

**VIRTUAL HEARINGS IN INTERNATIONAL COMMERCIAL ARBITRATION:
IS THIS THE ‘NEW NORMAL’?**

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ABSTRACT

Virtual hearings have become a regular practice in international commercial arbitration since the COVID-19 outbreak. Their advantages, ensuring the flexibility of the process and facilitating the expeditious hearing of cases, promise to make them the default option in post-COVID arbitration. However, virtual hearings raise problems of equal treatment of the parties and of the exercise of their right to be heard. These problems have not received duly attention from scholars and practitioners in view of the widespread appreciation of virtual hearings. The very reason for that may be the failure of legal norms to reflect the true nature of virtual hearings and containing the ambiguous concepts of “oral hearing” and “in-person hearing”. Be that as it may, virtual hearings raise insurmountable challenges to the party’s due process guarantees. These include the irreconcilability of time zone differences, limitations on effective remote witness examination, as well as risks to technology operations and data security. Against this backdrop, this thesis argues that virtual hearings violate due process guarantees according to the existing standards in international commercial arbitration. It therefore suggests that virtual hearings should not replace the traditional practice of physical hearings after COVID-19 is over.

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INTRODUCTION

The COVID-19 pandemic has opened the anticipated future of international commercial arbitration where technology dominates every stage of the process. The most noticeable changes have occurred in the traditional practice of hearings. Participants can now attend a hearing room by having only an electronic device and Internet connection. Because of this flexibility, virtual, or remote, hearings are believed to replace physical hearings once and for all.

We may view the pandemic as a kind of a testing period in international commercial arbitration. The parties to proceedings can evaluate whether the new format of hearings conforms to their needs and expectations of due process. If both parties' answer is negative, the tribunal should wait until a physical hearing is possible. If only one party opposes a virtual hearing, the tribunal should balance the party's objections against the tribunal's duty to conduct proceedings in an expeditious manner. The pandemic is of course the strongest argument in favour of a virtual hearing. However, the tribunal should not have the expeditiousness of proceedings as its principal aim but to ensure that due process guarantees of the parties are respected. Despite their perceived benefits, especially in the context of the pandemic, virtual hearings raise problems of equal treatment of the parties and of the exercise of their right to be heard. This thesis takes the view that, given their negative impact on the parties' due process guarantees, virtual hearings should not become 'the new normal' in international commercial arbitration after the end of the pandemic¹.

The due process concerns stem from the very nature of virtual hearings. These cannot only be confined to the operation of technology, for example videoconferencing. Before the pandemic,

¹ In that regard I support the suggestion to return to physical hearings, made by practitioners on the ICDR Y&I Online Debate – Virtual Hearings and Cybersecurity in International Arbitration of 24 June 2020, < <https://www.youtube.com/watch?v=zbsufzJI3CA&t=10s> > (Accessed June 28, 2021).

videoconferencing had been commonly used for hearing a witness being unable to attend a hearing in person². However, videoconferencing was the means for the physically unavailable witness to attend a physical hearing, while the tribunal and the parties were physically present in the hearing at one location³. The second characteristic of a virtual hearing is that all participants connect from different locations to a virtual medium which enables them to appear in person onscreen⁴. It should be noted that the latter aspect is often overlooked when one tries to find a legal basis for virtual hearings, notably in institutional rules and arbitration laws, and, in particular, to establish whether the concepts of “oral hearing” and “in-person hearing” used therein can be considered as allowing to conduct virtual hearings.

The new format of hearings has brought to the surface new challenges that were unthinkable in physical hearings. First of all, the hearing date and time vary depending on different time zones where the participants sit and attend the hearing remotely. Therefore, the participants should be convened at such a timeslot so as not to have the hearing in the early morning or the late evening in a respective time zone. Secondly, experiences with physical hearings cannot be easily transposed to the new format. Arbitrators should learn new techniques to read the witness’ body language remotely. The witnesses’ concentration and focus has become a primary concern for arbitrators and counsel in the hearing. Finally, the reliability of technology and privacy determine whether the hearing is at all possible to hold.

I have put myself in the shoes of a party opposing the practice of holding virtual hearings (the “opposing party”) as it develops its arguments in hypothetical arbitral proceedings. The first argument covers the illegality of virtual hearings. The thesis argues that the place of arbitration

² Gary B. Born, *International Commercial Arbitration*, 3rd edn., (Kluwer Law International, 2020), 2432-2433.

³ Maxi Scherer, ‘Remote Hearings in International Arbitration: An Analytical Framework, *Journal of International Arbitration*’, (Vol. 37 Issue 4, Kluwer Law International 2020), 407-448, 413.

⁴ Mohamed S. Abdel Wahab, ‘Exculpating the Fear to Virtually Hear: A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations’, *New York Dispute Resolution Lawyer*, (Vol. 13, No. 2, Summer 2020), 18-21, 20, Endnote 1.

mentioned in an arbitration clause⁵ does not constitute the parties' agreement on the modality of hearings. In cases where an arbitration clause specifies the place of hearings⁶ or institutional rules incorporated into an arbitration clause refer to a location of hearings⁷, the tribunal would interpret these provisions broadly if the possibility to use videoconferencing or other types of technology is not excluded thereunder. With equal force, an opposing party would not succeed in proving that virtual hearings do not fall within the category of oral hearings used in arbitration laws based on UNCITRAL Model Law. Chapter 1 of the thesis is devoted to the above analysis.

Even if that first argument fails, the opposing party would still prevail in the second argument, which relates to the breach of its due process guarantees. The thesis argues that scheduling a virtual hearing beyond usual working hours of the party's respective time zone amounts to unequal treatment. The virtual format is barely capable of accounting the subtleties of reading the witnesses' body language by arbitrators. This ability varies from person to person in physical interaction, let alone in a virtual hearing. In addition, a virtual environment can be challenging for witnesses, due to the absence of a professional background, to keep full concentration during the hearing. That can make a difference in assessing witness testimonies, and, therefore, prejudice the party's right to be heard. The party is also exposed to the non-observance of the right once the tribunal forces the party to participate in the hearing amidst disruptions and data security breaches. The analysis of the above aspects involves inquiries into relevant case law of Australia, Austria and Canada. Chapter 2 of the thesis reports my findings in this regard.

