/2020/06/Newsletter-May-June-2020-12-06-2020_250790_1.pdf> (last accessed 3 March 2021).

granting a power to the tribunal to adjust the schedule of the remote hearing as necessary in the event of delays or other interruptions caused by technical problems in the functioning of the videoconference. Equally, the parties may consider including express provisions to determine whether interruptions should result in suspension of time running.

These considerations are important because a technical issue may in an extreme situation prevent a party from presenting its case fairly and being accorded due process, therefore raising the possibility of a challenge to the award.

9. Documents and Bundles

Where an external document management platform is being used, it is advisable to carefully consider the referencing of documents, to ensure there is consistency between the references used in submissions and the references used by the evidence exhibiting software. Inconsistencies between the two reference numbers can create particular issues during oral submissions, and witness and expert questioning, when documents are often required to be displayed at short notice or even immediately.

It is suggested that electronic bundles should be sent to the tribunal and other parties, or uploaded to the document management platform, in good time to allow for orientation prior to the hearing. Bundles and documents should be sent using encryption, password protection and/or other suitable method of data security. It is advised that acknowledgment of receipt should be obtained to ensure that the electronic copies have been correctly received.

The preparation of hard-copy bundles for use in a remote hearing presents its own set of logistical challenges. Parties are likely to need to finalize bundles at an earlier stage in remote proceedings compared to in person proceedings, to leave time for the bundles to be couriered to the location of the tribunal members, witnesses, experts, and other involved parties. This can also apply to demonstratives used during the hearing. Where demonstratives are not to be shown to witnesses prior to their cross-examination, local counsel's assistance may be required with the provision of such documents at the appropriate time. Local counsel's assistance in preparing bundles can also be useful for reasons of timing, logistics and costs.

The tribunal in particular should be asked for their format preferences for any hard-copy bundles and the extent of documentation they want to receive. Some tribunal members may prefer to work with the documents they have already received in the rounds of submissions, whilst others may prefer a full set, printed in a particular format.

As to the witnesses and expert bundles to be used for the cross-examinations, the parties should consider the practicalities of providing them with hard copies of the bundles. A risk is that the bundle may not arrive on time for the hearing – such as in the case of transportation delays in the context of the Covid-19 pandemic. Should a hard copy bundle be required, counsel will have to prepare such a hard copy bundle well in advance of the actual day of the cross-examination. In practice, this can result

in counsel including more documents than those that will ultimately be used for the cross-examination, as the content of the cross-examination and any script may vary until the day before/of the cross-examination.

Furthermore, the parties may agree to supply the factual witnesses with hard-copy bundles, placing them in a sealed envelope to be opened on screen during the hearing, and shipping the hard-copy bundles to the location from which each witness will communicate to the parties and the tribunal.

Where it is unfeasible to provide a witness with a hard copy of the cross-examination bundle or it is not delivered on time, an electronic bundle may be used. Equally, the parties may decide to use electronic bundles only showing the documents on screen during the cross-examination. Parties may also consider the potential difficulty that a witness may encounter when using an electronic copy of a bundle, as opposed to a hard copy. It may be easier for a witness to navigate a document in a hard copy bundle, and it may potentially be more complicated for a witness to navigate a document in electronic format that the witness does not control and is presented on a screen. It is therefore important that the parties are in agreement on the procedure well in advance to minimize the risk of challenges to the award.

10. Witnesses and Experts Examination

It is not uncommon for fact or expert witnesses to be permitted to testify remotely,[39] but one of the main concerns in holding a remote hearing is the relative lack of control

39. *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Award (10 February 2012) para. 23 (one of the claimant's witnesses, Mr. Michael Lironi, testified and was cross-examined by video); *EDF (Services) Ltd. v. Romania* (ICSID Case No. ARB/05/13), Award (8 October 2009) para. 38 (one of the respondent's witnesses was examined by videoconference during the evidentiary hearing); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability (28 April 2011) para. 61 (the tribunal granted permission for some of the respondent's witnesses to appear by videoconference. It noted that this was granted, in part, in light of the claimant's consent. This was granted in the form of Procedural Order No. 9, which is not available online); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award (16 August 2007) para. 43 (the tribunal issued a procedural order granting the respondent's request that Mr. Villaraza, a witness, could testify and be cross-examined at the hearing on jurisdiction and liability by videoconference); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Second Partial Award (21 October 2002) para. 76 (a witness testified by videoconference at the second stage hearing). However, in *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentina*, the tribunal refused a request to hear an expert remotely because no good reason was given as to why the expert could

on the witnesses and experts,[40] and practical issues that can arise in such circumstances.[41] One practical difficulty of remote hearings is that the witness or expert may have access to files available on his/her screen during the cross-examination. Equally, witnesses or experts may be able to access live chats during the cross-examination. Therefore, beside practical technological considerations, the parties may decide to include provisions in the remote hearing protocol that prevent witnesses and experts from conferring with anyone else during their testimony or using any documents to which the other hearing participants do not have access.

It is key that the parties agree to specific rules to be included in the remote-hearing procedural order. One practical solution is to ensure that the witnesses attend any testimony in the same venue where the party calling the witness, their co-counsel or opposing counsel is located. Where that is not possible (which has frequently been the case during the Covid-19 pandemic due to social-distancing restrictions), the witnesses or experts may testify from their own home or office, and opposing counsel should have the opportunity to send a representative to the location from where the witness or expert is testifying.

Where a witness or expert is testifying from their own home or office, they should be permitted to have one technical assistant present, and the parties should consider the use of 360-degree cameras, or that the videoconferencing system used by each witness

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not attend in person, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award (20 August 2007) para. 2.7.16.

40. Gary BORN, Anneliese DAY and Hafez VIRJEE, "Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views" in Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the Covid-19 Revolution* (Wolters Kluwer 2020) p. 137 at pp. 148-149.

41. The House of Lords held in *Polanski v. Condé Nast Publications Limited* that cross-examining a witness by video link does not, in and of itself, prejudice the party conducting the cross-examination, *Polanski v. Condé Nast Publications Limited* [2005] UKHL 10, para. 43. The court in *P v. D* commented that, if a tribunal does not allow a party to put a key point to a witness and then finds against the evidence of that witness, it is likely to raise a challenge under Sect. 68(2)(a) of the Act (this scenario is potentially more likely to occur in virtual hearings because of time and technology limitations), [2019] EWHC 1277 (Comm), para. 34. The High Court has indicated that, where a witness gives evidence remotely, they should be physically sat with another person. If any interaction between the witness and the other person is not visible to the court, it may be a serious irregularity under Sect. 68(2)(a) of the Act, *Navigator Equities Ltd v. Deripaska* [2020] EWHC 1798 (Comm), paras. 7-9. In *Re B*, a nine-year old child was taken into foster care during a telephone hearing because the recorder was unaware of some of the key facts that should have been put before him. The Court of Appeal commented on the significant pressures that these hearings place on all parties, their representatives, and the court service, especially judges. The Court of Appeal also emphasized that the principles of fair and open justice cannot be sacrificed. *Re B* [2020] EWCA Civ 584.

allows a reasonable part of the interior of the room in which the witness is located to be shown on screen, while retaining sufficient proximity to clearly depict the witness. The parties may even require the witness or expert to show to the tribunal the room in which testimony is given, to confirm that the desk used for the videoconference is clear of any papers, except for the cross-examination bundle, and that only authorized persons are in the room.

11. Interpreters and Real-Time Transcripts

Using interpreters, court reporters and real-time transcripts is part of the regular conduct of arbitration hearings. In the case of remote hearings, it is important to ensure that the platform can support the equipment that court reporters require to share real-time transcripts and channels to allow participants to listen to the hearing in the required languages. Translation, whether simultaneous or sequential, is also a matter to consider carefully in this regard.

D. Remote Hearing Planning: Internal Counsel Team's Considerations

The organization of a remote hearing also requires counsel to plan how to work effectively in a remote environment. Key factors to consider are: (i) ensuring effective advocacy; (ii) the location(s) to attend the remote hearing; (iii) the use of devices; and (iv) communication among members of the counsel/co-counsel/client team.

1. Oral Advocacy

Oral advocacy is an essential component of a hearing, whether remote or physical, and counsel should consider how best to conduct the advocacy in the new setting of remote hearings. It is particularly important that the advocate is able to develop a rapport with the tribunal despite the physical distance. This can be enhanced by using technology to the advocate's advantage. As discussed previously, using a separate webcam is helpful to ensure that the tribunal can see the leading advocates throughout the course of the oral advocacy. Facial expressions are easily notable during a remote hearing and having any notes on or adjacent to the screen where the separate web camera is located, has advantages.

As remote hearings may entail a higher level of concentration and fatigue, it can be helpful to use demonstratives during the oral advocacy, such as in the opening and/or closing statement. While these tools are used in normal hearings, they become particularly helpful in circumstances where the arbitrators are required to look at a screen for several hours.

Finally, talking across others and interjections should be minimized to ensure that parties can be heard clearly. This is of particular importance for the purposes of the transcript of the proceedings.

2. Location

The counsel team may decide to attend the remote hearing from home or in the same office. Whilst during the Covid-19 pandemic many counsel team could not meet in person and therefore had to attend remote hearings from different locations, it is advisable where feasible that members of the same counsel team attend remote hearings from the same location, which should be the office or chambers of counsel where a high-speed connection is available.

3. Devices

It is advisable that each member of the counsel team uses a laptop connected to at least two screens. That is particularly useful for hearings with many participants and for members of counsel team involved in oral advocacy. Multiple monitors are an excellent tool to manage the many elements of a virtual hearing. Indeed, some lawyers have suggested that a minimum of three monitors are necessary.[42] As a minimum, it is advisable to have at least two screens; one to display the virtual hearing room and the speaker, and the other to display the documents being referred to and the script. A third video screen (or the laptop video screen) if available may be used too for the script, as well as for internal communications with the counsel team.[43]

Participants should be encouraged to consider the positioning of their camera in advance of the hearing as this has an important effect on advocacy. It is best for the camera to be directly in front of the participant, at eye-level, and placed in the middle of the participant's screen. It is also suggested that participants try to keep the camera at a distance that makes the size of the face approximately two-thirds to four-fifths of the screen height. For these reasons, there are benefits to using a separate webcam instead of the in-built camera of a laptop. A separate webcam can be positioned and moved more easily, which will help to generate the best angle and lighting. For the purposes of lighting, depending on the location of the participant and time of day the hearing takes place, a ring light may be a useful tool to ensure the participant's face and expressions can be clearly seen.

The quality of the audio can be greatly improved by the use of a headset with an inbuilt microphone and speakers. Alternatively, a desktop speaker and microphone are options for ensuring the participant can hear and be heard. If a participant is speaking, it is advisable to consider potential background noise prior to the hearing commencing so that it can be minimized where possible. Although not all background noise can be eliminated (for example, the noise of air conditioning units or roadworks), turning other devices to silent mode and ensuring the hearing space will not be disturbed by

42. Singapore Academy of Law, "Virtual hearings without tears", available at <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/virtual-hearings-without-tears-with-cheatsheet.pdf> (last accessed 3 March 2021).
43. AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties, fn. 36 above.

third parties are easy ways to improve the quality of the audio for all involved in the virtual hearing.

4. Counsel Team's Internal Communications

Where the counsel team is in the same venue, communications may happen in person or using yellow flags/post-it notes as occurs normally in physical hearings. However, to guarantee successful communication among team members that are in different locations, the counsel team may use an internal chat, such as those supported by Skype or Meets, which are software used for every-day communications within teams.

To communicate with clients or external counsel, it is possible to set up external chats, such as WhatsApp or Signal. Whichever application the counsel team chooses to communicate with external parties during the hearing, it is important to give consideration to cybersecurity, as in the case of the choice of the platform. Moreover, policies on data protection and retention should be factored in when deciding the application to use.[44]

It is also recommended that such off the record confidential chats are kept on separate devices such as mobile phones, which provide an additional safety net to ensure internal information and instructions are not shared with the tribunal or other side.

