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### ***VIRTUAL ARBITRATION HEARINGS: THE NEW NORMAL?***

*This paper addresses the notion and legal framework for virtual hearings in international arbitration. The authors first examine the existing laws in different jurisdictions and how they tackle the issue both when it comes to litigation and when it comes to arbitration, followed by analyses of various institutional arbitration rules, including recent changes thereof and pertinent case law on the matter. They further examine the general idea of a virtual setting for the hearing against legal and technical objections frequently encountered in practice. In particular, the interplay of technical capabilities and legal standards such as “due process” and the “right to present one’s case” is assessed. Finally, the authors identify possible pathways to replacing the classical in-person hearing with the virtual one and the key legal and practical considerations to be assessed before deciding to proceed with it.*

**Key words:** *Arbitration. – Virtual hearing. – Due process. – Right to be heard. – Party autonomy.*

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## 1. INTRODUCTION

Arthur C. Clarke famously observed “Any sufficiently advanced technology is indistinguishable from magic.” Internet and the “magic” of instantaneous communication is nowadays taken for granted, although the availability of the means and ways to reach anyone, anywhere, anytime could have hardly been foreseen even a couple of decades ago.

Even though law firms were, in general, quick to embrace many productivity-enhancing technologies and the benefits of online collaboration, arbitration and court hearings continued to operate “in person” as a rule. Until recently, internet-enabled virtual hearings were seldom discussed in academic and professional circles or expressly regulated by the legislator, and were conducted in practice only occasionally. This is not surprising. Observation of form and the accompanying formalities is a lawyer’s second nature. Nowhere is it seen better than in a courtroom: justice is dispensed beneath symbols of state power and the procedure conducted pursuant to a myriad of interconnected rules. Likewise, an arbitration hearing, although touted as less formal than litigation, is often a carefully orchestrated exercise of formalities, and to a seasoned practitioner most of them are hardly obtrusive. Rather, stepping into a procedural environment filled with things one knows and expects is a comfortable experience.

The unprecedented tsunami of 2020 lockdowns and travel restrictions affected every industry and profession and threw them out of their “comfort zone”. Many discovered that a lot of their regular working routines could move online. Litigations were affected in a different way across jurisdictions – some courts shut down, some moved online, some continued business under restrictions. The world of international arbitration faced a different set of challenges. With parties and arbitrators usually coming from different and multiple jurisdictions, and with the travel restrictions and epidemiological situations shifting literally on a weekly basis, the system would have faced a complete standstill had it continued to operate “in-(physical) person” only. In response, some arbitration hearings were postponed but a great many moved

online, to a virtual setting.<sup>1</sup> In the process, the tribunals who have organized them had to deal with real and perceived legal and technological challenges, some of which were promptly dealt with by the arbitral institutions.<sup>2</sup>

In order to answer the question whether it is to be expected that virtual hearings will become “the new normal” in arbitration practice, this paper will first address the ways in which virtual hearings, or elements of hearings, can be organized, the general legal framework of virtual hearings or elements of a virtual hearing, both in the context of national domestic legislations (which feed into the overall sentiments with regard to use of technology in dispute resolution) and in the context of rules applicable to international commercial arbitration. Furthermore, the general idea of a virtual setting for hearings will be examined against legal and technical objections frequently encountered in practice. In this context, the interplay of technical capabilities and legal standards (such as “due process” and the “right to present one’s case”) will be assessed. The paper will present an overview not only of the pre-COVID-19 regulatory framework that has served as a background for recent proliferation of the virtual hearings, but also of the recent amendments of institutional arbitration rules that have been made in this regard once the pandemic was well under way. Finally, the authors of this paper have tried to identify possible pathways to replacing the classical in-person hearing with the virtual one and the key legal and practical considerations to be assessed before deciding to proceed with it.

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<sup>1</sup> For example, during the period from 24 February 2020 to 29 June 2020, oral hearings 57 out of 59 arbitration proceedings administered by the Milan Chamber of Arbitration were conducted remotely. *See* Shaughnessy 2020, 36. The demand for virtual hearing services in Seoul and Hong Kong was also subject to significant increase already in the first half of 2020. *See* Wilske 2020, 13.

<sup>2</sup> Most of arbitral institutions enacted special protocols for organizing virtual hearings as early as the first half of 2020. Many of them are available at the VIAC website: <https://www.viac.eu/en/arbitration/general-measures-covid-19>. Many arbitral institutions issued a joint statement calling for efficient conduct of arbitration in the times of pandemic. *See* Arbitration and COVID-19, available at: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>. The ICC also issued the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, available at: <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

## 2. THE NOTION AND SUBTYPES OF VIRTUAL HEARINGS

There are several conceivable ways in which audio and visual technology may be used in the context of the “virtual hearings” conducted online. The terms “virtual”, “online” and “remote” hearings are used here interchangeably, although there are authors who prefer one over the other. It is the authors’ opinion that the listed terms describe the process accurately, either by making reference to a medium through which it is run, or to the physical separation of the actors.<sup>3</sup>

One distinction may be made with regard to the extent to which the actors interact in a physical setting, if at all. At one end would be hearings conducted entirely virtually (remotely), while on the other end would be those that are conducted physically and the remote technology is used to “fill in the gaps” (hybrid hearings), e.g., for examination of witnesses who would otherwise be unavailable due to medical conditions, travel restrictions or other commitments. It is, of course, possible to envisage other sub-types as well, such as having parts of legal teams appear virtually and parts physically, on one or both sides, or one legal team appearing fully virtually, and the opposing team being present physically.<sup>4</sup>

The overarching definition of virtual, i.e., remote hearing can be found in the recently amended IBA Rules on the Taking of Evidence in International Arbitration:

“Remote Hearing’ means 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.”<sup>5</sup>

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<sup>3</sup> Scherer (2020a, 68 et seq.) prefers the notion of “remote hearings” to that of “virtual” because the participants are not virtual and actually do exist, but participate remotely. In our view, the terms “virtual”, “remote” and “online” are interchangeable as each of them refers to a facet of the phenomenon they attempt to describe: “virtual” and “online” to the medium through which they are conducted, and “remote” to the physical separation of the participants.