⁵ As in model arbitration clauses of the LCIA and ICC.

⁶ This type of an arbitration clause is quite unusual in arbitration practice as was discussed in the 28th Willem C. Vis International Commercial Arbitration Moot.

⁷ The prime example of that is the ICC Rules which are in stark contrast to the LCIA Rules in that regard.

CHAPTER 1. THE LEGAL BASIS FOR VIRTUAL HEARINGS: ARE THEY PERMITTED BY THE RELEVANT NORMS?

It is difficult to imagine adversarial proceedings without hearings. Arbitration is no exception. A hearing brings benefits to the tribunal and the parties. The parties can elaborate orally on the arguments they included in their written submissions, confront each other and present witnesses. Arbitrators have a possibility to reevaluate their impressions of the case, based on the parties' written submissions, after hearing the parties and witnesses in person.

According to established practice, the parties always have a hearing granted unless documents-only arbitration has been chosen by mutual accord⁸. To my best knowledge, arbitration agreements concluded before the pandemic rarely limited arbitration to evaluation of documents. Nor did the parties select a modality of hearings, since it was commonly understood that a hearing would be in a physical format, with the occasional use of videoconferencing for an unavailable witness⁹. The pandemic has brought out a brand-new modality of hearings, thus forcing tribunals to seek a legal basis for virtual hearings in the norms governing arbitration.

For instance, the arbitration agreements designed after the standard clauses of the LCIA and ICC, are enforced so as to permit virtual hearings in new circumstances, save where the parties subsequently agree to the contrary. A recent landmark case of the Austrian Supreme Court confirmed this point of view¹⁰. On rare occasions where the parties have designated places of hearings, the tribunal may not easily opt for a virtual hearing without securing the parties' consent to it¹¹. In that case, although virtual hearings, or least the use of technology, have not

⁸ Born, *supra*, n.2, 2430.

⁹ Scherer, *supra*, n.3, 413.

¹⁰ Oberster Gerichtshof, Case No. 18 ONc 3/20s, 23 July 2020, < <http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> > (Accessed June 28, 2021).

¹¹ This issue was highlighted by the 28th Willem C. Vis International Commercial Arbitration Moot.

been explicitly excluded, one may say that the places of hearings implicitly constitute the parties' choice of a physical format of hearings.

At the level of the institutional rules selected by the parties, provisions on hearings may not always reflect the nature of virtual hearings, that is, a virtual hearing does not have a single location. The reason for that may be that the drafters of institutional rules sought to signal the recognition of virtual hearings by a total revision of the relevant provisions, as shown by the ICC Rules. However, the failure to account a perfect set of rules on virtual hearings, as in the LCIA Rules, may lead to say that the drafters did not contemplate virtual hearings in the revised provisions.

Finally, arbitration laws adopting Art. 24(1) UNCITRAL Model Law and therefore mandating for oral hearings may be construed broadly to recognize virtual hearings¹². The conservative approach may also be valid¹³. However, the logic of the provision may be that not to stipulate modalities of hearings but to introduce the principles of orality and immediacy in arbitration laws.

As this Chapter will explain, one may be tempted to require the two characteristics of virtual hearings for them to exist under the above norms. However, the tribunal would not rule out a “virtual hearing” in proceedings if at least there is no prohibition of technology in the norms.

¹² Jeffrey M. Waincymer, ‘Online Arbitration’, *Indian Journal of Arbitration Law* (Vol. 9, No.1, 2020), 1-23, 4-7; David Bateson, ‘Virtual Arbitration: The Impact of COVID-19’, *Indian Journal of Arbitration Law* (Vol. 9, No. 1, 2020), 159-169, 160-161; Grant Hanessian, J. Brian Casey, ‘Virtual Arbitration Hearings When a Party Objects: Are There Enforcement Risks?’, *New York Dispute Resolution Lawyer*, (Vol. 13, No. 2, Summer 2020), 25-29, 27; Erica Stein, *International Arbitration and the COVID-19 Revolution*, Chapter 9: ‘Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings’, (Kluwer Law International, 2020), 167-178, 173.

¹³ As under an equivalent rule in German legislation. Born, *supra*, n.2, 2433.

1.1 The Parties' Agreement on a Modality of Hearings

One of the elements commonly found in arbitration agreements is the place, or seat, of arbitration. The choice of the place of arbitration has far-reaching implications for the parties in a dispute, since it identifies a *lex arbitri*, i.e., a law governing the arbitral proceedings, and courts entitled to adjudicate an annulment action¹⁴. The model arbitration clauses of the LCIA and ICC specify a relevant field to be filled in by designating the place of arbitration¹⁵.

The place of arbitration should be distinguished from the place of hearings. The former is a legal fiction designed to submit arbitration to a particular jurisdiction as mentioned above. The location specified as the place of arbitration only indicates that jurisdiction. The latter, however, refers to a definite physical location where hearings are held¹⁶. In the end, arbitration¹⁷ is deemed to be conducted in a definite location, notwithstanding that the location of hearings might be elsewhere¹⁸.

The drafting of Art. 20 UNCITRAL Model Law reflects the above considerations. Under that provision, the parties' choice of the place of arbitration does not affect the tribunal's right to conduct hearings at any place it considers appropriate. The only limitation of the tribunal's right is the parties' agreement on a specific place of hearings under the mentioned clause. The same rule is contained in the LCIA Arbitration Rules 2020¹⁹ and ICC Arbitration Rules 2021²⁰. In other words, the determination of the place of arbitration as being in a particular city or country

¹⁴ Nigel Blackaby, Constantine Partasides (ed.), Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, 6th edn., (Oxford University Press, 2015), 99; Born, *supra*, n.2, 827-829.

¹⁵ LCIA Recommended Clauses < https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx > (Accessed June 28, 2021); Standard ICC Arbitration Clause < <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/> > (Accessed June 28, 2021).

