“Virtual” Dispute Resolution in International Arbitration

Mapping Its Advantages and Main Caveats in the Face of COVID-19

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1 Introduction

Before the COVID-19 pandemic, international arbitration embarked on the reform of the rules dealing with remote arbitration prompting a new wave of procedural regulations on the use of telematic means for the conduct of hearings and taking of evidence. As part of this trend, for instance, the German Arbitration Institute (DIS) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) revised their respective rules. The COVID-19 pandemic acted as a major disruptor by bringing in significant effects on online dispute resolution. The impact of the pandemic has been significant on both substantial and procedural rules leading to adjustments. The panoply of rules emerging in the various arbitral setting poses several important questions.

The paper aims at throwing light on COVID-19-related effects on international arbitration rules by examining the delicate balance between competing priorities and the observance of legal principles (both of substantive and procedural nature). Even though e-arbitration is a major component of online dispute resolution (‘ODR’), there are other processes in which parties can solve any dispute arising out of their contractual relationship online. Before the COVID-19 pandemic, e-arbitration was mainly used for the resolution of Business to Business (‘B2B’) cross-border e-commerce disputes, and only partly relied upon for the settlement of traditional cross-border commercial disputes.

The analysis proceeds in four parts. Firstly, it addresses the question of legitimacy and authority of norms providing for online arbitration. Although many arbitration rules already referred to virtual hearings, some of the more recent

1 This project was funded through an SNF Grant aimed at studying the impacts of COVID-19 on dispute resolution and international trade law. Previous versions of this paper were presented at the 7th Kuwait Law School Conference, “Digital revolution and its impact on investment dispute settlement” in 2020 and at the University of Lausanne in October 2021.
provisions were adopted as “technical notes” or “protocols” as emergency solutions. Their continuity in time might be subject to confirmation once the pandemic effects will be lessened. Secondly, the article turns the attention to the nature of the process and the different roles played by the parties and potential stakeholders. For those cases in which the arbitral agreement stipulated a specific “place of arbitration”, the shift to a virtual environment could be considered detrimental for the parties’ rights. This entails looking at these provisions through the lens of the due process of law principle and further examining the scope of the arbitrators’ mandate. Thirdly, the article considers online dispute resolution’s main advantages and drawbacks. Whereas online arbitration presents advantages in terms of cost efficiency, it may hinder transparency and the enjoyment of third party’s rights, a rather recent achievement in international arbitration. This requires gearing new ways in which transparency could be articulated in a virtual environment. Fourthly, confidentiality and security concerns are examined. Although cyber security protocols and procedural orders dealing with the organization of virtual hearings attempt to avoid this, it might be difficult to rule out all risks in a real context. Finally, the paper advocates for a holistic approach to “virtual” dispute resolution, acknowledging the various interests at stake.

2 Legitimacy and Authority of the Emerging Online Arbitration Provisions: Is There a Right to Physical Hearings?

As the global pandemic unfolded, unprecedented measures adopted by governments across the globe to control the spread of the pandemic caused by novel coronavirus disease (COVID-19) led to an increase in the use of online technologies to manage both judicial and arbitral proceedings. This “new normal” pervaded different areas of the legal profession and ADR proceedings were no exception. The pandemic caused first disruption and then, adaptation to disruption. Even though the use of online dispute resolution (ODR) methods was widespread before the beginning of the COVID-19 pandemic, the restrictions imposed accelerated the digitalization of arbitral proceedings.

Portrayed as a “turning point”, the COVID-19 pandemic prompted contrasting and conflicting views on the use of virtual means for international dispute settlement, particularly concerning arbitration.

At first glance, international arbitration might appear as a sector which would have been at the forefront of the use of new technologies. Parties tend to be located in different countries around the world and there was a somehow widespread use of the video-technology for some parts of the arbitral
proceedings. Beyond the Case Management Conferences, however, the use of technology was less common for hearings. The prevailing tradition of in-person hearings, coupled with the notion of a right to a physical hearing, was regarded as a core element of “due process of law” or right to a fair trial.

Different concerns were raised as the COVID-19 pandemic was unfolding. At the beginning, videoconference hearings were introduced as emergency measures across different arbitral venues. Issues such as cybersecurity, effective conduct of virtual cross-examination, confidentiality, and potential breaches of due process were common in different jurisdictions. In an effort to efficiently face the challenge, arbitral institutions updated their rules while publishing guidelines and guidance to deal with these concerns.