<sup>4</sup> Scherer (2020a, 68–72) makes distinction between “fully remote” hearings which have no main venue, and “semi-remote” which have one main venue and several remote venues.

<sup>5</sup> 2020 IBA Rules on the Taking of Evidence in International Arbitration, available at: <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>.

Nonetheless, for the purpose of this paper, the issues discussed will be (unless otherwise indicated) examined with regard to the hearings conducted entirely virtually, i.e., with no party and no witness appearing physically before the tribunal, and the tribunal members, in turn, engaging each from their own location. Not only is this design (at its most “virtual”, or atomized) the one that was used the most during the 2020 lockdowns, but it is also the one against which the robustness of the technology and adherence to standards of due process can best be tested.

### **3. LEGAL FRAMEWORK FOR THE VIRTUAL HEARINGS**

#### **3.1. Legal Framework for the Virtual hearings in Litigation**

In-person distribution of justice has been the norm for centuries, if only because until recently there had been no alternative to it. There was no Internet and, when it eventually came into existence, it took some time for it to develop and for adequate hardware and software for the purpose to emerge. Some legislators took note of the technological developments and tried to, more or less gently, nudge court proceedings towards the digital future, but the use of such capacities was relatively sparse and reserved for particular circumstances.<sup>6</sup> For instance, use of videoconferencing in litigation, even over the objection of the parties, was introduced in Germany as early as 2002 (Bert 2020). However, the initial uptake was mostly reserved to hearing testimony of witnesses who would otherwise not be able to travel and give their testimony in the courtroom. While this may be seen as giving rise to potential cross-border conflicts of sovereignty, given that the fact gathering was conducted online and without seeking permission of the sovereign on the territory of which the witness was located,<sup>7</sup> it was not until 2020 that the issue of whether the “right to a hearing” also entailed a guarantee that the hearing will be in person (i.e., physical) emerged.

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<sup>6</sup> More information on use of video-conferencing in litigation throughout the world is available at: <https://remotecourts.org/>. See also The Law Library of Congress, Global Legal Research Directorate, *Virtual Civil Trials*, April 2020, LL File No. 2020-018927, available at: <https://www.hsdl.org/?view&did=838061>; Scherer 2020b, 415.

<sup>7</sup> For Australian case law regarding potential conflict of remote examination of witnesses in China against the restrictions imposed by the Chinese civil procedure on cross-border taking of evidence, see Martinez, Tseng 2020, 9 fn. 54.

As the 2020 lockdowns rolled out, that issue came to the forefront and the initial assumptions and ultimate conclusions differed in the context of court litigation. Some jurisdictions, including Serbia, did not address it head on and instead locked down the courts too.<sup>8</sup> The Law on Civil Procedure of the Republic of Serbia only provides for, admittedly as an exception, taking of evidence by means of video-conferencing technology.<sup>9</sup> Similarly, in Italy, physical hearings were viewed as guaranteed, and a special, temporary law decree was considered necessary to allow the use of videoconferencing, with the exception of situations where taking of evidence by witness testimony was required.<sup>10</sup> Likewise, in Austria the right to a physical hearing before the court is at present generally accepted, subject to few exceptions that allow for taking of evidence by means of video-conference technology. However, the challenges to physical hearings imposed by the pandemic prompted the Austrian legislature to enact the provisions in 2020 (with temporary application) that allow for complete remote court proceedings subject to consent of all parties.<sup>11</sup> Similarly, the Supreme Court of Switzerland ruled in July 2020 that the COVID-19 pandemic cannot serve as a valid ground for holding an oral litigation hearing by video-conference if one of the parties objects to it.<sup>12</sup> In Vietnam, on the other hand, the provisions of its 2015 Civil Procedure Code regarding organization of hearings are interpreted as being incompatible with anything but physical hearings,<sup>13</sup> although it is unclear to what extent such position stems from the fact that Vietnam managed to suppress the epidemic remarkably well in 2020 and thus avoided the epidemiological concerns present in other jurisdictions.

In other jurisdictions, the courts look favorably at the use of internet technology for the purposes of conducting litigation. For instance, a majority of the Australian courts concluded that there is nothing unfair in virtual

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<sup>8</sup> The decree on time limits in court proceedings during the state of emergency announced on 15 March 2020, *Official Gazette of the Republic of Serbia*, No. 38/2020 was in force until 6 May 2020, when the state of emergency was lifted.

<sup>9</sup> Articles 245 and 277 of the Law on Civil Procedure, *Official Gazette of the Republic of Serbia*, Nos. 72/2011, 49/2013 – decision of Constitutional Court, 74/2013 – decision of Constitutional Court, 55/2014, 87/2018 and 18/2020.

<sup>10</sup> With reference to consecutive legislative instruments see Elgueta, Mauro 2020, 5–6 fn. 16.

<sup>11</sup> See Schwarz, Ortner 2021, 14 et seq.

<sup>12</sup> Bundesgericht, 146 III 194, *C. AG v. A.*, 6 July 2020, available at: <https://cutt.ly/CkEUQFw>.

<sup>13</sup> See Dundas, Trang, Mai Anh 2020, 3 et seq.

hearings and that they may properly substitute those held physically.<sup>14</sup> In the United States a number of courts interpreted the requirement of “open testimony”, pursuant to Rule 43(a) Federal Rules of Civil Procedure, as one which can also be satisfied by use of modern technology and remote and virtual hearings.<sup>15</sup>

Although availability and/or admissibility of virtual hearings in litigation has no direct impact on the availability and/or admissibility of virtual hearings in arbitration, the position of national legislation on this matter has been examined in all reports submitted under the 2020–2021 ICCA project titled “Does a Right to a Physical Hearing Exist in International Arbitration?”, as it may have potential application in arbitration.<sup>16</sup> Namely, the national courts, if seized with the matter of setting aside or recognition and enforcement of the arbitral award, might be influenced by the availability and permissibility of virtual hearings in domestic litigation. This is a concern shared by some of the ICCA rapporteurs.