III. Conclusion

The possibility of holding hearings remotely has lain dormant for years, typically with only partial uptake such as in the context of a witness or expert who, for an explicable and unavoidable reason, was unable to attend the physical hearing where the tribunal and parties to the proceedings, including their counsel, gathered. However, the Covid-19 pandemic has transformed the practice of international arbitration hearings whereby remote hearings have become the "norm" over the last year and a half. This has been borne of necessity, but has also been a function of the flexibility of legal and arbitral frameworks that are largely permissive of the arbitrators' discretion to order remote hearings, and the adaptability and resourcefulness of the international arbitration community. Even as physical hearings again become feasible, the advantages of remote hearings in terms of efficiency, cost and the environment remain. This underscores the continued salience of best practices for remote hearings, even as they continue to be refined and evolve in the context of this dynamic landscape.

44. Niccolò LANDI, "Remote Hearings: Observations on the Problem of Personal Data Protection and Cybersecurity" in this Volume, pp. 134-135.

Remote Hearings: The Arbitral Institutions' Perspective

Giacomo Rojas Elgueta[*]
Benedetta Mauro[**]

I. Introduction

When the Covid-19 pandemic broke out in the early months of 2020, and one jurisdiction after the other had to adopt restrictions on physical gatherings and international travel, it became evident that, all of a sudden, international arbitration as we knew it could no longer exist.

If international arbitration proceedings were to move forward, the need to avoid any physical contact and the impossibility of travel required adapting many stages of an international arbitration, including its main act: the arbitral hearing.

Arbitral institutions were at the forefront of this adaptation process, as it was obvious for parties and arbitral tribunals to turn to arbitral institutions for guidance on how to make their cases progress in these unprecedented circumstances.

Arbitral institutions have a privileged vantage point from which to observe the extent to which parties and tribunals have embraced change and adopted new modalities for conducting their proceedings and, in particular, arbitral hearings.

Hence, we decided to carry out a survey of arbitral institutions aimed at taking stock of their experience from 1 March 2020, to the date of the survey response (between June and August 2021).

Our main goal was to collect data from as diverse a sample as possible, which included both institutions with an international reach and institutions with a more regional focus.

The institutions that were involved in the survey are the following: (i) Australian Centre for International Commercial Arbitration ("ACICA"); (ii) Arbitration Foundation of Southern Africa ("AFSA"); (iii) Milan Chamber of Arbitration ("CAM"); (iv) Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"); (v) Cairo Regional Centre for International Commercial Arbitration ("CRCICA"); (vi) Hong Kong International Arbitration Centre

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("HKIAC"); (vii) International Centre for Dispute Resolution of the American Arbitration Association ("ICDR"); (viii) Kigali International Arbitration Centre ("KIAC"); (ix) London Court of International Arbitration ("LCIA"); (x) Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"); and (xi) Saudi Center for Commercial Arbitration ("SCCA").[1]

The survey was conducted through different modalities. First, we circulated a written questionnaire. Then, we collected the institutions' response in writing and/or orally, sometimes arranging a video call interview. In some cases, we also circulated follow-up questions.

As not all institutions were able to provide us with an answer to all the survey questions, we decided not to publish the survey responses. Instead, we organized the data that emerge therefrom, identifying any converging trends and divergences, and present it in this essay. Unless indicated otherwise, all information and quotes included in this essay were derived from the survey responses, which are on file with the Authors.

The present essay follows a chronological timeline and is structured as follows. In section II, we will describe the state of the art when the pandemic emerged and present the different responses that were implemented by arbitral institutions as a response. In section III, we will display the data related to the use of remote hearings in cases administered by arbitral institutions from 1 March 2020, to the date of the survey response. In section IV, we will present the observations offered by various representatives of the arbitral institutions on what may be the way forward for remote hearings in international arbitration.

II. Covid-19 as a Game Changer

A. The Pre-Pandemic *Status Quo*

In a recent volume edited by Scherer, Bassiri and Abdel Wahab, the effects of the Covid-19 crisis on international arbitration have been defined as a "revolution".[2] What

1. Our most sincere thanks go to Deborah Tomkinson (ACICA), Julia (Zhang) Le Roux (AFSA), Stefano Azzali, Rinaldo Sali, Benedetta Coppo and Sara Forni (CAM), Eleonora M.B.L. Coelho, Patrícia Shiguemi Kobayashi, Luíza Kömel, Ana Flávia Furtado, Andreas Maximillian and Leonardo F. Souza (CAM-CCBC), Mohamed Hafez and Malak Lotfi (CRCICA), Sarah Grimmer and Eric Ng (HKIAC), Luis M. Martinez (ICDR), Victor Mugabe (KIAC), Jacomijn van Haersolte-van Hof and Wing Shek (LCIA), Natalia Petrik and Lise Alm (SCC), and Chris Alberti (SCCA).
2. *See* "Preface" in Maxi SCHERER, Niuscha BASSIRI and Mohamed S. ABDEL WAHAB, eds., *International Arbitration and the Covid-19 Revolution* (Kluwer Law International 2020) p. xxix.

justified the use of this word was the fact that for the first time *entire* arbitral proceedings, including arbitral hearings, were regularly being conducted remotely.[3]

The magnitude of the paradigm shift prompted by the pandemic is apparent if one considers the state of the art of international arbitration prior to Covid-19.

Before the outbreak of the pandemic, the use of information technology in international arbitration was already promoted by arbitration institutions, but was typically limited to specific administrative tasks or procedural steps.[4]

Among others, for example, SCC and ICDR had launched their digital platforms for communication and file-sharing with the parties and the tribunals,[5] meaning that case filings, exchanges of written submissions, file-sharing, communications, and other administrative tasks were routinely conducted electronically.[6]

As to conferences and arbitral hearings, the use of information technology was much more limited. While procedural conferences (i.e., case management conferences and pre-hearing conferences) were usually held by telephone, hearings on the merits or on major procedural issues were primarily conducted as physical meetings, with the use of videoconferencing for one or very few attendants (usually fact or expert witnesses)[7] unable to attend the hearing physically.[8]

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3. *See* Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration to a Changing World", p. 21 (2021) available at <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> (last accessed 20 October 2021); Allen & Overy, "A&O Cross-Border Surveys on Virtual Hearings", p. 2 (2020) available at <https://www.allenovery.com/en-gb/global/news-and-insights/virtual-hearings> (last accessed 20 October 2021).
4. The use of information technology in international arbitration was already the object of a Task Force set up by the International Chamber of Commerce ("ICC") Commission on Arbitration and ADR as early as in 2002, which published four documents in 2004: "Issues to be Considered when Using IT in International Arbitration", "Operating Standards for Using IT in International Arbitration ('The Standards')", "Explanatory Notes on the Standards" and "IT in Arbitration: The Work of the ICC Task Force". The first document was updated in 2017: *see* ICC Commission Report, "Information Technology in International Arbitration" (2017) available at <https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/> (last accessed 10 October 2021).
5. *See* SCC, "SCC Virtual Hearing Survey", p. 2 (October 2020) available at <https://sccinstitute.com/media/1773182/scc-rapport_virtual_hearing-2.pdf> (last accessed 10 October 2021); ICDR, "AAA-ICDR Technology Services: AAA WebFile®" at <https://www.adr.org/TechnologyServices/aaa-icdr-software-and-online-tools> (last accessed 10 October 2021).
6. *See* Maxi SCHERER, "The Legal Framework of Remote Hearings" in M. SCHERER, N. BASSIRI and M.S. ABDEL WAHAB, eds., *International Arbitration*, fn. 2 above, p. 65 at p. 66.
7. Some institutional rules already provided for the express possibility that witnesses be examined via videoconference. *See* CRCICA Arbitration Rules, Art. 28, para. 4 (2011)

As reported by SCC:

> "Procedural conferences have been held by telephone in international disputes, and video conferencing has been used for witnesses unable to join hearings in person. But very few arbitration practitioners had experienced a fully virtual arbitration hearing before March 2020, when COVID-19 changed the playing field".[9]

When the Covid pandemic arose, however, international arbitration proved to be well-suited to switch to fully remote proceedings, with arbitral institutions taking the lead.

B. Institutions' Practical Responses to Covid-19

1. Institutions' Early Responses

Of the surveyed institutions, HKIAC was the first arbitral institution that had to cope with social distancing measures, imposed as a consequence of advance reports on the extent of the Covid-19 epidemic in mainland China. Although the measures adopted in Hong Kong did not amount to a full lockdown, HKIAC had to implement work-from-home arrangements and roll out remote hearings as soon as in early February 2020.

Towards the end of the same month, Covid-19 found its way to Europe through Northern Italy, compelling CAM to adapt its work to the strict confinement measures adopted by the Italian Government at an early stage of the Covid-19 pandemic. In an interview with the Global Arbitration Review published in early March 2020, CAM General Director Stefano Azzali reassured: "This is almost the second week of the

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("The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conference)") available at <https://crcica.org/rules/arbitration/2011/cr_arb_rules_en.pdf> (last accessed 5 November 2021); SCCA Arbitration Rules, Art. 24, para. 5 (2016) ("The Tribunal may direct that witnesses be examined through means that do not require their physical presence") available at <https://www.sadr.org/assets/uploads/download_file/SCCA_Arbitration_Rules_EN.pdf> (last accessed 5 November 2021).

8. These observations are confirmed by the results of the Queen Mary, University of London – White & Case 2021 International Arbitration Survey. When compared to the survey conducted in 2018, the 2021 survey results show that the use of virtual hearing rooms has skyrocketed: "72% of respondents report using virtual hearing rooms at least 'sometimes', if not 'frequently' or 'always', in stark contrast to our 2018 survey, when 64% of respondents said that they had 'never' utilized virtual hearing rooms […]". *See* Queen Mary, University of London – White & Case 2021 International Arbitration Survey, "Adapting Arbitration", fn. 3 above, p. 21.
9. SCC, "SCC Virtual Hearing Survey", fn. 5 above, p. 2.

emergency. […] The Chamber is fully operative and able to guarantee the continuation of its activity".[10]

On 11 March 2020, Covid-19 was officially characterized as a "pandemic" by the World Health Organization ("WHO"),[11] after which arbitration institutions all around the globe had to deal with the challenges posed by the health crisis to the ordinary administration of arbitration proceedings.

Although to a varying degree – depending largely on the different restrictive measures adopted by national Governments – arbitral institutions had to quickly adapt to the new circumstances by putting in place procedures enabling the remote administration of cases, and published notes and guidelines to provide assistance to users, arbitrators and counsel.[12]

This common effort culminated in a joint statement by twelve leading arbitral institutions (six of which are among the respondents to this survey), together with the International Federation of Commercial Arbitration Institutions ("IFCAI"), that was published on 16 April 2020.[13]

In their statement, the signatory institutions endeavored to support international arbitration's role in guaranteeing stability and foreseeability amidst uncertainty, particularly by making sure that pending cases progressed and that any undue delays were avoided.

