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(DE)LOCALIZATION OF ARBITRATION - ONLINE V. OFFLINE ARBITRATION

- E-arbitration in time of Covid 19 –

Abstract

"We are living in unprecedented times" - a statement in all aspects of our lives for the past year. This is also valid for international commercial arbitration. Like never before COVID 19 is changing and reshaping the world of arbitration. From expensive places for arbitral hearings to online platforms, from in-person hearings to virtual hearings. The direct impact of the lack of universal lex arbitri can be observed in the field of online and offline arbitration. In this sense, the terms "online" and "offline" arbitration are used to demonstrate the difference between in-person and virtual conduct of the arbitration. Traditional arbitration is converting into e-arbitration. By doing so, many national legislators and arbitral institutions are modernizing their rules just to provide an appropriate framework for e-arbitration. However, some of the theoretical concepts are more vivid now than before. The detach of international arbitration as a concept in the arbitration theory once again is attracting the attention of many legal scholars. Adapt, improve, and overcome – is the new standard in international arbitration. And this standard needs to fit with the basic principle of international commercial arbitration – due process and right to be heard.

Keywords: e-arbitration*, lex arbitri*, delocalization, seat of arbitration.

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I. INTRODUCTION

In the international context, dispute resolution by domestic courts is, more often than not, no longer an adequate solution. There are different reasons for the parties turning to alternative dispute resolution mechanisms.[1] Among many different types of ADR methods, arbitration is the most used method for the settlement of commercial disputes. As an alternative method of resolving commercial disputes, it is widely used after the end of the Second World War, which was followed by expansion of the level of international trade and investments. Globalization has led to the growth of international trade in goods and services and, in parallel, to the emergence of many disputes arising from commercial agreements between the parties. Due to the growth of such disputes, international commercial arbitration is deemed to be a leading mechanism for resolving disputes in international trade. The main advantage of international arbitration stems from its power to adapt to different situations. Nowadays, necessity is the master of invention and the pandemic environment has required arbitration to adapt to the new environment and reality.

International arbitration is generally considered to be quicker, more flexible, and less formal than litigation. There is far greater freedom for both the tribunal and the parties: subject to the arbitration agreement provisions, the panel may control the procedures to be employed, the rules on taking testimony, and evidentiary matters. Therefore, arbitration is at present the best means of peacefully establishing and preserving the rule of law in the world marketplace. It is a flexible process for the final determination of private rights in an international context; when parties submit to arbitration they agree to appoint a third party (or third parties, in the case of the multi-member tribunals common in high-value disputes) to act quasi-judicially and finally decide their rights, duties and obligations in the dispute.[2] Among the various ADR mechanisms, arbitration is the closest in spirit to the adjudication process. Unlike other settings, the arbitrator is granted the authority to decide the case and deliver awards to the parties in dispute.[3]

The challenges caused by the pandemic have impacted all sectors of life including the field of arbitration. The ongoing travel restrictions, quarantines, lockdowns, and social distancing have affected the traditional in-person arbitration hearings. Due to its flexible nature, arbitration has often adopted innovative measures when the need arises. For example, when the yellow vests protest occurs in Paris, ICC was faced with the need to promote e-arbitration (e-submissions, e-hearings, e-deliberations). During the COVID-19 pandemic, online arbitration is increasingly used. Still, several questions arise with the new concept of international commercial arbitration. Firstly, is it possible to have a full e-arbitration for every type of disputes, secondly, what are the limits of the party's autonomy and the tribunal's discretion in the field of virtual arbitration and finally, what is the impact of the place of arbitration for the manner of the hearings?

But, arbitration is not perfect. It is based on the principles of consent and party autonomy, and so procedures that are usual in litigation may not be available, or may not work very well, in international arbitration.[4] Therefore, in this paper, the authors will provide a short overview of the benefits to have e-arbitration in the time of COVID 19, and the response of arbitral institution in

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[1] Ingeborg Schwenzer and Claudio Marti Whitebread, Legal Answers to Globalization, in *Current Issues in the CISG and Arbitration*, Eleven International Publishing, 2014, 2.

[2] Sam Luttrell, *Bias Challenges in International Commercial Arbitration, the Need for a 'real danger' test*, Wolters Kluwer, the Netherlands 2009, 2.

