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How is Parties' Right to a Fair Hearing Affected by Remote Arbitration Hearings?

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Abstract
While remote hearings are not novel, the COVID-19 situation has compelled international arbitration to go beyond its comfort zone. Arbitrators, parties, and counsel must adjust to the new realities of conducting arbitrations in the face of travel limitations and social distancing measures. One especially perplexing issue is whether and to what degree physical hearings cannot be performed due to the constraints mentioned above should be postponed or conducted remotely through current communication technology. This paper takes a step back from the immediate problem and presents an analytical framework for remote international arbitration sessions. Considering the present pandemic and beyond, it gives essential information to parties, lawyers, and arbitrators on determining whether to conduct a hearing remotely and, if so, how to arrange for and organise it effectively. Additionally, the paper assesses the probability of challenges to awards based on remote hearings, focusing on claimed violations of the parties' right to be heard and treated equally.
Keywords: International Commercial Arbitration, Right to a Fair Hearing, Remote Hearing

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I. Introduction

In these uncertain times caused by the COVID-19 pandemic, we are confronted with a slew of unexpected difficulties and often have to pick between being proactive and cautious. Arbitration at the international level is no exception.[1] Parties, lawyers, and arbitrators must adjust to the new realities of international arbitration in the face of travel limitations and social distancing tactics. One especially vexing issue is whether and to what degree physical hearings that cannot be convened due to the limits mentioned above should be postponed (prudently) or held remotely using current communication technology (proactively). This paper discusses the evaluation of such remote sessions in international arbitration.

Nowadays, the majority of stages in international arbitration are conducted remotely.[2] This is true for initiating the proceedings by sending the request for arbitration, either electronically (via email or through the institution's dedicated filing platform) or by mail; selecting and confirming the arbitrator(s), possibly following brief telephone interviews; holding case management conferences, at the outset or during the proceedings, between the parties and the Tribunal, which are frequently conducted via telephone or video-conference rather than in person; exchanging documents; and exchanging information. Perhaps the last 'parts of the jigsaw' that often remain in the form of actual meetings are hearings on the merits or on significant procedural problems. However, the present COVID-19 pandemic compels international arbitrators to review this topic and determine if such hearings may also be conducted remotely.[3] Depending on the duration of the present crisis, it can be a

[1]Egemen Egemenoglu, "Remote Hearıngs - Then, Now and in the Future - Litigation, Mediation & Arbitration - Turkey" (*www.mondaq.com*2021) <https://www.mondaq.com/turkey/arbitration-dispute-resolution/1106356/remote-hear305ngs---then-now-and-in-the-future?navCountryId=/7/all-regions/Oman/arbitration-dispute-resolution>; Global Arbitration Review, "Remote Hearings and the Use of Technology in Arbitration" (*Lexology*May 26, 2021) <https://www.lexology.com/library/detail.aspx?g=c1a1810d-b55b-45a3-9891-7a2b69038939> accessed January 13, 2022; Anthony Connerty, "CIArb - the Future of International Arbitration Following the Pandemic: The Hybrid Hearing?" (*www.ciarb.org*2020) <https://www.ciarb.org/resources/features/the-future-of-international-arbitration-following-the-pandemic-the-hybrid-hearing/> accessed January 13, 2022.

[2]*Id.*

[3] Samar Abbas Kazmi & James Bradford, *Coronavirus & Arbitration: Institutional Responses, Challenges and Practical Tips (Part One)*, 39 Essex Chambers (20 Apr. 2020); Clare Ambrose, Sara Masters C & Josephine

game-changer if international arbitral tribunals and national courts worldwide grow used to conducting hearings remotely. A paradigm change of this magnitude may be something that many arbitrators have desired for some time.[4] This study takes a step back from the current issue and presents an analytical framework for remote international arbitration proceedings. In light of the present pandemic and beyond, it gives important information to parties, lawyers, and arbitrators on determining whether to conduct a hearing remotely and, if so, how to arrange for and organise it effectively.

II. Defining Remote Hearings

Remote hearings are defined in this article as those that are held using communication technology to connect participants from two or more locations simultaneously. This could include telephone or video-conference communication and more futuristic technologies such as telepresence. Unless otherwise specified, this article will concentrate on remote hearings via video-conference, which is defined as '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] Remote hearings are occasionally referred to as 'virtual hearings.'[6] The term 'virtual' has numerous definitions, but in computer science, it can be defined as

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Davies, *A Tale of Two Cities: Virtual Arbitration in The Best of Times, The Worst of Times*, Twenty Essex Bulletin (Apr. 2020); Michaela D'Avino & Bahaa Ezzelarab, *After Covid-19 Lockdown Will Virtual Arbitrations Become the New Normal?*, Global Legal Post (21 Apr. 2020); Gary Benton, *How Will the Coronavirus Impact International Arbitration?*, Kluwer Arb. Blog (13 Mar. 2020); Richard Butt, *COVID-19 Disputes: Zooming Ahead – The Challenges of Virtual Hearings in International Arbitration* (27 Apr. 2020); CMS EAlert, *Virtual Hearings: Are They Really the Answer?*, Mondaq (17 Apr. 2020); Debevoise & Plimpton, *Conducting International Arbitrations During the COVID-19 Pandemic* (21 Apr. 2020); Ema Vidak Gojkovic, *Follow the Guidance: The ICC Court's Plan to Mitigate the Impact of COVID-19*, Prac. L. Arb. Blog (23 Apr. 2020); Steven Finizio & Polina Permyakova, *Coronavirus (COVID-19) – Practical Tips for ConductingTeleconferences and Videoconferences in Arbitral Hearings*, Lexis PSL Arb. (24 Mar. 2020); Alexander Foester, *Das COVID-19-infizierte Schiedsverfahren*, Dispute Resolution (11 Mar. 2020); Jason Hambury, Coronavirus '*Will Speed up the Adoption of Virtual Arbitrations'*, Pinsent Masons Out-Law Analysis (17 Apr. 2020); Herbert Smith Freehills, '*Necessity Is the Mother of Invention': COVID-19 Dramatically Accelerates Digitalisation of Arbitration Processes* (1 May 2020); HFW Briefing, *Questions and Answers on How Best to Deal with International Arbitration in the Face of COVID-19* (Mar. 2020); Hogan Lovells, *Protocol for the Use of Technology in Virtual International Arbitration Hearings* (Apr. 2020); Jiyoon Hong & Jong Ho Hwang, *Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing*, Kluwer Arb. Blog (6 Apr. 2020); Linklaters, *Drafting for Virtual Hearings in Arbitration: Helping to Keep Matters Moving in Light of Covid-19* (16 Apr. 2020); Simon Rainey QC & Gaurav Sharma, *Arbitration Hearings … and the Corona 'New Normal' Ten Golden Rules: Or the Easy Path to Your Virtual Hearing*, Quadrant Chambers (30 Mar. 2020); S. Rodríguez Senior, *Virtual Hearings in International Arbitration: The Way of the Future?*, TDM (29 Apr. 2020); Mirèze Philippe, *Offline or Online? Virtual Hearings or ODR?*, Kluwer Arb. Blog (26 Apr. 2020); Jessica Sabbath & Brianna E. Kostecka, *INSIGHT: Best Practices for Conducting Remote Arbitration Hearings*, Bloomberg Law (21 Apr. 2020); Janet Walker, *Virtual Hearings – The New Normal*, Global Arb. Rev. (27 Mar. 2020).

[4] Queen Mary School of International Arbitration Survey, *The Evolution of International Arbitration* chart 36 (2018) (89% of the survey participants expressed the view that videoconferencing should be used more often as a tool in international arbitration; 66% said the same about virtual hearing rooms).

[5] Hague Conference on Private International Law, *Guide to Good Practice on the Use of Video-Link Under the Evidence Convention*, para. 10 (2020).

[6] See e.g. Queen Mary Survey, The Evolution of International Arbitration, supra n. 4, charts 35–36; Jasna Arsic, International Commercial Arbitration on the Internet – Has the Future Come Too Early?, 14 J. Intl. Arb. 209–222 (1997); Till Alexander Backsmann & Josef Fröhlingsdorf, Science and Arbitration, The Vienna Propositions for Innovative and Scientific Methods and Tools in International Arbitration, in Austrian Yearbook on International Arbitration 419–426 (Christian Klausegger & Peter Klein eds, C.H. Beck 2020); Sigvard Hakan, What Has Become of Our Anticipations About Arbitration Three Decades Ago? Reflections on Experience, Expectations and Evolution in International Commercial Arbitration, in Liber Amicorum Samir Saleh: Reflections on Dispute Resolution with Particular Emphasis on the Arab World 115–132 (Nassib Ziadé ed., Kluwer Law International 2019); Gabrielle Kaufmann-Kohler & Thomas Schultz, The Use of Information Technology in Arbitration, JusLetter (Dec. 2005); Sundaresh Menon, Technology and the Changing Face of Justice, 37 J. Int'l Arb. 167–190 (2020); Pratyush Panjwani, The Present and Near Future of New Technologies in Arbitration (Report on the Club Español de Arbitraje's Third Annual Conference), Spain Arb. Rev. 21–33

'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 layman's terms, it refers to something that is not real or physical,[8] such as the virtual landscape in a computer game. Occasionally, references to 'virtual arbitrators' appear in discussions about whether or not human decision-makers can be replaced or assisted by artificial intelligence.[9] In the case of international arbitration hearings held in multiple locations, the participants are not virtual but physically present; they simply communicate with one another via communication technologies. To avoid creating misconceptions about remote hearings' physical reality, the term' virtual hearings' should be avoided or used sparingly.

Additionally, the term' online hearings' appears on occasion.[10] These can be perplexing due to the conceptual overlap with online dispute resolution (ODR) and online courts. Indeed, online courts and ODR are frequently understood as adjudicating cases outside of physical courtrooms through computer technology.[11] Often, however, this also means that no hearing occurs (in the traditional sense of asynchronous exchange of arguments or evidence), but rather that asynchronous forms of interaction take their place. As Richard Susskind explains in his book on online courts, 'as with email and text messages, those 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 in stark contrast to the concept of remote hearings, which was discussed in this article.

Remote hearings – as previously defined – are not novel concepts in international arbitration. Not only are the majority of case management conferences and some procedural hearings held remotely, but in some cases, merits hearings are also held remotely.[13] Remote hearings, for example, are frequently used in expedited and emergency arbitrator proceedings. Additionally, it is not uncommon for witnesses or experts to testify remotely.[14] According to a recent survey, the vast majority of respondents indicated that they had used video-conferencing in international arbitration proceedings.[15] Perhaps most notably, the International Centre for the Settlement of Investment Disputes (ICSID) announced that most of its 2019 hearings would be conducted via video-conference.[16] Additionally, remote hearings are not restricted to international arbitration proceedings. They are also utilised in domestic court proceedings, as discussed below, most notably during the current pandemic.[17] Their use is contemplated by national statutes[18] and international instruments, such as the EU

(2018); Philippe, supra n. 3; Mohamed S. Abdel Wahab, The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution, 21 J. Int'l Arb. 143–168 (2004).