To this end, the institutions encouraged parties and arbitrators to take all possible steps towards ensuring the fairness and efficiency of arbitral proceedings, including by

10. Alison ROSS, "The Coronavirus: What Impact?", Global Arbitration Review (7 March 2020) at <https://www.camera-arbitrale.it/upload/documenti/gar-coronavirus-impact-on-international-arbitration.pdf> (last accessed 18 October 2021).
11. *See* WHO, "WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020" (11 March 2020) at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last accessed 18 October 2021).
12. A specific account of some arbitration institutions' initial response can be found in Patricia L. SHAUGHNESSY, "Initiating and Administering Arbitration Remotely", in M. SCHERER, N. BASSIRI and M.S. ABDEL WAHAB, eds., *International Arbitration*, fn. 2 above, p. 27. A table summarizing the steps taken by different arbitral institutions, updated as of 2 October 2020, can be found on Herbert Smith Freehills' website: *see* Craig TEVENDALE, Vanessa NAISH and Charlie MORGAN, "Covid-19: Institution and Organisation Specific Proposals as at 02 October 2020" (2 October 2020) at <https://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2020/10/HSF-Arbitration-Notes-Institutional-Responses-to-COVID-19-at-02-October-2020.pdf> (last accessed 18 October 2021).
13. CRCICA, DIS, ICC, AAA, ICSID, KCAB, LCIA, CAM, HKIAC, SCC, SIAC, VIAC and IFCAI Joint Statement, "Arbitration and Covid-19" (16 April 2020) at <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> (last accessed 18 October 2021).

taking full advantage of each institution's particular rules and case management techniques. The statement further directed parties and arbitrators to consult publicly available guidelines and information.

The practical steps taken by arbitral institutions with a view to achieving the objectives expressed in the joint statement mainly concerned three areas: (i) the filing of new cases, (ii) case submissions, and (iii) remote hearings.

First, some institutions already provided for requests/notices of arbitration to be filed electronically, either via email (like HKIAC, LCIA and SCC) or through an online platform (like, again and alternatively to emails, LCIA, as well as ICDR and SCCA), so that no changes were warranted as a consequence of the pandemic.[14]

The others followed suit. For instance, since March 2020, CAM-CCBC has provided that all new cases can be filed via email and has made available an online (cloud-based) platform to enable the safe filing of all submissions and their documents.[15] In a similar way, AFSA launched its own online filing system as of November 2020.[16]

Second, all institutions shifted to electronic means for their communications with parties and arbitrators and for parties' submissions, as well as for their internal operations. Again, institutions like HKIAC, SCC and SCCA, that had already digitalized case management, were barely affected in their daily operations, and did not need to implement any changes in the way they administered proceedings.[17]

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14. *See* SCC, "Covid-19: Information and Guidance in SCC Arbitrations" (27 March 2020) at <https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/> (last accessed 18 October 2021); LCIA, "LCIA Services Update: Covid-19" (18 March 2020) at <https://www.lcia.org/lcia-services-update-covid-19.aspx> (last accessed 18 October 2021); AAA-ICDR, "Filing Considerations" at <https://go.adr.org/covid-19-filing-considerations.html> (last accessed 18 October 2021); SCCA, "Update on SCCA Services in the Wake of COVID-19" (24 March 2020) at <https://www.sadr.org/news-details/69?lang=en> (last accessed 18 October 2021).
15. *See* CAM-CCBC, "CAM-CCBC Activities on an Emergency Basis in View of Public Health Recommendations Related to the Coronavirus (Covid-19)", AR 39/2020 (16 March 2020) at <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-39-2020/> (last accessed 18 October 2021), which remained in force until 1 April 2020 and was replaced by CAM-CCBC, "Administrative Organization of the CAM-CCBC and Rules for the Electronic Processing of Proceedings under the Public Health Rules Related to Covid-19", AR 40/2020 (2 April 2020) at <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-40-2020/> (last accessed 18 October 2021).
16. *See* "Online Filing System" in Deline BEUKES, ed., *AFSA @ Work* (July/August 2021) p. 12, available at <https://arbitration.co.za/wp-content/uploads/2021/09/AFSA-Newletter_JULY-AUG-2021.pdf> (last accessed 18 October 2021).
17. As to SCC, *see* SCC, "Covid-19", fn. 14 above. SCCA told us: "SCCA's philosophy to work completely paperless and invest in technology has paid off and kept daily operations largely unaffected by the pandemic's impact".

The greatest challenge was obviously represented by the difficulty (or, in many instances, the impossibility) of holding physical hearings.[18]

The steps taken by the surveyed institutions to facilitate remote hearings are dealt with in the following subsection.

2. Challenges Posed by Remote Hearings and Institutions' Responses

To learn about the challenges posed by the increased use of remote hearings as a consequence of Covid-19, and to explore the different responses implemented by the surveyed institutions, we asked them to answer the following two questions:

> "From the perspective of the institution, what is the biggest challenge and/or the most relevant issue encountered with regard to remote hearings?"
>
> "What steps has the institution taken or what support has it offered to facilitate remote hearings since the onset of the Covid-19 pandemic?"

First, several institutions mentioned that their first response to the outbreak of the pandemic was reaching out to parties and arbitral tribunals and encouraging them to adopt all necessary measures to make their cases progress, including by taking advantage of the possibility of holding remote hearings.[19] This was done either directly – via email or through the institution's online platform – or publicly through the institution's website.

Although merely a soft statement, it was pointed out by SCC that this was an important step for the institution to take, as its message was quoted by many arbitral tribunals – especially in cases where the parties were in disagreement as to the modalities by which the proceedings should move forward.

18. As CAM's Stefano Azzali reportedly said in the early days of the pandemic, the parties' first reaction was to have hearings cancelled and rescheduled. However, as it became clear that holding physical gatherings was not going to be possible any time soon, new solutions were found: "During the first week we had to cancel almost all arbitration […] hearings […]. This week, the cancellations have been fewer, which indicates users of our services have got over the shock and are adjusting to the emergency situation". *See* A. ROSS, "The Coronavirus: What Impact?", fn. 10 above.
19. These include AFSA, CAM, CAM-CCBC, CRCICA, SCC and SCCA. With reference to CRCICA, *see* Mohamed HAFEZ, "Remote Hearings and the Use of Technology in Arbitration" in *The Middle Eastern and African Arbitration Review 2021: A Global Arbitration Review Special Report* (Law Business Research 2021) p. 42 at p. 44, available at <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2021> (last accessed 20 October 2021).

Interestingly, in these early communications to the parties and the tribunals, some institutions considered that the possibility of holding hearings remotely should be subject to the parties' and the tribunal's agreement.[20]

This sort of "moral suasion" aimed at encouraging remote hearings was a response to some parties' initial reluctance to shift to virtual proceedings. As CAM, CAM-CCBC, KIAC and SCCA respectively told us:

> "From the point of view of the institution, the organization of virtual hearings has not presented big challenges or relevant issues, however, at first we have noticed some resistance due to a lack of knowledge of the potential of current videoconferencing platforms and due to a lack of experience in their use" (CAM).

> "From our experience […] the hesitation of parties and lawyers to deal with the virtual environment in which the hearings were being held, mainly right after the pandemic's breakout, was a challenge although not a great one" (CAM-CCBC).

> "With the Arbitration and the conduct of remote hearing being new trends in Rwanda one of the biggest challenges encountered is that parties are not comfortable using the technologies. Especially in witness cross-examination. As parties, tribunals and witnesses may be in one hearing but sitting in different countries, it was so hard for parties to trust security, good faith and truthfulness of the witnesses" (KIAC).

> "Breaking old habits was likely the most challenging aspect of the transition. Concerns of remote hearings impacting due process or the ability to properly marshal through the evidence were at the forefront. But the experience has all-around been a positive one as even initial opposition died down fairly quickly once it became clear that returning back to in-person hearings would not occur in the short term" (SCCA).

This approach, requiring that all parties involved should agree to hold a remote hearing, gradually shifted towards leaving the arbitral tribunal free to decide whether to order a remote hearing based on the specific fact scenario, including whether one or more parties objected thereto.[21]

Second, several institutions reported that, in the months following the outbreak of the pandemic, they assisted their users by publishing various guidelines and notes,

20. In particular, this was the approach taken by AFSA and CAM.
21. The approach of arbitral tribunals facing a party objection is the object of a separate question in our survey and will be dealt with in section III.C below.

setting out issues for consideration and recommendations for parties and arbitrators when conducting a remote hearing.[22]

In addition, ICDR published a model procedural order for remote hearings, as ACICA had already done in 2016.[23]

Third, various institutions mentioned undertaking educational and scientific initiatives aimed at examining best practices for remote hearings in international arbitration.

Among these initiatives, one forum convened by the ACICA Judicial Liaison Committee[24] on 20 November 2020 stands out. ACICA said to us:

> "This initiative, the first of its kind, brought together 150 members of the judiciary, government and dispute resolution practitioners from across Australia in a virtual forum to consider best practice, the creation of efficiencies in all aspects of dispute resolution and learnings from collective experiences over the course of 2020". [25]

22. *See* ACICA, "ACICA Online Arbitration Guidance Note" (19 October 2020) at <https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf> (last accessed 20 October 2021); AFSA, "Remote Hearing Protocol" (October 2020) at <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf> (last accessed 20 October 2021); CAM-CCBC, "Notes on CAM-CCBC Remote Meetings and Hearings" (2020) at <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/remote-hearings/> (last accessed 20 October 2021); HKIAC, "HKIAC Guidelines for Virtual Hearings" (14 May 2020) at <https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf> (last accessed 20 October 2021); ICDR, "AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties" (9 May 2020) at <https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf> (last accessed 20 October 2021). SCCA also mentioned drafting a set of guidelines on how to overcome IT issues.
23. *See* ICDR, "AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference" (9 May 2020) at <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf> (last accessed 20 October 2021); ACICA, "Draft Procedural Order for the Use of Online Dispute Resolution Technologies" (16 August 2016) at <https://acica.org.au/wp-content/uploads/2016/08/ACICA-online-ADR-procedural-order.pdf> (last accessed 20 October 2021).
24. The task of the ACICA Judicial Liaison Committee, which is composed of both judicial officers and ACICA representatives, is to undertake liaison work between Australian courts and ACICA with a view to exchanging information on the conduct of arbitration in Australia: *see* "ACICA Judicial Liaison Committee" at <https://acica.org.au/judicial-liaison-committee/> (last accessed 20 October 2021).
25. *See* ACICA, Media Release "ACICA Forum Examines Greater Efficiencies and Cooperation in Dispute Resolution Practice in Australia" (1 December 2020) at

ACICA also reported working within its Judicial Liaison Committee "to discuss and share information with members of the Australian judiciary in relation to potential issues that may arise in coming months and years from the use of virtual hearings".

SCC, on the other hand, took a slightly different approach, organizing two online seminars that were attended by more than 300 arbitrators.[26] SCC also conducted a survey with arbitrators in all SCC arbitrations that were in the pre-hearing stage as of 15 March 2020, or that were initiated after that date (for a total of seventy-eight cases), to collect statistical data about the use of, and attitudes towards using, remote hearings.[27]

Fourth, having taken stock of the experiences of the past year and a half, all the surveyed institutions report that, as of today, they offer some sort of technical support to parties and arbitrators for the conduct of remote arbitral hearings.

Remarkably, many of the institutions surveyed – including for example CAM, CAM-CCBC and CRCICA – chose to internalize most of the services currently offered by external providers, with their case managers having the responsibility of supervising the organization and preparation of the remote hearing, instructing all the hearing attendees beforehand and conducting technical tests,[28] and providing technical assistance during the hearing, as well. CAM-CCBC further oversees and hires court reporting services and interpreters, something which is more typically left to the parties.

This "in-house" approach is also confirmed by the answer provided by HKIAC, which – among the measures taken to facilitate remote hearings – included "investment in personnel, including hiring additional staff dedicated to managing and improving HKIAC's virtual hearing offerings". "Hiring new IT support" was mentioned by SCCA, as well.

In particular, according to HKIAC:

> "The need to manage across various different time zones has required much greater focus and planning to ensure that all participants have a balanced experience during the course of the hearing. Staggered hearing times and

<https://acica.org.au/wp-content/uploads/2020/12/Media-Release_1-December-2020.pdf> (last accessed 20 October 2021).

