

# “ZOOMING” INTO THE FUTURE: VIRTUAL INTERNATIONAL ARBITRATION IN THE POST-COVID WORLD

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## I. INTRODUCTION

In 2020, the COVID–19 pandemic upended legal practice, including the field of international commercial arbitration.<sup>1</sup> International commercial arbitration has traditionally required international travel and in-person hearings, both regarded as indispensable to achieving fairness and neutrality in the resolution of cross-border disputes.<sup>2</sup> With those

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1. Amy J. Schmitz, *Arbitration in the Age of Covid: Examining Arbitration’s Move Online*, 22 CARDOZO J. CONFLICT RESOL. 245 (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699778](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699778) [[https://web.archive.org/web/20210329184759/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699778](https://web.archive.org/web/20210329184759/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699778)]; Aram Aghababiyam et al., *Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications*, KLUWER ARB. BLOG (Aug. 19, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/08/19/global-impact-of-the-pandemic-on-arbitration-enforcement-and-other-implications/> [<https://web.archive.org/web/20210329185255/https://static.hotjar.com/c/hotjar-807273.js?sv=6>].

2. See generally Schmitz, *supra* note 1 (comparing traditional international arbitration with virtual international arbitration and how the loss of in-person interactions affects hearings).

hallmarks of arbitration procedure in mind, many parties resented the transition to virtual arbitration proceedings, believing it threatened the integrity of arbitral procedure, even in the midst of a long-term global pandemic.<sup>3</sup>

However, participants gradually found that virtual proceedings<sup>4</sup> can satisfy the requirements of procedural fairness, while also addressing two popular criticisms of traditional, in-person international arbitration: cost and inefficiency.<sup>5</sup> Now, the legal industry is looking toward the integration of virtual hearings into a stronger, more functional arbitration process for the post-COVID world.

This Note asserts that virtual hearings will become a commonly utilized feature of international arbitration procedure; parties will opt to conduct all or part of the proceedings virtually. Part II.A of this Note will explain the history of COVID-19 and its impact on the legal world, specifically international arbitration. Part II.B explores international arbitration's history and development into current international arbitration operations. Part II.C will analyze how international arbitration adjusted to COVID-19, issues that have arisen with this adjustment, and how arbitration procedure and policy have begun accommodating virtual arbitration. Part III focuses on the role of virtual arbitration proceedings in the post-pandemic world. Part III.A looks at parties' use of COVID as an excuse to delay arbitration proceedings. Part III.B discusses the use of virtual arbitration proceedings in the past. Part III.C will analyze the advantages and disadvantages of virtual arbitration hearings, while Part III.D will propose reforms in certain sensitive areas, like witness testimony and party inequality. Finally, Part IV synthesizes the previous sections to conclude that parties should continue to use virtual proceedings in international arbitration.

## II. BACKGROUND

### A. COVID-19

Originating in Wuhan, China, COVID-19 turned the world upside down in 2020 after a handful of patients developed severe acute respiratory

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3. See Stephan Wilske, *The Impact of Covid-19 on International Arbitration—Hiccup or Turning Point?*, 13(1) CONTEMP. ASIA ARB. J. 7, 14 (2020).

4. The terms “virtual proceedings,” “remote proceedings,” and “online proceedings” are used throughout this Note interchangeably. These terms represent legal proceedings and conferences conducted via video meeting platforms. However, “online dispute resolution” is not the same, and is defined later in this Note. See *infra* Part III.B.

5. See generally Wilske, *supra* note 3, at 13 (discussing the benefits of international arbitration and how virtual proceedings and COVID affect those benefits).

syndrome.<sup>6</sup> Quickly, the virus spread across China, to Europe, and then the United States.<sup>7</sup> On January 30, 2020, the World Health Organization (hereinafter “WHO”) declared COVID–19 (hereinafter “COVID”) a Public Health Emergency of International Concern, and in March, a global pandemic.<sup>8</sup> Despite a history of other coronavirus outbreaks, as well as global pandemics and epidemics involving AIDs and the Swine Flu, COVID has had the most severe impact on the world’s population since the 1918 Influenza Pandemic.<sup>9</sup> As of January 12, 2022, over 313 million people have tested positive for COVID, and over 5.5 million people have died.<sup>10</sup> In an effort to slow the spread of the disease, countries around the world placed their citizens in lockdowns that closed non-essential businesses, created social-distancing guidelines, and limited the size of non-familial gatherings.<sup>11</sup>

China first entered into lockdowns in January 2020, but when European countries implemented lockdowns in early March,<sup>12</sup> international business slowed and moved to virtual platforms, due to the decrease in Chinese export demand.<sup>13</sup> The United States’ lockdown intensified this trend, as the world’s largest economy (based on gross domestic product) dealt with reduced production and “disruptions in

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6. Miriam N. Lango, *How Did We Get Here? Short history of COVID–19 and Other Coronavirus-Related Epidemics*, 42 J. SCI. & SPECIALTIES HEAD & NECK 1535 (May 23, 2020).

7. *Id.*

8. *Id.*

9. *1918 Pandemic (H1N1 virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 20, 2019), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://web.archive.org/web/20210329190148/https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>].

10. *Covid World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/world/covid-cases.html> [<https://web.archive.org/web/20220113000840/https://www.nytimes.com/interactive/2021/world/covid-cases.html>] (last updated Jan. 12, 2022).

11. Gil Loewenthal et al., *COVID–19 Pandemic-Related Lockdown: Response Time Is More Important Than Its Strictness*, 12 EMBO MOLECULAR MED. 1, 1 (2020).

12. *Id.*

13. Lyle Moran, *Will the COVID–19 Pandemic Fundamentally Remake the Legal Industry?* ABA J. (Aug. 1, 2020, 12:00 AM), <https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry> [<https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry>]; see also John Cassidy, *China’s Slow Economic Rebound from the Coronavirus Points to an Extended U.S. Slump*, THE NEW YORKER (May 13, 2020), <https://www.newyorker.com/news/our-columnists/chinas-slow-economic-rebound-from-the-coronavirus-points-to-an-extended-us-slump> [<https://web.archive.org/web/20210329190814/https://www.newyorker.com/news/our-columnists/chinas-slow-economic-rebound-from-the-coronavirus-points-to-an-extended-us-slump>].

global trade and supply chains.”<sup>14</sup> Further, as courts shut down around the world, the legal industry had to adapt quickly.<sup>15</sup> Attorneys set up home offices, bought webcams, and began running meetings virtually to maintain workflow.<sup>16</sup> However, even as remote proceedings began to take place, COVID became the basis for requesting extensions of deadlines and adjournment of hearings.<sup>17</sup>

### *B. International Arbitration Past and Present*

International arbitration offers a neutral forum for conflict resolution between parties from different jurisdictions.<sup>18</sup> Historically, some countries bore hostility to international arbitration agreements and adopted rules inhibiting arbitration.<sup>19</sup> As time went on, however, some countries reversed course.<sup>20</sup> Despite evidence that some form of arbitration took place in Ancient Greece, the modern practice of international arbitration took shape at the beginning of the twentieth century with the establishment of the Permanent Court of Arbitration (PCA).<sup>21</sup> The PCA was the first formal institution offering resolution of international disputes between foreign governments.<sup>22</sup> After World War II, cross-national commerce surged, which in turn increased international contract disputes.<sup>23</sup>

As international arbitration became more prevalent, the enforcement of arbitral awards subsequently developed.<sup>24</sup> The 1927 Geneva Convention on Execution of Foreign Arbitral Awards required states to

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14. See generally, Muhammad Fahad Sattar et al., *Covid-19 Global, Pandemic Impact on World Economy*, 11 *TECHNIUM SOC. SCI. J.* 165 (2020); Horus Alas, *Experts Say Largest Economies Will Rebound in 2021*, U.S. NEWS (Jan. 25, 2021, 3:57 PM), <https://www.usnews.com/news/best-countries/articles/2021-01-25/major-economies-eye-economic-recovery-in-2021-analysts-say> [<https://web.archive.org/web/20210227054943/https://www.usnews.com/news/best-countries/articles/2021-01-25/major-economies-eye-economic-recovery-in-2021-analysts-say>].

