Cambridge Law Review (2021) Vol VI, Issue i, 45–59

Has COVID-19 Unlocked Digital Justice? Answers from the World of International Arbitration

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Abstract

The article aims to provide an overview of 'digital arbitration' one year after the beginning of the COVID-19 pandemic, with a view to supporting its wider implementation. In particular, the article illustrates some of the additional benefits online hearings confer and presents the legal framework, giving examples of how arbitral institutions around the world have adapted to the constraints the pandemic has imposed, with reference to their arbitration rules. In order to investigate the legality of remote hearings, examples of relevant provisions in the law of the seat of the arbitration, and the impact of the New York Convention, are also considered. In addition, the article briefly explores how virtual proceedings take place in practice, highlighting some of the key factors to be taken into account when conducting a hearing online. We conclude that a single, uniform and exhaustive answer on the legality of virtual hearings is not possible. This is because the answer is conditional on the position adopted in legislation across multiple jurisdictions and it requires a case-by-case approach. Nevertheless, in general, remote hearings are permissible under the New York Convention regime, and are not prohibited by the national

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arbitration laws which were analysed in the article. Therefore, their increased adoption is foreseeable in the near future.

Keywords: international arbitration, dispute resolution, remote hearings, digital justice, COVID-19

I. Introduction

The global spread of the COVID-19 epidemic has severely restricted people's mobility.[1] Not surprisingly, the international arbitration community has responded by strongly advocating for the adoption of long-distance communication technologies, including the shift to online platforms to carry out pending proceedings,[2] while also pointing to the shortcomings of a virtual process. In order to assess whether the move to online hearings will be permanent, one first needs to analyse the legality of this form of 'digital justice'.[3]

An agreement to hold an online arbitration is recognisable and enforceable under the New York Convention, as well as compatible with the UNCITRAL Model Law and encouraged by the rules of different arbitral institutions (as will be shown below). Nevertheless, online arbitration entails new challenges, such as preserving overall procedural fairness. For instance, 'due process' is a concern, especially with respect to the cross-examination of witnesses and in circumstances where the principle of orality cannot be disregarded.[4] Therefore, it is necessary to take into consideration on a case-by-case basis not only the arbitration rules applicable, but also the domestic laws of both the seat elected by the parties for the dispute, and of the country in which enforcement is sought. It is then possible to establish the extent to which the parties can opt for an online hearing and, in the event of disagreement between the parties on the point, in which circumstances

1 For historical information and updates on social distancing measures relating to COVID-19, refer to the World Health Organization's official website at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019, accessed 22 November 2020.

2 See, for instance, Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37(4) Journal of International Arbitration 407, 407 et seqq.

3 While the concept of "digital justice" may be used to indicate different forms of digitalisation of the law and its process—many of which may also involve some degree of automation—in this work, by "digital justice" the authors intend to refer to the specific process of de-materialising the courtroom and holding hearings virtually, hence delivering justice to people through online spaces.

4 Yvonne Mak, 'Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore' (Kluwer Arbitration Blog, 20 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/> accessed 22 November 2020.

the Arbitral Tribunal may mandate such an online hearing without jeopardising the enforceability of the award.

The goal of this article is to provide an overview of 'digital arbitration' one year after the start of the pandemic. Section II outlines the problems associated with online hearings. Section III presents the legal framework by providing examples of how arbitral institutions around the world have adapted to the pandemic, also referring to their arbitration rules. The article then assesses relevant provisions which may be contained in the law of the seat of the arbitration and considers the impact of the New York Convention. Finally, Section IV briefly explores how virtual proceedings take place in practice, highlighting some of the key factors to be considered when conducting a hearing online, and Section V gives a conclusion concerning the progress of their implementation.

Despite the fact that most practitioners currently still prefer in-person or semi-remote hearings,[5] it is safe to assume that the new technological solutions which are now adopted will continue to be deployed once social distancing measures have ceased. This is primarily because there are strong incentives among the international community to make international commercial dispute resolution more expedited and less costly.[6] Secondly, national laws and the treaty network, which sustain the international arbitration system, enable the parties to validly opt for the implementation of online hearings and enforce the outcomes. Any potential shortcoming arising from this type of practice will turn into an opportunity for those lawyers who are able to master this new phase of the proceedings by adjusting their toolkit to an online environment, thus limiting the disruption caused by the pandemic, and offering their clients a new set of skills in the future.

