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Remote Hearings in International Arbitration

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*The COVID-19 outbreak has caused havoc to businesses, owing to lockdowns, courts being shut, and disputes being on a surge. Businesses will appoint convenient alternatives in resolving their disputes. By contrast, arbitration as an alternative boasts inherent flexibility by conducting remote hearings ("**Hearings**"), safeguards confidentiality, upholds party autonomy, and offers operational stability, inter alia. This paper propounds a systemic substructure for the conduct and organising of Hearings, drawing comparisons among the rules of different arbitral institutions around the world, indicating the initiatives taken by arbitral institutions in favour of facilitating Hearings, expounds on the need and rationale behind Hearings, discussing potential challenges to arbitral awards concerning Hearings, possible challenges during the conduct of Hearings and cogent arguments to rebut such challenges, expounds the power of the arbitral tribunal under different circumstances, the role played by legal practitioners in advising clients during Hearings in international arbitration and finally the concluding thoughts of the author.*

Keywords: *remote hearings, covid-19, pandemic, arbitration.*

INTRODUCTION

The Covid-19 pandemic (**"Pandemic"**) is an all-pervasive issue causing global ramifications, impacting almost every aspect of our lives, specifically, the manner we work, function, and interact as social distancing guidelines are in place. To adapt to such ramifications, the

majority of our activities have led to a paradigm shift, into a virtualised experience, both personally and professionally as an interim relief (short term solution) and as a continuing global solution, the rollout of vaccinations has taken the edge off the spread of the Covid-19 virus worldwide to an extent, and this, having eased travel restrictions, inducing several to hope for a return to normalcy. But are we really there yet? The governments across various countries continue to enforce lockdowns, travel bans[1] , and social distancing protocols, resulting in the flow of commerce being stymied, business activities being stalled, supply chains being compromised and ergo**,** a spike in disputes materialising is an expected outcome.

Accordingly, to keep the wheels of justice turning and to avert a 'procedural paralysis' from materialising, it is paramount to identify viable alternatives to resolve such disputes in a time-efficient, economical, flexible, and fair manner, specifically in the form of remote hearings ("**Hearings**") in international arbitration ("**Arbitration**"). Throughout, this paper outlines the importance of Hearings in Arbitration, especially in times of Pandemic. Segment-2 of this paper lays out the definition of Hearings and expounds on the different types thereof. Segment-3 showcases the successful implementation of digital technology in Arbitration even before the Pandemic. Further, segment-4 critically evaluates the rationale behind Hearings per se and magnifies the growing necessity for Hearings at different times. Consequently, segment-5 recognises the underpinning role of Institutions as the facilitators of Arbitration and analyses various approaches adopted by major Institutions to reform the Rules to facilitate Hearings. Moreover, the increasing caseloads across Institutions are compared statistically. Additionally, segment-6 discusses a practice-focused conundrum wherein,

- The authority of the arbitral tribunal (**"Tribunal"**) to order Hearings, despite the objection expressed by one party, in the absence of the parties' agreement thereof, and
- The Tribunal's duty is to balance due process requirements with that of expedient resolution of disputes.

[1] Caroline Kantis, Samantha Kiernan, Jason Socrates Bardi, & Lillian Posner, 'UPDATED: Timeline of the Coronavirus' (*Think Global Health*, 01 April 2021) <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> accessed 02 April 2022

Segment-7 provides for a practical substructure for the conduct and organisation of Hearings and the subsequent parts of this paper critically examine the various roles played by legal practitioners**"Practitioners"** in facilitating clients when concerning Hearings, the roles of technology in facilitating Hearings, speculative arguments for and against the conduct of Hearings and lastly, how Practitioners can adopt best practices when drafting clauses(Segment-8). Finally, segment-9 provides the concluding thoughts of the author.

ENTER ARBITRATION: SCARCITY LEADS TO OPPORTUNITY

Under the burgeoning demand to resolve disputes and the need for radical change, this Pandemic has channeled and accelerated our commitment to the use of digital technology in Arbitration. Online arbitration boasts inherent flexibility that makes it an attractive dispute resolution tool[2] and often works as an agile resolution process[3], ideally suited to ameliorate the challenges posed by the Pandemic. This has forced major stakeholders in Arbitration to seek refuge in the inherent flexibility that Arbitration has on offer and adopt a convenient framework suited to a case basis.

A cogent argument: A significant part of modern-day Arbitration does not require the physical presence of parties or the handling of paper documents. Submissions and evidence are filed electronically, correspondence is conducted via emails, and case management conferences can and usually are conducted by telephone/videoconference.[4] Arbitration is at a point where it is prepared to address and accommodate all stages of the arbitral proceedings (**"Proceedings"**) remotely and I strongly expect businesses to turn their attention toward what is most convenient.

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[2] Tola Adeseye, 'How COVID-19 might affect international arbitration' (*Thomson Reuters*, 8 April 2020) <http://arbitrationblog.practicallaw.com/how-covid-19-might-affect-international-arbitration/> accessed onaccessed 03 April 2022

[3] Michael Stocks, 'Agile arbitration during a pandemic: change for the better?' (*Thomson Reuters*, 25 June 2020) <http://arbitrationblog.practicallaw.com/agile-arbitration-during-a-pandemic-change-for-the-better/>accessed 04 April 2022

[4]Andrey Panov, 'Post-COVID-19 world and the duty to conduct arbitrations efficiently and expeditiously' (*Thomson Reuters,* 13 August 2020) <http://arbitrationblog.practicallaw.com/post-covid-19-world-and-the-duty-to-conduct-arbitrations-efficiently-and-expeditiously/> accessed 05 April 2022

The year 2020 alone depicts a massive surge in the filing for Arbitration as a mode of dispute resolution.[5]However, several uncertainties yet prevail and though the practice of Arbitration has spurred massive development, the speed and trajectory of that journey will vary from country to country.[6]

HEARINGS AND ITS BRANCHES

The term 'remote' used simultaneously with arbitral hearings, indicates Hearings that take place where the participants of the Proceedings are not all assembled physically in the same physical location. It is not a novel phenomenon in Arbitration for some aspects of the arbitral proceedings to be conducted remotely, with few or all participants attending by the means of video or telephone[7] and interestingly, during this Pandemic, the application and conduct of Hearings are not confined to Arbitration alone but, the famously known traditional judicial branches such as domestic courts of different hierarchies have embraced the implementation of Hearings.[8]A2021 International Arbitration Survey (**"Survey"**) conducted several interviews with different stakeholders of Arbitration and there appears a growing expectation of Hearings becoming the default option in the future concerning procedural hearings and conferences.[9]

Hearings (definition): The conduct of arbitral hearings with the usage of communication technology, to concurrently interact or connect by two-way video and audio transmission,

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[5] Hannah Azkiya, 'The 2020 SIAC Annual Report: Trends & Questions' (*Thomson Reuters*, May 28 2021) <http://arbitrationblog.practicallaw.com/the-2020-siac-annual-report-trends-questions/> accessed 05 April 2022

[6] 'Light in The Tunnel- The Post-COVID Arbitration Outlook' (*Herbert Smith Free Hills*, 27 July2021) <https://www.herbertsmithfreehills.com/insight/light-in-the-tunnel-the-post-covid-arbitration-outlook> accessed 02 April 2022

[7] Steven P. Finizio, 'Remote hearings in international arbitration—a practical guide' (*Lexis Nexis*) <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/61DS-12M3-GXFD-8203-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=remote-hearings-in-international-arbitration%E2%80%94a-practical-guide> accessed 03 April 2022

[8] 'COVID-19: Examples of Cases Heard Remotely (March to July 2020)' (*Thomson Reuters Practical Law*, 10 July 2020) <https://uk.practicallaw.thomsonreuters.com/w-026-4644?transitionType=Default&contextData=(sc.Default)> accessed 03 April 2022

[9] '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (*Queens Mary University of London*, October 2021) <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> accessed 03 April 2022

facilitating participants from two or more locations that include communication through telephone or videoconference, or other more futuristic technology such as telepresence.[10]

What Hearings are not: Hearings are often used or addressed interchangeably with the term 'virtual hearings'. However, professor Maxi Scherer was the first to distinguish between both the contrasting terminologies, advised the usage of the term 'virtual hearings' sparingly to avoid misconception, besides bringing about clarity with the common misapprehension surrounding their definitions and claims that:

> "*Virtual has many possible meanings, but in computer science, it may be defined as 'not physically present as such but made by software to appear to be so from the point of view of a program or user…In the case of Arbitration hearings conducted in several locations, the participants of the hearing are not virtual, but really exist; they merely interact with each other using communication technologies.*"[11]

Kinds of Hearings: The kinds of Hearings in Arbitration are distinguished as follows:

a. Hearings in terms of the extent of remoteness:

The parties to an arbitration, subject to the institutional rules (**"Rules"**), are free to hold Hearings in many unique forms, mainly, either in the form of 'fully remote hearings', or partially remote hearings which means parts of the hearing is conducted partially through Hearings and partially through in-person hearings **("Hybrid Hearings"**). During Hybrid Hearings, the participants may reside in different places or some may reside together physically in a hearing venue and the other participants may reside remotely or there may prevail, innumerable of such other combinations in the placement of participants (some residing physically together and others remotely). For instance, the Tribunal may reside at a specific location (the main venue) and the parties with their representatives may reside physically at a different location or various other locations. Hybrid Hearings may also feature a mixture of in-person hearings and Hearings. Illustration: The parties may decide to conduct the procedural hearings remotely and substantive hearings in the form of physical hearings.

