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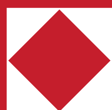
Online Dispute Resolution

New Challenges



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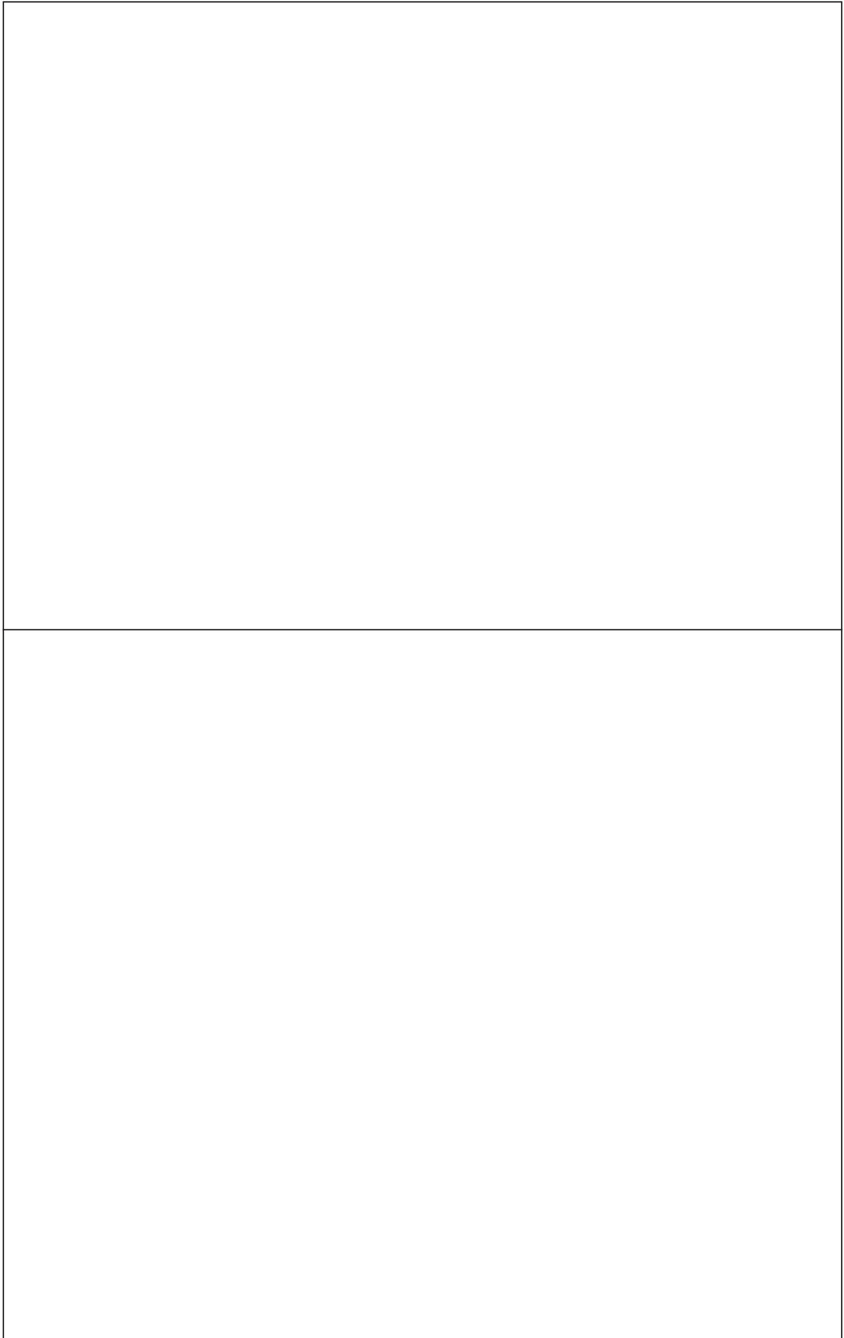

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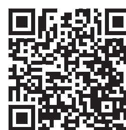

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Table of Content

List of Abbreviations 7

Introduction 9

Editors 11

Contributors 13

Part I Due Process Guarantees and Online Dispute Resolution

A Judge's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution 21
António Santos Abrantes Geraldes

An Arbitrator's Perspective: Between Equal Treatment and the Good Administration of Transnational Justice in Online Arbitration 37
Diego P. Fernández Arroyo and Bruno Sousa Rodrigues

A Lawyer's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution 59
Nuno Ferreira Lousa

An Arbitration Center's Perspective: Due Process in Online Dispute Resolution 65
Juan Serrada Hierro

Part II Online Trial Hearings – In Particular, Evidence

A Judge's Perspective: Online Hearings, especially the Gathering and Assessment of Evidence 87
Luís Filipe Pires de Sousa

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An Arbitrator's Perspective: Online hearings in Arbitration: the taking of Evidence 107
Pilar Perales Viscasillas

A Lawyer's Perspective: Virtual Hearings 133
Catarina Monteiro Pires and Madalena Diniz de Ayala

An Arbitration Center's Perspective: Online Dispute Resolution and the Virtual Hearings: Six Characters in Search of an Author 145
Paula Costa e Silva

Part III Confidentiality, Privacy and Security

A Judge's Perspective: Privacy and Confidentiality in Voluntary Commercial Arbitration 159
Rui Torres Vouga

An Arbitrator's Perspective: Confidentiality – Privacy – Security in the Eye of the Arbitrators or the Story of the Arbitrator who Became a Bee 181
Marc Henry

A Lawyer's Perspective: Confidentiality, Privacy and Security in Arbitration in Times of Covid 205
Sofia Ribeiro Mendes

An Arbitration Center's Perspective: Confidentiality, Privacy and Security 233
Joana Jerónimo Soares Correia

https://doi.org/10.5771/9783748931508, am 03.07.2022, 17:41:36
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List of Abbreviations

AAA	American Arbitration Association
CAC	Commercial Arbitration Centre (Portuguese Chamber of Commerce and Industry)
CIArb	Chartered Institute of Arbitrators
CPR	International Institute for Conflict Prevention and Resolution
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ISO	International Standards Organization
LCIA	London Court of International Arbitration
NYC Bar	New York City Bar Association
ODR	Online Dispute Resolution
PAL	Portuguese Arbitration Law
ROA	Revista da Ordem dos Advogados
SCC	Stockholm Chamber of Commerce
UNCITRAL	United National Commission on International Trade Law
ZPO	*Zivilprozessordnung* (German Code of Civil Procedure)

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Introduction

One of the lines of research pursued by the Private Law Research Centre at the Faculty of Law of the University of Lisbon concerns *Private Law in the Digital Age*.

This topic includes online dispute resolution, a practice which, after growing slowly but surely over several years, has been taken up much more widely as from mid-2020, due to the constraints on in-person proceedings imposed by the COVID-19 pandemic. In view of the impossibility of participants appearing safely in person for proceedings before state courts and arbitral tribunals, the response to this problem has been to use online forms of communication. Unprecedented use has thus been made of digital platforms, making it possible to maintain a reasonable pace in proceedings.

However, the shift to online means of communication in the conduct of dispute settlement mechanisms has posed a plethora of challenges, relating, *inter alia*, to questions of procedure before state courts and arbitral tribunals. This was the cue for holding a webinar on *Online dispute resolution: new challenges*, which took place on 29 June 2021 and was organised jointly by the Private Law Research Centre at the Faculty of Law of the University of Lisbon and by the Portuguese Arbitration Association.

As central topics for exploration at this event we chose "Due process guarantees and online dispute resolution", "Online trial hearings – in particular, evidence" and "Confidentiality, privacy and security".

In order to provide differing points of view and stimulating debate, we invited a judge, an arbitrator, a lawyer and the representative of an arbitration centre to share their knowledge and experience on each of the topics. As a result, the webinar featured illuminating contributions from António Abrantes Geraldes, Catarina Monteiro Pires, Diego P. Fernández Arroyo, Joana Soares Correia, Juan Serrada Hierro, Luís Filipe Pires de Sousa, Marc Henry, Nuno Lousa, Paula Costa e Silva, Pilar Peralles Viscasillas, Rui Vouga, and Sofia Ribeiro Mendes, who subsequently submitted their articles, which are published here.

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To all contributors, whose biographies can be found below in this book, we wish to express our sincere gratitude for their collaboration. Our thanks are also due to Nomos, which promptly agreed to publish this work.

Lisbon, April 2022

Dário Moura Vicente
Elsa Dias Oliveira
João Gomes de Almeida

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Editors

Dário Moura Vicente is a Full Professor at the Faculty of Law of the University of Lisbon, where over the past 30 years he has taught Private International Law, Comparative Law, Civil Law and Intellectual Property Law. He was the Chairman of the Scientific Council of the same Faculty between 2020 and 2022. Admitted to the Portuguese Bar (*Ordem dos Advogados*) in 1987. Has participated as arbitrator, counsel and expert in numerous domestic and international arbitrations. Member of the ICSID panels of arbitrators and conciliators and of the arbitration rosters of several arbitration centres in Angola, Brazil, Cape Verde, Mozambique and Portugal. Member of the ICC Commission on Arbitration and ADR. Chairman of the Portuguese Arbitration Association.

Elsa Dias Oliveira is an Associate Professor at the Faculty of Law of the University of Lisbon where she teaches *inter alia* Arbitration Law, Private International Law, International Contracts and Civil Law. She has published several articles and books also on arbitration, including *Arbitragem Voluntária: uma Introdução*. She is also President of the Arbitration and Dispute Resolution Center of the Faculty of Law of the University of Lisbon. She has been a member of the Board of the Portuguese Arbitration Association (APA) since July 2021 and is a member of the International Academy of Comparative Law (IACL) and of the Private Law Research Center of the Faculty of Law of the University of Lisbon.

João Gomes de Almeida is an Assistant Professor at the Faculty of Law of the University of Lisbon where he teaches *inter alia* Private International Law, International Commercial Law and Civil Procedure Law. He is a member of the Pedagogical Board and Vice-President of the Arbitration and Dispute Resolution Center of the same Faculty. He is a member of the International Academy of Comparative Law (IACL), European Association of Private International Law (EAPIL), the Portuguese Arbitration Association (APA) and the Private Law Research Center of the University of Lisbon Faculty of Law. He also works in legal practice and as a legal consultant.

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Contributors

António Abrantes Geraldes is a retired Judge of the Supreme Court of Justice. Published books: *Recursos em Processo Civil*; *Temas da Reforma do Processo Civil*, vols. I, II, III and IV; *Código de Processo Civil Anotado*, vols. I and II (as co-author); *Recursos no Processo do Trabalho*; *Temas da Responsabilidade Civil*, vols. I and II; *O Novo Regime do Processo de Inventário e outras Alterações na Legislação Processual Civil* (as co-author).

Bruno Sousa Rodrigues is a Brazilian attorney at law, admitted to the bar in 2012. He is a lecturer and doctoral researcher at Sciences Po Law School, with scholarly interests gravitating around international arbitration, public and private international law, transnational legal theory, and legal sociology. He regularly acts as tribunal secretary in international arbitrations and currently serves as Academic Coordinator of the Sciences Po Law School LLM in Transnational Arbitration & Dispute Settlement. Bruno is also a Director of the *Clube dos Arbitralistas Lusófonos*, a founding member of the *Instituto de Arbitragem da Bahia* and a member of the European Society of International Law.

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firm Fátima A. Rodrigues, Joana Borralho de Gouveia & Associates. In March 2009, she was invited to join the board of ARBITRARE, taking charge of the Legal Department. In July 2012, she was elected Chairman of the Board of ARBITRARE, her current position.

Juan Serrada Hierro is *Abogado del Estado* (State Attorney), chairman of CIMA and Secretary of the Corporación de Reservas Estratégicas de Productos Petrolíferos, responsible for managing Spain's strategic hydrocarbons reserves. In a career in public administration, and subsequently in the private sector and legal practice, he has held positions such as: Head of Technical Staff for the Minister of Finance and Legal Adviser to the National Airports Authority and the Government Delegation to CAMPSA, Deputy Secretary to the Board of Directors of the National Industrial Institute and Sociedad Estatal de Participaciones Industriales (state holding company for industrial sector), and Secretary to the Board and Advisor to a number of companies (Infoinvest, Carcesa, Ence, Inisas, Iberia and Aerolíneas Argentinas). In legal practice he has represented several companies as well as acting as arbitrator in numerous cases. He is a Correspondent Member of the Real Academia de Jurisprudencia y Legislación (Royal Academy of Jurisprudence and Legislation, Spain).

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turing on the same subject in Master 2, in particular at the University of Paris 1 Panthéon-Sorbonne, from where he holds a PhD in law. His PhD thesis on "The Duty of Independence of the Arbitrator" was published and won him an award.

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Rui Torres Vouga first joined the judiciary in 1985 and has been a judge at the Lisbon Court of Appeal (civil divisions) since 2006. He has worked with CEJ (Centre for Judicial Studies), since 2008, training judges and investigating magistrates and lecturing to future judges on European Judicial Cooperation in civil and commercial matters. On this subject, he has published: 'O novo regime jurídico dos pactos de jurisdição (à luz do artigo 25.º do Regulamento BRUXELAS I revisto [Regulamento (UE) n.º 1215/2012, de 12 de Dezembro de 2012])' (2018), in I *Revista do CEJ*,

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65-118; and, in December 2019, the ebook *Reconhecimento e execução de decisões no âmbito do Regulamento BruxelasI-Bis*, available at: http://www.cej.mj.pt/cej/recursos/ebooks/civil/eb_Decisoes_Bruxelas2019.pdf.

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Part I
Due Process Guarantees and Online Dispute Resolution

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A Judge's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution

António Santos Abrantes Geraldes

1. The simple idea that a dispute can be resolved online still raises eyebrows, especially among those justice professionals (judiciary and legal counsel) whose training was based on the classical paradigm involving in-person proceedings conducted according to rules contained primarily in the Code of Civil Procedure (CCP). The centrepiece of these proceedings, which start with the submission of pleadings and the discovery phase, is the final trial, featuring the oral proceedings in which statements are heard from parties, expert and witnesses.

Despite this, these are changing times and although the administration of justice is an area naturally more conservative than others, we are nonetheless seeing changes driven by technological progress to which everyone, willingly or otherwise, finds themselves adapting. This can be seen especially in the increasingly routine and mandatory use of an online platform (CITIUS) on which the lawyers acting for the parties, judges and court officials now expedite procedural acts, providing a record of all the documents and information relevant to the resolution of cases.

The current situation created by the pandemic has also affected how courts operate and has added fresh impetus to the growing use of online resources, bringing about procedural changes in the form of widespread use of videoconference systems, not just for trial proceedings in the lower courts, in which participants are not physically present at the court, but also for the deliberations of the higher courts, with judges communicating with each other online.

Force of circumstance has meant that lawmakers have had to institute arrangements that allow justice to be done despite the adverse conditions, permitting the use of online means for remote communications. Whilst temporary in character, these steps will inevitably influence future decisions in response to the foreseeable need for faster-moving and more effective procedural instruments.

These measures will necessarily result in an apparatus more accepting of further legislative changes currently being pursued at European Union

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level with a view to online dispute resolution (ODR), especially in cases arising from commercial relations exclusively or preferentially established online.

2. The resolution of private law disputes using channels that offer an alternative to the justice administered by state courts is now firmly established in most European legal systems.

In consumer law in particular, a need has long been felt to establish mechanisms to settle disputes involving mediation, conciliation and arbitration, as the traditional judicial response has frequently proved wanting and, in other cases, too cumbersome and expensive, in view of the nature of those disputes and the sums of money at issue.

Globalisation of the economy and growing consumption of goods and services purchased from different locations has fed into an upsurge in low density litigation in the field of consumer law, putting huge pressure on the apparatus of state courts that have long faced a shortfall in the human and material resources needed for a swift response to other demands.

On the other hand, the traditional procedural model has been shown to be too cumbersome for needs of these litigants, whilst also hampering a swifter and more effective response to other disputes.

In this context, a new network of arbitral tribunals in the field of consumer law was a natural option, providing an alternative way of settling the disputes better suited to their nature and scale, and offering a less expensive channel for prospective litigants.

3. In the meantime, the system has evolved to allow disputes to be settled online, keeping up with the trend for online trading in goods and services. This trade is not tied to specific territories and tends to be global in reach, creating a need for solutions that match this reality.

Here too, we can point to two distinct styles of response:

a) One where disputes are settled through online platforms that serve to receive complaints, which are assessed by the system administrators, sometimes using artificial intelligence, without however offering guarantees of independence from the entities against which the complaints are directed;
b) Another where online dispute resolution seeks to offer users guarantees similar to those provided by the use of alternative means of dispute resolution and by the bodies empowered to handle mediation, conciliation and arbitration proceedings, leading in this case to an award with effects equivalent to those of a court ruling.

This second approach has been the subject of recent legislation in the European Union, in the form of Regulation (EU) No 524/2013, relating to

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Directive 2013/11/EU on alternative dispute resolution for consumer disputes which, in Portugal, was transposed by Law 144/15, of 8 September.

At issue here are essentially disputes resulting from online cross-border transactions, within the European Union, albeit without ruling out the possibility of including disputes arising from online transactions within a single country.

However, this is a system that only caters for situations where the goods or services are acquired by a consumer, i.e. a natural person who has acquired them outside or predominantly outside the scope of his business, industrial, trade or professional activities. And although the Regulation also provides for complaints brought by traders against consumers, it is naturally a channel that will be sought out most by consumers, allowing them to file complaints and claims against online vendors or service providers, leading to settlement of disputes through acceptance, mediation, conciliation or arbitral award.

For this purpose, the Regulation has made provision for an interactive online platform allowing for procedures to be conducted electronically and offering connection to an organisation qualified to offer alternative forms of dispute resolution.

So it is not the platform itself that responds to the complaints submitted, acting instead as a facilitator of access to alternative means of dispute resolution for those seeking to exercise their rights arising from online trading in goods and services.

Although it is not mandatory for complaints to be handled online by alternative disputes settlement bodies, all communications to the parties concerned and their interactions with the procedures take place through the platform, without needing in-person appearances.

Another highly important aspect is that the use of this procedure is not obligatory, meaning that the possibility of reaching online settlements to disputes does not preclude exercise of the right of action through the traditional justice administration system offered by state courts.

4. But there is one crucial point regarding any dispute resolution promoted through national or supranational legislative measures: it must be ensured that such resolution is fair.

This requires the existence of functional rules that safeguard what is called fair trial, both in the sense accepted in domestic law, and in that emerging from the vast body of case law of the European Court of Human Rights.

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According to this case law, a fair trial implies several requirements, which include:

a) the right to adversarial process, meaning that the parties are able to participate effectively and on an informed basis;
b) the need to ensure equal treatment of the parties; and, as an especially important aspect of any adjudicative activity,
c) conditions that objectively and subjectively ensure the independence and impartiality of those judging the case, be they the judges in a state court, or arbitrators in disputed submitted for alternative dispute resolution, whether in person or online.

Fair trial is not to be confused with the use of criteria of equity in the resolution of disputes. It is more than that. Notwithstanding the application of criteria of equity, when applicable, respect for a fair trial is furthered by the necessary association between dispute settlement and the entities to which powers are granted to settle disputes.

As regards online dispute resolution (ODR), arrangements must be in place that make it possible to assert the independence and impartiality of the arbitrators, both as regards the persons managing the alternative dispute resolution bodies, and as regards those responsible for medication, conciliation and arbitration activities.

This means that the persons responsible for dispute resolution:

a) must not receive instructions from the parties or their representatives;
b) must enjoy a minimum level of stability in exercise of their duties;
c) must be remunerated on a basis not tied to the outcomes reached; and, where applicable,
d) must declare their interests when any circumstance calls their independence and impartiality into question.

The arrangements must also ensure:

a) the transparency of the rules and procedures; and
b) the effectiveness of the procedure, so that it is resolved in a necessarily short space of time, in view of the nature and origin of disputes arising from the online sale of goods and services.

All this must come together to ensure users have confidence in the system.

5. Steps to introduce online dispute resolution should therefore be viewed as the natural way forward, insofar as they constitute further progress towards effective consumer protection.

Although this is still a relatively recent measure, data from the European Consumer Centre shows that all European Union countries have

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provided access to the online dispute resolution platform, which is linked to alternative dispute settlement bodies.

According to the figures published, consumer demand for these services arises largely from disputes relating to air travel, sales of clothes and goods and hotel stays.

In conclusion: the facilitation of complaints through online platforms which are easy for the interested parties to use, the transparency of procedures, the independence and impartiality of the persons who will examine the facts in a procedure with a due adversarial element and reduction of costs, in view of both the value of the goods and services in question, and the comparative costs of using traditional channels - all these are factors that not only make it safer to trade online, but also offer effective, simple and swift protection for consumer rights in an increasingly globalised society.

6. As already stated, the guarantee of a fair trial is fundamental to the resolution of any disputes through voluntary arbitration, whether national and international, or through the ordinary state courts. This requirement is all the more pressing when electronic means are used in those disputes, either for the submission of pleadings, or else for discovery phase or trial.

In arbitral proceedings, the greater freedom enjoyed by arbitrators in mapping out the procedural rules and the combined efforts of both parties and their legal representatives with a view to securing swift and fair settlement of the dispute increases the scope for harnessing new technology.

In the state courts, where procedural rules are more rigid, it is naturally more difficult to make technological innovations, but ordinary civil procedure has nonetheless evolved to do so.

We will cite some important examples:

After some initial hesitation, Portuguese legislation moved decisively to enshrine online procedures in the state courts, as now provided for in Article 132 CCP, as amended by Decree-Law 97/19, of 26 July: “the case file is electronic in nature, comprising structured information contained in an information system supporting the activity of courts and of electronic documents”.

In practice, this means the CITIUS system, through which cases are processed, from the submission of the parties' pleadings and applications, to notifications between parties, court orders and judgments, and all the acts of the court clerks. This may also include communications with external bodies provided the information systems are interoperable, on terms regulated in Ministerial Order (*Portaria*) 280/13, of 26 August.

It is in this system that, under Article 144 CCP, parties represented by lawyers or *solicitadores* must carry out all procedural acts, including the

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submission of documents, unless, in view of their nature or size, they cannot be processed online.

The only exception to this rule is in situations where representation by a lawyer is not mandatory and parties opt to represent themselves, in which case other means may be used (submission to the court clerks, by email or fax), under the terms of Article 144 para. 7.

This integrated system also records hearings and, in particular, oral evidence produced to the judge, under Article 155 CCP, providing the parties with access for the purpose of challenging the decision on the matter of fact proven and not proven, and also ensuring that the Appeal Court has access to this when necessary for forming its conviction concerning the matter of fact, in the light of the principle of free appraisal, in accordance with the provisions of Article 662 CCP.

As is obvious, this new technological resource must guarantee the integrity, authenticity and inviolability of the system (Art. 132 para 4 CCP). These requirements together with respect for the fundamental principles of adversarial process, equality of the parties and the independence of the judge, combine to ensure a fair trial.

Experience now makes it possible to point to the advantages of online proceedings over physical or material proceedings insofar that, when those guarantees are in place, they represent significant progress in terms of procedural simplification, the celerity of proceedings and increased convenience for all participants, especially for lawyers, as they do away with unnecessary travel and facilitate procedural acts. For judges, it means they can monitor the course of proceedings more directly and access the case file from wherever they may be.

Observation of the system as currently implemented and functioning has revealed no procedural issues that undermine the right to a fair trial, because all the fundamental principles of civil procedure, most notably adversarial process and equality of the parties, are upheld in a way equivalent to the model based on the existence of a physical case file (Art. 3 and 4 CCP), and the transparency of proceedings is ensured, both at first instance, and at the Appeal Courts or the Supreme Court of Justice.

7. But online procedure is also compatible with other technological advances capable of bringing greater efficiency and celerity to the settlement of disputes, which involve the possibility of using means of remote communication to facilitate the taking of oral evidence; this can reduce costs, although supplementary safeguards need to be adopted.

We may here point to the increased powers given to judges to direct the proceedings, on terms made very clear in Article 6 CCP, which provides for a pro-active approach to ensuring swift progress is made in proceed-

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ings, by taking all the steps needed to ensure the process runs smoothly and adopting such measures as may be appropriate to simplify and speed up proceedings, geared essentially to the central objective to be pursued in all proceedings, which is to arrive at a just settlement of the dispute within a reasonable time.

This power of direction attributed to the judge must be exercised in keeping with the principle of appropriate form established in Article 547 CCP, whereby "the judge must adopt the procedural stages appropriate to the specific features of the cause and adapt the content and form of procedural acts to their intended purpose, ensuring a fair trial".

All these powers exist alongside rules and traditions that point to adherence to a certain procedural ritual that ensures a standard of predictability and certainty for all those involved and, at the same time, offers the solemnity appropriate to the activity of resolving disputes or settling conflicts of interests through judicial channels.

It is these guiding concepts - celerity and efficiency on the one hand, and certainty and solemnity on the other - that we find throughout the procedural rules, and especially in those governing the discovery phase and the final hearing, with the aim of producing a final decision that is the result of compliance with fundamental principles that include adversarial process and equality, both essential features of a fair trial.

It follows that all acts whereby evidence is produced must comply, in material terms, with the principle of an adversarial process; this entails ensuring that no evidence is admitted and evaluated without both parties having the chance to challenge it (Art. 415 CCP).

The adversarial principle is especially important in the case of evidence not yet in existence, such as in the case of party depositions, expert testimony and witness depositions, where each party has the right to intervene in the preparation and production of that evidence, under the first part of Article 415 para. 2 CPC. These requirements apply even when the early production of evidence is needed in the circumstances provided for in Article 419 CCP: in these cases too, evidence must be admitted and produced in a setting that allows for effective exercise of adversarial process.

8. It so happens, however, that the system has been evolving towards facilitating and expediting the production of this evidence, which now does not necessarily have to take place in the presence of the judge and the parties' legal representatives at the final trial hearing.

Well before the courts and lawmakers came under pressure from the epidemiological circumstances that arose as from early 2020, giving rise to a temporary legislation governing, among other things, the holding of trial hearings by video link (Law 1-A/20, of 19 March, in successive versions

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responding to the changing situation), legislators had felt the need to tackle a number of factors that held up the taking of oral evidence.

For example, instead of the sending of letters of request for the hearing of witnesses resident outside the court's area of jurisdiction, the system had already moved to allow oral evidence to be taken using technological equipment permitting real time communication using audiovisual means. In the first instance, this required the witness to attend the court in his or her area of residence, but the change made to Article 502 CCP by Decree-Law 97/19, of 26 July, allowed witnesses to be heard not just from the premises of a court, but also from other public premises belonging to municipalities or civil parishes, or other public buildings. In these circumstances, using a videoconference link, witnesses depose in just the same way as they would if present at the hearing.

These rules on the production of oral evidence also apply to party depositions, under Article 456 para. 2, and even to clarifications requested from certain expert witnesses, under Article 486 para. 2 CCP.

It is nonetheless true that, in the case of persons resident in other countries, the procedure resulting from instruments of international law (e.g. The Hague Convention, of 18-3-1970, on the taking of evidence abroad in civil or commercial matters) or European law (Council Regulation No. 1206/2001 of 28 May 2001, on the taking of evidence in the European Union using teleconference facilities) must be followed.

For the purpose of the questioning of witnesses within the European Union, this Regulation contains rules on requests for taking oral evidence by the courts of the country of residence of the deposer and provides the possibility of the deposition being taken directly by the court of the requesting country, including by video link, albeit in all cases on a voluntary basis and with the intervention of a judge or judicial personnel of the country of residence (Art. 17). Under the convention mentioned, provision is made only for the issue of letters of request to the judicial authorities of the country of residence or requests for the taking of oral evidence from citizens of the requesting State.

Whilst neither of these instruments provides for the possibility of taking oral evidence directly using technological means, the internal rule contained in Article 502 para. 5 CCP allows for this possibility, on the decision of the judge, under his power to direct proceedings, in accordance with Article 6 CCP and after first consulting the parties; this may be especially justified when the institutions of the country of residence are unable to guarantee a swift response to any other request entailing the use of other channels.

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This possibility presents the particular feature of not requiring deponents to present themselves to any other entity and permitting them to depose from any location abroad, as was admitted in the Judgment of the Lisbon Appeal Court, of 19-11-2019, 28325/17, *www.dgsi.pt*, in a case where the judge at first instance issued the following order:

Notify the claimant that it may not be possible to establish a videoconference link between Portugal and Mozambique for the questioning of the witnesses he has listed, and that he should therefore clarify, within ten days, whether he wishes a connection using other technological means ("Whatsapp"; "Facetime", "Skype" or other) for which purpose he must provide the contact number of the witnesses and make available the equipment to be used to this end or else to send, as originally envisaged, a letter of request indicating the alternatives of questioning by videoconference, failing which questioning by conference call, and failing which questioning by a Mozambican Judge.

If he opts, as originally envisaged, for the sending of a letter of request to Mozambique, in view of the existing constraints, he must indicate, within ten days the questions he wishes to be put to each of the witnesses, in the eventuality of the sole means of international cooperation available being questioning by a Mozambican Judge.

The following order was subsequently issued:

Considering that the claimant does not object to his witnesses resident abroad (*in casu*, in Mozambique) using "*Skype/Whatsapp*" and in view of the constraints in the procedures for international cooperation on the use of videoconference links, for reasons of procedural economy I hereby determine that his witnesses be questioned in this way, under the terms of Article 502 para. 4 CCP.

9. Nonetheless, in spite of the growing importance that has been given to depositions made remotely, beyond the direct reach of the judge and the parties' legal representatives, the practical arrangements are only thinly regulated, especially as regards measures to ensure the possibility of control over factors influencing how depositions are made, challenged by the parties' legal representatives and evaluated by the judge.

Article 504 para. 4 CCP limits itself practically to certifying that persons presenting themselves to depose are actually those indicated for this purpose, and it is for this that the persons identifies him or herself to the court clerk or public servant at the place attended by the deponent.

Greater concern has been shown for situations where failure to appear is due to impossibility or serious difficulty, under the terms of Article 520 CCP, in which case it is established that the person may be questioned by telephone or other means of direct communication between the court

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and the deponent, specifying that the court must take all possible steps to ensure the authenticity and full freedom of deposition, sending a court official to the remote location to accompany the deponent.

Irrespective of any specific regulations, the guarantees of authenticity and freedom must apply to any deposition, regardless of the circumstances, and it is important to this end that the deponent be distanced not only from the judge but also from the attorneys of each of the parties, ensuring that oral evidence is provided in a way that is effectively close to what would happen at a trial fearing. This will be easier to evaluate when audiovisual means are used, but perhaps more difficult to confirm when merely employing an audio link.

This is what happened in the case that was assessed in the Judgment of the Guimarães Appeal Court, of 28-2-19, 2281/17, *www.dgsi.pt*, concerning an issue relating to confirmation of the identity and credibility of a witness who was questioned on *Skype*, where it was observed that:

We believe it was the legislator's intention to enable the courts to expedite the questioning of witnesses, in particular when resident abroad, in order to avoid that questioning from being an added factor in delaying the conclusion of proceedings, both by eliminating the need for sending a letter of request and, in some instances, of the actual questioning by conference call which, as it must comply with specific formal requirements, involving the necessary translation, as well as contacts with the foreign judicial authority, also entails added delays.

This is the view taken by António Geraldes, Paulo Pimenta and Luís Filipe Pires de Sousa (CCP annotated., vol. I,559) who, in an annotation to this provision, write that "in an era of technological globalisation and continuous mobility of the workforce, it makes no sense for the questioning of witnesses resident abroad to continue to constitute a factor adding to delays in concluding proceedings (…) We believe that the changes to this provision, now headed "Questioning by technological means", point towards this process being expedited.

…

We also consider that the legislator has in fact permitted the use of technological means, such as *Skype* and not just conference calls, for the questioning of witnesses resident abroad and that those technological means, namely *Skype*, must be considered as reliable means which, being at the court's disposal, must be used instead of others that can cause delays in concluding trials and consequently in reaching the close of proceedings.

And we do not consider that the legislator has established that conference calls are in any way the first preference of the various electronic options referred to in Article 502 CCP, so as to require at present that

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witnesses resident abroad be questioned using that particular electronic means, with recourse to others only to be contemplated when a conference call is impossible.

On the contrary, the principle of procedural management established in Article 6 CCP requires the judge to take active steps to direct the proceedings and ensure their celerity, adopting mechanisms to simplify and expedite the proceedings such as ensure a fair settlement of the dispute within a reasonable time, safeguarding at all times the guarantee of the parties' rights which, in our view, are not affected by the use of these technological means, because the parties are still able to pursue the proceedings in relation to the witnesses and to raise all the procedural issues they deem relevant to the defence of their interests.

For this reason, the question of possible risks in the identification of the witnesses should not be raised in relation to the admissibility of questioning by *Skype*, but in the context of the actual questioning carried out in each case and the precautions that can be taken in each instance. For example, we may point to the countless situations in which the identity of a witness is not even open to question, as he or she is personally or professionally know to both parties, meaning their identity is unquestionable, without prejudice, of course to the identification by the court referred to in Article 513 para. 1 CCP.

…

In any case, the court's identification of the witness was exhaustive, as we confirmed by listening to the recording, going far beyond that which is usually done and implied in the said Article 513 para. 1 CCP, namely with the witness replying as to his place and date of birth, his parents' names, his wife's name and the names of his two children, and exhibiting his citizen's card in a way that left the lower court in no doubt as to his identity.

10. It is clear that all these mechanisms call into question aspects traditionally regarded as relevant in lending credibility to depositions.

In the first place, they lack the solemnity of a deposition in the setting of a trial hearing. Whilst form is not to be confused with content, the two are not unrelated, especially in situations where depositions are given under oath, implying an awareness of the importance of the act to the outcome of the dispute.

Secondly, the greater physical distance of the witness from the court may aggravate the chronic problem of perjury, a risk that is all the greater when we consider that the idea that testimony must be provided in strict obedience to the truth, for the sake of justice, independently of the party calling the witness, is not truly rooted in our community.

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We may also note that our system is based on the orality principle, that is to say, that the depositions of witnesses or parties are provided orally before the court. Recent legislation permitting the submission of written depositions, on the terms established in Article 518 CCP, has failed to bear fruit, as has the introduction of the model of questioning as agreed by the parties, provided for in Article 517 CCP, and frequently employed in the French courts.

In these circumstances, special importance continues to be attached to the principle of immediacy emerging from Articles 459 to 462 CCP and to the principle of free assessment of evidence produced orally (Art. 607 para. 5 CCP), as in the case of witness depositions (Article 396 Civil Code) or even in that of party depositions, in the situations provided for in Article 358 para. 4 Civil Code. Both these principles unavoidably suffer when it is decided to take oral evidence using remote means communication, whether in the form of videoconference or, even more so, in the form of a mere audio link.

In reality, despite the technological advances made over time, oral evidence obtained by technological means, even when this involved transmission and recording of both sound and images, still fails to transmit all the details which, as we are taught by judicial psychology or even the rules of experience, customarily come into play when assessing the credibility of a witness. In particular, this procedure can undermine the ability of the judge and legal counsel to perceive effectively elements of non-verbal communication, which are sometime as or more important than that which is put into words.

11. Despite this, however, it would be wrong to attach too much importance to these issues because, as we have seen, the traditional ways in which oral testimony is given to courts has very frequently failed to prevent false depositions, with a direct influence on the settlement of disputes and without those responsible suffering any effective penalties.

What is more, irrespective of how it is provided, the scrutiny of oral evidence in order to verify the deponent's claim to first-hand knowledge and truthfulness must entail not just active efforts on the part of the judge, but also the endeavours of the parties' legal counsel, who will have access to information beyond the reach of judicial control.

Moreover, there is no reliable data to tell us which aspects are truly relevant in order to assess the credibility of depositions, because factors that might point in one direction for a particular deponent may not be applicable to another.

The same can be said as regards the solemnity of oral testimony, which cannot be held up as exemplifying an absolute standard that all other

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elements necessarily fail to meet. Whilst it is clear that the authority of the State is also manifested in court ritual, it should not be overlooked that, alongside this value, there are also the interests of procedural efficiency and celerity in the administration of justice, which are important to keeping the social peace, which depends on the settlement of disputes or the resolution of conflicts of interests.

There is no doubt that, as far as possible, material truth must be pursued in keeping with the general principles inherent in any judicial procedure, ensuring that, alongside the equality of the parties and the independence and autonomy of the judge, the adversarial principle is truly respected, especially at the stage of the production of evidence, before or during the final hearing.

It is the sum total of all these principles and rules that makes it possible to ensure that the right to a fair trial is upheld; in view of the importance that is still assigned to evidence provided orally and of the fact that other, more objective evidence is often lacking, a fair trial cannot do without rigorous, albeit less solemn or formal, handling of how oral evidence is provided, challenged and evaluated by the judge.

12. These are issues that unavoidably also arise in arbitration proceedings.

Given that, in this channel for judging disputes, more weight is attached to the parties' shared interest in the goal of arriving at settlement of a dispute through the intervention of the arbitrators, following through a procedure that must be truly instrumental to that ultimate end, the way in which evidence is gathered, and in particular how the depositions of the different persons involved, namely the parties, experts and witnesses, are provided, obtained and evaluated, is of no little consequence to the fairness of the final outcome.

Because of the high value of the economic interests at stake, arising from legal relationships of great complexity, the process of establishing the relevant matter of fact is commonly dependent on obtaining and evaluating the depositions of persons living or working in different places, often in different countries.

It is clear that, within the greater freedom enjoyed by arbitrators in setting the procedural rules, there are no absolute impediments to submission of written depositions, but a measure of resistance may also be discerned here, arising from misgivings as to whether the duty of truthfulness will prevail or when it has to be ensured that the depositions are free of any pressures arising from professional loyalty or closeness to one or other of the parties.

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Less difficulties exist in relation to the option of depositions being provided by electronic means, which is especially justified in cases involving persons living abroad; in addition to offering a more convenient form of making depositions, this option allows parties to reduce arbitration costs by limiting travel to the arbitration venue.

The circumstances created by the pandemic also highlighted the utility or even the necessity of altering the traditional paradigm, leading to examinations and cross-examinations that would otherwise have taken place in the physical presence of the arbitrators being conducted online, albeit surrounded by the precautions needed to verify the authenticity of depositions, for the sake of fair and equitable resolution of the arbitral dispute.

13. Consequently, neither in litigation proceedings in state courts nor in those following national and international arbitration rules should the use of technological resources appropriate to the specific circumstances be ruled out.

In the case of depositions by parties, experts or witnesses, it is of pressing importance to tighten the procedures for verifying the identity of deponents, checking their claim to first-hand knowledge and controlling how oral testimony is given, thereby reducing the risk of deponents being manipulated on the basis of their dependence on one or other of the parties.

It is common for persons who come forward to depose to have a working relationship with the parties themselves, which may increase the likelihood of partial testimony, the evidential value of which must necessarily be assessed, on pain of vitiating the final outcome.

This means that, in addition to giving advance notice of how oral evidence will be provided, there are objective requirements for ensuring that examination and cross-examination by the parties' lawyers, or the questioning by judges or arbitrators, is carried out in an environment that allows the deponents and the place from which they speak to be seen, so that their claim to first-hand knowledge can be freely assessed, along with the quality of their deposition and its impact on the decision on the matter of fact which is, of course, the essential element on which the settlement of disputes depends.

In a system such as that in Portugal where, in both the state courts and arbitral tribunals, a strong influence on the decision on the matter of fact is still exerted by evidence subject to free evaluation, such as the testimony of witnesses or even party depositions without the effect of confession, the guarantees of a fair trial imposed by Article 20 para. 4 of the Constitution necessarily require proper grounds for that decision, in which the judge or arbitrators trace the methodological pathway that led to a given result.

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This is the meaning of the rule in Article 607 para. 4 CCP, with regard to ordinary civil procedure, whereby in setting out his grounds for the decision on the facts he deems proven and not proven the judge must examine 'critically the evidence, indicating the inferences drawn from instrumental facts and specifying the other grounds which were decisive in forming his conviction', as well as drawing "from the established facts the presumptions imposed by law or by the rules of experience".

To this end, it does not suffice to merely reproduce portions of the oral testimony; instead, there must be a critical examination of the evidence produced, in particular that which is subject to free evaluation, under Article 607 para. 5, enunciating the essential reasons which, in the light of varied and often contradictory elements, proved to be crucial in forming his conviction as regards the facts deemed proven and not proven.

This, of course, amounts to complying with the duty to state grounds, requiring judges or arbitrators to set out and explain the reasons for their decision, declaring why, without forfeiting the freedom of decision guaranteed by the continued applicability of the principle of free evaluation of evidence, certain conclusions of the expert witnesses were judged relevant or irrelevant, whether the evidence resulting from exhibits was deemed satisfactory or otherwise, or whether greater credibility was assigned to some depositions and not to others.

If this task is already difficult in the light of depositions made in the presence of the judge or arbitrators, subject to intensive cross-examination and to the principle of immediacy which makes it possible for the judge or arbitrator to take a pro-active approach to seeking out the material truth, the fact that the oral evidence is taken by videoconference or other means of remote communication must not serve to justify less rigorous treatment of the factual elements relevant to the free formation of the judge's (or arbitrators') conviction.

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An Arbitrator's Perspective: Between Equal Treatment and the Good Administration of Transnational Justice in Online Arbitration

Diego P. Fernández Arroyo and Bruno Sousa Rodrigues

Table of Content

A. Introduction 37

B. The Limits of Equal Treatment in Arbitration 38

C. Good Administration of Justice in Transnational Arbitration 45

D. Good Administration of Online Transnational Arbitration: the View from the Tribunal 51

E. Conclusion 56

Bibliography 56

A. Introduction

Online arbitration is here to stay. The expression is deployed here to refer to the ever-increasing digitalization of arbitration proceedings. One cannot but note that the pandemic has accelerated the deployment of information technology in the conduct of proceedings, making this the norm.[1] What was once the preserve of geeks and tech aficionados, is now a common topic of conversation even among the most senior members of the arbitral community. Indeed, it is difficult to find a single arbitration practitioner who has not been faced with online hearings and generalised use of electronic submissions.

1 Yves Derains talks about 'the role of electroshock' played by the pandemic over arbitration proceedings, in 'Une nouvelle approche de la procedure arbitrale internationale' (2021) 3 *Revue de l'arbitrage* 629 (645).

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Lawyers acting for parties and arbitrators alike have managed to transition satisfactorily to the world of online proceedings. This has generated great optimism on the part of many, who now see the dawn of a new era in dispute resolution. The standard account is that we face an opportunity to reduce arbitration's carbon footprint and costs in general. Anyone who demonstrates less than great enthusiasm for this new (virtual) reality risks being regarded as odd or anachronistic.

The many benefits of online arbitration, especially in the context of the Covid crisis, are beyond question. Several of the elements of online arbitration will certainly survive – in a balanced way – even if one day the pandemic is (hopefully) put behind us.[2] Even so, one must guard against online euphoria, because the conduct of arbitral proceedings in this setting throws up a number of challenges and difficulties. Most notably, online arbitral proceedings can complicate the relationship between two foundational values governing any system of dispute resolution, i.e. that of equal treatment and that requiring a good administration of justice. Indeed, the benefits of cost reduction and expediency, usually associated with the transition to online proceedings, may also come at the cost of an increased concern for parties' equality of arms. As has been the case in other circumstances, the expansion of arbitration over greener pastures has always come with a price tag on it.[3]

This chapter will proceed as follows. First, it will discuss the limits to the principle of equal treatment in arbitration. It will then explore how the concept of good administration of justice is to be understood in the context of transnational arbitration. Lastly, it will explore a number of issues in the relationship between the good administration of transnational justice and equal treatment in the context of online arbitral proceedings. A final section will set out this chapter's conclusions.

B. The Limits of Equal Treatment in Arbitration

Due process and fair trial are terms that tend to be correlated, if not conflated. Normative instruments of various pedigrees usually proclaim their centrality to the administration of justice, and literature on due process

2 See Fellas, 'International Arbitration in the Midst of COVID-19: One Year Later' (2021) *New York Law Journal*.

3 See Fernández Arroyo, 'Nothing is for Free: The Prices to Pay for Arbitralizing Legal Disputes' in Cadiet, Hess and Isidro (eds), *Privatizing Dispute Resolution* (2019), 615.

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in arbitration[4] will most often refer to the sources of these principles by reference to article 18 of the UNCITRAL Model Law[5] and article 10 of the Universal Declaration of Human Rights.[6] Evidently, the many arbitration rules in existence will also pay tribute to the notion of fair trial, as can be seen in Article 17 para. 1 of the 2010 UNCITRAL Rules[7] and Article 22 para. 4 of the 2021 ICC Rules[8].

All the instruments mentioned seemingly converge in associating fair trial with equality of the parties. In the literature, when fair trial is dressed in its guise of equal treatment it is often presented as a synonym of the right to be heard (*audiatur et altera pars* or *audi alteram partem*). In all circumstances, it is claimed that '[a]djudicators must be vigilant to maintain equality between the litigants over the entire span of the adjudicatory process because it is a key component of fair hearing.'[9] Adopted by most mu-

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4 For recent scholarship on the matter, see Cordero-Moss, 'The Alleged Failure of Arbitration to Address Due Process Concerns: Is Arbitration under Attack?' in Calissendorff and Patrik (eds), *Stockholm Arbitration Yearbook* (2021), 251; Ferrari, Rosenfeld and Czernich (eds), *Due Process as a Limit to Discretion in International Arbitration* (2020); Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International*, 361.

5 The provision reads as follows: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' See Art. 18 UNCITRAL Model Law on International Commercial Arbitration, 2006.

6 The text of the provision is the following: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' See Art. 10, Universal Declaration of Human Rights. Similar provisions are adopted, with more detail, in the International Covenant on Civil and Political Rights (Art. 14) and the European Convention on Human Rights (Art. 6).

7 The provision reads as follows: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.' See Art. 17 para. 1 2010 UNCITRAL Arbitration Rules.

8 This is the text of the provision: 'In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.' See Art. 22 para. 4 2021 ICC Rules of Arbitration.

9 Kotuby and Sobota, General Principles of Law and International Due Process (2017), 177.

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nicipal legal systems, procedural equality is considered a general principle of law with long-standing recognition before international jurisdictions.[10]

Indeed, the evanescent concepts of due process and fair trial are deeply connected to a broader egalitarian agenda, even if expressed in a narrower procedural sense. In this regard, the principle of equal treatment establishes within the procedure a measure of equality between the contenders, which should be manifested in equidistant behaviour on the part of the adjudicator. The question that obviously arises in relation to this notion of egalitarian fair trial will inevitably have to do with the age-old paradox opposing formal to substantive equality.

'Treating likes alike' is a running theme in philosophy and legal theory going as far back as Aristotle's Nicomachean Ethics.[11] Conversely, substantive equality, an idea with a similarly long career in the history of thought, has been expressed in numerous forms and is most famously echoed by Ulpian's maxim 'to each one's own.'[12] More recently, the dichotomy in question has given rise to a theory of justice, in which equality as fairness gains new contours under a veil of ignorance, which includes the accommodation of a principle of difference protecting the worst off in any given context.[13]

The battle over the notions of formal and substantive equality has been fought time and time again in society and the situation in arbitral procedure is no different. Are parties to be treated on strictly equal terms or ought the adjudicator to treat them in way to accommodate some level of inequality proportional to their corresponding unfavourable circumstances? This seemingly unsolvable philosophical question is at stake at every turn in the conduct of arbitral proceedings and arbitrators must not shy away from providing a solution to the problem. Still, as would be expected in the realm of practical reason, the administration of equality within arbitral proceedings will have to do with more mundane issues than the transcendental questions addressed by philosophers and theoreticians. In this regard, the compass used by the arbitrator navigating these troubled waters will be the afterlife of the arbitral award.

It is clear that under all normative instruments governing arbitration, whether national, international, or transnational, the validity of the award

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10 See Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), 290 ff..