[7]Oxford English Dictionary, "Virtual."

[8]Lexico Dictionary, "Virtual."

[9] Maxi Scherer, *Artificial Intelligence and Legal Decision-Making: The Wide Open? Study on the Example of International Arbitration*, 36 J. Int'l Arb. 539–573 (2019).

[10]*See* FORUM Arbitration Rules 2008, rule 2(T)(2)(c); Shenzhen Court of International Arbitration (SCIA) Arbitration Rules, Art. 67.

[11]*See* UNCITRAL Technical Notes on Online Dispute Resolution, paras 2, 24 (defining ODR as a 'mechanism for resolving disputes through the use of electronic communications and other information and communication technology'). See also Julia Hornle, *Online Dispute Resolution*, in *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* vol. 1, 782 (Ronald Bernstein, John Tackaberry & A. L. Marriott eds, 4th ed., Sweet & Maxwell 2003); Zbyněk Loebl, *Designing Online Courts: The Future of Justice Is Open to All* 25–54 (Kluwer Law International 2019); Edwin Montoya Zorrilla, *Towards a Credible Future: Uses of Technology in International Commercial Arbitration*, 16(2) SchiedsVZ German Arb. J. 108 (2018).

[12] Richard Susskind, *Online Court and the Future of Justice* 60, 182 et seq. (OUP 2019).

[13]*See* AAA-ICDR International Expedited Procedures, Art. E-9; ICC Rules, App. V, Art. 4(2); ICC Rules, App. VI, Art. 3(5).

[14]*See SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, para. 23 (10 Feb. 2012); *Paushok v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, para. 61 (28 Apr. 2011); *Murphy Exploration & Production Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, para. 26 (15 Dec. 2010); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, para. 38 (8 Oct. 2009); *Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, para. 43 (16 Aug. 2007); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, para. 76 (21 Oct. 2002).

[15] Queen Mary Survey, *The Evolution of International Arbitration*, supra n. 4, chart 35 (90% of the survey participants had used videoconferencing as a tool in international arbitration, of which 17% always, 47% frequently and 30% sometimes).

[16] ICSID, *A Brief Guide to Online Hearings at ICSID* (24 Mar. 2020).

[17]*See infra*-5.2.1.

[18]*See* Federal Court of Australia Act 1976, s. 47A(1); Canada Rules of Civil Procedure, rule 1.08(1); Singapore Evidence Act, s. 62A(1); US Federal Rules of Civil Procedure, rule 43(a). *See*

Evidence Regulation[19] and the Ibero-American Convention on the Use of Videoconferencing in International Cooperation Between Justice Systems.[20] In the past, international courts and tribunals, such as the International Criminal Court, have conducted hearings via video-conference.[21]

As in other fields, there are several distinct types of remote hearings in international arbitration. To begin, they can be classified according to their degree of remoteness. On the one hand, semi-remote hearings utilise a single central location and one or more remote locations.[22] For example, the Tribunal could be assembled in one location with the parties, and one or more witnesses or experts could testify remotely before them. As previously stated, such a structure is frequently used in international arbitration. On the other hand, in fully remote hearings, all participants are located in separate locations, and there is no established central hearing venue. Although fully remote hearings have been used infrequently in international arbitration to date,[23] they are currently being considered in several proceedings to address COVID-19-related restrictions. Notably, fully remote hearings not only present technical challenges due to the increased number of remote locations but also imply a change in nature due to the absence of a physical hearing room.[24] Indeed, this type of remote hearing may be referred to as 'virtual' in the sense that no physical hearing venue exists but for the use of computer technology. Due to this fundamental difference in nature, fully remote hearings may require not only transplantation of what is done in physical hearings to a fully remote setting but also a fundamental rethinking of the process.

Second, remote hearings can be classified according to the remote part's content.[25] As discussed below, remote legal arguments may be evaluated differently than remote evidence gathering. Additionally, semi-remote hearings may raise distinct issues depending on which participants are absent. While hearings with remote witnesses or experts are the most common, there may be instances where one or both parties (or their legal representatives) or one or both co-arbitrators participate remotely. As discussed in greater detail below, the evaluation of remote hearings may indeed be contingent on who participates remotely.[26]

Thirdly, one may specify whether the remote participation pertains to the entire hearing or only a portion of it. Notably, all of the distinctions outlined above can be combined in practice. For instance, one could envision a hearing in which the majority of evidence is taken in the presence of the experts or witnesses, except for some who are physically located too far away, followed by fully remote closing statements and final tribunal questions. Different components of the hearing are conducted physically, semi-remotely, or entirely remotely in this configuration. The subsequent sections of this article will discuss whether and to what extent such remote hearings, or combinations thereof, are possible.

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also German Civil Procedure Code ZPO, s. 128a (which is, however, said to be rarely used), *See* Dirk von Selle, *Beck'scher Online-Kommentar* ZPO § 128a, para. 2.1 (C.H.Beck 2020).

[19] EU Council Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Art. 10(4). *See also* Regulation (EC) 861/2007 of 11 July 2007 Establishing a European Small Claims Procedure, Art. 9(1).

[20] Convenio Iberoamericano sobre el uso de la Videoconferencia en la Cooperación Internacional entre Sistemas de Justica (3 Dec. 2010), entered into force between Spain, Mexico, Costa Rica, Panama, Dominican Republic, Ecuador, and Paraguay.

[21]*See 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, para. 2 (International Criminal Tribunal for the Former Yugoslavia 25 June 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, para. 15 (International Criminal Tribunal for the Former Yugoslavia 28 May 1997). *Compare Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence and Prosecution Motions Related to Witness Ade, para. 12 (International Criminal Tribunal for Rwanda 31 Jan. 2006).

[22]*See* Korean Commercial Arbitration Board (KCAB), 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').

[23] Queen Mary Survey, *The Evolution of International Arbitration*, supra n. 4, chart 35 (64% of the interviewees indicated they had never used 'virtual hearing rooms' and 14% only rarely).

[24]*See* Judith Resnik & Dennis Edward Curtis, *Representing Justice, Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press 2011).

[25]*See infra*-5.2.2.2.

[26]*Id.*

III. Framework for the Regulation of Remote Hearings

Remote hearings are permissible or not depending on the appropriate regulatory framework, particularly the legislation of the arbitration's seat and the arbitral rules selected if any. To begin, the author is unaware of any domestic legislation or arbitration rules that clearly require or ban remote hearings. Rather than that, if national legislation or arbitration rules include explicit provisions relating to remote hearings, they do so in a permissive manner, as mentioned in Section 3.1. The majority of national laws and arbitration rules make no provision for remote hearings, a circumstance that is discussed in Section 3.2.

3.1 Domestic Legislation and Arbitration Rules that Provide Explicit Restrictions for Remote Hearings

Only a few national statutes and arbitration rules have express provisions relating to remote hearings. If they do, they just allow for remote hearings, using permissive language ('may'), without prescribing a specific remedy.

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', 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.'[27] 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).'[28] Other arbitral organisations' rules also include provisions allowing for remote hearings.[29] These country laws and arbitration procedures expressly permit remote hearings by arbitral courts. While some arbitration rules do not explicitlyhavevideo-conference or other electronic hearings as alternatives to physical hearings, they refer to the use of technology[30] or the need to conduct hearings expeditiously or appropriately.[31] These might plausibly include remote hearings.

Remote hearings are mentioned in a number of arbitration rules, but only under limited situations. For instance, Article 28(4) of the United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules allows for remote hearings of witnesses and experts but not for other components of hearings, such as legal arguments.[32] Other examples include (1) the Rules of the Stockholm Chamber of Commerce's(SCC) Arbitration Institute, which permit remote case management conferences[33] but do not contain comparableprovisions for hearings; and (2) the Rules of the International Chamber of Commerce (ICC), which include provisions on remote hearings for case management conferences,[34] emergency arbitrator proceedings[35] and expedited proceedings[36] but are silent on remote hearings.[37]

This has prompted some to explore, if one may argue, *a contrario*, that remote hearings are not authorised unless under expressly stated circumstances.[38] In other words, whereas remote hearings are explicitly authorised in certain instances, they are impliedly barred in all others. Remote hearings, on the other hand, would be impossible for legal arguments under the UNCITRAL Rules and for merits hearings under the ICC Rules in conventional (i.e. non-emergency arbitrator or non-expedited) procedures. This viewpoint is unpersuasive. It's difficult to see why legal arguments could not be heard remotely under the UNCITRAL Rules, especially given that remote testimony by witnesses or experts is permitted. On the contrary, one may argue that remote witness or expert evidence introduces new complications and so demands greater scrutiny, as explained

[27] Dutch Civil Procedure Code, Art. 1072b(4). *See also* UAE Federal Law, Arts 28.2(b), 33.3 and 35.
[28] LCIA Rules, Art. 19.2.
[29]*See* International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules, s. 30.6.
[30]*See* Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, Art. 13.1; International Centre for Dispute Resolution (ICDR) International Arbitration Rules, Art. 20.2.
[31]*See* Singapore International Arbitration Centre (SIAC) Rules, Art. 21.2.
[32] UNCITRAL Arbitration Rules 2010, Art. 28(4).
[33] SCC Rules, Art. 28(2).
[34] ICC Rules, Art. 24(4).
[35]*Id.*, App. V, Art. 4(2).
[36]*Id.*, App. VI, Art. 3(5).
[37]*See* SIAC Arbitration Rules, Arts 19.3, 19.7, Sch. 1, para. 7.
[38] Andrew Foo, *No Further Questions, 7 Tips for Safe-Distancing Your Arbitral Award from Pandemic Protestations*, paras 19–24 (27 Mar. 2020)

below.[39] Additionally, the ICC Rules particularly encourage the use of video-conferencing or other alternatives to actual hearings as time and cost-cutting case management tools.[40] It is illogical to imply that a tribunal would be prohibited from adopting such approaches under the ICC Rules.
This leaves unanswered the issue of whether arbitral courts may conduct remote hearings in the absence of express provisions in national legislation or institutional arbitration rules.

3.2 National Statutes and Arbitration Rules that do not Include Express Provisions for RemoteHearings

The majority of national statutes and institutional arbitration procedures expressly exclude remote hearings. However, in this scenario, one may go to other principles for help, such as the parties'right to a hearing, outlined in Section 3.2.1, and the Tribunal's extensive authority to resolve procedural concerns in the arbitration, as described in Section 3.2.2.