[10] Prof. Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37 (4) J. Int. Arbitration
[11] *Ibid*

The parties may agree, before the commencement of an Arbitration, to conduct a semi-remote configuration, i.e. A situation in which several participants attend the Hearings from the same physical room.[12] There are expectations that Hybrid Hearings are the way forward in Arbitration as the users have gained increased familiarity with the relevant technology used and procedural and logistical demands of remote participation in Hearings.[13] Conversely, in fully remote hearings, all the participants of the Arbitration reside and operate from different locations without the use of a main venue in the hearing. Although this form of Hearings can attract several challenges due to the existence of an increased number of remote locations,[14] it is conducive to tackling logistical barriers posed by cross-border disputes. Interestingly, as compared to pre-covid-19 times, there exists a growing demand for the conduct of fully remote hearings. In the fourth quarter of 2020, an overwhelming 71% of users opted to participate in fully remote hearings as compared to a meagre 36% in the first quarter of the same year, according to the results of an Industry Survey conducted by the International Chamber of Commerce (**"ICC"**) released in November 2020.[15]

b. Hearings in terms of the arbitration agreement ("Agreement"):

Hearings conducted based on an Agreement: Apre-meditative agreement prevails between the parties, in the form of a written agreement that, on the arising of dispute/s, the proceedings would take place in the form of Hearings. The tribunal will effectuate the conduct of the proceedings in a manner that is congruent with the language (clauses) within the Agreement, hence, it is incumbent that the Agreement is drafted with caution.

Hearings conducted based on the merits of the case: The ICC's amended Rules, rendered broad discretionary powers to the Tribunal to decide whether it wishes to conduct hearings by physical attendance or Hearings, subject to the facts and circumstances of the case and in

[12] 'ADGM Arbitration Centre Protocol for Remote Hearings' (*ADGM Arbitration Centre*) <https://adgmac.com/wp-content/uploads/2021/05/Protocol%20for%20Remote%20Hearings.pdf> accessed 03 April 2022

[13] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)

[14] Prof. Maxi Scherer (n 10)

[15] 'International arbitration in 2021- Illuminating the top trends' (*Freshfields Bruckhaus Deringer*) <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2021/the-future-of-remote-hearings-in-a-post-pandemic-world/> accessed 03 April 2022

consultation with the parties.[16] It is recommended that the tribunal must refrain from conducting Hearings if both parties wish to opt for in-person hearings. Further, the parties may also decide to resort to Hearings on the merits of the case, subject to the approval of the Tribunal.

c. ***Hearings based on the content of the remote part and who participates remotely:***

The assessment of Hearings might depend on who participates remotely, and the content part of the Hearings, for instance, one party might be present physically (with their legal representatives) and the tribunal in the main venue of the hearing whilst the other party (with their legal representatives) might be participating remotely, this arrangement may raise different questions depending on which participants participate remotely.[17] Further, parties may prefer that the procedural part of the hearings be conducted remotely and the substantive part of the hearings be conducted through the arrangement of physical hearings.[18]

d. Asynchronous Hearings and synchronous hearings:

'Synchronous hearings' require the stakeholders in the Proceedings to be present at the same time either physically or remotely- a two-way conversation occurs in real-time and there is a defined start and end to the Hearing and is almost always a common practice in Arbitration. Whereas, in an asynchronous Hearing, the parties are permitted to present their evidence or upload their submissions (through an online platform) at different times and both parties need not be present simultaneously. The parties can choose to respond to questions at different times and this form of hearing is conducive in cases involving multiple stakeholders and issues to resolve. To streamline the arbitral process (**"Process"**), the parties may mutually agree to affix certain facets of a Hearing, in a manner asynchronous.

The above distinctions concerning hearings may be combined in practice and different parts of the hearing may be conducted in person or via Hybrid Hearings or fully remotely.

THE IMPLEMENTATION OF DIGITAL TECHNOLOGY IN ARBITRATION IN THE PRE-PANDEMICERA: A PIONEERING STEP BY INSTITUTES

[16] International Chamber of Commerce, 2021, art. 26(1)
[17] Prof. Maxi Scherer (n 10)
[18] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)

The avant-garde practice of 'the streamlining of the Process through the means of digital technology' stemmed from the Stockholm Chamber of Commerce (**"SCC")** and in May 2019, guidelines were issued by which, all SCC arbitrations would be managed on the SCC platform – a secure digital platform that enables communication and file sharing between the SCC and the participants of the arbitration (**"Platform"**), serving as an end to end service from, the request for arbitration (**"Request"**) to the rendering of the arbitral award **("Award"**). The Platform aspires to serve 4 overarching functions, namely: (i) efficiency; (ii) simplicity; (iii) transparency; and (iv) security. Upon receipt of a Request to the SCC, the case is registered on the Platform and it is then, upon appointment that, the arbitrator/s receive an invitation to the Platform. The purpose of the Platform is to provide the participants of the arbitration (parties, counsels, Tribunal) with a simple, efficient, and secure manner of sharing documents, i.e. exhibits, submissions of reports, etc, and a communication mechanism throughout the Proceedings and access to, or usage of, the Platform is limited to the participants alone. The data contained and garnered within the Platform is encrypted using military-grade encryption and all files are scanned, to detect malware when uploaded, therefore, serving the interests of security.

The participants are encouraged to take full advantage of the Platform. Fundamentally, the Platform seeks to serve a two-fold purpose concerning transparency, namely:

- serves as a secure body of storage concerning the case materials and;
- serves as an archive for a duration of a year after the arbitration is terminated.

These guidelines paved the way for the use of digitalisation (in practice) in Arbitration, the learnings of which, were subsequently extrapolated and adopted by other Institutions.

THE RATIONALE AND THE EVOLVING NEED BEHIND HEARINGS

- ***The need for Hearings at the time the Pandemic struck***

"Nothing changes, if nothing changes"

To put the above quote into perspective, Arbitration is no exception in the aftermath of the Pandemic. Institutions featuring as the facilitators of Arbitration had to then adapt at a short

notice to novel ways of working and recognised the need for change in the existing structure to ameliorate the zeitgeist shift in the co-vid era. There came about a realisation that lockdowns and safety measure guidelines would be a part and parcel of daily life when the Pandemic stuck, and therefore, a change of attitude towards Hearings ensued. On April 16th, 2020, major Institutions, to underscore their efforts towards change, released a joint statement to the market encouraging, for the first time, a revolutionary approach in the form of a collaboration from each of the Institutions in ensuring the best use of digital technologies[19] for working remotely, and that, this guidance mirrored the approaches of many national courts around the world, that being, the delay in the resolution of disputes is an option untenable in uncertain times.[20] Further, this joint ambition of the Institutions is aimed at instilling stability while ensuring that, pending cases may continue to be heard, new cases are filed electronically, and parties have their cases heard without unnecessary delay.

As evidenced above, the SCC implemented digital technology in Proceedings, i.e. the use of the Platform for certain facets of the Proceedings, even before the outbreak of the Pandemic and thereby, continued to function unaffected. As a consequence, in practice, the use of digital technology in Arbitration has withstood the test of time and therefore, Institutions made provisions for Hearings in their Rules for quick implementation and urged Tribunals to encourage the users to resort to Hearings to the fullest extent.

- ***The need for Hearings in present times***

Travel restrictions and safety guidelines have been relatively eased under the rollout of vaccinations globally, however, several measures taken by Institutions in refining their processes continue to remain in practice even today. Earlier, the intention for implementing such measures was chiefly, to ensure that the conduct of Proceedings is carried out efficiently to ward off unnecessary delays, however, at present, the focus expands to enhance user convenience (time-effective) and procedural flexibility, resulting in greater demand for

[19] 'Arbitration and COVID-19' (*International Chamber of Commerce,* 16 April 2020) <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> accessed 02 April 2022

[20] 'Inside Arbitration: Running an Arbitration in Challenging Times: COVID-19, "Digitalising" Arbitral Procedure and the New World of Virtual Hearings' (*Herbert Smith Freehills*) <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-running-an-arbitration-in-challenging-times-covid-19-> accessed 03 April 2022

Arbitration, i.e. Since the introduction of Hearings in Arbitration, the caseloads of major Institutions have increased in recent years.

- ***The rationale behind Hearings***

A party's right to a hearing[21] is one of the salient features of Arbitration and many national laws[22] across the globe feature provisions in that regard. However, this begs the question, is the right to a hearing absolute, and is it limited to physical hearings only?

Some commentators have opined that certain national laws do not meet the threshold requirements for a Hearing to effectuate, the requirements need to be, hearings must occur oral (principle of orality) and allow for, simultaneous exchange of arguments (principle of immediacy).

- ***Cogent arguments in favour of Hearings:***

Similarities: There are similarities between physical hearings and Hearings, as, arguments and communication are made orally during both types of hearings, the latter uses communication technology to transmit the audio and/or video, and the exchange of arguments is undertaken synchronously,[23] hence, the above requirements fall short of reasonability.

Nature and applicability: The nature of Arbitration boasts flexibility, and the principle of immediacy and the right to a Hearing is less pronounced/applicable than in the law of state court proceedings.[24]

Remote witness hearings: Before the Pandemic, it was a common practice to use videoconferencing to collect witness evidence from witnesses that were unable to attend a hearing in person, a practice that was relatively successful and hence, this practice should be extrapolated to other kinds of hearings.