11 See Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15; Politics, III.9.1280 a8–15, III. 12. 1282b18–23.

12 See Ulpian, *Inst*. 1,1,3-4.

13 See Rawls, *A Theory of Justice* (2005).

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is conditional on procedural equality. This is evident in the New York Convention of 1958, when it states that enforcement may be refused if 'the party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.'[14] Similarly, the 2006 Model Law states that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'[15] The principle is also applicable in the context of investor-State dispute settlement (ISDS), and it is clear that awards may be annulled under the ICSID Convention when '[there] has been a serious departure from a fundamental rule of procedure.'[16] Clearly, the equal treatment of the parties is a fundamental rule of procedure as ad hoc committees have consistently stated.[17]

Consequently, arbitrators, institutions and parties are very aware of the impact of unequal treatment on the enforceability and validity of arbitral awards. That said, one also knows that some jurisdictions do allow parties, at least those in international commercial disputes, to greatly reduce the scope of court control over arbitral awards subject to certain requirements. Take the example of Swiss law, which provides as follows in Article 192 para. 1 of the Federal Private International Law Act (PILA):

If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, by a declaration in the arbitration agreement or by subsequent agreement, wholly or partly exclude all appeals against arbitral awards; they may limit such proceedings to one or several of the grounds listed in Article 190 paragraph 2; […][18]

Article 190 para. 2, referred to in the above-quoted provision, reproduces the grounds for setting aside an award established under the New

14 See Art. V para. 1(b) of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

15 See Art. 18 of UNCITRAL Model Law on International Commercial Arbitration (2006).

16 See Art. 52 para. 1(d) of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Article 52(1)(d). As is well known, around two thirds of investment arbitration is conducted under the aegis of the ICSID.

17 ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 99, note 186.

18 The term 'express' (declaration), present in the original version, was excluded in the reform of 2021. See Jarrosson, Besson and Rigozzi, 'La réforme du droit suisse de l'arbitrage international' (2021) 1 *Revue de l'arbitrage*, 11 (42-43). Nevertheless, according to these authors, this modification should not change the approach to 'indirect' waivers, consistently rejected by the Swiss Federal Tribunal.

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York Convention of 1958. With that in mind, a combined reading of Article 192 para. 1 and 190 para. 2 of the PILA shows us that, under Swiss law, foreign parties are in a position to exclude court control over an arbitral award in relation to, *inter alia*, equal treatment. Similar provisions exist under other legal systems,[19] suggesting that in transnational contexts the principle of equal treatment might be important but dispensable.

The possibility of waiving court control over arbitral awards has given rise to a relevant ruling of the European Court of Human Rights (ECtHR). In *Tabbane v. Switzerland*, the court had the opportunity to assess the compatibility of Article 192 of the PILA with Article 6 of the European Charter on Human Rights (ECHR).[20]

A certain Mr. Tabanne and his sons entered into an option agreement with Colgate Palmolive. The contract in question contained an arbitration clause providing for ICC arbitration and expressly entrusted the tribunal with the power to select the seat of those proceedings. In addition, the same arbitration clause established that the 'decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.'[21]

A dispute arose, and Colgate initiated arbitration proceedings. The arbitral tribunal was duly constituted and, pursuant to the arbitration clause, Geneva was selected as the seat of arbitration. During the course of proceedings, Mr. Tabbane and his sons applied for an expert financial report, which was denied by the arbitral tribunal on the grounds that their opponent had produced financial documents that could be used by Mr. Tabbane and his son to conduct their own financial analysis.

The arbitral tribunal eventually rendered its decision, which was favourable to Colgate Palmolive. Mr. Tabanne and his sons then applied to the Swiss Federal Tribunal to have the award set aside arguing, *inter*

19 See Gaillard, 'Aspects philosophiques du droit de l'arbitrage international' (2007), 329 *Recueil des cours* 119. This is the case of Belgium, French, Swedish, Spanish, Tunisian, Peruvian and Colombian law. In all of these, except for French law, the absence of a connection with the seat of the arbitration is required. In France, Article 1522 of the Code of Civil Procedure allows waiver of the right to apply for annulment even if there is a link with France. However, when enforcement of the award is sought in France a similar control exists in the form of the exequatur.

20 See ECHR, Application no. 41069/12, 23.3.2016, *Noureddine Tabbane v. Switzerland*, ECLI:CE:ECHR:2016:0301DEC004106912.

21 The arbitration clause is fully quoted in the judgment. See ECHR, Application no. 41069/12, 23.3.2016, *Noureddine Tabbane v. Switzerland*, ECLI:CE:ECHR:2016:0301DEC004106912, para. 5.

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alia, that their right to be heard had been violated.[22] The Swiss Federal Tribunal, however, considered that the arbitration clause contained a waiver in the terms of Article 192 of the PILA, for which reason the application was considered inadmissible.

The case was brought before the ECtHR, which then had to consider whether Mr. Tabbanne and his sons had their right to access justice curtailed by the Swiss Federal Tribunal and whether the arbitral tribunal's refusal to produce expert evidence violated their right to be heard. No violation was found.

The decision is telling insofar as the court entrusted with the guardianship of human rights in Europe considered that the grounds for annulment of foreign arbitral awards, which includes equal treatment, do not necessarily trump other considerations such as the enhanced expediency of arbitration and the policy of *favor arbitrandum* implemented by the Swiss legislator.[23] In fact, the ECtHR noted that a waiver of court control was within the bounds of the freedom of contract and party autonomy, for no party was obliged to agree to such provisions unless they so wished.[24]

The same case also provides some insights into the more precise limits of equal treatment in arbitration. In this regard, while the ECtHR recognised the precedence of domestic law over evidentiary matters, it did not shy away from evaluating whether the arbitral tribunal's refusal to produce supplementary expert evidence amounted to unequal treatment of the parties.

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22 See Tribunal fédéral, Ière Cour de droit civil 4.1.2012 - 4A_238/2011 -, (2012) 30(2) *ASA Bulletin* 369.

23 This was expressed in the following terms: '*En ce qui concerne la présente affaire, la Cour note que l'article 192 LDIP reflète un choix de politique législative qui répond au souhait du législateur suisse d'augmenter l'attractivité et l'efficacité de l'arbitrage international en Suisse, en évitant que la sentence soit soumise au double contrôle de l'autorité de recours et du juge de l'exequatur, et de décharger le Tribunal fédéral (paragraphe 13 ci-dessus).*' See ECHR, Application no. 41069/12, 23.3.2016, Noureddine Tabbane v. Switzerland, ECLI:CE:ECHR:2016:0301DEC004106912, para. 33.

24 The ECHR affirmed the following: '*De plus, il convient de noter qu'une partie, n'ayant ni domicile, ni résidence habituelle, ni établissement en Suisse, n'est nullement obligée d'exclure tout recours; bien au contraire, elle peut librement choisir de saisir cette possibilité qu'offre la loi suisse en renonçant valablement à tout recours à un tribunal ordinaire. La Cour estime que ce moyen offert aux parties qui n'ont pas de liens avec la Suisse est proportionné au but de renforcer l'attractivité de la Suisse en matière d'arbitrage international et de renforcer le principe de la liberté contractuelle des parties.*' See Tribunal fédéral, Ière Cour de droit civil 4.1.2012 - 4A_238/2011 -, (2012) 30(2) ASA Bulletin 369, para. 34.

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In this regard, it was noted that the right to be heard was to be understood within the boundaries of a 'reasonable' opportunity to present the case and produce evidence. The ECtHR did not consider that the arbitral tribunal's refusal to produce expert evidence could be qualified as arbitrary or unreasonable, nor did it find any disadvantage imposed on the applicant as a result of the arbitral tribunal's decision. In essence, the ECtHR's ruling suggests that, under the ECHR, a violation of equal treatment requires the existence of arbitrariness creating a situation of clear disadvantage to one of the parties.[25]

This approach to the limits to equal treatment has been echoed in recent literature, with some authors suggesting a two-pronged test very close to the reasoning followed by the ECtHR.[26] In this test, the first step would be to assess the rationale (or lack of it) for the treatment in question, while the second step would be to assess whether the treatment of the parties creates a substantial disadvantage for one of them. This proposed test implies that there must be a causal link between the treatment and the disadvantage in question. Furthermore, it should be noted that the classification of the disadvantage as 'substantial' implies that minor harm with no repercussion on the outcome of the case does not impact

25 The reasoning of the ECtHR was expressed as follows: '*L'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause – y compris ses preuves – dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (Dombo Beheer B.V. c. Pays-Bas, 27 octobre 1993, § 33, série A no 274). Même à supposer que les garanties de l'article 6 soient applicables au cas d'espèce, il convient de rappeler que la Convention ne réglemente pas le régime des preuves en tant que tel (Mantovanelli c. France, 18 mars 1997, § 34, Recueil 1997-II). L'admissibilité des preuves et leur appréciation relèvent en principe du droit interne et des juridictions nationales (García Ruiz c. Espagne [GC], no 30544/96, § 28, CEDH 1999-I). Un refus d'ordonner une expertise n'est pas en soi inéquitable; il convient de l'examiner au vu de la procédure dans son ensemble (H. c. France, 24octobre 1989, §§ 61 et 70, série A no 162-A). Dans le présent cas, le tribunal arbitral a considéré que la société Colgate avait déjà produit des preuves financières d'un expert, et qu'il suffisait de permettre à l'expert privé du requérant d'obtenir l'accès aux mêmes documents comptables que ceux utilisés par l'expert de la demanderesse. Cette motivation ne paraît ni déraisonnable ni arbitraire. Compte tenu du fait que le requérant a eu accès aux documents litigieux, il n'apparaît pas non plus qu'il ait été placé dans une situation de net désavantage par rapport à la société Colgate*.' See paras. 38-39 ECHR, Application no. 41069/12, 23.3.2016, Noureddine Tabbane v. Switzerland, ECLI:CE:ECHR:2016:0301DEC004106912.

26 See, for example, Scherer, Prasad and Prokic, 'The Principle of Equal Treatment in International Arbitration' (2018) SSRN <https://ssrn.com/abstract=3377237>, 26 ff..

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procedural equality. All in all, this appears to offer appropriate guidance for exploring the boundaries of equal treatment in arbitration.

C. Good Administration of Justice in Transnational Arbitration

Arbitration, of course, very frequently takes place at the crossroads of domestic and international law, often blurring the boundaries between private and public international law. Whilst still controversial, the characterization of arbitration as a transnational legal order has proved resonant.[27] In this regard, even if arbitration is heavily reliant on party autonomy, it must be noted that the autonomy of the parties will not be absolute.[28] The limits to that autonomy is found in the applicable mandatory rules and public policy. Transnational public policy, in particular, provides a set of legal norms arising at the crossroads of public and private international law which will constrain the autonomy of parties to an arbitration agreement.[29] It is posited here that the good administration of justice is one such norm pertaining to transnational public policy.

The idea of good administration of justice is a cornerstone of many domestic judicial systems, although it is most often put into operation by judges across civil law jurisdictions. In France, for instance, the Constitutional Council has repeatedly recognized the good administration of justice as an 'objective' of constitutional status.[30] The notion itself may not be so common in common law jurisdictions, but it appears strongly correlated to the power vested in common law judges to impose penalties for contempt of court.[31] Indeed, this power to respond to contempt probably arises from the idea that the judicial function requires an orderly adminis-

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27 See Gaillard, 'Aspects philosophiques du droit de l'arbitrage international' (2007), 329 *Recueil des cours* 119.

28 Giuditta Cordero-Moss, 'Limitations on party autonomy in international commercial arbitration', 372 *Recueil des cours* (2014) 129.

29 For a discussion on the limits of party autonomy in relation to the procedural powers of arbitrators, see Fernández Arroyo, 'Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?' in Ferrari (ed), *Limits to Party Autonomy in International Commercial Arbitration* (2016), 199.

30 For example, Conseil Constitutionnel 21.3.2019 - 2019-778 DC, para. 22; Conseil Constitutionnel 9.7.2014 - 2014-406 QPC, para. 7; and Conseil Constitutionnel 17.12.2010 - 2010-80 QPC, paras. 6 and 8.

31 For a discussion of a comparative approach to contempt, see Chesterman, 'Contempt: in the common law, but not in the civil law' (1997) 46(3) *International and Comparative Law Quarterly* 521.

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tration of proceedings - in other words, good administration of justice. One might wonder, however, whether this notion can be transposed beyond the confines of domestic law, especially to transnational situations.[32]

Direct formulation of the notion is somewhat scarce in international and transnational normative instruments. An exception may be the Charter of Fundamental Rights of the European Union, which expressly provides for a right to good administration of justice. This right encompasses, *inter alia*, the 'right to have his or her affairs handled impartially, fairly and within a reasonable time.'[33] The case law of the European Union Court of Justice (EUCJ) contains plentiful references to the good administration of justice. Indeed, it might be regarded as one of the essential principles in the decision-making of the EUCJ.

The UNIDROIT Principles of Transnational Civil Procedure are also evocative of the idea of good administration of transnational justice, referring, however, to the 'prompt rendition of justice.' The principle in question encompasses, on the one hand, a duty imposed on the courts to settle disputes within a reasonable time and, on the other hand, a duty imposed on the parties to cooperate.[34] In its comments on the provision, the working group in charge of the matter noted that '[i]n all legal systems the court has a responsibility to move the adjudication forward' and that '[p]rompt rendition of justice is a matter of access to justice', even if it should also be 'balanced against a party's right of a reasonable opportunity to organize and present its case.'[35]

Addressing this in more detail, the ASADIP Principles on Transnational Access to Justice (TRANSJUS) enumerate the principles that 'in proceedings pursuant to transnational litigation, judges and other State authorities

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32 For a theoretical framework on transnationality, see Jessup, *Transnational Law* (1956).

33 See the first two paragraphs of Article 41 of the Charter of Fundamental Rights of the European Union, which read as follows: '1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions.'

34 See Geoffrey Hazard, Rolf Stürner and Antonio Gidi, 'Draft Rules of Transnational Civil Procedure (with commentary)' (2005) UNIDROIT Study LXXVI – Doc. 13, Principle 7.

35 Id., 17

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should seek to ensure, in a reasonable manner, adherence to.' These are the principles of: maximum respect for the human right of access to justice, favouring amicable solutions, jurisdictional equivalence, transposition of procedural guarantees to the transnational context, international judicial cooperation, transnational judicial activism, procedural expeditiousness, procedural adjustment, and protection of collective rights.[36]

References to the good administration of justice also abound in international case law. As early as 1956, in the UNESCO advisory opinion, the International Court of Justice (ICJ) stated in passing that 'the principle of equality of the parties follows from the requirements of good administration of justice.'[37]

In the 2007 judgment rendered in the case *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ ruled that a piece of evidence brought at a late stage of the proceedings was inadmissible as contrary to the interest of the good administration of justice.[38]

More recently, in the 2013 case Construction of a Road along the San Juan River (*Costa Rica v. Nicaragua*), Judge Cançado Trindade issued a separate opinion dealing at length with the 'sound' administration of justice (as the concept of *bonne administration de la justice* was translated into English). In this opinion, Judge Cançado Trindade argued that 'the ICJ has

36 See www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf

37 See Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, Advisory Opinion, 23 October 1956, ICJ Reports (1956), 77, at 13.

38 The ICJ noted the following: 'By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.' See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007, ICJ Reports (2007), 43 (60, para. 54).

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the 'inherent power' to take *motu proprio* the measures necessary to secure the sound administration of justice.'[39]

One also finds references to the good administration of justice in ISDS, especially in connection to the arbitrators' 'inherent powers.' A procedural order issued in *ICRS v. Jordan* offers a case in point. In this arbitration, the respondent applied to the tribunal for a stay of proceedings on the grounds of an alleged *lis pendens* with an ICC arbitration. This application was made on the grounds of Article 44 of the ICSID Convention, Article 19 of ICSID Rules and the tribunal's inherent powers. Whilst rejecting the request for the stay, the arbitral tribunal considered that it is 'common knowledge that the purpose of an inherent jurisdiction is to enable a Tribunal to conduct its proceedings in an effective and efficient manner for the good administration of justice.'[40]

Considering the foregoing, it is not unreasonable to assert that the good administration of justice is an emerging principle of law commanding transnational authority across the divide between municipal and international normative regimes. It is also observed that the content of this principle remains very closely bound up with the notion of the inherent powers of adjudicators to move proceedings forward.[41] Fundamentally, the good administration of transnational justice is posited here as a norm of transnational public policy directed at both adjudicators and parties, requiring that they behave in a fair, loyal and efficient manner for the duration of proceedings.

Efficiency may be the most visible feature of the three elements referred to above. In arbitration, this dimension of the good administration of transnational justice has been regulated extensively. Most sets of arbitration rules, chosen by the parties themselves, impose a duty on the arbitra-

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39 See *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica)*, Joinder of Proceedings, Order, 17 April 2013, ICJ Reports (2013), p. 189 (195, para. 18) (Separate Opinion of Judge Cançado Trindade).

40 See *International Company for Railway Systems (ICRS) v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/09/13, Procedural Order no. 2 (9 July 2010), para. 16.

41 For more general discussion of the inherent powers of international courts and arbitral tribunals, see Sylvain Bollée, 'Les pouvoirs inhérents des arbitres internationaux" (2021) 418 *Recueil des cours* 21; Ferrari and Rosenfeld (eds), *Inherent Powers of Arbitrators* (2019); Brown, 'Inherent Powers of International Courts and Tribunals' (2005) 76(1) *British Yearbook of International Law* 195.

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tor to administer proceedings effectively, expediently, and economically.[42] Furthermore, arbitration rules will not only impose on the tribunal the duty to police time and costs but will have special provisions on expedited arbitral proceedings.[43] UNCITRAL, in its transnational legislative activity, has reached an advanced stage in the codification of expedited rules for arbitration proceedings. It is asserted that these special rules will be implemented to 'balance […] the efficiency of the arbitral proceedings and […] the rights of the parties to due process and fair treatment.'[44]

As important as efficiency may be, it has been stated above that the good administration of justice also requires fairness and loyalty. On the one hand, fairness is intrinsically connected to the equality of the parties. A fair trial is one in which the parties are afforded procedural equality within the limits discussed above. On the other hand, procedural loyalty is an emanation of the general principle of good faith, which requires cooperative behaviour during the proceedings from parties and adjudicators.[45] One must note that the balance between fairness and procedural loyalty precludes abusive procedural behaviour, requiring the adjudicator to take an active role in penalising procedural misconduct by the parties.

In performing this duty, arbitrators should not fall prey to due process paranoia. In this regard, it has been noted that due process claims are increasingly weaponised with strategic procedural intentions. From a shield ensuring the fairness of proceedings, such claims are put forth as a sword to disrupt the orderly conduct of proceedings.[46] The phenomenon has been observed for some time now and has considerably impacted the development of arbitration's normative framework. Lucy Reed has pointedly observed that the UNCITRAL arbitration regime has evolved in a way so as to curb what she termed 'abuse of due process.'[47]

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42 See, for example, Art. 22 para. 4 of the ICC Rules of Arbitration (2021), Art. 23 para. 2 of the SCC Arbitration Rules (2017), Art. 14 para. 1 (ii) of the LCIA Arbitration Rules (2020).

43 See Appendix VI of the 2021 ICC Rules of Arbitration (2021).

44 See UNCITRAL, Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules, 15 April 2021, A/CN.9/WG.II/WP.219, 2, para. 1.

45 See Sheppard, 'The Lawyer's Duty to Arbitrate in Good Faith and with Civility' (2021) 37(2) *Arbitration International* 535; Veeder, 'The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith' (2002) 18(4) *Arbitration International* 431.

46 Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International,* 361 (374-376).

47 Reed, 'Ab(use) of due process: sword vs. Shield' (2017) 33(3) *Arbitration International,* 361 (366-372).

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Take the example of Article 15 para. 1 of the 1976 UNCITRAL Rules. This provision granted arbitrators a discretionary power in the conduct of proceedings, yet it made the exercise of this power conditional on the equality of the parties and to a very broad right to be heard. Accordingly, under the 1976 UNCITRAL Rules, arbitrators were required to afford parties equal treatment and offer them 'at any stage of the proceedings' a 'full opportunity' of presenting their case.

It is not difficult to see how such a rule might be abused. Indeed, less than 9 years later, UNCITRAL made a slight change in its normative approach to the matter. Whilst the discretionary power of arbitrators was to be exercised within the bounds of equal treatment, the right to be heard, even if established at the level of 'full opportunity' to present the case, was not necessarily to be afforded 'at any stage' of proceedings. Indeed, Article 18 of the 1985 UNCITRAL Model law, through the omission of the expression 'at any stage', included a temporal limitation to the right to be heard in order to avoid dilatory tactics.[48]

Some 25 years later dilatory tactics would reach the level of 'guerrilla tactics.'[49] This would lead UNCITRAL to substantially change the scope of arbitrator's discretion over the conduct of proceedings. In particular,

48 Commenting on the drafting history of the provision, Holtzmann and Neuhaus, noted the following: 'The terms of Article 18 were modelled on Article 15(1) of the UNCITRAL Arbitration Rules. The Commission Report provides no authoritative guidelines to interpreting the terms 'treated with equality' and 'full opportunity of presenting his case'; nor do the reports of the Working Group. It is submitted that this may be because the delegates considered that the terms were so well understood in all legal systems that comment was unnecessary and that detailed definitions might limit the flexible and broad approach needed to assure fairness in the wide variety of circumstances that might be encountered in international arbitration. It is also submitted that the terms "equality" and 'full opportunity' are to be interpreted reasonably in regulating the procedural aspects of the arbitration. While, on the one hand, the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. For example, as the Secretariat noted, the provision does not entitle a party to obstruct the proceedings by dilatory tactics, such as by offering objections, amendments, or evidence on the eve of the award. An early draft that would have required that each of the parties be given a full opportunity to present his case "at any stage of the proceedings" was rejected precisely because it was feared that it might be relied upon to prolong the proceedings unnecessarily.' See Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989).

49 For an overview of the issue, see Horvath and Wilske, *Guerrilla Tactics in International Arbitration* (2013).

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Article 17 para.1 of the 2010 UNCITRAL Rules now grants arbitrators a considerable margin of discretion over the right to be heard. Arbitrators are to afford parties at the 'appropriate stage of proceedings' a 'reasonable opportunity' to present their case. In addition, the same provision highlights that the tribunal 'shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

This points us to the potential trade-off between equal treatment and the good administration of justice. If one party, at any and every stage of proceedings, behaves disruptively, ought its opponent to be afforded a corresponding right to disruption? The answer could not be other than no.

It must be borne in mind that it is within the prerogatives of the tribunal to police the boundaries between 'routine procedure' and 'due process', so as to avoid overuse of claims of due process violation and unequal treatment.[50] For the sake of the good administration of transnational justice, it is the arbitrators' duty to control all and any abuses of procedural rights. Indeed, it would seem that 'due process paranoia is unwarranted.'[51]

D. Good Administration of Online Transnational Arbitration: the View from the Tribunal

It is not disputed that the deployment of information technology in arbitration promotes gains in cost and time. Nevertheless, the move from analogical to digital arbitral proceedings (with various hybrid combinations in between) put an extra burden on arbitrators in navigating through their obligation to conduct proceedings fairly, loyally, and efficiently. The shift to digital requires skilful and sensible arbitrators, because the age of online arbitral proceedings introduces unforeseen constraints on legal cognition and considerable technical obstacles for the good administration of transnational justice.

From a cognitive perspective, online arbitral proceedings considerably reduce the opportunity for non-verbal acquisition of information. The most evident instance of this is the widespread adoption of online hearings. Hearings are the occasion to assess not just the argument put forth

50 Reed, 'Ab(use) of due process: sword vs. shield' (2017) 33(3) *Arbitration International*, 361 (372-373).

51 See Ferrari, Rosenfeld and Czernich, 'General Report' in Ferrari, Rosenfeld and Czernich (eds), *Due Process as a Limit to Discretion in International Commercial Arbitration* (2020) 38.

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by counsel, but the level of conviction and doubt of the various procedural actors at play (counsel, parties, witnesses, and experts). Certainly, not all is lost in an online hearing, for one may still capture nuances in intonation or the general behaviour of a given witness. Still, considerable noise is introduced with the use of information technology, concealing information that could emerge from the heat of a face-to-face exchange.

Arbitrators must also be attentive to the phenomenon of screen fatigue, which results from the long hours sitting in front of a computer. Many of us has experienced it: the longer we sit continually in front of a screen, the more our attention span and our ability to retain information both decline. This phenomenon is again of particular importance in remote hearings, because the allocation of time to each segment of the hearing must accommodate enough resting time for cognitive recuperation.

In addition, it is important to note that the relationship between the members of the arbitral tribunal is significantly impacted by the absence of in-person interaction. Whilst it is true that communication between tribunal members is ordinarily via email, it is also undeniable that the complete absence of face-to-face exchanges can potentially take the edge off the tribunal's deliberative process. Moreover, in a tribunal where the members are not acquainted with each other in advance, physical interaction is also an opportunity to build trust between arbitrators - an indispensable element for the inner workings of the tribunal.

From a technical perspective, there are multifarious issues that may affect the good administration of transnational justice. For instance, procedural issues as mundane as the signing of the arbitral award are bound to throw up questions as the adoption of e-signatures increases.[52] Similarly, data protection issues will inevitably grow with the widespread use of cloud computing in arbitral proceedings. The specific discussion on data protection lies beyond the scope of this study, but it has given rise to an ever-growing body of literature.[53]

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52 See Schäfer, 'E-Signature of Arbitral Awards', in Scherer, Bassiri et al. (eds), *International Arbitration and the COVID-19 Revolution* (2020), 151.

53 See Richman, 'Compliance and Data Protection' in Scherer, Richman and Gerbay (eds), *Arbitrating under the 2020 LCIA Rules: A User's Guide* (2021), 435; Ramani, 'One size doesn't fit all: the General Data protection Regulation vis-à-vis international commercial arbitration' (2020) 37(3) *Arbitration International* 613; de Bruet and Landbrecht, 'Cloud computing and US-style discovery: new challenges for European companies' (2016) 32 (2) *Arbitration International* 297;Malinvaud, "Will Electronic Evidence and e-discovery Change The Face of Arbitration?" in Giovannini and Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009), 373.

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Remote and hybrid hearings are a special source of concern for the arbitral tribunal. Indeed, arbitrators need to oversee the correct functioning of all its many technical aspects. In particular, the tribunal must be sensitive to possible connectivity problems faced by the parties, especially in the context of asymmetric access to technology. These situations may create a particularly delicate situation to deal with, for the party facing adverse conditions may easily feel unfairly treated. In the face of technical difficulties, the tribunal might find it prudent to adjourn the hearing or to repeat certain procedural acts with a view to ensuring that all those involved are afforded a reasonable opportunity to present their case.

From the tribunal's perspective, the conduct of online proceedings and remote hearings means that tribunal secretaries have an important role to play. Indeed, the tribunal secretary may be entrusted with technical oversight of the proceedings and hearings, while members of the tribunal devote their full attention to settling the dispute.

That said, arbitrators must be watchful for tactical manoeuvres from the parties, as IT issues can easily be weaponised to the detriment of good administration of transnational justice. It is advisable for the arbitral tribunal to draft its procedural orders with extra care and with heightened attention to detail in order to protect proceedings from undue disruption. Procedural orders must establish with precision the appropriate steps to be taken by parties, counsel, witnesses, and experts throughout the online proceedings in general and remote hearings in particular. For instance, in relation to remote hearings, it is prudent to ask the parties to designate a contact person to be in charge of informing the tribunal of any technical difficulties, which then allows the tribunal to react promptly by taking steps to solve the problem or suspending the hearing.

Interesting instances of how online proceedings may lead to questions as to equal treatment before domestic courts are offered by several cases in different jurisdictions. One such example is *Sino Dragon v. Noble Resources*.[54] This case is particularly insightful when it comes to the use of videoconferencing in UNCITRAL arbitration and how technical difficulties may give rise to due process claims.

The Australian International Arbitration Act gives effects to the UNCITRAL Model Law, adopting it with slight modifications. Most notably, section 18C of the act provides that '[f]or the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been

54 See FCA, 13.7.2016 - NSD 1333 of 2016 -, Sino Dragon Trading Ltd v Noble Resources international Pte Ltd, [2016] FCA 1131.

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given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.'

In the case in question, Sino Dragon, a company incorporated in Hong Kong, and Noble Resources, a Singaporean corporation, were parties to arbitration proceedings conducted under the 2010 UNCITRAL Arbitration Rules. The constitution of the tribunal had been challenged on numerous counts by Sino Dragon, but to no avail. Following a hybrid hearing on 7 December 2015, an award was rendered on 12 May 2016 in favour of Noble Resources.

In July that year, upon application by Noble Resources, the award was recognized and leave to enforce was granted by the Hong Kong High Court. Although no appeal had been filed against that decision, in August 2016, Sino Dragon sought to have the award set aside in Australia. The grounds advanced in support of this application were many, but one argument is of particular interest to the present study. The applicant contended that the conduct of proceedings produced a 'partial exclusion of witness[es] through technical faults causing confusion and hampering effective examination or mistranslation of evidence.'[55]

In essence, the argument advanced before the Federal Court of Australia was that the malfunctioning of the video link used to hear two witnesses in a hearing resulted in the production of incomplete evidence, a situation further aggravated by translation errors allegedly caused by these technical difficulties.[56] This situation, it was argued, consisted of a violation of procedural fairness and equal treatment. The iteration of procedural facts leading to the application is of considerable interest.

During the arbitration in question, Noble Resources informed Sino Dragon that it intended to cross-examine two of its witnesses. At the pre-hearing conference, a discussion was entertained on whether the two witnesses were to take part in the hearing via videocall or whether they should appear in person. Noble Resources argued it would be placed at a 'forensic disadvantage' if Sino Dragon's witnesses were heard via videocall, especially if they were to give evidence with the aid of an interpreter. Sino Dragon rebuffed this argument and requested the arbitral tribunal to hear its witnesses by videocall. The arbitral tribunal then deferred to Sino Dragon's request, but it highlighted that any malfunctioning of the videocall would be at Sino Dragon's risk.

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55 Id., at 34, para. 127

56 Id., at 35, paras. 128-129.

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After the pre-hearing conference call, an e-mail was sent by the arbitral tribunal with the annotated agenda of this meeting. This agenda contained a clear statement from the tribunal attributing to Sino Dragon the obligation of setting up the videocall to hear its witnesses. In addition, sometime later, Noble Resources requested its opponent to ensure that, during the hearing, the two witnesses had before them a copy of the disputed contract, copies of Sino Dragon's Statement of Response, Rejoinder and a series of communications exchanged between Sino Dragon and Noble Resources.

Sino Dragon duly set up the videocall, but its witnesses only had before them some of the material requested by Noble Resources. This fact in itself created difficulties during the cross-examination – especially for Noble Resources' counsel.[57] The problems, however, kept mounting up, because the platform used for the videocall became somehow inoperative. Ultimately, the witnesses were cross-examined using an iPad and a telephone. The iPad was connected to WeChat as the source of the video feed and the telephone was used as the source of the audio feed.[58] Furthermore, at some point in the hearing, the arbitral tribunal realized that both witnesses were simultaneously present at the same room during cross-examination. Obviously, full details of this situation were recorded by the tribunal in its award.[59]

The Federal Court of Australia noted that Sino Dragon made no objection to the conduct of the proceedings during the arbitration, nor did it seek adjournment of the hearing when the technical difficulties arose. In fact, the Australian Court understood that Sino Dragon not only acquiesced to the procedure adopted, but that it also produced some of the difficulties through its acts and omissions. As a consequence, the court failed to see how the situation described above could be classified as a breach of equal treatment. Instead, the court was of the view that 'the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce "real unfairness" or "real practical injustice"',[60] stressing that 'article 18 and the review powers under article 34 of the UNCITRAL Model Law are not intended to apply to unfairness caused by a party's own conduct including forensic or strategic decisions.'[61]

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57 Id., at 38, para. 147.
58 Id., at 41, para. 152.
59 For the relevant parts of the award, id., 39-41.
60 Id., at 48, para. 154.
61 Id., at 52, para. 178.

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What can be learned from this case for the good administration of transnational justice in online arbitration? The first lesson arises from the fact that the procedural incidents narrated above provide a vivid illustration of all the troubles that an arbitrator may confront in the context of hybrid hearings. More importantly, however, the case offers an excellent vantage point from which to contemplate the centrality of procedural loyalty for the good administration of transnational justice. Even if of limited positive authority, the decision of the Federal Court of Australia demonstrates that contradictory behaviour from a given party will not be excused under an (abusive) due process claim.

E. Conclusion

It is no easy task to ensure a good administration of transnational justice in online arbitral proceedings, especially in times of due process paranoia. Whilst equal treatment is not at odds with efficiency, much of the good administration of transnational justice depends on procedural loyalty of the parties. It is in the interest of justice that parties cooperate and do not abuse their procedural rights. However, the world is imperfect and procedural abuses do take place. Online arbitral proceedings multiply the opportunities for these abuses, as parties acting in bad faith may feel compelled to weaponise technology and its dysfunctions for their strategic gains. What is the role of arbitrators in protecting the good administration of transnational justice against such procedural misconduct? The answer is a simple one. An active, diligent and - why not? - coercive role, insofar as procedural misconduct often gives an undue advantage to the party who hijacks the proceedings in the service of their own interest.

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A Lawyer's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution*

Nuno Ferreira Lousa

Table of Content

A. Introduction 59
B. The Status Quo prior to the COVID-19 Pandemic 60
C. The Challenges of Online Dispute Resolution 61
D. Conclusions 64

A. Introduction

This article addresses a topic where several of the fundamental values of our society intersect. These values include the right to a fair trial, access to the law and to the courts, and, in particular, the right to obtain a decision within a reasonable time, as an essential corollary of effective protection, in good time, against threats to or breaches of personal rights. Taking a political perspective, another of these values is the fulfilment of the jurisdictional function incumbent on the state. These are all values that are rooted in the Portuguese Constitution. Indeed, it is curious to note that the principles somehow under strain in the current pandemic - the guarantee of a fair trial and, at the same time, the guarantee of a decision within a reasonable time - are enshrined in precisely the same constitutional provision: para. 4 of Article 20 of the Constitution of the Portuguese Republic.

Historically, the guarantee of a fair trial and the guarantee of a decision within a reasonable time are regarded as two sides of the same coin, insofar

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as both are essential principles underpinning not only the rule of law, but also protection of citizens' rights.

The issue raised by the pandemic in the handling of civil proceedings is that the guarantee of a decision within a reasonable time may not be compatible with the guarantee of a fair trial, and vice versa.

As we shall see, this question will often be more theoretical than real and can be exploited by parties to take a position that best suits their interests in a specific dispute, in particular, their interest in delaying a decision, or even, their interest in raising procedural issues that may later provide grounds for appeals or other proceedings to annul decisions, depending on the type of proceedings in question.

However, it would be flagrantly unfair to treat as equal, in all instances, efforts to defend the guarantees of a fair trial with an interest in delaying proceedings. Reality has shown that there are cases where the new conditions under which proceedings are conducted raise additional issues for one party, which are not raised for the other. We shall look below at some of these questions.

B. The Status Quo prior to the COVID-19 Pandemic

As our starting point, one shall have to acknowledge that online dispute resolution has been a reality in our professional lives for more than ten years. People who litigated in the last century and in the early years of this century will certainly remember the ritual of filing proceedings at the court registry, delivering applications at the central offices, with one copy to be stamped and another to be added to the proceedings reform.

Today, most procedural acts in state courts take place online, on digital platforms such as Citius or Sitaf. This is the case in both civil and administrative proceedings, not just for most acts of the parties, but also for those of the court, including the rendering of decisions and judgments.

The same is true for the witnesses examination, parties and even experts. Examination by video conference has been a frequent procedure for a long time, using a variety of computer-based communication systems. This has led some to point to an erosion in the principle of immediacy in the production of evidence and, related to this, the impact that the production of evidence by videoconference can have on the formation of the judge's free conviction, on the grounds that certain elements used to assess the reliability and relevance of oral evidence – most obviously, body language – can be prejudiced by the fact that the witness, deponent or expert is not present in the courtroom.

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Likewise, experience has also shown that cross-examination by the party not presenting the witness or deponent may in some way be undermined, forcing a slower pace of questioning to avoid missteps that might undermine the production of evidence.

As part of the wider digitisation of the justice system, even in physical hearings, parties were already making growing use of audiovisual media, in their opening presentations and closing arguments, and also, albeit in more limited cases, during the production of evidence phase. This does not amount to conducting procedural acts online, but it does represent the use of electronic tools that contribute to inevitable changes in habits and customs as regards procedural rituals.

The above considerations demonstrate that online dispute resolution had already been adopted, to a large extent, by Portuguese courts prior to the COVID-19 pandemic.

In arbitration, in addition to certain procedural acts taking place by email or using secure document management systems, it was already a widespread practice for witnesses, parties or experts to be questioned by videoconference and for electronic tools to be used to present each party's case. The main difference here was perhaps the fact that preliminary pre-trial hearings were also frequently organised by videoconference or conference call, avoiding the need for parties to travel to attend the arbitral tribunal in person, which undoubtedly represented a significant saving of time and money for the parties.

So any analysis we make today of this matter must take as its starting point a situation in which the use of electronic tools was already commonly accepted for conducting proceedings remotely, seeking a fair balance between:

- the necessary solemnity and formality of administering justice and of procedural acts; and
- criteria of efficiency, which make justice swifter and, at the same time, minimise the inconvenience of participants in proceedings having to travel to attend in person.

C. The Challenges of Online Dispute Resolution

The question that the COVID-19 pandemic now raises is whether remote proceedings can be taken to an extreme.

The initial response of Portugal's legislator to the pandemic was to suspend deadlines for procedural acts and to allow certain acts to take

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place remotely. However, it is not our purpose here to analyse or assess the virtues of the temporary and exceptional procedural rules applied in the Portuguese legal system, their definition and application.

Instead, this article seeks to assess the impact that the use of online dispute resolution tools may have on the guarantees of a fair trial, taking into consideration that, irrespective of the rules each country may have adopted (the arrangements have varied greatly), we are moving towards a paradigm shift in how procedural acts take place: what formerly required people to be physically present is now being processed by virtual means. The prime example of this phenomenon is online trial hearings.

The practical challenges faced over the past two years have included:

- The dynamics of cross-examination, as already referred to;
- The showing of documents to witnesses and arbitrators, where there is no longer the possibility of observing the witness, unless more complex multi-screen systems are used;
- The workings of simultaneous translation;
- Opening statements or closing arguments without, once more, the possibility of observing the facial expressions of the person taking the floor;
- The difficulties of ensuring that a witness is not being prompted by other persons present in the same room, or using a chat tool, for example;
- The possibility that the legal representatives of one party may be present in the same room as the tribunal, but not those of the other party;
- In international arbitration, the fact that arbitrators, legal teams and witnesses may be in different time zones;
- The possibility of one of the parties disconnecting from the session halfway through, perhaps when things are going less well, leaving the tribunal uncertain as to whether there has been a technical problem and so suggesting that it should not proceed with the taking of evidence (a phenomenon that has been called “rage-quitting”); and
- Last but not least, managing the different sensibilities of the parties with regard to the pandemic. By way of example, at this stage, there are individuals clearly less willing than others to attend a hearing in person with eight, nine or ten people in the same room, over several hours, even if everyone complies with respiratory etiquette. This raises the question of how to deal with the different attitudes of the parties in relation to this matter, bearing in mind that scientific research has pointed to an increased risk of infection when several people meet

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indoors for several hours on end, irrespective of whether they wear masks.

As regards in-person procedural acts, the same issues may arise in relation to on-site inspections. This might be viewed as a matter of only slight importance in proceedings in Portugal's state courts, which rarely use this procedure to obtain evidence, but in arbitration (in particular, in the construction sector) inspections of this type are a common feature of proceedings. What should be done? Should the tribunal avoid an inspection that one of the parties, or the tribunal itself, deems necessary, and, instead of visiting the site in person, arrange for a guided tour by video?

The answers to these questions will necessarily have to take into consideration not only the rival claims referred to above of (i) the guarantee of a fair trial and (ii) the guarantee of a decision within a reasonable time, but other values too. Taken to extremes, there may be a conflict between the guarantee of a fair trial (allegedly based on maintaining the paradigm of procedural ritual as it existed prior to March 2020) and each individual's right to his or her physical integrity.

It is not my view that we should approach this issue on the basis of personal preconceptions on this matter, however firmly held, but rather accept that, either on the basis of scientific evidence or because of the exponential increase in the severity of the disease linked to comorbidities, or else due to the way the pandemic has affected people personally close to us, certain persons may have a greater sensitivity in what regards attending in-person procedural acts.

As we have seen, there are different values rooted in the Constitution which are absolutely fundamental to guiding the courts (both state courts and arbitral tribunals) in the task of deciding how far to make use of online tools in administering justice. There is nothing in Portuguese law to say that hearings must necessarily be held in person. The principle of orality in relation to certain acts and the principle of immediacy do not mean that the parties and the court have to meet in the same place to carry out procedural acts. The rule that raises the most questions would apparently be Article 34, para. 1 of the Voluntary Arbitration Law, from which it follows, *a contrario sensu*, that the parties may agree that hearings must be held for the production of evidence. However, even in those cases, the same rule does not provide that these hearings must be held in person.[1]

1 A different solution would apply if the parties had expressly indicated in the arbitration agreement that hearings were to be held in person.

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The underlying procedural principles suggest that, failing a specific provision in law, the court should decide in conjunction with the parties on how to proceed, consulting them prior to taking a position, in strict application of the principle of cooperation between participants in proceedings. Whenever possible, in the absence of express legal provision, arrangements should be reached through agreement, avoiding any decisions based on the court's preconceptions concerning the pandemic and in the understanding that, in addition to an interest in administering justice within a reasonable time, there may be other reasons for conducting proceedings by videoconference.

D. Conclusions

As we have seen, there can be tension between the rival claims of the guarantees of a fair trial and the guarantees of a decision within a reasonable time. This second group of guarantees points to relative criteria of efficiency in the administration of justice, whilst the first points to an absolute criteria of defence of the parties' rights.

Nonetheless, as has been demonstrated, there is a series of other values that weigh on the decision the court must take in relation to the use of online tools in administering justice. In the first place, how far does the use of these tools make it possible to uphold or safeguard the principles of a fair trial? Here too, it is important to reject preconceived ideas that suggest that in-person proceedings offer better guarantees than virtual proceedings, and experience has shown that, in many cases, the use of online platforms is not just more efficient, but also results in no harm to the guarantees offered to each of the parties.

As in any exercise involving tension between different values rooted in the Constitution, the court must decide on the basis of judgments of proportionality, adequacy and necessity, taking into consideration, in the circumstances of the current pandemic, the position of the parties and the extent to which that position can be accommodated, the latest science evidence, levels of COVID-19 infections at the time and the safety arrangements that can be made for in-person procedural interactions.

As always, it is by weighing up the different interests that the right solution for each case should be found.

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An Arbitration Center's Perspective: Due Process in Online Dispute Resolution

Juan Serrada Hierro

Table of Content

A. Approach to the Issue 66
- I. Guarantees in Dispute Resolution 66
- II. Simplification 66
- III. Respect for the Will of the Parties and Flexibility. 67
- IV. Procedural Momentum 67
- V. Administrative and Logistical Assistance 67

B. Extraordinary Health Crisis Situation 68

C. Resolution of 16 March 2020 69

D. CIMA Briefing Note of 6 April 2020 70

E. CIMA Resolution of 2 June 2020 75

F. CIMA Rules or Audiovisual Witness or Expert Witness Evidence Hearings 77
- I. Introduction 77
- II. CIMA Audiovisual System 79
- III. Rules to ensure the Reliability and Transparency of Remote Hearings 81
  1. Identification of the Parties to the Hearing 81
  2. IP Address from which the Evidence or Statement is issued 81
  3. Measures to ensure simultaneous Visibility of all Participants 82
  4. Measures to ensure the Reliability of Evidence and Statements 82
  5. Measures to be taken to ensure the Isolation of Witnesses and Expert Witnesses 82
  6. Measures regarding the Presentation of Documents 83
  7. Recording of the Hearing 83

G. CIMA Virtual Hearing Organisation Protocol 83

https://doi.org/10.5771/9783748931508, am 03.07.2022, 17:41:36
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A. Approach to the Issue

Arbitration is based on the free will of the parties, and so only if there is a specific agreement (the 'arbitration agreement') can this means of dispute resolution be employed. This will may be manifested through two channels: *ad hoc* arbitration, and what is known as institutional arbitration.

In the latter case, the parties entrust an arbitration institution or body with the power to lay down the rules of procedure, and the institution will then administer the arbitration.

Institutional arbitration is growing in step with the expansion of international trade, making it entirely logical to suppose that a higher level of globalisation means a higher profile for arbitration.

If this is true with regard to international arbitration, it is no less true that the same parallels may be observed in national or domestic arbitration.

With regard to the former, and also the latter, the parties seek supplementary guarantees which they sometimes fail to find in state courts.

There are many reasons why institutional arbitration may be considered to offer significant advantages over *ad hoc* arbitration.

One need only state a few in general terms, connected with the topic that concerns us here:

I. Guarantees in Dispute Resolution

As the parties entrust the administration of arbitration to an institution, it may be presumed that the experience this institution has built up contributes more efficiently to the successful completion of the procedure.

II. Simplification

In *ad hoc* arbitration, the arbitration clause must define and settle all or most of the procedural aspects, although clearly many situations are difficult to foresee. This could lead to complex clauses being drawn up and agreed, which might on occasion not correspond to the reality that emerges.

Arbitration institutions, on the other hand, have proven procedural regulations which are continuously reviewed and improved in application

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to various cases and situations, capable of responding to any incidents that may arise.

III. Respect for the Will of the Parties and Flexibility.

Arbitration bodies establish procedures that nonetheless seek to preserve the will of the parties.

Article 1 of the CIMA Rules (paras. 2, 3 and 5) states the following:

2. Unless otherwise provided by the parties, the Court shall apply to all proceedings whose administration is entrusted to the Court the provisions of the Statutes and Rules in force at the time of submission of the request for arbitration or of the request for an emergency Arbitrator.
3. The Court will address any questions raised regarding the interpretation, application and enforcement of the Rules, ex officio or at the request of any party.
5. In the administration of arbitrations entrusted to the Court, the Secretariat shall assist both the Court and the Arbitral Tribunal. The Court shall ensure the appropriate conduct of the arbitral proceeding and the compliance with time limits, as well as the respect –in coordination with the Arbitral Tribunal– of the rights of a fair hearing, presentation of the case and equality of the parties.

IV. Procedural Momentum

In cases where the proceedings are excessively delayed or even brought to a halt because of negligence or bad faith by one of the parties, or even because of certain attitudes taken by the arbitrator, the institution can take steps to restart the process.

V. Administrative and Logistical Assistance

Lastly, two aspects of relevance should be highlighted. As for the first, this support is very important for the smooth handling of the proceedings and compliance in practice with the principle of 'dueprocess'. The proceedings will be conducted in an orderly manner.

The logistical aspect is of great importance and becomes even more significant when viewed from the perspective that concerns us this afternoon.

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Logistics are very important for the hearings process. The institutions have advanced audiovisual and document reproduction and display systems as well as professionally trained ancillary staff.

In short, the success of institutional arbitration is based on the administration of arbitration by a prestigious, reliable institution with adequate logistical and support resources, providing a quality service.

If this is the case in general, there can be no doubt that the recent events that have so seriously altered the normal rhythm of our societies have reinforced this approach and the conclusions here set out.

The role of arbitration bodies in conducting this process has thus become (and will undoubtedly continue to become) more significant.

B. Extraordinary Health Crisis Situation

The pandemic, which emerged first in certain locations and then spread exponentially across the globe in the early months of 2020, represents an unexpected and radical change in the habits of society and disruption to legal relations of all kinds, with an unquestionable impact in the judicial field and also in arbitration.

These events have shaken to the core the way in which people view life and also how they relate with one another, not only in the personal sphere, but also professionally, in the world of business and, in a unique way, in the world of law, as specifically reflected in the sphere of arbitration which concerns us here.

Until early 2020, we lived in a mobility-based society, as reflected in all our personal and professional activities. Business and professional travel and meetings were an essential aspect of daily life.

The first specific (negative) effect of the pandemic consisted of restrictions on mobility, insofar that travel was practically cancelled for months.

This had a direct effect on all business activities, and of course also had a very direct impact on arbitration.

Faced with a challenge of this magnitude, the need arose to explore and advance different alternatives in an attempt to respond to the legitimate aspirations of the parties that were already or about to be involved in arbitration proceedings.

Legislators in different countries sought to respond to this situation, and edicts were issued declaring a state of emergency.

In Spain, the situation was addressed through Royal Decree 463, of 14 March 2020, declaring a state of emergency, in order to manage the health crisis caused by Covid-19.

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Regulations were established for the administration of different public services, and the possibility of conducting various activities, some of which were considered essential.