26. A report of the two seminars is available in Velislava HRISTOVA and Malcolm ROBACH, "Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway From the SCC Online Seminar Series", Kluwer Arb. Blog (16 May 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/05/16/legal-and-practical-aspects-of-virtual-hearings-during-and-after-the-pandemic-takeaway-from-the-scc-online-seminar-series/> (last accessed 16 November 2021).
27. The findings of the survey conducted by SCC are available online: *see* SCC, "SCC Virtual Hearing Survey", fn. 5 above.
28. In particular, "conducting tests and trial runs" was reported by the SCCA to be "essential" for its users.

> alternating sitting days require much greater situational awareness from the institution. After-hours support has required additional investment from HKIAC to ensure that staff are available to manage a hearing regardless of what time it begins or ends. […] Each remote hearing entails several different permutations which mean that each hearing must undergo a testing session with HKIAC staff to ensure that each specific setup works for the parties and to ensure that internet connections are sufficient for each hearing. This has meant much higher staff investment into hearing preparation, which is compounded by the sheer number of hearings which have taken place in 2020-2021. This has required additional investment into staff, and much more careful planning in terms of staff engagement and distribution of work".

Finally, among the technological advancements prompted by the pandemic,[29] AFSA reported that it is working to develop its own remote hearing platform, to be embedded in its already-existing online filing system.

The investment in IT made by the surveyed institutions had beneficial effects. As ACICA reported to us:

> "The experience of participants to virtual hearings and improvements in technology through the pandemic has also been positive for Australia as a venue for international arbitration, with distance seen as less of an obstacle and encouraging greater use of Australia-based arbitrators and arbitration counsel".

Another potential benefit of the "in-house" approach taken by some of the surveyed institutions might be to minimize parties' opportunistic behaviors. As reported by CRCICA:

> "Sometimes parties will abuse technical issues, pretending that their connection dropped out in order to gain extra time or to mess up their opposing counsel's argument/concentration".

Of course, challenges remain. According to AFSA:

> "After more than 18 months, a lot of issues with the software have been ironed out, but internet connection is still a problem from time to time. South Africa sometimes faces load shedding, which affects the internet connection and makes remote hearing difficult. Another challenge that the institution is facing is the physical space that the institution made available for physical hearings. With the

29. Technological upgrades of hearing and conference rooms at the arbitration institution's premises were reported by CAM-CCBC, CRCICA, HKIAC and KIAC. These, however, are likely to be relevant for the conduct of hybrid, rather than remote hearings.

> increased number of virtual hearings, the income used to be generated via room booking has largely decreased".

From the perspective of SCC, the most relevant challenges with regard to remote hearings are (i) users' behavior, (ii) digital procedural etiquette, and (iii) cybersecurity. As to users' behavior, SCC stressed that:

> "The brain was not built for two-dimensional models. Digesting information from a 2D feed, while at the same time your brain is managing the 3D feed that is around you, is a very different task than when you have a live hearing. Then the questions is how can we settle remote hearings in a way that our brain can actually handle and that are, at the same time, procedurally sound".

C. Institutions' Legal Responses to Covid-19

In addition to the practical and technological responses described in subsection II.B above, since its onset, the Covid-19 crisis has also acted as a catalyst for legal innovations, either prompting or accelerating revisions to many arbitral institutions' rules.[30]

As confirmed to us by LCIA:

> "The pandemic accelerated several aspects of the 2020 update to the LCIA Rules, specifically, making electronic communications the primary means of communications, explicit recognition of virtual hearings, and permitting the use of electronic signatures in electronic awards".

30. Although not covered by this survey, it is worth noting that the ICC International Court of Arbitration initially chose not to amend its Rules, rather taking an official position that the Rules as they stood already allowed for hearings to be held remotely. *See* ICC, "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic", para. 23 (9 April 2020) at <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> (last accessed 27 October 2021) ("While Art. 25(2) of the Rules provides that […] the tribunal 'shall hear the parties together in person if any of them so requests', this language can be construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place 'in person' by virtual means if the circumstances so warrant"). Eventually, however, the ICC International Court of Arbitration did amend its Arbitration Rules to expressly make provision for remote hearings. *See* ICC Arbitration Rules, Art. 26 (Hearings), para. 1 (2021) available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> (last accessed 27 October 2021).

LCIA is one out of four surveyed institutions that have deemed it necessary to amend their arbitration rules in such a way as to clarify that there is an unequivocal legal basis for holding remote hearings.[31]

The following table summarizes the amendments dealing with remote arbitral hearings that have been adopted by the institutions involved in the survey since March 2020, contrasting the "post-Covid" rule with the corresponding "pre-Covid" rule as a redline.

The table should be read as follows: insertions are marked in blue and underlined (example 1); deletions are marked in orange and struck out (~~example 2~~); parts of the text that remained unchanged are left in black (example 3).

ACICA[32]	Art. ~~31~~ 35 (Evidence and Hearings)[33] 1. Each party shall have the burden of proving the facts relied upon to support its claim or defence. 2. The Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration. 3. An agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the International Bar Association Rules on the Taking of Evidence in International Arbitration. 4. If either party so requests, the Arbitral Tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, and/or for oral argument. In the absence of such a

31. Further to these institutions, it should be pointed out that the CAM Arbitration Rules already provided for fully remote hearings. *See* CAM Arbitration Rules, Art. 27 (Hearings), para. 2 (2019) available at <https://www.camera-arbitrale.it/upload/documenti/arbitrato/2019%20arb%20rules.pdf> (last accessed 27 October 2021) ("The Arbitral Tribunal may grant the attendance [of the parties, their representatives and counsel] by any appropriate means"). Although it was likely drafted with a different scenario in mind (i.e., the one where one or few attendees are unable to attend physically), this provision can be interpreted to encompass fully remote hearings, as well.
32. The 2021 ACICA Arbitration Rules entered into effect on 1 April 2021 and are available at <https://acica.org.au/wp-content/uploads/2021/04/ACICA_Rules_2021-WFF3.pdf> (last accessed 27 October 2021). The contrasted version was effective from 1 April 2016 and is available at <https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf> (last accessed 27 October 2021).
33. Further articles were revised to accommodate remote (and hybrid) hearings: *see* ACICA, "ACICA Arbitration Rules 2021: Key Amendments", p. 1 (2021) at <https://acica.org.au/wp-content/uploads/2021/05/ACICA-Rules_2021_Key_Amendments.pdf> (last accessed 27 October 2021).

	request, the Arbitral Tribunal shall decide whether to hold such hearings or whether the arbitration proceedings shall be conducted on the basis of documents and other materials. 5. The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the arbitration agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time limits and geographical place (if applicable). As to form, 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). 6. The Arbitral Tribunal shall give the parties reasonable notice in writing of any hearing.
AFSA[34]	Art. 21.6 (Hearings) The hearing may take place in person or by any other means that the Arbitral Tribunal considers appropriate considering all relevant circumstances, including by video or telephone conference, or a combination thereof. The Arbitral Tribunal may make directions for the interpretation of oral statements made at a hearing and for a record of the hearing if it deems that either is necessary in the circumstances of the case.
ICDR[35]	Art. ~~23~~ 26 (Hearing) 1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing. ~~2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony, and the~~

34. The AFSA International Rules entered into effect on 1 June 2021 and are available at <https://arbitration.co.za/international-arbitration/international-rules/> (last accessed 27 October 2021). This is the first set of rules adopted by the AFSA International Division, which was itself only established after the enactment in 2017 of the law regulating international arbitration in South Africa.
35. The ICDR International Arbitration Rules entered into effect on 1 March 2021 and are available at <https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar> (last accessed 27 October 2021). The contrasted version was effective from 1 June 2014 and is available at <https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl> (last accessed 27 October 2021).

	~~languages in which such witnesses will give their testimony.~~ 2. A hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process. The tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence. 3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination. 4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses ~~may~~ should be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may ~~disregard any written statement by that witness.~~ make such order it deems appropriate, which may include reducing the weight to be given to the statement(s) or disregarding such statement(s). ~~5. The tribunal may direct that witnesses be examined through means that do not require their physical presence.~~ 5. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and contact information of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony. 6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.
LCIA[36]	Art. 19.2 – ~~Oral~~ Hearing(s) The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if

36. The LCIA Arbitration Rules entered into effect on 1 October 2020 and are available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> (last accessed 27 October 2021). The contrasted version was effective from 1 October 2014 and is available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> (last accessed 27 October 2021).

	applicable). As to form, a hearing may take place ~~by video or telephone conference or in person (or a combination of all three)~~ 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). As to content, the Arbitral Tribunal may require the parties to address a list of specific questions or issues arising from the parties' dispute.

III. Amidst the Pandemic: Arbitral Institutions' Experience with Remote Hearings

When this survey was conducted, in June-August 2021, arbitral institutions had had to cope with the new reality of remote hearings for over a year.

At that point in time, it was already possible for them to report some trends and statistics regarding the use of remote hearings in the previous fifteen months.

The questions that will be dealt with in the following subsections aimed at assessing and better understanding what was the experience of arbitral institutions with remote arbitral hearings in cases that were pending on or initiated after 1 March 2020.

As mentioned above, not all institutions were able to provide us with an answer to all the survey questions, and therefore their responses were not perfectly comparable. It was nonetheless possible to identify some trends, which will be presented in the following subsections.

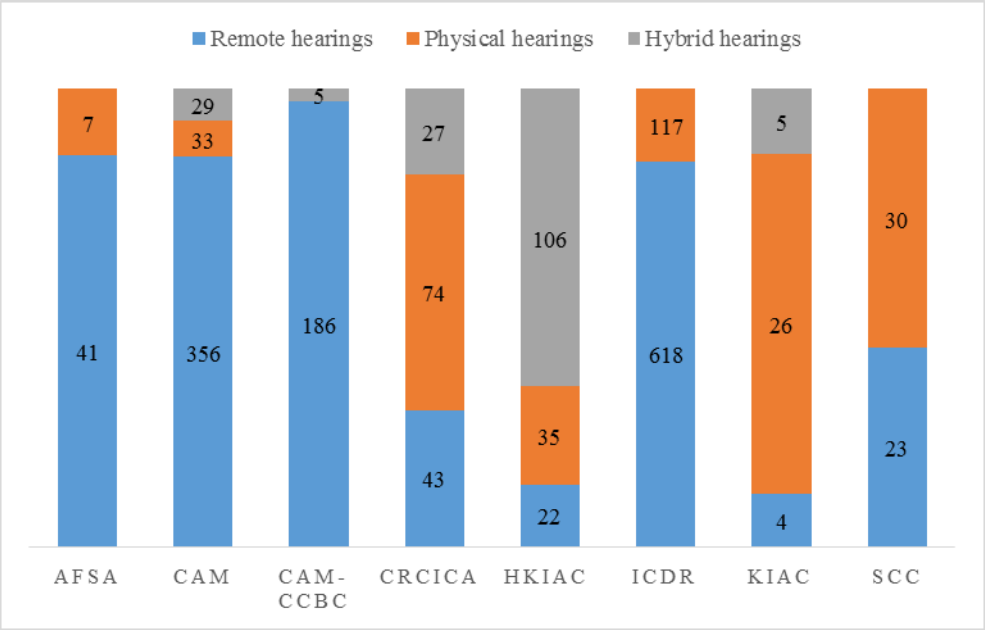
A. Remote vs. Physical (and Hybrid) Hearings: Numbers

The first question of the survey concerned the numeric impact of remote hearings, compared to the other possible modalities of the hearing (i.e., physical and hybrid hearings).

The question that was posed to the surveyed institutions reads as follows:

> "Between 1 March 2020 and the date of your response ("End Date"), how many hearings (including those already scheduled but not conducted yet) were:
>
> a. Remote **[number]**
> b. Physical **[number]**
> c. Hybrid **[number]**".

Eight out of the ten institutions involved in the survey were able to provide us with the precise data.[37] The following chart summarizes their answers.