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<sup>14</sup> See Martinez, Tseng (2020, 6–7) which provides reference to conflicting positions of Australian courts on the matter; the majority that held that that virtual hearings can be deployed in lieu of in-person in *Capic v. Ford Motor Company of Australia Limited* (Adjournment) [2020] FCA 486; *ASIC v. GetSwift Limited* [2020] FCA 504; *Wharton on Behalf of the Kooma People v. State of Queensland* [2020] FCA 574; *Auken Animal Husbandry Pty Ltd v. 3RD Solution Investment Pty Ltd* [2020] FCA 1153; *Long Forest Estate Pty Ltd v. Singh* [2020] VSC 604; *Ozamac Pty Ltd v. Jackanic* [2020] VCC 790; *Ascot Vale Self Storage Centre Pty Ltd (In Liquidation) v. Nom de Plume Nominees Pty Ltd* [2020] VSC 242; *McDougall v. Nominal Defendant* [2020] NSWDC 194; *JKC Australia LNG Pty Ltd v. CH2M Hill Companies Ltd* [2020] WASCA 38; *Universal Music Publishing Pty Ltd v. Palmer* [2020] FCA 1472 and the apparent minority of the courts who have concluded that the virtual, remote hearings are unfair *Roberts-Smith v. Fairfax Media Publications Pty Limited* (No 4) [2020] FCA 614; *ASIC v. Wilson* [2020] FCA 873; *Tetley v. Goldmate Group Pty Ltd* [2020] FCA 913 (Bromwich J); *Rooney v. AGL Energy Limited* (No 2) [2020] FCA 942; *Porter v. Mulcahy & Co Accounting Services Pty Ltd* (Ruling) [2020] VSC 430; *Quince v. Quince* [2020] NSWSC 326.

<sup>15</sup> See Hosking, Lahlou, Cardoso 2020, 7 et seq. citing *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 WL 3717792, (E.D. Mich. 30 June 2020), and *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, 2020 WL 3104033 (E.D.N.Y. 11 June 2020).

<sup>16</sup> These questions were formulated in the following manner: “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? If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?” See ICCA Report, available at: <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

## 3.2. Legal Framework for the Virtual Hearings in Arbitration

### 3.2.1. National Laws

While it is true that the arbitration hearings were, until recently, conducted physically as a rule, this was done under a different set of legal norms and considerations applicable to litigation.

First, arbitration proceedings are generally a creature of contract. The basic parameters of the proceedings are based on the agreement of the parties. Contrary to the commonly comprehensive regulation of litigation proceedings, arbitration agreements seldom regulate procedural peculiarities. Instead, they normally reference to arbitration rules agreed upon, which in turn usually employ a broad-brush approach in procedural matters: spelling out some points but generally empowering the arbitration tribunal to conduct proceedings as it sees fit.<sup>17</sup> The tribunal's discretion is, in the same vein, confirmed by arbitration laws.<sup>18</sup>

Second, the tribunal's discretion to organize the proceedings as it sees fit is subject to several considerations: the will of the parties, the tribunal's duty to render an enforceable award, and its duty to conduct proceedings in an efficient and cost-effective manner.

Finally, the award may be tested in the setting aside proceedings, as a rule before the courts of the country where the arbitration has its seat, pursuant to national arbitration laws, and potentially in other countries where recognition and enforcement is sought, regularly pursuant to the provisions of the New York Convention.

National arbitration laws usually provide that a party is entitled to request "oral hearing", without specifying whether such "oral hearing" is to be conducted as a physical hearing or not, and do not require that a party's "appearance at a hearing" be carried out physically.<sup>19</sup> 2006 Serbian Arbitration Act<sup>20</sup> is based

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<sup>17</sup> See Arts. 19, 22(2) 2017 ICC Rules, Art. 14.5 2014 LCIA Rules, Arts. 17(1), 28(2) UNCITRAL Rules, Art. 3(2) BAC Rules, Art. 39(2) PA Rules.

<sup>18</sup> Art. 19(2) UNCITRAL Model Law; Section 34(1) English Arbitration Act; Art. 182(2) Swiss Private International Law Act; Art. 32(3) Serbian Arbitration Act.

<sup>19</sup> See Arts. 24 and 25 of the Model Law; with regard to Australian International Arbitration Act 1974 see Martinez, Tseng 2020, 5–6; with regard to Italian Code of Civil Procedure see Elgueta Mauro 2020, 1; with regard to US Federal Arbitration Act see Hosking, Lahlou, Cardoso 2020, 1.

<sup>20</sup> Serbian Arbitration Act, *Official Gazette of the Republic of Serbia*, No. 46/2006 (hereinafter: SAA)



on the 1985 UNCITRAL Model Law,<sup>21</sup> and its provisions on the matter are on the same page – it merely allows for the tribunal to meet outside the place of arbitration for purpose of deliberation, hearing of witnesses or experts, or otherwise, thus confirming that the tribunal may determine that a legal place of arbitration and place of the hearing need not coincide. However, this provision does not necessitate that departure from the place of arbitration will necessarily result in a physical hearing.<sup>22</sup> The intended purpose of the provision was to mitigate the inconvenience of a particular place of arbitration and give the arbitral tribunal wider freedom to meet in any place considered appropriate (Holtzmann, Neuhaus 1994, 595). Such a purpose does not exclude the arbitrators’ right to order a hearing to be held in a virtual setting.

The fact that a party’s right to an “oral hearing” does not expressly encompass the right to a physical hearing is also confirmed by all (but one) of the national reports submitted under the ICCA project “Does a Right to a Physical Hearing Exist in International Arbitration?” when answering the question “Does the *lex arbitri* of your jurisdiction expressly provide for a right to a physical hearing in arbitration?”<sup>23</sup> Likewise, the question “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)?” was predominantly answered in a fashion that speaks against

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<sup>21</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf)

<sup>22</sup> Article 34(5) SAA, implementing Article 20(2) Model Law.

