The Right to an 'In-person' Hearing in International Arbitration

Peter Ashford FCIArb*

*Le mieux est l'ennemi du bien***

The pandemic saw a considerable increase in the use of virtual hearings. Whilst telephone or video conference procedural conferences had been commonplace in international arbitration, full virtual evidentiary hearings had not been. The pandemic changed that and virtual/remote evidentiary hearings became commonplace and kept the wheels of justice turning. This article considers whether there is a right to insist on a virtual hearing and conversely whether there is a right to an in-person hearing. The broad consensus is that save in exceptional or unusual circumstances, there is no right to an in-person hearing. Virtual hearings work perfectly well and will generally observe due process. Virtual hearings are good enough and are here to stay in at least some arbitrations.

Keywords: Virtual, In-Person, Due Process, Consent, Hybrid, Equality

1 INTRODUCTION

The Coronavirus disease 2019 (COVID-19) pandemic has not been all bad[1] – it has driven innovation through the promotion of virtual hearings; reduced costs (by reducing travel); freed up diaries by taking out travel, acclimatisation time, and conferences; and made us all better at working without paper. If the long-term result is to have a greener planet and a cheaper and more efficient arbitration world – we have something to be thankful for.

The pandemic has made us face novel issues in very many aspects of our lives. International arbitration is no exception. Parties, counsel and tribunals have had to

* Partner and co-head of the International Arbitration Group at Fox Williams LLP in London. This article was drafted and produced for the 3rd Fox Williams/CIArb Panel Debate on the legal issues in the 28th Vis Moot problem. Email: pashford@foxwilliams.com.

** Commonly attributed to Voltaire, who quoted an Italian proverb in his *Dictionnaire philosophique* in 1770: '*Il meglio è l'inimico del bene*'. See also Robert Watson-Watt, who developed early warning radar in Britain to counter the rapid growth of the Luftwaffe, propounded a 'cult of the imperfect', which he stated as 'Give them the third best to go on with; the second best comes too late, the best never comes'.

1 That, of course, is not to trivialise the huge impact of the pandemic. My thoughts are with those who have lost a loved one and with those who have been ill or otherwise affected by the pandemic.

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adapt to the new reality of conducting international arbitration proceedings in the face of travel restrictions and social distancing measures. One particular issue is whether hearings that cannot be held in-person can and should be heard remotely.

Many steps in the process of an international arbitration are done remotely nowadays. This is true for all communications including filing the Request (which are done electronically/online), as well as constituting the tribunal; all filings, submissions or briefs are electronic (perhaps also with a paper copy) and all or many of the procedural steps are undertaken by telephone or video conference. The essential issue is whether a party (or the parties) can insist upon a hearing on the merits to be in-person. There is no doubt that there have been very many successful virtual merits hearings, and parties, counsel and tribunals have rapidly assimilated the technology and introduced protocols to ensure efficiency and due process: necessity truly has been the mother of invention (or perhaps more strictly, innovation).

A virtual hearing is a hearing conducted by means of communication technology to simultaneously connect participants from two or more physical locations. This includes the now ubiquitous Zoom[2] call, allowing multiple locations to interact simultaneously by both video and audio transmission. As mentioned above, the concept of remote or virtual hearings ('virtual hearings') is not a new phenomenon in international arbitration. Not only in pre-pandemic times were most case management conferences and some procedural hearings conducted virtually, so were merits hearings in certain cases. For instance, virtual hearings are often used in expedited and emergency arbitrator proceedings. Indeed, ICSID announced that the majority of its hearings in 2019 were held by videoconference.[3]

Moreover, it was not uncommon for certain witnesses or experts to give their evidence virtually and by video-link. Similarly, some aspects of a merits hearing might be in-person and others virtual. For example, (some, or all, of the) evidence might be in-person and closing oral submissions might be virtual.

2 THE LEGAL/RULES FRAMEWORK

The permissibility of a virtual hearing depends on the applicable legal and contractual framework, in particular the law of the seat of the arbitration and the agreement to arbitrate (including any arbitration rules incorporated).

So far as I am aware, no national law or institutional rules expressly impose or prohibit virtual hearings. Rather, to the extent that laws or institutional rules contain specific provisions on virtual hearings, they do so in permissive terms.

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2 Other platforms are, of course, available.

3 ICSID, A Brief Guide to Online Hearings at ICSID (24 Mar. 2020), https://icsibidworldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid.

For example, Article 1072b(4) of the Dutch Civil Procedure Code provides that *'[i]nstead of 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, … '*

Most 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*'[4] and '*decide all procedural and evidential matters*'[5] or '*determine [the procedure] to the extent necessary, either directly or by reference to a statute or to rules of arbitration*'.[6]

Similarly, Article 19.2 of the London Court of International Arbitration (LCIA) Rules 2020 provides: *'[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)*'.[7,8]

Some other rules contemplate specific aspects of virtual hearings being conducted virtually, for example, Article 28(2) of the SCC Rules provides: '*The case management conference may be conducted in person or by any other means*'. There is no similar provision in Article 32 regarding hearings.[9] This gives the potential for the argument that virtual hearings are not permitted (absent agreement), except in those situations specifically provided for. That would be answered by the wide discretion afforded to tribunals to manage and organise proceedings efficiently and in their discretion.

3 A RIGHT TO A HEARING

A party's right to a hearing is a fundamental right. Indeed, many national laws and institutional rules contain provisions to that effect, specifying either that a party may request a hearing,[10] or that the arbitration cannot be conducted on a documents-

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4 UNCITRAL Model Law, Art. 19(2).