3.2.1 *The Right of a Party to a Hearing*

In international arbitration, the right to a hearing is regarded to be a basic concept.[41] Indeed, several national statutes and institutional arbitration rules have provisions to such effect, saying either that a party may seek a hearing[42] or that the arbitration cannot be performed only based on documents without the agreement of all parties.[43] Other national laws and institutional arbitration procedures defer to the Tribunal whether or not to conduct a hearing.[44] Even if a party's right to a hearing is established, the issue remains whether this right necessarily entails a physical hearing. According to certain scholars, remote hearings do not fulfil the threshold conditions for a 'hearing' under some national laws.[45] This position seems to be predicated on the premise that hearings must be oral (oral principle) and allow for the simultaneous exchange of arguments or evidence (principle of immediacy).[46]

However, even assuming that these conditions apply to international arbitration processes, it remains unclear why a remote hearing would not satisfy these standards. First, arguments are made verbally at both physical and remote hearings, with the latter using communication technology to transmit audio or video. Second, both physical and remote hearings allow for simultaneous exchanges of arguments or evidence: parties, lawyers, witnesses, experts, and arbitrators may debate and relate issues in real-time. Thus, the orality and immediacy concepts outlined above do not adequately explain why remote hearings should be considered differently from physical hearings. Of fact, there are important distinctions between the two sorts of hearings, as mentioned below.[47] However, the claim that remote hearings are forbidden solely based on a party'sright to a hearing is erroneous.

A specific example is found in Article 25(2) of the ICC Rules, which states 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.' Article 25(2)references a hearing 'together' and 'in person' might be interpreted as forbidding anything except physical hearings. Other linguistic versions of the ICC Rules, on the other hand, exclude the 'in person' phrase and instead mandate that parties be heard orally[48] and permitted to engage in an adversarial exchange of

[39]*See infra*-5.2.2.2.
[40]ICC Rules, App. IV on Case Management Techniques, para. (f).
[41] 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).
[42] For national laws, *See* German Civil Procedural Code (ZPO), s. 1047(1); Swedish Arbitration Act, s. 24(1). See also Arbitration Law of the People's Republic of China, Art. 47. For institutional arbitration rules, *See* SCC Rules, Art. 32(1); UNCITRAL Rules, Art. 17(3).
[43]*See* ICC Rules, Art. 25(6); SIAC Rules, Art. 24.1.
[44]*See* English Arbitration Act, ss. 34(1), (2); HKIAC Rules, Art. 22.4; Indian Arbitration Act, s. 24(1).
[45]*See* 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 s . 24(1) of the Swedish Arbitration Act); Germany: Joachim Münch , *Münchner Kommentar zur* ZPO § 1047, para. 9 (2017); Hans-Joachim Musielak & Wolfgang Voit, *ZPO*, § 1047, para. 2 (2019). *See also* Frank Spohnheimer, *Gestaltungsfreiheit bei antezipiertem Legalanerkenntnis des Schiedsspruchs* 308 et seq. (2010).
[46] Münch, supra n. 45, § 1047, paras 8–9 (noting that a hearing should be oral and allow the hearing of, and negotiation between, the parties, which requires physical presence).
[47]*See infra*-5.2.2.
[48]*See* German version of ICC Rules, Art. 25(2) ('*mündliche Verhandlung* ').

ideas.[49] As stated in the ICC's new COVID-19 Guidance, Take note that remote hearings may satisfy these standards.[50] The term 'in person' in Article 25(2) of the ICC Rules should thus be interpreted as referring to a hearing in which the different parties exchange arguments or evidence in real-time (i.e. between individuals) - regardless of whether this occurs in a physical meeting or by remote communication.

In essence, a hearing is an oral and synchronous exchange of arguments or evidence - in contrast to the written and asynchronous discussions included in the parties' briefs. As long as a remote hearing enables spoken and synchronous communication, it seems impossible to claim it is not a hearing. To be clear, the above does not imply that remote hearings are appropriate in all circumstances. As stated further below, a thorough examination is necessary.[51]However, it is critical to note that the mere right to a hearing does not exclude the option of holding the hearing remotely.

3.2.2 *The Tribunal's Broad Authority Over Procedural Conduct*

If the applicable national legislation or institutional arbitration rules make no specific provision for remote hearings, the Tribunal's extensive authority to arrange procedural issues serves as a fallback. Typically, national arbitration statutes specify that, in the absence of an agreement between the parties, the arbitral Tribunal may 'conduct the arbitration in such manner as it considers appropriate'[52] and 'decide all procedural and evidential matters'[53] or 'determine [the procedure] to the extent necessary, either directly or by reference to a statute or rules of arbitration'.[54] Institutional arbitration rules include identicalprovisions governing the Tribunal's general authority to arrange the proceedings and, more specifically, the Tribunal's authority to take evidence.[55]

Absent a contrary agreement or provision, the Tribunal'sbroad authority to undertake the proceedings as it sees fit also includes the organisation of any hearing, including its time, location, duration, and other modalities.[56] Thus, barring any rule to the contrary, the arbitral panel determines whether a hearing shall be conducted physically or remotely. In summary, regardless of whether the applicable national laws or arbitration rules contain specific provisions on remote hearings, the Tribunal will have to decide. In the presence of a specific provision on remote hearings, the Tribunal must determine whether to exercise the specific power granted to it to'may' hold hearings remotely; in the absence of a specific provision, the Tribunal will have to exercise its broad general power over the organisation and conduct of the hearings.

Inany scenario, the Tribunal's authority to conduct remote sessions is not unrestricted. The Tribunal's authority is restricted, among other things, by the parties' agreement, as mentioned in Section 4 below, and by the parties' right to be heard and treated equally, as discussed in Sections 5 and 7.

IV. Remote Hearings in the Event of an Agreement Between the Parties

This section discusses circumstances where the parties agree to have a remote hearing. Generally, these scenarios provide minimal complications in reality since the Tribunal will generally adhere to the parties' agreement. Moreover, the notion that the Tribunal shall conform to the parties' agreement on procedural problems is enshrined in several national statutes and institutional regulations governing arbitration.[57] Nonetheless, there are certain – presumably uncommon – circumstances that need more investigation.

First, let us suppose that the parties agree that no remote hearing will be held. Could the Tribunal still proceed with a remote hearing in this case? Without elaborating, it's difficult to understand how the

[49] *See* the French or Spanish versions of ICC Rules, Art. 25(2) ('*contradictoirement*' and '*contradictoriamente*').

[50] ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic* (9 Apr. 2020), para. 23. Cf. Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* para 3.958 (ICC 2012).

[51]*See infra*-5.2.2.

[52] UNCITRAL Model Law, Art. 19(2).

[53] English Arbitration Act, s. 34(1).

[54] Swiss Private International Law Act, Art. 182(2).

[55]*See* HKIAC Rules, Arts 13.1, 22.5; ICC Rules, Arts 19, 22(2); ICDR Rules, Art. 20.1; LCIA Rules, Art. 14.5; SCC Rules, Art. 23(1); SIAC Rules, Art. 19.1, 25.3; UNCITRAL Rules, Art. 17(1), 28(2).

[56]*See* 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 (2012).

[57]*See* English Arbitration Act, s. 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).

Tribunalcould disregard the parties' agreement to have the hearing in person. One may claim that the parties' demand for a physical hearing would significantly delay the arbitration (particularly in light of the present pandemic's unknown duration) and violate the Tribunal's mandate to conduct the procedures swiftly and efficiently.[58]Nonetheless, if the delay results from the parties' decision to conduct the arbitration in a certain way (e.g., via a physical hearing), preserving party autonomy seems to be more essential than expediency. This is not different to situations in which parties agree on an excessively protracted procedural timeline.[59] While the Tribunal may urge the parties to rethink, it cannot, in the end, and absent exceptional circumstances, conduct the arbitration in contravention of the parties' agreement.

Second, the parties may agree to have a remote hearing. However, if the Tribunal is hesitant to hold a remote hearing, may it refuse? In certain instances, tribunals have voiced reservations about holding remote hearings due to their (or the presiding arbitrator's) desire to cope with the associated technical problems. This is a particularly bad circumstance, given that technology problems can often be overcome with appropriate planning, as explained below.[60] While the Tribunal should adhere to the parties' agreed process, the parties will have trim options – other than to nominate new arbitrators in the future – when confronted with genuine opposition from the Tribunal.

The scenario may be somewhat different if the Tribunal's hesitation is not owing to a lack of technological savvy but rather to other considerations, such as the enforcement of any future judgement. Certain arbitration rules include a clause requiring the panel to give an enforceable award.[61] However, as described below, the chance of awards based on remote hearings not being enforced or challenged is minimal, barring exceptional circumstances.[62] In any case, by agreeing on a particular approach, the parties accept the risk that any award based on that procedure would be unenforceable. The Tribunal may want to call the parties' attention to any concerns about the Tribunal's enforcement. Still, in the event of an explicit agreement by the parties regarding remote hearings, the Tribunal should continue accordingly.

In each of the cases above, the parties have agreed to have a remote hearing. However, the opposite circumstance, in which no such party agreement exists, is more significant and problematic, as detailed below.

V. In the Absence of an Agreement Between the Parties for a Remote Hearing

This section of the article discusses scenarios – which raise complex practical issues – in which one party demands a remote hearing while the other side objects and insists on a physical hearing.

In this situation, the arbitral Tribunal must weigh critical, and possibly conflicting, factors: on the one hand, the parties' right to be heard and treated equally, which is enshrined in numerous national statutes and institutional arbitration rules;[63] on the other hand, the Tribunal's obligation to conduct the proceedings efficiently and expeditiously.[64]

In concrete terms, the Tribunal will have to determine first whether to hold a remote hearing in the face of objection from one side. This subject is covered in further detail in Section 5.1. Assuming the Tribunal determines that it has the authority to hold a hearing despite a party's resistance, it must decide the applicable standard it should use to exercise this authority, including the considerations it should consider in this context (as discussed in section 5.2).

[58]*See* American Arbitration Association (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 Rules, Art. 28(1).

[59]*See* Born, supra n. 41, 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 AmicorumPierre A. Karrer* 281 (Patricia Louise Shaughnessy & Sherlin Tung eds, Kluwer Law International 2017). Cf. e.g. Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. Int'l Arb. 327, 329 (2007).

[60]*See infra*-4.

[61]*See* ICC Rules, Art. 42; LCIA Rules, Art. 32.2; SIAC Rules, Art. 41.2.

[62]*See infra*-7.

[63]*See* Dutch Civil Procedure Code, Art. 1036; English Arbitration Act, s. 33(1)(1); French Civil Procedure Code (CPC), Art. 1510; German Civil Procedure Code ZPO, Art. 1042; Hong Kong Arbitration Ordinance, s. 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).

[64] See 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 Rules, Art. 28(1).