As regards procedural deadlines, it was generally established that:

> Time limits under procedural laws for all courts are suspended and interrupted. Calculation of time limits shall be resumed once this Royal Decree or, where applicable, any extensions thereto, is no longer in force.

In other words, there was a complete halt to judicial activity, with some exceptions in criminal procedure and in special regulatory proceedings for the protection of the fundamental rights of the individual.

Notwithstanding all the above, provision was made for judges or courts to issue any rulings required in order to avoid irreparable harm to the legitimate rights and interests of the parties to the proceedings.

As one would expect, no provisions were made with respect to arbitration proceedings. In light of this situation, arbitral tribunals naturally analysed the situation and came up with solutions for the various scenarios that could arise.

The Court of Civil and Commercial Arbitration (*Corte Civil e Mercantil de Arbitraje*, CIMA) studied the situation, aiming to balance the interests of the parties to the arbitration with the general mandatory rules, while also taking into account the personal positions of those involved in the proceedings (lawyers, witnesses, experts and even the staff of the Court itself).

Due process thus had to be guaranteed, without undermining any interests of those who were and would usually be involved in each arbitration.

In this respect, CIMA adopted several measures:

C. *Resolution of 16 March 2020*

IN THE LIGHT OF THE STATE OF EMERGENCY DECREED BY THE SPANISH GOVERNMENT, THE COURT HAS DECIDED TO ADOPT THE FOLLOWING MEASURES:

1. Staff will work from home. All activities of the Court will likewise be conducted by remote procedures.
2. Face-to-hearings or face appearances provided for in the Rules or agreed by the parties and the Arbitral Tribunals (Mission Statements, Article 31, or any other) are suspended, and may be held by means of a

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telephone conference, provided that this is agreed by the parties and the corresponding Arbitral Tribunal, with the Secretariat of the Court having been consulted.
3. Evidence hearings are suspended.
4. All deadlines for ongoing arbitration proceedings are suspended. As an exception, procedures may be carried out if, due to their special characteristics, this is ruled by the Arbitral Tribunal, with the agreement of the parties, and following consultation of the Court.
5. All professional travel is postponed, except in urgent and essential cases, which must be duly authorised by the Court.
6. The above measures take effect from today and will continue for as long as the competent authorities so determine, while the current situation remains in place.
7. The Court remains entirely at the disposal of all arbitrators, parties and all legal agents, and regrets any incidents and/or delays arising in the provision of its services.

D. CIMA Briefing Note of 6 April 2020

A Briefing Note on the Resolution of 16 March was subsequently issued:

> In light of the consultations addressed to the Court as to the application of the Resolution of 16 March on the suspension of deadlines and hearings in arbitration proceedings currently taking place, this BRIEFING NOTE is duly issued to clarify the scope and application of the suspension of the deadlines to which the resolution refers, in addition to the possibility of lifting said suspension provided that the arbitral tribunals and the parties affected thereby so agree.
> In order to resolve any possible doubts that may arise in the interpretation and application of the aforementioned resolution, the Court deems it necessary to issue this BRIEFING NOTE which: a) first analyses the scope of application of the aforementioned resolution; b) then refers to the procedures and actions excluded from the suspension; c) third, refers to the procedures to be completed in writing by the parties or the arbitral tribunal; d) fourth, the note analyses the effects of the resolution in relation to in-person appearances and hearings; and e) lastly, refers to the procedures relating to the pronouncement of the award, notification and the deadlines for clarification, supplementation or rectification.

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ONE. REGARDING THE SCOPE OF APPLICATION OF THE RESOLUTION OF 16 MARCH 2020.

1. The Spanish Government decreed a State of Emergency as a consequence of the pandemic known as CORONAVIRUS (COVID-19), which led to the confinement of the public to their homes. Many arbitrators and lawyers agreed to adopt measures in this regard, in order not only to avoid appearances in person, but also the processing of ongoing proceedings, given the possible difficulty for the parties and their lawyers to access to documents and other resources so as to draw up their respective written submissions.
2. On this basis, and in the face of such an exceptional situation, the Court adopted the aforementioned resolution in which, among other measures, all deadlines of the arbitration proceedings managed by it were suspended, while allowing the proceedings to continue in certain cases, provided that the arbitrator and the parties were in agreement.
3. The aim was as far as possible to make the exceptional situation caused by the aforementioned State of Emergency compatible with the specific features of arbitration proceedings.
4. The terms of the Court's resolution should thus be understood to refer solely and exclusively to 'arbitration proceedings' and not to other stages of arbitration. Hence the fact that in referring to the possibility of lifting the suspension and continuing the proceedings, reference is made to the parties and also to the Arbitral Tribunal, and not the Court, whose involvement is confined to consultation.
5. In practice, in order to be able to lift the suspension and thus agree on the continuation of the 'proceedings', the Arbitral Tribunal and the parties must all so agree. This mutual agreement can scarcely occur if the Arbitral Tribunal is not formally constituted.
6. At a preliminary stage (initial phase), prior to the arbitration proceedings themselves, one may distinguish three fully differentiated moments: a) the request and response regarding the arbitration (Articles 6 to 8); b) the preliminary assessment of the arbitration agreement (Article 9); and c) the constitution of the arbitral tribunal (Articles 15 to 21).
7. Once the Arbitral Tribunal has been constituted, the procedural phase begins (the arbitration proceedings per se), with Tribunal receiving the case file previously processed by the Court Secretariat, as indicated in Article 23 of the Rules. Article 24 literally refers to the '**terms of reference and calendar for the arbitration procedure**', indicating here, that it is following the constitution of the arbitral tribunal, and its

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receipt of the case file, that the processing of the arbitration procedure itself begins.

8. The power to interpret the Rules lies with the Court (Article 1.3 of the Rules). In exercising this power of interpretation, and taking into account the resolution of 16 March 2020, it must be understood that the suspension of deadlines refers exclusively to the arbitration procedure itself, as indicated in Article 23.

TWO. REGARDING THE PROCEDURES TO BE DEEMED EXCLUDED FROM THE SUSPENSION.

Taking into account the above considerations, the following procedures and/or actions should be understood to be excluded from the suspension ruled by the Court on 16 March 2020:

1. The procedures in response to the request for arbitration and announcing a counterclaim.

2. The defendant's raising of procedural objections, and service thereof on the plaintiff to formulate arguments.

3. The preliminary assessment of the arbitration agreement by the Court.

4. Appointment of the arbitral tribunal, including the deadline for a challenge to it, or to any of its members if a collegiate body.

THREE. REGARDING PROCEDURES TO BE COMPLETED IN WRITING.

1. Once the arbitral tribunal has been constituted, all procedures comprising written submissions by the parties, decisions of the Court or procedural orders of the arbitral tribunal must be deemed suspended for the period indicated in the resolution of 16 March.

2. However, this general rule may be disregarded as long as this is agreed by the arbitral tribunal and the disputing parties, with the Court having been consulted. This possibility is therefore left to the good judgment of the tribunal and the parties, who must weigh up in each case whether or not it is appropriate to continue with the proceedings on the terms and up to the procedural steps they deem sensible and reasonable.

3. To this end, likewise taking into account the characteristic features of arbitration, the Court encourages arbitration tribunals (single-person or collegiate), if they deem so appropriate, to contact the legal representatives of the parties in order to seek their opinion as to whether or not they should avail themselves of this option.

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FOUR. REGARDING IN-PERSON APPEARANCES AND HEARINGS.

1. Specific reference and treatment are required for in-person appearances and hearings during the course of arbitration proceedings, such as the terms of reference (Article 24.2), the organisation of the procedural calendar (Article 31) or the examination of witness and expert witness evidence (Articles 32.2 and 33.8). This is without prejudice to any appearances that may be agreed by the parties and the arbitral tribunal (e.g. in the case of oral conclusions).
2. Of the appearances set out in the Rules, only that referring to preparation of the terms of reference is optional, and may be replaced by draft terms of reference exchanged among the parties and drawn up by the tribunal itself, in order for the lawyers to suggest or propose any additions or modifications they might deem appropriate. However, if the arbitrator and the parties consider it necessary to meet, this could be conducted remotely.
3. The same applies to the appearance scheduled for the establishment of a calendar of actions, both for the examination of evidence and for the presentation of written conclusions (Article 31 of the Rules). In this case the appearance could be replaced by written communications between the tribunal, the parties and the Court, could be performed remotely, although given the terms of this principle, it would be advisable to conduct it digitally, with the agreement of all the parties.
4. With regard to the hearing for the examination of witness and expert witness evidence, although it is true that the Rules of the Court for the examination of witness evidence allow this to be conducted by audiovisual means (Article 32.5), provided that this is agreed by the Court itself and the arbitral tribunal, the Court has held that this must be examined in person, since at least the parties, the arbitral tribunal and the Court Secretary must be present. Therefore, and given the special circumstances that exist, the resolution of 16 March does not consider lifting the suspension of such an important hearing.

FIVE. REGARDING THE FINAL AWARD AND WRITTEN CLARIFICATIONS

1. With regard to the issuance of the final Award, a distinction must be made between those cases in which, following completion of the conclusions procedure by the parties, the respective award is pending pronouncement, and those others in which it has already been issued and notified to the parties.

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2. In both cases, the arbitration proceedings per se have by this point been concluded, and the deadline for issuing the award should therefore not in principle be deemed to be suspended. As a result, the arbitral tribunal must, when presented with the written conclusions or, where applicable, when the parties appear remotely to present their oral conclusions, issue the corresponding award by the deadline.

3. Following issuance of the award, notice must be served on the parties, with deadlines being left open for them to present their respective written submissions in a request for clarification, correction, supplementation and rectification of the award.

SIX. FINAL CONSIDERATIONS.

1. In short, the resolution of the Court of 16 March must be interpreted, and therefore applied, by taking into account the considerations contained in this note, resulting in the following situations, by way of conclusion:

a) The arbitration must follow the regulatory procedures from commencement up until the constitution of the arbitral tribunal and delivery to it of the corresponding case file. Consequently, none of these procedures is affected by the suspension referred to in said resolution.
b) The evidence hearing is affected by the suspension, which cannot be lifted during the term of validity of the aforementioned resolution.
c) Once the arbitral tribunal has been constituted, the procedures to be completed in writing by the parties, the decisions of the Court and the Procedural Orders may be reactivated following agreement by the arbitral tribunal and the parties, with the Court being consulted.
d) Likewise, once the arbitral tribunal has been constituted, in-person appearances, with the exception of the evidence hearing, may be replaced either by written communications between the parties and the arbitral tribunal, with a copy to the Court, or by remote appearances. All the above provided that the arbitral tribunal and the parties so agree, with the Court being consulted.
e) Once the conclusions procedure has been completed, the deadlines for issuance of the award are not deemed to have been suspended, nor for the parties to request that they be corrected, clarified, supplemented and rectified.

2. The Court would like to thank its associates, the various arbitral tribunals now constituted or in the process of constitution, as well as the legal representatives of the different parties involved in the arbitration administered by CIMA, for their understanding, comments and suggestions to reconcile the exceptional situation in which we find ourselves,

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with the continued processing of such arbitration, at all times with proper respect for the right to due process and the inalienable rights of the litigants.
3. In short, if it is the wish of the parties to maintain the suspension of the arbitration proceedings, they may do so once the arbitration tribunal has been constituted, since it is at this point that the resolution of 16 March 2020 fully applies. If they instead wish to lift the suspension and continue with the proceedings, they may be resumed, where applicable, up until the conclusion of the arbitration, or until the applicable procedural stage, as allowed by the resolution of the Court.
4. The Court encourages both the arbitral tribunals and the parties and their legal representatives, as far as possible and in the light of the circumstances of each case, to find the ways and means by common agreement to facilitate their arbitration proceedings.

E. CIMA Resolution of 2 June 2020

This resolution established the following:

One. By resolution of the Court on 16 March, it was decided, as a result of the state of emergency decreed by the Government of Spain, to suspend 'the in-person hearings or appearances established in the Rules or agreed by the parties and the Arbitral Tribunals (Terms of Reference, Article 31, or any other), which may be held by means of a telephone conference, provided that this is agreed by the parties and the corresponding Arbitral Tribunal, with consultation of the Secretariat of the Court'. It was also decided to suspend 'the evidence hearings' and 'all deadlines for ongoing arbitration proceedings. As an exception, those procedures which are, due to their special characteristics, so agreed by the Arbitral Tribunal may be conducted with the agreement of the parties and consultation of the Court'.
These resolutions were supplemented by the briefing note of 6 April 2020.
Finally, it was agreed that 'the above measures take effective from today and will continue for as long as the competent authorities so determine, while the current situation remains in place'.
Two. Whereas Royal Decree 537/2020, of 22 May 2020 (Article 8) provides that 'from 4 June 2020 onwards, the suspension of procedural deadlines is lifted, repealing the second additional provision of Royal

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Decree 463/2020, of 14 March 2020', leaving all procedural deadlines suspended.

Three. On the basis of the above, the Court deems it necessary to resolve, and therefore does resolve, to lift the suspension of the aforementioned deadlines, such that all arbitration proceedings handled by the Court may complete their normal process until the award is issued or, where applicable, until the clarification, correction or supplementation thereof.

The lifting of the suspension will begin to take effect from 5 June 2020.

Four. For the continuation of arbitration proceedings the deadlines of which have been suspended, it is resolved to resume the aforementioned deadlines, in each case it being up to the arbitrators strictly to comply with the right of defence and the principle of equality between the parties.

Five. Arbitral tribunals are authorised to ensure that all actions and proceedings, with the agreement of the parties and consultation of the Court, except for evidence hearings, can be conducted remotely or in the manner deemed most appropriate in each case, while guaranteeing the integrity of the proceedings.

Six. With regard to evidence hearings, these may be conducted by audiovisual means if the arbitral tribunal so decides, with the agreement of the parties and consultation of the Court. The Court has in place the 'Microsoft Teams' system, guaranteeing the quality, security and confidentiality of the hearings, with recording capacity. In any event, the Court will provide the arbitral tribunals and the parties with the rules (protocol) to ensure the utmost authenticity in the proceedings.

Seven. For in-person evidence hearings, and for as long as this recommendation by the health authorities remains in place, appropriate measures will be taken and required of the attendees (distances, face masks, gel and other additional measures) to protect the health of the parties involved, in accordance with the recommendations of the competent public authorities, with the corresponding information being provided in due course for such measures.

Eight. The services of the Court will provide the arbitral tribunals and the parties with all the Information necessary for the normal course of arbitration activity and the continuation of the respective arbitration proceedings.

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F. CIMA Rules or Audiovisual Witness or Expert Witness Evidence Hearings

Subsequently, the court (CIMA) turned to the question of establishing rules on the use of audiovisual means for witness or expert witness evidence hearings. These are intended as longer-term rules, since these audiovisual systems seem destined to remain in use.

There can be no doubt that the profound crisis caused by the pandemic served as the trigger for implementation of these systems.

As a result, CIMA implemented complete regulations for evidence hearings for witnesses and expert witnesses by audiovisual means, dated 8 June 2020, summarised as follows:

I. Introduction

Arbitration must, as an alternative means of resolving disputes, also take into account new technological advances, and arbitration institutions must promote and have in place appropriate systems serving to conduct appearances and hearings remotely with the utmost guarantee of quality and reliability, especially in the case of evidence hearings, where it is necessary to find the formulae and methods that offer the greatest guarantees for arbitrators, users and arbitration institutions, and ensure the absence of external interference with witnesses and experts.

The fact is that there is no use in having a reliable audiovisual communication system for evidence hearings, if one cannot ensure that witness evidence or expert witness statements are delivered without assistance or intervention by third parties unrelated to the evidence, who could condition their responses one way or another, thereby undermining the very essence of the process, and consequently the end result of the dispute.

We must not forget that the significant advances made in communication techniques may be used for unlawful purposes, especially when the person providing the statement is not under the face-to-face scrutiny of the arbitral tribunal, since the most sophisticated virtual communication formulae in existence could allow the witness to connect to external elements that could affect the statements or responses given.

Audiovisual media were of course used by most arbitration institutions before the emergence of the pandemic situation affecting numerous countries. CIMA makes provision for this option in Article 32.5 of the Rules of Procedure, and witness statements have been given by such means in many cases. The Seoul Protocol was drafted and signed in 2018.

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However, the exceptional situation arising from what is known as Covid-19 has in particular led to the clear and unquestionable consideration of the suitability of using such resources, in order to facilitate the processing of arbitration proceedings given the serious consequences that could result from a suspension or delay.

CIMA deems it essential for the proper conduct of virtual hearings to provide the users of the arbitration (arbitrators, parties, lawyers, witnesses and expert witnesses) with access both to the audiovisual technical resources allowing for the quality of appearances and hearings (with the utmost guarantees of security and confidentiality) and the indications (rules) for their use and the examination of witness and expert evidence, so as to offer the arbitration community a combination that combines the security and quality of audiovisual hearings, with the guarantee of the purity of the proceedings, ensuring the absence of external interference in the statements of witnesses and expert witnesses, avoiding any form of communication among them or between them and their lawyers or third parties.

One must nonetheless recognise the desirability and usefulness, as a general rule, of hearings for the examination of witness and expert witness evidence to be conducted in person if possible, thus using the audiovisual system only for special cases where the physical and economic difficulty (high costs) of an in-person hearing would make this advisable.

In fact, at in-person hearings, the immediacy of the relationship between arbitral tribunals and lawyers, and witnesses and expert witnesses, involves the study and direct analysis of their gestures, doubts, responses and a host of nuances which may not be perceived when using remote means. Hence the importance of the in-person approach, and where appropriate, the importance of the quality of the audiovisual system used for remote hearings.

However, the significant reduction in costs and time that the use of audiovisual systems may entail for the parties cannot be ignored. The use of audiovisual resources will therefore make it desirable and necessary for arbitration institutions to implement as an additional service those telematic systems that would facilitate any remote hearings demanded that users might call for.

Either party may in each case propose hearings for the examination of witness and expert witness evidence, whether in person or not, and the arbitrators and arbitration institutions must decide, in coordination with them, if it would be suitable, appropriate and feasible to conduct the examination by audiovisual means. In any event, arbitration institutions must have systems in place allowing evidence to be examined with

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the utmost guarantees of security and confidentiality, together with rules (protocols or guidelines) underpinning the guarantee of procedure and compliance with the principles of equality and an adversarial approach.

This is why CIMA considers that the most reliable method for audiovisual evidence hearings is to have venues where witnesses and experts are supervised with full guarantees, so that no external elements can interfere with the examination of evidence.

It is to this end useful for CIMA, as the institution responsible for the administration of arbitration, to make delegations or sign collaboration agreements with other arbitration institutions, corporations and associations (or legal practices) located where the witnesses and experts are present, to provide not only a room in which each of them can make their statements, but also to check their identity and ensure their isolation, without the possibility of internal or external communication, requiring them to use the technical resources provided by the partner institution itself for their evidence or statement.

II. CIMA Audiovisual System

The system made available by the Court for users, arbitrators, lawyers, witnesses and expert witnesses is 'Microsoft Teams', with the following technical characteristics, guaranteed by Microsoft:

Microsoft Teams is a system enabling video conferencing (audio/video), guaranteeing the privacy and security of users who connect remotely, allowing meetings of up to 300 people to be held.

It allows us to decide who, from outside CIMA, can join our meetings directly, and who must wait until we give them access.

The organisers of the meeting can at all times bring in new participants and remove those who were part of the meeting but can no longer continue participating.

Microsoft Teams offers the possibility of recording meetings, always showing a message to everyone in attendance that a recording is being made. Information from the organisations and individuals within the meeting is not used for other purposes.

At the end of the meeting, all those who took part in the meeting can access the recording, as well as any others to whom the organiser provides access.

Microsoft Teams has in place an identity protection and account information system for those taking part in its meetings, with:

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a) **Multifactor authentication** (**MFA**) requiring users to provide additional forms of verification to prove their identity, helping protect their accounts from attacks that exploit weak or stolen passwords. This ensures the identities and security of those accessing the application.
b) **Conditional access** allowing one to set risk-based policies for access based on user context, device status, location, and more.
c) **Microsoft Endpoint Manager** allowing one to manage devices and applications and enforce conditional access on any device.
d) **Secure guest access** allowing users to collaborate with people outside their organisation while controlling their access to the organisation's data.
e) **External access** providing an authenticated connection to another organisation, enabling collaboration among organisations.

Each person's information is deleted once the subscription is deleted or expires.

Regular and transparent reports are provided on how the information requested from the company by third parties is processed.

As regards security, Teams network communications are encrypted by default, requiring all servers to use certificates and using OAUTH, TLS, Secure Real-Time Transport Protocol (SRTP) and other industry standard encryption techniques, including 256-bit Advanced Encryption Standard (AES). All Teams data are thus protected within the network.

Meanwhile, Azure Active Directory (Azure AD) provides a single trusted back-end repository for user accounts. User profile information is stored in Azure AD through Microsoft Graph actions.

Transport layer security (TLS) and mutual TLS (MTLS) encrypt instant messaging traffic and enable endpoint authentication. Point-to-point audio, video, and application sharing sequences are encrypted and checked for integrity with the Secure Real-Time Transport Protocol (SRTP). OAuth traffic can also be used for monitoring, especially with reference to negotiable permissions while switching between tabs in Teams, for example, to move from posts to files.

Teams also uses industry standard protocols for user authentication whenever possible, and features the standards ISO 27001, ISO 27018, SSAE16 SOC 1 and SOC 2, HIPAA and the EU model clauses (EUMC).

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III. Rules to ensure the Reliability and Transparency of Remote Hearings

1. Identification of the Parties to the Hearing

Following conclusion of the hearing provided for in Article 31 of the Court Regulation, and having established the calendar and date for the examination of witness and expert witness evidence admitted by the arbitral tribunal, it will reach agreement with the parties and provide the Court with the number of witnesses and experts whose testimonies or statements need to be processed via the audiovisual system, as well as their full names, ID numbers and any documented accreditation (ID card, passport, etc.), as well as the place (country, city and room location) from which they will give their statement.

The arbitral tribunal may, at the start of each intervention, carry out the corresponding check as to the IP address of the issuing computer, the identity of the witness or expert, to place this on record in the case. The same verification will be carried out to identify those persons (translators, transcribers or technicians) who will be present at the respective hearing.

Aside from these individuals, no one else will be allowed access to the hearing. The parties involved or present will gain access by means of the corresponding password. Access control will be conducted by the Court's services.

2. IP Address from which the Evidence or Statement is issued

Before the session begins, the parties will email the IP address used for connection to the arbitral tribunal, which will forward it to the Court, as well as the technical audiovisual communication system to be used by each of them, and in particular by the witnesses and/or expert witnesses, the parties being responsible for ensuring that said system offers the necessary guarantees of image and sound quality to ensure and place on record that the arbitral tribunal and the lawyers will be able to conduct the examination of evidence with due fluidity.

Before the session begins, the Court services will check the suitability of the remote digital systems to be used.

If the required image and sound quality cannot be obtained, the Arbitral Tribunal may, having consulted the technical services of the Court and of the parties, suspend the process and pass the resolution (Procedural Order) best suited to the arbitration process, preventing possible technical

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deficiencies from being used as a delaying tactic by either party to prevent the procedure and/or delay the arbitration proceedings.

3. Measures to ensure simultaneous Visibility of all Participants

Although the Microsoft Teams system allows for simultaneous visibility of all parties involved, as well as the display on screen of only the speaker, it is advisable that the system be set to simultaneous display so that the arbitral tribunal and the lawyers have an overall and combined view of all the participants. However, the arbitral tribunal will, in each specific case, decide what is most appropriate for the smooth conduct of the hearing.

4. Measures to ensure the Reliability of Evidence and Statements

CIMA considers that the most reliable method for audiovisual evidence hearings is not to provide the access password to witnesses until the moment of their intervention.

5. Measures to be taken to ensure the Isolation of Witnesses and Expert Witnesses

Each of the witnesses and experts summonsed to the hearing must appear only when giving their testimony or statement, avoiding communication between them, before and after their testimony and/or statements. They must be positioned in front of the computer screen (or equivalent) at a sufficient distance to allow them to be clearly heard. They may not be assisted by any instrument or technical means allowing them to be contacted externally and, if possible, in a position that allows most of the room from which they give their evidence or statement to be observed. Experts may rely on their opinions or reports. In the event of face-to-face comparison of witnesses and experts, the arbitral tribunal will decide, in agreement with the parties and duly in advance, how to conduct this practice.

The tribunal will call on them not only to state the truth, but also to declare that they will not use any technical or other means allowing them to connect to and/or receive information from other witnesses or expert witnesses and third parties.

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6. Measures regarding the Presentation of Documents

In the event that the lawyers of the parties wish the witnesses or expert witnesses to be presented with documents included within the different classes of evidence, they must record this with the arbitral tribunal and the other party, indicating them and identifying them at the hearing, presenting them to the other party's lawyer and to the tribunal for confirmation that they match the aforementioned documents. Once they are identified, the lawyer will show them to the witness or the expert, without any annotations, deletions, or any sign which could influence the statements of the witness.

If available, a separate screen/window (other than the screen/window used to show the video transmission) will be used to show the witness or expert the relevant documents during questioning.

7. Recording of the Hearing

Regardless of whether the parties can save the video session on the corresponding computer issuing the signal, the services of the Court will make the corresponding recording, of which a copy will be sent as soon as possible to the arbitral tribunal and the lawyers of the parties, with the Court recording being deemed the original for all purposes.

If, at the request of a party, the Court considers it necessary to authorise the presence of an interpreter during the hearing, it will issue this ruling sufficiently in advance so that the Court services can coordinate with the interpreter the ways and means to facilitate his/her presence, providing him/her with the space and means necessary to perform the role in the normal manner.

G. CIMA Virtual Hearing Organisation Protocol

Similarly, the Madrid International Arbitration Centre (MIAC) in which CIMA participates has established a **FULL PROTOCOL ON THE ORGANISATION OF VIRTUAL HEARINGS**, published on its website (https://madridarb.com), the main recommendations of which are as follows:

a) Determine the minimum technical conditions to be met by both the devices and the type of connection of the Participants;

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b) Connect to the Hearing via a desktop or laptop computer, refraining from using tablets or mobile phones, which may present an unstable connection with reduced functionalities;
c) Preferably use a wired rather than a wireless internet connection to facilitate higher speed;
d) Use a functional webcam and microphone, providing a clear and flawless image and audio, to ensure the best possible quality during the Hearing;
e) Consider the acoustics and lighting levels of the location from where the participant connects to the Hearing;
f) Verify that the IT devices are properly charged and that power cables or backup batteries are available as required;
g) Ensure that the platform application is updated on the device;
h) Disable automatic IT updates on the devices, which risk being automatically activated and could interrupt the Hearing;
i) Compile a list of all Participants at the Hearing and how their presence and identity will be confirmed;
j) Take into account the different time zones when setting Hearing dates, start and end times, breaks and duration of each day of the Hearing;
k) Determine the manner in which the parties' pleadings, witness and expert witness evidence are presented, together with any documentary presentation and inspections or expert opinions that may be required.

17. In short, in the field of arbitration we have arrived at a point where we have systems offering complete guarantees to those involved in conducting online procedures, while guaranteeing 'due process'.

Madrid, 29 June 2021.

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Part II
Online Trial Hearings – In Particular, Evidence

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A Judge's Perspective: Online Hearings, especially the Gathering and Assessment of Evidence

Luís Filipe Pires de Sousa

Table of Content

A. Online Examination of Witnesses: an Obstacle to Establishing their Truthfulness? 87
B. Is the Trier of Fact's Decision Affected by the mode of the Witness's Presentation to the Court? 95
C. Online Hearings and the Right to a Fair Trial 100
Bibliography 103

A. *Online Examination of Witnesses: an Obstacle to Establishing their Truthfulness?*

The line of thought that still prevails today is that personal contact (in the same physical space) between judge and/or jury and the witness allows the judge to draw inferences concerning the honesty and reliability of the testimony from the witness's non-verbal behaviour. It is therefore commonly asserted that, in evaluating depositions, consideration is given to factors relating to the witnesses' demeanour, reactions, tone of voice, gestures, mimicry, blushing or pallor, or their evident nervousness. In short, the witness's non-verbal channel of communication is regarded as a reliable basis for making deductions about the honesty and trustworthiness of the deposition, and it has been said that "Immediacy is the key that decodes the deposition."[1]

Within this line of reasoning, the wearing of a mask (a public health requirement during the pandemic) by a witness deposing in person undermines the postulate that observation of the witness's non-verbal behaviour is fundamental for establishing their credibility.

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1 Pissarra, 'Audiências judiciais por teleconferência em processo civil' (2020) 1-4 *Revista de Direitos e Estudos Sociais*, 167 (176).

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However, this epistemological supposition is far from being correct and workable, on the terms assumed by professionals in the judiciary and arbitration, and even by lawmakers.

In effect, immediacy cannot be seen as a kind of sensory experience that permits the judge, in the first place, not to be mistaken in his or her perceptions and, in the second place, to develop a kind of infallible and unaccountable intuition as to the honesty and reliability of testimony.

Mouraz Lopes has astutely observed that:

> To 'take refuge' in the assertion that certain evidence does not need to be justified or validated because what was decided falls within the scope of the principle of immediacy is a way of evading the mandatory requirement that judgments must be supported by due grounds, and in particular the principle of full grounds.[2]

This author also points out that orality and immediacy offer essentially a technique for obtaining evidence and not a method for forming a judge's conviction. Once the information has been obtained from the production of evidence using immediacy, “the task of immediacy ceases at that moment and the judge's reasoning begins.”[3]

It should be emphasised that the practice of detecting lies on the basis of non-verbal behaviour is informed by an array of incorrect social stereotypes, shared by judges and arbitrators. The underlying idea is the naive psychological view that a person who lies is under emotional pressure, and that their inner suffering is betrayed through channels unknown to them, and beyond their control.

The table below lists the indicators most often used for this purpose, indicating their effective relevance (scientifically determined through meta-analysis) for this purpose, as well as the social value attached to them.[4]

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2 Lopes, *A Fundamentação da Sentença no Sistema Penal Português: Legitimar, Diferenciar, Simplificar* (2011), 248.

3 Lopes, *A Fundamentação da Sentença no Sistema Penal Português: Legitimar, Diferenciar, Simplificar* (2011), 251.

4 Table taken from Vrij et al., ‘Reading Lies: Nonverbal Communication and Deception’ (2019) 70 *Annual Review of Psychology*, 295 (309).

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Cues	Actual relationship	Assumed relationship
Vocal		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	.04	Associated with lying
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	.00	Associated with lying
High-pitched voice	**.21**	Associated with lying
Speech rate (number of spoken words in a certain period of time)	.07	No assumed relationship
Latency period (period of silence between question and answer)	.02	No assumed relationship
Pauses (silent, filled, or mixed)	.02	Associated with lying
Visual		
Gaze aversion (looking away from the conversation partner)	.03	Associated with lying
Smiles (smiling and laughing)	.00	No assumed relationship
Facial fidgeting (face touching or rubbing hair)	.08	Associated with lying
Self-fidgeting (touching, rubbing, or scratching body or face)	-.01	Associated with lying
Fidgeting (undifferentiated)	**.16**	Associated with lying
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	**-.14**	No assumed relationship
Leg and foot movements	-.09	Associated with lying
Posture shifts (movements made to change seating position)	.05	Associated with lying
Head movements (head nods and head shakes)	-.02	Associated with lying
Eye blinks (blinking of the eyes)	.07	Associated with lying

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This table was drawn up from a meta-analysis by Bella DePaulo (2003)[5], and the correlations based on an article by Aldert Vrij (2008), two of the most comprehensive and scientifically credible sources in this field. A positive score indicates that the pointer, or cue, is more present when people lie, whilst a negative score indicates that the cue is less present when they lie. Relationships that are significant in percentage terms are indicated in bold; for scientific purposes, amplitudes of 0.20, 0.50 and 0.80 should be interpreted as describing, respectively, a small, medium and large effect.

It therefore follows from this analysis that the cues - socially assumed to be linked to deception and also with confirmed scientific relevance - that score highest (.21, .16 and -.14) are still classified as pointing to only a small effect, meaning they perform poorly as indicators of deception. DePaulo's meta-analysis presented a mean of just .27 in the thirteen most relevant cues. It flows from this that the relationship between non-verbal behaviour and the detection of deception is weak. As these authors emphasise 'Nonverbal lie detection is also a domain where many myths continue to exist: People typically overestimate the relationship between deception and nonverbal behavior and the ability to detect deceit by observing nonverbal behavior.'[6]

Several explanations can be advanced for this faint correlation between non-verbal cues and lying. In the first place, how people lie varies from individual to individual, and each individual will lie in a different way depending on the context and how much is at stake in the account (idiosyncratic behaviour). 'There is no dictionary of nonverbal cue meanings, because contextual factors involving encoders' intentions, their other verbal and nonverbal behaviors, other people (who they are and their behavior), and the setting will all affect meaning.'[7] A liar may trigger nervous behaviour when what is at stake is important, but the same can happen with someone speaking honestly, out of the fear of not being believed. Secondly, in order to appear convincing, honest and lying speakers use similar non-verbal strategies (both seek to suppress signs of nervousness and instead give out signs they believe will create the impression of being honest, e.g. looking their interlocutor in the eyes and not fidgeting), but they use different verbal strategies (honest speakers are collaborative and employ the "*say it all*" strategy, whilst liars use the "**keep it simple**" strat-

5 The meta-analysis in question considered 116 studies, with 158 cues to deception.

6 Vrij et al., 'Reading Lies: Nonverbal Communication and Deception' (2019) 70 *Annual Review of Psychology*, 295 (297).

7 Hall, Horgan and Murphy, 'Nonverbal Communication' (2019) 70 *Annual Review of Psychology*, 271 (272).

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egy and avoid mentioning details that might incriminate them), which explains why verbal content is a more reliable pointed to deceit than non-verbal behaviour. Thirdly, we tend unconsciously to mimic the non-verbal behaviour of our interlocutor, meaning that a suspect will tend to mimic the restless behaviour of his or her interrogator. Fourthly, a meta-analysis conducted in 2016 showed that training for investigators/judges centred on vocal and visual cues for detecting lies resulted in small improvements, whilst training focused on verbal content brought about moderate improvement.[8] Fifthly, a meta-analysis conducted in 2006 pointed to a pitfall of paying attention only to visual cues: messages judged only on the basis of non-verbal cues generate a **lie bias**, i.e. a tendency to judge that the person questioned is lying. Because non-verbal stereotypes refer more to the behaviour of liars than to that of honest speakers (e.g. lack of eye contact and fidgeting/restlessness), the outcome generated is a lie bias. Once these stereotypes are created, several cognitive processes are activated so that stereotypes tend to endure, causing the questioner to interpret the behaviour of the person questioned in a way that does not correspond to reality (**illusory correlations**), e.g. when an observer is told that someone is lying, he will tend to overestimate the occurrence of aversion to eye contact. Sixthly, misconceptions about non-verbal lie detection are transmitted culturally, and stereotypes about lying are intended to discourage untruthfulness.[9] In other words, by way of example, because lying is objectionable, someone who lies must exhibit emotional agitation/nervousness.

In short, researchers with scientific experience of detecting lies and truthfulness agree that ‘there are no nonverbal behaviors that are present in all liars and are absent in all people who tell the truth. There are no nonverbal behaviors that are indicative of deception, such as **Pinocchio’s**

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8 The study in question is: Hauch et al., ‘Does Training Improve the Detection of Deception? A Meta-Analysis’ (2016) 43 *Communication Research*, 283. In the authors' words, 'Truth accuracy was only improved if verbal content cues to detect the truth were utilized, although this result should be interpreted with caution, because it could be due to a shift in response bias toward correctly detecting the truth. Training with verbal content cues yielded the highest training effect, whereas training with nonverbal cues, paraverbal cues, or feedback resulted in quite small or nonsignificant training effects. Therefore, researchers and practitioners should not base their trainings on these unreliable cues but focus on verbal content training.' (318)

9 Vrij et al., ‘Reading Lies: Nonverbal Communication and Deception’ (2019) 70 *Annual Review of Psychology*, 295 (304-311).

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nose.'[10] And when it is documented that facial expressions and gestures are related to lying, this relationship is faint, and often moderated by situational variables. What is said does not prevent non-verbal language (such as facial expressions, gaze pattern, posture, body movements) from transmitting interpersonal and social information, such as the witness's assessments, concerns and disposition concerning the situation. These non-verbal cues also signal their intentions and create impressions in courtroom observers.[11]

Judges, like ordinary citizens, are often prey to misconceptions concerning cues to deceit (e.g. nervousness, an aversion to eye contact), concentrating on incorrect subjective cues. We find it difficult to see beyond deeply rooted stereotypes of this kind and are resistant to adjusting our convictions, even when science shows this to be necessary. What is more, multiple studies show that actual lie detection capability (including justice sector professionals), averages only 54%, in other words, only slightly above the level of chance.[12] Even when training is provided on objective

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10 Denault et al., 'The Analysis of Nonverbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts' (2019) 30 *Anuario de Psicologia Jurídica*, 1.
In view of the authority of its authors and the analysis it makes of repeated practices lacking an adequate and sufficient scientific basis, this article contains what amounts to a manifesto against the pseudoscience of lie detection.
Denault, *L'Incidence de la Communication Non Verbale Lors de Procès: Une Menace à l'Integrité du Système Judiciaire?* (2015), 160, states that the use in lie detection of concepts belonging to synergology, at variance with scientific consensus, amounts to a pseudoscience and a threat to the integrity of the judicial system.
To the same effect, concerning the relegation of non-verbal behaviour to a secondary role, cf. Bennett, 'Unspringing The Witness Memory and Demeanor Trap: What Every Judge And Juror Needs to Know About Cognitive Psychology And Witness Credibility' (2015) 64 *American University Law Review*, 1331.

11 Denault and Patterson, 'Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges' (2020) 45 *Journal of Nonverbal Behavior,* 1 (https://link.springer.com/article/10.1007/s10919-020-00339-x), accessed on 2021-02-08.

12 Vrij and Granhag, 'Eliciting Cues to Deception and Truth: What Matters are the Questions Asked' (2012) 1 *Journal of Applied Research in Memory and Cognition*, 110. In the meta-analysis conducted by Aldert Vrij, in 2008, concerning the combined lie detection ability in laymen, it was found that the average percentages were 63.41% for truth detection and 48.15% for lie detection, yielding a combined value (truth and lie) of 54.27% - cf. Aldert Vrij, *Detecting Lies and Deceit, Pitfalls and Opportunities* (2008), 187-188. The analysis of 24 studies on the detection capability of professionals, especially police officers, yielded an average figure of 55.91%.

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indicators of lying, individuals only improve their detection skill to a level in the order of 57% or 58%[13], showing that instruction programmes are not very effective.

There are also studies that demonstrate that the ability to assess correctly the veracity of testimony is not affected by the mode of presentation (live or video).[14]

A research project in 2016 sought to determine whether the witness's wearing of a chador was a hindrance to establishing the truth in court. The

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In 2006, Bond and DePaulo conducted a meta-analysis of more than two hundred studies, concluding that the general level of accuracy in lie detection was 54%. In another meta-analysis from 2006, Aamodt and Custer, 'Who can best catch a liar? A meta-analysis of individual differences in detecting deception' (2006) 15 *The Forensic Examiner*, 6, the general level of accuracy in lie detection was 54.22%, whilst for police personnel and judges the figure was 55.51%. From looking at this type of research, Aamodt and Custer concluded that the overall experience of judges does not have a positive overall influence on their ability to detect lies –Reinhard *et al*, 'Listening, Not Watching: Situational Familiarity and the Ability to Detect Deception' (2011) 101 *Journal of Personality and Social Psychology*, 467. Also to the effect that judges and police offices are not better able to detect lies than an average member of the public, cfr. Fuller, *High-Stakes, Real-World Deception: An Examination of the Process of Deception and Deception Detection Using Linguistic-Bases Cues* (2008), 10.
These studies are largely replicated in the study by Bogaard et al., 'Strong, but Wrong: Lay People's and Police Officers' Beliefs about Verbal and Nonverbal Cues to Deception', *PLoS ONE* 11(6): e0156615. doi:10.1371/journal.pone.0156615, 2016.
In contrast, Ekman and O'Sullivan, conducted a study in 1991 demonstrating that a lie detection capability in secret service officers of 64% –Warren et al., 'Detecting Deception from Emotional and Unemotional Cues' (2009) 33 *Journal of Nonverbal Behavior*, 59 (60).
As has been mentioned, the reasons for the poor level of lie detection divide into different kinds, and some of the most pertinent are: judicial professionals make use of incorrect subjective indicators, liars take precautions to disguise their behaviour, aware, as they are, of what segments of their statements are false, and there is no feedback from lie detection, meaning that practitioners are unable to hone their skills.

13 Fuller, *High-Stakes, Real-World Deception: An Examination of the Process of Deception and Deception Detection Using Linguistic-Bases Cues* (2008), 10. In 2003, Frank and Feeley published a meta-analysis of eleven studies of training in non-verbal lie detection, concluding that the group that underwent training achieved average accuracy of 58%, as against 54% for the untrained group – cf. Frank and Feeley, 'To Catch a Liar: Challenges to Research in Lie Detection Training' (2003) 31 *Journal of Applied Communication Research*, 58.

14 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 35 and 37.

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study confirmed that when witnesses wore ordinary clothes, participants' success rate in gauging truthfulness was no better than chance. When witnesses wore a chador (revealing only their eyes) or hijabs (covering the hair and neck, but not the head), observers performed better than chance in detecting lies. The researchers advanced the hypothesis that, because they limited the quantity of visual information possible, the chador and the **hijab** forced participants to base their decisions on verbal cues. It was noted that, when witnesses wear a chador, some observers did not look at them, and limited themselves to listening to the witnesses. The conclusion that emerges from this study is that, when it comes to assessing non-verbal behaviour as a source for forming a conviction, **less is more**.[15] Transposing these research findings to the context of the pandemic, it may be inferred that the wearing of a mask by a witness does not interfere with the most objective and valid criteria for assessing testimony, and has the effect of making the judge concentrate on these more reliable criteria, without being distracted by the more random subjective aspects deriving from non-verbal behaviour.

On the other hand, in situations where the testimony is unfaithful because it is based on **distorted memories** (due either to factors concerning the witness him or herself or to external factors)[16], these lie detection methods prove utterly useless and ineffective to the precise extent that the verbal statement is not accompanied by physical reactions that might possibly be associated with untruthfulness.

In short, there are few scientifically validated non-verbal cues to deceit, and those that exist have only a faint relationship with lie detection and, above all, judges lack the ability and specific training to enable them to make effective and reliable use of the detection of those cues to deceit. Even when they undergo specific training, their ability does not greatly improve.

It follows that direct and in-person contact between judge and witness cannot be deemed to offer advantages that the psychology of testimony does not recognise. The formation of a conviction concerning the trustworthiness of a deposition is based, in the first place, on the **verbal channel of communication**[17], and the non-verbal channel is of residual and uncertain relevance. As stated by Contreras Rojas,

15 Simon-Kerr, 'Unmasking Demeanor' (2020) 88 *Geo. Wash. L. Rev. Arguendo*, 171.

16 On this subject, de Sousa, *Prova Testemunhal, Noções de Psicologia do Testemunho* (2020), 38-48.

17 On this subject, cf. de Sousa, *Prova Testemunhal, Noções de Psicologia do Testemunho* (2020), 140-170 and 343-379.

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all conclusions that are built on the use of subjective impressions will fail to pass the test of rational examination. This is why Taruffo has argued that 'that which cannot be grasped by reason does not exist for the purposes of correct evaluation of evidence'.[18]

It may be concluded from this that the physical presence of the witness before the judge/jury is not, as it turns out, so essential for the purposes of evaluating their oral evidence. The effective parameters for evaluating the witness are not significantly undermined if the witness is examined online or by video link.

B. Is the Trier of Fact's Decision Affected by the mode of the Witness's Presentation to the Court?

McLuhan wrote that "the medium is the message"(*Understanding Media*, 1964), seeking to stress that the technology through which communication is established is not just the form of communication, but actually determines the **content** of the communication. In other words, the medium influences the message we will receive, and the message is understood differently depending on the medium through which it is transmitted, meaning that media acts as extensions of human senses. McLuhan's argument is relevant to our analysis here because, as we shall see, the questioning of a witness (or the making of a statement by a defendant) online is not entirely neutral, from the point of view of the person judging.

Starting with more general research, the approach proposed by **construal level theory** suggests that people feel and experience their surroundings at the present moment. All that which is not present, "*here*" and "*now*", is distal and so constructed intellectually. In other words, when we move away from the direct experience of things, we have less information on then, and so we form more abstract (simpler and more prototypical) representations of psychologically distant realities, whilst persons/entities close to us present themselves in a more concrete and detailed way.[19]

A study conducted in 2012 found that individuals are naturally more inclined to practice deceit when they use a communication medium with low cue diversity (cues = physical presence, inflection of voice, gestures, words, numbers, figures), which influences behaviour by reducing social

18 Rojas, *La Valoración de la Prueba de Interrogatorio* (2015), 326-327.

19 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 7-8.

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evaluation, permitting people to concern themselves less with their self-presentation and self-evaluation. [20] In other words, a person is more likely to lie in an interaction mediated by video than face to face, provided there is an opportunity of obtaining a personal gain.

Several studies of the social impact of media platforms on communication suggest that individuals who communicate from behind a screen tend to talk more rudely, aggressively and discourteously than they would in a face-to-face interaction.[21]

In research conducted outside a judicial setting, it was concluded that people tend to form less positive impressions of colleagues when the relationship is mediated by conference calls than in face-to-face interactions. Transposing this analysis to a judicial setting, the question posed is whether the telepresence of a witness hinders the creation of an emotional/empathic relationship with the participants in a court case. Some believe that the use of technology in this context can create a dehumanising barrier between the telepresent witness and the people in the courtroom, and "there is plentiful evidence that one effect of video is to present the person in a more rigid way to his or her audience."[22] Observers tend to be more indulgent in assessing persons physically present targets more positively, than persons observed by video. [23]

In a judicial setting, a significant number of studies have suggested that individuals who appear before the court by video link run the risk of harsher treatment by judges: an example of this is a study on the use of video conferencing in asylum cases, showing a significant increase in the likelihood of asylum being denied.[24]

Children who testified via CCTV were assessed as less credible than children who testified in person, despite the children who testified by

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20 Xu, Cenfetelli and Aquino, 'The Influence of Media Cue Multiplicity on Deceivers and Those Who Are Deceived' (2012) 106 *Journal of Business Ethics*, 337.

21 Gourdet *et al* "Court Appearances in Criminal Proceedings Through Telepresence", (https://www.rand.org/content/dam/rand/pubs/research_reports/RR3200/RR3222/RAND_RR3222.pdf), accessed on 2021-02-08.

22 Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal*, 429 (447).

23 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 27-28.

24 Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal*, 429 (447).

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CCTV having done so more accurately.[25] The same study concluded that, in general, technology resulted in a more accurate testimony from children, and also that the use of technology does not reduce the judge's ability to assess the accuracy of the child's testimony.

Landström and Granhag conducted research in which they found that children who testified via CCTV were judged more negatively than children who testified in person. Children who testified away from the courtroom were considered less credible, honest, accurate, attractive, intelligent and confident in comparison to those who testified in person, who are judged to be more credible.[26] The reason for this different perception is attributed to the **vividness effect**, whereby testimony that is emotionally interesting, provokes imagery and proximate in time and space, is deemed vivid. This type of testimony is considered more credible, attracts more attention and is better remembered than a non-vivid deposition. In-person testimony is perceived as more vivid than that produced by telepresent witnesses, as a result of spatial proximity.[27] In other words, the live testimony is more immediate and has more emotional impact on the person judging. However, it was also demonstrated that children who testified away from the courtroom displayed less anxiety and are able to provide fuller and more detailed testimony.[28] The more proximate the mode of presentation, the more difficult it was for children to testify. [29] In short, in-person deposition renders the child's testimony more credible, but it also causes the child greater stress.

In concluding her dissertation, Sara Landström stressed that the more proximate the mode of the witness's presentation, the more positively they will be perceived. Witnesses who appear away from the physical courtroom are perceived as telling less convincing stories, as being less

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25 Salyzyn, ‘A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario’ (2012) 50 *Osgoode Hall Law Journal*, 429 (446).