¹⁶ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 104, [8].

¹⁷ As a set of procedural acts, including hearings.

¹⁸ UNCITRAL Digest, *supra*, n.16, 104, [9].

¹⁹ Art. 16.3.

²⁰ Art. 18(2).

in an arbitration agreement is not equal to the parties have agreed that the place of hearings should be that city or country.

Therefore, the tribunal can exercise its discretion to conduct a virtual hearing in a situation where an arbitration agreement provides for only the place of arbitration, and in the absence of the parties' agreement on the place of hearings. However, the question remains of what happens when a party *does* object to the tribunal's discretion. In the abovementioned case²¹, the Austrian Supreme Court ruled that holding a virtual hearing does in no way contradict the parties' choice of the place of arbitration. The Court's reasoning was essentially based on the meaning of Art. 20(2) UNCITRAL Model Law²², whereby physical hearings regardless of where they are conducted are still deemed to be held at the place of arbitration. The Court extended this legal construct to virtual hearings, thus making a virtual hearing to be presumed to take place at the arbitration seat.

There is no justification to read Art. 20(2) UNCITRAL Model Law as mandating for physical hearings. Strictly speaking, the tribunal discretion under the rule lies exclusively in the choice of a location for the hearing²³, not of a modality of the hearing. On the contrary, Art. 20(2) UNCITRAL Model Law aims not to confine the procedural acts to the "place of arbitration" if circumstances require²⁴. The pandemic can definitely be regarded as such a circumstance to hold a virtual hearing in the absence of the parties' agreement to the contrary.

The tribunal's discretion may however be questioned where an arbitration agreement does specify the place of hearings, in addition to the place of arbitration. The interpretation of an

²¹ Oberster Gerichtshof, *supra*, n.10.

²² Or an equivalent rule in institutional rules, for example, the VIAC Rules 2013 (Art. 25(2)), which were incorporated into an arbitration agreement discussed by the Court.

²³ Which in principle excludes virtual hearings as described below.

²⁴ 'UNCITRAL Model Law, Chapter V, Article 20 [Place of arbitration]', in Howard M. Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Kluwer Law International 1989), 592-608, 595-596.

arbitration agreement drafted this way raises topical and difficult issues. For instance, the problem of the 28th Willem C. Vis International Commercial Arbitration Moot featured a hypothetical arbitration agreement modeled after the SCAI model arbitration clause²⁵, but modified to endow the tribunal to choose the place of hearings from two cities agreed by the parties.

The agreement did not mention the means by which participants could attend hearings, either by physical presence or through information technology. The designation of a location for hearings, *i.e.*, a city or country, does not generally prevent the tribunal from holding a virtual hearing. As stated by a US district court in *Legaspy v. Fin. Indus. Regulatory Auth., Inc.*²⁶, a virtual hearing is located at the parties', witnesses' and arbitrators' locations.

However, the above arguments are valid only in the context of domestic arbitration where arbitrators, parties and witnesses are located in one city or country²⁷. In international arbitration, the participants are scattered across the world. As a result, a virtual hearing cannot be considered as having a single location, which is contrary to arbitration agreements specifying the place of hearings.

Indeed, tribunals may develop a legal construct to regard a virtual hearing's location to be at the tribunal's location, given, for example, the tribunal's predominant role in ensuring the integrity of hearings²⁸. In that case, all members of a tribunal should be located in one city or country mentioned in an arbitration agreement, which in practice may not occur. In addition, in a virtual environment the contribution to the integrity of a virtual hearing of entities which

²⁵ SCAI Model Arbitration Clause < <https://www.swissarbitration.org/Arbitration/Arbitration-clauses/Model-Arbitration-Clause> > (Accessed June 28, 2021).

²⁶ *Legaspy v. Fin. Indus. Regulatory Auth., Inc.*, 2020 U.S. Dist. LEXIS 145735, 2020 WL 4696818 (United States District Court for the Northern District of Illinois, Eastern Division, August 13, 2020, Filed), < advance.lexis.com/api/document?collection=cases&id=urn:contentItem:60KD-PN81-F8KH-X0T7-00000-00&context=1516831 > (Accessed June 28, 2021).

²⁷ As was the case in *Legaspy v. Fin. Indus. Regulatory Auth., Inc.*

²⁸ Born, *supra*, n.2, 2463-2464.

support the hearing, an arbitral institution or an outside online platform provider, may be indispensable for making the hearing run smoothly. It is very unlikely that those entities may happen to be located at the place chosen by the parties for hearings.

The pandemic has forced stakeholders of international commercial arbitration to adopt virtual hearings. While there is no prospect of the pandemic ending soon, arbitration agreements will likely be drafted with care to contemplate the possibility of having virtual hearings once a dispute arises²⁹. The parties can thus settle their concerns as to a format of hearings when entering an arbitration agreement, not to make tribunals and courts decide on these. At the same time, adjudicators may be facing an issue to enforce arbitration agreements concluded before the pandemic. As presented above, those arbitration agreements may specify the place of hearings but not exclude explicitly virtual hearings. The literal interpretation of such agreements, namely the need to locate a virtual hearing at a single location, may be used as a defense against a virtual hearing to the detriment of an opposing party though. It is not the single location of a virtual hearing that matters, but does the observance of the procedural fairness and equality of the parties in the hearing. A court annulling an arbitral award where the mentioned agreement is interpreted as permitting virtual hearings would diminish the parties' expectations from arbitration in the COVID-19 time, regardless of their attitude towards virtual hearings.

²⁹ One of the possible wordings specifying an option to have a virtual hearing in extreme circumstances, such as COVID-19, was developed by the International Arbitration team at Linklaters, < <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/drafting-for-virtual-hearings> > (Accessed June 28, 2021).

1.2 The Arbitral Tribunal's Power to Conduct a Virtual Hearing under Institutional Rules

In addition to the arbitration agreement, the institutional rules incorporated into that agreement are also binding on the tribunal. Where the parties do not specify a modality of hearings in the arbitration agreement, the tribunal may however be prevented from holding a virtual hearing because of those institutional rules. The LCIA Arbitration Rules 2020 and ICC Arbitration Rules 2021 establish different frameworks for modalities of hearings. Those institutional rules will be discussed in turn.