The survey results, as described above, could be explained in light of multiple factors.

First, the extent to which the outbreak of the pandemic made remote hearings a necessity, rather than an option, depended on the different national Governments' approaches to managing the Covid-19 outbreak. Presumably, this factor differently impacted those institutions that mainly administer cases seated in the same country where they have their headquarters (and that had to mainly deal with the Government's

37. These are AFSA, CAM, CAM-CCBC, CRCICA, HKIAC, ICDR, KIAC and SCC. In addition, ACICA reported that: "A small number of cases administered under the ACICA Rules had hearings scheduled in the period from March 2020 to July 2021. […] Around half [of those hearings that were scheduled in this timeframe] proceeded in hybrid form and half were conducted entirely remotely. No completely physical hearings were held". *See also* ICDR's virtual hearings tracker, available at <https://go.adr.org/virtual-hearing-statistics> (last accessed 13 April 2022), where the statistics related to virtual events (including both arbitral hearings and mediation conferences) are being published.

measures implemented in a single country), than those that administer cases seated in different countries.

For instance, CRCICA noted that "remote hearings have increased in 2021, despite no real need to do so", given that "there have been no lockdown measures in Egypt for the better part of the past 6-12 months". This could account for the relatively high number of physical (and hybrid) hearings that were reported by this institution.

Similarly, SCC noted that:

> "The relatively high share of in-person hearings must be viewed in the context of Sweden's much publicized approach to managing the COVID-19 outbreak, which has eschewed lock-downs and hard restrictions […]. In arbitrations involving only Swedish parties, hearings typically require little or no travel".[38]

Considering the statement above, it is interesting to note that seven of the twenty-three remote hearings reported by SCC were held in cases with only Sweden-based parties and arbitrators, who could presumably have opted for a physical hearing, instead.

Also, it is worth pointing out that no fully physical hearing was held in cases administered by CAM-CCBC from March 2020 to July 2021, despite these having been possible again since October 2020.[39]

Second, the survey results may depend on the approach of arbitral institutions, whether more or less openly in favor of remote hearings.

As described above, some institutions have exercised their moral suasion to push parties and arbitral tribunals to conduct any scheduled arbitral hearings via videoconference, even when physical hearings were theoretically possible based on the Governmental measures in place.[40]

Third, a relevant factor may be the prevalence of either domestic or international cases among those administered by the different institutions and, consequently, the extent to which domestic practices influence the conduct of the proceedings.

Fourth, cultural peculiarities might also play an important role in the decision whether to proceed with a remote or a physical (or hybrid) hearing.

38. SCC, "SCC Virtual Hearing Survey", fn. 5 above, p. 4.
39. *See* CAM-CCBC, "Resumption of Physical Hearings, Considering Public Health Recommendations Related to Covid-19", AR 43/2020 (5 October 2020) at <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/ar-43-2020-resumption-of-physical-hearings/> (last accessed 28 October 2021). CAM-CCBC noted that: "All 'physical' [hearings] were, in fact, hybrid with either witnesses, arbitrators or party representatives connecting from a remote location while others were connecting from CAM-CCBC's facilities".
40. *See* section II.B.2 above.

For instance, CRCICA mentioned the fact that:

> "Parties want their 'day in court' for the Oral/Evidentiary Hearing at least, [since] they feel that a remote hearing doesn't really enable them to have the same impact on the tribunal (shouting, arguing, body language, eye contact…etc.)".

On a different note, with specific regard to those cases (if any) where the parties and arbitral tribunals decided to postpone a scheduled hearing, we inquired about the average duration of such postponements.

This ranges from 2.5 to 3.5 months.[41] KIAC stands as a low outlier, with a reported average of only three weeks. Interestingly, ACICA reported that no scheduled hearing was postponed from March 2020 to July 2021.

B. Remote vs. Physical (and Hybrid) Hearings: Unpacking the Numbers

One of the objectives of this survey was to grasp the characteristics of cases where remote hearings were most frequently held, as opposed to those where physical or hybrid hearings were preferred (when they were possible).

In order to do so, we asked arbitral institutions to indicate the data concerning the remote, physical and hybrid hearings conducted from 1 March 2020 until the date of the survey response, in relation to a number of factors that might have influenced the decision over the modality of the hearing.

The factors we identified are the following: (i) the number of arbitrators, (ii) the nationalities of each of the parties, (iii) the amount in dispute, and (iv) the industry.

The following subsections will summarize the data provided by surveyed institutions, evidencing the relationship (if any) between the use of different hearing modalities and the individual factors considered.

1. Number of Arbitrators

The first question, concerning the composition of the arbitral tribunal, was intended to investigate whether sole arbitrators might be more inclined than arbitral tribunals to order a remote hearing, or vice versa.

41. The longest average duration of postponements was reported by CAM-CCBC (i.e., 3.5 months), however, they noted that: "For specific reasons, two cases registered exceptionally long-term postponements of five [hundred] and three hundred days", and that "when they are excluded, the average drops to 53 days" (i.e., shorter than any other institution, except KIAC).

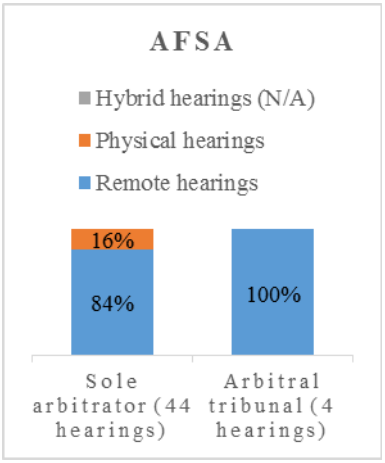
From the data provided by the institutions that answered this question (i.e., AFSA, CAM-CCBC, CRCICA, KIAC and HKIAC), it was possible to extract the percentage of – respectively – remote, physical and hybrid hearings held (i) in cases with a sole arbitrator and (ii) in cases with an arbitral tribunal.

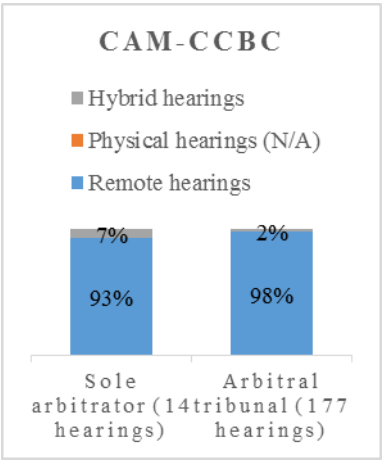
This information is summarized in the following charts (one for each institution). Each chart is structured as follows:

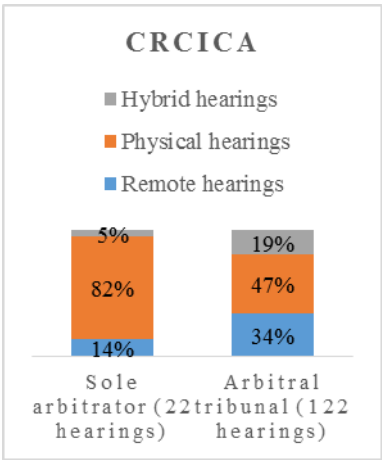
The column on the left represents the total number of hearings held in cases with a sole arbitrator.

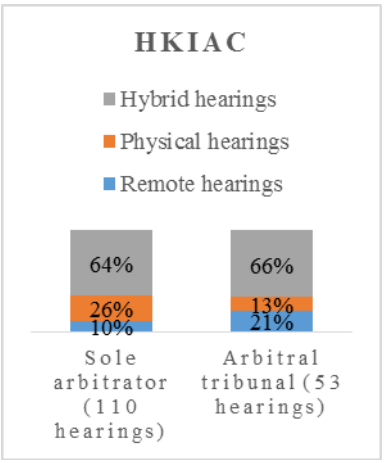
The column on the right represents the total number of hearings held in cases with an arbitral tribunal.

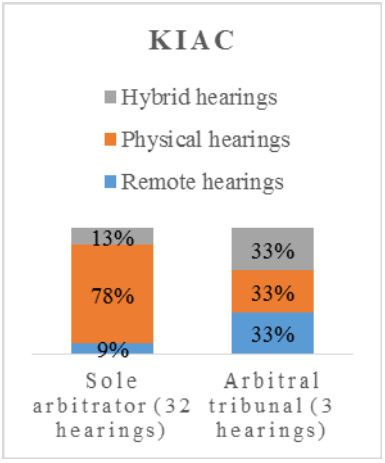
Each column is internally divided into three stacks: the blue stack represents the percentage of *remote* hearings, the *orange* stack represents the percentage of physical hearings, and the *grey* stack represents the percentage of hybrid hearings.











The charts above show that in all surveyed institutions that provided an answer to this question, three-member arbitral tribunals were more inclined than sole arbitrators to order a remote hearing.[42]

One possible reason for this may be strictly linked to the current contingency, as the restrictions on travel and gatherings can make it more difficult for a three-member tribunal to meet physically, while sole arbitrators have more flexibility to live with delays and disruptions.

42. The percentage of remote hearings – calculated out of the total hearings held by sole arbitrators and arbitral tribunals, respectively – are the following: AFSA 84% vs. 100%; CAM-CCBC 93% vs. 98%; CRCICA 14% vs. 34%; HKIAC 10% vs. 21%; KIAC 9% vs. 33%.

Further, it was suggested by HKIAC that in many cases a three-member tribunal would indicate a more complex case, which would imply more participants and stakeholders, including more jurisdictions, more fact and expert witnesses, etc. A sole arbitrator, instead, may be dealing with smaller cases that have fewer subjects involved.

While highly speculative, another reason for sole arbitrators being less likely to order a remote hearing than three-member tribunals may be that, being alone in making procedural decisions, sole arbitrators might be more conservative and therefore less likely to order a remote hearing, especially in cases where a party objects.

This speculation about arbitral tribunals' decision-making process may not reflect the specific experience of each arbitral institution. For instance, in the two cases where HKIAC reported an arbitral tribunal ordering a remote hearing over a party's objection (see section II.C below), one order was made by a sole arbitrator.

2. Nationalities of the Parties

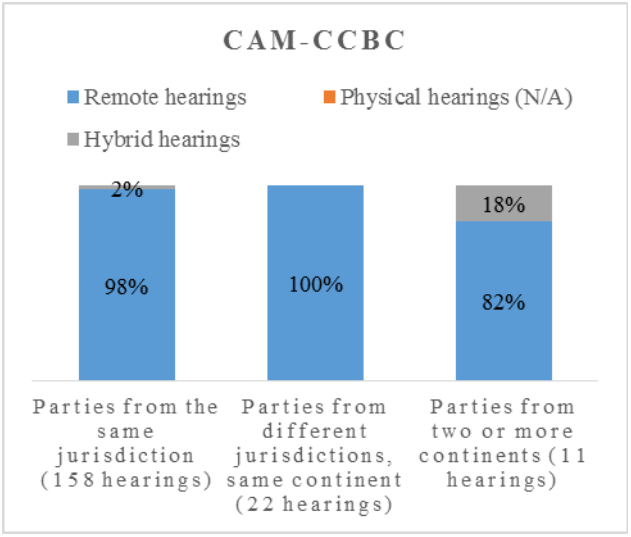
The second question, concerning the nationalities of the parties, was intended to investigate the relationship (if any) between the geographical origin of the parties and the preferred modality for the hearing.