2.1 The Legal Nature of the Norms Regulating “Online Arbitration”

Clearly, there is no “one-size-fits all” stance when it comes to online arbitration, as the approaches taken to deal with the disruption caused by the COVID-19 pandemic vary across arbitral institutions and in national settings. In terms of legitimacy and authority of these provisions, while many arbitration rules already referred to virtual hearings, some of the more recent provisions were adopted in the shape of “technical notes” or “protocols” more as emergency solutions rather than as new rules. Some of these protocols address practical problems faced at remote hearings and built-in safeguards for the appropriate conduct of the hearings (See Table 3.1). Thus, in the former case, the continuity of the rules in time might be subject to confirmation once the pandemic effects will be lessened.

One of the central questions posed is what type of proceedings can be considered as online or “e-arbitration”. Strictu sensu, in e-arbitration the arbitration agreement is concluded, and the entire arbitral process is conducted online. Many computer software programs had already enabled multiple parties to participate in arbitral proceedings before the COVID-19 pandemic started. The question posed by the pandemic was whether the entire arbitral process could be held online.

Based on the existing rules, a safe assumption one can make is that the different stages of the arbitral proceedings may take place remotely if needed or decided by the parties or the arbitral tribunal. The controversial question arises when it comes to the main hearing. Hence, the crucial issue in this regard is what constitutes a “hearing”? UNCITRAL rule 17(3) states if any party request to hearing, there will be a hearing.

Clearly, wherever both parties to the arbitration consent to remote arbitration no legal question is posed. In the opposite scenario, however, if the
arbitral tribunal would like to proceed with the virtual hearing it should adequately balance the rights of the parties.

2.2 The “Right” to a Physical Hearing

Another issue that was at the center of the debates was the existence of a right to a physical hearing as such and if, in the event of an online arbitration, that right was at risk. While the pandemic emphasized the need for a more widespread use of new technologies in arbitration, it brought questions about the legitimacy of the remote procedures and online proceedings.

The right to a hearing in international arbitration has been extensively analyzed in the literature by scholars such as Scherer and Born. The so-called right to a physical hearing is rooted in the right to be heard and coupled with equal treatment, which is, in turn, rooted in the human right to a fair trial.

In response to the increasing controversy generated by the remote arbitration procedures that were conducted during the COVID-19 pandemic, the International Council for Commercial Arbitration (ICCA) launched a project comprising a multitude of jurisdictions around the globe. This project unveiled some differences between Civil and Common Law jurisdictions in terms of written and oral proceedings, without clearly identifying a divide between the different systems. The practice of international arbitration tends to focus on the physical hearing rather than on-screen proceedings. The opportunity for the parties to examine the evidence and cross-examine the witnesses by the other party is the core of adversarial proceedings.

Other issues raised during the pandemic are more related to the questions of oral advocacy and the right to directly address the witnesses. This correlates to the right to be heard and the right to receive proper notice. In turn, the right to be heard orally could be differentiated from the right to be heard in


writing, which is a common procedural principle. It stems from the right to receive equal treatment, which is a widespread right across different jurisdictions. Online arbitration may raise concerns about anything that can limit the parties’ freedom to design their own arbitration procedure.

The right to a hearing or to a fair trial is also related to the recognition and enforcement of arbitral awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The New York Convention") stipulates the non recognition of an award if the party facing recognition of the award "was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case".5

In terms of the UNCITRAL Model Law, articles 18 and 24 refer to equal treatment and the conduct of hearings during the arbitral procedure. Article 18 deals with the equal treatment of parties.6 The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Though, in the 2010 amended version, this was narrowed to state that each party should be given reasonable opportunity to present its case at an appropriate stage of the proceeding. Despite apparent differences, the divide between Civil Law and Common Law traditions dissipates when it comes to online arbitration.7

The determination of whether a hearing could take place through virtual means entails a case-by-case analysis. Article 24 states that "(1) 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. (2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents. (3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report

or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties”.

Even before the pandemic started, the Prague rules and the LCIA rules provided guidance for online hearings. The Prague rules contemplate the resolution of the dispute on a documents only basis, if it is appropriate, and to promote cost-efficiency. The rules also provide for online arbitration, in the following terms: “if one of the parties requests a hearing or the arbitral tribunal itself finds it appropriate, the parties and the arbitral tribunal shall seek to organize the hearing in the most cost-efficient manner possible, including by limiting the duration of the hearing and using video, electronic or telephone communication to avoid unnecessary travel costs for arbitrators, parties and other participants”.

The controversy arises when holding a virtual hearing even against the objection of a party. It should be noted that there is consensus about the legal power of arbitrators under their mandate to order a virtual hearing, as there are no national laws or institutional rules which either prohibit or impose the use of virtual hearings. In the face of silence of the norms, arbitral tribunals would follow some general principles. Ultimately, the arbitral tribunal may decide to have an oral hearing or to have proceedings on the documents only.