II. The Status Quo

Digital tools have been used in international arbitration long before the COVID-19 outbreak. In particular, the correspondence among the parties takes place via email, and video or phone conferences have been employed for preliminary meetings, typically to discuss administrative aspects of the process (e.g., for the case management conference). This has been facilitated by the spread

[5] Gary Born, Anneliese Day, and Hafez Virjee, 'Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views', in Maxi Scherer, Niuscha Bassiri, and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 138.

[6] For some of the efficiency benefits envisioned by the international arbitration community, see Mirèze Philippe, 'Offline or Online? Virtual Hearings or ODR?' (Kluwer Arbitration Blog, 26 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/> accessed 22 November 2020.

of increasingly sophisticated and reliable forms of digital signatures,[7] which certify the origin of the files exchanged and the identity of the people involved; this allows all of the paperwork to safely circulate digitally.[8]

However, hearings on the merits have so far seldom taken place via video conferencing. Arguably, the stage of the procedure which is still linked to physical interactions more than any other is the oral examination of witnesses. Generally speaking, virtual interrogations might be ineffective with regard to the assessment of their credibility. More specifically, typical cross-examination tactics, such as using surprise effects or engaging in prolonged eye contact, might become impracticable. When lawyers and arbitrators are not in the same room, it also becomes harder to monitor the witness' behaviour as they might receive unlawful interference during the examination or access documents they were not supposed to access, thus leading to a reduction in the formality of the proceedings.[9]

This has recently been acknowledged by the Federal Court of Australia. The shortcomings brought about by online trials were discussed in an exceptionally clear manner in a case pending before this Court during the first lockdown of early 2020. After addressing the objections raised by the Respondent, the Court issued an Order listing the principles which should be taken into account when deciding on the feasibility of a virtual hearing. These principles were grouped into "technological limitations; physical separation of legal teams; expert witnesses; lay witnesses, and in particular cross-examination; document management and trial length and expense".[10] This confirms that most of the challenges are due to how difficult it is for the parties to interact and communicate as they normally would, and suggests that there is scope for a trade-off between the thoroughness of the

[7] On the formalities required for the validity of written documents across jurisdictions, see Reinmar Wolff, 'E-Arbitration Agreements and E-Awards: Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration* (Cambridge University Press 2018) 151–181; Felipe Volio Soley, 'Signing the Arbitral Award in Wet Ink: Resistance to Technological Change or A Reasonable Precaution?' (Kluwer Arbitration Blog, 6 November 2020) <http://arbitrationblog.kluwerarbitration.com/2020/11/06/signing-the-arbitral-award-in-wet-ink-resistance-to-technological-change-or-a-reasonable-precaution/> accessed 24 November 2020.

[8] As a leading example, starting in September 2019, the Stockholm Chamber of Commerce has been providing electronic case management and file sharing facilities through its proprietary digital platform for the arbitral institution, the parties and the Arbitral Tribunal, available at <https://sccinstitute.com/scc-platform/> accessed 13 November 2020.

[9] For an example of a witness's examination and the relative challenges, see Chahat Chawla, 'International Arbitration During COVID-19: A Case Counsel's Perspective' (Kluwer Arbitration Blog, 4 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/> accessed 22 November 2020.

[10] See *Capic v Ford Motor Company of Australia Limited* (Adjournment) [2020] FCA 486.

process and its duration and cost.[11] Before considering these challenges further, it is crucial to determine the legal basis for assessing the legality of virtual hearings.

III. Legal Basis for the Legality of Online Hearings

With regard to assessing the legality of online hearings, multiple sources come into play in international arbitration. First of all, one must consider the law, especially procedural guarantees, at the seat of the arbitration, as well as laws applicable in the country of enforcement. These might trump the rules selected by the parties and are crucial to the validity and enforceability of the award. This means that for a full exploration of the legality of online hearings, a comparative analysis of the mandatory provisions governing arbitration proceedings across jurisdictions is necessary. The UNCITRAL Model Law aids the interpreter in this enterprise, given the harmonising effect that the Model Law has had on the arbitration laws of those countries adopting its provisions.[12] Secondly, the New York Convention is also included in the relevant framework as it lists the conditions for recognising and enforcing foreign awards, and is therefore paramount for those parties seeking to effectively enforce an award issued at the end of a partially or entirely virtual process.