15. *Id.*

16. Wilske, *supra* note 3, at 12.

17. *Id.*

18. See Katerina Yiannibas, *The Adaptability of International Arbitration: Reforming the Arbitration Mechanism to Provide Effective Remedy for Business-Relation Human Rights Abuses*, 36 *NETH. Q. HUM. RTS.* 214, 215 (2018).

19. Gary B. Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 *SING. ACAD. L.J.* 814, 821 (2014).

20. *Id.*

21. Yiannibas, *supra* note 18, at 216.

22. *Permanent Court of Arbitration*, THE HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=311> [<https://web.archive.org/web/20220113001836/https://www.haguejusticeportal.net/?id=311>] (last visited Nov. 13, 2020).

23. Yiannibas, *supra* note 18, at 217.

24. *Id.*

“recognize and enforce on their territory foreign arbitral awards pronounced on the territory of a state party to the Convention provided that such an award is not contrary to public order or to the principles of public law in the country where it was invoked.”<sup>25</sup> However, the Geneva Convention had several drawbacks—including its reciprocity clause, its heavy burden of proof on a party trying to enforce an arbitral award, and the lack of freedom parties have when arranging and controlling arbitration procedure.<sup>26</sup> Then, in 1958, the United Nations sponsored the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the ‘New York Convention’ (hereinafter “Convention”).<sup>27</sup> The Convention made strides by widening its scope of application, simplifying the requirements for enforcement, giving parties more freedom in shaping the arbitration procedure, and shifting the burden of proof to the party against whom enforcement of an award is invoked.<sup>28</sup> Further, it details the “recognition and enforcement of foreign arbitral awards” and “marks the equality of awards rendered by ad hoc arbitrations and those given by institutionalized arbitrations”<sup>29</sup> The Convention, put simply, governs judicial treatment of arbitration agreements and awards. Further, the Convention, in the United States, is a self-executing treaty; a treaty that “has direct, binding effect in U.S. courts and operates of itself without the aid of any legislative provision.”<sup>30</sup> This forces the United States, and the individual states thereof, to give effect to the Convention without implementing any legislation.<sup>31</sup>

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25. Sevastian Cercel & Ștefan Scurtu, *The Regulatory Framework of International Arbitration*, 62 REVISTA DE ȘTIINȚE POLITICE 102 (2019); see Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, [https://www.trans-lex.org/511400/\\_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/](https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/) [[https://web.archive.org/web/20210329192201/https://www.trans-lex.org/511400/\\_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/](https://web.archive.org/web/20210329192201/https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/)].

26. Peter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETH. INT’L L. R. 43 (Mar. 1959); Pierre Tercier, *The 1927 Geneva Convention and the ICC Reform Proposals*, 2 DISP. RESOL. INT’L 19, 22 (May 1, 2008).

27. Yiannibas, *supra* note 18, at 217; see also U.N. Conference on International Commercial Arbitration, *Summary Record of the Twenty-Fifth Meeting*, at 2, U.N. Doc. E/CONF.26/SR.25 (Sept. 12, 1958).

28. Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT’L L. 116, 126 (2018) (citing U.N. Conference on International Commercial Arbitration, *Summary Record of the Twenty-Fifth Meeting*, at 2, U.N. Doc. E/CONF.26/SR.25 (Sept. 12, 1958)).

29. Cercel & Scurtu, *supra* note 25, at 102–03.

30. Born, *supra* note 28, at 132–33 (internal quotations omitted).

31. *Id.*

After the Convention, the international community wanted to encourage private investors in foreign, often developing, countries, but investors were still wary of the political risk that comes with foreign investments.<sup>32</sup> To mitigate those uncertainties, the International Centre for the Settlement of Investment Disputes (hereinafter “ICSID”) was created, and in 1966, the ICSID Convention established firm rules of procedure for arbitration of disputes brought by foreign investors against host states.<sup>33</sup> ICSID’s “mandate is to promote increased flows of international investment by providing a neutral and effective forum for the resolution of disputes between host governments and foreign investors by administering arbitration and conciliation.”<sup>34</sup> This mandate is met through the use of procedural rules, prior to the adoption of any international substantive law provisions.<sup>35</sup> However, the ICSID Convention applies only to disputes between an investor of one state party and the government of another foreign state party arising directly out of an investment.<sup>36</sup> In addition to the ICSID, to advance procedural rules for disputes arising out of commercial transactions between private parties, regardless of whether they involve an investment, the International Chamber of Commerce (hereinafter “ICC”) has its own set of arbitration procedures used around the world—the ICC Rules of Arbitration (hereinafter “ICC Rules”), which “define and regulate the management of cases received by [the ICC].”<sup>37</sup> Founded after World War I, the ICC developed a system of rules to govern trade, investment, finance, and commercial relations between foreign parties.<sup>38</sup> The ICC Rules revolutionized arbitration procedures when the ICC “became the first modern institution to introduce a fast-track procedure” for international arbitration in 1998 by including rules for expedited arbitration.<sup>39</sup> As arbitration was originally utilized for efficiency, parties became frustrated as international arbitration

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32. Yiannibas, *supra* note 18, at 218.

33. *Id.*

34. *Id.*

35. *Id.*; see also ICSID Rules of Procedure for Arbitration Proceedings (Apr. 2006).

36. See generally Int’l Ctr. for Settlement of Inv. Disp., *Services*, ICSID, <https://icsid.worldbank.org/services/arbitration> (last visited Jan. 9, 2021) [<https://web.archive.org/web/20210329192803/https://icsid.worldbank.org/services/arbitration>].

37. 2021 *Arbitration Rules*, INT’L CHAMBER OF COM. (Jan. 1, 2021), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [<https://web.archive.org/web/20210329193300/https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>].

38. *History*, INT’L CHAMBER OF COM., <https://iccwbo.org/about-us/who-we-are/history/> [<https://web.archive.org/web/20210125214016/https://iccwbo.org/about-us/who-we-are/history/>] (last visited Jan. 9, 2021).

39. Dina D. Prokić, *Mitigating Arbitration’s Flaws? The 2017 Expedited Procedure Rules*, 29 AM. REV. INT’L ARB. 47, 54 (2018).

proceedings utilizing procedural rules, such as the London Court of International Arbitration Rules (hereinafter “LCIA Rules”) as an example, were taking months or even years to complete.<sup>40</sup> The 1998 revisions to the ICC Rules allowed parties to expedite procedural matters in order to conclude the matter quickly, but the parties sacrificed having every detail of their dispute analyzed in exchange for a “speedy final resolution.”<sup>41</sup> Expedited procedure applies if “the arbitration agreement was concluded on or after 1 March 2017 and before 1 January 2021 . . . or the amount in dispute does not exceed [\$3 million], and the parties have not opted out of the Expedited Procedure Rules in the arbitration agreement or at any time thereafter.”<sup>42</sup> Further, parties can opt in regardless of whether they met the previously stated requirements.<sup>43</sup> Currently, in addition to the ICC, fifteen institutions have created expedited arbitration rules.<sup>44</sup> Expedited arbitrations increase overall arbitration efficiency by decreasing arbitration length, resolving the previously mentioned party frustrations.

As international arbitration became increasingly prevalent, especially for commercial disputes, countries across the globe began to establish their own international arbitration institutions with sets of arbitration rules.<sup>45</sup> In addition to the ICC and LCIA, arbitration supporters created the Arbitration Rules of the Singapore International Arbitration Centre (hereinafter “SIAC Rules”), the Vienna International Arbitration Center, and the International Centre for Dispute Resolution Rules (hereinafter “ICDR Rules”); additionally, the United States has an international division of the American Arbitration Association.<sup>46</sup> These are just a few examples of how countries began developing systems to handle complex international disputes. Modern international arbitration utilizes all of these institutions and their corresponding rules to keep international arbitration

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40. *Id.*

41. *Id.* at 50; *see also* ICC Rules, art. 32(1) (1998).

