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Preface

Historians generally reserve the term 'revolution' for abrupt and sometimes violent upheaval that leads to systemic change in the existing socio-political order. The Industrial Revolution of the eighteenth and nineteenth century is traditionally characterized as an event of such magnitude, so are the contemporaneous French and American Revolutions, heralding the advent of republicanism and popular sovereignty.

It is better left to historians to judge whether the events of 2020 and resulting developments in the socio-political sphere amount to a 'revolution' properly so called. Speaking for the legal profession and the field of international arbitration in particular, it seems clear that the COVID-19 crisis has triggered profound and systemic changes. In many ways, of course, the crisis has merely reinforced existing trends and not led to a complete reversal; yet, the fact that entire proceedings are now being conducted remotely constitutes so significant a deviation from the norm as to warrant the designation 'revolution'.

It is in this spirit that we have chosen the title *International Arbitration and the COVID-19 Revolution* for this book and for the special publication of the *Journal of International Arbitration*. The chapters in this volume comment on the effects of the COVID-19 crisis from a variety of perspectives – legal, practical, and sector-specific. What they all have in common is that they perceive the crisis not only as a catalyst for change but also as a moment of opportunity. Arbitration, it turns out, was well prepared for its remote 'revolution'.

Putting together this special edition in a relatively short time frame, despite the inevitable logistical obstacles, does not just confirm the spirit of this publication. More importantly, it is the result of the hard work of dedicated individuals located on different continents. We note with great appreciation that many of the authors drafted their contributions while maintaining full-time legal practices, juggling between child care, home teaching and home office. Furthermore, the editors would like to express their special gratitude to Ms Maria Paschou of Hanotiau & van den Berg for her excellent assistance in reviewing and editing the chapters in this special edition.

P xxx We sincerely hope that the wisdom collated in these pages may be of use to scholars and practitioners of arbitration and beyond, and that this special edition will serve as a modest contribution to a field that is constantly evolving and destined for change.

London, Brussels and Cairo, August 2020

Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab

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Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis

Mohamed S. Abdel Wahab

Prologue

The word 'crisis' originates from the Greek word 'κρίσις', which commands fear, concern, and distress. Crisis is very commonly associated with events and calamities that often lead to significant deviation from the normative order of things. It is also associated with events that destabilize and imperil social, cultural, economic, political, legal, and/or environmental aspects and affairs. Crisis can affect individuals, groups, communities, societies, states on domestic, regional, and international levels, and is often associated with adverse ramifications and fears of worsened or worsening conditions.

Linguistically, crisis can mean 'a time of intense difficulty or danger', 'a time when a difficult or important decision must be made' or 'the turning point of a disease when an important change takes place, indicating either recovery or death'. (1) As such, crisis has several defining characteristics, including: (i) unforeseeability (unexpectedness); (ii) fostering an environment of uncertainty; (iii) posing serious threats; (2) and (iv) triggering a change or a need for change and transformation. (3)

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It is in this respect that the COVID-19 pandemic can be characterized as a global crisis with far-reaching ramifications for governments, people, businesses, transactions, disputes, and dispute resolution. Ever since the COVID-19 crisis forced governments to take varying measures between lockdowns, curfews, travel bans and other restraining measures, physical distancing became normative in many localities and physical interaction remains challenging. COVID-19 was indeed unforeseen, created lots of uncertainties, challenged established institutions and practices, and triggered worldwide waves of disruption and change across all sectors, industries, societies, and states. This status quo together with the uncertainties (surrounding the restrictions on travel and social proximity) has brought about a new realism that is now powered and driven by information and communication technologies (ICTs).

The new realism brought about by the COVID-19 crisis has called for adequate 'crisis management' (4) techniques and invited global adaptation and eventual transformation in the ways business is conducted and how disputes are handled, managed and resolved. The worldwide spread of COVID-19 has affected commercial operations, logistics, and finances across industry sectors all over the world. The social, political, and economic instability caused by COVID-19 will likely result in a notable surge in the number and types of disputes, as businesses become unable, and, in some cases, even unwilling to fulfil their pre-existing contractual obligations owing to novel circumstances and unaccounted for pressures on their finances and operations.

While the judicial systems in many jurisdictions had come to a halt in the first weeks during which the pandemic struck, arbitration lived up to individual, institutional and organizational expectations through a swift and smooth transition into the virtual environment. Institutions, practitioners and users of arbitration pooled their efforts and joined forces across all jurisdictions to ensure that arbitration remains a viable destination for justice midst the derailing crisis.

Crises and disputes are invariably entangled with social organization and have existed ever since the dawn of human interaction. However, in times of crisis, much remains to be observed and learnt from the uncertainties surrounding events qualifying as crises, and adequate dispute prevention, management and resolution techniques must be deployed to mitigate the risks and perils of impending crises. As correctly stated by some scholars, the dispute resolution community does not seem to have benefited from management sciences that offer a wealth of knowledge worthy of consideration to improve the management and organization of dispute resolution processes. (5)

P 3 It is in this context that the present chapter aims at addressing the impact of the COVID-19 crisis on dispute prevention, management and resolution techniques and how this is reshaping the dispute resolution landscape, specifically in the context of international arbitration. That said, this chapter will commence by providing an analytical overview of crisis management and will then address specificities of dispute prevention, followed by particularities of dispute management and will then move to dispute resolution before concluding with some remarks and observations.

1 CRISIS MANAGEMENT AT A GLANCE: WHAT WE NEED TO KNOW

Crisis management is an essential part of any operational planning. Failure to institute a crisis management plan (CMP) may result in losses of a financial nature and severe

adverse ramifications on facilities costs, personnel costs, market share, achieving strategic goals, which puts at risk organizational survival. (6)

The exposure to the COVID-19 crisis has put to test the viability of organizational planning and institutional policies midst the challenges and risks brought about by COVID-19, and many have now voiced the immediate need to revisit established practices and policies as well as the dire need to develop effective CMPs. While CMPs have been known to industries and businesses for some decades, the global dispute resolution community has not yet availed itself of the benefit of integrating CMPs.

Effective CMPs comprise three distinctive phases: *pre-crisis*, *crisis response*, and *post-crisis*. Effective CMP's follow a linear progression of activation whereby each phase is addressed both vertically and horizontally, within an organization. As such, all members of the work teams (7) are aware and have had input into the development of the plan, the preparation for possible crises, the handling of a range of risks that may present themselves, and the review of how each crisis was handled and whether improvements are needed in anticipation of future similar or dissimilar crises. (8)

Every CMP focuses on the overall safety and well-being of an organization, its members and all other stakeholders. By following the noted sequence of organizational crisis preparation and implementation negative, and possibly fatal, consequences can be minimized if not avoided altogether. (9)

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1.1 Pre-crisis Phase

It is essential to identify both risks and how such risks can be addressed by the crisis management and response team. Such efforts should include adding a clear structure to the plan, identifying and training the various team members, as well as practising drills on how to handle various kinds of risks and having pre-planned responses that are written for future reference. (10) Annual updates of the plan, the team membership and the training/practice are indispensable.

Concerning the CMP, it is not a prescriptive manual with answers to every possible question. (11) It contains relevant facts, CMP team members and assignments, what to do in general crisis situations, etc. Since the CMP will not answer every question that may arise during a crisis, there is a dire need to have an active, well-informed crisis management team who can work collectively to address any anticipated and unforeseen crisis.

With respect to the crisis management team, this should be comprised of members who represent the full range of departments and who have the needed expertise on all issues covered in the CMP and falling within an organization's mandate or scope of business. (12) The structure of the teams may vary with the particular type of risk that is assigned to them, while training and practice in decision-making should be part of the pre-crisis phase of the CMP.

Regarding channels and forms of communication for daily operating purposes, while these may be adequate for activities of a routine nature in normal times, a different (set) of channels should be established for operating in diverse crises, (13) including pandemics. Not every crisis will lend itself to the same form of crisis communication. Consideration should also be given to each stakeholder group, as they well may have different access needs and opportunities.

1.2 Crisis Response

Responses to crises refer to what needs to be done when the crisis hits. Crisis response can be divided into 'initial response' and 'reputational repair and behavioral intentions'.

Effective *initial* crisis responses require three essential components: (i) immediate acknowledgement and action, which serve as an affirmation of the commitment to transparency; (ii) accuracy in both internal and external communication to boost trust and confidence in the organization's handling of the crisis; and (iii) actions consistent both with the previously agreed upon CMP and with any communication about the crisis. (14)

P 5

Repairing an organization's reputation because of a crisis may be as difficult as managing the actual crisis. Two of the most commonly used techniques to support reputational repair are: (i) evidencing that the crisis was caused by circumstances beyond the control of the organization; (15) and (ii) capitalizing on an organization's long-term role within the community. (16) In any event, planning for and implementing reputational repair should be part of the CMP, and can be implemented at any appropriate stage during the response and post-response phases of the CMP, noting the importance of proceedings with cost-effective implementation measures.

1.3 Post-Crisis Phase

The post-crisis phase is a rebound that is often referred to as the 'getting back to normal

as quickly as possible' phase. In this phase, any organization needs to demonstrate that it is engaged in pursuing promises and commitments made during the crisis and communicating same to whatever audiences that may have been affected by the crisis (whether domestic, regional or international). The crisis may have moved to the background of normal operations, but it still needs to become a part of any post-crisis investigation, planning and action by management. (17) The crisis management team(s) will need to solicit input as to how well every aspect of the crisis was managed, and what were the deficiencies in both the CMP and its implementation. (18) While an organization's internal culture may be one that encourages praise, and discourages criticism, it is essential for management to ensure that weaknesses in the handling of the crisis are addressed in the modification of a new CMP.

In essence, a post-crisis phase is a period of reflection on what has been done during a crisis as opposed to what ought to have been done in accordance with the CMP. The less the gap between the actions taken and the actions that should have been taken, the more successful an organization would be in handling and managing the crisis.

1.4 Crisis Management from a Legal Perspective

Legal counsel must be part of the CMP and is normally tasked with the review and possibly the communication on behalf of the organization with external stakeholders. It is legal counsel who should speak extemporaneously about the events of the crisis, make any representations of what has happened, what is going to happen, and how various issues have been (or will be) addressed and communicated to the world. (19)

P 6 From the beginning of the crisis, a central focus of the CMP must be the control of potentially legally damaging statements/actions, as well as the management of legal risks that begin to arise throughout the crisis, and so legal counsel will be the person concerned about compliance, regulation, direct legal liability, and collateral liability that may arise from unintended statements/actions.

In addition to playing a role in the short-term management of the crisis, and the resulting litigation, legal counsel is charged with conducting internal legal investigations and gathering and organizing relevant evidence.

Finally, legal counsel will need to play a role in the revisions of the CMP to ensure that better responses are instituted in the future, which will reduce the risk of legal exposure.

In light of the above, it is essential that all dispute resolution stakeholders factor into their policies CMPs, drawing upon the lessons learnt (and which are being learnt) from the COVID-19 pandemic. In as much as interdisciplinary research is indispensable for the dispute resolution field, crisis management now presents itself as an important area befitting of integration into dispute resolution-related policies and standards, to engage effective dispute avoidance, management and resolution policies.

The remainder of this chapter will be devoted to shedding light on the aspects of dispute prevention, management and resolution in times of crisis.

2 DISPUTE PREVENTION IN TIMES OF CRISIS

Disputes are the alter ego of business dealings and transactions in diverse sectors. While it is indeed true that businesses aim at carrying out their dealings with the hope that no disputes will arise, it is not always possible to avoid disagreements and controversies that can escalate to become legal disputes. These disputes can be time-consuming, costly and may even adversely impact business and dealings. Thus, contracting parties when entering into a new deal or transaction must acknowledge and embrace the fact that conflicts and disputes may arise, and so care must be exercised when drafting contracts and agreeing to dispute resolution processes. This is all the more exacerbated in times of crisis, where the uncertainties and the significant ramifications of the crisis may well contribute to dispute escalation or proliferation. The COVID-19 is a concrete example of a crisis that has impacted businesses and States across all sectors, and this is leading to a novel faction of disputes. (20) Along with the health implications COVID-19 has on humans, the pandemic has pushed the whole
P 7 world into a crisis mode, with significant impact on economies, financial markets, business operations, logistics and financing. All this is a clear recipe for more disputes.

Given that 'prevention is better than cure' and that liquidity is a serious concern midst crises with financial implications, it is imperative that all stakeholders take note of the diverse techniques that ought to be employed to mitigate the risk of both commercial and investment disputes. Both types are addressed below, with the aim of identifying means to prevent disputes in both worlds.

2.1 Preventing Commercial Disputes

Generally speaking, contractual problems tend to result from 'a combination of uncertainty and limited ability of people to think of future problems that may arise from the possible meaning of what they had written'. (21)

After a dispute arises, parties are prevented by their heated emotions from agreeing on the simplest of things. Realizing that disputes may arise out of, or in relation to a specific

agreement – before the actual occurrence of the disputes – gives the parties reasonable time and opportunity to contemplate and consider means to avoid disputes to the extent possible.

Dispute prevention should be part of organizational planning and CMPs for three main reasons: *first*, dispute prevention processes and mechanisms allow issues to be resolved before escalation into a dispute, which saves considerable time and costs, especially at times of crisis when all efforts ought to be directed at managing the crisis on a business level. *Second*, dispute prevention processes and mechanisms foster good business relationships and dispense with the stigma of being perceived as dispute centric. *Third*, dispute prevention processes and mechanisms act as natural filters through which only the most essential of disputes would pass, which enables an organization to give the needed due care in managing and prosecuting selected disputes which averts unnecessary waste of efforts and maximizes the chances of a favourable outcome.

Dispute prevention processes and mechanisms take different forms, including: (i) the negotiation of balanced, appropriate, complete and prophetic contracts that are inclusive of adaptive and exemption clauses dealing with unforeseen material adverse events and allocating the risk thereof accordingly (the 'Pacta Equilibrium'); (ii) bona fide communications between contracting parties to resolve issues arising from their contractual relationship; (iii) proper administration of contracts; and (iv) engaging in early assessment and evaluation of divergent contractual positions. I address those processes and mechanisms below.

P 8

2.1.1 The Pacta Equilibrium

Parties to international commercial contracts should pay specific attention to negotiating and drafting agreed contractual terms and conditions. A well-negotiated and balanced contract is a true epitomization of the universal principle of '*pacta sunt servanda*'. A clear, comprehensible, balanced, definitive, well-chosen form of contract that incorporates adequate dispute management and resolution procedures dispenses with unnecessary disputes and minimizes the inherent risk of disputes that may arise between the parties. In principle, unambiguous and precise drafting is key to dispute avoidance. (22) Clarity of terms, obligations and rights as well as proper risk allocation are quintessential and dispense with risks of uncertainty and potential disputes.

Moreover, choosing the best-fit form of contract as well as proper pre-contract review is among the most successful dispute avoidance methods. (23) Similarly, the inclusion of a well-designed and binding conflict management procedure may obligate parties to engage in early discussions so as to identify problems once they arise, and attempt to resolve same rapidly and amicably before escalation to formal dispute resolution processes. (24)

Accordingly, parties are indeed encouraged to consult qualified lawyers early on during the negotiations phase to ensure that their commercial deal is ring-fenced and well captured legally. As mentioned herein, a well-drafted and well-balanced contract is crucial and will undoubtedly be of great value during times of crisis. While no contract can foresee or anticipate the infinite array of situations that may remotely or likely occur and impact either party's ability and willingness to perform, proper drafting, careful choices and an informed allocation of risks will undoubtedly mitigate the inherent risks associated with challenges arising in times of crisis.

Finally, the COVID-19 crisis has all the more shown that traditional boilerplate force majeure and hardship clauses merit reconsideration, to ensure that contracts cater for both normal circumstances and exceptional events leading to crises. A contract may indeed be well negotiated and properly drafted, but if it fails to carefully account for abnormal circumstances and contractual anomalies by way of specifically tailored standards and principles, it risks becoming a recipe for disputes should certain crises unfold.

While most national laws have specific provisions that deal with force majeure and hardship situations, such provisions tend to differ across different jurisdictions, it is vital that the parties to international contracts negotiate, agree and draft clauses bespoke to
P 9 their contractual relationship such that disputes could be avoided or reduced without recourse to litigation or arbitration. (25) As part of their pre-contractual review, parties should carefully consider whether such concepts as force majeure and hardship are subject to mandatory or non-mandatory regulation under the potentially applicable *lex causae*, so that their choices and drafting are informed by legal considerations. (26)

Finally, for contracts which performance is stretched over time, parties are encouraged to consider whether a contract review mechanism ought to be set in place to ensure that their contractual bargain is not short-lived and survives on a long-term basis.

2.1.2 Bona Fide Communications Between Contracting Parties

To resolve issues arising from their contractual relationship in an amicable environment prior to escalation to a dispute situation, parties should engage in bona fide communications all throughout the contract performance period.

Communication is a core conflict avoidance technique and is crucial to dispute prevention. It enables the parties to engage in meaningful discussions insofar as the parties are acting in honesty and playing fair. As rightly stated by Bingham J, contracting parties 'should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table"'. (27)

If no communication at all takes place between the parties, or if either party is not willing to engage in bona fide communications, existing disagreements or controversies will undoubtedly escalate and disputes will likely ensue. This could all the more be compounded in times of crisis.

2.1.3 Proper Administration of Contracts

Within any organization, whether in normal times or in times of crisis, it is crucial that proper teams are tasked with the mandate to properly and efficiently administer and perform contracts. Improper or unprofessional administration of contracts will
P 10 undoubtedly lead to disputes and could be even detrimental to the outcome of any ● dispute-related proceedings. Thus, regular review, reporting, as well as proactive intervention to ensure that the de facto performance is aligned with the agreed terms and conditions.

By streamlining practices, aligning performance with contractually agreed terms, planning future work and raising any issues of concern, the parties will be able to consider, analyse, and manage contractual disagreements at an early stage before their escalation to disputes.

2.1.4 Engaging in Early Assessment and Evaluation of Divergent Positions

It is not uncommon that parties have divergent positions and views on issues of contractual interpretation, performance, execution and/or termination. Thus, it is essential that parties engage in the early assessment of views and positions to develop strategies and evaluate the prospects of success if dispute resolution proceedings are initiated.

At times of crisis, early assessment and evaluation of positions should form part of any CMPs, such that cases of very low probability of success ought to be eliminated and avoided so that time and costs are not wasted. Accordingly, it is important for cases to be well assessed prior to the commencement of any dispute resolution proceedings, (28) and external counsel should assist the parties with their early assessments and in making informed and realistic choices regarding various alternatives and approaches ranging from dispute prevention to dispute resolution. (29)

2.2 Preventing Investor-State Disputes

In the context of investor-State disputes, dispute prevention is of paramount importance given the public law and public interests involved. Thus, States and State-owned entities must establish adequate institutional mechanisms to manage investment challenges and investor relations. They should also ensure that adequate policies and qualified teams are in place to efficiently manage investment instruments, contracts and treaties. The implementation of dispute preparedness mechanisms enables governments to recognize possible areas of disputes with investors more easily and respond to the disputes as and when they occur.

On the one hand, dispute prevention mechanisms include the delegation of relevant authority among State agencies, for instance, by specifying who is responsible for dealing with investment issues and disputes, who trains relevant employees and public officials,
P 11 and who covers the associated costs. On the other hand, dispute ● prevention mechanisms necessitate adequate coordination and communication between governmental entities, such as through improved channels for information sharing and better institutional cooperation. (30)

If action is taken only after the damage has already been done and after the disputes have already arisen, then there is an element of false timing and late response. Thus, it would be best to plan ahead and ensure that the State's CMP is operable and properly executable ahead of times of crisis, so that States can take advance actions and measures in full transparency and predictability, such that investors would not be surprised or oblivious of the measures that impact their rights and obligations.

It has been validly highlighted that the best chance to resolve a dispute between an investor and a government agency is likely before the challenging issues become an investment dispute, whether under a contract, a treaty or an investment legislation. (31) Accordingly, the best way for a State or a State agency to avoid and prevent disputes and/or achieve an early settlement is by putting in place policies for information sharing and institutional cooperation. The UNCTAD secretariat has been actively providing technical assistance to States on the implementation of Dispute Prevention Policies (DPPs) and is contributing to the sharing of experiences and practices, involving various actors of the international investment community. Some of the most successful DPPs are addressed below.

2.2.1 Information Sharing

Many States are now involving prominent representatives from the attorney general's office (or other similar State agencies) in the negotiation team to facilitate information sharing at an early stage of treaty negotiation. (32) The sharing of information will generally increase awareness, among government agencies and across government levels, of novel and relevant issues in international investment law and practice, so that States can, to the extent possible, develop adequate policies to avoid disputes with investors.

2.2.2 Reinforcing Institutional and Amicable Procedures: Administrative Review

Another way to prevent escalation to investment disputes involves developing institutional mechanisms that enable aggrieved investors to initiate procedures in the host State to carry out an administrative review of the law or measure that the investor
P 12 considers to be in violation of its rights. Such administrative review may allow an easy and rapid resolution of a problem that was not initially recognized by governments and State agencies. An administrative review leads the host State to recognize the controversy of a measure and may hence decide to alter or reverse it – to the extent it is willing to do so – and within a set timeframe so as to avoid delay, which is all the more essential in times of crisis where timely responses could make a lot of difference. By adopting such approach, the State may eventually avoid: (i) facing a lengthy arbitration procedure; and (ii) paying compensation to credible and serious investor. (33)

It should also be noted that some bilateral investment treaties (BITs) expressly provide for recourse to administrative review prior to commencing arbitration, as a form of exhaustion of local remedies, (34) noting the inherent difficulties associated with the implementation of, and compliance with, such clauses.

2.2.3 Securing Authority to Negotiate and Settle

As part of the State's policies to avoid conflict with foreign investors and as a consequence of selecting a lead agency or coordinating commission is the empowerment of public officials to hold discussions with individual or collective investors, to propose or to respond to the proposals for direct contacts, and to initiate negotiations either directly or with the support of third-party neutrals. (35)

By granting the State multiple opportunities to resolve issues as they arise, States may be able to avoid investor-State arbitration claims, which will reduce the number of disputes that will proceed to arbitration, and this will come in handy in times of crisis, where efforts and funds ought to be directed at the crisis rather than the disputes that can be avoided.

Despite the DPPs set out above, disputes could be unavoidable, but at least, in times of crisis, they could be controlled and kept to a minimum, and if all efforts to avoid disputes fail, then dispute management processes and techniques will need to be deployed and considered.

3 DISPUTE MANAGEMENT IN TIMES OF CRISIS

If dispute avoidance is a missed opportunity, proper dispute management becomes a necessity. Management is a universal human activity in domestic, social and political settings, as well as in organizations. (36) It can be defined as 'knowing exactly what you want people to do, and then seeing that they do it in the best and cheapest way', (37) 'to
P 13 forecast and plan, to organize, to command, to co-ordinate and to control. To foresee and provide means examining the future and drawing up the plan of action', (38) 'a process of planning, organizing and staffing, directing, and controlling activities in an organization in a systematic way in order to achieve a common goal', (39) 'Management is the process of achieving organizational goals by engaging in the four major functions of planning, organizing, leading, and controlling,' (40) 'coordinating work activities so that they are completed efficiently and effectively with and through other people', and 'Management is the process of working with people and resources to accomplish organizational goals. Good managers do those things both effectively and efficiently.' (41)

In light of these definitions, it is clear that management, in its simplest form, entails proper administration and governance, and includes activities of forecasting, strategizing, coordinating, setting goals and objectives and pooling available resources (legal, economic, financial, technical and logistical) to achieve the set goals and objectives in the most efficient and cost-effective ways.

In the specific context of 'dispute management' one could speak of engaging in processes of planning and prosecuting disputes through coordinated and controlled team efforts to achieve optimum favourable outcomes in the most cost-effective and efficient means by harnessing the available legal, financial, technical and logistical resources. That said, effective dispute management requires the identification of dispute resolution processes that can deliver optimal outcomes in the most efficient and cost-effective ways. It is in this respect that international arbitration has faced some challenges when users voiced 'commercial arbitration now costs just as much, and takes just as long, as litigation'. (42) However, bespoke procedure that enables arbitration to be faster and cheaper 'is not inherently difficult to accomplish'. (43)

More specifically, as disputes proliferate and continue to occur and evolve during times of crisis, it becomes essential to consider 'effective dispute management tools' in order to achieve the best possible outcome and assess whether arbitration can deliver the much-desired promise of efficient and cost-effective justice. Among the tools to consider from the perspective of good governance and effective management, especially in times of crisis, are: (i) objective case assessment; (ii) adopting a cost-effective and time-efficient bespoke arbitration process; (iii) setting presumptive time limits; (iv) considering dispute settlement options; (v) preservation of rights; (vi) preservation of evidence; and (vii) establishing a workable communications protocol. I briefly address these below.

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3.1 Objective Case Assessment

As previously mentioned, the assessment of a case before initiating arbitration proceedings is key dispute prevention. However, in-depth objective case assessment should proceed in case of dispute escalation. Such in-depth objective assessment will enable disputants to have more visibility in a manner that will enable them to strategize, plan, organize, control and develop options to prosecuting their disputes. It will also enable them to consider the best bespoke procedure that balances interests and expectations.

Among the case assessment techniques are decision trees which offer an example of a useful management tool that enables parties to assess their positions, manage their risks and provide better resource planning. (44)

Specifically, in relation to arbitration and in times of crisis, in-depth objective case assessment enables disputants to plan and structure proceedings in the most efficient and cost-effective way.

3.2 Cost- and Time-Efficiency and Bespoke Proceedings

In times of crisis, whether actual, foreseeable or pending, time and money are of the essence, and so the traditional one-size-fits-all approach to arbitration proceedings or other dispute resolution processes would not be appealing to the parties, hence the need for innovation and tailored solutions. That said, it becomes incumbent upon the parties to establish a proper framework for the arbitration and account for this in their contractual arrangement. It is axiomatic that the less pre-dispute effort is made to establish a suitable framework, the more likely it is that arbitration proceedings will swirl out of control.

Thus, users, institutions, practitioners and other stakeholders must pool their efforts to offer bespoke procedural choices that are founded on speed, efficiency and costs effectiveness. This may require dispensing with traditional approaches prevailing in normal times, and the process management skills of arbitrators, counsel and users will become all the more critical to proper management and resolution. (45) Among the bespoke procedures that could be adapted to boost speed and cost-efficiency of arbitrations, as hallmarks of efficient dispute management particularly in times of crisis, are: (i) resorting to expedited (fast-track) procedures; (46) (ii) considering emergency interim relief to mitigate loss and harm and preserve the underlying business in critical
P 15 times; (47) (iii) opting for documents only procedure or making use of ICTs through virtual/remote hearings to reduce costs of travel and physical meetings; (iv) limiting the number and the length of the written submissions. (48)

3.3 Setting Presumptive Time Limits

While it is common to set out a detailed procedural calendar/timetable for the entire arbitration at the outset, at least in commercial arbitrations, (49) in an attempt to properly manage and control the proceedings, (50) it is anomalous that such calendar/timetable gets varied throughout the proceedings for various reasons that are either consent based or emergency oriented. More importantly, in times of crisis, it may be impossible to stick to the agreed-upon schedule if the said crisis was not considered or foreseen. This has been quite the case during the early weeks/months of COVID-19.

The COVID-19 crisis has unveiled the benefit of presumptive time limits, where an ultimate long stop date could be established with presumptive time limits for each procedural milestone and arbitrators can be granted the authority to put these presumptive time limits into effect once the agreed triggers materialize. Arbitration institutions could also develop practice notes and guidelines on presumptive time limits in times of crisis and they could form part of a set of arbitration-specific CMPs.

The benefit this offers is twofold: (i) clarity and visibility well ahead of any looming crisis such that several alternatives and time limits are set and the parties can plan ahead; and (ii) reduce the number of procedural battles and disputes at times of crisis, which is an efficient dispute management technique.

3.4 Boosting Awareness of Settlement Options

Generally speaking, settlement options are always part of good dispute management. However, in times of crisis, the parties' appetite for prosecuting disputes may likely be affected and new unaccounted for facts may present opportunities for settlement.

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Propitious settlement opportunities appear at multiple stages of the proceedings, and at such stages, counsel should revisit their early case assessment and discuss the pros and cons of pursuing settlement, particularly in times of crisis. It is often in the client's best interest to pursue a reasonable settlement that avoids risk and incurring heavy costs. (51)

Subject to any procedural constraints under any applicable law, arbitrators may also encourage parties to 'tee up' particular issues for early resolution whenever the resolution of such issues is expected to promote fruitful settlement discussions or expedite the arbitration. (52) However, irrespective of any intervention from the arbitrators, sophisticated parties who are familiar with the benefits of proper dispute management at times of crisis may well seize a window of opportunity to discuss options for settlement for all or part of the dispute. Even partial settlements may have a positive impact on the duration and costs of the proceedings.

3.5 Preservation of Rights

While overarching reservation of rights is standard boilerplate closing statements in any submissions, applications or communications between disputants, this reservation of right is all the more pertinent in times of crisis, where a party's exercise of a right could be curtailed or delayed owing to an impending or existing crisis.

Given the arguable defences of waiver and estoppel and their impact on procedural and/or substantive rights (subject to applicable law considerations), efficient dispute management may call for tailored (rather than standard) reservation of rights.

The COVID-19 crisis has also drawn attention to the importance of reconsidering and redrafting contractual 'no waiver' clauses to ensure that they capture, with precision, the parties' exercise of their rights and obligations in times of crisis.

3.6 Preservation of Evidence

Effective dispute management policies and techniques call for developing (ahead of any crisis) workable protocols, whether as part of CMPs or not, that deal with storing, retrieval and handling of evidence.

Again, the COVID-19 crisis has exposed the realities of the mishaps with organizational handling of evidence and accessibility thereto. Thus, it is now important for organizations to preserve evidence and create a secure, accessible and reliable electronic repository that can be fully functional if physical access is curtailed owing to any unaccounted-for crisis. This is quintessential for any proper organizational planning and proper management; otherwise, risks of loss of information and data may threaten a party's standing in any proceedings.

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3.7 Establishing a Workable Communications Protocol in Due Regard to Privilege and Confidentiality

In tandem with developing proper dispute management policies and processes, establishing viable and workable communications protocols within an organization and externally is essential for efficient and proper dispute management. This necessitates, especially for organizations engaged in cross-border dealings and disputes, careful labelling of communications as private, confidential and/or privileged subject to any applicable law requirements.

Confidentiality, privilege and privacy are dynamic concepts that vary from one jurisdiction to another and from one applicable law to another, and issues of disclosure have become highly complex in arbitration proceedings. Thus, sophisticated parties and organizations will undoubtedly need to develop protocols (and clauses within their agreements) dealing with issues of communications (whether in hard copy or electronic), especially that international arbitrations are exceedingly involving disputes over legal privilege and confidentiality. This is due to the fact that the nature, scope and effect of privileges vary as between common law and civil law systems and there are fundamental differences in the characterization of privilege as a matter of substance or procedure in common law and civil law systems. These challenges are all the more compounded by the absence of any concrete conflict of laws rules to determine the law applicable to privilege claims. (53)

In times of crisis, these issues will no doubt impact issues of time and costs more than in normal times, so protocols and agreements that account for these concepts and determining how to handle them must involve detailed planning, control and consideration to minimize the risk of side disputes. That said, parties may actually benefit from already existing texts that offer some guidance such as the IBA Rules on the Taking of Evidence (2010), noting that this is an area where approaches and positions

diverge. For example, among the tests considered when dealing with issues of privilege are the 'most favored nation' approach, where the rules on privilege granting the broadest protection apply to all parties, and the 'least-favored nation' approach, where the rules on privilege with the least protective standard would apply. (54)

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4 DISPUTE RESOLUTION IN TIMES OF CRISIS

Under this section, I will succinctly address the arbitration of COVID-19 contemporaneous and related disputes. While the focus of this section will be on arbitration as the prominent dispute resolution mechanism, it is a fact that there exists a wide variety of other options across the dispute resolution spectrum (i.e., direct negotiations, mediation, conciliation, expert determination, adjudication, etc.). The suitability of each option is a function of the nature of the dispute at hand, the legal issues at stake, the solvency of the parties, and the nature of the relationship between the parties. (55) This availability of diverse options has resulted in the creation of different versions of 'multi-tiered' or 'step' dispute resolution clauses in numerous international contracts.

It is not uncommon that, during the contract drafting phase, counsel will include multi-tiered or step clauses that either keep arbitration as a last resort or carve out certain disputes from the jurisdiction of arbitral tribunals. However, in many cases and particularly in times of crisis, the agreed method may be changed to better suit the parties' needs and the prevailing circumstances.

As previously mentioned, careful consideration of the diverse alternative means of dispute resolution is of particular relevance during a crisis where time and money are of paramount importance and great concern. Even in the specific context of arbitration, which is a costly dispute resolution option, COVID-19 has resulted in the creation of new bespoke (and cheaper) options to swiftly arbitrate small value and uncomplicated cases.

4.1 Arbitrating Investment Disputes

At the outset, it should be noted that whenever a crisis strikes, investment disputes will likely increase. (56) This was indeed the case of Argentina in the early 2000s when its financial and economic crisis led to more than forty ICSID arbitration cases. (57) This was
P 19 a crisis on a national (or at best regional) level, and it has resulted in a surge of cases against Argentina.

With respect to the COVID-19 crisis, many States have implemented measures, to varying degrees (including physical distancing, lockdown, curfew, quarantine and travel restrictions), in an attempt to control and mitigate the spread of the virus. Some States have even declared a state of emergency under their domestic laws. These measures have had (and continue to have) significant economic impact. (58) The IMF's Managing Director Kristalina Georgieva described the outlook for global growth in 2020 as 'sharply negative, anticipating a recession at least as bad as during the global financial crisis'. (59)

Irrespective of the economic and financial repercussions caused by the COVID-19 crisis, States (with varying economic and political power) have already started to integrate pandemic and crisis-related provisions in their BITs, and some have even shifted to other dispute resolution mechanisms. The USMCA, which is also known as the new NAFTA, (60) is a free trade agreement with an investment chapter between the US and Mexico, and the said chapter limited the scope of investment claims to be brought by foreign investors against host States, where it provides, in application of the doctrine of exhaustion of local remedies, that such claims can be brought by investors only after attempting first to resolve issues in domestic courts before bringing disputes to the international level.

Another approach that reflects a transition from 'investment protection' to 'investment cooperation and facilitation' is the Investment Cooperation and Facilitation Treaty between Brazil and India, which limits investment dispute resolution through investor-State arbitration, and only allows for State-State dispute settlement returning to the concept of 'diplomatic protection'. (61) According to the dispute prevention procedure set out in this Treaty, the resolution of disputes between parties will be effected through a joint committee, and the aggrieved party is allowed to submit the dispute to arbitration only after the completion of the joint committee's proceedings or in case a party has not participated in the proceedings before the joint committee. It should be noted that the purpose of such an arbitration is to decide on treaty interpretation and the arbitral tribunal is not even authorized to award compensation.

On a different note, there have also been voices calling for a suspension of Investor-State Dispute Settlement (ISDS) arbitrations for all COVID-19-related measures, though such
P 20 proposal has not gained much traction or support. (62) However, the fact remains that the ISDS caseload will increase and arbitral tribunals will be tasked with the consideration of the proportionality and consequences of COVID-19 related measures that have impacted investments, and this will undoubtedly require a factual and legal analysis of the matrix of the dispute and provisions of pertinent BITs, contracts and investment laws and whether they have, *inter alia*, adequate exclusions or protections for national security, health and safety, environment, human rights, force majeure situations,

etc. (63) It has also been correctly suggested that arbitrators will have tread cautiously when reasoning their awards in times of crisis and in due regard to the parties' bargain, the economics of their relationship, prevailing industry practices, and prevailing trends of fair and equitable treatment standards at tumultuous times. (64)

On a further note, it is not uncommon in times of crisis that further opportunities for settlement during the pendency of arbitration proceedings present themselves, possibly because of financial and temporal constraints, as well as unpredictability of the outcome of disputes that involves elements of socio-economic crises.

It is also clear that the COVID-19 crisis has further compounded the already-framed debate regarding the ISDS reforms. (65)

From a procedural stance, the COVID-19 crisis has struck pending ISDS disputes more than commercial disputes, specifically in relation to extensions of time sought by States and State entities as respondents had difficulties in proceeding with virtual/remote hearings due to the sometimes unreliable connections in some participating developing States or the reluctance of arbitral tribunals to force a new mode of proceeding on disputants.

4.2 Arbitrating Commercial Disputes

With respect to commercial disputes, the COVID-19 crisis did not result in a decrease in international arbitrations. In fact, the disruption that has been experienced by national courts during the early weeks of the pandemic has led to an increase in the number of arbitration cases because the international arbitration system has been able to swiftly adapt to the crisis and institutions, users and practitioners have pooled their efforts to ensure that the delivery of justice through arbitration is not curtailed. Despite the immediate relative slowdown during the first weeks of the pandemic, arbitration cases have progressed with limited delays, suspensions and/or terminations. In many
P 21 instances, parties have been able to negotiate and agree on limited suspensions, ● extensions and/or a varied procedural path with the support and assistance of counsel and arbitral tribunals, and electronic filings became normative.

The true challenge that presented itself pertained to virtual/remote hearings when parties disagreed on the holding of such hearings. The issues pertaining to such hearings include: (i) the legality of proceeding virtually/remotely under the applicable procedural rules and *lex loci arbitri*; (ii) the choice of appropriate, secure and reliable platforms and technology; (iii) whether proceeding virtually/remotely presents real and credible challenges to due process; (66) (iv) whether cross-examination of witnesses and experts can be effective and impactful when conducted online; (67) and (v) whether time zone differences permit long sitting times for arbitral tribunals.

It is also worth noting that the COVID-19 crisis has impacted business and industry sectors to varying degrees and other chapters in this publication deal with the impact of the COVID-19 crisis on the insurance, (68) finance, (69) aviation, (70) telecommunications, (71) energy (72) and construction (73) sectors to name a few. The COVID-19 crisis has also brought about a novel category of arbitration disputes within the biotechnology and pharmaceuticals sectors, (74) and it is submitted that this novel category will expand into a trend post-COVID-19 as the world enters into the new era of global pandemics and natural crises.

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4.3 Organizational and Institutional Responses and International Arbitration During the COVID-19 Crisis

In recent years, there has been a mounting chorus of concern over the excessive length and cost of arbitration owing to the increasing 'judicialization' of arbitration. (75) However, the current COVID-19 crisis has proven that the arbitration system is capable of swift adaptation to changed circumstances more than the judicial systems across the globe. (76)

Thus, arbitration has given disputants considerable flexibility to tailor the procedure for resolution of their disputes to their own needs, and this is an edge in times of crisis. When time is of the essence, many arbitration institutions and organizations have raced to embrace fast-track or expedited proceedings, and many have even released bespoke COVID-19 guidance notes and guidelines that have helped streamline proceedings and mitigate the effects of COVID-19 on pending arbitrations in administered contexts. (77) By way of example, the ICC has released a guidance note to assist parties, counsel and arbitral tribunals in managing arbitrations midst the COVID-19 crisis. (78) The LCIA (79) and the SIAC issued a 'case management update', (80) and the HKIAC partnered with leading legal technology specialists to offer users a comprehensive range of integrated
P 23 virtual hearing services. (81) Delos also produced a useful ● checklist on holding arbitration and mediation hearings during the COVID-19 crisis, (82) and the SCC successfully launched a platform for virtual hearings. (83)

Moreover, twelve arbitral institutions (including ICC, HKIAC, ICSID, CRCICA, (84) LCIA, SCC, SIAC and VIAC (85)) have teamed up and issued a joint statement on 16 April 2020, which encouraged parties and arbitrators to discuss the impact of the crisis and the potential

ways to mitigate its effects, in an open and constructive manner through advanced case management strategies. (86) In crisis management terms, these institutions have issued a high-level Crisis Management Policy Statement (CMPS) that provided the needed assurance and solidarity at times when uncertainties and unpredictability ensued.

In the specific context of ISDS, the ICSID has led the way by taking an immediate and welcomed move to the online world, by making electronic filing its default procedure in order to make its proceedings more efficient and environmentally friendly. (87)

The CIArb also published a Guidance Note on Remote Dispute Resolution Proceedings, with the aim of furnishing parties to existing and future disputes with a guide for conducting proceedings online, and it expressly states that it is 'intended to be broadly applicable to the current 2020 global health crisis and well beyond'. (88)

Certain practitioners have also teamed up and provided a protocol for online case management for conducting international arbitration, which aims to meet the needs of arbitration users, including how to practically and cost-effectively meet obligations relating to international data management and cybersecurity. (89) Other practitioners
P 24 have also published helpful practical tips, an analytical framework and a pandemic ● pathway aimed at assisting parties, counsel and tribunals in addressing and analysing issues associated with virtual hearings. (90)

On a regional level, the African Arbitration Academy has spear-headed drafted and issued a Protocol on Virtual Hearings in Africa. While the Protocol has been predominantly developed to take into account health and safety concerns in the wake of COVID-19 crisis, it is also aimed at reducing the costs and enhancing the efficiencies of arbitral proceedings. The Protocol offers guidelines and best practices for arbitrations within Africa, encourages African institutions and governments to make express references to virtual hearings in arbitration rules and laws, presents principles and provisions to be adopted by arbitral institutions and disputants when negotiating and drafting their arbitration agreements. (91)

5 EPILOGUE

The COVID-19 crisis has changed our world and presented the global community with unprecedented challenges that highlighted the importance of crisis management techniques and policies. The worldwide spread of COVID-19 has affected all humanity on all social, political, economic and legal levels. COVID-19 has destabilized States, institutions, communities and called into question the adequacy and fragility of existing policies and protocols. This crisis that shook our world was an eye-opener regarding the importance of crisis management as the organized and systematic preparation for controlling unexpected situations. COVID-19 has shown the necessity of interdisciplinary studies and the indispensability of implementing CMPs to deal with the unexpected threats to States, institutions, organizations and individuals. CMPs are our safety net at times of crisis, and our guiding compass at critical times when normal policies and strategies fall short of delivering the desired results.

At the heart of this crisis, dispute prevention, management and resolution became key concepts that must be observed and embraced by States, organizations, institutions, practitioners and all users of the dispute resolution services. On the prevention level, dispute prevention tools may take different forms, including: (i) maintaining a *pacta*
P 25 *equilibrium*; (ii) engaging in bona fide communications; (iii) ● proper administration of contracts; and (iv) securing early assessment and evaluation to ascertain the feasibility of escalation of issues to disputes.

On the management level, it is essential to deploy processes of planning and prosecution of disputes through coordinated and controlled efforts to achieve optimal favourable outcomes in the most cost-effective and efficient means by harnessing the available legal, financial, technical and logistical resources. Effective dispute management in times of crisis, where dispute continue to proliferate, occur and evolve requires due implementation of 'effective dispute management tools' including: (i) objective in-depth case assessment; (ii) adoption of a cost-effective and time-efficient bespoke dispute resolution process; (iii) setting presumptive time limits; (iv) considering dispute settlement options; (v) preserving rights; (vi) preserving evidence; and (vii) establishing workable communications protocols.

On the resolution level, the novelty of the COVID-19 crisis has brought about challenges to existing practices and procedures, and opportunities to innovate and evolve through the accelerated integration of ICTs into dispute resolution processes generally and international arbitration specifically. The COVID-19 crisis has compelled parties, counsel, arbitral institutions and tribunals to explore bespoke options aimed at mitigating the effects of COVID-19. The new imposed migration to the virtual world has caught the arbitration community by surprise, and so all stakeholders have pooled their efforts to explore, examine and adapt practices to proceed as efficiently as possible with arbitration proceedings. To that effect, the global arbitration community's response to the COVID-19 crisis has been encouraging as parties, institutions and practitioners managed to seamlessly transition into the new reality powered by ICTs. Thus, the COVID-19 crisis has had some silver lining in the specific context of dispute resolution, where out-of-court dispute settlement system (inclusive of international arbitration) systems

have managed to steal the limelight due to their great flexibility and swift adaptability. COVID-19 has effectively catalysed the integration of technology into dispute resolution processes and the procedural framework for traditional dispute resolution processes is being reshaped and redefined by the winds of inevitable change midst this crisis mode.

Among the novel tools and practices that facilitate dispute resolution in times of crisis are: (i) the availability and use of interactive virtual platforms for remote hearings; (ii) the publication of guidelines, protocols, standards and best practices for online arbitration and virtual/remote hearings; (iii) broadening the pool of qualified and diverse practitioners by considering tech-savvy practitioners (arbitrators and counsel); (iv) reconsidering traditional techniques in oral pleadings and examination of witnesses and experts; and (v) due consideration of the most appropriate dispute resolution processes and best options for settlements to save time and costs.

By and large, the COVID-19 crisis, whether at the level of dispute prevention, management or resolution, has impacted both investment and commercial arbitration and has cut across all business sectors with varying degrees. The pending crisis will end at some point, but what will remain are the lessons learned and the innovative practices that have emerged, and it will then be up to the dispute resolution community to harness this knowledge and build a forward-looking CMP that can be implemented in case of any
P 26 future crisis. It is in this spirit that I suggest that the existing institutional ● competition should be supplemented by continuous efforts of cooperation among all stakeholders to build solid online systems that are freed from the shackles of traditional conceptual restraints. This will also enable the infusion of new strains of diversity into the existing systems, which will enable an inflow of new qualified practitioners that will enrich the global dispute resolution system in times of crisis and beyond.

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Chapter 2: Initiating and Administering Arbitration Remotely

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The COVID-19 pandemic crisis suddenly and significantly impacted international arbitration, triggering responses that will reshape attitudes, approaches, and procedures in this field. Arbitral institutions were forced to quickly react at a time when the full impact of the crisis was not apparent, but case management required an immediate response. This chapter explores the response of arbitral institutions to the COVID-19 crisis in handling the initiation and administration of arbitrations. At the time of preparing this chapter, the crisis situation remains fluid, making it difficult to foresee the immediate and longer-term developments and impact on arbitration case management. However, arbitral institutions, practitioners, users, academics, and commentators, all concur that the COVID-19 crisis has triggered changes that will hasten the integration of digitalization to promote efficiency and flexibility in effectively handling international arbitration cases. Greater use of tools enabling arbitration to be conducted remotely creates opportunities to increase diversity in arbitration and to enhance environmentally sustainable practices. This chapter will consider these potential developments from the perspective of arbitral institutions in the administration of cases. These institutions shouldered their responsibility to remain operational, to ensure the efficient and fair management of cases, and to provide leadership in the face of an unpredictable crisis.

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1 INTRODUCTION

When the reports of the COVID-19 virus first appeared in news media, very few, if any of us, could have imagined the catastrophic impact it would quickly spread across the globe and into every sector of business and our personal lives. By mid-March 2020, across the globe, the crisis restricted air travel, lockdowns were being imposed, factories and businesses were sending employees home (to work or to be unemployed), construction projects halted, supply chains interrupted, and many retail and service industries temporarily curtailed or closed. Arbitral institutions reacted to the prevailing situation, which varied to some extent depending on their physical locations and their case management systems. These institutions needed to quickly adapt their internal operations and to provide guidance to users, counsel, and arbitrators with pending cases and with initiating new cases. Overall, arbitral institutions rose to the challenge, demonstrating adaptability and leadership to ensure the continued functioning of their services. Those institutions that had already significantly digitalized their internal operations and case management were well situated to swiftly convert to the 'new normal' of the crisis.

By July 2020, the arbitration community has adjusted to the reality of the pandemic, recognizing that the situation remains unpredictable, but likely to continue to impact the conduct of arbitration for many more months or longer, particularly if a second wave of the virus infection develops. Countless webinars have addressed virtual hearings and managing arbitrations in these challenging times. Arbitral institutions, organizations, and law firms have published guidelines, protocols, checklists, model procedural orders, and commentary to provide guidance for navigating in the digital and virtual arbitration environment. (1) Arbitral institutions have gained experience, as have users, their lawyers, and arbitrators, in using technology effectively, while ensuring the balance between due process rights and efficient dispute resolution. Out of necessity, the arbitration community is forging new approaches to arbitration that employ existing and new procedures, tools, and technology. As arbitral institutions enjoy positions of influence and control in developing arbitration procedures and practices, they can and will significantly shape the post-COVID-19 future of arbitration. This future will reflect innovations wrought out of the crisis and developed into hybrid, technologically enhanced procedures that will facilitate fair, efficient, and effective dispute resolution.

Despite the nimbleness and efficiency that technology enables, the key factor for the success of arbitral institutions and the arbitration community in responding to the COVID-19 crisis is the human factor. The dedicated, creative, skilled people leading and staffing arbitral institutions quickly converted operations to remotely administer cases, to provide information and guidance to users, and to ensure that parties received efficient and fair dispute resolution. The lessons learned during the pandemic will be
P 29 carried forward. The pandemic created a continuing transformative event, not only with far-reaching and tragic consequences but also with benefits. It has compelled the arbitration community to embrace and accelerate change to become more efficient, cost-effective, and sustainable through using existing and new tools in innovative ways.

This chapter explores the challenges that arbitral institutions initially faced from the COVID-19 crisis and the measures that the institutions took to ensure that new

arbitrations could be initiated and that existing arbitrations could be appropriately administered. It also considers how the response to the crisis may affect the future administration of institutional arbitration. To obtain information on how arbitral institutions have reacted to the crisis and its impact on their operations, the information posted on the websites of many arbitral institutions was reviewed, as well as other commentary and sources as noted herein. To complement this material, the author reached out to nineteen arbitral institutions with a request for brief answers to four questions. All the contacted institutions kindly responded very quickly; in some cases, the author had a video interview with representatives of the institution. Some of the responses of institutions are reported in this chapter as anecdotal examples, but unfortunately not all the responses could be reported due to limitations on the length of this chapter. The surveyed institutions include the institutions listed in Appendix 1. (2) The questions posed were the following:

(1) In the near future, does your institution anticipate changing the policies and procedures it instituted in the past months on initiating and administering arbitration remotely?

(2) Has the initiation and administration of arbitration gone relatively smoothly during the 'lockdown' and remote situation?

(3) Is it likely that this experience will encourage continued or greater digitalization of your administrative procedures?

(4) Has your institution seen a discernible change in the number of arbitrations or emergency arbitrations initiated during the COVID-19 situation?

This chapter does not consider the conduct of arbitration from the perspective of the parties and arbitrators (these topics are covered in other chapters in this book). However, as arbitral institutions' procedures and practices are directed to parties and arbitrators, there may be some overlap. This chapter ventures some predictions on how arbitral institutions may apply the experiences of dealing with the crisis into innovating new procedures and instituting new policies. This chapter will first review the initial response of some representative arbitral institutions to the COVID-19 situation. It will then consider the state of digitalization of arbitral institutions and their role in leading integration of technology in the administration of arbitration. The specific issue raised by initiating arbitrations remotely is addressed followed by a more general discussion of administering arbitrations remotely, considering the lessons learned from the pandemic
P 30 and how the future practice may be shaped. In conclusion, the remarkably ● agile response of arbitral institutions to the pandemic demonstrates the potential for adapting administration of arbitration to a more flexible, efficient process aided by digitalization.

2 ARBITRAL INSTITUTES' INITIAL RESPONSE TO THE COVID-19 SITUATION

As the virus spread across the globe, from Asia to the Americas, from the Northern to the Southern hemisphere, arbitral institutions experienced and responded to its impact. The institutions located in Asia were alerted early, as were institutions administering arbitrations in that region. For example, already in the beginning of February 2020, the Hong Kong International Arbitration Centre (HKIAC) instituted a COVID-19 response plan that ensured the management team remained fully operational, with many working remotely and a skeleton staff in the office to perform essential work. While its office remained opened, visitors were required to complete Health Declaration Forms confirming their travel and contact history and some restrictions were implemented. HKIAC also instituted increased cleaning and sterilization of the Centre and staff wore facemasks.

The virus spread quickly, creating a highly unpredictable and rapidly changing situation. On 17 February 2020, the World Health Organization (WHO) issued guidance on mass gatherings and care of ill travellers. (3) By the end of February the virus was significantly impacting Northern Italy and rapidly spreading in Europe and other regions. On 3 March 2020, WHO published guidance on preparing a safe workplace, which recommended measures for meetings. These measures encouraged reconsidering if meetings were necessary or could be replaced by videoconferencing. (4) The WHO formally characterized COVID-19 a pandemic on 11 March 2020. (5)

By mid-March 2020, most arbitral institutions – in fact all of the institutions surveyed – had adopted some procedures to enable remote administration of cases and provided information to their users, usually on their websites and directly to parties and tribunals in ongoing cases. The response of arbitral institutions varied to some extent based upon their local situation and restrictions. In some cities there were strict lockdown orders imposed by the authorities, while in others there were no lockdowns but recommendations to avoid non-essential travel, limit shopping or errands, and restricted use of public transportation.

For example, in South Korea and Sweden, there has not been a lockdown, allowing people
P 31 to move around and making it optional to close workplaces, but ● authorities have encouraged sheltering-at-home and following social distancing guidelines. Only recently have masks been required on public transportation in South Korea and masks remain voluntary in Sweden. Nonetheless, in March, both the Korean Commercial Arbitration

Board (KCAB) and the Stockholm Chamber of Commerce (SCC) implemented work-at-home for staff, with a limited number of staff rotating for on-site work. The SCC Secretariat scheduled daily team meetings on a video platform to discuss case management. (6)

Remote working became common for most institutions around the globe either due to imposed restrictions or voluntarily out of concern for staff. Arbitral institutions are concerned about ensuring the safety of their staff, as well as their users and arbitrators. Many arbitral institutions prepared for the worst-case scenario where many staff members might not be able to work at all due to illness or care for family members. In many cities, schools were suddenly closed forcing parents of children to work from home, juggling work with childcare and home-schooling. Even in those workplaces where staff could work on-site, some employers restricted non-essential, on-site working and imposed strict social distancing and hygienic procedures. Some arbitral institutions rotated reduced staff in the office premises, while others had all staff members working remotely from home. Some institutions, such as Singapore International Arbitration Centre (SIAC), obtained special permission to have limited staff in the office. Those institutions which offered hearing facilities, either closed the facilities or implemented strict procedures to ensure social distancing and appropriate hygienic conditions.

When pandemic-related measures were implemented in March, there was little information regarding the potential impact of COVID-19. No one could assess or even guess how long the situation might last and how the impact of the pandemic would develop. Most arbitral institutions were faced with users and arbitrators seeking guidance in the sudden interruption and consequent uncertainties that affected ongoing arbitral proceedings. Many surveyed arbitral institutions reported that they were contacted by parties and arbitrators seeking extensions to case deadlines due to the restrictions in travel and 'shelter-in-home' orders and recommendations. Many workplaces, including law firms, were working remotely creating challenges for legal teams to work together and to consult with clients, experts, and witnesses in preparing submissions and for hearings. Arbitrators and parties were prevented from travelling and holding in-person hearings. Many believed that by the late summer or early autumn the situation would become more normal and sought to reschedule in-person hearings, if possible. However, in many cases, due to busy schedules, it was not possible to coordinate a new date within a relatively reasonable period of time. By early summer it became apparent that in-person hearings requiring travel will be difficult, if at all feasible, for many months. Even if an in-person hearing was possible, facilities and arrangements would need to accommodate social distancing and hygienic practices to avoid the spread of the virus. The situation remains unpredictable at the time of preparing this chapter.

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In the early stage of the crisis, some arbitral institutions stayed all time limits in cases, particularly those institutions located in areas that were dramatically affected and under strict restrictions affecting staff, users, counsels, and arbitrators. For example, in Milan, the government stayed court proceedings in March 2020 and added a stay of arbitral proceedings in April. These stays were lifted on 11 May 2020, as other government restrictions were eased or lifted. However, although there was an initial stay of cases, the Milan Chamber of Arbitration (CAM) urged parties and arbitrators to continue the case activities as much as possible, and for many cases the scheduled deadlines were not changed. CAM also encouraged parties and arbitrators to consider virtual hearings and in simpler cases to consider whether the case could be decided without a hearing. CAM reported that about thirty case hearings were initially postponed at the outset of the crisis (most of these were domestic cases). CAM administration of cases was not hindered as its internal work was already digitalized and it was able to quickly convert to remote operations. Despite some initial resistance and scepticism, parties and arbitrators soon became more familiar with the situation and began to adapt to using the digital tools and platforms. Remarkably, despite the unexpected situation, between 24 February 2020 and 29 June 2020, CAM had fifty-nine hearings of which fifty-seven were conducted entirely remotely, while two were hybrid, with some participants remote and some social distancing in the same venue.

Peru also imposed strict lockdown measures, which caused the Centro de Arbitraje of Cámara de Comercio de Lima (CCL) to operate remotely. It had already established digital case administration and its practices and rules allowed for digital procedures and submissions. Because of the COVID-19 restrictions, during the immediate initial period many proceedings were temporarily suspended. However, as the Secretariat implemented necessary measures and users became aware of and received guidance regarding the remote procedures and tools, many arbitrations were reactivated and continued through remote and virtual means.

Some arbitral institutions published more detailed and more frequently updated information than others. For example, the SIAC published six posts of information on its website between 16 March and 23 June 2020. (7) One of the most innovative responses to the COVID-19 situation was revealed in the 28 April 2020 letter from the SIAC President, Gary Born, posted on the website. (8) In this letter, he informed that SIAC was training designated counsel in the Secretariat as 'Remote Technology Specialists' to staff a Live

Help Desk chat feature on the SIAC website to facilitate direct contact with the SIAC Secretariat during the period of workplace closure. This chat feature has proven so useful that it is likely to continue when COVID-19 situation has ended. Additionally, SIAC posted
P 33 special 'COVID-19 FAQs' on its website, providing ready ● answers to commonly asked questions and easily accessed information to users about the management of cases during the crisis. (9)

The Deutsche Institution für Schiedsgerichtsbarkeit (DIS) also provided detailed information on its website and in a published announcement on 31 March 2020. The Bonn office remained operational with two employees, while others worked remotely from home. (10) However, the Berlin office was closed, including its overnight mailbox, consequently all communications and transmission of documents needed to be done electronically by email. The 2018 DIS Rules, Article 4.1, provide for electronic submissions as the standard procedure. Users were encouraged to refrain from transmitting communications and documents through portable storage devices by mail or courier. Users were given specific guidelines on contacting the Secretariat by telephone. On 1 July 2020, DIS updated the 31 March announcement to include a new paragraph (paragraph 10) which related to arbitrator expenses and value added tax regulations, which had been affected by the newly enacted 'Second Corona Tax Relief Law'. (11)

On 17 March 2020, the International Chamber of Commerce (ICC) posted an 'urgent COVID-19 message' on its website providing guidance to its users, arbitrators and other neutrals. (12) The guidance noted that the ICC Secretariat remained operational while working remotely. It strongly advised that all communications should be made by email and noted that all hearings scheduled at the Paris ICC Hearing Centre prior to 13 April 2020 were postponed or cancelled. On 9 April 2020, the ICC published a COVID-19 guidance note, the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic on its website. (13) As this Guidance Note indicates, many of the procedures and tools that can be used to facilitate efficient and fair arbitration remotely already existed and were contained in other ICC guides, including guidance in Appendix IV to the Rules and in the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (14) and in the ICC Commission on
P 34 Arbitration and ADR reports entitled 'Controlling Time and ● Costs in Arbitration' (15) and 'Effective Management of Arbitration – A Guide for In-House Counsel and Other party Representatives'. (16)

On 16 April 2020, twelve arbitral institutions, (17) together with the International Federation of Commercial Arbitration Institutes, collectively issued a joint statement on 'Arbitration and COVID-19'. (18) The statement informed that these institutions were committed to working together 'to support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay'. (19) The statement encouraged parties and tribunals to work together to mitigate any impediments while ensuring fairness and efficiency, and to use 'any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments'. (20) This initiative was the result of these institutions sharing information and experience in the pandemic leading to collaborating on the publication of a common statement.

During March through May 2020, many institutions updated or implemented their 'COVID-19' practice notices. (21) As the restrictions began to ease in some cities, some institutions began to have more staff working at the institution's office, coming in two or three times a week, while implementing social distancing and ensuring a hygienic work environment. For example, at the outset of the COVID-19 situation, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) encouraged users to communicate and transmit documents by email. Initially the office was open only once a week to receive hard copies when necessary and later it was open three times a week. CRCICA has allowed physical hearings to take place at its premises, with a requirement that attending parties may not have more than three representatives present, in order to maintain a safe distance between attendees. CRCICA reported that case administration has worked well
P 35 during the crisis and that overall tribunals and ● parties have been cooperative, becoming more receptive to the use of technology and alternative procedures to accommodate the restrictions imposed by crisis.

Some institutions plan to continue remote working largely or completely until the autumn as the situation remains unpredictable and importantly as the case management of arbitral institutes has not been significantly affected by remote working. Particularly those institutions which had already digitalized their case management and had already integrated IT solutions into their operations could smoothly convert to effectively working remotely. For example, the Saudi Centre for Commercial Arbitration (SCCA) announced on 24 March 2020 that it temporarily closed its offices, and all operations would be conducted remotely and videoconference facilities would be provided as needed. (22)

All institutions reported that despite some initial resistance, parties and arbitrators have become more accustomed to working remotely, finding solutions for the challenges, and exploiting the opportunities. The arbitration institutions and the arbitration community have been sharing information and experience. The technology has been adapted and new services offered by hearing centres and others to facilitate remotely managed and

conducted arbitrations.

Challenges and difficulties imposed by the pandemic remain, but the arbitration community has shown that it can adapt rapidly and flexibly to the situation. Many arbitral institutions and organizations have published guidance, protocols, checklists, model procedural orders, and commentary to help parties and tribunals adapt to remote arbitration. (23) Arbitral institutions have converted planned seminars and conferences to virtual webinars, which allow for large global audiences to attend; for example, the Paris Arbitration Week took place on 6-10 July, featuring over forty virtual events. The 27th Willem C Vis Arbitration Moot and the 17th VIS East took place virtually, with students and arbitrators spread across the globe. Many institutions and organizations have arranged special webinars devoted to conducting arbitration remotely and other related topics. Arbitral institutions and their users have been on a steep learning curve and have gained familiarity with arbitrating in the virtual world.

3 ARBITRAL INSTITUTIONS AND DIGITALIZATION

All the arbitral institutions surveyed for this chapter had some degree of digitalization prior to the pandemic. Indeed, a business focused on providing service to international business users must at least have information available on a website and use email for communications and transmitting documents. However, the sophistication and integration of digitalization varies considerably among arbitral institutions, as does their IT resources and budget. For some arbitral institutes, the move to digitalization reflects a
P 36 ● general policy to move away from paper-based arbitration administration in its internal operations. For others, it is an investment and commitment to developing innovative solutions to enhance more efficient, effective, and secure arbitral services that interface with modern and developing technological tools. (24) A distinction can be made for digital systems designed: (1) for internal operations and communications, (2) for communications between the institution and users in case management, and (3) for providing a secure system for communications, scheduling, filing of documents and submissions in the arbitration by the institution, parties and arbitrators. (25) While developing and integrating digitalization and technology to enhance administration of cases can bring many benefits – the kind of benefits that can now be reaped in the pandemic – digitalization also creates challenges and costs. (26)

When the pandemic arrived on the doorstep of arbitral institutions, most institutions were already using at least basic digital tools, such as email for their internal communications, as well as communicating with users. Case submissions, documents and materials, and other data had largely migrated from paper-based to electronic storage. For example, most institutions retain a searchable database on their cases and arbitrators. Institutions have an obligation to ensure the security and reliability of their data storage system and communication system, as well as to comply with any applicable data protection regulation. (27) The storing, sorting, mining, use, and sharing of the compiled information raises a number of potential issues, which are beyond the scope of this chapter.

While most institutions regularly communicated internally and with users by using email and other information communication technology (ICT), most also continued to accept and send paper-based communications and documents, particularly requests for arbitrations and awards. (28) These documents are frequently sent by courier or registered post in order to obtain to send and receive original copies with wet-ink signatures and to receive a proof-of-delivery receipt. However, often a courtesy copy is also transmitted by email.

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Some institutions had already launched secure online arbitration platforms to some extent, while others were exploring potential systems and developing platforms. Some institutions developed online arbitration for specialized cases, such as the World Intellectual Property Organization, or for smaller cases. For example, the China International Economic and Trade Arbitration Commission (CIETAC) developed online arbitration already in 2009 and could use its experience and procedures to adapt to increased use of remote arbitration administration. CIETAC reported that it was able to smoothly convert to remote administration; however, many parties and arbitrators were resistant and preferred to have an in-person hearing when it was possible. Since converting to remote case administration, in more than forty cases, the parties and arbitrators accepted remote administration and hearings. This number should be considered in the context of the large CIETAC caseload (which includes domestic cases). In the period between January and end of June 2020, CIETAC has accepted 1,544 new cases, which is 5.97% increase in comparison with the same period of last year.

The International Centre for Settlement of Investment Disputes (ICSID) had been using the technology, resources and processes for remote administration and hearings for several years before the pandemic, which enabled it to adapt quickly and efficiently. ICSID had a secure digital file-sharing platform ('BOX'), which ICSID, the parties, and the arbitrators could use for uploading communications, submissions, orders, and documents. On 13 March 2020, ICSID announced that electronic filings would be the default procedure, to build on its 'ongoing commitment to leverage information technology to make its

proceedings more efficient and environmentally friendly', and saving the parties' costs and time. (29) Paper-copies were only required if requested by a party; arbitrators and conciliators were also encouraged to use electronic filings. On 19 March 2020, ICSID posted a 'COVID-19 update' reminding and encouraging parties and tribunals to use the electronic filing system and noting that if hard copies were sent to ICSID, the party should ensure that the tribunal or Committee Secretary was aware in case of disruptions to the mail service. (30) It noted that the 'ICSID Secretariat is fully-operational from remote work-stations and coordinating with Tribunals and parties to minimize disruption to cases.' (31) On 24 March 2020, ICSID posted a message with brief information on conducting online hearings at ICSID. (32) Consequently, ICSID could seamlessly adapt to administering arbitration remotely and organized many hearings on its platform, without additional costs to the parties, and offering a virtual court stenographer and interpretation if needed. (33)

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The SCC launched its digital platform ('the SCC Platform') in September 2019, which is a secure digital platform for communication and file-sharing between the SCC, the parties, and the tribunal. (34) The use of the SCC Platform is encouraged but optional for SCC parties and arbitrators. However, following the receipt of the Request for Arbitration (RFA), the platform is the only mode of communication used by the SCC to parties and arbitrators. In response to the COVID-19 pandemic, the SCC, in partnership with Thomson Reuters, announced that from May 2020, the platform could be used at no cost by parties and arbitrators in ad hoc cases. (35) The SCC Platform does not provide a designated platform for remote hearings, but is restricted to communications, documents, scheduling, etc. SCC parties and arbitrators can agree to use any virtual hearing platform they prefer or use a hearing venue service that can provide technical support. The SCC uses Microsoft Teams for its internal operations, online meetings, seminars, conferences, and webinars.

Prior to the pandemic, the International Centre for Dispute Resolution of the American Arbitration Association (ICDR-AAA) already had been devoting significant resources to digitalization, including a secure online platform where parties and arbitrators can file case documents. Parties and arbitrators can complete various administrative tasks on the platform, such as rank arbitrators' lists, complete appointment materials, etc. Hard copies were not required other than original copies of awards. There have been ongoing efforts to improve cybersecurity through technology and training for both staff and arbitrators. The ICDR-AAA had previously incorporated a business continuity planning into its operations, which included lessons learned from past tragedies, such as 9/11 and Hurricane Sandy. The plan has been updated on a continuing basis to enable ICDR-AAA to be almost fully operational remotely quite quickly. Despite closing its twenty-eight offices, including many with hearing rooms, and requiring the ICDR-AAA staff to manage thousands of ongoing and new cases remotely, the conversion was accomplished relatively seamlessly. Cases were not significantly affected and the commitment to cybersecurity, confidentiality and data privacy was maintained.

Many arbitration institutions do not have a dedicated secure platform for digital communications, documents, and file-sharing available to the parties and arbitrators for the cases they administer. Some institutions, such as the ICC, were already developing such platforms prior to the pandemic and will soon launch them. The ICC has been using internal digitalization for some time for its case management and internal operations. Already in 2017, the ICC published an ICC Commission Report on Information Technology in International Arbitration. (36)

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Some smaller arbitral institutions may find that developing such a platform may require substantial investment of resources that cannot be justified as their case management has been operating well without the transition to a platform. For example, although the Arbitration Institute of the Finland Chamber of Commerce (FAI) does not have such an online platform, it relatively smoothly converted to remote administration by using its existing internal system which already administered cases digitally. The FAI reported that it has a well-functioning data system and, except for the original copy of the final award that the arbitrators are required to send to the institute, there are no other parts of the procedure which could not be done digitally. It also noted that, at times, sending documents is the most practical and efficient way of operating and that it considers the wishes of the parties and the arbitrators.

Institutions that are connected to a larger organization, such as a Chamber of Commerce, may be able to benefit from the larger organization's investment into digitalization and IT use development and support. In the context of the pandemic, some such 'integrated' institutions received support from the larger organization in moving to remote service. They were also subject to restrictions and procedures imposed by the organization, such as restrictions on staff and visitors in the premises.

Large international law firms may be better positioned to provide digital services to support remote arbitration in their cases as they usually have sophisticated IT departments that can provide services tailored to the specific case needs and client wishes. Law firms may also be better positioned to pass on and to recover the costs of

remote arbitration technology. Arbitral institutions may need to have a less bespoke system and rely on a one-size-fits-all approach, particularly if it is not a large institute. (37) However, relying on law firms to provide the technology raises issues of equality of arms when one party and its lawyers have less resources. It is also possible to outsource the digitalization to a third-party commercial ICT Service for all or part of the needed services. (38)

Developing and expanding digitalization in the administration of cases can make an arbitration institution more attractive to users. Institutions which use modern technology may be perceived as more reliable, modern, and international, features which inspire trust and confidence in users. (39) Arbitral institutions can not only improve the impressions of their ability to provide efficient global dispute services but also enhance their services to users through digitalization. Some institutions have considered offering different levels of digitalization, such as basic or upgraded digital tools with different pricing. However, this concept has not been implemented and could introduce a number of issues. The experience of the pandemic demonstrates that arbitral institutions can provide efficient remote administration of cases and coordinate with the parties and tribunals on the platforms which the users preferred.

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Even arbitral institutions that had not extensively integrated digital systems into their case administration with parties and tribunals managed to quickly convert to remote administration of cases at the outset of the pandemic. For example, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) noted that when the pandemic was decreed although it had internal digitalization, most of the arbitral proceedings were managed 'physically' with submissions and documents partially submitted in hardcopies. Hearings were usually conducted in person, although occasionally testimony was taken by videoconference. CAM-CCBC quickly developed a plan to ensure the safety of employees and to ensure the efficient continuity of the cases. The institution's rules and available tools provided the needed mechanisms to convert to remote case management. On 16 March 2020, CAM-CCBC issued a notice that all petitions and other documents must be submitted by email and provided the parties and tribunals with guidance and access to a shared electronic folder. (40) The institute also increased all cybersecurity measures which existed prior to the pandemic and issued two administrative resolutions relating to electronic processing of the arbitral proceedings and remote hearings. (41) The sudden conversion to remote case management went relatively smoothly, although at the very beginning there was a suspension of seventeen proceedings until 1 April 2020. This was because the first notification of the RFA to the Respondent had not yet been effected or the response was pending. By 1 April 2020, the CAM-CCBC had notified and implemented the needed measures and case management proceeded efficiently and effectively.

The experience of the CAM-CCBC is generally consistent with the experiences of other arbitral institutions as they confronted the challenges of the pandemic and converted to remote arbitration administration. The move to remote administration was achieved relatively smoothly and efficiently, while the bigger challenge was to nudge parties and tribunals to convert to virtual hearings. As the arbitration community has realized that the pandemic effects will not soon subside and has become more familiar with the relevant technology, there is an increase in the interest and willingness to use digital tools and hold virtual hearings.

Issues remain with electronic awards and original wet-ink signatures by all the arbitrators on the original award. Although arbitral institutions may accept digital versions and electronic signatures, there are concerns about courts accepting the awards with electronic signatures and in digital form in recognition and enforcement proceedings.
P 41 Some suggest that technology, such as blockchain, can alleviate these issues, but this is a topic beyond the scope of this chapter. The topic of electronic signatures is addressed in another chapter of this book. (42)

4 INITIATING ARBITRATIONS REMOTELY

Many arbitral institutions had adopted procedures for accepting Requests for Arbitration (RFA) and other communications by email prior to the pandemic while continuing to accept RFAs in paper form delivered by post, courier, or in person at their premises. As a result of the pandemic, most arbitral institutions requested parties to submit the RFA by email and posted a designated email address on their websites. Those institutions which did not (or do not) have staff on the premises typically requested that a party wishing to file an RFA in hard copy at the premises should either call or email the Secretariat to make arrangements for the hard copy delivery. Some institutions that were in lockdown had a designated person who once or a few times of week could pick up deliveries. For example, during the approximately one-hundred days of lockdown in Milan, the Milan Chamber of Commerce, where the Camera Arbitrale di Milano (CAM) is located, had a single person who could check for mail deliveries once a week. A few institutions were unable to retrieve mail at all during the most intense period of restrictions.

The initiation of the arbitration or an emergency arbitration application poses particular issues as it is the first point of contact that an arbitral institution has with the case and

when it is registered into the system. Under many arbitration rules, the institution will transmit the RFA or the request for emergency arbitration to the Respondent. This is typically done by courier service or registered mail to ensure that there is a record of receipt of service. (43) It may also be sent by email as a courtesy. The failure to effect proper services on a Respondent can be the basis of a claim that the Respondent was not given proper notice of the arbitration proceedings which is a ground for annulment under most arbitration laws (44) and a ground for the refusal of the recognition and enforcement of the award under the New York Convention. (45) The failure to timely and properly serve the RFA could also trigger the potential statute of limitation issues, if applicable. The time period in which an answer should be filed is also related to the date
P 42 of service of the RFA under many arbitral rules. Some countries ● impose formalities, such as original and 'official' stamps of receipt on documents, such as an RFA.

Due to restrictions in many countries resulting from COVID-19, regular post and courier services were significantly disrupted causing delays or not at all functional in some places. Some arbitral institutions reported that courier delivery that would normally take two or three days was taking two weeks or longer during the lockdowns. Institutions reported that they allowed for a greater time than usual for an answer to be filed, in part due to the recognition that an RFA may take more time to actually reach a Respondent.

When an RFA or an emergency arbitrator application is filed, a fee must be paid to the institution. Typically, this fee can be paid electronically to the institution's bank and a proof of payment is provided to the institution. This process was delayed or disrupted in some places. Most arbitration institutions do not have online payments available directly to their institution, through PayPal, digital bank transfer, credit card, or otherwise. In countries, such as Italy, an RFA must bear a government fiscal stamp showing that the required tax fee has been paid. During the lockdown, it was nearly impossible to obtain the fiscal stamp. The arbitral institution must be able to show the stamps if an inspector appears to conduct a check, which could occur much later. To deal with this situation, CAM accepted RFAs without stamps by email and required the parties to promptly provide the stamp to CAM after the lockdown.

The surveyed institutions were asked if they had seen a discernible decline, increase, or no change in the number of arbitrations filed since the start of the pandemic, and, where applicable, in the number of emergency arbitration applications. Most institutions reported that the number of cases filed was about the same as the previous year, with perhaps a small decrease at the start of the pandemic. A few institutes noted an increase, with one institute, FAI, recording a significant increase, but noted that this might not be related to the pandemic. KCAB noted a moderate increase in cases, but not in emergency arbitration requests. It noted that this may be due to parties' perception that Korean national courts tend to be extremely quick and efficient in granting interim relief court orders for ongoing or anticipated disputes.

The CCL and the American Chamber of Commerce for Brazil, as well as some other institutions, such as VIAC, experienced an initial drop in new cases when lockdown required immediately converting to remote services, but the cases picked up and are now equivalent to last year. ICC noted that, while the number of new cases remained stable, there was a notable increase in emergency arbitration applications. SIAC similarly noted a significant increase in emergency arbitration applications.

The CAM-CCBC Secretariat reported that the number of cases remained about the same as the previous years. It analysed the arbitration proceedings initiated from mid-March until the beginning of June and found that in the first month only one case out of eight related to the COVID-19 crisis. Interestingly, as of mid-April, it noted that over half of the arbitrations initiated during the analysed period had a direct relation to the impact of COVID-19. Many cases related to power purchase agreements and other supply contracts with take-or-pay provisions. Also, M&A disputes related to the impact of the pandemic
P 43 crisis on the price under negotiation. Moreover, those cases were ● mostly initiated after a pre-arbitral emergency measure was granted or partially granted by judicial courts.

Both ICSID and the Permanent Court of Arbitration have noted a slight increase in new cases during the 1 March-30 June 2020 period as compared to the same period in 2019. ICSID registered twenty-three new proceedings, including sixteen new arbitration cases. Between 1 March and 30 June 2020, ICSID registered twenty-eight new proceedings, including eighteen new arbitration cases. However, it is not possible to ascertain whether the slight increase is related in any way to the pandemic situation.

Generally, arbitral institutions appear to have stable caseloads despite the pandemic, with many noting a slight increase in cases, such as SCCA and DIS. However, it is too early to determine if the increase is related to the pandemic and if the trend will continue. It is likely that the effects of the pandemic, if any, on new and existing cases will not clearly manifest for several months or longer. In the future, it may be possible to have sufficient information regarding cases that were initiated during or after the COVID-19 crisis to analyse the impact of the pandemic on business disruptions leading to disputes.

5 ADMINISTERING ARBITRATION REMOTELY: LESSONS LEARNED AND THE FUTURE

Arbitral institutions across the globe, large and small, have now gained experience in administering arbitrations remotely. It is indeed impressive how agilely and smoothly arbitral institutes immediately and effectively responded to the unexpected crisis. Despite many parties and tribunals being startled by the uncertainties of the new situation, arbitral institutions rose to the challenge of providing leadership and guidance to ensure that arbitrations could be managed and conducted under the pandemic. There is no one solution that fits all cases, but arbitral institutions worked with users and tribunals to ensure that they had needed information and tools to navigate a course for the conduct of the particular case.

All of the institutions reported that parties and tribunals were generally cooperative and open to solutions, although many parties were initially sceptical or resisted remote hearings. Some institutions reported that some parties appeared to exploit the situation to seek delays, but institutions encouraged tribunals to use case management tools to ensure efficiency and fairness. Some arbitrators lacked technical skills and needed assistance to manage digital tools and platforms. Some parties indicated that they lacked the resources for remotely handling the case, particularly a remote hearing which requires access to appropriate hardware and a stable internet connection with an adequate bandwidth. Issues were raised with virtual meetings and hearings involving parties and arbitrators with wide-ranging time-zones. It was challenging for many parties to conduct a complex hearing with the legal team and witnesses each located in separate
P 44 home environments. As the arbitration community gained and ● shared experience, these challenges were addressed, as is discussed in other chapters of this publication. (46)

The arbitration community has collaboratively shared information and experience to facilitate the continued efficient and fair conduct of arbitration during the pandemic. For example, in June 2020, VIAC published the 'Vienna Protocol: A Practical Checklist for Remote Hearings'. (47) There are several initiatives that provide free information to the public. For example, Virtual Arbitration is a website which has gathered information on a range of guides, checklists, webinars, and other materials relating to virtual arbitration. (48) A number of law firms created a combined working group to create a proposed Protocol for Online Case Management in International Arbitration. (49) Delos Dispute Resolution has published a list of resources available on holding remote arbitration and mediation hearings. (50) Many hearing centres now offer remote hearing assistance and also facilities that can accommodate social distancing and hygiene requirements. Most larger law firms have provided information relating to remote arbitration and other measures related to the pandemic.

As noted earlier, the arbitral institutions that already had developed and were extensively using technology and digital tools were able to relatively seamlessly convert to remote administration of arbitration. For example, the ICDR-AAA had already been using a digital platform for communications and documents with parties and arbitrators and had been training staff and arbitrators to use digital tools. SCCA, a relatively new arbitral institute, was launched with 'paperless' case administration through a digital platform which it encourages users and arbitrators to utilize, although it is not mandatory, and it will accept traditional hard copies filings. The SCCA secretariat was already set up to work remotely. Team meetings typically took place by videoconferencing as staff worked from three different locations. Consequently, the move
P 45 to remote administration due to the pandemic was smooth. CCL reported that ● their existing digital platforms played a crucial role in converting to remote administration, especially as they had been using them for a while before the pandemic, so many parties and arbitrators managed them well and felt comfortable with their use.

When asked if the COVID-19 experience would encourage continued or greater digitalization, all surveyed institutions responded affirmatively, even those which were already functionally digital to a significant degree. For example, HKIAC has been a leader in virtual hearings throughout Asia over the past several months, having issued Guidelines on Virtual Hearings, (51) and having conducted webinars and round-table discussions to improve awareness and alleviate concerns regarding greater use of technology and digitalization in arbitration. It has been investing into its physical capacity to better facilitate virtual initiatives, including turning one of its largest hearing rooms into a full virtual hearing suite equipped with the latest technology. HKIAC plans to launch several digitalization initiatives over the next twelve months to better adapt and support the quickly changing arbitration environment. Those institutions that do not currently have a secure platform for communications and file-sharing with users and tribunals are either considering or planning to introduce such a platform. However, for some smaller institutions, this may be an investment that will not be possible soon.

The arbitral institutions that have recently revised their rules were well equipped to convert to remote arbitration. For example, HKIAC reported that the revisions made to the 2018 HKIAC Administered Arbitration Rules encouraged and enabled greater use of technology (Article 13.1), noting that physical hearings are not required (Articles 14.2, 2.25), and that notification can be made by upload to a secured online repository (Article 3.1(e)). Older institutional rules may only refer 'hearings' and 'submissions' without specifically accommodating digital practices. Some of these institutes have issued guidelines clarifying that the digital submissions and virtual hearings comply with the

existing rules.

ICSID is in the process of revising its arbitration rules and already had established policies and procedures to facilitate digital and remote case management and hearings. It reported that the main aspects of recently instituted policies include replacing paper filings with electronic-only filings, for existing cases and for new requests and applications. Although printing and couriering is becoming possible again, it is unlikely that ICSID will roll back the new electronic-only filings policy, as this was already contemplated by the proposed amendments to the rules. The electronic filings work very well; they save time and cost for users and they considerably reduce the environmental footprint of cases (trees are saved, carbon emissions are reduced). ICSID will likely continue efforts to go green, which started years ago and are reflected in the draft amended rules.

The London Court of International Arbitration (LCIA) is also revising its rules and the experience gained during the pandemic may influence the revisions. The LCIA reported
P 46 that it converted into a virtual office prior to the official lockdown in the UK ● and was able to provide the entire team with facilities to work remotely. It communicated with parties and arbitrators requesting to minimize the use of paper and the transition was seamless. It noted that, while the current LCIA rules already include language supporting virtual arbitration better than the rules of most other large institutions, it has been able to benefit from the impending update to introduce a few additional changes enhancing the procedural framework in the rules revision that is currently underway. This may include some provisions making electronic communication the default system, supporting virtual hearings, and electronically signed awards. (52)

The surveyed arbitral institutions were asked if they anticipated changing any of the policies or procedures instituted in the past months in response to the pandemic. All institutions responded that many of the policies and procedures will remain in place, such as encouraging electronic communications and submissions to replace paper filings. Overall, the institutions have found the procedures for facilitating remote arbitration have worked well and meet the needs of clients for fair, efficient, and cost-effective arbitration. As one Secretary General stated, 'the pandemic allowed us to implement our goals in a faster manner'. Another commented 'it is undoubted that the current COVID-19 situation has greatly accelerated our digitalization initiatives'. One institution leader noted, 'I think that this experience not only encourages greater digitalization, but it demonstrates that it is needed (and wanted!).' Nearly all reported that the response to the pandemic pushed parties and arbitrators to overcome initial resistance to remote case management and virtual hearing and to become familiar with the tools and opportunities.

Arbitral institutions noted that international arbitration practice will not likely return to the pre-pandemic state, but will reflect greater acceptance and use of digital tools and virtual hearings. It is not likely or even desired that virtual hearings become the norm, but it should become the norm that parties and arbitrator consider virtual hearings. Each case has its own circumstances which the parties and tribunal should take into consideration. Many observers believe that the post-pandemic arbitration procedure will include hybrid procedures, where there be a mix of virtual and in-person hearings in a case.

During the pandemic, there were developments of various digital tools and platforms. These developments will undoubtedly continue, particularly since there is much greater interest in using these tools. Digital arbitration administration enhances the efficiency and effectiveness of an arbitral institution's case management. It is unlikely that arbitral institutes will continue to operate remotely when the pandemic-induced restrictions are removed. There are benefits to the team working together in an office, but work is enhanced through digitalization. As digitalization increases, arbitral institutions, arbitrators, and parties will need to become more familiar with new technology and to ensure adequate cybersecurity measures and data protection compliance.

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There are other benefits to digitalization than efficiency and cost savings. As noted by ICSID, digitalization and virtual meetings and hearings can have a substantial impact on environmental sustainability. As Lucy Greenwood has argued, the arbitration community should contribute to reducing its environmental impact. She has initiated a 'Green Pledge' with guiding principles towards minimizing the environmental footprint of arbitration. (53) There is a great need for greater diversity and more inclusiveness in arbitration. Arbitrator appointments should reflect the entire international community of users, which is not the case today. Diversity will improve arbitration performance and legitimacy. Parties and institutions need to ensure that there is diversity in all respects: gender, age, racial, geographical, religious, and professional backgrounds. Remote arbitration procedures and virtual hearings enable arbitrators located anywhere on the globe to arbitrate in a case without regard to travel times and costs. Virtual training programmes, webinars, and other activities make these events considerably more accessible to a broad and diverse audience, reducing barriers to entry into the field of international arbitration.

A few arbitral institutions have noted that there appears to be a significant rise in third-

party funding in new cases. Given the disruptions to business and the economic impact of the pandemic, many expect to see a continuing increase in funding. This may cause arbitral institutions to consider policies or rules regulating disclosure of funding, security for costs regulation, and other related issues.

There has not yet been a significant rise in mediation and other ADR mechanisms at the arbitral institutions surveyed. However, many believe that as a result of pandemic-related business disruptions, parties are engaging in more negotiations and may be considering mediation. The role of arbitrators in encouraging settlement may gain greater attention in the future.

6 CONCLUSION

As the pandemic subsides in some places and is flaring up in others, it remains uncertain when it will be possible to return to pre-pandemic practice in international arbitration. However, it is certain that even when restrictions are lifted and it is no longer necessary to administer and conduct arbitrations remotely, the experience that was gained during the pandemic will have lasting effects on how arbitral institutions, parties and tribunals approach case management. The world of international arbitration is going through a major transformative event that has accelerated technological integration and innovation. It will not return to 'normal'; the pre-pandemic 'normal' is the past and the future is now being forged.

Arbitral institutions have shown leadership, resilience and nimbleness in dealing with the challenges. Parties, lawyers, and arbitrators have collaboratively sought to find
P 48 pragmatic solutions to accomplish the task of providing efficient, effective, and fair arbitration of disputes. Arbitration plays an important role in facilitating business, trade and investment, and in the aftermath of the pandemic, the world will need to ensure that business, trade and investment can tackle the economic consequences of the pandemic and provide needed jobs and revenue to communities.

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Chapter 3: Arbitrator Appointments in the Age of COVID-19

Catherine Rogers; Fahira Brodlija

1 INTRODUCTION TO THE "NEW NORMAL" IN INTERNATIONAL ARBITRATION

At least for one moment, the COVID-19 pandemic seemed to have pressed "PAUSE" on the world, bringing everything to a grinding halt. (1) Business transactions, whether large or small, were at best disrupted and at worst permanently damaged. (2) As governments around the world were scrambling to contain the virus and save human lives, the measures they introduced completely stopped global travel, the exchange of goods and services, and many mechanisms of governance and justice. (3)

As a result, according to the analysis of the World Trade Organization (WTO), global trade is forecast to plunge between 13% and 32% in 2020 due to the disruption caused by the COVID-19 pandemic. (4) In addition, global flows of foreign direct investment (FDI) are
P 50 expected to decrease by up to 40% from their 2019 value of USD ● 1.54 trillion. (5) This reduction would bring FDI below USD 1 trillion for the first time since 2005.