26 Landström, CCTV, *Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), pp. 15 and 30

27 Havener, *Effects of Videoconferencing on Perception in the Courtroom* (2014), 6; Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), pp. 5-6.

28 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 14.

29 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 32.

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honest, confident, natural and communicative.[30] Witnesses who testify in person have a stronger impact on judges than televised witnesses and, the stronger the impact, the more positive the assessment of the witness and the clearer the memory created by their testimony.[31]

Another study concluded that statements by accusers are assessed as more credible when made live than when presented by video, corroborating the vividness effected considered above.[32]

In a study of the spontaneity of **confession**, participants classified the confession as less coercive when the camera was focused mainly on the suspect, more coercive when the camera focused equally on the suspect and the detective, and even more coercive when the camera focused predominantly on the detective. The camera angle influenced the judgement as to how voluntary the confession was, assigning more responsibility to the suspect to the extent to which he appeared more on the screen, creating a **camera perspective bias**. This bias may be a manifestation of illusory causation, which is the tendency that people have to assign causation unduly to a stimulus for the simple reason of it being more salient or perceptible in relation to the others. The best method for mitigating this bias is to give equal on-screen visibility to the detective and the suspect.[33] It was also demonstrated that the use of slow motion makes the viewers of a video more likely to perceive intention on the part of the agent. A jury that views a shooting in slow motion is more likely to consider that the shooter acted with malicious intent to kill.[34]

Another study of bail hearings over a period of 15 years in Cook Country concluded that bail tended to be set higher for telepresent defendants than for those heard in person.[35]

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30 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 36. Also concluding that witnesses appearing in person are assessed more positively and as more honest, cf. Landström et al., 'Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory' (2005) 19 *Appl. Cognit. Psychol*., 913 (928-929).

31 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 39.

32 Landström et al., 'The emotional male victim: Effects of presentation mode on judged credibility' (2015) 56 *Scandinavian Journal of Psychology*, 99.

33 Havener, *Effects of videoconferencing on perception in the courtroom* (2014), 5.

34 Williams, 'The Noisy "Silent Witness": The Misperception and Misuse of Criminal Video Evidence' (2019) 94 *Indiana Law Journal*, 1651 (1672).

35 Dumoulin and Licoppe, 'Videoconferencing, New Public Management, and Organizational Reform in the Judiciary' (2016) 8 *Policy & Internet*, 313 (317) (https://onlinelibrary.wiley.com/doi/abs/10.1002/poi3.124), accessed on 2021-02-09;

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The logistics involved in video conferencing also interferes in the mode of transmission of the message, and several studies have pointed to the following conclusions.

The **camera** must be positioned at an angle of 90º to the vertical plane (i.e., at the same level as the target), since diversion from this neutral camera position can have a biasing effect on the observers: heroes and villains are filmed from a low-angle shot so they look tall and powerful, whilst victims are filmed from a high-angle shot to make them look small and vulnerable.

Camera position can capture only the witness's face (close-up shot), or show him from the waist up (medium shot) or else give a whole body view (long shot). The first of these centres the observer's attentions on the witness's reaction, emotions and facial details. The second stresses body language and facial expressions, whilst the last serves to place the person portrayed in their setting. Researchers have concluded that children observed in medium shots were considered more credible than those filmed in close-up, and also that adults filmed in close-up create a less favourable impression than those filmed in medium shots.[36] Medium shots allow people to understand better and the conversation is more natural.[37] Children filmed in long shots were assessed more positively (more natural and relaxed) than children filmed in close-up, who were perceived as having to make more effort to think.[38]

The **lighting** should be indirect in order to avoid hot spots, and light should fall on the face at an angle of between 45 and 60 degrees, in order to minimise shadows around the eyes and chin.[39] Daylight bulbs should be used rather than incandescent bulbs. Wall finishes, furniture and other accessories in the camera's field of view must be in neutral colours, and discreet blue and grey highlights work better with cameras. One basic principle to be observed is that the monitor image should be close to real size, meaning that a 50 to 60 inch screen is ideal for creating an image of

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Williams, 'The Noisy "Silent Witness": The Misperception and Misuse of Criminal Video Evidence' (2019) 94 *Indiana Law Journal*, 1651 (1658).

36 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 18-19.

37 Vavonese et al., *How Video Changes the Conversation* (2020), 5.

38 Landström, *CCTV, Live and Videotapes, How Presentation Mode Affects the Evaluation of Witnesses* (2008), 34.

39 Center For Legal & Court Technology, *Best practices for using video teleconferencing for hearings and related proceedings*, (2014), 39-40, 56 (https://www.acus.gov/research-projects/best-practices-using-video-teleconferencing-hearings), accessed on 2021-02-09.

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the same size that would correspond to the judge being physically present in the room.[40] There should be two cameras: one focused on the witness and another with a general view of where the witness is, to guard against the risk of the witness being influenced.

In short, factors such as lighting, sound, camera and monitor placement, image quality and connection quality affect the quality of the message and the interactions and the way in which remote interactions can mimic those that take place in person.

For as long as judges/juries continue to believe that the best way to testify is in person, the use of video conferencing will tend to undermine the witness's credibility, and telepresence will not be a neutral characteristic in the production of evidence.

Although existing studies offer plentiful pointers, more research is needed in this area in order to arrive at a better understanding of how the use of technology interferes in the way evidence is evaluated. In any case, judges, juries and arbitrators should be familiarised with the existing research findings and alerted to the potential adverse effects of oral evidence being provided remotely, and so take steps to neutralise these.

C. Online Hearings and the Right to a Fair Trial

It is important not to disregard the risks (referred to above) that can arise from trial hearings using video conferencing or equivalent technology. However, the growing introduction of technology in the justice system is only one of the facets of the deformalisation of justice, in a shift towards an increasingly informal system and greater flexibility in the procedural rules. One aspect of this is that the administration of justice is no longer so centred in the courtroom, and takes place in multiple locations, such as offices, mediation rooms and conciliation offices. Greater value is attached to the **authenticity of procedures**, whilst less weight is accorded to ritual and symbolic references. "Modern justice appears less concerned with the trauma of judicial ritual, albeit controlled by the defence and by being the public eye, than with the social normalisation taking place in the justiciable."[41] Rigid adherence to ritual should today give way to flexible solutions and procedures, triggered and guided by the prevalence and observance of

40 Center For Legal & Court Technology, *Best practices for using video teleconferencing for hearings and related proceedings*, (2014), 51.
41 Garapon, *Bem Julgar, Ensaio Sobre o Ritual Judiciário* (1999), 269.

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the underlying principles of the procedural system: the principle of equality, of adversarial process, procedural establishment of the facts, admissibility of evidence (cf. Art. 630 of the Portuguese Code of Civil Procedure), the right to a fair trial (Art. 20, para. 4, Constitution of the Portuguese Republic and Art. 6, Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR).

Special relevance may here be assigned to the case law of the European Court of Human Rights (ECHR) on the holding of trials using video links. The ECHR has ruled that this form of participation in a trial is not in itself incompatible with the notion of a public and fair trial. However, the use of this measure should, in any case, serve a legitimate purpose and the procedures for the evidence thereby produced must be compatible with the requirements for ensuring a fair trial, as provided for in Article 6 ECHR. In particular, it must be ensured that the respondent/claimant is able to follow the proceedings and to be heard without technical impediments, and has to be provided with effective and confidential communication with his lawyer (ECHR, Application no. 45106/04, 5.10.2006, *Marcello Viola v. Italy*, ECLI:CE:ECHR:2006:1005JUD004510604, paras. 63-67; ECHR, Application no. 21272/03, 2.11.2010, *Sakhnovskiy v. Russia*, ECLI:CE:ECHR:2010:1102JUD002127203, para. 98; ECHR, Applications nos. 43183/06 and 27412/07, 1.3.2016, *Gorbunov and Gorbachev v. Russia*, ECLI:CE:ECHR:2016:0301JUD004318306, para. 37). In *Bivolaru v. Roménia* (no. 2), (Application no. 66580/12, 2.10.2018, ECLI:CE:ECHR:2018:1002JUD006658012), the ECHR again asserted that questioning by video link is a form of participation in proceedings which, in itself, is not incompatible with the principle of fair and public trial. In this case, the respondent refused to be questioned by video link because domestic law did not permit it. The ECHR ruled that, although domestic law did not require a respondent who refused to appear by video link to state grounds for his position, there was no breach of Article 6 because that mode of questioning was offered to the respondent and constitutes an appropriate means of ensuring that he is heard directly and diligently. In *Saïdi v. France*, (Application no. 14647/89, 20.9.1993, ECLI:CE:ECHR:1993:0920JUD001464789), the ECHR ruled that Article 6 was breached because the respondent had no adequate opportunity, neither during the discovery phase nor during the trial, to question the witness (who testified anonymously in a drug trafficking case), it being the case that the right to question a witness is satisfied by the opportunity to formulate questions. In *Vronchenko v. Estonia* (Application no. 59632/09, 18.7.2013, ECLI:CE:ECHR:2013:0718JUD005963209), para. 65, the ECHR ruled that the national authorities acted in the child's best interests, in

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not permitting the child, and presumed victim, to testify in person. Reproduction of the video recording containing the child's statements allowed the court and the respondent to observe the minor's behaviour and to assess, to a certain point, the credibility of the account given. However, considering the importance of the testimony in question, the ECHR ruled that the procedure followed was insufficient to ensure the respondent's right of defence, insofar as the respondent never had the opportunity to put questions to the victim, despite the authorities' wish not to bring in the witness to testify in person, and so, in this case, there was no strong evidence to corroborate the child's statement. The ECHR stressed that there was no need for a direct confrontation between the witness and the respondent in court, but that it should be asked whether questions could be put to the child, through the respondent's defence or even through a psychologist, in an environment controlled by the investigatory authorities and in a way that would not differ, materially, from an examination conducted by those authorities.

The ECHR has explained that the requirements for a fair trial are not necessarily the same in cases concerning civil rights and obligations: “the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.” (ECHR, no. 14448/88, 27.10.1993, *Dombo Beheer B.V. v. The Netherlands*, ECLI:CE:ECHR:1993:1027JUD001444888, para. 32; ECHR, no. 21920/93, 23.10.1996, *Levages Prestations Services v. France*, ECLI:CE:ECHR:1996:1023JUD002192093, para. 46). In *Moreira Ferreira v. Portugal* (Application no. 19867/12, 11.7.2017, ECLI:CE:ECHR:2017:0711JUD001986712), the ECHR declared that “The Court considers that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings. The principles and standards applicable to criminal proceedings must therefore be laid down with particular clarity and precision" (para. 67). In *Dlipak and Karakaya v. Turkey (*Application no. 7942/05, 4.3.2014, ECLI:CE:ECHR:2014:0304JUD000794205), the Court stated that neither the letter nor the spirit of Article 6 prevent a person from expressly or tacitly relinquishing the guarantees of a fair trial, and that any waiver of the right to take part in the trial must be formulated unambiguously and accompanied by safeguards proportional to its importance; waiver counter to an important public interest is not possible (para. 79).

In short, the legitimacy of the proceedings - and of the decision at which it is intended to arrive - derives, in the first place, from observance of underlying principles and not so much from the solemnity of the pro-

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cedure. This solemnity serves to support the underlying principles of the procedure.

This is what Owen Dixon[42] meant when he asked "*Who is the most important person in the courtroom*?", explaining that it is not the judge, but rather the litigant who has lost his case and will have to leave court satisfied with the system in which he lost, satisfied that his case was judged fairly and impartially. As long as the use of technology permits justice to be done with this success, the defining features of the system will be preserved and upheld for the parties and the public.

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An Arbitrator's Perspective: Online hearings in Arbitration: the taking of Evidence

Pilar Perales Viscasillas[*]

Table of Content

A. Introduction 107
B. Soft Law, the new Arbitration Rules and Practices 109
C. Witness and Expert Testimony 116
D. Other Evidence: Signature Recognition and On-site Visual Inspections 127
E. Conclusions 128
Bibliography 129

A. Introduction

It is an indisputable fact that the pandemic situation caused by Covid-19 has led to an unprecedented increase in the use of technologies for all facets of human life and our society[1] and also, as concerns us here, in the world of arbitration, both national and international; undoubtedly

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1 According to United Nations Conference on Trade and Development (UNCTAD), *Digital Economy Report 2021, Cross-border data flows and development: For whom the data flow*, 17: 'Global For Internet bandwidth use rose by 35 per cent in 2020, a substantial increase over the 26 per cent growth of the previous year. Driven largely by the response to the pandemic, this represented the largest one-year increase since 2013'. Available at: https://unctad.org/system/files/official-document/der2021_en.pdf.

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the pandemic has changed the face of arbitration forever[2]. Covid-19 has subjected society as a whole to a stress test, and in an unprecedented altruistic movement, before which the arbitration world has not remained impassive, arbitration operators have taken action both collectively and individually[3]. What can we learn from this? This is a question that Cherie Blair pertinently asked in the 2020 *Roebuck Lecture of the Chartered Institute of Arbitrators* in June 2020, and that she rightly answered with a desideratum by stating that: "the arbitration community can change and adapt quickly, to help protect and enhance the effectiveness and efficiency of the arbitral process. I hope this spirit of co-operation and willingness to change will endure long after lockdown has ended and penetrate other areas of arbitral practice"[4].

From this perspective, the use of remote means of communication has become standard (telephone, videoconference and virtual platforms (video-link[5])) for meetings between the arbitrators (for example, to deliber-

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2 See Benton, 'How Will the Coronavirus Impact International Arbitration?' (2020) *Kluwer Arbitration Blog,* available at http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/; and Walker, 'Virtual Hearings: An Arbitrator's Perspective' (2020), available at https://www.tribunalarbitraldesporto.pt/noticias/virtual-hearings-an-arbitrator-s-perspective.

3 For example, the Stockholm Chamber of Commerce (SCC) made its virtual platform available to users free of charge for both arbitrations under their management and *ad hoc* arbitrations. https://sccinstitute.com/scc-platform/ad-hoc-platform/
In another instance, a group of arbitration institutions and arbitration associations issued a joint statement (16 April 2020) with the aim of showing unity and reassuring arbitration users that proceedings would continue in cases pending. See: https://sccinstitute.com/media/1658123/covid-19-joint-statement.pdf.

4 Blair, 'Getting ahead of the curve: how arbitration can better meet the needs of parties, people and planet' (2020) *Chartered Institute of Arbitrators 2020 Roebuck Lecture*, available at: https://ciarb.org/media/10078/20200611-ciarb-2020-roebuck-lecture-by-cherie-blair-cbe-qc-mciarb.pdf.

5 The term *video-link* is used as a generic term in the Guide to Good Practice on the Use of Video-Link under the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention), footnote no. 2, published in November 2019, defining it as "the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations (…). Other terms commonly used to describe this practice, when used for the purpose of taking evidence, include "videoconferencing", "remote appearance" or "video presence" (id., no. 10).
The recent edition of the International Bar Association (IBA) Rules on The Taking of Evidence in International Commercial Arbitration (2020) has introduced a new definition for remote hearings: "Remote Hearing 'means a hearing conducted, for

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ate) meetings between arbitrators and parties for settlement of procedural issues, as well as for full-blown virtual hearings, even in complex procedures[6]. This has led not only to a change in attitude in the global arbitration community, in which has been plunged into this new dynamic of holding hearings and procedural meetings in virtual format, with almost no time to digest the phenomenon, but also to a new language, facts, practices and usages that have been reflected and accommodated in the area of soft law. Far from knocking out the system, this change, prompted, undoubtedly, by the extreme circumstances that the whole world was suddenly and unexpectedly forced to confront, has clearly demonstrated the adaptability of international commercial arbitration to the needs of the arbitration industry, and its capacity for innovation, reinvention and flexibility.

B. *Soft Law, the new Arbitration Rules and Practices*

Rapid digitisation is one of the phenomena and trends that have undoubtedly marked arbitration during the pandemic, and has gone hand in hand with another of the two trends that will also be a feature of arbitration in the years ahead, soft law, digitalization and sustainability[7], while confirming that arbitration is a global institution by nature.

The globalisation of arbitration is part of its DNA as demonstrated by the international uniformity of rules achieved thanks to the

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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". This rule is accompanied by a provision establishing the general framework for conducting such hearings (Article 8.2).

In this article we will use the terms remote, online or virtual hearings interchangeably.

6 See two examples at: Fung, 'Personal Takeaway from the Warzone: Organizing, Preparing and Attending a Two-Week Virtual Hearing' (2020) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2020/08/02/personal-takeaway-from-the-warzone-organizing-preparing-and-attending-a-two-week-virtual-hearing/; Cesmarc, 'A pandemia na maior arbitragem societária do país, a disputa pela Eldorado' (2020), available at https://exame.com/negocios/a-pandemia-na-maior-arbitragem-societaria-do-pais-a-disputa-pela-eldorado/.

7 Perales Viscasillas, '"El arbitraje internacional durante la pandemia y más allá: *soft law*, audiencias virtuales y sostenibilidad"' in Menéndez Arias (ed), *Anuario de Arbitraje (2022)* (forthcoming).

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1985 UNCITRAL Model Law on International Commercial Arbitration, amended in 2006 (MAL) and the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (NYC) and the full recognition of transnational principles in arbitration, such as the international and uniform interpretation of the *lex arbitri* rules, the separation between the legal seat and the place where the hearings are held and the standard transnational practice of the legal profession in international arbitrations where a party is not necessarily represented by lawyers from their own country, who do not have to practice at the seat of arbitration. From this perspective, there should be no legal problems concerning the place of arbitration even if proceedings are conducted entirely online[8].

The frequent use of virtual hearings during the pandemic has created a need to adapt the usage and practices of face-to-face arbitration to virtual arbitration, so as to establish a framework for these hearings (Protocols on remote or virtual hearings, *Cybernetic Protocol*[9]); the emergence of new practices (the 'test run' or technical tests carried out prior to virtual hearings); the need to create new rules that better accommodate the virtual scenario (guides, notes and recommendations issued by arbitration institutions, including innovation through the creation of a sort of *Redfern Schedule* in the virtual scenario, the "Covid-19 Schedule"[10]; creating model clauses[11], or models of procedural orders for the virtual environment[12]);

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8 However, the Note by the UNCITRAL Secretariat: *Legal Issues Related to the Digital Economy: Dispute Resolution in the Digital Economy.* A/CN.9/1064/Add.4, May 5, 2021, no. 55, seems to suggest that it would be necessary to develop *ad hoc* rules for determining the place of arbitration when the procedure is conducted entirely online.

9 This is the term used in Asociación Latinoamericana de Arbitraje (Latin American Arbitration Association; ALARB), Observatorio Permanente sobre el estado del arbitraje en América Latina. Protocolo para la celebración de audiencias arbitrales en forma remota o virtual, 10 May 2021.

10 By way of example, Annex III on technical requirements to be agreed by the parties in ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, 9 April, 2020.

11 Model clauses to enable virtual hearings (Both in: Scherer, 'Remote Hearings in, International Arbitration: An Analytical Framework' (2020), 37-4 Journal of International Arbitration, 1 (online version).
And a model clause by which the parties undertake not to contest the validity of the award, in ALARB, Observatorio Permanente sobre el estado del arbitraje en América Latina. Protocolo para la celebración de audiencias arbitrales en forma remota o virtual, 10 May 2021, Annex 2.

12 International Institute for Conflict Prevention and Resolution (CPR), *Annotated Model Procedural Order for Remote Video Arbitration Proceedings*, 26 August 2021.

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new *guests* in hearings ("Tech Secretary"), proceedings ("Remote Technology Specialist"[13]) or in arbitration in general (technology companies that offer products and services adapted to the new needs of electronic arbitration)[14]; the need for lawyers and arbitrators capable of dealing with new technologies[15]; the introduction of a new language (virtual or online etiquette, for example); the need to innovate and be imaginative both in the use of tools that facilitate the taking of evidence (use of drones for visual inspections), and in persuading the court (how to present the case and examine witnesses in the virtual environment); and even the emergence of new pathologies associated with the use (and abuse) of the new platforms (physical and mental fatigue, leading even to the identification of

A list of model procedural orders for virtual hearings can be viewed at: https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/
In practice: *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23), Procedural Order No. 7 (27 September 2020).
Both for the hearing and for the previous conference on the matter: Bassiri, 'Chapter 5. Conducting Remote Hearings: Issues of Planning, Preparation and Sample, Procedural Orders' in Scherer et al (eds), *International Arbitration and the COVID-19 Revolution* (2021), 105 (108).

13 Member of the Secretariat made available to arbitration proceedings by Singapore International Arbitration Centre (SIAC), basically a technology assistant working via a chat function. See: Shaughnessy, 'Chapter 2. Initiating and Administering Arbitration Remotely', in Scherer et al (eds), *International Arbitration and the COVID-19 Revolution* (2021), 27 (32), with a detailed analysis of how arbitration institutions had to adapt to the pandemic for the remote administration of arbitrations.
Refers to the presence of the technician: Netherlands Arbitration Institute (NAI)/ Dutch Arbitration Association (DAA), *The Hague Video Conferencing and Virtual Hearing Guidelines*, section 1 e), November 2020.

14 https://virtualarbitration.info/directory/technical-providers.htm.

15 Without of course going as far as requiring formal cybersecurity qualifications, as noted, among other attributes of the "Tech-Savvy Arbitrator" by: Zimmerman, 'International Arbitration 2.0. Strategies for Tech-Savvy Proceedings' in González Bueno (ed.), *40 Under 40 International Arbitration* (2021), 185 (196).
More realistically: Rogers and Brodlija, 'Chapter 3. Arbitrator Appointments in the Age of COVID-19', in Scherer et al (ed), *International Arbitration and the COVID-19 Revolution* (2021), 49 (57-58), indicating how digitisation can lead to greater diversity in the appointment of arbitrators because geographical distance would no longer be a barrier both in relation to the nationality/location of those arbitrators and regarding their age. In this regard also: Gojkovic and McIlwrath, 'International Arbitration and the COVID-19 Revolution', in Scherer et al (eds), *International Arbitration and the COVID-19 Revolution* (2021), 191 (198-199).

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a new disorder: *Zoom fatigue*[16], also called ‘screen fatigue’[17] or ‘streaming fatigue’[18]), potentially causing the proprietary name to enter common usage[19]. And all this without forgetting the legal questions raised during the pandemic about the legal validity and the violation of due process if virtual hearings are adopted[20].

The arbitration institutions were the first to react to this new scenario, aware of the importance of providing their users with procedural adaptations in line with the requirements of arbitration (speed and security), given the health restrictions that affected practically the whole world (total lockdown, restricted mobility and social distancing), including the main international arbitration venues.

Arbitration operators and in particular arbitration institutions were catalysts for this process of adaptation, even before the Covid, especially in matters related to the security of new technologies[21], and have strongly

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16 *Zoom fatigue* has already been the subject of studies, see: https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions. Obviously the same happens with any other platform: Webex or Teams, for example. In any case, it is also subjective. In an optimistic tone: Nappert and Apostol, ‘Healthy Virtual Hearings’ (2020) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2020/07/17/healthy-virtual-hearings/.
It has even been proposed that, in order to mitigate the consequences of this new pathology, opening statements could be pre-recorded on video: Scherer, ‘Asynchronous Hearings: The Next New Normal?’ (2020) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2020/09/09/asynchronous-hearings-the-next-new-normal/.

17 White & Case and The School of International Arbitration of Queen Mary University, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 2021, 3.

18 Miles, ‘Chapter 6. Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges’ in Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (2021), 130.

19 Kim, ‘Audiovisual Evidence in International Arbitration: Would 'seeing is believing' still work?’ in González Bueno (ed.) *40 Under 40 International Arbitration*, (2021), 211.

20 See Perales Viscasillas, ‘Audiencias virtuales y debido proceso’ (2021) 42 *Spain Arbitration Review*, 9.

21 International Chamber of Commerce (ICC) Commission, *Report on Information Technology in International Arbitration*, 2017; IBA, *Cybersecurity Guidelines, by the IBA's Presidential Task Force on Cyber Security*, October 2018; and International Council for Commercial Arbitration (ICCA), New York City Bar Association and International Institute for Conflict Prevention and Resolution, ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration, 2020.
Arbitration is clearly not safe from malicious and unwanted intrusions such as that which occurred in 2015 at the Permanent Court of Arbitration (PCA), dur-

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supported the virtual option[22], sending from the outset a message of solidarity and reassurance to users, promoting the creation and adaptation of procedural rules to the virtual world either by modifying arbitration regulations, such as in the case of the ICC[23], the LCIA[24], or the ICDR[25], to name a few. This trend has continued, with the recent modification of the

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ing the third day of the arbitration hearing between the Philippines and China. See: Pastore, 'Practical Approaches to Cybersecurity in Arbitration' (2017) 40-3 *Fordham International Law Journal*, 1023; and Rebeca Mosquera, 'Cybersecurity in times of virtual hearings' in González Bueno (ed), *40 Under 40 International Arbitration* (2021), 201, with references to other similar situations. Also of interest is the recent inclusion in article 2 of the IBA Rules on Evidence (2020) in relation to inquiries about: (*e) the treatment of any issues of cybersecurity and data protection.*

22 Arbitration Institute of the Stockholm Chamber of Commerce (SCC), *Guidelines for Arbitrators*, June 2020, p.6, in which, for the sake of efficiency and speed, arbitration tribunals are encouraged to use resources such as videoconferencing.

23 ICC, *Arbitration Rules*, 2021, Art. 26 para. 1, which has clarified issues concerning the possible holding of virtual hearings. See also, earlier: ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, April 2020, para. 8, which suggested that arbitrators use "either audioconference or videoconference for conferences and hearings where possible and appropriate", and also nos. 22-23, interpreting pre-existing arbitration rules to mean that the arbitral tribunal may order a virtual hearing despite opposition from one of the parties.

24 London Court of International Arbitration (LCIA), *Arbitration Rules*, 2020, prior to Covid-19, Arts. 26 and 29.

25 International Centre for Dispute Resolution (ICDR), *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)*, 1 March 2021, expressly providing that issues related to technology are addressed in Article 22 para. 2 relative to the first procedural order: 'in establishing procedures for the case, the court and the parties may consider how technology, including video, audio, or other electronic means, could be used to increase the efficiency and economy of the proceedings' and, in particular, allowing virtual hearings in Art. 26 para. 2: 'A hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process. The tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence'. These provisions are complemented by the use of electronic signatures for the award and procedural orders (Art. 32), and cybersecurity issues (Art. 22 para. 3).

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Swiss Arbitration Rules[26], VIAC Rules[27], clarifying that the provisions of its regulations allow virtual hearings despite their silence on the matter[28], and the new UNCITRAL Expedited Arbitration Rules (2021, Art. 3.3).

Arbitral institutions have been also very active in creating guidelines, notes, guides, protocols and models designed to help parties, lawyers and arbitral tribunals and to facilitate the holding of virtual hearings; soft law precipitated by the Covid-19 crisis, but which is clearly here to stay, without prejudice to any subsequent revision or modifications in the light of the experience currently being acquired during the pandemic situation. Some of the most significant of these soft law instruments are (in chronological order, and without seeking to be exhaustive):[29]

- Delos Hearings in times of Covid-19. Delos checklist on holding arbitration and mediation hearings in times of COVID-19, first version dated 8 March 2020 and second version dated 20 March 2020; broader in scope due to inclusion of detailed guidelines for face-to-face hearings during Covid.

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26 In force since 1 June 2021, Art. 27 para. 2: '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'. The possibility of witnesses testifying by videoconference is also maintained (Article 27 para. 5).

27 Vienna International Arbitral Centre (VIAC), *Arbitration Rules* (1 July 2021), Art. 30.
See also: Asian International Arbitration Center (AIAC), *Arbitration Rules*, 1 August 2021, which introduce virtual hearings, i.e. the use of technology to remotely participate in the arbitration procedure (Art. 2 para. 4). Provision is also made for using remote means for holding meetings, conferences and deliberations remotely (Art. 14 para. 3), for procedures before the emergency arbitrator (Art. 18 para. 4) and for the examination of witnesses (Art. 28 para. 7).

28 VIAC, *The Vienna Protocol. A Practical Checklist for Remote Hearings*, June 2020, 2: "The Vienna Rules are currently silent on the permissibility of conducting hearings remotely rather than in person. Article 30 (1) of the Vienna Rules only requires an "oral hearing", if a party so requests, but not a hearing "in person": a remote hearing that allows parties to orally present their case satisfies this provision in principle". In view of the broad powers of arbitral tribunals under the Rules, it is emphasised that the decision can be adopted by the arbitrators, and for this purpose a list of issues to be considered is indicated, as well as technical issues and the platforms that could be used (id., at 3-4).

29 For further details: Santabaya and Fernández, 'The holding of virtual hearings in arbitration: main action protocols issued by national and international institutions' (2021) 8 *La Ley Arbitraje y Mediación*, 1-19; Perales Viscasillas, 'El arbitraje internacional durante la pandemia y más allá: *soft law*, audiencias virtuales y sostenibilidad' in Menéndez Arias (ed), *Anuario de Arbitraje* (2022) (forthcoming).

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– Seoul Protocol on video conference in international arbitration, 18 March 2020.

– Chartered Institute of Arbitrators (CIArb) Guidance Note on Remote Dispute Resolution Proceedings, 8 April 2020, which expressly also indicates that this can be used for other ADRs (Alternative Dispute Resolution), such as mediation, negotiation, etc.

– ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, April 2020, possibly published on April 9, especially Annex I containing the Protocol of issues to consider for a virtual hearing.

– Corte de Arbitraje de Madrid (Court of Arbitration of Madrid; CAM), *Nota sobre organización de audiencias virtuales* (Note on organisation of virtual hearings), 21 April 2020.

– Protocol on Virtual Hearings, Africa Arbitration Academy, April 2020,

– Hong Kong International Arbitration Centre (HKIAC) Guidelines on Virtual Hearings, May 2020.

– VIAC, The Vienna Protocol. A Practical Checklist for Remote Hearings, June 2020.

– SIAC, Guides, Taking your Arbitration Remote, 31 August 2020.

– CIAM, *Nota sobre organización de audiencias virtuales* (Note on organisation of virtual hearings), October 2020, which in Annex I also offers a model Virtual Hearing Protocol.

– NAI/DAA, The Hague Video Conferencing and Virtual Hearing Guidelines (November 2020).

– Protocol for Online Case Management in International Arbitration, November 2020, by the Working Group on LegalTech Adoption in International Arbitration (Group formed by the law firms: Ashurst, CMS, DLA Piper, Herbert Smith Freehills, Latham & Watkins, and Hogan Lovells).

– IBA Rules on the Taking of Evidence in International Commercial Arbitration, 17 December 2020 (definition of remote hearings and new article 8.2), halfway between the provisions of a regulation and a protocol.

– ALARB, Observatorio Permanente sobre el estado del arbitraje en América Latina. Protocolo para la celebración de audiencias arbitrales en forma remota o virtual (Permanent Observatory on the state of arbitration in Latin America. Protocol for holding arbitration hearings remotely or virtually), 10 May 2021.

– Protocol for Remote Hearings (June 2021) of the Abu Dhabi Global Market Arbitration Center.

It will not be surprising that, precisely in the pandemic situation in which the 2021 International Arbitration Survey was conducted, it asked

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what adaptations would make other institutions or arbitration rules more attractive to users, and 38% of respondents chose administrative/logistical support for virtual hearings. As the Report pointed out in this regard, the need for adaptation in response to changing circumstances is further underlined by the fact that the regulations were also required to include a 'provision for arbitrators to order virtual and face-to-face hearings' (23%), along with 'the establishment of secure electronic platforms for the presentation and exchange of documents'[30].

It is therefore evident that what was an exceptional situation in pre-Covid times, although gradually becoming more common, albeit held back by a lack of experience and adequate guidelines, has become the norm since the outbreak of the pandemic[31]. It is true that, in the pre-Covid era, arbitration institutions had already focused on the use of new technologies as a way to promote swifter and more efficient arbitrations and to reduce the costs of the process, and that now the use of electronic means to initiate an arbitration, present briefs and handle communications between the participants and others, has become absolutely normal[32].

C. *Witness and Expert Testimony*

In the face-to-face world, which was the rule in the pre-Covid era, hearings were undoubtedly of fundamental importance as the key moment at which to listen to the *actors* directly involved in the facts of the case, or to question the authors of expert reports. So much so that hearings are generally restricted to obtaining this evidence directly, without the need for the parties to present initial arguments or conclusions[33], although this can ob-

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30 White & Case and The School of International Arbitration of Queen Mary University, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 2021, 11.

31 Martín, 'The use of Technology in International Arbitration', in González Bueno (ed), *40 Under 40 International Arbitration* (2021), 337 (339).

32 For all: Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37-4 *Journal of International Arbitration* 1-2. Also in: Queen Mary University of London, School of Law Legal Studies Research Paper No. 333/2020.

33 Note the wording of some of the laws based on Art. 24 para. 1 MAL referring to 'hearings for the presentation of evidence or for oral arguments' (using the conjunction 'or'); Art. 30 para. 1 Spanish Arbitration Act: 'the arbitrators will decide whether to hold hearings for the presentation of allegations, the taking of evidence and the issuance of conclusions', which uses the conjunction 'and'. And

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viously take place. Without going into issues related to the violation of due process that will be dealt with in other chapters of this book[34], it is necessary to point out that whilst the right of either of the parties to the holding of a hearing can be considered fundamental in arbitration (Art. 24 para. 1 MAL)[35], hearings can be held remotely and so there is no absolute right to have a physical hearing[36]. Remote hearings pose certain challenges, when compared to the traditional face-to-face format, but, in my opinion, these are not generally insurmountable[37]. It can even be said that experience of virtual hearings should lead us to higher standards of efficiency, accountability and self-discipline, and to redefine the focus of hearings irrespective

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Art. 34 para. 1 Portuguese Arbitration Law that only refers to the possible holding of evidential hearings, which has led to the understanding in accordance with its literal wording that this provision is restricted only to evidential hearings (Hoyos and Botelho, 'Portugal' (2021), *The ICCA Reports: Does a Right to a Physical Hearing Exist in International Arbitration?*, 1 (5).

34 See also Perales Viscasillas, 'Audiencias virtuales y debido proceso' (2021) 42 *Spain Arbitration Review*, 9-30.

35 This is illustrated by Singapore Court of Appeal, Case 30/ 2020, 20.1.2021, *CBS v CBP*, where an arbitration award was annulled as the arbitrator's decision to reject the oral evidence of witnesses proposed by one of the parties without presenting prior written statements from the witnesses was considered a violation of the right to be heard (Art. 18 MAL), the hearing being held later by telephone. One comment: Hardy and Yeap, 'How Sacred is the Right to be Heard in Arbitration?' (2021) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2021/06/14/how-sacred-is-the-right-to-be-heard-in-arbitration/.
In the case in hand, the provision under discussion under the applicable rules (Singapore Chamber of Maritime Arbitration (SCMA) Rules), was Art. 28 para. 1, stating that: *Unless the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.* The interpretation made was (para. 35): "When read holistically, r 28.1 did not mean that oral submissions were an alternative to the presentation of witness evidence. Rather, where parties have not agreed to a documents-only arbitration, they must be allowed to call witnesses to give evidence, if they wish to do so".

36 See Perales Viscasillas, 'Audiencias virtuales y debido proceso' (2021) 42 *Spain Arbitration Review*, 15. Of interest: *The ICCA Reports: Does a Right to a Physical Hearing Exist in International Arbitration?* (2021), for the situation in more than 80 jurisdictions.

37 Federal Court of Australia, 15.4.2020, *Capic v Ford Motor Company of Australia Limited* (Adjournment) 486, where the judge decided not to suspend the trial scheduled for 15 June 15 2020 and took into due consideration the following elements to decide on the virtual holding of the hearing despite the refusal of one of the parties: technological limitations; physical separation of legal teams; expert witnesses; lay witnesses, and in particular cross-examination; document management; future issues; and trial length and expense.

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of the environment. Witnesses can be better prepared, lawyers can be more selective about the documents and witnesses they present, and the examination and cross-examination of witnesses can take less time, by asking brief and simple questions that are more concise and coherent[38]. Actors can be given practical tips, such as to avoid reading from a script, especially if there are opening statements, or to speak more slowly.

The starting point is that, in essence, examining experts or witnesses remotely is no different from doing this face-to-face, however much the detractors seek to highlight the potential negative aspects. The drawbacks commonly cited relate to technical issues, the relatively impaired perception of witness or expert testimony and the loss of human interaction[39]. It is argued that the *quality* of the witness evidence is negligible in remote hearings; quality here refers not only to possible technical issues but also to the lack of physical proximity, meaning that the arbitral tribunal is not in a position to appreciate the reactions or the body language of the witness or expert, and it is contended that this may undermine the arbitration. Another argument is that the deliberations of the arbitral tribunal can be affected in a virtual scenario. Possible interference by third parties is also added to the list, either because the technical security of the virtual environment can be violated or because experts or witnesses can more easily be influenced in this format. All this may impair rights of the parties and the principle of equality, all the more so because some witnesses may testify remotely and others in person[40].

38 Miles, 'Chapter 6. Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges', in Sherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (2021), 121 (124-127).

39 Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Virtual Hearing Survey*, October 2020, 8-9. Born, Day and Virjee, 'Chapter 7. Empirical Study of Experiences with Remote Hearings: A Survey of User´s Views', in Scherer et al (ed), *International Arbitration and the COVID-19 Revolution* (2021), 137 (146), state that these negative perceptions have to be weighed against two pieces of information: that the questions of the arbitral tribunal are more numerous in the virtual environment and that virtual hearings do not present disadvantages compared to face-to-face techniques in relation to calibrating the evidence presented by witnesses and experts, techniques of oratory during the arguments or the arbitrators' understanding of case. They also point out (pp. 140-141) that: 'fully remote hearings were eleven times more common after 15 March 2020 than they had been at any time previously'.

40 In a clearly alarmist tone: Fietta, 'Client Alert: The impact of COVID-19 on arbitration proceedings and due process'", 9 April 2020, available at: https://www.volterrafietta.com/volterra-fietta-client-alert-the-impact-of-covid-19-on-arbitration-proceedings-and-due-process/

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Detractors point to several shortcomings in remote depositions that could undermine the right of defence[41], such as incorrect interpretation of the expressions and reactions of witnesses and experts due to the close focus on the face, or the silences that can occur in the virtual environment. Mention is also made of possible inconveniences resulting from audio/video failures/image freezing/delays, which can cause distortions during the deposition and especially when this causes the connection to be lost during the examination, which can generate a loss of procedural momentum and allow witnesses to reassess their answers in the extra time, or lastly when testimony is unbalanced because some witnesses appear in person and others by videoconference.

Clearly, in a virtual hearing, the image projected differs from that when proceedings are conducted in person[42], but this is not fatal[43], besides which the fact that the quality of the direct facial image of the witness or expert (incidentally, in the case of the arbitrators, this is also what makes them more focused on the course of the hearing) means that their features or reactions can be more closely scrutinised, while current technology can

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41 See Perales Viscasillas, 'Audiencias virtuales y debido proceso' (2021) 42 *Spain Arbitration Review*, 14.

42 In the 2021 International Arbitration Survey Report, p.25, users pointed precisely to this type of concern.

43 See Federal Court of Australia, 15.4.2020, *Capic v Ford Motor Company of Australia Limited* (Adjournment) 486, in relation to a case where 50 witnesses were to testify: para. 14: 'the Respondent raised issues specific to the expert witnesses briefed in this matter. Counsel must understand this evidence in the lead up to the trial and there is no doubt in my mind that by far and away the best way to do that is by means of conferring with the witness in person. Sometimes this process can take days. I accept that doing this on a virtual platform will be slower, more tedious for all concerned and therefore more expensive. I do not, however, accept that it will result in a process which is unfair or unjust'. And para. 16: 'there are a number of issues said to be relevant to lay witnesses. In the case of witnesses who are remotely located in their homes (which I am assuming will be all of them) there are practical problems. For example, it will not be possible to see whether there is somebody in the (upstairs bed) room coaching the witness or suggesting answers out of earshot. My impression of that problem is that in this case it will not be acute. To begin with this is a class action about allegedly defective gear boxes, not a fraud trial. In addition, although some of the class members may have a motive to exaggerate how defective their vehicles are I doubt that in that process anyone will be able to help very much. Then there is the problem that the putative coacher will need to brave the health regulations and situate themselves in the same room off camera. Although there may be cases where a person desires to assist another person giving evidence so much that they are willing to risk life and limb to do so, I doubt that this is one of those cases'.

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also provide an image of the entire room (360º view)[44] from which the witness speaks, ensuring that no external interference or pressure is applied. This is one of the issues that seems to concern lawyers the most, i.e., that the witness or expert may be subject to external influence whilst testifying, since the online format can facilitate the covert use of communication devices during the hearing: phone messages, WhatsApp, emails, etc.[45].

In addition to the 360º vision, more expensive but technologically advanced methods can be used such as software applications that block web pages or that prevent consultation of documents while the hearing is in progress. Provision could be made for the a third party to be present during the testimony of the witness or experts[46], or even the presence of a neutral third party (arbitration court personnel or a notary) or of a member of the opposing party's legal team[47]. More rudimentary and less expensive methods can also be used such as asking the witness to show the room where he is with his camera or having two cameras: one that focuses directly on the witness in a short shot and another that offers an overview of the room[48]. Likewise, some of the protocols recommend that

the witness or expert: (i) appear from a room specifically arranged for the occasion, only with the technological devices and the documentation and materials authorized to participate in the Hearing; (ii) reasonably certify that, regardless of the exchanges that his statement requires with the

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44 HKISC, *Guidelines on Virtual Hearings*, May 2020, para. 11; CIAM, *Nota sobre organización de audiencias virtuales*, paras. 13-17; CAM, Nota sobre organización de audiencias virtuales, April 21, 2020, paras. 32-34; ICC, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, April 9, 2020, Annex I, Letter E, section iii; NAI/DAA, The Hague Video Conferencing and Virtual Hearing Guidelines, November 2020, section 2 h).

45 In *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, 9 April 2020, Annex I Letter E, section iii), the ICC recommends that the Protocol address 'the permission/prohibition of synchronous or asynchronous communications between witnesses and parties/counsel in chat rooms or through concealed channels of communications, interaction between the examiner and the witness/expert in an online environment' and 'whether the witness/expert will be sitting at their location together with anyone else and if he/she will be assisted by someone while giving his/her testimony'. It also refers to the possible 'sequestration'" of witnesses as an issue to be addressed in the protocol.

46 HKIAC *Guidelines on Virtual Hearings*, May 2020, para. 11; and CIAM, *Nota sobre organización de audiencias virtuales*, para. 14.

47 CIAM, *Nota sobre organización de audiencias virtuales*, para. 14.

48 CIAM, *Nota sobre organización de audiencias virtuales*, para. 14.

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Participants who ask him questions, he does not communicate with other people during the testimony, without authorization from the court[49].

While these issues are a legitimate concern to counsel, and are those that involve the greatest risks during virtual hearings[50], we have seen that security measures such as those indicated above can be implemented and that, in practice, interference with the witness or expert during the hearing, whilst possible, is very difficult. In the first place, because this would amount to bad faith[51] and good faith is presumed to be the normal behavior of all parties concerned; secondly, because of the serious consequences that this might entail for the outcome of the case once the infringement is detected. Lastly, and following on from this, the other participants may detect that the witness or expert is acting suspiciously, just as in physical hearings they can notice when a witness glances at lawyers to seek approval through eye contact.

A recent example may serve to illustrate this point. The Ontario Superior Court of Justice decision in *Kaushal v. Vasudeva et al.* (2021 ONSC 440) shows that inappropriate behaviour during a virtual examination can be sanctioned to the point of determining the exclusion of the witness's testimony from the procedure. This decision, although in the judicial sphere, describes a situation that might equally occur in the course of an arbitration procedure. In the case in question[52], the defendant, Mr. Vasudeva, was questioned on Zoom, having sworn an affidavit prior to questioning.

Mr. Vasudeva, his attorney and an interpreter were all in the same meeting room at the attorney's office. Each of Mr. Kaushal's lawyers, the claimant himself and the court reporter were at separate locations. At the beginning of the cross-examination, Mr. Kaushal's attorney asked and Mr. Vasudeva's attorney confirmed in the record that the only parties present in the room were Mr. Vasudeva, his attorney, and the interpreter.

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49 CIAM, *Nota sobre organización de audiencias virtuales*, para. 15.

50 Miles, 'Chapter 6. Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges', in Sherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (2021), 121 (127-128).
For the purposes of online examination of witnesses or experts, it is our view that identification will rarely be the subject of discussion.

51 As a standard of conduct, see Guideline 21 of the IBA *Rules on Party Representation in International Arbitration* (2013): 'A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances'.

52 For what follows see: Selby, Hellrung and Mills, 'Canada: Crossing The Line: Misconduct During Virtual Examinations' (Cassels, 2021).

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However, the Zoom link remained active after the examination was completed and Mr. Kaushal heard the voices of Mr. Vasudeva's wife and son, apparently discussing what had occurred during the cross-examination. Mr. Kaushal recorded the discussion on his cell phone and shared what he had heard with his attorney. Mr. Kaushal's attorney rejoined the Zoom meeting to claim that Mr. Vasudeva's wife and son appeared to have been present during Mr. Vasudeva's questioning, which Mr. Vasudeva's attorney denied. The interpreter stated that Mr. Vasudeva's wife and son were in the room during the examination. This was contradicted by Mr. Vasudeva who swore that his wife and son remained in the reception area of the law firm. In an attempt to undermine the interpreter's evidence, Mr. Vasudeva also swore that his lawyer had informed him that Mr. Kaushal's lawyer had threatened the interpreter if he did not testify that Mr. Vasudeva's wife and son were present during the testimony.

Ultimately, the Court granted a motion to annul Mr. Vasudeva's affidavit, on the grounds that his conduct amounted to an abuse of judicial process. The Court preferred independent evidence from the court interpreter and held that the suggestion that Mr. Kaushal's lawyer had threatened the interpreter was unfounded.

Leaving aside potential abuses and returning to the decision on the type of hearing, the fact that interaction between arbitration participants may be different in the virtual world has no impact on due process, insofar that, in our opinion, the credibility of the witness is not affected by the online setting. Indeed, one might speak of different nuances or degrees of perception, which might also vary depending on how the use of new technologies is perceived by their users. As already mentioned, new technologies make for improved scrutiny of facial features in comparison with face-to-face hearings, although the wider picture may be lost[53]. If remote

53 Federal Court of Australia, 15.4.2020, *Capic v Ford Motor Company of Australia Limited* (Adjournment) 486, para. 19: 'The Respondent then submitted that the cross-examination of witnesses over video-link is unacceptable. I accept the Respondent's submission that there are many authorities in this Court which underscore the unsatisfactory nature of cross-examination by video-link: see, eg, *Hanson-Young v Leyonhjelm (No 3)* [2019] FCA 645 at [2]; *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* [2009] FCA 1306; 181 FCR 152 at 171 [78]. However, those statements were not made in the present climate, nor were they made with the benefit of seeing cross-examination on platforms such as Microsoft Teams, Zoom or Webex. My impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court. What is different—and significant—is that the video-link technology tends to

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hearings mean fewer questions can be asked by arbitrators, we believe it will be up to the arbitrators not to be pressured by technology.

Other possible drawbacks, such as that the hearing could be slowed down if the technique of displaying documents on the screen is abused, are by no means insurmountable[54]. It is just a question of planning and organizing in advance, and for that great help is offered by the numerous Protocols for online hearings.

It is possible that virtual hearings require more preparation by lawyers when preparing the interrogation or cross-examination, and the documents to be presented, particularly if they go beyond the written text and deal with other elements such as diagrams, plans or photographs, since in this case their exhibition should be properly planned and assured[55]. Here, the online medium itself points to opportunities for innovation through more visual forms of presentation, such as *PowerPoint* slides or the use of virtual or augmented reality[56]. The virtual world has considerable potential

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reduce the chemistry which may develop between counsel and the witness. This is allied with the general sense that there has been a reduction in formality in the proceedings. This is certainly so and is undesirable. To those problems may be added the difficulties that can arise when dealing with objections'.