<sup>23</sup> A question “Does the *lex arbitri* of your jurisdiction expressly provide for a right to a physical hearing in arbitration?” was answered “NO” by rapporteurs for Argentina, Australia, Austria, the Bahamas, the Kingdom of Bahrain, Bangladesh, Barbados, Belgium, Benin, Bolivia, Brazil, the British Virgin Islands, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, the Czech Republic, Denmark, the Dominican Republic, Ecuador, Egypt, England and Wales, Finland, France, Georgia, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Indonesia, Iran, Italy, Jamaica, Japan, Kenya, Lebanon, Lithuania, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, the Russian Federation, Scotland, Singapore, Slovakia, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, the United Arab Emirates, Ukraine, Uruguay, USA, Uzbekistan, Venezuela, Vietnam, and Zimbabwe. The report on Tunisia was the only one in which some skepticism has been shown, despite confirmation that the express right to a physical hearing does not exist. All stated reports are available at: <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

an implied right of a party to a physical hearing.<sup>24</sup> Along those lines, the German rapporteurs have straightforwardly stated that “It can be inferred from the laws applicable to arbitration procedure that there is no right to a physical hearing, that a remote hearing is sufficient to comply with the need for an ‘oral argument’, and that a remote hearing can be agreed between the parties or, absent an agreement by the parties to the contrary, ordered by the tribunal subject to minimum procedural safeguards” (Maucher, Meier 2021, 2 et seq.). Similarly, the Austrian rapporteurs state “This question is not finally settled, but the better view, based also on recent case law, is that the existence of a general right to a physical hearing cannot be inferred, and can instead arguably be excluded, by reference to the procedural rules of Austrian law” (Schwarz, Ortner 2021, 4). The Swiss rapporteurs agree that although virtual hearings in litigation against objection of one of the parties are not allowed in Switzerland, the same conclusion cannot be drawn for virtual hearings in arbitration as litigation proceedings are, per se, more rigid than arbitration proceedings and guided by different concerns (Marzolini, Durante 2021, 2 et seq.).<sup>25</sup>

However, a number of rapporteurs were hesitant to give conclusive answers to this question for their jurisdictions.<sup>26</sup> Some opted in favor of an implied right to a physical hearing subject to certain exceptions (the Czech Republic, Ecuador, Sweden) and some confirmed the existence of such a right predominantly based on arbitration practice in the respective jurisdictions (Tunisia, Vietnam, Zimbabwe). For example, the rapporteurs for Zimbabwe state “it is impossible as a practical matter to hold virtual 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,

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<sup>24</sup> See reports for Argentina, Austria, Bahamas, Bangladesh, Barbados, Belgium, Bolivia, Brazil, the British Virgin Islands Canada, Chile, China, Columbia, Costa Rica, Croatia, Denmark, the Dominican Republic, Egypt, England and Wales, Finland, France, Georgia, Greece, Guatemala, Hungary, India, Indonesia, Iran, Italy, Jamaica, Japan, Kenya, Kingdom of Bahrein, Lebanon, Lithuania, Mauritius, Mexico, Morocco, New Zealand, Nigeria, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, the Russian Federation, Scotland, Slovakia, South Africa, South Korea, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, Uruguay, USA, and Uzbekistan, available at: <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

<sup>25</sup> See also Zaugg 2021.

<sup>26</sup> See reports for Australia, Bulgaria, Hong Kong, the Netherlands, Norway, Singapore, and Venezuela, available at: <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration>.

unless the parties have agreed that no hearings shall be held” (Kanokanga, Pasipanodya 2020, 3). This appears to be a conclusion based on the lack of necessary infrastructure, rather than a lack of normative latitude.

### 3.2.2. Institutional Rules

Prior to the pandemic, only a handful of institutional rules made specific references to use of internet technology in the course of the organization of an arbitration hearing, despite the fact that such practice was recommended in many arbitration reports and soft-law instruments.<sup>27</sup> This lack of direct reference did not prevent the arbitrators and the parties to opt for virtual hearings even in the absence of specific reference. Unlike ICSID practice, where virtual hearings and sessions have become almost a norm (60% of the 200 hearings and sessions in 2019, even before the pandemic),<sup>28</sup> 64% of the users of commercial arbitration services had never taken part in virtual hearings.<sup>29</sup> Nevertheless, the ongoing COVID-19 pandemic served as a catalyst for the acceleration of embracing new ways and year 2020 was not without reason hallowed as “the year of virtual hearings” (Fanou, Nasir Gore 2020).<sup>30</sup> This designation stands true, to the best of our knowledge, for arbitration hearings conducted in a virtual fashion in 2020 under the rules of the two arbitral institutions in Serbia: the Belgrade Arbitration Center and the Permanent Court of Arbitration at the Chamber of Commerce of Serbia. In addition, judging by the recent changes of institutional rules of major arbitral institutions worldwide, virtual hearings are here to stay.<sup>31</sup>

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<sup>27</sup> See Art. 25(4) 2012 Swiss Rules; Art. 14(1) 2014 LCIA Rules; ICC Commission Report, *Information Technology in International Arbitration*, International Chamber of Commerce (ICC) 2017, available at: <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf>; ICC Commission Report, *Controlling Time And Costs In Arbitration*, International Chamber of Commerce (ICC) 2012, available at: <https://www.iccwbo.be/wp-content/uploads/2012/03/20151101-Controlling-Time-and-Costs-Report.pdf>.

<sup>28</sup> ICSID, A Brief Guide to Online Hearings at ICSID, 24 March 2020, available at: <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid>.

<sup>29</sup> Accounting for the remaining 36% of respondents: 14% have stated that they rarely took part in virtual hearings, 14% said that they sometimes do, 5% frequently take part in virtual hearings, whereas 3% have stated that they always do. See *2018 International Arbitration Survey: The Evolution of International Arbitration*, 34, available at: <http://www.arbitration.qmul.ac.uk/research/2018/>.

<sup>30</sup> See also Scherer 2020b, 414–415.

<sup>31</sup> See section 4 of this paper.

### 3.2.3. Case Law

The number of court cases deciding the matter of the viability of use of virtual hearings or their compatibility with relevant legal framework of *lex arbitri* appears to still be negligible, as the number of awards that have been made subsequent to holding such hearings is also still limited, and the number of them that ended up before the courts in annulment or recognition proceedings is normally even smaller.