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[21] UNCITRAL Model Law on International Commercial Arbitration, 1985, art.18
[22] Indian Arbitration and Conciliation Act 1996, s 19(2)
[23] Prof. Maxi Scherer (n 10)
[24] Alexander Foerster, 'The COVID-19 Infected Arbitration' (*Dispute Resolution*, 11 March 2020) <https://www.deutscheranwaltspiegel.de/disputeresolution/schiedsverfahren/das-covid-19-infizierte-schiedsverfahren/> accessed 04 April 2022

Note: The party's right to a hearing is based on the principle that the party shall be treated with equality and be given a full opportunity to present its case (discussed below). As long as this right is upheld by the Tribunal during Proceedings, it is difficult to argue that the right to a hearing is absolute.

It was rightly pointed out by Lord Chief Justice Hewart, "justice should not only be done but should manifestly and undoubtedly be seen to be done".[25] In upholding this point and in essence, observing the above arguments collectively and through a lens of a critical eye, it is only tenable in the interests of justice that, if a hearing compromises arguments that are made orally and synchronously, it should ideally be termed in equivalence to a hearing. To conclude, the right to a hearing does not exclude in and of itself the possibility to hold the hearing remotely.[26]

THE APPROACH OF ARBITRAL INSTITUTIONS ("INSTITUTIONS") TO HEARINGS

The facilitators of Arbitration during the Pandemic

The concept of Hearings was embraced and welcomed by Institutions well before the Pandemic, albeit, due to the impact caused by its repercussions, the efforts of Institutions were further intensified and propelled towards sky blue thinking, resulting in proactively announcing soft law instruments in the form of guidelines, specifically relating to Hearings, inter alia. Additionally, Institutions identified the importance of Hearings then, and the major Institutions i.e. ICC & the London Court of International Arbitration (**"LCIA"**) held deliberations with major stakeholders in Arbitration, leading to amending their Rules in a manner congruent to bringing about conspicuous unambiguity, certainty, practicality, flexibility, permissibility, and most importantly legality in the conduct of Hearings. Institutions have bolstered their Rules, and have replete Tribunals with broad discretionary power in the conduct and facilitation of Hearings.

- ***The similarity between the Rules of major Institutions***

[25] *R v Sussex Justices* [1924] 1 KB 256
[26] Prof. Maxi Scherer (n 10)

The main approach in the Rules of different Institutions aims to achieve the same objective, namely, facilitating the parties during Hearings. The actual approach, however, in certain instances narrowly differs.

a. ***Expressly legalising Hearings:*** The Pandemic features as the main catalyst for wide-ranging developments, mainly, the legal backing concerning Hearings, marking an epoch in the life of Arbitration. Most of the adaptions are structured to allow for, the filing of both, continuing and new arbitrations remotely.

LCIA: The first Institution to effectuate its Rules in a manner legally authorising for, the conduct of Hearings, to take place through the medium of conference call/s, videoconference, or by the usage of other communications technology with participants in one or more geographical locations or a combination thereof.[27] This opened the floodgates for other major Institutions to keep pace with user demands and invigorate their efforts in legalising Hearings into their Rules.

ICC: Subsequently, the ICC followed in the footsteps of the LCIA and enforced the ICC Rules of Arbitration on the 1st January 2021, and the Rules provide for, the increase in the Tribunal's duties to manage the Proceedings efficiently and conduct Hearings with reasonable notice to the parties, through the usage of telephone/s, videoconferencing or other appropriate means of communication.[28] These Rules have empowered Tribunals, in certain cases, with broad discretionary power to order Hearings, despite party resistance, however, the one notable exception to this is the Agreement, for instance, a documents-only arbitration is agreed upon between the parties. These reformative provisions have put to rest any ambiguity in the legality of Hearings and therefore, this concludes that one type of hearing is not favoured over another. Other Institutions have paved the way in guiding users in the conduct of Hearings through the publishing of guidelines.[29]

b. ***E-filing for a Request and primacy of electronic communications:***

[27] London Court of International Arbitration Rules, 2020, art. 19(2)
[28] International Criminal Court Rules 2021, art. 26(1)
[29] ADGM Arbitration Centre Protocol for Remote Hearings (n 12)

Institutions have taken conspicuous efforts to promote efficiency in streamlining their processes and mitigate potential delays caused by the Pandemic, for instance, stamping out the need for submissions furnished in the form of hard copies. Institutions have mandated for, filings and communications are made in electronic form, a practice now customary in Proceedings, and have expressly urged Tribunals to encourage parties to avail electronic means of communication for the submissions and exhibits to the full extent possible.[30] This reform takes a step in the direction of reducing the costs and time of the participants in Proceedings.

- ***Spike in Arbitration applications: Supporting observations***

As a result of the adaptive nature of Arbitration, the users now more than ever, have embraced and resorted to Arbitration.

Statistics: A comparative analysis of caseload filings in numbers across major Institutions for the year 2019-20.

- **The ICC** recorded a total of 946 new arbitration cases in 2020 the highest number of cases registered since 2016.[31]
- **The LCIA** reported an all-time high of 444 referrals to the LCIA in 2020 and, 2019, with a record number of 406 cases referred to the LCIA,[32] which was the highest number of cases referred for that year.
- The Singapore International Arbitration Centre(**"SIAC"**) reported the highest ever case filings in the year 2020 amounting to 1,080 cases (crossing the 1000 mark barrier for the

[30] 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic' (*International Chambers of Commerce*, 09 April 2021) <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/> accessed 04 April 2022

[31] 'ICC Announces Record 2020 caseloads in Arbitration and ADR' (*International Chambers of Commerce,*12 January 2021) <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> accessed 05 April 2022

[32] '2020 Annual Casework Report' (*London Court of International Arbitration*) <https://www.lcia.org/LCIA/reports.aspx> accessed 04 April 2022

first time), the parties featuring across 60 jurisdictions and the total sum in disputes amounting to a whopping USD 8.49 billion.[33]

WHAT ARE THE MOST PREFERRED INSTITUTIONS AND WHAT ATTRIBUTES MAKE FOR A BETTER INSTITUTION?

According to the Survey, the ICC stands out as the most preferred Institution, receiving 57% votes, followed by SIAC with 49% votes, Hong Kong International Arbitration Centre **("HKIAC")** with 44% votes, and the LCIA with 39% votes.[34]

Several factors that influence user preference concerning Institutions and interviews conducted suggest, that the principal driver behind user preference of Institutions include the Institution's general reputation and the respondent's previous experience[35]. However, since the growing popularity of the concept of Arbitration featuring as an efficient mechanism for dispute resolution permeates globally, the likely outcome suggests, several first-time users are featuring in this platform and the previous experience of users may not serve as an ideal indicator to the choice of Institution, as compared to perhaps, attributes that feature competitive pricing of, or technical support/guidance provided by the Institution involving new users in specific. Notwithstanding, neither of these indicators in and of themselves displaces the key attribute of a reputation of the Institutions as the driving force for user preference concerning Institutions, and hence, it comes as no surprise that, the ICC is the most preferred Institution worldwide.

Key takeaways: As evidenced above, there appears to be a steady, and in some cases, an astronomical increase in the application to Arbitration year-on-year, a thriving response from users, a continuous outcome that is directly proportional to the growing efficiency of Institutions. Additionally, in the year 2020, three out of the five above-mentioned Institutions recorded their all-time highest ever cases filed.

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[33] '2020 Annual Report' (*Singapore International Arbitration Centre,* 31 March 2020) <https://siac.org.sg/ysiac/about-us/69-siac-news/699-siac-sets-a-new-record-in 2020#:~:text=Of%20the%201%2C080%20cases%2C%201%2C063,a%204.9%25%20increase%20from%202019> accessed 05 April 2022

[34] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)

[35] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)

In sum, the institutional reforms display promise in ensuring that arbitrations remain flexible, efficient, competitive, cost-efficient for all participants and further popularise the concept of Arbitration as a mode to resolve disputes during the Pandemic and are expected to have a lasting imprint in practice, leading to an invigorated environment for Arbitration in the future.

POTENTIAL COMPLICATIONS IN THE CONDUCT OF HEARINGS: APPROACHES AND OUTCOMES

We have witnessed above, how Hearings facilitate Arbitration, however, it is not smooth sailing in practice, several possible complications may arise in different instances when Hearings are conducted, we take an in-depth assessment into such instances and aspire to discuss prospective solutions for the same. One thorny concern yet up for debate is the balance of duties of the Tribunal. On one hand, uphold the due process in Proceedings by treating parties equally besides fairly, whilst on the other hand, uphold the duties of issuing an enforceable Award, and in some instances, expedient resolution of the dispute, especially where it is contractually agreed for (expedited procedure). Further, the party that possesses greater bargaining power in the transaction may strategically hold out against the idea of participating in Hearings.

In such an instance where one party actively does not consent to the conduct of a Hearing, does the Tribunal possess the authority in conducting a Hearing?

This instance in which the Tribunal needs to determine whether to conduct Hearings despite the opposition of one party is a grey area in practice that is conspicuously left unaddressed. Let us assume that the Tribunal has ordered for a Hearing in this instance, where inference can be drawn in favour of the Tribunal to possess the requisite authority to conduct a Hearing, and the potential concerns that may arise as a consequence are further discussed below.

The Tribunal's authority to conduct a Hearing if one party objects

There are contrasting perspectives that are furthered by several authors.