5.1 The Tribunal's authority to order remote hearings in the absence of agreement between the parties

Two divergent perspectives exist on the topic of whether a tribunal, in principle, has the authority to hold a remote hearing if one party objects. On the one hand, some writers assert that a remote hearing is only conceivable with the agreement of all parties.[65] Typically, this approach is founded on the premise that a party has the right to seek a hearing. As mentioned before, this notion is enshrined in several national statutes and institutional arbitration procedures.[66] However, as previously stated, the party's fundamental right to a hearing does not require that the hearing be conducted in the presence of participants. As long as arguments or evidence are exchanged orally and synchronously, the threshold conditions for a hearing are fulfilled.[67]

Even Article 25(2) of the ICC Rules, which states in its English translation that 'the arbitral tribunal shall hear the parties together in person if any of them so requests'does not exclude the use of remote hearings in the absence of consent between the parties. When read in conjunction with the various linguistic forms of Article 25(2) that exclude the 'in person' reference, it becomes evident that Article 25(2) does indeed need an oral and synchronous exchange of arguments or evidence - which may occur remotely.[68] Indeed, the latest ICC COVID-19 Guidance Note permits remote hearings '[i]f the parties agree, or the tribunal [so] determines', implying the potential of proceeding with remote hearings in the absence of parties' consent.[69] On the other side, and somewhat contrary to this, others argue that arbitral tribunals should have 'carte blanche' when deciding on remote hearings.[70]Tribunals indeed have extensive authority to select the right process for arbitration, which includes the authority to decide on remote hearings, as described above.[71] However, it is inaccurate to assert that this capacity equates to conferring limitless authority or a 'carte blanche' on the Tribunal. Rather than that, the Tribunal must carefully consider all relevant factors to decide whether a remote hearing is suitable in the particular instance. Moreover, asdiscussed below in Section 7, the Tribunal must be aware of the parties'right to be heard and treated fairly to deliver an enforceable judgement.

To summarise, rather than taking one of the aforementioned extreme positions – either that tribunals may never conduct remote hearings over the opposition of a party or that they have 'carte blanche' to do so – arbitral tribunals typically have the authority to order a remote hearing over the opposition of a party, but exercising that authority requires careful consideration. Accordingly, the following section examines how tribunals should use their authority to order a remote hearing in the absence of an agreement between the parties.

5.2 Test for the Tribunal to use in determining whether to hold remote hearings in the absence of the parties' agreement

When determining the standard that tribunals should apply when deciding on a remote hearing in the absence of the parties' agreement, the first critical question is who bears the onus of proof: is it the party seeking the remote hearing's onus to establish why it is warranted, or is it the party opposing the remote hearing's onus to demonstrate why it would be improper in the circumstances? This issue has been contested in several countries in relation to remote hearings in cases before national courts, as laid forth in section 5.2.1. While these principles apply only to domestic court proceedings, they give insight into the right solution for arbitral tribunals to adopt, as addressed in Section 5.2.2.

5.2.1 Onus on the Applicant for Remote Hearings vs. Onus on the Opponent for Remote Hearings

Remote hearings, as indicated in section 2, are not unique to international arbitration.[72] On the contrary, national courts conduct sessions remotely in several jurisdictions across the globe — they have done so in the past and will do so much more often during the present epidemic.[73] In this context, courts must define the standard they will use to determine whether to continue with a remote hearing and, more specifically, which side will bear the onus of evidence, i.e. the party seeking the remote hearing or the party opposing it.

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[65] See Sweden: Lindskog, supra n. 45, at 653 (noting that if a party requests oral hearing under s . 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. 45, § 1047, paras 8–9; Musielak & Voit, supra n. 45, § 1047, para. 2. See also Spohnheimer, supra n. 45, at 308 et seq.

[66] *See supra*-3.2.1.

[67] *Id.*

[68] *Id.*

[69] ICC, Guidance Note, supra n. 50, para. 21.

[70] Rainey & Sharma, supra n. 3, point 4.

[71] *See supra*-3.2.2.

[72] *See supra*-2.

[73] "Remote Courts" (*Remote Courts Worldwide*) <https://remotecourts.org>.

The answer is included in the appropriate legislative provision in several countries. For example, the Federal Rules of Civil Procedure in the United States specify that 'the court may authorise testimony in open court by simultaneous transmission from a remote location' but only '[f]or good cause in compelling circumstances and with appropriate safeguards'.[74] Thus, the party seeking remote hearings has the burden of establishing 'compelling circumstances.'[75] In some countries, such as Australia, the legislative rules are silent on the standard to be used by the court but merely provide it with authority to hold remote hearings.[76] As a result, case law examines the proper test. In rare instances, Australian courts have imposed a strict threshold, placing the burden of proof on the party seeking the remote hearing.[77] These decisions seem to be predicated on the premise that physical hearings are the'ordinary procedure,' while remote hearings are the exception.[78] International tribunals[79], as well as domestic courts,[80] have followed suit. However, Australian courts have adopted a more lenient standard in other circumstances, permitting remote hearings 'in the absence of considerable impediment.'[81] Under this method, the party opposing the remote hearing must establish the existence of such a'considerable impediment.'[82] Or, as one Australian court stated:

> '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.'[83]

Several situations have attempted to reconcile the two diametrically opposed perspectives outlined above. For example, in *Australian Competition and Consumer Commission v. StoresOnline International Inc.*, the court stated that 'the choice in every case cannot be determined solely by reference to general principles,' concluding that 'the exercise of discretion as to what is appropriate in a particular case will require a balancing of what will best serve the administration of justice while also maintaining justice between the parties'.[84] In other circumstances, a balancing test has been used to determine '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.'[85]

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[74] US Federal Rules of Civil Procedure, rule 43(a).

[75]*See Anil Sawant v. Geoffrey Ramsey*, Civil Action No. 3:07–cv–980 (VLB), at 3–4 (D. Conn. May 2012); *Dynasteel Corp. v. Durr Systems, Inc.*, 2009 WL 10664458, at 1–2 (W.D. Tenn. 26 June 2009); *United States v. Philip Morris Inc.*, No. Civ.A. 99–2496 (GK) (D.D.C. 2004).

[76] Federal Court of Australia Act 1976, s. 47A(1). See also Australian Federal Court Rules, Ord. 24, rule 1A.

[77]*See Australian Medical Imaging Pty. Ltd. v. Marconi Medical Systems Australia Pty. Ltd*. (2001) 53 N.S.W.L.R. 1, para. 27 (New South Wales Supreme Court); *Campaign Master (UK) Ltd. v. Forty Two International Pty. Ltd.* (No. 3) [2009] F.C.A. 1306, para. 77 (Federal Court of Australia). *See also Australian Competition & Consumer Commission v. World Netsafe Pty. Ltd.* (2002) 119 F.C.R. 303 (Federal Court of Australia); *Odhiambo v. Minister for Immigration & Multicultural Affairs* (2002) 122 F.C.R. 29, para. 97 (Federal Court of Australia).

[78]*See Sunstate Airlines (Qld) Pty. Ltd. v. First Chicago Australia Securities Ltd.* (Giles, C.J., Comm. D., 11 Mar. 1997, unreported) (cited in Australian Medical Imaging Pty. Ltd., supra n. 77, para. 26).

[79]*Islamic Republic of Pakistan v. Republic of India(Indus Waters Kishenganga Arbitration),* Partial Award, PCA Case No. 2011–01 (18 Feb. 2013), in *Indus Waters Arbitration (Pakistan v. India): Record of Proceedings* 2010–2013, 10 PCA Series 81–376, para. 3 (2014).

[80]*See Hong Kong: Re Chow Kam Fai, ex parte Rambas Marketing Co. LLC* [2004] 1 H.K.L.R.D. 161 at 174, para. 28 (H.K. Court of First Instance).

[81]*Tetra Pak Marketing Pty. Ltd. v. Musashi Pty. Ltd.* [2000] F.C.A. 1261, para. 25 (Federal Court of Australia).

[82] See also *Hong Kong: Sun Legend Investments Ltd. v. Ho Yuk Wah* [2008] 4 H.K.L.R.D. 239, at 243, para. 6 (H.K. Court of First Instance).

[83]*Versace v. Monte* [2001] F.C.A. 1454, para. 16 (Federal Court of Australia). See also *McDonald v. Commissioner of Taxation* [2000] F.C.A. 577, paras 21–22 (Federal Court of Australia).

[84]*Australian Competition & Consumer Commission v. StoresOnline Int'l Inc.* [2009] F.C.A. 717, para. 14 (Federal Court of Australia).

[85]*Moyette Pty. Ltd. v. Foundation Healthcare Ltd.* [2003] F.C.A. 116, para. 10 (Federal Court of Australia). *See alsoStuke v. ROST Capital Group Pty. Ltd.* [2012] F.C.A. 1097, para. 23 (Federal Court of Australia); *Kirby v. Centro Properties Ltd.* [2012] F.C.A. 60, para. 11 (Federal Court of Australia); *Australian Securities & Investments Commission v. Rich* [2004] N.S.W.S.C. 467, para. 43 (New South Wales Supreme Court). Compare *Capic v. Ford Motor Co. of Australia Ltd.* (Adjournment) [2020] F.C.A. 486, paras 7–8 (Federal Court of Australia).

This middle ground, in which the court does not require either party to demonstrate good reason for or against conducting remote hearings but instead weighs multiple criteria, is likewise incorporated in statutes in other countries, including Canada[86] and Singapore.[87]This option seems to be the most appropriate for international arbitration, as detailed in the next section.

5.2.2 Exercise for Overall Balancing

Concerning the standard that arbitral tribunals should employ when deciding on a remote hearing in the absence of parties' consent, one may envisage solutions similar to those chosen by national courts, as described in the preceding section. For example, arbitral courts might either demand that the party requesting a remote hearing prove good reasonor, to the contrary, place the burden on the party contesting a remote hearing to explain why the hearing cannot be performed remotely.[88] However, none of these solutions is provided for by national arbitration laws or institutional procedures. As a result, adopting the intermediate solution of an overall balancing test is the most appropriate and consistent with arbitral tribunals' extensive discretion in evaluating whether a hearing may be held remotely.[89] In this overall balancing effort, tribunals must weigh the possible advantages of a remote hearing against the risk of prejudice to any party.

This balancing act must take into account all relevant factors. However, arbitral tribunals often evaluate a variety of considerations in the framework of this multi-factorial approach. They are described in the following subsections and include: (1) the rationale for the remote hearing; (2) the planned hearing's content; (3) the remote hearing's technological framework; and (4) the time and expenses associated with a remote hearing versus a physical hearing. This is not an entire list, and depending on the circumstances, the elements mentioned may not necessarily have the same significance or weight in each situation. When addressing the different criteria, references toremote hearings in procedures before national courts. Again, although these solutions are not appropriate – or, in some cases, even transposable – to international arbitration, they may serve as examples.

5.2.2.1 Need for the Remote Hearing

An investigation into the rationale for a remote hearing is an excellent place to start when evaluating it. Amid the COVID-19 epidemic, remote hearings are justified in light of mandated travel restrictions and social distancing measures. However, thinking beyond the current pandemic, a variety of possible reasons are conceivable, ranging from certain participants being physically unable to attend due to professional obligations (e.g., an important business meeting) or more critical reasons (e.g., medical condition) to other altruistic motives (e.g. decreasing carbon footprint). Generally, the more severe the hindrance, the greater its weight in the total judgement.