The Austrian Supreme Court (OGH) addressed the matter already in June 2020, although in the context of a challenge of an arbitral tribunal. In this specific case the OGH ruled that a change of a procedural order that results in a switch from a physical hearing to a virtual hearing, despite the objection of one of the parties, does not represent a procedural irregularity that justifies a challenge of an arbitrator (and consequently, also rules out setting aside of an award solely on this bases).<sup>32</sup>

The OGH thus appeared to have confirmed the viability of holding an oral hearing by means of video-conference, even where such an express provision is neither provided in *lex arbitri* (Austria is, like Serbia, a UNCITRAL Model Law country) nor in the applicable rules (2018 VIAC Rules) and that the virtual mode of a hearing alone does not violate on its face equal treatment of the parties or their right to be heard. This stance was later also confirmed in US and Egyptian court practices.<sup>33</sup> In the US case, previously scheduled hearings were, due to COVID-19 pandemic, moved to a virtual setting by the tribunal's order against an objection of one of the parties. In dismissing the arguments against virtual arbitration hearing, the US court reasoned as follows:

“The single line of reasoning [the objecting party – Legaspy] offers does not suffice. He says that ‘given the number of witnesses, the amount and nature of the documents, and the need for an interpreter and the complexity of the issues, a Zoom virtual hearing will deprive [Legaspy] of the ability to effectively defend against the claim being made.’ [...] This is the

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<sup>32</sup> *Obersten Gerichtshof* 18 ONC 3/20s, 23 July 2020, available at: <https://cutt.ly/wkm98VO>. See Scherer *et al.* 2020.

<sup>33</sup> *Carlos Legaspy v. Financial Industry Regulatory Authority, Inc.*, US District Court for the Northern District of Illinois Eastern Division, Case No. 20 C 4700, 12 August 2020, available at: <https://cutt.ly/gkRN4In>; Court of Cassation, 27 October 2020, 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>.

only support for his oft-repeated line that he cannot present an effective defense over Zoom. [...] Legaspy—who bears the burden of persuasion—cites no evidence that defenses cannot be presented remotely. He thus pits his conjecture against this court’s experience holding several remote evidentiary hearings since the pandemic began (once with an interpreter), all of which permitted the parties to air their claims and defenses fully. Remote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses. Moreover, the court sees no reason why the Claimants would fare better than the Respondent in a remote hearing. The Claimants will have the burden of proof in the arbitration; if anything, the logistical challenges of a remote hearing is more likely to harm them. Legaspy has established, at most, that he would prefer not to arbitrate remotely, not that remote proceedings make it more likely that he will suffer any harms.”<sup>34</sup>

The Egyptian decision on (refusing) to set aside an award did not directly deal with the issue of virtual hearings, as this was not an issue raised by the claimant. Nevertheless, the Court stated in *obiter dictum* that “virtual hearings” are increasingly used in arbitrations across the globe, prompting the conclusion that such *obiter* is a “a coded message that virtual hearings are consistent with Egyptian law, which does not include any express prohibition of virtual hearings” (Abdel Wahab 2020) to be taken into account in potential future challenges of arbitral awards solely on this basis.

### 3.3. Limits of Party Autonomy and Virtual Hearings

#### 3.3.1. Parties’ Agreement to Have or Not to Have a Virtual Hearing

Given that the arbitration procedure is, first and foremost, to be shaped by the parties’ agreement, the decision on whether to organize a virtual hearing or not may depend on the content of the arbitration agreement and the subsequent agreement of the parties.

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<sup>34</sup> *Carlos Legaspy v. Financial Industry Regulatory Authority, Inc.*, US District Court for the Northern District of Illinois Eastern Division, Case No. 20 C 4700, 12 August 2020, available at: <https://cutt.ly/gkRN4In>.

Just like national laws and institutional rules, arbitration agreements have so far seldom dealt with the issue of whether hearings are to be conducted physically or online, as the physical hearing was a *de facto* standard. Modern technology was mostly utilized on a need-to-do or convenience basis, for the case management conferences or occasional examination of a witness who would otherwise be unable to appear before a tribunal. According to some estimates, the number of fully virtual hearings increased tenfold in the second half of 2020 over the comparable previous period (Born, Day, Virjee 2020, 140).<sup>35</sup> It remains to be seen whether this shift is temporary or permanent. While it is reasonable to expect that the current pandemic will subside in the near future, the timeline is anything but certain and will depend on the success of the vaccination efforts, (non)emergence of the new, vaccine-resistant strains, duration of immunity acquired, and the way in which any recurrence of the current pandemic or a new pandemic will be handled. In the meantime, epidemiological considerations will remain not only one of the important reasons for embracing virtual hearings, but also a potential disrupting factor for the organization of in-person physical hearings.

With regard to future arbitration agreements, 2020 had put everyone on notice, and the parties that are averse to virtual arbitration hearings can be expected to channel such aversity in writing when agreeing to arbitration. This is particularly true nowadays, in light of recent changes of the arbitration rules of major arbitral institutions worldwide, which have included an express provision that gives the tribunal the right to order a virtual hearing – a right that nonetheless appears to have been considered covered by inherent powers of the tribunal.

As for the legacy arbitration agreements (i.e., those concluded prior to the pandemic), they can preclude online hearings if they expressly exclude them (which, it appears, has not been the practice), or exclude them implicitly. In the authors' view, indications of implied exclusion would have to be conclusive. For instance, fixing the physical location of the hearing in an arbitration agreement should not in itself be indicative of excluding conducting certain elements of the hearing online or holding a semi-virtual (semi-remote) hearing where there is one main venue and one or more remote venues. Agreeing on the place of the hearing in the arbitration agreement is usually a matter of logistical convenience and not of legal significance, unlike fixing

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<sup>35</sup> For instance, the authors provide details of an empirical survey that indicates that the prevalence of fully remote hearings in the second quarter of 2020 was ten times greater than “at any time previously” when the results are annualized (Born, Day, Virjee 2020, 140, Figure 7.1.).

the place of arbitration. Consequently, interpretation of such stipulations on the venue of the hearing will have to take into account the purpose for which it was fixed and, in light of that, deduce whether overriding matters of logistical convenience (or logistical impossibility) allow for the organization of a virtual hearing.