While so many issues remain uncertain, one thing that is now inevitable is that the number of claims and legal actions caused by or related to the global crisis is going up. (6) The result of this increase remains uncertain. Some suggest that increased regulatory "protectionism" to support domestic industries may lead to an increase in investor-State arbitration claims. (7) For example, in 2019, United Nations Conference on Trade and Development (UNCTAD) has reported fifty-five new investor-State disputes filed, which was below the annual average over the previous five years. (8) It is already anticipated that in 2020 there will instead be an increase in claims brought by investors based on alleged treaty violations. (9)

The pandemic has also disrupted the free movement of goods, shipping and transportation, construction and manufacturing projects. The result has been the breach, cancellation, or significant delay in contract performance. (10) This chapter will explore the new reality in international arbitration which is quickly setting in due to the COVID-19 pandemic with an emphasis on the arbitrator appointment process and the marketplace for arbitrators. The chapter first addresses the advantages of arbitration as the dispute resolution mechanism for claims arising in the context of COVID-19 and the adjustments made by the leading arbitral institutions around the world. The next section is dedicated to the arbitrator appointment process in the COVID-19 era, the shifting needs of the parties and their counsel and the expectations of the market for international arbitrators. The chapter further explores the preexisting and new challenges in the arbitrator appointment process (primarily the lack of information and metrics on the track record and procedural preferences of international arbitrators), and the opportunities to increase the visibility and appointment rate of new arbitrators from diverse backgrounds with the help of available and emerging informational resources. The chapter concludes with a summary of the main points of discussion and provides an optimistic outlook on the possibilities of progress in the arbitrator appointment process, even in the challenging times of COVID-19.

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2 ARBITRATION AS AN IMPORTANT RESOURCE

In contrast to national courts, arbitral institutions have more flexibility to ensure that their operations are only minimally disrupted. (11) This makes international arbitration a much more attractive option for disputing parties in the aftermath of the COVID-19 pandemic, seeking efficient and flexible resolution of their disputes. In a recent joint statement issued by the leading arbitral institutions (including the London Court of International Arbitration (LCIA), International Court of Arbitration of the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and others), the institutions committed to preventing any disruption to ongoing arbitral proceedings despite the pandemic. (12) Disputing parties are encouraged by the arbitral institutions to continue with their proceedings (when possible online). (13) Institutions have also developed mechanisms to ensure the safety and security of their staff and users. (14) The end result is that arbitration practice will not only continue but also likely increase in numbers and accelerate in innovation. (15)

As discussed in another chapter in more detail, leading international arbitration organizations have also adopted special rules and guidelines for the parties and their counsel, which should help them adapt to the online hearings and other relevant procedural issues related to the arbitration. (16) However, none of the most recent guidelines and protocols published by the arbitral institutions address the issue of arbitrator appointment in much (if any) detail.

For example, the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic starts with the guidance for initial consultations between the
P 52 tribunal and the parties, as well as the case management conference, but ● the

arbitrator appointment process is left out. (17) The ICC Guidelines also explicitly recommend reducing production of document, potentially reducing the number of witnesses, opting for tribunal-appointed experts, rather than party-appointees. (18) Tribunals are also advised to consider the early identification and resolution of certain issues, as well as to conduct mid-stream procedural conferences and to prioritize early resolution of issues. (19)

The Singapore International Arbitration Centre (SIAC) has also issued a special set of Frequently Asked Questions (FAQs) in the context of COVID-19, providing their users with guidance on issues related to the administration of their cases and the actual conduct of the hearings. (20) SIAC advises its users to make any inquiries or submissions electronically, as SIAC is fully operational and working remotely. (21) The parties are encouraged to conduct their hearings online, upon mutual consultations and consultations with the tribunal, as there are no prohibitions of online hearings in the SIAC Rules (2016). (22)

SIAC has not issued any specific protocol for the conduct of remote hearings, so they can be conducted in a manner considered appropriate by the tribunal, in consultation with the parties. The only specific guidance provided in this sense is the need to implement measures to ensure the security and confidentiality of the hearing. (23) Aside from providing regular services to the parties to arbitrations administered by the center, the Stockholm Chamber of Commerce (SCC) also started to offer the use of its online case management tool to parties to ad hoc arbitrations free of charge during the COVID-19 pandemic (for arbitrations registered by December 31, 2020). (24)

The Seoul Protocol on Video Conferencing in International Arbitration, which was drafted with the support of Korean Commercial Arbitration Board and the Seoul International Dispute Resolution Centre, is another valuable resource for the facilitation of online hearings. (25) The Protocol covers a range of issues, starting from online witness examinations, videoconference venue and observers, to the technical requirements of the online platform and equipment used for remote hearings. (26)

The Africa Arbitration Academy issued the Protocol on Virtual Hearings in Africa, which
P 53 mostly mirrors the approach taken in the guidelines and protocols of other ● regional and international institutions. (27) However, this protocol also provides a Model Pre-Virtual Hearing Agreement and a Model Virtual Hearing Clause as Annexes. (28) These provisions aim to ensure the integrity of the proceedings and the enforceability of the final award.

All of these guidelines and recommendations aim to optimize the arbitral proceedings for the online format while ensuring that the dispute can be resolved effectively and without additional delays. However, none of them provide any guidance or resources for the parties and their counsel in the process of selecting and appointing arbitrators. The likely increase of the number of new arbitrations will inevitably require the transformation of the market for international arbitrators, to create room for new entrants with the requisite skills, which can be deduced from the guidelines outlined above and elaborated in depth in other chapters. (29) The one thing all these guidelines have in common is that they must be implemented by arbitrators who, in most instances, will have to be able to adapt their case management skills to address and incorporate these various sources.

3 CHANGES AND CONSTANCY IN INTERNATIONAL ARBITRATION PRACTICE

The influx of new arbitration cases and the demand for more arbitrators will inevitably turn more attention to the market of arbitrators and renew questions about arbitrator availability. (30)

Despite recent growth, the arbitrator market remains a relatively small, interconnected and cohesive group, which makes it difficult for talented newcomers to position themselves for a significant number of appointments. (31) As a result, newer arbitrators often have to be plucked from relative obscurity and introduced to the arbitration practitioners in a meaningful and effective manner. In order to meet the growing demand for arbitrators, the existing process of arbitrator selection and appointment will have to grow and evolve in order to overcome certain “pre-existing conditions,” which were problematic even prior to the COVID-19 pandemic.

3.1 The Preexisting Conditions of the Arbitrator Appointment Process

The Covid-inspired increase in demand for arbitrators highlights the importance of the arbitrator appointment process for the parties and their counsel and creates opportunities to address some long-standing deficiencies in the existing framework.

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Arbitrator appointment is the ultimate exercise of party autonomy in international arbitration, but the lack of substantive and accessible data on arbitrators and their decisional track record seriously limits the choices for the parties and their counsel. (32) In other words, as Lucy Greenwood has explained, “[i]t is unarguable that the single most important thing you do as counsel in a case is appoint an arbitrator, and yet it is the

thing you do with the least available tangible information." (33)

In a similar vein, the most recent Queen Mary survey from 2018 on the state of international arbitration demonstrated that stakeholders from all over the world agree that there is a need for more information about arbitrators and their track records. (34) Responders to the Queen Mary survey were primarily interested in a number of key points regarding the arbitrator's case management style, proactiveness and/or deference to the requests of the parties and other procedural details. (35) They also expressed interest in more substantive matters, including the arbitrator's reasoning on contractual and substantive matters, as well as their handling of different issues on the merits of the dispute. (36)

Given the confidential nature of arbitration, gathering the relevant information means personal phone calls with individuals who have appeared before a potential arbitrator or, better yet, sat as a co-arbitrator with that person. Even responders in the Queen Mary survey who stated that they possess sufficient amount of information about arbitrators conceded that the primary means for obtaining this information was through "word of mouth, internal colleagues or publicly available information." (37)

This kind of ad hoc individual research largely confines assessment of potential arbitrators to feedback from a limited number of individuals. The result is several negative consequences.

First, lack of information about arbitrators undermines the predictability and efficacy of arbitrator appointments for the parties. No other aspect of corporate decision-making relies on such a collection of informal impressions and industry gossip instead of concrete data, research, and analysis. Why make an exception in such a critical context as the appointment of the person who will decide the dispute?

Despite this limited scope, ad hoc research can be time-consuming (and therefore costly), but not always reliable. Without broad data against which to evaluate these inputs, however, it is impossible to determine whether the feedback is broadly representative, readily transferrable to the case at hand, or just an outlier.

Second, the lack of information about arbitrators distorts the market for international
P 55 arbitrators and makes it more difficult for diverse arbitrators to establish their ● reputations and, consequently, increase their likelihood of appointments. (38) Particularly as we see some of the greatest case growth in regions like Latin America, Africa and the Middle East/North Africa, there is a clarion call for more arbitrators from these regions. (39)

In the current market for arbitrators, there is a problematic information bottleneck. Newer and more diverse arbitrators cannot readily develop international reputations as long as personal references are the primary means for determining expertise and efficiency. This informational bottleneck is increasingly intolerable in light of concerns about the lack of diversity among international arbitrators. Meanwhile, in-house counsel often have corporate benchmarks to find newer more diverse service providers, which would include arbitrators except for the scarcity of information.

Recent statistics published by the leading international arbitral institutions confirm the gradual improvements in the percentages of diverse appointments. Most of these improvements are attributable to arbitral institutions, however, not the parties or co-arbitrators. For example, in the ICC, 21% of the arbitrators appointed in 2019 were women, which is a slight increase from 2018 (18%). (40) The ICC had a slightly higher rate of female appointments, while the co-arbitrators recorded the lowest rate. (41)

Among the 159 arbitrators appointed by SIAC in 2019, fifty-eight (36.5%) were women, which is an improvement from 2018 (34.4%). (42) There are no statistics about the appointments by the parties or the co-arbitrators in this category. (43) The LCIA has also made improvements in gender diversity, in the short span of six years. Namely, in 2014 only 11.7% of arbitrators appointed to LCIA tribunals were women, while in 2019, this percentage rose to 48%. (44) The parties and co-arbitrators still appoint female arbitrators at a significantly lower rate, but these figures have also increased in 2019 (17% increase for party appointments and 18% increase for co-arbitrator appointments). (45)

A closer look at the statistical improvements still reveals that most progress has been made in gender diversity, but other categories, such as racial, ethnic, and geography diversity, are still lagging behind. This issue is particularly visible in International Centre
P 56 for Settlement of Investment Disputes (ICSID) arbitration, where ● a bigger part of the appointments is made publicly available. The recent report on monthly appointments at ICSID had two instances in which the same arbitrator was appointed to two tribunals within two weeks. (46) The confidential nature of other investment arbitration (such as ad hoc proceedings under the UNCITRAL Rules) prevents a deeper comparative analysis of this issue. (47)

As a result, even if diverse names appear on lists maintained by arbitral institutions, or are proposed by party counsel, arbitration practitioners still report that they are more likely to appoint repeat players. (48) This quandary can be directly attributed to the deficit of both quantitative and qualitative information about arbitrators that goes beyond their names and professional profiles. Over time, this situation has resulted in an

overemphasis on repeat appointments, with very few new entries able to establish effective reputations to penetrate into that category. (49)

To fill the gaps in the information obtained through internet searches and phone calls, and to evaluate the "soft skills" that parties seek in an arbitrator, some parties conduct pre-appointment interviews with potential arbitrators. However, the information acquired in the pre-appointment interviews is of limited scope, and it does not necessarily provide the parties and their counsel with key and essential insights into the arbitrator's procedural preferences or track record. (50)

According to the existing guidelines and best practices at the international level, pre-appointment interviews should not delve into any substantive matters but should mostly deal with matters of arbitrator availability. (51) Some questions which may be appropriate in this context may be related to the estimated timetable for the proceedings, the previous experience of the arbitrator and their availability to hear the case. (52)

For example, the Chartered Institute of Arbitrators (CIArb) International Arbitration Practice Guidelines for the Interviews of Prospective Arbitrators provide that the pre-appointment interviews may take place, but should not include any discussion about the
P 57 merits of the case (instead of limiting the interview to questions of availability). (53) The CIArb Guidelines do not provide for mandatory disclosure of the content of the interview. In a similar vein, the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration limit the pre-appointment interviews to communications aimed at determining their expertise, availability, or the existence of potential conflicts of interest. (54)

More recent sources seem aimed at imposing more serious restrictions on pre-appointment interviews. For example, the newly published Draft Code of Conduct for ISDS Adjudicators was developed jointly by the secretariats of UNCITRAL and ICSID. (55) In its current form, the Draft Code provides a broad disclosure obligation which encompasses the adjudicator's relationships in the previous five years, any financial interest in the outcome of the case, and their service in other cases. (56) The disclosure obligation also extends to pre-appointment interviews, which are addressed in a separate Article of the Draft Code. This provision limits their scope to discussions concerning the availability of the adjudicator and absence of conflict, to the exclusion of any issues pertaining to jurisdictional, procedural or substantive matters of the case. (57) In addition, the bracketed text of this article leaves the policy makers the option of adopting a disclosure obligation for any pre-appointment interview. (58) In addition, the Draft Code provides that the parties conducting a pre-appointment interview with a potential candidate should take notes or recordings, which would be automatically disclosed once the selected candidate accepts the appointment. (59)

While it is still uncertain whether the Draft Code will be adopted or adopted in its current form, it is at least possible that in the future pre-appointment interviews may be subject to mandatory disclosure, prohibited, or significantly curtailed. (60)

3.2 Opportunity for More Diverse Appointments in the Absence of Geographical Barriers

The fact that the parties and the arbitrators will no longer have to travel internationally
P 58 to attend in-person conferences may open new avenues for assessing newer and more diverse arbitrators. (61) They may also lead to greater geographic flexibility in appointments as arbitrators no longer need to be selected from a place close to the legal seat. Online dispute resolution platforms and videoconferencing systems are accessible and operational in most parts of the world. Even if certain restrictions exist, the IT market is booming with new and robust online meeting platforms, which may be used as a compromise solution. (62)

In the absence of geographical limitations and increased connectivity, the parties and their counsel may be more inclined to consider lesser-known arbitrators who possess the requisite expertise and technical skills necessary in the new format of international arbitration. For small- and medium-sized claims, parties and their counsel may be more willing and well served to appoint a "new face" to the tribunal, as they are more likely to be available and able to dedicate their full attention to the dispute. In addition, in smaller disputes where a sole arbitrator is appointed by the arbitral institution or an appointing authority, the deeper pool of available arbitrators who can be reached remotely may provide an additional boost to the diverse appointments made by arbitral institutions. (63)

As discussed above, arbitral institutions have made substantial contributions to the improvement of the diversity in international arbitration (particularly when it comes to gender diversity). (64) With the physical barriers broken down, and with the diversification of the appointments made by the parties and their counsel, the market of international arbitrators may be transformed in the aftermath of the COVID-19 pandemic.

3.3 Efficient Online Case Management and Technological Proficiency of Arbitrators

Faced with the reality of remote hearings becoming increasingly prevalent in the practice

of international arbitration, the parties and their counsel in the arbitrator appointment process will have to take into consideration the willingness and ability of the potential arbitrator to conduct, coordinate and conclude arbitral proceedings online. (65) Some of
P 59 the leading arbitration institutions were able to immediately move ● their operations online since their rules provide the parties and the tribunals with broad discretion to determine the details and logistics of the arbitral proceedings. (66)

If these circumstances persist for the foreseeable future, the arbitrators will have to be able to adapt their case management skills to the online fora. (67) Even after the immediate crisis, the efficiencies of online proceedings may not be easily relinquished by parties or institutions, at least in some phases of the proceedings. (68)

As a result, in the future arbitrators may be expected to organize, manage, and conduct the hearings online, and demonstrate comfort using various online tools. The above-referenced institutional protocols outline a dynamic and demanding procedural framework which will require a level of technical skills which will enable the management of the new tech-driven, online arbitral proceedings. (69)

Arbitrators should be able to develop the concept and plan for the proceedings, and to conduct the online hearings either by means of an audio, video or document-based communication. These methods can be combined and varied at different stages of the proceedings, but they will require a considerable level of technical proficiency on the side of the arbitrator, in order for the parties to rely on their ability to successfully manage the case. (70)

Effectively managing online hearing platforms requires arbitrators to manage the interface, document submission, and communication tools. (71) Arbitrators will also have to be mindful of the cybersecurity, data protection considerations and confidentiality of the volumes of documents submitted in e-document production. (72) The increased demand for technical skills may create new opportunities for younger arbitrators to receive more appointments, especially in small-claim arbitrations.

These skills may give an advantage to tech-savvy arbitrators, who may also be able to adopt quickly to the new format of arbitral proceedings. Experienced arbitrators may also consider arbitral chairpersons who can complement their depth of experience with these new skills.

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Although it is difficult to anticipate all the possible scenarios and concrete technical issues that may arise in online hearings, the outlines of the online procedure can already be anticipated, and it does seem like that arbitrators in the COVID-19 with technical competencies will be increasingly valued.

3.4 New Tools for Arbitrator Selection

Even before the current crisis, the need for more information and more sophisticated tools for arbitrator selection was well understood. Various tools have been created to bridge the information gap and to take assumptions and proxies out of the equation in the arbitrator appointment process. One prominent example was the Puppies and Kittens survey, which provided an insight into the procedural preferences and soft skills of arbitrators. (73) The information is gathered through an arbitrator questionnaire, which inquires about their procedural preferences and soft skills. The gathered information should be made publicly available in order to not only enhance the arbitrator appointment process but also promote new and more diverse arbitrators. (74)

The GAR Arbitration Research Tool (GAR ART), which appears largely inspired by the Puppies and Kittens survey, provides users with information on both prominent and lesser-known arbitrators, allowing users to search arbitrators by name and experience, including the various legal fields in which they have arbitrated and the language of the proceedings. (75) Users can also access publicly available awards, arbitrator CVs, and other relevant links of interest to the parties. (76)

Another information tool which is available for arbitration practitioners is ArbiLex, which is an analytics platform which offers empirical and quantifiable benchmarking and prediction services. (77) ArbiLex seeks to provide custom risk assessments for parties in arbitration, based on machine learning and game theory inspired models. (78)

Finally, Arbitrator Intelligence (AI) (79) is another resource providing new tools to fill the information gap and level the playing field for all arbitrator practitioners through its new Reports. AI Reports provide users, for the first time, with previously unavailable, but
P 61 highly valuable, data-driven insights regarding arbitrators' case management ● and decision-making. These specialized insights will enable users to make more informed and predictable decisions in selecting arbitrators.

The information is collected through an anonymous online survey called the Arbitrator Intelligence Questionnaire or the AIQ. (80) The AIQ allows the parties and counsel to provide factual and evaluative answers about an arbitrator, which produce quantitative and qualitative information on individual cases without revealing any confidential information. The questions relate to a range of procedural matters, such as the timing and duration of the proceedings, costs, fees and interest awarded in the arbitration, case

management and procedural orders, document production, rulings on jurisdiction and interim relief, and damages analysis and legal methodologies in the award.

The AIQ seeks to replicate, through systematically collected feedback, the same kinds of information currently sought through person-to-person inquiries. Data from the AIQ will not eliminate altogether the value of individualized ad hoc inquiries, but it will allow parties and counsel to tap into the collective intelligence of the global international arbitration community.

Regardless of whether the AI report is based on one or several AIQs, it provides valuable feedback on the efficiency, level of preparation, reasoning and interpretation of contractual and statutory issues. In addition, it provides information about the case management and method used for the calculation of damages, costs, fees and interest. All this information can be provided about an arbitrator based on a single AIQ response, which allows the development of AI Reports for newer arbitrators who may not have had a large number of appointments. This not only helps meet the growing needs of the arbitrator market but also allows the entry of candidates from diverse backgrounds. (81)

The availability of more information about arbitrators will be beneficial across the board in the practice of international arbitration. Primarily, the parties will be able to make informed decisions based on objective information, especially if they are considering the appointment of a less-known arbitrator. The selection of the chairperson can also be streamlined, as the parties are more likely to agree to a common nomination if they have equal access to information about a candidate.

The information from the AI resources will also provide a strong baseline for analysis and the development of strategies of big law firms which are advising their clients on the appointment of arbitrators. An added advantage is the time which will be saved once the lawyers no longer have to conduct extensive online and in-person inquiries about a single arbitrator.

Arbitral institutions can also supplement the information they have gathered about the arbitrators on their appointment lists, or those who have conducted proceedings in cases administered by the institution. Therefore, although it may not happen overnight, the
P 62 benefits of increased availability of information on arbitrators ● can elevate the arbitrator appointment process to the desired level of efficiency and effectiveness.

The AI resources also outline the skills and traits of relevance for the parties and their counsel in the context of arbitrator appointments made in the COVID-19 era. In the reports, the users are able to find information about the arbitrator's case management style, including bifurcation of the dispute or early resolution of certain issues, nature and scope of the document production, including how the documents are submitted and stored, and implementation of other methods for the increased efficiency of the proceedings.

The availability of these resources creates numerous benefits for the supply and demand side of the arbitrator appointment process, as they represent a timely innovation as opposed to the traditionally available tools and information gathering mechanisms (such as publishing arbitrator names on institutional websites, collecting publicly available awards, and planning for systematic publication of redacted awards). The arbitration community has previously expressed their support and desire for improvements in the diversity and transparency of the information about available arbitrators, so there is no doubt that such reforms will be welcomed by the relevant stakeholders.

4 CONCLUSION

As the landscape of international arbitration changes, perhaps irreversibly, the arbitrator appointment process remains one of the crucial aspects of the arbitral process. Arbitration is likely to go through another period of intensive growth, as the number of international claims is likely to spike in the aftermath of COVID-19. Disputing parties will be attracted to the flexibility and efficiency of international arbitration, as an alternative to the judiciary which is already overwhelmed with outstanding and incoming cases. The large number of new arbitration claims will inevitably require the increase of the number of arbitrators.

In the aftermath of the COVID-19 pandemic, the market for international arbitrators will have to transform not only in size but also the skillset of the available arbitrators. As arbitral hearings shift to the online platforms (at least for the foreseeable future), arbitrators will have to successfully navigate both the technical and legal landscape of the emerging disputes. Arbitrators are expected to successfully organize and conduct all phases of the proceedings, starting with the case management conference to the issuance of the final award, following the guidance and protocols of the arbitral institutions. Parties and their counsel will, thus, be interested in the capabilities and level of comfort of the potential arbitrators of conducting arbitral proceedings online.

The challenging environment created by the COVID-19 pandemic will open the doors of opportunity for the entry of new and diverse arbitrators to the market of international arbitrators. The online format of arbitral hearings will make tech-savvy arbitrators more attractive, and their availability will be less tied to geography. However, this brings to
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light one of the most persistent and well-known flaws of the existing arbitrator appointment process, which is the lack of available information on new and diverse arbitrators.

Parties still rely on outdated and limited information channels, which will no longer be sufficient to meet the increasing scope and variety of disputes. Thus, the parties and their counsel will be looking for more comprehensive and data-driven solutions which will provide them some sense of certainty in uncertain times. As elaborated above, the parties already have at their disposal some valuable information tools, which can help them make informed decisions in the arbitrator appointment process. The increased volume and scope of information on potential arbitrators, including their track record and soft skills, may create an opening for younger and more diverse arbitrators to "break" into the market. It remains to be seen whether they will use the existing and developing information resources to their advantage, and what impact this will have on the diversity of the market for international arbitrators. Considering the high stakes in the arbitrator appointment process in the COVID-19 era, one can only hope that the window of opportunity will not be wasted.

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Chapter 4: The Legal Framework of Remote Hearings

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1 INTRODUCTION

> Dans ses écrits un sage Italien
>
> Dit que le mieux est l'ennemi du bien;
>
> Non qu'on ne puisse augmenter en prudence,
>
> En bonté d'âme, en talents, en science;
>
> Cherchons le mieux sur ces chapitres-là;
>
> Partout ailleurs évitons la chimère.
>
> Dans son état heureux qui peut se plaire,
>
> Vivre à sa place, et garder ce qu'il a!
>
> *Voltaire*

The proverb "the best is the enemy of the good" is attributed to Voltaire, the eighteenth century French philosopher. Indeed, he referred to this saying in his poem "La Bégueule" from 1772, the first lines of which are reproduced above. According to the poem, the saying was from a wise Italian, and indeed, the original seems to be "*Il meglio è l'inimico del bene.*" (1) The proverb is often cited as meaning that "people are [...] unhelpfully
P 66 discouraged from bringing positive change because what is proposed ● falls short of ideal" and "[i]f we want to make progress, we should [...] seek improvement rather than perfection." (2)

However, put in context, Voltaire's poem suggests quite the opposite. In "La Bégueule" Voltaire tells the story of a woman who is perpetually unhappy. According to the opening lines, when it comes to prudence, goodness, talent or science, one should strive for excellence. Yet, for other matters, one should avoid falling for the illusion of constant improvement. Instead, one should stay put and "remain at one's place," the value of which is not to be underestimated.

The tension between the two meanings—the one typically attributed to the saying and the other originally intended by Voltaire—is interesting. It highlights two rather opposing human approaches to uncertainty. On the one hand, a proactive approach aiming for improvement and embracing unknown situations even if they are not perfect. On the other hand, a cautious approach avoiding progress for the mere sake of it and at the risk of making matters worse.

In current times of uncertainty due to the COVID-19 pandemic, we are facing many novel issues and often have to choose between being proactive or cautious. International arbitration is no exception. Parties, counsel and arbitrators have to adapt to the new reality of conducting international arbitration proceedings in the face of travel restrictions and social distancing measures. One particularly thorny question is whether and to what extent physical hearings that cannot be held due to the abovementioned restrictions should (cautiously) be postponed, or (proactively) be held remotely using modern communication technologies. The assessment of such remote hearings in international arbitration is the topic of this chapter.

Most steps in an international arbitration are done remotely nowadays. This is true for starting the proceedings by sending the request for arbitration, either electronically (by email or using the institution's dedicated filing platform) or by post; selecting and confirming the arbitrator(s), possibly after conducting short telephone interviews; holding case management conferences, at the outset and/or midstream, between the parties and the tribunal, often organized as telephone or videoconferences rather than as physical meetings; exchanging written submissions via document share platforms; conducting possible telephone or video hearings of (minor) procedural issues (if any); organizing prehearing conferences; exchanging post-hearing briefs; holding deliberations between arbitrators, partially, by phone, videoconference or exchange of emails; and finally, signing the award, by exchanging copies thereof or mere signature pages.

Possibly the last "pieces of the puzzle" that typically remain as physical meetings are hearings, either on the merits or on major procedural issues. But the current COVID-19 pandemic forces international arbitration practitioners to reconsider this point and
P 68 assess whether those hearings, too, can be held remotely. (3) Depending on its ● length, the current crisis has the potential of being a real game-changer if international arbitral tribunals, as well as national courts around the globe, become used to holding hearings remotely. Such a paradigm shift might be something that many arbitration users have wanted for some time. (4)

This chapter takes a step back from the immediate crisis and proposes an analytical framework for remote hearings in international arbitration. In the connect of the current pandemic and beyond, it provides parties, counsel and arbitrators with the relevant guidance on assessing whether to hold a hearing remotely, and if so, how to best plan for and organize it.

Section 2 of the chapter starts by providing a definition of remote hearings and setting out different types thereof, distinguishing them from other, similar concepts. Section 3 defines the regulatory framework and assesses various national laws and arbitral institutional rules relevant to the question whether a tribunal may hold hearings remotely. The subsequent parts distinguish different possible scenarios depending on whether the parties have found an agreement as to whether or not to hold a remote hearing (section 4) or, more importantly in practice, whether the parties are in disagreement on this issue, with one party seeking a remote hearing while the other party opposing it (section 5). The latter is indeed one of the most delicate issues, and the chapter discusses in detail the tribunal's power to order remote hearings in the absence of the parties' agreement, the relevant test it should apply in that assessment, as well as the factors to consider therefor. Section 6 offers some thoughts on the organization of remote hearings and section 7 considers the enforceability of, and challenges to, awards that contain decisions based on remote hearings, looking in particular at possible breaches of the parties' right to be heard and to be treated equally. The conclusion in section 8 contains the chapter's findings and outlook to possible further research.

2 DEFINITION AND TYPOLOGY OF REMOTE HEARINGS

Remote hearings are understood in this chapter as hearings that are conducted using communication technology to simultaneously connect participants from two or more locations. This could include communication through telephone or videoconference, or possibly other more futuristic technology such as telepresence. However, unless specifically indicated otherwise, this chapter mainly focuses on remote hearings using a videoconference link, i.e. "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." (5)

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Remote hearings are also sometimes called virtual hearings. (6) Virtual has many possible meanings, but in computer science it may be 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." (7) In lay terms it is often understood as something not really or physically existent, (8) such as the virtual landscape in a computer game. References to "virtual arbitrators" can sometimes be found in discussions as to whether human decision-makers may be replaced or supported by artificial intelligence. (9) In the case of international arbitration hearings conducted in several locations, the participants of the hearing are not virtual, but really exist; they merely interact with each other using communication technologies. To avoid any misconceptions about the physical reality of remote hearings, the terminology of virtual hearings should be avoided or used sparingly.

One also sometimes finds references to the term "online hearings." (10) These can be confusing because of overlap with the concepts of online dispute resolution (ODR) and online courts. Online courts and ODR are indeed typically understood as determining cases outside physical courtrooms using computer technology. (11) Often, however, this
P 70 also means that no hearing (in the sense of a synchronous exchange of arguments or evidence) takes place at all, but rather is replaced by asynchronous forms of interaction. As explained by Richard Susskind in his book on online courts, "this means that [...] participants need [not] be available at the same time for a case to progress" and "as with email and text messages, those who are involved do not need to be on tap simultaneously—arguments, evidence and decisions can be sent without sender and recipient being physically or virtually together at the same time." (12) This is quite different from the idea of remote hearings, discussed in this chapter.

Remote hearings—as defined above—are no new phenomena in international arbitration. Not only are most case management conferences and some procedural hearings conducted remotely, so are merits hearings in certain cases. For instance, remote hearings are often used in expedited and emergency arbitrator proceedings. (13) Moreover, it is not uncommon that certain witnesses or experts testify remotely. (14) A recent survey shows that a large majority of interviewees had used videoconferencing in international arbitration proceedings. (15) Even more strikingly, the International Centre for Settlement of Investment Disputes (ICSID) announced that the majority of its hearings in 2019 were held by videoconference. (16)

Remote hearings are also not limited to international arbitration proceedings. They are equally used in national court proceedings, as discussed below, in particular in the
P 71 current pandemic. (17) Their use is foreseen in national statutory provisions (18) and international instruments including, for example, the European Union Evidence Regulation, (19) the Rules of Court of the International Court of Justice (20) and the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems. (21) International courts and tribunals, such as the International

Criminal Court, have dealt with remote hearings in the past. (22)

In international arbitration, as in other areas, there are several types of remote hearings that need to be distinguished. First, one may distinguish them according to their degree of remoteness. On the one hand, semi-remote hearings use one main venue, and one or several remote venues. (23) For instance, the tribunal might be assembled with the parties in one location, and one or several witnesses or experts might testify before them remotely. Such a setup is indeed regularly practiced in international arbitration, as mentioned above. On the other hand, in fully remote hearings, all participants are in different locations, with no existing main hearing venue. Fully remote hearings are rarely used in international arbitration so far, (24) but are currently considered in many proceedings in order to deal with COVID-19-related restrictions. Importantly, fully remote hearings not only raise technical challenges due to the increased number of remote locations, but they arguably also entail a difference in nature because of the absence of a
P 72 real hearing room. (25) It is this type of remote ● hearings that may indeed be called "virtual" in the sense that no hearing venue exists, but for the use of computer technology. Due to this difference in nature, fully remote hearings arguably require not only to transplant what is done in physical hearings to a fully remote setting but also to rethink the process more fundamentally.

Second, remote hearings might be distinguished according to the content of the remote part. Remote legal arguments might be assessed differently than remote evidence taking, as discussed below. (26) Moreover, semi-remote hearings might raise different questions depending on which participants are remote. While the hearing of remote witnesses or experts is most common, there are instances where one or both of the parties (or their legal representatives) participate remotely, or one or both co-arbitrators. As discussed further below, the assessment of remote hearings indeed might depend on who participates remotely. (27)

Third, one may further distinguish as to whether the remote participation concerns the entire hearing or only a part thereof. Importantly, all of the above distinctions may be combined in practice. For instance, one could imagine a hearing for which the evidence taking is mainly done in the physical presence of the experts or witnesses, except for some located too far away, followed sometime later by fully remote closing statements and final tribunal questions. In this combination, different parts of the hearing are conducted physically, semi-remotely and fully remotely. Whether and to what extent any such type of remote hearings, or combinations thereof, are possible will be discussed in the subsequent sections of this chapter.

3 REGULATORY FRAMEWORK OF REMOTE HEARINGS

The assessment whether or not remote hearings are possible depends on the applicable regulatory framework, in particular the law of the seat of the arbitration and the chosen arbitration rules, if any. As a starting point, the author is not aware of any national law or arbitration rules that expressly impose or prohibit remote hearings. Rather, if national law or arbitration rules contain specific provisions on remote hearings, they do so in permissive terms, as discussed in section 3.1. Most national laws and arbitration rules do not contain any specific provisions on remote hearings, a scenario which is considered in section 3.2.

3.1 National Laws and Arbitration Rules with Specific Provisions on Remote Hearings

Few national laws and arbitration rules contain specific provisions on remote hearings. If they do, they merely provide for the possibility of holding hearings remotely, using permissive terms ("may"), without imposing a particular solution.

For instance, Article 1072b(4) of the Dutch Civil Procedure Code provides that "[i]nstead of
P 73 a personal appearance of a witness, an expert or a party, the arbitral ● tribunal may determine that the relevant person have direct contact with the arbitral tribunal and, insofar as applicable, with others, by electronic means," adding that "[t]he arbitral tribunal shall determine, in consultation with those concerned, which electronic means shall be used to this end and in which manner this shall occur." (28) Similarly, pursuant to Article 19.2 of the London Court of International Arbitration (LCIA) Rules, "[t]he Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its [...] form [...]," specifying that "[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)." (29) Rules of other arbitral institutions also contain provisions referring to remote hearings. (30) These national laws and arbitration rules specifically allow that arbitral tribunals may conduct hearings remotely.

Some arbitration rules do not contain express references to hearings by videoconference or other electronic means as alternatives to physical hearings, but refer to the use of technology (31) or the need for expedient or appropriate means to conduct hearings. (32) These may arguably be interpreted as including remote hearings.

A number of arbitration rules contain references to remote hearings, but only in particular circumstances. For example, Article 28(4) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provides that witnesses and experts

may be heard remotely, but contains no similar provision for other aspects of hearings, such as legal arguments. (33) Other examples are the rules of: (i) the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) which allow case management conferences to be conducted remotely, (34) but contain no similar provisions for hearings; and (ii) the International Chamber of Commerce (ICC), which include provisions on remote hearings for case management conferences, (35) emergency arbitrator proceedings (36) and expedited proceedings, (37) but remain silent on remote hearings otherwise. (38)

This has led some to consider whether one could argue, *a contrario*, that remote hearings are not permitted, except in those situations specifically provided for. (39) In other words, because remote hearings are expressly permitted in certain circumstances, they
P 74 are impliedly prohibited in all others. Following that line of argument, ● remote hearings would not be possible for legal arguments under the UNCITRAL Rules, and for hearings on the merits in normal (i.e., non-emergency-arbitrator or non-expedited) proceedings under the ICC Rules. This view is unconvincing. It is difficult to conceive why legal arguments could not be heard remotely under the UNCITRAL Rules, if remote testimony by witnesses or experts is allowed. Quite to the contrary, if anything, one could argue that remote witness or expert testimony entails additional difficulties and therefore requires more careful consideration, as discussed below. (40) Moreover, the ICC Rules specifically promote the use of videoconferencing or other alternatives to physical hearings as case management techniques for controlling time and cost. (41) The suggestion that a tribunal would be barred from using those techniques under the ICC Rules is nonsensical.

This leaves, however, the question open as to whether or not arbitral tribunals may resort to remote hearings if the national laws or institutional arbitration rules contain no specific provision on remote hearings.

3.2 National Laws and Arbitration Rules Without Specific Provisions on Remote Hearings

Most national laws and institutional arbitration rules remain silent on remote hearings. In this case, one may look toward other principles for their guidance, such as the parties' right to a hearing, discussed in section 3.2.1, and the tribunal's broad power to determine procedural matters in the arbitration, set out in section 3.2.2.

3.2.1 Party's Right to a Hearing

A party's right to a hearing is said to be a fundamental principle in international arbitration. (42) Indeed, many national laws and institutional arbitration rules contain provisions to that effect, specifying either that a party may request a hearing, (43) or that the arbitration cannot be conducted on a documents-only basis unless all parties agree. (44) Other national laws and institutional arbitration rules leave the question whether or not to hold a hearing to the tribunal. (45)

If it is established that a party has the right to a hearing, the question remains whether this necessarily means a physical hearing. Some authors have expressed the view that,
P 75 under certain national law, remote hearings do not meet the threshold ● requirements for a "hearing." (46) This view seems to be based on the assumption that hearings must be oral (principle of orality) and allow for a simultaneous exchange of arguments or evidence (principle of immediacy). (47)

However, it remains unexplained why a remote hearing would not meet these requirements, even assuming they apply to international arbitration proceedings. First, arguments are made orally during physical hearings as well as in remote hearings, with the mere difference that the latter uses communication technologies to transmit the audio and/or video. Second, in both physical and remote hearings, the exchange of arguments or evidence is done simultaneously: the parties, counsel, witnesses, experts and arbitrators are able to discuss and relate points in a live mode. The abovementioned principles of orality and immediacy therefore do not suffice to explain why remote hearings should be treated differently from physical hearings. Of course, there are differences between the two types of hearings that warrant careful consideration, as discussed below. (48) However, it is unfounded to allege that remote hearings are prohibited merely on the basis of a party's right to a hearing.

A particular illustration is found in Article 25(2) of the ICC Rules, which provides that "[a]fter studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them." The reference in Article 25(2) to a hearing "together" and "in person" could indeed be read as prohibiting anything but physical hearings. However, other linguistic versions of the ICC Rules do not contain the "in person" language; rather, they simply require that parties should be heard orally (49) and allowed an adversarial exchange of arguments. (50) The ICC has made it clear in its recent *COVID-19 Guidance Note* that these requirements can be met by remote hearings. (51) "In person" in Article 25(2) of the ICC Rules is therefore best understood as referring to a hearing where the various participants are exchanging arguments or evidence live with each other (i.e., in between persons)—irrespective of whether this is done in a physical meeting or remotely.

In essence, a hearing consists of an oral and synchronous exchange of arguments or

evidence—as opposed to the written and asynchronous exchange of arguments or evidence in the parties' briefs. As long as a remote hearing allows for the exchange to be
P 76 oral and synchronous, it seems difficult to argue that it is not a hearing. To be clear, ● the foregoing does not mean that remote hearings are suitable in every single case. As discussed below, a careful assessment is required. (52) Importantly, though, the mere right to a hearing does not exclude in and of itself the possibility to hold the hearing remotely.

3.2.2 Tribunal's Broad Power Concerning Procedural Conduct

If the relevant national law or institutional arbitration rules do not contain any particular provision on remote hearings, the fallback solution is to refer to the tribunal's broad power to organize procedural matters. National arbitral laws typically provide that, absent any agreement by the parties, the arbitral tribunal may "conduct the arbitration in such manner as it considers appropriate" (53) and "decide all procedural and evidential matters" (54) or "determine [the procedure] to the extent necessary, either directly or by reference to a statute or to rules of arbitration." (55) Institutional arbitration rules contain similar provisions regarding the tribunal's power to organize the proceedings generally, and evidence taking more specifically. (56)

Absent any agreement or provision to the contrary, the tribunal's broad power to conduct the proceedings as it considers appropriate also encompasses the organization of any hearing, including its time, venue, length and other modalities. (57) Accordingly, the question whether a hearing should be held physically or remotely is for the arbitral tribunal to decide, absent any provision to the contrary.

In sum, irrespective of whether the applicable national law(s) or arbitration rules contain specific provisions on remote hearings or not, the tribunal will have to make a decision: in case of a specific provision on remote hearings, the tribunal must assess whether to use the specific power granted that it "may" hold hearings remotely; in the absence of a specific provision, the tribunal will have to exercise its broad general power on the organization and conduct of the proceedings.

In either case, the tribunal's power to decide on remote hearings is not without limits. Among other things, the tribunal's power is limited by the parties' agreement, as set out in section 4 below, and the parties' right to be heard and treated equally, as discussed in sections 5 and 7.

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4 REMOTE HEARINGS IN CASE OF THE PARTIES' AGREEMENT

This section addresses situations in which the parties agree on whether or not to hold a remote hearing. Typically, these situations raise few issues in practice because the tribunal will typically simply follow the parties' agreement. The principle that the tribunal should abide by the parties' agreement on procedural issues is set forth in many national laws and arbitral institutional rules. (58) Nevertheless, there are some—hopefully rare—scenarios that require further inquiry.

First, let us assume that the parties agree not to hold a remote hearing. In this case, could the tribunal still go ahead and hold a hearing remotely? Absent specific circumstances, it is difficult to see how the tribunal could ignore the parties' agreement to hold the hearing physically in-person. Possibly, one might argue that the parties' insistence on a physical hearing might significantly delay the arbitration (especially in the current pandemic of undetermined length) and thus clash with the tribunal's obligation to conduct the proceedings expeditiously and efficiently. (59) Nonetheless, if the delay is due to the parties' agreement on conducting the arbitration in a certain manner (e.g., a physical hearing), upholding party autonomy seems more important than insisting on expeditiousness. This situation is not dissimilar to those in which parties agree on a (too) lengthy procedural timetable. (60) The tribunal might encourage the parties to reconsider but, ultimately, and absent specific circumstances, cannot conduct the arbitration against the parties' agreement.

Second, the converse situation is when the parties agree to hold a remote hearing. If, however, the tribunal is reluctant to organize a remote hearing, can it refuse to do so? In some cases, tribunals have reportedly expressed reluctance to hold remote hearings because of its (or the presiding arbitrator's) unwillingness to deal with the technological challenges involved. Such a situation is most unfortunate, particularly since many technological challenges can be resolved if adequately planned for, as discussed below. (61) The tribunal should follow the parties' agreed procedure, as just mentioned, but in practice the parties will have little choice when facing real resistance from the tribunal—other than appointing different arbitrators in the future.

The situation might be slightly different if the tribunal's reluctance is not because of its
P 78 lack of tech-savviness, but due to other concerns including, for instance, the ● enforceability of any future award. Arbitration rules may contain a provision on the tribunal's obligation to render an enforceable award. (62) However, as discussed below, the risk of non-enforcement of, or challenges to, awards based on remote hearings is low, absent specific circumstances. (63) In any event, the parties, by agreeing on a certain

procedure, take the risk of the non-enforceability of any award based thereon. The tribunal might want to draw the parties' attention to its enforceability concerns, if any, but in case of a clear agreement by the parties on remote hearings, the tribunal should, in principle, proceed accordingly.

In both scenarios above the parties have agreed as to whether or not to hold a remote hearing. In practice more relevant and complicated is the opposite scenario in which no such party agreement exists, as discussed hereafter.

5 REMOTE HEARINGS IN THE ABSENCE OF THE PARTIES' AGREEMENT

This part of the chapter deals with cases—raising delicate questions in practice—in which one party requests a remote hearing while another opposes the request and insists on a physical hearing. In this situation, the arbitral tribunal has to balance important and, possibly opposing, considerations: on the one hand, the parties' right to be heard and treated equally, which is enshrined in many national laws and institutional arbitration rules; (64) on the other hand, the tribunal's obligation to conduct the proceedings in an efficient and expeditious way. (65)

Concretely, the tribunal will have to assess first whether it may decide to conduct a remote hearing over the opposition of one party. This question is discussed in section 5.1. Assuming that the tribunal finds that it has such power to conduct a hearing over the opposition of a party, it must determine the relevant test it should apply to exercise this power, and in particular the factors it should take into account in this context (as discussed in section 5.2).

5.1 Tribunal's Power to Order Remote Hearings in the Absence of the Parties' Agreement

Two opposing views can be found regarding the question whether, in principle, a tribunal has the power to conduct a remote hearing if one party opposes such request.

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On the one hand, some authors state that a remote hearing is possible only if all parties agree. (66) This view is based on the principle that a party has a right to request a hearing. As detailed above, such principle is found in some national laws and institutional arbitration rules. (67) However, as also detailed above, the party's principled right for a hearing does not entail that the hearing is necessarily held with participants being physically present. As long as there is an oral and synchronous exchange of arguments or evidence, the threshold requirements for a hearing are met. (68)

Even Article 25(2) of the ICC Rules, which in its English version provides that "the arbitral tribunal shall hear the parties together in person if any of them so requests," does not bar the use of remote hearings in the absence of the parties' agreement. Read in the context of the other linguistic versions of Article 25(2), which do not contain the "in person" reference, it becomes clear that Article 25(2) in fact requires an oral and synchronous exchange of arguments or evidence—which can be done remotely. (69) Indeed, the recent ICC *COVID-19 Guidance Note* contemplates remote hearings "[i]f the parties agree, or the tribunal [so] determines," which implies the possibility to proceed with remote hearings in the absence of the parties' agreement. (70)

On the other hand, and quite to the opposite, some suggest that arbitral tribunals would have "carte blanche" when it comes to determining remote hearings. (71) It is true that tribunals have broad power to determine the appropriate procedure in an arbitration and that this power includes deciding on remote hearings, as discussed above. (72) Yet, it is incorrect to suggest that this faculty amounts to providing the tribunal with unrestricted power or "carte blanche." Rather, the tribunal needs to assess carefully all the circumstances to determine whether a remote hearing is appropriate in the specific case. The tribunal must be mindful of the parties' right to be heard and be treated equally, so as to render an enforceable award, as discussed below in section 7.

In sum, therefore, rather than following any of the abovementioned extreme approaches —either suggesting that tribunals may never conduct remote hearings over the opposition of a party, or to the contrary have "carte blanche" in doing so—arbitral tribunals typically have the power of ordering a remote hearing over the opposition of one party, but the exercise of that power requires careful consideration. The next sections discuss how tribunals should go about exercising their power to order a remote hearing in the absence of the parties' agreement.

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5.2 Relevant Test for the Tribunal to Order Remote Hearings in the Absence of the Parties' Agreement

In assessing the test tribunals should apply when deciding on a remote hearing in the absence of the parties' agreement, the first important question is which party bears the onus of proof: is it for the party applying for the remote hearing to show why it is

warranted or, to the contrary, is it for the party resisting the remote hearing to establish why it would be improper in the circumstances? This question has been debated in various jurisdictions when it comes to remote hearings in national courts proceedings, as set out in section 5.2.1. While these principles in national court proceedings are not applicable as such in international arbitration, they shed some light on the appropriate solution for arbitral tribunals to adopt, discussed in section 5.2.2.

5.2.1 Onus on the Party Applying for Remote Hearings Versus Onus on the Party Resisting Remote Hearings

As mentioned in section 2, remote hearings are not specific to international arbitration. (73) Quite to the contrary, in many jurisdictions around the world, national courts conduct hearings remotely—have so done in the past and do so even more in the current pandemic. (74) In this context, courts have to determine the test they apply as to whether a remote hearing should proceed and in particular which party should bear the onus of proof, i.e. the party applying for the remote hearing or the party resisting it.

In some jurisdictions, the answer is found in the applicable statutory provision. For instance, in the United States (US), the Federal Rules of Civil Procedure provide that "the court may permit testimony in open court by contemporaneous transmission from a different location" but only "[f]or good cause in compelling circumstances and with appropriate safeguards." (75) The onus of showing "compelling circumstances" is thus on the party applying for remote hearings. (76)

In other jurisdictions, for instance in Australia, the statutory provisions remain silent as to the test the court should apply, but simply provide it with the power to conduct remote hearings. (77) Case law therefore discusses the appropriate test. In some cases, Australian courts have applied a stringent test, imposing on the party applying for the remote hearing the onus of proving why it would be necessary. (78) These cases seem based on
P 81 the idea that physical hearings are the "ordinary procedure," i.e., the ● standard, and remote hearings the exception. (79) International tribunals, (80) as well as courts in other jurisdictions, (81) have followed that trend.

There are, however, other cases in which Australian courts have applied a more liberal test allowing remote hearings "in the absence of considerable impediment." (82) Under this approach, it is for the party resisting the remote hearing to show that such "considerable impediment" exists. (83) Or, as one Australia court put it:

> a substantial case needs to be made out to warrant the Court declining to make an order for evidence to be taken by video link, especially where evidence is adduced from various witnesses. (84)

Some cases have tried to reconcile the two opposing views described above. For instance, in *Australian Competition and Consumer Commission v. StoresOnline International Inc*, the court noted that "the choice in every case cannot be determined solely by reference to general principles," concluding that "the exercise of the discretion as to what is appropriate in a particular case will involve a balancing exercise as to what will best serve the administration of justice consistently with maintaining justice between the parties [...]." (85) A balance exercise also has been applied in other cases, assessing "whether the convenience of the witness in not attending in person is outweighed by considerations of fairness to the opposite party in the manner in which the trial will be conducted." (86)

This intermediate solution whereby the court does not require either side to show a good cause for or against the conduct of remote hearings, but balances various factors, is also
P 82 enshrined in statutory provisions in some jurisdictions, including ● Canada (87) and Singapore. (88) It is this solution which seems most suitable to be transposed to international arbitration, as discussed in the next section.

5.2.2 Overall Balancing Exercise

Regarding the test arbitral tribunals should apply when deciding on a remote hearing in the absence of the parties' agreement, one could imagine solutions similar to those adopted in national courts, set out in the previous section. Arbitral tribunals could either require that the party seeking a remote hearing show good cause thereof or, to the contrary, put the burden on the party resisting a remote hearing to establish why the hearing cannot be conducted remotely. (89) However, national arbitration laws or institutional rules do not provide for either such solution. Therefore, adopting the intermediate solution of an overall balancing test is best-suited and in line with the broad power granted to arbitral tribunals in determining whether a hearing may be conducted remotely. (90) In this overall balancing exercise, tribunals need to compare the potential benefits resulting from a remote hearing with the potential prejudice to any party resulting therefrom.

This balancing exercise must involve careful consideration of all circumstances of the case. There are, however, a number of factors arbitral tribunals typically consider in the context of this multifactorial approach. They are discussed in the next subsections and may include: (a) the reason for the remote hearing; (b) the content of the planned hearing; (c) the envisaged technical framework for the remote hearing; and (d) the timing

and costs comparing between a remote hearing and a physical one. This is no exhaustive list and, depending on the specific circumstances, the listed factors might not always have the same relevance and weight in each case. In discussing the various factors, reference will be made to case law from jurisdictions around the world relating to remote hearings in national court proceedings. Again, while these solutions are not applicable—or sometimes not even transposable—to international arbitration, they may serve as possible illustrations.

5.2.2.1 Reasons for the Remote Hearing

A good starting point for the assessment of a remote hearing is an inquiry into its reason. In times of the COVID-19 pandemic, the reason for remote hearings is obviously related to imposed travel restrictions (91) and social distancing measures. However, thinking beyond the current pandemic, a variety of possible reasons is conceivable, ranging from
P 83 certain participants not being able to attend physically due ● to professional inconvenience (e.g., important business meeting) or more critical causes (e.g., medical condition) to other more altruistic reasons (e.g., decreasing carbon footprint). Generally speaking, the stronger the impediment, the heavier this factor will weigh in the overall assessment.

Typically, the reason for his or her absence is an important factor to consider if a witness or expert is sought to testify remotely. (92) For instance, in the so-called *Indus Waters Kishenganga Arbitration* between Pakistan and India, the tribunal found that it needed to be satisfied, among other things, that "there is good reason, by virtue of the nature of the expert's duties at the time of examination, for excusing the expert's physical presence during the hearing." (93) Similarly, in *Compañía de Aguas del Aconquija S.A., Vivendi Universal v. Republic of Argentina*, the tribunal refused a request to hear an expert remotely because no good reason was given why the expert could not attend in person. (94)

Relatedly, tribunals might also inquire whether at the time when the witness' or expert's testimony was initially offered, the reason for his or her absence was already known to the party presenting him or her; and whether such party has taken any appropriate steps to try to ensure the witness' or expert's physical presence at the hearing. (95)

5.2.2.2 Content of the Planned Hearing

The content of the planned hearing is also an important factor in considering whether it may be conducted remotely. For instance, legal arguments are said to be done more easily in a remote fashion than taking of evidence. (96) This seems somewhat contradicted by the fact that arbitral tribunal has—for decades now—successfully conducted some witness and evidence taking remotely. (97)

5.2.2.2.1 Legal Arguments

A 2006 survey with US federal court judges confirms their satisfaction with legal arguments being presented remotely. (98) Having interviewed judges and their clerks who
P 84 use videoconferencing for oral arguments, the authors of the survey found that the ● users were overall satisfied and that the benefits of remote hearings (including scheduling flexibility, time and cost savings) outweighed possible downsides (including technical problems). (99) The judges noted that the quality of their experience was the same as in physical hearings: they had the same understanding of the case and its underlying legal issues. (100) Most judges also stated that they asked as many questions (101) and did not miss the physical interaction. (102)

Interestingly, the more experienced a judge was with videoconferencing, the less likely he or she was to find the physical absence to be an issue. These results seem to indicate that experience with remote hearings is an important factor in how they are perceived and that concerns with remote hearings are typically expressed by those having less experience with them. In international arbitration, an increased use of remote hearings, due to the current COVID-19 pandemic, might thus have a game-changing effect, with more and more arbitrators (and national court judges) getting the relevant experience to conduct hearings remotely to their satisfaction.

5.2.2.2.2 Witness and Expert Testimony

If the planned hearing entails some form of witness or expert testimony, the debate typically turns around the question whether their cross-examination can efficiently be conducted in a remote fashion. The cross-examining party typically argues that remote cross-examination is not as effective as one where the witness or expert is physically present, often referring to one of the following arguments.

First, it would arguably be more difficult to assess remotely the credibility of a witness or expert, in particular because of the loss of non-verbal cues and the inability to scrutinize the person's demeanor. For instance, in a national context, courts sometimes refer to the "'chemistry' in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness," (103) and state that technical difficulties "are considerable and markedly interfere with the giving of the evidence and, particularly, with cross-examination," in particular "the difficulty of

assessing a witness where evidence is given by video link." (104) As stated by the Singapore International Court in 2018:

> Whilst many meetings in the business world now take place by video conference, as did many of the Case Management Conferences in this case, courts and international tribunals still attach importance to being able to see and assess the demeanour of the witness as part of the assessment of the credibility of the witness's evidence. Equally, there is a degree of
P 85 disadvantage for a party in ● carrying out cross-examination of a witness by video link, compared to the witness being present in court. (105)

However, save specific circumstances, none of the abovementioned points are entirely convincing and cannot be counterbalanced by appropriate technological solutions. Non-verbal cues such as body language can be picked up in remote hearings if it includes some form of video-transmission and if multiple cameras allow to see both a frame of the witness as a whole and a frame of his or her face/torso. (106) Provided the quality of transmission is good and the remote setup appropriate, including large screens, the tribunal's ability to see and hear the testifying person is often better than in a physical hearing room. The audio volume can be adjusted to the needs of each individual participant and, in some settings, allow participants to remotely control cameras and zoom in if needed. Remote hearings therefore not only meet the said Anglo-Saxon predilection for "seeing the witness," they are often more satisfactory in this regard. As Wendy Miles QC put it in a recent conference, "if you cannot see the whites of the witness' eyes, get a bigger screen." (107)

Moreover, in case of a recording of the remote hearing, the tribunal is not only able to see and hear the witness at the time of the testimony, but also later, for instance during deliberations. Being able to view again a specific moment of a recorded testimony might be more helpful than just rereading a certain passage in a transcript.

Courts around the world are aligned with this view that remote cross-examination can be done efficiently, stressing in the context of national court proceedings that no disadvantage exists for the cross-examiner because of the virtual remoteness. (108) In some instance, the potential prejudice might not be on the cross-examiner's side, but for the party presenting the witness or expert. (109) In most cases, as some courts state, "[t]he witness can be closely observed and most if not all of the visual and verbal cues
P 86 that could be seen if the individual was physically present can be observed on the ● screen," (110) others go as far as noting that facial expressions can be seen much clearer than in physical encounters. (111)

As early as 2001, a Canadian court downplayed the alleged risks of remote testimony while warning against the overstated usefulness of the witness' demeanor and body language:

> In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms [...] I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language," taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence coincides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done. (112)

All in all, the fears surrounding the alleged prejudice to the cross-examining party and the tribunal's supposed inability to assess the credibility of a witness or expert in a remote hearing seem overblown.

Second, the cross-examining party might also express concerns that a remotely heard witness or expert might be coached or otherwise unduly influenced. (113) In many remote hearings, though, it is common practice to send a representative from, or designated by, the cross-examining party to sit with the person who testifies to ensure that he or she is free from any outside influence. Even without any physical presence of a person with the testifying witness or expert—which might be expensive or impossible, for instance in the

current pandemic—technological solutions exist. They range from specific applications that ensure a 360-degree view of the testifying person's venue, to the use of simpler schemes, such as multiple cameras, or even just asking the person to turn the camera around the room. Whist these mechanisms have proven useful in remote hearings to exclude any unwanted physical presence with the testifying person, the tribunal should also be mindful that the witness or expert often has several screens in front of him and
P 87 her, which could theoretically also be used for ● coaching. Nevertheless, this risk should not be overstated. It requires highly dishonest behavior on the side of the party and testifying person, which the tribunal is likely to notice and thus risks to backfire, i.e. destroy the credibility of the witness or expert.

Third, some are of the view that remote hearings do not ensure the same gravitas and solemn nature as physical hearings. The witness is therefore less likely to "remain conscious of the nature and solemnity of the occasion and of his or her obligations." (114) This argument might have some truth in the context of national courts, which often use symbols of authority, such as the judges' attire (including robes and wigs) and architectural cues (including judicial canopies, coat of arms, courts' elevated benches). (115) The same is not true for international arbitration proceedings which typically lack any of these aspects. Entering an arbitration hearing room, apart from the seating plan, there is no visual distinction between parties, counsel, witnesses, experts and arbitrators, who all wear similar business attire. Moreover, one might even question whether testifying remotely and in a more relaxed atmosphere might not improve a witness' testimony. In a physical hearing or courtroom, the witness might be stressed and thus confused. Also he or she testifies under the eyes of the counsel and party who presented the witness, which might lead to conscious or unconscious interference—something that is absent for remote testimony.

For all the above reasons, concerns typically voiced against remote witness and expert testimony should not be seen as unsurmountable hurdles. However, this is not to say that cross-examining witnesses or experts remotely is a "walk in the park." At a minimum, remote hearings, in particular those involving remote witness or expert testimony, require careful and in-depth preparation. It is also true that remote communication technologies—in particular if they are not working properly—might sometimes exacerbate differences of language and culture, with a risk of frustrating the cross-examiner. For instance, it might be unclear whether the witness' or expert's delay in answering questions is due to his or her evasiveness or to technological issues and delay in signal.

Therefore, in assessing whether to conduct a remote hearing involving witness or expert testimony, careful consideration should be given to the technological setup (and limitations thereof) and specific circumstances of the case. The importance of the relevant witness or expert and the planned length of his or her cross-examination are factors for arbitral tribunals to consider. (116) Moreover, other specific features, such as the need for interpretation, witness sequestration and conferencing, are all to be taken into account. Often, however, possible technical solutions exist, some of which are discussed in section 6 below. (117)

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Ultimately, it is vain to argue whether remote witness and expert testimony is the same as, or better/worse than, in-person testimony. It is different and therefore requires different preparation, planning and organization. It would be wrong for parties, counsel and arbitrators to just "plug" what is done in physical hearings into situations where witnesses or experts are heard remotely.

5.2.2.3 Technical Framework for the Remote Hearing

Choices regarding the technical framework, such as for instance the platform used, are important aspects when organizing remote hearings, as detailed below in section 6. Some features, however, need already to be taken into account at the earlier stage, when the tribunal decides, in principle, whether or not to proceed with a remote hearing.

To begin, the tribunal needs to be satisfied that all remote participants have a sufficiently good internet connection and hardware setup. (118) While this cannot be taken for granted in the context of national court proceedings, (119) the issue should be less acute in international arbitration proceedings. With sufficient lead time and funds, the right setup can typically be organized, using professional help.

Moreover, the tribunal may want to assess in advance how many remote connections are needed, from which locations and in which time zones. The higher the number of connections, the more likely it is that technological or practical issues occur (e.g., finding a convenient hearing time for all participants), which need to be accounted for. The need for interpreters is also one of the factors tribunal may take into account when deciding whether a hearing should proceed remotely. While where are solutions, discussed below, interpretation adds complexity to the organization of remote hearings, which tribunals may want to take into consideration. (120)

The Singapore International Commercial Court has gone as far as to test the remote setup *before* deciding whether it was sufficiently satisfied with the quality in order to proceed

with a remote hearing. (121) Testing rounds are an important part of any remote hearing, as discussed below. However, tribunals in international arbitration typically decide first whether or not to proceed with a remote hearing and then test the setup, and not the other way around. In case of doubt, and if sufficient lead time exists, an arbitral tribunal may consider conducting a testing phase before deciding on whether or not to conduct a hearing remotely, even though this solution might add further costs.

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5.2.2.4 Timing and Costs of Physical Hearing Compared to Remote Hearing

International arbitration proceedings are often criticized as being too long and costly. (122) Arbitral institutions, and other stakeholders, have tried for a long time to drive down length and costs, with mixed results. (123) Remote hearings might prove to be helpful in controlling time and costs related to international arbitration proceedings. Therefore, comparing the timing and costs of a physical hearing and those for a remote hearing might be one of the factors arbitral tribunal should take into consideration when deciding which hearing type to choose.

Holding a physical hearing often entails a longer timeframe. In the current COVID-19 pandemic, this is obvious, since hearings planned physically have to be postponed, unless they proceed remotely. In this context, tribunals need to take this potential delay (and any possible adverse consequences for either party) when deciding whether or not to proceed remotely. But even beyond the pandemic, remote hearings will typically avoid delay due, for instance, to the unavailability of a certain witness or experts. More generally, remote hearings often are easier to schedule since they do not involve any (or less) travel for its participants.

Costs are another factor. In national court proceedings, the setup of a videoconference may sometimes be more expensive than organizing a physical hearing. In international arbitration proceedings, the same is unlikely to be true. Given the costs involved in a physical hearing (e.g., venue location costs, international airfares and accommodation expenses), a remote hearing will typically be significantly less expensive. However, one should not underestimate the costs involved in some remote setups, in particular if they include top-end platforms and possibly hardware rentals. Much will depend on the choice of the platform and other parameters of the actual organization of the remote hearing, as discussed in the next part of the chapter.

6 PLANNING AND ORGANIZATION OF REMOTE HEARINGS

Guidelines, practice notes and other soft law instrument on remote hearings have proliferated, in particular in recent times of the COVID-19 pandemic. Arbitral institutions (124) and other arbitral bodies (125) have issued them, as have law firms and arbitration
P 90 practitioners. (126) They range from general practical tips on how to conduct remote hearing and draft procedural orders, (127) to specific guides for certain platforms (128) or certain regions. (129) Some are not specific to international arbitration but contain helpful guidance, nonetheless. (130)

The purpose of this chapter is not to review these soft law instruments in detail, nor to give a comprehensive analysis on how to best plan for or organize a remote hearing. Rather, the following sections will highlight some important issues regarding: (a) the planning for remote hearings before or at the outset of the proceedings; and (b) the organization of remote hearings during the arbitration.

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6.1 Planning for Remote Hearings Before or at the Outset of the Arbitration

In the COVID-19 pandemic, the discussion has focused understandably on the most urgent issue, i.e. how to find alternatives for hearings that were planned as physical meetings. Beyond the immediate crisis, parties, counsel and arbitrators might want to consider the possibility of remote hearings at earlier stages, including during the negotiation of dispute resolution clauses or at the first case management conference in the arbitration. In-house counsel have been vocal in discussions on remote hearings that users should avoid falling back into the old habit of physical hearings. (131)

Not much thought has been given so far on how to deal with the possibility of remote hearings in drafting dispute resolution clauses. If parties are keen, as some in-house lawyers state, to avoid hearings, and in particular physical hearings, they may consider adding language regarding remote hearings in their arbitration agreements. It does not seem advisable to exclude physical hearings altogether, but the possibility of remote hearings could be considered in various ways.

First, parties might clarify that the arbitral tribunal has the power to conduct a hearing remotely, even over the opposition of one party. While such power exists anyway under most national laws and arbitration rules, as discussed above, (132) a clarification in the arbitration agreement has the advantage of cutting short any possible discussion on the issue. The following sample clauses could be inserted in the arbitration agreement:

> "The Arbitral Tribunal shall have the power to establish the conduct of a

> hearing, including whether it may takes place physically or remotely (including by video or telephone conference) or a combination thereof."
>
> "At a request of a Party or on its own motion, the Arbitral Tribunal, after having heard the Parties, may decide to conduct a hearing either physically or remotely (including by video or telephone conference) or a combination thereof."

Second, parties could go further and incentivize the arbitral tribunal to hold remote hearings where possible. This could be achieved by shifting the burden of proof to the party resisting remote hearings. As discussed above, in the context of national court proceedings, some jurisdictions allow remote hearings "in the absence of considerable impediment" or require the party resisting them to establish why a physical hearing would be needed. (133) In addition to the abovementioned sample clauses, parties could include the following text in their arbitration agreement:

> The Arbitral Tribunal should consider conducting hearings remotely where possible and unless there are good reasons why a physical hearing is necessary, taking into account all circumstances of the case.

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Even where parties have not included these or similar clauses in their arbitration agreement, tribunals may discuss the possibility of remote hearings at the outset of the arbitration. They could invite the parties to comment on including language, similar to the sample clauses above, in a first procedural order which sets out the procedural framework of the arbitration. During the COVID-19 pandemic discussing the prospect of remote hearings during the first case management conference seems inevitable, but even beyond the current crisis, such a discussion would prove useful.

Whether or not a first procedural order contains language on the possibility of a remote hearing, it may also be sensible to discuss this topic again midway through the arbitration, for example after the parties have exchanged their written submissions. The possibility of a remote hearing might be discussed during a midstream case management conference. In any event, if a remote hearing is going to take place, its planning should ideally begin early, and before the typical prehearing conference, as discussed in the next section.

6.2 Organization of Remote Hearings

Once it has been decided that a hearing will proceed remotely, the tribunal and the parties should start preparations therefor with as much lead time as possible.

This includes, first and foremost, a discussion about, and determination of, the platform to be used for the remote hearing. Much depends on the specific circumstances of the case (e.g., whether the hearing is semi-remote or fully remote; location and number of the remote connections, etc.) and there is no one-size-fits-all solution. The range of possibilities is broad: from publicly available free platforms (134) to arbitration-specific providers offering tailor-made solutions, including by some arbitral institutions and hearing centers. (135) This chapter is not the place to compare the technical differences of various options, which change rapidly. (136)

When making the choice of the relevant platform, parties and tribunals should not only look at the technical setup but also consider data security and privacy issues. (137) Certain platforms that have been described as the "go-to solution" for international arbitration proceedings (138) have at the same time been reported to face serious security issues. (139) At a minimum, parties and arbitral tribunal should discuss these
P 93 issues, considering two related but distinct aspects. On the one hand is data security (or cybersecurity), i.e. the question of how to ensure that unauthorized third parties cannot gain access to the remote hearing. Cybersecurity has been discussed for some time in international arbitration, and the organization of remote hearings is not the only weak link. (140) Platforms that guarantee end-to-end encryption are encouraged, as is, at a bare minimum, password protection. On the other hand is data privacy or confidentiality, i.e. the question whether the remote hearing provider or any other involved third party that stores, transmits or otherwise has access to data during the remote hearing might (mis)use it outside the arbitral proceedings. (141) Some videoconferencing platforms' general terms and conditions grant the provider ownership rights over the data transmitted during the videoconference. The provider may therefore sell or otherwise use the data, which for confidential arbitration proceedings is problematic, of course. Overall, the conclusion from the ICC *Commission Report on Information Technology in International Arbitration*, dating back to 2017, seems still relevant today in the context of remote hearings:

> Despite the potential seriousness of these issues [i.e. confidentiality and data security], some IT users seem unconcerned, or perhaps too willing to opt for convenience over security. (142)

Once the choice of the remote hearing provider has been made, there are still numerous issues the tribunal and the parties need to consider in advance of the remote hearing.

They are best discussed at one (or possibly several) specific case management conference(s), followed by directions in procedural orders. Several of the abovementioned soft law instruments contain practical tips thereon. (143) While the following list is not exhaustive, these procedural orders should typically include, other than the usual hearing directions, provisions on:

- the technical setup of any remote venues, including the required system specification (e.g., connectivity) and equipment (e.g., number and positioning of screens, microphones, cameras, etc.);
- the use of technical assistants or administrators, including remotely if necessary, and the need for training sessions for participants;
- the preparation and use of hearing bundles, electronic by preference, including which documents, if any, should be physically present in any remote location and how electronic documents are shared during the remote hearing;
- the date of circulation of a list of attendees, including a seating plan, and the procedure to remotely verify their presence;

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- the hearing agenda, considering in particular shorter sitting days to accommodate potential time zone differences between participants;
- the procedure to deal with technical difficulties during the remote hearing (e.g., connectivity issues), including channels of communication how parties may inform the tribunal thereof and ways the tribunal may stop the proceedings if difficulties persist;
- the requirements of online speaking etiquette (e.g., who mutes/unmutes microphones and how to ask for permission to speak);
- the use of virtual breakout rooms for participants to confer privately among themselves (e.g., each party's representatives, or members of the arbitral tribunal);
- the (im-)permissibility of communication or interaction between witnesses/experts and party representatives before, during and after their testimony, including the need for, and means of, virtual sequestration;
- the determination of persons, if any, permitted to be with the testifying witness/expert (e.g., representatives from the cross-examining party or both parties) and other means to prevent impermissible witness coaching (e.g., rotating camera view);
- the need for interpretation, if any, including when it will be needed, in which form (i.e., simultaneous or consequential) and where the interpreter(s) will be located (i.e., with the tribunal, with the testifying person or in a separate remote location);
- the use of demonstratives, if any, and how they will be shared during the remote hearing;
- the use of real-time transcripts, if any, and how they will be shared during the remote hearing;
- the recording of the remote hearing, if any, including how it will be distributed; and
- the determination who will bear the costs of the remote setup, pending the arbitral tribunal's decision on the final allocation of costs.

In advance of the remote hearing, it is appropriate to conduct several testing sessions. These should typically include one well in advance of the hearing (to ensure that there are no compatibility issues with the various soft and hardware systems used) and one shortly before the remote hearing is to begin (e.g., twenty-four hours before).

If well planned and organized, according to the steps outlined above, the remote hearing should not create any unforeseen issues. In particular, if technical issues occur, the tribunal will be in a position to deal with them according to the preestablished procedures. Nonetheless, effective case management skills of the presiding arbitrator, before and during the remote hearing, will typically prove even more crucial than for physical hearings.

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7 ENFORCEABILITY AND CHALLENGE OF AWARDS BASED ON REMOTE HEARINGS

The ultimate test for any remote hearing is whether the resulting award withstands a challenge in recognition/enforcement or set-aside proceedings. (144) This test seems to have been positive so far: to the best knowledge of the author, there is no reported case which has refused an award's recognition/enforcement or set it aside on the basis that a hearing was conducted remotely.

This is not to say that parties, in the future, will not try to challenge awards on this basis. The most likely grounds of challenge in this regard will be the parties' right to be heard and treated equally (sometimes referred to together as "due process" standard), (145) such as set out for instance in Article V(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Articles 34(2)(a)(ii) and 36(1)(a)

(ii) of the UNCITRAL Model Law or similar provisions in national arbitration statutes. (146)

Before looking at the right to be heard and the right to equal treatment in more detail in the following sections, a general remark applies to both grounds. They are among the most frequently invoked grounds in particular under the New York Convention, but they are rarely successful and only so in the most egregious cases. (147) A party arguing that an award breaches the parties' right to be heard and treated equally because it is based on a remote hearing will therefore typically have to meet a high threshold.

7.1 Breach of the Parties' Right to Be Heard

A party seeking to set aside an award or resist its recognition/enforcement because a hearing was conducted remotely will likely present one of the following arguments to assert that it lacked the opportunity to present its case in a meaningful manner.

First, the party might argue that the award breaches its right to be heard since it had a right to a physical hearing. Such an argument would typically be based on provisions in national law or institutional arbitration rules granting the party the right to a hearing, and their interpretation that this necessarily means a right to a physical
P 96 ● hearing. (148) However, such an interpretation is unconvincing, as discussed above, and a remote hearing, being an oral and synchronous exchange of arguments or evidence, typically meets the required test for a hearing. (149)

Second, a party might argue that its right to be heard was breached because it could not effectively present its arguments or evidence in a remote hearing. Typically, the party might argue that its remote oral submissions or testimony of witnesses or experts was not as effective as in a physical hearing. However, absent any specific circumstances, these arguments seem insufficient. As discussed above, both legal arguments and witness/expert testimony can be presented efficiently in remote hearings. (150) In particular, fears that it would be more difficult to assess remotely the credibility of a witness or expert are overblown. (151) Courts around the world have generally expressed their satisfaction with remote witness/expert testimony, noting that they could assess the testimony as well as (or maybe even better) than in physical hearings and that no disadvantage existed for the cross-examining party. (152)

Case law from various jurisdictions around the world confirms that remote hearings in and of themselves do not constitute a breach of the parties' right to be heard. (153) For instance, in *China National Building Material Investment v. BNK International*, a US court dealt with a party's objection to the enforcement of an arbitral award, among other things, on the basis of Article V(1)(b) of the New York Convention. (154) The party argued in particular that the arbitral proceedings were "fundamentally unfair" because one of its witnesses suffered from a medical condition and could not attend the hearing. (155) The court noted that the arbitral tribunal had offered to hear the witness remotely via videoconferencing, but the party insisted on a physical hearing. (156) In those circumstances, the courts found no breach of Article V(1)(b) of the New York Convention, stressing that "Mr. Chang failed to personally appear—either in person, via videoconferencing, or through his Hong Kong attorneys—at a hearing at which every reasonable accommodation was made for him, and he did so at his own peril." (157) Had the court found that the remote hearing of a witness was in and of itself a breach of the party's right to be heard, it would not have listed it as a possible alternative to a physical hearing.

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Similarly, in 2016, another US court confirmed that remote hearings in and of themselves are no issue under Article V(1)(b) of the New York Convention. In *Research and Development Center v. Ep International*, a party resisted enforcement of an award on the basis that it was not physically present at the hearing. (158) In this context, the court noted that "[w]hen a party asserts that its physical presence at arbitration is prevented, it is generally unable to prevail on such a defense if there are available alternative means of presenting its case." (159) In the case at hand, the applicant had not demonstrated that it was unable to present its case before the arbitral tribunal because the relevant institutional arbitration rules specifically allowed party appearance by videoconference—something the application had failed to request, according to the court. (160) This makes clear that participation by videoconference would have satisfied the parties' right to be heard (as did the mere possibility to be able to request it). (161)

Further comfort might also be found in case law from some jurisdictions that an arbitral tribunal's decision not to hold a hearing *at all* does not quality automatically as a breach of the parties' right to be heard. (162) If the absence of a hearing may be found in compliance with the parties' right to be heard, so may, *a fortiori*, a hearing that allows the parties to present their case, albeit remotely. The same goes for case law that the tribunal is not obliged to grant certain means of witness examination, such as cross-examination. (163) If a tribunal's refusal of cross-examination does not automatically violate the parties' right to present their case, remote cross-examination may even less constitute such a violation.

However, despite the principle that a remote hearing in and of itself does not breach the parties' right to be heard, there might be instances where such a breach does occur. For

example, if technical issues arise and the tribunal proceeds nonetheless, this might affect the parties' opportunity to present their case in a meaningful manner. This is why it is important, as mentioned above, to include this in the advance planning of remote
P 98 hearings and foresee procedures how to deal with potential difficulties, including providing for channels of communication that parties may use to inform the ● tribunal of technical issues and ways the tribunal may stop the proceedings if these difficulties persist. (164)

The occurrence of technical and other difficulties during a remote hearing was at the heart of a 2016 Australian case. (165) In *Sino Dragon Trading v. Noble Resources International*, the court dismissed an application to set aside an award even though the applicant had argued, among other things, that the remote testimony of its witness was affected by numerous technical and other difficulties. The award indeed listed quite a few issues that arose during the remote testimony, citing in particular the fact that: (i) the planned videoconferencing tool did not work and evidence was given by Skype instead; (ii) a "split format" needed to be adopted, i.e. the video was transmitted via the computer, while a separate telephone link was used for the sound; (iii) the witness had not been given any of the relevant documents and therefore could not be directed to them during cross-examination; (iv) the interpreter was not qualified and eventually had to be replaced; and (v) it appeared that someone unknown was present in the room with the witness during his testimony. (166) As a result, the tribunal noted in the award the "highly unusual circumstances" and the fact that "the examination and cross-examination of Mr Li was carried out in a way that was quite unsatisfactory." (167)

As an initial remark, this case serves as an illustration of some of the things that can go (terribly) wrong in a remote hearing. However, in case of careful planning and organization following the steps discussed above, these issues are typically avoidable. (168) Importantly, despite the numerous problems with the remote testimony, the Australian court did not set aside the award. It noted 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'." (169) Regarding the technical and other issues, the court noted that the applicant had insisted that its witness be heard by video-link (over the objections of the other side) and was partly responsible for some of the issues that occurred. (170) The court further noted that the testimony, despite the difficulties, had been taken into consideration by the arbitral tribunal, (171) and that the party most affected by the issues was the cross-examining party and not the party presenting the witness. (172)

One may speculate whether the court might have decided differently absent many of the case's peculiar circumstances, for example had the applicant for the set-aside not been the party who insisted on its witness being head remotely and who was partly responsible
P 99 for the issues therewith. It remains that despite those issues, the ● court upheld the award. It also clearly noted that in and of itself a remote hearing was not a breach of the parties' right to be heard or treated equally. (173)

Moreover, one should not forget that the parties' right to be heard might sometimes be affected in the converse situation, i.e. if a remote hearing is refused. In particular in the circumstances of the COVID-19 pandemic, refusing a remote hearing might significantly postpone the resolution of the case, potentially for an undetermined timeframe. This delay might harm one of the parties in such a way that its right to present its case in a meaningful manner might be affected. (174)

Irrespective of whether the alleged ground for a violation is the conduct of a remote hearing or, to the contrary, its refusal, the threshold for a violation of the parties' right to be heard is high. There is some debate as to whether the parties' right to be heard under the New York Convention should be defined in reference to national law (e.g., the *lex arbitri* or law of the enforcement forum) or international standards. (175) In any event, however, even those jurisdictions applying national law recognize that purely domestic standards must be applied with some adaptation. Thus, what could be a violation of the parties' right to be heard under domestic law is not necessarily a violation of Article V(1)(b) of the New York Convention. (176) Accordingly, even if a given domestic law might require a physical hearing, such a requirement is not applicable as such in international arbitration. (177)

This being said, national court practice might still be relevant in the current discussion. In the course of the COVID-19 pandemic, many national courts had to innovate and move toward remote hearings. (178) If national courts therefore consider remote hearings as sufficient guarantees for procedural rights in a national context, it will be difficult for the same courts to hold that remote hearings in international arbitration violate the parties' right to be heard.

Finally, even where a breach of the parties' right to be heard occurred, this does not automatically lead to the non-enforcement of the award under the New York Convention. Rather, some national courts require a causal nexus between the breach and the
P 100 outcome of the arbitration. In other words, a violation of the right to be heard ● leads to the refusal of award recognition/enforcement only if the award would have likely been decided differently had the procedural irregularity not occurred. (179) In the case of remote hearings, this might not be easy to establish.

7.2 Breach of the Parties' Right to Be Treated Equally

In addition to the right to be heard, some national laws also refer to the parties' right to be treated equally. (180) Even though Article V(1)(b) of the New York Convention does not include a specific reference, the right of equal treatment is considered to be part of this provision's standard. (181) It is a relative and comparative test, meaning that one party should not be treated less favorably than others in the arbitration. (182) Indeed, the principle requires that the parties be treated equally, but not identically. (183) However, if there is no difference in treatment, it will be difficult to argue that equality has not been respected.

Therefore, in a fully remote hearing, in which are all the parties (as well as their witnesses and experts) participate remotely, their right to be treated equally typically is not violated, absent specific circumstances. Such specific circumstances may occur if one party is affected by technological issues, but not the other. In the peculiar case of *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd*, discussed above, the Australian court found no breach even though serious issues occurred during one party's witness evidence. (184) However, if the issues are significant and affect one side more than the other, the equality of conditions under which the parties present their case may be disturbed.

A difference in treatment could also be a potential ground to challenge an award if one party is suspected to have coached its witnesses or experts. The other party might argue that this distorted the conditions under which testimony is heard. These issues are best avoided by following the preparation and planning steps, set out above, including tribunal directions on the (im-)permissibility of communication or interaction between witnesses/experts and party representatives before, during and after their testimony, and specific means to prevent impermissible witness coaching, such as rotating camera views. (185) In any event, the tribunal is well advised at the end of any remote testimony to confirm with all parties that they have no concerns about the conditions under which the testimony took place.

Finally, the parties' right to be treated equally is relevant for semi-remote hearings, in
P 101 which one side (or its witnesses and experts) participates remotely, but not ● the other. According to the CIArb *Guidance Note on Remote Dispute Resolution Proceedings*, unless the parties agree otherwise, "[i]n the interests of equality, it is preferable that if one party must appear to the tribunal remotely, both parties should do so." (186) However, in many instances, a semi-remote hearing might precisely be necessary because one party (or often its witness or expert) is unable to be physically present. The mere fact that some part of the hearing is conducted remotely does not seem in and of itself a breach of the parties' right to be treated equally. This is so for the same reasons as those discussed above, showing that there is no breach of the right to be heard. (187)

8 CONCLUSION

The COVID-19 crisis has forced international arbitration out of its comfort zone. Parties, counsel and arbitrators need to assess whether, and if so how, to proceed with planned hearings. Whereas many other steps in arbitration proceedings are already being conducted remotely, hearings could be seen as the "last bastion" of requiring physical meetings. This has changed with the current pandemic, at least for now. Whether the change is here to stay, however, remains to be seen.

Taking a step back from the immediate crisis and proposing an analytical framework for remote hearings in international arbitration beyond COVID-19, this chapter leads to the following findings:

- As discussed in section 2, it is important to distinguish between different types of remote hearings. For instance, fully remote hearings, in which every participant is in a different location, raise additional questions compared to semi-remote ones, in which a main venue is connected to one or several remote venues. Moreover, remote legal arguments might require a different analysis than remote evidence taking. In the post-COVID-19 world, hearings might combine these different forms, with some parts of a hearing being held semi-remotely or fully remotely and others with physical meetings.
- For all possible forms of remote hearings, parties and tribunals must assess the relevant regulatory framework, including in particular the law of the seat of the arbitration and the arbitration rules, if any. As set out in section 3, some national laws or arbitration rules contain specific provisions on remote hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely. Others do not contain specific provisions, and remote hearings will therefore be assessed against the backdrop of other provisions, such as the parties' right to a hearing and the tribunal's broad power to determine procedural matters. This chapter finds that arbitral tribunals typically have the power to decide on remote hearings—either as granted under a specific rule or as part of the tribunals' general broad power to conduct the arbitral proceedings as they deem appropriate.

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- However, the tribunal's power to decide on remote hearings is not without limits.

Section 4 discusses one important limit: the parties' agreement. If the parties agree on a certain conduct (i.e., to hold a remote hearing or not), absent specific circumstances, arbitral tribunals should follow the parties' agreement.

- Section 5 deals with the opposite situation, i.e. where one party requests a remote hearing while the other insists on a physical hearing. This situation raises delicate questions, and arbitral tribunals have to balance the parties' right to be heard and treated equally with its obligation to conduct the proceedings in an efficient and expeditious manner. The finding of this chapter is that arbitral tribunals typically have the power of ordering remote hearings over the opposition of one party, but the exercise of that power requires careful consideration. This balancing exercise must contain a multifactorial approach, including for instance assessing the reason for, and content of, the remote hearing, as well its envisaged technical framework. The envisaged timing for the hearing and any potential delay if it is held physically, and a comparison between the costs for a remote hearing and a physical one might also be relevant. Among other things, the chapter addresses concerns often raised in the context of remote witness and expert testimony, namely the alleged prejudice to the cross-examining party and the tribunal's supposed inability to assess the credibility of a remote witness or expert. This chapter finds that these fears are often overblown and typically can be counterbalanced by appropriate technological solutions.
- The findings of the previous sections emphasize the importance of careful planning and organization of remote hearings, which are the subject of section 6. Existing soft law instruments on remote hearings mainly focus on the actual setup of remote hearings, but this chapter shows that the planning thereof must start much earlier. This includes considering specific language regarding remote hearings in the parties' arbitration agreements or the tribunal's first procedural order.
- Finally, section 7 tests whether awards based on remote hearings withstand potential challenges in recognition/enforcement or set-aside proceedings. Detailed analysis of existing case law from jurisdictions around the world shows no reported cases in which such challenges were successful. The chapter discusses the most likely grounds for challenges, namely the parties' right to be heard and treated equally. It concludes that, absent specific circumstances, remote hearings in and of themselves do not violate any of these principles.

The assessment of remote hearings is a delicate issue, and the analytical framework proposed in this chapter seeks to help parties, counsel and tribunals in making this assessment. In the current COVID-10 pandemic and beyond, the choice between holding a remote hearing, possibly over the opposition of one party, or postponing it, illustrates the two opposing approaches set out in the introduction, exemplified by the diverging interpretations of Voltaire's poem. Are we proactively striving for novelty, without fear of
P 103 possible imperfections, or do we take a cautious ● approach, stressing both the benefits of the status quo and the risks of too radical a change?

In Voltaire's poem, the discontent woman eventually returns to her husband and lives a happy life, but not without taking a secret lover. Leaving aside questions of morality, and pushing the interpretation of the poem to its limits, the conclusion shows that solutions cannot be found by imposing a principled approach, but are better if they are specific to each individual case, taking into account all relevant circumstances. In any event, the fact that many arbitral tribunals, as well as national courts, are growing their experiences with remote hearings is an opportunity that should not be underestimated. It allows users of international arbitrations—parties, counsel and arbitrators alike—to increase their toolbox and find the best-suited solution for any given case.

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22) *See* e.g. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 25, 1996); *Prosecutor v. Mucic & Landzo*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video Link Conference, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia May 28, 1997). Compare *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness Ade, ¶ 12 (Int'l Crim. Trib. for Rwanda Jan. 31, 2006); Press Release of the International Court of Justice No. 2020/15 of May 29, 2020, on the public hearings by videoconference on the question of the Court's jurisdiction in the case concerning the Arbitral Award of Oct. 3, 1899 (*Guyana v. Venezuela*); Press Release of the Inter-American Court of Human Rights, I/A Court H.R._PR-47/2020 of Jun. 18, 2020. *See also* Public Hearing of the Request for an Advisory Opinion about the Obligations in Matters of Human Rights of a State That Has Denounced the American Convention on Human Rights, Requested by Colombia on Oct. 21, 2019 (Inter-American Court of Human Rights, Jun. 15, 2020).
23) *See* e.g. Kevin Kim et al., *Seoul Protocol on Video Conferencing in International Arbitration* (distinguishing between the "Hearing Venue" defined as "the site of the hearing, being the site of the requesting authority, typically where the majority of the participants are located" and the "Remote Venue" defined as "the site where the remote Witness is located to provide his/her evidence (i.e. not the Hearing Venue), typically where a minority of the participants are located.").
24) Queen Mary Survey, *supra* n. 4, at chart 35 (64% of the interviewees indicated they had never used "virtual hearing rooms" and 14% only rarely).
25) On the importance of physical court houses, *see* Judith Resnik & Dennis Edward Curtis, *Representing Justice, Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press 2011).
26) *See* below at section 5.2.2.2.

27) *See* below at section 5.2.2.2.
28) Dutch Civil Procedure Code, Art. 1072b(4).
29) LCIA Rules, Art. 19.2.
30) *See* e.g. International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules, § 30.6; Rules of Arbitration of the Vietnam International Arbitration Centre, Arts. 25(1) & 37(2c).
31) *See* e.g. HKIAC Administered Arbitration Rules, Art. 13.1; AAA-ICDR Rules, Art. 20.2.
32) *See* e.g. Singapore International Arbitration Centre (SIAC) Rules, Art. 21.2; SCC Rules, Art. 2(1); Korean Commercial Arbitration Board (KCAB) Rules, Art. 30(4).
33) UNCITRAL Arbitration Rules 2010, Art. 28(4).
34) SCC Rules, Art. 28(2).
35) ICC Rules, Art. 24(4).
36) *Id.*, at Appendix V, Art. 4(2).
37) *Id.*, at Appendix VI, Art. 3(5).
38) *See also* SIAC Rules, Arts. 19.3, 19.7 & Schedule 1, ¶ 7.
39) Andrew Foo, *No Further Questions, 7 Tips for Safe-Distancing Your Arbitral Award from Pandemic Protestations* ¶¶ 19-24 (Mar. 27, 2020) (published on LinkedIn and on file with author).
40) *See* below section 5.2.2.2.2.
41) ICC Rules, Appendix IV on Case Management Techniques, ¶ (f).
42) *See* e.g. Gary Born, *International Commercial Arbitration* 3512 (2d ed., Kluwer Law International 2014); David Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 601 (OUP 2013); Maxi Scherer, Lisa Richman & Rémy Gerbay, *Arbitrating under the 2014 LCIA Rules: A User's Guide* 223 (Kluwer Law International 2015).
43) For national laws, *see* e.g. German Civil Procedural Code (ZPO), § 1047(1); Swedish Arbitration Act, § 24(1). *See also* Arbitration Law of the People's Republic of China, Art. 47. For institutional arbitration rules, *see* e.g. SCC Rules, Art. 32(1); UNCITRAL Rules, Art. 17(3).
44) *See* e.g. ICC Rules, Art. 25(6); SIAC Rules, Art. 24.1.
45) *See* e.g. English Arbitration Act, § 34(1) & (2); HKIAC Rules, Art. 22.4; Indian Arbitration Act, § 24(1).