3 Nature of the Online Dispute Resolution Processes, Parties’ Roles, and Applicable Principles

Turning now the attention to the nature of the process and the different roles performed by the parties to the arbitration proceedings, in online arbitration the parties display similar roles as in traditional arbitration. The arbitrator’s mandate includes the power to organise the hearing and decide on the manner

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10 The “Prague Rules” were adopted on December 14, 2018, and are available for parties to adopt in their arbitration proceedings. The Rules were drafted by a Working Group formed of representatives from mostly civil law based jurisdictions. The rules may be used alongside any institutional or ad hoc rules that might apply.
12 Id. at Art. 8.2.
in which the arbitral proceedings will be conducted. In the face of the COVID-19 pandemic, many courts suspended court proceedings. Due to court closures and proceeding postponements, online arbitration was the preferred method. Key issues and considerations regarding virtual arbitration are mainly related to the fairness of arbitral proceedings so conducted.

The form applicable to online arbitral proceedings is not as strict when compared to traditional arbitration. In an arbitration held completely online, as seen before, different stages and elements of the arbitral proceedings take place online. Some commentators argue that, in some cases, such as in e-commerce the form is even less relevant. Hence, if the electronic document is sufficiently precise, setting up clear elements that may infer online dispute resolution, this can be used in the future to hold a remote arbitration.

Various Civil Law jurisdictions, such as Germany, France, Austria, Slovenia, Greece, The Netherlands, Ukraine, and Switzerland have expanded the form requirement as regulated by the New York Convention to also include electronic communications such as e-mail notifications. This broad consideration of “form” has led to case law about the interpretation of “any other means of communication” as in Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA, decided by the Swiss Supreme Court.

In that case, Article 11 (2) of the New York Convention was interpreted broadly, to also comprise within its wording the “exchange of letters or telegrams”. In addition, the Court found that the form requirement was also met, as this was equivalent to the form stipulated by Article 178(1) of the Swiss Code on Private International Law.

Emphasis has been placed on the arbitrators' mandate; commentators agree on the arbitral tribunal's power to decide whether a procedure should take place remotely or on documents if they deem it appropriate. This decision ought to be made as a balancing exercise weighing, on one hand, the duty (and the correlative power) to conduct the proceedings efficiently and, on the other hand, the parties' right to be heard and to equality. When properly dealt with and the rights are respected in a virtual hearing, all parties would have been heard online.

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13 Amro, supra note 7.
15 Id.
16 Id.
In certain jurisdictions, applicable national laws grant parties a right to a hearing, as the Swedish Arbitration Act (SAA), however, this does not translate, *strictu sensu*, into a right to a physical hearing.

With regard to the question of location (place and venue to conduct the hearing), the law of the arbitral seat and the institutional procedural rules applicable to arbitration may refer to the right to a hearing in a less stringent fashion. A common rule found across institutional arbitration rules stipulates that if any party to an arbitration requests a hearing, the arbitral tribunal should hold a hearing. For those cases in which the arbitral agreement stipulated a specific “place of arbitration” the shift to a virtual environment could be considered detrimental for the parties’ rights. This entails looking at these provisions through the lens of the due process of law principle and further examining the scope of the arbitrators’ mandate.

Before the pandemic, it was usual for hearings to be held remotely by tele-conferencing. As the adaption to disruption became the new normal, arbitrators would include the virtual setting to conduct international arbitrations. Arbitrators’ powers depend on the various stages of the arbitral proceedings.

Exploring more closely the advantages and paradoxes of online international arbitration, one should examine the arbitrator’s power vis-à-vis the parties’ rights. From a certain viewpoint, it seems as if the question at issue would be whether the arbitrator’s powers might be in contradiction with the parties’ rights to fairly conducted arbitral proceedings.

What transpires when examining the different rules is that there is no one-size-fits-all approach in terms of ODR. Different levels of automation are observed across the board. Contrary to the impression that ODR may offer the possibility of an easy “click and settle”, there are several layers of complexity. There is a wide range of possibilities according to different types of norms on online arbitration.

Clauses may stipulate the number of arbitrators required to decide a case. The legacy of emerging rules and protocols during the pandemic also relates to properly identifying the applicable international procedural or evidence principles.

Going forward, what is interesting is the contribution to more substantive principles about international online dispute settlement or resolution (IODR). IODR has a broader scope, as it encompasses, negotiation and mediation as well. It has grown exponentially during the pandemic. If it is possible to draw a comparison between arbitration and mediation, in the case of mediation the
disruption caused by the pandemic has had a bigger impact because of the nature of the method. Space precludes a more detailed analysis.