In cases where the parties subsequently agree to a virtual hearing, either at their own initiative or upon suggestion of the tribunal, such agreement may be accompanied by waivers of future possibilities to challenge. Such waivers are of little practical importance as the decision to organize a virtual hearing is not in itself a violation of due process and, at the same time, the waiver is unlikely to cover violations of due process that might later happen at the hearing (Stein 2020, 168–171).

An interesting potential problem might arise where the arbitration agreement is silent on the issue of the way in which a hearing should be conducted, but the parties subsequently agree that it should be organized virtually, contrary to the wishes of the tribunal. Such a situation might arise if the tribunal holds a particularly strong opinion on the benefits of physical hearing and/or drawbacks of the virtual one, or is not comfortable or familiar with the features of the virtual hearings. Generally, a tribunal is free to conduct the proceedings as it sees fit, as long as it conducts them efficiently, treats the parties even-handedly, and allows them reasonable opportunity to present their case, in accordance with the mandatory rules of the place of arbitration. However, tribunal is expected to follow the parties' procedural wishes and stipulations, as expressed in the initial or subsequently amended arbitration agreement. Should it fail to convince the parties to reconsider their choice and remains in disagreement, the tribunal should either follow the parties' stipulation, or resign and allow the parties to select a new tribunal, as otherwise the ensuing arbitral award would be susceptible to setting aside or denial of recognition for reasons of not complying with the arbitration agreement.<sup>36</sup>

### *3.3.2. Ordering a Virtual Hearing Over Objection of One Party*

Occasionally one of the parties will be opposed to a virtual hearing and insist on having it organized physically, in-person. However, extensive review of national arbitration laws and well-known arbitration rules (both by the authors and by others) could not identify provision(s) that limit a tribunal's

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<sup>36</sup> See Art. V.1.d of the New York Convention and Art. 34(2)(a)(iv) and 36(1)(a)(iv) Model Law. See also Arts. 58(1)(4) and 66(1)(4) of SAA.

discretion to order a virtual hearing even if one of the parties objected to it. The same conclusion appears to have been reached by the Austrian Supreme Court in 2020 in the context of the Austrian law (based on UNCITRAL Model Law) and the VIAC Rules,<sup>37</sup> and in the US court practice.<sup>38</sup>

As long as both parties are given an equal opportunity to be heard and their right to be heard is not jeopardized, a virtual or physical form of the hearing should not make a significant difference in itself. Rather, the way in which a particular hearing is conducted – be it virtual or physical, in-person – would be determinative of whether the due process considerations have been observed. This is not to say that virtual hearings do not present additional considerations that need to be observed and resolved in order to preserve the parties’ procedural rights. This would, *inter alia*, include ensuring that the parties have “reasonable access to the necessary technology, have had adequate time to prepare for the virtual hearing, and face similar restrictions in their and/or their counsel’s respective jurisdictions. Parties may also consider having a neutral third-party in the same room as a witness or the use of a camera with a 360-degree view, to mitigate against possible allegations of witness-coaching during a virtual cross-examination” (Mak 2020).

On the other hand, it could be argued that not ordering virtual hearings in circumstances where physical hearings are impossible to organize, either for an unforeseeable period of time or for an unreasonably long period of time, may actually be in violation of parties’ right to be heard. This stems from the tribunal’s obligation to conduct the arbitration efficiently and provide parties with final resolution of their dispute in reasonable time<sup>39</sup> as “justice delayed is [indeed] justice denied”. Some courts have already reached similar conclusions in cases where parties objected to the tribunal denying their requests for postponing arbitral (physical) hearings, finding that denying postponement of a (physical) hearing is not a violation of due

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<sup>37</sup> *Obersten Gerichtshof*, 18 ONc 3/20s, 23 July 2020, available at: <https://cutt.ly/wkm98VO>.

<sup>38</sup> *Carlos Legaspy v. Financial Industry Regulatory Authority, Inc.*, US District Court for The Northern District of Illinois Eastern Division, Case No. 20 C 4700, 12 August 2020, available at: <https://cutt.ly/gkRN4In>.

<sup>39</sup> See Article 14.4 of the LCIA Rules (2014) and Article 14.1. of the LCIA Rules (2020); Rule 19.3 of the SIAC Rules (2016); (iii) Article 22 of the ICC Rules (2017 and 2021).



process where such postponement would lead to significant delays.<sup>40</sup> The same rationale should apply when the postponement leading to a significant delay is denied in favor of a virtual hearing.

Last but not least, the parties' reliance on alleged procedural detriment stemming from conducting hearing virtually, should not be sufficient to undermine enforceability of the ensuing arbitration award. This is because the party challenging the award bears the burden to prove that its right to be heard has been fundamentally breached (Lew, Mistelis, Kröll 2003, 675),<sup>41</sup> i.e., that such an occurrence has resulted in a different award than it otherwise would (so-called causality requirement) (Borris, Hennecke 2012, 286 et seq.; Scherer 2012, 327–328; Jana, Armer, Kranenberg 2010, 252–253; Nacimiento 2010, 298–299).<sup>42</sup>

This view is shared throughout the national reports submitted to the ICCA project. For example, the Argentinean rapporteur stated that “[t]he party requesting that the award should not be enforced has to conclusively prove how the lack of a physical hearing has actually affected its right to due process by preventing it from presenting its case and that such failure is material to the outcome of the case” (Campolieti 2020, 11). Likewise, the Austrian rapporteurs conclude that “only rarely will a party be able to resist recognition and enforcement of an award pursuant to Article V NYC because a tribunal decided to hold a remote hearing rather than a physical hearing – even if holding a physical hearing was requested by one party or agreed by both parties. Rather, only if this decision of the tribunal actually led to a violation of fundamental procedural principles, particularly the right to be heard and to fair and equal treatment, would Austrian courts deny recognition and enforcement of a foreign award on that basis” (Schwarz, Ortner 2021, 28). The German rapporteurs similarly state “the right to be heard does not

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<sup>40</sup> *Sungard Energy Sys. v. Gas Transmission N.W. Corp.*, 551 F. Supp. 2d 608 (S.D.Tex. 2008); *C.T. Shipping, Ltd. v. DMI (U.S.A.) Ltd.*, 774 F. Supp. 146 (S.D.N.Y. 1991).