The LCIA Rules allow the tribunal to hold physical³⁰ and virtual hearings. The physical hearing is conducted at a definite place, with the participants' physical attendance³¹. The virtual hearing uses communications technology connecting participants from one or more places³². In addition, the LCIA Rules explicitly recognize that virtual hearings do not have any place³³. Indeed, the LCIA Rules adopts a consistent approach towards the modalities of hearings³⁴. Under the LCIA Rules, the distinction between the two modalities is clear: a physical hearing always exists within a definite place, and a virtual hearing is physically non-existent due to the fact that this is the product of technology.

The ICC Rules, by contrast, are a prime example of how virtual hearings have been considered, but never introduced. The previous version of the Rules³⁵ stipulates that "...the arbitral tribunal shall hear the parties together *in person*... [emphasis added]"³⁶. The term "in person"

³⁰ Although the Rules use a term "in person" to refer to a physical hearing, this thesis uses the concept of "physical hearing", given the different interpretations of the term "in person" as described below.

³¹ Art. 16.3 LCIA Rules.

³² Art. 19.2 LCIA Rules. The types of communication technology are not limited to conference call and videoconference.

³³ *Ibid.* This fact shows that the above restricted interpretation of an arbitration agreement specifying places of hearings is not devoid of merit.

³⁴ Unlike the ICC Rules (Art. 18(2) and 26(1)).

³⁵ With effect from 1 March 2017.

³⁶ Art. 25(2).

traditionally meant involving physical interaction³⁷ has been construed by the ICC upon the COVID-19 outbreak as not precluding physical interaction by virtual means³⁸. Indeed, technology enables us to appear by video and to transmit our voices to electronic devices in real time. Finally, the mentioned provision has been removed from the amended Rules, with effect from 1 January 2021. Instead, the drafters have clarified that hearings can be conducted by physical attendance or through different types of technology³⁹.

However, the amendment reveals the means of attending a physical hearing, not physical and virtual modalities of hearings⁴⁰. This can be inferred from other provisions of the amended ICC Rules, Art. 26(1) and 18(2). Firstly, Art. 26(1) ICC Rules obliges the tribunal to notify the parties of the place of a hearing. In stark contrast, the LCIA Rules have drafted the similar provision with a reservation that notifying of a place of hearings is not applicable to virtual hearings⁴¹. Secondly, Art. 18(2) mentions a location for hearings, without specifying what a modality of hearings is meant thereunder. Again, the similar provision of the LCIA Rules indicates physical hearings, since only these have a location⁴². The LCIA Rules framework is relevant for the interpretation of the ICC Rules, since the same flaws were contained in the LCIA Rules 2014⁴³ but are corrected in the LCIA Rules 2020.

³⁷ Cambridge Academic Content Dictionary, <<https://dictionary.cambridge.org/ru/%D1%81%D0%BB%D0%BE%D0%B2%D0%B0%D1%80%D1%8C/%D0%B0%D0%BD%D0%B3%D0%BB%D0%B8%D0%B9%D1%81%D0%BA%D0%B8%D0%B9/in-person>> (Accessed June 28, 2021).

³⁸ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, 9 April 2020, para. 23, <<https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>> (Accessed June 28, 2021). The new interpretation affected only Art. 25(2) ICC Rules 2017, while other provisions thereof (Art. 24(4), Appendix IV(f), Appendix V (Art. 4(2)) logically excluded such an interpretation.

³⁹ Art. 26(1).

⁴⁰ At best, the ICC Rules mention so-called “hybrid hearings” where a tribunal is physically present at one location, and other participants attend the hearing by virtual means.

⁴¹ Art. 19.2 in conjunction with Art. 16.3.

⁴² Art. 16.3.

⁴³ Art. 16.3 and 19.2.

Videoconferencing or the use of other types of technology cannot be equated with a virtual hearing. Although the technology is a medium that connects participants to a virtual hearing, the hearing itself is an intangible thing that cannot be embodied in any tangible object. On the contrary, a physical hearing is tangible as long as a location for it, *i.e.*, a room, building, city, country, exists. All these considerations have been reflected in the LCIA Rules. At the same time, the ICC Rules have abandoned the promising idea to interpret a virtual hearing as being in person⁴⁴. The new solution has aimed to make an explicit reference to the technology as permitting virtual hearings. However, other provisions of the ICC Rules have remained unchanged to confine hearings to some defined location. Therefore, virtual hearings are rather prohibited under the ICC Rules. These flaws of a drafting technique of the ICC Rules may be highlighted by the consistency of the LCIA Rules recognizing the true essence of virtual hearings. At the same time, this argument may not deserve any merit in practice, since the operation of the technology does not change by the fact whether it is a virtual hearing or a hybrid hearing. Essentially, the more important issue is whether the operation of the technology causes any prejudice to a party. The existence of such a prejudice will be discussed in Chapter 2.

1.3 The Parties' Right to a Virtual Hearing in a *Lex Arbitri*

Where the parties' agreement is silent on a modality of hearings and selected institutional rules are ambiguous in this regard, the tribunal should comply with mandatory rules of a *lex arbitri* equivalent of Art. 24(1) UNCITRAL Model Law in holding an oral hearing upon the party's request. The opposing party may argue that virtual hearings are not "oral hearings" and therefore excluded thereunder. Another strong argument for the party may be that drafters of

⁴⁴ This would still require amending other provisions of the Rules using the term "in person".

the UNCITRAL Model Law could not have contemplated virtual hearings as falling within the scope of oral hearings back in 1985.