46) *See* e.g. Sweden: Stefan Lindskog, *Skiljeförfarande: En kommentar (Eng.: Arbitration: A Commentary)* 653 (2d ed., Norstedts Juridik 2012) (noting that a hearing by videoconference would not to be regarded as oral within the meaning of § 24(1) of the Swedish Arbitration Act); Germany: Joachim Münch, *Münchner Kommentar zur ZPO* § 1047, ¶ 9 (2017); Hans-Joachim Musielak & Wolfgang Voit, *ZPO*, § 1047, ¶ 2 (2019). *See also* Frank Spohnheimer, *Gestaltungsfreiheit bei antezipiertem Legalanerkenntnis des Schiedsspruchs* 308 et seq. (2010).
47) Münch, *supra* n. 46, at § 1047, ¶¶ 8-9 (noting that a hearing should be oral and allow the hearing of, and negotiation between, the parties, which requires physical presence).
48) *See* below section 5.2.2.
49) *See* e.g. German version of ICC Rules, Art. 25(2) ("*mündliche Verhandlung*").
50) *See* e.g. the French or Spanish versions of ICC Rules, Art. 25(2) ("*contradictoirement*" and "*contradictoriamente*").
51) ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic* (Apr. 9, 2020), ¶ 23. Compare Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* ¶ 3-958 (ICC 2012).
52) *See* below section 5.2.2.
53) UNCITRAL Model Law, Art. 19(2).
54) English Arbitration Act, § 34(1).
55) Swiss Private International Law Act, Art. 182(2).
56) *See* e.g. HKIAC Rules, Arts. 13.1 & 22.5; ICC Rules, Arts. 19 & 22(2); AAA-ICDR Rules, Art. 20.1; LCIA Rules, Art. 14.5; SCC Rules, Art. 23(1); SIAC Rules, Arts. 19.1 & 25.3; UNCITRAL Rules, Arts. 17(1) & 28(2).
57) *See* e.g. Arif Hyder Ali, Jane Wessel & Alexandre de Gramont, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* 280 (Kluwer Law International 2019); Howard M. Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 696 (Kluwer Law International 1989); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 723 (Kluwer Law International 2012).
58) *See* e.g. English Arbitration Act, § 34(1); Swiss Private International Law Act, Art. 182(1); UAE Federal Law, Art. 23; UNCITRAL Model Law, Art. 19(1); ICC Rules, Art. 22(2); SCC Rules, Art. 23(1).
59) *See* e.g. AAA-ICDR Rules, Art. 20.2; HKIAC Rules, Art. 13.5; ICC Rules, Arts. 22.1 & 25.1; LCIA Rules, Art. 14.4(ii); SCC Rules, Art. 23(2); SIAC Rules, Art. 19.1; UNCITRAL Rules, Art. 17.1; Vienna International Arbitration Centre (VIAC) Rules, Art. 28(1); Rules of Arbitration of the Vietnam International Arbitration Centre, Arts. 25(1) and 37(2c).
60) *See* e.g. Born, *supra* n. 42, at 2142; J. William Rowley & Robert Wisner, *Party Autonomy and Its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws*, 5 World Arb. & Med. Rev. 321 (2012); Klaus Sachs & Tom Christopher Pröstler, *Time Limits in International Arbitral Proceedings*, in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 281 (Patricia Louise Shaughnessy & Sherlin Tung eds., Kluwer Law International 2017). Compare e.g. Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. Intl. Arb. 327, 329 (2007).
61) *See* below section 6.
62) *See* e.g. ICC Rules, Art. 42; LCIA Rules, Art. 32.2; SIAC Rules, Art. 41.2; HKIAC Rules, Art. 13.10.
63) *See* below section 7.
64) *See* e.g. Dutch Civil Procedure Code, Art. 1036; English Arbitration Act, § 33(1)(1); French Civil Procedure Code, Art. 1510; German Civil Procedure Code ZPO, Art. 1042; Hong Kong Arbitration Ordinance, § 46; Swiss Private International Law Act, Art. 182(3); UAE Federal Law, Art. 26; UNCITRAL Model Law, Art. 18; HKIAC Rules, Art. 13.1; SCC Rules, Art. 23(2); UNCITRAL Rules, Art. 17(1); CEPANI Rules, Art. 41; KCAB Rules, Art. 6.
65) *See* e.g. AAA-ICDR Rules, Art. 20.2; HKIAC Rules, Art. 13.5; ICC Rules, Arts. 22.1 & 25.1; LCIA Rules, Art. 14.4(ii); SCC Rules, Art. 23(2); SIAC Rules, Art. 19.1; UNCITRAL Rules, Art. 17.1; VIAC Rules, Art. 28(1).
66) *See* e.g. Sweden: Lindskog, *supra* n. 46, at 653 (noting that if a party requests oral hearing under § 24(1) of Swedish Arbitration Act, a videoconference would not be enough and all arbitrations would need to be physically present); Germany: Münch, *supra* n. 46, at § 1047, ¶¶ 8-9; Musielak & Voit, *supra* n. 46, at § 1047, ¶ 2. *See also* Spohnheimer, *supra* n. 46, at 308 et seq.
67) *See* above section 3.2.1.
68) *See* above section 3.2.1.
69) *See* above section 3.2.1.
70) ICC, *Guidance Note*, *supra* n. 51, at ¶ 21.
71) Rainey & Sharma, *supra* n. 3, at point 4.
72) *See* above section 3.2.2.
73) *See* above section 2.
74) On remote hearings in national courts generally, *see* e.g. https://remotecourts.org/.
75) US Federal Rules of Civil Procedure, Rule 43(a).
76) *See* e.g. *Anil SAWANT, v. Geoffrey RAMSEY*, Civil Action No. 3:07–cv–980 (VLB), at * 3-4 (D. Conn. May 8, 2012); *Dynasteel Corp. v. Durr Systems, Inc.*, 2009 WL 10664458, at *1-2 (W.D. Tenn. Jun. 26, 2009); *U.S.A. v. Philip Morris Inc.*, No. Civ. A. 99–2496 (GK) (D.D.C. 2004).

77) Federal Court of Australia Act 1976, § 47A(1). *See also* Australian Federal Court Rules, O 24, r 1A.
78) *See* e.g. *Australian Medical Imaging Pty Ltd. v. Marconi Medical Systems Australia Pty Ltd.* (2001) 53 NSWLR 1, ¶ 27 (New South Wales Supreme Court); *Campaign Master (UK) Ltd. v. Forty Two International Pty Ltd. (No 3)* [2009] FCA 1306, ¶ 77 (Federal Court of Australia). *See also* e.g. *Australian Competition and Consumer Commission v. World Netsafe Pty Ltd.* (2002) 119 FCR 303 (Federal Court of Australia); *Odhiambo v. Minister for Immigration & Multicultural Affairs* (2002) 122 FCR 29, ¶ 97 (Federal Court of Australia).
79) *See* e.g. *Sunstate Airlines (Qld) Pty Ltd. v. First Chicago Australia Securities Ltd.* (Giles CJ Comm D, Mar. 11, 1997, unreported) (cited in *Australian Medical Imaging Pty Ltd.*, *supra*n. 78, at ¶ 26).
80) *Islamic Republic of Pakistan v. Republic of India (The Indus Waters Kishenganga Arbitration)*, Partial Award, PCA Case No. 2011-01 (Feb. 18, 2013), in *Indus Waters Arbitration (Pakistan v. India): Record of Proceedings 2010-2013*, 10 PCA Series 81-376, ¶ 3 (2014).
81) *See* e.g. Hong Kong: *Re Chow Kam Fai ex parte Rambas Marketing Co. LLC* [2004] 1 HKLRD 161 at 174, ¶ 28 (H.K. Court of First Instance).
82) *Tetra Pak Marketing Pty Ltd. v. Musashi Pty Ltd.* [2000] FCA 1261, ¶ 25 (Federal Court of Australia).
83) *See also* Hong Kong: *Sun Legend Investments Ltd. v. Ho Yuk Wah* [2008] 4 HKLRD 239, at 243, ¶ 6 (H.K. Court of First Instance).
84) *Versace v. Monte* [2001] FCA 1454, ¶ 16 (Federal Court of Australia). *See also McDonald v. Commissioner of Taxation* [2000] FCA 577 at ¶¶ 21-22 (Federal Court of Australia).
85) *Australian Competition & Consumer Commission v. StoresOnline International Inc* [2009] FCA 717 at ¶ 14 (Federal Court of Australia).
86) *Moyette Pty Ltd. v. Foundation Healthcare Ltd.* [2003] FCA 116 at ¶ 10 (Federal Court of Australia). *See also Stuke v. ROST Capital Group Pty Ltd.* [2012] FCA 1097, ¶ 23 (Federal Court of Australia); *Kirby v. Centro Properties Ltd.* [2012] FCA 60 at ¶ 11 (Federal Court of Australia); *Australian Securities & Investments Commission v. Rich* [2004] NSWSC 467, ¶ 43 (New South Wales Supreme Court); *JKC Australia LNG Pty td v. Ch2M Hill Companies Ltd* [2020] WASCA 38, ¶¶ 13-14 (Western Australia Supreme Court); *Quince v. Quince* [2020] NSWSC 326, ¶¶ 16-20 (New South Wales Supreme Court); *R v. Macdonald; R v. Edward Obeid*; *R v. Moses Obeid* (No. 11) [2020] NSWSC 382, ¶¶ 4-5, 16, 29 (New South Wales Supreme Court). Compare *Capic v. Ford Motor Co. of Australia Ltd.* (Adjournment) [2020] FCA 486, ¶¶ 7-8 (Federal Court of Australia).
87) Canada Rules of Civil Procedure, rule 1.08(3).
88) Singapore Evidence Act, § 62A(2).
89) In this latter sense, *see* e.g. Rainey & Sharma, *supra*n. 3, at point 1.
90) *See* above section 3.2.2.
91) *See also Haiye Developments Pty Ltd v. The Commercial Business Centre Pty Ltd* [2020] NSWSC 732; *Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd* (Adjournment) [2020] FCA 539.
92) For national court proceedings, *see* e.g. Canada Rules of Civil Procedure, rule 1.08(5)(e); Singapore Evidence Act, § 62A(2)(a). *See also Zigiranyirazo*, *supra*n. 22, at ¶ 31.
93) *Pakistan v. India*, *supra*n. 80, ¶ 3.
94) *Vivendi Universal v. Republic of Argentina*, Award, ICSID Case No. ARB/97/3, ¶ 2.7.16 (Aug. 20, 2007).
95) *Pakistan v. India*, *supra*n. 80, ¶ 3. In national courts, *see* e.g. Singapore: *Sonica Industries Ltd. v. Fu Yu Manufacturing Ltd.* [1999] 3 SLR(R) 119, ¶¶ 10-20 (Singapore Court of Appeal).
96) *See* e.g. Foester, *supra*n. 3, at 4-5.
97) *See* e.g. *Murphy Exploration & Production Co. International*, *supra*n. 14, at ¶ 26; *S.D. Myers, Inc.*, *supra*n. 14, at ¶ 76; *Paushok*, *supra*n. 14, at ¶ 61; *Fraport AG Frankfurt Airport Services Worldwide*, *supra*n. 14, at ¶ 43; *EDF (Services) Ltd.*, *supra*n. 14, at ¶ 38; *SGS Société Générale de Surveillance S.A.*, *supra*n. 14, at ¶ 23.
98) Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeal*, Federal Judicial Center (2006).
99) *Id.*, at 1, 8-12.
100) *Id.*, at 12.
101) *Id.*
102) *Id.*, at 10.
103) *Campaign Master (UK) Ltd.*, *supra*n. 78, at ¶ 77.
104) *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* [2007] FCA 1502, ¶ 7 (Federal Court of Australia). *See also* e.g. *Hanson- Young v. Leyonhjelm* (No. 3) [2019] FCA 645 at ¶ 2 (Federal Court of Australia). *See* further, *Zigiranyirazo*, *supra*n. 22, at ¶ 32.
105) *Bachmeer Capital Ltd. v. Ong Chih Ching* [2018] SGHC(I) 01 Suit No. 2 of 2017 (Summons No. 2 of 2018), ¶ 18 (Singapore International Commercial Court).
106) In comparison, audio-only telephone hearings might in this respect indeed be less efficient, *see* e.g. *Pakistan v. India*, *supra*n. 80, ¶ 5.
107) SCC, *Webinar: "Online Hearings When the Parties Cannot Agree"* (Apr. 29, 2020), https://sccinstitute.com/about-the-scc/news/2020/now-available-recordings-from-scc-s-online-seminars....

108) Australia: *see* e.g. *ICI Australia Ltd. v. Commissioner of Taxation* (May 29, 1992, unreported), cited in *Tetra Pak Marketing Pty Ltd.*, *supra*n. 82, at ¶ 22; *Commissioner of Taxation v. Grbich, Y.F.R* [1993] FCA 516, ¶¶ 5-6 (Federal Court of Australia); *Rich*, *supra*n. 86, at ¶ 28. Canada: *see* e.g. *Pack All Manufacturing Inc. v. Triad Plastics Inc.*, [2001] O.J. No. 5882, ¶ 6 (Ontario Superior Court of Justice); *Chandra v. CBC*, 2015 ONSC 5385, ¶ 20 (Ontario Superior Court of Justice); *Wright v. Wasilewski*, 2001 CanLII 28026 (Ontario Superior Court of Justice); *Davies v. Corp. of the Municipality of Clarington*, 2015 ONSC 7353, ¶¶ 23-35 (Ontario Superior Court of Justice). UK: *see* e.g. *Polanski v. Conde Nast Publications Ltd.* [2005] All ER (D) 139, ¶ 14 (citing the experience of the trial judges). US: *see* e.g., *DynaSteel Corp.*, *supra*n. 76, at *2.

Compare in the even stricter context of (international) criminal proceedings, *Prosecutor v. Mucic & Landzo*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video Link Conference, ¶ 15 (Int'l Crim. Trib. for Former Yugoslavia May 28, 1997).

109) *See* e.g. *Polanski*, *supra*n. 108, at ¶ 13.
110) Canada: *Chandra*, *supra*n. 108, at ¶ 20.
111) *Capic*, *supra*n. 86, at ¶ 19.
112) *Pack All Manufacturing Inc.*, *supra*n. 108, at ¶ 6.
113) *See* e.g. *Capic*, *supra*n. 86, at ¶ 16.

114) *Campaign Master (UK) Ltd.*, *supra*n. 78, at ¶ 78. *See also Capic*, *supra*n. 86, at ¶ 19.
115) On the image of judges using videoconference more generally, *see* Emma Rowden & Anne Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 Intl. J. L. Context 504-524 (2018); Emma Rowden & Anne Wallace, *Performing Expertise: The Design of Audiovisual Links and the Construction of the Remote Expert Witness in Court*, 28 Soc. & Legal Studies 698-718 (2019). *See also* Emma Rowden et al., *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (University of Western Sydney 2013).
116) *See* e.g. Canada Rules of Civil Procedure, rule 1.08(5)(b).
117) *See* below section 6.
118) Alex Lo, *Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations*, 13 Contemp. Asia Arb. J. 82, 89 (2020).
119) *See* e.g. *Capic*, *supra*n. 86, at ¶¶ 10-11, 17. *See also* Menon, *supra*n. 6, at 167-190 (noting that the so-called cyber-divide can be an important issue when considering the use of technology in national courts).
120) *See* below section 6.
121) *Bachmeer Capital Ltd.*, *supra*n. 105, at ¶¶ 11-12; *See also* Yvonne Mak, *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, Kluwer Arb. Blog (Jun. 20, 2020).
122) *See* e.g. Queen Mary Survey, *supra*n. 4, at 5; Queen Mary School of International Arbitration Survey, *Driving Efficiency in International Construction Disputes* 3 (2019); Mohamed A. Wahab, *Costs in International Arbitration: Navigating Through the Devil's Sea*, in *Evolution and Adaptation: The Future of International Arbitration* 465-503 (Jean Kalicki & Mohamed Rouf eds., ICCA Congress Series 2019).
123) *See* e.g. the ICC as one example of many others: ICC Rules, Appendix IV on Case Management Techniques; ICC, *Commission Report: Decisions on Costs in International Arbitration* (2015).
124) *See* e.g. AAA-ICDR, *Virtual Hearing Guide for Arbitrators and Parties*, *supra*n. 6; AAA-ICDR, *Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM;* AAA-ICDR, *Model Order and Procedures for a Virtual Hearing via Videoconference;* ACICA, *Draft Procedural Order For Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations*; China International Economic and Trade Arbitration Commission (CIETAC), *Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic* (Trial) (Apr. 28, 2020); VIAC, *The Vienna Protocol: A Practical Checklist for Remote Hearings* (June 2020); HKIAC, *Precautionary Measures in response to COVID-19* (Mar. 26, 2020); ICC, *Guidance Note*, *supra*n. 51; ICSID, *supra*n. 10; KCAB, *supra*n. 32 Madrid Court of Arbitration, *Note on the Organization of Remote Hearings* (Apr. 21, 2020). *See also* Delos, *Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19* (Mar. 20, 2020); Thomson Reuters Practical Law Arb., *A Comparison of Institutional Arrangements and Virtual Services* (2020). A group of predominant arbitral institutions issued a joint statement on 2020 on the coronavirus (COVID-19) pandemic and encouraged parties to "use the full extent of our respective institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite such impediments." CRCICA, DIIS, ICC, ICDR/AAA, ICSID, KCAB, LCIA, Milan Chamber of Arbitration, HKIAC, SCC, SIAC, VIAC, IFCAI, *Joint Statement on Arbitration and Coronavirus (COVID-19) Issued by Group of Arbitral Institutions* (Apr. 16, 2020).
125) *See* e.g. Africa Arbitration Academy, *Protocol on Virtual Hearings in Africa* (April 2020); American Chamber (AmCham)-Peru Virtual Arbitration Guide (May 2020); CIArb, *supra*n. 6; London Maritime Arbitrators Association (LMAA), *Guidelines for the Conduct of Virtual and Semi-Virtual Hearings.*

126) *See* authorities cited in *supra* n. 3. *See also* Working Group on LegalTech Adoption in International Arbitration, *Protocol for Online Case Management in International Arbitration* (July 2020) (the draft of this protocol was released for public consultation until Aug. 31, 2020 by a working group of several law firms); Kevin Kim et al., *Seoul Protocol on Video Conferencing in International Arbitration* (March 2020). For a detailed analysis, *see* Niuscha Bassiri, *Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders*, in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab eds., Kluwer, 2020).
127) *See* e.g. AAA-ICDR, *Model Order and Procedures for a Virtual Hearing via Videoconference*; Richard F. Ziegler, *Draft Procedural Order to Govern Virtual Arbitration Proceedings*, Transnat'l Disp. Mgmt (Apr. 9, 2020).
128) *See* e.g. AAA-ICDR, *Virtual Hearing Guide for Arbitrators and Parties*, *supra* n. 6; Stephanie Cohen, *Draft Zoom Hearing Procedural Order*, Transnat'l Disp. Mgmt (Apr. 10, 2020).
129) Africa Arbitration Academy, *supra* n. 125.
130) *See* e.g. EU, *Final Report Informal Working Group on Cross-Border Videoconferencing* (2014); EU Council, *Recommendations Promoting the Use of and Sharing of Best Practices on Cross-Border Videoconferencing in the Area of Justice in the Member States and at EU Level*, 2015/C 250/01 (2015); Federal Courts of Australia, *Guide to Videoconferencing in Court Proceedings* (October 2016); Hague Conference on Private International Law, *supra* n. 5; Courts of New Zealand, *Supreme Court and Court of Appeal Remote Hearings Protocol* (June 2020); Hong Kong Judiciary, *Guidance Note for Remote Hearings for Civil Business in The High Court* (Phase 1: Video-Conferencing Facilities) (April 2020); Hong Kong Judiciary, *Guidance Note for Remote Hearings for Civil Business in the Civil Courts (Phase 2: Expanded Video-Conferencing Facilities and Telephone)* (June 2020); COMBAR *Guidance on Remote Hearings—2nd Edition* (June 2020); HM Courts & Tribunals Service, *Guidance—HKCTS Telephone and Video Hearings During Coronavirus Outbreak*, https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak.
131) *See* e.g. SCC, *supra* n. 107. *See also* Alison Ross, *Covid-19: Participants in SIAC Case Share Success of Virtual Hearing*, Global Arb. Review (Apr. 23, 2020).
132) *See* above section 5.1.
133) *See* above section 5.2.1.
134) Some of the most common videoconferencing platforms include Zoom and BlueJeans, WebEx, Skype, GoToMeeting, or Microsoft Teams.
135) *See* SCC, *Stockholm International Hearing Centre Launches Platform for Virtual Hearings* (Apr. 27, 2020); ICSID, *Virtual Hearings ICSID Service and Technology*; *Arbitration Place Virtual* available at, https://www.arbitrationplace.com/arbitration-place-virtual-ehearings.
136) For a comparison, *see* e.g. Wikipedia, *Comparison of Web Conferencing Software*, https://en.wikipedia.org/wiki/Comparison_of_web_conferencing_software.
137) *See* CIArb, *supra* n. 6, at § 1.5.
138) Rainey & Sharma, *supra* n. 3, at point 6.
139) *See* e.g. Bill Marczak & John Scott-Railton, *Move Fast and Roll Your Own Crypto: A Quick Look at the Confidentiality of Zoom Meetings*, Citizen Lab (Apr. 3, 2020); Maria Ponnezhath & Shubham Kalia, *Zoom Sued for Overstating, Not Disclosing Privacy, Security Flaws*, Reuters (Apr. 8, 2020).
140) *See* e.g. International Council for Commercial Arbitration (ICCA), New York City Bar Association & International Institute for Conflict Prevention & Resolution Working Group, *Cybersecurity Protocol for International Arbitration* (2020).
141) *See* e.g. ICC, *Guidance Note*, *supra* n. 51, at Annex II, point III.
142) ICC, *Commission Report: Information Technology in International Arbitration* 15 (2017).
143) *See* e.g. ICC, *Guidance Note*, *supra* n. 51, at Annex I. For a detailed analysis, *see* Niuscha Bassiri, *Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders*, in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab eds., Kluwer, 2020).
144) For a detailed analysis, *see* Erica Stein, *Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings*, in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab eds., Kluwer, 2020).
145) It has rightly been pointed out that the term "due process" has a specific meaning in some national legal systems and is therefore best avoided in the context of international arbitration. *See* Born, *supra* n. 42, at 3494.
146) *See* e.g. Belgian Judicial Code, Arts. 1717(3)(a)(ii) & 1721(1)(a)(ii); English Arbitration Act, § 103(2)(c); French CPC, Art. 1520(4); Hong Kong Arbitration Ordinance, Ch. 609, Part 10, division 2, § 89(2)(c); Indian Arbitration and Conciliation Act, Art. 48(1)(b); Japanese Arbitration Act, Art. 45(2)(iii)-(iv); Malaysian Arbitration Act, Art. 39(1)(a)(iii); Singapore International Arbitration Act, Ch. 143A, Art. 31(2)(c).
147) *See* Maxi Scherer, *Commentary on Article V(1)(b)*, in *New York Convention, Article-by-Article Commentary* ¶ 130 (Reinmar Wolff ed., 2d ed., Beck, Hart & Nomos 2019).
148) *See* above section 3.2.1.
149) *See* above section 3.2.1.
150) *See* above section 5.2.2.2.
151) *See* above section 5.2.2.2.2.

152) *See* above section 5.2.2.2.2.
153) Compare *Hanaro Shipping v. Cofftea Trading* [2015] EWHC 4293 (Comm), ¶ 16 (English High Court) (application to continue an anti-suit injunction on the basis of an arbitration agreement, noting the possibility of remote evidence); LCIA Court Decision on Challenge to Arbitrator in Reference No. 122039, ¶¶ 44-47 (Oct. 10, 2009), in LCIA, *Challenge Decision Database* (dealing with a proposed testimony by video-link).
154) *China National Building Material Investment Co., Ltd. (PR China) v. BNK International LLC (US)* (W.D. Tex. 2009), in *Yearbook of Commercial Arbitration*, Vol. 35, 507-509 (Albert Jan van den Berg ed., Wolters Kluwer 2010).
155) *Id.*, at ¶¶ 19 et seq.
156) *Id.*, at ¶¶ 21-22.
157) *Id.*, at ¶ 25.
158) *Research & Development Center "Teploenergetika," LLC, v. Ep International, LLC*, 182 F.Supp.3d 556 (E.D. Va. 2016).
159) *Id.*, at 566, referring to *Rive v. Briggs of Cancun, Inc.*, 82 Fed.Appx. 359, 364 (5th Cir. 2003); *Empresa Constructora Contex Limitada v. Iseki, Inc.*, 106 F.Supp.2d 1020, 1026 (S.D. Cal. 2000).
160) *Id.*, at 570.
161) *See also* for a participation by telephone, *China National Building Material Investment, supra* n. 154, at *7.
162) *See* e.g. England: *O'Donoghue v. Enterprise Inns plc* [2008] EWHC 2273 (Ch), ¶ 43 (English High Court); Hong Kong: *Kenworth Engineering v. Nishimatsu Construction Co. Ltd.* [2004] HKCU 593 (H.K. Court of First Instance 2004); Italy: *Ca. It. Re. v. Ed. S.r.l.* (Naples Court of Appeal, First section 3 Apr. 3, 2009); Switzerland: BGE 117 II 346, ¶ E. 1b/aa; BGE 142 III 360, ¶ E. 4.1.1. But *see* Austria: Case No. 7 Ob 111/10i (Austrian Supreme Court Jun. 30, 2010); China: *Taiwan Huaching Plastic Industry Ltd. v. Yantai Economic & Technological Development Zone Plastic Ltd.* (2002) Er Zhong Min Te Ding No. 06244, Application for Annulment of the Arbitration Award [2002] No. 0039 Rendered by CIETAC in Beijing (Beijing No. 2 Intermediary People's Court 2002). Compare England: *Lorand Shipping Ltd. v. Davof Trading (Africa) B.V. (Ocean Glory)* [2014] EWHC 3521 (Comm), ¶ 25 (English High Court). *See also* Christian Oetiker, *Zürcher Kommentar zum IPRG* Art. 182 ¶ 60 (2018).
163) *See* references cited in Scherer, *Article V(1)(b)*, *supra* n. 147, at ¶ 176.
164) *See* above section 6.2.
165) *Sino Dragon Trading Ltd. v. Noble Resources International Pte Ltd.* [2016] FCA 1131 (Federal Court of Australia).
166) *Id.*, at ¶ 148.
167) *Id.*
168) *See* above section 6.
169) *Sino Dragon Trading Ltd.*, *supra* n. 165, at ¶ 154.
170) *Id.*, at ¶¶ 161-162.
171) *Id.*, at ¶ 163.
172) *Id.*, at ¶¶ 164-165 (noting further that the applicant's counsel had, at the end of the hearing, expressed its satisfaction with the way the testimony occurred).
173) *Id.*, at ¶¶ 154, 160.
174) Compare Singapore: *Coal & Oil Co. LLC v. GHCL Ltd.* [2015] SGHC 65, ¶ 73 (Singapore High Court) and *PT Central Investindo v. Franciscus Wongso* [2014] SGHC 190, ¶ 68 (Singapore High Court) (both discussing whether any delay in rendering the award is a sign of tribunal bias).
175) *See* e.g. Scherer, *Article V(1)(b)*, *supra* n. 147, at ¶¶ 136-141 (and references cited there).
176) On this point further, *see id.*, at ¶ 140 (and references there).
177) For instance, in some jurisdictions the so-called principle of immediacy applies, whereby the judge should obtain an "immediate" impression of evidence in an oral hearing (*see* e.g. Austrian Civil Procedure Code, § 320; Brazilian Civil Procedure Code, Art. 453; Bolivian Code of Civil Procedure, Art. 5(1); Colombian General Procedure Code, Art. 60; Peruvian Preliminary Title of the Code of Civil Procedure, Art. 5). Irrespective of whether or not this requires a physical hearing, the principle of immediacy does not apply, as such, in international arbitration. *See* e.g. Franz Schwarz & Helmut Ortner, *The Arbitration Procedure: Procedural Ordre Public and the Internationalization of Public Policy in Arbitration*, in *Austrian Arbitration Yearbook 2008* 133, 210 (Christian Klausegger et al. eds., Beck, Munich & Manz 2008). On remote hearings in the national connect more generally, *see* Tjaša Ivanc, *Theoretical Background of Using Information Technology in Evidence Taking*, in *Dimensions of Evidence in European Civil Procedure* 265 et seq. (Vesna Rijavec et al. eds., Kluwer 2016).
178) On national court practice, *see* e.g. https://remotecourts.org/.
179) *See* e.g. Scherer, *Article V(1)(b)*, *supra* n. 147, at ¶¶ 142-144 (and references cited there, including those arguing to do away with the causality requirement).
180) *See* e.g. Brazilian Arbitration Law, Art. 21(2); French CPC, Art. 1510; Spanish Arbitration Act, Art. 24(1); Swiss International Private Law Act, Art. 182(3); Turkish International Arbitration Law, Art. 8; UNCITRAL Model Law, Art. 18.

181) *See* e.g. Scherer, *Article V(1)(b)*, *supra* n. 147, at ¶ ¶ 170-171 (and references cited there).
182) *Id.*
183) *Id.*
184) *See* above section 7.1.
185) *See* above section 6.2.
186) CIArb, *supra* n. 6, at Art. 1.6.
187) *See* above section 7.1.

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Chapter 5: Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders

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(*)

1 INTRODUCTION

The outbreak of the COVID-19 pandemic has led to a global health and economic crisis unprecedented in recent decades. Albeit relatively crisis-resistant, the field of international arbitration has not been immune to the myriad challenges arising out of travel restrictions, physical distancing measures and the varying degrees of lockdown imposed by different countries. In particular, since tribunal members, parties, counsel, witnesses, and experts are frequently located in different countries and time zones conducting a physical hearing has proved infeasible in some cases, with indefinite postponement often the only alternative, tribunals and parties have been increasingly opting for hearings by videoconference. While hearings by videoconference or "remote hearings" may offer advantages in terms of flexibility and efficiency, they require special preparation that goes beyond the familiar planning process in the run-up to physical hearings. This chapter is designed as a guide to navigate some of the practical challenges arising in this context, apart from the legal and procedural issues dealt with by elsewhere in this publication. (1) May it serve as a signpost for what will likely remain part of our
P 106 professional lives for years to come. The outline of this chapter is depicted below: ●

Section 2. Practical Issues to Consider with Regard to Planning and Preparation of Remote Hearings

Section 3. Practical Factors that Militate Against Conducting a Physical Hearing

Section 4. Sample Procedural Order

1. Pre-Hearing Videoconference
2. Practical Sequence of the Hearing
3. Software and Hardware for Videoconferencing
4. Hearing Participants
5. Internet Connection and Devices
6. Videoconference Etiquette
7. Evidence and Document Management During the Hearing
8. Witness and Expert Testimony
9. Interpretation and Transcription Services
10. Technical Problems
11. Recording of the Hearing, Confidentiality and Cybersecurity

2 PRACTICAL ISSUES TO CONSIDER WITH REGARD TO PLANNING AND PREPARATION OF REMOTE HEARINGS

Preparing for remote hearings requires the consideration of several specific issues that do not apply to physical hearings and should be coordinated and harmonized in advance. Most importantly, these include the following:

(1) Time difference.
(2) Internet connectivity.
(3) Equipment.
(4) Virtual platform.
(5) (Simultaneous) interpretation.
(6) Court reporting and/or recording of the Hearing.
(7) Document management and sharing.
(8) Breakout rooms.
(9) Witness cross-examination/sequestration/risk of tampering.

The approaches or solutions adopted in this regard will be case-specific, but typically depend on the following practical factors:

(1) Location of the Parties, the Tribunal and counsel.
(2) Hearing with or without witness examination.
(3) Institutional or ad hoc arbitration.
(4) Use of external service providers or "DIY."

Section 4 sets out a sample procedural order that addresses the aforementioned issues
P 107 and can be adapted to any remote hearing scenario. The provisions of the ● procedural order are accompanied by annotations, which explain the rationale and the considerations behind them.

3 PRACTICAL FACTORS THAT MILITATE AGAINST CONDUCTING A PHYSICAL HEARING

As covered in "Initiating and Administering Arbitration Remotely" by Patricia Shaughnessy elsewhere in this publication, (2) institutional rules and applicable laws may ascribe varying degrees of importance to conducting a hearing with all participants physically present in the same location; some will, consequently, provide greater flexibility in respect of the remote hearing option than others. On a conceptual level, the difference in the approaches appears to result from the reliance on one of two theoretical considerations that, taken together, yield potentially conflicting results: on the one hand, the Tribunal's duty to conduct the proceedings in an efficient manner and in accordance with the law applicable and the Parties' agreements, (3) and on the other, the Parties' right to equal treatment and to a full opportunity to present their case. The former seemingly militates in favor of remote hearings, and the latter against them.

However, on closer examination, it is not necessarily the case that the Parties' due process rights automatically weigh against the remote hearing option. There are a range of factors that, given current circumstances in many common hearing locations, may render the physical environment for Hearing participants unsafe, and in turn may interfere with the Parties' equal treatment and their right to a full opportunity to present their case, even for physical hearings. These include, *inter alia*:

(1) maintaining a physical distance of 1.5 meters; i.e., the average recommended physical distance by health experts, in a conference room may not be consistently feasible, and could raise a number of challenges for all Hearing participants;

(2) ensuring proper circulation of clean air in a conference room may not be feasible, especially if reliance is placed solely on the room's air conditioning system for this purpose;

(3) ensuring that the tables, chairs and other furniture being used by Hearing participants are disinfected at regular intervals may not be feasible, and, if so, could raise a number of challenges for an efficient conduct of the Hearing;

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(4) it may be necessary for some or all Hearing participants to wear masks for extended periods of time, and this may cause discomfort to them and interfere with witness examination;

(5) the above factors warrant frequent breaks at short intervals, and in turn, interfere with a focused and attentive participation of all Hearing participants during the Hearing; and

(6) travel or quarantine restrictions for travelers to and from the designated location of the Hearing may be in place and will have to be factored in when planning for a physical hearing, also in the context of equal treatment between the Parties.

It is advisable for the Tribunal to raise these issues with the Parties—if they have not done so themselves—in order to ensure that an informed decision can be reached in this regard. (4)

4 SAMPLE PROCEDURAL ORDER

This sample procedural order is aimed at providing an example of how the various issues identified in section 2 may be dealt with by an arbitral tribunal in practice. It is by no means intended as a firm guideline for the procedural management of remote hearings. The contents and provisions that follow are dynamic in nature; as such, they will necessarily have to be amended on a case-by-case basis, and in accordance with changing conditions and technological developments. (5)

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1 Pre-Hearing Videoconference(s)

1.1 In accordance with [**insert relevant communications**], the Pre-Hearing Conference is scheduled to be conducted between the Tribunal and the Parties on [**insert date**] in order to resolve any outstanding procedural, administrative and logistical matters in preparation for the Hearing.

1.2 During the Pre-Hearing Conference, the Parties will be able to raise before the Tribunal any procedural, administrative or logistical issues pertaining to the organization of the Hearing.

1.3 The Pre-Hearing Conference will be conducted by videoconference on [**insert platform**] as a trial run, in order to verify the proper functioning of the videoconference system ("PHVC").

1.4 The PHVC shall attempt to replicate the conditions under which the Hearing will be conducted on [**insert dates**]. Accordingly, all persons who intend to participate in the Hearing shall also participate in the PHVC.

1.5 Each participant should, where possible, join the PHVC with the same device(s) and internet connection and from the same physical location that they intend to use for the Hearing.

1.6 The PHVC shall include a test of each of the functions of the [**insert platform**] software that is intended to be used during the Hearing.

1.7 The Tribunal may direct further videoconference testing sessions to take place with any or all Hearing participants if it considers necessary.

Comments:

¶¶ 1.1 and 1.2 are standard provisions, encompassing the purpose and aim of the Pre-Hearing Conference.

¶¶ 1.3 through 1.7 aim at familiarizing all participants with the use of the platform(s) of the remote hearing, including court reporters and interpreters as well as the representatives of the parties. The presiding arbitrator or, on their behalf, the tribunal secretary, acting as the host of the remote hearing, or the technical support staff, should be tasked with showing the main features of the platform (e.g. muting and unmuting speakers, presentation of evidence through the shared screen function of the videoconference platform, movement of the Hearing participants into their designated break-out rooms, the interpretation functions). In particular, it should be ensured that the PHVC is simultaneously used as a test run for the remote hearing. Further test runs may, of course, be scheduled.

2 Procedural Sequence of the Hearing

2.1 The procedural sequence of the Hearing on [**insert date**], as determined by the Tribunal after consultation with the Parties during the PHVC, shall be as follows:

(a) Starting Time for Technical Check: [**inserttime (possibly schedule a first check 24-48 hours in advance of the Hearing)**]

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(b) Commencement of Hearing: [**inserttime**]

(c) Claimant's Oral Pleadings [**insert duration, including a short break**];

(d) Lunch Break: [**inserttime**]

(e) Respondent's Oral Pleadings **[insert duration, including a short break**];

(f) Break Prior to Rebuttal and Sur-Rebuttal Pleadings [**insert duration**];

(g) Claimant's Rebuttal Pleadings [**insert duration**]; and

(h) Respondent's Sur-Rebuttal Pleadings [**insert duration**].

2.2 The above procedural sequence and time available to each side also takes into account that the Tribunal may have questions for the Parties during the Hearing.

Comments:

The above order foresees one hearing day without witness testimony. In case witness examination is taking place, it is advisable to prepare a spreadsheet with time allocations per oral pleading and witness testimony. Regardless of whether sequestration of witnesses is agreed upon or not, technical checks should be conducted for all participants, including witnesses, as the first thing on the hearing day. Thereafter, all witnesses can be placed in separate break out rooms and called into the main meeting room, as and when they have to testify.

Also, in order to account for potential time difference issues and to ensure that Hearing participants stay focused throughout, which may be more difficult for remote hearings than their physical counterparts, (6) the maximum duration of each hearing day should be shorter than usual, around five to six hours. Furthermore, it is advisable to schedule lunch breaks and additional shorter breaks in between pleadings. Consequently, the number of hearing days will be more numerous than those scheduled for physical hearings. Also, another option is to split the hearing and schedule the hearing at two different consecutive hearing day periods. In any event, it is advisable to keep hearing date(s) in reserve, should any technical or other difficulties prevent the hearing from concluding within schedule.

3 Software and Hardware for Videoconferencing

3.1 Further to the agreement reached by the Parties and communicated to the Tribunal, the Hearing shall be conducted by videoconference on [**insert platform**]. During the Hearing, all participants should ideally use a computer or a laptop with a camera, or a separate camera, and a well-functioning audio system to access the [**insert platform**] software. The [**insert platform**] software should not be accessed through a mobile (smart) phone.

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3.2 The [**tribunal secretary/assistant/contact person of the external service provider**] shall be the "Host" of the meeting. As a Host, the [**tribunal**

secretary/assistant/contact person of the external service provider] shall be authorized, on behalf of the Tribunal, to manage the meeting. All of the actions by the [**tribunal secretary/assistant/contact person of the external service provider**] are to be carried out with prior permission from, and under the supervision of, the Tribunal. The Host may have additional meeting management rights, which the other Hearing participants do not have. With respect to these additional meeting management rights, please note the following:

(a) The Host has the right to assign participants to specific meeting "Rooms," which include (i) the "Main Meeting" Room, i.e., where the Hearing shall be conducted; and (ii) a total of three "Breakout" Rooms, i.e. one Breakout Room per side, and one Breakout Room for the Tribunal.

(b) The Breakout Room shall be personal to the Hearing participants assigned therein; i.e., no participants other than those assigned to a particular Breakout Room may be able to hear or see the discussions therein.

(c) If any Hearing participant wishes to enter their side's personal Breakout Room, they shall communicate the same to the Host, who will assign them to that Breakout Room. Similarly, if any Hearing participant wishes to exit the Breakout Room or requires any other assistance in the Breakout Room, they shall communicate the same to the Host by clicking "Ask for Help," which will enable the Host to enter the Breakout Room to offer the assistance required. The Host shall not enter a Breakout Room unless so requested by the Parties or the Tribunal.

(d) As a default setting, all Hearing participants will be put on "Mute" by the Host during the admission into the Hearing.

(e) Once admitted into the meeting, no Hearing participant should "Leave Meeting" until and unless the Tribunal directs them to do so.

3.3 The Meeting ID and Password for the meeting shall be circulated in an invitation sent by the Host on the day prior to each Hearing day, together with the link to join the meeting. Upon clicking the link and thereafter entering the Password, the Hearing participants will enter a "Waiting Room," which will be managed by the Host. Once all Hearing participants have entered the Waiting Room, the Host shall admit the Hearing participants into the meeting, and shall assign them either into the Main Meeting or into the respective Breakout Rooms, as the case may be.

3.4 Once admitted into the Main Meeting by the Host, the Hearing participants should:

(a) by default be on Mute, except for the Hearing participant that is speaking at a particular point in time (*see* ¶ 3.2(d) above);

(b) ensure that they remain connected via audio and video throughout the Hearing day, unless there are technical issues or other exceptional circumstances or the Tribunal decides otherwise. If any Hearing ● participant is disconnected from the meeting at any time during the Hearing due to any technical issues, they can reconnect to the meeting by clicking again on the link in the Host's invitation for the meeting (*see* ¶ 3.3 above);

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(c) ensure that they are in a quiet environment, and should ensure that all devices (e.g., phones) other than the device through which the participants are connected are in silent mode; and

(d) be on the "Gallery View" layout, as opposed to "Active Speaker" layout, so that they are able to see all participants at once.

3.5 Each side will make its own separate arrangements for private communications between their team members, i.e. counsel or representatives, during the Hearing by email, instant messenger or other appropriate means during the Hearing. [**Insert platform**] "Chat" function, which usually allows Hearing participants to send written messages either to one or to all the participants, will be disabled during the Hearing.

3.6 The above provisions in ¶ 3 concerning the use of [**insert platform**] shall be applied *mutatis mutandis* to the conduct of the PHVC.

Comments:

There are various platforms available for the conduct of virtual hearings. Some offer a built-in simultaneous interpretation function, while others require the use of additional software. Some (but not all) institutions work exclusively with one platform; for ad hoc arbitrations, the choice will lie exclusively with the tribunal and the parties. The above provisions are based on common features and functionalities offered by many platforms.

¶ 3.1 provides for the participants of the remote hearing to be properly equipped with the technical tools necessary to smoothly run a remote hearing. In this respect, the writer finds it inappropriate for arbitrators to request parties to technically equip the arbitrators. Rather, the costs of fully functional and modern technical equipment is to be considered as a standard overhead cost for any office, no matter the office's size. An exception may be if the parties would provide the equipment to the

arbitrators for their use during the remote hearing in a specific matter. The technical equipment is then only borrowed by the arbitrators and needs to be returned upon the termination of the remote hearing. The same applies if technical equipment is provided to fact or expert witnesses; it has to be returned to the parties upon the termination of the remote hearing. The use of smartphones, in particular for the main Hearing participants, is not recommended, as it limits the features of the available platforms and creates an inequality in terms of opportunities between the parties.

¶ 3.2 takes account of the fact that managing the platform and the queries of the participants in the remote hearing is a time-consuming technical matter. Delegating the "hosting" to a third party, either internally to the tribunal secretary or a staff member from the involved institution or externally to a third-party provider, will allow the arbitrators and counsel to focus on the contents of the hearing. However, given the many technical features that are in the control of the host of a remote hearing, any actions by the host are to be carried out on behalf of the tribunal and under its close supervision and express authorization, taking into account the special circumstances that may occur during the remote hearing.

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¶¶ 3.2 through 3.4 provide for the technical aspects of the various rooms and audio and video conditions.

In addition to the provisions in ¶ 3.4, for large hearings it may be advisable to turn off the videos of non-speaking participants, but not the arbitrators and the counsel on either side who conducts the pleadings, for purposes of reducing bandwidth and ensuring better internet connectivity.

¶ 3.5 aims at avoiding disclosing any confidential attorney-client communication or deliberations amongst the arbitrators. For this purpose, it may be advisable to disable any features of the platform which would otherwise allow sending messages within the platform to one or all participants of the remote hearing, such as the "chat" function. It also enables the parties to communicate with and amongst their counsel at their convenience by separate means than the remote hearing platform. If the tribunal and the parties prefer to have the option to request assistance via the hearing platform, they may also consider leaving the chat feature enabled.

¶ 3.6 is added in case the protocol would be circulated prior to the PHVC.

4 Hearing Participants

4.1 Each side shall provide a list of participants (including counsel, representatives of parties and any others) who will be joining the Hearing from their side by [**insert date**]. Together with this list, each side shall also:

(a) designate the name and contact details of their "Document Manager," as defined in ¶ 7.3 below;

(b) designate the name and contact details of their "VC Emergency Contact Person," as defined in ¶ 8.1 below; and

(c) confirm that adequate connectivity or technology is available at the location from where each participant is joining the videoconference or is in the process of being procured.

4.2 Access to the [**insert platform**] meeting shall be restricted to the members of the Tribunal, the list of participants provided by the Parties (including counsel, party representatives and any others) pursuant to ¶ 4.1 above, and the tribunal secretary [**if applicable**]. All Hearing participants bear an ongoing duty to warn of the presence of any other person in the meeting.

4.3 In order to ensure easy identification and admission into the Hearing, when downloading the [**insert platform**] software and creating an account therein, all participants shall ensure that the account/user name bears their first and last names, and not any other name, number or character. The name of each participant may be preceded or succeeded by Claimant or Respondent, as the case may be, for easy identification and for placement into the Breakout Rooms.

4.4 All Hearing participants are encouraged to join the Hearing at least 20 minutes in advance of the start of each day and notify any technical problems to the [**contact person from the external service provider/tribunal secretary**] by email or

P 114 telephone. ●

Comments:

¶¶ 4.1 through 4.3 concern the privacy of the remote hearing. It is imperative that the parties circulate in advance a list of participants from either side, so as to avoid the presence of unauthorized persons at the hearing. More often than not, counsel will also provide the details of an

additional connection within their law firm in order to use a further screen or an additional computer. These additional connections should be advised in advance of the remote hearing, too.

For security reasons, any unauthorized participant should be removed, once it is established that the said participant is indeed not allocated to any party, as previously advised. It is advisable for the host to configure their own settings in advance, allowing people who are removed by the host may rejoin again. If such settings are not fixed in advance, in the event it turns out that a removed participant was allocated to a party and, thus, authorized, that participant may use another device to join the remote hearing. Alternatively, all participants have to leave the remote hearing and a new link for joining the remote hearing has to be used.

It is advisable to lock the remote hearing once all authorized participants have successfully joined the remote hearing; no other participant may then join the remote hearing. At remote hearings with witness testimony, it would be required to unlock and relock the remote hearing once a witness joins the remote hearing.

In order to facilitate the log-on process, participants should also ensure that the username appearing on the chosen platform reflects their actual name and not some other name or character, as may often be the case. If an entire counsel team is joining from one location, the identification may be marked as such.

Joining the hearing sometime before the scheduled start time will ensure a smooth commencement of the proceedings. Overall management of the log-on process may be delegated to the host, it being an external service provider or the tribunal secretary, as the case may be.

The designation of a "Document Manager" and "VC Emergency Contact Person" by each party in ¶ 4.1(a) and (b), normally provided by the counsel's law firm, facilitates the communication between the host and each party's counsel in case technical problems would occur. Also, it aims at reminding the parties of timely preparing and organizing the conduct of the remote hearing.

The provision in ¶ 4.1 ensures that any technical issues are dealt with in advance of the commencement of each hearing day without interrupting the hearing.

5 Internet Connection and Devices

5.1 Each side is responsible for ensuring that each of its participants connects to the Hearing through a stable internet connection offering sufficient bandwidth and uses a camera, microphone, and speaker of adequate quality. (7)

5.2 The Hearing participants should consider using a wired Ethernet connection instead of Wi-Fi. The participants are also encouraged to keep a smartphone ● or tablet, having at the minimum a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times during the Hearing.

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5.3 A dial-in telephone audio option shall be offered as a backup option for the Hearing participants experiencing difficulties with computer audio. Certain key Hearing participants may wish to dial-in by phone in addition to connecting through their computer, so as to be able to switch seamlessly to telephone audio in case they should happen to be disconnected at any point. In order to avoid interference with the Hearing platform due to signal connection, participants should not simultaneously use the audio function of both connections or mute themselves.

5.4 The above provisions in ¶ 5 concerning Internet Connection and Devices shall be applied *mutatis mutandis* to the conduct of the PHVC.

Comments:

¶¶ 5.1 and 5.2 encompass the recommendation that the participants do not rely on the Wi-Fi connections in their respective locations, which might differ in strength and quality. In order to minimize the risk of disconnection and the disturbance caused thereby, two solutions should be considered: (i) Ethernet cables to reinforce Internet connectivity; and (ii) dial-in details by telephone. Furthermore, the use of headphones may be advised for sound quality purposes and to minimize distraction from outside noises.

¶ 5.3 suggests that key participants connect in advance by both computer and telephone so as to avoid any disruptions in case of connectivity failure. If there is particular concern with regard to witness tampering, the parties may for these purposes also consider the use of a 360-degree "owl" camera in addition to a regular laptop camera. Alternatively, the witness may be asked to place an additional standard camera behind them at an angle so as to get a view of the front section of the room where the witness is sitting. Another solution to avoid the risk of witness tampering is to request the

witness to camera scan the room at the outset of the examination.

¶ 5.4 is added in case the protocol would be circulated prior to the PHVC.

6 Videoconference Etiquette

6.1 At the commencement of a Hearing day, each side shall indicate the concerned participant from their side who will speak on a specific issue.

6.2 All Hearing participants shall adjust their cameras in a manner that their head and part of their torso may be visible in an adequate lighting.

6.3 It is recommended that the Hearing participants do not use a virtual background feature while appearing on the videoconference, since such backgrounds may cut off parts of the participants' appearance.

6.4 The above provisions in ¶ 6 concerning videoconference etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

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6.5 Participants should refrain from interrupting the speaker at their own initiative. In order to raise an objection, counsel may simply raise their hand or contact the Host so that the Tribunal may be informed.

6.6 The above provisions in ¶ 6 concerning videoconference etiquette were applied *mutatis mutandis* to the conduct of the PHVC.

Comments:

The etiquette set out in in the above paragraphs concern all participants in order to balance any shortcomings that a hearing by means of videoconference may have.

In particular, ¶¶ 6.2 and 6.3 relate to the appearance of the participants on screen.

Other recommendations may be added as the remote hearing goes live, as provided for in ¶ 6.4.

¶ 6.6 is added in case the protocol would be circulated prior to the PHVC.

7 Evidence and Document Management During the Hearing

7.1 The Parties are at liberty to make use of [**insert name of program/software**] presentations or other visual aids during their oral arguments in the Hearing, provided that those materials reflect evidence on the record and do not introduce new evidence, directly or indirectly. Soft copies of any such PowerPoint presentations or visual aids shall be provided by the Party(ies) using them to the other Party(ies) and to the Tribunal by email just before the presentations during the Hearing. These PowerPoint presentations or visual aids may be, but are not required to be, shared by using the "Share Screen" function.

7.2 The Parties are also at liberty to make use of demonstrative exhibits (such as charts, tabulations, etc.) during their oral arguments. Soft copies of any such exhibits shall be provided by the Party(ies) submitting such exhibits to the other Party(ies) and to the Tribunal at the latest [**X**] business days prior to the Hearing.

7.3 During the Hearing, the presentation of any evidence or demonstrative exhibit shall be made through the "Share Screen" function. While using the Share Screen function, the Parties shall ensure that the concerned speaker and the relevant document being shared can be seen simultaneously at all times. For this purpose, the Parties shall designate one person on each side who shall be responsible for presentation of the evidence or demonstrative exhibit through the Share Screen function during the Hearing ("Document Manager"). The name and contact details of each side's Document Manager shall be provided to the Tribunal, together with the list of participants to be provided by [**insert date**] (*see* ¶ 4.1 above).

7.4 In this connection, for presentation of documents during oral arguments at the Hearing, the Parties are also at liberty to seek assistance from external technical
P 117 support personnel or service provider [**insert provider name**]. The ● Parties shall notify the Tribunal whether they intend to use any such external technical support personnel, at the latest by [**insert date**].

Comments:

Providing any PowerPoint presentations or visual aids that the parties wish to use during the remote hearing in advance of the introduction of these presentations, as mentioned in ¶ 7.1, enables each participant to print and open those presentations at their own convenience.

¶ 7.3 explains the tasks of the so-called "Document Manager" per party to facilitate a smooth presentation.

For ease of convenience, notwithstanding the provisions of ¶ 7.3, participants may consider using multiple screens to simultaneously view (i)

the hearing (and participants); (ii) the transcript; and (iii) personal annotations on any documents, respectively.

¶ 7.4 opens the room for third party service providers to be involved by the parties, if so desired.

8. Witness and Expert Examination

8.1 [**Insert relevant provisions of procedural order**] shall govern the examination of witnesses and experts during the Hearing.

8.2 As determined in [**insert relevant correspondence**], the sequence in which the witnesses and experts will be examined shall be as follows/is set out in the schedule annexed to this Procedural Order.

8.3 Prior to testimony, each witness or expert shall be required to make the following affirmation: [**insert text**]

8.4 Fact witnesses shall be sequestered. They shall not have access to the Main Hearing Room, the Hearing transcript or any recording of the Hearing until called to testify. During the examination of a witness, counsel are not permitted to communicate with the witness by any means other than communication on the record.

8.5 The above ¶ 8.4 shall [not] apply to expert witnesses.

8.6 The testifying witness shall receive digital copies of the Hearing bundles from [**inserttribunal secretary/assistant/contact person from external service provider**] upon entering the Main Hearing Room. Electronic bundles shall not be shared with the testifying witness in advance.

8.7 The Tribunal may, in consultation with the Parties, adopt further measures in order to mitigate the risk of undue interference. This may include, for instance, the use of a 360-degree "owl camera" and requiring witnesses to stay "on screen" during breaks.

Comments:

The majority of the provisions in ¶ 8 are standard also for physical hearings.

In relation to ¶ 8.3, in order to address concerns of witness tampering, when admonishing the witness to tell the truth, the tribunal may require an oral P 118 *affirmation by the witness that no risk of witness tampering exists. Furthermore, before such affirmation is given,*

it may be helpful to remind witnesses that testifying in a remote hearing is equivalent to testifying in a physical hearing, in the sense that the tribunal will take into account and rely on the testimony given when rendering its decision. "Traditional" affirmations used in the context of physical hearings may be amended to reflect that from a legal standpoint remote hearings are no different.

¶ 8.4 differs in relation to the terminology; "Main Hearing Room" refers to the screen showing all participants. This provision also takes account of the fact that there is a physical distance between the tribunal and the witness to closely supervise counsel and witness in order to avoid undue influence of the witness by counsel.

¶ 8.6 is adapted to the fact that a "witness bundle" may not be provided to a witness before their cross-examination in hard copy, but only in electronic copy.

As mentioned in ¶ 8.7, a special 360-degree camera may be used for witness examination in order to verify that there is no undue witness interference. If the examination is interrupted by a break, the witness can be requested to stay "on screen" for the time being.

9. Interpretation and Transcription Services

9.1 Simultaneous interpretation from [**insert language**] to [**insert language**] will be provided by [**insertplatform/service provider**].

9.2 Transcription services in [**insert language(s)**] will be provided by [**insertplatform/service provider**], which may be accessed via separate log-on details circulated by [**inserttribunal secretary/assistant/contact person from external service provider**] prior to the Hearing. A final version of the transcript will be circulated at the end of each hearing day.

Comments:

With respect to ¶ 9.1, it is worthwhile noting that there are a number of service providers, specialized on remote simultaneous interpretation. The features that they offer vary and allow the participants to hear both languages with variable sound. New developments in artificial intelligence are being used in this field for some time, already.

As to transcription services, provided for in ¶ 9.2, real time transcription would benefit from a separate screen to be used by the participants in order to follow the transcript live without any interruption.

10. Technical Problems

10.1 Each side shall designate one of its representatives to act as the videoconferencing contact person ("VC Emergency Contact Person") for purposes of addressing any technical problems that may arise during the videoconference. The name and contact details of each side's VC Emergency Contact Person shall be provided to the Tribunal, together with the list of participants to be provided by [**insert date**] (*see* ¶ 4.1 above).

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10.2 The VC Emergency Contact Person shall be:

(a) available throughout all Hearing days, as their side's emergency contact person, in case there are any technical problems during the videoconference; and

(b) responsible for advising the Tribunal if an essential participant from their side is disconnected or otherwise cannot participate, such that the Tribunal is requested to pause the Hearing. For this purpose, the VC Emergency Contact Person shall contact the [**tribunal secretary/assistant/contact person of the external service provider**].

10.3 The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. Unless this is impossible for technical reasons, this shall be discussed between the Tribunal and the Parties.

Comments:

¶ 10, in most parts, concerns technical matters and explains the need for a videoconference emergency contact person, a so-called "VC Emergency Contact Person."

¶ 10.3 emphasizes that, albeit generally reserved as a measure of last resort, the tribunal and the parties should not be overly hesitant to temporarily suspend the proceedings in case of technical or other difficulties. From a pragmatic standpoint, it may be preferable in this scenario to briefly interrupt the proceedings rather than incurring a violation of the parties' due process rights by continuing with a compromised hearing where, for example, not all party representatives or tribunal members are able to fully participate. That being said, since the COVID-19 crisis is still ongoing and strict measures are in place in case of illness, the parties should be prepared for second counsel to take over seamlessly should lead counsel fall sick. It does not seem appropriate to suspend or postpone the remote hearing under these circumstances.

11. Recording of the Hearing, Confidentiality and Cybersecurity

11.1 It was determined by the Tribunal after consultation with the Parties during the PHVC that the Hearing shall be audio recorded on [**insert platform**] recording function, and shall be stored locally on the Host's computer. The audio recording shall be made available to the Parties by the Tribunal if and when requested. Only the Main Room audio recording will be taken.

11.2 Pursuant to [**insert applicable provision**], the Hearing shall be private and confidential, and no participants other than those mentioned in ¶ 4.2 shall be allowed to participate in the Hearing.

11.3 The Tribunal, in consultation with the Parties, may draw up a cybersecurity protocol.

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Comments:

¶ 11.1 provides that the recording is being made by the host of the remote hearing on the host's computer for cybersecurity and data protection reasons, as opposed to be recorded on the cloud of the platform that is used for the remote hearing. Experience has shown, however, that it is highly recommended to audio record the remote hearing on a separate device, too. This might also be done by the court reporter.

Furthermore, since remote hearings are done by video, recordings by the host and/or a third-party service provider may be both done in audio and video. However, in line with physical hearings, the author believes that recording and circulating audio recordings are sufficient and properly ensure data protection.

To balance missed non-verbal cues and body language during cross-examination of the witness, it may be considered to also share the video,

but only if the video will have two pictures available: counsel and the witness being cross-examined. Generally, the use of advanced technology bears the risk not only of disclosure of confidential information by participants and service providers, but also of interference by third parties, for example in the form of hacking. Accordingly, the tribunal and the parties may draw up a separate cybersecurity protocol in this regard. (8)

5 CONCLUSION

This chapter has explored the practical challenges that arise in respect of the planning and preparation of remote hearings and provided suggestions for how arbitral tribunals could address these *in concreto*. While some of the above recommendations may convey the impression that the legal profession is entering unknown territory, the author trusts that after a short adjustment period practitioners accustomed to physical hearings will have become equally familiar with, and appreciate the advantages of, their remote counterparts.

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References

***)** The author is most grateful for the valuable research and review of drafts of this chapter by Anna-Christina Schmidl, Associate at Hanotiau & van den Berg in Brussels.

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3) *See*, e.g., Art. 820 cod. proc. civ. (*Italian Code of Civil Procedure*); Art. 1114(4), C. Proc. Civ. (*Romanian Code of Civil Procedure*); Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, Art. 8(2)(e) (Nov. 26, 2003); Agreement Between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments, Art. 8(2)(e) (Oct. 5, 2014).

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Chapter 6: Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges

Wendy Miles

1 INTRODUCTION

Toby Landau QC's 2010 Kaplan Lecture, poetically entitled *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration*, examined the value of witness testimony and questioned our reliance on it as a tool for resolving disputes through international arbitration. In his opening gambit he challenged the legitimacy of what is now common practice:

> Witness evidence is a major element of most international arbitrations, subsuming time, energy and costs. Over the years we have arrived at a standardized witness evidence mechanism. Yet, once scrutinized and tested by reference to relevant scientific research, it transpires that this witness evidence mechanism is fundamentally flawed in terms of procedure, theory and assumptions. This is because our approach to witness evidence is not built on sound understanding of the workings of the human mind, and it often serves to undermine rather than assist witnesses' recollection. (1)

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Landau offered scientific support for his pre-pandemic conclusions as to the fallibility of witness evidence. (2) There is no need to rehearse the scientific bases here, save to reiterate that Landau's summary of the literature was that memory is 'an alliance of multiple interacting structures and processes' and overall is 'a fragile, delicate, fallible and unreliable mechanism'. Therefore, Landau concluded back in 2010, as the taking of witness evidence in international arbitration relies on memory (or at least purports to do so), then '[i]t is time to radically re-think the witness evidence procedure and to redefine the role and proper ambit of witness evidence'. (3)

Now, ten years on, there cannot be a better time for radical rethink than in the midst of a global pandemic that has already fundamentally changed the way we work and conduct almost every aspect of business in our global economy and demands that we continue to do so in new and exciting ways. And that radical rethink should encompass the myriad ways we use advocacy, in the form of both written and oral submissions as well as through the taking of evidence through documents, witness and expert testimony (both written and oral), to get to a timely, efficient and fair resolution of the parties' dispute. (4)

2 WITNESS TESTIMONY

The rethink starts with the taking of witness evidence and the 2010 Landau lecture. The pre-pandemic phenomenon of the written witness statement evolved out of English civil court practice has become standardized in international arbitration, and is now enshrined in the International Bar Association (IBA) Rules for the Taking of Evidence in International Commercial Arbitration. (5) The rationale for it is that it frontloads proceedings, ultimately narrowing issues, focusing the parties and saving time and cost. (6)

By submitting written witness statements in advance, accompanying full written submissions on fact and law, as well as documentary evidence and legal authorities, they become part of the submitting party's narrative. Counsel sometimes refer to the witness statements as the opportunity to 'tell the story' from a factual perspective. Given that witnesses in theory should only testify to facts that they personally and directly observed, this strange form of storytelling involves a series of characters each presenting his or her own monologue from start to finish, one after another. It is not a device common to English literature and it is not how we ordinarily communicate as human
P 123 beings. Yet it is a device that is now embedded in English commercial court practice and in international arbitration, together with the right to require the testifying witness to attend a hearing to be questioned on that statement. (7)

Remote arbitration proceedings undoubtedly present a unique set of challenges and opportunities for advocates. In relation to the taking of evidence from witnesses, the challenges span early fact-finding and case investigation, collection of evidence, preparation of witness statements, witness preparation and the evidential hearing itself. These challenges may have been confronted in one-off situations pre-COVID-19, with hard to reach witnesses interviewed by telephone or email, and hybrid hearings involving one or two absentee witnesses providing evidence by video link into an otherwise in-person hearing. But the phenomenon of entirely remote arbitration proceedings is less familiar to most. And lack of familiarity is often enough, in and of itself, for resistance.

In order to understand how to overcome concerns arising out of the remote taking of witness evidence, it is worthwhile considering not only what pre-pandemic procedures and norms existed, but how they operate and whether or not they always offer the best possible approach.

Pre-pandemic, a considerable amount of time and cost in international arbitration typically has been apportioned to the taking of witness evidence. Almost entire oral hearings are dedicated to testimonial evidence. In preparing that evidence, in order to preserve its integrity as well as the strength of delivery at hearing, counsel try to attend witness interviews physically in person as much as possible, often attending two or more rounds of witness meetings to prepare witness statements, another to prepare witnesses for the evidentiary hearing and finally to bring the witness to the hearing to testify physically in person. Each of the pre-testimony meetings and procedures, according to science, serves further to taint the memories and recollection of the witness. Yet we persevere with this approach more often than not; it has to some extent become common practice in international arbitration. (8)

Meanwhile, the more reliable evidence in commercial disputes almost always is the contemporaneous documentary record. Relevant documents usually come into existence at the time of the event to which they relate, do not rely on recollection or memory and are not prepared solely for the purpose of arbitration, at a time after the dispute has arisen and parties have doubled down on their respective litigation positions. Contemporaneous documents, unlike witness statements, are rarely written by counsel in
P 124 the proceedings. Unsurprisingly, therefore, arbitral awards rarely resolve ● critical facts in issue on the basis of witness testimony; the contemporaneous documentary record will almost always be given primacy.

If we start by acknowledging that witness testimony mainly serves as a vehicle through which to 'tell a story' or 'bring the documents to life' or present the 'human element' of the case, i.e., to assist in the presentation of the party's position, as opposed to evidence to prove the truth or otherwise of alleged facts in issue, we might be able better to assess perceived challenges in remote proceedings. Similarly, if we were to accept the neuroscience as to the unreliability of witness recollection and memory and, as Landau suggested, (9) 'stop pretending that we are working off the actual "recollections" of witnesses when we are not' and 'acknowledge that witnesses assisting the tribunal's finding of "probabilities" on reviewing evidence is very different from memory *per se*' but is still 'critical when evaluating competing accounts and testimony clashes', then perhaps we might be less concerned about insisting that the entire witness process be conducted physically in person.

COVID-19 might just provide the opportunity to change 'the nature of the exercise'. This would start with accepting that witnesses provide only 'educated beliefs' as opposed to 'actual recollections'. (10)

2.1 Witness Preparation

Against that backdrop, the first perceived challenge in the taking of evidence in remote proceedings relates to preparing witnesses and witness statements without physical in-person meetings. An oft-cited concern is that counsel need to sit with the witness to go through the documents, to understand where the strengths and weaknesses of the evidence are and to get a measure of the witness and how he or she will perform at an oral hearing in front of the tribunal and during cross-examination. Ultimately, the witnesses are players in the performance of the oral hearing and the success of the show depends, at least in part, on how well they play that role. Their primary role in many cases is to assist the tribunal to see the context and understand the documents in that context. Rarely are they expected or understood to be providing video playback with perfect recall of past events. Accordingly, perhaps we overstate the importance of physical in-person preparation for the purpose of obtaining accurate evidence.

For example, if the real purpose of a witness meeting is to 'meet' them, to hear their story and to walk them through the key documents (and perhaps identify additional documents or documentary sources), that all can be achieved through remote procedures. Arguably it is more efficient and effective to do so. Most videoconferencing platforms have a facility for sharing screens so documents can be put up in front of the witness to discuss. The witness is able to check his or her own documents and do the same, copying those documents to counsel in real time. With some basic folder management, this may prove to be a more reliable process than printing out folder after
P 125 folder of witness preparation bundles that collect dust on an office floor (not ● to mention infinitely cheaper and better for the environment). For more technical issues, there are applications available that permit all participants in the videoconference to draw on a whiteboard, mark up documents and delve down into difficult issues using diagrams and notebooks.

All of this, respectfully, must enhance the procedure of international arbitration. The absence of international travel and the additional diary management that this requires will reduce delay and will certainly reduce cost (monetary and to the environment).

COVID-19 provides an excellent opportunity to exercise some discipline in the volume of witness evidence, both in terms of number of witnesses and length of statements and commensurately the length of hearings and cross-examination of those witnesses. A dispassionate evaluation as to precisely what value each and every proposed witness adds in terms of new evidence is more important than ever. Dispensing with unnecessary testifying witnesses would have a marked impact on time and cost, avoiding inordinate

delay in remote proceedings, at no loss to the completeness of the record or the impact of the advocacy in most cases.

By simply insisting on pre-COVID-19 practices and procedures in relation to the taking of evidence, we risk extensive and unnecessary delay in existing arbitral proceedings until counsel is able to travel to speak to potential witnesses in order to prepare these witness statements. This exercise might even be presented as a critical part of the proceedings; a timetable that does not permit such physical in-person interaction might be cited as a fairness or natural justice concern. Such a position presupposes – not always correctly – that the witness testimony that is driving the prolonged timetable in fact adds value and has an impact on the ultimate outcome of the case.

Even where witness testimony is absolutely essential, the inability to prepare witness statements with the witness physically in person does not necessarily lead to procedural unfairness. Most of the time lawyers draft witness statements for the witnesses. That was the case pre-pandemic and is unlikely to change now. Usually, lawyers do so in conjunction with interviews and with the assistance of the contemporaneous documents (including contemporaneous emails produced by the witness). The witness is usually taken carefully through the draft statement and the documents. Then the witness will sign the statement and counsel will submit it. The witness statement then, in accordance with the IBA Rules, will usually stand as evidence-in-chief in the proceedings. The documents it refers to are attached as exhibits.

It is not at all clear that any of this need take place physically in person.

The conventional, pre-COVID-19 approach to the taking of witness evidence should be reconsidered in the context of remote proceedings in the following key respects:

(a) If the witness statement is no more than a recitation of the contemporaneous documents (including emails) in the witness' words (as crafted by the lawyer), its value should be reconsidered. Perhaps the COVID-19 revolution might be our
P 126 opportunity to learn to take responsibility for making prudent, ● courageous, and perhaps more honest decisions about when it is appropriate to adduce witness testimony and when it is not.

(b) If, having made a careful evaluation, counsel determines that a particular witness statement is necessary in order to adduce or explain evidence that is not adequately covered by the documentary evidence, is it then necessary to conduct the witness interviews physically in person? As noted above, the reasons lawyers give for preparing witnesses physically in person is to enable them to evaluate the individual as a witness, get a feeling for how he or she will come across to the tribunal and manage the process of going through the subject matter of his or her testimony. Yet all of this can be achieved through a video link. Perhaps the real reason is a combination of habit and control. Counsel seeks to control the proceedings, and minimize surprises. However, seeking to do so through close meetings with the witnesses risks further undermining the witness' recollection.

(c) As to the integrity of any final witness statement, in reality, the end product is almost always generated back in the office and finalized over the phone or email. Therefore, not having an opportunity to sit in a room and go through the testimony line-by-line with a witness is, again, nothing new. And if counsel felt it was critical, it is infinitely more convenient in the days leading up to a large filing deadline to do that by virtual platform rather than travelling to meet physically in person.

(d) Finally, an in-person physical meeting with a witness does provide an opportunity to build trust and confidence. For those outside the world of arbitration (and some of those in it), hearings are an alien, intimidating and often overwhelming experience. Spending time with witnesses can help reassure and remove some of the fear. It might be more difficult to make the necessary connection to achieve this in a remote setting than in an in-person physical meeting, but again this might simply be a matter of habit and unfamiliarity. COVID-19 has demonstrated to us that it is not impossible to build rapport remotely and, with increased time and effort, this will become a more natural way effectively to communicate. Moreover, if the ultimate hearing is to be conducted from the comfort of the witness' own home or office, without requiring the witness to travel, less reassurance and acclimatization to a formal hearing room is probably necessary in any event.

In confronting procedural fairness objections arising out of difficulties in accessing witnesses physically in person in remote proceedings, an arbitral tribunal might consider pressing counsel on some of the aforementioned points. For example, an early case management conference dedicated to evidence might provide an opportunity for counsel to identify for the tribunal which witnesses they seek to call, what evidence they intend to cover, and the extent to which that evidence is not already covered in the documentary record. The tribunal could strongly encourage counsel to reconsider whether or not particular witness testimony is in fact adding anything at all to the existing evidentiary record. Regular case management conferences could be held at different stages in the proceedings to reassess at appropriate decision points.

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It might transpire that the client representatives simply want their 'day in court' to tell

their story physically in person, but that their 'telling' adds nothing new to the documentary evidence. In such cases, it is within the tribunal's power to permit these representatives to make a statement, in the form of submissions, rather than testify as witnesses. It might be a more authentic form of delivery than existing practice (in some cases) and in most cases it would likely save time and cost.

2.2 Witness Presentation

The second perceived challenge is that witnesses in a remote hearing setting are arguably at greater risk of being coached or led in the presentation of their evidence. This concern stems at least in part from pre-COVID-19 hybrid hearings, where one or two witnesses might present their evidence by video link, due to time or health or other travel restrictions. In a physical in-person hearing, a witness is at a table with nothing in front of him or her except his or her witness statement and the tribunal. If connected by video link, it is near impossible to control who or what the witness has in the room or on the desk in front of him or her during testimony. Even if a camera were able to demonstrate that the desk in front of the witness is clear of papers and the room is clear of people, most video cameras are embedded in the screens of a laptop or other mobile devices and those devices themselves are capable of receiving text messages or email prompts during the testimony.

In reality, the mischief of not playing by the rules already exists in physical in-person as well as in hybrid hearings and it would be naïve to think that was not the case. It is not in any way condoned, but it is clear that at times witnesses are 'coached' before giving testimony, or prompted in breaks during cross-examination, or even assisted by interpreters in the presentation of interpreted evidence. Sometimes, the witness' own counsel will give prompts through body language, looks or sighs, in front of the tribunal throughout the opposing party's cross-examination. These tactics are usually obvious to the tribunal and taken into account in attributing the weight to be given to the testimony. They should be no less obvious if deployed in a remote hearing. Arguably, it is more difficult to lead in a remote setting; counsel's body language does not convey in the same way through a screen. In some respects, therefore, this setting provides a barrier to non-verbal communication with a witness, including unintentional signalling.

The greatest risk in remote hearings, as indicated above, is of the witness receiving or using prompts read from messages or a document in front of him or her. If parties or tribunals are genuinely concerned about this, in a case where witness credibility and testimony is critical, they might deploy closed systems that limit any other windows to open on the screen during testimony. (That will not stop a witness glancing at a mobile phone or another device, but that is usually easier to spot.) Also, when a witness is reading as opposed to answering from memory, it is usually apparent from the cadence of his or her voice, in an in-person physical hearing and on the screen. Additionally, when a witness reads from the screen, it is usually noticeable from the changed eye focus in the camera. It is all the more important for questioning ● counsel – and arbitrators – to have a decent-sized screen and to pay close attention to the witness' demeanour, including eye focus. A large screen can often provide a better insight to a witness' demeanour than a chair behind a table in a large hearing room, where the witness is flanked by multiple counsel and his or her employer.

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For the reasons set out above, Landau observed that witness statements are often 'far from what the witnesses would have produced if they were speaking in their own words' and that '[w]hile the articulate, complete, confident and coherent version of events may seem more credible to tribunals, in fact, a truthful recollection of events is patchy, incomplete, and incoherent'. (11) Often all successful cross-examination achieves is a confirmation that actual recollection is patchier that what lawyers compose in witness statements. But if tribunals were to accept that as their starting premise, perhaps we could spend a whole lot less time and energy trying to prove it to them in every single instance.

We know memory is unreliable and truthful recollection is patchy and incomplete. We know a perfect memory reflects a well-prepared and well-rehearsed witness as opposed to a factually accurate one. In these circumstances, that the evidence is presented through a video screen as opposed to face-to-face is unlikely to make much difference to the outcome.

Perhaps the only exception to this is in cases where there are allegations of fraud or a key issue turns on disputed oral evidence between the witnesses. But even where opposing witnesses allege opposite versions of the truth, the testimony is often supported by other documentary evidence and not entirely dependent on determination as to which witness is speaking truthfully. And such determinations are fraught with difficulty. Psychological studies show us that we are more likely to be persuaded by the more confident liar than the individual with the best recollection as to the actual facts in any event. (12) And a witness may be speaking entirely truthfully, but just be wrong about what he or she heard or saw. Therefore, even in the narrow category of situations where witness testimony might meaningfully impact the finding of fact, it is frequently unreliable.

Tribunals look at the whole record and determine the case on the basis of everything before them. Witness statements might provide a useful repackaging of facts otherwise

evidenced in the documents. Questioning might tidy up some questions and uncertainties. Usually it just proves what we already know: that witness statements are drafted by lawyers, not by the witnesses, and that witness recollection and memory is flawed and unreliable, even when truthful. And that witnesses are sometimes coached and are not always truthful.

None of that is any different in a remote hearing. Arguably, the less time the lawyers spend physically in person with the witness, the less that witness' recollections will be tarnished by the lawyer's input or the strategic objectives of the arbitration case. And at least for the duration of working from home, the candour and openness of a witness
P 129 testifying from his or her living room or home office is refreshing and ● somewhat less inhibited than that of a witness armed and ready for battle in a much more formal hearing room.

2.3 Testing Witness' Truthfulness

The third perceived challenge is that the tribunal does not have the opportunity to see the witnesses more closely in physical form, presumably to assess the witness' truthfulness or otherwise. Yet it is often easier and more effective to zoom in on a witness and see his or her face and facial expressions in a virtual environment than in an actual hearing. If the remote hearing is conducted on a large screen with a speaker view, the tribunal has ample opportunity to observe the witness and his or her spoken and unspoken communication cues, throughout the testimony.

There has been a number of cases that have considered the fairness of taking evidence remotely in courts, and the ability of the courts to assess the witness is raised as a concern. (13) In a recent Australian case *Haiye Developments Pty Ltd v. The Commercial Business Centre Pty Ltd*, (14) the issue was raised in a fraud claim. There the court ordered that it would be unfair to take evidence from a non-national witness, including because it would be difficult for the court to assess credibility, interpreters would create additional challenges, and cross-examination of documents remotely would be more challenging. However, that case seemed to involve particular challenges with the witnesses' location in China. Similarly, the Australian courts have been sympathetic to witnesses who find themselves with poor internet connections or other practical challenges. (15) But in principle, the general acceptance of remote witness testimony has been upheld. (16)

None of the aforementioned challenges goes to the question of whether or not taking of witness evidence in remote arbitration in any way undermines or inhibits the communication of the necessary information for the tribunal to resolve the dispute. That, at the end of the day, comes down to advocacy. And it is true that advocacy in a virtual setting is different from advocacy in a physical, in-person setting. So, what advocacy skills assist in a virtual world in the taking of witness evidence?

First, the rules of engagement need to be clearly stated at the outset. If witnesses are to be asked to affirm their written and oral testimony, and required to affirm that they are not communicating in any way with any other person regarding their evidence during testimony, they should be made aware of this before the remote hearing begins. If expectations are set from the outset, they are more likely to be adhered to, and it is easier to call out a transgression. Tribunals can be nimble in this regard; calling witnesses together prior to a hearing to outline the rules of engagement, including the effect and purpose of any sequestration, will avoid mixed messages from counsel or employers.
P 130 These types of meetings are feasible in a remote proceeding, whereas they ● might not have been in physical hearings where witnesses tend to arrive at different times during the hearing.

Second, the witnesses (and indeed counsel) should spend a little time working on creating the appropriate environment for each participant's screen and online experience. As remote hearings are only as formal as the least formal participant environment, it is important to ensure witnesses know to dress professionally, ensure the screen background is free from distractions and that they have no interruptions. If virtual screens or blurred backgrounds are to be used, they should be tested beforehand; a repeatedly disappearing arm (or head) can become a bigger distraction than a bookshelf behind the witness. Perhaps more importantly, a virtual background disguises the witness' location and environment and full transparency might militate against their use at all in remote hearings – or at least during cross-examination of the witness. Where witnesses are to be sequestered, it is worth ensuring that this is adhered to through some form of waiting room facility within the virtual hearing room environment and that its access is controlled or monitored. If at all possible, witnesses should not be held overnight or over long breaks for lunch while under cross-examination, as this opens up opportunities for them to discuss their evidence with others outside formal hearing room settings.

Third, during witness questioning counsel should try to ensure that there are short, regular breaks throughout the process. Breaks should not be long enough to permit the witness to discuss his or her evidence with another, but sufficient for all participants to be able to stretch their legs, refill drinks and go to the bathroom. This is even more important when participants are in different time zones; lunch does not fall between 12 and 1 pm GMT all over the world, even on a screen.

Fourth, questions need to be clear and to the point. Most cross-examination training promotes short questions, with one fact per question relevant to the outcome of the case. In a virtual setting, it is even more critical to keep questions short, slow, coherent and concise. It is also important to keep the entire cross-examination short and crisp. On a video screen, it is easy for a witness to avoid answering an unclear question and it is easy for a tribunal member to lose focus. As counsel, it can be more challenging to keep track of the tribunal and be able continuously to gauge its interest and focus on a particular witness during questioning. The more focused the process, the less risk of losing engagement in respect of what matters.

All this is equally true of the taking of witness evidence in physical in-person hearings. But there is a certain formality that is respected, by convention if nothing else, where all stakeholders tend to sit patiently throughout the process of witness questioning even when the point of it is not at all apparent. In the virtual world, where streaming fatigue is a very real thing, it can be more challenging to hold the audience's meaningful attention for any length of time. A tribunal might appear to be staring intently at the testifying witness, but is in fact reading his or her emails on the screen immediately below the embedded camera.

Fifth, if the primary purpose of a cross-examination is to test the documentary evidence, be prepared to use screen sharing function to ensure that everyone has the same document, on the same page, on the screen at the same time. Spend a moment to guide
P 131 the tribunal to arrange the screen sufficiently to see both a speaker view and the
shared screen document during the questioning. The document will provide focus but the speaker view will keep attention. It is worth taking a moment to ensure that the tribunal still has views of questioning counsel and the witness, alongside the document during the cross.

There are many excellent electronic document management platforms that host electronic hearing bundles. These range from extremely simple folders to more interactive products. They need not be expensive. There are plenty of applications that enable tribunals to view and mark up hearing bundles on iPads or similar devices. Bundles in remote proceedings do not need printing at all. And where cases do not merit the expense, a simple screen share function available on most videoconferencing tools is also a very usable substitute.

Sixth, consider a pre-hearing tutorial session for the tribunal. Tribunal members may wish to take a witness to a document, and a tutorial or refresher course on the system would likely be welcomed and save everyone's time.

Seventh, be flexible. The chess clock is a necessary phenomenon of arbitration hearings. A lot of information needs to be conveyed in a finite period of time. There is rarely if ever time for the luxury of a long, gradually built cross-examination that traverses all issues in the case relevant to a witness. Different people come across in different ways on a screen (and indeed in person). A witness might not be what you expect, so be prepared to change tack or pull out of a cross-examination if it is not adding value. No tribunal would criticize a party for finishing a hearing early.

Eighth, if interpreters are required, all of the above points become even more critical. In an entirely remote hearing, the interpreter will be sitting remotely as well. It makes it even more challenging to focus attention on the cross-examination itself. Ideally, the interpreter should be minimized in screen view – appearing in a smaller window in the top right corner a little like the sign language interpreter on a news channel – to keep visual focus and attention on the cross-examiner and the witness. Sequential interpretation is easier to control than contemporaneous but it takes longer, using up valuable chess clock time. Laser-like focus is required for effective cross-examination using interpreters in this environment.

Flexibility in adjusting to the new norm need not stop at adapting to fewer witnesses, shorter cross-examinations, more focused questions and cutting of fat. These are all things we should be doing anyway. Remote proceedings give us an opportunity for a level of flexibility that could permit the type of radical rethink that Landau proposed a decade ago. He invited us to redefine 'the purpose and focus of hearings … to move away from the farce of witness cross-examination to a different exercise' and to allow 'more submissions from witnesses' by loosening 'the firm grip of lawyers on witnesses'. (17) This requires us to focus on other forms of advocacy – written and oral – and recalibrate the balance between the tools we deploy to adduce evidence and communicate with and ultimately persuade decision-makers.

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3 EXPERT TESTIMONY

Many of the same points apply to expert testimony. Essentially, it is often submitted but not always necessary. It comes at an enormous additional cost and often delays proceedings. Tribunals are not always made aware of its purpose or relevance to the outcome of the case. It would be valuable for this to be made clear early in the proceedings. At least one well-known arbitrator requires experts (and witnesses) to provide an introductory paragraph in all written statements to describe what issues the

testifying expert or witness is addressing in his or her evidence. It is a subtly effective way to focus the minds of counsel from the outset.

However, if counsel were to reduce the number of fact witnesses to 'tell the story', it may place a renewed focus on the role of experts. In many highly technical disputes, they not only provide opinion on issues within their expertise but also give context to the facts in issue not otherwise provided by fact witnesses. There is a danger of course in simply replacing fact witnesses with more expensive experts, but the role of both should be considered in the round in order to ascertain what is necessary to determine the facts in issue and what is not.

Necessity is the master of invention and the pandemic environment has required experts to cooperate in new ways. By creating at the outset of a proceeding a joint platform for documents to be considered by the experts, such as data room documents in M&A disputes, or project documents in infrastructure disputes, the experts have an early opportunity to evaluate, assess and ultimately narrow the issues between them. Moreover, as each expert has the same data from the outset, this could reduce document disclosure requests and associated cost and delay.

A radical rethink would be enhanced with the benefit of insight from regularly testifying experts; they know how best to communicate complex technical material both in writing and orally (at least sometimes). For example, in certain circumstances written submissions might include more dynamic content, such as video links or interactive demonstratives, to enhance those reports and bring them more to life before the hearing. Certainly increased joint meetings of experts prior to any hearing serve to focus and narrow the issues and enhance efficiency.

4 LEGAL SUBMISSIONS

Finally, a word about oral advocacy in openings and closings in remote hearings. Three or more months into the pandemic, counsel and arbitrators have had ample opportunity to experience remote advocacy. It is clearly a different exercise to in-person, physical hearings.

Commanding a room as an advocate is engaging in all means of communication – oral, body language and demeanour. It is difficult to carry that into a small rectangular box on a screen. But there are a few observations that have emerged over the past few months that are worth considering.

First, reading aloud entirely from a script takes something away from advocacy, even in
P 133 in-person physical hearings. It is even more so in remote hearings. If a script is ● indispensable, it is important to have it on the same screen in which the camera is embedded, with the camera positioned so the reader appears to be looking into the camera. This is almost certainly a taught art in newsreader school. COVID-19 has given us the opportunity to witness late-night comedy hosts as they grapple with the elusive audience engagement through a computer screen set up in a solitary room at home. It is a challenge. Reading from scripted bullet points and notes is more natural than reading from a dense script. Obviously, the bigger the font, the less the reader will look to be peering at words on a screen rather than making eye contact with the tribunal members.

In the same vein, it is worth keeping the tribunal members on the same screen so you are able to gauge their reactions and attention levels while you speak. This might require investing in a larger or additional screen.

Second, speaking slowly and clearly with breaks for questions is even more important in remote hearings. When participants are together in a room, there is a certain energy that keeps everyone mostly alert and at least with an appearance of being interested or engaged. This is not quite as easy to emulate on the screen. It is useful to keep checking in with the tribunal and making sure they have no questions or concerns and are following the points as they are made.

Third, using documents in screen share or a shared platform is a terrific way to keep the attention of the tribunal during submissions. A shared platform has the additional advantage that the tribunal members can mark up the documents themselves. (Again, counsel should not hesitate to offer tutorials early in the proceedings if using more sophisticated systems.) PowerPoints have a similar attention keeping effect in the right cases, but if they are merely punctuating the advocate's oral points, it might be more effective to keep the screen view on the advocate, save for exhibits and demonstratives.

Again, it is important to ensure that your screen is set up to see the tribunal at all times. It is also worth asking the tribunal members to maintain their speaker window beside any document on the shared screen, so they can see the speaker at all. This helps prevent the whole exercise feeling like an online tutorial for the tribunal and the advocate.

Fourth, as above, minibreaks are encouraged. The number, length and frequency of such breaks must be openly discussed and agreed early on in the proceedings or when establishing the hearing protocol. It goes without saying that videos should be turned off and microphones muted during minibreaks. It makes sense to agree that as a protocol from the outset so one party does not find itself in an ex parte conversation with the tribunal mid-hearing.

5 CONCLUSION

Remote proceedings herald an opportunity for a different approach to arbitration and advocacy. It is as though we have been playing one instrument all our careers, learning and producing ever more complex symphonies. Now we are all forced to switch and learn
P 134 to play a new instrument. It is similar, but different. And we have an opportunity ● to go back to the basic elements of the production of arbitration advocacy, to learn to reproduce the necessary chords in a new ensemble, taking with us the benefit of our existing experience with an added focus and discipline.