Furthermore, regardless of whether the parties have opted for an *ad hoc* or institutional arbitration, the rules of arbitral institutions can provide additional 'authoritative' support by expressly contemplating a series of provisions concerning virtual hearings.[13] The parties are free to include some of these rules in their arbitration agreements when arbitrating *ad hoc,* or they find them by default in their agreements if they decide to file with an arbitration institution, even in those cases where the parties never negotiated any rules with regard to online hearings clearly.

[11] In this case, the Supreme Court concluded that the virtual process was likely to increase the overall costs of the proceedings, see ibid. Notwithstanding that this consideration might be questionable, it is not conclusive for the present study on international arbitration where the parties would have to otherwise bear the costs of appearing before a foreign court or Arbitral Tribunal. This is arguably more expensive than holding part of the process online, especially when witnesses or expert witnesses are also involved.

[12] See Nigel Blackaby and others, *Redfern And Hunter on International Arbitration* (6th ed, Oxford University Press 2015) 58–60.

[13] The distinction between ad hoc and institutional arbitration is illustrated at ibid 43–47.

The support currently provided by arbitral institutions encourages the parties to use online hearings and adopt specific provisions in their arbitration agreements.

A. Arbitral Institutions

Most arbitral institutions have provided guidelines on the conduct of proceedings during the current pandemic. For example, the ICC's 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' is particularly detailed.[14] Similar guidance was released by the Chartered Institute of Arbitrators[15] and the Vienna International Arbitral Centre.[16] Likewise, in an official communication in April 2020, the Milan Chamber of Arbitration invited the Tribunals to make every possible effort to carry out pending hearings via video or audio conference.[17] The website of Delos contains a comprehensive overview of checklists issued by various arbitral institutions as well as links to many of the webinars that have been conducted since the beginning of the pandemic.[18]

These leading arbitration institutions were also part of a joint communication which was released to encourage Arbitral Tribunals and parties to identify measures necessary to address the challenges arising from the pandemic and preserve the efficiency of arbitration proceedings. On that occasion, explicit reference to the use of digital technologies for working remotely was made.[19] These initiatives are clear evidence that online hearings are seen by leading arbitral institutions as a

[14] ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (9 April 2020), <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> accessed 22 November 2020.

[15] Chartered Institute of Arbitrators, Guidance Note on Remote Dispute Resolution Proceedings (8 April 2020), <www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf> accessed 22 November 2020.

[16] Vienna International Arbitration Centre, A Practical Checklist for Remote Hearings (June 2020), <www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL.pdf> accessed 22 November 2020.

[17] Milan Chamber of Arbitration (14 April 2020) <www.camera-arbitrale.it/it/news/arbitrato-sospensioni-dei-termini.php?id=930> accessed 22 November 2020.

[18] See https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/, accessed 22 November 2020. For further information on this topic, see Patricia Louise Shaughnessy, 'Initiating and Administering Arbitration Remotely' in Maxi Scherer, Niuscha Bassiri, and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 27–48.

[19] The joint statement may be viewed at https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf, accessed 22 November 2020.

viable option in the context of the disruption caused by COVID-19, and possibly for improving arbitration in the future.

Moreover, when parties choose a particular set of arbitration rules, they are generally free to tailor them to their specific needs, filling any existing gap by directly contracting with each other on those aspects of the procedure which are not already regulated by the rules; or they can deviate from the non-mandatory parts of the rules. This would include adapting the chosen rules to the setting up of online hearings, if deemed necessary. In any case, if the parties have not agreed *ex ante* on the matter or are unable to reach an agreement during the proceedings, the Arbitral Tribunal may well mandate that the hearing be held online, as long as this is aligned with the arbitration rules agreed upon by the parties and not prohibited by the applicable law of the seat.

Under the rules of some of the most prominent arbitration institutions, granting extensive discretionary powers to the Arbitral Tribunals is the norm. For example — and without having the expectation of providing a universal picture — Article 17 of the International Rules of the Korean Commercial Arbitration Board[20] and Article 19.1 of the 2016 Singapore International Arbitration Center Rules[21] envisage this principle. Additional evidence for this point is provided by Article 13.1 of the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules,[22] where the discretion of the tribunal encompasses making use of technology as it considers appropriate, and Article 28.1 of the Vienna International Arbitral Centre 2018 Arbitration Rules, entitled "conduct of the arbitration".[23] Similarly, reference to the arbitrators' discretion is made at Article 23 of the Stockholm Chamber of Commerce 2017 Arbitration Rules,[24] and at Article

[20] "The Arbitral Tribunal shall conduct the proceedings in accordance with the Rules and, where the Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal may settle on".