However, the drafters would have specified physical, or in-person, hearings in the rule, had they attached any importance to a modality of hearings thereunder. Art. 24(1) UNCITRAL Model Law has been introduced to entitle the party to have oral hearings, instead of documents-only arbitration⁴⁵. The reason for the party to request oral hearings is that oral submissions have immediate impact on adjudicators in comparison with written submissions⁴⁶. In other words, the right to an oral hearing is based on the principles of orality and immediacy. Although the principles have been developed through the case law of the European Court of Human Rights on the application of Art. 6 European Convention on Human Rights to criminal cases, they are also well-suited for arbitration as a set of adversarial proceedings.

The principle of orality means that a party and a witness may be able to appear before a tribunal to make submissions and give a testimony orally. The principle also implies that these submissions and testimony may be challenged orally by the other party or a tribunal itself⁴⁷. The principle of immediacy means that a tribunal tasked with rendering a final decision should be present when a party conveys its position, and a witness testifies⁴⁸.

A virtual medium can keep the participants in one virtual room where the participants can exchange arguments and evidence orally and synchronously⁴⁹. This proposition has found

⁴⁵ Explanatory Note by the UNCITRAL SECRETARIAT on the Model Law on International Commercial Arbitration, para. 32.

⁴⁶ Andrea Menaker, Noor L. Davies, 'The Direct Examination of Witnesses and Experts Not Called for Cross-Examination: Balancing Efficiency and Fairness', BCDR International Arbitration Review, (Vol. 2 Issue 1, Kluwer Law International 2015), 135-152, 149.

⁴⁷ Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb), Updated on 31 December 2020, 53-55, < <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> > (Accessed June 28, 2021).

⁴⁸ *Ibid.*, 46-47.

⁴⁹ Scherer, *supra*, n. 3, 417-418.

support in case law⁵⁰. The opponents of such an approach may however argue that what make participants perceive their voices and appearances is technology first, not human senses of sight and hearing as would be in a physical courtroom. This clear distinction between physical hearings and virtual hearings does not nonetheless render the latter inconsistent with the principles of orality and immediacy, since the command of the voices and appearances rests with the participants, not the technology. As a result, the silence of Art. 24(1) UNCITRAL Model Law on the modality of hearings does in no way exclude virtual hearings⁵¹.

In light of the review of the applicable norms, a few interim conclusions can be drawn. The current virtual trend has found its support not in a perfectly drafted arbitration agreement or a sound legal rule, but in stakeholders of international commercial arbitration embracing a new *de facto* reality and its effects. The ambiguity of the above three sets of norms may nevertheless be an incentive for a party to oppose virtual hearings. In other words, the legal certainty as regards those norms is yet to be achieved. At the same time, the interpretation of those norms is usually based not only on a wording but also on our personal attitude to virtual hearings. As a consequence, the reconciliation of a physical place, or a location, with a virtual hearing is unlikely to be successful. In the end, this bias should not be an obstacle for the tribunal to order a virtual hearing if the latter is certain that due process would be observed in the hearing.

Virtual hearings may indeed be detrimental to the party, not unlike physical hearings may be. Therefore, it bears analyzing virtual hearings in light of their compliance with procedural guarantees, especially where legal grounds for the hearings can be inferred from the relevant

⁵⁰ *Polanski v. Conde Nast Publications Ltd*, [2005] 1 W.L.R. 637 (“In the past oral evidence required physical presence. But recent advances in telecommunication technology have made video conferencing a feasible alternative way of presenting oral evidence in court”); *The Islamic Republic of Pakistan v. The Republic of India* (The Indus Waters Kishenganga Arbitration) (Partial Award), PCA Case No. 2011-01, 18 February 2013 (“...the Court is of the view that video-conferencing is, under certain circumstances, an acceptable substitute for in-person cross-examination. By providing a synchronous audio and visual connection between the witness or expert, the cross-examining counsel, and the arbitral tribunal, video-conferencing can potentially approximate the conditions of in-person cross-examination”).

⁵¹ However, some clarification on this point from the UNCITRAL would be desirable.

norms. The next Chapter is entirely devoted to this analysis. This, however, should not impede further improvement of the relevant norms in adopting the true essence of virtual hearings.

CHAPTER 2. VIRTUAL HEARINGS IN PRACTICE: IMMINENT CHALLENGES

As Chapter 1 sought to show, virtual hearings are not prohibited by the relevant rules. Therefore, the opposing party relying solely on the absence of legal grounds for holding a virtual hearing would probably not succeed in having the virtual hearing denied. In practice, however, that party may also invoke rules equivalent of Art. 18 UNCITRAL Model Law in local legislation to substantiate an allegedly imminent breach of procedural guarantees in the virtual hearing. The rules establish two procedural requirements for the tribunal to follow, namely to treat the parties equally and to give the parties a full opportunity to present their cases⁵². The scope of these requirements is not derived from constitutional principles or rules of civil procedure of a particular country⁵³. Even if a state court of the place of arbitration rules in litigation proceedings that conducting a virtual hearing over a party's objection contravenes a civil procedure code, the tribunal is not under obligation to consider this finding while deciding on a virtual hearing⁵⁴.

Rather, the definition of the above requirements is incumbent upon annulment and enforcement courts testing applications under Art. 34(2)(a)(ii) UNCITRAL Model Law and Art. V(1)(b) New York Convention. The first requirement implies that the tribunal should apply similar standards to the parties⁵⁵. Thus, if a virtual hearing is scheduled during usual working hours in a party's time zone, this should not lead to the situation where the other party would participate in the hearing beyond usual working hours in its time zone. Obviously, the parties may sit in

⁵² These requirements are also known as safeguarding the parties' due process right.

⁵³ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 edn., 165, [39].

⁵⁴ Niklaus Zaugg, Roxana Sharifi, 'Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective', 14 January 2021, < <http://arbitrationblog.kluwerarbitration.com/2021/01/14/imposing-virtual-arbitration-hearings-in-times-of-covid-19-the-swiss-perspective/> > (Accessed June 28, 2021).

⁵⁵ UNCITRAL Digest, *supra*, n.16, 97, [5].

time zones that are hardly reconcilable to hold a virtual hearing without the parties being treated unequally.