<sup>41</sup> *Ymca v. Comune Bardonecchia*, Court of Cassation, First Section, 08/01/2014, n. 131, *High Court of Catalonia* 56/2013, 7 October 2013; *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294 (11th Cir. 2015); *Sandra Regina Mujol da Cruz Restaurante ME. v. Munique Empreendimentos e Participações Sociedade Ltda et al.*, Paraná Court of Appeals, District of Curitiba, 8 June 2016, Agravo de Instrumento No. 1.486.395–1, the Court Gazette 24 June 2016; *Hugo Görner, Glas- und Kunststoffwarenfabrik v. Büchel Industriebeteiligungen GmbH*, Beijing No. 4 Intermediary People's Court, 30 November 2015, Te Zi No. 118; *A AS v. B. SAL*, Swiss Federal Tribunal, First Civil Law Court, 17 August 2015, No. 4A\_54/2015, para. 4. 2; *KB v. S & ors* [2016] 2 HKC 325, Hong Kong Court of First Instance (15 September 2015).

<sup>42</sup> See also UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, available at: <https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>, 139–140, 174, 175.

equate to a right to a physical hearing per se. What is more important is the question of whether or not each party has been given a chance to participate in the proceedings and to present its facts, evidence and legal arguments. In short, the right to be heard as understood in German law is focused on the opportunity for a party to participate in the proceedings by submitting its own views and commenting on all possibly relevant issues. [...]ny violation of the right to be heard in Art. V(1)(b) of the New York Convention must have had at least a(n) (possible) impact on the outcome of the arbitration proceedings to the detriment of the party arguing against recognition and enforcement. Thus, a party invoking a ground for refusal must state what legal argument and/or evidence it was deprived from presenting and prove how this would have impacted the arbitral tribunal's decision" (Maucher, Meier 2021, 16). These lines of reasoning are followed in other published reports as well.

#### **4. RECENT CHANGES IN LEGAL FRAMEWORK FOR VIRTUAL ARBITRATION HEARINGS**

Despite the disruptions of 2020, the world of international commercial arbitration has managed to press ahead and continue with the resolution of disputes. Not unexpectedly, novel challenges provided impetus for reform of the arbitration legal framework and the arbitral practice in order to strengthen one of its advantages over litigation – flexibility.<sup>43</sup> Consequently, the number of arbitration proceedings is expected to increase in the post-COVID-19 world (Schroeder 2020, 41).

Two of the most popular providers of arbitration services – the International Court of Arbitration (ICC) and the London Court of International Arbitration (LCIA) – have used the year 2020 to complete their work on changes to their arbitration rules.<sup>44</sup> These efforts were followed by the

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<sup>43</sup> International surveys demonstrate that in the eyes of users of arbitration services flexibility of arbitral proceedings is recognized as one of the three most important advantages of arbitration in comparison to litigation. See *International Arbitration Survey: The Evolution of International Arbitration*, available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

<sup>44</sup> The new rules of LCIA entered into force on 1 October 2020, available at: [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx). The new ICC rules entered into force on 1 January 2021, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

Swiss Arbitration Center (formerly known as SCAI) and the Vienna International Arbitration Center (VIAC), which have both issued new sets of rules in 2021.<sup>45</sup> In all instances the reasons for change were an increase of flexibility, efficiency and transparency of arbitral procedure, as well as the need to codify the best international arbitration practices and meet the demands of modern, technology-friendly conduct of business and dispute resolution procedure. Similarly, in all instances an express provision on the conduct of virtual hearings has been included in the rules.

Article 19(2) of the 2020 LCIA Rules states:

“[the] Arbitral Tribunal shall organize 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). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties’ dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed.”

Article 26(1) of the 2021 ICC Rules provides that:

“[a] hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.”

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<sup>45</sup> The new Swiss Rules of International Arbitration are applicable as of 1 June 2021, available at: <https://www.swissarbitration.org/centre/arbitration/arbitration-rules/>. A new version of the VIAC Rules of Arbitration and Mediation entered into force on 1 July 2021, available at: <https://www.viac.eu/en/arbitration/rules-for-arbitration-and-mediation>.

Article 27(2) of the 2021 Swiss Rules now specifies that:

“[any] hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties.”

Article 30(1) of the 2021 Vienna Rules provides that:

“[unless] the parties have agreed otherwise, the arbitral tribunal shall decide whether the proceedings should be conducted orally or in writing. If the parties have not excluded an oral hearing, upon any party’s request the arbitral tribunal shall hold such a hearing at an appropriate stage of the proceedings. Having due regard to the views of the parties and the specific circumstances of the case, the arbitral tribunal may decide to hold an oral hearing in person or by other means. The parties shall in any case have the opportunity to acknowledge and comment on the requests and pleadings of the other parties and on the result of the evidentiary proceedings.”

In addition, the amended version of the IBA Rules on Taking of Evidence also now incorporates provisions on remote hearings.<sup>46</sup>

It would be incorrect to view the changes as an indication that the virtual hearings were not a possibility under prior versions of the rules. It is not uncommon for a legislator or another rule-enactor to supplement a general, flexible rule with another that contains a greater degree of specificity, in order to lower the cost of the application of the rule by removing arguments about its interpretation, both during the proceedings and in the process of review before national courts. As previously observed, theory and practice are on the same page with regard to the interpretation of the pre-COVID-19 rules on the issue of virtual hearings and the amendments of the institutional rules, thus only explicitly spelling out possibilities that were there to begin with.