The onus placed on the objecting party: One of the perspectives favoured the party applying for a Hearing whereby, the onus should be placed on the party objecting to the conduct of a Hearing, to establish why the conduct of such an arrangement is untenable.[36]

In my opinion, this approach through unconventional appears to be one-sided and the threshold requirements for explaining the conduct of the Hearings are quite high. Further, in transactions that comprise parties that possess significantly uneven bargaining power, the party possessing lesser bargaining power might find themselves coerced into an untenable arrangement, for instance, a party may lack sufficient funds for the installation of top-end platforms or subscribes for hardware rentals, or worse, one of the key witnesses testifying possesses a poor internet connection, which may result in negatively influencing the outcome of the Award. This approach is not expressly supported either by Rules or by domestic arbitration laws. On a deeper note, this approach is likely to violate party autonomy, and therefore, based on the above reasons, this approach is unlikely to succeed in practice.

An overall balancing exercise: A contrasting yet better suited, overarchingly neutral, and well-balanced approach would mean that Tribunals would need to critically assess the potential benefits resulting from conducting Hearings with the potential prejudice to any party resulting therefrom.[37] This approach is largely congruent to the Rules of major Institutions with the granting of broad discretionary to the Tribunals in determining the most viable form (through the conduct of mainly, physical hearings or Hybrid Hearings) in which the Proceedings would be conducted on a case basis.[38] To clarify, this approach does not involve an a-one-size-fits-all or cookie-cutter style, rather a careful consideration of all the facets (i.e. reason for the Hearing, timing, and costs of the Hearing compared to a physical hearing, inter alia) of the case is necessary.[39]

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[36] Janet Walker, 'Virtual Hearings: An Arbitrator's Perspective' (*Story Blok*) <https://a.storyblok.com/f/46533/x/f51aefc9b6/virtual-hearings-an-arbitrator-s-perspective.pdf> accessed 03 April 2022

[37] Prof. Maxi Scherer (n 10)

[38] London Court of International Arbitration Rules, 2020, art. 14

[39] Prof. Maxi Scherer (n 10)

POSITIVE OUTCOME

The Tribunal is forced to be mindful of the ends (upholding the due process of the Proceedings) in the commencement of the assessment concerning all the circumstances in determining whether to conduct a Hearing, in other words, the Tribunal will have to ascertain how it would adhere to the due process of the Proceedings even before the commencement of the Proceedings take place or right from the outset in the form of a pre-established procedure. This has a two-fold benefit, namely:

Higher accountability: This approach underscores the Tribunal's efforts toward accountability towards the parties, specifically relating to, how the Tribunal would safeguard the party's basic procedural right of equal treatment and the right to be heard as the essential principles of the arbitral due process.

Higher chances in the issuance of enforceable Awards: The parties, by agreeing on a certain procedure, run the risk of the non-enforceability of any Award, however, by identifying potential risk to the due process of the Proceedings at an early stage or before the commencement of the Proceedings, provides more time and opportunity to work on averting such risks. Thus, increasing the chances of the issuance of enforceable Awards. Though this approach is relatively practice focused, its efficacy, in my opinion, shall also be considered in tandem with other influencing factors such as applicable Rules and domestic arbitration laws that govern the case.[40] The International Council for Commercial Arbitration surveyed 77 jurisdictions, to determine whether a right to a physical hearing exists in Arbitration and published reports for the same. The survey confirmed that a provision that expressly provides for the right to a physical hearing was absent in all the reports across the surveyed jurisdictions.

Nevertheless, several parallels were drawn across different domestic practices and a few jurisdictions in which such a right to a physical hearing could be inferred based on an interpretation, for instance, in the UAE, a few reporters argued in favour of the Tribunal ordering a Hearing despite the party's agreement otherwise, on the condition that adhering to

[40] 'The Lex Mercatoria (Old and New) and The TransLex-Principles' (*Trans-Lex*) <http://translex.uni-koeln.de/969020/_/arbitral-due-process/#comments> accessed 03 April 2022

the Agreement would lead to exceeding the statutory time limit of the arbitration, or, to take it a notch further in a jurisdiction such as Qatar, the Tribunal could order for a Hearings if the duty of the Tribunal of conducting the Proceedings expeditiously is violated and contrastingly, in other jurisdictions such as Finland, conducting a Hearing against the party's Agreement runs the risk in setting aside the Award.[41] In other words, the interpretation of a physical hearing would have a different definition across different jurisdictions and careful consideration should be given to these nuances when it concerns the authority of the Tribunal to conduct a Hearing.

Cogent arguments: In favour of conducting Hearings when one party objects

- ***The principles of immediacy and orality are inclusive in Hearings:*** Furthermore, as discussed above, the need for the principle of immediacy and the need for orality concerning legal arguments serves the purposes in Hearings as well and regardless of the language of the applicable domestic laws, the parties have agreed to grant the Tribunal the authority to decide this question through provisions in any applicable Rules.[42] This is mainly applicable in cases wherein the parties have opted for institutional arbitration.
- ***The burden of proof on the objecting party to establish a causal nexus between breach and Award:*** The arbitration laws in Singapore carry additional stringent requirements on the part of the party alleging that a breach of natural justice against such party has taken place in the Proceedings. Under section 24(b) of the International Arbitration Act (**"IAA"**), for the General Division of the High Court to set aside the Award of the Tribunal, for an applicant alleging that, a breach of natural justice had occurred during the Proceedings by filing such an application to set aside the Award, is required to establish that, such breach had a causal nexus with the making of the Award and such outcome prejudiced the right of the applicant.[43]

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[41] 'Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences' (*International Council for Commercial Arbitration*, 26 May 2021) <https://www.arbitration-icca.org/right-physical-hearing-project-newly-released-reports-confirm-core-trends-and-divergences> accessed 03 April 2022

[42] Remote Hearings in International Arbitration- A Practical Guide (n 7)

[43] *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 [50]; Yvonne Mak, 'Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View From

- ***Breach of the party's right to be heard does not always amount to non-enforcement of the Award:*** In certain cases, despite the happening of a breach of the party's right to be heard, this does not amount to the non-enforcement of the Award under the New York Convention (**"Convention"**). Such breach of the right to be heard would only form the basis for rejecting enforcement of the Award if such violations had prevented the affected party from raising its claims and defences, therefore, the party alleging breach of the right to be heard has to meet a high threshold in resisting the enforcement of the Award.
- ***Timely intimations of a breach to the Tribunal:*** As a general principle, the complaining party intending to contend that, a breach had taken place in the Proceedings must communicate with the Tribunal of its intention to take that point as a contention at the appropriate time if the Tribunal insists on proceeding, or seek to suspend the Proceedings until such breach is remedied and not reserve its position until after the Award is issued.[44]

In a jurisdiction such as the United Kingdom, the national law makes it mandatory for a party to object to any due process issues or irregularities to the Tribunal or court within a reasonable time and not later than the time prescribed by the relevant statute or the Tribunal, or under the Agreement, instead of suppressing such complaints to strategically resist the enforcement of the Award. In case of delays in objecting due process concerns, the complaining party runs the risk of losing the right to object.[45]

Note: Timely intimations by the complaining party to the Tribunal on the happening of a potential breach would bring such information to the knowledge of the Tribunal and this intimation would assist the Tribunal in remedying such breach (potential or actual). Subsequently, if the Award is challenged in a court of competent jurisdiction based on the

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Singapore'(*Kluwer Arbitration Blog*, 20 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/> accessed 03 April 2022

[44] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC & Anor* [2020] SGCA 12 [168] and [170]

[45] Arbitration Act, 1996, s 73

alleged breach, the decisions of the Tribunal in the conduct of the Proceeding would be assessed based on what the Tribunal knew about such breach, at the time of the intimation.

- ***Tribunal's authority to adopt procedures:*** In certain jurisdictions, subject to certain conditions, the applicable law expressly allows for, evidence to be given through the means of live television links or video links[46] and concretely, Section 33 of the Arbitral Act 1996, refers to the authority of the Tribunal to adopt such procedures suitable under the circumstances of the case to run Proceedings and avert undue delay.

This provision is mandatory and implies that the Tribunal is bound by such a provision and brings such provision into effect notwithstanding any contrary Agreements between the parties. As discussed above, where the Tribunal finds its authority through procedural law to adopt measures in the conduct of Proceedings, thus, disproving the Tribunal's strong presumption that, ordering for a Hearing is tenable in the applicable case is quite challenging, besides, as discussed below, the case law that supports in the favour of a Hearing when one party objects, subject to the Tribunal carrying out its positive duty in upholding the due process during Proceedings. As a consequence of the Pandemic, there is a smorgasbord of fully remote hearings being conducted and thus, the likely outcome is that courts would be bound eventually to address this concern and therefore case law may evolve.[47]

The possibility of a different outcome in the Award, in the absence of the alleged breaches: Supporting case law

The courts, when assessing a case, take into account the possibility of a different verdict in the Award (a different outcome in the arbitration) assuming the absence of the alleged breaches occurring, in other words, whether the absence of the alleged breaches (in the case discussed below, the reference to technological failures in specific, as the alleged breach) taking place in the Proceedings influence a different decision in the Award? The court, in an Australian case (Sino Dragon Trading v Noble Resources International), dismissed an application to set aside an Award despite the occurrence of unusual circumstances[48] (the negative impacts of the

[46] Evidence Act, 1872, s 62
[47] China Machine New Energy Corp (n 44)
[48] *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, para 130

technological failures) in the Proceedings, besides, the examination of the witness was undertaken in a manner 'unsatisfactory'.