5 English Arbitration Act. § 34(1).

6 Swiss Private International Law Act, Art. 182(2).

7 Interestingly, this is the same language as in the 2014 Rules.

8 Article 24.4 of the ICC Rules 2021 provides '*Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted*'. And Art. 26.1 provides '*The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*'. As to hearings, this was a change from the previous 2017 ICC Rules which provided: '*When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it*'.

9 *See also* e.g., Art. 28(4) of the UNCITRAL Arbitration Rules provides that witnesses and experts may be heard remotely, but contains no similar provision for other aspects of hearings, such as submissions.

10 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).

only basis absent consent.[11] Other national laws and institutional arbitration rules leave the question of whether to hold a hearing to the discretion of the tribunal.[12]

The substantive question is then whether this fundamental right necessarily means a physical in-person hearing. What distinguishes a hearing is that it involves the simultaneous exchange of argument and (usually) evidence. It can be seen that a 'documents-only' arbitration is thus the antithesis of a hearing: it is neither oral nor simultaneous (it is usually sequential).

However it is convened, a virtual hearing meets those distinguishing features. Evidence is adduced and arguments are made orally during in-person hearings, as well as in virtual hearings, albeit that virtual hearings use technology to transmit the audio (and video) to other participants. In both in-person and virtual hearings, the exchange of evidence and arguments is simultaneous in the sense that it is live and demands (or at least permits) an immediate response (whether by cross-examination or counter-argument).

The evolution in hearing parties in-person is illustrated by the changes in the ICC Rules. The 2017 Rules at Article 25(2) provided: '[*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 have been read as prohibiting anything but an in-person hearing.[13] The 2021 Rules have a different Article 25(2): '*The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned*'. The reference to in-person has been removed although it would have been open, it is suggested, to construe the 2017 Rules as permitting a virtual hearing however it was convened.

4 THE PARTIES' UNANIMOUS CONSENT, ONE PARTY CONSENT AND ONE PARTY OPPOSE AND BOTH PARTIES OPPOSE

If the parties agree to a virtual hearing, or conversely agree to adjourn until an in-person hearing can take place, a tribunal will generally follow the parties' agreement albeit that they may wish to discuss with the parties to be sure that upholding party autonomy is really what is desired, for example, if it moved a hearing into a period when the tribunal were unable to hold a hearing for a considerable period (e.g.,

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11 *See* e.g., ICC Rules, Art. 25(6); SIAC Rules, Art. 24.1.

12 *See* e.g., English Arbitration Act, §§ 34(1) & (2); HKIAC Rules, Art. 22.4; Indian Arbitration Act, § 24(1).

13 Note, however, that other linguistic versions of the 2017 ICC Rules did not contain the '*in person*' language; rather, they simply required that parties should be heard orally and allowed an adversarial exchange of arguments.

scheduled medical treatment of a tribunal member). A long delay may also conflict with the Tribunal's duty of an expeditious award.

A tribunal might be reluctant in the face of party agreement for a virtual hearing due to unfamiliarity with online platforms: there is a short answer to that – invite the tribunal to resign in favour of a tribunal who is familiar and who can and will hold a virtual hearing.[14] It is not acceptable for technophobia to impede or override the parties' consent. More legitimate concerns might be raised over the enforceability of an award (it being the tribunal's duty to render an enforceable award). Again, if those are discussed with the parties and they still wish to proceed, a tribunal should do so (no doubt recording that it was raised and discussed, and that the parties remained agreed).

More difficult issues arise if the parties are not agreed. This will involve the consideration of whether the power exists, at law or by reason of the arbitration agreement (incorporating any institutional rules), to order a virtual hearing; the considerations that weigh in the exercise of the power and how the facts fit to those considerations.

5 DUE PROCESS

This exercise of any power will likely come down to potentially competing interests of the parties' right to be heard and treated equally, (enshrined in many national laws and institutional rules) and the tribunal's obligation to conduct the proceedings in an efficient and expeditious way.

As a preliminary comment, absent some very specific agreement for in-person hearings, it must be very questionable whether a Court would be sympathetic to a due process argument that an in-person hearing was mandated. In the course of the pandemic, many national courts had to innovate and move (further) towards virtual hearings. If national courts therefore consider virtual hearings as sufficient guarantees for procedural rights in a national context, it will be difficult for the same courts to hold that virtual hearings in international arbitration violate the parties' right to be heard.

One difference might well be that Courts operate on a system of open justice and whilst who can, and who cannot, attend virtual Court hearings remains important, there is a difference with the inherently confidential and private nature of arbitration. If a party could raise legitimate concerns over whether a virtual arbitral hearing was sufficiently cyber secure, it may be sufficient to justify a differential with a Court process.

[14] Efficiency would dictate that this should be resolved at an early stage, perhaps at the first procedural conference.

The power to order a virtual hearing is likely to be a question of law or institutional rules, as discussed above. Assuming that the tribunal finds that it has such power, it must determine the relevant test it should apply to exercise this power, and in particular the factors it should take into account which will be peculiarly fact sensitive. As above, tribunals will typically have the power of ordering a virtual hearing over the opposition of one party, but the exercise of that power will require a careful consideration of the facts.