[3] Ran Kuttner, The Arbitrator as Leader and Facilitator, in Tony Cole, *The Roles of Psychology in International Arbitration*, International Arbitration Law Library Series Volume 40, Kluwer Law International 2017, 96.

[4] Nigel Blackaby, Constantine Partasides, Aalan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration*, sixth edition, Oxford University Press, 2015, 31.

this time of the pandemic. Although many of us have embraced the use of videoconferencing programs like WebEx, Skype, Zoom, Microsoft Teams in the past year, it is still questionable whether such platforms are fit for international commercial arbitration.

II. THE CONCEPT OF (DE)LOCALIZATION OF ARBITRATION

International contracts are often drafted in a rather standardised manner, making use of so-called boilerplate clauses that aim at regulating the interpretation and operation of the contract. In addition, they often contain an arbitration clause that submits all disputes to arbitration, thus excluding any involvement of national courts in disputes arising out of the contract.[5] As the popularity of international commercial arbitration continues to spread, it appears that the time has come again to ask the question of whether the traditional goals of private systems of dispute resolution are or should be governed by systems of national law. Because every arbitral proceeding takes place somewhere and is enforced somewhere, it is presumed that these proceedings and awards are governed by the laws of the states where those activities take place. The goals of state laws on privatized dispute resolution would thus have a direct impact on private parties' desire for certainty.[6]

Every jurisdiction which has adopted rules on international commercial arbitration contains methods for control of the arbitrator's conduct. The contemporary system of state control is twofold – firstly, at the level of *lex arbitri,* and secondly, at the level of recognition and enforcement of that award.[7] When this is translated in particular arbitration, the effect would be that two different legal systems are having a crucial role in the field in international commercial arbitration: **system A** – where the arbitral proceedings are taking place (the home of the arbitration *in concerto*) and **system B** – where the arbitral award is recognized and enforced. System A governs the arbitral proceedings and all affiliated aspects of the arbitration. The question here is whether system A must be a national legal system, or it can be outside of the national limits. If the answer is positive, then we are in the field of "floating" home of arbitration. This home is a direct result of the party autonomy and goes to the roots of arbitration as a creature of contract. The result of this concept is having a delocalized arbitral award that can be enforced in **system B**.

In the legal literature, this concept is well known as the delocalization theory. But why, this theory is so attractive in this time of pandemic?

The delocalization theory is an attractive one from the perspective of both arbitrators and parties to an arbitration. Very often the place of arbitration is selected for reasons of convenience or neutrality, with neither party desiring to submit the arbitration to the procedural norms of that forum, especially those that permit the intervention of the local court system. In addition, failure to comply with the local procedural law could result in the final award being set aside by a local court, which may jeopardize any chances of enforcement elsewhere. Delocalization of the arbitral process and the final award would mean that parties remain unaffected by unforeseen and undesired local procedural law, and do not face the risk that non-compliance with such law would

[5] Giuditta Cordero-Moss, Limits to Party Autonomy in International Commercial Arbitration, *Oslo Law Review 2014* Issue 1, 48.

[6] Theodore C. Theofrastous, International Commercial Arbitration in Europe: Subsidiary and Supremacy in Light of the De-Localization Debate, *31 Case W. Res. J. Int'l L. 455* (1999), 456-457.

[7] Belohlavek Alexandar, Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, ASA Bulletin, Volume 31, Issue 2*, 2013, 268.

render their award unenforceable.[8] The main characteristics of delocalized arbitration are: 1. It is detached from the procedural rules of the place of arbitration, 2. It is detached from the procedural rules of any specific national law 3. It is detached from the substantive law of the place of arbitration and 4. It is detached from the national substantive law of any specific jurisdiction.[9]
Delocalization has its foundations in party autonomy where both parties are allowed to decide what procedural laws will guide the arbitration. Delocalization is also the need of the hour as new forms of arbitration such as e-arbitration are coming to the fore. Parties need to decide the procedural law guiding the arbitration process. At the root of arbitration is privacy and freedom of choice. Local and national courts should not be allowed to intervene, except to give effect to the arbitral award.[10] The concept of delocalization of offline arbitration and its transformation into "*e-arbitration*" control by the party autonomy and arbitral tribunal is even more crucial in a case for virtual hearings. For example, if one of the parties is objecting to the virtual hearings, and the arbitral tribunal decide to proceed with virtual hearings, there is a level of risk for setting aside the award if at the place of arbitration virtual hearings are not welcomed. Most of the national arbitration laws are not dealing with e-arbitration, and this can be used as e guerilla tactic to slow down the proceedings. There is a strong voice for the delocalization of online arbitration in the sense of preserving the role of international arbitration as e leading mechanism for resolving disputes.
The effect of recognizing arbitration as an autonomous institution would be to recognize the delocalization (separation from any legal order) of arbitration as a reality and to enable unlimited autonomy of the will of the parties. This absolute autonomy is, in Rubellin-Devichi's view, the instrument through which arbitration will acquire a truly "supranational" character, where international trade law can be applied directly. To better understand this concept of arbitration in the sense of e-arbitration, first, we need to address the role of the seat of arbitration and the party autonomy.