42. *Expedited Procedure Provisions*, INT’L CHAMBER OF COM., <https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/> [<https://web.archive.org/web/20210329194355/https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/>] (last visited Mar. 17, 2021). Note that the 2021 ICC Rules increased the expedited provision monetary requirement from \$2 million to \$3 million. *Id.*

43. *Id.*

44. Practical Law Arbitration, *Expedited Procedures in International Arbitration*, THOMSON REUTERS (2021), [https://uk.practicallaw.thomsonreuters.com/w-010-4433?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a893808](https://uk.practicallaw.thomsonreuters.com/w-010-4433?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a893808) [[https://web.archive.org/web/20210329194934/https://uk.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectId=rt\\_ff9ce49c-cf1b-4967-b7b3-d84a45395a73](https://web.archive.org/web/20210329194934/https://uk.practicallaw.thomsonreuters.com/Cosi/SignOn?redirectId=rt_ff9ce49c-cf1b-4967-b7b3-d84a45395a73)].

45. *See generally*, Prokić, *supra* note 39.

46. *Id.* at 47–48; *About ICDR-AAA*, Int’l Ctr. For Disp. Resol., [https://www.icdr.org/about\\_icdr](https://www.icdr.org/about_icdr) [[https://web.archive.org/web/20210329200010/https://www.icdr.org/about\\_icdr](https://web.archive.org/web/20210329200010/https://www.icdr.org/about_icdr)] (last visited Jan. 9, 2021).

organized, efficient, and, hopefully, less burdensome than traditional litigation.

Today, most international commercial disputes arise from contracts with arbitration clauses defining where arbitration will take place, what law will govern, and a variety of other procedural matters. Additionally, contracting countries must abide by the New York Convention's rules for arbitral awards.<sup>47</sup> Further, in 1976, the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") adopted a set of UNCITRAL Arbitration Rules, which were revised in 2010 and 2013, and are frequently used to conduct arbitration proceedings, including disputes between private commercial parties where no arbitral institution is involved.<sup>48</sup> The general purpose of the UNCITRAL Rules began with the "premise that there must be an administrative authority competent to designate the arbitrator instead of the party who refuses to do so, to decide on claims for challenging, etc., so that ad hoc arbitration would have genuine independence from the courts."<sup>49</sup> Since the premise behind arbitration is to avoid the court system, the UNCITRAL Rules ensure the arbitrator's neutrality, the equality of the parties' treatment, and that justice is served without court interference. Establishing uniform rules for arbitration promotes the efficiency that parties expect when they include a binding arbitration clause in their contracts. In addition to procedural rules for parties, UNCITRAL has developed a model law that legislatures can adopt to regulate international arbitration.<sup>50</sup> These guidelines are known as the UNCITRAL Model Law.

Although uniform rules for international arbitration, like the UNCITRAL Rules and the New York Convention, are incredibly useful for procedural issues, one of the most important and difficult decisions for parties is the choice of substantive law that will govern the arbitration. Parties must choose the country whose law will govern the arbitration proceedings. For example, if parties choose United States law, the Federal Arbitration Act will govern.<sup>51</sup> However, choice of law can create unique

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47. See Born, *supra* note 28, at 116–17.

48. U.N., UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 28, U.N. Sales No. E.86.V.8 (1986).

49. Cercel & Scurtu, *supra* note 25, at 101.

50. *Frequently Asked Questions—Arbitration*, UNCITRAL, <https://uncitral.un.org/en/texts/arbitration/faq> [<https://web.archive.org/web/20210329200328/https://uncitral.un.org/en/texts/arbitration/faq>] (last visited Mar. 16, 2021); U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985, WITH AMENDMENTS AS ADOPTED IN 2006, U.N. Sales No. E.08.V4 (2008) [hereinafter UNCITRAL Model Law].

51. Federal Arbitration Act, 9 U.S.C. §§ 1–16.



complexities as well.<sup>52</sup> National courts and different arbitral tribunals have provided guidelines for choosing the arbitration proceeding's governing law, but tribunals are also subject to choice of law. For example, parties may opt not to choose the governing law for their arbitration, requiring the tribunal to choose the law of the state with the closest connection or most significant relationship.<sup>53</sup> This usually occurs where the parties have expressed that their choice of law provision extends to the separable arbitration agreement.<sup>54</sup> This keeps the law more simplistic, making it easier to understand, and thus, more efficient.<sup>55</sup> In terms of virtual arbitration, choice of law makes virtual hearings far easier or more difficult to take advantage of, depending on which country's law governs.

Alongside choice of law, international arbitration emphasizes party autonomy. Parties have the freedom to choose their form of arbitration, venue, language, various proceedings (pre-hearing conferences, hearing, etc.), arbitral tribunal procedures (number of arbitrators, tribunal rules, etc.), and their arbitrators.<sup>56</sup> Recognized under the UNCITRAL Model Law, autonomy means "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."<sup>57</sup> Further, there should be equality between the parties, which UNCITRAL also recognizes.<sup>58</sup> Parties have the right to be treated equally and fairly throughout all arbitration proceedings, and the self-governance aspect to autonomy allows this because parties can choose procedural and substantive law that will most benefit them.<sup>59</sup> For example, if one party wants a hearing, then both sides then have the right to be heard, or parties can choose to have a documents-only arbitration.<sup>60</sup> Equality also includes neutrality from the tribunal, which means there will be unbiased decision-

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52. Born, *supra* note 19, at 821.

53. See generally George A. Bermann, "International Standards" as a Choice of Law Option in International Commercial Arbitration, 27 AM. REV. INT'L ARB. 423 (2016).

54. Born, *supra* note 19, at 827.

55. See *id.*

56. Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* 6 J. SUSTAINABLE DEV. L. & POL'Y 222, 223 (2015).

57. UNCITRAL Model Law, *supra* note 50, art. 19.

58. *Id.* art. 18.

59. *Id.*; see also Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37 J. INT'L ARB. (2020) (manuscript at 33–34); Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMPAR. L. Q. 991, 993 (2020).

60. Scherer, *supra* note 59, at 11.

making.<sup>61</sup> The tribunal must weigh testimony, written or oral, fairly and equally between both parties when making decisions.<sup>62</sup> Choosing the governing procedural rules, along with the governing substantive law, will create the basis of what is meant to be a smooth, efficient, and private process.

### *C. International Arbitration, COVID-style*

Typically, when conducting in-person international arbitration hearings, parties, witnesses, and the arbitrator, or more often, a three-person arbitral tribunal, fly to the designated arbitration location.<sup>63</sup> Prior to 2020, virtual arbitration proceedings were only common regarding pre-hearing conferences and general discussions.<sup>64</sup> However, when the COVID pandemic began, international arbitration moved entirely onto virtual platforms, and will remain so situated for the foreseeable future; however, some parties have resisted this and raised objections to it.<sup>65</sup> Parties filed objections arguing that video proceedings are unfair, especially in terms of questioning witnesses, due to body language not visible on camera and the potential off-screen witness direction.<sup>66</sup> However, the burden on a party arguing for a video hearing has lowered. Parties must meet technical requirements, such as demonstrating they have

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61. See Hafez R. Virjee, *Activating Arbitration: Four Delos Principles to Achieve Fair and Efficient International Arbitration*, at 28 (Mar. 21, 2017), <http://delosdr.org/wp-content/uploads/2018/01/Hafez-R-Virjee-Activating-Arbitration-Delos-2017.pdf?pdf=AAArticle-EN> [<https://web.archive.org/web/20211022010937/http://delosdr.org/wp-content/uploads/2018/01/Hafez-R-Virjee-Activating-Arbitration-Delos-2017.pdf?pdf=AAArticle-EN>]; see also Ronán Feehily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice*, 7 PENN ST. J.L. & INT'L AFF. 89, 91 (2019).

62. See Feehily, *supra* note 61, at 104.

63. *Guide to International Arbitration*, LATHAM & WATKINS LLP (2019), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> [<https://web.archive.org/web/20200918104025/https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>] (providing an overview of what international arbitration is, the process, treaties, and rules).

64. Scherer, *supra* note 59, at 4.

65. Cosmo Sanderson, *Germany Fails in Second Challenge to Vattenfall Panel*, GLOB. ARB. REV. (July 9, 2020), <https://globalarbitrationreview.com/article/1228737/germany-fails-in-second-challenge-to-vattenfall-panel> [<https://web.archive.org/web/20210329200730/https://globalarbitrationreview.com/arbitrator-challenges/germany-fails-in-second-challenge-vattenfall-panel>].