a. Issues:

i) Some of the material was not translated, nor were the copies of the concerned documents provided to the witness during cross-examination therefore, this created difficulties for the party examined, and the counsel who conducted the cross-examination.[49]

ii) The interpreter who was undertaking the task of interpreting the evidence was struggling with interpreting the evidence into English and thus, was replaced.[50]

iii) The relevant video links failed to function for unknown reasons and evidence was collected through Skype.[51]

b. Court's observations:

i) Evidence collected using the mode of a telephone or through video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce "real unfairness" or "real practical injustice".[52]

ii) In light of the technical difficulties, the mode (videoconference) used for the collection of evidence was chosen by the respondent itself (over the objection of the claimant),[53] besides, the technical difficulties that occurred in the mode used to collect evidence were partly caused because of the omissions of the respondent and at the time the technical difficulties occurred, the respondent was prepared to continue with the hearing[54] (as discussed above, this act forms a basis of a waiver in the right to object to procedural irregularities, by the reason of not reporting such irregularity promptly to the Tribunal).

iii) The evidence of the respondent was not excluded by the technical difficulties[55] and on the contrary, these difficulties caused more problems for the cross-examining counsel of the

[49] *Ibid*, para [147]
[50] *Ibid*, para [131]
[51] *Ibid*, para [130]
[52] *Ibid*, para [154]
[53] *Ibid*, para [161]
[54] *Ibid*, para [162]
[55] *Ibid*, para [163]

claimant,[56] moreover, at the time of closing address in the arbitration hearing, no issues were raised with the Tribunal then or thereafter about any lack of opportunity to present the respondent's case and therefore, based on such conduct, and the absence of complaint therefor, the court inferred that the respondents did not perceive any lack of opportunity to.[57]

c. *Comments:*

In light of the above observations, inter alia, the court took note of the Tribunal's considerations (the Tribunal's act of taking into account) concerning the difficulties caused by the technical issues in the Proceedings, yet, under the circumstances of this case, upheld the decision in the Award. The verdict of this case highlights, inter alia, the need to assess each case on its merits, and if a breach of a party's right to be heard occurs, subject to certain conditions (as discussed above), such breach does not necessarily render the Award unenforceable under the Convention (as discussed above), neither the conduct of Hearings in and of itself produces "real unfairness".

CASE LAWS IN FAVOUR OF CONDUCTING A HEARING WHEN ONE PARTY OBJECTS

A landmark judgement on 23rd July 2020 was rendered by the Austrian Supreme Court on a decision examining whether the conduct of a hearing over the objection of a party may violate due process. According to the apex court's ruling, the Tribunal could schedule a Hearing despite the objection of a party, if the Proceedings are conducted in a manner that safeguards the fair and equal treatment of the parties throughout the Proceedings.[58] The apex court further affirmed the general principle that Tribunals enjoy broad discretionary power in the manner in which Proceedings are conducted under Austrian arbitration law and the Vienna

[56] *Ibid*, para [164]
[57] *Ibid*, para [165]
[58] Maxi Scherer, Franz Schwarz, Helmut Ortner, & J. Ole Jensen, 'In a First Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns' (*Kluwer Arbitration Blog*, 24 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/#:~:text=On%2023%20July%202020%2C%20the,18%20ONc%203%2F20s).&text=After%20the%20VIAC%20had%20rejected,case%20went%20to%20the%20OGH> accessed 04 April 2022

rules (Vienna being the seat of the arbitration). Ergo, the respondent's challenge was dismissed.

1. ***Practical observations**:*

The verdict in the judgement further confirms that the conduct of a Hearing does not violate the party's right to a hearing unless the due process requirements are not upheld by the Tribunal at all stages of the Proceedings. With the extensive use of Hearings in Arbitration in modern times, this landmark case provides concrete guidance relating to the legitimacy of the conduct of Hearings and this judgement may form a legal precedent. In sum, it can be argued that the Tribunal possesses the substantial legal authority to order a Hearing despite a party's objection to the same, however, such discretion is influenced by several factors and should be dispensed with caution. Further, judicial intervention is limited concerning due process challenges, and overturning the presumption that a Hearing is conducted in a manner that is legitimate is often challenging. The Tribunal is bound to avoid delays during Proceedings and issue enforceable Awards, however, the efficacy of Hearings largely depends on the upholding of due process rights that parties enjoy, i.e. this may include factors such as equal treatment of the parties during the Proceedings or other relevant external factors such as access to a reasonable internet connection, inter alia.

2. ***Tribunal's authority to conduct a hearing under Rules:***

As discussed above, several Rules and Institutions make provision for the use of technology in Proceedings and protocols encourage the e-filing of cases, to the largest extent possible. In instances where the parties under an Agreement apply for institutional Arbitration, it is then that the parties are bound by the Rules of such Institution and in essence, this includes, in specific, granting a broad discretionary power to the arbitrator in determining procedural matters, mainly the need and viability in the conduct of a Hearing on a case basis. As discussed above, major Institutions across the globe have reformed their Rules to make provisions to permit the conduct of Hearings. The Tribunal, on its motion and by giving

reasonable notice, may determine, whether a physical hearing or a Hearing is the most viable approach, after consulting with the parties and based on the circumstances of the case.[59]

The ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration (**"ICC Note"**) supplements the ICC Rules and offers invaluable guidance on conducting Hearings. The ICC Note touches upon various factors and relevant circumstances that Tribunals need to consider when opting to proceed with a Hearing, without party Agreement or over party objection, namely, the nature of the hearing, the possible existence of travel constraints, the duration of the hearing, number of participants (including witnesses and experts), the costs and the gains of efficiency that may be expected by resorting to Hearings, besides whether rescheduling the hearing would entail excessive delays[60] and assess whether the award is enforceable at law and provide reasons for that determination.[61] Given the broad discretionary powers enjoyed by the Tribunal to adopt such measures as it deems fit to run the Proceedings, it would be challenging for a party objecting to the order of a Hearing, to argue against the authority of the Tribunal, unless such party is not given a fair chance to present its case.

Summary: As evidenced above, in practice, there is no one-size-fits-all answer when one party objects to the conduct of a Hearing, however, several factors suggest that, the Tribunal in certain circumstances, holds the authority to order a Hearing, as long as the duty of upholding the due process of the Proceedings is balanced with the duty to issue enforceable Awards in law besides, the expedient resolution of disputes. When it concerns case law, there is general assent to the decision of the Tribunal to order for Hearings with judicious intervention by the judiciary and the party seeking to challenge Awards in this regard, meet a high threshold requirement and are successful in such challenges generally when the Proceedings are conducted in a manner egregious.

A PRACTICAL SUBSTRUCTURE FOR THE CONDUCT AND ORGANISING OF HEARINGS

[59] International Criminal Court Rules, 2021, art. 26(1)
[60] 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (*International Chamber of Commerce*, 01 January 2021) <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> at para 99 accessed 02 April 2022
[61] *Ibid*, para 100

The use of technology in the Process is not a novel concept in Arbitration as discussed above, however, there always lies a lurking reluctance by the parties as to whether their encounter with remote participation would be marred by technological malfunctions, or may have logistical concerns such as operating with different participants featuring from different time zones. To begin with, the conduct of Hearings poses several challenges, and Institutions and other stakeholders of Arbitration, such as academic institutions were aware of these challenges. Further, Institutions identified the need for Hearings in modern times is far greater than ever before, and therefore, several measures were carried out to mitigate these challenges. Institutions, scholars, law firms, and international conferences have all suggested several practical guidelines for managing and organising Hearings. These guidelines were then adopted by users into practice and have since, contributed invaluably to the development of Hearings, therefore, making it the new normal in the Arbitration sphere. With adequate budgeting and lead time, the right setup can be organised with the use of professional help. The following discusses practical and user-friendly approaches in participants of Arbitration may adopt on a case basis, achieve better structure and efficiency in the Proceedings while ensuring the right of due process.

a) ***Drafting considerations:*** As a preliminary step and a precautionary measure, Practitioners should ensure that their client's Agreements provide for, the use of Hearings in dispute resolution clauses, or such pre-Hearings Agreements could be entered into even at the time of negotiation between the parties. It would be unwise to completely rule out the prospect of Hearings because of the volatile nature of the Pandemic or for other reasons, such as user convenience. It is paramount to attain the consent of the parties (for the conduct of Hearings) in a manner recorded in writing because this acts as a precaution to dispense with frivolous challenges to Awards rendered where Hearings are held, where there is no express agreement between the parties on the use of Hearings.[62]

[62] 'African Arbitration Academy Protocol on Virtual Hearings in Africa 2020' (*africaarbitrationacademy.org*) <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/> accessed 04 April 2022

Note: It is preferable to agree on the prospect of a Hearing at an early stage of the process, however, if such a decision to proceed with Hearings between the parties is established and agreed upon, such decision should be recorded in the terms of reference. In certain cases, the parties may deem it suitable to address the possibility until they have more clarity about the nature of the case, for instance, the issue may arise on the happening of an unexpected event, such as a travel restriction that affects the ability of a party to attend a physical hearing. When there is such a development, it is prudent to raise such concerns with the Tribunal and the other party as soon as practical and to the extent necessary, take steps at that time to ascertain the parties' views on proceeding remotely.[63]

As discussed above, several Rules and national laws grant broad discretionary power to the Tribunal to order Hearings in Arbitration, however, an express provision granting authority to the Tribunal to order a Hearing, notwithstanding the objection of one party, would reduce potential ambiguity concerning the Tribunal's authority to order for Hearings. As an additional step, it is advisable to provide for, in the Agreement, the suitable modes through which Hearings can be conducted. By way of example: The permissible use of videoconference and telepresence or a combination of both as is deemed fit on a case basis.