One of the first questions to be addressed is whether there is a burden of proof and, if so, on which party it rests. Is it for the party applying for a virtual hearing to show why it is needed or is it for the party resisting a virtual hearing to establish why it would be inappropriate in the circumstances? Some guidance might be obtained from national courts.[15] It seems very plausible that tribunals might well follow local court practice. Whilst there is a particular focus now due to the pandemic, there will be good reason to consider this issue into the post-pandemic future. It may be that certain participants have difficulty in, or resistance to, travelling due to a variety of reasons including other commitments, medical or visa issues, or to reduce the carbon footprint.

In general terms, due process[16] can be broken down into four elements or principles: (i) a party must be given notice of the case against it; (ii) the party has an opportunity to present its case and respond to the case put against it; (iii) before an impartial and independent tribunal; (iv) that treats all parties with equality. Put another way, due process is the procedural cornerstone of the 'rule of law'. Due process means that persons are not to be deprived of their property or other rights, without the fair opportunity to defend themselves before neutral judges. Due process or 'natural justice' serves as the shield of fundamental *procedural* rights before deprivation of *substantive* rights.

It is embodied for arbitration purposes in Article 18 of the UNCITRAL Model Law:

> *The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*

Similarly, section 33(1)(a) of the English Arbitration Act:

> *The tribunal shall 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.*

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15 *See* e.g., *Surrey Heath Borough Council v Robb & Ors* [2020] EWHC 1650 (QB) where Freedman J said, 'the onus is on a party to draw attention to a requirement to have a hearing in Court and to provide reasons why it would not be just for the hearing to take place remotely' at [5].

16 It is interesting to *see* the change in phraseology over time. Generally, expressions protecting due process are become more specific. This has not been with a view to limiting protections but rather at preventing abuses. A full discussion is outside the scope of this paper.

The likely issues in challenging a virtual hearing or demanding an in-person hearing are (ii) and (iv).

5.1 Presenting its Case and Responding

Tribunals are usually bestowed with a very wide discretion as to the form of any hearing. This breadth of discretion indicates that there is no absolute right to a physical hearing, although there may be limited circumstances in which procedural fairness would require one. Specifically, an arbitral tribunal's power to decide on procedural and evidential matters under the English Arbitration Act 1996 is subject to a duty to give each party a reasonable opportunity of putting its case and dealing with that of its opponent,[17] and to 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.[18] The arbitral tribunal must therefore comply with these due process duties when considering whether a hearing should proceed on a fully or partially virtual basis.[19]

In most cases a party will be able to put its own case or deal with that of its opponent adequately or reasonably virtually, given the accumulated knowledge that it is possible to conduct arbitration proceedings (including key aspects such as making oral submissions, cross-examination of witnesses, tribunal deliberations, party and counsel communications etc) on a virtual basis. Inevitably, there will be (rare) cases on the other side of the line. These will include cases where a robust internet connection cannot be guaranteed or where an inspection is necessary.

It is important that proceedings be conducted as close as possible to the norm, but departures from the norm are justified where the broader interests of justice and the efficient conduct of proceedings require.[20]

5.2 Equality

The requirement for procedural equality permeates all phases of the arbitral proceeding, setting limits on both the tribunal's and the parties' conduct. The universality of the equal treatment principle makes it impossible to exhaustively list the various

[17] §33(1)(a).
[18] §33(1)(b).
[19] §33(2).
[20] *See* e.g., *Neurim Pharmaceuticals (1991) Ltd and another v. Generics UK Ltd* [2020] EWHC 3270 (Pat) at [18].

scenarios in which it might arise throughout the arbitral process. Indeed, the enduring quality of procedural fairness is perhaps its ability to defy mechanistic application and adapt to the demands of a case.[21] For instance, where one case might necessitate a strict division of hearing time between the parties,[22] another might warrant a more nuanced approach to account for differences between the parties in the number of witnesses and experts to be cross-examined, the number of parties (e.g., one claimant and multiple respondents), or the burden of proof.

Equality in the virtual hearing focusses on the same treatment for everyone. It is unlikely to be one party (and its witnesses) attending in-person with the tribunal and the other (and its witnesses) virtually. Similarly, the same platform and the same protections to ensure that the witnesses are giving uninfluenced evidence, should apply.

The tribunal should likewise be either all virtual or all in-person together (even if the parties, counsel and/or witnesses are virtual). It is unlikely to be desirable to have two tribunal members together in-person and another virtual.[23]

If one party is affected by technological issues, but not the other, this may infringe equality. In *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd*,[24] the Australian court found no breach even though serious issues occurred during one party's witness evidence. Sino Dragon sought an order from the Federal Court of Australia setting aside the Final Award asserting that, inter alia, technical and translation issues during the arbitration process gave rise to a lack of procedural fairness and lack of equality of treatment. In short, that the evidence of two key witnesses called by Sino Dragon in the arbitration via videoconference was 'beset by technical difficulties', such that the evidence could not be properly

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[21] *See* e.g., *Schweiker v. McClure* (1982) 456 US 188, 200 ('due process is flexible and calls for such procedural protections as the particular situation demands').

[22] *See Gold Reserve Inc v. Venezuela* No. CV 14–2014 (JEB). Venezuela defended a New York Convention action to enforce an ICSID Additional Facility award against it, in part on the ground that it had been 'unable to present its case' because the division of hearing time had been unequal. Venezuela itself had requested a condensed hearing, following the unfortunate death of its Attorney General, and it chose not to examine the claimant's witnesses. The claimant did use its hearing time to examine Venezuela's witnesses. The US District Court rejected Venezuela's due process defence, stating: *'It is not enough that Venezuela provides evidence of unequal time; it must show … how the denial of extra time prevented it from presenting its case'*.