If we as stakeholders and participants permit it, remote proceedings can drive us to new levels of focus and efficiency, saving time and cost for users of international arbitration. Without the investment of long-distance travel, lengthy periods of time away from home and the ensuing expense, we have the opportunity to use our time to focus on what really matters, to tighten up what we do and rid ourselves and our system of redundancy. Our growth curve on volume of material submitted in arbitration seems to be steadily increasing; the capacity of members of the tribunal to absorb material remains constant. It is possible that we are producing and delivering material that is not meaningfully contributing to the resolution of the dispute, let alone the efficiency of the dispute resolution process.

Pascal's letters in 1656 made the apology that '[j]e n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte'. (18) Counsel in remote proceedings now have more time – time saved in commuting, long-distance travel, jet lag and negotiating time zones – to focus on narrowing down submissions, alleged facts in issue and documentary and testimonial evidence in support, including expert testimony. We have the time to make our written submissions shorter. We have the time to think about whether or not we need witness testimony at all. We have the time to consider whether we need a hearing in a particular dispute, or whether the tribunal can adequately resolve it on the basis of documents only. These are all matters that deserve our attention as renewed focus can only help international arbitration.

Tribunals similarly have the gift of time to focus on what they require from counsel and parties and witnesses in order effectively to resolve the disputes that have been put to them.

This global pandemic has forced a radical rethink to how we conduct our business of arbitration. We have a choice. We can focus our attention on how to adopt and apply the same practices that we know from a pre-COVID-19 world, adapted to work in remote or hybrid proceedings. Or we can take the time to rethink what really is the best way to play this new instrument so as to offer the best possible results for our users.

And perhaps this experience might open our minds to an entire orchestra of options for resolving disputes through international arbitration. Eventually, we will be able to go back to the physical in-person hearings of our pre-COVID-19 world. But that does not mean that we need to dispose of our newly acquired remote hearing skills and opportunities. Or a hybrid. Or one of the myriad other instruments, including documents-only proceedings, hearings for oral submissions only, hearings for party representatives to convey messages to the tribunal, or any variation of the above.

If nothing else, let the 2020 remote proceedings experience remind us that users of
P 135 arbitration choose it for its flexibility. Our increasingly rigid approach to procedures, ● exchange of submissions, documents and witness statements followed by formulaic hearings is anything but flexible and by no means appropriate for every case. We can use the time we save by travelling less to focus more on making the arbitral process shorter and less complex, instead of searching for ways to emulate our pre-COVID-19 practices in a remote environment. Shorter submissions, fewer witnesses and experts and possibly even fewer documents will enable tribunals better to focus on what really matters in a dispute. It will also save parties enormously in time and cost, at a time of unprecedented financial turmoil. And that would be a rewarding rethink.

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7) For English commercial court practice, *see Report of the Review Body on Civil Justice* (1988) Cm 394 and *Practice Direction* [1955] 1 All E.R. 385. For international arbitration practice, *see IBA Rules on the Taking of Evidence* and UNCITRAL Model Law, Art. 24(1); UNCITRAL Rules (2010), Art. 15(2); ICC Rules, Art. 20(6); LCIA Rules, Art. 19(1); IBA Rules (2010), Arts 4(7) & 4(8); ICSID Rules, Art. 35.
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Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views

Gary Born; Anneliese Day; Hafez Virjee

One of the most visible impacts of the COVID-19 pandemic on international arbitration has been the digitalisation of interactions that previously took place in person: team meetings, conferences, and especially, hearings dealing with major procedural issues and/or the substance of the case. Although there has been an energetic debate about the merits of remote hearings, much of that discussion has been either theoretical or based on anecdotal accounts.

In order to empirically ascertain the extent of this phenomenon and form a preliminary view about whether it is likely to be permanent (even after the pandemic), we designed a detailed survey that ran from 10 June to 6 July 2020. We are grateful to the many institutions, organisations and participants in the arbitral hearing process that supported and promoted the survey and this study. (1)

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This chapter captures our preliminary findings, which can be summarised in three points:

- the prevalence of fully remote hearings in the second quarter of 2020 was over ten times greater than at any time previously;
- while the collective experience of fully remote hearings appears to be limited, users have a preference for in-person or semi-remote over fully remote hearings (at least so far as final hearings are concerned); and
- fully remote hearings have been integrated into the toolbox of arbitration practitioners and service providers and those with experience of remote hearings reported a greater willingness to propose them in the future, particularly for case management or interim hearings.

Before elaborating on these preliminary findings, we explain below certain key definitions relied upon in the survey and the profile of the survey respondents (1). We then set out findings on the quantitative aspects of our study (2), as well as users' qualitative feedback on their experiences with remote hearings (3). We conclude with some views on how the experience of fully remote hearings compares to the concerns one might have had about them beforehand (4). (2)

These are only preliminary findings. One or more publications will follow in due course setting out our further findings from the survey, to help inform how we adapt and respond as a community to these uncertain times. Notably, one trend we have seen emerging both in our practices and through the survey which may be here to stay is the increased conduct of case management type hearings in a fully remote manner, whereas previously these were typically conducted by phone or in person.

1 DEFINITIONS AND PROFILES OF SURVEY RESPONDENTS

There has been a certain amount of semantic confusion over the past few months about hearings, which these questions illustrate: does an in-person hearing necessarily imply that everyone is physically present? If everyone is connecting remotely, is that a virtual or an online hearing?

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As ably elucidated by Professor Maxi Scherer, (3) a '**remote hearing**' is one 'conducted using [videoconference or other] technology to simultaneously connect participants from two or more locations'. This definition would also include a telephone hearing. A remote hearing is '**semi-remote**' if it 'use[s] one main venue, and one or several remote venues'. It is '**fully remote**' if 'all participants are in different locations, with no existing main hearing venue'.

In addition, '**in-person hearings**' for the purposes of this study mean hearings taking place with all participants physically present, and '**hearings**', whether in part or full, refer to arbitration hearings dealing with major procedural issues (4) and/or the merits of the case, i.e. to the exclusion of case management conferences and minor procedural meetings.

We identified four key time periods for our study: pre-15 March 2020; 15 March-30 June 2020; 1 July -31 December 2020; and 1 January 2021 onwards. COVID-19 was characterised as a pandemic by the WHO on Wednesday, 11 March 2020, (5) and travel restrictions and confinement measures were imposed by governments around the globe from about mid-March onwards. (6) Up until mid-March, the prevalent sentiment was still that hearings might go ahead in person, possibly at postponed dates. (7) It was only from mid-April onwards, when it became clear that the pandemic would not dissipate easily and that confinement measures were likely to continue, that fully remote hearings became far more prevalent, at least based on anecdotal accounts. (8) April-May 2020 saw a significant production of guidance, checklists, protocols and draft orders on remote hearings, and May-June 2020 a multiplication of experience sharing webinars and similar

publications. (9) The day 30 June 2020 therefore seemed a natural cut-off for the transition period undergone by the international arbitration community, which fell neatly at the midpoint for the year.

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The survey was considered by 201 unique respondents. (10) Respondents came from forty-three different jurisdictions, covering six continents. (11)

Finally, respondents were asked to identify in what capacity they were typically involved in arbitration hearings. We define '**Participants**' to refer to participants at hearings and related parties, namely arbitrators and tribunal secretaries, counsel and counsel teams, in-house counsel and experts. (12) Conversely, '**Providers**' are taken to refer to the providers of arbitration hearing services, namely hearing centres, technology providers and arbitral institutions. Of the 106 actual respondents, ninety-two were Participants (87%) and fourteen Providers (13%).

2 A SPIKE IN FULLY REMOTE HEARINGS

The first question we wanted to consider was whether there had been a non-negligible variation (increase or decrease) in the number of fully remote hearings before and after 15 March 2020. Our findings confirm anecdotal accounts that there was a significant increase in such hearings after 15 March 2020. This is made clear by Figure 7.1.

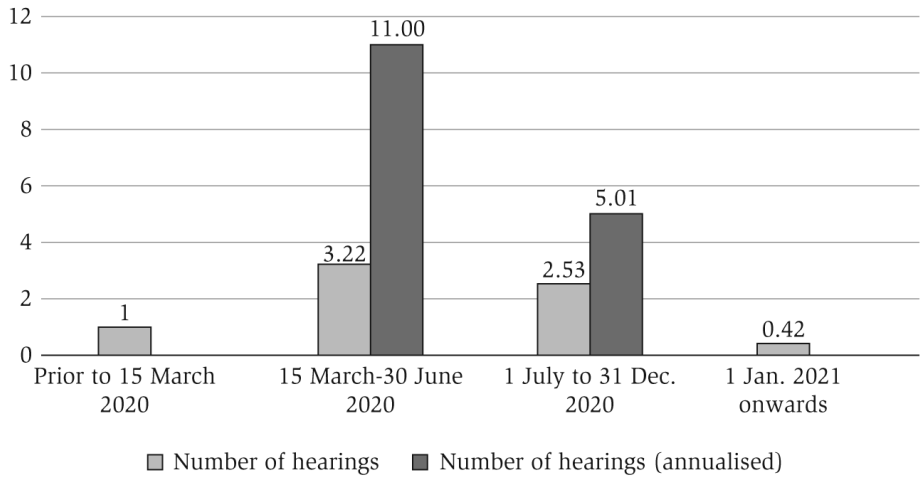

Figure 7.1 Number of Fully Remote Hearings Compared

P 141 For the purposes of this analysis, the number of fully remote hearings that took place prior to 15 March 2020 was taken to represent '1', and the number of fully remote hearings in subsequent periods was adjusted accordingly so that they could be compared easily with that baseline. (13) Respondents indicated that, in the three and a half months between 15 March and 30 June 2020, over three times more fully remote hearings took place or were scheduled to take place (14) than in the open-ended preceding period. On an annualised basis, (15) fully remote hearings were eleven times more common after 15 March 2020 than they had been at any time previously.

The reported increase was much more significant for Providers than for Participants: x10 vs. x2.3 respectively for the period 15 March-30 June 2020, and x7.9 vs. x1.9 respectively for the period 1 July-31 December 2020. This is likely due to the fact that Providers are involved in many more cases at any one time than are Participants, and therefore the effects of any variation are magnified.

As might have been expected, the increase appears to have resulted from in-person or semi-remote hearings converting to fully remote ones, rather than from a sudden shift in hearing scheduling practices. For fully remote hearings that took place prior to 15 March 2020, Participants stated that 85% of them had originally been scheduled that way, (16) meaning that only 15% of these had been changed from in-person or semi-remote hearings. Conversely, for the period 15 March-30 June 2020, only 19% fully remote hearings had originally been scheduled that way prior to 15 March 2020, meaning that some 81% hearings had previously been intended to be held in person or semi-remotely. Of these, it appears that most were not held at their original dates, but at postponed dates. (17) Our understanding is that this was probably more so the case in the second quarter of 2020 when the uncertainty surrounding the pandemic was at its highest, than for hearings scheduled to take place in the second half of the year.

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Figures 7.2 and 7.3 provide additional insight into the impact of the pandemic.

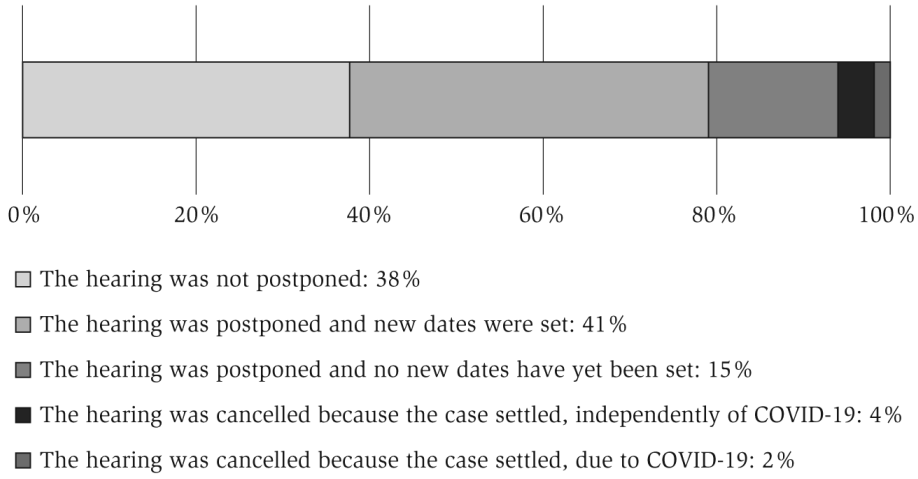

Figure 7.2 Since 15 March 2020, Hearing Dates in Flux

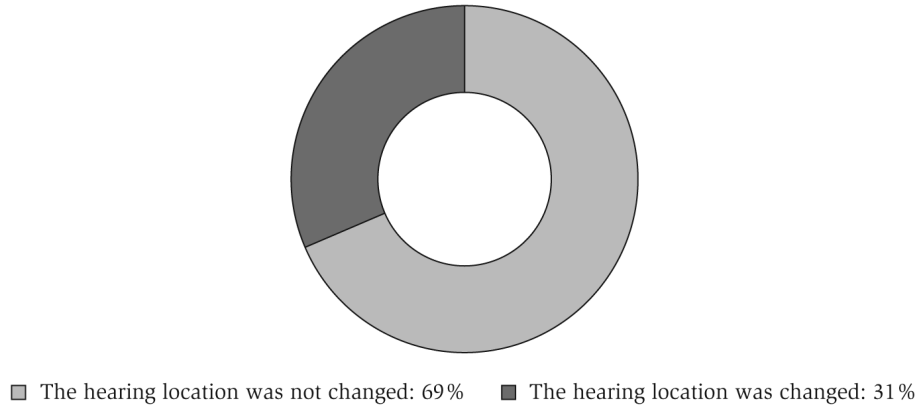

Figure 7.3 Since 15 March 2020, Hearing Locations in Flux

The above leads to the following conclusions: as of mid-2020, the pandemic appeared to have: (i) impacted the dates for 58% of all arbitration hearings, (18) (ii) caused a change of location for close to a third of all arbitration hearings, and (iii) resulted in a de facto
P 143 suspension (without a deadline) of some 15% of all arbitrations ● that were about to go into a hearing. It is clear from this data that the pandemic has caused significant upheaval to the conduct of arbitrations.

This has been true for Participants to varying degrees across the globe. In Asia-Pacific, which was the region first affected by the pandemic, hearing dates were maintained in only 22% arbitrations, with some 60% being postponed to new dates and 15% being postponed with no new dates set. Similar figures were seen for India, which might be linked to the importance of Singapore as a place for arbitrations involving Indian parties. (19) By contrast, Participants in Europe and North America reported having maintained their hearing dates in 40%-50% of their cases and set postponed new dates in about 40% of their cases, with less than 10% of cases postponed without new hearing dates having been set. The data for Central and South America was similar to that of Asia-Pacific. It also appears that, in sub-Saharan Africa, hearings were postponed most frequently without new dates being set, although the data was too limited to quantify the phenomenon with any certainty.

Respondents indicated that post-15 March 2020, they still had some 350 hearings scheduled to take place, or that had taken place, in person or semi-remotely. In particular, a total of twenty-seven in-person hearings were reported by Participants for the period 15 March-30 June 2020; over half of these took place in Europe, and close to a quarter in North America.

Figure 7.4 places these in-person hearings in perspective, comparing them to the number of fully remote hearings. (20)

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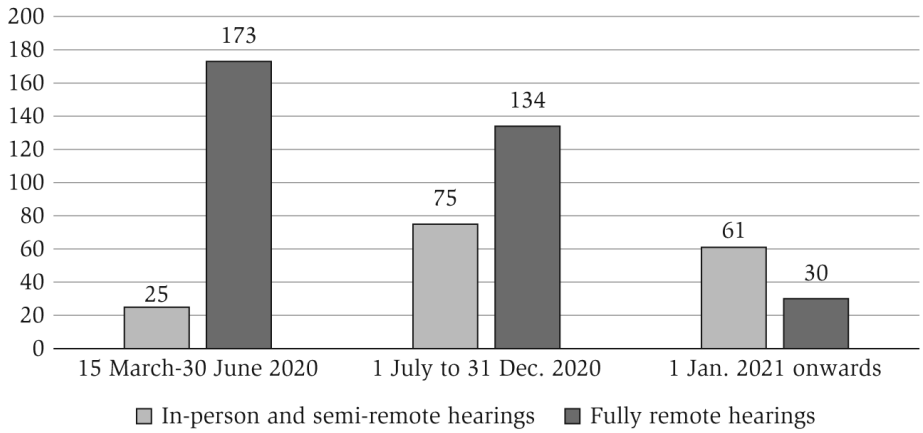

Figure 7.4 In-Person Hearing Trends for Participants with Experience of Fully Remote Hearings

While it is difficult to read too much into the above data without details of when these hearings were scheduled and whether all or only some of the Participants in each case had prior experience of a fully remote hearing at the time of scheduling, the data does suggest that in-person hearings continued to be viewed as the norm. In other words, the underlying assumption by Participants is that fully remote hearings would be the exception rather than the norm in the future. The qualitative aspects of our survey, which are discussed below, provide further confirmation of this assumption.

3 A PREFERENCE FOR IN-PERSON HEARINGS

The second question explored by our survey was how users' experience of fully remote hearings compared with that of in-person and semi-remote hearings.

Seventy-four per cent of the Participants reported having already participated in a fully remote hearing as at the time of filling out the survey. Of the Participants who reported having already participated in a fully remote hearing, 78% had no more than a week (i.e., five sitting days) of cumulated experience, and 49% had only one-two days of experience; only one Participant reported having more than twenty-one sitting days of relevant experience. Notwithstanding this limited collective experience, some clear preferences have emerged.

Respondents were asked to compare ('less good', 'same', 'better') the different types of hearings in relation to nine defining features of hearings: six related to the examination of experts and witnesses, one to advocacy, and two to the understanding of the case from the tribunal's perspective. While a majority of responses placed fully remote hearings on a par with in-person or semi-remote hearings, at least in some respects, overall, respondents considered fully remote hearings to be less effective than in-person or semi-remote hearings, as shown in Figures 7.5 and 7.6.

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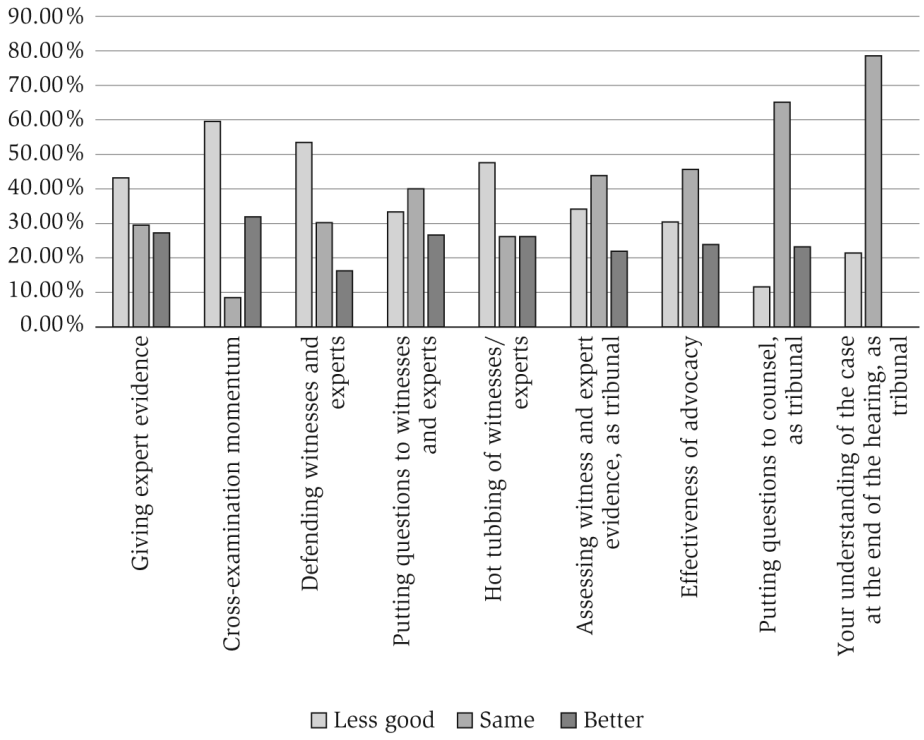

Figure 7.5 The Experience of Fully Remote Hearings Compared to In-Person Hearings

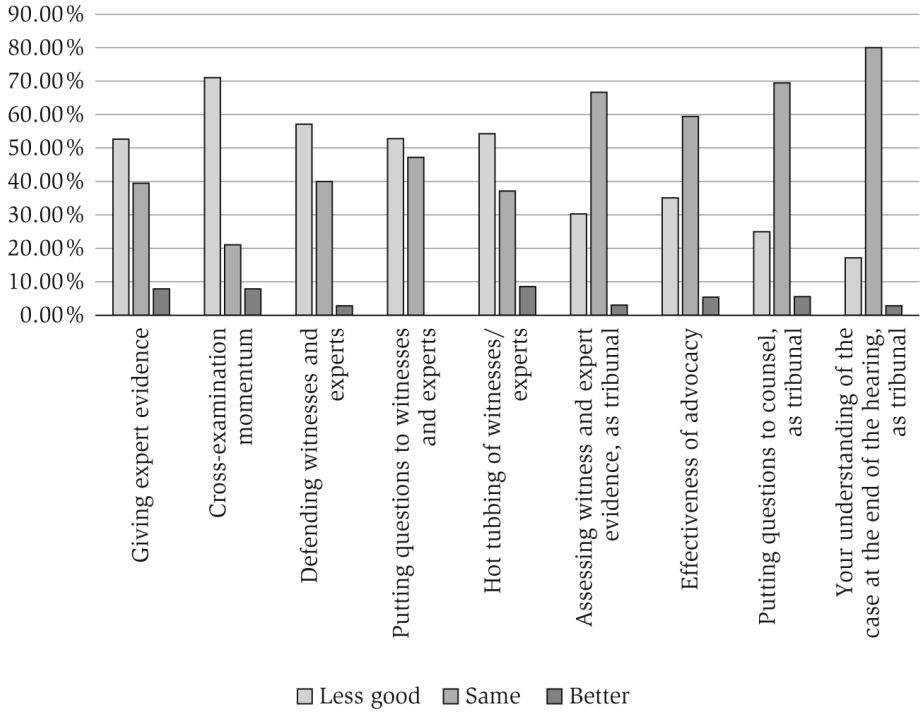

Figure 7.6 The Experience of Fully Remote Hearings Compared to Semi-remote Hearings

P 146

With respect to the examination of experts and witnesses, fully remote hearings were consistently rated by respondents as being less good than in-person and semi-remote hearings, whether this related to giving expert evidence, cross-examination momentum, defending a witness or expert, putting questions to witnesses and experts (as counsel or tribunal), hot tubbing/conferencing of witnesses and experts, or the tribunal assessing the evidence of witnesses and experts. Similarly, fully remote hearings were deemed to be less conducive to effective advocacy than in-person or semi-remote hearings. Finally, regarding the tribunal's understanding of the case, a majority of respondents considered it to be the same in all types of hearings, even if overall it was also rated as being less good in a fully remote hearing than in the other types of hearings.

The above should be qualified in two respects: (i) fully remote hearings were seen as better than in-person hearings for tribunals to put questions to counsel; and (ii) leaving aside the aggregate overall preferences of all respondents, a majority of respondents considered that fully remote hearings and in-person hearings were the same when it

came to assessing the evidence of witnesses and experts, the effectiveness of advocacy, putting questions to counsel, and tribunals' understanding of the case.

We next sought to see how the preferences of different types of respondents varied and noted that no in-house counsel or third-party funder had answered these specific questions. As may be seen from Figures 7.7, 7.8 and 7.9, (21) Providers appear to be the most enthusiastic about fully remote hearings and experts the least enthusiastic; as for counsel and arbitrators, they took the most even view of how these different types of hearings compared. In the end, however, and as noted above, none of the respondents preferred fully remote hearings over the other types of hearings.

P 147

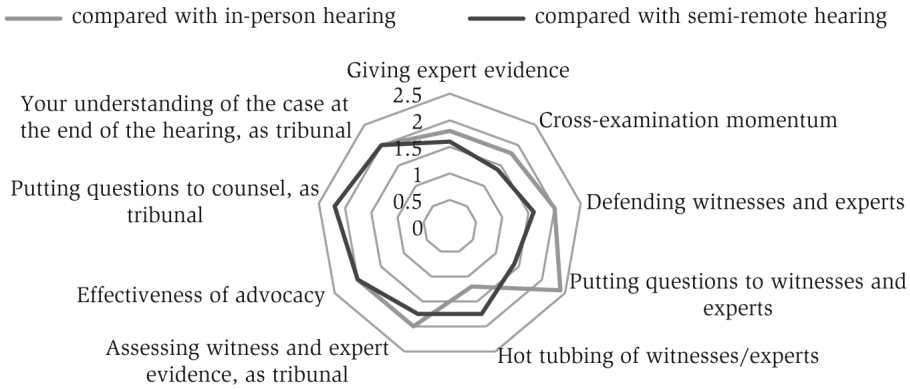

Figure 7.7 Providers' Experience of Fully Remote Hearings

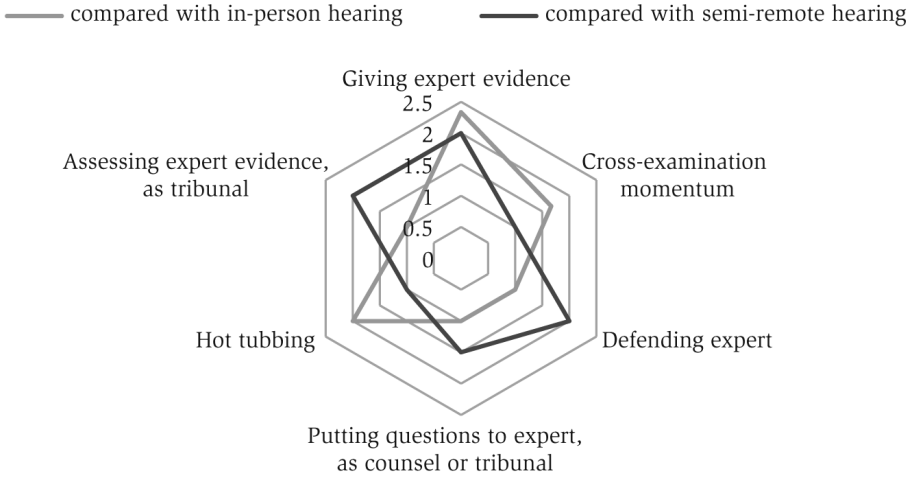

Figure 7.8 Experts' Experience of Fully Remote Hearings

P 148

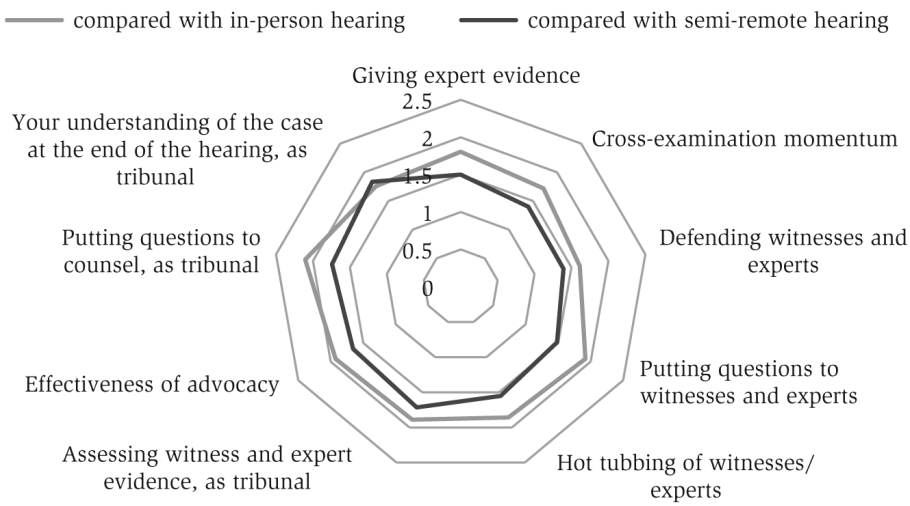

Figure 7.9 Counsel and Tribunals' Experience of Fully Remote Hearings

From the above, it appears that Providers see the most value in fully remote hearings for putting questions to witnesses and experts, and the least for hot tubbing. In their comments, they further noted a preference for fully remote hearings in document-heavy cases. One leading institution further commented as follows:

> Remote hearings seem to push Tribunals to put more effort into managing the hearing and to push parties to be more respectful of the organization of the hearing. It has been our experience that parties tend to wait and listen more, and Tribunals have a better chance of asking questions. Similarly, witnesses and experts are seemingly less on the spot, and in being more relaxed, are sometimes [clearer] in their testimony.

As for experts, only a few respondents answered these specific questions, which limits the weight of the following findings. Experts preferred fully remote hearings for giving evidence and, relatedly, considered that fully remote hearings made it harder for counsel to cross-examine them or, as one expert put it, 'remote hearings give too much of a possibility to dodge questioning or faking a technical issue'. But this reduced control by counsel over the examination of witnesses also reflected in a perceived reduced ability for counsel to 'defend' experts, whether in terms of raising objections or conducting a redirect examination. On hot tubbing, experts considered fully remote hearings to provide a similar experience to in-person hearings, but a decidedly less satisfactory one than for semi-remote hearings, which may be due to taking the vantage point of being the expert in the room during an expert conferencing session where the other expert is connected remotely. Finally, and crucially, experts considered fully remote hearings as detrimental overall to tribunal's assessment of their evidence.

Turning to counsel and arbitrators, only 14% of their ratings expressed a positive preference for fully remote hearings, with all other feedback being neutral ('as good as') (45%) or negative ('less good') (41%). Control over the examination of experts ● and witnesses, i.e. cross-examination and defence, was the aspect for which fully remote hearings received the poorest ratings. The most recurring comment in this regard (50%) was the difficulty in reading non-verbal cues and body language during remote examinations, and oral submissions too, and the importance that respondents attached to this feedback and its immediacy.

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One respondent also noted that 'it is more difficult to interrupt opposing counsel during their cross-examination in a remote-hearing and to interact with the witnesses and the arbitral tribunal. However, I don't believe that it will materially affect the overall efficiency of the hearing and the assessment of the evidence by the arbitrators'. Further, some leading arbitrators stated their appreciation for the 'close-up'/'active speaker' views in fully remote hearings, albeit this was also noted as a challenge by other respondents when it came to witness or expert conferencing.

Other respondents commented that fully remote hearings made it much harder to interact within the counsel team (including the client), as well as with the other side, whether in relation to agreeing small procedural issues or discussing the settlement of the case. In addition, respondents flagged the risk of attention span issues in fully remote hearings, and one respondent further noted that '[i]f there is translation required for examination, it quadruples the time required and makes it a Benny Hill comedy of errors'. Nonetheless, respondents were also asked about whether they would draw a distinction between oral submissions on legal issues and oral submissions on factual issues in comparing different types of hearings, and the vast majority (86%) considered that there was none. For the minority that drew a distinction, their main point was that '[l]egal issues are more technical and less emotional'.

Finally, 26% of arbitrators and counsel considered that fully remote hearings did not allow tribunals to achieve as good an understanding of the case at the end of the hearing than in other forms of hearings. This should be seen as a warning flag, irrespective of the fact that 72% arbitrators and counsel considered that the type of hearing had no impact on tribunals' understanding of the case. Counsel and arbitrators will need to consider carefully in each case whether fully remote hearings are suitable.

4 A NEW SOLUTION FOR TIME- AND COST-EFFICIENCY

The survey has confirmed the prevalence of fully remote hearings in the second quarter of 2020, despite a general lack of experience prior to the pandemic. The combination of these two points underlines the resilience and adaptability of the arbitration community, as also evidenced by the amount of knowledge-sharing and experience feedback publications and webinars released in record time over the past few months.

One of the questions put to respondents in the survey was intended to identify their greatest concerns prior to participating in their first fully remote hearing, whether that had materialised and how they looked upon those concerns now. (22) Two-thirds of the answers focused on technology issues, technology proficiency and internet ● stability. By and large, these issues did not materialise during the fully remote hearings of those responding to the survey and, while this is not to say that they can now be entirely ignored, it appears that there is a lot more confidence in this type of hearing than there was previously.

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Does that mean that fully remote hearings are here to stay? We saw two consistent trends: (i) Participants with prior experience of fully remote hearings have more in-person hearings scheduled for 2021 than they do fully remote hearings; and (ii) Participants have a preference for in-person (or semi-remote) hearings over fully remote hearings. As will

be seen from a closer examination of the survey results, however, the true picture is more nuanced: smaller value cases and/or cases with fewer witnesses and experts to examine are more likely to be conducted as fully or semi-remote hearings, not least given the benefits that can be achieved in terms of time and cost; and, indeed, survey respondents, particularly arbitrators, reported a much greater willingness to propose fully remote hearings for the future than they had previously.

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References

1) Particular thanks are due to Prof. Maxi Scherer and Mihaela Apostol, Jonathan Lim and Myriam Khedair. Supporting institutions and organisations: ADGM Arbitration Centre, AmChamLab, American Chamber of Commerce of Peru, ArbIt (Italian Forum for Arbitration and ADR), ArbitralWomen, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration & Mediation Court of the Caribbean (AMCC), Arbitrator Intelligence, Asia-Pacific Forum for International Arbitration (AFIA), Asian International Arbitration Centre (AIAC), Associação Portuguesa de Arbitragem (APA) 40, Bali International Arbitration and Mediation Center (BIAMC), Beihai Asia International Arbitration Centre (BAIAC), Brazil Very Young Arbitration Practitioners (BRVYAP), BVI International Arbitration Centre, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Campaign for Greener Arbitrations, Careers in Arbitration (CiA), Center for International Investment and Commercial Arbitration (CIICA), Centro Internacional de Arbitraje de Madrid (CIAM), CIS Arbitration Forum, Club Español del Arbitraje (CEA), Comitê Brasileiro de Arbitragem (CBAr), Comité français de l'arbitrage (CFA) 40, CPR Institute, Delos Dispute Resolution, Deutsche Institution für Schiedsgerichtsbarkeit (DIS) 40, DIFC-LCIA Arbitration Centre, IBA Arb 40, the International Arbitration Centre (IAC), International Centre for Settlement of Investment Disputes (ICSID), Lagos Chamber of Commerce International Arbitration Centre (LACIAC), Lagos Court Of Arbitration, LONDAP, Konfederacja Lewiatan, Madrid Very Young Arbitration Practitioners (MAD VYAP), New York International Arbitration Center (NYIAC), Paris Very Young Arbitration Practitioners (PVYAP), the Russian Arbitration Association (RAA), Silicon Valley Arbitration & Mediation Center (SVAMC), Tales of The Tribunal (ToT), Tashkent International Arbitration Centre (TIAC), Ukrainian Arbitration Association (UAA), Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Vietnam International Commercial Mediation Center (VICMC), Vilnius Court of Commercial Arbitration, Virtual Arbitration, Vis Moot Alumni Association, Young Arbitration Practitioners Norway (YAPN), Young Canadian Arbitration Practitioners (YCAP), and Young ITA (Institute for Transnational Arbitration), with additional thanks to Chiann Bao, Dr Kabir Duggal and Amanda Lee, and to Elijah Putilin and Baria Ahmed.

2) We note that all of our findings concern the actions of parties and arbitral tribunals, rather than national courts. *See* Gary Born, *The Principle of Judicial Non-interference in International Arbitration Proceedings*, 2008 U. Pa. J. Int'l L. 30, 999.

3) Prof. Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 2020 J. Intl. Arb. 37(4), section 2.

4) *Id.*, section 1. We understand 'major procedural issues' in this context to refer, for instance, to questions of jurisdiction or preliminary phases addressing issues such as the admissibility of evidence. *See* Gary Born, *International Commercial Arbitration* §15.08[P]-[R] (3d ed. 2020).

5) *See* World Health Organisation (WHO), *Rolling Updates on Coronavirus Disease (COVID-19)*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (accessed 11 Jul. 2020).

6) *See* e.g. Global Arbitration Review (GAR), *Coronavirus Disruption Continues but Guidance on Hand*, https://globalarbitrationreview.com/article/1216258/coronavirus-disruption-continues-but-guidance-on... (13 Mar. 2020).

7) It was in this context that Delos Dispute Resolution produced a checklist on holding arbitration and mediation hearings in times of COVID-19, which was first published on 12 Mar. 2020.

8) This was how the leading remote transcription, electronic presentation of evidence and electronic bundle providers described their experience to the authors, via Justin Kaplan, Director, LONDAP (the Delos hearing centre based out of London).

9) *See* Delos Dispute Resolution, *Resources on Holding Remote or Virtual Arbitration and Mediation Hearings*, https://delosdr.org/index.php/2020/05/12/resources-on-virtual-hearings/, first published on 12 May 2020 and updated regularly since.

10) Of these, 106 answered at least one question. The only mandatory questions of the survey were the initial ones requesting respondents to indicate their names, contact details and typical role at an arbitration hearing.

11) Argentina, Australia, Austria, Barbados, Botswana, Brazil, British Virgin Islands (BVI), Canada, Denmark, Egypt, France, Germany, Guatemala, Hong Kong, Hungary, India, Italy, Kazakhstan, Kenya, Kyrgyzstan, Lithuania, Malaysia, Mexico, The Netherlands, Nigeria, Pakistan, Peru, The Philippines, Portugal, PRC, Romania, Russia, Singapore, Spain, Sweden, Switzerland, UAE, UK, Ukraine, USA, Uzbekistan, Vietnam, and Zimbabwe.

12) The survey also gave respondents the possibility to identify as third-party funders, but the only respondent that did so did not answer any questions of the survey.

13) This chart is based on respondents' answers to Question 4 of the survey: 'How many full remote hearings have you done and do you have scheduled?', broken down into the four time periods shown on the chart. Respondents could choose a number between zero and twenty, or '21+'. For the purposes of analysing the survey results, one correction was made to the data for this question and similar questions: we approximated answers stating '21+' to twenty-five; we consider this approximation to be conservative, given that the respondents who indicated '21+' were mainly the Providers.

14) The survey was launched on 6 Jun. 2020, i.e. prior to the end of the 30 Jun. 2020 time period.

15) In other words, if the three and a half months from 15 Mar. 2020 to 30 Jun. 2020 were taken to be representative of a full year. As will be apparent, it is not possible to annualise the time periods prior to 15 Mar. 2020 or from 1 Jan. 2021 onwards.

16) More specifically, respondents were asked at Question 5 of the survey to state: 'How many of your above fully remote hearings [i.e. those indicated in response to Question 4, above, at fn. 12] were originally scheduled that way prior to 15 March 2020?', broken down into the same time periods as for Question 4. We then compared the responses to Questions 4 and 5 for the first two time periods, namely pre-15 Mar. 2020 and 15 Mar. 2020-30 Jun. 2020, only. In doing so, we made two assumptions: (i) for hearings scheduled to take place subsequently to 30 Jun. 2020, there was a risk that they had not been so scheduled prior to 15 Mar. 2020 and therefore not be responsive to Question 5, while being responsive to Question 4; and (ii) where a respondent had completed Question 4 but not answered Question 5 at all, this was taken to mean that the values for Question 5 were all nil.

17) More specifically, Question 6 asked respondents to indicate how many of their fully remote hearings scheduled to take place after 15 Mar. 2020 corresponded to different statements. Sixty-one per cent indicated that their hearings were originally due to take place in person or semi-remotely and were changed to fully remote at postponed dates, while the remaining 39% indicated that their hearings were originally due to take place in person or semi-remotely and were changed to fully remote at the same dates.

18) The remaining 42% consist of hearings for which the dates were not postponed and hearings which were cancelled due to the case settling for reasons independent of the pandemic.

19) In 2015-2017, Indian parties were the greatest users of the Singapore International Arbitration Centre (SIAC), and the second largest user group in 2018, according to the SIAC Annual Reports.

20) For the purposes of this figure, we focused on Participants who had prior experience of fully remote hearings at the time of filling out the survey. This was done to get a better sense of how the prior experience might influence future choices between in-person and fully remote hearings. It was possible to determine which Participants had such prior experience on the basis of Question 9 of the survey, which asked respondents to indicate 'What is the total number of fully remote hearing days you have participated in during the following time periods as of the time of filling out this form?'

21) One of the benefits of this type of figure is to be able to visualise respondents' relative preference for fully remote hearings: the larger the area delineated by the coloured lines, the greater the preference for fully remote hearings. These figures were prepared by assigning a weight of 1 to 'less good' ratings, 2 to 'same' ratings and 3 to 'better' ratings. The number of such weighted ratings was counted for each key feature of hearings and averaged out. As a result, where a data point on the figure is at 2, it means that overall respondents considered the experience of fully remote hearings to be the same; where it is beyond 2, that means they considered the experience of fully remote hearings to be better; and where it is below 2, which is mostly the case in these figures, it means that they considered the experience of fully remote hearings to be less good.

22) Question 31 of the survey asked respondents the following questions: 'Prior to participating in your first fully remote hearing: What were your greatest concerns? Did they materialise? How do you look on them now?'

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Chapter 8: E-Signature of Arbitral Awards

Erik Schäfer

1 INTRODUCTION

When this chapter was written in July 2020 the world was still grappling with the COVID-19 pandemic and its consequences. Earlier in the year, the pandemic threatened to grind to a halt arbitration proceedings due to travel restrictions and lockdowns imposed in many countries, confining stakeholders in the proceedings to their (home) offices. This prospect was unbearable to many since it threatened revenues, and was likely to cause unacceptable delays in the resolution of many disputes. This resulted in the widespread adoption of online tools – mainly videoconferencing – as a substitute for physical in-person meetings and hearings. These tools had been available for more than a decade but were not used extensively – purportedly due to assumed legal obstacles of a procedural nature. Suddenly these obstacles seemed to have vanished and solutions to mitigate potential and current shortcomings were quickly being put in place. Notwithstanding these changes, this has not seemed to have prompted a more fundamental discussion about the future of such tools and how they are to be used in the foreseeable future, in particular their use in an increasingly digitized legal environment worldwide. It is time to fill this gap.

The digital signature of arbitral awards is only one piece of the puzzle. Before one dives into the specific legal and technical aspects of electronically signed awards, one needs to shed some light on the context of digital signatures as such.

Because each arbitration typically consists of a specifically constituted arbitral tribunal for specific parties, the focus on all attempts of somehow facilitating or standardizing the
P 152 approach to the intra-procedural use of digital technologies has been ● on the requirements in the particular case and not more general aspects. (1) Therefore, these attempts have not yet addressed the broader question of whether there is a need to conceive a virtual infrastructure ('virtual arbitration highway' or 'digital arbitration biotope') that could simplify certain aspects for the numerous recurring users of arbitration. The general access to such facility could be regulated through a transnational private body open to all who abide by the body's rules of use and technical specifications. Technical access to the facility would require a digital identity of individual users, requiring the usual username, password, and, if applicable, digital certificates employed for cryptology purposes or an access code received via another channel than the internet. This could shield the virtual facility from outside interference of undesired third parties. Of course, such system would require an identity verification process when a user registers for the first time. To achieve these goals a virtual private network (VPN) (2) could be the means of choice since all admitted users would need to implement technical specifications for proper use and accept the terms of use. Such terms would only contain a few basic rules that are applicable for all activities within the facility, such as rules for valid transmissions and valid binding declarations, including the signature of legal instruments. However, the contractual nature of these rules may not per se subtract the virtual facility from mandatory rules that apply in a specific arbitration and which may come to bearing especially when an award is challenged or enforced. This chapter will focus, in an exemplary way, on these aspects.

Another relevant aspect resulting from the need for a logical interface of the virtual facility with the real world is technical accessibility. National courts and enforcement agencies need to be enabled and equipped by the state to handle digitized documents that were created within the virtual facility. The same issues arise if parties in a specific arbitration agree that the award shall be made in a digital format only, independent of
P 153 the presence of a virtual facility. The difference, however, would be ● that the virtual facility would hold a certain global clout, which would be based on the trust awarded to the body that runs it and based on its broad userbase.

This will be exemplified below when dealing with digitally signed awards.

2 LEGAL SIGNATURE REQUIREMENTS FOR AWARDS: BASICS

Basically, this would be a non-issue, if awards that are made orally (3) would be binding and enforceable. Any kind of document, electronic or on paper, would then simply be evidence concerning the oral award. Form requirements would not matter.

However, all *lex arbitri* (i.e., the arbitration law at the seat of arbitration) known to the author contain formal requirements along the lines of Article 31 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which provides in relevant part:

> (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. ... (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

In respect to the recognition and enforcement stage, Article 35 of the Model Law provides:

> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. ...

The Explanatory Note by the UNCITRAL Secretariat does not address the issue of what the formal requirements for a signature are. Manifestly, the text is drawn up on the concept that the award and the (original) copies thereof must exist in paper format with physical signatures of the arbitrator(s) affixed thereto. Notwithstanding this, if legal rules are in force at the place of arbitration that, subject to certain requirements, establish the equivalence of a digital signature to a physical signature for the document category *arbitral award* and such requirements are met, the award would be considered as 'signed' by the arbitrator(s).

At the transnational recognition and enforcement stage, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), in Article IV 1, provides:

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof. ...

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Again, this rule requires under one alternative supplying one original copy that in addition needs to be duly authenticated or in a second alternative a copy of the original that is duly certified. The term 'authentication' refers to an attestation certification that the signature(s) on the original award and the text as such are authentic (e.g., were executed by the persons who were sitting as arbitrators in the matter decided by the award). The term 'duly certified copy' is an attestation that the copy is a true copy. Both attestations require a signature or equivalent seal or sign legally attributed to the confirmor. The term 'duly', however, is not defined in the Convention. The formal requirements with regard to: (i) who may legalize the attestation; and (ii) according to which formal requirements are governed by the legal rules applied by the court recognizing or enforcing the award. Depending on its local law, such court may apply its own formal rules or those of the seat of the arbitration. (4) Therefore, these requirements may vary.

Based on this abbreviated general overview we can reach the intermediate conclusion that there is a diversity of formal requirements, depending on the country where the award is made or where recognition or enforcement is being requested. Accordingly, we need to establish for each individual case whether the physical signatures may validly be replaced by digital signatures, and if so, to which requirements such signatures should be subjected in order to be recognized as fully equivalent replacements of physical signatures.

3 DIGITAL SIGNATURES: BASICS

In the world of things, original signatures accompany only a limited number of original paper documents. The signature under an original award acts as a full endorsement of the authenticity and integrity of the content of the text at the time of signature and attests that this original was issued by the signee. The physical signature on a certified copy attests that it is a true copy. Because of the 'guaranteeing' function of the signature concerning the integrity and authenticity of a legalization or certification, formal requirements regarding the signature are strict. Often only a restricted category of persons (court clerks, notaries public, consular offices, etc.) are recognized as authorized signatories, and internationally a further signature, (5) for example, under an Apostille, (6) is required. Due to their public function these third parties are accorded a particularly high level of trust by the legislators.

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Electronically signed arbitral awards will need to fulfil the same functions as just described. This raises certain issues due to the technical nature of digital documents. Any award will be a digital file (7) consisting of metadata (8) and content in machine-readable format. As such, the file is composed of binary information that only displays its content to the human eye when processed on a computing device with a dedicated program for this kind of file format. The metadata does not only comprise necessary information concerning such things as pagination, formatting, typesetting but also comprise supplementary attributes such as creation date, right to display and alter, and version history. Files are ubiquitous in that they are and can be copied while being created and later distributed, and in that it is virtually impossible to distinguish between the first copy and any subsequent copies if no changes are perceivable. With the right tools it is not difficult to subsequently alter metadata or content, unless certain technical precautions are undertaken. Without these precautions anybody can type in and record any name in the file to be displayed or insert a digital bitmap (9) file copy of a physical

signature that was scanned from an original on paper. This means that already from a technical viewpoint electronic files deserve little trust unless delivered in person by the original author and they were recorded on a storage medium that technically does not allow for changes.

Accordingly, to be trustworthy, a digital award needs to include information which makes sure that it cannot be altered after it is created or which easily and securely records that no changes have been made, and in the case of which, it would no longer be an authentic award. This is presently best achieved by using a cryptographic hash function (10) and by using an advanced qualified electronic signature. (11)

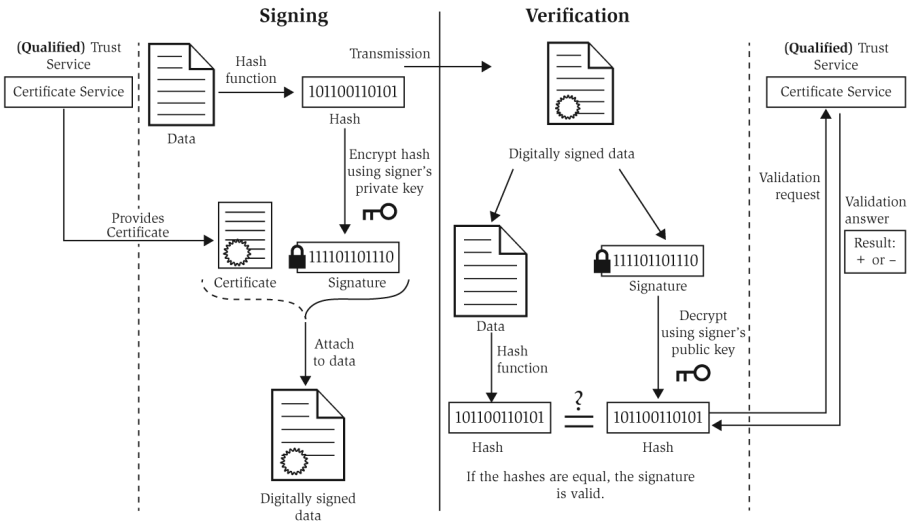
Wikipedia defines Electronic Signatures as being: (12)

> data in electronic form, which is logically associated with other data in electronic form and which is used by the signatory to sign. This type of signature provides the same legal standing as a handwritten signature as long as it adheres to the requirements of the specific regulation under which it was created (e.g., eIDAS in the European Union, NIST-DSS in the USA or ZertES in Switzerland). ... Electronic signatures are a legal concept distinct from digital signatures, a cryptographic mechanism often used to implement electronic signatures. While an electronic signature can be as simple as a name entered in an electronic document, digital signatures are increasingly used in e-
> P 156 commerce and in regulatory filings to ● implement electronic signatures in a cryptographically protected way. Standardization agencies like NIST or ETSI provide standards for their implementation (e.g., NIST-DSS, XAdES or PAdES). (13)

The implementation end of electronic signatures is digital signatures, which Wikipedia defines as:

> cryptographic implementations of electronic signatures used as a proof of authenticity, data integrity and non-repudiation of communications conducted over the Internet. When implemented in compliance to digital signature standards, digital signing should offer end-to-end privacy with the signing process being user-friendly and secure. Digital signatures are generated and verified through standardized frameworks such as the Digital Signature Algorithm (DSA) by NIST or in compliance to the XAdES, PAdES or CAdES standards, specified by the ETSI. (14)

The following logical scheme exemplifies how these signatures work:



Source: Author's own.

As may be seen above, the technology used is *public-key cryptography* or *asymmetric cryptography*. (15) A person using this technology will privately 'own' a password or token-secured key pair (the keys are elaborate digital data in a dedicated file). One key is private and should not be shared, the second key is public. Anybody may encrypt a message using the receiver's public key, but that encrypted message can only be decrypted with the receiver's private key. For a digital signature the signee will use
P 157 her/his private key. Public keys may be directly exchanged or uploaded to ● dedicated public key servers. Because anybody can easily obtain the tools (16) for generating such keys under any identity, this can establish trust on a personal level but not the trustworthiness required for awards. What is needed is a trustworthy public key infrastructure (17) (PKI) that requires the owners of keys to undergo an identity verification to prove that they are who they claim to be. Wikipedia defines such infrastructure as:

> a set of roles, policies, hardware, software and procedures needed to create, manage, distribute, use, store and revoke digital certificates and manage public-key encryption. The purpose of a PKI is to facilitate the secure electronic transfer of information for a range of network activities. ... (18)

The key owner is provided by a Certification Authority with a digital certificate for the key whose primary role is to digitally sign and publish the public key bound to a user. Key and digital certificate are 'tied' to the digital signature. When a key is used for signing, the dedicated software will connect with a dedicated (trust) server to check whether the used signature is identical to the signature issued to that user and also whether it is still valid, i.e. has not been revoked. From a technical perspective this type of technology and infrastructure is widely standardized and available for use. This technology enables the production and digital signature of digital documents that are authentic and can be attributed to a natural person as signee with a degree of certainty that is as trustworthy as any signed *original* paper document. This includes arbitral awards.

4 RECOGNITION OF DIGITALLY SIGNED AWARDS

Considering the above, and that a digitally signed award can provide the same level of credibility with regard to its authenticity and integrity as an original physically signed paper document, that the required technology has achieved a certain level of maturity and is available, there are no technological barriers for use, parties could freely agree to such use in their agreement to arbitrate, for example by reference to arbitration rules that allow for the issuing and electronic delivery of electronically signed digital awards. (19) However, seeing that international arbitration started to thrive as a means of dispute
P 158 resolution only after a more robust legal framework was created for the ● recognition and enforcement of arbitral awards, it is likely that the enforceability of digital arbitral awards will be a prerequisite for their acceptance.

A good starting point for our analysis is the hypothetical scenario of purely national arbitration proceedings, where the award is likely to be enforced in the same country where the arbitration has its seat.

If we take Germany as an example for this analytical approach, we can note that according to §1054(1) German Code of Civil Procedure (ZPO) the award must be issued in writing and be signed by the arbitrator(s). (20) Pursuant to §1055 ZPO (21) the award is equivalent to a final and binding national court judgment. Therefore, legal literature is of the view that requirements under §1054(1) ZPO (22) correspond to those for a national court judgment (§315 ZPO). In regard to court judgments, §130b ZPO (23) establishes that the handwritten signature under a judgment may be replaced by a qualified electronic signature. This requires that the judgment itself is in electronic format. Accordingly, electronically signed awards are valid under German law if the qualified electronic signature meets the legal requirements.

These requirements are enacted in Regulation (EU) No. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (24) (eIDAS) and in the supplemental German Act on Trusted Services (Vertrauensdienstgesetz). (25) These abstractly regulate the formal requirements for advanced (formerly: 'qualified') electronic signatures and their administration by admitted trustworthy service providers who operate the required infrastructure (PKI) under the oversight of regulatory bodies.

Article 25 eIDAS provides in relation to the legal effects of conformant electronic
P 159 signatures: ●

> 1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.
> 2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature. ... .
> 3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States. ... (26)

Article 4 eIDAS further provides that 'there shall be no restriction on the provision of trust services in the territory of a Member State by a trust service provider established in another Member State for reasons that fall within the fields covered by this Regulation' and that 'products and trust services that comply with this Regulation shall be permitted to circulate freely and to be recognized in the internal market'. This is further detailed in Article 6 eIDAS. (27)

If the eIDAS requirements are met, the advanced electronic signature of any arbitrator on an electronic award will be treated as being equivalent to a handwritten signature in Germany.

Article 14 eIDAS – International Aspects, *inter alia*, provides:

trust services provided by trust service providers established in a third country shall be recognized as legally equivalent to qualified trust services provided by qualified trust service providers established in the Union where the trust services originating from the third country are recognized under an agreement concluded between the Union and the third country in question or an international organization in accordance with Article 218 TFEU.

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Seeing this, one may note the door has been thrown open but is apparently still unused for regulated extra-EU (European Union) PKI systems and advanced electronic signatures issued by Trust Service Providers operating under other regulations.

The German example should be valid *mutatis mutandis* also for other EU countries since they are also bound by eIDAS. Notwithstanding this, the EU Member States may subject the use of electronic signatures in the public sphere to additional requirements if these are objective, transparent, proportionate, and non-discriminatory. This leaves a certain level of uncertainty. In cases where the Member States do not muster the benchmark test, because in the concerned Member State court judgments may not be rendered in digital format, that should prompt deeper investigation regarding the recognition and enforceability of digital arbitral awards.

It is interesting to note that from the intra-EU perspective the recognition of the validity of an advanced electronic signature depends on whether the electronic signature 'exists' under a trustworthy PKI operating under eIDAS since Article 25.3 eIDAS only requires that the advanced electronic signature be 'based on a qualified certificate issued in one Member State'. There is neither a requirement regarding the nationality of the 'owner' of the electronic signature nor a requirement regarding the place of signature.

Taking the analysis one step further, the question arises whether an eIDAS-conforming digital arbitral award, issued in a case having its seat in the EU, could be enforced under the New York Convention in a country that is not an EU Member State. (28) While the author cannot provide a comprehensive country-by-country analysis in this chapter, it is possible to develop the benchmark criteria, which are as follows:

(a) If according to the law of a country where enforcement or recognition is requested, the validity of a signature is determined by reference to the applicable law at the seat of arbitration, the advanced electronic signature should be recognized, unless this would be considered as being contrary to the public policy of that country (Article V(2)(b) of the New York Convention). This could occur if such country does not allow for valid digital signatures in general – for example, there is no legislation on digital signatures at all – or in the judicial domain and/or if the judiciary is not technically equipped or knowledgeable in dealing with electronic signatures.

(b) If, what is more likely, according to the law of a country where enforcement or recognition is requested, the validity of a signature is determined by reference to
P 161 the locally applicable law, (29) there are two options: (i) electronic signatures are not admitted in general or in the judicial context for lack of regulation or prohibition. Then the electronically signed award will be deemed to be non-existent; (ii) there is municipal law governing electronic signatures and the circumstances under which they equate physical signatures. In that case, the first determinative issue is the question of whether this law provides for the recognition of electronic signatures that are issued under foreign laws in different PKIs. Should this be the case, one would need to examine the factual (technical) requirements for such recognition by operation of the law and the compliance of the signature(s) at hand. Should the local electronic signature law not include requirements regarding the PKI and/or its authorized operation in the concerned country, but rather only address requirements regarding the technical features of the signature as such, one would only need to examine whether or not these requirements are met. (30) For example, a reading of the US Uniform Electronic Transactions Act (31) and the US Electronic Signatures in Global and National Commerce Act (32) seems to indicate that an advanced electronic signature conforming to eIDAS would qualify as being valid in the United States. This is also the case in China under the Electronic Signature Law of the People's Republic of China. (33)

Conversely, and taking the analysis a step further, we need to ask whether an electronically signed digital arbitral award would – for example –be recognized under the eIDAS regime if it was made under a signature issued in a PKI governed by US or Chinese law. As mentioned above, eIDAS has a more stringent approach requiring
P 162 registered and admitted Trust Service Providers who issue the signature certificates to the signees. The recognition (which would be technical and automated, i.e. work by operation of the law) of signatures issued under a non-EU PKI would require that certain equal standards are met and a treaty of mutual recognition made under Article 218 of the Treaty on the Functioning of the European Union (TFEU) is in place. (34)

One may conclude from the above that, from a regulatory perspective, electronic awards which are signed with advanced electronic signatures conforming to eIDAS should meet recognition and enforcement requirements within the EU and in many other countries. However, there are questions regarding the recognition and enforcement of awards that

have been electronically signed under a non-EU PKI.

There may be pragmatic workarounds. Trusted Service Providers operating in different PKIs that are governed by diverging rules may find means to cross certify the certificates they issue to signature owners in order to breach the frontier between legal regimes. Or the signees may obtain the required different certificates of several of these Trusted Service Providers and sign all of them.

5 NOTIFICATION OF DIGITALLY SIGNED AWARDS

The form of notification of any procedural document in arbitration is usually governed by the *lex arbitri*, which in most instances leaves room for agreed-upon institutional arbitration rules incorporated by reference into the arbitration agreement or established early during the proceedings under the direction of the arbitral tribunal. These rules increasingly stipulate for valid notifications by electronic means. (35) In practice, little is heard about legal challenges to the arbitral proceedings resulting from this procedure.

However, arbitral awards are – for obvious reasons – in practice exempted and delivered as printed and physically signed originals against acknowledgement of receipt using private services. The crucial point is the proof of receipt, which in a digital environment may not be reliable evidence in a court at the recognition and enforcement level.

With regard to electronic awards that are signed with an advanced electronic signature, the required proof of receipt could be obtained by physically sending a data carrier on which the award is stored by courier service or registered mail. This would be considered odd. It may be preferable to apply the electronic communication method applicable to the arbitral proceedings with the proviso that the recipient of the award is obliged to acknowledge receipt, preferably by electronically signing the notice of receipt. Only if
P 163 this acknowledgement is not issued could one issue the award stored on ● a data carrier that is physically sent as described. That there are also trusted technologies under eIDAS and other laws that allow for secure digital service of communications must be mentioned but will not be further explored. (36)

6 THEORY MEETS REALITY

At the time this chapter was finalized (August 2020), electronic awards that were signed with advanced electronic signatures were not issued in any reported number. (37) Rumours had it that some awards had been issued in PDF format with bitmap copies of the original handmade signatures on the physically existing award. Under such circumstances, there is no case law that would provide more certainty with regard to the views expressed herein. Because making and delivering hand-signed awards is an established procedure practitioners are familiar with, one could ask whether given this relative uncertainty there are sufficient reasons for *fixing what is not broken* even if COVID-19 caused short temporary disruptions in delivery. This can be argued.

The author, however, is of the view that in an increasingly digitized commercial environment where in many countries the courts embrace digital technologies also for their communications, digital awards that are signed with a valid electronic signature are the logical next step. This will meet a certain number of practical hurdles.

First, probably the majority of arbitration practitioners (including arbitrators) neither own an advanced digital signature nor have the required knowledge of the electronic tools or means for using them.

Second, in the context of international arbitration, the concern will be raised that the technology required for and used for electronic signatures puts parties and counsel from less technologically advanced countries into a disadvantaged position. This inequality of
P 164 arms or lack of fairness is often addressed in relation to information ● technology use in arbitral proceedings and, in particular, in respect to remote hearings. (38) In a way, this argument is patronizing and underestimates the qualifications, intelligence and openness of arbitration practitioners who may reside in places where high-speed internet access is not readily available. It should go without saying that arbitral institutions and tribunals are the guardians of the required level of fairness in the particular case, where this type of issue will need to be addressed. More importantly, the programs and tools required for using electronic signatures including their verification are available on the internet at no or moderate cost (39) and can be downloaded even using slower network connections.

Third, even if legislation allowing for digital awards that are signed with electronic signatures is in place, the courts in many countries are underfunded and/or not equipped with the means for processing and verifying authentic digital awards. This extends to bailiffs and other public functionaries involved at the enforcement stage.

Fourth, there is an inherent wildly spread unwillingness of arbitration practitioners to acquaint themselves with technical tools on the operational level that allows any digital system to work, unless using this technology is a prerequisite for their own professional activity or necessity. This is evidenced by the sudden spread of videoconferencing that was prompted by the COVID-19 pandemic in early 2020. The technology had been available for more than a decade but was sparingly used in arbitration.

How can these hurdles be overcome?

The obvious answer is that in order to enable widespread use of digitally signed awards, a known and accepted methodology and network needs to be put in place. On the one hand, it is unlikely that individual arbitration practitioners or individual law firms will have the clout and the resources to create such a system in an adequate timeframe. On the other hand, the pivotal stakeholders in arbitration who have or should have a vital self-interest in a seamlessly working global arbitration environment are arbitral institutions or associations. Presently, these appear to be sternly focused on their own development, the development of their rules and their ancillary procedural aspects, their caseloads and promotional activities. The common good of having an efficient and working up-to-date arbitration biotope is probably subordinate to these goals. It would also appear to be asking too much of a single institution to require that it dedicates the resources needed in taking action on a global level for facilitating secure and trustworthy digital communications, including electronically signed awards. This, however, does not justify inaction.

The solution is a call for established international arbitration institutions and associations to jointly form and staff a body that has the sole purpose of conceiving and
P 165 implementing a virtual facility that allows secure use of the electronic means for secure and reliable electronic signatures (and much more) in international arbitration. Such a body (with the help of or in cooperation with technical providers) could on the basis of the various legal regimes for electronic signatures conceive data security and personal-data-protection-defined processes that are trustworthy, secure and stable (resilient) which institutions and individual users alike implement. The technical tools required could be certified as process conforming and their procurement be facilitated. In particular, this would comprise advanced electronic signatures that are recognized in as many jurisdictions as legally possible at any given time. The institution could certify the Trust Service Providers who offer such signatures or in cooperation with these provide itself such signatures. Since the signatures are also a kind of virtual identity, the signature certificates could be the means of access to an arbitration VPN (with legal usage limitations where VPN use is locally prohibited) where the body is the virtual gatekeeper. This would shield arbitration as an institution from quite a number of security and data integrity threats lingering in the global internet. That any person in the VPN would act under her/his digital identity could be an additional means to establish security and trust. Of course, access needs to be provided on a non-discriminatory basis and at a cost that is affordable on a global level. For the usage of all this, the body could provide (online) training and training certification for users and free enabling assistance to national courts.

Last but not least, seeing that such a body would be underpinned by the combined reputations of its founding members, it would be in the position to lobby for its purposes with governments and transnational institutions.

Electronic signatures under digital awards are only one piece in the puzzle, which – if one starts to assemble it – would open a perspective on arbitration in an increasingly digitized world.

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2) Wikipedia, *Virtual Private Network (VPN),*https://en.wikipedia.org/wiki/Virtual_private_network (3 Aug. 2020).
3) During the early ages, most judicial decisions were made and binding orally and not reduced into writing. Most contracts could be made orally without being ever reduced into writing; written form is due to the complexity of contracts and the need to be able to prove what was agreed. Arbitral awards, however, require written form in order to be enforceable in law.
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8) Wikipedia, *Metadata*, https://en.wikipedia.org/wiki/Metadata (accessed 3 Aug. 2020).
9) A *bitmap file* is a raster image (graphical) file; *see* Wikipedia at https://en.wikipedia.org/wiki/Bitmap_file (accessed 3 Aug. 2020).
10) Cryptographic Hash Function – *see*https://en.wikipedia.org/wiki/Cryptographic_hash_function.
11) The term '*advanced electronic signature*' is used as defined in Art. 3(11) of Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 Jul. 2014 (eIDAS); *see* at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0910&from=EN (accessed 3 Aug. 2020).
12) For terminology also *see* Bruce Schneier, *Applied Cryptography*, 2nd ed., 1996, pp. 34-46, 483-494, also check out Schneier's website at https://www.schneier.com/ (accessed 3 Aug. 2020).
13) Wikipedia at https://en.wikipedia.org/wiki/Electronic_signature comprising also a section with national legal definitions of the term.
14) Wikipedia at https://en.wikipedia.org/wiki/Electronic_signature.
15) Wikipedia, *Public-Key Cryptography*, https://en.wikipedia.org/wiki/Public-key_cryptography (accessed 3 Aug. 2020).
16) *See* e.g. OpenPGP, *Kleopatra,*https://www.openpgp.org/software/kleopatra/ (accessed 3 Aug. 2020).
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19) For example, if the parties use smart contracts or some blockchain-based platform that provides a quasi-automatic enforcement of the award, they may be content with their agreement on the electronic means and not require enforcement or recognition by a state. For example, *see* Darcy Allen, Aaron Lane & Marta Poblet, *The Governance of Blockchain Dispute Resolution*, Harvard Negotiation Law Review, Vol. 25 (2020), pp. 75ss, https://www.researchgate.net/publication/340827439_The_Governance_of_Blockchain_Dispute_Resolution_-... (accessed 3 Aug. 2020).

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21) *See*http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3650 (accessed 3 Aug. 2020).

22) *See* German Code of Civil Procedure at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3645 and, e.g., Fabian von Schlabrendorf/Anke Sessler § 2054, pp. 339 ss, 345, cf. 17, Böckstiegel, Kröll, Nacimiento eds, *Arbitration in Germany: The Model Law in Practice*, 2nd ed. 2015, who, based on sources that predate 2013 still propose that the signatures must be handwritten. However, on 1 Jan. 2018 the German Regulation on Electronic Judicial Acts and Communications (Elektronischer-Rechtsverkehr-Verordnung – ERVV, *see*https://www.gesetze-im-internet.de/ervv/BJNR380300017.html (accessed 3 Aug. 2020)), entered into force and changes of the relevant provisions of the ZPO concerning judgments entered into force. It is submitted that these changes obviate older legal sources. *See also* Baumbach/Lauterbach/Anders/Gahle ZPO, 78th Ed (2020), § 130a, § 315 cf. 4; Ed. Althammer et al. Zöller ZPO, Ed. 33; § 130b.

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26) Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 Jul. 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJEU L 257/73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN (accessed 3 Aug. 2020).

27) Article 6 eIDAS provides: '1. When an electronic identification using an electronic identification means and authentication is required under national law or by administrative practice to access a service provided by a public sector body online in one Member State, the electronic identification means issued in another Member State shall be recognised in the first Member State for the purposes of cross-border authentication for that service online, provided that the following conditions are met: (a) the electronic identification means is issued under an electronic identification scheme that is included in the list published by the Commission pursuant to Article 9; (b) the assurance level of the electronic identification means corresponds to an assurance level equal to or higher than the assurance level required by the relevant public sector body to access that service online in the first Member State, provided that the assurance level of that electronic identification means corresponds to the assurance level substantial or high; (c) the relevant public sector body uses the assurance level substantial or high in relation to accessing that service online. Such recognition shall take place no later than 12 months after the Commission publishes the list referred to in point (a) of the first subparagraph. 2. An electronic identification means which is issued under an electronic identification scheme included in the list published by the Commission pursuant to Article 9 and which corresponds to the assurance level low may be recognised by public sector bodies for the purposes of cross-border authentication for the service provided online by those bodies.'

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29) *See* United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Electronic Signatures (2001)*, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures (accessed 3 Aug. 2020); UNCITRAL, *UNCITRAL Model Law on Electronic Signatures (2001) – Status,*https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures/status (accessed 3 Aug. 2020); UNCITRAL, *UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 bis as Adopted in 1998*, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (accessed 3 Aug. 2020); UNCITRAL, *UNCITRAL Model Law on Electronic Commerce (1996) – Status,*https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce/status (accessed 3 Aug. 2020). *See also* UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts,*https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (accessed 3 Aug. 2020), and UNCITRAL, *Status: United Nations Convention on the Use of Electronic Communications in International Contracts*, https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status (accessed 3 Aug. 2020). UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT),*https://www.uncitral.org/clout/index.jspx (accessed 3 Aug. 2020).

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31) *See* Uniform Law Commission, *Electronic Transactions Act, Final Act with Comments*, https://www.uniformlaws.org/committees/community-home/librarydocuments/viewdocument?DocumentKey=d58f... (30 Dec. 2019).

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33) *See* WIPO, *Electronic Signature Law of the People's Republic of China*, https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn105en.pdf. Article 14 thereof provides: 'A reliable electronic signature shall have equal legal force with handwritten signature or the seal.'

34) A research by the author on 3 Aug. 2020 has not revealed any such bilateral or multilateral treaties governing mutual recognition of electronic signatures concluded by the EU.

35) Concerning receipt of electronic communications, *see also* UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts*, Arts 10.2, 20.1, https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (accessed 3 Aug. 2020).

36) For example, such trust services can be electronic-registered delivery service as a secure channel for the transmission of documents bringing evidence of (the time of) sending and receiving the message, or sender as well as the addressee identification by a qualified trust service provider; *see also* Schneier *supra* pp. 122, 577ss.

37) A number of arbitral institutions have reacted to COVID-19 and issued emergency policies, which *inter alia* encouraged the notification of arbitral awards in electronic format (supposedly PDF files); *see* e.g. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, B.15, at https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effect... (accessed 3 Aug. 2020); LCIA Services Update: COVID-19 at https://www.lcia.org/lcia-services-update-covid-19.aspx (accessed 3 Aug. 2020); SIAC COVID-19 FAQs, No. 17, at https://siac.org.sg/faqs/siac-covid-19-faqs (accessed 3 Aug. 2020)). However, they do not address the issue of electronic signatures in the sense of the signatures described in this chapter. One may suppose that the signatures on these awards were digital (e.g., bitmap file format) copies of signatures on a physical award that was signed physically and then scanned and converted into PDF file format. As stated in the first paragraph of section 4 of this chapter, this may be agreed and sufficient for the parties. In August 2020 it was too early for court cases that would resolve or at least address any related legal issues.

38) *See* Maxi Scherer, 'Legal Framework of Remote Hearings' in Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab (eds) *International Arbitration and the COVID-19 Revolution* (Kluwer, 2020).

39) *See* e.g. Capterra, *Digital Signature Software*, https://www.capterra.com/digital-signature-software/ (accessed 3 Aug. 2020); Adobe Acrobat Reader DC, https://get.adobe.com/de/reader/ (accessed 3 Aug. 2020); ABBYY, ABBYY FineReader PDF 15, https://pdf.abbyy.com/ (accessed 3 Aug. 2020); Foxit, https://www.foxitsoftware.com// (accessed 2 Sep. 2020); there are many other products.

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Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings

Erica Stein

1 INTRODUCTION

As we know, awards come in many forms. Awards can be on jurisdiction, merits, quantum, costs, interest or any combination thereof. Awards can be interim, partial, final, or even partial final. For purposes of this publication, I have been asked to write about challenges to 'remote arbitration awards'. But what is a remote arbitration award, exactly?

The word 'remote' does not have a legal significance, but it does describe the way in which we have been working in the COVID-19 context. In the dictionaries, 'remote' means, on the one hand, physically 'separated by an interval or space greater than usual' and, on the other hand, 'controlled indirectly, or at a distance' through technology. (1) During the past months, we have all – counsel, arbitrators, parties – been confronted with being 'remote' in both senses of the word. We have been unable to travel, yet we have been brought together through technology platforms to carry on with our work. In light of this, it seems logical to understand a 'remote arbitration award' as being one that results from proceedings, culminating in fully remote hearings, that cannot take place in person due to the physical distance between the arbitrators, parties and/or their witnesses and experts, but nevertheless are held through the use of technology.

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With this definition in mind, challenges to remote arbitration awards remain, at this stage, theoretical. Delos ran a survey on users' experiences of remote hearings and asked users in how many of their cases the award had been challenged in setting aside or enforcement proceedings because the hearing was held fully remotely. Out of 210 respondents, representing an international cross-section of counsel and arbitral institutions, thirty-two answered the question. Of the thirty-two that answered, only one user responded that, since the outbreak of the pandemic (set at 15 March 2020), s/he had challenged an award because the hearing was held fully remotely – but not on the basis that one of the parties had objected to holding a remote hearing in the first place. (2)

Seeing as we simply do not yet know whether and on what basis remote arbitration awards may be challenged in the future, this chapter will attempt to look into the crystal ball. To do so, this chapter will first discuss the principles applicable to challenging an award in set-aside or enforcement proceedings – whether the award is remote or not. Second, this chapter will look at the particularities of remote hearings to determine the circumstances that may (or may not) give rise to challenges to remote awards. Finally, this chapter will conclude with some remarks about whether there is a future for fully remote hearings and, therefore, whether challenges to remote arbitration awards will remain a topic of study.

2 PRINCIPLES GOVERNING CHALLENGES TO AWARDS

Generally speaking, remote arbitration awards – like any awards – can be challenged under one of three legal regimes. National arbitration laws – of which the UNCITRAL Model Law represents guiding principles (3) – may govern set-aside proceedings for commercial and investment arbitration cases seated in a particular jurisdiction. Challenges to commercial and investment awards in enforcement proceedings, which take place outside the jurisdiction where the arbitration is seated, are governed by the New York Convention. (4) Challenges to investment awards under the ICSID Convention, which are not seated in a national jurisdiction and are instead considered 'a-national', are governed by the ICSID Convention itself. (5)

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These three instruments – the UNCITRAL Model Law, the New York Convention and the ICSID Convention – each incorporate the principle of due process as fundamental to the enforceability of an award. Before seeing how those instruments do so, it is important to first take a bird's eye view of what due process is. Due process can be distilled into four main principles, namely, that: (i) a party must be given notice of the case against it, (ii) so that it can present its case and respond to the case against it, (iii) in front of impartial and independent arbitrators, (iv) who treat the parties equally. (6) In the context of a remote hearing, principles (ii) and (iv) are the most salient and are both integrated into the UNCITRAL Model Law, New York Convention and ICSID Convention. These principles are, therefore, the most likely to form a basis to challenge remote awards. (7)

Article 18 of the UNCITRAL Model Law expressly provides that: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' The corollary to this principle, found in Article 34(2)(a)(i)), is that '[a]n arbitral award may be set aside … if the party making the application … was otherwise unable to present his case' or, as provided in Article 34(2)(a)(iv), 'the arbitral procedure was not in accordance with the agreement of the parties … or was not in accordance with this Law'.

Nearly identical provisions are found in Article 36 of the UNCITRAL Model Law, which applies not to set-aside, but rather to recognition and enforcement, and tracks the language of the New York Convention.

For its part, the New York Convention foresees in its Article V(1)(b) that an award may be refused enforcement when 'the party against whom the award is invoked was … unable to present his case'. Article V(1)(d) of the New York Convention then provides, in relevant part, that an award may be refused enforcement when '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'. Similarly, Article 52(1)(d) of the ICSID Convention provides that an award may be annulled when 'there has been a serious departure from a fundamental rule of procedure', which is understood to encompass equal treatment of the parties and the right to be heard. (8)

Lucy Reed, in her 2016 Queen Mary School of International Arbitration-Freshfields Lecture entitled *Ab(use) of due process: sword vs shield* gave an overview of what due process, as embodied in these instruments, means. She called it 'the shield of fundamental *procedural* rights, before deprivation of *substantive* rights'. (9) Speaking from the perspective of an arbitrator, she drew the critical distinction between '*ordinary* process' versus '*due* process' (10) with the following explanation:

> Do not promise the parties a 'full' opportunity to present their cases, and thereby invite due-process labelled complaints that a hearing was one day too short or that
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● a cross-examination went one hour too long. Look instead at what is a 'reasonable' opportunity at an 'appropriate' stage of the proceedings, not at 'any' stage, which could (abusively) include the eleventh-hour stage or even after the close of the record. And thereby trust tribunals to exercise their discretion and judgment to protect the fundamental fairness – and shield – of due process. (11)

'Ordinary process' is, therefore, the decisions that arbitrators take in 'their discretion and judgment' to protect due process which, in turn, constitutes the 'fundamental fairness' of the procedure.

ICCA's Guide to the Interpretation of the 1958 New York Convention, specifically drafted and titled as *A Handbook for Judges*, looks at the question of due process in a manner complementary to that put forth by Lucy Reed. According to the *Handbook*, when judges apply the due process provisions of the New York Convention, they are not to use them to allow appeal to the tribunal's 'ordinary process' decisions, but rather to address 'fundamental deviations from the agreed procedure'. (12) In this sense, judges are invited to look at the purpose of these provisions as 'not intended for the court to take a different view to the tribunal on procedural issues. What has to be shown is that the party resisting enforcement somehow was deprived of its right to have its substantive case heard and determined by the tribunal'. (13)

In light of the above, it should come as no surprise that, despite the many cases filed by parties with a view to challenging awards on due process grounds, (14) most of these cases have been unsuccessful. We are often quick to say that this is because the courts have set a very high bar to challenge awards on due process grounds. However, there is no reason to consider that a court (or ICSID ad hoc committee), faced with true due process concerns as opposed to, in Lucy Reed's words, 'due-process labelled complaints', (15) would not uphold a challenge to an award. Indeed, certain studies have shown this to be the case. (16) In other words, we should not conflate the fact that parties often file challenges based on 'ordinary process' concerns – which should rightfully be rejected under the principles discussed above – with a court's (or ICSID ad hoc committee's) willingness to uphold a challenge based on a true violation of due process.

Relatedly, it should be recalled that parties cannot waive their basic due process rights. They are simply too fundamental. By way of example, in the context of the New York Convention, even if a party does not invoke a violation of due process to challenge an
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award, a court can still decide to refuse enforcement on its own motion in ● accordance with Article V(2)(b). As it is well known, this Article allows a court to refuse enforcement on the basis of public policy, which is understood to encompass due process guarantees. (17)

In light of the foregoing, it is not surprising that the question of due process has been front and centre in the minds of arbitration practitioners confronted with the question of holding fully remote hearings. For instance, it has been suggested in at least one remote hearing protocol drafted during the pandemic that the parties should sign a waiver with respect to any due process challenges that they may have to the remote award on the basis of holding a remote hearing. (18) The value of such waivers appears to be limited, however. On the one hand, and as will be discussed in more detail below, the decision to hold a remote hearing will generally not constitute a due process violation, such that parties should (hopefully) decide not to waste time and money challenging the award on this basis. On the other hand, if remote hearings are considered as violating due process in a given jurisdiction, it is arguable whether such a waiver would be recognized in the first place. Similarly, to the extent such waivers could aim to pre-empt challenges to the remote award on the basis of what might happen during the remote hearing itself, such waiver will be ineffective and unenforceable. (19)

3 CIRCUMSTANCES THAT MAY (OR MAY NOT) GIVE RISE TO CHALLENGES TO REMOTE AWARDS

As an initial matter, it should be noted that it has become commonplace for many aspects of the arbitral process to be carried out remotely, such as procedural conferences (mostly held by phone), filing briefs (almost always done by email or sharing platforms and not via an in-person drop-off), and even the occasional examination of witnesses or experts (now foreseen as a matter of course in procedural orders for *in extremis* situations where in-person presence at a hearing is not possible). It should, therefore, come as no surprise that there is scant case law where challenges to an award were successful on any of these points.

What the COVID-19 pandemic has brought to the fore, however, is something that has not heretofore been commonplace, namely, holding a full merits hearing remotely. According to the White & Case-Queen Mary University of London 2018 International Arbitration
P 172 Survey, 78% of participants had never, or rarely, participated ● in virtual hearings. (20) And of the 22% that had, it is not clear whether they participated in a merits or some other type of hearing. Although holding a fully remote hearing has not been the norm in international arbitrations pre-pandemic, there is no reason to believe that holding one would give rise to particular challenges to remote awards. (21) This is for two main reasons.

First, the arbitrators' decision to push forward with a remote hearing, particularly when one of the parties objects thereto, will involve 'ordinary process' considerations. For instance, arbitrators may decide that it is more appropriate to hold a remote hearing when the parties are only to present oral arguments, as opposed to when a full hearing is necessary to establish the facts of the case. Or the arbitrators may decide that the number of witnesses, the matter's complexity and the number of participants make it appropriate to hold a full remote hearing, balanced against the concern of delaying the procedure. (22) By contrast, if there is no risk of delay, the arbitrators may consider whether a remote hearing is really necessary, particularly where witness evidence plays a central role in establishing the facts of the case. In short, what is critical is that the arbitrators carry out a balancing test between the reasons for proceeding with a remote hearing and the risks that holding a hearing may entail. (23) In all events, as 'ordinary process' considerations, these decisions will not likely provide a basis to challenge a remote award.

There are, however, two exceptions to this general proposition.

One exception is if the parties had previously agreed that an in-person physical hearing, to the exclusion of a remote hearing, should take place. As explained in the preceding section, awards can be challenged when the arbitral procedure was not in accordance with the agreement of the parties, or departs from a fundamental rule of procedure. Taking into account the principle of autonomy underlying international arbitration, it can be considered that any such agreement provides the parties' baseline, common denominator as to the procedure they consider necessary to present their case. Taking a decision contrary to such agreement could, therefore, put the award at risk.

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More likely than not, however, no specific agreement will have been made and, instead, the parties' agreement regarding the procedure will be incorporated by reference to arbitral rules. Certain rules – such as the ICC Rules of Arbitration – would, on their face, indicate that a hearing should take place physically in person: 'the arbitral tribunal shall hear the parties together *in person* if any of them so requests'. (24) However, during the pandemic, the ICC issued its Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, making clear that it considered that a 'tribunal [may determine] to proceed with a virtual hearing'. (25) In so doing, the ICC has made clear that this provision of its Rules – and in particular, the term 'in person' – is to be interpreted broadly and in light of advances in modern technology that will allow for 'a live, adversarial exchange'. (26) Other arbitral institutions, such as ICSID, have equally been quick to clarify that they consider that, under their respective rules, remote hearings are also permissible. (27)

A second exception is that, in the absence of party agreement, there could be a challenge if the law at the place of arbitration proscribes the use of remote hearings. The UNCITRAL Model Law, which embodies the generally accepted principles incorporated into many of the world's arbitration laws, clearly provides in its Article 24 that the arbitrators must hold a hearing when one is requested, but is silent as to the form of the hearing. (28) Taking into account that the purpose of the UNCITRAL Model Law was to modernize arbitration laws, (29) and it has evolved with modern means of communication in mind, (30) there seems to be no barrier to interpreting it broadly to encompass both physical and remote hearings, as well.

Second, like the arbitrators' decision to hold a remote hearing, the manner in which the arbitrators organize the hearing itself will also encompass 'ordinary process' decisions. For example, beyond the usual questions about how many witnesses to hear, or how much
P 174 time each side should be granted to present its case, the arbitrators ● will need to take remote hearing-specific decisions, such as which technical platforms to use, how virtual

hearing bundles should be prepared and presented, what procedures to apply in case of technical difficulties, whether to conduct a technical testing session, etc. (31) As 'ordinary process' decisions, these decisions will not likely be questioned by reviewing courts or ad hoc committees, either.

In this context, there has been much discussion as to whether arbitrators should put measures into place to prevent witness coaching during a remote hearing. (32) Among others, proposals have been made that technological tools be put in place to allow hearing participants to have a full view of the witness (e.g., installing 360° cameras) and ensure that no communications can pass to the witness (e.g., disabling chat functions on virtual hearing platforms). Arbitrators will need to weigh the complication and expense of these extra technological dispositions versus the likelihood that witness coaching may occur, (33) knowing that the international arbitration community (not to mention various local bars) regards witness coaching as unethical. (34)

Although the arbitrators' decisions with respect to organizing remote hearings will be given deference upon review, it does not mean that remote hearings do not cause special concerns to which arbitrators should not pay extra attention. In particular, remote hearings can bring to the fore inherent differences between the parties that may otherwise have no or less relevance when the parties are heard in personam. Three examples come to mind.

First, when the parties and their counsel (and potentially witnesses and/or experts) are in different time zones, time differences will necessarily weigh on the parties in a remote context. For instance, if parties are represented by counsel in New York and Singapore, it may be difficult to organize a remote connection without having New York counsel work during the early hours of the morning, or Singapore counsel late into the night. While it has rightly been suggested that hearing days be shortened to accommodate time zone
P 175 differences between participants, (35) there may be limits on ● the ability to overcome this issue. Obviously, the farther apart the time zones, the more acute the problem. In managing this issue, the arbitrators must proceed with particular caution when they sit in the same time zone as one party but not the other, so as to avoid organizing a hearing day that, while it suits the arbitrators, may also arguably result in giving one party an advantage over the other. (36)

Second, when a party presents fact or expert witnesses who do not master the language of the arbitration and must, or prefer to, present evidence through an interpreter, the usual practice in international arbitration is for the witness to be interpreted simultaneously. The technology and professionals necessary to ensure proper simultaneous interpretation in a remote context appear to be available, (37) but largely untested and not on wide offer. In light of this, the territory remains uncharted as to whether remote simultaneous interpretation actually works. Technological and personnel issues aside, depending on whether the interpreter is located with the arbitrators, the testifying witness or in a separate location, the chances of the interpreter and witness misunderstanding each other are increased in a remote context, as is the chance for counsel and the arbitrators to misunderstand the interpreter. The ease with which such misunderstandings can be clarified is also more complicated in a remote context. It may be for this reason that certain protocols, such as the Seoul Protocol, propose the use of consecutive, instead of simultaneous, interpretation in remote hearings. (38) However, consecutive interpretation creates other problems by substantially lengthening the time that the witness must be on the stand – with fatigue leading to more trouble for the witness to express himself/herself and the interpreters to interpret accurately. In this context, it must be borne in mind that '[a] party may not be able to properly present its case and defend itself if its witnesses are not able to properly relay their messages to the arbitral tribunal or if it is not able to properly confront the opposing party's witness and evidence'. (39) In light of this, if one party has witnesses who will testify through interpreters and the other side does not, the arbitrators must proceed with caution to ensure that holding a remote hearing does not cause unequal treatment of the parties and meaningfully impact one side's ability to present its case.

Third, when the parties and their counsel have unequal access to reliable technology, arbitrators must proceed with particular care. Unequal access to reliable technology can result from many factors. Depending on who the persons are and where they are located, there may be: financial barriers to accessing the technological equipment necessary to carry out a remote hearing, lack of sufficient technology infrastructure and/or reliable
P 176 electricity supply to allow that equipment to work, ● political barriers if there is government censorship of online platforms used for remote hearings, or individual barriers that can result from lack of skills or knowledge as to how to use the available online platforms. Taking into account the central role that technology plays in enabling the conduct of a remote hearing, the arbitrators may decide, in the face of such unequal access to technology, that it is best not to proceed with a remote hearing at all. If they nevertheless do proceed, special precautions must be taken (e.g., stopping the hearing until technological issues are resolved if they arise during the hearing).