66. J. Brian Casey & Grant Hanessian, *Ordering Virtual Hearings over the Objections of a Party*, ADR INST. OF CAN., <https://adric.ca/adr-perspectives/ordering-virtual-hearings-over-the-objections-of-a-party/> [<https://web.archive.org/web/20210329200906/https://adric.ca/adr-perspectives/ordering-virtual-hearings-over-the-objections-of-a-party/>] (last visited Jan. 12, 2022); see Wilske, *supra* note 3, at 15.

the minimum bandwidth and software required for video hearings. Additionally, joining the hearing via video can enhance witness credibility, compared to calling in via phone.<sup>67</sup> Unfortunately, the ICC Rules do not expressly grant the tribunal the authority to decide between in-person versus virtual hearings, although the parties can choose a virtual hearing.<sup>68</sup> Conversely, the LCIA Rules do allow video or telephone hearings,<sup>69</sup> so depending on which rules the parties agreed to, it may be much easier to deny a party's objection to a video hearing.

Regarding objections, parties have used COVID to justify requests for extensions or suspension of filing dates and proceedings.<sup>70</sup> For example, Germany recently failed in its second attempt to disqualify the arbitration tribunal in the famous *Vattenfall* case, which has since settled, claiming the tribunal showed bias after it refused to delay a hearing due to COVID and related travel restrictions the pandemic caused.<sup>71</sup> Parties have challenged awards made during COVID, arguing bias and inequality due to remote hearings; however, the Convention set standards for when a party may challenge an award<sup>72</sup>:

Under . . . the New York Convention, an arbitral award may be challenged if a party against whom the award is invoked . . . was otherwise unable to present his case or where the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in agreement with the law of the country where the arbitration took place.<sup>73</sup>

A party may try to argue it did not have the ability to properly present its case in person, as a general procedure, before COVID.<sup>74</sup> However, unless a party established grounds to refuse enforcement, subject to an

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67. Casey & Hanessian, *supra* note 66.

68. Aghababiyam et al., *supra* note 1.

69. *Id.*

70. Wilske, *supra* note 3, at 11; LCIA Arb. R., art. 19.2 (2020) (“As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).”).

71. Sanderson, *supra* note 65.

72. Adrienne Goins & Elena Guillet, *Challenges and Opportunities of Hearings in International Arbitration*, JD SUPRA (Oct. 19, 2020), <https://www.jdsupra.com/legalnews/challenges-and-opportunities-of-virtual-55893/> [<https://web.archive.org/web/20210329201038/https://www.jdsupra.com/legalnews/challenges-and-opportunities-of-virtual-55893/>].

73. *Id.* (internal quotations omitted); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a)–(d), June 10, 1958, 21 U.S.T. 2517.

74. Goins & Guillet, *supra* note 72.

exception of Article V of the Convention, such as a public policy violation, all awards are enforceable.<sup>75</sup>

In addition to the procedures applicable to virtual arbitration, three arbitration bodies formed an alliance to provide more support during the transition to virtual international proceedings.<sup>76</sup> Created through the combined efforts of Arbitration Place, International Dispute Resolution Centre, and Maxwell Chambers, the International Arbitration Centre Alliance (hereinafter “IACA”)<sup>77</sup> intends to “reduc[e] the distance, time-zone and other challenges associated with planning and conducting international arbitration hearings and ADR proceedings.”<sup>78</sup> The IACA established its own virtual arbitration platform, provides technology needed by parties who do not have equipment necessary for virtual hearings, and provides virtual assistance at any time.<sup>79</sup> The IACA is a crucial example of how the international arbitration community is adapting to a future in which remote proceedings will play a more prominent role.

The ICC, LCIA, and the Stockholm Chamber of Commerce (hereinafter “SCC”) have rules and support systems in place to accommodate virtual proceedings during COVID.<sup>80</sup> The ICC grants arbitrators wide discretion as to how to conduct arbitrations, as long as the parties’ agreement is not violated.<sup>81</sup> Appendix IV, section (f) of the ICC Rules, although effective in 2017, includes a clause allowing the use of “telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court” as a case management technique to help control time and cost.<sup>82</sup> The Arbitration Rules of the LCIA also include an article dealing

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75. Aghababayan, *supra* note 1.

76. Ben Rigby, *Trio of Top Arbitration Bodies Form International Alliance to Hear ‘Hybrid’ Covid-19 Compliant Hearings*, GLOB. LEGAL POST (May 14, 2020), <https://www.globallegalpost.com/big-stories/trio-of-top-arbitration-bodies-form-international-alliance-to-hear-hybrid-covid-19-compliant-hearings-98099925/> [<https://web.archive.org/web/20210329201243/https://www.globallegalpost.com/big-stories/trio-of-top-arbitration-bodies-form-international-alliance-to-hear-hybrid-covid-19-compliant-hearings-98099925/>].

77. *Id.*

78. *Id.*

79. *Complete, Integrated Services*, INT’L ARB. CENTRE ALLIANCE, <https://www.iacaglobal.com/services> [<https://web.archive.org/web/20201130011039/https://www.iacaglobal.com/services>] (last visited Feb. 25, 2021).

80. Anthony Connerty, *COVID-19 and International Arbitration: A Hybrid Future?*, NEW L.J. 27, 27–28 (2020); ICC Rules, Appendix IV § f (2017); LCIA Arb. R., art. 19.

81. Connerty, *supra* note 80.

82. *Id.* (citing ICC Rules, Appendix IV § f (2017)).

with oral hearings and “states that any party has the right to a hearing unless the parties have agreed in writing to a documents-only arbitration;” and that the hearing may take place “by video or telephone . . . or in person (or a combination of all three).”<sup>83</sup> The SCC, in conjunction with Thomson Reuters, offers the SCC Platform to *ad hoc* arbitrations globally, with no charge, during the pandemic, providing “a secure digital platform for communications and file sharing between the parties and the tribunal.”<sup>84</sup> These provisions have proved useful in the current environment by minimizing the number of objections parties could make in protest of virtual proceedings.

The procedural rules already in place for virtual international arbitration proceedings, in conjunction with their previous and current utilizations, make it likely that virtual, or at least hybrid proceedings, will remain fairly prevalent in the post-COVID pandemic world. Further, as arbitral institutions continue to adapt their procedural rules to virtual settings, parties and tribunals can learn to adjust to this “new normal” of virtual international arbitration.

### III. ANALYSIS

Virtual international arbitration has a promising future. This new form of international arbitration proceedings in the post-pandemic world offers an evolution of international arbitration because virtual proceedings increase efficiency and accessibility, while simultaneously decreasing costs.<sup>85</sup> The challenges posed by virtual proceedings, such as internet connectivity, are able to be resolved. Arbitration institutions that have held arbitration proceedings virtually, even prior to COVID, have found the results align with in-proceeding results.<sup>86</sup> Finally, the issues that may arise

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83. *Id.* (citing LCIA Arb. R., art. 19).

84. *Ad Hoc Platform—Powered by the SCC*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM. <https://sccinstitute.com/scc-platform/ad-hoc-platform/> [<https://web.archive.org/web/20210329201741/https://sccinstitute.com/scc-platform/ad-hoc-platform/>] (last visited Jan. 12, 2022). See also Connerty, *supra* note 80.

85. Shaun Lee & Low Zhe Ning, *SIAC Congress Recap: This House Believes That Virtual Hearings Are Just as Effective as In-Person Hearings*, KLUWER ARB. BLOG (Sept. 4, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/09/04/siac-congress-recap-this-house-believes-that-virtual-hearings-are-just-as-effective-as-in-person-hearings/> [<https://web.archive.org/web/20210329202449/http://arbitrationblog.kluwerarbitration.com/2020/09/04/siac-congress-recap-this-house-believes-that-virtual-hearings-are-just-as-effective-as-in-person-hearings/>].