The second requirement means that the parties should be entitled to present arguments and evidence on issues crucial for the outcome of proceedings, and to challenge arguments and evidence of the other party⁵⁶. A virtual format may affect the outcome of a dispute in view of the tribunal struggling to read the witness' body language remotely. While this ability varies from arbitrator to arbitrator, witnesses may also be a reason for such a state of affairs, by distracting from what is happening in the hearing. Beyond the aspects mentioned, the party's participation in the hearing and, therefore, presenting its case before the tribunal may not happen at all due to possible disruptions to technology operations and data security breaches.

Although the widespread appreciation of virtual hearings has not made, to my best knowledge, any "virtual" arbitral award annulled or not recognized, the above challenges to a virtual hearing are insurmountable to respect the party's due process guarantees, as this Chapter will show.

2.1 Reconciliation of Time Zone Differences

The tribunal favouring a virtual hearing may encounter difficulties when scheduling the hearing in view of the participants connecting from different time zones. The parties, as well as the tribunal, witnesses and experts, may anticipate to participate in a hearing, whether physical or virtual, during usual working hours. A virtual format should not be an excuse to force the participants to attend the hearing beyond the usual working hours in their respective time zones. Failure of the tribunal to accommodate time zone differences between all participants may evidence unequal treatment of a suffering party. This argument has already been examined by the Austrian Supreme Court in the previously mentioned case⁵⁷. The party sitting in Los

⁵⁶ UNCITRAL Guide, *supra*, n.53, 163, [33]; UNCITRAL Digest, *supra*, n.16, 98, [8].

⁵⁷ Oberster Gerichtshof, *supra*, n.10.

Angeles moved against a virtual hearing scheduled at 3 p.m Vienna time⁵⁸ (6 a.m Los Angeles time). The Court stated that by choosing Vienna as a place of arbitration the parties accepted the disadvantages of a geographical location of the place of arbitration with regard to their places of business, including travel time and time differences. The Court concluded that it was more convenient for the moving party to have the virtual hearing at 6 a.m Los Angeles time than to travel to Vienna for a physical hearing.

The Court's reasoning leaves much room for discussion. While one can agree that the parties had to tolerate the distance from their places to Vienna, it also prudent to state that what they could not have agreed was to meet beyond Vienna business time in case of a physical hearing. It is not clear why the party should have experienced the negative effect of the time zone difference solely because it should not have left its place for the virtual hearing. Ultimately, the Court has confused the time efficiency of virtual hearings with the parties' natural work-life balance to be respected.

Although in the Austrian case the early participation of the Los Angeles party did not apparently cause any significant prejudice to the latter, the Court's reasoning should not be of guidance in every case. The tribunal's willingness to adjust its sitting at the parties' convenience⁵⁹ could not bring any benefit to the parties in far distant time zones, for example, in Mexico City (UTC-6) and Beijing (UTC+8). Beyond that, the tribunal happened to be convened in one time zone should be cautious in scheduling a virtual hearing if its time zone is more favorable to one party than the other⁶⁰. To overcome these difficulties, some practitioners have suggested to conduct asynchronous virtual hearings where the one party's oral submissions are recorded and

⁵⁸ The other party sat in Vienna.

⁵⁹ Which was suggested by the Federal Court of Canada in *Guest Tek Interactive Entertainment Ltd. v. Nomadix Inc.*, 2020 FC 860, 2020 CF 860, 2020 CarswellNat 3478, [31]-[33].

⁶⁰ Stein, *supra*, n.12, 175.

submitted to the other party who thereafter makes its oral submissions being recorded⁶¹. In addition to such virtual hearings being inappropriate for cross-examination, as the practitioners admit themselves, these hearings do not comply with the principles of orality and immediacy as described in Chapter 1 of the thesis.

The pandemic has made the equality principle more flexible to apply, as can be seen from the Austrian case. However, this cannot eliminate time zones differences being hardly reconcilable in some instances. Proceeding with a virtual hearing in these circumstances exposes a disadvantaged party to the same, or even greater, inconveniences as an employee forced to work beyond working hours endures. The half-hearted solutions, such as conducting asynchronous virtual hearings, are not in the spirit of adversarial proceedings, arguably already diminished in the shift from physical hearings to virtual hearings⁶². After the pandemic, the new reality of virtual hearings would encounter new problems, such as choosing arbitrators based not only on their qualifications, but also on their availability in time zones suitable for all participants in dispute.

2.2 Limitations of Remote Witness Examination

For the opposing party, the core argument supporting due process violation is the unsuitability of virtual hearings for assessing witness live testimonies. The party may not advance the concern regarding witness coaching. The tribunal may reserve the right to ask a witness to complete a 360-degree view of its location⁶³. Moreover, a witness may be instructed to look

⁶¹ Michael Hwang S.C. in Institutional Responses to the COVID-19 Pandemic: Cooperation, Collaboration and Going Virtual, Norton Rose Fulbright Publication, June 2020, < <https://www.nortonrosefulbright.com/en/knowledge/publications/e2e707f2/institutional-responses-to-the-covid19-pandemic> > (Accessed June 28, 2021).

⁶² Let alone the illegality of asynchronous virtual hearings under a rule based on Art. 24(1) UNCITRAL Model Law.

⁶³ David Singer, 'Conducting the Evidentiary Hearing Remotely', New York Dispute Resolution Lawyer, (Vol. 13, No. 2, Summer 2020), 32-33, 33.

straight into the camera and keep the hands visible before the camera⁶⁴. Nor may the party allege that technology cannot in principle facilitate witness examination. Modern technology allows viewing more than 10 participants on the screen at once or opting to observe only an active speaker⁶⁵. Documents and other files can be shown to other participants by screen sharing or using the chat's 'file upload' feature⁶⁶. Virtual breakout rooms can be utilized to have other witnesses excluded while a witness testifies⁶⁷.