In sum, although the arbitrators' 'ordinary process' decisions to hold and organize remote hearings are unlikely to provide grounds to challenge the remote award, this does not mean that remote hearings do not raise issues that deserve special attention. This being said, even if the arbitrators account for those special issues, it is impossible to anticipate

how they may cause problems in the remote hearing and impact the parties' due process rights. Here is, therefore, where the arbitrators roll the dice: arbitrators take a gamble to hold remote hearings where there is simply a greater unknown quantity to them and more complicating factors as compared to hearings where the parties are heard physically in person.

4 CONCLUSION: IS THERE A FUTURE FOR REMOTE ARBITRATION AWARDS?

Despite these unknowns, much of the international arbitration community has come down resoundingly in favour of moving forward with remote hearings in the COVID-19 context. It seems that the principal motivation for this is to ensure that parties are able to benefit from one of arbitration's key draws: the expeditious and cost-effective resolution of disputes. (40) Taken a step further, concerns have been raised that remote hearings play a necessary role in the administration of justice, in that, if arbitrators do not push forward with remote hearings, 'justice delayed [will be] justice denied'. (41)

While there is no doubt that these are valid concerns, what can be doubted is whether it is actually *preferable* to hold a remote hearing over one where all participants are physically present. In my view, it is not. And it seems that the arbitration community, as late as 2018, agreed. Tellingly, in the 2018 White & Case-Queen Mary International Arbitration Survey, the international arbitration community responded as follows with respect to the idea of holding virtual hearings:

> [A] considerable number of both counsel and arbitrators took the opportunity to [express] reservations as to the effectiveness of conducting cross-examinations of witnesses or delivering and hearing the parties' closing arguments through a ● videoconference. In particular, some arbitrators responded that for such instrumental hearings, they systematically insist on the physical attendance of all involved. (42)

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It is unlikely that the arbitration community's views have undergone a sea change in such a short amount of time. (43) While the discussion surrounding remote hearings is helpful, we should not forget that it has long been accepted, for good reason, that in personam hearings are simply better at allowing the parties to establish the facts of a case and the arbitrators to weigh the evidence before them. (44) For this reason, in the post-pandemic world, it may be – and should be – that hearings where all participants are physically present are restored as the norm. In light of this, we may not be interested in challenges to remote arbitration awards for long.

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1) *See*, e.g., *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/remote (accessed 16 Jul. 2020); *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/remote (accessed 16 Jul. 2020).
2) *See also* Gary Born, Anneliese Day & Hafez Virjee, *Empirical Study of Experiences with Remote Hearings: A Survey of the Users' Views* in Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer, 2020).
3) UNCITRAL Secretariat, *Explanatory Note on the 1985 Model Law on International Commercial Arbitration as Amended in 2006* (2007) ('[s]ince its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law').
4) The exception to this general rule is in the United States, where the courts often apply the New York Convention to analyse questions of set-aside, or vacatur, of awards seated in the country. This is due to a unique reading of the New York Convention adopted by the US courts, which goes beyond the scope of this chapter.
5) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Arts 53-55 (14 Oct. 1966).
6) Lucy Reed, *Ab(use) of Due Process: Sword vs Shield*, 33 Arb. Intl. 366 (2017).
7) Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) J. Intl. Arb. 438-445 (2020).
8) Christoph Schreuer et al., *The ICSID Convention: A Commentary* 983-992 (2nd ed., 2009).
9) Reed, *supra* n. 6 (emphasis in original).
10) *Id.*, at 369 (emphasis in original).
11) *Id.*, at 370.
12) International Council for Commercial Arbitration (ICCA), *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* 98 (2011).
13) *Id.*, at 89.
14) It goes without saying that there are many more reported cases filed and decided on this subject coming from national courts than from ICSID ad hoc committees.

15) Reed, *supra* n. 6, at 369.
16) Herman Verbist, *Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of The New York Convention*, in Emmanuel Gaillard and Domenico Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice,* 679, 692 (2008), cited in Maxi Scherer, *Article V(1)(b),* 280, in Reinmar Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Beck – Hart – Nomos, ed. 2012).
17) Albert J. van den Berg, *The New York Arbitration Convention of 1958* 300-301 (Kluwer Law International, 1981).
18) Hogan Lovells, *Hogan Lovells Protocol for the Use of Technology in Virtual International Arbitration Hearings* section 2.10(b). https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_04_09_hogan_lovells_internatio... (April 2020) ('In order to minimize any risk of vacatur in certain jurisdictions where virtual hearings may be viewed as infringing on due process rights, it is recommended that the parties sign the above referenced [agreement] not to challenge the award on the basis of a virtual hearing] and present it to the tribunal').
19) Maxi Scherer, *Article V(1)(b)* in Reinmar Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Beck - Hart – Nomos, ed. 2012).
20) White & Case-Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration,* 32. https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-inter... (2018).
21) *See*, e.g., Philippe Pinsolle, *Arbitration and New Technologies,* 648, in Albert J. van den Berg (ed.), *International Arbitration: The Coming of a New Age?* (Kluwer Law International, 2013) ('The use of technology is new but the issue of due process is not. Does technology change the situation? There has not been any assessment on this issue by a court or tribunal yet, but the answer would probably be no. A hearing is no less oral when it is conducted via videoconferencing than when it is held in person'). As this chapter aims to look at the particularities of remote hearings leading to remote awards, it does not carry out a survey of what issues have caused enforceability issues in in-person hearings and resulting awards.
22) International Chamber of Commerce (ICC), *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* 4, https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effect... (April 2020).
23) For an overview of the relevant test that arbitrators may apply to order remote hearings in the absence of party agreement, *see*, Scherer, *supra* n. 7, at 424-433.
24) Article 25(2), ICC Rules (emphasis added).
25) ICC, *supra* n. 22.
26) *Id.,* at 5. This is in keeping with Art. 3(5) of Appendix VI of the ICC Rules, which deals with Expedited Proceedings and refers to the possibility of holding hearings via videoconferencing.
27) *See*, e.g., International Centre for Settlement of Investment Disputes (ICSID), *Virtual Hearings: ICSID Services and Technology*, https://icsid.worldbank.org/en/Documents/Virtual_Hearings.pdf (accessed 16 Jul. 2020).
28) Article 24(1) of the UNCITRAL Model Law provides: 'Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.'
29) UNCITRAL Secretariat, *supra* n. 3 ('The form of a model law was chosen as the vehicle for harmonization and modernization').
30) UNCITRAL, 39th Sess., Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 Jun. 1958 (2006) ('Considering the wide use of electronic commerce, Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts').
31) For a sample checklist of procedural issues that arbitrators may need to address in remote hearings, *see* Scherer, *supra* n. 7, at 437. *See also* 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, 2020).
32) Caroline Simson, *Virtual Arbitration Hearings Prompt Witness Coaching Fears*, Law 360, https://www.law360.com/articles/1287300/virtual-arbitration-hearings-prompt-witness-coaching-fears (2 Jul. 2020).

33) This being said, there is no question that, if witness coaching is discovered, in particular after the award has been rendered, this can indeed be a viable ground for challenge. However, if discovered before an award is rendered, the issue will likely have been 'rectified' by the arbitrators themselves when they weigh the evidence before them. As witness coaching would seriously undermine the credibility of the evidence presented by the party in question, it would seem unlikely that the issues relying on that evidence would be decided in favour of that party.

34) Guideline 21 of the IBA Guidelines on Party Representation in International Arbitration provides that: 'A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances.' While the Guidelines 'are intended to reflect best international arbitration practice with respect to the preparation of Witness and Expert testimony', this standard applies *a fortiori* to when the witness actually gives testimony to the tribunal.

35) Scherer, *supra* n. 7, at 436 ('the hearing agenda, considering in particular shorter hearing days to accommodate potential time zone differences between participants').

36) It goes without saying that, absent an agreement to the contrary, arbitrators should avoid physically sitting together with one party while the other must connect remotely.

37) *See*, e.g., ICSID, *supra* n. 27.

38) Kevin Kim, Yu-Jin Tay, Ing Loong Yang & Seung Min Lee, *Seoul Protocol on Video Conferencing in International Arbitration*, News & Event Art. 7.2, http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_... ('As a general principle, consecutive interpretation shall be preferred to simultaneous interpretation').

39) Sherlin Tung, *The Importance of Languages in International Arbitration and How They Impact Parties' Due Process Rights*, 10(1) Contemp. Asia Arb. J. 126 (2017).

40) *See*, e.g., ICC, *supra* n. 22 ('[t]he Court recognises the important role that parties, counsel and tribunals play in ensuring that disputes will continue to be resolved on a fair, expeditious, and cost-effective basis').

41) Kun Fan, *The Impact of COVID-19 on the Administration of Justice*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-on-the-administration... (10 Jul. 2020).

42) The 2018 International Arbitration Survey, *supra* n. 20, at 32.

43) *See*, e.g., the survey recently conducted by DLP Piper in relation to the use of virtual hearings as a result of the COVID-19 confinement measures which concludes that: 'Respondents to this survey noted that not all hearings may be as amenable to being held remotely as others. Cases cited included complex construction disputes, where detailed technical presentation and models may be required. While technology can fill many of the gaps, it was felt that it would be crucially important to have a more direct connection with the judge or tribunal during such presentations to ensure that the pacing was correct. Similarly, some respondents noted that managing difficult witnesses, and even one's own witness who turns hostile, may pose significant problems for the advocate' (DLA Piper, *Empirical Experience from Our Global Experience – Virtual Hearings* 14, https://www.dlapiper.com/en/uk/insights/publications/2020/05/virtual-hearings-report/ (May 2020).

44) Thomas Clay et al., *Report: Online Arbitration*, 35 (2019), https://www.leclubdesjuristes.com/wp-content/uploads/2019/04/Online-Arbitration.pdf ('Indeed, the "physical" procedure still seems to be an element that is appreciated by actors in the arbitral community, notably in case of complex arbitration').

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Chapter 10: Third-Party Funding and COVID-19

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We have seen a significant spike in funding applications since the onset of COVID-19. Applications have come from a variety of sources including corporates and law firms looking to manage cash flow and risk and monetise awards or judgments. Given the economic downturn associated with the COVID-19 pandemic in many parts of the world, it is more important than ever that clients and counsel understand how third-party funding works and how it can assist during times of economic uncertainty.

1 INTRODUCTION

Economic uncertainty is a prevailing aspect of the COVID-19 pandemic. It is important that third-party funders have expertise and experience in handling funding requests during times of economic uncertainty. The litigation funding industry and Omni Bridgeway have their roots in insolvency funding. In 1995, Australia enacted legislation allowing insolvency practitioners to undertake contracts to finance litigation designated as company property, essentially recognising legal claims as a corporate asset. As a result, litigation finance companies, including Omni Bridgeway (then operating as IMF (Australia) Ltd.), emerged in the late 1990s to assist bankrupt entities with the high costs associated with pursuing their existing legal claims in exchange for a return from the proceeds.

This legislative development in Australia combined with: (i) the legalisation of class action lawsuits in Australia a couple of years prior, (ii) Australia's ban on contingent fee agreements, and (iii) the application of the 'loser pays' rule requiring an unsuccessful party to pay the other party's legal costs created the perfect climate for this young industry to thrive.

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Most recently, we saw this happen in Canada, where the Supreme Court of Canada approved a litigation funding agreement in the *Bluberi* decision, (1) opening the door for parties to maximise recoveries and realise value from litigation in that jurisdiction. Funders with a worldwide team of bankruptcy and insolvency funding specialists are uniquely positioned to understand and explain the host of opportunities available to creditors, trustees in bankruptcy, receivers, monitors, and their lawyers seeking to maximise the value of litigation claims in an insolvent estate for the benefit of creditors and other stakeholders.

The COVID-19 pandemic has increased disputes in many different areas, not all involving insolvent entities. As a result, we have observed an increase in funding applications for many types of claims. One of the most obvious areas of new litigation and arbitration relates to business interruption claims caused by supply chain disruptions, forced shutdowns, or other impediments caused by the pandemic. Many of these claims are against insurance companies but some are against other businesses and even sovereign states.

We have also observed an increase in applications by investors under bilateral and multilateral investment treaties for funding of treaty arbitration claims during the period associated with the COVID-19 pandemic. These claims do not necessarily directly relate to COVID-19, although some do. It may be that clients who would have previously self-funded their treaty claim or have been able to obtain external counsel representation on a contingent fee basis are now finding third-party funding a practical and – in some cases – a necessary resource in order to pursue their treaty claims. Some of these entities seeking third-party funding may be a subsidiary or affiliate of an insolvent parent company going through restructuring.

We also have observed a steady stream of applications for funding of intellectual property disputes. This was true before the COVID-19 crisis but has increased since, particularly with respect to requests to monetise intellectual property assets to generate revenue during the economic downturn.

In the sections below, we discuss: (i) whether and how COVID-19 has impacted third-party funding services; (ii) sectors that appear to have been most affected by COVID-19 from the perspective of third-party funding; (iii) the increase in portfolio funding for corporates and law firms; (iv) challenges and opportunities that COVID-19 has introduced to third-party funding arrangements; and (v) future trends anticipated after the COVID-19 pandemic.

2 WHETHER AND HOW COVID-19 HAS IMPACTED THIRD-PARTY FUNDING SERVICES

In this challenging and uncertain economic environment, almost all businesses, large or small, are trying to preserve cash and are considering ways to access liquidity. Dispute resolution finance is one such potential source of liquidity. While businesses are likely to
P 181 face a range of new commercial disputes, many companies' budgets in this ● COVID-19 environment offer little room to pursue legal claims and seek recoveries that may sustain them through the economic downturn. Third-party funding makes it possible to assert such claims.

Litigation or arbitration outcomes lie in the future and are inherently uncertain. A dispute resolution funder can help assess these outcomes – in itself a valuable service – and, on that basis, provide a financing solution that lowers liquidity pressure using an asset that may otherwise be overlooked.

By using external funding to finance the costs of a dispute (including lawyer and expert fees, court costs, arbitration-related fees, and adverse cost protection where applicable), legal claims are leveraged as assets. This means that the funder pays some or all of these costs in return for a share of the outcome. In this way, businesses can improve liquidity, maintain cash on the balance sheet and transfer all or a portion of the legal expenses to the funder. Legal claims (or uncollected judgments/awards) can also be monetised by selling them, in whole or in part, to a funder.

Unlike traditional forms of finance, dispute resolution finance is non-recourse. This means that the funder receives a return on its investment only in the event of a successful recovery from the litigation or arbitration. If the case is lost, the funded costs or purchase price of the claim need not be repaid.

If the claim is successful, the funded client can record the revenue without having incurred any downside costs or risk along the way, particularly when the funder is able to offer insurance to cover adverse costs. Dispute resolution finance therefore helps transform litigation or arbitration from an expense into a cash-generating asset. And the funding provides opportunities for substantial recoveries without negatively affecting profitability along the way.

It is therefore no wonder that, since the beginning of the pandemic, funding applications generally, including those received by Omni Bridgeway, have increased substantially as compared to this same period last year. However, a funder's rigorous vetting process for potential investments still applies (and may even be enhanced) during the COVID-19 pandemic. As a result, while funders of commercial disputes may be assessing more cases and ultimately funding more cases, at the time of writing, the ratio of cases assessed for funding against the number actually funded does not appear to have materially changed. Many commercial funding applicants who are new to third-party funding are not aware of the criteria that funders typically apply in reviewing a claim. The following paragraphs outline some (non-exclusive) key criteria that funders generally consider when assessing a claim for funding.

When considering whether to fund a claim, funders carefully assess various factors that bear on the financial risks that funders are being asked to assume. In our experience, seasoned funders have not relaxed or changed the criteria considered in evaluating a claim for funding since the beginning of the pandemic.

The (non-exhaustive) factors and criteria include:

- *The prospects of success of the claim*. As funding is provided on a non-recourse basis, the claim should have a strong likelihood of success based on the evidence and the law. When assessing an international arbitration claim, for example, funders will
P 182 consider, *inter alia*, the terms of the agreement or treaty; ● the seat of the arbitration; the applicable law; any potential jurisdictional issues; potential counterclaims; qualifications and arbitration-specific experience of counsel; the qualifications and experience of the arbitrators; and the likely ability to collect on the award or resolution. Some of these elements are discussed in more detail below.
- *The quantum of the claim*. A funder will look closely at the claim size and assess whether it is realistic. A dispute needs to have a reasonably high claim value to make the economics of third-party funding fruitful for all stakeholders including the client. On the other hand, extraordinarily high damages claims can pose problems, too. For example, a multibillion-dollar award or judgment against a sovereign may be difficult to enforce. For a funder, an uncollectible award or judgment is the same as a loss.
- *The estimated budget required to prosecute the claim to completion.* Funders examine the budgets prepared by counsel closely and often ask counsel to consider aspects of the proceedings that may have been initially overlooked or estimated in a way that may be unrealistic. A realistic and thorough budget for litigating or arbitrating the claim(s) informs the amount of the funder's investment.
- *The quantum of the claim in comparison with the likely costs and risks of pursuing the claim*. It is important that a case has enough in dispute to make it economically

productive for all stakeholders to use third-party funding. Usually, experienced funders seek a claim size to funding amount ratio that aims to ensure that the claimant will recover a significant share of the proceeds while still allowing for the funder to obtain a return on its invested capital. In certain circumstances, the ratio may be lower where a claimant (particularly an insolvent claimant) may be prepared to accept a lower share of the proceeds on the basis that recovering some proceeds is better than none. That said, for the vast majority of funded claims there is a significant differential between the anticipated proceeds and the funding provided for legal fees and costs; a minimum 10:1 ratio is common.

- *The likely timing to resolution of the claim*. It is important for a funder to understand the likely procedural timeline of the dispute and whether or not the dispute will likely go all the way to hearing or trial (as opposed to settle), whether appeals are likely and how long those will take, and whether enforcement measures likely will be necessary. The time to collection – not just the time to an award or judgment – will impact a funder's internal rate of return on its investment.
- *The capacity of the respondent to meet any award, including the risks associated with enforcing and obtaining payment under an award.* In international commercial arbitrations, one of the most important factors is whether the respondent has assets of sufficient value in a state that is a signatory to the New York Convention. Expertise and resources may be required to enforce an award or judgment, particularly during an economic downturn. Ex parte interim and conservatory measures can be a useful tool to try and prevent asset dissipation and may eventually lead to early settlement.

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- *Concentration risk*. When evaluating whether to fund a claim and to lower its overall risk exposure, a funder will be mindful of its existing investments and ensuring that its investments remain diversified.

Generally speaking, a funder will not expect that a litigation or arbitration claim has no risk with respect to the likelihood of success, but a funder will look to ensure that a potential investment has the right balance of risk versus reward and that the funded costs to litigate or arbitrate the claim are not disproportionate to the likely recovery sums.

All of these (non-exclusive) investment criteria are equally important. However, in the current COVID-19 context where companies' liquidities have been depleted, experienced funders are especially mindful of whether a respondent will be capable of paying if and when the claims succeed. A funder with in-house asset-tracing teams and recovery specialists can help identify where a respondent's assets are located and help develop a recovery strategy in the appropriate jurisdictions.

COVID-19 has also brought to the forefront concentration risk concerns with respect to a high number of similar claims. Funders may receive many applications for the funding of claims that are similar in nature, within the same industry, or against the same respondents. For example, we have observed an increase in funding applications for business interruption insurance claims in the hospitality industry. We also have observed an increase in applications for funding relating to claims for breach of contract in the construction industry. In assessing these applications, funders usually are mindful of the need to maintain a diversification of the types of matters funded.

Diversification matters because it is a way of reducing risk for funders. An extreme example of such risk is if a funder were to have invested exclusively in intra-EU (European Union) bilateral investment treaty (BIT) arbitrations before the *Achmea* decision and subsequent events calling into question the enforceability of awards resulting from such intra-EU BIT arbitrations. While the case law in this area is still developing, if a funder had invested exclusively in such cases, such lack of diversification would have created substantial risk. Thus, funding different kinds of arbitrations and litigations allows funders diversification and less overexposure to an unexpected development in the law in a certain area.

All in all, we have been busier than ever during the COVID-19 pandemic. In the next section, we discuss which sectors appear to have been most affected by the pandemic.

3 SECTORS THAT APPEAR TO HAVE BEEN MOST AFFECTED BY COVID-19 FROM THE PERSPECTIVE OF THIRD-PARTY FUNDING

A significant proportion of funding applications received this year have been from clients seeking to conserve cash and minimise the risk of legal proceedings. Many of these applications arise from business interruptions caused by travel restrictions, shelter-in-place orders, and extended business closures, as governments around the world strive to control the spread of COVID-19. The travel, leisure, hospitality, dining, and entertainment
P 184 sectors have sustained significant damage. It will come as no ● surprise that claims against insurers make up many of these COVID-19-related funding applications.

Cash flow constraints have also given rise to claims across diverse industry sectors ranging from technology to entertainment and sports, as some counterparties experience 'buyer's remorse' and attempt to renege on transactions. Some applicants are well-

resourced corporates who wish to demonstrate to their shareholders that they are pursuing claims in a prudent manner that gives up a portion of the upside but eliminates or reduces the expense and risk of doing so.

Parties have also sought funding for a variety of pending commercial disputes where COVID-19-related business and court disruptions have led to cash flow constraints. For example, many hearing and trial dates have been significantly delayed, resulting in delays in revenue for lawyers acting on large contingency fee arrangements. Likewise, a corporation that once had the ability to pay its law firm to pursue its affirmative arbitration and litigation claims may find that due to COVID-19-related revenue declines, it no longer has the cash available to see the arbitration or litigation through to completion without funding.

Some successful claimants, mindful of the backlog of cases and delays in the courts as well as potentially deteriorating asset positions of award debtors, look to monetise their arbitral awards by selling them as a means of improving cash flow in the short term and/or eliminating the risk involved in pursuing recalcitrant respondents through the courts. Experienced funders who have the requisite in-house expertise are well-positioned to find avenues to execute against such respondents.

Funding applications also increased in relation to investment treaty arbitrations originating from multiple regions worldwide. A lack of cash flow in industry sectors including energy, infrastructure, and natural resources may be causing aggrieved investors to consider initiating claims that were previously put to one side in favour of revenue-generating deals.

It is still too soon to know the magnitude of the funding applications that will relate to COVID-19. While many hoped the COVID-19 pandemic would be short-lived, unfortunately that is not the case. At the time of writing, the pandemic is still very severe in many parts of the world; companies are focused on immediate business operations or managing the commercial and practical impact of forced shutdowns and business interruptions. We have yet to see many of the claims to come that will stem from the COVID-19 pandemic.

4 INCREASE IN PORTFOLIO FUNDING SINCE THE ONSET OF COVID-19

Separate from business-specific sectors, we have seen an increase in portfolio funding applications from both law firms and corporates in the wake of the COVID-19 pandemic.

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4.1 Law Firm Portfolios

Due to COVID-19 disruptions, clients' financial ability to continue paying or consider paying external counsel on an hourly fee basis has been strained. Clients increasingly push their lawyers for creative fee arrangements. In addition, many clients are in financial distress and thus are paying their law firms more slowly (or in some cases not at all). Firms that have taken commercial cases on a partial or full contingency fee basis now see the payment of their potential return delayed by court closures due to the pandemic, thereby causing cash flow difficulties all around.

In this context, law firms, more than ever before, are seeing the possible value of non-recourse portfolio funding. As a result, we have observed an increase in the number of law firms seeking portfolio funding.

Many disputes funders will provide working capital based on the recoveries expected from a portfolio of three or more commercial litigation or arbitration matters that a law firm has on a full or partial contingency basis. Typically, these cases are for different clients (but need not be) and based on different causes of action. For example, the portfolio could include a contract dispute, an antitrust or competition claim and a patent dispute. The common elements are that the same law firm is acting for the client(s), and the law firm is handling them on a full or partial contingency fee basis. In the present context, we are seeing more and more law firm portfolios proposed that include one or more matters on an inadvertent or forced contingency fee, where the client initially paid the firm on an hourly basis but can no longer pay the agreed fees.

When one or more of the cases in the portfolio results in a payment of fees to the firm, the law firm pays the funder its return, which typically is a multiple of the funding provided to the firm or an interest rate on the funded amount (or a combination of the two). Typically, the return owed to the funder reflects the duration of the funder's investment. If none of the cases in the portfolio succeeds, the funder loses its entire investment. It has no recourse to any of the firm's other assets or non-portfolio income.

The capital provided by a funder to a law firm can be used for disbursements, including arbitral institution costs, arbitrator fees, and experts; the capital also can be used to support the law firm's operations while the cases progress, including partner draws or associate salaries. The law firm has the discretion to allocate the funds as needed, thereby allowing the firm to better manage its cash flow during the pendency of the cases.

While law firms have traditionally taken bank loans or used their own partner equity to

cover expansion costs, litigation finance presents an appealing option for a number of reasons.

First, unlike bank loans, usually the capital deployed by funders like Omni Bridgeway is not treated as debt. Instead, it is treated as a non-recourse investment. If the cases in the funded portfolio do not result in fee revenue, a non-recourse funder is not entitled to recover a return on its invested capital or even the amount of funding that it has disbursed to the law firm.

Another advantage of portfolio funding is that the firm can reduce its risk when taking a commercial matter on a full or partial contingency fee basis. Many firms that have
P 186 historically been cautious about contingency fees (either full or partial) are ● starting to consider them, particularly in the current COVID-19 atmosphere. In the right circumstances, contingency fee cases can enable a firm to preserve or increase its book of business, as their existing or new clients are unable or unwilling to pay full hourly rates due to their own pandemic-related cash flow issues.

Historically, contingency fee arrangements required the law firm's partners to take on risk and forgo cash flow. With portfolio funding from a third-party funder, however, law firms that are less comfortable with risk can start offering contingency arrangements to their clients or increase the number of cases they take on this basis.

Law firm portfolio funding can enable law firms to offer creative and profitable arrangements to existing and potential clients while maintaining cash flow and mitigating risk. It is a powerful option to fuel expansion and growth for firms with litigation practices and an appetite for taking measured risk. The COVID-19 pandemic has further heightened law firms' awareness of the benefits of portfolio financing, resulting in a spike of portfolio funding applications from law firms.

4.2 Corporate Portfolios

Similar to law firm portfolio funding applications, the COVID-19 pandemic has spurred a spike in funding applications from corporates looking to increase their liquidity while pursuing their legal rights.

In the corporate portfolio model, funders invest in claims for the same client, funding the client directly rather than the law firm. Corporate portfolio funding allows companies to monetise pools of litigation and/or arbitration to produce steady capital inflows over time as the disputes progress. In some circumstances, the funds provided by the third-party funder also can be used for capital and operating expenditures. A client portfolio of claims may present a decreased risk profile, and the diversification presented by a portfolio of cases may mean that a funder can offer the client better economic funding terms.

Portfolio financing represents a significant change from the traditional way companies have approached managing their litigation and arbitration docket. From a corporate perspective, litigation, and to some extent arbitration, has often been viewed warily by executives and board members because of its unpredictability. Litigation costs are difficult to budget against, and for a public company whose stock price is affected by earnings reports, a long-running expensive litigation can have a significant negative impact on the company's financials.

A contingency victory, while welcomed, also does little to heal the accounting damage of self-funded litigation. At most companies, income from a recovery is treated as a special event for accounting purposes and, thus, cannot be counted against the expenses incurred in connection with pursuing the legal claims on an earnings report.

With funding, legal expenses are reduced or eliminated on the balance sheet, because the funder is covering them. When provided, working capital provided by the funder often can be treated as an immediate revenue event for corporate accounting purposes. And if the claims succeed, the company will still be able to take part in the upside of a large victory when it occurs.

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By working with a funder, companies can develop a business process that helps them identify litigation for financing across business units. A cross-unit strategy can help unlock financial revenue in litigation where none previously existed. Pursuing affirmative legal claims also sends a strong message to the marketplace that the company will fight back when harmed. This, too, might dissuade other wrongdoers from attempting to take advantage of the company in the first place, especially in the present context.

Even if a commercial litigation or arbitration is not successful, the company has taken a calculated risk with its commercial disputes portfolio that leaves it with a minimal potential downside. It is not spending millions of dollars out of pocket on counsel to handle a case – the funder is – and it owes the funder nothing if a case is unsuccessful.

In the present economic climate where corporations are looking to manage their cash flow and increase their liquidity while protecting their rights, portfolio funding can be an attractive tool for companies to realise the value of their litigation assets while offloading risk to a funder.

5 CHALLENGES AND OPPORTUNITIES COVID-19 HAS INTRODUCED TO THIRD-PARTY FUNDING ARRANGEMENTS

COVID-19 has increased the risk of insolvency of parties on both sides of disputes. This can present special challenges for funders evaluating disputes for investment and makes it important for funders to have expertise and experience in funding matters involving insolvent parties or parties who potentially may become insolvent. Experienced funders with a team of lawyers seasoned in insolvency proceedings are well-positioned to assess the risks associated with insolvency and see the opportunities available to funders working with a liquidator or trustee of an insolvent estate to pursue and collect on claims of the estate.

COVID-19 also has increased insurance coverage claims associated with business interruption and other issues. This is a complex area of law and makes it important for funders to have team members with expertise in insurance disputes who can analyse the terms of the insurance contract and exclusions from coverage in light of events during the pandemic. Third-party funding is well-suited to assist companies in pursuing meritorious claims at a time when companies may not have the financial liquidity to pursue affirmative cases; rather than delay asserting such claims, companies can turn to third-party funders to enable them to assert their claims timely and effectively, because with funding, companies can afford to hire excellent counsel to handle the case and leading testifying experts (if needed) to present the best case possible. In short, the availability of third-party funding makes it possible for companies to avoid abandoning their meritorious affirmative claims due to liquidity limitations during the pandemic.

One potential opportunity that may come out of the COVID-19 pandemic and the associated economic uncertainty is that parties may be motivated to explore alternative
P 188 dispute resolution mechanisms such as mediation and settlement sooner than they ● otherwise might. On the other hand, some respondents might try to take advantage of the increased congestion of cases and arbitrations due to the suspension of some proceedings since early 2020, and seek to delay the case, especially when courts are not operating at full capacity. However, both courts and arbitral tribunals have become increasingly receptive to conducting proceedings telephonically or by videoconference. Some appellate courts are issuing decisions more rapidly than usual since the number of new and urgent matters reaching the appellate level courts has been reduced due to months of closures at the trial court level before such first instance courts began conducting proceedings telephonically or by videoconference. Some cases are still delayed because not all first instance cases can be heard by telephone or videoconference.

Finally, a significant risk posed by the economic impact of COVID-19 is that a successful arbitration award or judgment may be difficult to collect. This makes it important for third-party funders to have expertise in enforcement and execution of awards and judgments. For instance, an enforcement team can work on dispute funding cases where a judgment or award has yet to be handed down, but where it is expected that the debtor in question will try to evade payment. Experienced funders with an in-house asset-tracing and enforcement team can anticipate such attempted evasive manoeuvres and develop a strategy to best position the claimant to collect against the debtor.

Funding can also be provided for enforcement and management for cases where the client has already obtained an award or judgment. The intelligence and asset-tracing team can perform a preliminary asset trace to determine if the debtor is able to pay the judgment or award. If this is the case, like dispute funding, financing can be provided to pursue enforcements on a non-recourse basis in return for a percentage of the recovery. Monetising an enforceable award in whole or in part or selling certain types of claims may be a good solution for businesses, whether they are individual cases or portfolios, such as a pool of unrecovered insurance claims or non-performing loans.

6 FUTURE TRENDS IN THIRD-PARTY FUNDING ANTICIPATED AFTER THE COVID-19 PANDEMIC

In the post-COVID-19 world, we anticipate that the increased interest in funding that we have observed in the first half of 2020 will continue. Corporates will more regularly consider third-party funding as a financial management tool and turn to it not only during times of economic uncertainty but also during stable and even prosperous economic times.

Similarly, the increased familiarity among corporates and law firms with portfolio funding due to the need for financing in the COVID-19 period likely will lead to more normalised and increased use of non-recourse portfolio funding as a financing tool. This may include companies that have historically been less inclined to use third-party financing given their historically extensive capital reserves, such as oil and gas companies.

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Certain types of disputes may arise with more force after the COVID-19 pandemic, such as increased disputes between insurers and reinsurers. Insurers are likely to assert claims

against reinsurers to recoup some of the losses that the insurers incurred on policies paid out to insured parties during the pandemic. In another sector, long term oil and gas contracts that were negotiated pre-Covid, when prices were substantially higher, may lead to price re-opener or price revision arbitrations or other disputes based on the drop in the market price of oil and gas. This may spur an increased interest by sovereign states as well as national oil and gas companies in export-driven economies to consider funding such disputes.

Regardless of the types of disputes that arise, experienced third-party funders are well-positioned to support the needs of corporates and law firms long after the COVID-19 pandemic. An important trend for funders is to be able to offer the panoply of substantive and procedural expertise that corporate and law firms need: teams that have the substantive expertise in the kinds of disputes that are likely to be funded in the future and the procedural expertise with respect to both the dispute resolution mechanisms chosen by the parties and enforcement and execution of a resulting award or judgment.

Funders will need to be increasingly innovative and willing to enter into bespoke funding arrangements responsive to client and law firm needs. Such arrangements are fact-specific to the needs of the client and firm. As with any economic downturn, the COVID-19 pandemic has set the stage for parties and law firms and funders to think 'outside the box' to arrive at funding arrangements that meet the needs of all stakeholders.

Finally, the COVID-19 period has demonstrated the importance of the liquidity of third-party funders. Going forward, clients and law firms will look closely at not only the substantive qualifications of the team and reputation of the funder but also its liquidity and track record.

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Chapter 11: The COVID-19 Revolution: The Future of International Arbitration Is Not Over Yet

Ema Vidak-Gojkovic; Michael McIlwrath

When the asteroid now referred to as the Chicxulub Impactor slammed into the Earth some sixty-six million years ago, it set off a catastrophic chain of events that altered the planet's environment, causing the extinction of three-quarters of the world's plant and animal species, including most of the dinosaurs. (1) In the geological record, the event literally marks with a visible line of rock (2) the end of Cretaceous epoch and the beginning of a new one, the Paleogene. On each side of that boundary are very different types of plants and animals.

Future practitioners of international arbitration may see the Covid pandemic as providing a similar dividing line between different practices of arbitration, current and past. We believe we are in the middle of that line of demarcation now. The changes currently underway show no signs of abating and may even be accelerating, with formerly hidebound pre-pandemic practices being buried in the past. We should expect still further changes in all dimensions of international arbitration, ranging from the accessibility of the practice, to how arbitrators are selected, and how cases are conducted.

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1 CRISIS HAS CHANGED INTERNATIONAL DISPUTE RESOLUTION BEFORE

It is not fanciful to see the Covid crisis as an event that will fundamentally alter dispute resolution practices. Global upheaval has had this effect on international arbitration before.

A little over a hundred years ago, World War I left the world with a vacuum to regulate relations between States and burgeoning international commerce. Among many other innovations during that period, including the League of Nations and the Permanent Court of International Justice, in 1919 the International Chamber of Commerce (ICC) was created to foster a framework for renewed international trade. (3)

One of the ICC's first acts was to create the ICC Commission on Arbitration in 1920, which in turn created a set of rules and a court for facilitating the resolution of conflicts between businesses located in different countries. (4) And in the years that followed, States created the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. A new era of international commercial arbitration thus emerged from the crisis' wreckage.

In the early 1930s, however, the ICC's aspiration of achieving "peace through commerce" confronted the global economic crisis. This challenge gave rise to a need to resolve conflicts in a relatively short time by arbitrators who would be paid a fee to render final awards, as opposed the ICC's initial emphasis on conciliating disputes and providing the services of arbitrators gratuitously. (5)

From this, the basic structure of international arbitration—as practiced by the ICC and other institutions—emerged and since then remained relatively stable. Modern international arbitration has since followed more or less the same template: rules and procedures that contemplate initial pleadings, a case management conference with an initial procedural order and timetable, then further development of the written record, culminating in a conclusive oral hearing, followed by a final award. (6)

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2 THE COVID PANDEMIC CHANGED THE ENVIRONMENT FOR INTERNATIONAL ARBITRATION

Rather than inflicting minor inconveniences on parties and tribunals to international arbitrations, the pandemic is provoking a wave of evolution. It is no surprise that, when forced to choose between adopting new ways of resolving disputes or suspending the dispute resolution altogether, parties and tribunals are for the most part choosing the former. What is surprising is how easily and quickly these new methods are becoming standard practice.

In March 2020, as the Covid pandemic was rapidly proliferating beyond a few initial hot spots, a large and complex international arbitration was being held in Brazil, reportedly with seventy participants. Health concerns, the risk of stranding participants in a foreign country, and the consequences of delaying a hearing that had taken many months to schedule led the participants to immediately suspend the two-week physical-presence hearing midstream and quickly resume online for the second half of the proceeding. (7) Counsel, tribunal members, and witnesses all connected via Zoom from different countries. According to a newspaper report, the online portion of the hearing took place without difficulty and to the satisfaction of the participants. (8)

Adding to the momentum of parties and tribunals taking their own initiatives to move proceedings online, institutions began encouraging the use of remote hearings, and many tribunals also embraced remote proceedings as a means to maintain forward momentum. Questions or ambiguity over whether arbitral tribunals may order a remote hearing in the face of an objecting party have often been resolved in the affirmative, instead of defaulting to due process concerns in favor of the objector.

The problem that tribunals and parties had to overcome has been how to address parties' objections to remote hearings at a time when existing rules did not regulate that issue. To return to the ICC Rules of Arbitration as an example, Article 25(2) as it existed at the beginning of 2020 (and as of this writing) states that, after studying the parties' written submissions, the tribunal "shall hear the parties together in person if any of them so requests." (9) The ICC Secretariat's Guide had previously indicated that tribunals had generally interpreted this article conservatively to mean at least one "face-to-face" hearing in order to avoid any basis for a challenge on due process grounds. (10)

Given that this conservative interpretation could paralyze disputes for an undetermined period of time, the ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid Pandemic (the "ICC Guidance Note") to encourage tribunals to take a bolder approach to maintain momentum in cases. Published by the ICC in April
P 194 2020, when the pandemic was underway in Europe and ● just reaching North America, the ICC Guidance Note provided a basis for tribunals to interpret Article 25(2) as requiring only the opportunity for a "live, adversarial exchange," and not necessarily the physical presence of all participants in a single location. In other words, the hearing could be conducted "in person by virtual means." (11)

In recent months, the ICC has held public discussions about revisions to its arbitration rules that would clarify the authority of tribunals to conduct remote hearings whenever it would be appropriate to do so, including over the objection of a party. If adopted, the new rules should come into effect at the beginning of 2021.

Accordingly, while the ICC arbitration practice began 2020 by suggesting that the "safe" course demands that hearings be "face-to-face" if at least one party insisted on it, the year will likely end with rules that cement a tribunal's power to decide whether to conduct hearings remotely, even over a party's objection. (12)

3 THE CHANGES WILL BE STRUCTURAL AND PERMANENT AND REACH BEYOND REMOTE HEARINGS

While there will undoubtedly be legitimate reasons for some cases to return to past practices of long days in conference rooms and hearing centers and short nights in foreign hotels, parties and tribunals will operate under different assumptions than before. (13)

The question tribunals and parties will most likely face in the post-pandemic world will be the opposite of the one they faced pre-pandemic. Rather than asking whether hearings should be conducted online, tribunals and parties are more likely to ask whether the circumstances justify the inconvenience and expense of assembling everyone in a single physical location. And, even where physical, in-person hearings are justified, they are likely to question the assumption that *everyone* will or must attend in person. One well-known arbitrator has suggested that even in complex, high-value
P 195 construction disputes that rely heavily on the ability to cross-examine ● witnesses and experts, remote hearings are likely to continue to play an important role in a post-Covid world. (14)

And the more the practice of remote hearings is used, the more attuned participants will become at accounting for, and adapting to, both the limits and benefits of the new medium. Instead of rejecting the possibility of remote hearings because they do not provide the same feeling as a "courtroom," participants are already learning how their advocacy and supporting materials should be presented in the different medium.

For example, rather than protesting the problem of shortened attention spans or fatigue from staring at computer screens, counsel will instead adapt their advocacy to account for these differences from being in the same room. Social researchers have begun to refer to the phenomenon of shortened attention spans in online meetings as "*Zoom fatigue*":

> "Zoom fatigue" stems from how we process information over video. On a video call the only way to show we're paying attention is to look at the camera. But, in real life, how often do you stand within three feet of a colleague and stare at their face? Probably never. This is because having to engage in a "constant gaze" makes us uncomfortable—and tired. In person, we are able to use our peripheral vision to glance out the window or look at others in the room. On a video call, because we are all sitting in different homes, if we turn to look out the window, we worry it might seem like we're not paying attention. Not to mention, most of us are also staring at a small window of ourselves, making us hyper-aware of every wrinkle, expression, and how it might be interpreted. Without the visual breaks we need to refocus, our brains grow fatigued. (15)

Exactly how advocacy will evolve as a result of widespread use of remote hearings remains to be seen, but it is possible to predict some areas of how it will be affected. (16)

Given the challenge of reviewing hundreds of exhibits during a four-hour video call (let
P 196 alone during several consecutive eight-ten hour day hearings), practitioners ● concerned about their ability to persuade may begin to limit the number of documents they use to make their case. This self-imposed discipline may have an effect of questioning the need to file thousands of exhibits with each written submission—exhibits which few arbitrators would read comprehensively—and which in turn may lead to more focused requests for documents.

Equally, the very practice of how oral hearings are conducted may also evolve as a result of more of them being conducted online. During the initial wave of Covid, the main novelty of online hearings was video cameras in participants' homes. In the authors' experience and those of colleagues with whom we have consulted, the duration of hearing "days" is frequently shortened to accommodate different time zones, while in some cases the number of weeks to complete a hearing has grown longer. The authors are familiar with an example of a tribunal's order for a two-month-long hearing during the summer of 2020, with four-hour sessions on each day.

The practice of reserving such large chunks of time for consecutive hearing weeks may not endure long in the virtual (or post-Covid) era, or may only be used for truly exceptional cases. Now that it is widely accepted that a short-duration hearing can be organized quickly online and conducted without the need to have all participants physically together, participants may begin to prefer—or even insist on—multiple but shorter hearing slots for separate issues or witnesses. While remote hearings currently attempt to replicate the familiar practice of everyone being in the same room, this may fade as practitioners become comfortable with the technology and the possibilities it offers.

As an example of how the "new normal" may lead to further innovations, Maxi Scherer has recently suggested that at least parts of hearings might be conducted "asynchronously," i.e., without convening participants at the same time (physically or remotely):

> An asynchronous participation in an oral hearing could take the form of a video recording of the counsels' opening statements, for instance. They could be made available to the arbitral tribunal some time in advance of the evidentiary hearing (which could still take place in a synchronous fashion). The arbitrators could watch the opening statements at different times, at their leisure … and possibly even pre-deliberate some questions in advance of the evidentiary hearing. (17)

And the importance of holding one, large evidentiary hearing may also give way to other evolutionary steps in practice. Future tribunals may begin to structure procedural timetables to take advantage of the ease and flexibility by which parties may be convened online. Instead of having as few as two meetings with the parties—a case management conference at the beginning of an arbitration and an all-in merits hearing at the end—tribunals may instead hold a series of "mini-hearings" during the arbitration to address discrete issues of the case or procedural matters as they arise. (18)

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The popularity of videoconferencing may also lead to the replacement or demise of technologies currently in use, such as telephone conferences in international arbitration. One of the authors participated in a case management conference conducted via normal telephone in June 2020. Notwithstanding past experience of hundreds of such calls in the past, the use of telephone audio—during a time when video was already being used in all other meetings—felt stilted and even awkward and several participants found portions difficult to follow.

Not only is digital audio quality typically higher quality than analog telephone, but the ability to see who is speaking renders discussions easier to follow and avoids the need for each person to identify themselves before speaking or when rejoining calls. While it may not disappear entirely, the "tele-conference" in the post-Covid world may get as much use as fax and telex machines after the introduction of email, i.e. reserved only for rare circumstances where better technology is not available.

This is not to suggest that technology for online meetings and hearings is perfect. In fact, evolution in international arbitration practice may also occur because it is sometimes suboptimal. Bandwidth can be too little; audio may be dropped; video may freeze at times even with the best high-speed connections. These imperfections may cause parties and tribunals to reduce or minimize reliance on it. The ICC Guidance Note, for example, encourages this before discussing the appropriateness of remote hearings. It lists a number of existing case management techniques that can be useful in shortening lengthy hearings:

- dispose expeditiously certain claims or defenses;
- resolve the issues in dispute in stages by rendering one or more partial awards;
- identify whether the entirety of the dispute or discrete issues may be resolved on a documents-only basis, with no evidentiary hearing;
- consider whether certain issues can be decided either without or with highly limited production of documents;

- identify issues that may be resolved without witness and/or expert evidence or on the basis of written questions and answers;
- use either audioconference or videoconference for conferences and hearings where possible and appropriate;
- request parties to establish an agreed chronology of facts, joint lists of issues in dispute or other similarly jointly produced documents that help define and narrow the range of issues in dispute;
- consider whether and how the number and size of submissions can be limited; and
- consider opting-in to the ICC Expedited Rules Provisions. (19)

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With the exception of advising parties to consider using audio or videoconferencing "where appropriate," these case management techniques can potentially be employed without any hearing at all.

Broader adoption of any one of the above techniques could have a significant impact on how arbitrations are conducted. For example, summary disposals have long been viewed as underutilized in international arbitration. For years, practitioners (including one of the authors) have called for a wider use of summary disposals in international arbitration as a potentially powerful tool to render proceedings more efficient. (20) The lack of an effective summary disposition mechanism to determine at the outset of a proceeding, for example, an issue such as whether a nonsignatory may bring substantial claims against a respondent often casts international arbitration in an unfavorable light when compared with certain national courts. (21)

4 AN OPPORTUNITY FOR MORE DIVERSITY?

Technology-driven changes during the pandemic have also opened the doors to a wider "democratization" of international arbitration and created opportunities to level the playing field for groups that have traditionally been under-represented.

An essential element in that process is the availability of online knowledge exchange, which may create more opportunities for lawyers of different levels of seniority and different regional backgrounds.

As lockdowns came into effect in 2020 as a result of the pandemic, it brought with it a seemingly exponential amplification of international arbitration webinars and online courses, for free or nominal cost. For example, one of the authors launched a "Mute Off Thursdays" project, connecting over 350 women in arbitration through thirty-minute
P 199 virtual weekly meetings to discuss hot topics in arbitration and women leadership; (22) noted arbitration authority Gary Born led several interactive webinars with practitioners around the world on behalf of the Singapore International Arbitration Centre; in early July 2020, the Paris Arbitration Week organized almost fifty interactive webinars; and in the same week, the popular Tylney Hall biannual symposia offered three fully online Tylney sessions over Zoom for free (June-July 2020).

In pre-pandemic times, the cost of attending any of these events would easily have reached thousands of dollars for admission fees and airfare and hotel. More importantly, the level of interaction with panelists achieved through these online webinars has often exceeded what can be achieved between speakers and audiences at traditional, pre-pandemic arbitration conferences.

Similarly, junior lawyers may find they can acquire real-world experience more quickly by attending hearings conducted online, given the absence of travel costs.

"Democratization" through technology may not be fulfilled, however, unless access to viable technology is uniformly available.

High-speed Internet is key for remote arbitration, and yet the "digital divide"—the gap between those who have Internet access and those who do not—remains significant. Half of the world's population does not have access to the Internet. Developed economies like the United States, France, Germany, the United Kingdom, and Japan have among the highest access rates, whereas the countries in sub-Saharan Africa, followed by many in emerging and developing economies in Asia, are among those with the lowest access to the Internet. (23)

For comparison, looking at the Internet penetration rates by continents (as of Q1 2020), North America is at 94.6% while Africa remains at 39.3% (Figure 11.1).

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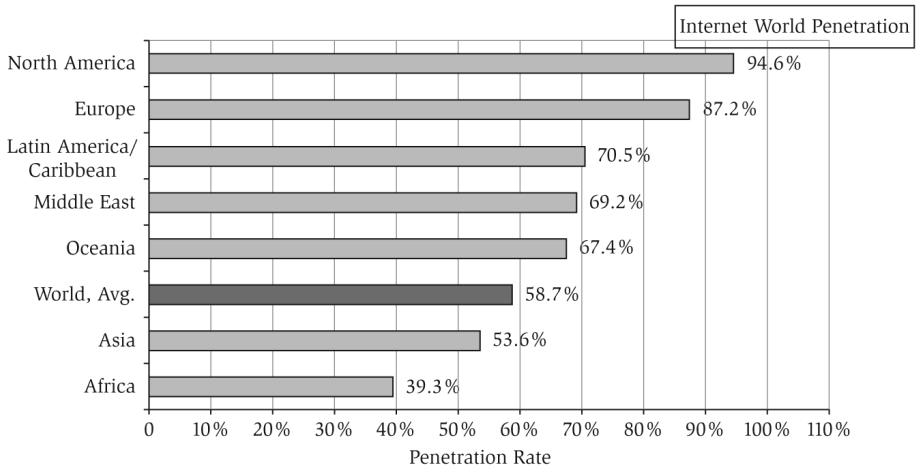
Figure 11.1 Internet World Penetration Rates by Geographic Regions: 2020 Q1 (24)



A significant difference in the quality of Internet connection as between the parties may give rise to concerns over biases against parties with poorer Internet connections. One 2014 study by German academics showed that delays on phone or conferencing systems shaped our views of participants negatively: even delays of 1.2 seconds made people perceive the responder as less focused or friendly. (25)

One way to address this problem could be, for example, via reliable online hearing services offered by local and regional arbitration institutions. This may raise yet another prospect of how change in one area might provoke changes in other areas. If local and regional institutions grow in importance in order to overcome deficiencies in technology, this may generate demand for their rules and their places of arbitration, and greater diversification of arbitration providers.

It is difficult to predict at this stage how the pandemic will also affect the playing field faced by members of the arbitration community who are today under-represented in more senior appointments and positions. Social distancing and lack of physical interaction may favor those who had relationships that existed before the pandemic, creating an invisible barrier for advancement.

Or barriers may fall as comfort levels rise on the ability of people to work and connect remotely, as schedules are accommodated across different time zones, and as background noises of children shouting and dogs barking become an accepted norm rather than being perceived as a career obstacle.

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If economic crisis follows the pandemic, the demand for arbitrators will follow the increased number of arbitrators, creating further demand for information about their performance, approaches to case management, and ability to conduct remote hearings and online proceedings.

In even the recent past, parties generally expected to recover from their counsel only a list of few highly prominent and esteemed candidates. Now, such lists are insufficient when parties expect to understand why an arbitrator is suited to their case, and request information about arbitrator candidates' procedural preferences, relevant geographical experiences, with industries or under relevant laws, along with legal issues addressed in past decisions.

In the pre-pandemic world, access to substantially greater information about arbitrators was already emerging through the initiatives such as Arbitrator Intelligence, the ArbitralWomen arbitrator database, or even self-declarations by arbitrators on their websites (as the authors had previously recommended). (26)

In the post-Covid world, among the topics of high interest will also be what experience the arbitrator candidate has in conducting remote hearings or in utilizing case management techniques that ensure efficient case progression regardless of the Covid circumstances. Making such information available will be an important tool for increasing the visibility of less experienced candidates.

The more information is readily available about candidates who may not already be known to the appointing party or counsel, the easier it will be to appoint from a wider pool, therefore decreasing reliance on the existing names and personal contacts.

5 CONCLUSION: THE CHANGES WILL OUTLAST THE PANDEMIC

The global pandemic arrived at a time when international arbitration was already primed for change. Although some practitioners may yearn for old times to resume, there are signs that we are currently in the midst of a period of evolution, of permanent adaption to the world of modern commerce and technology.

On the supply side, the proliferation of dispute resolution institutions and international commercial courts has created an environment where no provider of arbitration services

can be content to rest on their laurels. Arbitration institutions today must convince the market that they offer a better service than modern and increasingly competitive commercial courts. And they distinguish themselves by adopting innovative rules and procedures to attract parties to their services.

P 202 But the most significant pressures for change remain on the demand side, expressed by increasingly vocal arbitration users, who for years have been insisting on ● faster and less expensive means of resolving their disputes. (27) While the pandemic has put a spotlight on the use of remote means of conducting hearings, it will not be lost on users that this method of communication was already in widespread use by businesses around the world. Unfortunately, it took a global pandemic to become widely adopted and proven to be a viable means of resolving disputes.

The Covid crisis has already altered how disputes are resolved, and will continue to act as a catalyst for change even after the virus is brought under control. The forces propelling this evolution may even intensify as the pandemic's economic fallout exerts pressure on businesses to trim expenditures and conserve cash, and as the economic crises created by lockdowns drive more commercial relationships into disputes. This will increase the need for the rapid resolution of commercial conflict without overwhelming national court systems or even as a consequence of the courts being overwhelmed. (28)

While certain practices may fall out of favor and even face extinction – such as travel by air to attend a one-hour case management conference in a remote city – new ways of resolving disputes and others yet to emerge will help international arbitration flourish once the pandemic is behind us. Assuming the Covid moment is a line of demarcation between past and future arbitration, as we indicated at the beginning of this chapter, the dinosaurs may offer an unexpected lesson in adaptation. It is true that the impact of the Chicxulub asteroid caused most dinosaur species to go extinct. Yet one group survived, by being better suited to the radically changed environment on the other side of that demarcation. Now referred to as the "avian dinosaurs," they became one of the most thriving species of animal on the planet for the next sixty-six million years. We know them as "birds." (29)

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Chapter 12: COVID-19 and Construction Disputes

Todd Wetmore; Simon Elliot

Since its appearance, COVID-19 has distinguished itself as one of the most significant disruptive events in recent global history. Within weeks of a new form of pneumonia appearing in Wuhan, China, other countries reported their first cases, (1) and the World Health Organization (WHO) declared a global health emergency. (2) By early March 2020, the WHO confirmed that the world was in the grip of a pandemic, (3) and governments around the world began to take drastic measures to contain its spread. (4)

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As an industry that depends on global supply chains for equipment, materials, plant, and personnel, and one which frequently requires the concentrated deployment of personnel in close working conditions, the international construction sector is particularly vulnerable to the disruptive impacts of COVID-19. In this chapter, we examine the current and expected impacts of COVID-19 on international construction projects, and how they will likely feature in disputes in the post-COVID-19 world. We also offer observations on how the very process of construction dispute resolution can (and likely must) adapt in the face of the challenges presented by COVID-19.

1 THE IMPACT OF COVID-19 ON CONSTRUCTION PROJECTS

The effects of COVID-19 and of the measures necessary to contain it have been universal and pervasive. Their impact on the international construction sector has been pronounced, despite the efforts in some jurisdictions to temper the negative effects by exempting construction activity or certain key projects from otherwise applicable confinement measures.

Below, we survey the measures taken globally in response to the pandemic and the consequential impacts on construction projects.

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1.1 The Global Response to the COVID-19 Pandemic

With few exceptions, governments around the world have imposed a range of restrictive measures to combat COVID-19's spread, including border closures, in-country travel restrictions, generalised confinement (or 'lockdown') measures, and quarantine and social distancing requirements. As the survey of selected jurisdictions below reveals, the global response to date has been far from uniform; yet, it has been characterised generally by quarantine measures that have halted or slowed construction activities, despite concerted efforts to find ways for these activities to proceed apace. And, of course, despite the success of confinement and other containment measures, COVID-19 remains highly contagious and prone to resurgence. Pending the advent of a vaccine, the reimposition of containment measures, perhaps repeatedly over time, remains a substantial likelihood.

1.1.1 Asia

As ground zero for the COVID-19 outbreak, China was the first to impose a wide range of restrictions to prevent the virus' spread, including strict city-wide and regional lockdowns, international travel bans (5) and border closures, (6) and quarantine
P 206 measures. (7) Until those measures were lifted, only construction projects that were deemed essential – such as: (i) public utilities (e.g., water supply, gas supply, power supply, communication, etc.) and (ii) the prevention and control of the pandemic (e.g., production and sales of medical devices, drugs, protective products, etc.) – were allowed to continue.

From 9 February 2020, all construction projects were allowed to resume but were subject to specific health and safety requirements, including a requirement to conduct temperature checks and wear face masks at site and to quarantine international workers arriving from countries with high rates of infection. (8)

In India, the Modi government imposed a three-week nationwide lockdown from 24 March 2020. The lockdown was later extended through 8 June 2020. (9) From 20 April 2020, construction activities could resume on essential construction projects. Such projects included, for example, renewable energy projects. (10) From 8 June 2020, non-essential construction projects were also allowed to recommence. All construction, however, has remained subject to adherence to social distancing rules at site, mandatory thermal scanning, and frequent sanitisation of the workplace.

Japan closed its borders to foreign nationals from over seventy countries on 1 April 2020 (11) and declared a state of emergency on 16 April 2020, with local governments encouraging individuals to stay at home and advising (but not requiring) certain specified business sectors (which did not include the construction sector) to either limit or temporarily cease their operations. The Japanese response relied primarily on

P 207 voluntary compliance with recommended measures. (12) Thus, strictly speaking, it was possible for construction projects to continue. Nevertheless, many construction projects were suspended due to actual outbreaks of the virus among the workforce or to prevent the virus' further spread and preserve workers' health and safety. (13)

The early successes in Singapore at combatting the virus with testing and contact-tracing were nevertheless followed by a range of restrictive measures on 20 April 2020. The Singaporean example is interesting because specific legislation was enacted to extend temporary relief to businesses unable to perform their contractual obligations due to the virus outbreak in a number of sectors, including the construction sector. In particular, a statutory moratorium of six months (i.e., until 19 October 2020, unless further extended), (14) was introduced for contracts that were entered into before 25 March 2020 under the COVID-19 (Temporary Measures) Act. This has suspended, *inter alia*: (i) the enforcement of rights relating to obligations that are due on or after 1 February 2020; (15) (ii) claims for liquidated damages for delay in performance, or non-performance, of obligations due on or after 1 February 2020; and (iii) calls on performance bonds (or their equivalent). (16) In the period to 2 June 2020, only essential construction works were allowed to continue. (17) Thereafter, works could proceed on all projects, subject to compliance with newly issued health and safety requirements. (18)

1.1.2 Europe

By early March 2020, the WHO declared that Europe had become the epicentre of the pandemic (19) and most European countries began to take steps to contain its spread.

Italy, one of the first and worst hit European jurisdictions, imposed strict border control
P 208 and lockdown measures from mid-March 2020 to mid-May 2020. (20) During this time, all construction activities were halted except for those considered essential (notably, civil engineering, public utilities and national defence projects). (21) Numerous construction projects were thus suspended for nearly two months before resuming under the new conditions of social distancing.

France imposed a nationwide lockdown on 17 March 2020, which lasted until 11 May 2020. During that time, all non-essential movement was prohibited. This resulted in the effective closure of many construction projects. Borders were also closed to all non-essential travellers until 15 June 2020, when exceptions were first introduced for certain European Union and Schengen area countries. (22) According to a Eurosat survey, construction activity in France experienced a dramatic decline of 32.6% in April 2020. (23) For those projects that managed to continue, new governmental health and safety guidelines required adjustments to working methods, including limitations on the number of workers on site at any one time, the use of face masks, social distancing and the designation of a COVID-19 coordinator on each site to ensure compliance with health and safety measures. (24) Most construction projects have gradually resumed since the progressive relaxation of measures began in May 2020. According to the Minister of Housing, 53% of construction sites had reopened as of 12 May 2020. (25)

Spain declared a state of emergency on 14 March 2020, (26) and then placed tight restrictions on all non-essential movement and business activity (i.e., other than the medical sector, food production, security services and the like). This included the closure
P 209 of its borders to all non-citizens and non-residents. (27) These restrictions initially applied to construction activities and led to the suspension of most construction projects in the country. (28) Construction workers were eventually exempted from the stay-at-home orders and allowed to return to work on 10 April 2020, albeit in the new circumstances of social distancing.

1.1.3 The Middle East

In Saudi Arabia, lockdown measures, including round-the-clock curfews in some cities of the Kingdom, began from 23 March 2020. (29) These measures were relaxed and reimposed in some areas as the situation evolved, before being lifted on 21 June 2020. (30) Simultaneously, generalised internal travel restrictions and mandatory remote-working requirements for non-essential works (e.g., those not in the security, health or utility sectors) were put in place. Construction activities were not recognised as essential in principle; rather permits were issued on a case-by-case basis allowing key projects to continue. The Saudi government also issued general health guidelines to be respected at workspaces, including construction sites, which included, *inter alia*, social distancing requirements and frequent sanitisation of the workplace, as well as safety regulations setting out standards for employees' accommodation premises.

In the UAE, borders were closed to all passenger and transit flights from 22 March 2020 (31) and strict lockdowns were imposed nationwide. Construction projects were considered essential for the economy, however, and thus were permitted to continue subject to employers and contractors obtaining special permits. (32) Although construction works were permitted to continue in all emirates, restrictions such as the prohibition of movement of workers between emirates, the limitation of transportation vehicles' capacity, as well as social distancing requirements and other health and safety measures have nevertheless negatively impacted construction activities.

1.1.4 The Americas

In the United States, widely differing approaches have been taken to COVID-19 between
P 210 states, counties and cities. On 11 March 2020, the federal government ● imposed travel restrictions (33) and subsequently issued non-binding guidance on the measures to adopt, and the categories of workers that could be classified as essential. (34) At the state level, measures ranging from social distancing requirements to complete lockdowns have been instituted. Construction activity was prohibited, for example, in Michigan and Pennsylvania, and in certain cities such as Boston (35) and Cambridge, (36) with limited exceptions for emergency and critical infrastructure maintenance. In other parts of the country, construction projects seemed to continue without notable restriction, such as in District of Columbia, Florida, and Texas. This more sanguine approach to the virus has led to a situation that appears to require more drastic measures, which will presumably be imposed in due course.

The picture is similarly mixed in Latin America. In Mexico, for example, all non-essential activities were prohibited in April and May 2020. This initially included all construction activities, except those for essential infrastructure and services, such as those necessary to respond to the health crisis, water and power supply, and medical infrastructure. (37) By contrast, in Brazil, despite a nationwide travel restriction and ban on the entry of foreign nationals, (38) differing state and local governments have created a mix of stricter
P 211 and more relaxed measures from place to place. (39) Some state governors ● have imposed lockdown measures, which have greatly impacted construction. According to one study, Brazil's construction sector lost approximately 885,000 jobs between February and April 2020, with the industry's overall activity expected to shrink by 6% during 2020. (40)

1.2 Direct and Indirect Impacts of COVID-19 on Construction Projects

The variety and complexity of international construction projects – coupled with uncertainty about the pandemic's future trajectory – makes a comprehensive account of COVID-19 impacts impossible. It is clear that for some projects the impacts have been (or will be) severe and there is a serious risk that the impacts will continue to accrue over the months (and possibly years) ahead.

Most obviously, the effects of COVID-19 manifest themselves as sources of delay and disruption to the procurement and execution phases of construction projects. This is due to the adverse impacts on the mobilisation of personnel and plant to site, the procurement and delivery of equipment and materials, and imposed distancing affecting the pattern and intensity of works at site. (41) Given the inevitable detrimental effects on project progress and likely increases in the cost of executing the works, project cash flows will also be impaired.

1.2.1 Mobilisation of Personnel

Employers and contractors alike have faced obstacles to mobilising personnel and plant because of travel restrictions and quarantine measures imposed around the world.

International construction projects in particular rely heavily on imported labour forces for both skilled and less-skilled work, ranging from project management and supervisory functions to specialised trades and unskilled labour. In some cases, the location and character of the project require that extensive use be made of so-called fly-in-fly-out workers who rotate on and off construction projects, for example on a monthly or six-weekly cycle. Upstream and downstream oil & gas projects in more remote locations are a good example of this.

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As governments in jurisdictions where construction projects are occurring have moved to impose travel restrictions, the global supply chain for manpower has come under severe strain. There are reports of some workers being repatriated to their countries of origin because of the pandemic. (42) In practical terms, this means that international projects are exposed to the risk of manpower shortages, even where local conditions and regulations would otherwise permit works to progress.

1.2.2 Procurement of Equipment, Materials and Plant

International construction projects frequently make use of global supply chains for equipment, materials and plant. This exposes such projects to delays in the procurement of equipment, materials and plant at each step of the manufacturing and transhipment process. The more varied and lengthy the supply chain, the greater the exposure to the risk of measures affecting the timing of arrival on site. By way of example, China is a significant global supplier of raw and manufactured construction materials, with construction in the Middle East and the United States particularly dependent upon the availability of Chinese materials. (43) As a result of the particularly stringent lockdown measures imposed, many Chinese factories slowed significantly or shut down completely in the first quarter of 2020, leading to a substantial decline in the manufacturing and export of construction materials. (44)

The problem will be replicated elsewhere as interruptions in manufacturing, transportation, customs clearance, and acceptance testing ripple across jurisdictions.

Delayed equipment and material deliveries can induce further disruption as subsequent works must be performed out of sequence or in suboptimal ways. Shortages of piping material for a hydrocarbon project, for example, may force the contractor to shift away from an efficient construction logic that sought to maximise prefabrication and minimise field welding to much less efficient working methods that require greater quantities of field welding, executed on a piecemeal basis as required materials arrive.

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1.2.3 Operational Constraints at Site

The practical measures that must be followed to halt the transmission of COVID-19 have obvious direct consequences on the manner in which personnel can proceed with execution, testing, inspection and other activities on site.

For those projects which were required to close down entirely during periods of lockdown – which occurred, for example, in China and Spain – the consequent loss of progress was total. Even where projects have been able to continue, their progress has been hindered by the need to comply with stricter health and safety requirements at site. These have included: (i) temperature checks prior to entry onto site; (ii) regular sanitation of materials, tools and working environments; and (iii) social distancing requirements, which have limited the number of personnel who can work in a given space at any one time. Access to or within the site often involves the sharing of relatively limited spaces (e.g., elevators, voids for heating, ventilation and air conditioning, control and utilities rooms, etc.).

The United Kingdom (UK) government's guide on working safely on construction sites urges employers to reduce the number of workers on site to the minimum strictly necessary while complying with sanitary and social distancing measures. (45) A similar recommendation can be found, for example, in the safety handbook issued by the government in Singapore. (46) Even when advanced merely as guidelines (as opposed to mandatory norms), contractors and employers alike will be keen to adhere to them, given the health and safety culture that has rightfully taken hold in the international construction sector in recent decades. The practical effect of this is an inevitable reduction in the intensity of deployment of personnel and in their productivity. For example, one study, based on seventy medium-sized UK construction projects, concluded that a GBP 20 million commercial real estate project with an eighty-one-week programme will likely suffer productivity losses in the order of 15% as a result of labour and materials shortages, remote-working arrangements and site-based social distancing restrictions, with delays to project completion of up to thirty-two weeks and increases of around GBP 600,000 in preliminaries costs alone. (47)

The unavailability, or limited availability, of employer and third-party personnel may also hamper progress through delays to required approvals and inspections (particularly where the approval or inspection constitutes a hold-point for the commencement of subsequent work).

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1.2.4 Impaired Cash Flow

Most construction contracts condition contractor payments on the achievement of defined milestones or various metrics of progress. The negative impacts of the measures taken around the world in response to COVID-19 on project progress will therefore generally result in a direct impairment of contractors' cash flow. This can, in turn, have knock-on consequences for the cash flows of suppliers and subcontractors (particularly where there are 'pay when paid' arrangements).

Aggravating the problem, project participants may well also face increased costs as works take longer (thus increasing time-dependent costs) and are executed in a less productive manner (requiring more resources to execute the same scope of work).

In sum, impediments to the deployment of personnel, construction materials and equipment, as well as the overall decline in productivity resulting from novel working arrangements are expected to result in delays, disruption and increased cost, which will in turn adversely affect contractors' cash flows.

These COVID-19 related impacts directly or indirectly affect all industry stakeholders, including employers, contractors and subcontractors, lenders, insurers, and host governments. We therefore expect to see an increase in the number of disputes arising out of construction projects, as participants seek to reallocate the resulting financial burdens among themselves.

2 CONSTRUCTION DISPUTES IN THE POST-COVID-19 LANDSCAPE

Although COVID-19 is an unexpected and novel disease requiring an unfamiliar imposition of containment measures, one should not expect it to prompt a paradigm shift in the categories of dispute that typically arise out of construction projects. Rather, COVID-19 will amplify or add complexity to the familiar types of project disputes. (48)

Claims for extensions of time, prolongation costs, and additional payment will still

feature prominently in the disputes landscape, as contractors experience delay and disruption to their works as a result of the pandemic. Employers will continue to levy delay liquidated damages for delays in the achievement of contractual milestones and project completion.

But the bases on which these claims will be advanced and defended will differ. Reliance upon change of law, force majeure, hardship and other similar contractual and extra-contractual doctrines will increase sharply. Contests over causation, concurrency and the extent of contractors' mitigation obligations will involve additional complexity.

As contractors seek to avoid the burden and risks associated with COVID-19, contractors will naturally focus first on contractual provisions and legal doctrines that offer the
P 215 prospect of both schedule and financial relief. Below, we consider some of the ● primary avenues that contractors may pursue in contracts governed by the laws of common and civil law jurisdictions.

2.1 Change in Law

Experience from our own practice and anecdotal reports from others suggest that one of the first ports of call for contractors seeking to mitigate the impacts of COVID-19 will be contractual change in law provisions.

In most of the commonly used standard forms, change in law provisions provides a path to entitlement to both time and money. This is the case, for example, in the International Federation of Consulting Engineers (FIDIC) forms (both the 1999 versions and the updated suite published in 2017) which provide expressly that 'a change in the Laws of the Country' which affects the contractor in the performance of its obligations may give rise to an entitlement to both an adjustment of the contract price and an extension of time. (49) The concept of 'Laws' is broadly defined and would capture most kinds of legislative or regulatory action. (50)

In the many jurisdictions where governmental authorities have imposed restrictive measures in response to COVID-19, contractors may thus have a viable claim to additional payment and an extension of time where they can demonstrate that those measures caused an increase in costs or caused critical delay to a relevant milestone. In other jurisdictions such as the UK and Japan, where the governments issued guidance but stopped short of imposing binding legal restrictions on construction activity, contractors may find themselves without a relevant change in law to invoke and be forced to rely on other contractual provisions or legal doctrines. (51)

Whether a particular measure constitutes a relevant change in law will of course depend upon the particular wording of the contractual provision and the nature and impact of the alleged change. For example, based on the standard wording in the FIDIC Silver Book forms, it will be necessary to consider whether the relevant change was to the laws of the
P 216 'Country', which is defined to mean 'the country in which the Site (or ● most of it) is located, where the Permanent Works are to be executed'. (52) It seems that no particular difficulty in showing a relevant change in the laws of the 'Country' will likely arise if the measures in question are lockdown or health and safety measures that prevent or hinder the continuation of works at site. Although one might posit that the situation would have been worse without the change in laws, this is not typically a relevant consideration. Conversely, in a scenario where lockdown measures or travel restrictions in other jurisdictions have led to delayed deliveries of key equipment and/or materials, or prevented the deployment of personnel, in the country where the project is situated, it may be that no relevant change of law occurred and thus no entitlement can be claimed.

2.2 Hardship

Where contracting parties have chosen a civil law system to govern their contracts, contractors may also be able to look to the doctrine of hardship, which allows a rebalancing of contractual arrangements (by either negotiation or third-party adjudication) in certain circumstances.

Hardship exists in various forms in a number of civil law jurisdictions, including (e.g.) France, (53) Egypt, (54) Algeria, (55) Switzerland, (56) the Netherlands, (57) and Germany. (58) Hardship is rooted in good faith and typically occurs where an exceptional event changes the circumstances under which the parties had initially assessed and allocated the risks, benefits, and costs associated with their contractual arrangements. However, as the following examination of the examples of France, Egypt and Algeria show, the criteria for its application as well as the legal consequences vary between jurisdictions.

In France, hardship was codified only recently. Historically, French courts rejected hardship as a ground for the revision of contracts, based on the principle of the sanctity of contracts. (59) It is only in the 1990s that French courts began to find a duty for
P 217 contracting parties to renegotiate where exceptional circumstances had undermined ● the economic balance of their contract. (60) After a long and inconsistent jurisprudential evolution, heated doctrinal debates and various legislative attempts, hardship was eventually introduced into the Civil Code as part of the 2016 civil law reform. (61) Parties to contracts that post-date 1 October 2016 may now claim hardship where: (i) the performance of their obligations under the contract (ii) has become excessively costly,

(iii) as a result of a change of circumstances that was not foreseeable at the time of conclusion of the contract, provided that (iv) the risk of such a change was not allocated to one of them in the contract. (62)

French law obliges the claiming party first to seek the renegotiation of the contract with the other party. The scope of the renegotiation is broad and may encompass agreements as to both price and schedule. (63) In the event attempts to renegotiate *inter partes* do not bear fruit, the parties may agree to jointly terminate the contract or to submit the dispute to a court or arbitral tribunal. In the absence of such an agreement, either party may submit the dispute to a court or arbitral tribunal after a reasonable time has passed. Seized of a claim of hardship, the court or arbitral tribunal will decide in its discretion whether to revise or terminate the contract. (64) It bears noting that parties may agree in advance to opt out from the statutory regime of hardship.

There is no clear-cut conceptual line as to what constitutes an unforeseeable event under French law. French courts generally apply a reasonableness test to evaluate *in abstracto* whether a contracting party placed under the same conditions could have reasonably foreseen the event in question. (65) This point may carry great practical significance in the context of an epidemic (hardly novel) of a highly contagious coronavirus that can be
P 218 fatal for some, and transmitted by persons who are ● asymptomatic (an arguably quite surprising development). Recent French court decisions recognising COVID-19 as unforeseeable for the purposes of force majeure suggest that it is likely it would qualify as unforeseeable for the purposes of hardship as well. (66)

Therefore, where French law is applicable, disputes are likely to centre on: (i) whether the economic imbalance between the parties resulting from the pandemic is excessive, (ii) whether the risk of pandemic was allocated (expressly or impliedly) to one of the parties under the contract and (iii), if not, what is required to correct the resulting imbalance. This will be a highly fact-specific analysis.

Hardship having only been recently introduced in French law, what may be considered as 'excessively' costly in principle remains obscure. While a slight increase in costs would not be sufficient for a claim of hardship to be successful, it appears that a total undermining of the economic balance of the contract is not required either. (67) As such, a claimant is not likely to be required to show that COVID-19 has rendered the performance of the contract completely uneconomic. Importantly, such a test is one that may be progressively satisfied in the face of continuing impacts over months and years.

Although inspired by French law, Egyptian law codified a doctrine of hardship much earlier. Under Egyptian law, a court or arbitral tribunal can revise a contract where: (i) 'general exceptional circumstances' that (ii) 'could not have been foreseen' at the time of conclusion of the contract (iii) have rendered performance excessively burdensome on the debtor from an economic standpoint. (68) The notion of unforeseen events encompasses exceptional events only; this is understood to include unexpected epidemics. (69) Demonstrating that performance has become 'excessively' burdensome requires a 'serious loss' (as opposed to ordinary losses generally expected in business dealings), which is to be assessed on a case-by-case basis depending upon the surrounding circumstances. (70)

If these criteria are met, Egyptian law empowers the court or arbitral tribunal to adapt the contract to rebalance the parties' interests, including by reducing the debtor's obligation, increasing the reciprocal consideration, reallocating risks between the parties, suspending the contract until the exceptional circumstances no longer have an impact, extending performance deadlines, or by ordering any other measure that it deems appropriate. (71) In principle, the court or arbitral tribunal may not order the termination of the contract. (72) However, an exception has been made for construction
P 219 ● contracts. (73) Unlike French law, the Egyptian law provisions on hardship are mandatory and may not be excluded by agreement.

The Algerian Civil Code broadly reproduces the hardship provisions of the Egyptian Civil Code and sets forth the same criteria. (74) Under Algerian law, the unforeseeability element is strictly interpreted so that a failure to assess the normal economic risks underlying the contract will not be excused. (75) In turn, the debtor must be exposed to an 'exorbitant loss'. If hardship is established, a court or arbitral tribunal will have relatively broad powers to rebalance the contract as it sees fit, including by amending the contract price. (76) Like under Egyptian law, Algerian law provisions on hardship are mandatory and may not be excluded by agreement between the parties.

Unlike other legal doctrines, which suspend the performance of affected obligations, hardship concerns the problem of performance becoming excessively burdensome from an economic standpoint. As a consequence, under French, Egyptian and Algerian law, parties cannot rely on hardship to excuse non-performance and must continue to perform pending redress of the imbalance. (77)

While undeniably a promising avenue (for contractors and employers alike), the application of the hardship doctrine involves several hurdles. Its availability must be determined on a case-by-case basis, taking into account *inter alia* the applicable law and the impact of COVID-19 on the performance of the contract.

2.3 Force Majeure

Force majeure is the concept that has been widely invoked as the appropriate classification for the contractual problems associated with the COVID-19 pandemic. Governmental and quasi-governmental bodies in certain countries have recognised COVID-19 as a force majeure event. The French government has done so, for instance, in respect of public procurement contracts. (78) In the private sphere, French courts have traditionally been reluctant to consider epidemics such as H1N1 (79) and Ebola (80) as force majeure events. However, successive appellate courts have now held that COVID-19 is such an event. (81)

In China, the Council for the Promotion of International Trade has issued thousands of certificates for Chinese enterprises seeking to establish the existence of force majeure events (e.g., on the basis of local government restrictions). (82) Likewise, ● under Circular
P 220 No. 0088612 of the Italian Ministry of Economic Development, Italian chambers of commerce have issued force majeure certificates in light of the restrictions imposed by law. The juridical value of these certificates may be limited, but the fact of their issue stands as evidence of the widespread conception of the pandemic as an event of force majeure.

Common law legal systems typically treat force majeure as a creature of contract, as opposed to an autonomous legal doctrine. This is the case, for example, under English law. (83) The applicable requirements and legal consequences of establishing a force majeure event under such legal systems will thus depend entirely on the terms of the relevant contractual provision if one has been agreed.

Standard form contracts used in the construction industry typically include force majeure provisions, which define the specific events that will qualify as force majeure and also provide a test to determine whether undefined events may also constitute force majeure. (84) In the FIDIC forms, for example, force majeure events are defined as events or circumstances which:

(1) are beyond a party's control;
(2) the party could not reasonably have provided against before entering into the contract;
(3) having arisen, the party could not reasonably have avoided or overcome; and
(4) are not substantially attributable to the other party. (85)

Pandemic is not identified among the enumerated force majeure events in the FIDIC forms, which relate to man-made events and/or natural catastrophes. (86) However, a party seeking to bring COVID-19 and related events within the FIDIC force majeure clause may nevertheless demonstrate that the above four conditions are satisfied. (87) For
P 221 contracts entered into before the onset of the crisis, no particular ● difficulty will likely arise in respect of the first, second and fourth conditions. An area of greater contest will be the requirement that the party invoking the force majeure clause could not reasonably have avoided or overcome the particular COVID-19-related event that is relied upon, and the closely related questions of the extent to which the event actually prevented the performance of the relevant obligation and whether any resulting delay could have been mitigated.

By contrast to the position at common law, in most civil law jurisdictions, force majeure is defined in statutes or case law and implied into contracts in the absence of express provisions. In general terms, an unforeseeable event that is beyond the reasonable control of a party and which prevents that party from performing its obligations under the contract will qualify as an event of force majeure. Under the French Civil Code, for example, force majeure exists when there is an event:

(1) which is beyond the control of the debtor;
(2) which could not reasonably have been foreseen at the time of the conclusion of the contract;
(3) the effects of which could not be avoided by appropriate measures; and
(4) which prevents a party from performing an obligation. (88)

These requirements track closely those found in standard form construction contracts, such as those in the FIDIC forms cited above. Employers and contractors grappling with force majeure arguments under French law (and civil law with similar force majeure principles) will thus also be faced with the challenge of determining the extent to which the party invoking force majeure was truly prevented from performing their obligations by the identified event and could not have mitigated its effect.

Whatever the basis for its invocation (contractual or otherwise), a successful showing of force majeure typically leads to the suspension of performance obligations (and, hence, an extension of the time for performance) only and does not confer a financial entitlement. (89) For this reason, we expect to see contractors advance force majeure
P 222 arguments in the alternative, or where other contractual provisions or legal ● doctrines that might yield a monetary remedy are unavailable. For employers, force majeure may hold greater appeal as a defensive posture in response to allegations by contractors that the employer has failed to timely perform its obligations, including *inter alia* to grant site

access, provide approvals and/or attend inspections or walk-downs at site.

Force majeure may also lead to an entitlement to terminate the contract. In the standard FIDIC forms, for example, this right arises if the event has prevented the execution of 'substantially all of the Works in progress' for a period of 84 days (for a single episode) or 140 days (across more than one episode). (90) In the event of such a termination, in broad terms, the contractor is entitled to payment for works performed for which there is a price stated in the contract, liabilities reasonably incurred and demobilisation costs.

Similarly, in civil law systems, if the force majeure event persists, it may also give rise to an entitlement to terminate the contract. Under French law, the contract may be terminated by a court or tribunal if the length of the delay so justifies or if performance is permanently precluded. (91) In such a case, the parties are entirely discharged from their respective obligations. Absent any agreement to the contrary, contractors generally bear the risk of the works until full delivery and are therefore not entitled to remuneration for the works already performed. (92)

It remains to be seen whether the fallout from the pandemic will lead employers and contractors to calculate that termination is in their interests. For projects in their infancy – with contracts and, more importantly, contract prices negotiated pre-pandemic – parties may well prefer to avoid the project. Contractors may wish to avoid the burdens of performing a project in circumstances that are likely to disrupt and prolong performance; employers may prefer to delay further capital expenditure and postpone the project to a time with a more favourable economic climate.

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2.4 Frustration and Impossibility/Impracticability

Where force majeure cannot be invoked (e.g., in common law systems where there is no contractual force majeure provision), other principles may exist which can excuse non-performance, including frustration and impossibility (or impracticability).

Frustration has traditionally been exceptionally difficult to prove in most common law jurisdictions. In English law, a contract is frustrated when: (i) a supervening event (ii) occurs after the formation of the contract, which (iii) makes it physically or commercially impossible to perform a fundamental obligation in the contract, or (iv) renders a fundamental obligation radically different from that undertaken at the time of entering into the contract. (93) The fact that performance would merely inflict extreme, even ruinous, hardship on the performing party is insufficient, and it is often considered that performance must be genuinely impossible. (94)

Similarly, in the United States, frustration of purpose typically occurs where: (i) an unforeseen event, (ii) not caused by either party, (iii) radically changes the circumstances surrounding the agreement so that (iv) performance of the contract is significantly different than the parties initially intended. (95) It is also very difficult to prove frustration of purpose. For a party to invoke frustration, 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense'. (96)

In the United States, the doctrine of impossibility may provide another basis to excuse non-performance where: (i) an unexpected event occurred, (ii) the contract assumed such an event would not occur and (iii) the event rendered performance impossible. (97) Unlike frustration, performance must be objectively impossible, which sets an even higher threshold. (98) That said, in some United States jurisdictions such as California, the doctrine was broadened to cover events that make performance impracticable rather than impossible, including where performance is rendered unreasonably or excessively costly. (99)

When considering the application of frustration, impossibility, or impracticability, courts and arbitral tribunals will be called upon to assess the nature of the government restrictions, their duration, and their relationship to a party's claimed inability to perform its obligations under the contract. As with force majeure, the applicability of these doctrines will be determined on a case-by-case basis. However, while the financial impacts may be significant, the approach taken by governments in many jurisdictions to temper the impact of COVID-19 suggests that parties seeking to make out a case of frustration or impossibility will face stiff challenges.

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Frustration, impossibility and impracticability discharge the parties from further performance of their obligations under the contract. One would therefore expect resort to these doctrines to be reserved for exceptional cases in which, in addition to having a viable case on impossibility of performance, the employer or contractor considers the most advantageous course of action to be the termination of the relationship and/or the project.

2.5 Causation, Concurrency and Mitigation/Acceleration

Entitlement to time, money and any of the non-monetary remedies excusing non-performance examined above is contingent on causation. Demonstration of the existence of COVID-19-related impacts is insufficient. A direct causal link between the COVID-19

events and the impacts on the project in respect of which claims are made must be established.

As seen above, parties relying on change in law provisions will be required to prove that delay and/or increased cost resulted directly from COVID-19-related government restrictions in the relevant jurisdiction. Parties invoking hardship will, for their part, typically be required to demonstrate that the pandemic and/or the government actions in response rendered performance excessively onerous. Parties seeking to excuse non-performance based on force majeure, frustration (at least under English law) and impossibility will generally be required to prove that COVID-19 and/or the government measures adopted to limit its spread prevented the performance of the relevant obligations.

In all cases, demonstrating the distinct impact of COVID-19 and the measures taken in response to it from more classic causes of delay that predated the onset of the pandemic or ran in parallel will be essential. Large construction projects typically have multiple work fronts (on- and off-site) proceeding in parallel, many of which are liable to be delayed or otherwise affected by matters unrelated to COVID-19. For this reason, causation analyses will need to focus closely on the location of the critical path, which may be off site or on site, and the extent to which delays to critical activities were caused – or exacerbated – by COVID-19 impacts.

The analysis may become more complicated where a contractor relies upon a change in law provision. It may be necessary to differentiate between the impacts that the virus may have had before or irrespective of any relevant change in law (e.g., sickness of workers and voluntary self-isolation) and the impact of the legislative or regulatory measures in question (e.g., restrictions on- and off-site).

Causation may also be the subject of close debate where force majeure is alleged. Under English law, the relevant causation test for a force majeure event said to have resulted in
P 225 non-performance will vary according to the terms of the force majeure ● clause. Traditionally, it was enough for the force majeure event to be among concurrent causes (non-performance might have occurred without it). (100) However, recent cases suggest that a party seeking to rely on force majeure may be required to prove that it would have been willing and able to perform the contract but for the force majeure event. (101) In other words, the force majeure event must be the sole effective cause of the failure to perform, which sets a particularly high threshold.

Under French law, force majeure is excluded if the cause of non-performance already existed before the unforeseeable and unavoidable event alleged to constitute force majeure occurred. (102) Thus, where a project had already fallen into delay before the advent of COVID-19 as a result of other causes, contractors will be required to come to grips with those causes and seek schedule relief by reference to them.

As seen above, force majeure often requires the requesting party to mitigate the adverse effects of the force majeure event (commensurate with statutory or contractual requirements). The FIDIC forms notably require each party to use 'all reasonable endeavours to minimise any delay in the performance of the Contract'. (103) The Joint Contracts Tribunal (JCT) forms set a higher threshold requiring the contractor to use its 'best endeavours' to overcome and minimise the disruption. (104) Similarly, under French law, one of the conditions triggering the statutory regime of force majeure is that the effect of the force majeure event could not be avoided by appropriate measures. (105)

Therefore, a contractor that invokes an event of force majeure as a result of shortage in materials or equipment might not be successful in advancing that defence if other alternative sources of supply were reasonably available. Similarly, a contractor claiming that a closure of the worksite was inevitable due to the outbreak of the virus among workers will arguably need to show that it took all the necessary social distancing and quarantine measures in order to prevent the spread of the virus.

That said, what is reasonable to expect by way of mitigation can be nuanced and contextual. We expect to see close attention paid to the dividing line between mitigation, which contractors have an obligation to pursue, and acceleration, which may give rise to entitlements to additional payment. Take, for example, a contractor who is able to offset any delays caused by the pandemic simply by resequencing the works (as may well be possible in projects with longer durations). One may characterise this step as an act of simple mitigation and not expect the contractor to claim any additional entitlements. By contrast, where a contractor must add a second or third shift to each working day in order to maintain planned levels of progress while respecting social distancing requirements, one may more readily expect contractors to characterise such a step as acceleration rather than mitigation and assert an entitlement to additional payment or compensation.

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In all cases, contractors and employers will be well advised to redouble their efforts to keep contemporaneous records of COVID-19-related impacts, with sufficient detail to be capable of segregating those impacts from distinct causes within their control. This notably includes evidence of staff being precluded from accessing site, evidence confirming why a site was closed and contemporaneous confirmation from suppliers as to

the effect of COVID-19 on deliveries. In respect of delays, employers and contractors will also need to have and maintain accurate schedules before and after the impacts of COVID-19 to isolate its actual impact.

Each party should ideally keep records of the steps that it has taken to prevent or to mitigate the effects of COVID-19. This includes, for instance, evidence that the contractor sought alternative manpower but was unable to find suitable replacements and that it sought alternative suppliers but was unable to find one able to deliver on time.