[23] Especially, if it was the Chair and one party appointee, it might be that the parties would be more comfortable with the two party appointees being present together. I have had a situation of one tribunal member (a party appointee) physically present with counsel for both parties and the other two tribunal members attending virtually from different locations. That appeared to work well.

[24] [2016] FCA 1131. *Sino Dragon* is a significant case (not least as it was pre-pandemic) as most conceivable issues were raised and addressed by the Court.

presented. Sino Dragon submitted that the technical faults coupled with issues of mistranslation rendered it unable to present its case, amounting to a breach of natural justice, which it contended was contrary to Australian public policy. As part of its contention, Sino Dragon submitted that it was not 'treated with equality' and not given a 'full opportunity of presenting' its case within the meaning of Article 18 of the Model Law. The Court perceived numerous opportunities to avoid the difficulties with the evidence in question, including by having the relevant witnesses travel to Australia. The Court took into account that the platform used for the evidence of Sino Dragon's witnesses was that chosen by Sino Dragon. There was no explanation as to why Sino Dragon did not make video-link arrangements through a recognized and experienced provider. Of particular significance was the fact that no efforts were made to change the system used for the second day, given the difficulties experienced on the first day. The Court was also unimpressed by the fact that Sino Dragon did not raise the relevant technical difficulties until after the Final Award was handed down. Moreover, Sino Dragon's own counsel submitted that, notwithstanding the technical difficulties, the evidence of the witnesses had come out '*clearly and consistently with their evidence in chief*'. The Court considered it was entitled to infer from the absence of complaint during the arbitral proceedings that those '*charged with running the case for Sino Dragon did not perceive any lack of reasonable opportunity*'. Finally, the Court held that Article 18 and the review powers under Article 34 of the UNCITRAL Model Law do not apply to unfairness caused by a party's own conduct, including forensic or strategic decisions. The Court found that Sino Dragon was '*largely […] the author of its own misfortune*'.

A hybrid hearing is an alternative to an in-person hearing and parties and tribunals should consider whether it is possible to find a solution to any particular difficulty that has been identified with a virtual hearing. An example would be where counsel attend in-person, but a witness, who is self-isolating, gives evidence virtually. It may be appropriate for oral evidence to be given in person and closing arguments to be delivered virtually.[25]

Thus, if the issues are significant and affect one side more than the other, the conditions under which the parties present their case may not be equal. 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 during their testimony. The other party might argue that this distorted the conditions under which testimony is heard.

[25] *See* e.g., *Martin v. Kogan* [2021] EWHC 24 (Ch) at [20].

These issues are best avoided by following clear protocols,[26] 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. However, these protocols require the parties to agree on issues that they may find difficult to do in the first instance; the level of technology expertise required to be able to know what a 'good' internet speed is in numeric terms, or what audio coding standards are, will take some time for parties to understand and constructively negotiate. In any event, the tribunals would be well-advised at the end of any virtual 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-virtual hearings, in which one side (or its witnesses and experts) participates virtually, 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*'.[27]

Thus, 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 all parties (as well as their counsel, witnesses and experts) participate remotely, their right to be treated equally typically is not violated, absent very specific circumstances.

5.3 Considerations

The likely considerations in the exercise of any power for a virtual hearing are likely to include: (a) the reason(s) (i.e., whether any difficulty was always known); (b) the anticipated content (i.e., submission/argument or evidence and the nature of the evidence); (c) any technical issues; and (d) the timing and costs comparisons.

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[26] *See* e.g., CIArb Guidance Note on Remote Dispute Resolution Proceedings, https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf?mc_cid=cad9adebdf&mc_eid=f90f77d952; the Seoul Protocol on Video Conference in International Arbitration, http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024; and as well as The International Council for Commercial Arbitration, New York City Bar Association and International Institute for Conflict Prevention & Resolution Working Group's. 2020 Cybersecurity Protocol for International Arbitration, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.

[27] §1.6 CIArb Guidance Note on Remote Dispute Resolution Proceedings.

5.4 Reasons

The pandemic reasons of travel restrictions and social distancing measures are well known, but if a future reason is that one or more witnesses face visa issues, it may well be relevant to know e.g., when the issue arose and what has been done about it since.

5.5 Content

The typical reason is that cross-examination cannot be properly conducted remotely and all the more so where there are serious allegations of fraud (or similar) and so assessment of the witness's credibility is paramount. Video has many advantages over telephone and it is only if the internet link is so poor or temperamental that it cannot be relied upon that 'phone is likely to be chosen. Certainly, where there is disputed evidence being tested by cross-examination, video is almost inevitably going to be required, as demeanour is an important aspect of the assessment of witness and expert evidence. In *Polanski v. Condé Nast Publications Limited*[28] the House of Lords held that cross-examining a witness by video link does not, in and of itself, prejudice the party conducting the cross-examination.[29]

5.6 Technical

There may be technical issues preventing one or more parties from participating effectively, e.g., reliable internet connections. That may not necessitate travel to the seat (or other venue) rather it may entail travel to a convenient city, country or arbitration hearing rooms that are close to the party.

5.7 Timing and costs Comparisons

Generally, a virtual hearing will be cheaper than an in-person hearing but each case will depend on its facts. Virtual hearings may involve a large technical support cost, shorter sitting days (and hence a longer hearing)[30] whereas if the parties have

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[28] [2005] UKHL 10, at 43. And *see McGlinn v. Waltham Contractors Ltd & ors* [2006] EWHC 2322 (TCC), at 11.