[21] "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute".

[22] "Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case".

[23] "The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise according to its own discretion. The arbitral tribunal shall treat the parties fairly. The parties shall be granted the right to be heard at every stage of the proceedings".

[24] "The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties. In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case".

32 of the American Arbitration Association's most recent Commercial Arbitration Rules,[25] the latter of which specifically provides for the power of the tribunal to mandate the use of different instruments of communication. The discretion with which Arbitral Tribunals are usually entrusted by the parties arguably ought to include the option of holding a hearing online, as this interpretation enables the arbitrators to select the most appropriate method for conducting the hearing, adjusting for the circumstances of the case with which they are confronted.

In support of this argument, the ICC has updated its Arbitration Rules, which entered into force on 1 January 2021. These rules explicitly give the arbitrator the discretion to mandate that a hearing be held by remote means of communication. In detail, the revised form of Article 26.1 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".[26] Article 19.2 of the London Court of International Arbitration (LCIA) Rules, which were revised in response to the Pandemic and came into force in October 2020, reinforces this trend by explicitly detailing that "as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)".

Therefore, the discretionary powers conferred by default on Arbitral Tribunals in accordance with the rules of some of the main arbitral institutions may well be interpreted as enabling the arbitrators to mandate an online hearing. Moreover, even when the rules are silent on this matter, there is a new trend of including in each set of rules a provision expressly conceived for this purpose. This is the case especially regarding the sets of arbitration rules which used to be silent on the adoption of alternative means of virtual communication, such as the rules of the ICC and LCIA.

The situation is even clearer in the UNCITRAL Model Rules which take into account precisely the most problematic phase of the process, namely that of the testimony of the witnesses. The text of the Model Rules states beyond doubt that it may occur entirely by way of a virtual hearing. More specifically, Article 28.4 of the UNCITRAL Rules empowers the Arbitral Tribunal to hold examinations through "means of telecommunication that do not require their physical presence at the hearing (such as videoconference)". This rule is premised on Articles 17.3 and 27.2 of the UNCITRAL Rules. These provide that there is

[25] American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule 32(a), (b) and (c).

[26] ICC Rules of Arbitration, Article 26.

usually no obligation to hold parts of the arbitration process orally, as written and signed statements constitute a default rule, unless one of the parties requested an oral hearing with the arbitrators' approval, or the parties agreed on a specific mode in the first place.

As many arbitration rules move in the direction of facilitating online hearings, the assessment of the adequacy of such a process should be done on a case-by-case basis by the arbitrators, adjusting for the complexity of the dispute. To that end, the adoption of solutions which are tailored to the dispute is certainly not impeded by virtual hearings, but is in fact enhanced. Allowing flexibility on the matter is the approach most consistent with the founding principles of international arbitration.

B. Law at The Seat of the Arbitration

In addition to the applicable arbitration rules, which in most cases have proven to be in favour of online hearings, particular regard has to be had to the law at the seat of the arbitration, the *lex arbitri*, as this will ultimately determine the smoothness of the process. According to Article 24.1 of the UNCITRAL Model Law, the Tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials. Nevertheless, if one party requests a hearing, the Arbitral Tribunal should hold it at an appropriate stage of the proceedings. The possibility of online hearings is not explicitly mentioned in the Model Law; however, to some extent the fact that they are not prohibited supports the argument in favour of their legality.[27] Furthermore, according to Article 18 of the UNCITRAL Model Law, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This sets a broad standard in determining when a process contemplated by the parties, or implemented by the Arbitral Tribunal, is respectful of due process.

Similar rules to Articles 18 and 24.1 of the UNCITRAL Model Law are, for instance, contained in the Austrian Arbitration Law and the German Arbitration Law.[28] In Italy, the Articles 816-*bis* and *ter* of the Italian Code of Civil Procedure contain general provisions as to the extension of the powers of the Arbitral Tribunal throughout the process and the collection of evidence respectively. Arbitrators have broad powers to conduct the arbitral proceedings, provided that they respect the determination of the parties, guarantee due process and comply with public policy.