3 HOW THE EXPERIENCE OF COVID-19 WILL IMPACT ON THE RESOLUTION OF CONSTRUCTION DISPUTES

3.1 Pre-arbitration Dispute Resolution

Many construction contracts provide for a tiered dispute resolution procedure which typically involves the elevation of disputes through senior executive meetings, mediation or referral to a dispute board, followed by arbitration (or less commonly litigation). Below we briefly set out the most common pre-arbitration steps found in construction contracts and address the likely impact of COVID-19 on the use of those steps:

- *Senior management meetings*: Many construction contracts provide for mandatory or optional negotiation between senior representatives of the parties as a first step. (106) Irrespective of whether it is contractually mandated, parties are free to negotiate amicably at any time. There is good reason to expect that many will attempt this: party-to-party negotiation was the preferred dispute resolution method for construction disputes in Continental Europe and the Middle East according to a 2019 survey. (107) Senior representatives are typically removed from the day-to-day operation of the project and well placed to negotiate a settlement. Senior management meetings typically take place in person and can last for several days.

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- *Mediation*: Many construction contracts provide for optional (108) or mandatory (109) mediation. (110) The mediator, a neutral person, actively assists the parties in working towards a settlement. There is no set procedure for mediation. In most cases, however, mediation involves the exchange of position papers, some form of mediation hearing as well as an opportunity for the parties to negotiate with or without the mediator present. (111) Mediation can result in a quick and cost-effective settlement and was the preferred dispute resolution method for construction disputes in North America according to a 2019 survey. (112)
- *Dispute boards:* Dispute boards are a regular feature of construction contracts in one form or another. (113) There are several types of dispute boards, including: (i) dispute adjudication boards (DAB) adjudicate disputes by issuing decisions that are binding unless or until revised by the ultimate dispute resolution forum in the contract; (114) (ii) dispute review boards (DRB) issue non-binding recommendations; (115) and (iii) hybrid dispute boards, which can issue both recommendations and binding decisions. Under many contracts, the dispute board is appointed at the beginning of the project and given a dispute avoidance role. (116) These standing boards receive regular progress updates and are typically required to conduct site visits. (117) Conversely ad hoc boards are only appointed upon a dispute arising. (118) Either way, dispute boards will generally request an exchange of written submissions and conduct in-person hearings when a dispute arises. (119)

Traditionally, party-to-party negotiations, mediation and the work of dispute boards have involved the physical presence of participants. Indeed, many have thought that the direct involvement of sufficiently senior decision-makers 'in the room' was indispensable for these steps leading to a negotiated resolution of the dispute. These alternative dispute resolution methods remain the most obvious candidates for resolving construction disputes at an early stage in the post-COVID-19 world. However, they will need to be adapted to the new COVID-19 reality, notably by changing the manner in which they are conducted.

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There is no reason to believe that senior executive meetings, mediation and dispute board activities cannot be equally effective remotely. As far as site visits are concerned, emerging techniques using 3D scanning, 3D cameras, sometimes coupled with drones and virtual reality technologies, already allow virtual inspections when physical visits are not feasible. (120) Anecdotal reports suggest that virtual site inspections have been conducted efficiently by dispute boards.

Remotely conducted negotiation, mediation and dispute board meetings could have significant benefits. These meetings can be arranged more quickly, particularly where they involve parties residing in different jurisdictions. Virtual technologies offer a rapid and low-cost means of facilitating regular contacts between key decision-makers, and thus an opportunity to build rapport, and head disputes off early. Where discussions have become contentious, virtual meetings could arguably remove a modicum of tension and emotion, and enable better focus on substantive issues.

3.2 Arbitration

Virtual or remote hearings have become the centre of attention in the arbitration community as they have emerged as the obvious solution to lockdown restrictions, physical distancing measures and travel bans.

Before COVID-19, certain sets of arbitration rules authorised (121) or encouraged (122) hearings by videoconference. In practice, this was primarily used where the physical appearance of a particular witness or two was impracticable and seldom for entire evidentiary hearings. In a 2018 international arbitration survey, 60% of those responding indicated using videoconferencing at least frequently. (123) However, only 8% of those answering the survey indicated using virtual hearing rooms at least frequently, with 64% having never used this technology. (124) In the post-COVID-19 world, remote hearings are quickly becoming commonplace.

In the short and medium terms, fully remote/virtual or hybrid hearings (i.e., with both virtual and physical meetings) will often be the only means to avoid postponement or cancellation. Most arbitral institutions have quickly reacted and issued protocols and
P 229 guidance regarding remote/virtual hearings. (125) Arbitration centres have ● also moved quickly, sometimes partnering with service providers. (126) Positive feedback on the conduct of remote/virtual hearings has already come to light. (127)

The question remains whether a remote/virtual hearing can adequately meet the evidentiary needs of a particular case. In this respect, construction disputes pose particular challenges that must be considered when proceeding with a remote/virtual hearing.

Construction projects typically involve multiple parties, contracts, technical issues and considerable volumes of documents and data generated over the course of years (e.g., progress reports, schedule updates, minutes of meetings, drawings, specifications and correspondence). In turn, according to a 2019 international arbitration survey, the four most defining features of construction disputes are: (i) the factual and technical complexity, (ii) the large amounts of evidence involved, (iii) the existence of multiple claims and/or multiple parties, and (iv) the large amounts in dispute. (128)

As a result, in practice, the resolution of construction disputes requires detailed factual input and expert evidence (technical, delay and quantum) and it is not uncommon to see hearings spanning over weeks, or indeed months, and the contribution of many witnesses and experts to a question or subset of issues.

Some have observed that remote/virtual hearings may not be entirely satisfactory for long and complex hearings with significant amounts in dispute and that having all participants in the same room without distraction and able to build rapport remains preferable. (129) Others emphasise the difficulty of organising a remote/virtual hearing in complex, document-heavy cases with multiple witnesses and experts. (130)

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On the other hand, practical steps can be taken to adapt construction arbitration hearings so that they can be conducted remotely/virtually in a fair and efficient manner.

First, construction cases often feature distinct groupings of issues or claims, making it possible to divide the case materials and evidence, including witnesses and experts, and hear them in separate instalments of hearing time. Likewise, certain threshold or transverse issues that cut across the case (e.g., notification and limitation issues) may lend themselves to segregation and separate treatment in a virtual hearing. This episodic approach to the hearing of complex construction disputes dovetails with the use of remote/virtual hearing facilities: indeed, it is far easier to proceed with a heavy case in convenient blocks when arbitrators, counsel, experts, witnesses and parties are not required to converge in a single physical location.

Second, it is now possible to share evidence electronically and this can be done as part of the remote/virtual hearing facilities. Electronic bundles have already shown themselves to be an essential tool for a successful hearing where there is a voluminous record of documents and other data. They permit the evidence to be collated more easily into a common record that is easily navigated in real time. COVID-19 is likely to accelerate the shift towards use of these hearing tools and, indeed, towards paperless arbitration.

Arbitration practitioners have quickly adapted to COVID-19 and will no doubt continue to develop new methodologies making virtual hearings as effective as traditional in-person ones to determine construction disputes.

4 CONCLUSION

While its precise extent is as yet difficult to quantify, COVID-19 will undoubtedly have a significant impact on the execution of international construction projects and on the resolution of the disputes that arise from them.

As this unprecedented episode in recent history unfolds, we do not expect to see a paradigm shift in the typology of disputes that typically arise out of major construction

projects. We do anticipate, however, an uptick in the occurrence of disputes, a shift of emphasis towards certain contractual and legal remedies – such as change in law, hardship, and force majeure – that have previously received relatively less attention. We also expect marginally different, and more intense, contests over issues of causation, mitigation and acceleration.

Early anecdotal evidence suggests that there is cause for optimism that the resolution of construction disputes – at both the pre-arbitral and arbitral stages – will be facilitated by recourse to virtual technologies and, indeed, may be enhanced and rendered more efficient by the technological revolution that COVID-19 has imposed on us all.

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44) *See*, e.g., Carroll Joseph Hughes, *Chinese Copper, Italian Marble: Coronavirus Shipping Delays Hurt Developers*, The New York Times, https://www.nytimes.com/2020/03/20/business/coronavirus-construction.html (20 Mar. 2020); Matt Hickman, *Coronavirus-Related Slowdowns Poised to Pummel Construction Supply Chain*, The Architect's Newspaper, https://www.archpaper.com/2020/03/coronavirus-construction-supply-chain/ (24 Mar. 2020).

45) HM Government, *Working Safely During COVID-19 in Construction and Other Outdoor Work*, https://assets.publishing.service.gov.uk/media/5eb961bfe90e070834b6675f/working-safely-during-covid-... (24 Jun. 2020).

46) Building and Construction Authority, *Advisory for a Safe and Controlled Restart of the Construction Sector from 2 June 2020*, https://www1.bca.gov.sg/docs/default-source/bca-restart/advisory-safe-controlled-restart-of-construc... (25 May 2020).

47) Turner & Townsend, *UK Construction Counts the Productivity Cost of COVID-19*,https://www.turnerandtownsend.com/en/news/uk-construction-counts-the-productivity-cost-of-covid-19/ (23 Jun. 2020).
48) We note that the economic fallout of the COVID-19 crisis will extend across the industry and increase the likelihood of disputes emerging between consortium and joint-venture partners, between project participants and their insurers and between employers and lenders.
49) *See* Sub-Clause 13.7 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms; *see also* Sub-Clause 13.6 of the 2017 Red Book, Yellow Book, Silver Book, Emerald Book and Gold Book. *See also* Clause 2.15 of the 2016 JCT Design and Build Contract, 2016 JCT Intermediate Building Contract, and 2016 JCT Intermediate Building Contract with Contractor's Design forms; Clause 10.5 of the 2016 JCT Major Project Construction Contract form; Clause 2.17 of the 2016 JCT Standard Forms (with and without Quantities); and Clause 2.12.2.1 of the 2016 JCT Design and Build Sub-Contract. *See also* Option X2 of the NEC4 Engineering and Construction Contract, NEC Term Service Contract, and NEC4 ECC Subcontract.
50) *See*, e.g., Sub-Clause 1.1.6.5 of the 1999 Silver Book which defines Laws to mean 'all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority'. The definition is arguably even broader in the updated 2017 suite: *see*, e.g., Sub-Clause 1.1.43 of the 2017 Silver Book, which defines Laws to mean 'all national (or state or provincial) legislation, statutes, acts, decrees, rules, ordinances, orders, treaties, international law and other laws, and regulations and by-laws of any legally constituted public authority'.
51) *See*, e.g., Sub-Clause 8.5 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms; *see also* Sub-Clause 8.6 of the 2017 Red Book, Yellow Book, Silver Book and Emerald Book forms; and Sub-Clause 9.4 of the Gold Book.
52) Sub-Clause 1.1.6.2 of the 1999 Silver Book; *see also* Sub-Clause 1.1.18 of the 2017 Silver Book.
53) French Civil Code, Art. 1195: 'If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively costly for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The former party must continue to perform its obligations during renegotiation.'
54) Egyptian Civil Code, Art. 147.
55) Algerian Civil Code, Art. 107(3).
56) *See*, e.g., Swiss Federal Act on the Amendment of the Swiss Civil Code – Part Five: The Code of Obligations, Art. 373 B: 'where performance of the work was prevented or seriously hindered by extraordinary circumstances that were unforeseeable or excluded according to the conditions assumed by both parties, the court may at its discretion authorize an increase in the price or the termination of the contract'.
57) Dutch Civil Code (BW), Art. 6:258.
58) Bürgerliches Gesetzbuch (BGB), § 313.
59) As early as 1876, in the landmark case *Canal de Craponne*, the French Supreme Court explicitly excluded the courts' power to revise contracts on the basis of hardship, and held that: 'In no case can tribunals take into consideration [the specific] timing or circumstances – notwithstanding how equitable their decision may appear – to modify the agreements of the parties and to introduce new clauses instead of those that were freely accepted by the contracting parties,' Cass. civ., 6 Mar. 1876, DP, 1876.I.193. This is the position that was broadly adopted by French civil courts until the 2016 civil law reform, *see* Philippe Malaurie, Laurent Aynes & Philippe Stoffel-Munck, *Droit des obligations* (10th ed., LGDJ, 2018), ¶ 759.
60) *See*, e.g., Cass. Com., 3 Nov. 1992, No. 90-18547; and Cass. Com., 22 Dec. 1998, No. 96-18357. However, that position was far from being consistent, as in other more recent decisions, French courts refused to impose a duty to renegotiate the contract although the economic equilibrium of the contract seemed to have been compromised due to unforeseen exceptional circumstances, *see*, e.g., Bordeaux Court of Appeal, 28 Oct. 2015, No. 14/00668.
61) Government Regulation No. 2016-131 of 10 Feb. 2016, which entered into force on 1 Oct. 2016.
62) French Civil Code, Art. 1195.
63) The French Civil Code does not specify how contracts may be revised. The scope of the revision is therefore virtually unlimited. *See* Pascal Ancel, Répertoire de Droit Civil Dalloz, mai 2017, ¶ 91.
64) French Civil Code, Art. 1195(2) provides that: 'In the case of refusal or failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to proceed to an adaptation [of the contract]. In the absence of an agreement within a reasonable time, the court may, on the request of either party, revise the contract or put an end to it, as of the date and subject to the conditions that it shall determine.'
65) Ancel, *supra*n. 63, ¶ 81. *See also* Roland Ziadé & Claudia Cavicchioli, *L'Impact du Covid-19 sur les Contrats Commerciaux*, 4 AJ Contrat 2020, 176, ¶¶ 2.1.2., 3.1.1.
66) *See* Cour d'Appel de Colmar, Ch. 6 (Etrangers), 12 Mar. 2020, No. 20/01098. The same conclusion was reached by the Douai Court of Appeal in relation to the cancellation of flights to Italy, *see* Cour d'Appel de Douai, Chambre des Libertés Individuelles, 4 Mar. 2020, No. 20/00395.

67) *See* Bertrand Fages, *Droit des Obligations* (LGDJ, 9th ed. 2019), ¶ 351; *see also* Philippe Malaurie, Laurent Aynes & Philippe Stoffel-Munck, *Droit des Obligations* (LGDJ, 10th ed. 2018), ¶ 764.

68) Egyptian Civil Code, Art. 147(2).
69) Abd el-Razzak al-Sanhoury, *Al Wasit in the Explanation of the Civil Code*, Vol. 1, 2010, 554, n. 5.
70) *Id*., 556.
71) *Id*., 557-560.
72) *Id*.
73) Abd el-Razzak al-Sanhoury, *Al Wasit in the Explanation of the Civil Code*, Vol. 1, 2010, 558, n. 3.
74) Algerian Civil Code, Art. 107(3).
75) *See* Ali Bencheneb, *Le Droit Algérien des Contrats: Données Fondamentales* (EUD, 2011), 209, ¶ 309.
76) *Id*., 211-212, ¶¶ 313-314.
77) French Civil Code, Art. 1195; Bencheneb, *supra* n. 75, ¶ 312; Sanhoury, *supra* n. 73.
78) French Government Regulation No. 2020-306, 25 Mar. 2020.
79) Cour d'Appel de Besançon, 2e ch. Comm, 8 Jan. 2014, No. 12/02291.
80) Cour d'Appel de Paris, Ch. 12, 17 Mar. 2016, No. 15/04263.
81) Cour d'Appel de Colmar, *supra* n. 66. The same conclusion was reached by the Douai Court of Appeal in relation to the cancellation of flights to Italy, *see* Cour d'Appel de Douai, *supra* n. 66.
82) The China Council for the Promotion of International Trade is a national foreign trade and investment promotion agency.
83) *Thomas Borthwick (Glasgow) Ltd v. Faure Fairclough Ltd* [1968] 1 Lloyd's Rep. 16.
84) Clause 2.26.14 of the 2016 JCT Design and Build Contract form; Clause 18.1.1 of the 2016 JCT Major Project Construction Contract form; Clause 2.29.15 of the 2016 JCT Standard Form (with Quantities); Clause 2.29.14 of the 2016 JCT Standard Form (without Quantities); Clause 2.20.13 of the 2016 JCT Intermediate Building Contract, and the 2016 JCT Intermediate Building Contract with Contractor's Design forms; Clause 2.7 of the 2016 JCT Minor Works Building form; Clause 2.19.17 of the 2016 JCT Design and Build Sub-Contract form. *See also* Clause 19.1 of the NEC4 Engineering and Construction Contract, NEC4 ECC Short Contract, NEC4 ECC Subcontract, and NEC4 ECC Short Subcontract forms.
85) *See* Sub-Clause 19.1 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms; *see also* Sub-Clause 18.1 of the 2017 Red Book, Yellow Book, Silver Book, Emerald Book.
86) One commentator has suggested that pandemics such as COVID-19 are 'natural disasters occurring on a microscopic rather than meteorological or geological plane'. *See* Peter de Verneuil Smith QC, Adam Kramer & William Day, *COVID-19: Force Majeure, Frustration and Illegality in English Law: A Detailed Guide,* Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/w-024-6685?originationContext=document&transitionType=Doc...)&comp=pluk&firstPage=true&bhcp=1 (27 Mar. 2020). There is some force to this observation.
87) It should be noted, however, that even if the event in question falls within one of the exceptional events that are explicitly listed in the FIDIC forms as examples of force majeure (e.g., war, revolution, earthquake, etc.), Sub-Clause 19.1 of the 1999 FIDIC forms and Sub-Clause 18.1 of the 2017 FIDIC forms provide that such event will nevertheless not qualify as an event of force majeure unless if it has satisfied the four conditions listed above.
88) French Civil Code, Art. 1218.
89) We note, however, that while the NEC4 forms do not explicitly refer to the notion of force majeure, they provide nonetheless for a compensation event in circumstances very similar to those of force majeure. In particular, Clause 19 ('Prevention'), which should be read in conjunction with Clause 60.1 (19), sets out a test according to which a compensation event must: (i) stop the contractor from completing the 'whole' of the works, either indefinitely or by the date for scheduled completion; (ii) be one that neither party could prevent; and (iii) be sufficiently unforeseeable or remote at the Contract Date that an experienced contractor would have considered it unreasonable to include a specific provision for that event. However, it should be noted that the above test is strict, as it is not sufficient that the works or a section of the works be delayed for the test to be satisfied, but rather the delay must impact the date of completion of the whole of the works. Moreover, Clause 19 deals with the case of 'delay' only, and, therefore, does not apply where the only impact of the virus is an increase in costs, *see* NEC, *Covid-19 Issues and NEC4*, https://www.neccontract.com/getmedia/b5223420-75ba-4651-8dfa-343ff1b8223f/Covid-19-and-NEC4_1.pdf (accessed 30 Jul. 2020).

90) *See* Sub-Clause 19.6 of the 1999 Red Book, Yellow Book, Silver Book, and the 2005 and 2010 Pink Book forms; Clause 18.5 of the 2017 Red Book, Yellow Book, and Silver Book forms. *See also* Clause 8.11.1 of the 2016 JCT Standard Building Contracts and the 2016 JCT Design and Build Contract forms, which explicitly provides that in the event of a 'force majeure' (although undefined in the forms), either party may terminate the contract, provided that the performance of 'the whole or substantially the whole of' the uncompleted works was suspended for a continuous period of the length agreed upon between the parties in the Contract Particulars (two months being the JCT's default period in the absence of such a particular agreement). By contrast, Clause 91.7 of the NEC4 ECC provides that only the employer is entitled to terminate the contract by invoking an event of force majeure (within the meaning of Clause 19, as described above), if the event in question has prevented the contractor from completing the whole of the works, either indefinitely or for more than thirteen weeks. Clause 91.6 provides, however, that either party may terminate the contract if the employer has instructed the contractor to stop, or not start, any substantial works, provided that such instruction has lasted for more than thirteen weeks.
91) *See*, e.g., French Civil Code, Art. 1218.
92) The rationale behind this rule is that it is legally unfair to require the employer to pay for uncompleted works that it cannot benefit from. The result may differ, however, if the force majeure event has occurred after completion of the works.
93) Hugh Beale, *Chitty on Contracts* (32 ed. 2017), ¶ 23-001. The English law doctrine of frustration for illegality (a variant of frustration) is unlikely to see much use in the context of the COVID-19 crisis given that most jurisdictions either made an exemption for construction projects at the outset or lifted restrictions relatively quickly.
94) *Tennants (Lancashire) Ltd v. CS Wilson & Co* [1917] AC 495.
95) *See Jack Kelly Partners LLC v. Zegelstein*, 33 N.Y.S.3d 7, 10 (N.Y. App. Div. 2016). *See also* Restatement (Second) of Contracts ¶ 265.
96) *See Crown IT Servs., Inc v. Koval-Olsen*, 11 A.D.3d 263, 265 (N.Y. App. Div. 2004).
97) *See* Restatement (Second) of Contracts, *supra* n. 95, ¶ 261.
98) This is notably the case in New York. *See Kel Kim Corp.*, 70 N.Y.2d at 902.
99) This is notably the case in California. *See Habitat Trust for Wildlife, Inc. v.City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336 (Cal. Ct. App. 2009).
100) *See*, e.g., *Bremer Handelgesellschaft v. Vanden Avenue* [1978] 2 Lloyd's Reports 109.
101) *See Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); *Classic Maritime Inc v. Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.
102) *See* Cour de Cassation, Com., 19 Jan. 2010, No. 08-17.326.
103) FIDIC Contracts 2017 – Standard form, Clause 18.3.
104) *See* Clause 2.28.6 of the 2016 JCT Standard Building Contracts and the 2016 JCT Design and Build Contract forms.
105) French Civil Code, Art. 1218.
106) Senior management meetings are notably provided for in the NEC3 and NEC4 suite of contracts (and are mandatory in Option W1) as well as in Project Partnering Contracts.
107) Arcadis, *Global Construction Disputes Report (2020)*, 22 and 26, https://images.arcadis.com/media/B/2/3/%7BB233AA1F-3A1A-4F85-B187-DEA56F67365F%7DFinal-2020-GCDR-Rep... (accessed 30 Jul. 2020).
108) Most JCT contracts provide that the parties can, by agreement, seek to resolve disputes through mediation. *See*, e.g., JCT SBC 11, Clause 9.1 and JCT DB 05, Clause 9.1. *See also* Project Partnering Contracts.
109) Mediation is mandatory in the American Institute of Architects 2007 standard form.
110) Conciliation is frequently used interchangeably with mediation. Conciliation is available under several Institution of Civil Engineers (ICE) contracts.
111) *See* Janet Jenkins, *International Construction Arbitration Law* (2nd ed. Kluwer 2013), 54-55.
112) Arcadis, *supra* n. 107, at 14.
113) *See*, e.g., 1999 and 2017 FIDIC suites of contracts; NEC4; ICE.
114) The FIDIC 1999 standard forms provide for a DAB that issues binding decisions.
115) The NEC4 provides for a DRB that issues recommendations.
116) The DAB of the 1999 FIDIC standard forms was renamed Dispute Avoidance and Adjudication Board (DAAB) in the 2017 suite. The FIDIC DAAB is to be appointed at the outset of the contract for the duration of the project.
117) *See*, e.g., 2017 FIDIC Red Book.
118) Both the 1999 FIDIC Yellow and Silver books provided for ad hoc DABs.
119) Jenkins, *supra* n. 111, at 108, 113-114.
120) *See*, e.g., European Commission, *Intuitive Self-Inspection Techniques Using Augmented Reality for Construction, Refurbishment and Maintenance of Energy-efficient Buildings Made of Prefabricated Components*, https://cordis.europa.eu/article/id/287489-augmented-reality-realised-in-construction (2 May 2019).
121) LCIA Rules, Art. 19.2; Swiss Rules, Art. 25(4).
122) ICC Rules, Appendix IV (Case Management Techniques), ¶ f.

123) Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* 32, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (2018).
124) *Id.*
125) *See*, e.g., ICC, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*,https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effect... (9 Apr. 2020); American Arbitration Association (AAA-ICDR), *AAA-ICRD Model Order and Procedures for a Virtual Hearing via Videoconference*,https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20... (accessed 30 Jul. 2020); Singapore International Arbitration Centre (SIAC), *Enhanced COVID-19 Measures*, https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf (6 Apr. 2020); The Chartered Institute of Arbitrators (CIArb), *Guidance Note on Remote Dispute Resolution Proceedings*,https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf (accessed 30 Jul. 2020).
126) *See*, e.g., Australian Disputes Centre Virtual, https://www.disputescentre.com.au/adc-virtual/; Maxwell Chambers, *Virtual Hearing Experience at Maxwell Chambers*,https://www.maxwellchambers.com/2020/05/12/the-virtual-hearing-experience/ (accessed 30 Jul. 2020).
127) *See*, e.g., Alison Ross, *Covid-19: Participants in SIAC Case Share Success of Virtual Hearing*, Global Arbitration Review, https://globalarbitrationreview.com/article/1225832/covid-19-participants-in-siac-case-share-success... (23 Apr. 2020); Rupert Hamilton & Paul Baker, *Advocacy in Virtual Arbitration Hearings: A Practical Guide*, LexisNexis, https://www.lexisnexis.co.uk/blog/covid-19/advocacy-in-virtual-arbitration-hearings-a-practical-guid... (22 Jun. 2020).
128) Queen Mary University of London, *International Arbitration Survey: Driving Efficiency in International Construction Disputes*, 3 and 10, available for download at, https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey (accessed 30 Jul. 2020).
129) Angeline Welsh, *Arbitration Not Locked Down: Has the COVID-19 Pandemic Accelerated Inevitable Change?*, ¶ 29.30, https://files.essexcourt.com/wp-content/uploads/2020/05/15151207/Arbitration-reaction-to-lockdown.pd... (13 May 2020).
130) Michela D'Avino & Bahaa Ezzelarab, *After Covid-19 Lockdown Will Virtual Arbitration Become the New Normal?*, Global Legal Post, https://www.globallegalpost.com/commentary/after-covid-19-lockdown-will-virtual-arbitrations-become-... (21 Apr. 2020).

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Chapter 13: COVID-19 and Energy Disputes

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1 OVERVIEW OF IMPACT OF COVID-19 ON ENERGY INDUSTRY SECTOR

The effects of the COVID-19 global pandemic have echoed across the entire energy industry worldwide. Much of the focus has been on the oil and gas industry, given the crisis that struck the oil market during the early stages of the pandemic. But essentially every sector of the energy industry has seen rapid and dramatic shifts flowing from changes in commercial relationships and government policies instituted to address impacts of the pandemic.

Across all sectors, COVID-19 has precipitated a massive decrease in energy investment globally. At the start of 2020, the International Energy Agency (IEA) projected investments to increase industry-wide by approximately 2%. (1) But with the global economy ground to a halt, the IEA now projects capital spending to decrease by 20%, with the largest contributing factor to be consumer spending. (2) The IEA expects revenue collected by the oil and power industries alone to decrease by USD 1 trillion and USD 180 billion, respectively. (3)

Some of the impacts of this decrease in investment manifest similarly across all sectors. Project development, for example, has been threatened with delay across the board by
P 232 government-imposed lockdowns and shelter-in-place orders, as well as the ● health and safety of project personnel. The energy industry has been impacted by the same delays and breakdowns in global supply chains that have affected all industries.

Energy companies have also had to navigate the complex and seemingly ever-changing regulations surrounding lockdowns instituted at various levels of government worldwide. Wide swaths of the energy industry were largely, and understandably, deemed “essential” and therefore allowed to remain in operation. However, the boundaries of who exactly could continue working have not always been clear, and have been inconsistent across jurisdictions. As with all “essential” industries, energy companies have had to balance the realities of continuing to operate with the need to ensure employee and community safety.

Specific energy sectors, however, are also facing unique challenges as a result of the COVID-19 pandemic that have the potential to reshape the industry.

1.1 Oil and Gas

Even before the global pandemic laid siege to the oil and gas industry, many looked at it hesitantly; profits were plunging, companies operating in the space were heavily indebted, and around the world advocates and governments alike pushed for green solutions. This had led some to speculate that the world may have already passed “peak” oil demand. (4) So by the time COVID-19 left China and began working its way around the globe, the oil and gas industry was already facing significant challenges.

The measures adopted to combat the virus outbreak compounded these problems, with global oil demand sinking as economies froze, people sheltered in place, and the world’s oil began to accumulate. The IEA has projected that global investment in oil and gas will drop by almost one-third in 2020. (5) Oil and gas account for the majority of the overall global decline in energy spending, driven in significant part by a reduction in consumer spending. (6)

In response, Saudi Arabia, acting as the de facto leader of the Organization of the Petroleum Exporting Countries (OPEC), proposed new cuts in oil production to alleviate some of the pressure. (7) Russia, which had cooperated with OPEC as a member of OPEC+ since 2016, refused not only to implement new restrictions but also to roll forward already existing ones. (8) The result was a flood of oil into the global market as both Russia and Saudi Arabia entered a price war to capture market share, and a corresponding market free fall. (9)

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Although in April 2020 OPEC+ and countries around the world agreed to significant cuts in oil production in an attempt to lower supply, and demand slowly inches higher as some economies emerge from lockdown, the industry has a long way to go. (10) The oil and gas market is heavily saturated with excess that has accumulated since March, and the depressed price is likely to be unsustainable for many companies. (11) In fact, eighteen North American producers filed for bankruptcy in the second quarter alone. (12)

Analysts have projected a 40% decline in annual revenue in the exploration and production industry as a whole. (13) This has led many companies to make significant cuts to their capital spending plans. For instance, Exxon has announced a 30% cut in global capital spending and BP, Shell and Saudi Aramco have also announced spending cuts of between 20% and 25%. (14) It remains to be seen whether the current oil and gas market downturn will result in similar industry consolidation as occurred in the 2009-2010 and

2015-2016 downturns. (15) Chevron's $ 5 billion acquisition of Noble Energy (16) may be an early sign of such industry consolidation, but given the severity of the broader economic downturn, it is not clear that the capital markets will be as accessible for oil and gas acquisitions this time around. (17) Moreover, the pandemic is far from over. Infection rates are still rising in many parts of the world and new waves are already beginning to emerge. Economic recovery will be a slow and daunting process, one that will be all the more difficult for the oil industry.

1.2 Power and Electricity

As with oil and gas, power sector spending is expected to drop significantly, with the IEA projecting a 10% decrease in 2020. (18) Global demand for electricity has fallen as a result of commercial and industrial operations slowing or shutting down completely due to government-imposed lockdowns and related decreases in consumer demand. While
P 234 residential use has increased as people stay at home, this has not made up for the ● decrease in other sectors of the economy. For example, in India, on March 22, 2020, the maximum daily load of electricity was 162 GW. By March 31, 2020, after the imposition of government lockdowns, this number had dropped to 121 GW. (19) This significant decline in consumer demand is expected to result in a 9% decrease in investments in electricity networks this year. (20) In the U.S. alone, the largest twenty utility companies recorded a 13% drop in their market capitalization during the first quarter of 2020. (21)

The power sector has also been impacted by various measures impacting utility companies, as governments try to ensure that consumers maintain access to utilities. In the U.S., at least thirty states and the District of Columbia have issued orders restricting or prohibiting the ability of utility companies to disconnect service from customers. (22) These restrictions vary significantly among jurisdictions. For example, the Michigan Public Service Commission has imposed minimum restrictions to protect low-income customers, seniors, or those "exposed to, infected by or quarantined because of COVID-19." (23) The Commonwealth of Puerto Rico, on the other hand, has passed a broad law prohibiting companies from disconnecting water and electricity to residential and commercial customers alike. (24)

Countries around the world have imposed similar measures. In Australia, for example, the government has set expectations that energy companies: (i) waive any disconnection, reconnection, and/or contract break fees for small businesses during any period of disconnection until at least July 31, 2020; (ii) accept payment plans or hardship arrangements from all households and small businesses; (iii) not disconnect customers who may be in financial stress without their agreement before July 31, 2020; and (iv) minimize the frequency and duration of planned outages for critical works. (25) El
P 235 Salvador, Argentina, Italy, Spain, Senegal, and Ukraine have all similarly restricted ● the ability of utilities to cut off service to customers and/or have delayed the due date for utility payments. (26)

The power industry is already starting to see a resurgence, however, in countries that have softened their lockdown measures. In April 2020, when Italy and Germany eased confinement measures, demand showed signs of increasing. This upward trend was confirmed in May, as countries like India, France, and Spain softened lockdown measures. While this provides hope for a recovery, demand is still estimated to be 10% below what it was before the first lockdown measure in most countries. (27)

1.3 Renewable Energy

Compared to oil and gas and electricity generally, the renewables sector has shown greater resiliency. The IEA states, "[a]cross all major regions, the power mix has shifted towards renewables following lockdown measures, largely due to depressed electricity demand, low operating costs, and priority access through government regulations." (28) While the U.S. remained focused on natural gas as the leading source of electricity, output from renewables has exceeded coal, and as of May 2020 was the second leading power source. (29) The pivot toward renewable energy is not universal; indeed some governments, including the Lopez Obrador administration in Mexico, have taken action to freeze renewable projects and preserve the role of oil and gas as a source of energy. (30)

However, even the renewable sector has faced difficulties. Installations of rooftop solar panels on both homes and businesses have slowed due to both economic impacts and practical difficulties in completing installations caused by lockdown measures. (31) Investment in large-scale renewable projects has fallen as well. (32) As a result, in the U.S., the renewable energy sector was estimated to have lost nearly six hundred thousand jobs by the end of April 2020. (33) Losses are expected to increase over the summer, and the official figures likely understate the scope of the problem given that they come from unemployment claims. (34)

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COVID-19 will even have an impact on the most resilient sectors of renewable energy. For example, the impact on hydropower projects is expected to be relatively limited as compared to other renewable energy sources due to their long lead time. (35) Yet the IEA expects hydropower growth over 2020 and 2021 to be 10% lower than forecast before the COVID-19 outbreak. (36) Already, China—the largest producer of hydropower in the world—

saw its hydropower production down approximately 12% during the first two months of 2020. (37)

1.4 Nuclear Power

Nuclear power currently accounts for approximately 10.5% of electricity worldwide, with generating facilities in more than thirty countries. Nuclear energy is positioned to weather COVID-related disruptions better than some other sectors due to its ability to withstand prolonged periods of supply-line disruption; unlike with fossil fuels that require constant inputs of coal or gas, nuclear fuel reloads only take place every twelve-eighteen months, and operating companies have developed strategies to allow refueling during outages to reduce the number of staff required. Most fuel assemblies are used for around three years before requiring change. (38)

The nuclear sector has seen different impacts from other sectors as nuclear technology has shown the ability to detect and combat COVID-19. The International Atomic Energy Agency is providing diagnostic supplies and training in nuclear-derived detection techniques. China also used industrial irradiation facilities to treat medical supplies, which destroyed coronavirus and generally sterilized and disinfected the supplies. (39)

1.5 Mining

While not all mining operations are inherently tied to energy, there are significant links between the mining and energy industries. Energy-producing resources such as coal and uranium need to be mined, and mining operations have significant power requirements, often necessitating the construction of power generating stations.

While countries have generally designated mining companies as “essential” and therefore largely exempt from stay-at-home orders, mining operations remain difficult. Mining sites
P 237 worldwide have become hotspots for the spread of COVID-19. Approxi ● mately four thousand mine workers in eighteen countries have tested positive. Some of these sites are located in indigenous and remote communities, further complicating both the treatment and risk of spread as cases creep into these communities. Moreover, some mines operate on a fly-in, fly-out basis, which could present further risks as potentially infected miners return to their communities. (40)

As a result of these risks and impacts, most mines have been operating at reduced or affected levels since early March, with some reports estimating disruptions at up to 247 mines in thirty-three countries. (41) Gold, copper, and platinum production has been particularly impacted. (42) Mining companies have adapted by operating with bare-bones staff in order to reduce the number of employees present and stressing the use of personal protective equipment and other measures to reduce the risk of infection. (43)

Nevertheless, spikes in COVID-19 infections at mining sites can and have resulted in government-imposed shutdowns. In June, the Polish government shuttered twenty-two mines due to coronavirus running rampant through the Country’s mining industry. (44) Mines in the United States, such as the Chino copper mine in New Mexico, have experienced similar difficulties. (45)

2 POTENTIAL COVID-RELATED LEGAL DISPUTES IN THE ENERGY SECTOR

2.1 Investor-State Arbitration May Increase as a Result of State Action in Response to COVID-19

As the overview above shows, as COVID-19 spread around the globe, governments raced to implement measures to contain its impacts. Caught in the crossfire is any number of foreign investments, including investments made in the energy industry. There have been as many responses as there are global government bodies, and therefore a complex network of domestic laws at play. There are also more than three thousand treaties in place protecting foreign investments, which impose rights and obligations on both states and investors.

The degree to which the COVID-19 pandemic will set off a wave of investor-state dispute settlement (ISDS) is yet to be seen. Some commentators have predicted that investment arbitrations will increase dramatically, as investors begin to pick up the pieces of the
P 238 economic crisis, a part of which could include challenging any number of ● acts taken by governments in an attempt to stave off global pandemic or economic crisis. (46) Others, however, have predicted that investors will not rush to arbitration, weary of potential defense of tribunals to government actions taken during a time of crisis. (47)

It will likely be years before the full scope of the impact of COVID-19 on ISDS is known and can be analyzed. But even in this early stage of the crisis, energy companies can anticipate the legal framework that will apply to potential disputes and the underlying government actions that may give rise to such disputes. While each investment treaty is different, and the specific protections available to a specific investor will depend on the terms of the applicable bilateral investment treaty (BIT), investment treaties broadly include similar basic obligations that are potentially implicated by government responses to the COVID-19 pandemic, including fair and equitable treatment, protections equal to those of national investors, and protection from unlawful expropriation. (48)

With regard to the energy industry specifically, these protections are also found in the Energy Charter Treaty, which includes numerous investor protections including fair and equitable treatment, full protection and security, protection against unreasonable or discriminatory measures, protection against unlawful expropriation, and a right to bring claims directly against the host state for violation of any of these protections. (49)

Substantive legal issues arising out of the COVID-19 pandemic are likely to revolve around tribunals' assessment of whether states validly enacted nondiscriminatory policies necessary to protect public health and respond to the economic crisis, or if the policies were implemented in a way that was discriminatory or otherwise violated the state's treaty obligations. While the COVID-19 pandemic and myriad government responses, such as policies adopted to suspend or defer of utility payments in many countries, are sure to present unique issues as applied to the energy industry, the propriety of state action taken to respond to public health and economic crises has been the subject of prior ISDS claims.

For example, *Philip Morris v. Uruguay* dealt with legislation targeting public health issues. Claimants in *Philip Morris* were a tobacco company and its Uruguayan subsidiary who challenged two regulations on packaging and labelling of tobacco products; one which required large portions of cigarette packages to be covered with graphic health warnings, and another which prohibited cigarette companies from marketing different "variants" of
P 239 the same brand family to give the impression that one ● variant of cigarette was healthier than the other ("the single presentation requirement"). Claimants brought claims of indirect expropriation, breach of fair and equitable treatment requirement, failure to protect Claimants' investments, and several other claims.

The tribunal found for Uruguay on all counts, providing precedent for broad defense of nondiscriminatory regulation adopted in good faith to protect public health. (50) As to the expropriation claim, the tribunal found no expropriation because the regulations did not substantially deprive the investor of its property and, even to the extent they did, the measures were a "valid exercise of the State's police powers, with the consequence of defeating the claim of expropriation." (51) The tribunal explained that the police powers doctrine recognizes that measures taken within the sovereign right of states to regulate in the public interest do not constitute an expropriation, as "[p]rotecting public health has long since been recognized as an essential manifestation of the State's police power." (52) In reaching this decision, the tribunal traced the "consistent trend" since 2000 to differentiate legitimate police power from expropriation in both arbitral decisions and customary international law. (53) According to *Phillip Morris*, a valid exercise of police power requires that the action be: (i) a bona fide exercise of regulatory powers for the purpose of protecting public welfare; (ii) nondiscriminatory; (iii) proportionate. (54) Based on this standard, the tribunal found that the tobacco regulations were bona fide nondiscriminatory regulations made for the purpose of protecting public health.

With regard to the fair and equitable treatment claim, the tribunal adopted the definition of "arbitrariness" from the International Court of Justice Chamber in *ELSI*: "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety." (55) The tribunal reasoned that a measure would not be arbitrary if: (i) the measure was taken in an attempt to address a real public health concern; (ii) the measure taken by the state was not disproportionate to the health concern; and (iii) the measure was adopted in good faith. (56) Based on this test, as well as the tribunal's determination that states deserve wide deference when legislating to address "acknowledged and major public health problems," (57) the tribunal found that the fair and equitable treatment standard had not been violated.

Cases arising out of the 2008 financial crisis reached similar results when evaluating state authority to respond to economic crises. For example, in *Marfin v. Cyprus*, Claimants
P 240 partly owned Marfin Popular Bank Public Co. Ltd (Laiki Bank), the ● second largest bank in Cyprus. In May 2012, Cyprus acquired majority ownership in the bank and took over management control by government decree, taking the form of a EUR 1.8 billion recapitalization. The takeover was brought about by fears of default due in part to exposure to Greek bonds during the Eurozone crisis. The next year, the bank was placed in administration, a condition of which included that deposits of over EUR 100,000 would be subject to a levy. Claimants argued that the decision to remove Laiki Bank's management team and the terms of the 2012 recapitalization violated the BIT between Greece and Cyprus. Specifically, they claimed that Cyprus violated the provisions guaranteeing fair and equitable treatment and full protection and security. (58)

The tribunal dismissed the expropriation claims on the grounds that Cyprus legitimately exercised its police powers. Claimants alleged that the Cyprus' actions were a de facto nationalization of the Bank and therefore a breach of the expropriation clause of Article 4. The tribunal disagreed, finding that Cyprus' recapitalization and other measures taken to avoid Laiki Bank's default were a legitimate exercise of regulatory power. The tribunal cited *SD Myers v. Canada*, where the tribunal found that it should not second-guess political and policy decisions made by a state, particularly where those decisions were made based on continuously developing threats to the safety of the financial system. The tribunal in *Marfin* found that Cyprus itself was in a similar situation. Cyprus' actions, including the structure of the recapitalization plan and the removal of Laiki's management, were an exercise of regulatory power necessary to protect the public

welfare by supporting distressed banks. The alternative would be to accept systemic risk to Cyprus' banks and economy. (59)

Taken together, *Philip Morris* and *Marfin* suggest that tribunals evaluating ISDS claims in the energy sector arising from the COVID-19 pandemic may allow governments wide power to legislate in the public interest in the face of public health and economic crises, even if foreign investment is collateral damage. States that are challenged for actions taken to respond to COVID-19, by energy companies and otherwise, will be likely to rely on these principles in their defense.

2.1.1 Potential Investment Disputes in the Power and Electricity Sector

Governments around the world are acting in an attempt to preserve the buying power of the consumer, in an effort to keep local, national, and international economies moving as the world weathers COVID-19. As described above, in many jurisdictions these measures have included provisions delaying, or removing entirely, payment obligations to utility companies. Depending on the implementation and specifics of a given policy, these actions could lead to claims of expropriation or lack of fair and equitable treatment under various investment treaties given many of these companies are owned by foreign investors.

Claims that may arise between states and foreign-owned utilities could be analogous to
P 241 the issues presented in *CMS v. Argentina*. *CMS* arose out of the serious ● economic crisis Argentina experienced beginning in the late 1990s. (60) CMS, the claimant, was a shareholder in a gas transportation company created as part of the privatization of Argentina's energy industry. (61) The company operated pursuant to a license, which Claimants contended required calculation of tariffs in U.S. dollars, converted to Argentinian pesos at the time of billing in accordance with the U.S. Producer Price Index (PPI). (62) As the economic crisis deepened, the Argentinian government froze the PPI adjustment of tariffs, and ultimately cancelled the calculation of tariffs in dollars as part of a currency control plan to limit capital flight. (63)

The tribunal found that Argentina had breached its obligation to provide fair and equitable treatment. In doing so, it found that the treaty was designed to provide a "stable framework for investments," that "fair and equitable treatment is inseparable from stability and predictability," and that Argentina's actions to "entirely transform and alter the legal and business environment under which the investment was decided and made" violated these standards. (64) The tribunal also rejected Argentina's argument that any breach of the treaty was exempt due to necessity caused by the economic, social, and political crisis. The tribunal's decision rested largely on its conclusion that Argentina had failed to show that the measures taken were the only way to safeguard state interests, and that Argentina had contributed to the crisis. (65)

The *CMS* award thus presents a framework through which to view prospective claims by utilities arising out of the restrictions imposed by governments in response to the COVID-19 pandemic. Such changes might be considered to fundamentally alter the legal and business environment, and thus constitute a breach of fair and equitable treatment, depending, among other things, on the severity and duration. Tribunals assessing such claims will need to look closely at the extent to which the particular measures adopted by a particular jurisdiction were necessary to protect state interests and/or whether alternate policies were viable. This will be highly fact-intensive, given the differences in the impact of the COVID-19 pandemic in different jurisdictions at different times, and the multitude of policies adopted across the world to mitigate that impact. Tribunal could also be presented with arguments that states contributed to the crisis through mismanagement of the COVID-19 pandemic, such as by not taking sufficient measures to protect public health in the early stages of the pandemic.

2.1.2 Potential Investment Disputes in the Renewable Energy Sector

While the renewable sector is generally seen as having a more positive outlook than other sectors, it has been and could continue to be impacted by government actions that could give rise to investment claims.

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Most notable are the changes to Mexican legislations and resolutions impacting the renewable sector. On April 29, 2020, the Mexican National Energy Control Center (CENACE) issued a broad resolution which included provisions indefinitely suspending all pre-operation tests for wind and solar projects so to safeguard the national grid against interruptions caused by clean energy projects. (66) The move impacts a total of forty-four solar and wind projects (twenty-eight that are operational and sixteen in various stages of construction) representing approximately USD 6.4 billion in investments. (67)

Then, on May 15, the Mexican government promulgated the *Agreement Setting for the Policy of Reliability, Safety, Continuity, and Quality of the National Electric System*. It purports to establish guidelines allowing the government to guarantee the national grid's electricity supply based on principles of reliability. The policy views clean intermittent energy as a threat to security and reliability and creates future complications by requiring that the state-owned Federal Electricity Commission (CFE) recommend "strategic projects that further the public service" to the Ministry of Energy (SENER). (68)

This could permit CFE to prioritize conventional sources of energy, including Petroleos Mexicanos (PEMEX), a state-owned entity, which would be consistent with the policy agenda of President Andres Manuel Lopez Obrador. (69) The policy further restricts the ability for clean energy producers to obtain generation permits and enter interconnection agreements and gives CFE and CENACE the power to deny permits and requests made by green energy producers based on purported security and reliability concerns. (70)

Depending on their implementation and whether the policies survive challenges in the domestic courts, (71) they could give rise to claims under BITs and NAFTA/USMCA. Both NAFTA and the USMCA prohibit expropriation, require fair and equitable treatment, and provide for most-favored-nation treatment, (72) all of which could be implicated. Investors may claim that Mexico's new policies favor CFE over private business, and protect CFE from the downsides of the drop in demand arising from the COVID-19 pandemic to a greater extent than private businesses. (73)

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2.1.3 Potential Investment Disputes in the Nuclear Sector

The nuclear sector has also weathered the COVID-19 pandemic better than other energy sectors. Yet there remains a potential for investment disputes, particularly regarding uranium mining operations, which have been significantly impacted. Kazatomprom, the world's largest uranium producer, has reduced staff on site to comply with lockdown requirements, and is projecting a decrease in output of 18%, which amounts to approximately 5% of global supply. (74) Other mines, including Cigar Lake (Canada), Rössing (Namibia), and Lance Projects (U.S.) have all reduced or suspended on-site activities, including mining operations. (75) While the restrictions thus far may not suggest future investment claims, as they have affected state-owned entities (i.e., Kazatomprom) or appear to be voluntary safety measures, it is possible that as the pandemic progresses states may deem it necessary to further restrict mining operations.

Investment disputes could also potentially arise from the use of nuclear technology to treat medical supplies. In China and Russia, irradiation facilities have been used to destroy coronavirus and to sterilize medical supplies. (76) The Bruce Nuclear Generating Station in Canada similarly shifted its focus away from Major Component Replacement to allow for production of cobalt-60 for medical sterilization. (77) If a state were to direct a nuclear generating station to use its resources for sterilization of medical equipment or otherwise to combat the coronavirus, under laws such as the U.S. Defense Production Act, (78) that could potentially lead to ISDS claims, depending on the circumstances.

2.2 Commercial Disputes Will Likely Increase as a Result of Tensions Caused by COVID-19

There are currently few publicly disclosed disputes in the energy sector attributable directly to the COVID-19 pandemic. But with numerous disputes moving through commercial arbitration, and many parties are involved in pre-dispute negotiations, cross-border commercial disputes are undoubtedly coming, even if they take time to become public. Many companies currently find themselves in a holding pattern in an
P 244 attempt to weather the pandemic. That being said, disputes concerning disrupted supply chains, contract terminations motivated by any number of COVID-19-related causes, and delays in energy and construction projects around the world will be ripe for arbitration in the near future. (79)

One area that would be an expected focus of commercial disputes in the energy sector generally in light of the COVID-19 pandemic would be force majeure. (80) Force majeure clauses generally excuse performance in cases where circumstances beyond a party's control make performance difficult or impossible. (81) Force majeure clauses could be invoked in countless contexts, from breakdowns in supply chains to delays in project construction caused by lockdown restrictions or personnel health issues. Such disputes are likely to turn in significant part on the applicable law and specific contract language. (82)

A second area of focus in the civil law context would be the doctrine of hardship or *imprévision*. This doctrine allows courts to balance unforeseen events against the good faith principle in the performance of contracts. (83) *Imprévision* "reset[s] [the] contract equilibrium" in cases where there are changed circumstances that fundamentally impact a party's ability to perform the contract as initially agreed, or that substantially change the value of the product or service delivered under the contract. (84) The obligor must generally prove that the unforeseen event was unpredictable at the time the contract was entered, of a "general" or "public" nature, and made continued performance onerous, thereby threatening to cause grave losses. (85) Remedies may include an ability to renegotiate the contract or for a complete judicial rewriting of the contract, both serve to reset the "balance of the equities" between the contracting parties. This doctrine will be particularly relevant in the pandemic context when the restrictions implemented do not make contractual performance impossible but do make it excessively onerous. Similar to force majeure, COVID-19-related hardship or *imprévision* disputes will largely depend on the applicable law and specific contract language.

The energy industry as a whole is also likely to face numerous pricing disputes. Pricing of oil and gas have dropped rapidly, demand for energy is down, and mining operations are facing significant disruptions. Parties to long-term supply agreements are likely to find themselves in a different position relative to the market than when their contracts were negotiated, which could lead to disputes over pricing mechanisms or outright efficient breach of underwater contracts.

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In addition to these disputes that are expected across the energy industry, and broadly across all industries, individual sectors will likely face unique commercial disputes as a result of the COVID-19 pandemic.

2.2.1 Potential Commercial Disputes in Oil and Gas

One case filed recently in U.S. federal court shows one type of dispute that may be coming in the oil and gas sector, resulting from the combination of the pandemic and decreased energy prices. In *EQT Energy, LLC v. Direct Energy Business Marketing, LLC*, (86) EQT and Direct Energy entered into a contract by which EQT would sell and Direct Energy would purchase liquefied natural gas through a price calculated through a formula referencing the National Balancing Point Price in USD per one million British Thermal Units of gas. In April 2020, the price resulting from this calculation went negative. Therefore, Direct Energy, the buyer under the contract, claims that EQT, the seller, must pay it money under the contract. Direct Energy "netted" the amount that it claims it was owed due to the negative contract price and withheld this amount from payments due to EQT under the contract. EQT brought a claim for damages under the contract. (87) This is just one of the early examples of the type of dispute that will likely be rampant throughout the oil and gas sector.

The drop in oil prices is also prompting increased oil patch disputes between landowners and producers. (88) In addition to force majeure disputes, the sector is seeing an increase in shut-in well disputes and lease terminations. (89)

The fall in oil and gas prices caused by the OPEC+ pricing dispute and reduced demand is also pushing many oil and gas companies toward bankruptcy. (90) For example, Chesapeake Energy filed for bankruptcy on June 28, 2020. (91) While most of the core bankruptcy disputes, as well as anticipated litigation relating to environmental and executive pay issues, (92) will take place in domestic courts, many oil and gas companies,
P 246 particularly multinationals, use arbitration clauses in their commercial contracts, which can remain enforceable despite the bankruptcy process. (93) Bankruptcies may accelerate the initiation or prosecution of arbitrable claims collateral to the bankruptcy.

2.2.2 Potential Commercial Disputes in Power and Electricity

Power and electricity facilities operate pursuant to a litany of contracts that are being impacted by the COVID-19 pandemic. Power purchase agreements could be affected on either side of the contract. Power generating facilities may see their capacity shrink due to lockdown restrictions, employee health and safety issues, or the inability to repair and/or upgrade facilities due to disruption in supply chain. On the other hand, off-takers may seek to negotiate lower rates due to the decrease in demand caused by the pandemic.

Operations and maintenance contracts could be similarly impacted. While O&M personnel are likely to be designated as essential workers in most, if not all, jurisdictions, O&M providers are likely to face the same workforce issues affecting all industries globally.

2.2.3 Potential Commercial Disputes in Renewable Energy

The People's Republic of China has dominated the solar manufacturing industry for decades, accounting for approximately two-thirds of the world's production in 2018. (94) As a result of the pandemic, and due to the heavy concentration of the manufacturing industry, there have been significant delays in the solar panel supply chain, caused in significant part by transport restrictions imposed by countries to limit the spread of the coronavirus. (95) These delays are likely to develop into commercial disputes as the pandemic continues.

The wind power sector is also facing impacts that could develop into commercial disputes. As a result of travel restrictions, particularly in the European Union (EU), wind sector analysts are predicting increased downtime for broken wind turbines of up to six months, far beyond what is typical in the industry. (96) There is also the potential that operators may preemptively take turbines offline in order to avoid damage while repair is more difficult. (97)

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2.3 Settlement Agreements Could be Threatened by Instability Caused by COVID-19

Restrictions imposed by the COVID-19 pandemic are also impacting settlement negotiations in the energy sector. Union Fenosa Gas, a joint venture between Spain's Naturgy and Italy's Eni, operated the Damietta natural gas liquefaction plant and agreed

to settle an eight-year dispute with Egypt. The dispute arose from the decision by Egyptian Natural Gas Holding Company (EGAS) (the state-owned entity and minority partner in the plant) to cut off gas supplies to the Damietta plant, which had previously exported liquefied natural gas to Spain. Negotiations began in February 2020 to resolve all pending disputes over the Damietta plant, which would have entailed Naturgy's departure from Egypt and allowed Eni to resume operations at the plant. (98) That agreement has fallen through, for reasons attributable in significant part to the COVID-19 pandemic. In particular, one of the conditions of the agreement was that the plant would reopen, but this proved to be impossible because of worldwide restrictions on movement imposed in response to the pandemic. Another condition required Spanish and Italian technicians to travel to Egypt to fine-tune the facilities, which faced similar difficulties. In addition, the parties disputed whether the valuation of the assets made at the time the agreement was reached remained accurate, which would likely be impacted by the pandemic and the corresponding decrease in natural gas prices. Both Naturgy and Eni have expressed willingness to discuss the terms of a new agreement with Egypt and EGAS. (99)

2.4 Enforcement of Arbitration Awards Will Be All the More Difficult as a Result of COVID-19

Enforcing arbitral awards across may generally become more challenging as a result of the COVID-19 pandemic, with the energy industry being no exception. If an award debtor does not agree to comply, creditors will have to decide whether to pursue recognition and enforcement proceedings. Domestic enforcement proceedings present challenges under normal circumstances, but now creditors will have to contend with restricted mobility and closed and/or backlogged national courts, which serves only to drive up the cost for award creditors. Even if a creditor is successful in bringing an enforcement proceeding, the prospects of collecting on an award could be diminished if, as a result of economic crisis and instability, the debtor has no assets on which a creditor can collect. (100)

There have also already been examples of states resisting enforcement proceedings of energy-related awards based on the pandemic. *TECO Guatemala Holdings, LLC v. Republic*
P 248 *of Guatemala* deals with the enforcement of an award in favor of Teco ● Guatemala Holdings LLC, a U.S. owned company invested in a Guatemalan electricity company called Empresa Electrica de Guatemala SA. (101) The underlying dispute relates to Guatemala's calculation of Value Added for Distribution (VAD), an amount added to electricity rates to compensate distributors for operating expenses and infrastructure. Teco alleged the process by which Guatemalan authorities calculated the VAD for the 2008-2013 period was unlawful in various respects under the fair and equitable treatment provision of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). (102) Teco ultimately was awarded damages, and an enforcement proceeding was initiated in the United States District Court for the District of Columbia. The court entered a final judgment against Guatemala on November 4, 2019. (103) Guatemala sought a stay pending appeal, arguing that enforcement should be delayed until the COVID-19 panic was under control. Guatemala argued that its resources should be allocated to combating COVID-19 and protecting the lives of its citizens, not paying its judgment during the appeal. (104) The D.C. Circuit rejected Guatemala's request. (105) The district court subsequently issued an order for attachment pursuant to the Foreign Sovereign Immunities Act. (106)

3 LOOKING FORWARD TO A POTENTIAL GREEN RECOVERY

As economies around the globe begin to turn an eye toward life after COVID-19, and the work governments will have to do to restimulate economic growth and development, activists, government officials, and international entities alike are pushing for the recovery to be a green one. Many countries have already started the process of crafting aid and recovery packages targeted at supporting green recovery, and the IEA hosted a summit on the topic on July 9, 2020, attended by most major economies including China, the EU, the U.S., any more, covering about 80% of the global carbon emissions. (107) The goal of the summit is simple; avoid a repeat of the recovery plans promulgated around the world in response to the 2008 financial crisis. There, emissions sharply declined during the recession, but then skyrocketed as governments prioritized coal power, road projects, and other inefficient and damaging projects in order to stimulate the economy. (108) The key to new plans, according to the IEA, will be renovating buildings for energy efficiency, investing in sustainable energy such as wind and solar, as well as prioritizing
P 249 infrastructure necessary for increased reliance on ● electric vehicles. Proponents argue that these efforts are good for business as well as the environment. Research from Oxford University suggests that investing "green" will create more jobs and a greater return on investment in both the short and long terms compared to traditional recovery packages. (109)

Over forty-four different "green recovery" proposals have been made by different governments around the world, many of which are centered in the EU, and especially Germany. On June 3, 2020, Germany announced a major stimulus package totaling over EUR 130 billion which includes major investments in green energy. Germany's plan is

comprehensive and multifaceted, including funding for building renovations designed to reduce carbon emissions, funding to smaller municipalities to encourage compliance with the National Climate Protection initiative, and reducing taxes on electricity generated through green sources. Germany also will also remove political and regulatory roadblocks to green energy development such as removing the solar energy cap and restriction on offshore wind facilities. (110) The plan further prioritizes hydrogen development and established a national strategy to support domestic investment in the industry and technological development. Other facets include funding for the preservation and sustainable management of forests and an all-encompassing strategy to encourage the development and utilization of electric vehicles and public transportation. This includes modernization of Germany's railways, increasing the number of electric vehicle charging stations, and implementing financial incentives for exchanging traditional vehicles for electric ones.

Other countries have followed suit. Luxemburg and Lithuania both also released proposals totaling EUR 800 million and EUR 6.3 billion, respectively, designed to support private investment into green recovery, infrastructure, and clean energy. China has also prioritized green development in the wake of its COVID-19 crisis, extending electric car subsidies and tax breaks, (111) and allocating funding for electric vehicle charging stations. Denmark has developed a six-pillar plan for green development. The plan includes creating two wind-powered "energy islands," to generate over 4 gigawatts of electricity generating capacity, a fund dedicated to supporting carbon capture technology, grants to fund electrification and energy efficiency, subsidies for companies following "green transition" principles, as well as additional funding for green research and development. (112)

The push for green recovery is not universal. Indeed the vast majority of stimulus money so far announced is set to bolster the fossil fuel economy to the tune of more than half a
P 250 trillion dollars worldwide. (113) This includes some of the same economies ● now issuing green proposals. That being said, proponents of green recovery hope that may change as the recovery progresses. So far, most stimulus money so far has been considered as part of a "rescue" strategy designed to keep economies from collapsing. Later phases will focus on stimulating the economy and setting development priorities moving forward. (114)

4 CONCLUSION

It goes without saying that the COVID-19 pandemic has thrust the world into unprecedented public health and economic crises. The virus has impacted every region, industry, and person on levels that cannot yet be measured. The energy industry finds itself uniquely situated at the epicenter. On the one hand, energy companies provide necessary services to most of the world's population and form an essential element of every nation's fundamental infrastructure. This means that energy companies have become the target of many government policies—be they designed to waive payments or force operations—enacted in response to the pandemic. In this climate, investments will be impacted and treaty provisions will be implicated. On the other, shelter-in-place orders and economic slowdown have drastically reduced the demand for energy commodities and electricity. The corresponding drops in prices and consumer spending, paired with the inability to operate normally, have pushed companies to the brink of collapse and has strained many commercial relationships. These tensions have already boiled over into disputes, and it is only inevitable that more are on the horizon.

While the pandemic is far from over, the world is learning to adapt, with the energy industry powering that effort. Companies will have to position themselves strategically, respond to developments quickly, and navigate disputes judicially, but there is opportunity on the horizon. The energy industry is uniquely situated to, and has a history of, innovating in response to challenge, and COVID-19 will be no exception.

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Chapter 14: COVID-19 and Aviation Disputes

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This chapter focuses on the effects that COVID-19 has had upon the commercial aviation industry as follows.

The first section examines the immediate effects that COVID-19 has had upon the industry, the initial measures taken internationally to curb the spread of the disease and the effect those measures have had on the most significant industry stakeholders.

The second section considers the tensions that have arisen between stakeholders and the ways in which those tensions have been managed without resorting to formal dispute resolution, as well as the effects of COVID-19 on extant litigation and arbitration proceedings.

The third section looks at the likely shape of the aviation industry in a post-COVID-19 world. It explores potential changes to consumer attitudes towards travel and the measures that the key stakeholders will likely take to adapt and survive in the new normal of commercial aviation.

The authors are aviation dispute specialists at the international law firm Stephenson Harwood LLP and are admitted to practise in England and Wales, Ireland and Belgium (Dutch Bar). It follows that the focus of this chapter is predominantly on aspects of United Kingdom (UK) and European Union (EU) law, although trends in aviation disputes both globally and with specific reference to the Asia-Pacific region are also addressed. All content is current as at 28 July 2020.

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1 INTRODUCTION

On 11 March 2020, the World Health Organization declared COVID-19 a global pandemic, just seventy days after officials from Wuhan, Hubei province, the People's Republic of China confirmed the first cases of COVID-19. By June 2020, the virus had spread to at least 188 countries with devastating effect. (1) The effect of the ongoing COVID-19 pandemic on all stakeholders in the global commercial aviation industry is unprecedented. Data published by the International Air Transport Association (IATA) in April 2020 showed that worldwide flights were down by 70% at the start of the second quarter in 2020 (2) and that the total debt held by the airline industry will rise by USD 120 billion to a total of USD 550 billion by the end of 2020. (3) A report published by the International Civil Aviation Organization (ICAO) in June 2020 estimated that COVID-19 is likely to cost airlines between USD 195 billion and USD 255 billion worldwide, with the most severe impact being felt in North America, Europe and the Asia-Pacific regions. (4) The impact of COVID-19 will be like nothing we have seen before, and its repercussions will be felt for years to come.

In 2018, IATA predicted that the number of passengers transported by airlines would grow to 8.2 billion in 2037, a figure based on a compound annual growth rate of 3.5% for the sector. (5) Fast-forward to March 2020, and COVID-19 had forced most countries' governments to introduce legislative measures to close their borders, restrict all but essential travel, introduce quarantine restrictions to international travellers and implement health checks at borders in a bid to curtail the spread of the virus. At one time or another during the pandemic, over a quarter of the world's population has been in lockdown, and the global travel restrictions imposed on both domestic and international routes have decimated the airline industry. Very few are prepared to forecast the time required for airlines to achieve anything approaching a full recovery to IATA's 2018 predicted growth levels, with the spectre of a follow-on global recession looming. What is clear, as IATA has said, is that 'the scale of the current industry crisis is much worse and far more widespread than 9/11, SARS or the 2008 Global Financial Crisis. Airlines are fighting for survival … Millions of jobs are at stake … Airlines need urgent government action if they are to emerge from this in a fit state to help the world recover,
P 253 once COVID-19 is beaten'. (6) Even though the commercial aviation industry has proven itself to be resilient to economic and geopolitical shocks in the past, and emerged stronger, leaner, fitter and forward-looking, it has not, in its entire history, ever faced a catastrophe of this scale.

The measures taken by the various key stakeholders in the aviation industry in response to COVID-19 have been varied, and to some extent influenced by government interventions, and reflect the different ways in which COVID-19 has affected the many different types of stakeholders operating within the sector. The situation concerning COVID-19 is changing constantly. Although the worst now appears to be over, pockets of new infections have started appearing, and a second wave of outbreaks remains likely. This chapter is intended to provide an overview of the general effects that the virus has had to date on the commercial aviation industry and its repercussions going forward.

2 NAVIGATING THROUGH TURBULENT TIMES

2.1 Challenges Faced by Airlines

In contrast to previous crises affecting the airline industry, such as financial recessions, regional or global, terrorism such as the political hijackings, bombing and downing of aircraft, and the wide-ranging impact of 9/11, or regional outbreaks of diseases such as SARS, MERS or Ebola, the global spread, speed and severity of the COVID-19 virus came with little forewarning. This forced national governments to intervene with broad measures to try to mitigate the spread of the disease by restricting the movements of vast numbers of the global population. The combination of travel bans, stay at home orders and social distancing rules in response to the COVID-19 pandemic virtually shut down domestic and international air travel and resulted in an unprecedented global collapse in air traffic. In April 2020, global passenger demand fell by 98.4% compared to
P 254 that in the previous year, as illustrated in Table 14.1. (7)

Table 14.1 Comparison of International Passenger Demand Between 2019 and 2020 for the Months of March to May(8)

Region	*International Passenger Demand*		
	March 2020 Versus March 2019	*April 2020 Versus April 2019*	*May 2020 Versus May 2019*
Asia-Pacific	-70.2%	-98.0%	-98.0%
Europe	-53.8%	-99.0%	-98.7%
Middle East	-50.3%	-97.3%	-98.0%
Northern America	-54.7%	-98.3%	-98.2%
Latin America	-45.9%	-98.3%	-98.1%
Africa	-49.8%	-98.7%	-98.2%
Global	-58.1%	-98.4%	-98.3%

Although countries began to lift mobility restrictions in May and June 2020, IATA has predicted that global passenger revenues could fall by approximately USD 419 billion in 2020, a 50% decline compared to 2019. (9)

The speed at which the aviation industry as a whole can recover from the COVID-19 pandemic will depend largely on the severity of any second wave of outbreaks, the development of a vaccine, and in the short term, government policies and their impact on consumer confidence. Initial hopes of a sharp V-shaped recovery curve have turned into an expectation that recovery will be slower and more gradual in nature, particularly, if, as forecast, there is a global economic recession.

According to IATA, 75% of its members had liquidity reserves for fewer than three months at the start of 2020, (10) so their immediate challenge has been to manage cash flow in order to survive until travel restrictions are lifted and they can restart operations. Standard aviation insurance policies do not provide coverage for business interruption risk. The mandatory grounding of fleets caused by the COVID-19 pandemic has tipped some airlines that were struggling pre-COVID-19 into insolvent positions, on a cash flow or balance sheet test basis, and caused many others to undertake radical restructuring. Latin American carriers LATAM, Aeromexico and Avianca have filed for United States (US) bankruptcy protection to try to restructure their debts; Virgin Australia, Australia's second largest airline, and NokScoot, a low-cost carrier based in Thailand, have filed for voluntary administration or liquidation; Sun Express Deutschland, Germanwings and
P 255 Level Europe, owned by major European airline parent groups, have gone into liquidation, ceased operations and filed for insolvency, respectively. (11) Many other airlines remain at a tipping point.

2.1.1 Labour Costs

Labour costs typically make up a significant percentage of airlines' operating expenses. (12) In response to COVID-19, airlines have had to take immediate action to cut fixed labour costs and ask their staff to take voluntary unpaid leave and/or a pay cut, (13) or make a considerable part of their workforce redundant. (14)

In order to protect jobs, and to ensure that airlines can operate when travel restrictions are lifted, and as they start to resume services, some countries' governments have brought in measures to enable airlines to retain their staff and continue paying them while they are furloughed. In the United Kingdom (UK), the Government introduced the Coronavirus Job Retention Scheme on 26 March 2020, which enabled businesses to apply for a grant that covered 80% of monthly salaries of employees on temporary leave (known as furlough). (15) This scheme is scheduled to end in October 2020.

In the US, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was passed on 27 March 2020, which provides up to USD 25 billion and USD 4 billion in grants to passenger and cargo airlines respectively to cover salaries and benefits between April and September 2020, on the condition that airlines refrain from conducting involuntary

furloughs or reducing pay rates and benefits until the end of September 2020. (16) However, IATA has estimated that global employment levels in airlines will decline to 1.9 million in 2020, (17) a stark contrast to the 2.95 million predicted in December 2019. (18)

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2.1.2 Fuel and Aircraft Operational Costs

Jet fuel also represents a significant cost to airlines; it accounted for around 23.7% of operating expenses in 2019. (19) Although jet fuel and crude oil prices plummeted in March and April 2020 (20) and had been at historic lows pre-COVID-19, airlines in Europe and Asia-Pacific that had entered into hedging arrangements to mitigate against volatility in fuel prices are estimated to have lost about USD 4.65 billion on those hedging contracts this year, as a result of COVID-19. (21)

On 30 March 2020, the European Parliament and the Council of the European Union (EU) amended the Slots Regulation (22) regarding airport slots in order to mitigate the 'use it or lose it' requirement that an airline has to operate at least 80% of a series of slots to retain historical precedence (known as 'grandfather rights') to those slots for the next season. This amendment to the Slots Regulation relieved airlines of the costs of having to operate empty aircraft with no passengers (known as 'ghost flights') in order to retain valuable slots when they resume their normal flying programmes.

On 7 April 2020, the forty-one Member States of Eurocontrol, which coordinates air traffic control operations across Europe, agreed a financial package that enabled airlines to delay air traffic control fees due for payment in February 2020 to November 2020, with payments for March, April and May 2020 delayed to 2021, (23) these delayed payments totalling more than EUR 1.1 billion.

As national governments imposed stringent international and domestic travel restrictions in an attempt to reduce the spread of COVID-19, airlines have been forced to ground their fleets and put their aircraft into short-term storage. By 24 April 2020, 16,800 passenger jets – comprising 64% of the total global fleet – were in storage. (24) Newer, more fuel-efficient, aircraft have been placed in short-term storage programmes – typically for between three and six months – that enable them to be certified for release back into service quickly, while older, less fuel-efficient, aircraft have been placed in longer-term storage programmes. (25)

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Storing aircraft in the short term is costly, with attendant weekly parking charges and fees for repeat scheduled maintenance inspection and work. If aircraft are stored for longer periods of time, the cost of returning them back into service may be prohibitively expensive, particularly for older aircraft types. As a consequence, many airlines have accelerated the retirement from their fleets of their older, less fuel-efficient aircraft, particularly the four-engine giants such as the Airbus A340 and A380, and the Boeing 747, and older models such as the Boeing 757 and 767. (26)

One way for airlines to reduce the cost of storing passenger aircraft, and to keep them in service and earning some revenue, has been to utilise them for cargo-only flights, which have largely been unaffected by quarantines and travel bans. (27) Air cargo demand, particularly for the supply of personal protective equipment, medical supplies and goods that are part of the 'just-in-time' global supply chains, overtook available capacity not just because there was a higher volume of cargo to carry, but because the grounding of passenger aircraft removed the availability of carriage of cargo in the hold – belly cargo – which accounted for about half of all air freight capacity. (28)

2.1.3 Ticket Refunds/Compensation for Cancelled Flights

Airlines forward sell tickets for travel some months in advance, and therefore when COVID-19 led to the mandatory travel restrictions, airlines had significant liabilities accumulated from sold but not flown tickets. IATA has estimated that airlines have USD 35 billion of tickets due for refund. (29) If every airline with such liabilities had to pay out cash refunds on these sold tickets, within periods prescribed by some countries' domestic laws as well as supranational laws, it would have driven them into immediate insolvency.

In the EU, for example, under EC Regulation 261/2004 (hereinafter 'EC Regulation 261') (30) if a flight is cancelled, reimbursement of the ticket price must be made within seven
P 258 days, (31) with similar rules applying in the UK and US. (32) EC Regulation 261 ● applies to all flights leaving an EU airport irrespective of carrier, and to flights arriving at an EU airport if the operating air carrier is a 'Community' carrier. (33)

Under EC Regulation 261, airlines are also obliged to pay fixed compensation of between EUR 250 and EUR 600 to passengers whose flights are either seriously delayed or cancelled, to be paid within fourteen days of the date of the scheduled flight, unless the airline can prove that the delay or cancellation was caused by 'extraordinary circumstances' that were beyond the airline's reasonable control. (34) Helpfully, the European Commission was quick to declare the COVID-19 pandemic 'extraordinary circumstances', so airlines do not have to pay out fixed compensation to their passengers for delayed or cancelled flights.

With passenger revenue and cash evaporating with the grounding of airline fleets, and with staff furloughed and therefore unavailable to deal with the processing of refunds, many airlines have been slow in processing refunds, and have sought to offer flight vouchers in substitution. Given the cash demands consequential upon reimbursement of passengers' tickets, IATA, airline associations and airlines themselves have lobbied hard for legislation enabling airlines to offer vouchers in lieu of cash refunds. However, despite the best efforts of IATA and other airline associations to lobby governments to endorse this approach, (35) the US Department of Transport and the European Commission have steadfastly maintained the stance that cash refunds must be provided to passengers in the event that flights are cancelled or schedules are changed significantly. (36) On 13 May 2020, the European Commission published a Recommendation on Vouchers, which recommended that EU Member States introduce measures to make the use of vouchers more attractive to consumers (e.g., by providing them with insolvency protection), without going so far as to amend EC Regulation 261 enabling airlines to offer vouchers instead of cash refunds. Nonetheless, airlines have been overwhelmed with claims for cash refunds for flights booked often many months in advance of COVID-19, and are now attempting to process these refunds notwithstanding cash constraints and staffing issues. The delays in payment of refunds have led to widespread criticism of airlines in the media, and intensive lobbying of the European Commission individually by European Member States, through airline associations, to enable airlines to issue vouchers. If the slow pace of refunds continues, it is anticipated that there will be a significant rise in
P 259 passenger claims through the ● national courts or under the EU Directive on consumer alternative dispute resolution (37) (as implemented into national law by the Member States).

2.1.4 State Aid

Some countries' governments have moved quickly to support their airlines and have provided state aid such as bailouts and financial rescue packages to prevent them from going into insolvency. However, the level of state support has not been uniform across the globe, with carriers in Latin America, Africa and the Middle East receiving the least from their respective governments. Examples of the highest amounts of support given are shown in Table 14.2 below.

Table 14.2 Examples of Significant State Support for Airlines(38)

Country	*Approximate Amount of State Support for Airlines (USD)*
US	58 billion
Germany	10.9 billion
France & The Netherlands	10.9 billion
Singapore	7.7 billion
Malaysia	2.2 billion

In the EU, government financial support requires the European Commission's approval under the state aid rules, and the Commission has reacted to the effects of COVID-19 by relaxing those rules and approving a number of Member States' aid schemes to provide financial assistance to airlines.

On 19 March 2020, the European Commission adopted a Temporary Framework (39) (based on Article 107(3)(b) of the Treaty of the Functioning of the European Union that enables Member States to compensate companies for the damage directly caused by exceptional occurrences, such as those caused by the COVID-19 pandemic, including measures in sectors such as aviation and tourism), which was further extended on 3 April 2020 (40) and
P 260 8 May 2020, (41) that enabled Member States to provide ● a number of measures to preserve the continuity of economic activity during and after the COVID-19 pandemic, including grants, state guarantees, public loans and tax deferrals.

However, state aid for airlines often comes with strings attached. For example, the French government's EUR 7 billion bailout of Air France in May 2020 was conditional on the airline committing to cut its CO2 emissions by 50% by 2024, and drastically reduce its domestic air traffic to help the rail industry. (42) Similarly, in return for the German government's EUR 6 billion contribution to the recapitalisation of Lufthansa together with a EUR 3 billion state guarantee on a loan, the airline committed to make available slots and additional assets to new entrants at its hub airports in Frankfurt and Munich where the airline has significant market power. (43)

Low-cost carriers who cannot qualify for state aid, such as Ryanair and Wizz Air, (44) have been particularly vocal in their criticism of the European Commission in approving the bailouts of legacy flag carriers such as Lufthansa, Alitalia and Air France-KLM as it clearly creates an uneven playing field, puts those airlines receiving financial support in a stronger position to weather the storm, and enables them to subsidise the sale of cheaper tickets to drive volumes when flying programmes are resumed. On 25 June 2020, Ryanair Group CEO Michael O'Leary announced that he would be launching a legal challenge in the General Court of the EU against the European Commission's decision to approve the German government's proposed EUR 9 billion bailout of Lufthansa. (45)

Although some airlines, particularly the larger Chinese and North American carriers, are able to tap into their respective domestic bond markets to boost cash flow and provide
P 261 investment capital, (46) this option is not open to other airlines, and the high ● yields demanded by investors have made some airlines think twice about raising finances in this way. (47)

2.2 Aircraft Lessors and Financiers

Around 40% of the world's commercial aircraft are leased by airlines from specialist aircraft leasing companies or banks. As airlines looked to draw down on all available credit lines, although aircraft leases typically contain 'hell or high water' provisions where the obligation to pay monthly rent (and maintenance reserves in some cases) is absolute, some airlines have sought to negotiate with their financiers and lessors loan repayment and rental holidays (i.e., deferrals) of one to three months. (48) Well-drafted leases would not contain a force majeure provision that might enable lessees to argue they can stop paying rent, and as explained in the second section of this chapter, the common law doctrine of frustration is typically not engaged as the occurrence of the COVID-19 pandemic does not render the lease contract impossible to perform.

Other airlines have simply taken the 'can't pay, won't pay' approach and defaulted on their loan and rent payments. Lessors are left to rely on the security measures put in place at the time of the transaction to safeguard against default risk, which may include the ability to draw on the security deposit and call on guarantees given by a lessee's parent/guarantors. Non-payment is typically an event of default in loan and lease agreements that entitles the financier/lessor to recover unpaid rent, terminate the agreement and repossess its aircraft. However, lessors and financiers have been very reluctant to pull the trigger on terminating leases and finance agreements and to try and repossess their aircraft for a number of reasons. First, lessors in particular, and to a lesser extent financiers, are in a symbiotic relationship with airlines; they need each other to survive. Second, lessors have nowhere to place a repossessed aircraft in terms of an onward lessee because there is overcapacity in the market, and they would prefer the prospect of some money in the future from deferred rental agreements to no money now and having to pay parking and storage fees. Third, forcibly repossessing the aircraft through the courts, in circumstances where some courts are closed or working part-time, is difficult. Moreover, the process of accessing and inspecting the aircraft and then getting that aircraft flown out of the airport from where it is grounded presents real logistical difficulties.

For the most part, therefore, following an assessment of the lessee's credit, lessors have largely acceded to airline lessees' request for rental deferrals and extensions of terms of leases to avoid having to terminate leases and repossess aircraft, even in circumstances
P 262 where the airline is insolvent. For example, the vast majority of ● aircraft and engine lessors of Virgin Australia's fleet agreed to sign standstill agreements agreeing to refrain from repossession. (49) Where the prospects of an airline's recovery are slim, lessors have been inspecting their aircraft to assess their maintenance condition, identifying upcoming heavy maintenance events, and locating aircraft records, which are crucial for maintaining the value of the asset, in preparation for potential early unscheduled redeliveries or repossessions.

Certain airlines that have unencumbered aircraft within their fleet have looked to sale and leaseback arrangements as a means to raise further funding. (50) Lessors with few financial obligations maturing in the short term, and strong shareholder backing, saw this as a business opportunity to increase their market share. (51)

2.3 Aerospace Manufacturers

The commercial passenger jet aircraft market is dominated by two major manufacturers – Airbus and Boeing – and three engine manufacturers – General Electric, Rolls-Royce and Pratt & Whitney. Prior to COVID-19, strong travel demand and cheap financing led to a boom in aircraft orders and sales over the last decade, but, even before the pandemic, cracks were starting to emerge. Demand for large wide-body aircraft such as the Airbus A380, developed with the traditional hub-and-spoke model in mind, plummeted as airlines opted for smaller, more fuel-efficient aircraft that were capable of performing direct point-to-point flights over increasing distances. (52) Furthermore, the high-profile grounding of the Boeing 737 MAX in March 2019, (53) following two fatal accidents in short succession, has forced Boeing to stop deliveries and slow production rates of its most popular new aircraft.

As the COVID-19 pandemic spread around the world, the aerospace industry had to adjust from 'ramp-up' to 'ramp-down' in a matter of weeks. In modern times, aircraft manufacturers have moved away from the vertically integrated 'do-it-all' approach to an increasingly global outsourced model of production. As factories around the world were forced to temporarily close as countries implemented various measures to try to control the spread of COVID-19, Airbus and Boeing reacted quickly to boost their liquidity, by tapping into available credit lines, suspending dividends and voluntary top-up in
P 263 pension funding indefinitely to retain cash, and rallying governments to ● support the industry. (54) The immediate challenge for the manufacturers was to preserve their critical workforce of highly skilled engineers and support key suppliers who may be

vulnerable in the short to medium term. Aircraft systems suppliers are better funded and have better access to the bond market to raise capital than suppliers of aerostructures who are more dispersed and comprise small- to medium-sized enterprises.

As factories were gradually allowed to reopen, manufacturers and suppliers faced another set of challenges in keeping their staff safe, and continuing working (whether remotely or otherwise) in the new 'socially distanced' environment. This will affect the number of aircraft that can be delivered, but the lack of demand for new commercial passenger jet aircraft over the next few years may help alleviate some supply-side pressure. Even before the COVID-19 pandemic, the industry faced a number of teething issues with the latest models of fuel-efficient jet engines, (55) and long lead times for interior parts, (56) which disrupted production and deliveries.

As mentioned previously, the leasing sector is responsible for up to 40% of aircraft going into service whether it be in the form of factory orders, or sale and leaseback arrangements on delivery. However, during the climate of low demand and overcapacity in the short to medium term, airlines have been keen to negotiate with lessors and manufacturers to reschedule deliveries, convert orders to other aircraft types, and even cancel orders where they are entitled to do so due to the delay in deliveries. (57)

3 THE IMPACT ON AVIATION DISPUTES

3.1 Introduction

The difficult circumstances arising from COVID-19 have naturally created many potential tensions between key stakeholders in the aviation industry that may lead to disputes. This section explores the most significant of those potential tensions in more detail, including disputes concerning aircraft lease and purchase agreements, breaches of competition law, government policies, and violations of air passenger rights and conditions of carriage, with a particular focus on the UK, the EU and the Asia-Pacific region.

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In the short term at least, as of early July 2020, the various potential tensions have not given rise to any immediate increases in litigation and arbitration. This section examines the reasons behind this and considers whether that trend is likely to continue in the future. It also examines the impact that COVID-19 has had on disputes that were already the subject of arbitration or litigation prior to the pandemic.

3.2 Types of Potential Disputes as a Result of COVID-19

3.2.1 Aircraft Lease Agreements and Aircraft Purchase Agreements

Two of the key relationships in the aviation industry are between: (i) original equipment manufacturers (OEMs), whether they be airframe or engine manufacturers, and their customers, governed by purchase agreements; and (ii) aircraft lessors and aircraft lessees, governed by lease agreements. Both types of relationship have come under considerable strain as a result of COVID-19. In the case of OEM customers and aircraft lessees, who are usually the airlines, the effect of COVID-19 on their revenue streams has meant they have often been either unable or unwilling to comply with their contractual payment obligations, be that the requirement to make pre-delivery payments in the case of aircraft purchase agreements, or the requirement to pay rent and contribute towards maintenance reserves in the case of aircraft lease agreements. Some aircraft lessees have also indicated that they will not be able to find the money to carry out the necessary work to put the leased aircraft into the required redelivery condition before returning them to their lessors at the end of their leases. In some cases, cash strapped lessees have also sought to return aircraft to lessors before the end of their leases in order to avoid potentially onerous rental payments, and some airlines have sought to defer or cancel the delivery of aircraft already ordered from OEMs in an attempt to prevent the build-up of overcapacity. (58) As a result of that overcapacity, wet lessees have been looking for ways to escape from wet lease agreements that they had entered into in anticipation of a busy summer 2020 season. On the other side of the equation, OEMs and lessors have also been put into a difficult position by COVID-19. For example, international travel restrictions have meant that OEMs and lessors have in certain cases been unable to deliver aircraft to their customers. (59) All of these circumstances are likely to constitute breaches of the agreements between the parties involved.

One potential defence that parties have sought to deploy in order to protect themselves from the consequences of their breaches, or in some cases to relieve them entirely of their obligations under the relevant agreements, is the doctrine of force majeure. Force
P 265 majeure is not recognised under English common law but instead is a ● contractual doctrine that parties are only able to deploy if the contract in question specifically includes a force majeure clause. As noted above, most aircraft lease agreements do not include express force majeure provisions, which means that if the agreement in question is also governed by English law, which many are, neither party to it will be able to rely on force majeure. Moreover, as most aircraft lease agreements include 'hell or high-water' provisions, lessees are typically obliged to continue paying rent even if they cannot

operate their aircraft. (60) Agreements between OEMs and their customers are more likely to contain force majeure clauses, and it is possible that an OEM might be able to avail itself of such a clause if, for example, it is unable to deliver an aircraft as a result of prolonged airspace closures caused by COVID-19.

Without force majeure clauses to rely on, parties to aircraft lease agreements that have been affected by COVID-19 have been forced to consider alternative arguments, including in particular the English common law doctrine of frustration. A party seeking to rely on frustration must show that an unforeseen event has occurred that has either rendered performance of the relevant contractual obligations impossible or radically altered the principal purpose of the party entering into the contract. This is typically quite a high threshold. In an aviation context, for example, an airspace closure preventing an aircraft from being delivered to a specific country in the immediate future would probably be insufficient in itself to frustrate a purchase agreement for that aircraft. If a contract is found to be frustrated, then all contractual obligations are automatically extinguished on both sides. Crucially, parties do not need to expressly include a frustration clause within an agreement for it to take effect.

Relying on either frustration or force majeure to terminate a contract is, however, a high stakes game in English law. If it is subsequently found that the contract in question was wrongly terminated, then the innocent party can pursue the party that has repudiated the contract for damages to put them in the position they would have been in, had the contract been properly performed. (61) In the case of a wrongfully terminated aircraft lease or purchase agreement, this could be a considerable sum of money.

3.2.2 Government Policies

Despite the gradual reopening of many parts of the world for international travel, certain jurisdictions remain subject to stringent restrictions specifying who can and cannot enter, and under what conditions. Many countries are restricting entry at their borders to their own citizens for the foreseeable future. An example of this was the initial imposition by
P 266 the UK Government of a mandatory fourteen-day self-quarantine ● on all passengers arriving into the UK from abroad. (62) This received widespread criticism from participants across the aviation industry, culminating on 12 June 2020 in the initiation, in the English High Court, of a claim for judicial review of the decision by a group of three airlines comprising British Airways, easyJet and Ryanair on the basis that the UK Government policy had no scientific justification and would do disproportionate damage to the UK economy. (63) The judicial review was subsequently dropped by the airlines following the UK Government's announcement of travel corridors on 3 July 2020. (64) Although on 10 July the UK Government announced the lifting of the blanket two-week quarantine for travellers arriving from Spain, this blanket measure has been reinstated so all those currently on holiday in Spain need to self-isolate for fourteen days on their return to England. (65)

Likewise, travel bans may affect obligations under bilateral air service agreements, as well as the provisions on non-discrimination on the basis of nationality contained in the Chicago Convention on International Civil Aviation. (66) This has been reiterated by the European Commission, which has reminded Member States to maintain the fundamental aviation principle of non-discrimination when implementing travel restrictions and measures within their country. (67)

3.2.3 Passenger Rights: A New Class Action?

On 24 June 2020, the European Parliament announced that it would be putting forward plans for a new Directive to provide EU citizens with the right to launch collective lawsuits in cases where mass harm has been suffered, including in cases involving air passenger rights. (68) Once the proposed Directive is passed, it may open the way for class-action lawsuits against airlines arising from breaches of EC Regulation 261, including COVID-19 claims relating to late or non-payment of refunds.

Some airlines are amending their general terms and conditions of carriage to manage their potential exposure to passenger claims. For example, certain airlines are including
P 267 a new provision to prevent their passengers from participating in class-action ● lawsuits brought against them. Other airlines have included an additional ground under which they can refuse carriage to passengers for non-compliance with COVID-19-related health and safety measures.