86. See Wilske, *supra* note 3 (quoting Alison Ross, *Coivd-19: Participants in SIAC Case Share Success of Virtual Hearing*, GLOB. ARB. REV. (Apr. 20, 2020),

with virtual proceedings can be prevented by implementing policy changes—such as expressly acknowledging that video hearings qualify as a hearing when a party exercises its right to be heard, in international arbitration rules, guidelines, and state arbitration statutes.<sup>87</sup>

*A. Have you tried the “COVID” excuse?*

Initially, COVID only halted life in China, a place where health epidemics are more common than others,<sup>88</sup> and it was not expected to spread “all over the world with enormous speed and disastrous effects.”<sup>89</sup> However, once the virus began to spread, companies involved in international arbitration used COVID as an excuse to request hearing postponements and filing extensions.<sup>90</sup> For example, a March 2020 hearing scheduled to take place in Frankfurt, Germany, was postponed two months, after the German counsel of the Hong Kong company involved requested a suspension “because of corona,” stating that a Hong Kong resident planning to attend the hearing, although not even a representative of the Hong Kong company, could not travel.<sup>91</sup> Situations like that became frequent as the pandemic progressed. “[C]orona was the new magic word for anyone who needed more time” to prepare for arbitral proceedings and filings.<sup>92</sup> This is not the only example of the COVID excuse being used, however. In the famous *Vattenfall* case, which began in 2012, Germany “attempted to disqualify the ICSID tribunal . . . arguing that . . . the tribunal’s refusal to delay a hearing in the face of the [COVID] pandemic

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<https://globalarbitrationreview.com/article/1225832/covid-19-participants-in-siac-case-share-success-of-virtual-hearing> [<https://web.archive.org/web/20210329202902/https://globalarbitrationreview.com/virtual-hearings/covid-19-participants-in-siac-case-share-success-of-virtual-hearing>]; see also Stacey Smydo et al., *Online Courts and Litigation: Canada is Plowing Ahead with New Digital Processes*, LEXOLOGY (Sept. 17, 2020), <https://www.lexology.com/library/detail.aspx?g=27d261ba-2ca9-4666-aa39-565851b7474c> [<https://web.archive.org/web/20210329203210/https://www.lexology.com/library/detail.aspx?g=27d261ba-2ca9-4666-aa39-565851b7474c>]. *Accord* Connerty, *supra* note 80.

87. See generally WON KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* 18 (2017); see also Casey & Hanessian, *supra* note 66; Rigby, *supra* note 76.

88. See generally *Major Epidemics of the Modern Era*, Council on Foreign Relations, <https://www.cfr.org/timeline/major-epidemics-modern-era> [<https://web.archive.org/web/20210329203426/https://www.cfr.org/timeline/major-epidemics-modern-era>] (last visited Jan. 22, 2021) (giving a timeline of epidemics from 1899 to present day, many of which (i.e., Asian Flu, Hong Kong Flu, cholera, SARS, COVID–19) originated or were confined to China and closely related Asian cities and countries).

89. Wilske, *supra* note 3, at 11.

90. *Id.*

91. *Id.* (emphasis in original) (internal citations omitted).

92. *Id.*

showed bias.”<sup>93</sup> Further, BHP Group PLC was granted an extension of time “due to the difficulties caused by COVID–19” requiring “extra efforts [and preparation]” for a remote hearing.<sup>94</sup>

Despite some postponements of international arbitration proceedings, denials of extensions due to COVID increased in frequency. A PCA tribunal recently refused Bolivia an extension to “submit its statement of [defense] in an investment treaty claim, after the state argued that the coronavirus pandemic had made work on the submission virtually impossible.”<sup>95</sup> Here, the tribunal reasoned that the pandemic “created a new reality” and “practice shows that in most cases the participants in the proceedings have been able to adjust.”<sup>96</sup> Further, in Colombia, though directed more at domestic arbitration, the government prohibited “suspension of proceedings in arbitration, conciliation, and other mechanisms of alternative dispute resolution” to avoid burdening domestic and foreign businesses more than COVID already has, and continue the “expeditious resolution of commercial disputes.”<sup>97</sup>

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93. Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Recommendation on the Second Proposal to Disqualify the Tribunal (July 6, 2020). Originally filed May 31, 2012, this case involves Vattenfall AB, a massive Swedish energy corporation, and Germany, disputing under the Energy Charter Treaty of Dec. 17, 1994, and involves over €4 billion. *Id.* See also Sanderson, *supra* note 65.

94. Robert Lawrence & Leonard Soudagar, *COVID–19 Disputes: Adjournments and Time Extensions in Litigation and Arbitration*, CLYDE & Co (May 5, 2020), <https://www.clydeco.com/en/insights/2020/05/covid-19-disputes-adjournments-and-time-extensions> [<https://web.archive.org/web/20210329203651/https://www.clydeco.com/en/insights/2020/05/covid-19-disputes-adjournments-and-time-extensions>] (giving a variety of examples of cases where arbitration proceedings have been postponed or adjourned due to COVID and the reasoning behind them).

95. See Estate of Julio Miguel Orlandini-Agreda v. Bolivia, PCA, Case No. 2018-39, Proc. Ord. No. 7, ¶ 16 (Apr. 10, 2020); see also Cosmo Sanderson, *Arbitration Tribunal Refuses to Suspend Bolivia Claim Over Pandemic*, LATIN LAWYER (May 4, 2020), <https://latinlawyer.com/article/1226406/arbitration-tribunal-refuses-to-suspend-bolivia-claim-over-pandemic> [<https://web.archive.org/web/20220113151308/https://latinlawyer.com/survey/covid-19-reporting-crisis/covid-19-reporting-crisis/article/arbitration-tribunal-refuses-suspend-bolivia-claim-over-pandemic>] (internal quotes omitted); Wilske, *supra* note 3, at 26.

96. Estate of Julio Miguel Orlandini-Agreda, Case No. 2018-39 ¶ 36; Sanderson, *supra* note 95.

97. Horacio Grigera Naón & Björn Arp, *Virtual Arbitration in Viral Times: The Impact of Covid–19 on the Practice of International Commercial Arbitration*, AM. UNIV. WASH. COLL. OF L. <https://www.wcl.american.edu/impact/initiatives-programs/international/news/virtual-arbitration-in-viral-times-the-impact-of-covid-19-on-the-practice-of-international-commercial-arbitration/> [<https://web.archive.org/web/20210329204030/https://www.wcl.american.edu/impact/initiatives-programs/international/news/virtual-arbitration-in-viral-times-the-impact-of-covid-19-on-the-practice-of-international-commercial-arbitration/>] (last visited Jan. 25, 2021). See also L. 491/2020, marzo 28, 2020, DIARIO OFICIAL [D.O.] (Colom.).

The increase in requests for extensions caused arbitral institutions to issue specific guidelines for parties and tribunals to handle COVID-related filings.<sup>98</sup> For many arbitral tribunals in the midst of COVID, the question of whether a particular case is appropriate for a virtual hearing determines the postponement of a case; answering this question depends on a variety of factors, such as remote video support functions, specific to each case.<sup>99</sup> In the future, this question will not be so important as developments in virtual proceedings will continue. Further, previous virtual proceedings have been utilized in the past, which demonstrates how continued usage and development of virtual platforms will create more ease and normalcy in a virtual proceeding.

### *B. Previous Utilization of Virtual Proceedings*

Remote arbitration proceedings have increased in popularity over the last ten years, but mainly for document correspondence and phone conferences. Many countries began utilizing online dispute resolution (ODR) well before the COVID pandemic forced them to.<sup>100</sup> Although traditional ODR focused on solving e-commerce disputes via mediation

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98. See Andrew Battison et al., *Institutional Responses to the COVID-19 Pandemic*, 14 INT'L ARB. REP. 6 (2020), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report---issue-14.pdf?la=en&revision=6edf090e-2dae-4845-a812-c912f12016d0> [<https://web.archive.org/web/20210329204206/https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report---issue-14.pdf?la=en&revision=6edf090e-2dae-4845-a812-c912f12016d0>]; *Arbitration and COVID-19*, ICC, <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf> [<https://web.archive.org/web/20201020114012/https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>] (last visited Mar. 18, 2021). *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, ICC, (Apr. 9, 2020), <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> [<https://web.archive.org/web/20210114220314/https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>] [hereinafter Guidance Note]; *CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings> [<https://web.archive.org/web/20210329204719/https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings>] (last visited Mar. 18, 2021).