Typically, if a witness or expert is asked to testify remotely, the cause for their absence is a critical issue to examine.[90] For example, in the so-called *Indus Waters Kishenganga Arbitration* between Pakistan and India, the Tribunal determined 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.'[91] Similarly, in *Compaa de Aguas del Aconquija S.A., Vivendi Universal v. Republic of Argentina,* the Tribunal denied a request to hear an expert remotely due to the absence of a compelling basis for the expert's inability to appear in person.[92] Additionally, tribunals may inquire whether the reasons for the witness' or expert's absence were known to the party presenting them at the time the testimony was initially offered; and whether such party took any appropriate steps to ensure the witness' or expert's physical presence at the hearing.[93]

[86] Canada Rules of Civil Procedure, rule 1.08(3).
[87] Singapore Evidence Act, s. 62A(2).
[88] In this latter sense, *See* Rainey & Sharma, supra n. 3, point 1.
[89]*See supra*-3.2.2.
[90]For national court proceedings, see e.g. Canada Rules of Civil Procedure, rule 1.08(5)(e); Singapore Evidence Act, s. 62A(2)(a). *See also Zigiranyirazo*, supra n. 21, para. 31.
[91]*Pakistan v. India*, supra n. 79, para. 3.
[92]*Vivendi Universal v. Republic of Argentina*, Award, ICSID Case No. ARB/97/3, para. 2.7.16 (20 Aug. 2007).
[93]*Pakistan v. India*, supra n. 79, para. 3. In national courts, *See* Singapore: *Sonica Industries Ltd. v. Fu Yu Manufacturing Ltd.* [1999] 3 S.L.R.(R.) 119, paras 10–20 (Singapore Court of Appeal).

5.2.2.2 The Scheduled Hearing's Content

The scheduled hearing's topic is also critical in determining whether it can be performed remotely. For instance, legal arguments are believed to be easier to conduct remotely than the gathering of evidence.[94] This is partly countered by the fact that arbitral Tribunal have – for decades now – effectively handled certain witness and evidence taking remotely.[95]

(1) Legal justifications: A 2006 poll of US federal court judges confirmed their pleasure with remote presentation of legal arguments.[96] After interviewing judges and their clerks who use video-conferencing for oral arguments, the survey's authors concluded that users are generally satisfied and that the benefits of remote hearings (including scheduling flexibility, time and cost savings) outweigh any potential disadvantages (including technical problems).[97] The judges stated that their experience was comparable to physical hearings in terms of quality: they had the same comprehension of the case and its underlying legal difficulties.[98] Additionally, the majority of judges claimed that they asked as many questions as possible[99] and did not miss the physical connection.[100]It's worth noting that the more experience a judge had with video-conferencing, the less likely they were to consider the physical absence an impediment. These findings seem to imply that prior experience with remote hearings has a significant impact on how they are seen and that individuals with less prior experience often state concerns about remote hearings. Increased usage of remote hearings in international arbitration due to the current COVID-19 epidemic may have a game-changing impact, with an increasing number of arbitrators (and national court judges) gaining the necessary knowledge to conduct hearings remotely to their satisfaction.

(2) Testimony of witnesses and experts: If the scheduled hearing includes witness or expert evidence, the issue will often centre on whether their cross-examination can be done effectively remotely. Typically, the cross-examining party will argue that remote cross-examination is not as effective as one conducted in person with the witness or expert, frequently citing one of the following arguments. First, it would undoubtedly be more difficult to judge a witness's or expert's credibility remotely, particularly given the absence of non-verbal indicators and the inability to study the person's demeanour. For example, in a national context, courts occasionally refer to the "'chemistry" of oral exchanges in a courtroom, whether between a judge and counsel (or another representative) or between a cross-examiner and a witness',[101] and state that technical difficulties are considerable and markedly interfere with the giving of the evidence and, particularly, with cross-examination', referring specifically to 'the difficulty of assessing a witness where evidence is given by video link'.[102] As the Singapore International Court concluded 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 disadvantage for a party in carrying out cross-examination of a witness by video link, compared to the witness being present in court.'[103]

Except in exceptional instances, none of the claims made above are totally persuasive and cannot be offset by proper technology solutions. Non-verbal clues such as body language may be picked up in remote hearings if they incorporate video transmission and if numerous cameras enable viewing of both the

[94]*See* Foester, supra n. 3, at 4–5.
[95]*See Murphy Exploration & Production Co. Int'l*, supra n. 14, para. 26; *S.D. Myers, Inc*., supra n. 14, para. 76; *Paushok*, supra n. 14, para. 61; *Fraport A.G. Frankfurt Airport Services Worldwide*, supra n. 14, para. 43; *EDF (Services) Ltd*., supra n. 14, para. 38; *SGS Société Générale de Surveillance S.A.*, supra n. 14, para. 23.
[96] Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeal (Federal Judicial Center 2006).*
[97]*Id.*, at 1-12
[98]*Id.*, at 12.
[99]*Id.*
[100]*Id.*, at 10.
[101]*Campaign Master (UK) Ltd*., supra n. 77, para. 77.
[102]*Dorajay Pty. Ltd. v. Aristocrat Leisure Ltd.* [2007] F.C.A. 1502, para. 7 (Federal Court of Australia). *SeealsoHanson-Young v. Leyonhjelm* (No. 3) [2019] F.C.A. 645, para. 2 (Federal Court of Australia). *See further*, *Zigiranyirazo*, supra n. 21, para. 32.
[103]*Bachmeer Capital Ltd. v. Ong Chih Ching* [2018] S.G.H.C.(I.) 01 Suit No. 2 of 2017 (Summons No. 2 of 2018), para. 18 (Singapore International Commercial Court).

witness'swhole frame and their face/torso.[104] If the transmission quality is adequate and the remote setup is sufficient, including huge displays, the Tribunal's ability to see and hear the witness is often superior to that of a physical hearing chamber. The audio level may be changed to meet the particular demands of each participant, and in certain scenarios, participants can remotely operate cameras and zoom in as necessary. Remote hearings,therefore, not only satisfy the Anglo-Saxon desire for 'seeing the witness' but are often more so. As Wendy Miles, Q.C. said at a recent conference, 'if you cannot see the whites of the witness' eyes, get a bigger screen.'[105]

Additionally, if the remote hearing is recorded, the Tribunal is able to see and hear the witness not only during the testimony, but also afterwards, for example, during discussions. The ability to replay a particular segment of a recorded testimony may be more beneficial than just rereading a portion in a transcript. Courts around the globe concur with this notion that remote cross-examination may be conducted effectively, emphasising in the context of national court procedures that the cross-examiner has no disadvantage due to the virtual distance.[106] In certain instances, the possibility for bias may be on the side of the party presenting the witness or expert rather than the cross-examiner.[107] While some courts assert that '[t]he witness can be closely observed and most if not all of the visual and verbal cues that could be seen if the individual was physically present can be observed on the screen,'[108] others go so far as to assert that facial expressions can be seen much more clearly than in physical encounters.[109]As early as 2001, a Canadian court discounted the supposed dangers of remote testimony while cautioning against exaggerating the witness' demeanour and body language's value:

'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.'[110]

[104] In comparison, audio-only telephone hearings might in this respect indeed be less efficient, *See Pakistan v. India*, supra n. 79, para. 5.

[105]SCC, "Now Available: Recordings from SCC´S Online Seminars - the Arbitration Institute of the Stockholm Chamber of Commerce" (*sccinstitute.com*2020) <https://sccinstitute.com/about-the-scc/news/2020/now-available-recordings-from-scc-s-online-seminars/> accessed January 13, 2022.

[106] Australia: *See ICI Australia Ltd. v. Commissioner of Taxation* (29 May 1992, unreported), cited in *Tetra Pak Marketing Pty. Ltd.*, supra n. 81, para. 22; *Commissioner of Taxation v. Grbich, Y.F.R* [1993] F.C.A. 516, paras 5–6 (Federal Court of Australia); Rich, supra n. 85, para. 28. Canada: *SeePack All Manufacturing Inc. v. Triad Plastics Inc*., [2001] O.J. No. 5882, para. 6 (Ontario Superior Court of Justice*); Chandra v. CBC*, 2015 O.N.S.C. 5385, para. 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 O.N.S.C. 7353, paras 23–35 (Ontario Superior Court of Justice). United Kingdom: *SeePolanski v. Conde Nast Publications Ltd.*, [2005] All E.R. (D.) 139 (Feb.), para. 14 (citing the experience of the trial judges). United States: *See DynaSteel Corp*., supra n. 75, 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, para. 15 (International Criminal Tribunal for Former Yugoslavia, 28 May 1997).

[107]*See* Polanski, supra n. 106, para. 13.

[108]*Chandra*, supra n. 106, para. 20.

[109]*Capic*, supra n. 85, para. 19.

[110]*Pack All Manufacturing Inc.*, supra n. 106, para. 6.

In sum, the concerns about purported bias against the cross-examining side and the Tribunal's apparent incapacity to determine the reliability of a witness or expert in a remote hearing seem exaggerated.

Second, the cross-examining party may highlight concerns about a remotely heard witness or expert being coached or otherwise influenced improperly.[111] However, in many remote hearings, it is standardpractice to send a representative from or chosen by the cross-examining party to sit with the witness to ensure that they are free of outside influence. Moreover, even in the absence of a person physically present with the testifying witness or expert – which may be prohibitively costly or impossible in the current epidemic – technology alternatives exist. They vary from specialised programmes that guarantee a 360-degree view of the witness's venue to more straightforward methods such as several cameras or requesting the witness turn the camera around the room. While these mechanisms have been shown to be effective in excluding unwelcome physical presence from the testifying person during remote hearings, the Tribunal should keep in mind that the witness or expert frequently has multiple screens in front of them, which could theoretically be used for coaching. Nonetheless, this danger should not be exaggerated. It requires very dishonest behaviour on the part of the party and witness, which the Tribunal is likely to discover and hence risks backfiring, i.e. destroying the witness' or expert's credibility.

Thirdly, some believe that remote hearings lack the seriousness and solemnity associated with real hearings. As a result, the witness is less likely to'remain conscious of the nature and solemnity of the occasion and of his or her obligations'.[112] This argument may have some weight in the context of national courts, which often use authority symbols such as judges' apparel (including robes and wigs) and architectural cues (such as judicial canopies, coats of arms, and high seating in courts).[113] However, this is not true for international arbitration hearings, which often lack any of these components. Apart from the seating design, there is no apparent difference between parties, attorneys, witnesses, experts, and arbitrators, all of whom are dressed similarly for business. Furthermore, one may wonder if testifying remotely and in a more comfortable environment does not enhance a witness' evidence. The witness may be agitated and confused in a physical hearing or courtroom. Additionally, they testify in front of counsel and the party that produced the witness, resulting in conscious or unconscious influence — which does not occur with remote testimony.