Airlines also face the potential issue of liability in respect of passengers that contract COVID-19 while travelling on their aircraft. Where the flights concerned are covered by either the Warsaw Convention 1929 (as amended) (69) or the Montreal Convention 1999, (70) which in practice is the majority of commercial airline flights operated globally, the airline faces strict liability if the passenger can show that he/she suffered bodily injury as a result of an accident that took place on board the aircraft, or during embarkation or disembarkation. It is an established principle in the case law arising from claims for bodily injury under the Montreal Convention that contracting an infectious disease while on board an aircraft can constitute bodily harm, (71) but whether or not contracting the disease could be deemed to be the result of an 'accident' is less clear. Causation may be difficult to prove as passengers may not show symptoms of the virus and may be exposed to the virus at locations other than the aircraft and airport. To protect themselves from

potential claims, airlines will have to ensure that they adhere to all applicable national and international health regulations and to ensure that they take all reasonable steps to prevent infected passengers from boarding their aircraft. This could involve temperature checks and/or a visual examination of passengers, or an actual COVID-19 test prior to boarding the aircraft.

3.3 Translation of Potential Disputes into Litigation and Arbitration

Although COVID-19 has created the conditions for various tensions and disputes to develop within the aviation industry, very few of these have developed immediately into litigation or arbitral proceedings. There are many reasons as to why this might be the case, which are explored below.

The primary factor is the relatively short period since the pandemic commenced; there simply has not been sufficient time for disputes to progress to a stage whereby they reach the courts or arbitral tribunals. It remains to be seen whether there will be an upsurge in COVID-19-related aviation disputes in the coming months. However, it may not make business sense for some stakeholders to commit valuable time and resources to litigation or arbitration in instances where a commercial settlement between parties achieves an acceptable outcome.

In the case of aircraft lease agreements, in particular, there is very little appetite on the part of lessors to initiate proceedings against defaulting lessees to terminate lease agreements and repossess the aircraft concerned. As noted above, there are various reasons for this. In particular, the COVID-19 pandemic has given rise to practical
P 268 difficulties that make the physical repossession of an aircraft a difficult ● proposition, and even if lessors are able to successfully repossess their aircraft from defaulting lessees, the slump in lease rates for commercial passenger aircraft means that it will be difficult to re-lease that aircraft to another lessee either at a commensurate rate or at all. (72)

Second, in the long term, lessors and banks are acutely aware that the relationship they have with airlines is symbiotic, with both parties needing one another to survive. As a consequence, most aircraft lessors have been very reluctant to initiate enforcement proceedings against defaulting lessees and risk tipping those carriers into insolvency. Instead, lessors and banks have often taken a pragmatic long-term view, and agreed to lessees' requests for rent deferrals and payment restructuring, all the while reserving their rights in case termination and repossession should prove necessary. Many lessors are serving default notices, and reservation of rights letters so as not to waive any rights to enforce their contractual obligations and prevent estoppels arising, but very few are terminating leases and taking enforcement proceedings either for non-payment of rent or for orders for repossession of their aircraft.

The relationship between OEMs and their customers is equally symbiotic. Consequently, OEMs have also, to date, acceded to requests for the deferral of aircraft due to be delivered and to the rescheduling of pre-delivery payments to help customers manage the immediate pressure on their cash flows. That being said, the patience of OEMs is not infinite, especially when it comes to smaller airlines of 'lesser credit' and to serial late-payers. On 5 June 2020, the CEO of Airbus, Guillaume Faury, stated publicly that airlines that failed to comply with the terms of their agreements with Airbus could expect to be subjected to legal proceedings, albeit as a last resort. (73)

As the global economy begins to recover from the effects of COVID-19, and as it becomes clearer which airlines are likely to survive and which are not, it is possible that OEMs and lessors will become far less accommodating of defaulting airlines and will start initiating proceedings against them if their own cash flow positions are put in jeopardy, and their patience with non-payers begins to run out. (74) There will come a breaking point caused by mounting concerns over the liquidity of certain 'on watch' airlines squeezed by the effects of COVID-19 that are continuing to default and look unlikely to recover, which may force lessors and OEMs to initiate proceedings protecting their own positions, in order to ensure that they are not at the back of the queue when the lessee or customer in question goes under. For agreements governed by English law, with English jurisdiction clauses, it may be that parties will choose to pursue litigation for the recovery of unpaid rent, and for orders for the delivery up of aircraft, as this will typically allow claimants to obtain
P 269 quicker results by way of interim ● injunctions and default or summary judgment. For parties that are bound by arbitration agreements, it may be necessary to go to the English courts for interim conservatory measures, or to apply for injunctive relief under the emergency arbitration provisions available, for example under the rules of either the International Chamber of Commerce or the London Court of International Arbitration.

Another practical effect of COVID-19 that may have reduced the numbers of disputes proceeding to either litigation or arbitration in the short term is that it has severely reduced the resources available to organisations in general. Not only do industry players have severely reduced revenues at present, which impacts on the legal budgets available to commit to expensive dispute resolution procedures at this uncertain time, but also widespread furloughing schemes and government-imposed restrictions have hampered the ability of in-house legal teams to pursue proceedings proactively. The pandemic has also dominated the decision-making capacity for many organisations, to the extent that

little room is left for the senior management within airlines to consider taking on the additional management burden that would necessarily accompany the initiation of litigation or arbitral proceedings.

3.4 Impact on Current Disputes

The impact of COVID-19 on existing aviation disputes has been marked. A trend that we have noticed in particular is that many parties have agreed stays with one another in order to pause proceedings, whether in litigation or arbitration, while organisations focus on other more pressing matters. (75) Generally speaking, arbitrators and judges have been very accommodating of the sudden need to suspend proceedings and have been happy to make orders staying proceedings and to extend those stays and procedural timetables as circumstances require.

The English courts have been less sympathetic to those seeking to have hearings adjourned simply as a result of the practical difficulties brought about by COVID-19. For example, in a case heard in the middle of March 2020, an English High Court judge ruled that a trial due to take place the following week should take place regardless of the fact that some of the claimants' witnesses could no longer attend the trial as a result of international travel restrictions then in place, as the missing witnesses would be able to attend the hearing by remote videoconferencing facilities. (76) In doing so, the judge made it clear that the 'new normal' for now would be for hearings to be conducted remotely and that adjournment should always be a last resort. (77) Similarly, arbitrators in English-seated arbitrations have been keen to avoid delaying hearings and have introduced measures for interim hearings and trials to be conducted through videoconferencing platforms.

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4 THE FUTURE OF AVIATION IN A POST-COVID-19 WORLD

4.1 Annus Horribilis

As many countries around the globe start to ease restrictions, lift lockdowns, allow phased returns to work, and see some degree of normalisation returning, the short- to medium-term economic repercussions for the aviation industry, like other hard-hit industries, including retail and hospitality, will feel the after-effects for years to come. The COVID-19 pandemic has decimated the aviation industry globally when compared to previous pandemics, recessions and geopolitical shocks. Perhaps the starkest example of this is the fall in Revenue Passenger Kilometres (RPK), (78) which fell by 20% after 9/11 and 12% after SARS compared to a 95% fall in April 2020 due to COVID-19. (79) The year of 2020 will undoubtedly be the worst year in the history of the commercial aviation industry, an 'annus horribilis' beyond all others previously experienced, with IATA forecasting that airline revenue industry-wide is set to fall by approximately USD 419 billion in 2020 (a 50% decline from 2019). (80)

4.2 Getting Aircraft Back in the Air

With international travel restrictions starting to be lifted, airlines are preparing to take their aircraft out of storage, start phasing in limited flying programmes, and are getting ready to deal with passengers under new conditions while observing all necessary health and safety guidance. In an effort to provide a coordinated and safe recovery to air travel, ICAO Council's Aviation Recovery Task Force (CART) produced a report entitled *Take-off: Guidance for Air Travel Through the COVID-19 Public Health Crisis* (81) to provide governments across the world with a framework under which to restart aviation in their country in a way which addresses public health concerns. The guidance proposes a phased approach to restarting aviation; identifying a set of risk-based measures that aim to mitigate the risk of transmission of COVID-19 in line with recommendations from public health authorities. (82) Key recommendations include the wearing of face coverings on board aircraft; routine sanitation and disinfection of all areas; health screening; and the taking up of contact tracing procedures by governments, which aim to circumvent the need to quarantine travellers on arrival. (83)

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The ICAO guidance was only endorsed by the ICAO Council on 1 June 2020, (84) and while it was welcomed by many countries, it will take time for these countries to implement the recommended measures, and for consumer confidence to return. As of 24 July 2020, border restrictions have still not yet been widely relaxed. (85) As such, the aviation industry can expect a slow recovery to air travel despite border restrictions being eased and lifted.

In addition, despite the ICAO guidance aiming to provide a harmonised and coordinated approach to recovery, governments are encouraged to continuously readjust the measures, depending on their effectiveness to reduce the risk of transmission and scalability, especially as soon as air traffic increases. (86) The guidance itself will also be continuously updated to reflect ongoing risk assessments and medical knowledge. We have already seen considerable differences in the adoption of safety measures by

various countries. For example, the UK has adopted a mandatory fourteen-day quarantine period for certain countries and has legislated that face coverings are mandatory on board aircraft; Singapore requires passengers to submit online health declarations three days before arrival; (87) in Mumbai, passengers are thermally screened at entry gates; (88) and, in many countries, there are targeted restrictions against citizens coming from those countries that are deemed 'high-risk' zones. (89)

Airports will have to constantly navigate around a changing landscape of health and safety measures until an effective vaccine against COVID-19 is widely available or the virus disappears, in a situation akin to SARS. Airports may need to defer and rethink any reconstruction and expansion plans – as we have seen with Singapore Changi airport (90) – and reconsider the layout of communal areas. We have already seen this happening with airports using biometric check-in processes, additional health and screening points prior to boarding/temperature checks, and the use of fogging tunnels to disinfect
P 272 baggage after it has been dropped off by passengers at self-drop points. (91) ● Further measures will need to be implemented and will require the cooperation of national health authorities for airports to adapt physical distancing to specific layout operations, and to stay on top of changing requirements in health measures. (92)

Airlines will have to look carefully at how catering and ancillary services are provided on board the aircraft, for example with cashless transactions, and the use of open space by passengers; we have already seen changes in overhead baggage rules and suspension of duty-free inflight, with social distancing queues or no queues for restroom facilities. (93) It is questionable whether these health and safety measures to be adopted by airports and airlines are sustainable in the long run, without negatively impacting airports' and airlines' passenger handling capacity when air traffic increases, and only time will tell.

4.3 Which Routes Will Recover First?

The recovery of air travel in the second half of 2020 is predicted to come initially from the domestic and short-haul markets, with international and long-haul markets to gradually recommence thereafter. (94) Solving the health challenge is critical for international travel, and until a vaccine is developed or the virus disappears, opening borders to travel requires a fall in COVID-19 risk. This has been evident in the three key Asian domestic markets – South Korea, Vietnam and China – all of which successfully contained COVID-19, and where flight increases have been concentrated in the domestic market, resulting in the three countries being within 25% of 2019 domestic levels at the end of May 2020. (95)

International recovery is more complex, limited and requires consensus on in-flight and airport standards between countries, which will be slower to implement. Consequently, IATA expects that the average trip length will decline by 8.5% in 2020, before slowly recovering. (96) Domestic RPKs are forecasted to decline by approximately 40% this year, whereas international RPKs will suffer a steeper decline of around 60%. (97) International air travel may not recover to 2019 levels until 2024. (98)

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4.4 Customer Demand

A recent study by IATA found that only 45% of passengers would fly within the months immediately following June 2020, and 36% of passengers would wait at least six months before returning to their usual travel plans. (99) Encouraging passengers to return to air travel will be crucial for the recovery of the aviation industry, especially during the summer peak period.

Consumer demand is low for a number of reasons, but mainly due to concern regarding safety of health. While measures are being adopted by countries to ensure safe travel by air, restrictions are also a hindrance to the freedom of movement of people. (100) Unsurprisingly, in a recent survey conducted by IATA, 83% of participants from the UK stated that they would be unwilling to travel if they have to self-quarantine for fourteen days of their holiday or on their return to home. (101) Likewise, wearing a mask for several hours, asking for permission to use the restrooms and in-flight services being greatly reduced are not attractive features for travellers.

While we have started to see a reduction in travel restrictions through the implementation of travel bubbles and corridors agreed between countries, (102) a long-term solution is still needed. This presents an opportunity to develop and integrate digital innovation for a contactless and more efficient passenger experience through airports, although this will come at a cost. There is already concern around who will bear the cost for the implementation of the current safety measures adopted by the governments, as airports will want to pass this onto airlines and/or users of the airports. IATA and ACI (Airports Council International) are lobbying for governments to bear the costs of these public health measures to reduce the financial burden on airlines and airports. (103)

Airlines will need to look at creative ways to encourage passengers to return to the skies. We have seen many low-cost carriers offer reduced fares; others have chosen strong expansion and opening of new bases and routes. For example, Hungarian carrier Wizz Air

has opened four new bases and added more than fifty routes to its network. (104)

While at the same time as trying to rescue the remainder of the summer 2020 season, airlines also need to plan their winter 2020/2021 schedules which start at the end of
P 274 October, but they have zero visibility of what demand will be (105) and are making ● plans based on guesswork as to load factors and therefore required capacity. (106) The demand for flying has remained static over the past three months, in particular for long-haul flights, which remains close to zero. (107) Usually, by the end of June, airlines would have sold 14% of its tickets for the start of the winter season; (108) however, the current cumulative bookings for long-haul flights scheduled for the week of 1-7 November 2020 are currently 59% lower than the same time in 2019. (109) Passengers are booking flights much later, with 41% booking up to three days prior to departure in May 2020 (compared to 18% in 2019). (110)

To account for the prolonged period of uncertainty in customer demand, airlines will need to adapt their schedules to any last-minute changes and therefore will need greater flexibility to do so. (111) Airlines will not know with any certainty how demand for air travel will progress in the next few months, and therefore it is crucial that the waiver of the 80:20 rule at slot-coordinated airports (as mentioned in section 2.1.2 above) is extended. (112) The EU Commission intends to extend the waiver for part of the 2020/2021 winter season, but is considering whether any further extension should be made subject to certain conditions. (113)

If demand levels continue to remain low, then we may see a resurgence of the hub-and-spoke model as the hubs will become even more important to allow airlines to concentrate the number of passengers to meet viable aircraft load factors. (114) This could threaten the point-to-point model that has flourished in recent years as a consequence of low-cost carriers, and that are only economically viable on routes where there is enough capacity. (115) With 2019 levels of demand for air travel projected to only return in 2024, (116) it could undermine the future of point-to-point traffic. This will cause practical challenges for airports, as the reduction in point-to-point travel will increase the wait times and concentration of passengers at hub airports, making it difficult to enforce social distancing arrangements. (117)

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4.5 Survival of the Fittest

With customer demand remaining low, in the short term, cash flow will determine which stakeholders in the aviation industry will survive the pandemic and which will fail. The anticipated consolidation in the industry has been halted by injections of state aid and the efforts of airlines to reduce fixed operating costs, and in the short term allowed airlines to survive. As of mid-May 2020, airlines worldwide were estimated to have received USD 123 billion of government aid, (118) with Lufthansa and Air France-KLM receiving the greatest support: USD 10.2 billion and USD 7.9 billion, respectively. (119) However, government-backed financial support for airlines has been unevenly distributed across the globe and as between airlines, which will obviously affect which airlines will survive the crisis. Airlines in North America and Europe have received on average aid equivalent to 25% and 15% of regional airline revenue respectively, whereas in Asia-Pacific airlines received on average 10% of regional revenues (with Singapore providing the most aid). (120) In Latin America, the Middle East and Africa, where airlines are mainly state-owned, airlines received much less support and on average only about 1% of their operating revenues in 2019. (121)

One would expect that airlines receiving less or no government aid will be worse off than those that have received financial support, and while this may be the case in the short term, over half of the government aid (USD 67 billion) will have to be repaid by airlines, (122) creating new liabilities on their balance sheets. This includes loans provided either directly by governments or by the private sector and guaranteed by governments, and the deferral of some tax payments. (123) In addition to the government support that needs to be repaid, airlines have also taken additional financing and credit of USD 52 billion from banks, the capital markets and lessors, (124) increasing airlines' liabilities over the medium to long term. Repayment of this substantial level of increased debt to governments and other financiers will undoubtedly affect the ability of airlines to take on further debt and equity financing, and therefore prolong their recovery and affect their future expansion plans.

Deferring rental payments has enabled airlines to address their challenging liquidity needs, but many of these rent deferral agreements are due to expire, and it is anticipated that many airlines will request a further extension as consumer demand remains low. Lessors have shown considerable patience, but as the world slowly starts to
P 276 ease restrictions and it becomes clear which airlines will not survive – which for ● some could be as soon as the end of summer 2020 – lessors will begin to exercise their rights and industry experts believe that aircraft repossessions could begin before 2021. (125) This may particularly be the case for aircraft that form part of asset-backed security packages, in which case the ultimate investors are less likely to be willing or able to continue showing leniency towards defaulting airlines.

Airlines have also managed to secure postponements and even some cancellations of

scheduled deliveries of aircraft; easyJet has agreed to a five-year deferral on twenty-four Airbus aircraft that were originally due to be delivered between 2020 and 2022. (126) It is likely that airlines will continue to lean on their manufacturers into the second half of 2020 to help reduce airlines' costs and will seek to renegotiate terms of contract and pre-existing deals; Norwegian Air Shuttle is currently looking to cancel its pending order for ninety-two Boeing 737 MAX and five Boeing 787 Dreamliner aircraft. (127) However, manufacturers seem to be reaching the end of their tethers as they too suffer considerable loss in the drop in demand, (128) with Boeing and Airbus having reported backlogs of over four thousand and six thousand aircraft, respectively. (129) The investment appetite for new aircraft is projected to remain subdued into 2021, with new aircraft deliveries, in particular for Boeing 737 and Airbus A320 aircraft, remaining depressed for the next four years. (130) Some airlines are looking to finance new deliveries via the leasing market over the coming years and are engaging in more sale and leaseback transactions in order to conserve capital and cash flow to pay down debts including state aid loans.

Concerns regarding emissions initially took a back seat in the immediate aftermath of COVID-19. However, now that governments and industry members alike start to consider the future shape of aviation, concerns regarding sustainability are returning to the forefront. The CEO of Airbus is seeking to encourage airlines to engage in fleet renewal, which has the added benefit of lower carbon emissions and is lobbying for support within the EU for some stimulus cash for the scheme. (131) There is a possibility that this could gain traction, especially as European ministers have highlighted that reducing emissions
P 277 must work in parallel with the recovery of the aviation sector, with ● a focus on investment in green technologies and fleet renewal. (132) We have already started to see such support in conditions attached to bail out packages, for example with Air France, (133) and Germany has set aside EUR 1 billion in its stimulus package for airlines to buy new, more fuel-efficient aircraft. (134) The importance of a sustainable return to aviation may assist manufacturers and encourage airlines to reconsider fleet renewal.

It is likely that the full-service network carriers will be the major losers in the fallout from COVID-19, despite the significant amount of government support they have received in comparison to low-cost carriers, and this is likely to be due to the slow recovery in demand for long-haul flights. (135) Whereas the low-cost carriers, which had the strongest balance sheets going into COVID-19, are attempting to capture more of the market by opening new bases and routes and reducing passenger fares to try and drive passenger volumes up. (136) However, if consumer demand remains low, it will be difficult for low-cost carriers to maintain a competitive edge on pricing, and it is likely to result in a general reduction in frequencies at route level. (137)

The current demand for dedicated air freight capacity is unlikely to last in the long term, particularly as the amount of available belly cargo slowly recovers as more passenger aircraft gradually return into service. (138) IATA has estimated that it will take two to three years for demand for passenger air travel to return to pre-crisis levels. (139) During this time, the unavailability of belly cargo is likely to artificially inflate the relative cost of dedicated air freight as this will remain the primary source of cargo capacity.

The survival rate will also vary across regions. Airlines in North America are estimated to suffer a net loss of USD 23.1 billion in 2020; in Europe, net losses for the region are estimated to be USD 21.5 billion; whereas in Asia-Pacific losses are estimated to be slightly higher at USD 29 billion. (140) Airlines in the Middle East and Latin America will see their losses increase by USD 4.8 billion and USD 4 billion, respectively. (141) Prior to
P 278 the crisis, airlines in Africa were already in the weakest position (as ● they were unable to achieve sufficient load factors to drive profitable performance), and this is set to worsen with a forecasted net loss of USD 2 billion in 2020. (142) No corner of the globe is spared from the impact of COVID-19, and it is difficult for anyone to predict with any certainty, while the pandemic is active, how and when the commercial aviation industry will recover to its pre-COVID-19 growth rates.

5 CONCLUSION

COVID-19 has taken the aviation industry into unchartered territory with the full consequences yet to be seen. The crisis has created the conditions for various types of dispute to arise between different stakeholders within the aviation industry, but in the short term at least we have not seen many potential disputes developing into full-blown arbitration and litigation. This is likely to change in the medium term as the economic situation becomes clearer, and as parties start to find it easier and more attractive to enforce their contractual rights. Although there is still plenty of uncertainty around the pandemic and the expected recovery profile for both economic activity and air transport volumes, the key to recovery is to boost passenger confidence and encourage a return to air travel. Without passengers, airlines will continue to fly at reduced capacity, with serious knock-on effects on other stakeholders within the industry. Nonetheless, the aviation industry has proved its resilience time and time again, and therefore there is no doubt that the aviation industry will eventually recover to pre-2020 levels of demand and beyond.

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Chapter 15: COVID-19 and Technology, Media and Telecommunication Disputes

Olga Hamama; Danielle Herrmann

1 INTRODUCTION

The COVID-19 pandemic has challenged the global community in an unprecedented way and the Technology, Media and Telecommunications (TMT) sector is no exception. Quickly spreading across the globe and forcing multiple countries to introduce lockdowns of all but essential sectors and services, many stakeholders had to learn at an extraordinary speed in order to adapt, find answers, and make critical decisions to protect their business continuity. Some players had to rely on governmental support, where available. In view of the economic downturn, some businesses might even be facing bankruptcy in the months to come.

At the same time, there is a positive side to every crisis – innovation. Necessity has always been a forceful driver of innovation. Technology as well as other TMT subsectors have been playing a key role in fighting the pandemic and creating immediate innovative responses to many challenges the world community is facing. The pandemic is forcing multiple stakeholders, including the international dispute resolution community, to reassess business models, reinvent their offering, and erase resistance lines that were drawn because individuals and businesses were comfortable with old habits and processes. A required acceleration towards virtualisation, connectivity, and automation will benefit the TMT industry. Accordingly, some players of the TMT sector face an unprecedented economic momentum to grow their businesses.

This contribution offers an insight into the manifold impact of COVID-19 on the TMT sector (2). The authors also consider immediate effects of the pandemic on TMT-related dispute resolution (3) and share some thoughts with regard to potential future developments (4). Finally, the authors depict first takeaways, which could be considered going forward (5).

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2 IMPACT ON THE INDUSTRY

The COVID-19-induced economic disruption is having a severe impact on the economy, both locally and globally. The lockdowns and safety restrictions have immediately revealed the vulnerability of global supply chains and various business models. The global community has been forced to reconsider its business operations and deal with a great degree of uncertainty. Pandemic-related risks and lockdowns have also influenced the working environment, consumer's behaviour, and preferences. Some of these changes are likely here to stay.

The TMT sector comprises a wide range of businesses such as hardware, semiconductors, software, media, and telecoms. (1) Hardware companies include not only computer makers but also makers of server systems, mobile device handsets, tablets, and storage devices, such as hard drives and memory. Within the hardware subsector, semiconductor manufacturers develop and produce integrated circuits and microchips used in all sorts of applications. Software companies produce computer or mobile applications for both individuals and enterprises. Media and telecom companies are also an essential part of the TMT sector. Media firms develop, produce and distribute multimedia content on TV, in print and online. The telecom sector operates the global communication infrastructure, including the internet, and provides access to such infrastructure and provides various services using this infrastructure.

The TMT sector covers big tech companies, small and medium businesses, and start-ups. Many of these players depend on research and development and act across various subsectors. (2) Two key trends have been significant to the TMT industry. First, there is unrelenting digital disruption due to technological developments, meaning that new or enhanced technology enables disruptive business models that change markets extremely fast and beyond the influence of incumbent players. Second, the TMT markets are characterised by convergence of different technologies, infrastructure and services whereby the lines between the various players within the TMT sector, for example telecommunication and media companies, continue to blur. (3) Both trends have been driving change in the sector, particularly by threatening revenues of traditional players, by giving opportunities for new business models and by promoting consolidation and cooperation. (4)

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This multifaceted nature of the TMT sector has also been reflected in COVID-19's impact on the industry. But in general, there are no businesses, big or small, that have not been confronted with difficult questions over the past months. On the one hand, the TMT sector was no exception and felt the immediate effect of the pandemic: Impairment of the complex supply chains in view of the high reliance on imports from China and Southeast Asia for the consumer electronics products and services directly resulted from the extended shutdowns of the related economies, as well as labour shortage, and other

obstructions in factories and ports. (5) At the same time, from the very outset of the pandemic, many TMT companies experienced an immediate surge in demand for their products and services resulting from lockdowns and also have been urged to contribute to the fight against the challenges posed by COVID-19 with reliable, cost-effective solutions. These two-sided effects of the pandemic are apparent throughout the sector and will influence its further development.

2.1 Technology

Technology is heavily feeling the effect of the slowdown with key products being delayed or being soft-launched. Smartphone sales, for example, dropped by 40% in February 2020 and are expected to be down by 10% in 2020 in general. (6) The number of sales of units of professional service robots, which are predominantly sold for the surging warehouse, logistics and medical verticals, will likely grow and surpass the number of sales of industrial robots, which are deployed in the heavily affected automotive industries. (7)

At the same time, an immediate shift to remote working models – a development which will likely last beyond the pandemic – led to a tremendous demand in hardware and software, for example, additional supply of computers, laptops, monitors, and other
P 282 devices required to set up remote working places or homeschooling, hardware ● for data storage, etc., and software solutions, such as platforms for remote meetings, cybersecurity software, virtual data storage capacities, etc. (8)

Furthermore, leading technology and telecommunication companies have been closely cooperating with the governments in the development of tracing applications, data storage, and processing of information. (9) In Germany, for example, some of the leading representatives of the TMT sector (Telekom and SAP) have been involved in the development of the COVID-19 tracking application. While Germany and other countries have opted for a decentralised system for its COVID-19 tracking application in order to ensure the highest possible level of data protection, (10) other countries, such as South Korea, have decided to take more drastic measures in terms of tracking. To track the movement of its citizens, South Korea uses a vast amount of data, consisting of credit and debit card transactions, phone locations by mobile operators, and making use of its extensive network of surveillance cameras. (11)

In many countries, data is being used as a crucial method to monitor and control the spread of the virus. Technology further plays a key role in hospitals as millions of people on a global scale become dependant on medical equipment, such as respirators to support oxygen circulation. In general, tech start-ups are putting leading-edge innovations at the service of frontline workers. Many use artificial intelligence and cloud
P 283 computing to help organisations process data, giving new insights to help fight ● the virus and to come up with other innovative solutions to tackle COVID-19-related challenges. (12)

2.2 Media

A global lockdown and efforts to contain the virus led to cancellation or postponement of major sporting events, such as the Olympic Games Tokyo 2020, the Union of European Football Associations (UEFA) European Football Championship and national championships, just to name a few. (13) These developments affected commercial broadcasting networks that have already spent significant amounts on the broadcast rights and were losing billions in advertising revenues. In general, advertising spending was expected to be down by as much as 10% in all markets this year, despite the massive increase in the number of viewers of ad-supported video platforms due to pandemic lockdowns and people transferring to home offices. (14) This estimate was made prior to the decision to postpone the Olympic Games Tokyo 2020 – upon intensification of lockdowns worldwide, this number might grow. (15)

Content providers, such as Netflix or Disney Plus, experienced a rapid increase in demand which led to an exponential growth of subscribers. (16) At the same time, film and TV productions came to an indefinite halt, making it impossible to produce new content despite the high demand, questioning the ability to keep the new subscribers in the long term. (17) Overall, the global content delivery networks are in higher demand
P 284 than ever with video and game streaming exploding in view of the lockdowns, schools ● closing and people staying in home office. (18) The number of audiobook sales, for example, is also expected to grow by 25% in 2020. Podcasting, on the other hand, is likely to experience a limited growth, as people stopped commuting and listening to this media while travelling. (19)

2.3 Telecommunication

When countries introduced travel restrictions and lockdowns, people started spending more time at home. The decline in international travel will continue despite the opening of some boarders. It is also expected that business-related travel will continue to be limited even after the pandemic. These developments led to a decrease in revenue for telecommunication mobile network operators with regard to international roaming. (20) At the same time, usage of the telecoms networks in general is skyrocketing, with many telecommunication companies recording big spikes in data traffic. Lockdowns and

remote working lead to an increased demand in different types of telecommunication services, from internet access and video calls to video streaming. Therefore, telecommunication companies have been playing a key role in informing, entertaining and keeping connected those isolated by quarantine or lockdowns, in addition to enabling an enormous demand in technology for remote working or homeschooling. Resulting usage of far higher volumes of data and network capacities forced the telecommunication network operators to focus on enhancing network resilience. Network operators cooperated with each other, with state authorities and with over-the-top players to ensure sufficient network capacities and stability. The European Union, for example, has tried to minimise possible outages by, *inter alia*, introducing a reporting mechanism to monitor the internet traffic situation to be able to respond to capacity issues, (21) and approaching streaming platforms with a request to temporarily restrict the video quality. (22)

COVID-19 has also facilitated new cooperation models and initiatives in the subsector of streaming platforms. Operators across the US, for example, are raising their efficiency by borrowing competitors' spectrum. (23) Across Europe, telecommunication providers have increased capacity, offer unlimited or higher voice and data volumes to their customers,
P 285 and provide anonymised data to help track the spread of ● COVID-19. (24) As the global number of companies testing private 5G developments is growing, many are revising their planned investments in 5G. (25) As a result of economic slowdown, while very much needed, roll-out of new products and services, such as 5G, might well be delayed. (26)

In general, because of the surge in demand in technology and connectivity, the overall economic impact on the TMT sector might not be as critical as on other industries. However, as we experience new spikes of the case numbers in many parts of the world, many companies still have to address a lot of challenges, including restructuring their supply chains to make them more robust and considering new models to address possible labour shortage. It is important to note that an increase in online services and communication does not always correlate with an increase in revenues for all affected companies. For example, internet access is commonly marketed in flat-rate tariffs to customers in developed countries. As a result, additional usage does not lead to additional income but only to additional costs and, therefore, may even reduce revenues of network operators, while over-the-top service providers may well take advantage from the growing usage of their products and increase revenues from subscriptions or advertising. In the end, the pandemic might further intensify convergence and related developments in the TMT sector. It certainly pointed out the essential role of communication infrastructure and technology and the need for further investments in and adequate regulation of this sector.

3 IMMEDIATE IMPACT ON DISPUTE RESOLUTION

As in many other industries, the TMT sector was no exception to the immediate impact of the pandemic on dispute resolution. Prior to presenting an overview of immediate impact on dispute resolution in general, it is important to note that litigation is a dominating means of dispute resolution in the TMT sector. The parties resort less often to arbitration, mediation and other means of dispute resolution.

According to the 2016 Survey Report on TMT Disputes which was published by the School of International Arbitration of Queen Mary University of London (Queen Mary TMT Survey), as well as the 2017 Survey of the Silicon Valley Arbitration and Mediation Centre, arbitration has been depicted as a suitable means of dispute resolution after mediation in the TMT sector. (27) Despite this outcome, in practice, most of the TMT disputes are still predominantly being litigated in domestic courts. (28) This ● practice might have various
P 286 causes: (i) many TMT disputes are arising from non-contractual matters, such as matters relating to intellectual property (IP), competition, cybersecurity, data protection or regulatory matters; (ii) in view of the fast development of technologies and the urgency of related disputes, stakeholders may further chose state courts when it comes to obtaining interim relief; and (iii) the existence of specialised courts might also persuade stakeholders that their legal disputes will be handled with the required expertise. (29)

Expert determination and expedited arbitration have also been depicted as favourable means of dispute resolution, whereby mediation is also identified as a very favourable tool which is either deployed as a stand-alone dispute resolution method or in combination with court litigation (expedited) arbitration or expert determination. (30) According to users, this selection was motivated by the goal of finding business solutions. (31)

In view of the multifaceted focus of and contribution by the TMT sector in general, as well as a rapidly growing number of complex international transaction, most of the TMT-related disputes relate to IP rights, such as patents, trademarks, copyrights, and know-how. (32) According to the Queen Mary TMT Survey, the amount in dispute varies greatly from low-amount disputes to USD 1 billion disputes. (33) Different types of TMT disputes include:

(i) disputes related to IP rights (50%);
(ii) joint venture/partnership collaboration (39%);
(iii) licensing (37%);

(iv) information technology systems development/implementation/integration (35%);
(v) confidentiality/non-disclosure agreements (20%); and
(vi) outsourcing disputes. (34)

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3.1 Litigation

In the context of state litigation, the first impact of the pandemic was immediately felt with regard to the scheduling and postponement of hearings and service of submissions. The questions that parties have been dealing with in various jurisdictions relate to the extension of deadlines, rescheduling of hearings or possibilities to hold remote hearings, as well as availability to obtain interim relief in urgent cases.

In many jurisdictions, state courts have adapted to the situation reasonably. In Germany, for example, state courts were rather generous with regard to COVID-19-related requests for deadline extension and postponement of hearing requests, while guaranteeing the availability of interim measures in urgent cases. The necessary distancing requirements within the courts and administration have been implemented relatively quickly, too, so that judicial bodies remained operational to the extent possible. An important factor for German courts was that all courts and lawyers are, as a matter of law, equipped with compulsory e-filing accounts, (35) comparable to a specific mailbox, so all submissions, formal deliveries and notifications can be exchanged online using any computer, including in the home office. This makes state litigation a lot easier for all sides.

However, the general lockdown had its effects on the courts as well. Since administrative staff and judges relocated to home office and/or had to stay home to look after their children while schools and day care were closed, filings submitted by mail or fax were often only served to the other parties with considerable delay, rulings were not issued in written form within the timeframes provided by law, etc. The situation required some flexibility from all sides, also with regard to procedural rules. In essence, a constructive approach seems to prevail at least to an extent where patience and workaround practical solutions do not harm the legal interest of the parties.

This is also true for oral hearings. While many jurisdictions saw an urgent need for immediate action to increase the use of telephone and video technology to hold remote hearings where possible, (36) others had already provided for the possibility of remote hearings prior to the pandemic. (37) For example, section 128a of the German Code of Civil Procedure (CCP) provides for the possibility to hear oral arguments using image and sound transmission. (38) Section 128a(1) of the CCP grants the court the possibility to allow the parties, their attorneys and advisers to stay at another location than the court for a hearing on oral arguments, and to take action in the proceedings from there. In this event, the images and sound of the hearing shall be broadcasted in real time to this
P 288 location and the courtroom. The same applies to witnesses, experts and parties for an examination according to section 128a(2) of the CCP. In case of a remote hearing, the judge or judges, however, will be present in a courtroom. In view of this provision, a transition to remote hearings in German courts could theoretically work reasonably smoothly.

Practically, however, the legal possibility of formal remote oral hearings has been rarely used in German courts to date. If hearings could not be postponed, courts proposed to conduct a written procedure and requested parties to renounce their rights to an oral hearing wherever possible. For lawyers, this often had the implication for assessing whether a waiver of the oral hearing would be in their client's interests, as opposed to a postponed or remote oral hearing with judges not being particularly eager to conduct the hearing. Another option that turned out as an effective workaround is the written procedure combined with informal oral hearings conducted as a simple video or telephone conference. Such informal hearings are not subject to the formalities of a remote oral hearing, but are more flexible technically, as well as less bureaucratic, while still offering the opportunity of a legal discussion between the parties and the judges.

Generally, there seems to be no trend to conduct a significant number of formal remote oral hearings in countries where a lockdown was only temporary and courts never really closed or opened again for regular oral hearings rather soon. (39) Informal solutions have been applied, where possible, but their scope is limited because any such solution requires the consent of all parties and the court and cannot be implemented unilaterally. The vast majority of oral hearings has either been postponed or takes place taking into consideration the distance requirements, depending on the subject and the actual lockdown situation. In various countries, considerations to prioritise proceedings during the pandemic have been implemented, with a focus on urgent or essential litigation; in some more severely affected countries, courts were closed completely. (40) Such measures will lead to a significant backlog. Thus, the effect of the pandemic on litigation will largely depend on the number of infections, the duration and severity of lockdown measures and the occurrence of new waves with additional or longer lockdowns. Formal remote oral hearings may well play a more significant role under such circumstances and may eventually be required to avoid intolerable delays of proceedings.

3.2 Mediation and Arbitration

As indicated above, mediation and arbitration are among the most popular methods for
P 289 dispute resolution in the TMT sector after litigation. In pending mediation and ● arbitration cases, some of the first issues the parties and service providers faced in the context of the pandemic related to the scheduling of remote hearings and exploration of various technologies to enable the latter, as well as e-filings. Some hearings have indeed been postponed, while in others digital solutions were preferred or ordered by the tribunals to ensure business continuity. In general, videoconferencing and e-filings are not new when it comes to international arbitration and mediation. At the same time, the scale of the pandemic-related impact did cause a tremendous shift to the extensive reliance on technology and expanded offers by respective service providers.

The World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center, a leading international institution in the TMT sector, (41) was among early responders to the situation. The WIPO Arbitration and Mediation Centre published a COVID-19 update indicating that it continues to receive and administer cases under the WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules. (42) The WIPO Arbitration and Mediation Center also indicated that any new requests should be submitted electronically via email, until further notice. (43) The WIPO Arbitration and Mediation Center further made various online case administration options available, including an online docket and videoconferencing facilities, at no cost to interested parties. (44)

Other arbitral institutions and organisations have also joined forces and collaborated in finding the best solutions to the problem and providing parties and arbitrators/neutrals with guidelines and technical support in order to ensure that dispute resolution services remain available despite the pandemic. (45) Many arbitral institutions have permitted and some, such as the WIPO Arbitration and Mediation Center, require the electronic filings of requests for arbitration and application for emergency proceedings. (46)

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Online case management platforms have also previously been available or are being developed by some. (47) The Arbitration Institute of the Stockholm Chamber of Commerce, for example, offered its newly established digital case management platform (SCC Platform) to be used for ad hoc arbitrations globally free of charge during the pandemic. (48) The SCC Platform provides parties, counsels and arbitral tribunals with a unique cloud-based secure and efficient method to manage arbitrations. The International Court of Arbitration at the International Chamber of Commerce (ICC) is currently working on a technical virtual hearing solution which can be adapted to fully or partially accommodate remote hearings. (49)

One of the pressing legal issues arising in the context of remote hearings was the question of whether a remote hearing can be ordered despite an objection by one of the parties to the dispute. (50) A relating question was further whether parties could then successfully challenge awards arguing infringements of their procedural rights. An extensive number of webinars and other online discussions have been offered by the arbitral institutions and organised by other arbitration community representatives to address this topic. (51) Despite a multitude of approaches, a consensus by the arbitration community seemed to have developed during these discussions with regard to the necessity to carefully assess the applicable legal framework and specifics of the individual case when making a decision. Mostly, concerns have been raised in connection with assessing witness' credibility and conducting of cross-examinations, as well as scheduling of hearings in complex cross-border disputes involving parties from multiple jurisdictions and time zones. Such concerns would have to be scrutinised in light of the parties' rights to be heard and treated equally and in view of the specific circumstances.

While some technology is still being developed and tested, and some of the procedural challenges related to remote hearings are being analysed or decided upon, one cannot deny that COVID-19 has very much accelerated usage, development and acceptance of technology-based solutions in dispute resolution, be it in state courts, mediation or arbitration. Remote hearings and online dispute resolution platforms provide an opportunity to safe travel costs, rental costs for hearing facilities and accommodation. Remote hearings also provide parties involved to easily agree on dates for case management conferences and hearings, as physical presence is not necessary, and everyone remains very flexible with regard to the remaining schedule.

These changes have at the same time accelerated response to the needs which were
P 291 communicated by the representatives of the TMT sector already during the 2016 ● Queen Mary TMT Survey. Participants in the research indicated that they would favour deployment of technology in dispute resolution in order to increase efficiency and avoid costly delays of the decision-making process. (52) Forty-five per cent of participants indicated that online dispute resolution tools, like online case management platforms, could contribute to the improvement of international dispute resolution in this sector. (53) So now that this offer has been developed, international dispute resolution might improve its standing in the TMT sector.

With regard to mediation, as a result of the pandemic, some parties decided to stay

pending litigation proceedings and refer their disputes to a remote mediation aiming at saving costs and finding a timely and practical solution under the circumstances.

4 SHORT-TERM AND POTENTIAL LONG-TERM IMPACT ON TMT-RELATED CONFLICTS

It is difficult to accurately assess the overall short-term and long-term impacts of the pandemic on TMT-related disputes, as many disputes have not been initiated yet or are still pending. With regard to procedure, the TMT community as well as other sectors will be well served if the international dispute resolution players embrace the current situation in order to learn, develop and improve its offering. Increased use of technology might well lead to more efficient dispute resolution procedures. It will also provide parties with greater flexibility and might decrease the costs.

In addition to the increased use of technology, more flexibility might be required with regard to the dispute resolution methods – available data suggests the TMT sector very much prefers mediation, expert determination, as well as expedited proceedings to full-fledged arbitration. In view of the economic downturn, increasing interest of stakeholders in ensuring cash flows, business continuity, and business relationships, a flexible response and recommendation of business-oriented solutions is vital. Advantages and efficiency of mediation could be further promoted. Mediation's success might also be further supported by the recently adopted Singapore Convention – a response to the demand from a growing body of mediation users for an enforcement mechanism applicable to mediated settlement agreements in cross-border disputes.

With regard to the matters in dispute, if parties fail to find amicable solutions with their business partners, we might experience an increased number of disputes ranging from the disruption of supply chains, termination or reduction of advertising payments and damage claims against insurances. Questions of applicability and scope of force majeure clauses, hardship or other concepts such as frustration, material adverse change or illegality might be dominating some controversies. One cannot exclude that some corporate disputes exploring obligations of the joint venture partners, potential failure to agree on a course of action to be taken in light of COVID-19 circumstances could also arise. In case of disputes, parties will be forced to carefully consider the available dispute resolution mechanisms, depending on their geographical locations, technological possibilities and potential enforcement hurdles in view of the pandemic. In addition, solvency of the opponent and related risks will have to be considered carefully as well.

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5 KEY TAKEAWAYS

While some countries have been easing lockdown restrictions and some have, for now, defeated the pandemic, in most parts of the world people are still fighting the pandemic or experiencing spikes in the number of infections anew. The TMT sector has been severely hit by the consequences of COVID-19, but has also experienced a spur in innovation and demand for technological solutions. The economic impact of the pandemic is not expected to be completely remedied in the immediate future. Existing restrictions, economic downturn and potential insolvencies of some players might also contribute to further complications. At the same time, the pandemic might further intensify convergence in the TMT sector and promote investments in communication infrastructure. While many businesses have been occupied by finding urgent solutions for supply shortages and ensuring liquidity as a first step, a number of disputes arising from the pandemic-related circumstances are still to be expected as the parties are exploring their options and considering initiating proceedings to enforce their rights.

When these disputes arise, the international dispute resolution community should be prepared to implement recent learnings and offer an improved service. In view of the existing preference of the TMT sector for an increase in technology-based offers in international dispute resolution, mediation and arbitration might propose a viable alternative to litigation where appropriate. To achieve this goal, the arbitration community has to utilise technology-based solutions to respond to the user's demands and deliver a qualitative, time and cost-efficient dispute resolution service. When increasingly deploying technological solutions, the dispute resolution community also has to carefully consider and address related concerns with regard to data protection and cybersecurity.

Finally, a flexible approach with regard to various dispute resolution methods is also key when it comes to finding the right solutions in the wake of the pandemic-related commercial disputes. Mediation, for example, is likely to be preferred by the parties looking for timely and business-oriented solutions.

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Chapter 16: Finance Disputes and a Pandemic: The Eye of a Perfect Storm?

Philippa Charles

(*)

1 INTRODUCTION

One of the most jarring changes induced by the pandemic to business life has been the sudden sharp decrease in the rhetoric of fiscal rectitude and deficit-reduction, which has been the guiding principle for many developed economies since the financial crisis of 2008. The use of public money, or Government-supported lending, to multiple industry sectors, is a key difference between this and other crises, and in the context of disputes arising in the financial services sector, may be pivotal in the period to come.

This is a public health crisis, of course, but it is also an economic crisis unlike any that we have previously witnessed, both in global reach and effect and in scale. A key aspect of this is the fact that it is not (unlike some previous crises) focused on a particular industry (such as the technology crash of 1999) or that its effects are focused only on some aspects of society (such as the dearth of lending following the financial crisis in 2008). It is truly a global crisis in terms of the geographic effects too: with very few exceptions, the virus has impacted sharply on the economic activities of all major countries and on all continents.

As the pandemic has spread worldwide, the seriousness of its effects on national economies, and the duration of those effects, will vary from country to country, and therefore while one can speak in terms of a global recession, it is already apparent that there are certain countries which appear successfully to have minimised the impact on their economies whereas others are still 'knee-deep' in a growing downturn of uncertain scope.

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The effects of the pandemic on businesses of all sizes have been felt in waves as the virus has spread and developed across the globe, and 'lockdown' restrictions have been introduced to varying degrees in the nations affected by it. Early industry casualties of the pandemic included the travel and leisure industries, hotel groups, car hire companies, airlines, and theme parks. The ripple effects include a significant drop in the demand for aircraft (and consequent closures or reductions in workforce of manufacturers supplying them) as well as a significant diminution in demand (and value) of fuel oils used in those industries which have led to the abandonment of exploration and production opportunities. (1)

In order to seek to mitigate these effects, and to try to 'steady the ship' to allow companies a breathing space to restore their businesses once life returns to something closer to what we know as normality, Governments have deployed the tools at their disposal to support and provide some degree of safety net for business, with the assistance of financial institutions worldwide.

Since the pandemic was declared by the World Health Organisation in March 2020, Governments have taken extraordinary steps, at extraordinary speed, to pump liquidity into their economies and to augment funding for sectors of the economy which have perforce been mothballed as a result of public health restrictions. The numbers are already eye-catching as the following examples demonstrate:

- Since the start of the new tax year in the UK in April 2020, Government borrowing in the first two months of the year was over GBP 102 billion (as against an aspiration of GBP 55 billion in borrowing for the full year) and, based on an estimated shutdown of three months duration, the UK's Office for Budget Responsibility has predicted that that figure could rise to nearly GBP 300 billion. Money has been pumped into a Job Retention Scheme, to provide additional resources for the health service, and most recently to assist the arts to ensure the survival of museums, galleries, theatres and other cultural bodies. For business, the Government has introduced Government-backed loan schemes, which entitle the lender to recoup the debt from the State in the event that the borrower cannot do so.
- In the US, the Federal Reserve created the Primary Market Corporate Credit Facility (PMCCF) to buy corporate bonds to ensure corporations can get credit, on 23 March 2020. At the same time, it created the related Secondary Market Corporate Credit Facility (SMCCF), which buys up corporate bonds and bond Exchange-Traded Funds on the secondary market. The combined purchase limit for the programmes is USD 750 billion, up from an initial USD 200 billion. The Treasury Department contributed a total of USD 75 billion in initial capital to these two programmes from the European Social Fund, USD 50 billion for the PMCCF, and USD 25 billion for the SMCCF. The premise is that this programme makes banks more willing to lend to corporations because they

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know that they can sell the loans to the Federal Reserve if need be. These programmes were enacted alongside a number of other fiscal stimulus measures including interest rate cuts, asset purchase programmes constituting 'quantitative easing', and funding for local government of up to USD

500 billion. On fiscal policy, the US government has to date introduced three rounds of relief packages and one supplementary one, with a total value of USD 2.8 trillion.

– The European Union (EU) Member States have put in place a monetary policy (2) agreed centrally between them, including a commercial paper buying programme by the European Central Bank which will run until June 2021 and acquire bonds and commercial paper up to a total value of USD 1.5 trillion. In addition, on the fiscal policy front, the EU has agreed a fiscal stimulus package funded by bonds issued by the EU rather than by individual states, called 'Next Generation EU', which will give USD 550 billion in grants to Member States, and USD 275 billion in loans. In addition, individual Member States have made provision for localised fiscal stimulus packages to support wages, defer tax, and provide sector-specific support to those industries which have been particularly damaged by the pandemic. These are valued in the hundreds of billions of dollars in France, Germany, and Italy.

While there is no doubt that Governments worldwide are doing what they can to cushion their economies from the worst immediate effects of a short-notice commercial shutdown of uncertain duration, the emerging reality is that, in economic terms, the worst is very much still to come, and this is not only anticipated once the Government subsidies cease, but is already happening. Two key indicators point to the issues which are likely to arise in the financial sector in the coming months: first, the rapidly increasing rate of job losses notwithstanding the jobs protection schemes put in place to fund employers' payment of wages during shutdown in some economies, and, second, the increasing number of insolvency filings taking place in the major economies.

It is clear that those in charge of economic policy in Government are not at all certain that the measures outlined above will enable countries to escape the worst effects of this pandemic economically either. Speaking to members of the UK Parliament in May 2020, the UK's Chancellor of the Exchequer, Rishi Sunak, said this: 'I certainly won't be able to protect every job and every business, we're already seeing in the data there will be more hardship to come. Lockdown is having a significant impact on our economy and we are likely to face a severe recession the likes of which we haven't seen (before).'

The impact of this sort of extreme impact on the economy will be felt in multiple aspects of the financial services sector: while there are obvious issues around, for example, the treatment of loans to businesses which fall into insolvency as a result of a recession,
P 296 there are more indirect impacts too, such as unexpected credit risks arising ● due to the devaluation of a reference security (such as reserves of oil and gas, or a portfolio of commercial property assets) and technical defaults arising short of non-payment or insolvency events in instruments which are dependent on the maintenance of margin.

2 FINANCIAL SERVICES SECTOR: KEY CHALLENGES POST-COVID-19

In the remainder of this chapter, the author will address three key aspects of the impact of the pandemic on the financial services sector.

2.1 The ADR 'Breathing Space' and Financial Disputes

From the dispute resolver's perspective, an impending wave of financial defaults no doubt evokes memories of the period after 2008. In addition, however, in 2020, the task of the dispute resolver in an interconnected crisis such as the pandemic is to assess, early and effectively, the risk/reward inherent in taking a dispute into formal dispute resolution measures, rather than seeking to renegotiate or reschedule indebtedness or liability to a point when the debtor may be better able to meet that liability. While experienced judges and academics in the UK, at least, are pressing for a 'breathing space' for the early resolution of disputes by alternative means to avoid the consequences of a tsunami of litigation, the evidence of cases being issued already in the English courts suggests that some financial institutions are acting promptly to protect their position against defaulting counterparties.

2.2 Converting the Sceptics: Arbitration as an Opportunity for Institutions

Of perhaps particular significance for those seeking to persuade the financial services sector of the benefits of arbitration over national court litigation, the present issues affecting the operation of the national courts in the key financial hubs to which financial institutions have historically turned for assistance have been promptly and largely effectively addressed by the arbitral institutions to allow binding and enforceable decisions to be delivered throughout this period. (3) The mechanics of remote hearing management are outside the scope of this contribution but have been extensively
P 297 documented elsewhere, (4) and there is no question that adoption and use of ● remote hearings has enabled the continuation of dispute resolution processes in litigation and arbitration matters where parties, courts, and tribunals have been prepared to step up to the challenges they pose. The longer-term use of remote or hybrid hearings remains uncertain though at present the 'mood music' suggests that for case management and interim hearings at least it is likely that remote hearings will be utilised longer-term. The motivation for this includes reasons other than concerns around COVID-19 and public health, such as costs savings and limiting the environmental impact of dispute resolution processes.

2.3 New Products, New Challenges

The health of the financial services sector is and will be a key indicator for the ability of economies to recover from the damage caused by the pandemic and the measures adopted to address it. While certain aspects of the financial services industry have changed since 2008 to reduce their vulnerabilities (including some of the structural changes in institutions aimed at preventing the overexposure of banks to risks such as those they faced in the derivatives market in 2008), the ever-changing make-up of financial services business means that there are untested aspects of that business which are now likely to come to the fore in the resolution of disputes connected to COVID-19, such as the use of cryptocurrencies, other FinTech, and blockchain, to name but a few. Arbitration may be very well suited to the management and resolution of such disputes if it forms part of the ecosystem of the relevant product, but there are potentially negative consequences to the use of a non-public mechanism to resolve significant issues of principle in relation to these products.

3 ADR: A 'BREATHING SPACE' WORTH USING?

In the course of April 2020, two former Presidents of the UK Supreme Court, Lord Neuberger of Abbotsbury and Lord Phillips of Worth Matravers, together with a group of distinguished lawyers and academics, and the British Institute of International and Comparative Law (BIICL), made a bold proposal regarding disputes arising out of the pandemic. Their view was that, as it was apparent that one of the consequences of the pandemic was likely to be a surge in litigation arising out of a 'plethora of defaults' over issues such as force majeure, frustration, material adverse change, and the response of business interruption insurance policies to the situation affecting businesses worldwide, companies should beware getting bogged down in litigation which might be itself delayed or extended by the impacts of the pandemic. They proposed that such parties
P 298 ● should consider embracing a period of 'breathing space' in which they could search for a negotiated solution without having to engage in a formal process of dispute resolution. (5)

The Working Group noted with some approval the legislative steps taken in Singapore to protect parties unable to meet their contractual obligations because of the pandemic (6) and suggested that while 'the law must provide a solid, practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery', a strict application of the principles applied by the common law which result in a 'winner' and a 'loser' 'will not take full account of the market/social contextualisation of the crisis. Is there a case for adopting a more creative, graded, but nevertheless rigorous approach without prejudicing the underlying need for legal certainty? In many jurisdictions, procedural rules already encourage conciliation – can these be developed further to give a breathing space? The onus at least in the first instance would be for the continuance of a viable contract rather than bringing it to an immediate end'. (7)

In a subsequent second (and significantly expanded) Concept Note, BIICL summarises the proposal as being that the best policy approach in the case of many contracts is for the law:

- to support negotiated solutions to make viable contracts blighted by the pandemic work;
- to bring contracts made unviable by the pandemic to an end in an equitable manner;
- where negotiation fails, to encourage parties to undertake mediation or other alternative dispute resolution (ADR) methods;
- where court proceedings are needed and cannot be safely carried on in person, to encourage online hearings – these will have a much more important role in the future even when no longer necessary for health reasons, and will help to avoid a backlog of cases clogging up the system. (8)

In analysing the basis of claims, the BIICL working group points out that:

> ready access to the courts is important. It can be seen as assisting the negotiation (where sensible) of time to pay, because unless the creditor can if necessary achieve and enforce a speedy judgment, using common law procedures, the risk is simply shifted from debtor to creditor. Subject to any contractual or legislative provisions to the contrary, at common law the fact
> P 299 that a debtor is unable to pay ● because of the effect of a pandemic on its business is in itself unlikely to provide a defence. (9)

Noting that in the example of the present test case in the English courts as to the application and response of business interruption insurance policies to the closures resulting from the pandemic, there is a need for authoritative determination of such issues by the courts, the Working Group also refers to the legislative efforts which suspend remedies which might otherwise be available in the ordinary course to creditors (such as the Corporate Insolvency and Governance Bill) as a means of minimising litigation in the throes of the crisis in favour of a moratorium.

While not all claims are susceptible to settlement discussions (not least issues of principle such as the case in relation to the scope of business interruption insurance claims), the Working Group notes the established policy of many legal systems to require parties to participate in a form of ADR, such as conciliation, before proceeding with their dispute in formal proceedings. In England, it has long been the case that parties have been encouraged to consider ADR both at an early stage and throughout the course of their disputes, and the English courts have penalised in costs those parties which have failed to engage in such processes, even where they are ultimately successful on the merits of the case, where the refusal to engage in settlement discussions was unreasonable. However that 'nudge' has probably more often resulted in a virtual bombardment of protective offers aimed at shifting the likely allocation of liability for costs of the proceedings between the parties, rather than encouraging genuine dialogue between them.

In its purest sense, the plea for a 'breathing space' approach is just that – a pause for reflection on both sides of a putative dispute to establish whether, and if so how, their originally planned arrangements can be undertaken (on a deferred or delayed basis) rather than terminated in favour of a formal dispute resolution process. Were such an approach to be generally adopted, the authors of the BIICL Concept Note postulate, then the number of disputes referred to formal processes might diminish and – in the pandemic era – steps can be taken to preserve rather than to destroy relationships.

It seems to the author that this laudable ambition fails to appreciate the commercial reality that in many cases litigation or arbitration is already deployed as a last resort rather than as a first step. Quite apart from those contracts which make express provision for the conduct of escalated negotiations (and even a formalised commitment to ADR as a precondition to the commencement of proceedings) it is commercial common sense to seek to resolve issues when they arise rather than to refer them to a drawn-out and expensive process of dispute resolution. If it is right that in many cases parties appear in a litigation or arbitration case only after the exhaustion of all mechanisms short of such process, then the purpose of the 'breathing space' seems less designed to benefit the
P 300 parties per se, but more to protect the ability of the court ● system (in particular) to cope with the anticipated plethora of defaults to which Mario Draghi referred in an interview with the Financial Times in March 2020. (10)

In England, at least, the courts have taken a robust approach to the continuation of court business in the period of the pandemic, and have promptly switched both interlocutory hearings and trials to a fully remote or hybrid model which has continued successfully. The first such fully remote hearing was, in fact, a case involving financial institutions and the enforcement of an arbitration award made under the Energy Charter Treaty, (11) and took place within a week of UK lockdown, over four hearing days in late March and early April 2020, and involving witness testimony from multiple jurisdictions. With very few exceptions, current Commercial Court business has moved into the virtual sphere, with the result that, as of 15 June, the Commercial Court Users' Group was able to record that there was virtually 'no backlog' in the work of that court. (12)

That position is not replicated in the national courts of all other major financial centres. The New York State Courts, for example, have barred the commencement of new 'non-essential' cases to address their backlog ahead of an anticipated surge in disputes (and with the benefit of local State legislation extending the limitation period under New York state law), although the Federal Courts remain in operation. Other jurisdictions have also seen either total or partial suspension of their activities and a consequent build-up of stalled cases, with an inevitable anticipated delay in their resolution once operations resume.

Arbitration centres, by contrast, have generally moved swiftly to engage in remote working practices, and have continued to facilitate the issue and progression of claims (in some cases with updated guidance to users as to the conduct of proceedings on a remote basis including the replacement of hard copy filings with electronic versions only, and the use of electronically signed awards, where the parties are content to proceed on the basis of e-signatures). The fact that arbitrators are drawn from a wide pool of practitioners, already well used to working in a diffused way, has also meant that it has been possible to progress claims and case management in this period. While there may be very good reasons for parties to take a 'breathing space' before commencing proceedings in arbitration, there are few if any material hurdles to commencing arbitration from a practical point of view.

Given the stated long-term preference of financial institutions to have their disputes resolved in the courts of the major financial centres (including London, New York, Hong Kong, and Frankfurt), it is realistic to say that for those institutions proceeding outside England and Wales, they are likely to face the consequences of an extended backlog in
P 301 relevant court systems. Based on information gathered by ● Solomonic about the claims being issued in the English courts in the months since lockdown, it appears that certain financial institutions are not attracted by the idea of a pause before seeking to recoup sums due to them (though of course it may well be that the defaults now being pursued predate and are unrelated to the pandemic). (13) That is not, commercially, an unreasonable step for them to take in circumstances in which waiting may leave an institution competing for value in an insolvency situation – the pandemic having

exacerbated an existing situation of default.

While therefore one may argue that there is less need for a 'breathing space' and the exploration of ADR alternatives in England, from a functional perspective, it seems to the author that what lies behind the 'breathing space' proposal has more of a philosophical underpinning: namely that at a time when substantially the whole world is affected to a greater or lesser degree by an unanticipated and potentially unmanageable disease, the focus of potential disputants ought not to be on their prospects of success in litigation, but rather on finding a means for all such disputants to survive, if not thrive, by finding a meaningful resolution of their disputes without having to take up the tools of formal dispute resolution with which to batter each other into submission.

The relative ease with which arbitration institutions and practitioners have adopted modes of working to progress disputes is, however, a factor which in the longer term may point financial institutions (either temporarily or as a policy decision) towards arbitration as a preferred dispute resolution mechanism, particularly if the duration of delay extends further and the backlog of cases continues to increase.

4 CONVERTING THE SCEPTICS

In a report published in 2018, a Task Force of the International Chamber of Commerce (ICC) Commission on Arbitration and ADR addressed certain aspects of the relationship between financial institutions and international arbitration. The Task Force noted the historic preference of financial institutions both to avoid the national courts of emerging markets and for the use of the courts at the key financial centres (London, New York, Frankfurt, and Hong Kong) for the conduct of their disputes with counterparties. There remained, as of the period in which the Task Force was undertaking its work, a continuing lack of knowledge of the potential benefits of arbitration to financial institutions as an option for dispute resolution.

The Task Force identified a number of refinements to the arbitration process which would improve the willingness of financial institutions to adopt arbitration as a preferred mechanism and encapsulated them as recommendations in the Report. (14) These included in particular a focus on strong case management to reduce the time and costs
P 302 of arbitration processes, the availability of a summary disposition mechanism and simplification of the process of both joinder and consolidation in multiparty/multi-contract situations. In addition, the participating institutions were keen to ensure that tribunals had expertise both in arbitration and in the financial sector or even in respect of a particular subject product. (15) The availability of a potential option in the parties' agreement to change from a litigation approach to a submission to arbitration after a dispute has arisen was also recommended (although the Task Force recognised that commercially the conditions for such an agreement may not be available at that point in the evolution of a dispute).

The influence of these types of concern on the part of financial institutions on the process of review and updating of various institutional rules can be seen from the increasing inclusion in new versions of those rules of specific powers with respect to the early or summary disposition of cases referred to the institution (led by the Singapore International Arbitration Centre (SIAC) Rules 2016 which included a summary dismissal procedure for the first time). One may also see this influence in the increased number of institutions which are proposing expedited and or fixed-cost processes for lower value claims, with a view to making them 'opt-out' rather than 'opt-in' alternatives and thereby providing to parties and their counsel a real alternative to court-based procedures in terms of offering them a binding and enforceable outcome, quickly, when a dispute arises (SIAC also embraced this aspect early, as did the ICC, which now provides for its expedited procedure to apply in cases valued below USD 2 million, where the agreement to arbitrate was entered into after 1 March 2017). (16)

It is fair to say that there is debate in the arbitration community as to whether, for example, the breadth of the existing case management powers of tribunals appointed pursuant to rules which do not expressly provide for expedited processes and/or for a summary determination procedure would in any event permit tribunals to undertake such exercises. This is perhaps an area where concerns about due process (and subsequent challenges to awards or to enforcement) demand that an institution provide formal backing to the undertaking of such summary determinative processes or the application of a streamlined procedure (in particular one which excludes a hearing or the use of witness testimony). Nevertheless, the opportunity is there for counsel and tribunals to explore (e.g., at the first procedural meeting) whether time and cost management techniques can be used to enable the prompt disposal of the matter, and whether the use of a preliminary-issue type process may be dispositive of a claim or a defence which discloses no reasonable prospect of success. (17)

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Following the pandemic, and as set out above, the extent to which the courts preferred by financial institutions are now not available at all, or available only to a limited degree and at risk of being adversely impacted by a significant backlog of matters, it is possible that the reluctance of financial institutions to engage with arbitration as a preferred dispute resolution mechanism may be diminished by the extent to which the progress

and determination of these matters has been able to continue (more or less on schedule) in arbitrations, despite the restrictions consequent on the pandemic.

Arbitration may therefore have an important role to play to assist financial institutions in the resolution of these issues if the parties can be persuaded to convert their dispute resolution provisions in favour of arbitration rather than court proceedings.

At first blush, that may seem to be a rather long-tailed approach to a (hopefully) short-term crisis in court accessibility. But what is proposed is not simply the encouragement of financial institutions to move towards the adoption of agreements to arbitrate in the execution of new contracts. Rather the suggestion is that institutions and their counterparties may be prepared (in the interests of a speedy and cost-effective process) to convert to arbitration for existing or newly arisen disputes by means of a submission agreement.

The obvious counterargument to midstream or post-dispute conversions of this nature is that while one party may indeed be willing to undertake a conversion in order to preserve its claim and secure an earlier conclusion to the proceedings, the other party (likely the defendant/respondent) will have an equally strong desire and incentive to insist on the contractually selected forum in order to delay as far as possible the point at which the matter will be resolved. No doubt in many cases that will be true. However, for participants in interbank transactions, for example, the ability to resolve such disputes promptly and cost-effectively (and with the benefit of the ease of enforcement consequent upon the obtaining of an arbitration award, pursuant to the New York Convention of 1958) may outweigh the instinctive wish to defer a conclusion on the part of one party. Similar positions may be adopted by parties which have received third-party funding for the conduct of the dispute: the funders have an interest in reducing the length of time for which their capital is committed and may therefore be inclined to agree to a conversion if only for that reason.

A further potentially relevant aspect of the commercial backdrop to any such proposal for conversion is the disparity in bargaining power between financial institutions and their counterparties. Historically, many finance documents gave the financial institution party the option of selecting a dispute resolution forum upon the occurrence of a dispute, while restricting the ability of the counterparty to bring proceedings other than in the preferred forum of the institution.

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One aspect of the ‘breathing space’ concept alluded to above is that it is likely to be in the interests of many commercial parties to review, revise and/or renegotiate the terms of their arrangements in order to preserve the continuity of business where possible. In that context, an adjustment to the parties’ dispute resolution mechanism to incorporate the possibility of a reference to arbitration could well form part of a more general review of the terms of finance agreements and would offer real future procedural flexibility at least to the financial institution party (if not to both). Therefore if a financial institution is prepared to consider a rescheduling of terms in relation to a debt instrument, for example, the opportunity arises for it to adopt an arbitration alternative in the course of that rescheduling.

It appears to the author that conversion proposals, while motivated by a real desire to secure a continuation of access to determinations in this period, are going to be hampered by some very real impediments to their success, such as the following:

- As set out above, the inherent resistance of parties in dispute to agree on anything at all, least of all a fundamental change in the process of dispute resolution.
- The practical issues raised by a ‘mid-stream’ conversion from litigation to arbitration in terms of the existing procedural timetable having been fixed by reference to the rules and law applicable in the relevant court (a particular issue being likely to be one concerning the disclosure of documents which varies so widely between national court systems: would it ever be appropriate for a tribunal to impose a later obligation to provide disclosure pursuant to a process reflecting the provisions of the International Bar Association Rules on the Taking of Evidence in International Arbitration where no such obligation applied at the outset of the dispute?).
- Even where a process is moved from litigation to arbitration on commencement, the change in, for example, the applicable rules on costs liability to the principles generally applied in arbitration may represent a significant alteration in the risk attached to the litigation for the parties which they may not be willing to accept. Can parties contract out of the court, but essentially retain some of the applicable procedural or substantive law which would have been mandatory had the matter remained within a judicial forum?
- Concerns about the lack of availability of an appellate mechanism in arbitration may restrict parties’ enthusiasm for such a proposal. While, on the one hand, the very limited availability of appeal mechanisms in arbitration is often a selling point for parties, the absence of such a recourse may be a real reason for parties to wish to avoid arbitration.
- At the moment, case numbers in the major institutions range – in the main – in the

hundreds of cases per annum whereas case numbers in the national court systems stand in the thousands per annum. While arbitration does indeed benefit from an expanding pool of arbitrators, the administration of even 5% of the caseload of the courts would likely overwhelm the institutions in the short term, and given the likelihood that the parties would require any arbitrator to be admitted to practise in the jurisdiction of the applicable law, it ● is possible that capacity (of appropriately qualified and experienced arbitrators with knowledge of financial products) might become congested quite quickly, meaning that parties' expectations of a speedy and effective process may be defeated by a sheer excess of numbers of cases.

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In all likelihood, the reality is that the majority of financial institutions will be likely to wait for courts to reopen and to pursue their claims in the existing forum when it becomes available once again. However, there are points which can be made now as an incentive to the financial institutions to approach it differently in the future by demonstrating the continuity of proceedings in arbitration in this period, and their consequent cost-efficiency.

The sharp focus on the part of arbitral institutions on the streamlining of cases at lower value brackets may offer a time and cost-effective alternative to financial institutions for the resolution of those cases. While arbitration institutions are not seeking 'bulk claims' business, it is quite apparent that the institutional perspective is that what users really want to see from the arbitration community is an embrace of focused, time- and cost-limited proceedings for those cases where the value does not justify a 'no stone unturned' approach by counsel or require a full hearing by the Tribunal. By meeting those expectations in an agile way in this crisis, arbitration institutions and practitioners stand a real chance of persuading financial institutions of the added value they can create for those types of case.

At the other end of the scale, and for those cases which are existential threats for either the institution or its counterparty, arbitration can offer its classic advantages of privacy (and sometimes confidentiality), and ease of enforcement, coupled with the present availability of many eminent former judges now sitting as arbitrators who can bring to bear a judicial outlook on these very high-value and urgent matters, using remote hearings as needed pending the restoration of hearings in person. Where parties cannot wait for the courts to reopen and where the need for speedy case management is paramount, arbitration can indeed offer a real alternative to an otherwise unavailable or backlogged national court system, thereby demonstrating its agility and flexibility as a process, and increasing the likelihood that it will become a preferred choice of forum in the future.

5 CRYPTOCURRENCIES AND FINTECH DISPUTES: CAN ARBITRATION PLAY A ROLE?

In the years since the financial crisis of 2008 onwards, financial institutions (and others) have begun to innovate in the financial services sector by providing technology-based solutions to banking and finance business. 'FinTech' is a real growth area in banking and financial services business, and takes many forms, ranging from the provision of banking services through mobile phones up to algorithm-driven lending programmes which obviate the need for a personal interface between a bank and a customer. FinTech entities compete with the traditional financial services providers by operating independently of them (though traditional institutions are increasingly offering FinTech solutions alongside their existing areas of business).

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The impact of COVID-19 on the conduct of business generally may well encourage the further development of FinTech products and solutions for two reasons: first, because the reduction in face to face contact between people and businesses is likely to continue for some considerable time after the health crisis diminishes such that smart solutions incorporating protection such as blockchain will be increasingly desirable for both financial institutions and their clients, and, second, the erosion in value of traditional investment classes and the shrinkage in national economies is likely to have a material impact on the value of reference currencies, which is likely to drive further significant investment in cryptocurrencies which to at least some extent are independent of such considerations and may be thought to be cushioned against the impacts of the pandemic and anticipated recession for that reason.

Investment in, and therefore growth of, FinTech products and operators increased to USD 22 billion worldwide by 2015, and it remains a key area of growth and focus for both traditional financial institutions seeking to diversify their business and disruptive new entrants on to the scene. A good example of the latter is the development of social trading networks, which bypass traditional wealth management entities by essentially bringing traders together in an environment which encourages them to track each other's investing decisions. NAGA Trader, one of the early examples of this form of trading, reported trades valued in excess of EUR 27 billion in the second half of 2019. Functionality includes the ability to copy other traders' trades, or to mirror them, such that Trader B automatically follows every trade made by Trader A.

From a legal (especially litigation) perspective, the risks of this sort of unmediated arrangement are apparent: if by 'hitching your investment wagon' to an untested (and unknown) other trader through the platform, Trader B in the example above suffers losses because Trader A makes poor decisions, does Trader B have any recourse against either the platform or Trader A? The platforms operate on the basis of disclaimers as to the likelihood that risky investments (especially in contracts for difference (18)) may result in losses to the investor, and that investors whose trades a user may choose to follow, copy, or mirror on an automated basis may be inexperienced, not professional, and/or may have a different purpose and intention in making their trades. That situation is perhaps equivalent to the execution-only mandates which may be entered into by day traders with their brokers in a more traditional investing set-up, but the appreciation of the consequences of signing up in a purely web-based environment may not be the same for traders in different jurisdictions.

Many FinTech offerings are reliant on other more recent developments in the technology
P 307 sector, including manipulation of big data to assess customer behaviours, ● the use of artificial intelligence algorithms to predict changes in the stock market, robotic process automation (which is used to replace humans in undertaking repetitive administrative tasks), and blockchain – a technology which was specifically developed for use in the financial services sector and which therefore has applications in financial services factored into its make-up.

The automation of these processes, and the reduction in the number of humans in direct contact with customers, can raise questions about who is responsible in the event of a problem, and specifically who is at fault where an algorithmic system fails or produces an unanticipated result. This is most acute in the case of cryptocurrency trading.

A particular aspect of FinTech which has proliferated in recent years is the concept and increasing use of cryptocurrencies, in which traders can invest, and trade, in a completely virtual universe (although certain cryptocurrencies can be drawn down in physical form by being converted into a standard currency, and there are now 'cash machines' linked to cryptocurrencies available in some cities). Bitcoin is probably the best-known of the cryptocurrencies in common usage, but there are a plethora of alternatives in use. In common with other abstruse asset classes, valuation of cryptocurrencies varies widely (with a single Bitcoin having at one time been worth more than USD 19,000, and sitting at the time of writing at around USD 11,100 (19)), but it may well be that having a currency holding untethered to a national economy may lead in the future to a more stable valuation of cryptocurrency holdings.

Cryptocurrencies and their use (and abuse) have started to come before the courts in various common law jurisdictions in recent years. Both in England and in Singapore, the courts have been asked to consider the fundamental question of whether cryptocurrency is 'property' as a matter of law. With an anticipated rise in the number and use of such currencies following the pandemic (as set out above), such questions are highly relevant to the future development of the law in this area and to the role which arbitration may play in it.

Disputes involving cryptocurrencies and other FinTech are likely to form part of the future business landscape, and the suitability of arbitration as a mechanism for resolving them faces some challenges particularly as the law in this area is very limited. The interrelationship between the common law decisions discussed in the following paragraphs is of a kind which is likely to recur in the future and may have a bearing on how new FinTech products are designed for post-Covid economies, including as to the mechanisms to be used for resolving disputes concerning those products. Consideration has to be given to whether a 'black box' dispute resolution mechanism in the form of arbitration is really well suited to the development of jurisprudence for these new products and ways of conducting business.

The nature of cryptocurrency is a fundamental issue affecting the rights of those who trade in it. In England, the matter came before the court initially on the basis of an application for emergency injunctive relief to stop the dissipation of stolen Bitcoin. (20)
P 308 ● The Claimant Mr Robertson was the victim of a 'spear phishing' attack. The email account of a firm in which Mr Robertson was making a personal investment was hacked, and Mr Robertson's intended investment of one hundred Bitcoin (at the time worth approximately GBP 1.2 million) was misdirected to the fraudster(s). These were the 'persons unknown' who were sued as the first defendant.

Using the services of Chainalysis (a blockchain investigations firm), it was quickly established that eighty Bitcoin had been sent to a wallet held at Coinbase UK Ltd, the UK arm of San Francisco-based Coinbase, one of the world's leading cryptocurrency exchanges. The other twenty Bitcoin were sent to various local Bitcoin exchanges. The Claimant applied for an asset protection order (APO) to secure the eighty Bitcoin and a Bankers Trust order to permit Coinbase to reveal the identity of the individual who controlled the wallet containing the eighty Bitcoin (a Bankers Trust order is an order that typically requires a bank to provide details ordinarily protected by the bank's duties of confidentiality). Coinbase was supportive of Mr Robertson's claim but was limited in what it could do, given its contractual and regulatory obligations, unless complying with a court order.

English law divides personal property (as distinct from real property, which Bitcoin is not) into two conventionally recognised categories: a 'chose in possession' or a 'chose in action'. The first is a 'thing' of which one can take physical possession, and the second is a property right that can only be obtained or enforced through legal action.

At first blush, Bitcoin is neither. It is not a physical thing. The House of Lords in *OBG v. Allen* (21) made clear that intangibles are not chosen in possession.

Also, a Bitcoin does not create a right against anyone. Unlike, for example, money in a bank account which creates a relationship of debtor and creditor, a Bitcoin is an intangible 'thing' that does not depend upon a legal right enforceable against some other person in order to have value. In that sense, Bitcoin is more like a banknote than the money in a bank account: the former has value simply by virtue of being a banknote; the latter depends upon the account-holder's ability to enforce a right against the bank (and the bank's ability to pay). On this view, Bitcoin is information or data, which numerous English authorities have affirmed is not property.

The claimant in *Robertson* relied on the decision of Simon Thorley IJ of the Singapore International Commercial Court in *B2C2 Ltd v. Quoine Pte Ltd*. This case held that Bitcoin is personal property that can be the subject of a trust (*see* further on this case *infra*).

Mrs Justice Moulder accepted that there was a serious issue to be tried on the various matters of the proprietary claim and made an asset preservation order preventing any dealings with the eighty Bitcoin or any instructions being given to the Coinbase to transfer them. Mrs Justice Moulder also made Bankers Trust orders enabling Coinbase to disclose information relating to the second defendant.

These decisions are believed to be the first time an English court has considered in any
P 309 detail whether cryptocurrencies are property and are susceptible to proprietary
claims and remedies, including proprietary injunctions (with all the advantages they provide to claimants in fraud claims).

A key characteristic of cryptocurrencies is the pseudonymity or anonymity they confer on users. It is difficult enough (but possible) to trace stolen Bitcoin through the blockchain. But if claimants need to identify 'persons unknown' defendants holding stolen Bitcoin before a freezing order will be granted, then the chances of recovering those assets shift heavily in favour of the alleged fraudsters. (22) In *Robertson*, the judge was not prepared to put in place a freezing order against 'persons unknown' who by then were in possession of the stolen Bitcoin.

The benefit of an APO is that it is enough that the court is satisfied that there is a serious issue to be tried concerning a proprietary claim. For victims of fraud, this is the key reason why it matters whether cryptocurrencies are treated as personal property: the obstacles to securing stolen cryptocurrencies are reduced significantly.

Outside the context of fraud litigation, whether cryptocurrencies are property at all, and if so, whether they are treated as 'things' or 'rights' will be a matter of importance in a variety of commercial contexts (e.g., taxation, sale of goods legislation, transfer of title, the taking of security, etc.) and perhaps especially in insolvency scenarios. The decision in *Robertson* provides a prima facie basis for courts (or tribunals) being asked to take steps to preserve cryptocurrency assets to have confidence that such assets can indeed be the subject of such protective measures.

The Singapore authority to which reference was made in the *Robertson* case, *B2C2 Ltd v. Quoine Pte Ltd*, (23) in addition to considering the issue of whether or not cryptocurrency is real property, also looked at the role played by the automated algorithm in use in the subject transaction.

In this case, seven trades for the sale by B2C2 of the cryptocurrency Ethereum in exchange for Bitcoin were effected automatically by Quoine's currency exchange platform, in response to orders from B2C2's custom algorithmic trading software. In fact, because of an error in the way that Quoine's software had been programmed, an abnormal exchange rate was applied in B2C2's favour. On review by a human the next day, Quoine spotted the abnormal rates, and reversed the trades. B2C2 argued that Quoine had no right to reverse the trades, and that it was in breach of the relevant contractual terms. In addition, it claimed that Quoine held the amounts of cryptocurrencies in B2C2's account on trust for B2C2, and that their unilateral withdrawal by Quoine following the reversal of the trades was a breach of that trust. Quoine in
P 310 response argued, among other things, that it was right to reverse the trades because they had been entered into by mistake and were therefore void.

In his judgment, Simon Thorley IJ in the Singapore International Commercial Court concluded that the parties had intended holdings of cryptocurrency by Quoine's customers to be segregated in their own 'wallets' and that as such not only did cryptocurrency have the necessary characteristics to be treated as intangible property but that they were in consequence capable of being held on trust. It was this finding which was relied upon before Moulder J in the English Court in the *Robertson* case as to the nature of cryptocurrency qua 'chose in action'.

On the question of mistake in *B2C2*, under Singaporean law as under English law, a contract can be rendered void if one of the parties actually knows that the other party

has made a sufficiently important mistake about a term of the contract (e.g., as in this case, about the applicable exchange rate). The judge debated how he should assess a party's knowledge where the relevant operations were carried out by computer programs operating as programmed. Whose knowledge is relevant, and at what time should it be assessed? Quoine argued that the law should treat the algorithms used to enter into the contracts as the legal agents of their human principals. The judge rejected this approach and held that the relevant mistake must be a mistake by the person on whose behalf the computer entered into the contract, as to the terms on which that contract would be concluded. He noted that computer programs are deterministic in the sense that they do only what they have been programmed to do. They are, he said '... no different to a robot assembling a car rather than a worker on the factory floor or a kitchen blender relieving a cook of the manual act of mixing ingredients'.

He concluded:

> 'Where it is relevant to determine what the intention or knowledge was underlying the mode of operation of a particular machine, it is logical to have regard to the knowledge or intention of the operator or controller of the machine. In the case of the kitchen blender, this will be the person who put the ingredients in and caused it to work. His or her knowledge or intention will be contemporaneous with the operation of the machine. But in the case of robots or trading software in computers this will not be the case. The knowledge or intention cannot be that of the person who turns it on, it must be that of the person who was responsible for causing it to work in the way it did, in other words, the programmer.'

The judge accordingly concluded that while B2C2's counterparties on the relevant trades held the mistaken belief that they could never take place at the rates which were in fact applied, B2C2 did not know about that belief. In the circumstances, the trades were therefore not void for mistake.

It is instructive to review these cases in some detail, not only because they deal with new financial products the nature of which as legal instruments is being established over time in different jurisdictions, but because they are a particularly vivid example of the development of the law in respect of new classes of asset and intangible property in the financial services sector, where the decision of the Singapore International Commercial Court in *B2C2* directly assisted the English Court in *Robertson.* In the post-Covid world in which more and more business seems likely to be conducted in intangible ways and
P 311 making use of these emergent technologies, the challenges posed ● by these innovations to those engaged in dispute resolution (as well as their clients in the financial services industry) are wide-ranging. In particular, there are legal issues of principle to be established and applied consistently with respect to these new products, such as their nature as property.

Practitioners of arbitration in England were faced in 2016 with a challenge from the then Lord Chief Justice, Lord Thomas of Cwmgiedd, in the BAILII Lecture, (24) that the increasing dominance of arbitration as a preferred dispute resolution mechanism in certain industry sectors was risking the future development of the common law. (25)

Lord Thomas' starting-point was that:

> Clarity and predictability in the law, as well as its ability to develop in a principled manner, is the bedrock upon which businesses, just as much as individuals, order their affairs and enter into binding agreements. It is a necessary pre-condition for understanding rights and obligations, something which is of crucial importance whether the person is an individual entering into an agreement to buy a washing machine, a house or a car, or whether the person is a business entering into a debt finance agreement, an international sales transaction or a reinsurance agreement.

His concern was that the increasing diversion of cases away from the courts to arbitration (and the diminution in referrals back to the court for the purposes of appellate review, as a consequence of the exclusion of rights of appeal on issues of law in many of the institutional rules) posed significant problems for the continuing development of the common law:

> It reduces the potential for the courts to develop and explain the law. This consequence provides fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, 'an ossuary'. Here lies the irony. ... reform was effected to promote the use of London as a centre for dispute resolution largely based on contracts based on the common law as developed in the Commercial Courts of London. However, the consequence has been the undermining of the means through which much of the common law's strength – its 'excellence' was developed – a danger not merely to those engaged in dispute resolution in London, but more importantly to the development of the common law as the framework to underpin the international markets, trade and commerce. (26)

Lord Thomas went on to take a broader swipe at a further aspect of arbitration, as follows:

> [T]here are other issues which arise from the resolution of disputes firmly behind closed doors – retarding public understanding of the law, and public debate over its application. A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revision. A series of similar decisions in arbitral proceedings will not do so, and those issues may
P 312 then carry on being taken ● account of in future arbitrations. As has been put: Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs … Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court. As such it reduces individuals' ability to fully understand their rights and obligations, and to properly plan their affairs accordingly. (27)

At the time of this lecture, there were many arbitration practitioners who contested Lord Thomas' arguments and criticisms. However, in the context of the particular issue raised in terms of the law grappling with new financial products, and FinTech more generally, there may indeed be a principled case to be made for issues affecting the treatment and operation of these systems to be determined by the courts for the benefit of all those advising on the rights and liabilities of parties to contracts relating to these instruments.

Ultimately, there appears a natural synergy between, say, the confidentiality, security and anonymity built into the architecture of many FinTech products and the private nature of arbitration as a dispute resolution mechanism (indeed one major firm has described arbitration and cryptocurrency as a 'match made in heaven', not least because of a perception that arbitration, unlike other national systems, may be less instinctively opposed to the concept of cryptocurrency than a court system which is deemed inherently aligned with conservativism and establishment values). (28) In an area which is legally largely untested, and apparently at risk of both bad actors (as in the *Robertson* case) and significant commercial consequences arising out of flaws in the programming (as in *B2C2)*, the benefit to participants in that industry of publicly determined issues of law is clear. Perhaps the initiatives for transparency in arbitration (such as the ICC's practice regarding the publication of arbitration awards if the parties do not object to so doing) may go some way to address these concerns, though such initiatives are themselves subject to criticism for undermining the private characteristic of arbitration which has long been a key and valued attribute of the system.

6 CONCLUSION

Change, challenge, opportunity: for entities in the financial services sector the present moment is one framed by layers of uncertainty and threat, as well as potential opportunity to play a role in the hoped-for recovery of business in the global economy.

While this is not (yet) a liquidity crisis or an obviously immediate existential threat to the
P 313 banking and finance industries, a likely wave of lending defaults (perhaps ● especially on the Government-backed rescue loans to business) may pose a future such threat, and therefore there is both an opportunity and a challenge for arbitration practitioners to present arbitration as a method well suited to the priorities of financial institutions.

The trade-off may lie in aggressive time and cost management techniques needing to be used to persuade institutions to abandon the systems which have served them well to date. In the case of the complexities of the new financial products on the block(chain), the challenge will be to persuade users that arbitration is indeed the right forum in which the law in that area should be developed.

In England, at least, it may be time (as Lord Thomas in his 2016 BAILLI Lecture proposed) for practitioners and tribunals to take advantage of the mechanism provided by section 45 of the 1996 Arbitration Act, whereby a determination on a point of law may be made by the court either with the consent of both parties or, on the application of one of them, with the permission of the Tribunal. As much as this procedure appears to fly in the face of the authority of an arbitral tribunal to determine the matters within its jurisdiction, the purpose of section 45 is to provide guidance for the use of tribunals facing numerous cases arising out of the same set of circumstances. It may be that – particularly in cases involving new financial products – guidance from relevant commercial courts would assist arbitral tribunals to adopt a consistent approach (as they largely already do with respect to the application of settled law).

At the time of writing, any evidence of economic recovery in Europe and the US is stuttering, at best, and the threat of a second, or subsequent wave(s) of the virus may render any recovery plans illusory indeed. Past experience tells us that crisis – and recession – ultimately leads to more work for dispute resolvers, but in an unprecedented time of crisis it is absolutely right for practitioners in arbitration to consider with their financial services clients the extent to which arbitration as a mechanism can offer a more satisfactory outcome to the inevitable disputes which will arise, whether imminently or

later, from the situation faced by us all.

Returning finally to the speech given by Lord Thomas in 2016, he referred to the thoughts of the Qing Emperor Kangxi, who ruled China during the late seventeenth and early eighteenth Centuries, and who, he said:

> 'would take the view that arbitration was preferable to litigation'. As he put it: '... the good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice that is due to them'.

Practitioners may well consider that there is no less trouble, argument or quarrel in an arbitration setting than in a court-based one, but the nimble character of arbitration and its ability, through the institutions, to review and revise approaches quickly to meet the needs of its users stands in contrast to the often significantly slower process of revision of national legislation. In light of the extensive feedback available to the arbitration
P 314 community on what financial services institutions want to see ● delivered by arbitration, and the opportunity brought about by the challenge of the pandemic to promote arbitration's ability to meet those needs with agility, flexibility, ingenuity and continuity, practitioners and institutions have the chance to work with financial services users now to provide those users with a route to resolution promptly and cost-effectively, no matter how long the crisis persists.

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*) I am indebted to my partner Marc Jones for his input into the section addressing cryptocurrency proceedings.

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3) Credit is also due to those national court systems which have adopted remote hearing technology at pace in order to allow the work of the courts to continue. The Commercial Court in England & Wales at a Users' Group meeting (held remotely using Microsoft Teams) recorded that with four exceptions, from lockdown in late March 2020 up to the middle of June 2020, trials had been able to proceed remotely or semi-remotely, and that as a result there was virtually no backlog in their work.