99. *Id.*

100. See generally Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 615-57 (2014) (giving a history of the development of ODR use in alternative dispute resolution).



through an online platform, and commonly did not include a hearing,<sup>101</sup> ODR is considered the first “marriage” of technology and alternative dispute resolution (ADR), which encompasses various forms of dispute resolution, including arbitration.<sup>102</sup> Further, at the time ODR emerged, virtual proceedings were not the “norm,” as they are now, in the midst of the pandemic.<sup>103</sup> Previously, virtual proceedings extended only to pre-hearing meetings and conferences.<sup>104</sup> However, as virtual dispute resolution became more common, some arbitral institutes (ICC, LCIA, UNCITRAL, ICDR) included procedural guidelines and rules to assist parties wanting or requiring virtual proceedings, for whatever reason.<sup>105</sup>

For the foreign tribunals that have conducted virtual arbitration hearings, rather than just pre-hearings, they concluded with fairly positive outcomes. Canadian courts, although discussing virtual court hearings, even stated that virtual hearings are “just as fair” as in-person hearings,<sup>106</sup> and that there is “no reason why an evidentiary hearing should not take place in a virtual space.”<sup>107</sup> Additionally, Chinese tribunals actually began

101. Scherer, *supra* note 59, at 6.

102. Shackelford & Raymond, *supra* note 100, at 615. Although international arbitration has more in common with litigation than mediation, understanding how ODR came about assists in understanding how virtual international arbitration can be developed over time.

103. Smydo et al., *supra* note 86; see also Marc R. Labgold, *Virtual Hearings in International Arbitration Best Webinars*, LABGOLD LAW (May 19, 2020), <https://www.labgoldlaw.com/virtual-hearings-in-international-arbitrations--best-webinars> [<https://web.archive.org/web/20210329205519/https://www.labgoldlaw.com/virtual-hearings-in-international-arbitrations--best-webinars>] (“Although virtual hearings existed previously, the . . . 2018 International Arbitration Survey found 64% of respondents had never used “virtual hearing rooms” whereas only 8% had done so frequently or always.” (emphasis in original)).

104. John V.H. Pierce, *Predicting the Future: International Arbitration in the Wake of COVID-19*, 13 N.Y.B.A. SEC. DISP. RES. 2 (2020).

105. ICC Arb. Rules, Appendix IV § f (2021) (“Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential.”); LCIA Arb. R., art. 19.2 (2020) (“a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).”); UNCITRAL Arb. Rules, art. 28(4) (2013) (“witnesses . . . [may] be examined through means of telecommunication that do not require their physical presence at the hearing”); ICDR Int’l Arb. Rules, art. E-9 (2014) (“[h]earings may take place in-person or via video conference . . . at the discretion of the arbitrator.”).

106. Lee & Ning, *supra* note 85 (emphasis omitted).

107. Gary B. Born & Mikhail Kalinin, *A Fireside Chat with Gary Born: How to Become a Star in International Arbitration in Five (Easy?) Steps, and Is It Still Possible?* KLUWER ARB. BLOG (Jan. 12, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/12/tionafireside-chat-with-gary-born-how-to-become-a-star-in-international-arbitration-in-five-easy-steps-and-is-it-still-possible/> [<https://web.archive.org/web/20220113161755/http://>

conducting arbitration proceedings virtually in 2009, and the Guangzhou Arbitration Commission (hereinafter “GZAC”) published its own online arbitration rules in 2015.<sup>108</sup> Although GZAC’s rules focus on domestic disputes, it demonstrates the success virtual arbitration has had and illustrates the push toward greater utilization of virtual hearings. Russian courts have had similar success with virtual hearings and transitioning to more virtual legal proceedings, though acknowledging there needs to be a consistent and reliable video conferencing format to conduct virtual hearings.<sup>109</sup> It seems previous utilization of virtual hearings have had both positive and negative aspects, which should be analyzed separately, and appropriate policy should be ratified as needed.

### *C. Virtual Proceedings: Advantages and Disadvantages*

#### *1. Advantages*

Arbitration’s privacy, efficiency, cost-saving, and flexible qualities make it significantly more appealing than litigation when resolving international disputes.<sup>110</sup> With virtual arbitral proceedings, these advantages are even more prominent. Removing the need to travel from international arbitration is probably the greatest argument for the continued use of virtual proceedings. For parties who cannot travel, an issue that will be continuously relevant post-COVID as people cannot travel for a multitude of reasons, removing that factor from arbitration will allow for increased accessibility to the world of international arbitration as a whole. Further, removing the travel requirement may allow more people, such as witnesses if needed in person, to participate.

Cost savings stem from reduced travel needs. According to an ICC Commission Report, over eighty percent of international arbitration costs are party costs (including lawyers’ fees, witness expenses, and other costs

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arbitrationblog.kluwerarbitration.com/2019/01/12/tiona-fireside-chat-with-gary-born-how-to-become-a-star-in-international-arbitration-in-five-easy-steps-and-is-it-still-possible/].

108. Jie Zheng, *The Recent Development of Online Arbitration Rules in China*, 26 INFO. & COMM. TECH. L. 135, 135–36 (2017).

109. Karasev Anatoly Tikhonovich et al., *On the Effectiveness of the Digital Legal Proceedings Model in Russia*, 9 MATHEMATICS 125, 146 (2021).

110. *Id.* See generally Jon Berkelhammer, *Arbitration: A Comparison of the Pros and Cons, Insights*, ELLIS WINTERS (Nov. 2, 2015), <https://www.elliswinters.com/blog/arbitration-a-comparison-of-the-pros-and-cons/> [<https://web.archive.org/web/20210329205859/https://www.elliswinters.com/blog/arbitration-a-comparison-of-the-pros-and-cons/>] (analyzing the pros and cons of arbitration in America, specifically).

incurred by the parties).<sup>111</sup> Witness expenses and other costs encompass travel expenses. Travel is expensive, so removing that factor will reduce the cost of international arbitration, making it even more appealing and less expensive than before, compared to litigation.<sup>112</sup> Further, client costs decrease when there is no need to rent meeting spaces or provide food and lodging for any witnesses required to be there in person, rather than providing merely written testimony.<sup>113</sup> Although some virtual hearing services do cost money to use, it is far less than international travel.<sup>114</sup> Even in domestic proceedings, costs add up, though less than traveling internationally. Remote international hearings are overall less expensive than remote domestic court proceedings, making remote international proceedings more appealing in most situations.<sup>115</sup> Additionally, eliminating the need to travel allows more flexibility in terms of scheduling arbitration hearings and other proceedings. Further, using recordings of past proceedings, rather than relying on a transcript of the proceeding, gives parties the ability to observe how the witness appears physically while speaking, rather than just reading the words, giving more context to the testimony; however, some body language may be missed on video.<sup>116</sup> Recordings further reduce costs by eliminating the cost of a transcriber.<sup>117</sup> Additionally, written transcripts generate automatically

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111. ICC COMM'N ON ARB. & ADR, DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION (2015), <https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf> [<https://web.archive.org/web/20200808002034/https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>].

112. See Smydo et al., *supra* note 86.

113. *Id.*

114. Videoconferencing platforms (Zoom, Microsoft Teams, etc.) have subscription fees. Conversely, ICSID provides online hearing services at no extra charge, outside of normal administration fees, for ICSID cases, as well as UNCITRAL cases. *A Brief Guide to Online Hearings at ICSID*, ICSID (Mar. 24, 2020), <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid> [<https://web.archive.org/web/20220113172629/https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid>].