For the reasons stated above, concerns about remotewitnesses and expert evidence should not be seen as insurmountable obstacles. However, this is not to argue that cross-examining witnesses or experts remotely is simple. At the very least, remote hearings, particularly those involving remote witnesses or expert evidence, need thorough preparation. Additionally, it is true that remote communication tools – particularly when not functioning effectively – may increase linguistic and cultural gaps, thereby irritating the cross-examiner. For example, it may be unclear if the witness or expert's delay in responding to questions results fromtheir evasiveness or technology challenges and signal delay.

Thus, when deciding whether to hold a remote hearing, including witness or expert evidence, due attention should be given to the technology setup (and its constraints) and the case's unique facts. Arbitral tribunals consider the significance of the relevant witness or expert and the anticipated duration of their cross-examination. Additional unique characteristics, such as the need for interpretation, witness sequester, and conferencing, must be considered.[114]Technological solutions are often available, as mentioned in Section 6 below.[115] In the end, arguing whether remote witness and expert evidence is equivalent to, or better/worse than, in-person testimony is fruitless. It is unique and hence needs unique preparation, planning, and organisation. It would be incorrect for parties, lawyers, and arbitrators to simply 'insert' what occurs during physical hearings into scenarios involving remote witnesses or experts.

5.2.2.3 Technical Foundation for Remote Hearing

As detailed below in Section 6, technical framework choices, such as the platform employed, are critical for arranging remote hearings. On the other hand, certain characteristics must be considered earlier when

[111]*See Capic*, supra n. 85, para. 16.
[112]*Campaign Master (UK) Ltd.*, supra n. 77, para. 78. *See also Capic*, supra n. 85, para. 19.
[113] 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 Int'l 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 Stud. 698–718 (2019). *See also* Emma Rowden et al., *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (2013).
[114]*See* Canada Rules of Civil Procedure, rule 1.08(5)(b).
[115]*See infra*-6.

the Tribunal determines in principle whether or not to continue with a remote hearing. To begin, the Tribunal must ensure that all remote participants have an adequate internet connection and device configuration.[116]

In national court processes, the problem can be quite troublesome, but the issue should be less vexing in international arbitration proceedings. With enough advance time and funding, the proper setup may often be accomplished with expert assistance. Additionally, the Tribunal may choose to determine the number of remote connections required from which regions and time zones in advance. The more connections, the more probable that technical or practical challenges (e.g. scheduling a convenient hearing time for all parties) would arise and must be addressed. The need for translators is also one of the elements a tribunal may consider when considering whether to conduct a hearing remotely. While there are workarounds, which are addressed below, interpretation complicates the planning of remote hearings, which tribunals should consider.[117]

The Singapore International Commercial Court went so far as to test the remote setup before judging if the quality was satisfactory for a remote hearing to begin.[118] As explained below, testing rounds are an integral aspect of every remote hearing. Tribunals in international arbitration, on the other hand, often determine whether or not to conduct a remote hearing first and then test the setup, not the other way around. In the event of uncertainty and with appropriate lead time, an arbitral tribunal may consider undertaking a testing phase before determining whether or not to hold a hearing remotely, notwithstanding the possibility of additional expenses.

5.2.2.4 Physical Hearing vs. Remote Hearing: Timing and Costs

International arbitration hearings are sometimes criticised for being too lengthy and expensive.[119] For a long period of time, arbitral institutions and other parties have attempted to reduce the duration and expense of proceedings with variable outcomes.[120] Remote hearings may be beneficial in limiting the time and costs associated with international arbitration processes. Thus, comparing the time and expenditures of a physical hearing to those of a remote hearing may be one of the variables that an arbitral tribunal considers when selecting which form of hearing to conduct. Physical hearings sometimes need a longer-term. This is clear in the present COVID-19 outbreak since scheduled hearings must be postponed physically unless they are conducted remotely. Tribunals must consider this potential delay (along with any detrimental repercussions for either party) before determining whether or not to continue remotely. However, even in the absence of a pandemic, remote hearings often prevent delays caused by the unavailability of a particular witness or expert. More broadly, remote hearings are often simpler to plan since participants need no (or very little) travel.

Costs are another consideration. In national court procedures, the cost of setting up a video-conference may sometimes be more than the cost of conducting a real hearing. The same is unlikely to be true in international arbitration processes. Given the expenditures associated with a physical hearing (e.g. venue location, overseas flight, and lodging), a remote hearing is often substantially less costly. However, one should not overlook the costs associated with remote setups, particularly if they contain high-end platforms and perhaps rented gear. Much will rely on the platform used and other aspects governing the actual arrangement of the remote hearing, which will be explored in the next section of the article.

VI. Constitution of Remote Hearings

On remote hearings, guidelines, practise notes, and other soft law instruments have multiplied, particularly in the aftermath of the COVID-19 outbreak. They have been issued by arbitral institutions[121] and other arbitral organisations and law firms, and arbitration practitioners.[122] They vary from broad practical

[116]*See Capic*, supra n. 85, paras 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).
[117]*See infra*-6.
[118]*Bachmeer Capital Ltd., supra* n. 103, paras 11–12.
[119]*See* Queen Mary Survey, *The Evolution of International Arbitration*, 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).
[120]*See* the ICC as one example of many others: ICC Rules, *App. IV on Case Management Techniques*; ICC, *Commission Report: Decisions on Costs in International Arbitration* (2015).
[121]*See* AAA-ICDR, Virtual Hearing Guide for Arbitrators and Parties; Delos, Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 (20 Mar. 2020); HKIAC, Precautionary Measures in Response to COVID-19 (26 Mar. 2020); ICC, Guidance Note, supra n. 50; ICSID, supra n. 16; KCAB, supra n. 22.
[122]*See* authorities cited *supra* n. 3.

recommendations on conducting remote hearings and drafting procedural orders[123] to instructions tailored to certain platforms[124] or areas.[125] While some are not particular to international arbitration, they do include valuable suggestions.[126]

The objective of this essay is neither to comprehensively explore various soft law instruments, nor to provide guidance on how to arrange for or conduct a remote hearing. Rather than that, the following sections will focus on two critical issues: (1) remote hearing planning before or at the start of the arbitration; and (2) remote hearing organisation throughout the arbitration.

6.1 Preparation for Remote Hearings Before to or During the Arbitration

In the COVID-19 pandemic, the debate has naturally centred on the most pressing problem: locating other venues for hearings that were initially scheduled as physical sessions. Apart from the immediate crisis, parties, lawyers, and arbitrators may choose to explore remote hearings at an earlier stage, such as during the drafting of dispute resolution provisions or during the arbitration's initial case management conference. In-house lawyers have been vociferous in talks about remote hearings, emphasising the need of users not to revert to the traditional practice of physical hearings.[127] In writing dispute resolution provisions, little attention has been given to cope with the potential of remote hearings. If parties want to avoid hearings, particularly physical hearings, as some in-house counsel assert, they may choose to include language allowing for remote hearings in their arbitration agreements. While it does not seem prudent to rule out physical hearings entirely, the prospect of remote hearings might be addressed in various ways.

To begin, parties may explain that the ArbitralTribunal has the authority to hold a hearing remotely, even in the face of one party's resistance. While such authority exists under the majority of national laws and arbitration rules, as stated above,[128] a clarification in the arbitration agreement has the benefit of precluding any future dispute on the subject. The arbitration agreement might include one of the following example clauses:

> 'The Arbitral Tribunal shall have the power to establish the conduct of a hearing, including whether it may take place physically or remotely (including by video or telephone conference) or a combination thereof.'

After hearing the Parties, the Arbitral Tribunal may opt to hold a hearing either physically or remotely (including through video or telephone conference) or a mix of the two.

Second, parties might take it a step further and incentivise the ArbitralTribunal to conduct sessions remotely whenever feasible. This might be accomplished by shifting the burden of evidence in favour of the party objecting to remote hearings. As noted before, in the context of national court proceedings, some countries permit remote hearings' absent substantial hindrance' or require the party opposing them to explain why a physical hearing would be necessary.[129] Along with the example provisions stated before, parties may include the following wording 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.'

Even if the parties do not include these or similar articles in their arbitration agreement, tribunals may consider remote hearings at the commencement of the arbitration. For example, they might allow parties to remark on the inclusion of language similar to the example provisions above in a first procedural order that establishes the

[123] *See* AAA-ICDR, Model Order and Procedures for a Virtual Hearing via Videoconference; Richard F. Ziegler, Draft Procedural Order to Govern Virtual Arbitration Proceedings, TDM (9 Apr. 2020).

[124] *See* AAA-ICDR, Virtual Hearing Guide, supra n. 121; Stephanie Cohen, Draft Zoom Hearing Procedural Order, TDM (10 Apr. 2020).

[125] Africa Arbitration Academy, *supra* n. 122.

[126] *See* 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/C250/01 (2015); Federal Courts of Australia, *Guide to Videoconferencing in Court Proceedings* (Oct. 2016); Hague Conference on Private International Law, supra n. 5.

[127] *See* SCC Webinar, *supra* n. 105.

[128] *See supra*-5.2.

[129] *See supra*-5.2.1.

arbitration's procedural structure. While addressing remote hearings at the COVID-19 pandemic's first case management meeting appears probable, such a discussion would be beneficial even beyond the present crisis.

Whether or not the initial procedural order includes wording allowing for a remote hearing, it may be prudent to revisit this issue mid-way through the arbitration, for example, after the parties have exchanged written submissions. For instance, at a mid-stream case management meeting, the prospect of a remote hearing may be considered. In any case, if a remote hearing is to occur, planning should preferably begin early and prior to the traditional pre-hearing meeting, as mentioned in the following section.

6.2 Convening Remote Hearings

Once it is determined that a hearing will be conducted remotely, the Tribunal and the parties should begin preparations as soon as practicable.