Distinctive features of the rules present different nuances. The design of effective mechanisms to regulate the resolution of disputes online should take into consideration these differences. Positive externalities as incentives to broaden the use of online international arbitration include cutting down the greenhouse gas emissions. These positive environmental externalities are highlighted by the different protocols on greener arbitrations.17

Overall, the advantages offset the downsides of online international arbitration. There are questions like data protection and cyber-security that may pose a challenge to the confidentiality of the proceedings, the privacy of the parties and the protection of industrial secrets. The leeway different rules allow to the parties in order to choose the type of dispute resolution rules varies, an example of this is the 2021 Arbitration Rules of the Danish Institute for Arbitration.18

Confidentiality concerns have been at the heart of the debates, as new technologies also raise the question of cyber security breaches. Some ODR protocols provide for solutions to minimize the risks of cybersecurity breaches. Others provide a range of cyber-arbitration options along with other dispute resolution methods, including negotiation and mediation.

There has been an exponential increase in the number of ODR platforms in recent years. The variety of available platforms reveals different levels of sophistication. These platforms give technological leverage to handle uploads and downloads, granting a certain level of protection in the face of cyber threats. Different platforms align with rules and international standards to ensure cybersecurity, such as the 2020 Cybersecurity Protocol for International Arbitration.19 Platforms embody stricter measures to ensure cybersecurity in line with international standards (ISO).

Given the relevance of the principle of confidentiality in international arbitration, measures like multi-factor authentication to accessing sensitive information have become crucial. The 2020 Protocol in Principles 7 (b) and (c) refer to security measures in international arbitration that should contemplate

“asset management”, “access controls”, “encryption of data”, and “information security incident management”.

As with traditional international arbitration, the question of fairness remained central in the debates about the convenience of online arbitration. Generally, online arbitration offers greater flexibility vis-à-vis traditional international arbitration. To ensure that arbitration takes place in an appropriate setting that offers the guarantees of stability, transparency, and communication, parties should follow the protocols and the applicable norms.

Other issues raised with regard to ODR, concern how to catch up with the ever-evolving technology and adjust the arbitral procedure to the virtual/online environment. In the post-pandemic context, for some cases, face-to-face arbitration should be seen still as a priority. Online arbitration, would offer the benefits of more agile and flexible methods, which represents an advantage when dealing with international and very complex cases.

4 Exploring Advantages and Disadvantages of Virtual Arbitration beyond the Pandemic

In view of the rules adopted during the pandemic, the question is how such rules will evolve in a post-pandemic context. At the same time, different logistics must be in place to guarantee an efficient conduct of the arbitration that respects the parties’ rights. In terms of cost efficiency, online dispute resolution presents its clear advantages over traditional arbitration as it entails cost-efficiency in terms of travel and organization. The ability to proceed remotely to hold arbitration hearings has been made clear during the COVID-19 pandemic. Arbitral procedures could be efficiently managed in a virtual environment through the various available online dispute resolution platforms. As a general matter, remote arbitration could take place through different paths. Parties and their legal teams can be located in the same venue

20 Id.
and then communicate remotely with the other party and the respective legal team.

However, online arbitration may hinder transparency and the enjoyment of the so-called third party’s rights, a rather recent achievement in international arbitration. Prior to the COVID-19 pandemic, many arbitral institutions modified their rules to allow for more transparency by allowing third parties to make submissions, to access the documents and to attend the hearings in some cases. Remote arbitration would require creating new ways in which transparency could be articulated in a virtual environment. Another potential downside of remote arbitration relates to the issue of confidentiality, as several security concerns were voiced particularly regarding issues such as electronic data breaches, or cyberattacks that could affect the security and privacy of the parties, industrial secrets, and case information. There are some precedents already available before the pandemic whereas others were adopted during the COVID-19 pandemic, like the Cybersecurity Protocol for International Arbitration (2020).23

Setting the scene for a new era in international arbitration, this pandemic reinforced the idea of cutting costs, increasing the efficiency of the arbitral proceedings, and, also, promoting environmental considerations. The Protocols for Greener Arbitrations, include the guidance on hearing venues: “provides arbitration facilities and hearing centers and individuals therein with concrete steps to minimize their environmental impact as regards their daily operating procedures or as related to a particular matter”.24

To illustrate the impact of rules adopted during the COVID-19 pandemic, three different sets of rules are examined: the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (adopted on 19 April 2020) (hereinafter referred to as “ICC Guidance Note”), HKIAC Guidelines for Virtual Hearings (issued on 14 May 2020) (hereinafter referred to as “HKIAC Guidelines”) and Seoul Protocol on Video Conference in International Arbitration (released on 18 March 2020)25 (hereinafter referred to as “Seoul Protocol”) were drafted to assist tribunals (See Table 3.1).26