[29] Although perhaps dated by the language of the time, and verging on the hyperbolic, Wigmore said the following about cross-examination being '*beyond any doubt the greatest legal engine ever invented for the discovery of the truth*' (Wigmore, *Evidence*, 2nd ed (1923) at §1367). To be effective, cross-examination requires many conditions to be satisfied, one of which is that the witness under examination fairly and effectively be able to give his or her evidence.

[30] It is generally accepted that a virtual hearing is both more tiring and more difficult to concentrate on for long periods.

limited travel time and cost and there is no, or no significant, venue hire cost, it may be cheaper overall.

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 award. 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.[31] In the case of remote hearings, this might not be easy to establish.

6 NATIONAL LAW COMPARISONS

A brief review of how certain jurisdictions have addressed is given below. For those wanting a more detailed review, the research by ICCA[32] is a masterly global review. The various country reports reveal many common trends and convergences in response to the core questions of the survey. In particular, none of those jurisdictions' *lex arbitri* contains any express provision recognising a right to an in-person hearing. Instead, the majority of the reports suggest that such right can in fact be excluded by looking at three main factors, namely, the broad procedural discretion of the tribunal as to the form of the hearing; the possibility to order documents-only arbitrations[33]; and provisions in the Arbitration Rules of the most relevant institutions in those jurisdictions expressly allowing remote hearings.

In most of those jurisdictions, the arbitrators' procedural discretion is essentially limited by their duty to safeguard the parties' due process rights (with the exception of Indonesia). In practice, this will require a balancing of two key considerations. On the one hand, due process requires a case-by-case fact-specific evaluation of whether the key participants to the hearing are able to attend virtually and have an effective opportunity to present their case. On the other,

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31 For example, § 68 of the English Arbitration Act 1996 requires 'serious irregularity'. The DAC called Clause 68 a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.

32 Co-editors Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou in collaboration with ICCA, https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration .

33 The possibility that a dispute is decided on the papers, circumventing the need for a hearing of any kind, is a further option. In appropriate circumstances, albeit unlikely to arise often in cases of substance, that may be the neatest solution to any special difficulties in arranging remote, hybrid or physical hearings. In the Commercial Court case of *Roberts v. Royal Bank of Scotland PLC* [2020] EWHC 3141 (Comm), Cockerill J granted the defendant bank's application for summary judgment / strike out following a determination of its application, by consent, on the papers in circumstances where the claimant, a litigant in person, indicated that he was unable to attend a physical hearing for health reasons, or to attend a hearing by remote video link (for technical reasons), or even to attend by telephone (as this would make it impossible to consult with his McKenzie Friend during the hearing).

this must be balanced against considerations of access to justice and the duty to decide the dispute without undue delay.

In Model Law jurisdictions, the provision granting the parties the right to request an 'oral' hearing gives rise to different interpretations as to whether a right to a 'physical' hearing must be inferred. In the majority of those jurisdictions, (including Canada, Colombia, Georgia, Greece, India, New Zealand, South Africa, Sri Lanka, Turkey) the reporters have concluded that the right to an oral hearing does not exclude holding it through videoconferencing. In Hungary, however, the right to a physical hearing is now specifically excluded as a consequence of a recent reform that deleted the word 'oral' from the corresponding norm of the *lex arbitri*. In Bahrain and Denmark, whether 'oral' means 'in-person' remains to be determined.

The surveys have also revealed some interesting divergences. For example, the parties' agreement to hold an in-person hearing is not binding on the tribunal in the Czech Republic. In Brazil, France and Indonesia it is binding, but only when such agreement was made prior to the constitution of the tribunal. In turn, violation of the parties' agreement would in itself likely entail annulment of the award, without any additional showing, in Bahrain, Hungary, India, Russia, Sri Lanka and Turkey, whereas in England and Wales, such violation will not entail annulment of the award unless it has caused substantial injustice.

The surveys also provide insight into domestic courts' interpretation of the New York Convention. The courts of England and Wales again stand out, as reporters note that they would assess violations of due process against domestic notions of natural justice without looking at whether a right to a physical hearing exists at the seat of the arbitration. The same approach is reported for India. However, in the Czech Republic, Georgia and Russia, reporters note that courts will give deference to the provisions of the law of the seat.

7 SOME CASES

Some of the first direct court challenges to a remote hearing that I am aware of have recently been decided in England, Australia, the US and Austria. Some of those cases are reviewed below to illustrate the position taken by Courts. That is for two reasons: firstly, it may indicate good practice that a tribunal may wish to follow or take inspiration from; and secondly, they may indicate a standard that a reviewing Court may hold itself to and, by analogy, the due process standard that the Court may hold the tribunal to.

The position is some key jurisdictions is summarized in Table 1 below.