This comprises, first and foremost, a discussion and decision of the remote hearing platform to be employed. Much relies on the unique circumstances of each instance (e.g., whether the hearing is semi-remote or completely remote; the location and number of remote connections, etc.), and there is no one-size-fits-all approach. The variety of options is extensive: from freely accessible public platforms to arbitration-specific suppliers providing customised solutions, including those offered by certain arbitral institutions and hearing centres. This articledoes not discuss the technical distinctions between different alternatives, which are constantly changing.[130]

When selecting the appropriate platform, parties and tribunals should evaluate the technical configuration and data security and privacy concerns.[131] While some platforms have been dubbed the 'go-to solution' for international arbitration hearings,[132] severe security concerns have been raised.[133] At the very least, the parties and arbitral Tribunal should deliberate on these problems, considering two connected but separate facets. On the one hand, there is data security (or cybersecurity), which refers to the issue of preventing unwanted third parties from accessing the remote hearing. International arbitration has been discussing cybersecurity for some time, and the management of remote sessions is not the only weak link.[134] End-to-end encryption is preferred, as is password protection at a bare minimum. On the other hand, there is the issue of data privacy or confidentiality, which refers to the possibility that the remote hearing provider or any other third party involved in the remote hearing that stores, transmits, or otherwise has access to data during the remote hearing may (mis)use it outside of the arbitral proceedings.[135]For example, several video-conferencing systems' basic terms and conditions offer the provider ownership rights over the data transferred during the video-conference. As a result, the supplier may sell or otherwise utilise the data, which is obviously problematic for confidential arbitration procedures. In general, the conclusion of the 2017 ICC Commission Report on Information Technology in International Arbitration seems to be still valid today, given the prevalence 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.'[136]

After selecting a remote hearing provider, the Tribunal and the parties must address several problems in advance of the remote hearing. They are best handled in a single (or maybe many) case management conference(s), followed by procedural orders. Several of the soft law instruments discussed above provide practical recommendations.[137] While the following list is not inclusive, these procedural orders should often contain the following elements in addition to the standard hearing directions:

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[130] For a comparison, *See* Wikipedia, Comparison of Web Conferencing Software.
[131] *See* CIArb, *supra* n. 122, s. 1.5.
[132] Rainey & Sharma, *supra* n. 3, point 6.
[133] *See* Bill Marczak & John Scott-Railton, *Move Fast and Roll Your Own Crypto: A Quick Look at the Confidentiality of Zoom Meetings*, Citizen Lab (3 Apr. 2020); Maria Ponnezhath & Shubham Kalia, *Zoom Sued for Overstating, not Disclosing Privacy, Security Flaws* (Reuters 8 Apr. 2020).
[134] *See* 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).
[135] *See* ICC, Guidance Note, supra n. 50, Annex II, point III.
[136] ICC, *Commission Report: Information Technology in International Arbitration* 15 (2017).
[137] *See* ICC, Guidance Note, supra n. 50, Annex I.

a. the technical setup of any remote venues, including the required system specifications (e.g. connectivity) and equipment (e.g. the number and placement of screens, microphones, and cameras, etc.);
b. the use of technical assistants or administrators, including remotely if necessary, and the need for participant training sessions;
c. the preparation and use of hearing bundles, preferably electronic in nature, including which documents, if any, should be physically present in any recitation.

It is advisable to do numerous testing sessions before the remote hearing. These should typically include one well in advance of the hearing (to verify that the different soft and hardware systems employed are compatible) and one soon before the remote hearing is scheduled to begin (e.g. twenty-four hours before). There should be no unexpected complications if the remote hearing is appropriately planned and conducted per the stages indicated above. In particular, if technological difficulties arise, the Tribunal will be able to address them under the pre-established processes. Nonetheless, strong case management skills on the part of the presiding arbitrator, both before and during the remote hearing, will often be even more critical than they are at physical hearings.

VII. The Enforceability and Challenges of Awards from Remote Hearings

The final test for any remote hearing is whether the award issued survives a challenge in recognition/enforcement or set aside procedures. This test seems to have passed so far: to the author's knowledge, no known court judgement has denied recognition/enforcement of an award or set it aside on the grounds that a hearing was held remotely. However, thisdoes not indicate that parties will not attempt to contest awards on this basis in the future. The most likely grounds for a challenge in this regard will be the parties' right to be heard and treated equally (often referred to collectively as the 'due process' standard),[138] as set out in Article V(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in UNCITRAL Model Law Articles 34(2)(a)(ii) and 36(1)(a)(ii), and in similar provisions in national arbitration statutes.[139] Before delving more into the right to be heard and the right to equitable treatment in the following sections, a basic observation about both applies. They are regularly used, particularly under the New York Convention, although they are seldom effective, and only in the most extreme circumstances.[140] A party contending that an award violates the parties' right to be heard and treated equally as a result of a remote hearing must typically demonstrate a high standard.

7.1 Violation of a Party'sRight to be Heard

A party seeking to vacate an award or oppose its recognition/enforcement on the grounds that the hearing was conducted remotely would almost certainly use one of the following reasons to contend that it lacked a significant chance to present its case. To begin, the party may claim that the award violates its right to be heard since it was entitled to a physical hearing. Typically, such an argument would be founded on elements of national legislation or institutional arbitration rules guaranteeing the party the right to a hearing and their interpretation that this right always includes a right to a physical hearing.[141] However, as noted above, such an interpretation is implausible, and a remote hearing, as an oral and synchronous exchange of arguments or evidence, often satisfies the requisite hearing test.[142] Second, a party may claim that its right to be heard was violated because it could not present its arguments or evidence effectively at a remote hearing. Typically, the party may claim that their remote oral submissions or witness or expert evidence was not as successful as a real hearing. These justifications, however, are weak in the absence of any concrete conditions. As noted before, remote hearings allow for the quick presentation of legal arguments and witness/expert evidence.[143] In

[138] 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. 41, at 3494.
[139]*See* Belgian Judicial Code, Arts 1717(3)(a)(ii), 1721(1)(a)(ii); English Arbitration Act, s. 103(2) (c); French CPC, Art. 1520(4); Hong Kong Arbitration Ordinance, Ch. 609, Part 10, division 2, s. 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).
[140]*See* Maxi Scherer, *Commentary on Article V(1)(b),* in *New York Convention, Article-by-Article Commentary* para. 130 (Reinmar Wolff ed., 2d ed., Beck, Hart & Nomos 2019).
[141]*See supra*-3.2.1.
[142]*Id.*
[143]*See supra*-5.2.2.2.

particular, worries that it would be more difficult to judge a witness' or expert's credibility remotely are exaggerated.[144] Courts across the globe have usually expressed pleasure with remote witness/expert testimony, noting that they could evaluate it as well as (or maybe better than) in-person hearings and that there was no disadvantage for the cross-examining side.[145] Case law from several countries across the globe demonstrates that remote hearings do not constitute a violation of the parties' right to be heard in and of themselves.[146] Consider, for example, *China National Building Material Investment v. BNK Internationally*, a US court considered a party's opposition to the execution of an arbitral judgement based on Article V(1)(b) of the New York Convention among other reasons.[147] The party contended, in particular, that the arbitral procedures were 'fundamentally unfair' since one of its witnesses was unable to attend the hearing due to a medical condition.[148] The court observed that while the arbitral Tribunal offered to hear the witness via video-conference, the party insisted on a physical hearing.[149] In those circumstances, the courts found no violation of Article V(1)(b) of the New York Convention, noting that 'Mr Chang failed to personally appear – either in person, via video-conference, 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'.[150] Had the court determined that remote hearing of a witness constituted a violation of the party's right to be heard in and of itself, it would not have included it as a viable substitute for a physical hearing.

Similarly, another US court concluded in 2016 that remote hearings by themselves do not constitute a violation of Article V(1)(b) of the New York Convention. In Research and *Development Center v. Ep International*, a party sought to have an award vacated on the grounds that it was not physically present at the hearing.[151] In this connection, the court said that '[w]hen a party asserts that its physical presence at arbitration is prevented, it is generally unable to prevail on such a defence if there are available alternative means of presenting its case.'[152] In the instant case, the applicant failed to establish that it was unable to present its case before the ArbitralTribunal because the applicable institutional arbitration rules expressly permitted party appearance via video-conference – something the application failed to request, the court stated.[153] This demonstrates that video-conference participation would have met the parties'right to be heard (as did the mere possibility to be able to request it).[154] Additional reassurance may be found in case law from some countries that an arbitral tribunal's decision not to have a hearing does not inherently constitute a violation of the parties' right to be heard.[155] If the lack of a hearing is determined to be consistent with the parties' right to be heard, then a hearing that permits the parties to present their case, although remotely, may also be deemed to be consistent.

[144]*Id.*
[145]*Id.*
[146] Compare *Hanaro Shipping v. Cofftea Trading* [2015] EWHC 4293 (Comm), para. 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, paras 44–47 (10 Oct. 2009), in LCIA, Challenge Decision Database (dealing with a proposed testimony by video link).
[147]*China National Building Material Investment Co., Ltd. (P.R. China) v. BNK Int'l LLC(U.S.)* (W.D. Tex. 2009), in *Yearbook of Commercial Arbitration*Vol. 35, 507–509 (Albert Jan van den Berg ed., Wolters Kluwer 2010).
[148]*Id.*, para. 19 et seq.
[149]*Id.*, para. 21-22.
[150]*Id.*, para. 25.
[151]*Research & Development Center 'Teploenergetika,' LLC, v. Ep Int'l, LLC*, 182 F.Supp.3d 556 (E.D. Va. 2016).
[152]*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).
[153]*Id.*, at 570.
[154]*See also* for a participation by telephone, *China National Building Material Investment, supra* n. 148, at 7.
[155] See e.g. England: *O'Donoghue v. Enterprise Inns plc* [2008] EWHC 2273 (Ch), para. 43 (English High Court); Hong Kong: *Kenworth Engineering v. Nishimatsu Construction Co. Ltd.* [2004] H.K.C.U. 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. 2009); Switzerland: BGE 117 II 346, para. E. 1b/aa; BGE 142 III 360, para. E. 4.1.1. But see Austria: Case No. 7 Ob 111/10i (Austrian Supreme Court, 30 June 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 China International Economic and Trade Arbitration Commission (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), para. 25 (English High Court).

Similarly, case law establishes that the Tribunal is not required to permit some forms of witness questioning, such as cross-examination.[156]Suppose a tribunal's failure to conduct cross-examination does not constitute an automatic infringement of the parties' right to present their case. In that case,remote cross-examination may represent an even lesser violation.