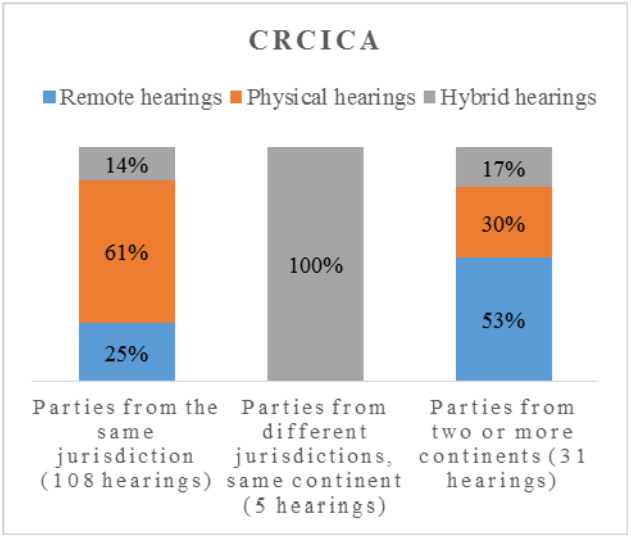
The following charts (one for each of CAM-CCBC, CRCICA, HKIAC and KIAC)[43] display the percentage of – respectively – remote, physical and hybrid hearings held in cases with: (i) parties from the same jurisdiction; (ii) parties from different jurisdictions in the same continent; and (iii) parties from different continents.

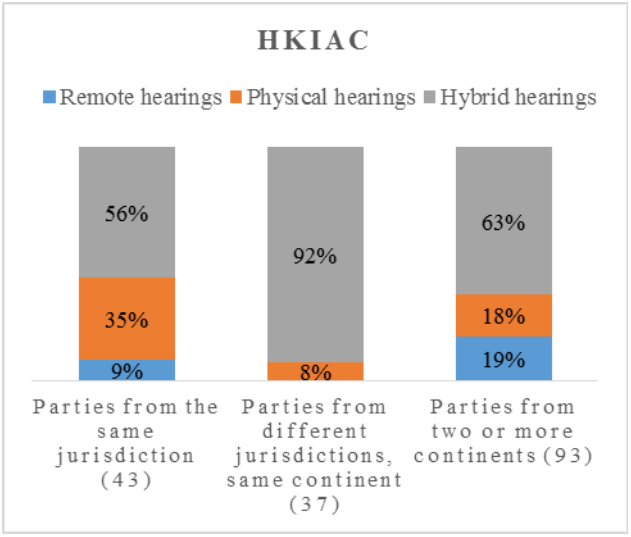
Each chart is structured as follows:

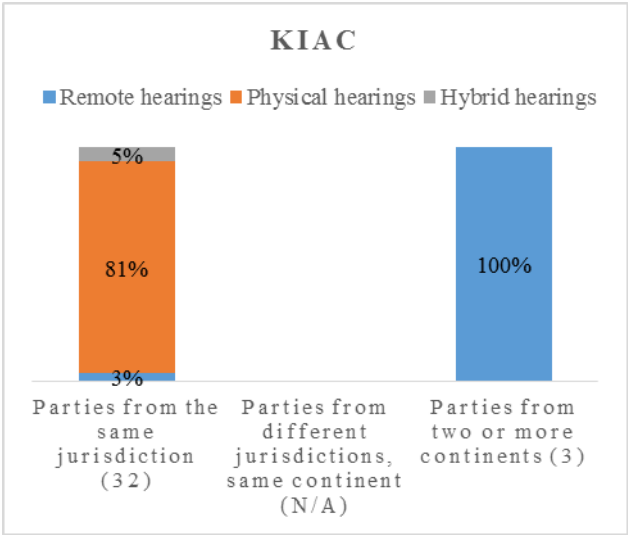
- The column on the left represents the total number of hearings held in cases with parties from the same jurisdiction.
- The central column represents the total number of hearings held in cases with parties from different jurisdictions in the same continent.
- The column on the right represents the total number of hearings held in cases with parties from different continents.
- Each column is internally divided into three stacks: the blue stack represents the percentage of *remote* hearings, the orange stack represents the percentage of *physical* hearings, and the grey stack represents the percentage of *hybrid* hearings.

43. AFSA provided the relevant data limited to remote hearings. Out of the total number of remote hearings (41), 75% were held in cases with parties from the same jurisdiction, 15% in cases with parties from different jurisdictions in the same continent, and 10% in cases with parties from two or more continents.


CAM-CCBC
Remote hearings
Physical hearings (N/A)
Hybrid hearings
2%
98%
100%
18%
82%
Parties from the same jurisdiction (158 hearings)
Parties from different jurisdictions, same continent (22 hearings)
Parties from two or more continents (11 hearings)


CRCICA
Remote hearings
Physical hearings
Hybrid hearings
14%
61%
25%
100%
17%
30%
53%
Parties from the same jurisdiction (108 hearings)
Parties from different jurisdictions, same continent (5 hearings)
Parties from two or more continents (31 hearings)





First, starting from cases where parties were from the same jurisdiction, physical/hybrid hearings were largely prevalent in all of CRCICA, HKIAC and KIAC. Equally, when interviewed, SCC told us that "if everyone is in Stockholm" "parties and tribunals would probably prefer to meet because this does not involve any cost".[44]

44. *See also* SCC, "SCC Virtual Hearing Survey", fn. 5 above, p. 12: "Arbitrators appear less likely to promote virtual hearings in cases involving only Swedish parties than they

CAM-CCBC represents an exception that, however, should not be overemphasized considering that, out of the 191 hearings conducted in the relevant time period, only five were not fully remote hearings.

Second, with regard to cases where parties were from different jurisdictions in the same continent, hybrid hearings were largely prevalent both at CRCICA and at HKIAC, while at CAM-CCBC the totality of the hearings were remote (although it should be pointed out that, as mentioned above, only a total of five hearings were *not* held remotely in the relevant time period). No such case was reported from KIAC.

Third, as to cases with parties from two or more continents, the percentage of remote hearings grows significantly (especially if compared with the first category of cases). Again, CAM-CCBC represents an exception to this trend.

The trend towards using remote modes of attendance in this latter category of cases is also confirmed by the percentage of hybrid hearings in relation to physical hearings at CRCICA and HKIAC. This percentage is also higher than in cases with parties from the same jurisdiction.

This latter result, regarding a possible trend towards remote hearings in cases with parties from different jurisdictions/continents, is not in line with some expectations that this might be a relevant factor pushing towards holding *physical* hearings, instead.

In particular, LCIA and SCC respectively stated that:

> "In a post-pandemic world, where the parties, tribunal, counsel and witnesses are in different jurisdictions, parties may still wish to have in-person [i.e., physical] hearings due to the difficulties of participants being in different time zones" (LCIA).

> "Some people bring up that [a remote hearing] is easier to schedule, but also all of a sudden you have to deal with time zones – which if you are travelling you do not – which means that when you have very incompatible time zones a virtual hearing might be quite complex and somebody will have to do it in the middle of the night all the time" (SCC).

This discrepancy could be explained by the fact that the results summarized above relate to a time period when intercontinental travel was heavily restricted by Covid-19 containment measures implemented all over the world.

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are in international cases: this is likely because in-person hearings in such cases require less travel, and the time and cost savings of a virtual hearing are less significant".

3. Amount in Dispute

The third question, concerning the amount of the dispute, was intended to investigate the possible correlation between the value in dispute and remote hearings.

It should be noted at the outset that the value of the dispute was indicated by CAM, LCIA and SCCA as one of the factors that they expect to be most relevant in determining how hearings will be conducted in a post-pandemic world.

All three institutions agreed in considering it likely that – quoting LCIA – "remote hearings may be attractive to parties with a less complicated and/or low value dispute" (although, as for SCCA, to the extent that the case involves remote parties).

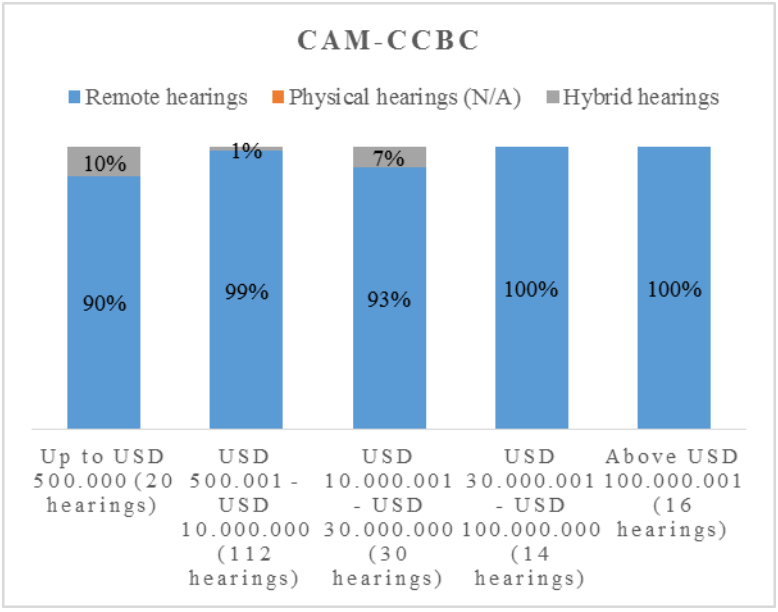
This prediction is not in line with the data that emerges from the answers from CAM-CCBC, CRCICA and HKIAC,[45] of course relating to proceedings during the pandemic, as summarized in the charts below.

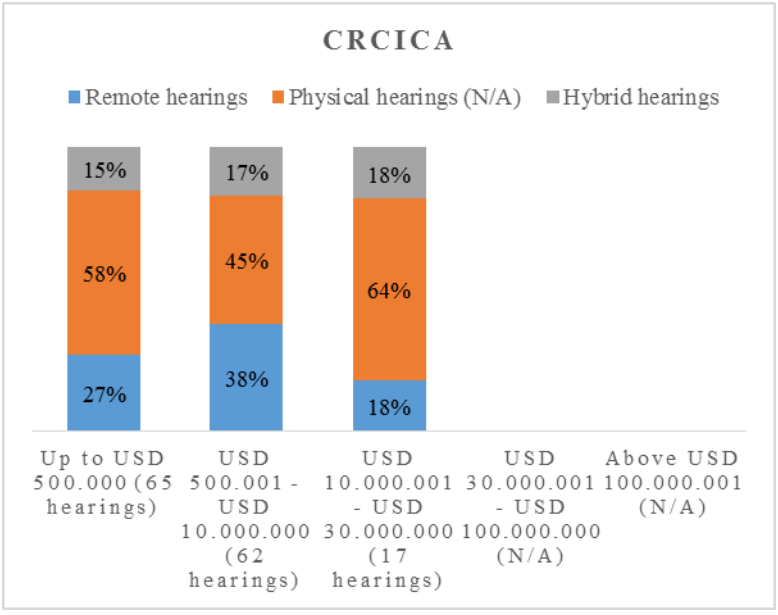
The following charts display the percentage of – respectively – remote, physical and hybrid hearings held in cases whose amount was of: (i) up to USD 500,000; (ii) USD 500,001 to USD 10,000,000; (iii) USD 10,000,001 to USD 30,000,000; (iv) USD 30,000,001 to USD 100,000,000; (v) above USD 100,000,001.

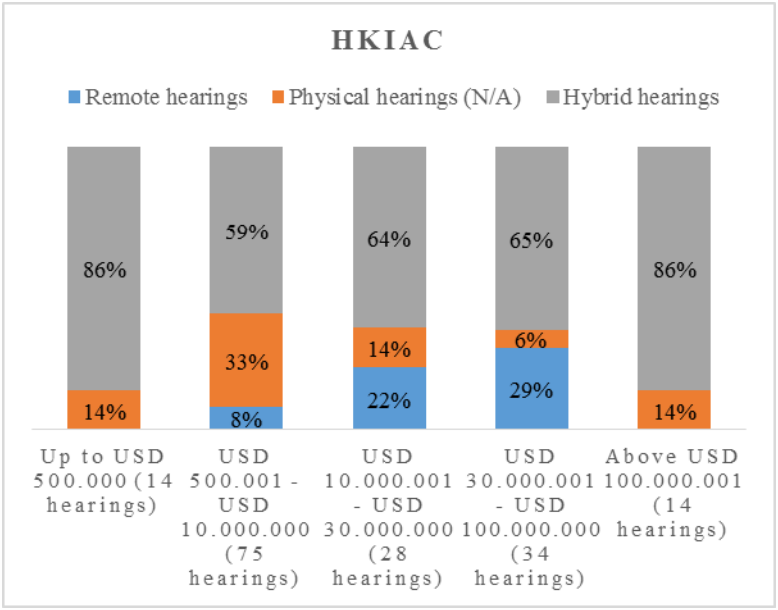
Each chart is structured as follows:

- Each column represents one value range.
- Each column is internally divided into three stacks: the blue stack represents the percentage of *remote* hearings, the orange stack represents the percentage of *physical* hearings, and the grey stack represents the percentage of *hybrid* hearings.