Note: With the inclusion of an express provision for Hearings in the Agreement between the parties, there lies a higher possibility on the part of the Tribunal, to give effect to party autonomy.

Once it is established that the parties and/or Tribunal have decided to proceed with a Hearing (either Hybrid Hearings or fully remote hearings), there are several factors to take into consideration for the organisation of the Hearing, namely: scheduling of the hearing, preliminary cost allocations, the selection of the appropriate platform besides cyber security and data protection, conduct rules, and other miscellaneous considerations. Ideally, these factors should be discussed in the negotiation stage, when deliberations relating to the drafting of the dispute resolution clauses are concerned, however in complex cases, ascertaining the nature of the case is from the outset is knotty a task and therefore, a more

[63] Sino Dragon Trading Ltd (n 44)

practical approach would mean that these factors are mainly found to be addressed in case management conferences between the parties and the Tribunal. These factors are discussed in detail below and are largely focused on the approaches that may be adopted concerning Hearings in specific, on a case basis, along with, preliminary best practice considerations that apply to all types of hearings.

b) ***Preliminary considerations:*** To begin with, these general considerations apply to all types of hearings. When approaching a case management conference, the parties should agree upon, an expedient and cost-effective procedure, failing upon such agreement, the Tribunal as a backup, possesses the authority to determine such procedures necessary, after consulting with the parties.[64] In my experience, it is advisable to consider each case on its merit and draft clauses/set up procedures that are specific to the transaction, as this approach brings about structure and predictability to the Process, especially when it concerns planning for a Hearing rather than, applying boilerplate clauses or carrying a capricious/piecemeal approach as the case progresses.

c) ***Scheduling of the hearing: General considerations***

Practical steps considering scheduling of hearings that Tribunals should consider after consulting the parties, namely:

- Affixing the dates, time (considering time zone differences between the participants, if any), and duration of all the hearing days- in addition, the Tribunal may consider affixing a schedule for shorter hearing days to instill efficiency in the Proceedings and resolve time zone issues (if any) to a practical extent.
- The need for hot-tubbing of expert witnesses to save time; to the extent necessary considering the need to appoint interpreters and case managers (subject to their qualification background and experience), how hearing time is allocated

[64] 'Effective Management of Arbitration' (*International Chambers of Commerce*) <https://iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf> accessed 05 April 2022

between/amongst the parties, and the requirement for, and timeframe affixed for direct examinations and cross-examinations of witnesses.

- For reasons deemed legitimate by the Tribunal for the delay, where, the hearing time for a particular hearing session has exceeded beyond the time affixed thereof, it is advisable to provide adequate buffer time under such instances.
- The procedure in which participants verify their identity and the seating plan (when necessary).

Considering the Factors that are specific to Hearings

a. ***Preliminary cost allocations:*** It is challenging to allocate costs to match the complexity of the case, especially when it accounts for Hybrid Hearings, this is because, in most circumstances, there is an unevenness in the use of technology between the parties. For instance, one of the parties may present its witnesses physically in the main hearing room whilst the other party's witness may attend the Hearing through remote participation therefore, it is necessary to agree upon (between parties) and divide/allocate preliminary costs between parties accordingly. In addition, parties should consider addressing beforehand, the potential delays caused as a result of technical malfunctions and under such result, the party who will bear any costs therefor.

b. ***The selection of the appropriate digital platform besides, cyber security and data protection:*** This is the most critical factor among all others, and it is paramount for parties to agree upon the use of a suitable platform to conduct the Hearings. There is a range of platforms that are available free of cost in the public domain, for example, Zoom, that can accommodate and host several participants simultaneously at one point in time and contrastingly, there are tailor-made platforms conducive for the use of Hearings in Arbitration. However, when deciding on a relevant platform, it is important to consider data security. Parties to consider adopting platforms that provide for end-to-end encryption with unique access to the user (with password protection).

However, the parties, as a shared concern, must consider the ramifications of opting for convenience over data privacy, as the terms and conditions of some platform providers

allow the provider ownership rights over transmitted data[65] (inclusive of the storage and access of such data), this could result in grave risk to the confidentiality of the Proceedings.

c. Technologies and technical support:

Technical Support Agent: The parties should consider appointing a dedicated technical support agent ("**Agent**") either arranged from third party sources or in certain instances, the Institute may provide such services at an additional cost. It is recommended to have an Agent appointed to operate the platform in times of necessity despite the Tribunal directing the Proceedings, this is because, there is a possibility of arbitrators not possessing the technical acumen or skill, especially in times of the happening of technical malfunctions and to avert delays, besides additional costs.

d. Technical equipment

The Tribunal should be convinced that all the participants who participate remotely in the Proceedings possess the requisite equipment (microphones, speakers, cameras, monitors, etc) and an internet connection that meets the minimum prescribed level as a standard that can be affixed, based on the requirements of the chosen platform for the conduct of the Hearing.

The Seoul Protocol Video Conferencing in International Arbitration ("**Protocol**") provided invaluable guidance concerning the organisation of video conferences in Arbitration and prescribes, a minimum transmission speed (256 kilobytes per second, 30 frames/second) with a high-definition standard, by the hearing participants besides, ensuring compatibility between hardware and software used during Hearings. Further, the Protocol recommends the use of portable equipment to the extent practical, to avert unforeseen technical complications.[66]

e. Testing and training sessions for the Hearing: It is incumbent to consider a minimum of two testing sessions before the commencement of the Hearing, and training sessions with the main participants of the Hearing (the legal representatives, the parties, and the Tribunal in

[65] Tim Fox, 'Preparing for a Remote Hearing in International Arbitration- Checklist' (*Lexis Nexis*) <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/63VB-64K3-CGX8-01VT-00000-00/Preparing-for-a-remote-hearing-in-international-arbitration%E2%80%94checklist> accessed 03 April 2022

[66] 'Seoul Protocol on Video Conferencing in International Arbitration' (*Viac.eu/de*) <https://www.viac.eu/images/COVID19/Seoul_Protocol_on_Video_Conferencing_in_International_Arbitration.pdf> accessed 04 April 2022

specific) to the extent necessary. These precautionary steps should be considered for such purposes:

- the participants to get familiarised with the technology used during the Hearing; and
- to identify any potential unforeseen issues that may arise and such issues rectified as soon as practical.

The list of factors discussed above, though not exhaustive shall facilitate the organisation of Hearings and these factors are generally found to be followed on a case basis in most Hearings. It is incumbent for parties to have premeditated Agreements on the procedural matters in advance and formulate contingency plans to deal with instances concerning potential conundrums, for example, technological failures. However, approval of the implementation of the above factors will largely depend on the approval (leave) of the Tribunal.

THE ROLE PLAYED BY PRACTITIONERS IN ADVISING CLIENTS CONCERNING HEARINGS: LEARNINGS AND APPLICATION BY PRACTITIONERS WITH THE IMPLEMENTATION OF STRATEGIES

The Practitioner plays a vital role in the solicitation of the client, these roles could mainly feature through part-taking in negotiations, sound drafting of the Agreement, providing legal advice, inter alia. This part of the paper largely focuses on practical considerations Practitioners must take into account, to adopt different best practice guidelines into legal clauses concerning Agreements.

a. The must-have clauses Practitioners should consider drafting into Agreements are, as follows:

Set limits on the number of party submissions and pleadings that can be produced.

i) Inclusion of a document submissions clause

An approach that Practitioners can adopt is crafting tailor-made clauses relevant to the dispute in question, perhaps, the inclusion of a clause in the Agreement limiting the length of party-written submissions, to **avoid unnecessary and repetitive submissions**.[67]

ii) Inclusion of a limit of pleadings clause and negotiation

Depending on the merits of the case, Practitioners can make a provision to negotiate with their counterparts (opposite party) to place caps on the number of pleadings. A single pleading in the Request along with the answer to the request simultaneously would save time, prevent duplication of effort, and render it cost-effective for each party, however, such agreement is subject to the mutual consent of the parties.

Example: One option may be to agree that the Request and the answer are fulsome documents setting out the parties' case, thus limiting the need for further voluminous rounds of pleadings.[68]

- ***Inclusion of clauses that provide for, the usage of technology in the submission of documents, participation in hearings, and production of witnesses.***
- ***Inclusion of clauses that enumerate the scope of digital submissions and set limits.***

Clauses Practitioners may consider including in the Agreement are:

- provision for making digital submissions, reasonable provisions for the attending of hearings remotely with the use of bespoke video conferencing portals, and limiting the number of digital submissions;
- make provision for reasonable delays in the submission of digital documents (access to such documents may take a reasonable time to procure) and narrow reasonable

[67] Melanie Willems, 'Avoiding Delays and Excessive Costs in Arbitration' (*Thomson Reuters Practical Law*) <https://uk.practicallaw.thomsonreuters.com/7-203-6664?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=867fbf8c7ae840c09d2df1b54b8c7891&skipAnonymous=true> accessed 05 April 2022

[68] Jonathan Newman, 'Tailoring the international Commercial Arbitration Process for Parties Traditionally Reluctant to Enter into Formal Dispute Resolution Proceedings' (*Thomson Reuters*, 11 September 2017) <http://arbitrationblog.practicallaw.com/tailoring-the-international-commercial-arbitration-process-for-parties-traditionally-reluctant-to-enter-into-formal-dispute-resolution-proceedings/> accessed 04 April 2022

categories of documents to be provided, rather than the production of all documents which might touch upon the dispute in some tangential way;[69] and

- making provision for the hot-tubbing[70] of expert witnesses to save time.