54 In more detail: Scherer, "Remote Hearings" (2020) 8-9.
See also: Federal Court of Australia, 15.4.2020, *Capic v Ford Motor Company of Australia Limited* (Adjournment) 486, para. 20: 'the Respondent also submitted that this case will involve a large number of documents and that document management in a virtual courtroom will make that much more difficult. I do not accept this submission. Whilst I cannot speak for other Judges, I have been operating using a digital court book for some time now and the use of a virtual courtroom has had no impact on that aspect of the hearing. The problem of witness and cross-examination bundles is readily soluble with a service such as Dropbox. I have conducted a trial this way already. It is not ideal, but I do not think this result in an unfair or unjust trial. Further, the use of a third party operator may carry with it enhanced document management procedures'.

55 A good guide is found in Africa Arbitration Academy, *Protocol on Virtual Hearings*, Principle 3.3 (Documents), April 2020. See also: ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, April 2020, para. 28 et seq.

56 Although not only in the virtual environment, virtual and augmented reality is a tool that possibly has the potential to be applied in virtual hearingsvirtual and augmented reality. See: Olmos, 'Uso de realidad virtual y realidad aumentada en el arbitraje internacional' (2020) 7 *Latin American Journal of Trade Policy*, 39: "New technologies have also brought about significant methodological changes in how to present a case persuasively to an abitral tribunal. One of the best examples is the use of virtual reality and augmented reality in arbitration, because it not only makes it possible to bring the arbitrator closer to events he did not witness

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for gaining the attention of the Arbitral Tribunal[57]. For instance, multiple screens[58] can facilitate the work of the arbitrators, as can the screen sharing function that allows experts, for example, to present complex ideas from their area of expertise in visual form, in a way that greatly facilitates these presentations when compared to face-to-face hearings. It should also be noted that virtual hearings present lawyers with the challenge of preparing more direct and concise questions in order not to overload the hearing, which much improves the efficiency of the procedure, lawyers seek to be persuasive and select those questions that are really important to the case[59].

The Protocols address issues such as time differences and measures to avoid the possible manipulation of the witnesses. It is precisely in relation to these two issues that the Austrian Supreme Court (OGH) rendered an important judgement on 23 July 2020.

Starting with the time differences, the claimants for annulment of the arbitration award issued under the VIAC Arbitration Rules argued that the court's decision to begin the virtual hearing at 3:00 pm Vienna (Claimants' time zone) and 6:00 am Los Angeles time (the time zone of the claimant´s attorneys and witnesses) amounted to unequal treatment of the parties. The OGH found that the time difference between Vienna and Los Angeles meant that the hearing could not take place during usual business hours for all of the hearing participants. The OGH held that because Vienna was the seat of the arbitration, the parties accepted, in principle, the disadvantages resulting from the geographical distance from their place of business

occurring, but also because it allows the presenter to explain how the alleged facts unfolded".

57 See: Ashton, Langley and Davidson, 'Creating Compelling Expert Testimony in International Arbitration Using Visual Aids' (2019) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2019/11/23/creating-compelling-expert-testimony-in-international-arbitration-using-visual-aids/: 'In today's busy and increasingly digitized world, pictures are the new words', commenting on the pros and cons of experts using these new techniques when being questioned.

58 For example, ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, April 9, 2020, refers in annex I, Letter E, section ii) refers to the issues that must be addressed in advance in relation to the presentation of evidence and the examination of witnesses and experts, in particular: (ii) Identify whether lawyers will use multiple screens for online pleadings, presentation of evidence and agree on the modalities to present and display exhibits of evidence in a virtual environment.

59 See: In arbitration in general, but with references also to virtual hearings: Vargas, *Comunicación persuasiva para el litigio arbitral* (2020), 1.

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and work, including the substantial time differences[60]. Furthermore, the court noted that these disadvantages were not compounded by a remote hearing. On the contrary, the court considered that starting a hearing at 6:00 am local time was less onerous than having to travel from Los Angeles to Vienna for an in-person hearing, and therefore rejected that the award could be annulled[61].

Similarly, the Austrian Supreme Court rejected the consideration that holding a remote hearing amounted to a violation of the court's duty to treat the parties fairly and equitably because the court took no steps to prevent witness tampering. Specifically, the Defendants alleged that neither the court nor the parties could determine what documents the witnesses would have access to; if there were other people present in the witness's room; and whether witnesses might have received chat messages while being questioned. The Supreme Court held that blanket allegations about the possible misuse of videoconferencing technology to question witnesses could not by themselves make them inappropriate. As a preliminary matter, OGH determined that the risk of witness tampering also existed in face-to-face hearings (for example, by influencing the testimony of a witness prior to the hearing or by providing the witness with information on other alleged evidence during the course of the procedure). The court then added that remote hearings allow for measures to control witness tampering that 'in part go beyond those available at a conventional hearing'. Such specific measures for remote witness testimony include: i) the (technical) ability of all participants to observe the person to be examined closely and head-on; ii) the possibility of recording the hearing; iii) the option of instructing the witness to look directly at the camera and to keep their hands visible on the screen at all times (which makes it impossible to read chat messages); and iv) showing the room in which you are testifying (making sure there is no other person present).

60 Critical of this position taken by t.he *Oberster Gerichtshof* (OGH), 23 July 2020 (Austria): Scherer et al., 'In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns' (2020) *Kluwer Arbitration Blog*, available at 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/.

61 See: The commentary on the judgment cited above: *Oberster Gerichtshof* (OGH), 23 July 2020 (Austria) by Scherer, et al. What follows in the text is by reference to this commentary.

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Again, it is a question of an adequate preparation of the technical or organizational details necessary for an online hearing. In the Protocol that is to be prepared for this purpose, it would be convenient for the arbitrators to consider alternative measures that might impair the testimony of the witnesses or experts either because of the poor quality of the transmission, the breach of confidentiality or security during hearings, their interruption or any other reason that prevents the continuation of the hearing. This should include the possibility that the arbitration tribunal has the possibility to suspend or conclude the hearing and locate the testimony on another alternative day or on the same day if possible[62].

From this perspective, the technical arguments against virtual hearings are side issues in relation to the procedure, and although they must also be addressed, they are not seen as being central, except on rare occasions where the violation of due process is manifest and real, such as in the decision of 25 January 2021 of the Chilean Court of Concepción, annulling a judgment adopted in default of one of the parties when what happened in reality is that the lawyer tried several times to access the hearing using the link provided but was left on hold[63].

In the situation where some participants are present physically while others take part remotely, it is a matter of organisation. Pre-Covid, online participation by a witness or expert was exceptional, and so all the participants - court, parties, witnesses and experts -were physically present during the hearing. During the Covid-19 pandemic, online participation by all the parties involved has been the general rule, although it should be clarified that, as far as possible teams of lawyers tend to be present in the same room. In domestic arbitration, it is easier for them to come together in person. What we do believe should be considered exceptional is the situation where the arbitrators decide to be present in the same room with only one of the parties. Unless the parties have expressly agreed otherwise, it is not recommended that one of the parties physically attend the hearing in the same place as the arbitrator or arbitral tribunal if the other party can

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62 See, for example, Africa Arbitration Academy, *Protocol on Virtual Hearings*, Principle 3.2.5, April 2020; CAM, *Nota sobre organización de audiencias virtuales*, 21 April 2020, para. 24; and CIAM, *Nota sobre organización de audiencias virtuales*, para. 11, and Annex I, section 6 (Protocolo en caso de fallo técnico), paras. 23-26.

63 Delivered by the Fifth Chamber of Concepción by Minister Claudio Gutierrez G., Alternate Minister Waldemar Augusto Koch S. and Member Attorney Gonzalo Alonso Cortez M. Concepcion, 25 January. 2021.

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only attend remotely[64]. The same rule can be applied to arbitral tribunals, but not to the Secretary[65].

Finally, in relation to the possibility of witness conferencing, more popularly known among the experts as 'hot-tubbing'[66], there is nothing to prevent this happening online[67]. The way in which the different windows can be arranged on the screen undoubtedly makes it easier to do so.

D. Other Evidence: Signature Recognition and On-site Visual Inspections

As well as the examination of witnesses and experts as considered above, there are some other types of evidence which, due to their complexity, might inevitably appear to require the physical presence of the parties, as for example in verifying signatures, where the original has to be inspected so that the witness or expert is in a position to confirm that a signature is attributable to its signatory. Another example is when a document has to be examined by an expert during the hearing in order to rule out manipulation. The same might be said in cases concerning technical defects in a specific object -for example, a machine or a commodity - or more frequently where works need to be inspected on site.

Without ruling out that in these cases the evidence must be obtained in person and *in situ*, it is nevertheless the case that the most recent, increas-

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64 See Africa Arbitration Academy, *Protocol on Virtual Hearings*, Principle 2.1.6, April 2020; and CAM, *Nota sobre organización de audiencias virtuales*, 21 April 2020, para. 14.

65 CAM, *Nota sobre organización de audiencias virtuales*, 21 April 2020, para. 14. A similar but not identical position: NAI/DAA, *The Hague Video Conferencing and Virtual Hearing Guidelines,* November 2020, section 1, sub-paras. i) and j).

66 See: CIArb, Guidelines for Witness Conferencing in International Arbitration, April 2019, 41-41.

67 See *Federal Court of Australia, 15.4.2020, Capic v Ford Motor Company of Australia Limited (Adjournment)*486, no. 15: 'Additionally, the fact that the witnesses involved in the expert hot tubs are in different jurisdictions may make it difficult for them to confer to prepare a joint report or to give their evidence concurrently. I do not, however, see this problem as insurmountable. The experts can confer beforehand on virtual platforms. This will be tedious and far from satisfactory but it is not impossible. The time zone problem can be solved by the Court sitting at different times (which I have done in matters heard before the days of this pandemic involving witnesses who for whatever reason were unable to travel to the courtroom in which I was sitting). The idea of two witnesses being examined at the same time in a virtual platform is no doubt challenging but, again, I do not think that it cannot be attempted or that it will be unfair or unjust'.".

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ingly sophisticated, high-quality and complex technologies, such as drones that can live stream images, scanners or high-resolution digital cameras offer a substitute for in-person inspections, avoiding the need to travel. In particular, as regards on-site inspections, the ICC Guide for proceedings during the pandemic[68] suggests that arbitration tribunals should consider whether on-site visits or inspections by experts can be replaced by video presentations or joint expert reports. The CIAM Note also refers to the use of drones for inspections of this type[69].

E. Conclusions

During the Covid-19 pandemic, arbitration has been subjected to a stress test that has normalised the use of remote means of communication, in particular the use of virtual platforms on which hearings are held online in their entirety, even in complex procedures. In fact, reports published since March 2020 tell of several complex international cases in which large numbers of witnesses and experts were held over many days, with participants from far afield.

Technological advances and the experience that we have acquired of remote hearings during Covid-19 have changed the perceptions of arbitration users regarding online hearings.

The large number of soft law instruments and protocols on virtual hearings, brought out hurriedly in response to the Covid-19 crisis, are clearly here to stay and will be of use once the pandemic situation ends.

Arbitration institutions have been an important part of the process of normalizing virtual hearings by creating soft law instruments and amending Arbitration Rules in order to expressly grant the arbitrators the power to decide the format of the hearing when parties disagree.

Any negative perceptions that arbitration operators might have had about virtual hearings in the pre-Covid era, to the effect that personal interaction between and with witnesses, experts, parties and co-arbitrators is inevitably more limited than when the hearing is held is face-to-face, has changed. An online hearing fulfills the same function, role and purpose as a face-to-face hearing.

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68 ICC, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, April 2020, para. 8.

69 CIAM, *Nota sobre organización de audiencias virtuales*, fn 6.

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A Lawyer's Perspective: Virtual Hearings

Catarina Monteiro Pires and Madalena Diniz de Ayala

1. Virtual hearings are nothing new. Several stages of the arbitration process were conducted via videoconference before the Covid-19 pandemic required remote participation[1]. International arbitration, as a global dispute mechanism which involves parties from different jurisdictions all over the world, has long been acknowledged the great value of technologies that do away with the need to meet face to face to resolve the many issues[2].

However, the Covid-19 pandemic has forced us to steer towards a more technological approach to life. In arbitration, the use of virtual hearings had been limited to situations where a witness was unable to personally attend the hearing, or if the cost and inconvenience of travel was held to outweigh significantly the importance of their testifying in person, to the extent to which a videoconference was deemed acceptable[3]. This paradigm has been changed by Covid-19. By the end of March 2020, most of the world was working remotely, using a variety of tools, such as *Zoom, Microsoft Teams* and *Google Hangouts*. As a result, many of the sceptics have had no other option but to accept and embrace this [4]. Most of these sceptics come from legal systems where cross-examination of witnesses (and even of experts) is a key feature of the arbitration process, such as in common law countries[5].

The shift towards widespread use of technology in arbitration seems to be irreversible, particularly in international arbitration proceedings. Institutions have adapted their rules to this new scenario. For instance, article 19.2 of the Arbitration Rules of the London Court of International

1 Madyoon, 'Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement' (2021) 87-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 597 (597-598).

2 *Ibid*, 598

3 Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration', in Calissendorff and Scholdstrom (eds), *Stockholm Arbitration Yearbook 2020* (2020) 99.

4 *Ibid* 101; See also Bornet al., 'Videoconferencing technology in arbitration: new challenges for connectedness (2020 Survey)' (2020) *Kluwer Arbitration Blog*.

5 Waincymer, 'Online Arbitration' (2020) IX-1 *Indian Journal of Arbitration Law*, 1;

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Arbitration (LCIA) (2020) states that 'a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)'. At the same time, some practitioners caution that in-person hearings are indispensable in certain cases, that in a post-pandemic world virtual hearings may be the right choice for simple cases, but not for factually complex cases, and that the codes of conduct for virtual hearings need to be improved. In-depth discussion and analysis is still needed on several matters, ranging from simple issues such as the duration of the hearing (virtual hearings usually take longer, but breaks are clearly needed to avoid concentration lapses) or the difficulty of conferring during a virtual meeting, to complex questions such the procedural adaptations required by the due process in a remote environment and assessment of oral testimony by the arbitral tribunal, [6]. International surveys highlight that

> post-pandemic, respondents would prefer a 'mix of in-person and virtual' formats for almost all types of interactions, including meetings and conferences. Wholly virtual formats are narrowly preferred for procedural hearings, but respondents would prefer to keep the option of in-person hearings open for substantive hearings, rather than purely remote participation[7].

Academics and practitioners have debated whether there is a right to physical hearing [8]. Efficiency gains may vary from case to case and other factors have to be assessed, particularly regarding the requirements of due process.

2. In 2021, the International Chamber of Commerce (ICC) published its 'ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings 2021' as an annex to the Protocol on Virtual Hearings[9]. This is a set of rules to help tribunals, arbitrators, lawyers and parties, when preparing a virtual hearing. The checklist is divided into five chap-

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6 Scherer et al., *International Arbitration and the COVID-19 Revolution* (2020).

7 This conclusion is expressed in the *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, conducted by the School of International Arbitration (SIA), Queen Mary University of London.

8 Elgueta et al., *Does a Right to a Physical Hearing Exist in International Arbitration?* (2020).

9 ICC, Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings (2021).

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ters: *1)* Pre-hearing plan scope and logistics[10]; *2)* Technical issues, specifications, requirements and support staff; *3)* Confidentiality, privacy and security; *4)* Online etiquette and due process considerations; *5)* Presentation of evidence and examination of witness and experts. These five chapters contain a number of points that we feel should be highlighted[11]:

- Agreement on the number of participants per virtual room and whether a 360.º view for all participating rooms is required or necessary;
- Consultation and agreement between parties and tribunal on the hearing date, duration and daily schedule, taking the different time zones into account;
- There has to be consultation between the tribunal and the parties regarding the preferred platform and technology to be used (including legal access to such platform and technology), the minimum system specifications and technical requirements for smooth connectivity (audio and video), adequate visibility and lighting in each location, and lastly, whether certain equipment is required in each location (phones, back-up computers, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary by the parties);
- Preliminary compatibility check on the selected platform and technology to be used;
- Consider the need for tutorials for participants who are not familiar with the technology, platform, applications and/or equipment to be used in the hearing;
- Consultation between the tribunal and the parties regarding the contingency measures to be implemented in case of sudden technical failures, disconnection, power outages (alternative communication channels and virtual technical support for all participants);
- Running a minimum of two mock sessions during the month preceding the hearing to test connectivity and streaming, with the last session being held one day before the hearing to ensure everything is in order;
- Consultation between the tribunals and the parties on whether the virtual hearing will remain private and confidential to participants;

10 Under Article 26 para. 1 of the ICC Arbitration Rules 2021, 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*".

11 *Ibid.*

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- Consultation between the tribunal and the parties on the recording of the virtual hearing (audio-visual recording, confidentiality of the recording and value of recording compared to any written transcript produced etc…), any overriding privacy requirements or standards that may impact access by or connectivity of certain participants, and the minimum encryption requirements to safeguard the integrity and security of the virtual hearing against any hacking, illicit access, etc…;
- Confirmation of the parties' agreement to proceed with a virtual hearing or identification of the legal basis for proceeding with a virtual hearing failing such agreement between the parties;
- Advising the parties on their duty to cooperate on technical matters prior to and during the virtual hearing;
- Consultation between the tribunal and the parties on the organisation and presentation of oral pleadings;
- Consultation between the tribunal and the parties on the examination of witnesses and experts (order of calling and examining witnesses/experts, connection time and duration of availability, virtual sequestration, the prohibition or otherwise of synchronous or asynchronous communication between witnesses and parties/counsel in chat rooms or through concealed channels of communications, interaction between the examiner and the witness/expert in an online environment etc…;
- Consultation between the tribunal and the parties on virtual transcription and the use of stenographers and interpreters able to provide the necessary level of service in a virtual environment.

3. In Portugal, the Rules of the Commercial Arbitration Centre (*Regulamento de Arbitragem do Centro de Arbitagem Comercial*) dated 1 April 2021, state the following, in Article 14 para. 3: 'The holding of virtual hearings for the production of evidence may only be determined by the arbitral tribunal after consulting the parties and ensuring respect for the principle of due process' [12]. This rule is evidently vaguer than that contained in the ICC Guidelines, showing the need for further regulation on this matter at a national level in Portugal.

4. Similarly in Brazil, the Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC) has issued "Notes on Remote Meetings and Hearings", clarifying issued and providing rec-

12 The original version in Portuguese reads as follows: "*A realização de audiências virtuais de produção de prova apenas poderá ser determinada pelo tribunal arbitral após consulta às partes e assegurando o respeito pelo princípio do processo equitativo*".

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ommendations for parties, attorneys, experts, arbitrators and other participants in proceedings administered by CAM-CCBC. In the event of a meeting or hearing being required, the arbitral tribunal is recommended to consult the parties and decide whether to hold it remotely. Virtual hearings also require more efficient management and preparation of the hearing. The Notes also recommend

> that the hearing schedule of the witnesses and/or other Participants be established before the Remote Hearing is held. If the hearing schedule has not been previously determined, parties' counsel must inform the arbitral tribunal which witness they intend to call, with the Secretariat, as the event organizer (host), remaining responsible for giving the witness access to the Remote Hearing room.

The recommendations also address checks on the behaviour of witnesses:

> at any time during the Remote Hearing, the arbitral tribunal, ex officio or at the request of the parties' counsel, may ask the Participants to display the physical environment in which they are located (360º rotation) in order to verify and confirm the people present on site.

5. In Korea, for example, on 18 March 2020, a mere few days after the official declaration of the Covid-19 Pandemic, the Korean Commercial Arbitration Board released the Seoul Protocol on Video Conferencing in International Arbitration, 'serving as a guide to best practice for planning, testing and conducting video conferences in international arbitration' [13]. The protocol consists of 9 articles and an annex, concerning technical specifications. Article 1 regulates the examination of witnesses, which we will consider further in the next chapter. Article 2 provides guidelines on the video conferencing venue, including rules such the requirement that parties should ensure that the connection between the Hearing Venue (the site of the hearing, where most of the participants are located) and the Remote Venue (the site where the remote witness is located, where the minority of participants are located) is as clear as possible, meaning that images and sounds are accurately and properly aligned, in order to avoid any delays. In addition, each of the venues must have at their disposal an on-call individual with the appropriate technological know-how to help in planning, testing and conducting the video conference. Article 3 concerns observers, and states that during the video conference the only people allowed in the Remote Venue are: the witness providing testimony (and

13 Seoul Protocol on Video Conferencing in International Arbitration, 2020.

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their lawyer, where applicable), an interpreter (where applicable), paralegals to assist with documents and representatives from each party's legal team. To ensure this rule is followed, each party is required to provide the identity of every individual in the room, and the Tribunal must verify those identities at the beginning of the video conference[14].

Following on from this, Article 4 regulates documents, and states that all documents referred to by the witness must be clearly identified and made available to them. Parties may also agree on using shared virtual document repository, available to all venues. Article 5 concerns technical requirements; in outline, it requires the video conference to be of satisfactory quality so as to allow for clear video and audio transmission of the witness, the Tribunal and the parties. Article 6 adds that, prior to the video conference, all equipment must be tested at least twice – once before the start of the hearing, and once immediately before the actual video conference. Articles 7 and 8 deal respectively with interpretation and recordings. These rules require the parties to ensure interpretation services are available if the witness needs them, and determine that the video conference may only be recorded with the consent of the Tribunal, in which case the recordings must be made available to the Tribunal and the parties within 24 hours of the end of the video conference[15].

Lastly, Article 9 deals with the preparatory arrangements. This is a crucial part of the virtual hearing process, as it serves the purpose of ensuring that the video conference itself runs smoothly. Article 9 requires parties to apply to the Tribunal for the use of video conferencing during the hearing at least 72 hours in advance, and to endeavour to agree on a seating plan that allows each participant to see the other participants to whom they will be speaking to during the video conference. It is during this preparatory stage that parties must brief the interpreters – when an interpreter is required – about the details of the case[16].

6. In May 2020, the Hong Kong International Arbitration Centre (HKIAC) also issued Guidelines for Virtual Hearings. These state the view that "whether or not a virtual hearing, in part or in full, is suitable for a particular matter remains a matter for the parties and the arbitral tribunal" and offer a number of recommendations on case management (reaching an early decision on the hearing) and technical issues.

14 *Ibid;*
15 *Ibid.*
16 *Ibid;*

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7. Two important issues in virtual hearings are the behaviour of witnesses, and matter of tampering and cybersecurity. Witness evidence plays a central role in international arbitration, especially in cases where recollection of past events is fundamental to the outcome of the case and where documents are not available to assess the witness evidence[17]. Factual recollection by witnesses remains a crucial part of international arbitration. In fact, in a complex and long dispute, witness accounts are vital to provide important context in order to acquaint the tribunal with the background story, to the point where they provide evidence on challenged factual matters which may, in due course, determine the outcome of the case[18]. Virtual hearings also present challenges concerning the behaviour of witnesses and assessment of oral testimony.

Kimberley A. Wade & Ula Cartwirght-Finch highlight some of the most relevant research and explain why each finding is important in the setting of international arbitration. These authors distinguish between *contextual factors* – that are inherent to the witness or the reported situation itself – and *retrieval factors* – that exert themselves when a witness retrieves information from memory during an interview. Contextual factors include schemas, stress and arousal, culture, alcohol, and drugs. Retrieval factors include co-witness discussion, perspective, interviewing procedures, and memory blindness[19].

Before the Covid-19 pandemic, it was common for witnesses from a remote location in certain circumstances, for example, if the witness was unable to travel due to illness, or even if the journey was too long and the witness could not reasonably be expected to travel. Indeed, Article 8, para. 2, of the IBA Rules on the Taking Evidence in International Arbitration[20] allows for virtual examination of witnesses, at the tribunal's discretion. But for most of 2020 and part of 2021, the uncertainty about a return to normality forced parties to rely entirely on virtual hearings, with witnesses

17 Wade and Cartwirght-Finch, 'The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration' (2021) 39-1 *Journal of International Arbitration*, 1.

18 *Ibid;*

19 *Ibid*;

20 Article 8.2 of the IBA Rules on Taking of Evidence in International Arbitration, which reads: '*At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions (…).*'

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testifying online. It was noticed that parties were more comfortable and relaxed than previously about using technology and remote hearings, and this, combined with the fact that it saves them time and money, will eventually make remote examination of witnesses the norm. This creates a growing need to ensure compliance with the principle of due process as a procedural safeguard, in order to guarantee a fair hearing. The definition of *due process* varies from country to country, but the basic elements, such as the right to be heard and equal treatment of parties, are uniformly applied[21].

Safeguarding the principle of due process must be a shared responsibility for all the participants in the arbitration process: arbitrators, parties, counsels and even institutions[22].

There is still widespread and significant reluctance to accept online examination of witnesses. From the practitioners' point of view, many are hesitant about the idea of leading a virtual hearing, as they find them rather impersonal. They argue that a virtual hearing is not capable of reproducing the formality of the arbitration process, undermining its essential character. Furthermore, traditional practitioners claim that a virtual hearing makes it more complicated to build trust between themelves and their clients, or to identify if the witness is lying, since a person's facial expressions and body language are more visible when speaking in person. In their view, the process of cross-examination is lost – a crucial part of a party's case, which they may consider decisive to a successful outcome[23].

Another very important question is that it is only human nature to suffer concentration lapses after when meetings continue for a long time, especially online. Witnesses in different time zones can also be called on to testify at anti-social times of day, unless care is taken to avoid this. Lawyers have also emphasised that it is important for them to establish credibility with the tribunal, which is harder when done via a computer, rather than face to face[24].

It is argued that remote hearings impair the tribunal's ability to evaluate witness testimony properly, making it harder to analyse body language, facial expressions, and changes of tone. Lawyers regard in-person contact as an essential component, critical to analysing evidence. However, it may

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21 Mirani, 'Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective' (2020), *Kluwer Arbitration Blog*.

22 *Ibid;*

23 Ayala, 'The Rising Inefficiency in Arbitration: is Technology the Solution?' (2021) XVI *Revista Internacional de Arbitragem e Conciliação*, 19.

24 *Ibid* 20;

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be contended that recent technological advances mean that such objections are no longer reasonable. Certainly, high-definition video is able to provide a clear picture of the participant, extremely similar to being in the same room with them, allowing the tribunal to observe body language, facial expression and changes in voice tone[25].

Even if the witness is fully visible, cross-examination may still be extremely difficult from a lawyer's point of view. It is common for lawyers to rely largely on an assessment of the tribunal's receptiveness, and an in-person hearing allows them to "*take the pulse*" of the hearing room. In a virtual hearing, it is likely that a lawyer is looking at a screen with at least five other people – three arbitrators, the witness and the opposing lawyer – at once, and it is possible to have another window open where they can chat with their legal team[26].

Further concerns are raised regarding other aspects of remote testimony. A good example is witness coaching. In a virtual hearing, it is very hard to determine whether the witness is being instructed by someone else in the same room, or even if they are following a previously prepared script. A solution for this would be having the witness sit in a room prepared with multiple cameras that point to every angle, as well as having a neutral and independent third-party to observe the witness' surroundings[27]. Nevertheless, having a third-party observing the witness cannot be considered the best practice, because of the added cost of having yet another person involved in the arbitration, and also because their presence may make the witness more nervous when testifying. But if both parties and the tribunal are in agreement, a solution such as this can be arranged[28].

Another example is the use of physical documents to confront the witness with. Many witnesses prefer to see the full document on paper when being questioned about them, as opposed to viewing them on a screen. However, it is essential that witnesses do not have access to those documents before the hearing, in order to obtain their genuine and truthful insights. A possible solution would be to send the documents to the

25 Madyoon, 'Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement' (2021) 87-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 597 (600).

26 *Ibid*;

27 *Ibid* 600-601;

28 Wikstrom-Hermansen and Spreigl, 'Chapter 13: Witness Examination in International Arbitration – Best Practices Regarding Cross-Examination and Related Issues', in Calissendorf and Scholdstrom (eds), *Stockholm Arbitration Yearbook 2020* (2020), 245.

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witness in a sealed box, which the witness would be required to open on camera immediately before testifying[29].

8. Cybersecurity concerns have expanded to include not only the internal network of the venue, but also individual home networks, due to growth in virtual hearings and remote working. In 2020, top arbitral institutions felt the need to address the issue of virtual hearings and published guidelines for tribunals. By agreeing on specific procedures for the management and exchange of sensitive information, all participants in an arbitration can lessen the cybersecurity risks[30].

This begs the question: *who should be responsible for ensuring cybersecurity?* One approach is that where the parties and the tribunal establish a security protocol for storing and transferring information, limiting the disclosure of information and documents that may attract attack, and, if a breach or an attack takes place, establishing the procedure for notifying the parties affected and for damage mitigation. A second approach is for the parties to address the matter of cybersecurity measures for the proceedings as a whole, and not merely for the exchange of information. In this approach, all participants – not only the parties and tribunal, but also the institution (if applicable), witnesses, experts and translators – must be considered. Moreover, practitioners are instructed to include all likely risks and the distribution of liability in the procedural order, and to include a protocol addressing all use of electronic equipment and video conferencing[31].

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29 *Ibid* 602;

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31 *Ibid*;

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An Arbitration Center's Perspective: Online Dispute Resolution and the Virtual Hearings: Six Characters in Search of an Author

Paula Costa e Silva

1. This text will include the observations I was able to make on 29 June 2021 at the conference held by the Centre for Private Law Research and the Portuguese Arbitration Association on online dispute resolution: the new challenges. The roundtable in which I participated concerned virtual hearings, and I was also asked for the institutional perspective.

The subtitle was suggested to us by the analogy that immediately emerges when looking at the differences between in-person hearings and remote hearings. The relationship between one and the other is like that which exists between the theatre, or stage, and the cinema. But the cinematic space in which remote hearings unfold is curious: the characters observing each other on the screen are, simultaneously, spectators and actors. It is no less true the characters who move on the stage of a live hearing are also, like the actors in Pirandello's play, simultaneously actors and spectators.

2. What immediately strikes one when considering the reaction of the institutions that administer arbitrations is the speed with which they moved. Faced with global restriction on flights, the impossibility of holding hearings in person has become an inevitability. If we think about the typical community put together for each international arbitration, we can immediately perceive a radical difference from that which is commonly constituted in the overwhelming majority of proceedings before the state courts. In an international arbitration of some complexity, the arbitrators are domiciled in different legal areas, the teams of representatives are composed of lawyers from different jurisdictions, legal experts are usually called upon to help the court interpret the substantive rules applicable to the case, which are typically not those of their national law, and if the dispute arises over the performance of a contract, the witnesses often live and work far from the seat of the court. The need for very significant number of procedural actors to come together at the place where the hearing will take place is part of the DNA of international arbitration. The flight bans and the closing of borders, as of March 2020, without any

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clue as to when the restrictions would be lifted, created an all-or-nothing situation: either proceedings would be suspended due to the impossibility of holding hearings, or a subrogation of face-to-face hearings would be accepted which, while attempting to maintain the standards of the due process of law, would protect another value inherent to the exercise of the judicial function, namely, the effective achievement of justice through the pronouncement of decisions.

The main arbitration institutions had no doubts: hearings should be allowed to take place without physical presence, otherwise there would be an endless delay in arbitration proceedings. ICC, HKIAC and CAM-CCBC, among others, issued memoranda to encourage the holding of virtual hearings, preventing a standstill in the rendition of decisions that would still be preceded by hearings, and equipped their respective secretariats with means to permit proceedings to move online, with a particular focus on the holding of virtual hearings.

If one of the advantages ascribed to arbitration is speed, and if one of the fundamental considerations in any method of adjudication is the delivery of decisions within a reasonable time, it would be taking an enormous risk, in the face of a public health situation which was known when it was recognised, but the outcome of which was unknown, to create, at the very outset, a tendency to suspend proceedings while awaiting developments. The steps taken by institutions were prudent and courageous. While leaving room for differing decisions, they set out a sense of duty: judgments should continue to be delivered within a reasonable time, which entailed accepting that holding virtual hearings was a good thing.

3. In addition to the arbitration institutions, professionals, in particular arbitrators and lawyers, have also adapted quickly to virtual hearings. If, as recently as 2018[1], only 30% of arbitrators reported having held hearings in a virtual environment, as early as March 2020 the growth in the number of hearings not conducted face-to-face was exponential[2].

1 Queen Mary's University of London, *International Arbitration Survey: The Evolution of International Arbitration*, 2018, https://arbitration.qmul.ac.uk/research/2018/, accessed on 22 December 2021.

2 A study conducted between March 2020 and June 2020 by Gary Born, Anneliese Day and Hafez Virjee found that the number of virtual hearings held had nearly tripled with reference to equivalent periods prior to the global pandemic crisis. Born, Day and Virjee, 'Empirical Study of Experiences with Remote Hearings', in *International Arbitration and the COVID19 Revolution* (2020), 137. The empirical data supporting this research can be found at https://delosdr.org/wp-content/uploads/2021/06/2021.07.08-Remote-Hearings-2020-Survey-Data-Sheet-2021.pdf, accessed on 22 December 2021.

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Nothing in this phenomenon is self-evident. Indeed, it is undeniable that the mode of the hearing is a sensitive issue for the way in which in party representatives and the court perform their respective roles. The hearing is a stage on which each person plays his or her role. The radical change in the environment in which the hearing takes place brings with it the need to adapt the way they play these roles. In seeking to make this idea a little more concrete, clarity was achieved by comparing virtual hearings and in-person hearings, with each person having to play different roles (presiding arbitrator and legal expert).

4. Since it is impossible to make these reflections in comprehensive terms on the iconography and symbolism associated with the delivery of justice, which is less visible in an arbitral tribunal than in a state court - suffice it to recall the typical layout of the courtroom, with the judge on a high level, the dress code and accoutrements that immediately identify and distinguish the various actors involved in the proceedings, the ritual language used in communication between lawyers, actors and the judge - even so, there are differences when the court hearing takes place in a virtual environment.

In face-to-face hearings, held by arbitral tribunals, there are practices in the spatial layout which, by marking the place belong to each person, have a bearing, for example, on the body language of the lawyers acting for the parties when, for instance, examining witnesses or experts, and observation of the representatives of the opposing party when it is their turn to conduct the questioning. The arbitrators too, typically seated where they have a view of the different movements taking place, have had to adapt the way they exercise their powers, how they communicate with the representatives and with each other. This is particularly true for the presiding arbitrator when he has to intervene to ensure orderly proceedings and in his direct communications with his fellow arbitrators.

5. The computer screen puts everyone on the same level, visually very close, but without the proximity that allows for direct communication and for roles to be played in the way to which the various actors were accustomed. Broken and poor connections, even if momentary and rare[3], break up the flow of the spoken word in questioning and in the provision of clarifications. Viewing side by side, on a flat screen, a document and

3 As also reported by Born, Day and Virjee, identifying that the number of reported cases in which there were instability or difficulties in communications during virtual hearings was small and, moreover, their occurrence was felt to be irrelevant. Born, Day and Virjee, ‘Empirical Study of Experiences with Remote Hearings’, *in International Arbitration and the COVID19 Revolution* (2020), 137.

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the procedural actor giving evidence entails a change in the way one pays attention to two activities that demand it simultaneously. Brains used to function in a three-dimensional space have had to adapt to "do the same" in a two-dimensional space.

"Doing the same thing" - that is, the attempt to replicate the conditions in which, in person, the same activities would take place, working to the same purpose and obtaining the same results - does not mean, as has been claimed, that the two environments are interchangeable. This non-equivalence is perhaps most apparent in the particularly severe fatigue occasioned by long online meetings, a subject already explored by scientists[4].

One of the reasons given for this phenomenon has to do with the effort made to convert an image, which is perceived as amputated, into one that is captured in face-to-face interaction. We are not concerned here with the process of apprehension of images as far as the neuronal mechanisms activated by the processing of technologically mediated information are concerned. However, the relational function of image is indeed of special interest for the purpose of this article.

6. The intuition that the evaluative observation of the other is permeable to the way in which his image is represented to us is, in fact, confirmed by specialist research, which points out that the interaction between individuals and between these and the environment is systematically interpreted by the other person - the observer - through the attribution of meaning to gestures, actions and activities[5].

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4 See, for example, Bailenson, 'Nonverbal Overload: a Theoretical Argument for the Causes of Zoom Fatigue' (2021) 2-1 *Techonology, Mind, Behaviour*, 1, available at https://tmb.apaopen.org/pub/nonverbal-overload/release/2, accessed on 22 December 2021. In this study, the Author explores four possible causes for the fatigue felt by frequent users of videoconferencing platforms: the visual effort required to seize small and often very detailed images, the overload of the brain areas that allow the decoding of non-verbal forms of communication which, in that context, are more difficult to perceive, the constant confrontation with oneself (in the Author's expression, the subjection to an "all day mirror") and the constraints on mobility imposed by the need to remain visible to the other participants in a setting where the camera position is selective and limited. See, also, Nadler, 'Understanding "Zoom fatigue": Theorizing spatial Dynamics as third skins in computer-mediated communications' (2020) 58 *Computers and Composition*, 1, available at https://www.sciencedirect.com/science/article/pii/S8755461520300748, accessed on 22 December 2021, and the sources cited therein.

5 On the relationship between this motor tripartition of human behaviour and the mental processes which, because they are represented by movement, reveal these mental processes to others, *cf.* Cartmill, Beilock and Goldin-Meadow, 'A word in the hand: action, gesture and mental representation in humans and non-human

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These movements, however, are only marginally captured by the instruments that allow communication at a distance - we may point, for instance, to the two-dimensional nature and small size of the image transmitted. On the other hand, mediation by an artificial means of capturing and transmitting images results in a greater degree of abstraction, with immediate consequences for the perception of the object - human or otherwise - represented[6].

7. Another relevant issue is related to the relevance of the levels of symbolic interaction[7], which are also fed by the perception of alterity. We are not dealing here with the symbology associated with the performance of certain functions or activities, but with the symbolic communication between individuals, which presupposes from the outset a common *framework* for attributing meaning to the interactions themselves, to the activities performed, to the environment in which they take place and to the subject who is either their protagonist or spectator. However, both the construction and consolidation of this common key to understanding are hindered by the aridity of the setting of the interaction, above all if they result in the abstraction of the *other person* - because the persons seeking to relate to each other are poorly represented, on both sides. It is therefore understood that the experience of another level of interaction, of which the digital realm is perceived as a degraded version, stimulates a creative

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primates' (2012) *Philosophical Transactions of the Royal Society B: Biological Sciences*, 129, available at https://royalsocietypublishing.org/doi/10.1098/rstb.2011.0162, consulted on 22 December 2021; Corbalis, 'Language as gesture'(2009) 28-5 *Human movement Science*, 556, available at https://www.sciencedirect.com/science/article/pii/S0167945709000645?via%3Dihub, consulted on 22 December 2021; Novack and Goldin-Meadow, 'Gesture as representational action: A paper about function' (2017) 24-3 *Psychonnomic Bulletin & Review*, 652, available at https://link.springer.com/article/10.3758%2Fs13423-016-1145-z, accessed on 22 December 2021.

6 Regarding the relation established between the levels of mental representation of an object and the observer's perception of what is being observed (namely as to the attribution to the human being observed of states of mind and as to moral judgements, which are directly conditioned by the degree of abstraction of its image before the observer), *cf.* Merritt, Jenkins and Kingstone, 'The Medusa effect reveals levels of mind perception in pictures' (2021) 118-32 *Proceedings of the National Academy of Sciences*, 1, available at https://www.pnas.org/content/pnas/118/32/e2106640118.full.pdf, accessed on 22 December 2021.

7 For a brief description of the theories of symbolic interaction, with reference to their fundamental Authors, *cf.* Carter and Fuller, 'Symbols, meaning, and action: The past, present, and future of symbolic interactionism' (2016) 64-6 *Current Sociology Review*, 931, available at https://journals.sagepub.com/doi/full/10.1177/0011392116638396, accessed on 22 December 2021.

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effort of reconstitution which is demanding, exhausting and incomplete. It is not a question here of measuring the efficiency of remote communication for the performance of specific tasks and functions, but it should not be ignored that the substantial change in the environment in which they are carried out corresponds to major psycho-cognitive changes which necessarily have repercussions for them.

8. The conduct of hearings in a virtual environment has also faced criticisms arising from the understanding of the principles and legal rules. The most significant - because potentially fatal, entailing, in the worst case scenario, annulment of the decisions rendered - relate to the situation that would result from an alleged violation of the principle of due process of law, due to diminished procedural guarantees.

In this context, the precedents that could be drawn from rulings issued by the European Court of Human Rights and the swift intervention of state courts is thought to have had a reassuring effect on the arbitration community. When assessing the delivery of justice, one should never lose sight of the context in which it is delivered. Judges, embedded in a hierarchy, are accustomed from the beginning of their careers to having their decisions scrutinised, overturned and replaced by decisions of courts to which they are hierarchically subordinate. The environment in which arbitrators carry out justice is entirely different. In fact, even though an appeal against an arbitration award may be envisaged, there is no hierarchy between the *iudex ad quem* and the *iudex a quo*. On the other hand, scrutiny of the legality of arbitral awards is very rare, because contractual provision is seldom made for the possibility of appeal against the arbitral award. This is the context in which arbitrators had to decide what to do as of March 2020: suspend the proceedings for lack of agreement of the parties regarding the scheduling of virtual hearings or face the risk of applications for annulment of the awards they would render[8].

8 The impact of the fear felt by members of an arbitral college and sole arbitrators of their decisions being reviewed has also been studied. Indeed, it has been noted that arbitral colleges and sole arbitrators are particularly sensitive to pressure from parties' representatives, often in the form of threats to initiate proceedings to have arbitral awards set aside (*cf.* Kopecky and Pernt, ‘A Bid for Strong Arbitrators’ (2016) *Kluwer Arbitration Blog,* available at https://www.google.com/search?q=A+Bid+for+Strong+Arbitrators&oq=A+Bid+for+Strong+Arbitrators&aqs=chrome..69i57j69i64l3j69i60l3.896j0j4&sourceId=chrome&ie=UTF-8, accessed on 22 December 2021, Gerbay, ‘Due Process Paranoia’ (2016) *Kluwer Arbitration Blog,* available at http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/, accessed on 22 December 2021 and Burgos, ‘The Fear of The Sole Arbitrator’ (2018) *Kluwer Arbitration Blog*, available at http://arbitrationblog.kluwerarbitration.com/2018/08

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If we look at the survey conducted by Queen Mary's University of London in 2018, we realise how shortly before the pandemic broke out, the majority of respondents responded that "due process paranoia" was a reality in arbitration proceedings, undermining court decisions and destructive of the effectiveness and speed of arbitration[9]. It is understandable,

/07/the-fear-of-the-sole-arbitrator/, accessed on 22 December 2021). There are also reasons of a psychological and behavioural nature which justify the permeability of arbitral decision-makers to these behaviours. Particularly relevant in this context is prospect theory which, in the field of cognitive and behavioural psychology, seeks to explain the process of self-determination in the face of environments of risk and uncertainty. Cross-referencing the above observations with this dimension of this analysis, see the study by Metsch and Gerbay, 'Prospect Theory and due process paranoia: what behavioral models say about arbitrators' assessment of risk and uncertainty' (2020) 36-2 *Arbitration International*, 233, available at https://academic.oup.com/arbitration/article/36/2/233/5857622?login=true, accessed on 22 December 2022. In this paper, the Authors propose that uncertainty as to i) the review of arbitral decisions and ii) the outcome of such review results in the impossibility of formulating probabilistic judgements and that iii) decision makers are permanently aware of these factors and the outcome of their combined existence. On the other hand, in a utilitarian assessment - that is, concerning the individual preferences of the decision-makers and the degree of satisfaction provided by the events pertaining to the decision-making activity - the annulment of a decision is felt as a significant loss, whereas the non-annulment/execution of the decision is felt as a marginal gain. The arbitrator's perception tends, therefore, to be that i) there is a high probability of a small gain and ii) a small probability of a large loss. However, because loss tends to be given greater emotional importance than gain, it will be typical for decision-makers to decide in such a way that reduces the probability of occurrence of the outcome perceived as adverse, even though this would always be much less likely. On the other hand, the probability of occurrence of one and another outcome are not evaluated in a linear fashion: precisely because the utility of the gain is perceived as less relevant than the "negative utility" that the loss represents. If the possibility of loss is perceived as a risk, the conduct of the decision-maker will seek to avert that outcome: the decision-maker will do everything so that he feels that the probability of occurrence of an outcome that he perceives as especially undesirable decreases.

9 According to the study by researchers at Queen Mary's University of London, *International Arbitration Survey: The Evolution of International Arbitration*, 2018, https://arbitration.qmul.ac.uk/research/2018/, accessed on 22 December 2021, due process paranoia is perceived as one of the main reasons for the decrease in efficiency in arbitration proceedings. On the relationship between speed of decision, economic efficiency and due process paranoia, *cf.* Metsch and Gerbay, 'Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty' (2020) 36-2 *Arbitration International*, 233 (239 and 240) and Menon, 'Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law' (2021) 17-1 *Asian International Arbitration Journal*, 1, available at

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however, that arbitrators feared scheduling virtual hearings without the parties' consensus; this was a practice not only rare in arbitration but very uncommon, in March 2020, in state courts. Hearing one witness or another using means of remote communication was not infrequent; however, hearings were rarely held in a virtual environment, without face-to-face contact between judges and lawyers.

9. This is why the immediate intervention by state courts having to rule on the conformity of proceedings where virtual hearings were held with the principle of due process of law was so important. In this context, reference should be made to the decision of 23 July 2020 of the Austrian Supreme Court[10], rendered a few months after face-to-face hearings had become impossible. The Supreme Court was faced with an application to annul an arbitral award, rendered in a case where the hearing had been conducted online against the express wish of one of the parties. The Supreme Court upheld the arbitral award, in the face of the various grounds invoked for violation of due process of law. As to these, let us note: if, the holding of hearings in person were in fact a guarantee inherent to the due process of law, a decision to schedule virtual hearings would be unlawful even with the agreement of the parties; the core of the fundamental guarantees is non-negotiable.

The Austrian Supreme Court's decision may have had a major impact because within weeks of the commencement of travel restrictions and the scheduling of online hearings, arbitral tribunals had a strong precedent that such hearings were admissible, and the awards were upheld on the grounds that fundamental procedural guarantees were not violated. Over time, the position that the parties' agreement did not have a decisive influence on the scheduling of online hearings was consolidated, and a

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https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/17.1/AIAJ2021001, accessed on 23 December 2021.

10 This decision can be consulted at https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf, accessed on 23 December 2021. For a brief description of its contents, *cf.* Scherer et al., 'In a "First" Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects due Process Concerns' (2021) *Kluwer Arbitration Blog*, 24 October 2021, available at 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 on 23 December 2021.

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decision to adopt this mode of production of evidence was regarded as exercise of the court's powers of management.

Confirming this interpretation of the principle of due process, on 30 June 2021, the European Commission for the Efficiency of Justice approved the 'Guidelines on videoconferencing in judicial proceedings' (CEPEJ (2021) 4REV4)[11]. Although this instrument is not directly applicable to hearings in arbitration proceedings, it provides an official framework ordering the guarantees entailed in the principle of due process: this does not exclude, inevitably, the holding of virtual hearings, but these should be conducted in such a way as to provide similar levels of protection for adversarial process to those that apply to in-person hearings.

10. This last point offers a convenient bridge to a set of instruments that have been produced in response to the concerns of those who have pointed to pitfalls in virtual hearings.

One problematic area, when viewed strictly in relation to hearings - leaving aside all the potential issues of intrusion and hacking by third parties into the information in the case file, such as that found in the statements of claim, in the statements of defence, the accompanying documents, the procedural orders and in the communications between arbitrators - is that of their security.

In March 2020 there were already international instruments dealing with this problem. Perhaps the most significant at that time was the 'Seoul Protocol on Video Conference in International Arbitration'. On 18 March 2020 a press release was issued from which we may highlight the following:

Given the global nature of international arbitration, witnesses are often required to travel great distances to provide testimony during a hearing. When such witnesses are unable to attend in person, the parties and the Tribunal are often left in the difficult position of determining how much weight to afford certain evidence (including, for example, witness statements). However, with the advent of new powerful technologies, parties are increasingly turning to remote video conferencing as a solution to this problem.

Every new technology brings with it certain risks and video conferencing is no exception. When utilizing this option, a tribunal must consider how to effectively, safely and fairly use video conferencing to best serve the interests of the arbitration. To this end, the Seoul Protocol on

11 These can be found at https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4, accessed on 22 December 2021.

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Video Conferencing in International Arbitration (the “Seoul Protocol”) was introduced at the 7th Asia Pacific ADR Conference, held in Seoul, Korea on 5-6 November 2018. (…). As international arbitration becomes increasingly globalized, and as the technology underlying video conferencing becomes increasingly powerful and sophisticated, it is reasonable to conclude that practitioners may increasingly turn to video conferencing when witnesses are unavailable for in-person examination. To this end, it is in the interest of the arbitration community to develop a sensible and clear protocol of best practices to ensure that such conferencing is effective, fair and efficient.