III. THE ROLE OF THE SEAT OF ARBITRATION

As a starting point, it is important to distinguish between the "*seat*" of the arbitration (sometimes referred to as the "place" of the arbitration) and the *geographic location* of the hearings or meetings in the arbitration. The arbitral seat is the legal or juridical home (or domicile) of the arbitration, the choice of which results in a number of highly significant legal consequences. At the same time, most national laws and institutional arbitration rules permit hearings and meetings to be conducted outside the arbitral seat, for reasons of convenience. With very few exceptions, the conduct of hearings outside the arbitral seat does not affect the location of the arbitral seat or the applicability of the arbitration legislation of the arbitral seat to the arbitration.[11] Traditionally, the place of arbitration has been defined as the place of the arbitral tribunal's seat.[12] That said, when we are

[8] Pippa Read, Delocalization of International Commercial Arbitration: its relevance in the new millennium, *American Review of International Arbitration*, Vol 10, No.2, 1999, 1.
[9] Dejan Janićijević, Delocalization in International Commercial Arbitration*, Facta Universitatis Series: Law and Politics,* Vol. 3, No1, 2005, 64.
[10] Chenoy Ceil, Theory of Delocalization in International Commercial Arbitration. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521053, 28.4.2021.
[11] Gary Born, *International Commercial Arbitration,* second edition, Kluwer Law International, 2014, 2052.
[12] Filip De Ly, The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning, *12 Nw. J. Int'l L. & Bus. 48* (1991-1992), 53.

talking about the seat of arbitration and place of hearings, we refer to their traditional meaning – physical and geographical place.

Choosing a seat of arbitration is important for many reasons: An arbitral process must be as rapid and efficient as possible. There should be minimal intervention by the courts at the seat, except in a supporting role. The law of the seat determines the extent to which the courts can intervene in the arbitral process.[13] The logistics of the arbitration are usually taken into account by the parties. It is a practical, and easily manageable way of assuring some of the objectives for choosing arbitration, such as time and cost-effectiveness. These logistics may include the availability of hearing facilities, technical support, accommodations, and transportation connections. As most parties conduct the hearings at the arbitral seat, the choice of the seat can carry practical importance. This also floats into the aspect of neutrality, as the parties will want to find a neutral arbitral seat to ensure the fairness of the proceedings.[14]

In other words, it is crucial to select the proper place for arbitration having in mind the character of the relations/case between the parties. It is of great importance to select *in favour arbitrandum* places. This is very important, since, among other things, the local arbitration law in the arbitral seat must provide unequivocally for the effective enforcement of arbitration agreements, for the desired level of judicial review in annulment proceedings (by neutral, competent courts), for the parties to be able freely to choose their legal representatives and party-nominated arbitrators (e.g., not being limited to locally-qualified lawyers or particular religious groups), for minimal nonarbitrability exceptions, for minimal judicial "supervision" of ongoing arbitrations (e.g., not permitting interlocutory appeals from interim procedural orders by tribunals), for limited after-the-fact judicial review of the arbitral procedures, and a supportive approach by local courts to requests by arbitrators for judicial assistance in aid of the arbitration.[15]

That being noted, by choosing the place of arbitration, parties are submitting to the law of that place. Thus, the parties need to check what is the position of the *lex loci arbitri* concerning e-arbitration. For example, is it possible to have a fully remote hearing, electronic submission of documents and evidence? The reason for the delocalization of offline arbitration is to prevent any unreasonable restriction to the party autonomy and the power of the arbitral tribunal contained in the law of the place of arbitration. By doing so, an autonomous legal system will be created primarily by the parties, the rules of the arbitral institution, the inherent powers of arbitrations and transnational arbitration rules and procedures. This system will in any case protect the basic principles of due process and international public policy at the same level as national legal systems.