[27] See also Erica Stein, 'Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings', in Maxi Scherer, Niuscha Bassiri, and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 173.

[28] See § 598 of the Austrian Code of Civil Procedure and § 1047 of the German Code of Civil Procedure.

Hence, in most cases, arbitrators are permitted to set the rules for specific aspects of the procedure as they deem most appropriate.[29] In these cases, notwithstanding the lack of an explicit provision on virtual hearings, it can be argued that the Tribunal has discretion to conduct hearings by video conferencing as long as no party objects.

Turning again to the Federal Court of Australia, it may be noted that no legal provision against virtual hearings was cited in *Capic v Ford Motor Company of Australia* to which this article referred previously.[30] This suggests that, if Australia, Italy, and Austria are assumed to be sufficiently representative jurisdictions, then finding a legal barrier to the implementation and enforceability of virtual arbitrations at 'seat level' might be unlikely, mainly due to the lack in most countries of an express provision which engages with the matter. It can therefore be argued with greater confidence that the fact that Australian judges have questioned the unsatisfactory nature of performing a cross-examination by video[31] does not lead to the conclusion that this practice violates due process, nor that it is against the free determination of the parties.

Apart from Australia, Austria is one of the few jurisdictions in which a higher court has ruled on the legality of online arbitration hearings.[32] In the case before the Supreme Court, the respondent did not agree to conduct the hearing via video-conferencing and subsequently challenged the Arbitral Tribunal over its decision to proceed with an online hearing. The Austrian Supreme Court found that remote hearings are permissible under Austrian law.

First, the Supreme Court held that conducting the hearing via a video conference did not violate the mandatory duty to treat the parties fairly as contained in the Austrian Arbitration Act, since the parties were granted sufficient time to prepare for the hearing. Most importantly, the Court held that using video technology in arbitral hearings does not violate Article 6 of the

[29] Michelangelo Cicogna, 'Arbitration in Italy' (Lexology, 9 January 2019) <www.lexology.com/library/detail.aspx?g=8c6a9ef8-00d1-4613-92e0-1e0ef728bed4#:~:text=Under%20Italian%20arbitration%20law%2C%20the,the%20inaction%20of%20the%20parties.> accessed 22 November 2020.

[30] See *Capic v Ford Motor Company* (n 10).

[31] For example, see *Hanson-Young v Leyonhjelm* (No 3) [2019] FCA 645 [2] and *Capic v Ford Motor Company* (n 10).

[32] Austrian Supreme Court 23 July 2020, 18 ONc 3/20s; for an English summary and comment see: Maxi Scherer and others, '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' (Kluwer Arbitration Blog, 24 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> accessed 22 November 2020.

European Convention on Human Rights (ECHR), even in the absence of both parties' agreement. It stressed that Article 6 ECHR requires a trade-off between safeguarding the parties' right to be heard with the right to effectively pursue their civil rights. As a virtual hearing can save time and costs, especially in the time of a pandemic, it is, in the opinion of the Austrian Supreme Court, an effective and legal method combining efficient law enforcement with the right to be heard.

The Court further held that potential abuses concerning witness examinations cannot undermine the legality of video conferencing, emphasising that abuses such as witness coaching are also possible in regular hearings. It even found that virtual hearings offer further possibilities to prevent such abusive practices. For instance, witness examination could be recorded and, if there is a danger that a witness received private messages on their screen, he or she could be ordered to look directly into the camera. Moreover, it also explicitly rejected an argument based on the fact that the hearing was scheduled for 15h CET, i.e., outside the "classic working hours" for a key witness located in Los Angeles. It specifically stressed the fact that the parties had agreed to an arbitration seated in Vienna and that the witness's participation at an early hour of the day was in any case less burdensome than the alternative: travelling from Los Angeles to Vienna to be heard in person.

Finally, courts could also be called upon in setting aside proceedings. The law at the seat is crucial at this stage because it determines under what circumstances an award may be challenged. For example, under the UNCITRAL Model Law, an award may be set aside if a party was otherwise unable to present its case (Article 34(2)(a)(i)), or if the arbitral procedure was not in accordance with the agreement of the parties or the law at the seat (Article 34(2)(a)(iv)).[33] Whether elements of remote hearings may fall under these grounds for challenge remains to be seen. As the grounds largely mirror those of the New York Convention, this will be further discussed in the subsection below.