As the Introduction states, ‘(t)his Protocol on Video Conferencing in International Arbitration (Protocol) is intended to serve as a guide to best practice for planning, testing and conducting video conferences in international arbitration’. The Protocol then sets out a set of procedural and technical rules designed to ensure secure communication; although intended for the testimony of witnesses who, for various reasons, are to testify using remote means of communication, many of the provisions may be applied in full to the hearing considered as a whole[12].

11. Another issue that presented obstacles to the conduct of virtual hearings was the alleged shortfall in information available to the court due to the loss of immediacy, as typically understood at that time. The court would have no way of gauging the consistency of the witness’ or expert's testimony because it would be difficult to assess their body language. Only through direct contact with the deponent would the court be able to tell whether he or she was telling the truth. On this point, empirical studies have shown that any interpretation that the decision-maker may wish to make as to the reliability of a statement from the expressions used by the witness, his body language or the way he looks at his interlocutor (and the interlocutor he chooses to observe while speaking) is fallible[13].

12 Another instrument that tackles cybersecurity issues is ICCA ‘Protocol on cybersecurity in International Arbitration’ (2020), available at https://www.cpradr.org/resource-center/protocols-guidelines/icca-nyc-bar-cybersecurities/_res/id=Attachments/index=0/ICCA-NYC%20Bar-CPR%20Cybersecurity%20Protocol%20for%20International%20Arbitration%20-%20Print%20Version.pdf and accessed on 22 December 2021.

13 De Paulo et al., ‘Cues to deception’ (2003) 129 *Psychological Bulletin* 74, available at https://www.researchgate.net/publication/10927264_Cues_to_Deception, accessed on 22 December 2021; Vrij, Hartwig and Granhag, ‘Reading Lies: Nonverbal Communication and Deception’ (2019) *Annual Review of Psychology*, 295, available at https://www.annualreviews.org/doi/abs/10.1146/annurev-psych-010418-103135, accessed on 22 December 2021.

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At the same time, there is a fear that witnesses - or experts - who are absent from the courtroom may be receiving instructions from their lawyers or a third party as to how they should answer questions. This risk, which is specific to testimony given by remote means of communication and when the witness is being examined in real time, can be avoided, for example, by using two cameras to show the witness and the entire setting in which he or she testifies.

12. As a community, we do not yet know what will endure from these months of experimentation. Whilst, on the one hand, there is great pressure to return to the practices in place prior to March 2020, on the other hand, the advantages of hearings conducted using remote means of communication have been understood. Cost savings, ease of scheduling and gains in efficiency have to weighed up against the relative impersonality of online hearings, glitches in communications and the problems of individuals participating in different time zones. It is likely that the future will bring a symbiosis between the two forms of producing evidence, with the parties, their representatives and the courts adopting the form that each specific case requires. Virtual hearings are not the same as in-person hearings, nor do they serve as a substitute; they are something else. It is human to seek analogies, inferring from the familiar to the new, and the resulting disruption will take time to dissipate. But the answers concerning the virtues of online hearings will emerge by themselves and in this specific context.

December 2021

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Part III
Confidentiality, Privacy and Security

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A Judge's Perspective: Privacy and Confidentiality in Voluntary Commercial Arbitration

Rui Torres Vouga

Table of Content

A. Confidentiality versus Transparency: Arguments For and Against Both 159
B. Confidentiality and Transparency in International Arbitration 162
I. 'Confidentiality' versus 'Privacy' 162
II. Confidentiality under National Arbitration Legislation 164
1. National Arbitration Legislation is generally silent on Confidentiality 164
2. Choice of Law Governing Confidentiality 165
3. Party Autonomy as regards Confidentiality 166
III. Confidentiality under Institutional Arbitration Rules 167
IV. Implied Confidentiality Obligations 170
V. Scope and Limits of Confidentiality Obligations 174
VI. Secrecy of the Arbitrators' Deliberations 175
VII. Privacy and Confidentiality of Arbitration Hearings 176
C. Confidentiality in the Portuguese Voluntary Arbitration Law 177
Bibliography 179

A. *Confidentiality versus Transparency: Arguments For and Against Both*

The **arguments** generally invoked *in favour of enshrining the rule of **confidentiality***, in commercial arbitration, are essentially the following:

a) The classification of arbitration as *a private and discreet form of justice of the parties*, to which confidentiality is therefore a corollary;

b) The *presumed wishes of the parties*, who will likely prefer the strife of litigation and the need to take a hard line on issues not to scupper the viability of future agreements;

c) The risk that competitors of either party might learn of the accusations traded and potentially use these against them;

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d) The *confidential character of the contractual documents* that often underlie arbitral disputes (shareholders' agreements, patents, technology transfer agreements, etc.);

e) The access unavoidably authorised in certain disputes to strategic company documents, undisclosed accounts, commercial secrets, etc.;

f) The belief that justice administered out of the spotlight and shielded from external pressures may prove more rigorous, dispassionate and even-handed;

g) The greater likelihood that the award will be complied with voluntarily without circulating reports of non-compliance, and indeed to avoid making this public, given that the enforcement of arbitral awards is necessarily public (involving proceedings in state courts)[1].

Contrariwise, another set of **arguments** is marshalled *in favour of **transparency** as a rule in the arbitration system*:

a) Transparency *is a corollary of the jurisdictional character of arbitration*, and should accordingly be treated as it would in the state courts;

b) Transparency *is intrinsic to the democratic principle* and can substantially reinforce the guarantees of impartiality;

c) Transparency *is the rule in information societies*, and it is not feasible to go against this tendency;

d) Transparency *strengthens the credibility of the arbitration system*, and thereby avoids raising suspicions of a cover-up of business dealings which may be less than lawful and harmful to the general interest, to the detriment of the system;

e) Publicity *will help to improve the arbitration system*, making it possible to create systems of precedents and avoid poor quality arbitral awards against which no appeal is possible;

f) In many cases, *publicity is vital to the interest of certain parties* (e.g. when prompted to go to arbitration by a reduction in income caused by alleged contractual non-performance), *is required by regulators* (as happens with listed companies, which are obliged to disclose important developments) or *is essential for the market in question as a way of avoiding disputes or facilitating operation in others* (this is the case, for example of documents obtained in an arbitration against the owner of works, where these are

1 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (88-89).

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essential for future litigation brought by a contractor against a subcontractor)[2].

Looking at international arbitration rules, national legislation and the rules of the main international arbitration centres, there is no standard solution to the question of enshrining the rule of confidentiality or the rule of transparency, and instead we find a wide variety of normative arrangements. There are cases where i) the legal rules and regulations *are silent on the issue of confidentiality, leaving the decision to the wishes of the parties or to a ruling of the arbitral tribunal*; ii) point towards *regarding confidentiality as the rule in arbitration proceedings, whilst admitting exceptions or leaving open the possibility of deciding otherwise*; and iii) those, in contrast, which tend to *attach value to transparency and publicity, which are deemed to be the rule, unless the parties decide otherwise*.

What are not to be found are extreme solutions admitting of **no exceptions to the rule of confidentiality** or requiring **full and absolute publicity**, without exceptions and without allowing the arrangements to be shaped in any regard by the shared wishes of the parties and the powers of the tribunal.

Consequently, when the rule of confidentiality applies, this allows for **exceptions**, such as situations where legal rules require the disclosure of information concerning disputes, when one of the parties exercises its right of appeal in the judicial courts, to comply with the requirements of legislation or of regulators or the equivalent, or if the parties determine, by mutual agreement, to do without confidentiality, in all or some regards[3].

On the other hand, even when publicity is the rule, there are some aspects which cannot be disclosed (or, at least, where the arbitral tribunal, on the request of one of the parties, so rules)[4].

So whilst the decisions vary widely, it may still be asserted that, in **commercial arbitration**, the predominant tendency is to give weight to the rule of confidentiality and, in contrast, in arbitrations to which States

2 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (89-90).

3 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (91).

4 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87.

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are party, namely in **investment arbitration**, the opposite rule, in favour of publicity, prevails[5].

B. Confidentiality and Transparency in International Arbitration

Many advocates of international arbitration point to **confidentiality** as an important advantage of arbitral proceedings. Among other things, **confidentiality** is regarded as encouraging efficient and impartial settlement of disputes, as opposed to a more heated 'trial by media', reducing the harmful disclosure to competitors and others of commercially sensitive information and facilitating negotiation, by minimising the role of public exposure[6].

I. 'Confidentiality' versus 'Privacy'

It is important to distinguish between 'privacy' and 'confidentiality' in arbitration. 'Privacy' refers to the fact that, under practically all national arbitration laws and institutional rules, *only the parties to the arbitration agreement* – and no third parties – *may attend arbitration hearings and take*

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5 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (93).

6 One of the aims of international arbitration is to offer the possibility of a dispute resolution procedure that is confidential, or at least private. Most proceedings in national judicial courts are not **confidential**. In many countries, trials and judicial pronouncements on case law are open to the public, to competitors, to the press and to regulators, and the parties are very often free to disclose their submissions and evidence to the public. Public disclosure can encourage 'trial by media' and stand in the way of settlements, causing parties to harden their positions, aggravating tensions and prompting collateral disputes.
In contrast, international arbitration is substantially *more private* and, very often, *more confidential*, than proceedings in national judicial courts. Arbitral hearings are almost always closed to the press and the public and, in practice, the parties' pleadings and the tribunal's award generally remain confidential. In many jurisdictions (although not in all), confidentiality obligations are implicit in international arbitration agreements as a matter of law and, moreover, many institutional arbitration rules expressly impose these duties. In general, most international corporations prefer actively to seek the privacy and confidentiality that arbitral proceedings provide. Confidentiality reduces the risks of aggravating the dispute between the parties, limits the collateral damage of litigation and leads parties to concentrate on an amicable and pragmatic resolution of their differences.

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part in proceedings. In contrast, the term 'confidentiality' is normally used to refer to the *obligation of the parties (and arbitrators) not to disclose information concerning the arbitration to third parties*. *Confidentiality obligations* extend not only to the prohibition of third party participation in arbitral hearings, but also to disclosure by a party to third parties of the transcriptions of the hearing, or of the submissions or written pleadings presented in arbitration, the evidence produced, materials presented during the procedure and awards[7] [8].

The defenders of confidentiality in international arbitration often argue that the *privacy* of arbitral proceedings necessarily demands that the proceedings be also *confidential* (unless otherwise agreed by the parties). They contend that it would make little sense to treat hearings and other aspects of the arbitration as *private*, but then to permit the parties to disclose details of those hearings to third parties[9].

Critics of confidentiality reject this analysis, regarding the privacy of arbitral hearings as a comparatively strict concept, without necessarily entailing or requiring broader obligations of confidentiality.

7 Cfr. Born, *International Arbitration: Law and Practice* (2021), 231.

8 Whilst **confidentiality** refers to the obligation on the parties not to disclose to third parties any information or documents produced and used during the entire arbitral process, **privacy** refers to the fact that third parties are not allowed access to arbitral hearings, without the parties' prior consent, in other words, to the parties' right to conduct arbitral procedures that entirely exclude non-parties, without any intervention by unrelated third parties: cfr., for all, Pozo, 'Confidencialidad, privacidad y transparencia en el arbitraje internacional' (2021) 40 enero-junio *Revista de Derecho Privado* (Universidad Externado de Colombia), 465.

9 One commentator (Fortier, *The Occasional Unwarranted Assumption of Confidentiality* (1999) 15 Arb. Int'l, 131 (132) has described this reasoning as follows: '*the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night*'.

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II. Confidentiality under National Arbitration Legislation

The New York Convention[10], the European Convention[11] and the Inter-American Convention[12] are all silent on the confidentiality of international arbitral proceedings. In the absence of international rules, national legal systems have historically taken different approaches to the question of *whether international arbitrations are presumably confidential*, and also as to the *reach of any implied obligations of confidentiality*.

1. National Arbitration Legislation is generally silent on Confidentiality

The UNCITRAL Model Law is representative of most arbitration legislation and is *silent on the matter of the confidentiality* of international arbitration procedures.

Other national arbitration legislation is also *silent as regards confidentiality*. This is the case in particular of the U.S. *Federal Arbitration Act (1925) (FCA)*, the Swiss *Federal Act on Private International Law*, the English *Arbitration Act*, and Japan's *Arbitration Law No. 138,* of 1 August 2003[13], the *Arbitration Law of China[14]* and other contemporary legislation.

However, on adopting the Model Law, several jurisdictions included provisions on confidentiality in arbitral proceedings: these include New

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10 The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, approved by ratification by Resolution of the Assembly of the Republic 37/94, of 8 July, published in *Diário da República I-A*, 156, of 8 July.

11 The *European Convention on International Commercial Arbitration* (*European Convention on International Commercial Arbitration [*ECICA*]*), of 1961, which took effect on 7 January 1964, to which 16 States (Portugal not among them) are signatories.

12 The *Inter-American Convention on International Commercial Arbitration*, which was concluded in Panama City on 30 January 1975 and took effect on 16 June 1976, approved for accession by Resolution of the Assembly of the Republic 23/2002; and ratified by Decree of the President of the Republic 21/2002 (published in Diário da República I-A, 79, of 4 April). However, Portugal has not deposited the instrument of accession to this Convention.

13 In force since 2004, a full English translation can be accessed online at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02

14 In force since 1 September 1995; the full text can be accessed online at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html.

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Zealand[15], Spain[16] and Hong Kong[17], which modified their versions of the Model Law to include confidentiality rules (applicable unless the parties agree otherwise). This has been the case in Portugal, since the entry into force of the *Voluntary Arbitration Law* of 2011[18].

2. *Choice of Law Governing Confidentiality*

The obligations of confidentiality to which parties are subject in international arbitration are generally defined by the law governing their **arbitration agreement**. This is incontestable in cases where *the parties' arbitration agreement expressly provides for the matter of confidentiality*: in these cases, the validity and scope of the confidentiality obligations are almost certainly governed by the **law applicable to the arbitration agreement**. On the other hand, the **parties' implied confidentiality obligations** derive from the arbitration agreement, and so *it is the law governing this agreement that defines the associated and implied confidentiality obligations*.

In many cases, the law that will govern the arbitration agreement will be that of the seat of arbitration, which is particularly appropriate with regard to confidentiality issues relating to arbitral hearings and procedures[19].

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15 *New Zealand Arbitration Act*, Art. 14 ('an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings').

16 Article 24 para. 2, Law 60/2003, of 23 December, on Arbitration ('Arbitrators, parties and arbitration institutions, if any, are obliged to maintain the confidentiality of the information to which they have access in the course of arbitration').

17 *Hong Kong Arbitration Ordinance*, § 18 ('Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those arbitral proceedings').

18 Cfr. Art. 30 para. 5 of the Voluntary Arbitration Law (VAL), approved by Law 63/2011, of 14 December ('Arbitrators, parties and, if applicable, entities that promote voluntary arbitrations on an institutionalised basis, are subject to the duty of secrecy concerning all information they may obtain and documents of which they may learn through the arbitration proceedings, without prejudice to the parties' right to make public the procedural acts as necessary for defence of their interests and the duty to report or disclose acts in the proceedings to the relevant authorities, as required by law').

19 Cfr. Born, *International Arbitration: Law and Practice* (2021), 233.

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3. *Party Autonomy as regards Confidentiality*

Despite the silence of most arbitration legislation, legal systems almost uniformly recognise *party autonomy* as regards the confidentiality of international arbitration procedures. This follows from the broader procedural autonomy of the parties, which is recognised in the New York Convention and in more modern arbitration rules. However, an express or implied agreement that an arbitration is confidential is only binding on the parties to that agreement, and not on third parties.

Accordingly, in a way coherent with the general affirmation of autonomy made in the UNCITRAL Model Law, it becomes clear that *the parties' agreement with regard to confidentiality will have effect*[20]. Moreover, judicial rulings on Model Law (and other) jurisdictions likewise assert the *autonomy of the parties with regard to confidentiality in their arbitral proceedings*.

Likewise, rulings issued in jurisdictions that do not follow the Model Law have confirmed the *right of the parties to agree on the confidentiality of the arbitration procedure*.

In one of these decisions (*Esso Australia Resources Ltd v Plowman* [1995] HCA 19; 183 CLR 10; 69 ALJR 404; 128 ALR 391), the court used the following argument to reject arguments in favour of an *implied obligation of confidentiality*: 'If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement'.

Although the **clauses on confidentiality** contained in the arbitration agreement are only binding between the parties (and not in relation to third parties), even between the parties *there are circumstances where an agreement establishing confidentiality will not be enforceable*, for reasons of public policy (for example, when there are obligations to report securities).

As with other contractual provisions, express confidentiality clauses contained in arbitration agreements may take several **forms**. A representative example of a confidentiality clause related to arbitration is that presented by Gary Born[21]:

> 'The parties to any arbitration under this Article [X] shall keep the arbitration confidential and shall not disclose to any person, other than

20 V. *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, XII Y.B. UNCITRAL 75, 90 (1981) (confidentiality 'may be left to the agreement of the parties or the arbitration rules chosen by the parties').

21 Born, *International Arbitration: Law and Practice* (2021), 234.

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those necessary to the proceedings, the existence of the arbitration, any information submitted during the arbitration, any documents submitted in connection with it, any oral submissions or testimony, transcripts, or any award unless disclosure is required by law or is necessary for permissible court proceedings, such as proceedings to recognize or enforce an award'.

The **content** of the *confidentiality obligation* in each specific case must be '*evaluated having regard to the surrounding circumstances in which this confidentiality agreement was made and the basic principles and purpose of arbitration*'[22].

An additional question that it falls to the courts to resolve is *whether a specific confidentiality clause is intended to be **exhaustive**, thereby precluding the operation of the implied obligation*. According to Mark Darian-Smith and Varun Ghosh[23], the **general principles of the interpretation of contracts** apply here, and so *a detailed clause will likely be interpreted as encompassing everything*.

Although an express confidentiality clause constitutes the primary source and the scope of the respective obligation, the courts continue to be relevant in determining the content of those obligations.

What is more, confidentiality clauses may be sufficient to exclude facilitatory legislative provisions, but *the parties may not exclude mandatory legal requirements*. Indeed, it is unlikely that the parties' agreement could preclude a public interest objection[24].

III. Confidentiality under Institutional Arbitration Rules

In the same way as in **national arbitration laws**, the treatment of confidentiality in **institutional rules** is likewise diverse. The arbitration rules of many institutions contain relatively lengthy provisions on confidentiality.

For example, Article 39 para. 1 of the 2016 Rules of the Singapore International Arbitration Centre (SIAC) lays down that:

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22 Cf. *Associated Electric and Gas Insurance Services* [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [7], per Lord Hobhouse.

23 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (361).

24 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360.

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> Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.
> Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority… .

Other institutional rules, in particular those of the London Court of International Arbitration (LCIA)[25], the Stockholm Chamber of Commerce Arbitration (SCC)[26] and the Japan Commercial Arbitration Association (JCAA)[27], contain similar provisions, prohibiting the parties (or arbitrators) from disclosing materials from the arbitration to third parties.

The 2020 Arbitration Rules of the World Intellectual Property Organization (WIPO)[28] contain one of the most extensive sets of such confiden-

25 Cf. Art. 30 para. 1 of the 2020 *LCIA Rules*: 'The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider'.

26 Cf. Art. 3 of the 2017 *SCC Rules*: 'Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award'.

27 Cf. Rule 42 para. 2 of the 2019 *JCAA Rules*: 'The arbitrators, the JCAA (including its directors, officers, employees, and other staff), the Parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings and shall not express any views as to such facts, except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds'.

28 Can be accessed online at: https://www.wipo.int/amc/en/arbitration/rules/index.html.

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tiality rules: Articles 75 to 78 were tailored to *intellectual property disputes*, where confidentiality concerns are particularly acute.

Some sets of institutional rules contain very limited confidentiality clauses, applicable only to *specific aspects of the arbitration proceedings*.

The UNCITRAL Rules *exclude from the hearings anyone who is not a party, unless otherwise agreed*[29], and *prohibit the disclosure of awards, in the absence of agreement to the contrary*[30], although they leave other aspects of confidentiality unregulated.

In contrast, the 2021 version of the *ICC Arbitration Rules* takes a rather different approach, addressing the general topic of confidentiality and *authorising ICC arbitral tribunals to issue confidentiality orders tailored to the circumstances of specific cases*[31] [32]. Despite the limited scope of the confidentiality provisions in the ICC Rules, courts general conclude that *ICC arbitrations are implicitly confidential*.

The *IBA Rules on the Taking of Evidence* (2020 version) contain a limited confidentiality clause, requiring that the documents presented by a Party or non-Party in the arbitration to be 'kept secret by the Arbitral Tribunal and by the other Parties, and shall be used only in connection with the arbitration'[33].

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29 Cf. Art. 28(3): 'Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.'

30 Cf. Art. 34 para. 5: 'An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.'

31 Art. 22 para. 3 of the *ICC Arbitration Rules* (2010 version) lays down that: 'Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.'

32 If the parties fail to reach agreement on the confidentiality of the arbitration, a party may request the arbitral tribunal to issue a **procedural order** to protect information it deems confidential. A party may have legitimate and comprehensible reasons for keeping information disclosed during an arbitration out of third party hands, especially if that information relates to commercial secrets. Article 22 para. 3 of the *ICC Arbitration Rules* confers on the arbitral tribunal the freedom to order measures to protect commercial secrets and other confidential information. The arbitral tribunal may seek, as far as possible, to obtain unanimous agreement.

33 Cfr. Art. 3 para. 13: 'Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confi-

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In contrast, the more recent *Prague Rules on the Efficient Conduct of Proceedings in International Arbitration* contain a comparatively broader confidentiality clause[34].

In addition, in certain specialised market sectors (such as in shipping and sport), the institutional rules provide for the publication of arbitral awards, unless the parties have agreed otherwise[35] [36]. Such publication is intended to confer on awards the authority of a precedent, serving as guidance for future disputes.

IV. Implied Confidentiality Obligations

In many cases, the parties do not include **express confidentiality clauses** in their arbitration agreement. In these cases, national courts have reached different conclusions, as regards the confidentiality (or privacy) of international commercial arbitrations.

Particularly in recent years, most courts, especially in the main centres of arbitration, have recognised relatively far-reaching *implied obligations of confidentiality* in the mere existence of an arbitration agreement.

Like *express confidentiality agreements*, *implied confidentiality obligations*are binding only on the parties to the arbitration agreement.

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dential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.'

34 Cfr. Art. 4 para. 8: 'Any document submitted or produced by a party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other party, and may only be used in connection with that arbitration, save where and to the extent that disclosure may be required of a party by the applicable law.'

35 Cfr. para. 3 Section I *SMA* (*Society of Maritime Arbitrators*) *Arbitration Rules*: 'Unless stipulated in advance to the contrary, the parties, by consenting to these Rules, agree that the Award issued may be published by the Society of Maritime Arbitrators, Inc. and/or its correspondents.'

36 Cfr. Rule 59 CAS (*Court of Arbitration for Sport*) Rules: 'The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.'

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The **English courts** have repeatedly found that *arbitration agreements impose implied confidentiality obligations on the parties*[37].

For its part, it is understood that *the privacy of arbitral proceedings entails the confidentiality of that which is disclosed in that procedure to third parties*, as an implied obligation of the arbitration agreement.

Subsequent English rulings have asserted this *implied obligation of confidentiality*, justifying it as *a general principle implied by law in all arbitration agreements*, although they set out standards concerning the nature of confidentiality obligations for specific categories of materials. In those rulings, the English courts laid stress on the confidentiality of non-public materials presented in arbitral proceedings (such as summaries, applications) or produced in the procedure (such as documents presented in disclosure), whilst at the same time permitting freer disclosure of arbitral awards in order to protect the legal rights of a party[38].

The **French courts** have also ruled that *an implied confidentiality obligation exists in relation to arbitral procedures and awards*.

A French court has ruled that *the filing, by a party, of an action for annulment of an award rendered in London, for the purposes of disclosure of the decision, was a breach of the parties' implied duties of confidentiality*. In this case the court noted that it is 'inherent in the very nature of arbitral proceedings that they guarantee the highest degree of discretion in the resolution of private disputes, as the two parties agreed'[39]. This decision appears not even to permit the limited exceptions recognised by English law.

Implied confidentiality obligations are generally subject to various **exceptions** under national legislation. These include: *i)* exceptions for the use of material connected with the arbitration *in order to enforce or protect a*

37 In *Hassneh Insurance Co of Israel v. Stuart J Mew*, [1993], *Insurance Co v. Lloyd's Syndicate* [1995] and *Ali Shipping Corporation v. Shipyard Trogir* [1998] the courts reasserted the existence of an **implied confidentiality obligation**, but recognised that it was subject to **exceptions**. In *Hassneh Insurance Co. of Israel v. Stuart J Mew* [1993], the English High Court ruled that *the award is presumed to be confidential*, but is also 'potentially a public document for the purposes of oversight by the courts or enforcement therein' and may therefore be disclosed, if reasonably necessary to protect the legal rights of a party; the statements, pleadings and evidence are presumed confidential.

38 Cfr. the awards rendered in *Hassneh Insurance Co of Israel v. Stuart J Mew*, [1993], *Insurance Co v. Lloyd' s Syndicate* [1995] and *Ali Shipping Corporation v. Shipyard Trogir* [1998].

39 Cf. Paris *Cour d'Appel*, 18 February 1986, *Aïta v. Ojjeh* (in *Revue de l'Arbitrage*, 1986-4, 583 – 584).

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legal right (for instance, to seek annulment, confirmation or recognition of an arbitral award); *ii)* exceptions for *materials that have already entered the public domain*; and also *iii)* exceptions *in order to comply with disclosure obligations imposed by mandatory laws* (for example, reporting requirements in relation to securities).

The least controversial **exception** to the obligation of confidentiality is **consent**: if the parties to the original arbitration consent to disclosure, it is of course permitted.

In addition, courts have ruled that *if the parties to the previous arbitration and in the subsequent arbitration are the same*, the use of materials from the previous arbitration does not conflict with the obligation of confidentiality[40]. In those cases, confidentiality is maintained because the parties are the same and the proceedings are private. However, this exception does not apply to subsequent proceedings involving a company controlled by a party or that controls a party, because these are distinct legal entities[41].

There are **three important categories of exceptions** that apply to the use of materials in subsequent proceedings: *i)* if the disclosure is made *in accordance with a court order or mandatory legal proceeding*, it is permitted; *ii)* if the use of the materials *is reasonable necessary for the exercise of legal rights*[42], then it will not collide with the confidentiality obligation; *iii)* its use will be permitted *if in the public interest or the interest of justice*[43] [44] [45].

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40 Cf. *Associated Electric and Gas Insurance Services* [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [8], [11], per Lord Hobhouse.

41 Cfr. *Ali Shipping Corp [1999] 1 W.L.R. 314* at 328–329, per Potter LJ.

42 Although, at first sight, this exception appears rather broad and flexible, the courts have adopted a narrow interpretation of the 'reasonably necessary' requirement. The materials must be 'unavoidably necessary for protection of the rights of the parties', and not 'merely helpful', in order to comply with the requirement: cfr. *Insurance Co v Lloyd's Syndicate* [1994] C.L.C. 1303 (1307), per Colman J.

43 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (362).

44 The 'interest of justice' exception is intended to ensure that parties to the arbitration cannot 'seek to use the cloak of confidentiality with a view to misleading or potentially misleading foreign courts' (cf. *Emmott [2008] EWCA Civ 184; [2008] Bus. L.R. 1361 at [28], per Lawrence Collins LJ*). In such circumstances, disclosure in the subsequent proceedings cures the damage. Whilst there are authorities that suggest that this exception is limited to witnesses that provide inconsistent evidence in different proceedings, there is no reason in principle for this exception not to apply to situations where confidentiality is used for improper ends (cfr., to this effect, Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confi-

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In contrast, rulings in certain jurisdictions have rejected invocation of *implied confidentiality obligations*. For example, in a widely discussed judgment of 1995[46], an Australian court ruled that arbitration proceedings in Australia were 'private', but that this did not mean they were 'confidential'. The court also ruled that, if the parties wished their arbitrations to be confidential, they were free to agree on *express confidentiality obligations* (and that such agreement would in principle be respected). However, subsequent Australian legislation overruled this decision, establishing a confidentiality obligation in international arbitrations seated in Australia (unless otherwise agreed)[47].

In the **United States of America**, some lower courts have also been reluctant to accept arguments that *arbitral proceedings are implicitly confidential*, although they consider that express confidentiality agreements are binding and effective. For example, a US court rejected the objections of a party concerning the submission of the pleadings, documentary evidence and transcriptions of an ICC arbitration disclosed on the request

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dentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (363).

45 The *public interest* exception is broader, but less clearly defined. Although the core element of the exception refers to matters of public importance that entail the exercise of public power or the activities of regulatory authorities, it was extended to situations where disclosure is necessary for the court or subsequent court to reach an adequate understanding of the issue (cfr. *Emmott [2008] EWCA Civ 184; [2008] Bus. L.R. 1361 at [130], 1393 at [132], per Thomas LJ*). Although the public interest exception is potentially very broad, it will probably be difficult to establish in practice, except in cases that involve the government, statutory corporations or matters of truly significant public interest: (cfr., to this effect, Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (363)).

46 This is the Judgment of the Australian High Court in *Esso Australia Res. Ltd v. Plowman*, [1995] HCA 19, ¶35, which refused to recognise the existence of an implied confidentiality obligation, on the grounds that *confidentiality was not an 'essential attribute' of arbitrations seated in Australia*.

47 Since this ruling in the *Esso Australia* case, legislation has been adopted in Australian on confidentiality, both in domestic arbitration (for instance, *Australian Civil Law and Justice* (*Omnibus Amendments*) *Act*, 2015) and in international arbitration (for example, *2011 Amendment to the Australian International Arbitration Act*). In 2015, the Australian International Arbitration Act was once again amended, to establish that the previous confidentiality provisions in the Act would be applied by 'default', applying automatically to international arbitrations seated in Australia, unless the parties affirmatively agree to exclude them.

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of the other party in litigation in the US[48]. Other US court rulings have rejected claims of implied confidentiality obligations in connection with arbitration proceedings, normally in cases where third parties sought the disclosure of materials connected with arbitration[49].

In contrast, more recent decisions by US courts have reached the opposite conclusion, recognising the *presumably confidential character of arbitration proceedings*, even in the absence of express confidentiality clauses[50].

As with express confidentiality agreements, *implied confidentiality obligationsare binding only on the parties* to the arbitration agreement.

V. Scope and Limits of Confidentiality Obligations

Both **express** and **implied** confidentiality obligations are *binding on the parties to arbitration agreements*, but generally *not on third parties*.

It is presumed that the Parties subject to confidentiality obligations are not permitted to disclose materials related to the arbitration to third parties or the public, unless an exception to the confidentiality obligation applies (for example, if disclosure is necessary to enforce or protect a legal right).

However, confidentiality obligations are not, in principle, binding on third parties. As a consequence, third parties not involved in the arbitration agreement may seek disclosure of materials related to arbitration and, normally, they will not be prevented from obtaining access to those

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48 Cf. *United States District Court for the District of Delaware · Civ. A. No. 87-190-JLL*, 118 F.R.D., 7 January 1988 346, in *United States v. Panhandle Eastern Corp*., 118 F.R.D. 346 (1988).

49 Cf., for example, *Contship ContainerLines, Ltd v. PPG Indus., Inc*., 2003 WL 1948807 (S.D.N.Y.) (granting the requested disclosure for document used in the arbitration based in London; recognising the confidentiality existing under English law, but concluding that disclosure would be permitted under English law); *Caringal v. Karteria Shipping, Ltd*, 2001 WL 874705 (E.D. La.).

50 Cf. *Del. Coal. for Open Gov't, Inc. v. Strine - 733 F.3d 510 (3d Cir. 2013)*. In this case, the court ruled that the confidentiality of arbitration proceedings under the aegis of the government of the State of Delaware violated the right of public access under the First Amendment because both the venue and the proceedings of arbitrations under the aegis of the government of Delaware were historically open to the press and the general public, the benefits of access were significant, as it would ensure accountability and permit the public to retain its faith in Delaware's judicial system, and the drawbacks of openness were relatively small.

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materials by confidentiality obligations existing between the parties to arbitration agreements.

Careful review of court rulings that express reluctance as to the existence of implied confidentiality obligations shows that nearly all these decisions involve disclosure requests from third parties, not bound by the arbitration agreement; the comments set out in these decisions on the absence of implied confidentiality obligations are therefore typically *obiter dicta*, and not essential to the courts' decisions. There may be circumstances where the applicable rules on disclosure and immunity protect materials related to the arbitration from disclosure to third parties, but in order to establish that privilege, this must be demonstrated separately (which is often difficult)[51].

VI. Secrecy of the Arbitrators' Deliberations

Under the laws of most countries and institutional rules, the **deliberations** of the arbitral tribunal are treated as *confidential*[52].

The same confidentiality obligations are imposed by **ethical standards and professional guidelines** for international arbitrators. Unlike most other types of confidentiality obligations in international arbitration, *the deliberations of the arbitrators are generally secret*, and third parties are barred from obtaining disclosure of these materials in keeping with the disclosure rules generally applicable[53].

Even in the absence of express provisions in institutional rules (and in national legislation), *the confidentiality of the arbitral tribunal's deliberations is an implied obligation, imposed as much on arbitrators as on the other participants in the arbitration proceedings*[54].

The confidentiality of arbitral deliberations is fundamental to ensure the jurisdictional character and integrity of the arbitration proceedings. This confidentiality is intended to ensure that each arbitrator may exercise

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51 Cfr. Born, *International Arbitration: Law and Practice* (2021), 239.

52 See, for example, Art. 1479, French Civil Code; *Cour d'Appel de Paris*, 9 October 2008, in *SAS Merial v. Klocke*, published in *Revue de l'Arbitrage*, Volume 2009, 352; *English Court of Appeal* in *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 137. See also Art. 30 para. 2 LCIA (*London Court of International Arbitration*) Rules 2020; Art. 44 para. 2 *Swiss Rules of International Arbitration* (*Swiss Rules*), 2012 version.

53 Cfr. Born, *International Arbitration: Law and Practice* (2021), 239.

54 Cfr. Born, *International Commercial Arbitration*, (2021), 3037.

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his or her independent judgment in a collegial setting. free from any external influence[55].

The confidentiality of the deliberations of the arbitral tribunal has features that differ from the confidentiality of the arbitration proceedings. Whilst the latter confidentiality obligations are addressed principally to the parties to the arbitration and normally have limited consequences for those parties, *the confidentiality of the deliberations of the arbitral tribunal is addressed principally tothe arbitrators*, but also has consequences for both parties to the arbitration and non-parties: not only are the arbitrators prohibited from disclosing their deliberations to persons outside the tribunal but both parties and non-parties to the arbitration are prevented from obtaining access to the deliberations. Accordingly, *neither parties nor non-parties may obtain the disclosure of information on the tribunal's deliberations*, including in relation to proceedings to have the award set aside or recognised. 'The deliberations of the arbitrators are sacrosanct'[56].

Although this question is rarely expressly contemplated in the applicable institutional rules or legislation, it is understood that the confidentiality of the arbitrators' deliberations extends to *drafts of the award, internal communications concerning the resolution of the case* or *comments on draft awards* and *the content of oral deliberations*[57].

VII. Privacy and Confidentiality of Arbitration Hearings

Most institutional arbitration rules also expressly provide for the *presumed privacy of arbitration hearings*, in international commercial arbitrations. The 2013 UNCITRAL Rules are representative of this general tendency, establishing that '[hearings] shall be held in camera unless the parties agree otherwise'[58].

These provisions generally require the exclusion of third parties from arbitral hearings (in other words, for the 'privacy' of hearings), but do not expressly provide for the confidentiality of hearings.

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55 Cfr. Born, *International Commercial Arbitration*, *ibidem*.
56 Cfr. Born, *International Commercial Arbitration*, *ibidem*.
57 Cfr. Born, *International Commercial Arbitration*, p. 3038.
58 Cfr. Art. 28 para. 3: 'Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.'

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In contrast, the laws of most countries are *silent on the presence of third parties at arbitral hearings*.

For example, the UNCITRAL Model Law, the Swiss *Federal Act on Private International Law* and the US *Federal Arbitration Act (1925)* (FAA) *make no provision on the confidentiality of arbitral hearings*. On the other hand, some national arbitration laws provide for the confidentiality of judicial proceedings related to arbitration proceedings.

In practice, it is unknown for third parties, let alone the public or the press, to be present at hearings in international commercial arbitrations. This stands in contrast to the treatment of hearings in some investor-State and State-State settings, where the hearings may be open to the public and, in some cases, even broadcast live to the public, online.

C. Confidentiality in the Portuguese Voluntary Arbitration Law

In Portugal, the Voluntary Arbitration Law (VAL), of 14 December 2011, enshrines (Art. 30 para. 5) the existence of a ***duty of secrecy*** 'concerning all information they obtain and documents of which they learn in the course of the arbitration procedure', which **applies to** *the arbitrators*, *the parties* and *organisations that promote arbitration on an institutional basis*, 'without prejudice to the right of the parties to make public the procedural acts necessary for the defence of their interests and of the duty to communicate or disclose procedural acts to the competent authorities, as may be required by law'.

In terms of those **subject to this duty**, António Menezes Cordeiro[59] advocates a broad interpretation of this rule, imposing the duty of secrecy on 'all agents who have contact with an arbitral procedure, including legal counsel and their auxiliary staff, the secretary, experts, translators, sound technicians, supporting personnel and the witnesses themselves', on pain of allowing chinks in the protective armour through which secrecy could be breached[60].

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59 Cordeiro, *Tratado da Arbitragem* (2016), 307.

60 Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 388, expresses surprise at the fact that the VAL restricts the subjective scope of the duty of secrecy to the arbitrators, parties and organisation promoting voluntary arbitrations on an institutionalised basis 'and fails, without apparent justification, to include the administrative personnel assisting the tribunal and some of the other characters in the arbitral story, such as experts (not to mention witnesses), although these

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As regards the **object** of this duty of secrecy, although the letter of the law circumscribes it to the *information* and *documents* of which knowledge is acquired in the course of the arbitration procedure, António Menezes Cordeiro[61] likewise maintains that it should be broadened so as to include *the actual existence of proceedings*, the *basic facts concerning it*, *all evidence*, any *procedural issues* raised during proceedings and the *final award*, in order to prevent the possibility of disclosure of 'incidental' matters from which knowledge of essential matters may be gleaned.

The provision in question introduces two important **exceptions** to the duty of secrecy: i) *procedural acts necessary for defence of the parties' rights*; ii) *communication or disclosure to the competent authorities of procedural acts, when the law requires they be reported.*

In relation to the **first exception**, it does not extent to arbitrators and arbitration institutions: only the **parties**, on the terms described, enjoy the possibility of not complying with the duty of confidentiality. Arbitrators and arbitration institutions must always comply with the duty of confidentiality[62 63].

Even so, António Menezes Cordeiro criticises the formulation used in the legal text, because the wording of this exception to the duty of secrecy, permitting the parties *to make public the procedural acts necessary for defence of their rights*, leaves it to the discretion of the parties to define what they understand as 'their rights' and to establish how they see fit to defend them. This author therefore considers that a **narrow interpretation** is needed of the two **exceptions** established in the legal text to the duty of confidentiality, because 'secrecy must be taken seriously and can only be lifted on the precise terms of the law'[64 65].

The **second exception** to the duty of secrecy envisaged in Article 30, para. 5 VAL is to allow for legal obligations to report or disclose procedural acts in connection with the fight against corruption or money laundering.

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categories of persons are encompassed by the laws concerning the protection of secrets'.

61 *Ibidem*.

62 Cfr., expressly to this effect, Barrocas, *Lei da Arbitragem Comentada* (2013), 123.

63 Cfr., also to the effect that 'non-parties may not avail themselves of this exception', Cordeiro *Tratado da Arbitragem* (2016), 307.

64 Cordeiro *Tratado da Arbitragem* (2016), 307-308.

65 This **narrow interpretation** of the first of the exceptions to the duty of confidentiality established in the 2nd part of para. 5 of Art. 30 VAL, advocated by António Menezes Cordeiro, draws applause from Monteiro et al., *Manual de Arbitragem* (2019), 295, fn. 1301.

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By operation of the provisions of para. 6 of Article 30 VAL, **publication of the award** and other rulings of the arbitral tribunal does not breach the duty of confidentiality enshrined in para. 5, provided details identifying the parties are redacted.

Even so, either of the parties may object to such publication, without needing to state any grounds.

The purpose of publication of arbitral awards is academic: it is to allow them to be examined and commented on by scholars, in order to form and build up a body of 'arbitral case law' that is as coherent as possible[66].

Consequences of breach of the duty of secrecy

The VAL does not regulate the consequences of breach of the duty of secrecy, meaning that the solution to this issue must be sought in the general law[67].

A consensus view exists that breach of the duty of confidentiality results in an *obligation to pay compensation* under the general terms of the law, both by the arbitrators to the parties and by the latter to another or other parties[68] [69] [70].

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66 Mendes, *Lei da Arbitragem Voluntária Anotada* (2019), 115.

67 Cfr., to this effect, Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 389.

68 Barrocas, *Lei da Arbitragem Comentada* (2013), 123.

69 Cfr., to the effect that 'breach of the duty of secrecy imposed on the various persons involved in arbitrations by Art. 30 para. 5 VAL is the source not only of tortious civil liability (which constitutes a more expeditious means of penalising the breach of that duty than that which would result from its being provided for in the arbitration agreement) but also of criminal liability for some of those persons, by operation of Articles 195, 196, 383 and 386 para. 1, c), of the Penal Code', Caramelo, 'Da Condução do Processo Arbitral / Comentário aos arts. 30.º a 38.º da Lei da Arbitragem Voluntária' (2013) Ano 73-II/III *Revista da Ordem dos Advogados*, 669.

70 Cfr., also to the effect that *unauthorised disclosure of procedural acts and information/documents relating to the arbitration may give rise to compensation for damages suffered as a result of disclosure of confidential information/documents*, Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 389.

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An Arbitrator's Perspective: Confidentiality – Privacy – Security in the Eye of the Arbitrators or the Story of the Arbitrator who Became a Bee

Marc Henry

My subject is: how shall the questions of confidentiality, privacy and security be addressed by the arbitrator in an online arbitration? And do these imperatives represent new challenges for the arbitrators when they are applied to online arbitration?

An alternative title for this article might be "The Bee and the Arbitrator".

To start with a preliminary observation: in this article, the notion of ODR and therefore of Online Arbitration will have the meaning given by UNCITRAL in its 2017 Technical Notes on Online Dispute Resolution. In section V of the Notes, online dispute resolution is defined as: 'a mechanism for resolving disputes through the use of electronic communications and other information and communication technology'. So it turns out that we have been practising online arbitration for a long time: indeed, it is sufficient that electronic means of communication are used in the arbitration procedure for the procedure to be considered an ODR. Email is an electronic means of communication. If the participants in an arbitral procedure communicate by email, the arbitration will therefore fall within the concept of ODR. This means that arbitration procedures have already been hybrid for a long time, using both online and offline dispute resolution processes.

While the use of the Internet in arbitration is now common, it should be remembered that just 20 years ago, as reported by one author[1], ICCA President (Fari Nariman), at the ICCA annual conference in Washington on November 10, 2000, expressed great scepticism about the importance the impersonal world of the Internet might attain in the intensely personal

1 Alford, 'The Virtual World and the Arbitration World' (2001) 18-4 *Journal of International Arbitration*, 449.

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world of international arbitration. What is more, in its Report on Information Technology in International Arbitration of 2017, the ICC states that when the task force issued its 2004 report, some anecdotes from arbitration practitioners suggested that there were arbitrators who refused to communicate by email or at least were reluctant to do so (page 21 of the report). Today, communication via email and other electronic means has become standard practice for nearly all parties and arbitrators (*ibid*).

So, Fari Nariman was wrong. After 9-11, and the pandemic, the Internet has indeed revolutionised arbitration. But to what extent? If emails have become the normal means of communication in arbitration proceedings, we can observe that videoconferencing has only recently appeared in arbitrations[2]. However, this technology had already existed for a long time. Skype or Facetime had long been used to organize virtual meetings. Back in 2017, as one author notes, the ICC observed that 'many widely available information Technology (IT) solutions are not used to save time and costs as effectively as they could be. For instance, parties and tribunals were reluctant to use videoconferencing even for minor witnesses, when such solution could easily cut time and costs' [3].

Similarly, ODRs and especially online arbitration seemed to be reserved for the resolution of small commercial and consumer disputes in e-commerce[4]. We have seen Amazon or Ebay include ODRs in their general terms of sale. However, the resolution of major international disputes has remained resistant to the use of video. In 2001, an author observed that: 'In the international context, it is quite common for hearings to last for several days. It seems unlikely that parties and arbitrators would happily discourse in private examinations and informal caucus sessions that are critical to such hearings'[5].

Finally, the use of information technology in arbitration has occurred where it was not expected: in international arbitration. But a catalyst was needed for this: this catalyst happened to be COVID and the impossibility of in-person hearings. The first reflex of arbitration actors was to postpone

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2 On the topic, see ICC, *ICC Commission Report, Information Technology in International Arbitration*, 2017.

3 Goh, 'Digital Readiness Index for Arbitration Institutions: Challenges and Implications for Dispute Resolution under the Belt and Road Initiative' (2021) 38-2 *Journal of International Arbitration*, 253; ICC, *ICC Commission Report, Information Technology in International Arbitration*, 2017.

4 Alford, 'The Virtual World and the Arbitration World' (2001) 18-4 *Journal of International Arbitration*, 449.

5 Ibid.

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the hearings. Then, in a second phase, faced with the unforeseeability of when normality might return, the actors had to resolve to organise virtual hearings.

Paradoxically, therefore, ODR has not been developed in judicial litigation, where it would seem to be very appropriate, given that judges have little or almost no more time to listen to the pleadings of lawyers and that if pleadings are eliminated, ODR becomes the most effective means of settling disputes. Instead, ODR has expanded into an area where hearings still play a major role, namely international commercial arbitration.

In short, what has really changed in recent times in online arbitrations is, in addition to the electronic exchange of documents, the use of virtual hearings.

Therefore, to assess the existence of new challenges in the use of Online Arbitrations today, and so to answer the question posed in the conference, it will be necessary to consider whether the increasingly frequent use of virtual hearings creates new challenges with regard to the imperatives of confidentiality, privacy and security for arbitrators.

One question immediately presents itself: why should Online Arbitrations create challenges *now*, and maybe even *new* challenges for arbitrators, in terms of confidentiality, privacy and security? The answer can be found in two words: "data" and "online".

As soon as exchanges and hearings are no longer carried out by physical means (mail, courtroom) but rather electronically (email, virtual hearings), the data forming the subject of the exchanges and hearings moves out of the physical domain and into cyberspace. This line of development is unsurprising. The fields in which human conflict is played out have evolved as human technology has progressed. To land, we have added the sea, the air, outer space and now a fifth field of conflict: cyberspace. In fact, rather than space, the idea of a universe might better evoke internet and the volume of digital data created. The volume generated annually has increased twenty-fold in ten years.

In 2018, the annual volume was 33 zettabytes of data: this represents the storage capacity of 660 billion Blue Rays or ... 33 million human brains. By 2020 we were talking about 50 zettabytes. And a zettabyte is a trillion bytes and a trillion bytes is a thousand billion bytes: a 1 followed by 21 zeros. This is what the annual volume of digital data creation represents.

The scale of the universe of digital data therefore rivals the scale of astrophysics, and even exceeds it. Speaking about perception of scales, Darwin wrote that: ‘The mind cannot possibly grasp the full meaning of the term of one hundred million years’. So, one can imagine how difficult it can be to conceive of scales measured in trillions!

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The difficulty of grasping the universe of digital data explains the difficulty that we all have, including arbitrators, course, in apprehending this universe, and so in perceiving and responding to the growing threats in this new dimension of human activity. The response to cyber threats is made all the more difficult by the absence of frontiers in cyberspace. It has been designed to free itself from borders, to do away with territories. Attempts to combat hackers can therefore look like trying to catch a chicken in open country.