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23 The Protocol was developed jointly by representatives of the International Council for Commercial Arbitration, the New York City Bar Association and Alternatives’ publisher and the International Institute for Conflict Prevention & Resolution.
26 The Seoul Protocol is a joint-project by the Korea Commercial Arbitration Board (“KCAB”) and the Seoul International Dispute Resolution Center (“Seoul IDRC”).
### TABLE 3.1  Comparison between some of the rules adopted during the COVID-19 pandemic

<table>
<thead>
<tr>
<th>Rules</th>
<th>ICC Guidance Note</th>
<th>HKIAC Guidelines</th>
<th>Seoul Protocol</th>
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<tbody>
<tr>
<td><strong>Guidance for virtual hearings</strong></td>
<td>Basic rules</td>
<td>Very detailed rules</td>
<td>Guidelines for best practice</td>
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<tr>
<td>Efficiency</td>
<td>Parties to consider certain measures that promote efficiency during arbitral proceedings.</td>
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<td>There is no specific provision on efficiency. Parties should test all video conferencing equipment and that adequate backup equipment is available for use.</td>
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<td>Submissions</td>
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<tr>
<td>Logistics and venue</td>
<td>The ICC Guidance Note provides no guidance regarding venue.</td>
<td>HKIAC Guidelines do not comprise any rules about logistics and venue.</td>
<td>The Seoul Protocol contains very detailed rules, covering minimum standards for venues where the video conference take place, referring to on-call IT technicians, safeguarded cross-border connections to prevent unlawful interception by third parties and security of video conference participants. Art. 5.1 to 5.6, address various points from audio output device to communication lines and screen width.</td>
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<tr>
<td>Hearings</td>
<td>The Guidance Note includes the use of multi-screens, and synchronous communications between witnesses and parties are permissible in chat rooms or through concealed channels of communication. As an innovative feature, the Guidance includes provisions on connection, time and duration of availability.</td>
<td>The HKIAC Guidelines briefly mention remote witness and expert hearings. The guidelines include arranging a hearing invigilator to attend at the same place as the witness. As another special feature, the guidelines provide for a 360-degree viewing of the room by video at the beginning of each session of the virtual hearing.</td>
<td>The Seoul Protocol addresses witness examination hearings in Art. 1. Under the Protocol the tribunal holds considerable discretion to decide to terminate the witness examination via video conferencing, in cases when it deems the video conference unsatisfactory making it unfair for either party to continue.</td>
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Security is paramount and an update on how security can be maintained throughout the entire hearing is required.

Witness statements should be given, including “a reasonable part of the interior of the room in which the Witness is located be shown on screen, while retaining sufficient proximity to clearly depict the Witness”.

**Source:** Author’s own elaboration based on rule and Kluwer International Arbitration
Drivers or factors for online case management in arbitration are, amongst others, cost reduction, increase of the efficiency, and speedy solutions. Each factor should be properly assessed to determine relevance, depending on the circumstances of the particular case. The relevance and weight of these factors vary across jurisdictions, depending on the approach taken by the respective procedural law applicable to the case. It is crucial for arbitral participants to adopt adequate online case management tools for processing of data during the proceedings.

Efficiency and effectiveness are considered key factors when assessing the convenience of the virtual setting and tools in international arbitration. Before the pandemic, there were already efforts to shift towards the use of digital tools in international arbitration to increase efficiency and effectiveness of the arbitral proceedings. Platforms can help to facilitate collaboration by sharing documents in a secure manner. In the report compiled by the aforementioned task force, it is also noted that platforms could significantly reduce the number of asynchronous communications (such as email or other data storage facilities) over the course of the proceedings.27

With regard to the convenience of having an online repository of case data in the handling of proceedings, this is seen as a way of avoiding duplication of tasks and enhancing consistency across the board. More advanced platforms include other possibilities which enable arbitration stakeholders to add up other tasks going beyond upload, download, and the storage of documents.

A particular question concerning the use of platforms is with respect to other functionalities offered by them, such as quality, control, and appropriate referencing. These new platforms could assist parties, tribunals, and institutions in establishing efficient workflows, providing better communication channels, running analytics over case data, identifying and handling particular types of data (e.g. personal data) and managing pleadings, evidence, hearing bundles, and awards. In this manner, parties may be in a better position to present their respective cases, particularly, in complex disputes that involve high volumes of documentary evidence.28

In other arbitral venues, such as the ICSID, arbitral institutions provide general guidance on services and technology. Although there are no specific rules, there is some general guidance about the proceedings and the benefits of using virtual hearings in ICSID administered arbitrations, conciliations, mediations,

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27 ICCA Report, supra note 4, at point 20.
28 Id. at point 21.
and fact-finding proceedings. These virtual solutions involve first-class security by using end-to-end encryption, following the World Bank Group’s security and risk requirements. As an example of best practice, within the ICSID, there is a service for court reporting and interpretation: a virtual court stenographer provides a real-time transcript of the proceeding, visible to all participants on the video-conference and simultaneous interpretation in multiple languages.