115. Scherer, *supra* note 59, at 4.

116. See *infra* Part III.C.2. (explaining the disadvantages of virtual witness testimony).

117. Matthew Croagh et al., *Online Dispute Resolution and Electronic Hearings*, 9 INT'L ARB. REP. 1, 5–8 (2020), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en&revision=c9a5375e-5aff-4a71-a492-18c9305047d6> [<https://web.archive.org/web/20201125000132/https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en&revision=c9a5375e-5aff-4a71-a492-18c9305047d6>].

through some programs, so in the event a party needs one, they are available.<sup>118</sup>

Remote proceedings are overall more efficient, comparatively, than in-person proceedings. First, most arbitral institutes' rules allow for electronic transmission and viewing of arbitration documents.<sup>119</sup> "An electronic hearing can be up to 25 percent to 30 percent quicker than a traditional hearing," since nobody will need to physically locate different documents within the physical files they brought to the in-person arbitration.<sup>120</sup> Additionally, documents presented during witness examination can appear on every device simultaneously.<sup>121</sup> However, parties are still free to use their own document copies instead, which can be determined during procedure negotiation. Increased efficiency does not benefit only the disputing parties, however. Arbitrators are generally in high demand and have strict time constraints, forcing them to schedule hearings much further in advance to accommodate travel time between different arbitrations.<sup>122</sup> Continued use of virtual hearings will allow arbitrators far more flexibility in scheduling, allowing them to schedule more arbitrations overall, increasing efficiency and accessibility in arbitration and shortening the general process of international arbitration.

In addition to increased efficiency, virtual arbitration will enhance due process, specifically the right to be heard.<sup>123</sup> The anecdote "justice delayed is justice denied" applies here.<sup>124</sup> The right to be heard, as a fundamental

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118. *Closed Captioning and Live Transcription*, ZOOM SUPPORT (Oct. 28, 2021), <https://support.zoom.us/hc/en-us/articles/207279736-Closed-captioning-and-live-transcription> [<https://web.archive.org/web/20210329210403/https://support.zoom.us/hc/en-us/articles/207279736-Closed-captioning-and-live-transcription>].

119. See Smydo et al., *supra* note 86; see also Croagh, *supra* note 117, at 5; accord Josephine Davies, *Arbitration in a Time of Covid-19: My Experience so Far*, TWENTY ESSEX (Mar. 23, 2020), <https://twentyessex.com/arbitration-in-a-time-of-covid-19-my-experience-so-far-by-josephine-davies/> [<https://web.archive.org/web/20210329210547/https://twentyessex.com/arbitration-in-a-time-of-covid-19-my-experience-so-far-by-josephine-davies/>].

120. Croagh, *supra* note 117, at 6.

121. *Id.* See also Michael G. Osborne, *Courts Closed? Try Arbitration*, CASSELS (Mar. 27, 2020), [https://cassels.com/?export=pdf&post\\_id=11871&force](https://cassels.com/?export=pdf&post_id=11871&force) [[https://web.archive.org/web/20210329210747/https://cassels.com/?export=pdf&post\\_id=11871&force](https://web.archive.org/web/20210329210747/https://cassels.com/?export=pdf&post_id=11871&force)]. The "share screen" feature available on many video conferencing platforms, such as Zoom, allows a user to share whatever document is pulled up on his or her screen with all other participants, so everyone can view the document simultaneously.

122. Croagh, *supra* note 117, at 7.

123. Scherer, *supra* note 59, at 11 ("A party's right to a hearing is said to be a fundamental principle in international arbitration.")

124. See Ricardo Ugarte, M. Imad Khan & Amanda Jereige, *Arbitration Proceedings In The Age of Virtual Hearing Rooms*, WINSTON & STRAWN LLP (Apr. 9, 2020),

right, should not be delayed. Such delays would undermine the point of international arbitration's efficiency.<sup>125</sup> Continuing use of virtual hearings upholds the due process right to be heard during an unprecedented time in history. Parties undertaking virtual arbitration will have justice in a timely fashion, rather than postponing for an unforeseen amount of time.<sup>126</sup>

For high-value international arbitration, cost-savings and efficiency do not pose a problem, and parties focus more on the privacy and neutrality aspects of arbitration.<sup>127</sup> Generally, businesses involved in multi-million or billion-dollar disputes do not "feel comfortable leaving dispute resolution in the hands of local courts."<sup>128</sup> International arbitration provides businesses a way to resolve disputes using an objective, neutral decision-maker and can designate the proceedings as confidential.<sup>129</sup> When the stakes are incredibly high, parties do not worry about travel costs or shortened process; the focus is on a positive and just outcome. However, virtual arbitration will still provide greater flexibility in high-stakes disputes.<sup>130</sup> Parties will still have flexibility in selecting their arbitrators, and although there are privacy concerns,<sup>131</sup> there are defenses to cybersecurity threats. For example, the Protocol on Cybersecurity in International Arbitration (hereinafter the "Protocol") provides a framework to determine reasonable security measures, identifying risks, general mitigation strategies, and possible consequences of a breach.<sup>132</sup> For high-stakes arbitration, the Protocol can help minimize privacy risks corporations worry about. Further, virtual arbitration allows flexibility in scheduling and can be conducted over longer periods of time if needed, with more frequent breaks, compared to in-person arbitration.

Although the positives of continued virtual international arbitration hearings focus on cost, efficiency, privacy, and overall policy-focused

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<https://www.winston.com/en/thought-leadership/arbitration-proceedings-in-the-age-of-virtual-hearing-rooms.html> [<https://web.archive.org/web/20201001085558/https://www.winston.com/en/thought-leadership/arbitration-proceedings-in-the-age-of-virtual-hearing-rooms.html>].

125. *Id.*

126. *Id.*

127. Quinn Emanuel Urquhart & Sullivan, LLP, *Raising the Stakes in International Arbitration*, JDSUPRA, <https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=c715220f-3483-4cde-944d-528f694ac0e9> [<https://web.archive.org/web/20210329211110/https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=c715220f-3483-4cde-944d-528f694ac0e9>] (last visited Mar. 19, 2021).

128. *Id.*

129. *Id.*

130. *Id.*

131. *See infra* Part III.C.2.

132. Hong-Lin Yu, *Data Protection and Cybersecurity in International Arbitration*, 13 CONTEMP. ASIA ARB. J. 45, 56 (2020).

ideas, those same ideas are virtual arbitration's core values, along with fair and just decision making.<sup>133</sup>

## 2. Disadvantages

With the continued use of virtual international arbitration proceedings, overcoming negative aspects of the process must occur. For example, virtual meeting spaces, like Zoom, Microsoft Teams, or Skype, have confidentiality and accessibility issues. Scheduling issues may arise when parties are in different time zones, too. Virtual hearings further lack the human interaction that people prefer to have when questioning a witness.<sup>134</sup> However, dealing with these negatives is possible. Additionally, videoconferencing—staring at a screen all day—exhausts a person mentally.<sup>135</sup> To combat this exhaustion, parties, or the arbitrator, could allow non-speaking participants to leave their video off and sound muted, to allow them a break from the technology until they need to speak again.<sup>136</sup>

Arbitration users value privacy. Holding proceedings in person ensures that information remains with the parties, unauthorized recordings do not occur, and “uninvited” third parties cannot interfere.<sup>137</sup> Video conferencing allows users to screen record meetings, which places privacy and confidentiality at risk.<sup>138</sup> However, in-person proceedings have been known to be at risk for secret recordings on cell phones.<sup>139</sup> This demonstrates that privacy and confidentiality are not foolproof regardless of whether the hearing is virtual or in-person. Another issue may arise if the video conference provider can grant itself ownership rights to recordings hidden within the terms and conditions.<sup>140</sup> To overcome these issues, parties should review all video conference providers' terms and conditions for anything that may put recordings of their proceedings at risk. Some arbitral institutes have begun offering their own virtual

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133. See generally Wilske, *supra* note 3.

134. Wilske, *supra* note 3, at 14.

135. Christina Ryan, *Lessons Learned from Running a Virtual Arbitration: A First-Person Account*, AAA-ICDR Blog, AM. ARB. ASS'N. (Dec. 1, 2020) <https://www.adr.org/Lessons-Learned-from-Running-a-Virtual-Arbitration-A-First-Person-Account> [<https://web.archive.org/web/20210113160106/https://www.adr.org/Lessons-Learned-from-Running-a-Virtual-Arbitration-A-First-Person-Account>].