We fail to realise that when we send an email, or when we hold a virtual hearing, it is like sending a post card. The content of the email or the video, like the content of a postcard, can be seen by third parties: Post Office staff in the case of postcards, the IT administrator of the company or the internet service provider in the case of emails or videos. The idea of a postcard is a good way for arbitrators visualise and be aware of the risks entailed by sending data into cyberspace.

Not only is email a postcard, but its use is much riskier because, unlike a card, it is so easy to send an email or a file to the wrong recipient[6].

Despite these risks, many arbitrators still do not fully realize what data is exposed to in an arbitration.

By feeding cyberspace with the data forming the subject matter of an arbitration, the arbitration players expose themselves to a much greater risk of third parties becoming aware of, capturing or even misappropriating this data.

This threat is not imaginary. There is the example of the attack against the website of the Permanent Court of Arbitration of the Hague at the time of the *China v. Philippines* arbitration in 2015 using the water hole technique. Just recently, in March/April 2021, allegations of a cyber-attack on a Brazilian multi-billion-dollar arbitration called into question the award rendered by the arbitral tribunal.

But then, in this context, is the arbitrator condemned, like Pessoa, to make unrest a constant feature of his activity? Certainly not.

Why? Precisely because confidentiality, privacy and security are instruments designed to avoid this kind of stress.

To illustrate my reasoning – and having just evoked Pessoa - I feel obliged to use a metaphor. The activity of the arbitrator, the space he creates when he joins an arbitral tribunal, is often described as a “black box”. For my part, to draw this time on an animal metaphor, I will compare

6 See ICC, *ICC Commission Report, Information Technology in International Arbitration*, 2017, 15.

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this space, and more generally the arbitration institution, to a beehive, in which the arbitrators are both the worker bees and the soldier bees. In these arbitral hives, the pollen will represent the digital data brought into the arbitrations, the honey representing the ultimate work of the arbitrator bee, i.e. the awards!

Like a bee in a hive, the arbitrator takes on two roles: those of both worker and soldier.

Confidentiality and privacy pertain to the role of worker arbitrator, while security pertains to the role of soldier arbitrator. These two aspects of the arbitrator's mission will be covered below.

A. The Contribution of Worker Arbitrators to Confidentiality and Privacy in the Arbitral Hives

Worker bees have the dual task of storing pollen and processing it to make honey. As such, they are both receivers and processors of pollen.

Similarly, in their arbitral hives, the worker arbitrators are both receivers and processors of a high-density pollen: the digital data. These digital data is the indispensable material for creating the finished product, the award, just as pollen is the necessary raw material for confecting honey.

The purpose of confidentiality is to keep the data at the disposal of the persons authorised to have access to the data. Confidentiality therefore relates to the data storage activity of the worker arbitrators in their arbitral hives. The purpose of privacy is to ensure fair and authorised processing of personal data. Privacy therefore relates to the data processing activity of the worker arbitrators in their arbitral hives.

I will study these two imperatives in the worker arbitrators activity successively.

I. Confidentiality in the Arbitrator's Data Storage Activity

What does confidentiality mean? Confidentiality is preventing unauthorised access to digital data to non-public information that two or more parties have agreed to restrict. Confidential is an imposed label that signifies access control. In other words, confidentiality applies to data and serves to define who can have access to the data and how the data may be used by those who have access.

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When arbitration was entirely organised in physical form, when letters were exchanged by post, when the terms of reference were signed during a meeting to launch the procedure, when hearings were held in person, it was obvious that arbitration was understood to be a strictly confidential form of justice, unlike state justice.

The title of the conference reflects this mindset. The requirement of confidentiality in arbitration is asserted as a given. However, this confidentiality, or at least its absolute character, has been questioned for some years.

It seems that this challenge dates from the advent of the internet. My analysis is that the use of the internet and the digitisation of exchanges and data that it brings, imbues its users with an unconscious propensity for transparency. This may be due to the feeling that in cyberspace, it is futile to believe that data can remain confidential and that the best thing would be to abandon any idea of confidentiality or at least to reduce its scope as soon as the arbitration takes place in cyberspace.

- Since confidentiality is no longer a constant in arbitration (in French law, it is *de jure* in domestic arbitration according to article 1464 of the Code of Civil Procedure, but it is no longer automatic in international arbitration, even if French case law continues to consider it as a principle applicable in this field), it is necessary to certify whether it is required. This is particularly true in the case of online arbitration. Several scenarios are possible:
- The parties have provided in the arbitration agreement for a seat of arbitration (which is assumed to be virtual): this seat makes it possible to determine a *lex arbitri* which may or may not be the basis for the confidentiality requirement,
- The parties have established the confidentiality requirement in the arbitration agreement, or an obligation to this effect is provided for in the arbitration rules applicable in the event of recourse to institutional arbitration (we may recall that the ICC Arbitration Rules no longer institute a confidentiality principle): in the event of online arbitration, the arbitrators will of course have to observe and ensure observance of this requirement,
- The parties have not provided for an arbitration seat in the arbitration agreement and a confidentiality requirement is not included in either the arbitration agreement or the arbitration rules: in this event, if the parties disagree, the question will arise for the arbitrator as to whether such a requirement must be respected: in the absence of a designated seat of arbitration, the arbitrator will not be able to find an answer

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in the *lex arbitri* that could be designated in the light of such seat; moreover, the use of online arbitration may be interpreted as the parties' will to exclude the application of any *lex arbitri* to the arbitration. How should we then answer the question of whether or not there is a confidentiality requirement in an online arbitration? It seems to me that, notwithstanding the reticence expressed by some authors (but not by companies) on the appropriateness of a confidentiality principle in international arbitration, the reason why companies resort to arbitration continues to be the confidentiality it offers and that this requirement therefore constitutes a transnational arbitration principle that the arbitrator should apply and enforce, even in an online arbitration.

We will therefore assume that the principle of confidentiality is maintained. The worker arbitrator will have to make sure that:

- this principle is well noted by the parties,
- that the necessary steps are taken to ensure that the data is stored in such a way that this confidentiality is guaranteed, and
- that only authorised persons can have access to this data.

The arbitrator should insist that counsel and the parties remind all persons with access to the digital data that the data is strictly confidential and should not be transferred without the express consent of the person from whom it originated. The arbitrator must also ensure that his or her assistant and any secretary to the arbitral tribunal scrupulously respects the confidentiality of the data and does not disseminate it to any unauthorized person. If the arbitrator is a lawyer in a law firm, he or she shall ensure that access to the data is not freely available in the law firm.

To this end, lawyers acting for parties must include a confidentiality clause in the arbitration clause and arbitrators must include one in the Terms of Reference. And this needs to be done even if the applicable arbitration rules or the applicable *lex arbitri* provide for such confidentiality.

In addition to the commitments by the actors in the arbitration procedure that the arbitrator should obtain, there is a technical means to facilitate compliance with confidentiality. This is the use of digital Platforms. As noted by practicians in a recent report published in July 2020 by a working group on LegalTech Adoption in International Arbitration, these Platforms can enable administrators to control access to specific folders/data and generate alert/audit trails if data is shared with anyone lacking the necessary access permissions. Platforms can also enable administrators to grant partial access permissions to data so that certain individuals or

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groups can view particular documents but not edit, send or print them[7]. Encryption methods can also enhance confidentiality since they protect against information leakage.

Finally, because virtual hearings dramatically expanded during the COVID outbreak, many practitioners now urge arbitrators to invite the arbitral actors to conclude Protocols defining the terms for these remote hearings[8], i.e.:

- The technology used must allow all participants to feel secure about the confidentiality of the information disclosed in the remote hearing,
- Access to the virtual hearing rooms and breakout rooms to be strictly limited to their allocated participants,
- Full names and roles of all participants in a remote hearing, including counsel, parties, witnesses, interpreters, tribunal secretaries and computer technicians, as well as their allocated virtual hearing and breakout rooms, to be circulated in advance and strictly adhered to,
- Physical rooms occupied by participants in remote proceedings, either in their homes, offices, or in special hearing venues, to be separate from non-participants in the remote proceedings, soundproofed where possible, and offering sufficient visibility to eliminate the possibility of undisclosed non-participating individuals, and/or any video recording equipment that has not been agreed to, being present in the room.

That said, from my personal perspective as an arbitrator, I must confess that I have only once recommended the use of such Protocol, in view of the sensitivity of the subject matter.

The protection of confidentiality in online arbitrations is all the more essential if we consider that digitisation of arbitration data leads the institutions supervising them to wish to process this data, in particular the awards, in order to make it public. The best example is the ICC which, as a matter of principle and save as otherwise expressly requested by the parties, has been publishing on its website, since 2016: the names of the arbitrators, their nationality, their role within the tribunals, details of their appointment and whether the arbitration has been closed or concluded. In addition, awards and/or orders, as well as dissenting opinions issued since 1 January 2019, have been subject to publication under certain conditions.

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7 Working Group on LegalTech Adoption in International Arbitration, *Protocol for Online Case Management in International Arbitration*, July 2020.

8 See for instance, CIArb, *Guidance Note on Remote Dispute Resolution Proceedings*, 2020, 5.

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It is therefore clear that confidentiality is a principle whose scope is being reduced, surprisingly on the initiative of certain major players in arbitration. I believe that a growing trend in this direction would be dangerous for arbitration, for several reasons.

- Firstly, arbitration is not state justice. The imperatives of transparency and publication of case law imposed on state justice are not intended, in principle, to be transposed to arbitration.
- Secondly, publication is not what arbitration users, i.e. companies, are looking for. They want confidentiality, and it is surprising to note that some actors who derive their livelihood from arbitration seem to ignore this fundamental wish of the users. Dogmatism is not a positive value in arbitration.

In view of the increasing digitisation of arbitration, whether in terms of data, means of communication, or hearings, to undermine the principle of confidentiality seems to me to create an environment where a less severe line is taken on the hacking and/or undue disclosure of data that is, in principle, confidential and that is transmitted and exchanged in arbitrations. This can only be detrimental to the institution.

I have previously had the opportunity to denounce this risk in an article published in 2019[9]. To devalue the principle of confidentiality in arbitration necessarily means reducing its scope and consequently exposing arbitrators to the risk of reducing the scope of the professional secrecy that they could enforce against public authorities seeking to seize the arbitration data in their possession. In fully digitized arbitration proceedings, it will be much easier for public authorities to seize the entirety of the data in the possession of one of the participants in the arbitration, and of the arbitrator in particular. And what is certain is that the risk of such seizure will increase in the years ahead: either because arbitration constitutes the actual instrument of a criminal offence, or because arbitration is more and more subject to circumstances likely to constitute a criminal offence. As I concluded in my article, arbitration proceedings, and online arbitrations in particular, should not become the antechamber of the public prosecutor's office[10].

- Lastly, in France at least, an Act of 23 March 2019 established a general framework regulating online arbitration platforms by providing

9 M. Henry, 'Infraction pénale et confidentialité de l'arbitrage : devoirs et obligations des arbitres et des conseils' (2019) 1 *Revue de l'Arbitrage*, 65.
10 *Ibid*.

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> for a certification procedure and a certain number of conditions for benefiting from it. Under French law, these platforms are subject to three essential obligations: respect for the protection of personal data (we will come back to this), pursuit of their mission with impartiality, independence, competence and diligence, and the obligation of confidentiality (unless otherwise agreed by the parties). Breach of this last obligation is a criminal offence (Article 226-13 of the Penal Code). This means that, for the legislator at least, confidentiality rightly still lies at the heart of arbitration, and in particular of online arbitration[11].

An arbitrator who breaches confidentiality may be liable to a party to the arbitration if the breach is prejudicial. Such a breach would not be committed in the exercise of his or her adjudicative function *per se.* It should therefore not be covered by the immunity that arbitrators enjoy in the exercise of their jurisdictional function. The obligation of confidentiality is part of the arbitrator's contract with the parties. The breach of this obligation constitutes a contractual fault for which the arbitrator must in principle compensate. However, it has been observed how easy it can be in an online arbitration to make a data handling mistake (in particular, the transmission of an email to the wrong person). This makes it even easier to violate the confidentiality obligation.

Therefore, I cannot sufficiently stress the need for arbitrators to include a disclaimer in the arbitration rules of the institutions or in the Terms of Reference. Under French law, only particularly serious and inexcusable that faults could allow such a clause to be set aside.

There is one last question that concerns the storage of pollen data by the worker arbitrators. It is the risk of the beehive taking in pollen that may be compromised. I mean by this the risk of admitting into the arbitration data originating from a cyberattack. This issue will probably occur more and more frequently. How should this data be treated by the worker arbitrators in their arbitral hives? Should the arbitrators disallow the admission of this data in the arbitration because of its fraudulent origin? Or should the arbitrators accept the data if it happens to be essential to an understanding of the issues at stake? These two solutions have already been adopted in arbitral case law (against admission in the *ConocoPhilips v/ Venezuela* case and in favour of admission in the *Caratube International v/ Kazakhstan* case). Article 9-2 of the IBA Rules on the Taking of evidence in International Arbitration permits arbitrators to exclude evidence on

11 Dalle, 'L'arbitrage, une justice alternative pour une nouvelle offre de justice' (2020) 7-8 *La Semaine Juridique*, 12.

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grounds of either ‘legal impediment or privilege (…) legal or ethical rules’ or ’special political or institutional sensitivity’. There is alas no space here to look further at this very interesting question.

In any case, the worker arbitrators in their arbitral hives are not only receivers of the data forming the subject matter of the arbitration, they also are the processors of this data: like the worker bees processing the pollen stored in the hive to make the honey.

II. Privacy in the Arbitrator’s Data Processing Activity

What does "Privacy" mean? Privacy is the fair and authorised processing of personally identifiable information. Personal information is any information that can be used to identify or contact an individual or can be reasonably linked to a specific individual, device, or computer. Processing is any action that can be performed in relation to that data: so, processing personal information includes collection, storage, use, sharing, organization, display recording, collation, copying, consultation, erasure, destruction and alteration. Whilst confidential information is an label imposed to signify control of access, personal Information is an organic label: it speaks to the substance of the information. In other words, while confidentiality will apply to data, privacy will apply to persons.

The personal data protection imperative has been taken up by the European Union. The European Parliament has adopted EU Regulation 2016/679 on the Protection of Natural Persons with regard to the Processing of Personnel Data and on the Free Movement of Such Data, named “GDPR” (General Data Protection Regulation). In France, a law was adopted in 2018 to adapt domestic legislation to the European Regulation.

The question arises as to whether online arbitration, and arbitrators in particular, are GDPR-proof. The answer is no, as I will now explain. On this subject I refer readers to the *Club des Juristes*’ Working Group Report published in 2019 on Online Arbitration (pages 89-103).

A brief reminder of the provisions of the GDPR may be useful.

As stated in the Report, the GDPR requires any entity having to process the personal data of a natural person to obtain his or her prior consent and to ensure compliance with the protection provided to natural persons by the GDPR.

The right of natural persons includes the right to transparency, the right to access their data, to rectify and erasure them, the right to restrict processing, the right to data portability, the right to object and the right not to be subject to an automated individual decision.

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As noted in the report of the Club des Juristes, 'such protection can be difficult to reconcile with the reality of arbitration, notably in view of the confidentiality principle that dominates arbitral procedures, and the need for a court to be able to reach a decision without essential data being withdrawn from it' (p. 89 of the Report)[12]

Furthermore, the GDPR applies:

- To the processing of personal data in the context of activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not,
- To the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (i) the offering of goods or services, irrespective of whether ta payment of the data subject is required, to such data subjects in the Union, or (ii) the monitoring of their behaviour as far as their behaviour takes place within the Union.

Accordingly, any arbitrator, if established within the European Union, is in principle subject to the GDPR to the extent to which they process personal data during the arbitral procedure.

Examples of personal data listed by the European Commission include: a name and surname, a home address, an email address, an identity card number, location data etc.

Accordingly, any information, even professional, exchanged as part of an arbitration procedure and containing information capable of identifying an individual is considered to be personal data for the purposes of the GDPR: that concerns the documents exchanged by the parties containing such information, and also briefs, witness statements, expert reports and the award itself.

All such documents, if capable of identifying individuals can therefore be subject to the provisions of the GDPR [13].

Processing means any operation performed on personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use disclosure by transmission etc. (Article 4-2 of the GDPR).

12 See also, Paisley, 'It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration' (2018) 41 *Fordham Int'l L.J.*, 841 (856); Paisley, 'Managing Arbitration Data under the GDPR' (2018) *Global Arbitration Review*.

13 Le Club des Juristes, Working Group Report, *Online Arbitration*, 2019, 90.

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Therefore, during the arbitral procedure, the collection and examination of documents, transfer of documents to an attorney or expert, exchange of documents between the parties or the disclosure of evidence ordered by the Tribunal are all likely to be considered as "processing activities" within the meaning of the GDPR[14].

A controller of data processing under the GDPR is defined as 'the natural or legal person, public authority, agency or another body which, alone or jointly with others, determines the purposes and means of the processing of personal data' (Article 4-7 of the GDPR).

The task of the controller is to ensure that the personal data is 'processed lawfully, fairly and in transparent manner', 'collected for specified, explicit and legitimate purposes, and not further processed in a manner that is incompatible with these purposes', 'adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed', 'accurate and necessary, kept up to date', 'processed in a manner that ensures appropriate security of the personal data' and retained for a limited duration (Art. 5 GDPR)[15].

As stated in the ICC Note to the Parties and Arbitral Tribunals (2021 version)[16], in performing their duties under the ICC Arbitration Rules, arbitral tribunals have to collect and process such personal data. For this purpose, personal data of this kind may be transferred by or to the various offices of the Secretariat in and out of the European Union.

Accordingly, because of the very nature of their functions, arbitrators are the actors in the arbitral procedure likely to be considered as controllers under the GDPR.

In their capacity as controllers under the GDPR, the arbitrators are subject to the following main obligations:

- To set up a cybersecurity system (Article 32): controllers are required to implement appropriate technical and organisational measures in order to guarantee a security level in keeping with the risk, including anonymisation and encryption of the personal data or measures intended to restore the availability of personal data. We will come back to this matter in the final part of this article.
- Data minimisation (Article 5): this is the principle whereby 'personal data may only be processed if, and insofar as, the processing purposes

14 *Ibid*, 91.
15 Ibid.
16 ICC, *Note to the Parties and the Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 1 January 2021.

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cannot be attained by the processing of information that does not contain personal data'[17]. Controllers must therefore ensure that the collected data is necessary for the processing, while reducing the categories as well as the volume of data processed to a minimum.

- Right to transparency (Articles 13 and 14): every controller must provide the data subject with specific information. This includes: the contact details of the controller and processor, the purposes of the processing and the respective basis, the legitimate interests pursued by the controller, where applicable, any intention of transferring personal data to a third country, the period for which the personal data will be stored and/or the criteria used to determine that period, the existence of the right to request from the controller access to and rectification and erasure of personal data, or restriction of processing concerning the data subject, or to object to processing as well as the right to data portability, the existence of the right to withdraw consent at any time, and the right to lodge a complaint with a supervisory authority[18].
- Right to rectification and to erasure (Articles 16 and 17): the data subject has the right to obtain from the controller the rectification of personal data concerning him or her. Such right cannot be exercised when the data processing is necessary for the establishment, exercise, or defence of legal claims. Accordingly, an arbitral procedure will be exempted from this obligation if the data is considered necessary for the exercise and defence of the rights of the parties, and that its erasure could undermine this.

The GDPR mentions six specific cases in which the processing of data is lawful (Art. 6):

- The data subject has given consent to the processing of the personal data for one of more specific purposes,
- Processing is necessary for the performance of a contract,
- Processing is necessary for compliance with a legal obligation to which the controller is subject,
- Processing is necessary to protect the vital interests of the data subject or of another natural person,

17 Conseil National des Barreaux, Guide Pratique – Les Avocats et le Règlement Générale sur la Protection de Données (RGPD), March 2018.

18 Le Club des Juristes, Working Group Report, *Online Arbitration*, 2019, 93.

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- Processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller,
- Processing is necessary for the purposes of the legitimate interests pursued by the controller of by a third party.

According to the Report of the Club des Juristes' Working Group on Online Arbitration: 'Data processing in connection with an arbitral procedure must be considered "lawful" since it is necessary for the fulfilment of a contract, to meet a legal obligation, or for the purposes of the legitimate interest pursued by the controller'[19]. I share this opinion.

Article 23 authorises Member States to provide for exceptions allowing data processing in contexts other than those indicated in the Regulation. Ireland adopted an exception to allow a limitation of the rights of data subjects in connection with judicial or arbitral proceedings. For the sake of arbitrators' peace of mind, the other European countries should do the same.

Finally, the GDPR only authorises the transfer of personal data to a country other than a Member State when the European Commission considers that the protection level provided by the third country is adequate, the controller or processor has provided appropriate safeguards for the data transfer, a court orders the data transfer in compliance with the treaty, or one of the exemptions under Article 49 applies, authorising data transfer to a third country when 'the transfer is necessary for the establishment, exercise or defence of legal claims'. This last exemption will enable data to be transferred to a third country in connection with arbitration.

In consideration of all these GDPR rules applicable to the arbitrators in their capacity as controllers in the processing of personal data in arbitration proceedings, the ICC added a section in its Note to the Parties and the Arbitral Tribunals on the Conduct of Arbitral Procedures addressing the subject of protection of personal data. In this Note, the ICC deals with the necessary consent to be obtained from the personal data subjects as well as with the ways the arbitrators must comply with their obligations under the GDPR.

In the first place, therefore, the ICC envisages that all the actors in arbitration procedures, and the arbitrators in particular, should agree on the fact that personal data needs to be collected, transferred and stored for the purposes of the arbitration proceedings and that this data may be

19 *Ibid*, 95.

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published in the event of publication of an award, procedural order and dissenting and/or concurring opinion.

The ICC Note goes on to invite arbitrators, and in their capacity as controllers, to:

- remind the parties, representatives, witnesses, experts and any other individuals appearing before it that the GDPR or other data protection laws and regulations apply to the arbitration, that their personal data may be collected, transferred, published and archived pursuant to the arbitration agreement or the legitimate interests in resolving the dispute and that arbitration proceedings operate fairly and efficiently,
- draw up a data protection protocol to that effect,
- ensure that only personal data that is necessary and accurate for the purposes of the arbitration proceedings is processed and that any individual whose data is collected and processed in the context of an arbitration shall be able at any time to apply to the appropriate data controller to exercise his right of access and that inaccurate data be corrected or suppressed, in accordance with the applicable data protection laws and regulations,
- ensure that all those acting on their behalf put in place appropriate technical and organisational measures to ensure a reasonable level of security for the arbitration, taking into account the scope and risk of processing, the state of the art, the impact on data subjects, the capabilities and regulatory requirements of all those involved in the arbitration, the costs of implementation, and the nature of the information being processed or transferred, including whether it includes personal data or sensitive business, proprietary or confidential information.

Lastly, the Note provides that once the arbitration procedures are completed, the arbitrators may retain the personal data processed during the proceedings for as long as they keep the case file in their archives pursuant to applicable laws, such duration having to be communicated to the parties and the ICC.

According to the ICC Note, the arbitrators are therefore invited to address the question of the processing of personal data with the parties and counsel at the beginning of the arbitral procedure. As far as I am concerned, as a President of arbitral tribunals, I now include in the Terms of Reference an article on protection of personal data, whereby the arbitrators are authorized to collect, process, transfer, store and archive this data if included in the awards, procedural orders and emails likely to be archived after the end of the procedure.

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In addition to a provision in the Terms of Reference on personal data protection, and to better protect this data, the use of an arbitration platform can reduce the risks of data breaches.

Indeed, as suggested in the above-mentioned Protocol for Online Case Management in International Arbitration, published by arbitration practitioners in July 2020, the use of a Platform in arbitration proceedings can enable personal data exchanged in the proceedings to be:

- processed only in those ways that have been agreed by the parties or directed by the arbitrators,
- processed only for the legitimate purposes for which they were expressly collected (i.e. the proceedings),
- shared only with those parties that need to process it (if a challenge is raised as to which party received the data, the Platform will help establish the trail of the data flow),
- kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed,
- effectively destroyed once the proceedings have ended.

Because of the obligations of privacy, arbitrators are no longer only responsible, but they also are accountable. Responsibility will be enforced through damages granted to victims. Accountability will be enforced through administrative fines. An arbitrator who fails to comply with his or her obligations under the applicable data protection regulations will be liable to the data subject concerned (Article 82 of the GDPR). Moreover, if his fault had consequences on the arbitration proceedings, he could also be liable to the parties to the proceedings, unless he benefits from an exclusive liability clause (which can be set aside in case of gross negligence and inexcusability). The arbitrator may also be exposed to administrative fines (Article 83 of the GDPR).

In their arbitral hives, we noted that worker arbitrators are both storing and processing arbitral data. But arbitrators are not only workers in their hives. Once the data (just like pollen) is brought into the arbitral hives, the data needs to be protected from external predators. In the same way that soldier bees protect the hives from external attacks, arbitrators will assume the role of soldiers in the fight against cyber-attacks, and therefore contribute to the security of the arbitral process.

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B. *The Contribution of the Soldier Arbitrators to the Security of the Arbitral Hives*

What does "Security" mean? Security means all measures likely to be implemented to avoid:

- security incidents, i.e. any event that may compromise the confidentiality, integrity, or availability of data, and
- security breaches, i.e. any security incident that results in unauthorized access to data and requires that notice be given to persons whose data has been compromised.

Accordingly, cybersecurity is the practice of defending computers, servers, mobile devices, electronic systems, networks, and data from malicious attacks.

If digital data is the pollen that feeds the labours of the worker arbitrators in the digital arbitral hives, it becomes the nectar that feeds the appetite of predators outside the hive. As I observed in my introduction, these predators do exist. Many arbitrators do not seem to realize that the material they deal with, the data they receive and exchange in arbitration proceedings, constitutes a real asset, which malicious persons may want to appropriate for their own purposes or to retail on the Dark Web through mafia networks.

Indeed, international arbitrations involve parties which are multi-national groups or governments or state entities and which as such hold valuable, highly commercial and sensitive information[20]. This information will all be shared within a space and during a limited period of time (the arbitral procedure) and this may facilitate the work of hackers who thereby gain access to valuable economic digital data. What is more, the variety of information technology used in arbitrations, including emails, cloud storage, hearing room technologies and software for interpreting,

20 de Westgaver, 'Cybersecurity in International Arbitration – A Necessity and An Opportunity For Arbitral Institutions' (2017) *Kluwer Arbitration* Blog, available at http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/; Rahman, 'The Role of Arbitral Institution in Cybersecurity and Data Protection in International Arbitration' (2020) *Kluwer Arbitration Blog,* available at http://arbitrationblog.kluwerarbitration.com/2020/11/24/the-role-of-arbitral-institutions-in-cybersecurity-and-data-protection-in-international-arbitration/.

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translating, document presentation, etc., provides a wide landscape for cyber-security threats[21].

The consequences of these cyber-attacks may be very serious for the parties involved in the arbitrations and lead to loss of personal/commercial data, money, intellectual property and reputation; their market value may fall and regulatory actions ensue. What is more, as the literature has rightly noted, after a cyber-security incident, the participants may find it difficult to trust the arbitration process (and the arbitrators) and may also question any data that is presented for its authenticity[22]. Similarly, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020) identifies several consequences that may result from inadequate attention to information security:

- Economic loss to individuals whose commercial information or personal data is compromised,
- Loss of integrity of data, or questions about the reliability and accuracy of data,
- Unavailability of data, networks, platforms, or websites due to disruption caused by a security incident,
- Potential liability under applicable law and other regulatory frameworks,
- Reputational damage to parties, arbitrators, arbitral institutions, and third parties, as well as to the system of arbitration in general[23].

Arbitration procedures cannot ignore these cyber-threats. This applies especially to arbitrators who, even though a significant proportion of their number are reluctant to actively engage in assessing cybersecurity risks and designing appropriate measures (relying on the parties)[24], will have to accept their role as soldier arbitrators against Cybercrime in their arbitral duties. In this respect, some practitioners tend to consider that the preservation and protection of the legitimacy and integrity of the arbitration

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21 Mirani, 'Tackling Cyber Security Threats in Arbitration – Have We Done enough?' (2020) ICAR, available at https://investmentandcommercialarbitrationreview.com/2020/09/tackling-cyber-security-threats-in-arbitration-have-we-done-enough/.

22 *Ibid*.

23 ICCA, *ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration*, 2020, 8-9.

24 de Westgaver, 'Cybersecurity in International Arbitration: Don't be The Weakest Link' (2019) *Kluwer Arbitration Blog,* available at http://arbitrationblog.kluwerarbitration.com/2019/02/15/cybersecurity-in-international-arbitration-dont-be-the-weakest-link/.

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process may constitute an ethical obligation on the part of arbitrators (*ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration* (2020) (p. 16)).

Arbitrators must therefore take into consideration the general IT environment of an arbitral procedure, in order to assess whether, in the light of the specific feature of a given dispute, special consideration should be paid to Information Security Measures (known as ISM). For instance, under the new LCIA Arbitration Rules (Article 30 A), arbitrators are required to consider whether it is appropriate to adopt not only means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation, but also specific information security measures to protect the physical and electronic information shared in the arbitration.

When should these ISM issues be addressed by the arbitrators with the parties, if they are needed? The best time would be at the case management conference, at the beginning of the arbitral procedure. This is what the ICC suggests in its ICC Commission report on Information Technology in International Arbitration, published in 2017 (page 20), as well as what the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020) suggests (Schedule D). According to the ICCA Protocol, at the CMC the arbitrators should be prepared to:

– Engage the legal representatives in a discussion about reasonable information security measures,

– Discuss the ability and willingness of the members to adopt specific security measures,

– Address any disputes about reasonable ISM, express their own interest in preserving the legitimacy and integrity of the arbitration process, considering the parties' concerns and preferences, the capabilities of any administering institution (pp. 26-27 of the Protocol).

After the CMC, if the hearing is to be held online, a Protocol on the necessary arrangements may include provisions on security.

In their assessment of the needs for specific ISM in an arbitration, all arbitrators should bear in mind that the ISM must be designed to protect what is called the CIA-Triad, i.e. Confidentiality, Integrity and Availability, where:

- as already mentioned, Confidentiality means protecting information from unauthorised access,
- Integrity means ensuring that the information is accurate and that systems function as intended,

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– Availability means guaranteeing uninterrupted access to information and systems.

Arbitrators should be considered as having the authority to determine the ISMs applicable to arbitrations. With a view to this, they should respect any engagement by the parties on the ISM to be employed, subject to overriding legal obligations or any significant countervailing considerations. Conversely, the parties must not be authorised to bind unilaterally the arbitrators. One reason for the arbitrators not to accept the ISM proposed would be the need to ensure proportionality. The measures should be proportionate to the arbitration and the IT resources that both parties can afford[25].

What are the means available for arbitrators to address security concerns?

The best way will be for the arbitrators to propose that the parties agree on an ISM Protocol. The purpose of this Protocol will be to provide a framework for incorporating and implementing reasonable ISM, i.e. both technical and organizational measures to secure against cyber security threats[26]. The ISM must be tailored to the risks present in the arbitration[27] and to the size of the entities involved in the arbitration. An author[28] has summarized the main features of the protocol proposed by the ICC to which the actors of an arbitration may refer in order to address their security concerns:

– The ICCA protocol prescribes that parties must exercise their autonomy to agree upon reasonable ISM. Thereafter, the arbitrators have final authority to determine the ISM applicable to arbitration,
– The arbitrators may depart from parties' agreement, to raise or lower the standards of ISM, based on capabilities of arbitrators and institutions, interest of third parties, such as witnesses, etc. and of legitimacy/integrity of arbitral Process: that leads to two observations:

25 ICC, *ICC Commission Report: Information Technology in International Arbitration*, 2017, 5.
26 Mirani, 'Tackling Cyber Security Threats in Arbitration – Have We Done enough?' (2020) ICAR, available at https://investmentandcommercialarbitrationreview.com/2020/09/tackling-cyber-security-threats-in-arbitration-have-we-done-enough/.
27 ICCA, *ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration*, 2020, 22-24
28 Ibid.

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- first, arbitrators shall be selected in consideration of their capability to meet security standards. Indeed, arbitrators practising as single practitioners may not have access to sufficient IT services[29].
- encryption of emails, share-file services, or use of USB keys to store and exchange data may be minimum ISM on which parties and the arbitrators may agree, if need be.

- Once the ISM are agreed upon, it is the duty of all the persons involved in the arbitration having access to any arbitration-related information, to implement them.
- Arbitrators shall ensure that any person involved in the arbitration is aware and is following the duly agreed ISM.

The last point is essential in the mission of our soldier arbitrator. Indeed, security in arbitral proceedings ultimately depends on the decisions and actions of all involved. Actions by any individual can be the cause of an information security incident, no matter the setting in which they take place or the infrastructure available to them. Indeed, as observed in the ICCA Protocol, many security incidents result from individual conduct rather than a breach of systems or infrastructure[30]. In other words, cybersecurity is only as robust as the 'weakest link' in the chain[31]. And to use again an insect metaphor, a good way to understand the risk run because of the weakest link is to observe how cockroaches use the lack of coordination between inhabitants of a building to survive, by taking refuge in the non-disinfected space of a building, due to the refusal of one inhabitant to mobilize in the fight against the invader. To fight an invasion of cockroaches, all the occupants of a building have to be mobilised. Transposed to cyberworms and other cyberviruses, this means that the inadequate security arrangements of one of the participants in an arbitration procedure can undermine the entire process.

One way to protect the arbitration process against security incidents and breaches may again be the use of Platforms. Arbitrators may propose such a tool at the CMC. A Platform may help level up the overall security of the custody chain as long as the relevant functions are enabled and used. Such

29 On the selection of arbitrators: ICC, *ICC Commission Report on Information Technology in International Arbitration*, 2017, 6-7.

30 ICCA, *ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration*, 2020, 10.

31 Working Group on LegalTech Adoption in International Arbitration, *Protocol for Online Case Management in International Arbitration,* July 2020, para. 24.

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a Platform may also reduce security and privacy risks when users transfer data through the Platform rather than by email.

Finally, as soldiers, the arbitrators in online arbitrations may not only combat the risks of cybersecurity incidents but may also penalise a participant for having violated the security measures. The ICCA Protocol recognises the power to arbitrators to allocate the additional costs arising from the security incident among the parties at their discretion and to impose penalties on the parties. More generally, a participant who has violated the ISM may incur liability to the other participants if they suffered damages as a result of the violation.

In conclusion, arbitrators undoubtedly do face new challenges in cyberspace. But these challenges are not at all insurmountable. And if arbitrators feel uneasy, they can fly, like a bee, to Lisbon, and de-stress by enjoying what Pessoa described as … the city's spray of colours under the sun!

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A Lawyer's Perspective: Confidentiality, Privacy and Security in Arbitration in Times of Covid

Sofia Ribeiro Mendes

Table of Content

A. Introduction 205
B. Online Arbitration 207
I. General Overview 207
II. Legal Framework for conducting Remote Hearings 209
III. Challenges and Practical Tips for holding Remote Hearings 215
C. Confidentiality and Privacy 220
I. General Overview 220
II. Legal Basis for the Confidentiality of the Arbitration 222
III. Challenges and Practical Tips 223
D. Security 225
I. General Overview 225
II. Potential Threats to Cybersecurity 226
III. Practical Tips 228
E. Final Remarks 230
Bibliography 231

A. Introduction

The current pandemic, caused by SARS CoV-2 and COVID-19 ("COVID-19 pandemic" or "pandemic"), has had, and will most likely continue to have, at least in the immediate future, a huge impact on the world, creating a set of challenges which still require a continuous effort of adaptation from all of us.

This was immediately visible at the outset of the pandemic in first half of 2020, with the generalised and worldwide cancellation of all in-person events without knowing if and when such events could be resumed and the shift to online events using various platforms that have proliferated in these troubled times.

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Throughout the world laws were published imposing special and exceptional regulations, with implications for arbitration proceedings in progress. Online events started to appear everywhere, because soon after March 2020[1] it was certain that for some time it would be impossible to hold hearings in person. The pandemic particularly affected international arbitration proceedings[2] given the numerous restrictions on movement that were imposed in many countries at that time and the uncertainty as to how long they would last.

Before long it was clear to everyone that the world had changed with the COVID-19 pandemic and that the arbitration world would not be immune to those changes. Whether those changes are here to stay, only time can tell, but it is not too bold to anticipate that, in several aspects, arbitration proceedings included, there is no turning back.

This article focusses on arbitration proceedings and how arbitration practitioners, including arbitral institutions, have adapted their *modus*

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1 In Portugal, on 18 March 2020, the President of the Republic decreed a state of emergency, in view of the exceptional global public health situation and the proliferation of recorded cases of COVID-19. Consequently, all judicial proceedings, including arbitration proceedings based in Portugal, were suspended from 13 March 2020 to 3 June 2020 (suspension ordered under Law 1-A/2020 of 19 March 2020 and lifted by Law 16/2020 of 29 May 2020) and again from 22 January 2021 to 6 April 2021 (suspension ordered under Law 4-B/2021 of 1 February 2021 and lifted by Law 13-B/2021 of 5 April 2021).

2 Article 7 of Law 1-A/2020 initially stayed all arbitration proceedings under way in Portugal; in response to criticisms, this was later amended to clarify that the suspension was subject to the parties' willingness to continue the proceedings. Arbitration parties could therefore (i) maintain the original schedule for the arbitration proceedings, (ii) agree to extend the deadlines initially decided without the need for suspension, or (iii) stay the proceedings. Also, following the approval of Law 4-B/2021, the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry ("CAC") announced that (i) the Secretariat would continue to perform its functions; (ii) parties were free to decide to suspend proceedings or to allow deadlines to be counted normal in cases where the arbitral tribunal had not yet been constituted; and (iii) where the arbitral tribunal had already been constituted, it was up to the tribunal to decide how to proceed with the arbitration. On the international scene, major arbitral institutions such as the International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA) and others, issued a Covid 19 Joint Statement to support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases could continue and that parties could have their cases heard without undue delay (https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf).

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operandi in response to COVID-19, especially in the critical areas of the confidentiality, privacy and cybersecurity of proceedings.

It seeks to describe some of the key legal as well as practical challenges currently faced in these areas in arbitration and to offer some observations on what the future may look like in arbitration, in the post-pandemic scenario.

B. Online Arbitration

I. General Overview

In the context of arbitration proceedings, particularly in international arbitration, arbitration users had for some time been well accustomed to using modern communication technologies in their proceedings[3].

The 2018 Queen Mary University of London Survey[4] showed that a significant majority of arbitration users had already been confronted in arbitration proceedings with the use of videoconferencing (60%), other communication technology suited to the courtroom (73%) or had already used cloud data storage (54%).

Likewise, arbitration users had been familiar for many years with having some online, virtual or remote hearings[5] in their proceedings, held by

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3 Ostrove et al., *Online Arbitration Hearings: A review of key developments in response to COVID-19*, available online at https://www.dlapiper.com/pt/portugal/insights/publications/2020/09/virtual-hearings-report.

4 Fridland and Brekoulakis, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

5 The terminology for hearings conducted using communication technology to simultaneously connect participants from two or more locations is not used consistently by different authors and the expressions 'online hearings', "'virtual hearings' and 'remote hearings' are often used interchangeably. In Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37-4 *Journal of International Arbitration,* 2, the author presents an extensive explanation of the different definitions and types of hearings, preferring the use of the expression 'remote hearings' over 'online hearings' or 'virtual hearings'. For Maxi Scherer, the use of the expression 'virtual hearings' is not appropriate and should be avoided or used sparingly since in computer science, and even in lay terms, 'virtual' is often defined as 'not physically present as such but made by software to appear to be so from the point of view of a program or user' or as something 'not really or physically existent', when in case of virtual hearings in arbitration the hearing is

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telephone or by videoconference: most case management conferences were held by telephone, as were some procedural hearings. It was even quite common to have witnesses or experts testifying by video link. However, it was relatively rare prior to the pandemic for entire hearings to be conducted remotely. The survey showed that 78% of the arbitrators had never or rarely conducted remote hearings.

Recent research[6] has shown that, during the first pandemic period (i.e. until 30 June 2020), the number of fully remote hearings tripled compared to pre-pandemic data.

Consequently, the possibility of having fully remote hearings in pending arbitration proceedings immediately faced arbitrators and counsel with a number of questions, not only as to whether it was preferable to postpone scheduled hearings due to travel restrictions and social distancing measures, but also whether if those hearings could be held remotely under the applicable arbitral rules. In addition, consideration was soon given to the risk of potential challenges to awards based on remote hearings, on the grounds of possible violation of the parties' right to be heard and treated equally or to due process[7].

Accordingly, many arbitral institutions[8] have changed or updated their rules to either expressly provide for, or at least leave open, the possibility of the arbitration being conducted 'remotely' using technology, including video hearings and telephone hearings.

conducted in several locations and the participants really exist and interact with each other using technologies, so there can be no doubts about the physical reality of these type of hearings. This author is not also keen on the use of the term "online hearings" to avoid confusion with the concepts of online dispute resolution (ODR) and online courts which often entail proceedings that are conducted outside physical courtrooms using computer technology, without a hearing (in the sense of a synchronous exchange of arguments or evidence) taking place at all, as the entire proceedings are conducted in asynchronous form.

6 Born, Day and Virjee, 'Empirical Study of Experiences with Remote Hearings', in Scherer, Bassiri and Wahab (eds) *International Arbitration and the COVID-19 Revolution* (2020), 2.

7 Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37-4 *Journal of International Arbitration*, 2 (29 ff.). See also, for Portugal, Hoyos and Sampaio, *Does a right to a physical hearing exist in international arbitration?*, ICCA Projects: 2-6, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Portugal-Right-To-A-Physical-Hearing-Report.pdf.

8 Examples of these are the ICC, ICSID and LCIA.

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Likewise, as discussed further below, many arbitral stakeholders, such as arbitral institutions[9], arbitral bodies[10] and law firms[11], have issued guidance to parties and their counsel on how to hold a hearing remotely and how to best plan for and organize it, which has proved to be very useful tool for arbitration practitioners.

II. Legal Framework for conducting Remote Hearings

The pandemic showed that few national laws and arbitration rules contained specific provisions regarding the use of remote hearings and the few that did usually only contained references to the permitted use of technology or the need for expedient or appropriate means to conduct hearings[12].

With the sudden onset of the COVID-19 pandemic and the related lockdown measures, arbitral tribunals made use of provisions of this type to justify recourse to remote hearings in several proceedings then under way.

Because most of the arbitration rules that contained references to remote hearings did so only for particular special circumstances[13] or to expedite forms of proceedings[14], some authors argue that, *a contrario*, remote hearings were by implication prohibited in all other situations not specifically provided for in those rules.

9 This was the case of American Arbitration Association (AAA)- International Centre for Dispute Resolution (ICDR), *Virtual Hearing Guide for Arbitrators and Parties*, available at https://go.adr.org/covid-19-virtual-hearings.html.

10 This was the case of the Chartered Institute of Arbitrators (CIArb), *Guidance Note on Remote Dispute Resolution Proceedings* (2020), available at https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf.

11 For example, https://www.dlapiper.com/pt/global/insights/publications/2021/07/virtual-hearings-2021/.

12 Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37-4 *Journal of International Arbitration*, 9 mentions Article 1072b, para. 4 of the Dutch Civil Procedure Code and Article 19 para. 2 of the LCIA Rules as among the few examples of rules that specifically allow that arbitral tribunals may conduct hearings remotely

13 For example, Article 28 para. 4 UNCITRAL Arbitration Rules provides that witnesses and experts may be heard remotely but contains no similar provision for other parts of hearings, such as opening or closing legal arguments.

14 As emergency arbitration proceedings or expedited proceedings.

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A party's right to a hearing[15] is said to be a fundamental principle in international arbitration[16] and so many national laws[17] and institutional arbitration rules contain provisions to that effect[18], specifying either that a party is free to request a hearing or that the arbitration cannot be conducted on a documents-only basis[19] unless all parties agree to this[20][21].

Having established that, the problem is whether this necessarily entails the holding of a physical hearing, as traditionally[22] it is considered that hearings must be oral (principle of orality) and allow for a simultaneous exchange of arguments or evidence (principle of immediacy) before the arbitral tribunal.

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15 Born, *International Commercial Arbitration* (2014), 3512. Blackaby et al., *Redfern and Hunter on International Arbitration* (2009), 413-428.

16 Respect for party autonomy and for the fundamental principles of due process and equal and fair treatment are often understood as international public policy in procedural matters.

17 This is the case of Article 34 of the Portuguese Arbitration Law that provides that unless agreed otherwise by the parties the arbitral tribunal decides on the holding of hearings, but the tribunal is obliged to hold a hearing for evidence production if one party so requests. The drafting of this article was clearly inspired by Article 24 of the Model Law, with minor differences. It is also the case of the Spanish Arbitration Act (Art. 30) or the German ZPO (§ 1047).

18 Mendes 'Chapter 9: Evidence' in Fonseca et al. (eds) *International Arbitration in Portugal.* (2020), 131 (137).

19 Most commentators accept that due process of law is not undermined if the arbitration is conducted only in writing and and on the basis of documents. To this effect, see Blackby et. al. *Redfern and Hunter on International Arbitration*, (2015), 400 and Caramelo, 'A Condução do Processo Arbitral – Comentários aos arts 30º a 38º da Lei de Arbitragem Voluntária' (2013) 73-II/III ROA, 669. Also, the Prague Rules explicitly state in Article 8 (1) that to promote cost-efficiency, the arbitral tribunal and the parties should seek to resolve the dispute on a document only basis.

20 Oliveira, *Arbitragem Voluntária: uma Introdução* (2020), 133. See also Caramelo, 'A Condução do Processo Arbitral – Comentários aos arts 30º a 38º da Lei de Arbitragem Voluntária' (2013) 73-II/III ROA, 669.

21 Some commentators contend that compelling reasons for holding an oral hearing, namely, to ensure the equal right of the parties to be heard and to present its case, may exceptionally allow the arbitral tribunal to overcome the previous agreement of the parties of not holding a hearing and schedule an oral hearing. See Caramelo, 'A Condução do Processo Arbitral – Comentários aos arts 30º a 38º da Lei de Arbitragem Voluntária' (2013) 73-II/III ROA, 669. This position is debatable as it can potentially violate party autonomy and subject the award to setting aside proceedings

22 El Ahdab et al., 'Approaches to Evidence across Legal Cultures' in Kläsener, Magál and Neuhaus (eds), *The Guide to Evidence in International Arbitration* (2021), 5.

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However, if one considers that a hearing consists of an oral and synchronous exchange of arguments or evidence (witnesses and experts' testimony) before a tribunal – as opposed to the written and asynchronous exchange of arguments or evidence (documents) in the parties' briefs – since the remote hearing allows for the exchange to be oral and synchronous, it seems that the legal requirement is fulfilled, and that the mere right to a hearing should not exclude the possibility to hold the hearing remotely.

In any case, faced with the lack of express provisions for remote hearings in many arbitral rules and the fear that the conduct of remote hearings in pending arbitration proceedings could jeopardize the validity of the award, several arbitral institutions started by releasing guidance notes to assist arbitration users to that end and soon many felt the need to update their arbitration rules to introduce express provisions admitting remote hearings through the use of technology.

For instance, the ICC Arbitration Rules, in the 2017 version, provided in Article 22 that both the parties and the tribunal were required to be proactive in making efforts to conduct arbitrations efficiently and to agree to appropriate procedural measures to further that cause wherever possible. Article 24 of the ICC Rules stated that an ICC tribunal can use telephone or video conferencing for both Case Management Conferences and other hearings 'where attendance in person is not essential'.

In respect of the main hearing, Article 25 para. 2 of the ICC Rules provides that the tribunal 'shall hear the parties together in person if any of them so requests'.

In the context of the pandemic, the ICC felt the need to issue a guidance note clarifying that this 'can be construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place 'in person' by virtual means if the circumstances so warrant'.

The ICC later issued a *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*[23] that included a reminder of the rules and measures already provided under the ICC Arbitration Rules and in other notes, reports and guides issued by the institution[24] that could

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23 https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/

24 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Arbitration Rules, the report approved by the ICC Arbitration Commission entitled Controlling Time and Costs in Arbitration and Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives.