At the heart of all these initiatives, the controversial question that is posed is whether a right to a physical hearing exists. Seemingly, there is not such an established right that is universally recognized across all jurisdictions. Some studies have unveiled how legal issues arose in different jurisdictions due to the increased use of remote arbitral hearings triggered by the COVID-19 pandemic. The project conducted in the framework of the ICCA and the resulting report concluded that, in the majority of jurisdictions, there is no such right.

According to the reports, the right to a physical hearing does not seem to be included in jurisdictions’ arbitration laws. The study demonstrated that many provisions give arbitral tribunals broad procedural discretion to decide how hearings are conducted and provisions in the arbitration rules of the most relevant institutions in those jurisdictions expressly allowing remote hearings. Based on this analysis, most legislations foresee the possibility for tribunals to order virtual hearings, documents-only arbitration being quite exceptional.

Disadvantages may depend on advocacy style and the adaptation of cross-examination to the new virtual arbitral environment. Another drawback relates to risks of technological failures and cybersecurity issues. Closely related to this there is the question of confidentiality of the arbitral proceedings, which covers and protects the hearings themselves, related-events, and access to any data (documents, videos, and transcripts). Protocols guarantee that data can be properly secured and safeguarded. Nevertheless, some procedural fairness implications remain, such as when a party opposes a virtual hearing.

Whether this can be implied from the lex arbitri, clear separation of the rules of legal procedure which may entail such a right to a physical hearing. There is almost a universal recognition that a party, who alleges it has a right

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30 In September 2020, Giacomo Rojas Elgueta, James Hosking, and Yasmine Lahlou, in collaboration with ICCA, launched the research project “Does a Right to a Physical Hearing Exist in International Arbitration?,” supra note 4.

31 See the reports per jurisdiction in “Does a Right to a Physical Hearing Exist in International Arbitration?,” supra note 4.
to a physical hearing must object during the proceedings to its violation or be deemed to have waived that right to seek the setting-aside or non-recognition of the award. As to the question of whether a right to a physical hearing is expressly recognized or, if it can be inferred from the *lex arbitri* (or other rules), the vast majority of the reports from different jurisdictions did not find that such a right exists. The surveys did not yield an express provision prohibiting the conduct of remote hearings, subject to the fulfillment of certain fundamental procedural guarantees.

Some jurisdictions recognize the right of the party to request an oral hearing, but whether such oral hearing translates to the right to a physical hearing is excluded in many Model Law jurisdictions, like Argentina, Croatia, Iran, Ireland, and Jamaica. In a minority of jurisdictions, of which Zimbabwe is an example, the right to an oral hearing may arguably lead to a right to a physical hearing.

Ultimately, it is the arbitrator’s power to decide on the hearing and the proceedings in the way he or she deems appropriate, so long as the parties are allowed to present their case. From the arbitrator’s perspective, there are two balancing considerations: one is due process which requires a case-by-case and fact-specific logistical inquiry of the party’s ability to attend a hearing remotely and effectively present its case.

There are also considerations to be made about access to justice and the duty to decide the disputes within a reasonable time as set out in Article 6 of the European Convention of Human Rights. Whenever the parties have agreed to a remote hearing, can the arbitral tribunal ignore or override that agreement if they had agreed before the pandemic started? In some cases this may lead to the setting aside of the award like in Bangladesh, Benin, Dominican Republic and Finland. The requirement for the setting aside is qualified as it requires that the violation of the parties’ agreement has had a material impact on the outcome of the case or caused substantial injustice.

Another controversial issue is whether the parties’ agreement can be superseded. In many jurisdictions, the parties’ agreement can be superseded on the grounds of fairness or efficiency, if holding a physical hearing would no longer be possible due to COVID-19 pandemic restrictions, as in Bulgaria, Bolivia, Hong Kong or Mauritius. Or, for example, if respecting the parties’ agreement would delay the conclusion of the arbitration beyond the statutory limit, as in the UAE or violate the arbitrator’s duty to conduct the proceedings without any

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33 *Id.*
delays. This seems to be the general trend based on the results of the survey reports about the right to a physical hearing.

As an emerging trend, after the pandemic restrictions have been lifted, potentially, States and governments may attempt to further define a physical hearing is. In terms of governments legislating on the basis of this trend and States’ behavior while considering how to amend legislation in this regard, most governments have been dealing with this pandemic and no attention has been paid to either amending the *lex arbitri* or the rules of civil procedure.