C. The New York Convention

An award rendered after a virtual hearing should be enforceable pursuant to the New York Convention. The New York Convention, in spite of its distant origin in 1958, generally allows the parties to enforce an award that is the result of an online procedure. This interpretation derives from the words of the Convention

[33] See Stein (n 27) 169.

from which it is clear that only a domestic mandatory provision can prevent the parties or the Arbitral Tribunal from lawfully opting for a process held remotely.

Article V lists the conditions under which the enforcement of an award may be denied. According to Article V(1)(d), an award may not be enforceable if the party against whom it is invoked proves to the competent authority that "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place". This means that an arbitral award would not be enforceable if, for instance, the arbitration which led to it was decided on the basis of an essential piece of evidence which had been collected in breach of the procedure contemplated by the parties in their agreement. Hypothetically, collecting a deposition via video-conference might lead to such a breach where the parties had not agreed to it explicitly and one of the aggrieved parties, after being negatively affected by the evidence, decided to challenge the enforceability of the award on the basis of the lack of consent.[34]

Similarly, the second part of Article V(1)(d) of the Convention states that in the absence of an agreement between the parties on the process, an award may not be enforceable when it has been issued in conflict with the procedural rules which are applicable in the seat of the arbitration. It may be inferred that the Arbitral Tribunal can mandate or restrict virtual activities — as the case may be — in those situations in which it is interpreting the national law of the country of the seat. In addition, utmost care must be given to how the judiciary in the place of enforcement interprets Article V of the New York Convention, as this will vary across contracting jurisdictions.

Therefore, in order to reduce the risk that an award is deemed to be unenforceable, it is recommended that lawyers agree expressly with their counterparty at the outset of or during the arbitral proceedings that hearings, and in particular cross-examinations, can be conducted virtually. This consent on the procedural rules trumps hypothetical national restrictions as long as they do not constitute mandatory law, and avoids putting the decision to the discretion of the Tribunal in case of disagreement. An illustration of such a clause is provided by the Milan Chamber of Arbitration, by which spontaneously or following the demand of one of the parties, the Arbitral Tribunal "may schedule a single hearing for the taking of evidence and a final discussion, […] held by videoconference, telephone

[34] The same point is made in Roberto Argeri and others, 'The Milan Chamber Of Arbitration Adopts New Measures In The Wake Of COVID-19 Pandemic' (Mondaq, 9 August 2020) <www.mondaq.com/italy/arbitration-dispute-resolution/971640/the-milan-chamber-of-arbitration-adopts-new-measures-in-the-wake-of-covid-19-pandemic-> accessed 22 November 2020.

or similar means of communication".[35] Equally, Article 19.2 of the LCIA Rules and 26.1 of the new 2021 ICC Rules constitute perfect examples.

Finally, parties might also argue that a virtual hearing violates their right to be heard or their right of equal treatment. These rights are both encompassed by Article V(1)(b) of the New York Convention. However, if both parties are given the same opportunity to present their case virtually and no technical issues occur, it is unlikely that this ground will be invoked successfully.[36]

In short, while many arbitral institutions have taken steps to encourage virtual hearings, the law at the seat of the tribunal and the New York Convention must also be taken into account. The present analysis suggests that neither the New York Convention nor laws based on the Model Law prohibit online hearings. Nevertheless, it is still advisable for parties to explicitly agree on this possibility beforehand. This agreement should consider the technical and practical implications of online settings, as these aspects may vary depending on the circumstances of the case and the location of the parties involved.

IV. Factors to be Considered when Conducting Online Hearings

While the international community reaches a consensus on the legality of online international arbitration, the potential problems arising from this new form of procedure call for lawyers to adapt their techniques and agree with the counterparty *ex ante* what rules shall apply to a cross-examination, for instance, in case a dispute subsequently arises. The factors which lawyers must take into account in advance include the time zones in which the parties and witnesses are based and their access to a stable and secure internet connection. Given that most national laws are currently silent on the legality of virtual proceedings and any additional requirements for the enforceability of the subsequent awards rendered by the Arbitral Tribunals, these elements should also inform the Tribunal's decision on whether or not they should impose an online hearing during the arbitration process. In fact, these factors potentially affect the overall procedural fairness, as well as substantive fairness as a consequence, thus determining when a virtual hearing is advisable for all parties involved.