The opposing party may however refer to inherent limitations of remote witness examination which may affect the outcome of a dispute. These limitations include the diminished ability of the tribunal to assess witness' demeanor and the lack of the witness' understanding of his or her role and obligations in the hearing. The first limitation was tested by the Federal Court of Australia in *Capic v. Ford*⁶⁸. There, Justice Perram opined that virtual hearing platforms enabled him to perceive the witness' facial expressions much greater than it is in a courtroom. Undoubtedly, technology transmits the witness' facial expressions as clear as his or her appearance⁶⁹. However, for some adjudicators the analysis of witness' facial expressions may not be sufficient in the assessment of his or her behavior. The evaluation of the witness' appearance against his or her surroundings may be indispensable for the task completion. At the same time, technology can unlikely shape the way the human eye sees people and their surroundings. The camera's angle of view is narrower than that of the human eye⁷⁰.

⁶⁴ Oberster Gerichtshof, *supra*, n.10.

⁶⁵ International Bar Association, Technology Resources for Arbitration Practitioners, < <https://www.ibanet.org/technology-resources-for-arbitration-va.aspx> > (Accessed June 28, 2021).

⁶⁶ Ibid.

⁶⁷ Lou Chang ALC, 'Arbitration Using Videoconferencing Tools: Protocols & Guidelines', 17 June 2020, < <https://louchang.com/2020/06/17/arbitration-using-videoconferencing-tools-protocols-guidelines/> > (Accessed June 28, 2021).

⁶⁸ *Capic v. Ford Motor Company of Australia Ltd*, [2020] FCA 486, [19].

⁶⁹ In times when face masks are compulsory, a virtual hearing is far more beneficial in that regard than a physical one.

⁷⁰ Two people sitting on opposite sides of the table see each other in a way completely different from that when one of them is replaced by a camera directed to the other, and the absent one sees the other on a screen.

At the same time, one may argue the above limitation is offset by the fact that an adjudicator may not find himself or herself in misinterpreting the witness' body language and, thus, in improper evaluation of a witness testimony. This opinion was stated by an Ontario court in *Pack All Manufacturing v. Triad Plastics*⁷¹. However, this position again supports a view that different adjudicators may have different approaches to assessing witness credibility.

The second limitation was assessed by the Federal Court of Australia in *Campaign Master v. Forty Two International*⁷², later referred to by the Court in *Rooney v. AGL*⁷³. The Court placed much weight on the solemnity of court proceedings which a virtual hearing cannot ensure. Although arbitration is devoid of many formal requirements of litigation, the role of participants in each capacity does not change from litigation to arbitration. The members of the tribunal and counsel, by reason of their occupation, are always focused on a hearing, whether physical or virtual. Witnesses may however fail to perceive the gravitas of a hearing in a virtual format. A virtual hearing essentially lacks all features of traditional proceedings which make witnesses feel the importance of his or her testimony at a hearing, namely the physical presence of the participants in one room, an austere room interior design, the participants' seating at tables, exchange of paper documents, etc.

Technology has become advanced to the extent that an evidentiary hearing can be started with a few mouse clicks. The usual procedures of evidentiary hearings, such as direct and cross-examination of witnesses, have been adapted to a virtual format. The practice of virtual hearings has developed its ways to mitigate the risk of witness coaching. However, technological solutions cannot be adjusted to personal needs of a particular adjudicator who may not be able to read the witness' body language remotely. Yet, the current virtual trend may place some

⁷¹ *Pack All Manufacturing Inc. v. Triad Plastics Inc.*, [2001] O.J. No. 5882 (ON SC), [6].

⁷² *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* [2009] FCA 1306; 181 FCR 152, [78].

⁷³ *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942, [19].

moral obligation on such an adjudicator to proceed with a virtual hearing. The likely outcome of that decision is inaccurate assessment of the witness' credibility. From the witness' perspective, the benefit of testifying remotely may be perceived as an easy endeavor and thus not requiring full concentration and sharp reaction. Those circumstances may render the outcome of a dispute opposite to what may have been at a physical hearing⁷⁴. The importance of examination of critical witnesses at a physical hearing has been recognized by several courts, even in times of COVID-19⁷⁵. Perhaps there would be no reason for the participants to deprive themselves of the traditional adversarial process in a post-pandemic world.

2.3 Risks to the Technology Operations and Data Security

A virtual hearing is technology dependent. The sudden shift to virtual hearings has triggered significant investments by stakeholders of international commercial arbitration into their technological capacities. One cannot deny that these investments have generally paid off, so that practitioners are satisfied with virtual hearings⁷⁶. Different protocols have been developed to safeguard virtual hearings from connection disruptions and technical glitches⁷⁷. However, technology may operate in unpredictable ways. The continuing difficulties may force adjudicators to break off with a remote hearing. Therefore, the expeditiousness of proceedings initially sought by adjudicators scheduling a remote hearing is offset by a delay in proceedings. Yet, this decision is more desirable than exposing the participants to difficulties seeing and

⁷⁴ In this context, the opposing party may be successful in complying with the so-called "effects on the award" requirement, and eventually have a "virtual" award annulled or not recognized. UNCITRAL Digest, *supra*, n.16, 150, [76].

⁷⁵ *Fairstein v. Netflix, Inc.*, 2020 WL 5701767 (M.D.Fla., 2020), [II(a)]; *Lainhart v. Ellinson*, [2020] FCCA 1877, [40], [44], [47]; *Macalvin v. Harricks*, [2020] FCCA 1590, [23]; *Walders v Mcauliffe*, [2020] FCCA 1541, [13].

⁷⁶ Alison Ross, 'Covid-19: Participants in SIAC Case Share Success of Virtual Hearing', *The International Journal of Commercial and Treaty Arbitration*, 23 April 2020.

⁷⁷ For example, the Seoul Protocol on Video Conferencing in International Arbitration.

hearing each other properly and thus depriving the participants of a fair trial, as was held by a New South Wales court in *R v. Macdonald; R v. Edward Obeid; R v. Moses Obeid*⁷⁸.

The technological problems may not necessarily have their source in the technology being used, but in the parties' internet connection and hardware. Therefore, the tribunal should inquire whether all participants have sufficient bandwidth and equipment to run the hearing smoothly. In addition, if one of the parties has less reliable technological capacities than the other, the tribunal should be cautious in scheduling a virtual hearing in view of the parties' unequal standing.