45. AFSA and KIAC provided the relevant data limited to remote hearings. At AFSA, of the total number of remote hearings (i.e., 41) 36% were held in cases with up to USD 500,000 in dispute, 22% in cases with USD 500,001 to USD 10,000,000 in dispute, and 4% in cases with USD 10,000,001 to USD 30,000,000 in dispute. The remaining 38% of remote hearings were held in cases that do not have a quantum (i.e., matters seeking a declaratory order and appeals). At KIAC, of the total number of remote hearings (i.e., 4) half were held in cases with an amount in dispute of USD 500,001 to USD 10,000,000 and another half in cases with an amount in dispute of USD 10,000,001 to USD 30,000,000.


CAM-CCBC
Remote hearings
Physical hearings (N/A)
Hybrid hearings
10%
90%
1%
99%
7%
93%
100%
100%
Up to USD 500.000 (20 hearings)
USD 500.001 - USD 10.000.000 (112 hearings)
USD 10.000.001 - USD 30.000.000 (30 hearings)
USD 30.000.001 - USD 100.000.000 (14 hearings)
Above USD 100.000.001 (16 hearings)


CRCICA
Remote hearings
Physical hearings (N/A)
Hybrid hearings
15%
58%
27%
17%
45%
38%
18%
64%
18%
Up to USD 500.000 (65 hearings)
USD 500.001 - USD 10.000.000 (62 hearings)
USD 10.000.001 - USD 30.000.000 (17 hearings)
USD 30.000.001 - USD 100.000.000 (N/A)
Above USD 100.000.001 (N/A)



First, it can be noted that there seems to be no straightforward correlation between the value of the dispute and the preferred hearing modality emerging from the charts above.

Second, as anticipated above, these results contradict, in two ways, the idea that remote hearings seem more attractive for low value disputes.

On one hand, remote hearings were mostly preferred in mid-value cases[46] at CRCICA, and in high-value cases[47] at HKIAC.

On the other hand, the data related to low-value cases equally goes in a different direction than expected. In fact, two of the five non-remote hearings held at CAM-CCBC in the relevant time period were held in cases with an amount in dispute of up to USD 500,000. Equally, hearings in low-value cases at HKIAC were all held either physically or in hybrid format.

4. Industry

The fourth question, concerning the industry involved, sought to investigate whether any trends can be identified as to the modality of the hearing depending on the industry that the underlying dispute is related to.

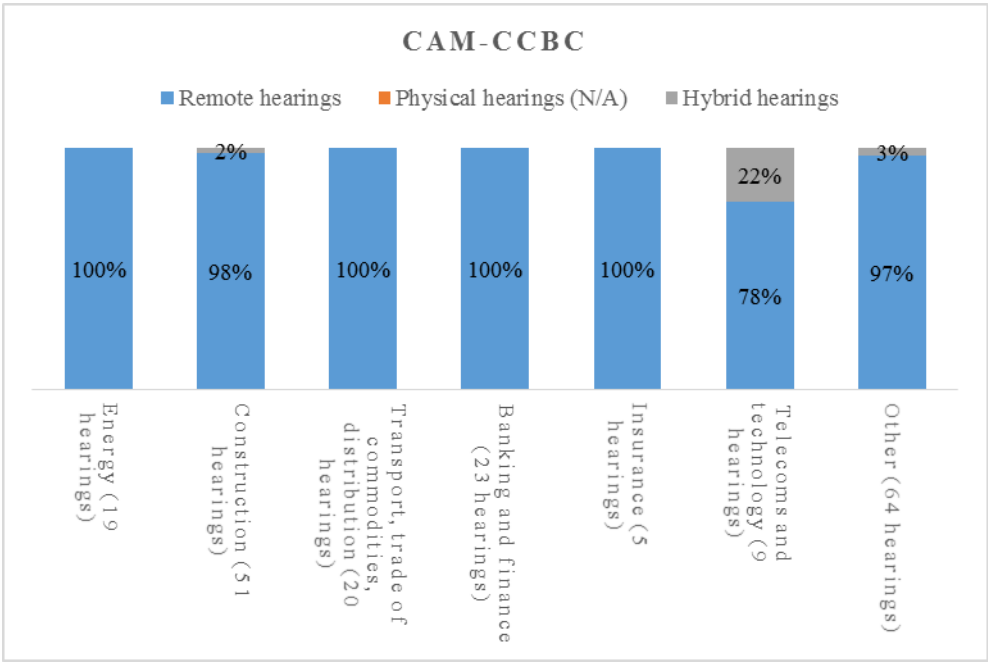
The following charts (one for each of CAM-CCBC, CRCICA, HKIAC and KIAC)[48] display the percentage of – respectively – remote, physical and hybrid hearings held in

46. USD 500,001 to USD 10,000,000.
47. USD 30,000,001 to USD 100,000,000.

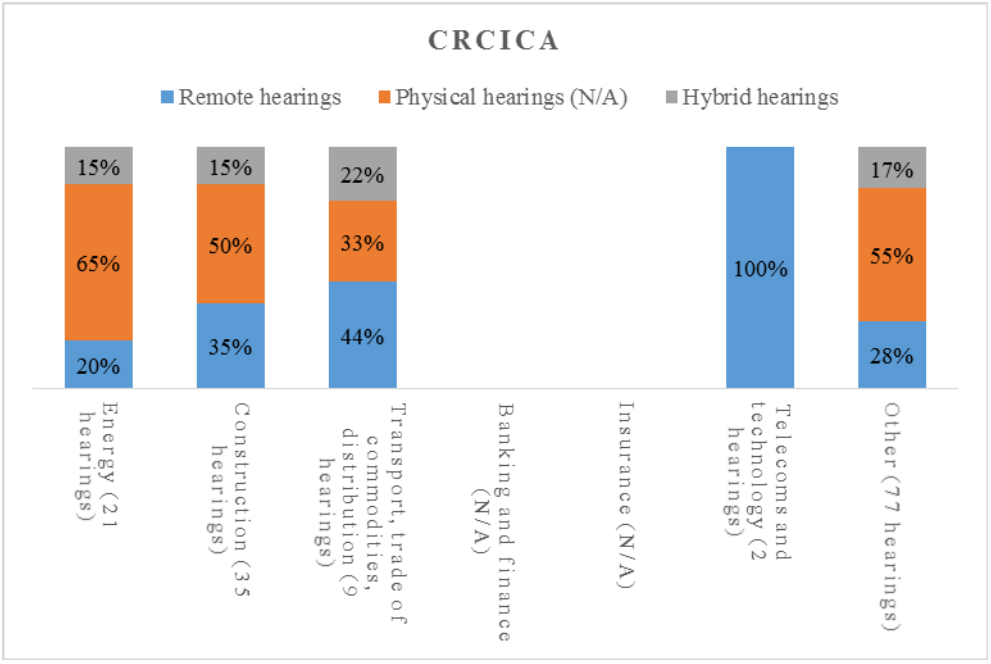
cases involving the following industries: (i) energy; (ii) construction; (iii) transport, trade of commodities, distribution; (iv) banking and finance; (v) insurance; (vi) others.[49]

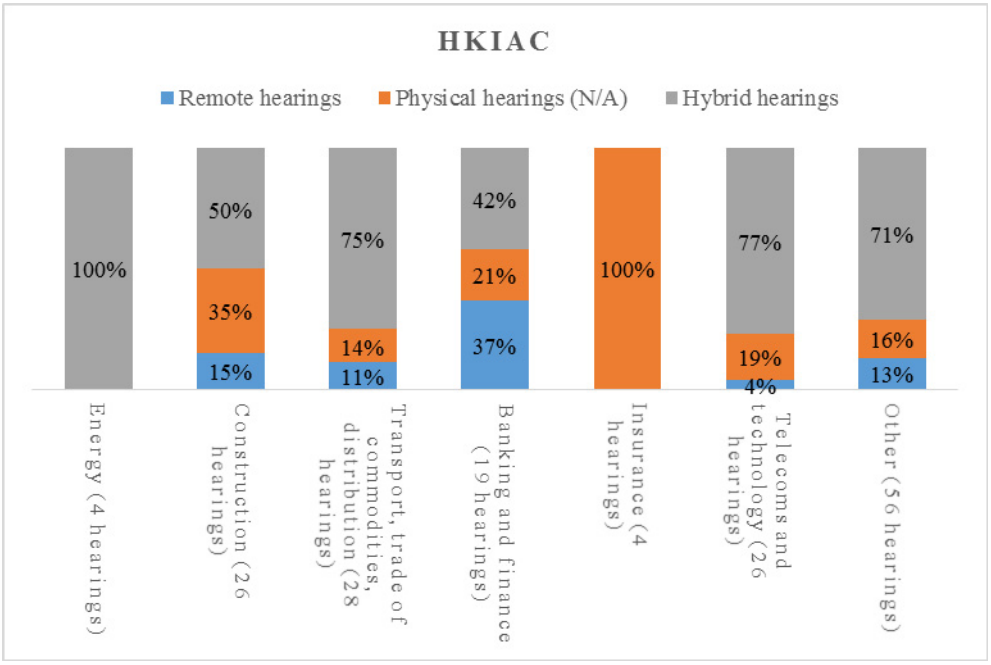
Each chart is structured as follows:

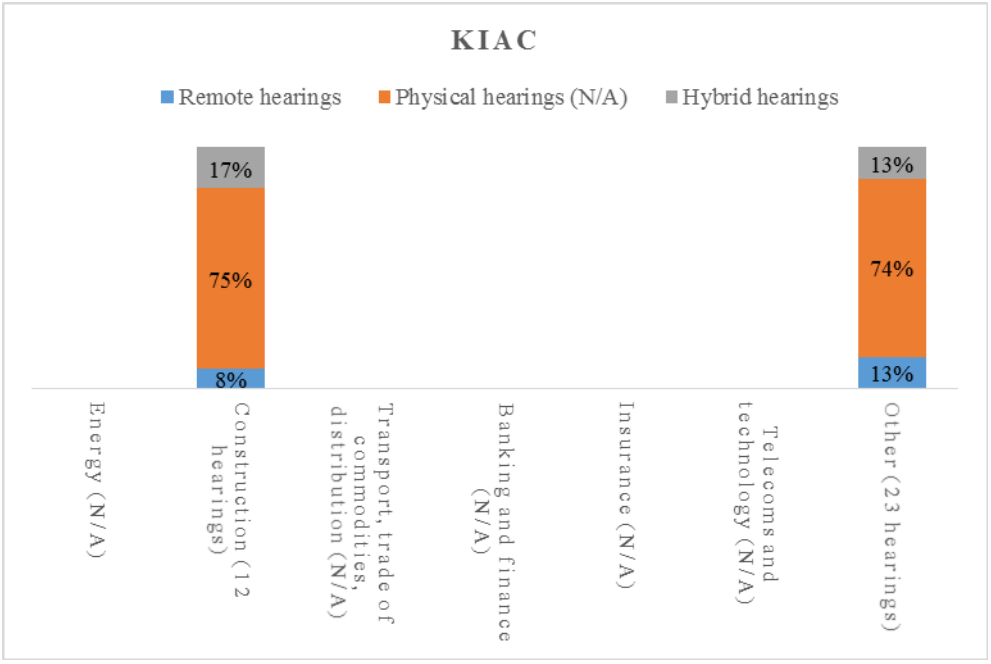
– Each column represents one specific industry.
– Each column is internally divided into three stacks: the blue stack represents the percentage of *remote* hearings, the orange stack represents the percentage of *physical* hearings, and the grey stack represents the percentage of *hybrid* hearings.