While during the pandemic, some emergency orders have been put in place to deal with the access to justice issues in certain jurisdictions; those orders were adopted in relation to cases that involved the violation of human rights, such as gender-based violence; in other words, in cases in which it was necessary to grant access to justice as a matter of human rights. With regard to commercial disputes in the context of international commercial arbitration, there is no similar urgency related to arbitral proceedings and the right to a fair trial is not intended to be taken literally. In the vein of the right to physical hearings, when the public health emergency will be lessened, it is foreseeable that there will be an amendment to the rules to confirm that there is no violation of the right when hearings are held remotely. Logistically, there have been cases in which the hardware has been provided to counteract the illegitimate or unwise protest by some parties to a remote hearing.

Clearly, there are technological constraints determined by the specific circumstances of the countries, such as the lack of reliable internet connections. Access to a stable connection and frequent power outages may affect the right to a fair trial. Internet access varies considerably amongst countries and regions. According to the World Bank data (2019), internet accessibility and speed varies across regions and countries, whilst 80% of the population has access to the internet in the Americas and 88% in Europe, the percentages are less in Asia (48.8%) and Africa (28%).

### An Emerging New Paradigm or Returning to Business as Usual?

Even before the pandemic, case management hearings could be held online with less resistance from the parties. Evidence-taking hearings were far more
controversial, particularly, in complex cases involving expensive disputes. The COVID-19 pandemic has emphasized the need for more detailed rules on virtual hearings. However, the question consists of whether in a post-pandemic context we will witness a new paradigm or be returning to a business as usual situation. Claims such as those concerning the need for a “greening” of international arbitration (both commercial and investment) are raising awareness and building on pressure to use more sustainable methods and tools in dispute resolution.

In the current scenario, if the arbitral tribunal so wishes, the hearings may proceed remotely. Practical and logistical issues may arise as discussed in the previous sections. Lack of consensus may happen if any of the parties does not want to conduct the hearings in person. Valid arguments can be posed by the claimant (e.g. need to present the case with in-person examination of evidence) or by the respondent (similarly, when the party objects to virtual hearings as an impairment to their right of defense). Those cases may be tackled and solved by setting a hybrid type of proceeding combining both methods. More complicated are those disputes in which both parties oppose the tribunal’s decision or invitation for virtual proceedings. In these controversial cases, if the arbitral tribunal decides to go ahead, this can lead to recognition or setting aside proceedings against the award.

Although cyber security protocols and procedural orders dealing with the organization of virtual hearings attempt to avoid and minimize risks, it might be difficult to rule them out. From a more holistic approach to “virtual” dispute resolution as a whole, the various interests at stake should be taken into consideration. As discussed previously, different positions concerning online hearings have demonstrated the need for a more consistent approach to virtual proceedings in a post-pandemic context. It became apparent that a virtual hearing does not necessarily mean that the hearing meets all the requirements under article 18 of the Model Law and Article 5.1 (b) and (d) of the New York Convention, in the sense of equal treatment and full opportunity of presenting the case as well as the right to be heard.

This entails unpacking the right to willingly participate in a virtual hearing and separating it from the right to be heard and equally treated. Insofar as virtual hearings are concerned, the acceptance to conduct the hearing through remote means does not imply the exercise of the right to be heard. The latter can nevertheless be infringed, like in the case of unequal access to the use of technology and accessibility that can have practical implications. In any event, the new “business as usual” scenario with regard to international arbitration may incorporate some elements of remote arbitration and virtual proceedings.

Summing up the arguments, in a non-exhaustive way, in terms of advantages and drawbacks of remote arbitration, several features can be noted.
5.1 **Remote Arbitration, Efficiency, Time and Cost Management**
One of the key questions in international arbitration is how to effectively manage time and costs; e-arbitration offers these benefits, as a clear comparative advantage. In line with green arbitration protocol claims, remote arbitration eliminates the need for the parties to move between countries, hence, reducing travelling and costs. Overall, e-arbitration improves time and costs, offering solutions when it is not possible to convene the parties in one place or the same venue.

5.2 **Flexibility of the Arbitration Rules**
During the COVID-19 pandemic, arbitration proceedings became more flexible and the various arbitral rules adjusted, responding to the challenges posed by the several restrictions imposed by governments. In comparison with rigid court procedures or, even, with traditional arbitration, remote arbitration encourages a more agile resolution of disputes in a less formal manner.

5.3 **Confidentiality and Access to Justice**
In a broad sense, access to justice is facilitated due to the removal of geographical barriers, however, potential obstacles arise from unequal access to connectivity and familiarity with the virtual environment. E-arbitration may bring challenges to the confidentiality due to potential breaches of cybersecurity attacks.