Leading international arbitration institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), are contributing by making available the IT tools necessary for a fully remote process.[37] Likewise, the

[35] See Article 5(5) of Annex D of the Arbitration Rules of the Milan Arbitration Chamber on simplified arbitration which are now applicable, since the 1st of July 2020.

[36] See the detailed analysis of Scherer (n 2) 439 et seqq.

[37] See the ICSID's case administration services on its official website available at https://icsid.worldbank.org/services/arbitration/case-administration, accessed 22 November 2020.

American Arbitration Association is offering a virtual hearing support service.[38] This is extremely important in terms of limiting any opportunistic arbitrages in the selection of the software deployed during the process, and absorbing some of the costs that otherwise would need to be borne by the parties. Accordingly, for online hearings to work, virtual spaces need to be cyber-secure and completely impenetrable with regard to potential hacks or privacy breaches aimed at obtaining confidential information.[39]

Different locations of hearing participants and choosing the right software are only two examples of practical issues that must be addressed at the outset of the arbitration. Thus, it is highly advisable that the Tribunal addresses these practical concerns in the form of a Procedural Order.[40] In spite of the technical support which a virtual hearing requires in order to be effective, to date they will cost between £3K and £5K per day in complex cases, depending on the number of participants, the composition of the legal team and the members of the Arbitral Tribunal.[41] Hence, this type of hearing is still likely to be cheaper than equivalent in-person hearings. This, in turn, constitutes a strong incentive for firms involved in international arbitration to continue developing the practice, and it is an additional element to consider when giving legal advice on the international dispute resolution options available to clients.

V. Conclusion

In conclusion, a single, uniform and exhaustive answer on the legality of virtual hearings is not possible. This is because the answer is conditional on the

[38] See https://go.adr.org/covid-19-virtual-hearings.html, accessed 13 November 2020.

[39] Cyber security and data protection challenges are not new to the world of arbitration: see Gerald Leong, 'How Do You Deal With Data Protection and Cybersecurity Issues In a Procedural Order?' (Kluwer Arbitration Blog, 19 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/19/how-do-you-deal-with-data-protection-and-cybersecurity-issues-in-a-procedural-order/> accessed 22 November 2020. However, the impact of the COVID-19 Pandemic, which is undoubtedly going to increase parties' reliance on remote forms of procedure, will exacerbate those problems and require more thought about the possible solutions. For example, see Gian Paolo Coppola and Marco Imperiale, 'Between Cybersecurity and Arbitration In Times Of Coronavirus Warnings, Suggestions And New Frontiers' (Mondaq, 5 August 2020) <www.mondaq.com/italy/security/972958/between-cybersecurity-and-arbitration-in-times-of-coronavirus-warnings-suggestions-and-new-frontiers> accessed 2 September 2020.

[40] For an example of such a Procedural Order, see Niuscha Bassiri, 'Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders', in Maxi Scherer, Niuscha Bassiri, and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 105–120.

[41] See Emily O'Neill and Mehdi Mellah, 'Hear us out: in-house litigators and the future of virtual hearings', (The Law Society, 28 October 2020) <https://www.lawsociety.org.uk/topics/in-house/the-future-of-virtual-hearings> accessed 22 November 2020.

position adopted in legislation across multiple jurisdictions. Parties are well advised to agree on the possibility of holding hearings virtually, either in their arbitration agreement or at a later stage. This choice seems more than advisable in a scenario where arbitrators from different nationalities are part of numerous tribunals spread across the globe, and where international lawyers are assisting several clients in different *fora* simultaneously. Moreover, this solution is permissible under the New York Convention regime, and also is not prohibited by the national arbitration laws taken into consideration. In line with the powers typically conferred on Arbitral Tribunals, in the absence of an agreement between the parties, the arbitrators should decide whether to mandate a virtual hearing, depending on the complexity of the case, its seat, and the specific situation of the parties. The more remote hearings are experienced during the COVID-19 pandemic, the more likely it is that 'digital' international arbitration will become a common option.

As a result, online hearings will often constitute a more efficient route for parties involved in international arbitration. This will benefit the clients of the most adaptable lawyers, who are able to perform effective cross-examination through a screen, or draft in their clients' agreements the relevant clauses. Hopefully, the transition to online arbitration will continue to be facilitated by international institutions, which may make it an available option in their sets of rules, starting with less complex disputes. This will help arbitration keep its competitive advantage over other alternative international dispute resolution methods in the future.