Table 1

Issue	*England*	*France*	*USA*	*Australia*
Is there an express right to an in-person hearing?	No. The Arbitration Act 1996 confers a wide discretion on the tribunal.[34] Absent agreement to the contrary, a tribunal would be able to order a virtual hearing.	No. Book IV of the French Code of Civil Procedure (**FCCP**) does not expressly provide for a right to a physical hearing whether for domestic or international arbitration.	No. Neither the Federal Arbitration Act (**FAA**) nor state laws on international arbitration provides for the right to a physical hearing.	No. There is no right to an in-person hearing. Rather, there is an obligation to observe due process.[35]
Can a right to an in-person hearing be inferred?	No. Whilst there may well be a right to an oral hearing, that can be virtual or in-person.	Likely not, as the parties and tribunal have a wide discretion. See specifically Article 1509 FCCP permitting the procedural rules to be determined '*as required*'.	Likely not. There is no reported case to that effect. Rather than being concerned whether an oral hearing entails an in-person hearing the debate is more likely to be over due process.	Likely not. Australian courts have rejected challenges to awards issued after virtual hearings, thus implicitly rejecting any right (express or implied) to an in-person hearing.

[34] § 34(1).
[35] *See* generally Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131.

Issue	*England*	*France*	*USA*	*Australia*
Is there a right to an in-person hearing before the Courts?	No absolute right unless due process might be infringed. The Civil Procedure contemplate and afford wide powers for using technology.[36]	Probably an inferred right. There are numerous references in various provisions to 'hearings', 'place' and 'personal appearance' without any definition to determine wither a virtual hearing would comply.	Maybe, but if so, it is subject to significant exceptions.[37]	No. The Federal Court Rules permit "testimony" and "submissions" to be given via "video link, audio link, or other appropriate means" in certain circumstances.
Can any Court practice be extended to arbitration?	No. But tribunals might take into account similar due process considerations.	No. The principle is that the rules of civil procedure are not transposable to arbitration proceedings.[38]	No. US courts have repeatedly confirmed that arbitrators are not bound to follow judicial rules of procedure.	No. Tribunals need not follow court process.
Can a tribunal override part agreement to have an in-person hearing?	No. Party autonomy prevails.[39]	Likely not. Party autonomy prevails, certainly if in the arbitration agreement	It depends. If the arbitration agreement plainly requires an in-person hearing a	Potentially, yes. Party autonomy prevails, certainly if in the arbitration agreement itself but possibly

[36] For example, re evidence CPR rule 32.1(1)(c) and re hearings and receiving evidence by technology CPR rule 3.1(2).

[37] Pursuant to s. 203 of the FAA, disputes arising out of international arbitrations are deemed to 'arise under the laws and treaties of the United States' and, as such, are subject to the original jurisdiction of the federal courts and hence the Federal Rules of Civil Procedure (FRCP). The FRCP requires that '*witness testimony must be taken in open court*': Fed. R. Civ. P. 43(a) However, '*[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location*': *Ibid*. This permission has often been used even before the COVID-19 pandemic to allow witnesses to testify by video or telephone when travel to the place of trial would be unfeasible or lead to unnecessary costs.

[38] Articles 1464 and 1509 FCCP.

[39] 34(1).

Issue	*England*	*France*	*USA*	*Australia*
		itself[40] and probably for procedural agreements in the course of proceedings.	tribunal could not order one.	not for procedural agreements in the course of proceedings. There may then be grounds for challenge.
Does a failure to object to a virtual hearing prevent a challenge to a subsequent award?	Yes. A right of challenge is lost where a party continues without having objected.[41]	Probably yes.[42]	Yes. US courts typically refuse challenges to enforcement if the resisting party did not raise the impugned arbitral conduct during the arbitration.	Probably not. But any challenge would be less likely to succeed. Certain fundamental procedural rights, including the rights to be treated equally and to present one's case, are treated as mandatory and non-derogable rights, which cannot be waived
Would breach of a right to an in-person hearing be grounds for refusing recognition or enforcement?	Possibly, but in extremely limited circumstances.	Likely not, but highly fact dependent.	Likely not. Essentially, whether the process was 'fundamentally fair'.[43]	Potentially, but such challenges are unlikely to succeed absent exceptional and egregious circumstances.

[40] Article 1509 FCCP (referring only to the agreement of the parties which is contained in the arbitration agreement itself).

[41] 73.

[42] Article 1466 of the FCCP provides that '[*a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*'.

[43] Parsons & Whittemore Overseas Co. *v.* Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974).

Issue	*England*	*France*	*USA*	*Australia*
What specific COVID measures have been introduced?	The Courts and judiciary have issued a number of practice directions[44] and statements. Virtual hearings have been widely adopted.	In Court, the possibility of using videoconferencing without the prior consent of the parties, has been mandated on a time limited basis. There has been limited take-up.[45]	The use of technology was widespread pre-pandemic and has simply been scaled up.[46]	Various steps taken to facilitate greater use of technology. Wide adoption of virtual hearings.

7.1 England

In the English pre-pandemic *Hanaro Shipping v. Cofftea Trading*[47] Teare J rejected an argument that there was a procedural imbalance between one party's witnesses giving evidence in person whilst the counterparty's witnesses gave evidence only by video link. Teare J held as follows:

> I should say in relation to the video link Mr Buckingham suggested that there would be an imbalance between witnesses who have to give evidence by video link and witnesses who give evidence in person. I am not persuaded that there is such a risk. Perhaps in the early days of video link when the quality of the video link was poor and it was a novelty, perhaps that might have been said, but these days I do not consider that that can be said.

As to applications to adjourn a commercial trial due to concerns about the conduct of a remote hearing, the decision of Mr John Kimbell QC, sitting as a Deputy High Court Judge, in *Re Blackfriars Limited*[48] is instructive: courts should continue to function so far as they are able to do so safely by means of the increased use of technology to facilitate remote trials; the parties are expected to work with available technology to overcome the challenges of hearing live witness evidence;

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44 *See* in particular, Practice Directions 51Y (Video or Audio Hearings During Coronavirus Pandemic) and 51ZA (Extension of Time Limits and Clarification of Practice Direction 51Y).