5.4 **Asynchronous Procedures and Streamlined Communication**
Unlike face-to-face discussions, when asynchronous proceedings take place, they offer an opportunity to cool off and revisit the claims and arguments presenting an opportunity to amicably resolve the dispute. Equally, when effectively managed, communication can be facilitated and the overall speed of the proceedings improved.

Remote arbitration still faces various obstacles on different fronts, the lack of face-to-face contact may create difficult communication. Similarly, access to resources and tools as well as access to appropriate literacy, coupled with insufficient confidentiality and secrecy of proceedings, and other barriers may be considered as some of the main critical problems.

5.5 **Consent**
This is a central challenge with respect to remote arbitration. As discussed, although, the arbitral tribunal can exercise its power and decide to conduct the proceedings online, it can meet the resistance of one or both parties. During the COVID-19 pandemic, there were fewer options available but in a relatively
normal context opposition can happen and curtail the possibilities of an e-procedure. Amendments to the arbitration rules could pre-empt these problems from happening.

5.6 **Place of Arbitration**
The choice of the place of arbitration has legal implications and ramifications. The geographical location of the proceedings cannot be determined when they are held completely electronically with the parties in different locations. In principle, it seems difficult to pinpoint the place of the arbitral proceedings unless there is clear agreement between the parties about this.

5.7 **Access to Justice and Transparency Issues**
In accordance with the arbitral tribunal’s powers and the requirements of the parties based on their own convenience, remote arbitration can be accessed anywhere at any time where an internet connexion is available. However, this does not translate into immediate and equal access to a connection. One of the most important drawbacks of video conferencing is the lack of a stable connection. In terms of transparency, third parties with a legitimate interest may see their rights curtailed.

5.8 **Data Storage and Data Protection**
These are two sensitive areas in e-arbitration which are intertwined with the question of confidentiality. Filing problems are also considered when discussing the advantages and disadvantages of remote arbitration. Cyber-attacks are exposing the weaknesses of the e-arbitration system. Some practical solutions exist, such as agreeing on a single IT provider or using a specifically-designed platform such as the ones used for institutional arbitrations (such as those administered by the ICC).\(^{35}\)

6 **Concluding Remarks**

Before and after COVID-19, transnational contracts and investment projects with parties located in different countries prompted the remote resolution of disputes. The dynamics of transnational contracts resulting from COVID-19-related developments are posing new challenges to the international

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“Virtua”l Dispute Resolution in International Arbitration

arbitration system. Cases of force majeure and breach of specific contracts clauses across different areas are emerging, including commercial law and investment law disputes, drawing on relevant case law.

During the COVID-19 pandemic, major international arbitration institutions already began accepting the necessity of virtual hearings in certain situations. Guidelines for virtual hearings were officially announced with the escalation of the COVID-19 pandemic.

In a post-pandemic scenario, it will be quintessential for the correct management of virtual arbitral proceedings that new rules and norms concerning virtual hearings will be adopted. The neutrality of the international arbitral procedures and settings have been put in the spotlight during the COVID-19 pandemic.

Best practice models are looking at ways to effectively conduct arbitral proceedings. Inequality in access to connectivity and tools was heightened during the pandemic. Moving forward, a more streamlined view of international arbitration, that envisions minimizing travel costs and cutting emissions is sorely needed.

The various responses in international arbitration to deal with the disruptions caused by the pandemic have not been uniform. Some sets of rules already existing were fit to address the situation. Rules set up in some institutional frameworks have spelled out criteria in rules and protocols.

For the future of remote arbitration, the focus will be placed on dispute resolution of emerging controversies in light of the obligation to negotiate in good faith, which implies an analysis of the different possible legal avenues to settle the disputes through remote arbitration.

Hybrid or semi-remotely held hearings are less controversial and will take place without much difficulty. The law of the seat will still be relevant to determine the applicable principles to govern the hearing. Applicable arbitral rules would determine if the hearing can be conducted remotely.

Measures to adapt to COVID-19 represented a shift in the conduct of the arbitration. Guidelines, rules and protocols to expedite online procedures are in order. In the context of the pandemic, with all the measures on border closure, essential travel regulations, entry and exit bans, the decisions to conduct the arbitral proceedings online was justified. Ultimately, the arbitral tribunal must conduct a balancing exercise. Debates about what constitutes a virtual hearing have underlined the relevance of clearly defining concepts and terms in light of technology and progress in communications. Once the restrictions are lifted, the legacy of these challenging times will stay. Virtual hearing guidelines, rules and protocols have consolidated good practice across different arbitral venues.