48. AFSA provided the relevant data limited to remote hearings. Of the total number of remote hearings (i.e., 41), 13% were held in energy cases, 13% in construction cases, 13% in transport, trade of commodities, distribution cases, 9% in banking and finance cases, 4% in insurance cases and 48% in other cases.
49. Other industries that were mentioned by CAM-CCBC include agriculture and food, public services, education, health, commerce and manufacturing, entertainment.


CRCICA
Remote hearings
Physical hearings (N/A)
Hybrid hearings
15%
65%
20%
15%
50%
35%
22%
33%
44%
100%
17%
55%
28%
Energy (21 hearings)
Construction (35 hearings)
Transport, trade of commodities, distribution (9 hearings)
Banking and finance (N/A)
Insurance (N/A)
Telecoms and technology (2 hearings)
Other (77 hearings)


HKIAC
Remote hearings
Physical hearings (N/A)
Hybrid hearings
100%
50%
35%
15%
75%
14%
11%
42%
21%
37%
100%
77%
19%
4%
71%
16%
13%
Energy (4 hearings)
Construction (26 hearings)
Transport, trade of commodities, distribution (28 hearings)
Banking and finance (19 hearings)
Insurance (4 hearings)
Telecoms and technology (26 hearings)
Other (56 hearings)



Again, there does not seem to be a clear correlation between certain industries and one or another hearing modality.

In particular, we aimed at verifying the popular sentiment that comparatively fewer remote hearings would be held in cases related to those industries, like energy and construction, where arbitration proceedings are generally more complex (both technically and factually), often relying on numerous fact and expert witnesses to establish the facts of the case.

The survey results show, however, that it is *not* possible to draw such inverse relationship between remote hearings and those industries.

C. Remote Hearings vs. Physical (and Hybrid) Hearings: Party Objections and Arbitrators' Response

Another aspect of the arbitral institutions' experience with remote hearings that we sought to investigate was any observations they could offer on the dynamics between the parties and the arbitral tribunal regarding the core legal question that lies at the basis of this research project, i.e., whether a right to a physical hearing exists in international arbitration.

It should be noted at the outset that, of the jurisdictions where surveyed arbitral institutions are located, all but Rwanda and Saudi Arabia were covered in the

jurisdiction-specific survey that was conducted as the centerpiece of this research project.[50]

Drawing from the results of that survey, it appears that in none of these jurisdictions is a right to a physical hearing expressly provided for, nor can it be inferred. As to Sweden, although the national reporters take the position that such right must be inferred, the majority view is reportedly in the opposite direction.[51]

Keeping this in mind, we inquired with surveyed arbitral institutions – to the extent they have insight into these issues – what was the approach of arbitral tribunals facing party objections to holding remote hearings in cases they were administering, or had administered since 1 March 2020.

In particular, we asked them the following question:

50. The seventy-eight national reports that were collected in the ICCA "Does a Right to a Physical Hearing Exist in International Arbitration?" project are available on the ICCA website at <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration> (last accessed 16 November 2021). *See* Lucy MARTINEZ and Jay TSENG, "National Report Australia" in ICCA *Does a Right to a Physical Hearing Exist in International Arbitration?* (henceforth *Does a Right to a Physical Hearing Exist?*); Sarah MCKENZIE, "National Report South Africa" in *Does a Right to a Physical Hearing Exist?*; Giacomo ROJAS ELGUETA and Benedetta MAURO, "National Report Italy" in *Does a Right to a Physical Hearing Exist?*; Rafael F. ALVES, "National Report Brazil" in *Does a Right to a Physical Hearing Exist?*; Sally EL SAWAH and Dalia HUSSEIN, "National Report Egypt" in *Does a Right to a Physical Hearing Exist?*; James ROGERS and Annie BIRCH, "National Report Hong Kong" in *Does a Right to a Physical Hearing Exist?*; James HOSKING, Yasmine LAHLOU and Marcel ENGHOLM CARDOSO, "National Report USA" in *Does a Right to a Physical Hearing Exist?*; Angeline WELSH and Akash SONECHA, "National Report England and Wales" in *Does a Right to a Physical Hearing Exist?*; Ylli DAUTAJ and Per MAGNUSSON, "National Report Sweden" in *Does a Right to a Physical Hearing Exist?*.

51. *See* DAUTAJ and MAGNUSSON, "National Report Sweden" in *Does a Right to a Physical Hearing Exist?*, p. 2 ff. and Kristoffer LÖF, "Addendum" in DAUTAJ and MAGNUSSON, "National Report Sweden" in *Does a Right to a Physical Hearing Exist?*, p. 17 ff. SCC has said to us: "There is obviously an ongoing discussion on the legal question […] The vast majority of practitioners are of the opinion that [ordering a remote hearing over the objection of one party] is in line with Swedish law". In this regard, *see* the report of the SCC seminar "Online Hearings From a Swedish Perspective" in V. HRISTOVA and M. ROBACH, "Legal and Practical Aspects", fn. 26 above. A recording of the event (in Swedish) is available at <https://vimeo.com/416363117> (last accessed 16 November 2021).

> "Between 1 March 2020 and the End Date, in how many cases did the tribunal order a remote hearing:
>
> a. Over one side's objection **[number]**
> b. Over both sides' objections **[number]**".

As to the question under letter (a), despite the survey results mentioned above confirming the arbitral tribunal's procedural discretion to order a remote hearing, some of the institutions that answered this question (AFSA, CAM and KIAC) reported no cases where a party objection to holding a remote hearing was overruled by the arbitral tribunal.

CAM indeed reported that in six cases, following one party's objection, the arbitral tribunal refrained from ordering a remote hearing, and the hearing was held physically, instead.

On the other hand, two of the twenty-two remote hearings reported by HKIAC, and five of the twenty-three remote hearings reported by SCC, [52] were conducted over the objection of one party.

Interestingly, one SCC award has been challenged on grounds related to the remote hearing. With a decision of 30 June 2022, the Svea Court of Appeal ruled that the right to an oral hearing under Sect. 24 of the Swedish Arbitration Act is technology neutral and allows for remote hearings.[53]

Equally, CAM-CCBC reported five cases where the arbitral tribunal ordered a remote hearing over one party's objection, although out of a much higher number of remote hearings than both HKIAC and SCC (i.e., 186 remote hearings).

Also in this regard, CRCICA noted, first, that party objections to holding remote hearings followed a decreasing trend from the beginning of the pandemic. Initially, parties were more inclined to postpone hearings until it would become possible to hold them physically, but the institution witnessed fewer objections at the moment of answering our survey (July 2021).

Second, CRCICA stressed that in Egypt remote hearings are certainly not questionable *per se*, as it is confirmed by the ongoing digitalization of the Egyptian judiciary system.

Therefore, it noted that arbitral tribunals generally exercise their discretion and decide over the hearing modality depending on the reasons for the objection. For instance, they would not force a party to hold a remote hearing if the reason for objecting thereto is that it lacks the technical capabilities necessary to ensure equality between the parties.

Third, CRCICA mentioned that arbitral tribunals have felt more confident in ordering a remote hearing over a party objection (to the extent that they do not consider

52. SCC, "SCC Virtual Hearing Survey", fn. 5 above, p. 11.
53. *See* Giacomo ROJAS ELGUETA, James HOSKING and Yasmine LAHLOU, "General Report" in this Volume, pp. 16-17.

it particularly well-founded) since the Court of Cassation rendered an arbitration-related judgment that was widely read as confirming that remote hearings are acceptable in Egypt.[54]

Finally, from a different perspective, CAM-CCBC has reported a case where the arbitral tribunal ordered a *hybrid* hearing despite one party's objection to physical gatherings.

As to the question under letter (b), all institutions reported that there were no cases where an arbitral tribunal ordered a remote hearing where both parties objected.

IV. The Way Forward

As this chapter is being drafted, we live in a post-vaccine world, where – despite the Covid crisis being far from at an end – restrictions on physical gatherings are being lifted and international travel is becoming possible again.

In other words, we are starting to live in the post-pandemic world that the arbitral community has tried to imagine – and has been preparing for – for months.

As a matter of fact, arbitral institutions do not consider the innovations and investments they put in place since the inception of the pandemic, and described in section II.B above, as a temporary remedy, but rather as a business model that is here to stay. As CAM, CAM-CCBC, CRCICA, HKIAC and KIAC respectively told us:

> "The institution will continue along these lines in the post-pandemic period" (CAM).
>
> "Considering the positive experience with online hearings and high-grade feedback from our users, CAM-CCBC will keep providing adequate tools for appropriate case management and efficient conflict resolution. In conclusion, it is within CAM-CCBC's expectations to continue offering multiple options for hearing setups".

54. Court of cassation, Com. and Eco., Appeal no. 18309/JY89, 27 October 2020, unofficial English translation available at <http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2020/12/Informal-English-Translation-of-the-Egyptian-Court-of-Cassation-Judgment-of-27-October-2020.pdf> (last accessed 16 November 2021). *See* M. HAFEZ, "Remote Hearings", fn. 19 above, p. 43; EL SAWAH and HUSSEIN, "National Report Egypt" in *Does a Right to a Physical Hearing Exist?*, p. 6 f. *See also* Mohamed S. ABDEL WAHAB, "The Egyptian Court of Cassation Sets Standards and Affirms Arbitration-Friendly Principles and Trends in a Ground-Breaking Judgment", Kluwer Arb. Blog (22 December 2020) at <http://arbitrationblog.kluwerarbitration.com/2020/12/22/the-egyptian-court-of-cassation-sets-standards-and-affirms-arbitration-friendly-principles-and-trends-in-a-ground-breaking-judgment/> (last accessed 16 November 2021).

> "We will continue to maintain these initiatives after the pandemic: it increases efficiency of the proceedings, saves cost and time, and encourages geographical diversity in appointments" (CRCICA).
>
> "HKIAC's investment in the above areas indicates its intention to maintain its virtual and hybrid hearing offerings past the pandemic. HKIAC's experience with virtual hearings has shown that even when physical hearings are possible, virtual and hybrid hearings are seriously considered as potential alternatives, particularly in procedural or interlocutory matters".
>
> "Our goal is to make every way possible for the parties to have a smooth and safe hearing, which is why we will maintain the remote hearings, as it has been shown that hearings can be conducted safely, it is cost effective and quick" (KIAC).

As a conclusion of our survey, we asked arbitral institutions to share their sentiment on what will be the future of remote hearings once the pandemic is over.

In this regard, CAM, CRCICA and SCCA respectively told us:

> "We do not believe remote hearings will remain prevalent, although they will have a significantly higher incidence than in the pre-pandemic period" (CAM).
>
> "It is not likely that remote hearings become the norm, but it should become the norm for parties and arbitrator to consider remote hearings" (CRCICA).[55]
>
> "While we see more complex arbitrations with heavy reliance on oral evidence slowly gravitating back to the old normal, we anticipate entire caseloads to stay fully remote […]" (SCCA).

In other words, although (quoting LCIA) "there will always be circumstances under which parties or Tribunals prefer to have in-person hearings", all institutions agree that remote hearings have added to the procedural toolbox of international arbitration and that remote hearings, in the words of SCCA, "will always be offered".

55. *See* M. HAFEZ, "Remote Hearings", fn. 19 above, p. 46.