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14) International Chamber of Commerce (ICC), *ICC Commission Report, Financial Institutions and International Arbitration,* section II, https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbi... (accessed 3 Aug. 2020).
15) Specialists in financial matters and dispute resolution have already come together as part of the P.R.I.M.E. Finance Initiative which operates in association with the Permanent Court of Arbitration in The Hague, demonstrating the desire within the finance community for experienced and specialist arbitrators. In certain national courts provision is also made for dedicated specialist judges in financial dispute matters (such as the English Financial List).
16) In the case of the SIAC procedure, it applies to cases valued below SGD 6,000,000 and it is an opt-in procedure triggered by the request of a party. Note that both SIAC and ICC are at the time of writing in the process of revising their Rules and changes are anticipated to both of these processes as part of those revisions.
17) As an example of institutional codification of the powers of the tribunal, the LCIA Arbitration Rules revision which will come into effect from 1 October 2020 incorporates a provision for summary determination whereby a Tribunal as part of its powers may 'determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")' in a new Art. 22.1(viii) (LCIA Arbitration Rules 2020, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Index (accessed 9 Sep. 2020)).
18) Contracts for difference (or CFDs) allow traders to trade in the price movement of securities and derivatives. Derivatives are financial investments that are derived from an underlying asset. Essentially, CFDs are used by investors to make price bets as to whether the price of the underlying asset or security will rise or fall.

    CFD traders may bet on the price moving up or downward. Should the buyer of a CFD see the asset's price rise, they will offer their holding for sale. The net difference between the purchase price and the sale price is netted together. The net difference representing the gain or loss from the trades is settled through the investor's brokerage account. CFDs are frequently used for speculation in, e.g., foreign exchange market trading.

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Chapter 17: COVID-19 and Insurance Disputes

Alexander Oddy; Chris Parker

(*)

COVID-19 has already led to multiple insurance disputes, with many more disputes likely to crystallise in the near future. Many – if not most – of these disputes are likely to be resolved by arbitration: the insurance and reinsurance industries have a long history of using arbitration to settle disputes. The London insurance and reinsurance market remains one of the leading centres for global (re)insurance capital and underwriting expertise. This chapter focuses primarily upon English law-governed policies and arbitration agreements which are underwritten not just in the United Kingdom (UK) but in other centres globally since English law is widely chosen by parties to govern their obligations in insurance and reinsurance contracts.

Indeed, the first English case in which the enforceability of an arbitration clause was accepted was apparently an insurance case. (1) Arbitration clauses continue to be popular in commercial insurance contracts: it is probably fair to say that they are 'common' in commercial insurance policies and 'almost universal' *in reinsurance disputes. (2)*

In particular, many commercial insurance contracts that may respond to claims in light of COVID-19 will provide for arbitration in London. As a result, we
P 316 *anticipate not only that the volume of London-seated insurance ● arbitrations will increase but also that there will be a number of new practical and procedural challenges arising from these cases.*

Against this background, we explain below the nature of the likely insurance and reinsurance debates, some common procedural features of insurance arbitrations seated in London and some particular issues that could arise in the arbitrations debating COVID-19 claims.

1 INSURANCE DISPUTES ARISING FROM COVID-19

The COVID-19 pandemic has caused – and will no doubt continue to cause – huge economic impact for policyholders across the world. In the immediate term, there are financial losses caused by the economic downturn, business closures and cancellation of events. Supply chain disruption could last for several months while businesses build back their production and stock and the longer-term business impact may extend over years. In the longer term, claims against businesses from employees and shareholders (to name but a few) appear inevitable. Policyholders are looking to insurance to mitigate these effects and insurers are set to suffer potentially crippling payouts – Lloyd's of London has indicated that it expects to pay between USD 3 billion and USD 4.3 billion to global customers as a result of COVID-19. (3) It should come as no surprise that insurers are taking a robust approach to scrutinising claims and the current crisis should be a rich source of arbitral disputes, a flavour of which is outlined below.

1.1 Business Interruption Insurance Policies

Business interruption (BI) policies generally cover businesses for loss of income and the additional costs of protecting income during periods when business cannot be carried out. They are usually packaged with property damage policies and require the premises in question (or, occasionally, those of key suppliers) to have suffered physical damage. However, extensions in cover can be taken out for loss of business as a result of denial of access to insured premises or other interference due to the actions of authorities (i.e., not requiring property damage), in some cases within defined geographical limits. Disputes under these policies are often – though not invariably – subject to arbitration.

Lockdown closures have resulted in lost profits, and many businesses will have incurred additional costs to ensure they can continue to generate turnover during the crisis. While policyholders may seek to recoup these costs under their BI policies, there is significant scope for insurers to dispute such claims. Even where the insured has taken out non-damage extensions to cover, insurers could question whether the extensions were
P 317 intended to cover a general closure of businesses irrespective of ● whether the insured premises or area in question was subject to infections. Even once coverage is established, insurers could seek to reduce a claim on the basis that the income of the insured would in any event have been reduced due to other restrictions on the ordinary operation of life and business as well as the general economic downturn. These will be fact sensitive to individual insureds based on the loss said to have been caused by the general downturn in commercial activity.

Although there is clearly scope for disputes under BI policies, clarity is being provided by a number of expedited judgments coming through national courts. In particular, the UK Financial Conduct Authority (FCA) brought proceedings in the English court against a number of insurers. The case was given 'test case' status, which is a pilot scheme which allows the court to grant declaratory relief in a 'friendly action' (i.e., where there is no

cause of action being actively pursued) where it is in the public interest to do so. The FCA sought an advisory opinion on whether the insurers should be obliged to pay out under the BI policy (rather than each of the insured parties having to bring individual claims). The hearing in the FCA test case took place over eight days between 20 July and 30 July 2020. The judgment was handed down on 15 September 2020 and was largely in favour of policyholders. For example, the court held that the effects of COVID-19 more widely could be factored in when determining what the insured's income would have been, and that occurrences of COVID-19 within the vicinity specified in the policy were sufficient to trigger BI coverage notwithstanding that business closures were also in response to the pandemic outside this area. On the other hand, for those policies requiring business closures the court took a strict approach based on the wording of the policy and the nature of the government measures and business in question. (4) It is possible that the judgment in the FCA test case will be appealed directly to the Supreme Court given the public interest in the issues being determined.

In addition there have been individual BI claims brought before the national courts. For example, on 22 May 2020, the Paris Commercial Court issued an interim order finding that AXA should indemnify a restaurant for BI losses resulting from French COVID-19 business closures, notwithstanding AXA's arguments, among others, that the policy was not intended to cover pandemic risks and the decision to order the restaurant's closure was taken voluntarily by the insured. (5)

1.2 Trade Credit Insurance Policies

On top of BI policies, businesses may also take out trade credit insurance policies to provide an indemnity where customers fail to pay their debts or do so later than required either because of financial reasons or events outside their control. Such policies are relatively specialised and often provided by state institutions and so are frequently subject to arbitration.

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Clearly the general disruption and economic downturn caused by the COVID-19 crisis could lead to default by customers, indemnifiable under trade credit policies. These policies often include a time-based deductible or waiting period of 180 days before the policy indemnity is available, so claims and disputes may be expected to crystallise during the fourth quarter of 2020 and beyond (on the basis that the lockdown in many countries took effect during the second quarter of 2020). Though these policies are often broadly worded, given the volume of losses in the market, insurers will inevitably take a strict approach to claims, for example seeking to capitalise on any late notifications of claim or any potential waivers of rights against the customer.

1.3 Liability Insurance Policies

Various different policies are available covering the cost of compensating and defending claims from third parties. In particular, businesses invariably take out public liability policies covering claims made by third parties in relation to the insured's activities and are often obliged to take out employers' liability policies covering claims made by employees. In addition, directors' and officers' (D&O) insurance covers the cost of compensating claims against the insured's management. Often such policies will allow the insurer a degree of oversight and control over the defence of the underlying claims. Given the sensitivities claims from third parties can bring, public liability and D&O policies are frequently subject to arbitration, though this is less common for employers' liability policies.

Given the expected increase in litigation arising out of the general economic downturn, the COVID-19 crisis has the potential to lead to a number of claims under liability policies. For example, customers and employees taken ill as a result of inadequate safety measures put in place by an insured business could trigger public liability and employers' liability policies, respectively. Similarly, claims could be brought by shareholders against public companies' directors and officers in relation to general business preparedness for a pandemic, or in the adequacy of the oversight of a return to work, potentially triggering cover under D&O policies. Such cases have already found their way into national courts – for example, in April 2020 it was reported that the family of a Walmart employee in Illinois who died after contracting COVID-19 filed a lawsuit against the company accusing them of failing to adequately screen and protect workers. (6)

Many listed companies whose shares or other securities are traded will purchase what is known as Side C cover under D&O policies against the company's own liability for securities claims. There have already been a number of securities actions in the US against insured companies arising from COVID-19, and statements made by companies
P 319 about their response to and the impact of COVID-19 on their business may trigger further litigation in the months and years ahead. To the extent these claims generate disputed policy claims, many will be resolved by arbitration.

While there are no common coverage limitations under liability insurance policies applicable to the pandemic (up until the crisis, there were few wholesale exclusions for pandemic/epidemic scenarios in the same way as there are for war, terrorism and

nuclear disasters), there may be some dispute as to what extent the insured is liable to the third-party claimants. For example, at English law a liability policy is generally only triggered where the insured is actually liable to the third party and the insurer is not bound by any settlement or even judgment/award in the underlying dispute. (7) Given the unprecedented nature of the COVID-19 crisis, the exact scope of the insured's duties and what measures were required by it are clearly uncertain, and could be seized upon by insurers in the control of any defence and payment of claim.

Since the COVID-19 crisis, many insurers have sought to introduce or impose exclusions to coverage on new and renewing policies against claims caused by or resulting from COVID-19, other diseases or indeed pandemic risks. (8) The terms of such exclusions will vary as to their breadth and proper effect, so it is reasonable to anticipate that there will be disputes in the future as the ambit of such exclusions are tested.

1.4 Event Cancellation Insurance Policies

Event cancellation policies cover event organisers for the irrecoverable costs and additional expenses incurred as a result of events being cancelled or postponed due to circumstances beyond the organiser's control. Cover for cancellation due to disease usually has to be purchased in addition to standard cover. As a relatively specialised form of insurance, these policies are likely to be subject to arbitration.

Though cover under event cancellation policies will only be available to those policyholders who have taken out disease extensions, claims under such policies are likely to be scrutinised carefully. In particular, insurers may question to what extent cancelled events could have gone ahead before there were any formal government restrictions or while government restrictions only impeded the economical running of the event (as opposed to preventing it from going ahead in any form). In addition, as event cancellation policies cover irrecoverable costs, insurers may take issue when refunds are given to attendees in case they are not strictly required or as to whether claims can be pursued against suppliers (e.g., in light of any force majeure provisions or after a potential wavier). Finally, as such cover will usually rely on a specific extension for cover for disease, there may be debate as to whether COVID-19 falls within the applicable extension as worded.

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1.5 Reinsurance

Most insurers will have reinsured a portion of their liability under their policies, such that payment of claims to policyholders in relation to COVID-19 could lead to disputes between insurers and their reinsurers (and in turn with the reinsurers of the reinsurers (known as retrocessionaires), and so on). While the above coverage points will no doubt be the subject of disputes between insurers and reinsurers, there will also be particular questions as to whether the various COVID-19-related losses can be aggregated together (whether on the basis of time or geography) for the purposes of triggering coverage under reinsurance policies. Such disputes have the potential to lead to numerous arbitrations, as reinsurance policies are almost always subject to arbitration provisions.

1.6 Other Developments

In some jurisdictions, the government has considered the potential introduction of legislation in the insurance sector to protect the rights of policyholders. For example, in the US, seven states have introduced bills to force insurers to provide retrospective coverage to policyholders, regardless of the wording of their insurance contracts. (9) These bills have not yet been enacted, and have (unsurprisingly) proven controversial, with insurers arguing that forcing insurers to cover incidents not included in their policies would be unconstitutional.

In the UK, it is unlikely that any legislation will be introduced to deal with substantive questions of insurance law relating to the pandemic – instead, this will be decided by the judiciary through the development of the common law, as in the FCA test case mentioned above. However, looking to the future, a project committee known as 'Pandemic Re' (following similar projects in relation to terrorism risk) has been formed by leading figures in the insurance industry to propose an industry solution for future pandemics. It remains to be seen how such proposals might address policy wording and suggest updates to relevant dispute resolution mechanisms.

2 COMMON PROCEDURAL CHARACTERISTICS OF LONDON-SEATED INSURANCE ARBITRATIONS

2.1 Preference for Ad Hoc Arbitration

In the London insurance and reinsurance market, contracts tend to provide for ad hoc arbitration seated in London. Institutional arbitration is less common. This reflects the historical development from the nineteenth Century onwards as a process by which the
P 321 London market would often choose to resolve its disputes within its own commercial community, for which the Arbitration Act 1996 and its predecessors provided sufficient

procedural support. The development of the reinsurance market added to the desire that arbitrations should be conducted by 'market men' who knew the customs and practices of the market, reflected in the use of 'honourable engagement' clauses. With London as the centre of gravity for these disputes and policy terms including arbitration agreements developed within that market, there was less focus upon institutional arbitration.

The arbitration clause formulated by the ARIAS (UK) (10) represents a hybrid option – it provides for arbitration pursuant to the ARIAS (UK) Rules, with ARIAS (UK) as appointing authority, but otherwise a more limited role than a typical international arbitration institution. In particular, ARIAS acts as appointing authority and adjudicates disputes regarding arbitrators' fees. It does not determine challenges to arbitrators, review awards or otherwise supervise the proceedings.

2.2 Nomination of Arbitrators

The ability to choose the decision-makers – and impose requirements as to their experience – is of course a distinguishing feature of arbitration. There is a strong preference in the insurance and reinsurance industry to nominate arbitrators who are familiar with the customs and practices of the industry. Insurance law often includes important differences to the general contract law in many jurisdictions, and the insurance market has developed techniques, procedures and terminology which are effective and suitable for the efficient transacting of business but can be opaque to those unfamiliar with the operation of the market. For example, ARIAS UK's model arbitration clause requires that: 'The Arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.'

Another model arbitration clause prepared by a different industry body provided: 'Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance.' (11)

This particular clause was considered by the English Court of Appeal recently. (12) The parties in that case could not agree whether a Queen's Counsel who had practised as a barrister specialising in insurance and reinsurance satisfied this requirement. The party opposing the appointment argued that there was a difference between insurance and reinsurance law and insurance and reinsurance 'itself'. The court held that no such distinction could be drawn. Lord Justice Leggatt (as he then was) observed that there was a need for those in the insurance business to understand insurance law (such as the duty for insureds to disclose material facts to the insurer) and that lawyers specialising in the field will have considerable knowledge of the industry. (13)

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This accords with a general understanding in the market that lawyers may very well be suitable arbitrators in insurance cases provided they meet the experience criteria.

Further, it is common to appoint the same arbitrator(s) in separate arbitrations that arise out of the same or similar events. One reason for this is that arbitration clauses in the industry frequently do not provide for joinder and consolidation, such that consistency of arbitrators can be the only route to mitigating the risk of inconsistent decisions. For example, a single insured policyholder which purchases a tower of liability insurance may find itself in dispute with various insurers, each subscribing to a layer of the insurance tower (with each layer only paying when claims exhaust the primary layer and excess layers below the layer of the insurer in question). This can lead to a multiplicity of arbitrations, all concerning the policyholder's loss from the same event. Most experienced users of arbitration in this sector are familiar with this practice and it has historically functioned smoothly.

However, this practice is currently the subject of judicial scrutiny in *Halliburton Company v. Chubb Bermuda Insurance Ltd*, (14) which concerns the extent to which an arbitrator can accept appointments in multiple references regarding the same or overlapping subject matter and the impact of non-disclosure of such appointments. In *Halliburton*, an arbitrator appointed on one tribunal subsequently accepted appointments proposed by one of the parties in a separate arbitration with a third party. The arbitrator did not disclose his subsequent appointment to the parties in the first arbitration. There was some overlap in the subject matter of the two arbitrations, the degree of which was disputed. The arbitration clause in *Halliburton* provided for ad hoc arbitration.

The Court of Appeal held that the mere fact of an appointment in a related reference with only one common party would not in and of itself justify an inference of bias: 'something of substance' was needed to show apparent bias. (15) On the facts of the case, including the degree of overlap between the arbitrations and the non-disclosure of the subsequent appointment (held to be accidental), the court found that a fair-minded and informed observer would not have concluded that there was a real possibility that the arbitrator was biased. (16) However, the court did find that as a matter of good practice in international commercial arbitration, the arbitrator should have disclosed the subsequent appointments. (17) The Court of Appeal's judgment has been appealed and the Supreme Court's judgment – which is pending at the time of writing – is expected to

contain important guidance on the issue.

In the context of claims arising out of the COVID-19 crisis, situations where the same arbitrators are appointed on the same or overlapping issues (with or without common parties) may arise and it will be important for parties to be mindful of the court's guidance on these points as well as any applicable institutional rules (which may impose
P 323 additional disclosure requirements). Parties should consider whether the ● appointment of the same arbitrator to decide overlapping or similar issues might give rise to grounds for challenge in the particular circumstances of the disputes. Arbitrators should have the same considerations in mind in determining whether they should accept any subsequent appointments, but will also need to consider what disclosures need to be made, to the parties in the first or subsequent arbitrations given that the duty to remain independent and impartial is an ongoing one.

2.3 Referrals of Points of Law to the English Courts

In English-seated arbitrations, the Arbitration Act 1996 (Arbitration Act) permits parties to refer questions of law to the English court, either on a preliminary basis (section 45 of the Arbitration Act) or as an appeal from the tribunal's award (section 69). Any such referrals may only be made with the agreement of all the parties or if stringent conditions are satisfied (including, in the case of a referral on a preliminary basis, the consent of the tribunal). For example, the court will only grant leave to appeal a point of law if it is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties;

(b) that the question is one which the tribunal was asked to determine;

(c) that, on the basis of the findings of fact in the award:

  (i) the decision of the tribunal on the question is obviously wrong, or

  (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. (18)

Sections 45 and 69 are not mandatory and are excluded by most institutional arbitration rules (including, say, the LCIA and ICC Rules (19)). As explained above, however, insurance and reinsurance contracts only infrequently provide for institutional arbitration – and these rights to refer points of law to the English courts are not excluded by the ARIAS (UK) Rules. (20) Accordingly, most insurance and reinsurance arbitrations seated in London will feature a potential right to appeal on a point of law – if the party seeking to appeal can satisfy the court that the grounds set out above are satisfied.

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2.4 Confidentiality

Under English law, the obligation of confidentiality is an implied term of the arbitration agreement. (21) The starting point for any COVID-19-related arbitrations in this sector (assuming they are seated in London, in accordance with the practice discussed above) is that the proceedings and the award will be confidential.

There are, however, recognised exceptions to this obligation:

> the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure. (22)

There is scope for debate as to the boundaries of these exceptions – and many of the leading cases dealing with these exceptions are insurance and reinsurance cases.

It is fair to observe that the insurance and reinsurance industry may not always be best served by the current position. Some commentators, for example, have commented that the prevalence of arbitration has reduced the opportunity for public, binding court decisions on difficult issues (23) – although, as explained above, there is the potential in ad hoc insurance arbitrations for court involvement on questions of law. Market participants will legitimately differ in their views as to the benefits of confidentiality in any given case, relative to the potential for increased efficiency and cost saving in similar or related disputes if decisions across the sector are public.

It is, of course, also open to parties to agree (in the policy or subsequently) that Awards will not be confidential. In 2017, ARIAS (UK) noted that:

> There is a distinct lack of clarity surrounding the use which the parties may make of Awards, even for what are essentially routine business purposes … In the UK it would seem helpful to provide parties with a draft 'model' clause to

be incorporated/adopted by the parties as they think fit which clarifies that aspect for both parties' benefit rather than awaiting further developments in the common law. (24)

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The ARIAS model Confidentiality Clause provides that: (25)

(i) the award and reasons shall be confidential but disclosure is allowed to reinsurers or retrocessionaires (26) who may be financially affected by the decision, to any other reinsurer subscribing to the contract or to any other contract forming part of the same reinsurance programme (amongst others); and

(ii) on a party's application, the Tribunal may decide whether to publish an anonymised decision if:

> there is a market interest in the issues, wordings or clauses resolved by or considered in the decision in light either of a lack of binding judicial authority thereon, or of the existence of previous, current, or likely future disputes thereon.

The Joint Excess Loss Committee later endorsed the ARIAS Confidentiality Clause.

It is difficult to comment on the extent to which the ARIAS Confidentiality Clause has been adopted – but awards in arbitrations concerning claims on policies including the clause may, therefore, be published to a greater extent than a typical London-seated arbitration award.

3 PARTICULAR ISSUES IN INSURANCE ARBITRATION ARISING OUT OF COVID-19

3.1 Group Actions

As we explain above, to date insurance disputes arising out of the COVID-19 pandemic in the UK have been based on a small number of potentially responsive policies. The most prominent of these disputes relate to claims under BI policies, where insurers have rejected claims for losses arising from the inability to operate their businesses during the government-imposed lockdown, stating that the policies do not respond. These declinatures of cover have led to a multiplicity of disputes or potential disputes against insurers in respect of the same or very similar policy provisions, with similar fact patterns. This makes them well suited to being heard together, as 'class' or 'group' actions. The Hiscox Arbitration – which we discuss below – is one public example of a group action arising from COVID-19. (27)

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Although group actions are increasingly common in the English courts, (28) 'class' or 'group' arbitration actions, in the sense of a multiplicity of claimants bringing claims against a respondent (or group or respondents), are rare in the UK. As arbitration is contractual in nature, it does not lend itself naturally to the consolidation of multiple claims, particularly if they arise out of different contractual relationships (such as in a scenario whereby many policyholders seek compensation under individual policies). Even if the claims arise out of separate but identical arbitration clauses, consolidation is very unlikely unless the relevant parties give their consent to the claims being heard together, either in advance in the arbitration clause (which is unlikely as the policyholders usually have no connection with or knowledge of each other) or after the disputes have already arisen.

Moreover, there is no set arbitration procedure to allow for a 'test case' scenario, where a finding in relation to one policy between a claimant and an insurer would be binding on the insurer and other policyholders. To achieve this would again require the consent of all the parties.

3.2 Issues in Group Arbitrations

Against this background, the ongoing Hiscox Arbitration represents an interesting development. The Hiscox Arbitration was commenced on 15 June 2020 by the Hiscox Action Group, a pressure group acting on behalf of policyholders, against Hiscox Insurance. Although many details relating to the arbitration agreement and the procedure are not in the public domain, certain key facts have been disclosed. (29) The claim has been brought by 369 small- and medium-sized enterprises (SMEs), (30) and relates to Hiscox's rejection of BI claims. The action is said to be worth approximately GBP 47 million. It has been made public that the case will involve a single arbitrator and a series of test cases to determine 'both the responsiveness of these policies and the quantum involved'. It is also public that the claimants have obtained financing from Harbour Litigation Funding.

The Hiscox Arbitration raises interesting points of arbitration procedure and practice. The following matters will be relevant to other insureds and insurers contemplating participation in group actions, in particular:

(i) In order for group actions to proceed, one would expect each policy to contain the same arbitration clause, or at least consistent arbitration clauses. This may be common where an insurer issues many policies on a standard policy wording. Further, claims can only be consolidated into a single arbitration or heard by the same arbitrator with the consent of all the parties ● involved. For insurance disputes related to the COVID-19 pandemic, it is likely (although not known) that parties will have provided this consent after the dispute had already arisen (as opposed to in advance, in each arbitration clause).

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(ii) There is no set 'test case' procedure for group arbitrations, and so the parties and tribunal will need to consider how the test case procedure will work in practice. For example, they will need to decide whether and how the decision in the test cases will be determinative of the other claims as to coverage (policy liability) and whether it is possible through such a procedure to determine quantum issues, which will necessarily vary between claimants, each of which has suffered its own loss. Again, however, whatever procedure is in place must have been agreed by all the parties. In agreeing to the procedure, a defendant insurer will likely have to weigh up the risk of an adverse decision impacting all claims, against the prospect of a favourable decision having the same impact and the benefits of a quicker resolution of all the claims and the costs savings in avoiding many separate arbitrations. This is particularly significant where the policyholders are SME businesses, such that the costs of pursuing a claim on an individual basis might be prohibitive and where the insurer is subject to regulatory obligations to treat customers fairly.

(iii) Whether the parties have excluded the possibility of an appeal to the English court under section 69 of the Arbitration Act on a point of law is another interesting factor to consider in relation to group actions arising from the pandemic. We have already discussed the very high threshold for this type of appeal to be permitted. If the parties have not agreed to exclude section 69, there may (depending on the issues) be an argument that aspects of the arbitrator's decision are questions of general public importance and that permission to appeal under section 69 should be granted if the tribunal's decision is at least open to serious doubt.

(iv) Third-party funding has been a growth area for arbitration in general in recent years. Proponents of third-party funding stress that it enables greater access to justice for claimants, but there is of course a cost to the claimants. Funders are likely to fund some or all of the costs of the case in return for a pay-out if the claim succeeds to cover their investment and generate a return. While this funding may provide the only practical means for some policyholders to finance claims against insurers, the requirement for the funder to secure a return will inevitably erode the recovery available to policyholders to some extent.

The Hiscox Arbitration is proceeding in parallel to the FCA test case. Hiscox Insurance was one of the defendants, and Hiscox Action Group (the claimant in the ● Hiscox Arbitration) was given permission to intervene in the action to make submissions. There is at least some overlap of subject matter being considered in both the Hiscox Arbitration and FCA test case. (31)

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3.3 Implications of FCA Test Case on Future Disputes

The FCA has previously communicated its expectation that, following final resolution of the FCA test case, insurers should apply the judgment in assessing or reassessing outstanding or rejected claims and complaints. (32)

In light of the policyholder-friendly judgment in the FCA test case, it is likely that a large number of policyholders will seek positive coverage determinations and any appeal from insurers in the FCA test case will not preclude them from doing so. Some may commence individual claims under the dispute resolution clauses in their policies, in either arbitration or court. It may be that the substantive legal issues in these follow-on cases can be dealt with expeditiously – unless the policies in issue differ from those in the FCA test cases.

Each policyholder's loss will, however, still need to be quantified – based on the individual circumstances underlying each claim. While the specific facts will vary from case to case, there will likely be common themes in disputes across claims – for example, as to the proper methodology to adopt in assessing loss. In addition while it will often need to be shown that there were instances of COVID-19 in the relevant area to trigger BI coverage, the court in the FCA test case did not make any findings of fact as to the prevalence of the disease in the UK. There may, therefore, still be significant benefits from a time and cost perspective in adopting an approach similar to that adopted in the Hiscox Arbitration, to allow for any such issues to be determined on a 'test case' basis, rather than separately in the context of every claim.

Further, there may be a role for mediation or other forms of alternative dispute resolution to assist in the economic and speedy resolution of quantum disputes. While arbitral tribunals in (re)insurance disputes have not traditionally sought to encourage alternative dispute resolution in the way that the English courts have done for many years, (33) a tribunal that is confronting the efficient case management of a group action might be more willing to encourage mediation or another procedure to facilitate efficient

resolution of quantum disputes of low(er) value.

4 CONCLUSION

There can be little doubt that the COVID-19 pandemic will be a major event – and shock – to the global insurance and reinsurance industries as with so many other sectors. The
P 329 pandemic coincides with a period of price correction in the insurance and reinsurance market with rates increasing and coverage terms contracting after a prolonged soft market. Those factors in combination are expected to give rise to an increasing volume of disputes, many of which will need to be resolved through arbitration as a favoured dispute resolution process in the sector. COVID-19 insurance arbitrations will also give rise to interesting procedural issues with the need to handle and coordinate large numbers of claimant policyholders seeking redress.

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*) The authors are grateful to Elizabeth Kantor, senior associate, Will Gibson and Nihal Joseph, associates, at Herbert Smith Freehills LLP in London for their considerable assistance in preparing this chapter.

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12) *Tonicstar Limited v. Allianz Insurance Plc* [2018] EWCA Civ 434, [2018] Bus LR 2347.

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14) *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817.

15) *Id.*, at 77.

16) *Id.*, at 95-96.

17) *Id.*, at 88-89.

18) Section 69(3).

19) Article 26.8 of the London Court of International Arbitration (LCIA) Rules (2014); Art. 35.6 of the Rules of Arbitration of the International Chamber of Commerce (ICC) (2017).

20) Unless the parties have by their arbitration clause chosen an 'Honourable Engagement clause' by which the tribunal is entitled to take account of matters of market custom and practice to achieve a 'gentleman's agreement' as opposed to a purely legal determination.

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27) There are others, including at least the Hospitality Insurance Group action.
28) These share somewhat different characteristics to class actions in, for example, the US in that class actions in England are 'opt-in' rather than 'opt-out'.
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Appendix: Conducting Remote Hearings Against a Party's Wishes: Overview of Arbitration Laws of Main Arbitral Seats

Amina Afifi

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Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
Australia	**International Arbitration Act of 1974, Act No. 136 of 1974 as amended.** **Article 18 – Reasonable Opportunity to Present Case:** '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.'	**General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** **Fairness:** There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. *See* however *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* [2016] FCA 1131. Here, the applicant sought to annul the arbitration award on the basis that they were not given a 'reasonable opportunity' to present their case, as a result of technical issues occurring during the taking of evidence via videoconference. The Court concluded that although giving evidence remotely was less ideal compared with being physically present, it did not in and of itself produce 'real unfairness' or 'real practical injustice'. (1)	**Commentary and/or National Court Cases Discussing Due Process Concerns in Claims Generally:** In *Tetra Pak Marketing Pty Ltd v. Musashi Pty Ltd* [2000] FCA 1261, the applicant suggested examining one of the witnesses remotely, relying on the following: (i) the additional cost associated with the cross-examination of such witness (if conducted physically), and (ii) 'professional inconvenience for the witness'. (2) The Federal Court of Australia (FCA) concluded that in the 'absence of some considerable impediment', conducting the hearing remotely should be allowed. (3) *See conversely Sunstate Airline (QLD) Pty Ltd v. First Chicago Australia Securities Ltd* (Giles, C.J., Comm. D., 11 March 1997, unreported) where

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
			Giles J, stated that 'cross-examination may be more difficult when video evidence is taken because documents have to be transmitted or produced in an unfamiliar manner, because of delay in voice transmission, or for other reasons, and the effectiveness of cross-examination as a weapon in the fight for truth should not be unduly hindered. And in many cases the Court is assisted in fact by observance of what is misleadingly called the demeanour of the witness, on which the taking of video evidence may impact'. (4) **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. (5)

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
			National Courts Dealing with Remote Hearings Post-COVID-19: In *Capic v. Ford Motor Company of Australia Limited* (Adjournment) [2020] FCA 486, the respondent requested an adjournment from a hearing scheduled for June 2020, until October 2020, as a result of COVID-19. The claimant submitted that technology allows for the trial to proceed remotely. The FCA denied the adjournment request, stating that issues related to: (i) technical issues, (ii) remote communication between counsel, (iii) issues with lay witnesses, (iv) a large number of documentation, (v) logistical issues, (vi) increased expenses were not enough to adjourn the hearing, because given the uncertainty of the situation (i.e., that it would not pass by October, which is when respondent wanted to adjourn the trial to), it is not feasible nor consistent with the overarching considerations of the administration of justice to stop the work of the courts for such a period. Nor is it healthy for the economy. (6) Citing a

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
			judgment by the Western Australian Court of Appeal, which ruled that an appeal could continue via telephone, over objection of the respondent (*JKC Australia LNG Pty td v. CH2M Hill Companies Ltd* [2020] WASCA 38). (7) Conversely, courts in Australia have adjourned hearings concluding that proceeding remotely or via telephone will cause unfairness to one or more parties: In *Quince v. Quince* [2020] NSWSC 326, Sackar J vacated a hearing on the basis that examining a witness remotely would lead to unfairness to both parties. Sackar J concluded that given the seriousness of the allegations, the witnesses' demeanour would play a significant role in coming to a conclusion, therefore concluding that cross-examination could not adequately be held remotely. (8) In *R v. Macdonald; R v. Edward Obeid; R v. Moses Obeid (No 11)* [2020] NSWSC 382, the judge adjourned the part-heard trial because of persistent technical issues occurring for the Court. (9) The trial was complex, and included a Court Book that exceeded 7,500 pages (which was 'not feasible nor practical' (10) to send to each witness), as well as, 79 additional documents. Further, the case required the cross-examination of several witnesses. This contributed to a difficulty to conduct the trial remotely, and the trial was adjourned until 31 August 2020. (11)
British Virgin Islands	**British Virgin Islands Arbitration Act 2013, No. 13 of 2013.** **Article 44:** '(1) Article 18 of the UNCITRAL Model Law is substituted by this section.	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. However, the BVI Commercial Court is holding remote hearings as a result of COVID-19. (12)	**National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A.

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
	(2) The parties to an arbitration shall be treated with equality. (3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Act or by the parties to any of those arbitral proceedings, the arbitral tribunal is required: (a) to be independent; (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.'		**National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.
People's Republic of China (PRC or China)	**Arbitration Law of the People's Republic of China, 1995, as amended in 2017.** (13) **Article 39:** 'Arbitration shall be conducted by means of oral hearings. If the parties agree to arbitration without oral hearings, the arbitral tribunal may render an arbitration award on the basis of the written application for arbitration, the written defence and other material.'	**General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** China has taken several steps to develop online dispute resolution with regards to arbitration. For example, several arbitration institutions in China set rules for Online Arbitration (e.g., China International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration). Remote hearing is possible when the arbitral tribunal deems appropriate.	**Commentary Discussing Due Process Concerns in Arbitration Claims Generally:** Problems may arise from the restrictive characteristics of the Arbitration Law of China: – The Arbitration Law of China is based on traditional means of arbitration, and it is unclear whether remote hearings comply with the traditional sense of in camera hearings.

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
	Article 40: 'Arbitration shall be conducted in camera. If the parties agree to public arbitration, the arbitration may be public unless state secrets are involved.' **Article 46:** 'Under circumstances where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence. If a party applies for preservation of the evidence, the arbitration commission shall submit his application to the basic people's court in the place where the evidence is located.'	China has been actively pushing for online dispute resolution since 2015. (14) At the end of May 2015, the Legislative Affairs Office of the State Council, together with several arbitral institutions, organized a special work conference on 'Internet Plus Arbitration' in Wuhan, and decided to develop online arbitration in the whole country. In addition, in September 2015, China Online Arbitration Union was established led by China Guangzhou Arbitration Commission (GZAC). So far, GZAC has independently developed thirteen systems such as a lawyer platform, case management system, remote hearing system. In May 2016, the first Online Arbitration Institution was established under Qingdao Arbitration Commission. With regards to court hearings, in September 2018, the Supreme People's Court of China promulgated the Provisions on Several Issues Concerning the Trial of Cases by Internet Courts and set the guideline for remote hearing for courts. China has also been urged to make full use of information technology in litigation during the COVID-19 outbreak, according to the Supreme People's Court. (15) On 21 February 2020, the Beijing Internet Court released the country's first protocol for an online court hearing, outlining details from online identity authentication to transcripts of hearings in a video courtroom. (16)	– The Arbitration Law of China does not fully authorize an arbitral tribunal to hear cases in the way it deems appropriate; as a result, it is questionable whether remote hearings can be carried out in a broader scope. **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
England and Wales	**Arbitration Act 1996** **Section 33 – General Duty of the Tribunal:** '(1) The tribunal shall: (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.'	There is no publicly available information on national courts' treatment of remote arbitration hearings. *See,* however, the adjacent column for cases where courts have not adjourned remote hearings and arbitration-related proceedings, as a result of COVID-19. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** Generally, the courts in England and Wales started to implement the use of remote hearings from 2009, starting with magistrates courts in criminal cases. (17) More recently, as a result of the COVID-19 pandemic, English courts issued a protocol necessitating the use of remote hearings where possible. (18)	**National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** In *Jiangsu Guoxin Corporation Ltd v. Precious Shipping Public Co Ltd* [2020] EWHC 1030 (Comm), the High Court held that oral submissions, made via telephone link, were 'highly effective' and concluded that nothing of significance was lost by reason of the parties not being in the same place. (19)
	Section 34 – Procedural and Evidential Matters: '(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. (2) Procedural and evidential matters include: (a) when and where any part of the proceedings is to be held; …'	In *Polansaki v. Conde Nast Publications Ltd* [2005] All E.R. (D.) 139, (20) the House of Lords, citing Eady J's trial experience, noted that 'giving evidence by VCF is a "readily acceptable alternative" to giving evidence in person and an "entirely satisfactory means of giving evidence" if there is reason for departing from the normal rule that witnesses give evidence in person before the court'. **Arbitrator Autonomy and Efficiency:** In *Jivraj v. Hashwani* [2011] UKSC 40, the Supreme Court held that under section 34 of the Arbitration Act, a court has complete power over all procedural and evidential matters. (21) Similarly, in *Brandeis (Brokers) Ltd v. Black* [2001] 2 All ER 980 (Comm), the Court concluded that arbitrators enjoy a wide discretion, and should determine that the procedure ensures the 'just, expeditious, economical and final determination of the dispute'. (22)	**National Courts Dealing with Remote Hearings Post-COVID-19:** In *National Bank of Kazakhstan and Others v. Bank of New York Mellon and Others* [2020] EWHC 916 (Comm), an application was made to adjourn a trial. Teare J concluded that the default position was to conduct hearings remotely, despite the challenges that may arise. (23) In *Blackfriars Ltd. Re* [2020] EWHC 845 (Ch), the Court addressed four main issues with conducting a remote hearing: (i) the respondent contending that conducting a remote hearing would allegedly be inconsistent with government instructions and guidance, (ii) putting the safety of those testifying on the line, (iii) the technological challenges,

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
		Fairness In *O'Donoghue v. Enter. Inns plc* [2008] EWHC B15 (Ch), the High Court refused to vacate an arbitral award on the basis that the arbitrators did not hold a hearing. (24)	and (iv) the potential unfairness to the respondent. Despite the Court acknowledging the difficulties that may arise, it did not agree to adjourn the trial and ordered the parties to prepare for a fully remote hearing. (25) *See also Municipio de Mariana & Others v. BHP Group PLC* [2020] EWHC 928 (TCC), where the defendant attempted to vacate a remote court hearing as a result of COVID-19. Here, the Court noted that the starting point 'as always is the overriding objective with the requirement that cases are to be dealt with justly; in ways which are proportionate to the amounts involved, the importance of the case, and the complexity of the issues; and expeditiously and fairly'. (26) The Court rejected the application, and provided several reasons. (27)

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
Egypt	**The Egyptian Arbitration Law No. 27 of 1994** **Article 25:** 'The parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal, including the right to submit their proceedings to the rules of any arbitration institution, organization or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral tribunal may, subject to the provisions of the Arbitration Law, adopt the arbitration procedures it considers appropriate.' **Article 26 – Equal Treatment of the Parties:** 'The parties to arbitration shall be treated with equality, and each shall be given an *equal* and *full* opportunity to present its case.' **Article 28 – Seat of Arbitration:** 'The parties to the arbitration are free to agree on the place of arbitration in Egypt or abroad. Failing such agreement, the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case including the	**General Analysis of the National Courts' Position on Conducting Remote Hearings:** In light of the lack of publicly available information, it is uncertain whether Egyptian courts have ever conducted remote hearings. However, it is worth noting that prior to the COVID-19 pandemic, a recent Law, No. 146 of 2019, was enacted to amend Law No. 120 of 2008 establishing the Economic Courts. Among the innovative amendments introduced by the 2019 Law is the possibility of conducting the proceedings before the Economic Courts *electronically*. This includes submitting briefs, documents, defences, claims and so hearings can be conducted remotely. (28) Given the novelty of these amendments, there are no precedents applying these provisions and no remote hearings have been held as yet. It is also worth noting that Egyptian courts are engaged in ongoing projects automating the work of the courts, which will soon lead to installing systems and equipment that will facilitate/remote hearings.	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** Under the Egyptian Arbitration Law, an arbitral tribunal may hold hearings or may proceed on the basis of documents only (unless otherwise agreed by the parties). There is no legal requirement to hold hearings physically in person. The law is silent on the form/format of hearings. Article 33 of the Arbitration Law simply refers to 'hearings' without requiring that they be physically in person. Should a tribunal decide to hold hearings remotely, the parties ought to be consulted and the tribunal should take all circumstances into consideration (including a party's ability to present its case remotely). That said, as a matter of principle, remote hearings are not illegal in

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
	convenience of the place to the parties. This shall be without prejudice to the power of the arbitral tribunal to meet in any place it considers appropriate to undertake any aspect of the arbitral proceedings, such as hearings, examining witnesses and experts, reviewing documents, inspecting goods or other property, deliberations, signing of the award or for any other reason.' It is worth noting that the distinction between the legal seat (place) and the venue of the arbitration is enshrined in the Egyptian Arbitration Law and is well understood and respected by Egyptian courts. **Article 31 – Communicating documents and information:** 'All briefs, statements, documents or other information submitted to the arbitral tribunal by one party shall be communicated to the other party. Similarly, copies of whatever may be submitted to the arbitral tribunal such as expert reports, evidentiary documents or other elements of proof shall be communicated to the parties.' **Article 33 – The Hearings:** '(1) The arbitral tribunal *may* hold hearings in order to enable each party to explain the merits of its case and to present its arguments as well as the evidence on which it relies. It may also decide that the proceedings shall be conducted		Egypt. However, a tribunal cannot hold remote hearings if both parties object. Nevertheless, it is possible to hold a remote hearing against the wish of a party, but certain risks may exist and the validity of the proceedings and/or the award may be challenged, if the party against whose wishes the remote hearing was held was able to *prove* that such hearing prejudiced its right to be heard and its ability to present its case, since Egyptian law requires giving each party a '*full*' opportunity to present its case pursuant to Article 26 of the Arbitration Law. The tribunal has broad powers in this respect by virtue of Article 25 of the Arbitration Law when the parties are in disagreement as to the manner in which the proceedings should be conducted. **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
	exclusively on the basis of the documents submitted, subject to any contrary agreement by the parties. (2) The parties to the arbitration must be notified of the dates fixed for the hearings which the arbitral tribunal decides to hold, sufficiently in advance of the scheduled date. (3) Summary minutes of the hearings shall be provided to the parties, unless otherwise agreed. (4) Witnesses and experts shall be heard without oath.' **Article 35:** 'If either party fails to appear at any hearing or to submit the documents required from it, the arbitral tribunal may continue with the arbitral proceedings and render the award on the basis of the evidence on record.' **Article 53 – Nullity of the Award:** '(1) An arbitral award may be annulled: ... c) If either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control;'		

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
France	**The French Code of Civil Procedure.** **Article 1464(3):** 'Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings.' **Article 1509:** 'An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules. Unless the arbitration agreement provides otherwise, the arbitral tribunal shall define the procedure as required, either directly or by reference to arbitration rules or to procedural rules.' **Article 1510:** 'Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.'	**General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** Generally, the courts in France started to implement the use of remote hearings from the 2000s, starting with French overseas territories which lacked judges, and then extending it to criminal proceedings. Videoconferencing has been then generalized with Article L. 111-12 of the French Judicial Organization Code which allows the president of the bench, either ex officio or at the request of a party, to decide on the use of videoconferencing with the consent of all the parties. More recently, as a result of the COVID-19 pandemic, French courts closed on Monday 16 March 2020-11 May 2020, but during this period they remained open for the handling of essential litigation. Orders issued on 25 March 2020 by the Government to deal with the economic, financial and social impact of the spread of the COVID-19 pandemic and the consequences of the measures taken to limit that spread extend the possibility of using videoconferencing or any other means of electronic communication for hearings in administrative (Article 7 of Order 2020-305), civil	**National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings:** In *Chaudronnerie Mécanique Ariegoise CMA SA v. Adjor Sofal Nemoneh Pars* (Paris Court of Appeal, 3 June 2010, n° 09/22247, Rev. Arb. 2010.395), the applicant attempted to set aside the arbitral award because the tribunal had, among other things, heard the witnesses by audioconference and not by videoconference as planned. The Paris Appeal Court dismissed the application for annulment because, even if videoconferencing had been planned, the plaintiff had failed to object to the use of an audioconference instead of a videoconference due to technical problems or to the lack of skills of the interpreter at the time of the witness hearing. Indeed, the tribunal had asked the parties if they had any objections, but the plaintiff's counsel had answered that they would only be raised after the award.

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		(Article 7 of Order 2020-304), and criminal (Article 5 of Order 2020-303) proceedings during the pandemic without the need to obtain the consent of the parties. (29) However, the orders point out that if the use of videoconferencing is decided, the judge must ensure that the rights of the defence, and the principle of due process are respected and that the quality of the transmission and its confidentiality are guaranteed in order to verify the identity of the parties. **Arbitrator Autonomy:** The arbitral tribunal's discretion and power to organize proceedings in a way it deems fit was confirmed by the Paris Court of Appeal in *Gold Reserve Inc v. Venezuela* (Paris Court of Appeal, 7 February 2017, n° 15/00496). However, the will of the parties is a limit to the tribunal's power. Indeed, the *Cour de Cassation* ruled that in the presence of precise procedural rules, set out in the arbitration clause, the	**National Courts Dealing with Remote Hearings:** The question of conducting a remote hearing against the party's wishes has arisen above all in criminal and immigration matters, which are specific areas. The Conseil Constitutionel approved the conduct of remote hearings with the consent of the parties. (30) Indeed, in its decision of 20 September 2019, n° 2019-802 QPC (concerning criminal proceedings), the Council concluded that it was unconstitutional (against the rights of defence) to use videoconferencing without the person's consent in hearings regarding pretrial detention disputes, (31) therefore suggesting that it was lawful to conduct remote hearing with the party's consent.
		arbitrators could not depart from these rules without infringing the law that the parties had chosen and which was binding on them (Cass. Civ. 2e, 15 October 1980: Rev. arb. 1985, p. 311, note E. Mezger).	In the decision dated 20 November 2003, n° 2003-484 DC (concerning immigration proceedings), the Constitutional Council had already validated the use of videoconferencing on certain conditions: (i) its use is subject to the consent of the parties; (ii) the confidentiality of the transmission is guaranteed; (iii) the courtrooms receiving the various parties during the hearing are open to the public.

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Germany	**German Code of Civil Procedure – Zivilprozessordnung** **Section 1042 – General Rules of Procedure:** '(1) The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. ... (4) Failing an agreement by the parties, and in the absence of provisions in this book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** In theory, section 128a ZPO allows for hearings by means of image and sound transmission ('*Verhandlung im Wege der Bild- und Tonübertragung*') before state courts in civil proceedings. Such 'remote hearings' may be ordered by the Court upon request of any party as well as ex officio at its discretion. Ordering a 'remote hearing' does not affect the hearing venue, meaning that the judge/bench still has to be present in the courtroom to ensure the public nature of the hearing ('*Öffentlichkeitsgrundsatz*'). In addition, ordering a 'remote hearing' does not require the consent of the parties because they are always free to attend the hearing *in persona* in the courtroom. In other words, the parties cannot be obliged to participate in the hearing via 'remote means'. In practice, the courts in Germany have generally been reluctant to make use of the possibilities offered by section 128a ZPO. (32) According to the UNCITRAL Model Law Commentary, a German Court concluded that the **mere refusal of a request for an oral hearing** would **not** amount to a violation of the right to be heard. (33)	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** In general, any procedural aspect of the arbitral proceedings only lies within the discretion of the arbitral tribunal if there is no definite agreement by the parties or no definite provision with the ZPO, as per section 1042(4) ZPO. That said, according to section 1047(1) ZPO; any party to arbitral proceedings has a right to request an 'oral hearing'. The law does not define the term 'oral hearing' comprehensively; i.e., it remains open to interpretation whether the term encompasses only hearings *in persona* or also remote hearings. Assuming that the term is to be interpreted restrictively, namely, as to only encompass hearings *in persona*, any decision by the arbitral tribunal demanding a refusing party to participate in a remote hearing instead of a hearing *in persona* would be violating that party's legal right to an oral hearing. In contrast, assuming that the term is to be interpreted widely, namely, as to include remote hearing, the ultimate decision to conduct a remote hearing rests with the arbitral tribunal exercising its procedural discretion pursuant to section 1042(4) ZPO. There is some merit in the argument for including remote hearings within the meaning of 'oral hearing'. Deferring the ultimate decision on the form of the hearing to the arbitral tribunal's discretion allows for a more fine-tuned approach to remote hearings, i.e., the potential merits and

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			the potential concerns (e.g., hearing *in persona* is impossible or 'just' associated with significant effort, expenses, etc., restricted experience of witnesses, technical issues, etc.) can be considered by the arbitral tribunal on a case-by-case basis and, in particular, with due regard to both parties' right to equal treatment and right to be heard pursuant to section 1042(1) ZPO. However, so far, the question has not been addressed by any court in Germany and legal literature is also scarce. **However, the few authors who have – with some amount of reasoning – dwelled on the issue take a rather sceptical, even negative tone**: *Spohnheimer* points out that any oral hearing serves to provide all the participants with a vivid picture of the facts and legal issues in question ('*anschauliches Bild des Lebenssachverhaltes und der Streitpunkte*'). This presupposes that the arbitral tribunal 'experiences' the parties and witnesses. In his view, however, this experience is

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			impossible in case of telephone hearings and at least impaired in case of video hearings. (34) *Münch* argues that the defining features of any 'oral hearing' is the opportunity: (i) to make verbal remarks ('*Mündlichkeit*') and (ii) to present its arguments and evidence in simultaneous (physical) presence of the other party and the arbitrators ('*verhandeln*'). Thus, any remote presence is not sufficient. (35) *Voit* even just states that a hearing by means of image and sound transmission ('*Verhandlung im Wege der Bild- und Tonübertragung*') may only serve as a base substitute for an oral hearing and, therefore, requires the consent of both parties. (36) **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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Hong Kong	**Cap. 609 Hong Kong Arbitration Ordinance** **Section 46 (Relying on Article 18 of the Model Law):** '(1) Subsections (2) and (3) have effect in substitution for article 18 of the UNCITRAL Model Law. (2) The parties must be treated with equality. (3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required– (a) to be independent; (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents. (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.'	Generally, in 2018, the Chief Executive of the Legislative Panel on Administration of Justice and Legal Services indicated for the funding of an e-arbitration and e-mediation platform to 'provide efficient and effective online dispute resolution services'. (37) **General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** In *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, the Court concluded that: 'full opportunity [of presenting one's case] cannot mean that a party is entitled to present any case it pleases, at any time it pleases, no matter how long the presentation should take. … In the case of a late application, any opportunity afforded to one party must be balanced against the opportunity to the other. … A party who has	**National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** In *CSFK v. HWH* [2020] HKCA 207, the Hong Kong Court of Appeal wholly conducted a remote hearing. The Court of Appeal confirmed that the use of remote hearings is permissible. It considered that there was 'no rule prohibiting other modes of hearings if the dual requirements for fairness and openness are satisfied'. (38)

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		had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process'. (39) The Court concluded that only a 'serious error' would amount to a violation of Article 18 of the Ordinance. (40) Conversely, in *Re Chow Kam Fai, ex parte Rambas Marketing Co. LLC* [2004], (41) the Hong Kong Court of Appeal concluded that cross-examining a witness remotely was an exception rather than the rule, and would be a matter of privilege. Note, however, that this is not an arbitration case.	Similarly, in *Cyberworks Audio Video Technology Ltd v. Mei Ah (HK) Co Ltd* [2020] HKCFI 347, the Court of First Instance considered that conducting a telephone hearing would allow parties to be heard, and would promote fairness and efficiency in proceedings. The Court concluded that 'the current COVID-19 crisis is actually an opportunity for the Courts and parties to litigation to reassess how cases can best be actively managed in furtherance of the underlying objectives', suggesting that there may even be a 'strong argument for moving matters for moving matters in a similar way beyond the end of the crisis'. (42)
India	**The Arbitration and Conciliation Act, 1996.** **Section 18 – Equal Treatment of Parties:** 'The parties shall be treated with equality and each party shall be given a full opportunity to present his case.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. However, the Supreme Court has started holding video hearings as a result of COVID-19. (43)	**National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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Netherlands	**The Dutch Code of Civil Procedure (DCCP), which incorporates the 2015 Netherlands Arbitration Act** **Article 1036:** '(1) … to the extent the parties have not provided for an arrangement on the conduct of the arbitration, the arbitration is conducted in the manner determined by the arbitral tribunal, without prejudice to the provisions in this Title. (2) The arbitral tribunal shall treat the parties equally. The arbitral tribunal shall give the parties the opportunity mutually to set out and explain their positions and to comment on each other's positions and on all documents and other information brought to the attention of the arbitral tribunal during the proceedings. The tribunal shall not base its decision, where it is unfavourable for one party, upon documents and other information on which that party was not sufficiently able to comment.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. **Analysis of the National Court's Position on Conducting Remote Hearings:** In the Netherlands, courts have on occasion conducted remote hearings by telephone since at least the early 2000s. More recently, as a result of the COVID-19 pandemic, courts have adopted specific amendments to the Court Rules, providing that urgent hearings can be conducted through telephonic or video connection.	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** A ***specific provision*** in the 2015 Netherlands Arbitration Act (Article 1072b(4) DCCP) expressly authorizes the tribunal to order that, instead of a personal appearance of a witness, an expert or a party, the relevant person shall through *electronic means* stand in direct contact with the tribunal and others. The Explanatory Memorandum to the 2015 Netherlands Arbitration Act notes: 'The fourth subsection [of Article 1072b DCCP] furthermore provides that **arbitral proceedings can be conducted fully electronically if the tribunal so orders**. If this is the case [i.e. if the tribunal so orders], this will naturally happen in consultation with those involved. Particularly for international arbitrations an arbitral proceeding by means of, for instance, **videoconference** can reduce costs significantly.'

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	Article 1038b: 'The arbitral tribunal shall, if so requested by one of the parties or if it so decides of its own motion, give the parties the opportunity to explain their case orally during a hearing, unless the parties have agreed otherwise.'		More generally, the Netherlands Arbitration Act: – gives the tribunal wide authority to determine within its discretion the conduct of the arbitration (Article 1036(1) DCCP); – gives the tribunal wide authority to make within its discretion evidentiary determinations, including determining the method of giving evidence (Article 1039(1) DCCP). **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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New Zealand	**Arbitration Act 1996** **Schedule 1, Article 18 – Equal Treatment of Parties:** 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.' **Schedule 1, Article 19 – Determination of rules of procedure:** '(1) Subject to the provisions of this Schedule, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this schedule, conduct the arbitration in such manner as it considers appropriate.' **Schedule 1, Article 20 – Place of arbitration:** '(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** Rules 10.23-10.26 of the High Court Rules provide for the use of video link for certain matters, largely preliminary, but including summary judgment. Furthermore, in response to the lockdown imposed on the New Zealand public as a result of COVID-19, on 2 April 2020 the High Court also issued a practice note encouraging the use of audiovisual link (AVL), virtual meeting rooms (VMR) and telephone link for appropriate hearings (not expressly limited to those provided under Rules 10.23-10.26). While no express rule is provided for full hearings to be conducted in this manner, we understand this to be an exercise of the High Court's inherent powers to regulate its own procedure and processes. The High Court's exercise of such powers is guided by pragmatism and necessity. Further, the Court of Appeal and Supreme Court issued a protocol for remote hearings during COVID-19	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** Article 18 of the Arbitration Act is essentially a codification of natural justice requirements. It requires the arbitrator to provide each party a 'full opportunity' to present its case. That phrase may go beyond what is merely a 'reasonable opportunity', though the position has not truly been tested. (44) Compare with *Methanex Motunui Ltd v. Spellman* [2004] NZLR 454 (CA). The Court of Appeal in *Methanex* noted that 'the purpose of the principles of natural justice in the arbitration context … is to do justice between the parties rather than to insist on an absolute standard of fairness'. (45) Against that background, the broad power in Article 19 of the Arbitration Act would very likely encompass a direction to attend an oral hearing by video link, provided the parties are provided with the opportunity to fully present their case.

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	(2) Notwithstanding the provisions of paragraph (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents.' **Schedule 1, Article 24 – Hearings and written proceedings:** 'Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.' **Schedule 2, Article 3 – Powers relating to conduct of arbitral proceedings:** '(1) For the purposes of Article 19 of Schedule 1, and unless the parties agree otherwise, the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to–	restrictions. Such protocol provides that the Court of Appeal and Supreme Court would conduct remote hearings using a web browser video conferencing system which is supported by the Ministry of Justice. (46) The Courts (Remote Participation) Act 2010 permits a court to order a party to appear by AVL, even without that party's consent (section 7(3)). For an example of a party being required to attend an oral hearing by video link. *See,* e.g., *Smith v. Chief Executive of the Department of Corrections* [2019] NZHC 2314.	Further, Article 20 of the Arbitration Act powers may also arguably extend to allow the arbitrator to determine a 'remote' venue for the arbitration. Article 24 of the Arbitration Act also allows for the arbitrator to determine that an oral hearing is not necessary in circumstances where the parties have not expressly agreed that an oral hearing is required. In doing so, the arbitrator should balance the need for an oral hearing with the parties' rights in Article 18. Where one party *requests* a hearing, the tribunal is bound to conduct a hearing, but we would expect that Article 24 of the Arbitration Act could still in most cases be complied with if a remote hearing were held. Finally, Article 3 of Schedule 2 of the Arbitration Act (only applicable in international arbitrations where the parties have expressly adopted it) provides an outline of the powers conferred upon the arbitrator for the

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	... (j) order any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently.'		purposes of Article 19, above. Paragraph (j) would appear to be broad enough to encompass conducting an oral hearing by video link. Finally, it is important to note that the threshold for a challenge to set aside an award on a natural justice/procedural ground is very high in New Zealand. (47) To be set aside it must be shown that the breach had, at least, a 'material effect on the outcome of the ... arbitration'. (48) In these circumstances, the challenging party must therefore show that the arbitrator's election to hold a remote hearing had a material effect on its ability to present its case. **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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Singapore	**Singapore International Arbitration Act 1994, as amended.** Singapore adopts the UNCITRAL Model Law. *See* cases in no. 1 for cases on Article 18. **Article 18 – Equal Treatment of Parties:** 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' **Article 19 – Determination of Rules of Procedure:** '(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.'	**General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** The Singapore Courts have concluded an agreement with the PCA in 2007, the PCA agreed with the Singapore government to set up a remote hearing centre for its cases. (49) Further, in *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and another* [2020] SGCA 12, the Singapore Court of Appeal held that the Article 18 right to a 'full opportunity' to present one's case is 'impliedly limited by considerations of reasonableness and fairness'. The Court went on to elaborate that, 'The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.' (50)	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** As a general matter, the Singapore Courts have been deferential to arbitral tribunals, allowing them to be the master of their own procedure so long as it does not result in manifest unfairness. In *Anwar Siraj v. Ting Kang Chung* [2003] SGHC 64, the Singapore High Court held that 'the arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice'. (51) *See also* an example

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		In *Triulzi Cesare SRL v. XinyiGroup (Glass) Co Ltd* [2014] SGHC 220, the Court was asked to assess whether the tribunal's refusal to refuse a request to postpone hearing dates was proper and legitimate. The Court held that this was merely a case management decision, and that the refusal of the application did not deny Triulzi its right to be heard.	where a Singapore Court ruled that 'only when the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, resulting in actual prejudice to a party, can or should a remedy be made'. (52) Similarly, in *Dongwoo Mann & Hummel Co. Ltd v. Mann & Hummel GmbH*, [2008] 3 SLR 871, the Singapore High Court, on rejecting a challenge to an award based on procedure for compelling document production, concluded that: 'This is a matter well within the jurisdiction of the tribunal, which has the power and the discretion to determine the rules of procedure and to conduct the hearing in a manner that it considers most appropriate to ensure the fair, expeditious, economical and just determination of the dispute procedure it would adopt.' (53) In *Sandz Solutions (Singapore) Pte Ltd and others v. Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562, the Singapore High Court held that an assessment of a witnesses' credibility would not be hindered if such witness was not 'ten feet away in the witness box'. (54) **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** In *Anil Singh Gurm v. J S Yeh & Co* [2020] SGCA 05, the Singapore Court of Appeal (55) granted leave to a witness that wanted to testify remotely because he was unwilling (rather than unable) to travel to Singapore. (56)

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Sweden	**The Swedish Arbitration Act (SFS 1999:116).** **Section 24:** 'The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution. A party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the opposing party or another person. Where one of the parties, without valid cause, fails to appear at a hearing or otherwise fails to comply with an order of the arbitrators, such failure shall not prevent a continuation of the proceedings and a resolution of the dispute on the basis of the existing materials.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** N/A.	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** Commentary on section 24 of the Swedish Arbitration Act, by S. Lindskog states: 'A video conference can, in certain situations, streamline arbitration. However, a hearing held by such a conference is not to be regarded as oral within the meaning of paragraph 1 (2). Therefore, if a party requests oral hearing under that provision, he does not have to settle for a video conference.' (57) S. Lindskog also goes on to state, in a footnote, that a videoconference *cannot* adequately replace an oral hearing. **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.
Switzerland	**Federal Code on Private International Law (PILA).** **Article 182 – Procedure:** '(1) The parties may directly or by reference to rules of arbitration regulate the arbitral procedure; they may also subject the procedure to the procedural law of their choice. (2) If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration. (3) Irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. Note, however, the statement of the Court of Arbitration for Sport (CAS), which is seated in Lausanne, Switzerland, in regards to disruptions caused by COVID-19: 'Depending on the circumstances of each individual case, the arbitrators and parties are encouraged to conduct hearings by video-conference or to cancel them (final award on the basis of the written submissions)'. (58) **General Analysis of the National Courts' Position on Conducting Remote Hearings:** With regards to court cases, Switzerland (59) is in the very early stages of implementing online dispute resolution, and so far, Swiss courts have not used remote hearings for court cases.	**Commentary and National Court Cases Discussing Due Process Concerns in Arbitration Claims Generally:** Article 182(3) PILA reflects the international minimum standard (e.g., Article 18 UNCITRAL Model Law). (60) The violation of Article 182(3) PILA constitutes a ground for appeal according to Article 190(2)(d) PILA. According to the case law of the Swiss Federal Supreme Court, solely the violation of Article 182(3) PILA can lead to an annulment of the arbitral award; the violation of other procedural rights does not lead to an annulment of the arbitral award. (61)

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			According to the case law of the Swiss Federal Supreme Court as well as Swiss doctrine, **Article 182(3) PILA does not provide a right to an oral hearing**. (62) Therefore, if an arbitral tribunal decides not to hold an oral hearing, such decision can, in principle, not successfully be challenged. A maiore minus, the same is expected to apply if a tribunal decides to hold a remote hearing. Note that even if the arbitral tribunal violates an agreement between the parties, according to which each party has the right to be heard orally, this does not per se lead to an annulment of the award (as long as the tribunal respects the procedural minimum standards as outlined above). (63) Moreover, commentary on Article 182(3) PILA seems to suggest, regarding fairness of proceedings, that a 'slightly different treatment of the parties by the arbitral tribunal may

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			well be inevitable and acceptable as long as neither of the parties is substantially disadvantaged by the way the procedure is carried out'. (64) Thus, there is no right to absolute equal treatment. (65) Further, according to commentary on the PILA, both the tribunal and the parties are obliged to avoid any behaviour that would unnecessarily delay the proceedings. (66) For example, in *Edok SA and Others v. Hydromechaniki Sàrl and Eupalinaos SA*, 10 May 1982, ATF/BGE108 Ia 197, a Swiss Federal Supreme Court considered that 'one of the objectives of arbitration is to enable parties to obtain a quick solution to the differences referred to arbitration. Parties that agree to go to arbitration are therefore bound by the rules of good faith to avoid all that could delay the normal progress of arbitration proceedings without necessity'. (67) **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A. **National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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United Arab Emirates	**Federal Law No. 6 of 2018 on Arbitration** **Article 26 on Equality of the Parties:** 'The parties shall be treated with equality, and each party shall be given a full opportunity to present its case. The arbitral tribunal shall have the power, on the application of any party or a third party, but in either case only after giving all parties, including the third party, the opportunity to be heard, to allow such third party to intervene or be joined in the arbitration provided it is a party to the arbitration agreement.'	There is no publicly available information specifically on national courts' treatment of remote arbitration hearings. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** UAE Federal Law Provision No. 33(3) on Hearings and Written Proceedings permits hearings by videoconference. It provides that 'hearings may be held through modern means of communication without the physical presence of the Parties at the hearing'. It is important to note, however, that the wording of Article 33.3 of Law No. 6 of 2018 permits videoconferencing without the physical presence of the **parties**, but is silent on whether a member of a three-person tribunal or an expert witness is covered by this provision.	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** As the Arbitration Law is relatively new, there is no case law discussing this topic. The same is true for the DIFC and the ADGM. However, it is important to note that it has been reported that parties to arbitrations seated in the UAE are seeking stays on the grounds that proceeding by videoconferencing is illegal. **National Courts Dealing with Remote Hearings in Arbitration-Related Proceedings Post-COVID-19:** N/A.
	Article 23 Determination of Rules of Procedure: 'Subject to Article 10-2 of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, including their right to subject such procedure to the rules in force of any arbitration association or institution in the State or abroad. Where there is no agreement to follow specific procedures, the arbitral tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is party.' **Abu Dhabi Global Market ("ADGM") Arbitration Guidelines 2015** **Article 31 Equal Treatment of Parties:** 'The parties shall be treated with equality and each party shall be given a reasonable opportunity to present its case.' **Article 32 – Determination of Rules of Procedure:** '(1) The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.		**National Courts Dealing with Remote Hearings Post-COVID-19:** N/A.

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	(2) In the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. (3) Unless otherwise agreed by the parties, the tribunal has the power to order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is: (a) an individual ordinarily resident outside the Abu Dhabi Global Market, or (b) a corporation or association incorporated or formed other than in the Abu Dhabi Global Market, or whose central management and control is exercised outside the Abu Dhabi Global Market. (4) In all cases, the arbitral tribunal must adopt procedures which are suitable to the circumstances of the particular case and which avoid unnecessary delay and expense.' **Arbitration Law, Dubai International Financial Centre ("DIFC") Law No. 1 of 2008** **Article 25- Equal Treatment of Parties:** 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'		

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
	Article 26- Determination of Rules of Procedure: '(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) In the absence of such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.'		
United States	**9 U.S.C – Federal Arbitration Act (FAA)** **9 U.S.C. § 10:** '(a) In any of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration. ... (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent	**General Analysis of the National Courts' Position on Conducting Remote Arbitration Hearings:** Generally, a US court will not annul an award because the hearing was held remotely. In *Research & Dev. Ctr. 'Teploenergetika,' LLC v. EP Int'l, LLC*, 182 F. Supp. 3d 556, 566 (E.D. Va. 2016), a U.S. district court rejected an attempt to resist enforcement of an award where a party and witness was unable to attend the hearing in person but had the opportunity to request an oral hearing via video or teleconference under the applicable rules. (68)	**Commentary and/or Cases Discussing Due Process Concerns in Arbitration Claims Generally:** In the United States, the FAA sets forth grounds for denying recognition and enforcement of arbitral awards deemed to fall under the New York Convention (§ 207) and for vacating arbitral awards made in the United States (§ 10). U.S. courts generally give arbitral tribunals substantial deference on procedural matters.

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	and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.' **9 U.S.C. § 207:** 'The Court shall confirm [an award subject to the New York Convention] unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.' [The New York Convention permits courts to deny recognition and enforcement where the party against whom the award is invoked 'was … unable to present his case', Article V(1)(b), 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', Article V(1)(d), or it would 'be contrary to the public policy of the country where recognition and enforcement is sought', Article V(2)(b).]	Similarly, in *Rive v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003), a U.S. Court of Appeals also confirmed an award over objections that the award-debtor's ultimate owner had been prevented from participating in the arbitration proceedings for fear of arrest upon entering the country where the proceedings were held. The Court ruled that the award-debtor could have been represented by counsel or a corporate representative and that the owner 'himself could have participated by telephone'. (69) **Fairness/Arbitrator Misconduct:** In *Trademark Remodeling, Inc. v. Rhines*, No. PWG-11-1733, 2012 WL 3239916, at 10 (D. Md. 6 August 2012), the Court held that '[T]he fact that the arbitrator permitted a witness to testify by telephone does not establish misconduct.' Similarly, in *Al-Haddad Commodities Corp. v. Toepfer Int'l Asia Pte., Ltd.*, 485 F. Supp. 2d 677, 686 (E.D. Va. 2007), the Court held that 'While cross-examination in person or by video would	Section 207 of the FAA requires U.S. courts to confirm awards unless one of the grounds for refusal of recognition under the New York Convention applies. U.S. courts have held that Article V(1)(b) of the Convention requires a fundamentally fair hearing, one that 'meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator'. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001). (70) Under section 10 of the FAA, courts generally hold that 'a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers'. (71) Therefore, several courts have rejected attempts to
		have been preferable to cross-examination by telephone, the fact that telephonic testimony was ultimately used did not render the proceedings fundamentally unfair. Accordingly, the Court concludes that the Panel's decision to allow Mr. Al-Haddad to appear by telephone was not misconduct under § 10(a)(3).' *See also Eaton Partners LLC v. Azimuth Capital Management IV, Ltd* 18 Civ. 1112 (ER) (S.D.N.Y 18 October 2019). Azimuth contended that the arbitrator was guilty of misconduct for failure to postpone the hearing when one of the witnesses became unavailable, as this allegedly showed manifest disregard for the law, and showed favour to Eaton. The Court concluded that 'even if the Arbitrator had in fact refused to adjourn the hearing and only allowed [the witness] to appear by video, this would not have constituted a deprivation of Azimuth's right to a fundamentally fair hearing'.	annul awards under section 10 based on the fact that a witness was permitted to testify by telephone or videoconference instead of through live testimony. Therefore, under section 10 of the FAA, courts generally hold that 'a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers'. **General Analysis of the National Courts' Position on Conducting Remote Hearings:** Before the COVID-19 pandemic, U.S. courts had used videoconferencing in some circumstances. For example, in *Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005), the Court held that 'In this case, we find that the district court did not abuse its discretion in conducting the trial by videoconference.' (72)

Jurisdiction	*Relevant Arbitration Law Provision(s)*	*National Courts' Positions on Remote Arbitration Hearings*	*Procedural Issues Arising as a Result of Conducting a Remote Hearing*
			In light of the COVID-19 pandemic, it appears that state and federal courts have taken a variety of approaches, including conducting some proceedings by videoconference and cancelling in-person appearances. **National Court Arbitration-Related Cases Arising as a Result of COVID-19:** N/A. **National Court Cases Arising as a Result of COVID-19:** N/A.

References

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1) *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* (2016) FCA 1131, 154.
2) *Tetra Pak Marketing Pty Ltd v. Musashi Pty Ltd* [2000] FCA. 1261, 7-8; *see also CI Australia Ltd. v. Commissioner of Taxation* (29 May 1992, unreported), cited in *Tetra Pak Marketing Pty. Ltd*, 22; *Compare with Dorajay Pty. Ltd. v. Aristocrat Leisure Ltd.* (2007) FCA. 1502, 7, where the FCA did not allow remote evidence because it was 'not satisfied that justice would be served'. *See also* e.g. *Hanson-Young v. Leyonhjelm* (No. 3) (2019) FCA. 645, 2.
3) *Id., Tetra Pak Marketing Pty Ltd v. Musashi Pty Ltd* (2000) FCA 1261 at 25; *see also Versace v. Monte* (2001) FCA 1454, 16, where the Court held that ('a substantial case needs to be made out to warrant the Court declining to make an order for evidence to be taken by video link, especially where evidence is adduced from various witnesses'); *McDonald v. Commissioner of Taxation* (2000) FCA 577; *Campaign Master (UK) Ltd. v. Forty Two International Pty. Ltd. (No. 3)* (2009) FCA 1306, 77; *Odhiambo v. Minister for Immigration & Multicultural Affairs* (2002) 122 FCR. 29, 97.
4) *Sunstate Airlines (Qld) Pty Ltd v. First Chicago Australia Securities Ltd* (Giles, C.J., Comm. D., 11 Mar. 1997, unreported),at 4; *see also Australian Competition & Consumer Commission v. World Netsafe Pty Ltd* (2001) 53 NSWLR 1, at 7; *Australian Competition & Consumer Commission v. StoresOnline Int'l Inc.* (2009) F.C.A. 717, 14; *Stuke v. ROST Capital Group Pty. Ltd.* (2012) F.C.A. 1097, at 23 (Federal Court of Australia); *Kirby v. Centro Properties Ltd.* (2012) F.C.A. 60, at 11; *Australian Securities & Investments Commission v. Rich* (2004) N.S.W.S. C. 467, at 43; Similarly, *see Australian Medical Imaging Pty. Ltd. v. Marconi Medical Systems Australia Pty. Ltd.* (2001) 53 N.S.W.L.R. 1, at 27.
5) 'N/A' as reflected in this table is meant to convey that the author has not yet located specific decisions on point in the respective jurisdictions. The author is treating this table as 'work in progress' and will continue to update it as additional jurisprudence becomes available.
6) *Capic v. Ford Motor Company of Australia Limited* (Adjournment) (2020) FCA 486, at 23; *see also ASIC v. GetSwift Limited* (2020) FCA 504. Conversely, *see Motorola Solutions Inc v. Hytera Communications Corporation Ltd* (Adjournment) (2020) FCA 539, where the FCA granted the adjournment to the hearing because cross-examining seven Chinese witnesses was, among other things, contrary to Chinese law, at 2, 18; *McDougall v. Nominal Defendant* [2020] NSWDC 194, where all parties applied to vacate the hearing. The Court dismissed the adjournment application, stating that 'it should give effect to the imperative to facilitate the continuation of the economy and essential services of the government including the administration of justice'; *see also Ozemac Pty Ltd v. Jackanic* (2020) VCC 790.

7) *JKC Australia LNG Pty td v. CH2M Hill Companies Ltd* (2020) WASCA 38, at 8: the Court's arrangements in 'the extraordinary circumstances presented by the COVID-19 pandemic constituted a 'necessary and proportionate alteration to the normal practice and procedure of the court consistent with the due administration of justice.' Where Respondent's submissions accepted, the result of indeterminate deferral would 'be antithetical to the due administration of justice'. But court noted the hearing was on discrete questions of law with agreed facts and document bundles.
8) *David Quince v. Annabelle Quince and Anor* (2020) NSWSC 326.
9) *R v. Macdonald; R v. Edward Obeid; R v. Moses Obeid (No 11)* [2020] NSWSC 382, at 4-5.
10) *Id.*, at 16.
11) *Id*, at 29-31. *See also Haiye Developments Pty Ltd v. The Commercial Business Centre Pty Ltd* [2020] NSWSC 732 (Haiye).
12) Conyers, *BVI Commercial Court Holding Virtual Hearings Amidst Covid-19 Pandemic*, https://www.conyers.com/wp-content/uploads/2020/03/2020-03-BVI-Alert-Coronavirus-BVI-Commercial-Cour... (accessed March 2020).
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14) Chen Zhi, *The Path for Online Arbitration: A Perspective on Guangzhou Arbitration Commission's Practice*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/03/04/the-path-for-online-arbitration-a-perspectiv... (accessed 4 Mar. 2019).
15) *See* e.g. The Supreme People's Court of the People's Republic of China, *SPC's Online Trial Platform Allows Witnesses to Testify Remotely*, http://english.court.gov.cn/2020-04/27/content_37535474.htm (accessed 27 Apr. 2020). *See also* The Supreme People's Court of the People's Republic of China, *SPC's Circuit Court Hears Civil Cases on Online Mobile Platform*, http://english.court.gov.cn/2020-03/23/content_37534632.htm (accessed 23 Mar. 2020).
16) The Supreme People's Court of the Republic of China, *China Steps Up Online Litigation Services Amid Coronavirus Epidemic*, http://english.court.gov.cn/2020-03/31/content_37534820.htm (accessed 31 Mar. 2020).
17) Law Society, *Virtual Courts*, https://www.lawsociety.org.uk/support-services/advice/practice-notes/virtual-courts/ (accessed 27 Mar. 2020).
18) Judiciary of England and Wales, *Business and Property Courts of England and Wales – Protocol Regarding Remote Hearings*, https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplica... (accessed 26 Mar. 2020). *See also* the Lord Chief Justice to judges in the Civil and Family Courts, who issued a statement on 19 Mar. 2020, concluding that: 'The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. [...] [t]he default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely. That will not always be possible. Sensible precautions should be taken when people attend a hearing. They are now well-known. We all take them when out of the home. There will be bumps along the road as we all get used to new ways of working forced on us the biggest public health emergency the world has faced for a century.'
19) *Jiangsu Guoxin Corporation Ltd v. Precious Shipping Public Co Ltd* (2020) EWHC 1030 (Comm), at 16.
20) *Polansaki v. Conde Nast Publications Ltd* (2005) All E.R. (D.) 139, at 14.
21) *Jivraj v. Hashwani* (2011) UKSC 40.
22) *Brandeis (Brokers) Ltd v. Black* (2001) 2 All ER 980 (Comm), at 56. *See also R C Pillar & Sons v. Edwards and Another* (2001) All E.R. (D) 232, where the English courts considered that the fact that an arbitrator failed to carry out his duty to adopt the proceedings in an expeditious manner was sufficient to annul an award.
23) *Blackfriars Ltd. Re* (2020) EWHC 845 (Ch), at 33, quoting *National Bank of Kazakhstan and Others v. Bank of New York Mellon and Others. See also Heineken Supply Chain BV v. Anheuser-Busch Inbev SA* (2020) EWHC 892 (Pat).
24) *O'Donoghue v. Enter. Inns plc* (2008) EWHC B15 (Ch); *see also McGlinn v. Waltham Contractors Ltd and others (No 2)* (2006) EWHC 2322, at 11, where the Court concluded that in any case, judges can take into account any deficiencies arising from the use of video link when deciding on the weight to be assigned to witness evidence.
25) *Blackfriars Ltd. Re* (2020) EWHC 845 (Ch).
26) *Municipio de Mariana & Others v. BHP Group PLC* (2020) EWHC 928 TCC, at 16. Conversely *see Heineken Supply Chain BV v. Anheuser-Busch Inbev SA* (Rev 1) (2020) EWHC 892 (Pat), where the Court adjourned the hearing for a reasonable time (two weeks), at 29.

27) The Court provided the following principles to be considered when deciding whether or not a hearing should be held remotely: (i) importance to the continued administration of justice, (ii) recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings; (iii) preparedness of the courts to hold remote hearings, (iv) rigorous examination of the possibility of a remote hearing, and the ways in which such hearings could be achieved consistent with justice; (iv) whether disputes can be resolved fairly by way of a remote hearing, as this would be fact specific. The Court allowed an adjournment until July 2020, and noted that there may be a possibility of conducting a remote hearing. *See also Re Smith Technologies* (unreported 26 Mar. 2020), where ICC Judge Jones noted the approach taken by Teare J in *National Bank of Kazakhstan v. Bank of New York Mellon*; *see also Re C (Children) (Covid-19: Representation)* (2020) EWCA Civ, where the Court of Appeal confirmed that holding a hybrid hearing in light of Covid, would be fair, even though one party's counsel would have to attend remotely.

28) *See* Articles 13, 19 and 20 of the Law No. 146 of 2019 Amending the Law Establishing the Economic Courts No. 120 of 2008.

29) *See* e.g. Jacques Fineschi (President of the Tribunal of Commerce of Nanterre), *Le Fonctionnement du Tribunal de Commerce de Nanterre en Période de Coronavirus*', D. 2020.872: The tribunal has used Zoom as videoconferencing platform; Douai Court of Appeal, 28 Apr. 2020, n° 20/0064.

30) The criminal division of the *Cour de Cassation* has also confirmed on numerous occasions the validity of such remote hearings (*see* e.g. Cass. Crim. 16 Oct. 2018, n° 18-84.430; Cass. Crim, 10 Dec. 2019, n° 19-86.138).

31) The Council had already ruled to this effect in Cons. Const. 21 Mar. 2019, n° 2019-778 DC and reconfirmed it in Cons. Const. 30 Apr. 2020, n° 2020-836 QPC.

32) *See* e.g. Legal Tribune Online, *Was Gerichte gegen Corona tun können*, https://www.lto.de/recht/hintergruende/h/coronavirus-gerichtsverhandlungen-atemschutzmasken-termin-v... (accessed 11 Mar. 2020), JUVE – Newsline, *Verhandlungen per Video: 'Die Krise beschleunigt die Digitalisierung der Justiz'*,https://www.juve.de/nachrichten/namenundnachrichten/2020/03/verhandlungen-per-video-die-krise-beschl... (accessed 31 Mar. 2020).

33) UNCITRAL, *UNCITRAL: 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012)*, https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (accessed 27 Mar. 2020), 98.

34) *See* Spohnheimer, Gestaltungsfreiheit bei antezipiertem Legalanerkenntnis des Schiedsspruchs, 2010, 308 et seq.

35) *See* Münch in: Münchner Kommentar zur ZPO, 2017, §1047, at 8 et seq.

36) *See* Musielak/Voit, ZPO, 2019, §1047, at 2.

37) Legislative Council Panel on Administration of Justice and Legal Services, Development of an Online Dispute Resolution and Deal Making Platform by Non-governmental Organisation, https://www.doj.gov.hk/pdf/ajls20190325e1.pdf (accessed 27 Mar. 2020).

38) *CSFK v. HWH* (2020) HKCA 207, at 7.

39) *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* (2012) 4 HKLRD 1, at 68, 95, 96, and 105.

40) *Id.*, at 105.

41) *Re Chow Kam Fai, ex parte Rambas Marketing Co. LLC* (2004) 1 H.K.L.R.D. 161 at 16; *see also Sun Legend Investments Ltd. v. Ho Yuk Wah* (2008) 4 H.K.L.R.D. 239, at 6.

42) *Cyberworks Audio Video Technology Ltd v. Mei Ah (HK) Co Ltd* [2020] HKCFI 347, at 40.

43) D. Mahapatra, *Court Without Lawyers Today: Virus Sends SC on Virtual Path*, The Times of India, https://timesofindia.indiatimes.com/india/court-without-lawyers-today-virus-sends-sc-on-virtual-path... (accessed 23 Mar. 2020).

44) *See Williams v. Stephenson HC Palmerston North* CP18/97, 20 Aug. 1999.

45) *Methanex Motunui Ltd v. Spellman* (2004) NZLR 454 (CA), 141.

46) Library of Congress, *New Zealand: Court of Appeal and Supreme Court Issue Protocol for Remote Hearings During COVID-19 Restrictions*, https://www.loc.gov/law/foreign-news/article/new-zealand-court-of-appeal-and-supreme-court-issue-pro... (accessed 28 Apr. 2020).

47) *See Kyburn Investments Limited v. Beca Corporate Holdings Limited* [2015] NZSC 150, at 4: ('breach of natural justice, even where serious, does not itself require an award to be set-aside').

48) *Id.*, at 5.

49) Chiann Bao, *International Arbitration in Asia on the Rise: Cause & Effect*, 4 Arb. Brief 31 (2014), fn 6.

50) *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and another* (2020) SGCA 12, ¶104, *See also: Anwar Siraj v. Ting Kang Chung* (2003) SGHC 64, at 41-42, *Triulzi Cesare SRL v. XinyiGroup (Glass) Co Ltd* (2014) SGHC 220, at 151 (Singapore High Court 2014) citing *Holtzmann and Neuhaus,*, at 551, *Dongwoo Mann & Hummel Co. Ltd v. Mann & Hummel GmbH* (2008) 3 SLR 871, at 87.

51) *Anwar Siraj v. Ting Kang Chung* (2003) SGHC 64, at 41.

52) UNCITRAL, *supra*n. 33, at 99 (emphasis added).

53) *Dongwoo Mann & Hummel Co. Ltd v. Mann & Hummel GmbH*, *supra*n. 50.

54) *Sandz Solutions (Singapore) Pte Ltd and others v. Strategic Worldwide Assets Ltd and others* (2014) 3 SLR 562, at 42. *See also Asia-Pac Infrastructure Development Ltd v. Ing Yim Leung Alexander and others* (2011) 1 HKLRD 587, at 62, and *Bachmeer Capital Ltd v. Ong Chih Chijng* (2018) SGHC(I.) 01 Suit No. 2 of 2017, 18, and *Sonica Industries Ltd v. Fu Yu Manufacturing Ltd* (1999) 3 SLR (R) 119.

55) *See also Bachmeer Capital Ltd v. Ong Chih Chung and others* (2018) 4 SLR 29. Here, Vivian Ramsey IJ refused to grant leave to a witness who wanted to testify remotely to avoid: (i) the inconvenience of traveling to Singapore, and (ii) to save time and costs (*see* 16 and 19). *See also Moorview Developments Ltd v. First Active plc* (2009) 2 I.R 788, at 70-71.

56) *Anil Singh Gurm v. J S Yeh & Co* (2020) SGCA 05, at 76.

57) Stefan Lindskog, *Commentary on the Swedish Arbitration Act* (unofficial English translation): 'A video conference can, in certain situations, streamline arbitration. However, a hearing held by such a conference is not to be regarded as oral within the meaning of paragraph 1 (2). Therefore, if a party requests oral hearing under that provision, he does not have to settle for a video conference. – An oral hearing can in principle be considered to be present only if all arbitrators are present. Regarding the case that an arbitrator has been replaced, *see* 4.1.1 above. What is said is not to understand that all arbitrators necessarily have to be present in preparation. If this is only to clarify the positions of the parties, then there should be no obstacle to the arbitrators agreeing that the chairman alone is responsible for the preparation. However, if the preparation is expected to go beyond this, the consent of the parties should be required for an oral preparation to be delegated to the chairman alone.'

58) Cf. Court of Arbitration for Sport, *COVID-19 – The Court of Arbitration for Sport – Emergency Guidelines – Valid from 16 March 2020*, https://www.tas-cas.org/fileadmin/user_upload/CAS_Guidelines_COVID-19_15.05.20.pdf (accessed 12 Sept. 2020).

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63) BGE 117 II 438; Oetiker, *supra*n. 62, Article 182 PILA N 32.

64) Joachim Knoll, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 182 [Procedure: principle]*, in Manuel Arroyo (*ed*), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2nd ed 2018), 133 – 156, at 143.

65) Oetiker, *supra*n. 62, Article 182 PILA N 36.

66) Knoll, *supra*n. 64, at 142.

67) *Edok SA and Others v. Hydromechaniki Sàrl and Eupalinaos SA*, 10 May 1982, ATF/BGE108 Ia 197, at 201.

68) A U.S. district court rejected an attempt to resist enforcement of an award where a party and witness was unable to attend the hearing in person but had the opportunity to request an oral hearing via video or teleconference under the applicable rules. *Research & Dev. Ctr. 'Teploenergetika,' LLC v. EP Int'l, LLC*, 182 F. Supp. 3d 556, 566 (E.D. Va. 2016) ('When a party asserts that its physical presence at arbitration is prevented, it is generally unable to prevail on such a defense if there are available alternative means of presenting its case'). *See also Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997) (holding that Article V(1)(b) of the New York Convention 'basically corresponds to the due process defense that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner'). A U.S. Court of Appeals also confirmed an award over objections that the award-debtor's ultimate owner had been prevented from participating in the arbitration proceedings for fear of arrest upon entering the country where the proceedings were held. The Court ruled that the award-debtor could have been represented by counsel or a corporate representative and that the owner 'himself could have participated by telephone'. *Rive v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003); *Anil Sawant v. Geoffrey Ramsey*, Civil Action No. 3:07–cv–980 (VLB) (D. Conn. 8 May 2012, p. 5-9; *see also Dynasteel Corp. v. Durr Systems, Inc.*, 2009 WL 10664458, at *1-2 (W.D. Tenn. 26 Jun. 2009); *United States v. Philip Morris Inc.*, No. Civ.A. 99–2496 (GK) (D.D.C. 2004).

69) *Rive v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003).

70) *See also Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997) (holding that Article V(1)(b) of the New York Convention 'basically corresponds to the due process defense that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner').

71) *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001); *see also D.E.I., Inc. v. Ohio & Vicinity Reg'l Council of Carpenters*, 155 F. App'x 164, 170 (6th Cir. 2005) ('Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing').

72) *See also Andrea Doreen, Ltd. v. Bldg. Material Local Union 282*, 250 F. Supp. 2d 107, 111 (E.D.N.Y. 2003) ('Designated to sit as a visiting judge in the Eastern District of New York, this Court has handled 38 jury waived matters via the video conferencing facilities of that court and the District of Massachusetts. Among these are four trials held, in whole or in part, via video conferencing. This efficient and just procedure is also followed in the District of Arizona (20 cases), the Middle District of Florida (13 cases), and the District of Maryland (1 case)' (citations omitted)); Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeals*, Federal Judicial Center, at 2006 ('Five [federal] courts of appeals have established programs by which oral arguments are heard via videoconferencing. In those courts, the attorneys generally appear remotely while the judges convene in a courtroom; occasionally, however, attorneys may appear in court with fewer than three judges, with the remaining judge or judges appearing remotely').