Despite the concept that a remote hearing in and of itself does not violate the parties' right to be heard, such a breach may arise in certain cases. For instance, if technological challenges develop yet the Tribunal continues, this may impair the parties' ability to present their argument meaningfully. This is why, as mentioned previously, it is critical to incorporate this into the advance planning of remote hearings and to anticipate procedures for resolving potential difficulties, including channels of communication for parties to inform the Tribunal of technical issues and mechanisms for the Tribunal to halt proceedings if these difficulties persist.[157] A 2016 Australian case centred on the emergence of technical and other issues during a remote hearing.[158] In *Sino Dragon Trading v. Noble Resources International*, the court denied an appeal to vacate an award, notwithstanding the applicant's argument that several technological and other obstacles harmed the remote evidence of its witness. The award cited several issues that arose during the remote testimony, including the following: (1) the planned video-conferencing tool did not work and evidence was given via Skype instead; (2) a'split format' was required, in which video was transmitted via the computer and sound was transmitted via a separate telephone link; and (3) the witness had not been provided with any of the relevant documents and thus could not be directed to them during cross-examination.[159]

Consequently, the panel underlined in its ruling 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'.[160] As a preliminary observation, this case demonstrates some of the ways in which a remote hearing might go wrong. However, with proper preparation and organisation in accordance with the processes outlined before, these concerns are often preventable.[161] It is worth noting that, despite numerous difficulties with the remote testimony, the Australian court did not vacate the award. It said that 'although testimony through telephone or video conference is less than ideal in comparison to having a witness present physically, it does not in and of itself result in "real unfairness" or "real practical injustice."[162] With regard to technical and other concerns, the court observed that the applicant had insisted on video conferencing its witness (despite the opposing side's objections) and was partially responsible for some of the complications that arose.[163]Additionally, the arbitral Tribunal[164] considered the challenges and found that the party most harmed by the concerns was the party cross-examining the witness, not the party presenting the witness.[165] One might speculate whether the court would have reached a different conclusion in the absence of many of the case's peculiar circumstances. For example, had the applicant for the set aside not been the party that insisted on its witness being heard remotely and was partially responsible for the resulting issues. Despite these concerns, the court maintained the award. Additionally, it stated unequivocally that a remote hearing did not constitute a violation of the parties' right to be heard or treated equally.[166]

Furthermore, one must bear in mind that the parties' right to be heard may sometimes be jeopardised in the inverse circumstance, i.e. if a remote hearing is rejected. Refusing a remote hearing, especially in the context of the COVID-19 epidemic, may considerably delay the settlement of the case, maybe indefinitely. This delay may cause injury to one of the parties, impairing its ability to present its argument meaningfully.[167] Whether the claimed infringement is the conduct of a remote hearing or its rejection, the bar for violating the parties' right to be heard is high. There is significant controversy about whether the New York Convention's right to be heard

[156]*See* references cited in Scherer, *Article V(1)(b), supra* n. 141, para. 176.
[157]*See supra*-6.2.
[158]*Sino Dragon Trading Ltd. v. Noble Resources Int'l Pte. Ltd.* [2016] F.C.A. 1131 (Federal Court of Australia).
[159]*Id.*, para. 148.
[160]*Id.*
[161]*See supra*-6.2.
[162] Sino Dragon Trading Ltd., supra n. 159, para. 154.
[163]*Id.*, para. 161-2.
[164]*Id.*, para. 163.
[165]*Id.*, paras 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).
[166]*Id.*, para. 164-5.
[167] Compare Singapore: *Coal & Oil Co. LLC v. GHCL Ltd*. [2015] S.G.H.C. 65, para. 73 (Singapore High Court) and *PT Central Investindo v. Franciscus Wongso* [2014] S.G.H.C. 190, para. 68 (Singapore High Court) (both discussing whether any delay in rendering the award is a sign of tribunal bias).

should be defined in reference to domestic law (e.g., the *lex arbitri* or the law of the enforcement forum) or international norms.[168]

In any case, even states that follow national law realise that solely domestic rules must be adapted. Thus, what may constitute a breach of the parties' right to be heard under domestic law does not always constitute a violation of the New York Convention's Article V(1)(b). Thus, even if a particular domestic law requires a physical hearing, such a need does not apply in international arbitration.[169] Having said that, national courtpractice may nevertheless be relevant in light of the current topic.[170] Numerous national courts were forced to adapt and shift toward remote sessions during the COVID-19 outbreak.[171]Suppose national courts see remote hearings as adequate safeguards for procedural rights in the domestic setting. In that case, it will be difficult for the same courts to conclude that remote hearings in international arbitration violate the parties' right to be heard.

Finally, even if a party's right to be heard has been violated, this does not automatically result in the award being rendered unenforceable under the New York Convention. Rather than that, some national courts demand a causal connection between the violation and the arbitral award. In other words, a breach of the right to be heard results in the award's refusal to be recognised/enforced only if the award would have been determined differently in the absence of procedural irregularity.[172] This may be difficult to prove in the case of remote hearings.

7.2 Violation of the Parties'Right to Equitable Treatment

Along with the right to be heard, several national laws relate to the parties' right to equitable treatment.[173] Despite the absence of a particular mention in Article V(1)(b) of the New York Convention, the right to equitable treatment is deemed to be a component of this provision's norm.[174] It is a relative and comparative test, which means that no party should be treated less favourably in the arbitration than others.[175] Indeed, the concept implies equal treatment of the parties, but not identical treatment.[176] However, if no disparity in treatment exists, it will be challenging to demonstrate that equality was not observed.

Thus, barring exceptional circumstances, the right to equal treatment is often not infringed in a completely remote hearing in which all parties (as well as their witnesses and experts) participate remotely. Such conditions may arise when one side is impacted by technology concerns while the other is not. For example, in the unusual case of *Sino Dragon Trading Ltd. v. Noble Resources International Pte. Ltd*., noted above, an Australian court found no violation despite significant problems with one party's witness testimony.[177] However, if the concerns are substantial and disproportionately harm one party, the equality of the circumstances in which the parties make their case may be disrupted.

A disparity in treatment may also be used to contest an award if one party is accused of coaching its witnesses or experts. The opposing side may contend that this skewed the circumstances surrounding the witness. These difficulties are best avoided by following the preparation and planning steps outlined above, which include tribunal directives prohibiting communication or interaction between witnesses/experts and party representatives prior to, during, and after their testimony, as well as specific measures to prevent impermissible

[168]*See* Scherer, *Article V(1)(b)*, supra n. 141, paras 136–141 (and references cited there).
[169] On this point further, see *Id.*, para. 140 (and references there).
[170] 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, s. 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* 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 context 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., ed., Kluwer 2016).
[171]"Remote Courts" (*Remote Courts Worldwide*) <https://remotecourts.org>.
[172]*See* Scherer, *Article V(1)(b)*, supra n. 141, paras 142–144 (and references cited there, including those arguing to do away with the causality requirement).
[173]*See* 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.
[174]*See* Scherer, *Article V(1)(b)*, supra n. 141, paras 170–171 (and references cited there).
[175]*Id.*
[176]*Id.*
[177]*See supra*-7.1.

witness coaching, such as rotating camera views.[178] In any case, the Tribunal is highly advised to reaffirm with all parties at the conclusion of any remote evidence that they have no reservations about the circumstances underwhich the testimony was conducted.

Finally, the principle of equitable treatment applies to semi-remote proceedings in which one party (or its witnesses and experts) participates remotely but not the other. Unless the parties agree otherwise, the Chartered Institute of Arbitrators' (CIArb) Guidance Note on Remote Dispute Resolution Procedures states that '[i]n the interests of equality, it is preferable that if one party must appear to the tribunal remotely, both parties should do so.'[179] However, in many cases, a semi-remote hearing is essential precisely because one party (or often a witness or expert) is unable to appear physically. The mere fact that a portion of the hearing is conducted remotely does not seem to constitute a violation of the parties'right to equal treatment. This is true for the identical reasons as described above, demonstrating that no violation of the right to be heard has occurred.[180]

VIII. Conclusion

International arbitration has been driven out of its comfort zone by the COVID-19 problem. Parties, lawyers, and arbitrators must decide whether to continue with scheduled hearings and, if so, how to proceed. While many other stages of arbitration are now handled electronically, hearings may be seen as the 'final bastion' of in-person sessions. This has shifted in response to the present epidemic. However, whether the transformation is permanent remains to be seen.

By stepping back from the present problem and offering an analytical paradigm for remote hearings in international arbitration that goes beyond COVID-19, this study concludes the following:

1. As described in Section 2, it is critical to understand the various forms of remote hearings. For example, completely remote hearings, in which each participant is at a different place, pose significant concerns in comparison to semi-remote hearings, in which a central site is linked to one or more remote locations. Additionally, remote legal arguments may need a different approach than remote evidence collection. Hearings may take on a hybrid form in the post-COVID-19 era, with portions of a hearing taking place partially or entirely online and others requiring actual meetings.
2. For all potential kinds of remote hearings, parties and tribunals must consider the applicable regulatory framework, in particular the legislation of the arbitration's seat and any applicable arbitration rules. As discussed in Section 3, several national laws or arbitration rules have explicit provisions on remote hearings, enabling the Tribunal to conduct hearings remotely. Others lack explicit provisions, and so remote hearings will be evaluated in light of other laws, such as the parties'right to a hearing and the Tribunal'sbroad authority to regulate procedural problems. The essay concludes that arbitral tribunals often have the authority to decide on remote hearings – either according to a particular rule or as part of their overall broad authority to conduct arbitral proceedings as they see fit.
3. However, the Tribunal's authority to conduct remote hearings is not unlimited. Section 4 addresses a critical constraint: the parties' agreement. If the parties agree on a certain course of action (e.g., whether to convene a remote hearing or not), arbitral tribunals, absent exceptional circumstances, shall adhere to the parties' agreement.
4. Section 5 addresses the inverse scenario, namely one in which one party demands a remote hearing while the other side insists on a physical hearing. This circumstance poses complex issues, and arbitral tribunals must strike a balance between the parties'right to be heard and treated equally and their need to conduct the processes efficiently and expeditiously. The essay concludes that, although arbitral tribunals normally have the authority to conduct remote hearings over one party's resistance, using such authority needs careful deliberation. This balancing effort must take a multi-faceted approach, which may include evaluating the rationale for and substance of the remote hearing, as well as its anticipated technological structure. The expected time of the hearing and any possible delay if it is held physically and a cost comparison between a remote and physical hearing may also be necessary. Among other things, the essay tackles frequent issues stated in the context of remote witness and expert evidence, especially the purported bias to the cross-examining party and the Tribunal's apparent incapacity to judge the remote witness' or expert's reliability. This essay demonstrates that these anxieties are often exaggerated and can be mitigated by adequate technical solutions.
5. The preceding sections' conclusions underline the critical need of thorough preparation and organisation of remote hearings, which are discussed in Section 6. Existing soft law instruments on remote hearings are mostly concerned with the actual organisation of remote hearings, but this paper demonstrates that

[178] *See supra*-6.2.
[179] CIArb, *supra* n. 122, Art. 1.6.
[180] *See supra*-7.1.

preparation for remote hearings may begin far earlier. This includes taking into account any wording about remote hearings included in the parties' arbitration agreements or the Tribunal's first procedural order.

6. Finally, section 7 examines the viability of awards based on remote hearings in the face of prospective challenges in recognition/enforcement or set aside actions. A thorough examination of current case law from countries worldwide reveals that no such challenges have been successful. The article addresses the most probable grounds for challenge, which include the parties'right to be heard and treated equally. It finds that, barring exceptional circumstances, remote hearings do not contradict any of these standards in and of themselves.

Remote hearings are a sensitive subject, and the analytical framework given in this article is intended to assist parties, counsel, and tribunals in reaching this determination. The decision between having a remote hearing, potentially against the resistance of one side, or delaying it exemplifies the two conflicting perspectives outlined in the introduction. Are we aggressively seeking originality, fearless of potential flaws, or are we cautious, emphasising both the advantages of the status quo and the dangers of too drastic a change?