45 Orders No. 2020–30439 of 25 Mar. 2020 and No. 2020–595 of 20 May 2020. These were declared in accordance with the constitution by the French Constitutional Court, 19 Nov. 2020, No. 2020–866 QPC.

46 Ciccone v. One W. 64th St., Inc., 2020 WL 5362065, at *5 (N.Y. Sup. Ct. 4 Sept. 2020) ('[F]ederal trial courts across the country [...] have consistently determined that given the pandemic, it is necessary, appropriate, and fair to hold bench trials entirely by videoconference').

47 [2015] EWHC 4293 (Comm) at [16].

48 [2020] EWHC 845 (Ch).

and where both sides are well-resourced, there is no potential unfairness due to the challenges of a remote hearing.

In *SC (A Child) v. University Hospital Southampton NHS Foundation Trust (Rev 2)*[49] the Claimant applied to adjourn a clinical negligence trial, involving expert witness evidence, which they said could not be fairly conducted remotely. Johnson J considered that the hearing could be conducted fairly, because all parties were legally represented and were able to access and utilise the technology necessary to conduct the hearing. His view was that there was no reason to think that the disadvantages of having a remote hearing would have an unequal impact on the parties. However, Johnson J held that even though a remote hearing could be conducted fairly, it was undesirable to do so having regard to the likely length of hearing, the nature of the issues, the volume of written material and the complexity of the lay and expert evidence. He noted that (a) a hearing that is wholly remote lacks many of the features and benefits of a hearing that takes place in court; (b) the solemnity, formality and focus of the courtroom is not easily replicated by a remote hearing; (c) the complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded when the hearing is conducted remotely; and (d) a video-conference is necessarily two-dimensional and permissive only of bilateral communication and observation.

7.2 Bilta (UK) Ltd (In Liquidation) *v.* SVS Securities Plc[50]

Marcus Smith J refused to adjourn the trial (for a second time in the pandemic) of a dishonest assistance claim, notwithstanding that the Defendant's witnesses had expressed a strong reluctance to attend court given a worsening state of the pandemic. The court set out sufficiently robust case-management directions to assuage concerns about contracting COVID-19 through attending court. Alternatively, a fair process could be achieved by receiving the witnesses' evidence remotely. The level of detail that the Court went into is instructive. The trial would be subject to extremely tight case-management directions.[51]

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[49] [2020] EWHC 1445 (QB).

[50] [2021] EWHC 36 (Ch).

[51] Including that a 'supercourt' (a large court room) would be allocated (at least forty-eight hours before the trial start date) to maximise social distancing space, and it would not be used for any other purpose for the duration of the trial; the hearing would be a hybrid of an in-person and remote hearing; not all of the members of the parties' legal teams would be physically present in court, and numbers present in general would be strictly limited, particularly when the witnesses gave evidence; the witness box would be in a remote zone within the court, as far removed from other persons as possible; there would be a much more detailed trial timetable than normal; witnesses would be given specific start times for their evidence, which would be adhered to; steps would be taken to ensure that participants, in particular the witnesses, accessed and left the court building without interaction with other people;

8 AUSTRALIA

8.1 Capic *v.* Ford Motor Company of Australia Limited[52]

Ford Motor Company of Australia Limited applied to adjourn a six-week trial, citing technological limitations, physical separation of legal teams, document management issues, and difficulty in briefing and cross-examining witnesses.

The Court refused the adjournment and held that technology difficulties could be resolved effectively, legal teams could communicate over instant messaging platforms (such as WhatsApp), document management could be facilitated by the use of digital court books and services such as Dropbox, and the briefing and cross-examination of witnesses and the preparation of joint reports over virtual platforms, although challenging, time-consuming and expensive was 'not unjust or unfair'. An adjournment of the trial because of COVID-19 would be for an indefinite period and, as the case had been pending for years, it was in the interests of the administration of justice that the proceeding should be resolved if possible.

8.2 Ascot Vale Self Storage Pty Ltd *v.* Nom de Plume Nominees Pty Ltd[53]

The Claimant submitted that it would be 'inapt' for a witness' dishonesty to be tried by video link in the COVID-19 environment, relying upon the *David Quince v Annabelle Quince* (summarised below). However, the Court did not accept that case to be authority for the proposition that a trial by video link should not proceed where there is a question of credit to be tried. Whether video link trials are appropriate is to be determined on a case-by-case basis. The Court was not satisfied that the proceeding could not be 'fairly and properly conducted' where it is necessary for the trial to occur by video link.

8.3 David Quince *v.* Annabelle Quince and Anor[54]

The Claimant sought to vacate the trial hearing, claiming that it would be unfair if the trial were to occur by video-link. The Claimant's counsel sought to cross-examine the Defendant in a conventional setting, claiming that the Defendant's

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the usual court hours would be adjusted as necessary; and car parking spaces would be procured for witnesses wishing to drive to court.

52 [2020] FCA 486. *See also* other cases where an adjournment was denied: *JKC Australia LNG v. CH2M Hill Companies Ltd* [2020] WASCA 38; *ASIC v. GetSwift Limited* [2020] FCA 504; *McDougall v. Nominal Defendant* [2020] NSWDC 194.

53 [2020] VSC 242.