## **5. CIRCUMSTANCES TO CONSIDER WHEN DECIDING ON THE FORMAT OF AN ORAL ARBITRATION HEARING**

Despite the fact that virtual hearings are most likely here to stay, one should not jump to the conclusion that the need for physical hearings no longer exists. After all, the year 2021 has demonstrated that depending on

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<sup>46</sup> Art. 8(2) of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, available at: <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>.

the success of vaccination efforts, and subject to strict health measures, the share of in-person physical hearings is gradually on the rise, both in Serbia and worldwide.<sup>47</sup>

Thus, when deciding on holding an evidentiary hearing by remote means of communication rather than by physical attendance, a tribunal is well advised to make careful consideration of all relevant circumstances.<sup>48</sup> The ICC note suggests that such circumstances include the nature of the hearing, the possible existence of travel constraints, the planned duration of the hearing, the number of participants and the number of witnesses and experts to be examined, the size and complexity of the case, the need for the parties to properly prepare for the hearing, the costs and the gains of efficiency that may be expected by resorting to virtual means of communication, and whether rescheduling the hearing would entail unwarranted or excessive delays.<sup>49</sup>

ICC Note further stipulates that:

“101. Any virtual hearing requires a consultation between the arbitral tribunal and the parties with the aim of implementing measures – often called a cyber-protocol – that are needed in order to comply with any applicable data privacy regulations. Such measures should also deal with the privacy of the hearing and the protection of the confidentiality of electronic communications within the arbitration proceeding and any electronic document platform.

102. In preparation for a virtual hearing, and in order to ensure that parties are treated with equality and that each party is given a full opportunity to present its case, the arbitral tribunal should consider:

- Different time zones in fixing the hearing dates, start and finish times, breaks and length of each hearing day;

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<sup>47</sup> During the course of 2021 the authors of this paper have already took part in several arbitration hearings, both in Serbia and abroad, which were held in a physical setting.

<sup>48</sup> See also Nikolić 2021, 241–242.

<sup>49</sup> See e.g. Note To Parties And Arbitral Tribunals On The Conduct Of The Arbitration Under The ICC Rules Of Arbitration, 1 January 2021, para. 99, 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>

- Logistics of the location of participants, including, but not limited to, the total number of participants, the number of remote locations, the extent to which any participants will be in the same physical venue, the extent to which members of the arbitral tribunal may be in the same physical venue as one another and/or any other participants, and the availability and control of break out rooms;
- Use of real-time transcript or another form of recording;
- Use of interpreters, including whether simultaneous or consecutive;
- Procedures for verifying the presence of and identifying all participants, including any technical administrator;
- Procedures for the taking of evidence from fact witnesses and experts to ensure that the integrity of any oral testimonial evidence is preserved;
- Use of demonstratives, including through shared screen views; and
- Use of an electronic hearing bundle hosted on a shared document platform that ensures access by all participants.”<sup>50</sup>

While most of the above points boil down to practical problem-solving and choosing appropriate technical solutions, the participation of actors from different time zones represents a constraint that, in extreme circumstances, can be mitigated only partly and might reduce the number of hours per day to be spent on the hearing. This, in turn, might require more calendar days to complete a virtual hearing than would otherwise be necessary for a physical in-person hearing. On the other hand, virtual hearings dispense with the need to spend time on travel and might thus offset some of the issues related to the extreme difference in time zones.

The issue of different time zones and its effect to arbitration proceedings was also considered in the 2020 OGH decision. In the arbitral proceedings that were an issue in this case the respondents were represented by counsel

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<sup>50</sup> Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, 1 January 2021, paras. 101–102; ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings, 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/>.

from Los Angeles, whereas the place of arbitration was Vienna, and virtual hearings were set to start at 3 p.m. Vienna time. The respondents felt prejudiced by such timing as this would mean that their hearing would start at 6 a.m. Los Angeles local time, whereas for claimant the proceedings would be in their local time zone. However, the OGH held that by concluding an arbitration agreement providing for arbitration institution based in Vienna, the respondents had, in principle, accepted the disadvantages resulting from the geographical distance of their place of business, including substantial travel and time differences. In addition, the court took the view that starting a hearing at 6:00 a.m. local time was less burdensome than having to travel from Los Angeles to Vienna for an in-person hearing.<sup>51</sup>

In the same fashion OGH dismissed the respondents' objections to the potential misuse of videoconferencing technology during witness examination. As a preliminary matter, the OGH found that the risk of witness tampering also existed in in-person hearings and that remote hearings allow for measures to control witness tampering that "partly go beyond these available at a conventional hearing" (e.g., the witness is seen up close on the screen, 360 degrees cameras can be used, evidence is recorded both in both audio and video format, etc.).<sup>52</sup>

In conclusion, the current advanced level of technology creates environments where switching to a virtual hearing does not in itself give rise to valid objections on the basis of due process. At the same time, virtual hearings are not panacea. While it is true that any shoe is better than none, wearing the same pair for the entire year and for all occasions is not advisable. There will often (or very often) be occasions where in-person hearing will remain a more efficient solution and when the extra expense of gathering physically at one location will remain a superior course of action.

## 6. CONCLUSION

Deciding on whether to embrace new technology usually begets only one question "Does it work?" (i.e., whether it solves a problem or serves a purpose without creating problems that a previous solution did not have or had but to a lesser extent). However, when a technology serves as an alternative to something that was a given since the very first legal procedure

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<sup>51</sup> *Obersten Gerichtshof*, 18 ONc 3/20s, 23 July 2020, available at: <https://cutt.ly/wkm98VO>.

<sup>52</sup> *Ibid.*

ever, questions have to be asked. With regard to a virtual hearing, the main questions are whether it is somehow prohibited by law and whether it is capable of providing the parties with the opportunity to present their case.

As for the first question, both in Serbian law and in other jurisdictions, there are no prohibitions either in statutes or in applicable rules to organizing hearings virtually. Unlike the court proceedings, where such constraints are sometimes identified or perceived, arbitration proceedings rest on two main pillars: party autonomy and the tribunal's mandate to conduct arbitration efficiently and in a manner it sees fit. Unless the parties specify otherwise, the tribunal can thus order a hearing to take place virtually. This will often be justified. Where the required technology is available to the parties, it will provide a platform on which they will be able to present their case in a manner guaranteed by the law. Whether they will be actually afforded that opportunity will normally have little to do with the technology and almost everything to do with how the procedural steps are handled by the tribunal.

Virtual hearings are already allowed by the latitude given in the arbitration statutes and rules. They have been further encouraged by recent amendments to some of the most prominent institutional rules. While they are certainly not an answer to every problem or a cure for every obstacle, they are expected to become a regular feature of the arbitration practice.

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