IV. PARTY AUTONOMY

The principal characteristic of arbitration is that it is chosen by the parties by concluding an agreement to arbitrate.[16] Party autonomy has its foundations in the freedom of parties to determine the conduct of the arbitral process and in the parties' selection of substantive law. Consequently, they choose all aspects of the arbitration which includes the seat of arbitration, the choice of law, the appointment of arbitrators and the language of the arbitration, among others.[17] In other words,

[13] Why the seat matters. Available at: http://parisarbitration.com/en/why-the-seat-matters/, 28.4.2021.
[14] Ibidem.
[15] Gary Born, op. cit. 2056.
[16] Andrea Marco Steingruber, *Consent in International Arbitration*, Oxford University Press, 2011, 2.
[17] Charles Chatterjee, The Reality of the Party Autonomy Rule in International Arbitration, *Journal of International Arbitration*, Vol.20, Issue 6, 2003, 539.

the principle which makes the arbitral process flexible is party autonomy. The principle of party autonomy, in the general sense, started to develop in the 19th century.[18] Today, all international arbitration laws, rules, and conventions recognize the principle of party autonomy as a core of international commercial arbitration. The principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular. It is closely related to the freedom to conclude contracts and the freedom of the contractual partners to rule on the details of their relationship, which in some countries is considered to be a constitutional right of every citizen.[19]
That said, we can analyze the party autonomy at four different stages: 1.During the negotiation of the arbitral agreement (drafting the agreement); 2. At the time when the dispute arises (whether they will execute the arbitral agreement or not); 3. During the hearings (especially in the time of pandemic in the sense of whether to hold a fully e-arbitration or not, documents only arbitration) and 4. Post-award period (whether the party will challenge the award or not).
However, although in international commercial arbitration the parties have broad freedom in every aspect, including *inter alia*, the freedom to choose the type of arbitration, the law applicable to the arbitration, number of arbitrators, the place of arbitration and procedure of arbitration, there is no absolute autonomy. Restrictions are imposed by the law and judicial authority based on public interest, public policy, bona fideness, legality and natural justice.[20]
When we are dealing with e-arbitration, the role of the party autonomy is even more important. *For example*, what if one of the parties is objecting to the virtual hearings? It is undisputed that the parties are free to agree on virtual hearings, or even more, to create an e-*ad hoc*-arbitration, but the real problem is when one of the parties is strongly objecting to the virtual hearings. Is then the arbitral tribunal empowered to override the objection of the parties and what will be the impact to the possible setting aside and non-enforcement of an arbitral award rendered in a virtual hearing, despite the objection of one of the parties. The answer can be found in either the institutional rules or within the *lex arbitri.* But is it possible to find the answer within the delocalized arbitration rules? For example, within the inherent power of arbitrators as part of transnational arbitration rules. For sure, the delocalization theory can help in a situation like this. In particular, the anticipatory consent of the parties can be observed as part of the transnational arbitration rules that can guide the arbitrators when dealing with objections in e-arbitration.
One of the dilemmas of the party autonomy is in which cases may the arbitral tribunal override the procedural agreement between the parties in e-arbitration? It is generally accepted that the arbitral tribunal has the authority to override procedural agreements. Notwithstanding the priority given to party autonomy, the arbitral tribunal has the right to modify the initial procedural agreement to impose procedures in the interests of expedition and fairness, even when both parties may wish otherwise. There should be some recognition of an arbitrator's inherent right to arrive at a just decision with a reasonable degree of independence in raising and defining the necessary issues. Even more, the arbitrator has the right, and arguably the obligation, to seek assertively to dissuade the parties from unreasonable or inefficient procedures.[21] In addition, a pure reference to a party's consent might imply that the parties' preference should win. However, that consent was to empower an expert adjudicator to exercise fair and reasonable judgement from time to time. That