54 [2020] NSWSC 326.

demeanour in the atmosphere of a trial concerning allegations of fraud with no supporting documentary evidence, would be crucial to assessing her credibility.

The Court allowed the adjournment and held that given the allegation of fraud (and without making a general finding), unfairness would arise for both parties if the trial were conducted by video-link, as demeanour plays a significant role in the establishment of serious allegations of this nature where there is limited corroborative material.

8.4 Motorola Solutions, inc. *v.* Hytera Communications Corporation Ltd (Adjournment)[55]

Hytera sought an adjournment, as seven of its witnesses were located in China and were unable to attend the hearing for cross-examination. Hytera argued that Chinese procedural laws also prevented them from being cross-examined via video-conferencing whilst in China without permission from the Chinese state, which would be unobtainable before the trial date.

Motorola disputed that Chinese law operated this way but accepted that Australian courts would be unable to secure cross-examination of the witnesses. Given this difficulty, Motorola indicated that it did not require the seven witnesses for cross-examination and instead intended to rely on other evidence which contradicted those witnesses' evidence. Both parties accepted that to do so would breach the obligation on a party to put their case to an opponent's witness in cross-examination which contradicts that witness' evidence (the rule in *Brown v Dunn*).

Hytera submitted it would be unfair if the trial were to proceed in these circumstances because the witnesses' responses might be persuasive if the matter were tried in-person. The Court accepted that if the trial proceeded, Hytera would be exposed to the risk that the Court may not be presented with potentially 'exculpatory material'.

In ordering that the hearing be vacated, the Court expressed uneasiness about commencing a hearing in which one possible outcome was the jettisoning of an important principle of cross-examination, which might result in a mistrial.

Finally, despite concluding that the trial should not proceed, the Court rejected Hytera's submission that time zone differences and the problems of conducting a remote trial rendered the trial inappropriate to proceed. Citing the decision in *Capic v Ford*, the Court did not accept that those problems are insurmountable or sufficient to adjourn a hearing in most cases.

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[55] [2020] FCA 539.

9 USA

9.1 Legaspy *v.* Fin. Indus. Regulatory Auth., Inc.,[56]

Two of Legaspy's clients initiated an arbitration against him under the rules of the Financial Industry Regulatory Authority (FINRA) to recover nearly USD 3 million for brokerage account losses. Pursuant to FINRA's rules, the parties signed a uniform submission agreement which provided that '*in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of FINRA*' and that '*the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure*'. An evidentiary hearing was originally set for August 2020. However, due to the COVID-19 pandemic, FINRA cancelled the in-person hearing and the arbitral tribunal subsequently ordered that the hearing be conducted remotely via Zoom. Legaspy objected, arguing that a Zoom hearing was unworkable because of the complexity of the issues, the large number of witnesses and documentary exhibits, and the Claimants' need for a translator. After the tribunal overruled Legaspy's objections, Legaspy filed suit in federal court to enjoin the virtual hearing on the grounds that it breached the parties' uniform submission agreement and FINRA's Code of Arbitration Procedure and denied Legaspy due process. The court denied Legaspy's motions for a temporary restraining order and preliminary injunction, allowing the virtual arbitration to proceed.

The court held that Legaspy could not succeed on his claim for breach of the submission agreement or the FINRA Code of Arbitration because, under the Federal Arbitration Act, procedural questions are committed to the arbitrator and *'[w]hether FINRA can or should conduct a hearing remotely is a question of procedure that FINRA, not this court, must decide*'. Finally, the court determined that even if it could review the arbitral panel's procedural ruling mid-arbitration, the FINRA Code of Arbitration permitted the panel to order a virtual hearing.

10 AUSTRIA

In a case in the Supreme Court in Austria,[57] the applicants contended that a hearing by videoconference was unfair conduct and had led to unequal treatment of the parties. Specifically, it contended that there was no control as to what documents an examined witness was using, nor whether there was another person in the room. Moreover, there was bias as the tribunal had not made provision for the protection of witnesses against undue influence and the chosen platform (WebEx) allowed private messages through the chat function. The court rejected

[56] No. 20 C 4700, 2020 WL 4696818 (N.D. Ill. 13 Aug. 2020).
[57] Docket 18 ONc 3/20s.

a challenge to the tribunal as ordering a video hearing, when opposed, could not constitute bias, nor would it violate principles of a fair trial and the right to be heard. The court accepted that hearing by video was commonplace, both in courts and arbitration. Ordering a video hearing against the wishes of one party does not violate Article 6 ECHR as Article 6 provides for not only the right to be heard but also effective access to justice to enforce or defend rights: video met those challenges. The court gave examples of measures to mitigate any risk including the witness looking directly into the camera, as necessary, zooming out and filming the room and having hands visible.

11 CONCLUSION

Save in exceptional or unusual circumstances, there is a broad global consensus that there is no right to an in-person hearing. Virtual hearings work perfectly well and will generally observe due process even in lengthy hearings involving allegations of fraud. They are probably cheaper, more efficient and more environmentally friendly. Substantiated cybersecurity concerns may well prove to be the most legitimate ground for insisting on an in-person hearing.

Some nuance may be lost by the bland two-dimensional image on a computer screen compared to the ability to see a more holistic view of witnesses in-person. In-person hearings might just be better, but, in the paraphrased words of Voltaire achieving the absolute perfection of an in-person hearing may be impossible and so, as increasing effort results in diminishing returns, further activity becomes increasingly inefficient and the second-best should be accepted. Virtual hearings are good enough and are here to stay.