Another concern for the integrity of a virtual hearing is data security. Practitioners can avail comprehensive approaches to cyber hygiene and cybersecurity, which may considerably reduce the risk of obstructing the hearing by third persons⁷⁹. However, those approaches contemplate that all participants devote their attention and resources to cybersecurity of the hearing. The security of a virtual environment of each participant becomes a prerequisite for the security of the whole hearing. Each participant supplies multiple electronic devices to facilitate his or her participation in the hearing. Therefore, those present a greater variety of choices for hackers than if there would be a physical hearing where the exchange of electronic files between the participants is rare⁸⁰. Apart from that, some participant may be even interested in having contents of the hearing leaked out. In the worst-case scenario, the participant would not only

⁷⁸ *R v. Macdonald; R v. Edward Obeid; R v. Moses Obeid (No 11)* [2020] NSWSC 382, [29].

⁷⁹ Cybersecurity Checklist of the International Centre for Dispute Resolution (American Arbitration Association); Best Practices Guide for Maintaining Cybersecurity and Privacy of the International Centre for Dispute Resolution (American Arbitration Association); Protocol on Cybersecurity in International Arbitration of the International Council for Commercial Arbitration, New York City Bar Association, International Institute for Conflict Prevention and Resolution (2020 edn.).

⁸⁰ Indeed, this does not exclude a possibility that arbitrators' computers, or a server of an arbitral institution, where files related to proceedings are kept during a physical hearing can be attacked as was the case with China-Philippines Arbitration (Luke Eric Peterson, 'Permanent Court of Arbitration Website Goes Offline, With Cyber-Security Firm Contending That Security Flaw Was Exploited in Concert with China-Philippines Arbitration', Investment Arbitration Reporter, 23 July 2015, < <https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/> > (Accessed June 28, 2021).

sabotage the implementing of the above approaches but may also record the hearing with audio and video⁸¹.

The tribunal may have little control, if any, over the implementation of cybersecurity protocols by each participant of a virtual hearing. However, the trend is to require the tribunal to avoid any intrusion into the hearing⁸². Such responsibility may be too heavy a burden to bear for the tribunal in combination with the fulfilment of its adjudicative functions.

In light of the above, one can conclude that the current virtual trend in international commercial arbitration has lowered demands on virtual hearings in terms of their compliance with procedural guarantees. The reason for that may be a common understanding that pending cases have to be heard with as little delay as possible, in the only possible format during the pandemic. In other words, the widespread appreciation of virtual hearings may be prompted not by their advantages over physical hearings but by the necessity in extreme circumstances. However, some caution towards virtual hearings is present even in times of the pandemic, as suggested by the case law discussed above.

Therefore, should international commercial arbitration not experience the effects of the pandemic, virtual hearings would barely elevate to a default option in proceedings because of the risks to the procedural guarantees of the parties in a virtual setting. Where a time zone difference is irreconcilable, forcing the party to attend the hearing beyond working hours in a respective time zone signals unequal treatment of the parties. Examination of critical witnesses may yield inaccurate assessment of their testimonies in view of the inability of arbitrators to read the witness' body language remotely, and witnesses not being focused on the hearing.

⁸¹ It is barely feasible to record a physical hearing with video. However, an audio recording is possible to produce there.

⁸² Stephanie Cohen; Mark Morril, 'A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion', *Fordham International Law Journal*, (Vol. 40, No. 3, April 2017), 981-1022, 994, 996-997.

Finally, technical glitches and data security breaches may obstruct the hearing to the extent where the party is unable to present its case before the tribunal.

CONCLUSION

The arbitration community has always speculated on when international commercial arbitration can become fully digital to the extent that its traditional practices, including physical hearings, are abandoned. The COVID-19 pandemic has turned this desire into reality. Virtual hearings have gained popularity over physical ones because justice is accessed with only a few mouse clicks. Moreover, safeguarding the expeditiousness of proceedings has become a coveted goal of the arbitration community. Virtual hearings have been the only solution in view of social distancing protocols and lockdowns. However, this enthusiasm for virtual hearings has overshadowed the due process concerns surrounding those hearings. A careful examination of these concerns, including those raised in actual proceedings, would have shown that virtual hearings could not respect the parties' procedural guarantees. This leaves them no room in a post-COVID arbitration world.

Against this backdrop, this thesis sought to draw the attention of scholars and practitioners to due process problems amidst a general expectation to have virtual hearings as a default option after COVID-19 is over.

I admit that the general lack of attention to due process may be caused by the misunderstanding of the true essence of virtual hearings. These cannot be simply equated with videoconferencing or other type of technology so as to allege that virtual hearings have been used long before the pandemic. A virtual hearing takes place once a virtual medium, that is, utilized technology connects participants from different locations. In other words, all participants attend the hearing remotely. These characteristics of virtual hearings are not always present in the norms governing arbitration as demonstrated in Chapter 1 of the thesis. In addition, the concepts of "oral hearing" and "in-person hearing" may confuse an arbitrator on the legality of virtual hearings under the norms. However, practice of virtual hearings does not change by the fact

whether the norms precisely adopt the true nature of virtual hearings or not. As long as these do not exclude the use of technology, the tribunal would not hesitate to hold a virtual hearing.

While the norms can easily be revised to unambiguously introduce virtual hearings, in practice the latter have adverse effects on the party's procedural guarantees. Virtual hearings are essentially not in compliance with the existing due process standards as described in Chapter 2 of the thesis. The reason for the arbitration community to tolerate this incompatibility is the pandemic. Should the community operate in normal circumstances, virtual hearings would be rarely used. The tribunal would not expose the party to attending the hearing beyond working hours in its time zone, while the hearing fits the other party's working schedule. The party would not compromise accurate evaluation of a witness testimony due to arbitrators being incapable of reading the witness' body language remotely, and a witness not being concentrated on the hearing. Finally, the party would not participate in the hearing, anticipating connection disruptions and data security breaches which eventually impede presenting its case.

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