❖ ***Application by Practitioners: Preventive and futuristic approach***

Opinion: The inclusion of such clauses into the Agreement would also suggest that the Tribunal would be reluctant to act against the wishes of the parties concerning the conduct of the Proceedings, in other words, the Tribunal is bound to respect uphold the autonomy of the parties. Practitioners must be vigilant when drafting such clauses. It is incumbent that such clauses are congruent with the governing domestic law, or any rules of the concerned Institution.

Agreement to Videoconference:

- The parties and the arbitrator/s agree that in the best interests of justice, the hearing on the arising of a dispute, in this case, will be conducted via [Platform Name] videoconference as a reasonable alternative to an in-person hearing in light of the COVID-19 pandemic, stay-at-home orders, and travel limitations. This confirms that the hearing will be deemed to have taken place in [place of arbitration].
- The parties acknowledge that they have made their investigation as to the suitability and adequacy of [Platform Name] for its use for the video conferenced hearing and of any risks of using [Platform Name], including any risks regarding its security, privacy, or confidentiality, and they agree to use [Platform Name] for the hearing.[71]

Observation: Taking into consideration the aforementioned points, it can be presumed that the brilliance of Arbitration has proved to be adaptive in searching times. However, one of the crucial elements includes party cooperation. If the party's approach reflects in delaying

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[69] *Ibid*

[70] *Ibid*

[71] 'AAA-ICDR Model Order and Procedure for Virtual Hearing Via Videoconference' (*American Arbitration Association*) <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf?utm_source=twitter&utm_medium=social&utm_campaign=virtual_hearing-order-and-procedure> accessed on 02 April 2022

of the Proceedings, it is then counter-intuitive to the purposes of Arbitration and ignores the bigger picture: 'Justice delayed is justice denied'.

The Role of technology in the world of Arbitration: The conduct of Hearings is no stranger in the world of Arbitration, albeit, quite inverse to those of the earlier times, Hearings are more of a necessity than an alternative. This part of the paper takes a nosedive into the role played by Hearings and the use of technology in facilitating Arbitration in this Pandemic, prospective adaptations that could be adopted in the Process to bolster efficiency, the prospective ramifications of Hearings (confidentiality), the adoption of the best practice guidelines to tackle such shortcomings, and the prospective considerations Practitioners should consider during legal drafting.

Prospective adaptions that could be adopted in the Process to bolster efficiency

Arbitration is a creature of contract because the court is bound to honour the voluntary choices of the parties. As discussed above, the continuing success of Arbitration is largely dependent on its users and serving user demands. To best serve these demands, it is paramount to ascertain what these demands are. Fortunately, in the Survey, the interviewees were asked which procedural options were they willing to forgo to make Arbitration cheaper and faster? There are several procedural formalities that the interviewees are willing to forego, the few that are discussed below are:

The quantum of rounds of submissions and its length thereof: Foregoing an unlimited length of written submissions (61%) emerged as the standout choice by the interviewees as they saw it as a safe choice regardless of the type of dispute at stake and it has become common practice for parties to submit unnecessarily long briefs.[72] As discussed above, it is paramount that in practice, the parties should agree in writing through express clauses in the Agreement to put a cap on the length of party-written submissions and avoid repetitive submissions and in certain cases, limit the rounds of submissions.

Oral hearings concerning procedural issues: Oral hearings on procedural issues (38%) were the second most popular option that interviewees were willing to forgo as concluded in the

[72] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)

Survey. The interviewees pointed out that, these issues are likely to emerge throughout the Proceedings and the participants should prudently seek to avoid the additional costs and time commitments that such hearings entail. However, I disagree with this outcome in particular. As discussed above and on a case basis, the need to carefully and effectively identify, plan, and organise Hearings cannot be underestimated. For the occurrence of an effective and successful Hearing, it is important to conduct comprehensive case management to address potential concerns at the early stages of the Process.[73] With that being said, it is important to ascertain user demands, preferences, and trends to make provisions through the reformation of Rules, and announcement of guidelines and protocols besides, refining user experience in Arbitration for greater sustainability in the future.

Reflection: The pros of Hearings, besides the current issues and development.

- ***The pros of Hearings***

Summary: The usage of technology in Arbitration may require a considerate amount of time and effort to execute, albeit, it is worth it's salt. The expenses form a meagre part of what would otherwise cost in the form of expensive airfare, heavier legal costs, and accommodation (especially in Arbitration), further, there is now increased potential for greater availability of hearing dates for the user to choose from.

Supported statistics in favour of the use of technology in Arbitration:

The finding of the Survey found that, when given an option, a whopping 79% of the participants opted as a heavy favourite in favour to proceed at the scheduled time for a Hearing rather than, postponing the hearing until it could be held in person (16%) or for that matter, proceed with a documents-only Award (4%).[74]Among other positives of Hearings, the Survey concluded that the potential for greater availability of dates for hearings was seen as the greatest benefit of Hearings (65% voted in favour), followed closely by 'greater efficiency through the use of technology (58%) and greater procedural and logistical flexibility (55%). In light of the above positives, it is fair to conclude that the findings of the survey indicate our

[73] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (n 9)
[74] *Ibid*

renewed support and effort in the use of technology in Arbitration emerged primarily as a result of this Pandemic. Interestingly, there was a long-standing debate on the use of technology in Arbitration and though met with initial resistance, users have now come to embrace its use overall. However, notwithstanding the increasing fanfare around the usage of technology in Arbitration, this part of the paper reflects on the potential instances that may potentially stymie the Process and the usage of recommended best practice guidelines to combat such setbacks.

Pitfalls: Likely Outcomes

Several challenges may emerge with the use of technology in Proceedings, namely:

- uneven access to technology between the parties;
- accommodating different time zones when concerning the Proceedings;
- technological breakdown and malfunctions during the Proceedings; and
- the likelihood of witnesses being coached or poor connectivity during Hearings may cause witnesses to gain extra time to alter their response when they are questioned.

These challenges cause a disparity between the parties and may form grounds upon which Awards could later be challenged. Furthermore, in the usage of technology in Proceedings, there lies an incessant duty on the Tribunal to treat each party fairly and impartially by giving them a reasonable opportunity of being heard[75] besides, conducting the Proceedings in an efficient, streamlined, and expeditious manner.[76]

Note: In such instances, the Tribunal, at the end of any remote testimony, must confirm with all the parties that they have no objection/concerns about the conditions under which the testimony was taken.[77]

Speculative arguments against and for Hearings

[75] Arbitration Act, 1996, s 33(1)(a)
[76] Arbitration Act, 1996, s 33(1)(b)
[77] Prof. Maxi Scherer (n 10)

In this day and age, be it formal events to international business meetings, it is common practice for such activities to take place through remote participation with the use of videoconferencing, however, several speculations are made, both for and against the conduct of Hearings in Arbitration. This part of the paper discusses first, the potential issues relating to the conduct of a Hearing, followed up by immediate reasons addressing such concerns. Some of the concerns relating to Hearings are as follows:

a. ***Lack of opportunity to assess the demeanour of the witness:*** With the use of modern technology and the suitable set-up (including the use of multiple cameras), including large screens, the Tribunal's opportunity to see and hear the testifying participant is far greater than in a physical hearing room, the audio volume can be adjusted to the needs of each participant and cameras can be controlled including the use of the zoom-in feature to the extent necessary, allowing for, the assessment of non-verbal cues such as the participant's body language.

   For ease and an added benefit for the assessment of witnesses, the Tribunal would be able to access the recordings of the Proceedings (including rewinding to the specific segments of the Proceedings to the extent necessary, for additional assessment or reference purposes, etc).

b. ***Accommodating disparate time zones:*** Arbitrations that feature participants across different time zones of the globe can be challenging to manage. Tribunals and parties would need to cooperate and adopt such measures that are amicable for all participants, although, in practice, parties are likely to further their competing interests over the other party.

Compelling suggestions to tackle time zone issues in Arbitration:

a. ***Effective and balanced scheduling of hearing sessions:*** Tribunals may schedule short effective hearing sessions with few short breaks. Moreover, it is advisable to distribute equally among the parties, the personal inconveniences.[78] For ease, scheduling the hearing

[78] Alvaro Galindo, 'Arbitration Unplugged Series – Virtual Hearing: Present or Future?' (*Kluwer Arbitration Blog*, 23 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/> accessed 04 April 2022

sessions in a manner that is balanced (taking into account the peculiar circumstances of the case) and layout such scheduling over a reasonably longer phase would assist Tribunals and legal counsels with valuable lead time to prepare for subsequent hearing sessions.

b. Adopting flexible procedural adaptations:

The beauty of Arbitration is flexibility and the parties are entitled to agree upon adopting, in the Process, such flexible measures as are necessarily subject to the limitations prescribed by the applicable Rules (if any) and applicable domestic law. In Hearings, the participants are likely to reside from many different locations and time zones, yet participate remotely in the Proceedings from their respective locations and ergo, a pragmatic approach to nullify the yawning gap amongst different time zones may mean, adopting an asynchronous hearing timetable (a hearing timetable that is scheduled in separate segments as opposed to single, continuous and consecutive sitting) that is tailored to the needs of each case and Hearing type.[79] As discussed above, the parties may agree to affix, the parties may mutually agree to affix certain facets of a Hearing, in a manner asynchronous though, it is best advised to consult the Tribunal thereof. For instance, segments of the asynchronous hearing timetable could be divided into the opening statements, collection of witness evidence, Tribunal questions, and closing statements. The participants may, subject to the approval of the Tribunal and the extent practical and necessary, submit documents electronically (email).

c. Default time zone and preferences:

Professor Kevin Kim suggested that the business hours of the seat of the arbitration should be the default, with adjustments to be made to accommodate the time zones where the counsel and the Tribunal members are based (being those attending the entirety of the hearing) followed by the time zones of the parties and witnesses.[80] In this approach, the key members of the Proceedings get the first preference when it concerns the appropriate time in scheduling the hearing sessions.