[18] Lord Collins of Mapesbury et. al, *Dicey, Morris and Collins on The Conflict of Laws*, 14th edition, Sweet & Maxwell, 2010, para. 32.
[19] Karl-Heinz Böckstiegel, The Role of Party Autonomy in International Arbitration - *Chapter 9 – ICDR Handbook on International Arbitration & ADR* - third edition, 2017.
[20] Advocate Rajveer, Parties' Autonomy in International Commercial Arbitration, *International Journal of Scientific & Engineering Research* Volume 9, Issue 10, October-2018, 1025.
[21] Gary Born, op. cit. 1757.

articulation might incline to the view that in many cases, a tribunal could reasonably overrule party determinations on the basis of fairness and efficiency.[22]

V. E-ARBITRATION (focus on virtual hearings)

Under the traditional meaning, online arbitration can be defined as arbitration in which all aspects of the proceedings are conducted online. Online arbitrations can have hearings through the use of video conferencing, but most online arbitrations simply require parties to upload their evidential documents, respond to questions from the arbitrator and will receive a decision from the arbitrator. Online arbitration shares many similar advantages as online mediation, such as lower costs and greater flexibility due to their asynchronous nature. The disadvantage of online arbitration not having face-to-face interactions is also less significant as arbitrations rely less on the parties' interactions but more on evidentiary written submissions.[23]

However, while it is undisputed that online arbitration presents an evolutionary step within the traditionally defined concept of in person arbitration,[24] in this paper, we are not dealing with this type of online arbitration, but rather, with the modern type of e-arbitration, in the sense of delocalization of offline arbitration. This hybrid type of arbitration is resulting from the ongoing COVID - 19 pandemics. Before the COVID – 19 pandemic, the primary meaning of the hearings was in person. Only certain organizational matters were conducted online. This drastically changes nowadays.

When considering virtual hearings *vis-à-vis* in -person hearings in arbitration, there are a number of matters which require consideration: choice and suitability of hearing platform, document presentation, confidentiality of the proceedings, witness examination, and advocacy.[25] The e-arbitration hearing can be different from traditional arbitration, since these factors are either non – existing (for example, utilization of online hearing platform), or are being considered from much simpler and traditional perspective (for example, examination of witnesses). In online arbitration, the e-arbitral process, including the hearing, is entirely conducted online. From case management point of view, in e-arbitration, an e-file for each e-commerce dispute is created and administered by the online service provider. This e-file includes all notifications and communications between the parties and the arbitrator(s), as well as the documents submitted by the parties. In traditional arbitration, parties may likewise agree to hold hearings online insofar as that is permitted, either by national laws or by the rules of the arbitral institution. For instance, the 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC") provide under Article 30(6) that either party has the right to request to participate in the hearing by means of videoconferencing, i.e. e-hearing. The arbitral tribunal

[22] Jeffry Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, 390.

[23] Derric Yeoh, Is online Dispute Resolution the Future of Alternative Dispute Resolution. Available at: http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/, 29.4.2021.

[24] Farzaneh Badiei, Online Arbitration Definition and its Distinctive Features, ODR, volume 684 of CEUR Workshop Proceedings, page 87-93. CEUR-WS.org, (2010).

[25] Frederico Singarajah, The hitchhiker's guide to virtual hearings (Part 1). Available at: http://arbitrationblog.practicallaw.com/the-hitchhikers-guide-to-virtual-hearings-part-1/. 10.11.2021

will bear in mind the circumstances of the case, the parties' position, and its technical feasibility when ruling such a request.[26]

As noted, the use of video or teleconference technology for certain aspects of the arbitral process is not a new phenomenon. Before COVID-19, certain pre-hearing steps in the arbitral process such as initial case management conferences and pre-hearing conferences with the tribunal were often held by teleconference or videoconference, particularly when the parties and their counsel were in different jurisdictions. In addition, it was not unusual, pre-COVID-19, for certain witnesses to appear at hearings via video in instances where physical attendance was not possible due to health or visa issues, or other circumstances. Indeed, the IBA Rules on the Taking of Evidence in International Arbitration expressly provide for such virtual appearances of witnesses at evidentiary hearings at the discretion of the tribunal, as do various institutional arbitration rules. What is new in the post-COVID-19 world is that parties, counsel and arbitrators are now accustomed to, and generally skilled at, using Zoom, Webex and other video platforms to conduct meetings, conferences and even hearings in a virtual format. By necessity, the "barriers to entry" for these technologies in the international arbitration world appear largely to have been overcome.[27]

When an international arbitration case is affected by the current situation, the parties and the arbitral tribunal are faced with the curtail question – to postpone the in-person hearing, to hold a virtual hearing or to conduct documents based arbitration only. They can also proceed with hybrid solutions, such as where the tribunal is in one place together and counsel for each side are together with their clients. At the start of the COVID -19 pandemic, most of the hearings were delayed and postponed. Slowly, remote hearing starts to take place due to travel restrictions. When remote hearings start to take place, new questions arose – is it possible to take evidence remotely in a complex arbitration?