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be of assistance. The guidance also refers to matters to be considered by arbitrators when determining the possibility of holding remote hearings, as well as on the steps to be taken beforehand, in particular, to ensure the suitable conduct of all participants and especially the privacy and confidentiality of the remote hearing itself and of the documents to be shared by electronic means.

More recently, the ICC issued revised Rules of Arbitration which entered into force on 1 January 2021, along with updates to the ICC Court's Note to Parties and Arbitral Tribunals on the Conduct of Arbitration. Article 26 of the revised Rules now expressly states that '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'.

Similarly, the LCIA also updated its Arbitration Rules and Mediation Rules in August 2020, including changes that focus on the primacy of electronic communication, facilitating electronic signing of awards by arbitrators and refining and expanding the provisions on the use of online hearings. In particular, Article 19 para. 2 of the LCIA Arbitration Rules 2020 specifically allows for any hearing to be held virtually: '…As to form, a hearing may take place in person, or virtually by conference call, video conference or using other communications technology with participants in one or more geographical places (or in a combined form)'.

In Portugal, arbitration law does not expressly provide for a right of the parties to have a physical hearing in their arbitration proceedings.

In the context of arbitration, Portugal's primary source of statutory law is Law No. 63/2011, of December 14, which approved the Portuguese Voluntary Arbitration Law ("PAL").

Article 30 para. 2 b) PAL states that the fundamental principle of the arbitration process is to guarantee the parties a reasonable opportunity to assert their rights, in writing or orally, before the final award is rendered.

Article 31 para. 2 PAL goes on to provide that the arbitral tribunal may, unless otherwise agreed by the parties, meet in any place it deems appropriate. Some authors[25] have therefore argued that there is no right

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25 Hoyos and Sampaio, *Does a right to a physical hearing exist in international arbitration?*, ICCA Projects: 2-6, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Portugal-Right-To-A-Physical-Hearing-Report.pdf., state that there is a general consensus among Portuguese authors regarding the possibility of conducting hearings remotely, with the exception of Professor António Menezes Cordeiro, who in the pre-pandemic context expressed

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in Portugal to a physical arbitration hearing and that the arbitral tribunal together with the parties may agree to hold a remote hearing.

If the parties are in agreement on whether to hold a remote hearing, typically the arbitral tribunal will follow the parties' agreement and no issues are raised[26].

The difficulty resides when one party requests a remote hearing while the other opposes the request and insists on holding a physical hearing, it being up to the arbitral tribunal to decide.

When deciding, the arbitral tribunal must weigh firstly the parties' right to be heard and treated equally and the arbitral tribunal's obligation to conduct the proceedings in the most efficient and expeditious way. Assuming that the request of a party to hold a physical hearing would entail a delay or the rescheduling of the hearing (for example, due to travel restrictions or social distancing rules, or because it is unadvisable due to health issues and not merely because the party considers travel to the physical hearing to be too troublesome or costly[27]) the arbitral tribunal will most likely deny the request and decide on the holding of a remote hearing, if the applicable law so permits.

If the arbitral tribunal considers that the applicable arbitration law or arbitral rules grant the tribunal the power to decide to hold a remote hearing in the face of opposition from one or both parties, such a decision

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a contrary view: '(…) a court cannot function electronically, without people ever meeting physically and without the need for a physical space where documents are legally stored; this is not possible: it would leave open the various legal points to which the determination of the seat is relevant and this even when all practical problems are overcome'. Cordeiro, *Tratado da Arbitragem – Comentário à Lei 63/2011, de 14 de Dezembro* (2015), 311.

26 Most commentators on the UNCITRAL Model Law point out that Article 19 provides for the autonomy of the parties and the arbitral tribunal in establishing the procedural rules whereby the arbitration will be conducted, stating that this freedom is at the core of modern systems of arbitration, as it trusts in the ability of the parties and the arbitral tribunal to conduct the proceedings in a fair and efficient manner, which is also valid for deciding to hold remote hearings. See, for all, Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration (Legislative History and Commentary)* (1989).

27 As Maxi Sherer correctly puts it in Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37-4 *Journal of International Arbitration,* 18, apart from the current pandemic, a variety of possible reasons is conceivable for a party requiring a remote hearing, ranging from certain participants not being able to attend physically due to professional inconvenience or medical conditions, just to state a few; in any case, the stronger the impediment the heavier this factor will weigh in the overall assessment of the arbitral tribunal.

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is discretionary, but grounds must be stated. This means that when deciding, the arbitral tribunal will consider the reasons behind each party's position on whether or not to hold a remote hearing, the content of that hearing (e.g. expert or witness testimony, legal arguments), the technology available for holding the remote hearing and the possibility of all the participants accessing it, as well as the timing and costs of holding a physical hearing as opposed to a remote hearing and vice versa. This is valid whether in a pandemic context or not.

As regards the legal grounds for allowing the arbitral tribunal, in the absence of agreement of the parties, to impose on the parties the holding of a remote hearing, most authors[28] refer to the tribunal's broad power to organize procedural matters.

Along the lines of the Model Law, most national arbitral laws, the Portuguese law included, typically provide that, failing agreement by the parties, the arbitral tribunal may conduct the arbitration in such a manner as it sees fit.

Portuguese Law provides that arbitral tribunals enjoy a wide range of discretion in determining whether to conduct hearings or decide solely on the basis of documents. Similarly, it grants the arbitral tribunal the power to choose the place where it will meet (including to conduct scheduled hearings), which allows the conclusion that this power also includes authority to decide on whether a hearing should be conducted remotely.

This does not mean however that arbitral tribunals should have 'carte blanche' when it comes to determining the holding of remote hearings, especially when such a decision is opposed by one of the parties.

It is generally true that arbitral tribunals based around the world have broad powers to determine the appropriate procedure in an arbitration and that no reason emerges for this power not to include the decision on whether to hold a remote hearing. But this power comes with responsibility and the arbitral tribunal, when taking such a decision, must weigh carefully all the circumstances of the case, namely the parties' right to be heard and to be treated fairly and equally (without falling into any due

28 In a pre-pandemic scenario, Ana Serra e Moura, in 'Chapter 7: The Conduct of Arbitral Proceedings' in Fonseca et al. (eds) *International Arbitration in Portugal* (2020), 97 (112), stated that 'The arbitral tribunal has full discretion to organize one or more hearings (…) take into account the costs that a hearing with parties from different nationalities may have. In such cases, electronic means may be an appropriate remedy to keep costs under control while still serving the purpose of assisting the arbitral tribunal and the parties'.

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process paranoia)[29], so to avoid the award being challenged as a result of the remote hearing.

In any case, the focus of the arbitral tribunal (and of a national court if confronted with the same issue in recognition and enforcement proceedings) should not be on the format in which the hearing takes place (remotely or physically) but rather on whether the guarantees of due process have been properly respected.

III. Challenges and Practical Tips for holding Remote Hearings

We shall now focus on the practical aspects of conducting a remote hearing, from the perspective of the arbitral tribunal and legal teams, as remote hearings should not just duplicate an in-person hearing. This offers an excellent opportunity for arbitration practitioners to reconsider what procedures may best meet the specific needs of a case, as one size does not fit all[30].

In terms of challenges and fears that remote hearings bring[31], the fact that arbitrators might not be able to sit 'together'." in the same location due to social distancing rules or precautions immediately raises the question on how the arbitration will be conducted and how deliberations between the arbitral tribunal will take place.

In such a scenario, this obstacle may be overcome if the arbitrators schedule regular breaks with a secure audio/video line to be able to internally discuss issues in a timely manner and use real-time messaging (e.g. WhatsApp) to allow immediate comments and deliberations on pressing issues.

Another concern that arises in international arbitration with participants located in different points of the globe is that different time-zones may pose difficulties for the hearing schedule or the scheduling may prove

29 Regarding 'due process paranoia' and the over cautious behaviour of some arbitrators, see Monteiro et al., *Manual de Arbitragem*, (2019), 288-299.

30 Practical tips for holding effective remote hearings were widely discussed in the China Arbitration Summit 2020 and can be viewed at https://icsid.worldbank.org/resources/multimedia/china-arbitration-summit-2020-practical-tips-holding-effective-remote-hearings.

31 Wahab, *Exculpating the Fear to Virtually Hear: A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations*, 2020, available at https://delosdr.org/wp-content/uploads/2020/10/Abdel-Wahab_Exculpating-the-Fear-to-Virtually-Hear_August-2020_NYSBA_NYDRL.pdf.

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more more awkward for one party depending on the location of majority of participants. Also, there may be a tendency for arbitrators to schedule the hearing to suit their own time zone, which may prove complicated for some of the attendees.

There is no easy solution for this problem, but it may be mitigated if the arbitral tribunal carefully considers the physical location of all participants and schedules shorter hearings with starting/finishing times designed to accommodate the time zone of the witness or expert, with minimum inconvenience to the other participants even if this means holding hearings at 'unusual' times. It is also advisable for the arbitral tribunal to schedule short breaks more frequently to allow participants to re-focus and address any technological issues that will certainly arise during the remote hearing.

Another common concern about holding a remote hearing is that witnesses and experts might have someone prompting them while they testify.

This fear may be overcome if witnesses and experts are able to leave home and testify from a neutral location with a good IT system (e.g. a law firm or an arbitration centre). If this is not an option, the arbitral tribunal should ask the witness/expert to solemnly declare that there is no one else in the room, which can also be verified by using a 360-degree camera or by asking the witness/expert to show the room before starting. Another solution is to establish that the door to the room must be visible during the whole testimony. Alternatively, whenever possible, the arbitral tribunal may allow for the parties' representatives to be present in the room while the witness/expert testifies.

There is also some concern that the arbitral tribunal might subconsciously take into account the shortcomings of a remote hearing when evaluating witness or expert testimony, which may compromise the arbitral tribunal's ability to assess the evidence. For instance, witnesses may be more or less accustomed to using online platforms and might not look directly at a questioner through the computer camera or display a degree of discomfort during the testimony, inadvertently compromising their credibility in the eyes of the tribunal. Also, in a remote hearing, arbitrators may not have the same ability to observe the body language of the witnesses or experts during the testimony as during in-person hearings. Parties may then be concerned that this jeopardises the presentation of witness evidence as the arbitral tribunal may tend to give precedence to documentary evidence.

These are of course legitimate concerns but, on reflection, this imbalance may also occur during in-person hearings, as there will always be people who are more convincing than others.

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Nevertheless, these challenges of witness testimony by video conference will certainly tend to disappear over time. For the present, they can be mitigated through preparation, as the legal team should get their witnesses and experts as familiarised as possible with what is in store for them at a remote hearing.

Lawyers are also often concerned with the difficulty of raising objections, if necessary, during the remote hearing. This may be easily overcome if at the beginning of the remote hearing the arbitral tribunal and the parties establish a protocol on how to make objections. This can be as simple as unmuting and turning video on or using the ‘raise hand’ function that appears in most available platforms. The arbitral tribunal should also be able to mute the witness once an objection is raised.

Another huge concern that the holding of a remote hearings often raises among practitioners is that of the security and privacy of the platform to be used.

In terms of cybersecurity, the main concern is how to ensure that unauthorized third parties cannot gain access to the remote hearing.

In terms of data privacy or confidentiality, the main fear is whether the remote hearing platform provider or any other third party involved, who stores, transmits or otherwise has access to the arbitration data during the remote hearing, might (mis)use the data outside the arbitral proceedings.

Due to the importance of confidentiality and security to arbitration users, who seek primarily to protect their trade secrets and confidential information while having their disputes resolved in an expeditious and cost-effective manner, these issues will be further discussed below. In any case, these fears and concerns may be mitigated by using a platform that offers end-to-end encryption and password protection, ensuring all video conferencing is protected by passwords and establishing access restrictions.

Another challenge that may arise with the widespread use of online arbitrations and remote hearings is related to the uneven access to technology enjoyed by participants in an arbitration.

For instance, witnesses located in some parts of the world may not have access to the same technological equipment or high-speed internet as others. There is no easy solution to this problem, but it may be anticipated during the preparation of the remote hearing and the arbitral tribunal may offer an alternative venue for the witnesses to testify.

Also, issues related to translations and interpreters may present additional challenges when working in an online environment, as reliable connectivity and transmission speed will be critical for the interpreter translating the testimony. During in-person hearings, there is always a risk that an interpreter may unconsciously (or not) impose his own interpretation

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of ambiguous language or mistranslate testimony. In remote hearings, this risk is significantly higher where simultaneous (rather than consecutive) translation may be employed. To mitigate the risk, the opposing party may have a 'check' interpreter attending the remote hearing, who can raise objections as to the accuracy of the translation if needed.

As shown, most of the challenges and fears concerning remote hearings can be easily overcome and do not present a serious obstacle to arbitral tribunals holding remote hearings[32] as ultimately this format will not prevent a just and fair hearing from taking place.

Nonetheless, the importance of carefully preparing the hearing has never been greater than with remote hearings.

The arbitral tribunal bears the responsibility of managing hearings efficiently, balancing the conflicting interests of efficiency and due process.

Case management decisions that expressly address these issues have proven to be crucial in the current context, especially as regards the holding of remote hearings, as they may provide grounds for challenging enforcement of an award resulting from a remote hearing.

It is therefore advisable that the arbitral tribunal should establish a comprehensive protocol on the holding of the remote hearings, preferably agreed with the parties, to ensure the hearing runs smoothly.

In procedural orders, the arbitral tribunal should seek to obtain the express agreement of the parties to the holding of a remote hearing. If it is not possible to obtain such agreement, it would be wise for arbitrators to issue a well-reasoned order as to why the arbitration is proceeding with a remote hearing, including, whenever possible, an explicit waiver of any challenge to the award based on the hearing being conducted remotely.

The arbitral tribunal should also consider establishing a cyber-security protocol that addresses the protection of the hearing room, the host level of control of the hearing, the video and audio directives and the sharing of document bundles.

As explained below, it is advisable for the hearing room to be password protected and for the parties to disclose in advance a participant list, to be shared with the arbitral tribunal and opposing party. Other security features such as two-factor authentication, video/audio recording and separate

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32 The challenges of virtual hearings were amply discussed at the 32nd Annual ITA Workshop and Annual Meeting, which can be consulted at https://itainreview.org/articles/2021/vol3/issue1/online-arbitration-hearing-ethical-challenges-and-opportunities.html.

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passwords for virtual break-out rooms are a good option for ensuring the privacy and security of the proceedings.

It has also proven helpful to arbitral tribunals to establish in advance of the remote hearing whether the host will be the institution, a tribunal secretary, the chair, IT staff, or a combination of these.

In any case, a significant body of soft law[33] is available on the subject and can be a precious aid to arbitrators and lawyers participating in remote hearings.

In conclusion, we have lived through almost two years of the pandemic and initial fears about holding remote hearings have faded away, as online communication has become almost commonplace in everyone's life and not only in the context of arbitration.

The question is whether remote hearings will remain an important part of the arbitration scene when in-person hearings become a viable option again.

The author of this article is confident that online hearings are here to stay.

As mentioned, many institutions including the ICC, the LCIA and ICSID have issued guidance on the subject, which suggests that over recent months many arbitral tribunals have adopted protocols to replace in-person hearings with remote hearings.

Equally, the flexibility of arbitration procedure will allow parties to agree on a hybrid approach, which will probably be the future, allowing arbitrators and parties to agree on a hybrid model that proves to be efficient and guarantees procedural fairness and the integrity of the hearing process itself.

Ultimately, the future of online hearings will depend on the experience of arbitration users and the skill of arbitral institutions and arbitrators in ensuring that the proceedings run smoothly and that parties are given adequate opportunity to present their case.

33 For a comprehensive list, see https://delosdr.org/resources-on-virtual-hearings/.

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C. Confidentiality and Privacy

I. General Overview

'Confidentiality' and 'privacy'" are terms often used interchangeably in the arbitration world, when in fact these two concepts are different and are worth distinguishing.

'Privacy' in arbitral proceedings usually refers to the idea that, unlike in state court proceedings, no third party can enter the arbitration proceedings or witness them, as these proceedings take place in a private set-up behind closed doors. In other words, privacy only means that arbitration proceedings cannot be attended by a third party who is not a party to the dispute, an exception being made for counsel, witnesses and arbitrators.

'Confidentiality' on the other hand means that the content of the arbitration proceedings, including the award, are to be kept confidential and in principle may not be published or disclosed by any party.

In any case, confidentiality in its broadest sense, including the privacy aspect, is widely[34] considered as one of the key reasons why parties choose to go for arbitration instead of settling their disputes in state courts. Parties wish to protect the sensitive information which may constitute the subject matter or be revealed during arbitration proceedings (e.g. trade secrets, commercial know-how, intellectual property), as arbitration is seen as an intrinsically private dispute settlement mechanism. This flows from the traditional understanding of the arbitration agreement as a private contractual arrangement.

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34 See Poudret and Besson, *Comparative Law of International Arbitration* (2007), 315-321. The authors stated that '*[S]*ometimes praised as one of the principal advantages of arbitration, the question of confidentiality has aroused the interests of authors and given rise to numerous discussions. It has led to an abundance of case law and caused great debate in connection with two famous cases in Australia and Sweden. The difficulty of the subject is due to the fact that there is no uniform conception of confidentiality in arbitration. The notion varies with the situations and functions which it is supposed to cover and does not even apply equally to all participants in arbitral proceedings. In addition, the laws governing arbitration considered here do not explicitly deal with confidentiality, and this contributes to the uncertainty surrounding the subject. Doubts persist even in institutional arbitration. while certain sets of rules contain provisions concerning one or more aspects of confidentiality in arbitration, those containing generic principles governing the question are rarer.' (315-316). See also Born, *International Commercial Arbitration* (2014), 2249-2287.

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It used therefore to be the case that arbitration proceedings were typically only known to the participants and a few other participants and awards were seldom published.

If this assumption was true 25 years ago, in the pre-internet age, the paradigm has gradually shifted with the emergence of a tension between the transparency demanded by the public interest, especially as regards arbitration involving state entities, and the confidentiality of the proceedings.

Calls for increased transparency in arbitration proceedings have gradually eroded the importance of confidentiality and privacy in arbitration.

Also, arbitral institutions now commonly publish awards (with or without redactions to conceal the identity of the parties involved) and there are several databases available for this purpose.

Interest in arbitration – or at least in certain high-profile cases – has been increasing over the years.

With the pandemic, the use of online arbitration platforms – with large-scale transfers of documents and the holding of remote hearings – has grown exponentially. The vast number of arbitrators, parties, lawyers and witnesses working online and attending remote hearings from their home/ business networks, which may offer little protection against intrusion by, has also exponentiality increased the risk of a cyberattack.

Consequently, the issue of confidentiality and privacy of the arbitration has become more difficult to manage with the increased use of all this technology.

Additionally, the complexity of the arbitration proceedings has escalated over the last decade or so, due to the involvement of multiple actors (witnesses, translators, officials of the arbitral institution, etc.) in the arbitration proceedings, who have access to confidential information but who are not subject to any confidentiality agreement resulting from the applicable arbitral rules. This poses several additional challenges as to how the confidentiality of the arbitration proceedings can be safeguarded.

In this context, several commentators[35] have already asked the difficult question of whether confidentiality is still possible in modern arbitration,

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35 Cremades and Cortés 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) 23-3 *Journal of Arbitration Studies*, 25, available online at https://www.koreascience.or.kr/article/JAKO201330951777494.pdf. See also Paulsson and Rawding, 'The Trouble with Confidentiality' (1995) 11 *ARB. INT'L* 303 (312). Singer 'Arbitration Privacy and Confidentiality In the Age of (Coronavirus) Technology' (2020) 38-7 *Alternatives to the High Cost of Litigation* 107, available online at https://doi.org/10.1002/alt.21849

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and if so, what can parties actually do to ensure the confidentiality of their arbitration proceedings.

II. Legal Basis for the Confidentiality of the Arbitration

Before moving on to analysis of the specific issues that have arisen from the increased use of online platforms and remote hearings in arbitrations with the pandemic and exploring what can the parties do to (try to) keep their arbitration private and confidential, is necessary to establish the legal basis for the confidentiality of the arbitration.

The UNCITRAL Model Law is silent on confidentiality.

In the absence of any international rules requiring the confidentiality of arbitral proceedings, opinions have diverged on the issue of whether or not arbitral proceedings are confidential *per se*.

Some jurisdictions[36] have rejected the idea of an implied duty of confidentiality in arbitration and state courts have held that there cannot be a presumption of confidentiality in arbitration.

Others[37] have recognised the concept of implied confidentiality, as there is no express statutory provision governing confidentiality.

Another solution[38] adopted by some countries is to have an express statutory provision stating that there is no duty of confidentiality in arbitration proceedings unless the parties agree otherwise.

Taking a clear stand in keeping with a tradition long established worldwide[39], the Portuguese Arbitration Law expressly provides in Article 30 para. 5 that arbitral proceedings are confidential, without prejudice to the possibility of final awards and other decisions being published, provided that all details identifying the parties involved are removed.

Under Portuguese law, arbitrators, parties and arbitral institutions therefore have to maintain and preserve confidentiality regarding all information obtained in the arbitration, which also includes documents of which they become aware of during the course of the proceedings. Nonetheless, the Law also states that the parties are entitled to make public the procedural acts necessary for the defence of their rights or to

36 E.g. courts in Australia and the USA.

37 For instance, the UK and France.

38 This is the case of Norway.

39 Caramelo, ‘A Condução do Processo Arbitral – Comentários aos arts 30º a 38º da Lei de Arbitragem Voluntária’ (2013) 73-II/III *ROA*, 669 (681 ff.).

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comply with the duty to communicate or disclose procedural acts to the competent authorities, as may be imposed by law.

As regards the rules of arbitral institutions on confidentiality and privacy, for example, the UNCITRAL Rules[40] and the Stockholm Chamber of Commerce (SCC) Rules[41] are modest in their requirements, merely providing for private hearings and confidentiality of awards. The ICC Rules[42] only provide for the confidentiality of awards, materials and the tribunal's deliberations, if requested by a party. The LCIA[43] requires parties to keep the (i) award, (ii) all materials and documents presented and, (iii) the Tribunal's deliberations confidential, providing for a few exceptions to this rule, namely, a court order, parties' consent, public interest and reasonable necessity.

This brief comparative analysis of confidentiality rules around the world clearly shows that the nature of arbitration proceedings and the extent of their confidentiality will depend on the seat of the arbitration and the arbitral rules applicable to the proceedings.

III. Challenges and Practical Tips

As mentioned above, the increased use of online platforms and remote hearings raises a whole new series of issues concerning confidentiality in arbitration.

Some of these issues are part of a wider list of issues concerning confidentiality in modern society that technical solutions have sought

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40 Article 6 of the Rules provides that hearings for the presentation of evidence or for oral argument are public, except where there is a need to protect confidential information or the integrity of the arbitral process where the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. Article 7 defines confidential and protected information and states that it shall not be available to the public as an exception for transparency.

41 Article 3 provides that unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award and Article 9 establishes the same for the procedure.

42 Article 22 para. 3. In contrast, the Mediation Rules (Art. 9) state that the proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential, unless the parties agree otherwise.

43 Article 30. The Rules also state that the LCIA will not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

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to resolve. For instance, in connection with remote hearings, arbitration practitioners and parties often question whether the online platform to be used is secure. Doubts have also arisen about the identity of the person sitting in the room and who else might be watching (or recording) the arbitration proceedings.

Likewise, parties are often troubled by doubts as to whether the witness or the expert is alone or has someone else in the room, who might be giving him instructions.

None of these fears typically arise in physical hearings and can in fact undermine confidence in a just and fair arbitration, leading to potential challenges of the award on grounds relating to the remote hearing.

In conclusion, it is undeniable that issues of confidentiality and privacy have become more difficult to manage in the Covid era.

However, that does not mean that there are no steps to be taken to ensure the confidentiality of the arbitration and to reduce the risks of unexpected publicity of the proceedings.

In general terms, parties are free to decide the degree of confidentiality they wish to confer on their arbitration. To protect their interests, parties can agree on specific confidentiality provisions to be included in the arbitration agreement (e.g. confidentiality requirements for documents and confidentiality obligations of third parties) or, at a later stage, to include such provisions in the applicable arbitration rules.

Since many institutional rules do not establish confidentiality *per se* and, in the absence of a request from a party, the rules leave it to the Arbitral Tribunal's discretion to decide on the confidentiality of the proceedings, if it is important to a party that all documents exchanged remain confidential or that depositions and the award be maintained confidential by all participants, including witnesses, experts and the administrative personnel of the arbitral institution, then it is advisable that the party specifically states this and requests the Arbitral Tribunal to include the confidentiality clause in a procedural order.

In other cases, it might be justified for the parties and the arbitral tribunal to agree a full protocol that guarantees the confidentiality and cybersecurity of the proceedings.

In response to some of the challenges and fears that have arisen with the increased use of remote hearings, a number of practical solutions have been adopted in recent arbitrations with success and are therefore worth reiterating.

As mentioned above when discussing the pros and cons of remote hearings, these practical tips include arbitral tribunals adjusting the oath or declaration made by witnesses and experts to include express confirmation

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that they are alone in the room, that they are not recording the deposition and that they will respect the confidentiality of the documents to which they have been given access in the course of the proceedings.

It is also important that the online platform to be used in the remote hearing should enjoy the participants' trust and feature all the necessary technical tools to ensure that video conferencing is protected by passwords and that other restrictions on access to the hearing are put in place.

Remote attendance of the hearing can be ensured with virtual waiting rooms for witnesses and break-out rooms that allow the arbitral tribunal and the legal teams to meet securely.

As regards the documents shared electronically in the arbitration proceedings, it is important to ensure they are handed over through a secure platform that prevents the documents being used other than for the purposes of the proceedings and that digital records of the hearing are destroyed after the end of the proceedings.

Recent experience has also shown that it is easier to keep the proceedings secure and confidential if the participants (arbitrators, lawyers, witnesses, and experts) attend the remote hearing from a business environment rather than from home or a hotel, where the network is more vulnerable to cyberattacks.

Arbitrators should also consider establishing procedural orders to address several practical aspects of the proceedings, especially those related to the confidentiality and security of the remote hearings. These orders can be prepared jointly with the parties, as the process of collaborating on an order governing online proceedings and remote hearings will prompt the parties to consider all the issues at stake, which will certainly help to reduce problems and misunderstandings at a later stage.

D. Security

I. General Overview

As has been discussed over the course of this article, the emergency situation that we continue to experience with the COVID-19 pandemic has forced the world to adapt to a new reality, involving exponential growth in

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the use of online communications in the private and public sectors alike, including in the area of justice[44].

In arbitration, online platforms have been widely adopted for holding meetings, conferences and gatherings and a preference has emerged for the almost exclusive use of remote means for conducting both domestic and international arbitration proceedings, which has raised several new issues related to the cybersecurity of the proceedings.

While until recently arbitration was not on most people's radar as a potential source of cybersecurity risk, experience has shown that some arbitrations are attractive targets for cyberattacks, particularly if hackers can identify a weak link in the chain of custody. Arbitrators and lawyers are not known for having the latest cybersecurity features in the networks they use. Even arbitral institutions have been victims of cyberattacks.

Additionally, security breaches are most prone to occur when multiple parties, arbitrators, counsels, witnesses and experts attend remote hearings from their home networks, where there might be little protection against intrusion by hackers.

In this scenario, hackers can easily crash the proceedings through zoom-bombing or the arbitral institution's website. The electronic hearing bundle can also be hacked which has led several arbitral institutions to issue guidance on how to best address these challenges.

As mentioned above, it has proven helpful for the parties and the arbitral tribunal to agree on a cybersecurity protocol on the outset of the proceedings.

Best practices include party representatives, counsel and arbitrators agreeing on a set of reasonable precautions to be taken in relation to cybersecurity, privacy and data protection at the start of the arbitration and for these to be applicable throughout the proceedings, so as to ensure an appropriate level of security for the case.

II. Potential Threats to Cybersecurity

In 2017, the ICC Commission Report on Information Technology in International Arbitration showed that, despite the potential seriousness of issues of confidentiality and data security in arbitration proceedings, many arbitration users were oblivious of the potential threats to their arbitration

44 C. P. Cunha 'Arbitration in Portugal before and after the COVID-19 pandemic' (2020) 12-12 *Revista Internacional de Arbitragem e Conciliação* 189.

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proceedings in these regards or were ‘too willing to opt for convenience over security’[45].

This statement has never been so relevant as it is today in the context of a generalised use of remote hearings.

While arbitration is not regarded by many as a potential source of cybersecurity risk, in reality the arbitration process is an obvious attractive target for cyberattacks[46], as arbitrations are likely to entail the exchange of information that is not in the public domain. Some of that information may have the potential to cause commercial damage, to influence share prices, to reveal corporate strategies or even government policy.

If one thinks about it, the amount of information transferred electronically, mostly by e-mail, in the context of an arbitration, is the most important factor.

Clients and lawyers and other legal advisers, including experts, normally share information and discuss the strategy for the case, circulating drafts of the submissions, all by email.

Party submissions and various types of evidence (e.g. documents, expert reports and witness statements) are mainly (or even solely) exchanged electronically with the arbitral institutions, arbitrators, the opposing legal team and third-party service providers.

Documents are also usually reviewed and produced by email or over an electronic data hosting platform that is often owned by third-party service provider.

Likewise, the final award will be drafted, discussed and exchanged between the arbitrators and also with the arbitral institution administering the arbitration before being communicated to the parties.

This means that legal advisers, arbitrators, parties to disputes and arbitral institutions are obvious targets for cyber-attacks.

But besides these primary targets, the sophistication of the attacks may also involve secondary participants such as past or prospective arbitrators or third parties holding information on any of the above, including experts, witnesses and platform service providers, since once data has been sent electronically in the context of an arbitration, the sender can no longer monitor or ensure its security and there is a fair chance that some of those participants will have limited cybersecurity protections.

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45 ICC, *Commission Report: Information Technology in International Arbitration* 15 (2017), cited in Scherer, ‘Remote Hearings in International Arbitration: An Analytical Framework’ (2020) 37-4 *Journal of International Arbitration*, 27.

46 As explained in https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-cybersecurity-matters-arbitration-away-from-prying-eyes.

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Regarding the hackers and the question of who might be interested in the data exchanged in an arbitration, there are multiple possible answers depending on the importance and subject matter of a particular arbitration.

Cybercriminals generally perpetrate such attacks for monetary gain, either by withholding information for ransom or stealing information and selling it on to interested third parties.

As said, the risk of having a cyberattack increases where parties, counsels and arbitral tribunals are working from home on unsecured networks or are using technologies that are unfamiliar to them, facilitating the attack.

It has also been reported[47] that cybersecurity risks have increased immensely in the current context 'as hackers use COVID-19 as "bait" to launch cyber-attacks on new and vulnerable remote working infrastructure and hijack video conference calls'.

To combat these risks, the arbitral community has published several soft law instruments providing guidance on how to protect data and ensure proceedings are cybersecure, and these have proved very helpful to arbitral tribunals, parties and parties' representatives navigating for the first time through the waters of online arbitration and remote hearings.

III. Practical Tips

Important guidance on data protection and cybersecurity has been published in the past year.

The prime examples are the ICC's Note on Information Technology in International Arbitration[48], the International Bar Association's Presidential Task Force's Guidelines on Cyber Security[49] and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020)[50].

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47 https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19---cybersecurity-and-data-protection/.

48 https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/.

49 https://www.ibanet.org/MediaHandler?id=2F9FA5D6-6E9D-413C-AF80-681BAFD300B0.

50 https://www.arbitration-icca.org/icca-reports-no-6-icca-nyc-bar-cpr-protocol-cybersecurity-international-arbitration.

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Some arbitral institutions[51] have also updated their procedural rules to include tougher provisions on cybersecurity and data protection and have introduced more secure digital platforms for managing case materials.

Online platforms have taken practical steps to apply and incorporate some of the distinctive features proposed by various cybersecurity instruments, including the 2020 Protocol and International Standards (ISO).

The features that have been identified[52] as improving the security of online platforms and that may best gain the trust of arbitration users moving online are:

- Multi-factor authentication or two-step verification, which limits the potential for data exposure as it provides for an additional layer of security, so that only authorised individuals may access sensitive information. Other features, such as default passwords, pre-entry waiting rooms and enhanced encryption, also help to repel cyber-attacks;
- Encryption of data, which protects information by using extremely complex and unique codes that mix up data and prevent unauthorised users from deciphering sensitive information, and requires routine audits during which the platform is tested to detect potential security vulnerabilities;
- Collection and storage of information data using a platform that allows secure exchange of information, which is initially stored securely and then, after the conclusion of arbitral proceedings, destroyed in compliance of applicable privacy rules.
- Managing breach incidents, as platforms should be able to act promptly to mitigate a data breach and recover lost or stolen information, which can be achieved through routine platform audits to perform a studied plan of actions in order to respond to an incident.

Arbitration practitioners and users should also bear in mind that a security breach in arbitration proceedings, especially when participants have not taken all the necessary precautions, may amount to violation of the confidentiality of the proceedings.

This type of vulnerability may undermine the integrity and viability of continued efforts to move international arbitration online, in line with the progress made in recent years.

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51 This is the case of the ICC, the Hong Kong International Arbitration Centre (HKIAC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

52 A more exhaustive list can be found at https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19---cybersecurity-and-data-protection/.

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It is the responsibility of stakeholders in arbitration, in particular arbitral institutions and arbitration practitioners, to acknowledge this threat and work together to ensure proceedings are as secure as possible.

E. Final Remarks

As we have seen, international arbitration has been moving online for some time and the impact of COVID-19 has significantly accelerated this transition. As is often said, necessity is the mother of invention.

For the past 20 years, most stakeholders in arbitration have been communicating exclusively online, submitting and exchanging documents electronically, namely by e-mail, storing documents on virtual platforms, conducting hearings via telephone or videoconference and, since the start of the pandemic, conducting full hearings remotely.

As demonstrated over the course of this Article, remote hearings are not a passing trend belonging only to the very recent past. On the contrary, their use has been gaining ground in international arbitration for some years and the pandemic situation offered the right conditions to accelerate their adoption by arbitration practitioners.

Since 2020, arbitral institutions and other arbitral bodies have issued new rules addressing these issues that have helped to consolidate this new reality.

Guidance and plentiful resources are now available online on how to conduct a remote hearing.

While it is true that this new reality entails several new dangers and challenges, identified over the course of this Article, the advantages of holding remote hearings in most cases will outweigh those dangers and challenges, while respecting the principles of equal and fair treatment of the parties and of the celerity and efficiency of the arbitration.

Arbitration, as a characteristically flexible method for dispute resolution, will tend to incorporate the use of remote hearings, creating a hybrid model that combines virtual and in-presence hearings.

Going forward, issues surrounding party agreement and digital equality in relation to remote hearings will need further consideration by the arbitration community to ensure that no fundamental principles are breached with the increased use of modern technology.

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An Arbitration Center's Perspective: Confidentiality, Privacy and Security

Joana Jerónimo Soares Correia

Table of Content

A. ARBITRARE's Mandate 233
B. Parties involved in Disputes submitted to ARBITRARE 234
C. Procedure 234
D. Online Platform for Dispute Resolution 235
E. Security, privacy and confidentiality in ARBITRARE's Online Platform for Dispute Resolution 237
I. Privacy 238
II. Confidentiality 240
F. ARBITRARE's Track Record 241

A. ARBITRARE's Mandate

The Arbitration Centre for Industrial Property, Domain Names, Trade Names and Corporate Names[1], known as ARBITRARE, is a Portuguese Arbitration Centre which was set up in 2009 with nationwide jurisdiction. It is a part of the network of Portuguese arbitration centres supported by the State.

This State support, in the form of funding, allows ARBITRARE to offer its services at a very affordable cost, counteracting one of the features of arbitration, which is that it is more expensive, as a rule, as a means of dispute resolution than the traditional justice offered by state courts.[2]

1 See ARBITRARE´s official website, available at: http://www.arbitrare.pt
2 For example, for a dispute concerning a single .PT domain name, the procedural costs are 270 € plus VAT. These costs comprise the fees of the arbitrator, the fees of the mediator and the administrative costs of the proceedings.

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Any disputes involving economic interests in matters of industrial property, .PT domain names, trade names and corporate names, may be submitted for resolution by the Centre's arbitral tribunal. This must be done under an arbitration agreement, provided that sole jurisdiction over the dispute is not assigned by special law to a state court or to compulsory arbitration before another arbitral court.

B. Parties involved in Disputes submitted to ARBITRARE

The disputes submitted to ARBITRARE may be those between private parties[3] or between private parties and the Portuguese registration bodies legally empowered to grant or refuse registrations. These bodies are the National Institute of Industrial Property (INPI), competent for granting industrial property rights, the association DNS.PT (DNS.PT), responsible for the management, registration and maintenance of the .PT country code top-level domain (ccTLD), and lastly the Institute of Registration and Notary Affairs (IRN), competent, *inter alia,* for granting trade names and corporate names to legal persons.

It is mandatory for those three Portuguese registration bodies to refer disputes to ARBITRARE. INPI and IRN are bound by law[4] and DNS.PT is bound by its own rules[5] to refer dispute resolution to ARBITRARE. This means that when private parties opt to refer a decision taken by one of these bodies to arbitration, the organisation in question cannot refuse the arbitration option because they are obliged to accept arbitration with ARBITRARE.

C. Procedure

Arbitral Proceedings before ARBITRARE fall into three stages. The first stage consists of the parties to the dispute submitting procedural documents. The proceedings begin with the submission of an initial petition by the claimant through ARBITRARE's Online Platform for Dispute Resolution available on its website. Where no prior arbitration agreement

3 Private parties may be natural or legal persons.
4 Ministerial Order (*Portaria*) no. 1046/2009, 15 September.
5 *PT Domain Names Registration Rules*, 2014, Legal Deposit no. 376640/14.

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exists, ARBITRARE will notify the defendant and any affected parties[6] and inquire whether they agree to resolving the dispute through ARBITRARE. If they do not agree, the case proceeds no further.

If arbitration is accepted or if a prior arbitration agreement exists, ARBITRARE will check the initial petition, and subsequently notify, firstly, the defendant and then the affected parties, giving them the option of submitting, respectively, a written answer and allegations.

Where the defendant has lodged a counterclaim, the claimant is notified that he may present a response to the counterclaim.

The second stage of the proceedings is mediation. This stage is optional and is prior to the constitution of the arbitral tribunal. It will only take place if all the parties to the dispute agree to refer it to mediation. In contrast to the majority of international mediation service providers, ARBITRARE currently only offers mediation services within the context of arbitration. This means that the parties must first request arbitration in order to then have the possibility of resolving the dispute through mediation.

If the parties reach a mediated settlement agreement, the arbitral proceedings are closed. In cases where the mediation settlement agreement is not binding, parties may request its homologation by the arbitral tribunal thus giving it the same value as an arbitral award.

If the parties fail to reach a settlement at the mediation stage, or if mediation does not take place because the parties refused it, the arbitration proceedings are resumed, and this is the third and final stage.

At this stage, once the arbitral tribunal is constituted[7], its award must be rendered within three months.

Under the Portuguese Law on Voluntary Arbitration[8], the arbitral award has the same binding effect on the parties as a court judgment and may be enforced as such.

D. Online Platform for Dispute Resolution

ARBITRARE was a pioneer in Portugal in offering an online platform for conducting arbitration proceedings.

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6 Affected parties are persons or entities that may be directly harmed by the occurrence of the arbitral proceedings.

7 The arbitral tribunal is considered constituted on acceptance of their appointment by all the arbitrators.

8 Law no. 63/2011, 14 December.

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ARBITRARE has offered an online platform on its website since 2009, enabling its users to submit disputes for voluntary arbitration in the Centre's areas of competence.

However, this first version of the online platform was developed and implemented at an embryonic stage of the ARBITRARE project, in 2008, by a team without experience in handling arbitration proceedings.

For this reason, the platform fell short of expectations and technical intervention was recurrently needed to resolve hitches in the proceedings. For example, if the arbitrator chosen by the parties decided not to accept his/her appointment, the procedure to appoint a new arbitrator had to be carried out off the platform, by email, and ARBITRARE had to request technical support for the new arbitrator to be entered in the platform, so that he/she could access it.

Meanwhile, in 2017, ARBITRARE was contacted by a – fortunately well-intentioned - hacker, alerting the Centre to the existence of vulnerabilities in the platform, with threats and attempts to intrude on the system. At this point, it became clear that, after nine years of intensive use, this version of the platform had become obsolete (entirely normal for this type of software).

Despite the security challenges that ARBITRARE faced with its first online platform, the overall picture was a positive one, considering that it allowed the Centre to offer dematerialized services over a period of ten years (with a few limitations related to the conduct of arbitration proceedings, as mentioned above).

In early 2017, ARBITRARE decided to invest in the development and implementation of a new Online Platform for Dispute Resolution, hereinafter referred to as 'platform'.

The Centre carried out an exhaustive survey of the requirements for the new platform (drawing on the workflow of the proceedings, communications within the platform, with the possibility of inserting notes in the proceedings, counting deadlines, and always with the concern of not being dependent on anyone (except for occasional bugs)).[9]

It took almost twenty months of intense work to conclude the new platform, which was launched at the end of December 2018 integrating all ARBITRARE's procedural experience over ten years.

The new platform is intuitive for all users as it always indicates the actions that have to be carried out and what action the proceedings is waiting to be performed.

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9 ARBITRARE consulted four different companies.

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Regarding this new platform, ARBITRARE's aim was to ensure security and operational autonomy, avoiding the need for intervention by technicians in resolving basic issues such as those mentioned.

E. *Security, privacy and confidentiality in ARBITRARE's Online Platform for Dispute Resolution*

ARBITRARE's Online Platform for Dispute Resolution offers its users the highest standards of security and privacy and enables the service to honour its obligation of confidentiality.

The platform complies with a series of non-functional requirements (defining the platform properties and restrictions) relating to reliability, supportability, usability, technology and security. We will look briefly at each of these issues.

– Reliability

Reliability refers to the quality of the service provided by a given system and the trust that can justifiably be placed in that service. ARBITRARE's platform was designed to minimise failures, offering data integrity and 99% service availability.

– Supportability

The platform was designed to support the following browsers: Google Chrome 56, Firefox 52 and Microsoft Edge 14.

– Usability

The platform was implemented in compliance with the best User Experience Design practices in order to guarantee a high quality of experience for users interacting with it.

System efficiency was paramount, organising pages in a sequential and easy-to-follow workflow, minimising both the need for user eyes and hand movement and the need for navigation between pages.

The platform is tolerant to common human errors. The navigation buttons have exit confirmation messages and some pages offer the possibility of undoing or redoing changes. Whenever an error occurs, the messages displayed to users give clear and constructive information.

– Technology

The platform was developed using .NET technology: ASP.NET MVC and MS SQL Server 2016 Express or higher.

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– Security

The platform was developed and implemented with extensive security mechanisms in order to avoid different types of vulnerabilities, such as:

Injections and common security breaches:
- SQL, SO, LDAP, XSS injection prevention;
- CSRF attack prevention;
- All redirections on the Platform are validated.

Communication and configuration of web services
- All communication is via HTTPS (HTTP over SSL);
- Sensitive data (such as usernames, password, tokens, etc.) never appear in the URL;
- Sensitive data, such as passwords, are never present in the software code;
- A user session is associated with an IP address and it is not possible for that session to change address.

Authentication
- When changing password, the previous password is always required;
- Passwords are encrypted, and never directly recorded in a database;
- Password recovery features never display either current or new passwords;
- No user information is given during login or password recovery.

Authorisation
- Each user has a clearly defined set of permissions;
- All access is logged, whether successful or unsuccessful.

Session management
- Sessions are unique to each user and are not shared;
- Sessions are invalidated from the moment they are no longer needed and/or after an inactivity timeout.

Logging and Error Management
- Sensitive information that is not needed is neither collected nor stored;
- Registration expires after a given period and is then deleted.

I. Privacy

In 2018 ARBITRARE approved a specific privacy policy for the platform, which ensures the privacy and security of users' data, informing them about the processing of their data, as well as their rights as data subjects.

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When registering on the platform, users have to read and accept this Privacy Policy, which states:

- The personal data collected and processed for user authentication on the platform (name and email address) and for filing of proceedings (name, nationality, address, post code, locality, country, email address, tax identification number, language, mobile phone number and IBAN);
- The purposes and legal grounds for processing personal data, and how long it is stored.

ARBITRARE processes the personal data of platform users:

- For authentication on the platform as an authorised user, allowing them to file and access dispute resolution proceedings;
- For all purposes necessary in managing dispute resolution proceedings, including contacts via the platform, email and/or telephone, notifications, answering questions, satisfaction surveys and evaluating the services provided;
- To fulfil any legal obligation to which ARBITRARE is subject.

The legal grounds for processing are pre-contractual due diligence at the request of the data subject, the provision of alternative dispute resolution services, in the form of mediation and/or arbitration, in matters relating to industrial property, domain names, trade names and corporate names, and the fulfilment of legal obligations.

Users' personal data, collected and processed in the course of dispute resolution proceedings, is stored until the data subject requests its deletion, provided five years have elapsed since the end of proceedings. If the data subject requests the deletion of his/her personal data, ARBITRARE must delete the arbitral proceedings from the platform, as well as from any document stored in a physical medium relating to the proceedings.

Personal data which has been collected and processed for purposes of user authentication on the platform is stored until the data subject asks for it to be deleted.

If a user completes a form on the platform without actually submitting it, the draft will be erased one month after it was created or updated.

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II. Confidentiality

Lastly, as regards confidentiality, the Portuguese Law on Voluntary Arbitration establishes the following in Article 30, paragraph 5:

5 - The arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain confidentiality regarding all information they obtain and documents brought to their attention in the course of the arbitration proceedings without prejudice to the right of the parties to make public procedural acts necessary to the defence of their rights and to the duty to communicate or disclose procedural acts to the competent authorities, if so imposed by law.

This means that arbitrators and arbitral institutions are subject without reservation to the duty of confidentiality. Parties are subject to the same obligation, but with the exemptions indicated in the final part of the paragraph.

Despite that principle of confidentiality, there has been debate about the possibility of keeping arbitral proceedings confidential, in view of the public importance of certain matters addressed in proceedings and, in some cases, the need to ensure transparency in arbitration, when, for example, the State is involved as a party.

Arbitration law in some countries, such as in France, provides for the principle of non-confidentiality of the arbitral proceedings, highlighting only its reserved nature, except when the parties have agreed otherwise.

In reality, arbitration is often chosen by parties to resolve their disputes precisely for the confidentiality it offers, in contrast to the public proceedings in state courts.

In view of the above, it is our conviction that arbitration proceedings conducted on ARBITRARE's platform comply with the confidentiality principle.

Finally, it should be noted that, in spite of this principle, many of the arbitral awards made by arbitral tribunals constituted under the aegis of ARBITRARE are published on its website[10]. Upon notification of the arbitral awards, ARBITRARE informs the parties of its intention to publish them, in order to allow the parties to exercise their right to object to the publication, as required by the Portuguese Law on Voluntary Arbitration[11].

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10 See http://www.arbitrare.pt/en/awards/

11 Article 30 para. 6, Law no. 63/2011, 14 December.

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In this way, ARBITRARE has been contributing to the dissemination of important arbitration case law in its areas of competence.

F. ARBITRARE's Track Record

Over the twelve years[12] of its history, ARBITRARE has received 382 arbitral proceedings, which amounts to an average of 32 cases a year.

Of these 382 cases, 115 ended with an arbitral award and five with a mediation agreement. The remainder were either terminated by agreement or failed to proceed for other reasons (non-payment of the procedural costs or non-acceptance of the arbitration agreement).

Since the start of the ARBITRARE project, the fact that it offers an online platform for arbitral proceedings has allowed the Centre to host several international proceedings filed by foreign companies, without offices in Portugal, who have had recourse to ARBITRARE, for example, on matters concerning the transfer of a particular domain name infringing a trademark of the company in question. With the onset of the pandemic, the advantages offered by the platform became even more evident and ARBITRARE started to hold the trial hearings online, as well as mediation sessions.

Despite its positive track record, ARBITRARE is aware that further efforts are needed to bring alternative dispute resolution, such as mediation and arbitration, to the attention of the business community in Portugal, as truly effective and efficient avenues to resolving disputes relating to industrial property, domain names, trade names and corporate names.

ARBITRARE therefore has a continued role to play in disseminating alternative means of dispute resolution, highlighting the various advantages they offer.

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12 From 2009 to 31 December 2020.

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