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[79] Rachel Chiu, 'Rethinking Arbitration Hearings: A Shift Towards Asynchronous hearing Timetables?' (*Thomson Reuters*, 16 February 2021) <http://arbitrationblog.practicallaw.com/rethinking-arbitration-hearings-a-shift-towards-asynchronous-hearing-timetables/> accessed 04 April 2022

[80] Sylvia Tee & Andy Lau, 'Case Management in Virtual Hearings' (*LK*, 10 July 2020) <https://www.lk.law/2020/07/case-management-in-virtual-hearings/> accessed 03 April 2022

d. General viewpoint of courts relating to time zone issues in Hearings:

The courts, when it concerns time zones issues in Arbitration, on a case basis, carry the general view that the parties in principle, accept the disadvantages resulting from geographical distance to their place of business, including substantial travel and time differences, further, to the contrary, time zone issues are likely less onerous (in time and effort) than travelling across the globe for physical hearings.[81]

e. Fear of witness coaching:

With remote participation, the risk of witnesses being coached during the Proceedings, is a general concern however, the court noted that added that Hearings allow for measures[82] to control witness tampering, specific to remote witness testimony, namely:

- the possibility to record the evidence and later refer to such recording of evidence;
- the option to instruct the witness to look directly into the camera and keep his or her hands visible onscreen at all times (making it impossible to read any chat messages); and
- the use of several cameras to ensure a 360-degree view of the testifying person's room and all other participating rooms[83] (to ensure that the testifying witness is free from outside influence in such a venue).

For the aforementioned reasons, such concerns of witness tampering are not ones that cannot be worked around, moreover, the practice of collecting evidence remotely in Arbitration is a long-standing practice, even before the Pandemic struck. However, it is important to assess the need for remote participation, mainly when it concerns, the collection of evidence because it is a delicate process and requires extensive planning to execute effectively.

Best practices and their adoption:

a. Summary: The rear-guard action

[81] Jonathan Newman (n 68)
[82] Jonathan Newman (n 68)
[83] 2020 Annual Casework Report (n 32)

Responding to the advent of videoconferencing in Arbitration, various initiatives such as the Protocol and the American ArbitrationAssociation have formulated guidance to regulate Hearings.

The Protocol propounded the following guidelines to safeguard the confidentiality, impartiality, and fairness of Hearings:

b. Provisions upholding confidentiality

- Stipulating a strict requirement for the parties to ensure in their best efforts the security of the Hearings and appoint a technical expert to plan, test, and conduct the videoconference. Encourage the use of end-to-end encryption; and
- Stresses the need for observers of the videoconference to be identified before the commencement of the Hearing and the need for the Tribunal to take steps to verify the identity of such individuals.

c. Provisions of upholding fairness & impartiality (due process)

- Outlines the need for the Tribunal and the parties to agree upon the minimum technological requirements which will reduce the risk of the unfairness of parties having access to lesser technology; and
- Confers power on the Tribunal to terminate the hearing session if it deems it unfair to any party.

Note: Implementing the above provisions must be carried out with caution on a case by case basis, nevertheless, these guidelines have provided significant counselling for parties to follow for the smooth functioning of the Hearings.

d. Learnings: Practitioners can adopt a two-tier approach when drafting clauses concerning Hearings

Review the Agreement, conduct negotiations with the opposite party, rope in clauses relating to the organisation of Hearings, and most importantly make provisions for mitigation measure clauses in existing Agreements.

The mitigation clause intends to serve as a backup plan in times of technical contingencies. The Tribunal undertakes a process resorting to mitigation measures: Right from devising a continuity plan, endeavouring to retrieve the arbitration to normalcy, and executing the same under fixed time frames on the happening of a supervening event (anticipatory or not). It can be argued that this clause not only provides for the safeguard measures in upholding the rights of the parties but also increases their confidence in resorting to Arbitration. Additionally, entitling the Tribunal to halt the Proceedings on the happening of a contingency and adopt appropriate steps to the extent necessary, to ensure the integrity of the Proceedings on behalf of the parties, escalates overall accountability and transparency in the Proceedings.

Opinion: This clause depends on the party's bargaining power and such will reflect in the negotiation. Legal counsels of each party must work collectively, with precision to understand the nature of business, enumerate the underlying challenges that may arise, and draft transaction relevant clauses in a manner benefitting the parties mutually. The challenge lies in drafting this clause in a manner that is not too onerous for the Tribunal to apply and at the same time safeguards the rights of the parties.

Application to Practitioners:

a. Strategy: Drafting consideration

To neutralise this clause, it is necessary for the parties/counsels to:

- Make best efforts to ensure the safety of the videoconferencing, ideally at the negotiation stage or at the earliest time on the arising of a dispute, by appointing a technical expert to assist the parties in organising the Hearing (before and during); and
- Set a limit and guidelines (mutually agreed procedure) on the scope of actions of the Tribunal to apply on/during the happening of certain technical contingencies.

b. Example: Mitigation Clause

Technical Difficulties:

- Should one party's or participant's videoconferencing connection fail, the Tribunal will ask the counsel remaining on the videoconference to mute their audio and to turn off

their video to avoid concerns regarding potential expert communications. Once the Tribunal is satisfied that the dropped participant has rejoined the videoconference, the remaining counsel should unmute their audio and turn on their video.

- If a participant is disconnected from the videoconference or experiences some other technical failure and connection cannot be re-established within a 10-minute interval:

  i) the Tribunal may take steps to "pause" the hearing, which may include moving the participants into a virtual waiting room, and the parties agree to pause Proceedings as needed to accommodate any technical issues; and

  ii) such participant shall email all hearing attendees, by replying to the [Platform Name] invitation circulated by the Tribunal and shall further monitor the email for any further instructions from the Tribunal.

- If the videoconferencing system fails to work and if it appears that the Hearing cannot take place as scheduled, or if the Tribunal determines that it would be unfair to any party to continue the hearing via videoconference, the Tribunal may take any appropriate steps as may be necessary to ensure the impartiality, fairness, and integrity of the Proceedings.[84]

Comments: The usage of technology in Arbitration at present is still an unfamiliar practice, however, Hearings have taken place in the past. The pros of Hearings far outweigh the wait in the hope for in-person hearings. The Tribunal holds responsibility for conducting the Proceedings expeditiously, efficiently, in a streamlined manner, and on the other hand, upholding the rights of the parties to be treated impartiality, otherwise, a lurking risk of the Award being challenged on the grounds of serious irregularity[85] exists.

[84] 2020 Annual Casework Report (n 32)
[85] Arbitration Act, 1996, s 68

CONCLUDING THOUGHTS

The revolution of 1789 **("French revolution"**), was a revolutionary movement of universal significance that shook France to its very grassroots, causing major social upheaval.[86] The French Revolution changed completely the relationship between the rulers and those they governed, ergo, this emanated many mottos in use, namely: "Liberty, Equality, and Fraternity".[87] In my opinion, this Pandemic and the French Revolution are no different as far as the notion of furthering 'change' is concerned, and this Pandemic is continuing to cause major upheaval globally. As discussed above, this Pandemic has intensified our efforts toward the use of digital technology in Arbitration and these changes should not be viewed as a "new normal", on the contrary, these changes are no lesser than a revolution in the world of Arbitration. As a result, major changes have been effectuated by Institutions to cope with user demands, and such changes have mottos to abide by, namely, "Legality, Equitability, and Technology".

The importance of each of these mottos is discussed in length above, invariably each motto must be upheld by the users (of Arbitration) during the Process, to obtain a successful result involving Hearings. The rise in the filing of caseloads (in cross-border disputes) has found a worthy mention in various Institutions, India tops the charts with 690 cases being filed in the year 2020 at the SIAC. Moreover, Arbitration is not the only beneficiary when it involves the use of Hearings. Widespread satisfaction can be found with the use of Hearings across different branches of the judiciary, for instance, lawyers who completed a survey under a report (The impact of COVID-19 measures on the civil justice system: Report and recommendations) were satisfied with their experience of Hearings- 71.5% of respondents described their experience as positive or very positive.[88] With the above arguments read holistically, it is only fair to conclude that Hearings have a profound influence on Arbitration.

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[86] 'French Revolution 1787-1799' (*Britannica,* 10 September 2020) <https://www.britannica.com/event/French-Revolution> accessed on 03 April 2022

[87] 'Liberty, Equality, Fraternity' (*France Diplomacy*) <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/symbols-of-the-republic/article/liberty-equality-fraternity> accessed 04 April 2022.

[88] Dr Natalie Byrom ,'The Impact of COVID-19 Measures on the Civil Justice System' (*https://research.thelegaleducationfoundation.org*, 04 June 2020) <https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020-v2.pdf> accessed 03 April 2022

The use of Hearings in Arbitration should not be viewed as the 'new normal' but rather, as a revolutionary movement that was a long time coming. Hearings have found their home in Arbitration and are expected to thrive in the post-Pandemic era.