Remote hearings are nothing new, but the COVID-19 crisis has forced international arbitration out of its comfort zone. Most steps in international arbitration are done remotely nowadays, including holding case management conferences at the outset and/or mid-stream (often organized as telephone or videoconferences rather than as physical meetings) and exchanging written submissions via document sharing platforms. Possibly the last "piece of the puzzle" that typically remains as physical meetings are hearings, either on the merits or on major procedural issues. But the current COVID-19 pandemic forces international arbitration practitioners to reconsider this point and assess whether those hearings, too, can be held remotely. Depending on its length, the current crisis has the potential of being a real game-changer if international arbitral tribunals, as well as national courts around the globe, become used to holding hearings remotely. Such a paradigm shift might be something that many arbitration users have wanted for some time. It is important to distinguish between different types of remote hearings. For instance, fully remote hearings, in which every participant is in a different location, raise additional questions compared to semi-remote ones, in which the main venue is connected to one or several remote venues. Moreover, remote legal arguments might require a different analysis from remote evidence taking in the post-COVID-19 world, hearings might combine these different forms, with some parts of a hearing being held semi-remotely or fully remotely and others with physical meetings.[28]

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[26] Ihab Amro, Online Arbitration in Theory and Practice: A comparative Study in Common Law and Civil Law Countries. Available at: http://arbitrationblog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/, 29.4.2021.

[27] John V.H. Pierce, Predicting the Future: International Arbitration in the Wake of COVID-19. Available at: http://documents.jdsupra.com/93088203-65d5-44d7-9e62-c064328c5b79.pdf. 29.4.2021

[28] Maxi Scherer, Remote Hearings in Arbitration and What Voltaire Has to Do With It, *NYSBA New York Dispute Resolution Lawyer*, Vol. 13, No. 2, 2020, 22.

Evidentiary and technical issues posed by the current "virtual" environment affect different actors in the proceedings – the cross-examining counsel, the witnesses, the experts and the arbitrators. Interactions that are smooth in person – the presentation of the evidence, the deliberation between the arbitrators – must be reconceived for the virtual setting.[29] But, technology can make any hearing more efficient. For example, document viewing software exists to remove the problem of multiple people in a room struggling to find the relevant passage amongst thousands of documents in multiple hard copy files; a technology consultant presses a button and the document/passage appears simultaneously on the screens of the arbitrators, counsel, parties and (where relevant) witnesses. Additionally, many hearings benefit from real-time transcripts and recordings of proceedings.

VI. INSTITUTIONAL RESPONSE TO COVID – 19 - From offline to online hearings and procedural steps

As a general matter, most arbitral institutions have strongly encouraged arbitral tribunals and parties to proceed with fully virtual hearings. Many have also outlined specific guidance and factors for arbitral tribunals to consider before transitioning from a physical to virtual hearing.[30]
In fact, COVID-19 put the brakes on a practice where in-person evidentiary hearings bringing together arbitrators, counsel, and witnesses from far and wide was the norm. But not for long. After a few weeks of scrambling, many matters were back up and running, relying on remote technology to continue hearings. Long-standing reliance on those technologies for procedural conferences, positioned international arbitrations well, to dive into the deep end of fully remote proceedings. These proceedings have been aided by the promulgation of copious guidance on how to use such technology effectively and best practices to ensure procedural fairness. Institutional arbitrations especially are known to be better equipped with their own set of procedural rules that ensure uniformity and a definite structure for conducting arbitration proceedings while also maintaining party autonomy and flexibility to model the procedural rules as per the convenience of the parties and the arbitral tribunal. These rules, even before the pandemic, contemplated remote hearings, e-service of documents, e-filing and video conferencing. These aid the adaptability of the proceedings to shift away from in-person hearings and physical service/filing of documents to virtual hearings and e-service/e- filings. It is this very aspect that has enabled these institutions to quickly adapt to the "new normal".[31] Any virtual hearing requires consultation between the tribunal and the parties to implement measures – often called a cyber-protocol – sufficient to comply with any applicable data privacy regulations. And all within the framework of party autonomy and *lex loci arbitri*.
ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic represents a useful tool in the hands of parties and tribunals. In deciding on the appropriate procedural measures to proceed with the arbitration expeditiously and cost-effectively, a tribunal should take account of all the circumstances, including those that are the consequence

[29] Elena Guilet, Challenges And Opportunities Of Virtual Hearings In International Arbitration. Available at: https://www.jdsupra.com/legalnews/challenges-and-opportunities-of-virtual-55893/, 29.4.2021.
[30] International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions. Available at: https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf, 5.
[31] Ajay Bhargava Aseem Chaturvedi and Shivank Diddi, Virtual arbitration and the new normal, Available at: https://www.khaitanco.com/sites/default/files/2020-12/Virtual-arbitrations-and-the-new-normal.pdf, 30.4.2021.

of the COVID-19 pandemic, the nature and length of the conference or hearing, the complexity of the case and a number of participants, whether there are particular reasons to proceed without delay, whether rescheduling the hearing would entail unwarranted or excessive delays, and as the case may be the need for the parties to properly prepare for the hearing.[32]

If the parties agree, or the tribunal determines, to proceed with a virtual hearing, then the parties and the tribunal should take into account, openly discuss and plan for special features of proceeding in that manner, including those addressed in the Annex od the ICC Guidance.

ICC Guidance Note is also dealing with a very interesting situation – how the arbitral tribunal should proceed if there is the objection of one or both parties for remote hearings. Thus, if a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances and assess whether the award will be enforceable at law and provide reasons for that determination. In making such a determination, tribunals may wish to take account of their broad procedural authority under Article 22(2) of the Rules, to, after consulting the parties, "adopt such procedural measures as [the tribunal] considers appropriate, provided that they are not contrary to any agreement of the parties.[33]

Finally, under the ICC Guidance Note, any virtual hearing requires consultation between the tribunal and the parties to implement measures – often called a cyber-protocol – sufficient to comply with any applicable data privacy regulations. Such measures shall also deal with the privacy of the hearing and the protection of the confidentiality of electronic communications within the arbitration proceeding and any electronic document platform.[34]

CIArb also offers Guidance Note on Remote Dispute Resolution Proceedings to provide parties to existing and future disputes, as well as neutrals, a guide for conducting proceedings in any circumstance where parties to the dispute are unable to meet physically.[35] Under this Guidance, Virtual hearing rooms are the preferred way to conduct hearings remotely. Rooms are organised via the use of commercial digital platforms and can be equipped to create an atmosphere approximating face-to-face proceedings. All participants should be visible and audible in the chosen virtual hearing room. Simultaneous access to shared documentation through means such as screen sharing should also be provided.[36] A breakout room, or a separate meeting from the virtual hearing room, can be used for caucus proceedings. The other party should not have the ability to hear or view muted caucus proceedings as the body language of participants, as well as their reaction, might negate the whole idea of confidentiality of caucus meetings. This is particularly important in mediation proceedings.[37] In arbitration proceedings, separate virtual breakout rooms for tribunal deliberations and caucusing by parties are recommended. However, party breakout rooms should never be visible or audible to neutrals to prevent the possibility of inadvertent ex parte communication. Likewise, tribunal deliberations should never be visible or audible to parties. Should a neutral or party find that they can hear a separate caucus within a breakout room, they should report this to all participants immediately and sever the connection.[38]

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[32] ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic. Available at: https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf, para. 18.

[33] Ibidem, para. 22.

[34] Ibidem, para. 26.

[35] CIArb, Guidance Note on Remote Dispute Resolution Proceedings. Available at: https://www.viac.eu/images/COVID19/CIArb_remote-hearings-guidance-note.pdf, 30.4.2021.

[36] Ibidem 3.1.

[37] Ibidem 3.2.

[38] Ibidem 3.3.

Seoul Protocol on Video Conferencing in International Arbitration is the third very important protocol in the field of e-arbitration.[39] To the extent possible, and as may be agreed to by the Parties or ordered by the Tribunal, the video conference shall occur at a Venue that meets the following minimum standards: a. The Parties shall use best efforts to ensure that the connection between the Hearing Venue and the Remote Venue is as smooth as possible, with sounds and images being accurately and properly aligned to minimize any delays. This principle applies equally to situations where there is more than one Remote Venue. Where a connection between additional Venues is required (for example when an interpreter is connected from a third location), the connection may be established through the use of a third-party video conferencing bridge service, such as multi-point control units or third-party router vendors that interlink and connect multiple video conferencing systems in a single conference. b. The Venue shall have at least one on-call individual with adequate technical knowledge to assist in planning, testing and conducting the video conference. c.The Venue shall be in a location that provides for fair, equal and reasonable right of access to the Parties and their related persons, as appropriate.[40]

A note must be taken into account regarding the standard of equal treatment of the parties and full opportunity to present their case during a virtual hearing, which the tribunal should consider. This standard can be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration and reflect the idea of fair arbitration. This is not just a standard within the national legal systems or UNCITRAL Model Law on International Commercial Arbitration. It is a part of transnational arbitration standards often called fair arbitration.

What kind of arbitration is fair then? It is clear a party has to be able to effectively participate in the proceedings. This general idea has plenty of practical derivatives in the way proceedings have to be conducted. Both of the parties have to have equal opportunities to participate.[41] This means that there must be a general opportunity to access to arbitration. And precisely here, the concept of delocalization of arbitration provides a safeguard to parties' best interest.

That said, in the case of virtual hearings, this standard must be respected. Several steps need to be fulfilled to have proper protection of the due process standard. To ensure that parties are treated with equality and each party is given a full opportunity to present its case during a virtual hearing, ICC recommends to the tribunal to consider: Different time zones in fixing the hearing dates, start and finish times, breaks and length of each hearing day; Logistics of the location of participants including but not limited to total number of participants, number of remote locations, extent to which any participants will be in the same physical venue, extent to which members of the tribunal may be in the same physical venue as one another and/or any other participants, availability and control of break out rooms; Use of real-time transcript or another form of recording; Use of interpreters, including whether simultaneous or consecutive; Procedures for verifying the presence of and identifying all participants, including any technical administrator; Procedures for the taking of evidence from fact witnesses and experts to ensure that the integrity of any oral testimonial evidence is preserved; Use of demonstratives, including through shared screen views; and Use of an electronic hearing bundle hosted on a shared document platform that ensures access by all participants.[42]

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[39] Seoul Protocol on Video Conferencing in International Arbitration Available at: https://www.viac.eu/images/COVID19/Seoul_Protocol_on_Video_Conferencing_in_International_Arbitration.pdf, 30.4.2021.

[40] Ibidem, 2.1.

[41] Matti s. Kurkela, Santtu Turunen, and Conflict Management Institute (comi), *Due Process in International Arbitration*, Oxford University Press, 2010, 185.

[42] ICC Guidance Note, para. 28.

VII. CONCLUSION

The "new normal" strikes not just everyday life, but also international commercial arbitration. COVID-19 pandemic shows that there is a great possibility for developing a new way of conducting the arbitration. E-arbitration is one of the solutions that is offered to the parties. In 2018, a survey conducted by Queen Mary University indicated that 78% of arbitrators had never, or rarely, utilized virtual hearing room. After two years, the situation is the opposite. [43]Almost every arbitrator is now involved in a certain type of virtual hearing. National arbitration laws are silent in regulating virtual hearings. And here is the risk of possible setting aside of arbitral award rendered in a fully virtual hearing in a case where one of the parties is opposing virtual hearings. This is a direct result of the party autonomy as a concept of international arbitration. Delocalization of offline arbitration will help to ensure that certain aspects of arbitration will always be analyzed in a transnational context, not just in a strict national sense. With the process of harmonization of national arbitration laws, the process of delocalization is once again back into the game. A direct result of the process of harmonization is slowly creating transnational arbitration standards and rules that can guide the arbitration to detach from national law. In the new post-COVID 19 period, the arbitration must proceed to be flexible and modern. We are not arguing that the in-person hearings shall be replaced with virtual hearings, but rather, there must be an opportunity to have virtual hearings and e-arbitration. Virtual rooms cannot replace hearing rooms, but they can help to ensure a smooth arbitration process. Some hybrid form of offline and online arbitration at this stage seems to be the most reasonable gateway in this pandemic.

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