136. *Id.*

137. Wilske, *supra* note 3, at 15; see also David C. Singer, *Arbitration Privacy and Confidentiality in the Age of (Coronavirus) Technology*, 38 ALTS. TO HIGH COST LITIG. 107, 107 (2020).

138. See Goins & Guillet, *supra* note 72; see also Singer, *supra* note 137, at 108.

139. See generally Singer, *supra* note 137.

140. Scherer, *supra* note 59, at 24.

arbitration platforms, too, which will ensure more secure hearings.<sup>141</sup> Further, the arbitrator should control the meeting access link and create a strong password to access the meeting, as well as check the identity information of those present at the meeting. A secure, private internet connection will also minimize the chance that a non-participant will hear, or virtually attend, while a public internet connection would make that easier.<sup>142</sup> Although this may not ensure complete privacy, it will help keep the virtual proceedings more secure than they would be otherwise.

Accessibility is also a considerable concern with respect to remote international arbitration. Internet connectivity issues arise without warning or reason for many users, and high-speed internet is not available equally throughout the globe.<sup>143</sup> To deal with internet issues, parties may consider renting an office space for the day, where a strong connection is more likely than at home. Additionally, parties are commonly located in different time zones.<sup>144</sup> Time zone issues will take careful planning and scheduling to work around and will result in one party having to attend earlier or later in the day (or at odd hours) than they would normally if attending an international arbitration proceeding in person. However, these difficulties are not as burdensome as having to travel and physically adjust to another time zone. All persons involved in international arbitration can avoid jet lag, which may inhibit their work quality, even if they must work at earlier or later hours in the day.<sup>145</sup> Further, witnesses can avoid travelling and potentially taking more days off of work than truly necessary.

Moreover, many international arbitration proceedings do require witness testimony.<sup>146</sup> Credibility is a large part of that testimony and is far more challenging to assess on video due to “the loss of non-verbal cues and the inability to scrutinize the person’s demeanor.”<sup>147</sup> During cross-

141. See Connerty, *supra* note 80, at 28 (“The Stockholm Chamber of Commerce (SCC) and Thomson Reuters offer the SCC Platform to ad hoc arbitrations globally . . . . [The Platform] will be free of charge for arbitrations commenced during the COVID-19 outbreak.”).

142. Singer, *supra* note 137, at 108.

143. Lee & Ning, *supra* note 85; see also Goins & Guillet, *supra* note 72 (“A witness situated in a developing country in the Middle East or in Africa may not have access to the same technology equipment or high-speed internet as a witness or expert in Europe.”).

144. Connerty, *supra* note 80.

145. See Generally Mark R. Rosekind et al., *The Cost of Poor Sleep: Workplace Productivity Loss and Associated Costs*, 52 J. OCCUPATIONAL & ENV’T MED 91 (2010).

146. John Fellas, *International Arbitration in the Midst of COVID-19*, 263 N.Y. L.J. (2020), <https://files.hugheshubbard.com/files/International-Arbitration-In-the-Midst-of-COVID-19.pdf> [<https://web.archive.org/web/20210115235940/https://files.hugheshubbard.com/files/International-Arbitration-In-the-Midst-of-COVID-19.pdf>].

147. Scherer, *supra* note 59, at 20.

examination, it is imperative for tribunal members to assess witnesses' body language.<sup>148</sup> Further, it will be harder to "ensure that the testifying witness is not secretly being advised or reading from hidden documents without the knowledge of the tribunal or opposing party."<sup>149</sup> To counter this witness-coaching concern, an issue "not unique to virtual hearings," cameras should be set up in order to show a reasonable amount of the room to ensure there is nobody else there, nor that the witness is using additional electronic devices.<sup>150</sup> Witness credibility may also create due process concerns.

Due process and fairness concerns raise serious issues in the realm of virtual arbitration, specifically at the hearing stage. Generally, all parties involved in the arbitration must agree to procedural rules governing the proceedings beforehand, including whether they will allow remote hearings. However, since the pandemic began, if arbitration agreements lack pre-approval of remote hearings, tribunals may still determine procedure requires a remote hearing.<sup>151</sup> Further, tribunals have proceeded with virtual hearings over the objections of one party, arguing such proceedings violate equality and due process of international arbitration.<sup>152</sup> However, as long as both parties have fair treatment in the decision-making process of whether to go forward with a virtual hearing, due process is not violated.<sup>153</sup>

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148. See Graham Coop & Robert Volterra, *The Impact of COVID-19 on Arbitration Proceedings and Due Process*, VOLTERRA FIETTA (Apr. 9, 2020), <https://www.volterrafietta.com/volterra-fiotta-client-alert-the-impact-of-covid-19-on-arbitration-proceedings-and-due-process/> [<https://web.archive.org/web/20220113181404/https://www.volterrafietta.com/volterra-fiotta-client-alert-the-impact-of-covid-19-on-arbitration-proceedings-and-due-process/>].

149. Wilske, *supra* note 3, at 15.

150. Lee & Ning, *supra* note 85.

151. Scherer, *supra* note 59, at 15; ICC Rules, Article 26(1) (2021) ("The arbitral tribunal may decide . . . that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.").

152. See Scherer, *supra* note 59, at 15–18; see also Maxi Scherer et al., *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 ARB. BLOG (Oct. 24, 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/?print=print> [<https://web.archive.org/web/20220113182530/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/>].

153. See Scherer et al., *supra* note 152.



*D. Policy Changes Needed to Support Continued Use of Virtual International Arbitration*

To compensate for the negative aspects of virtual international arbitration, arbitral institutions should adapt their current rules and policies to allow for more straightforward, easily implemented, and unobjectionable virtual arbitration. Setting clear expectations for virtual international arbitration proceedings will allow for increased efficiency and fewer postponements and objections to virtual proceedings.

There has already been movement toward adaption to virtual hearings, though generally aimed only at accommodating those hearings through COVID. Three arbitral bodies formed “an alliance to facilitate international hearings that conform to COVID–19 restrictions.”<sup>154</sup> As stated previously,<sup>155</sup> the International Arbitration Centre Alliance (IACA) aims to reduce the distance, time-zone, and virtual challenges, like internet connectivity, that accompany international arbitration hearings during this “extraordinary time[]” for parties utilizing these institutions for their arbitration needs.<sup>156</sup> These arbitration bodies believe that the future of international arbitration rests with hybrid and fully remote hearings, and assist in the transition to remote by facilitating the virtual platforms and ensuring parties do not have to struggle to participate, regardless of their location in the world.<sup>157</sup> Creating this alliance demonstrates that arbitral institutions are looking toward the future of virtual international arbitration, and see continued use of virtual proceedings. This is just one

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154. Rigby, *supra* note 76.

155. *See supra* Part II.C.

156. *Id.*

157. *See What are Hybrid Hearings*, INT’L ARB. CTR. ALL., <https://www.iacaglobal.com/hybrid-hearings> [<https://web.archive.org/web/20210329211841/https://www.iacaglobal.com/hybrid-hearings>] (last visited Jan. 13, 2022). The statement reads:

Our unique Hybrid Hearings employ a combination of on-site, remote, and virtual attendance methods to ensure that all parties can participate fully and easily, no matter where in the world they are located. Some will attend the IACA partner facility closest to them and participate either in a group room with social distancing protocols, or in private technology suites with video-conferencing connections. The choice is theirs. Others will connect remotely using our secure virtual platform. Even after COVID-related restrictions are relaxed around the world, it will be some time before international travel returns to its previous levels and ease. Furthermore, the restrictions imposed by the crisis have highlighted many greener options for the conduct of business, including dispute resolution, which may well be maintained when the crisis is behind us. *Id.*

example of the changes already being implemented, which in turn forecasts the continued use of virtual arbitration proceedings.

Rules and suggested guidelines for arbitrators to mitigate the problems virtual hearings may cause have also been put in place by the ICC.<sup>158</sup> The Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (hereinafter “Guidance Note”), adopted by the ICC, provides measures that “arbitrators can legitimately adopt without risking a successful challenge by one of the parties.”<sup>159</sup> For example, the Guidance Note allows the tribunal to modify typical timetables as needed, and can order a virtual hearing without party agreement, but must consult with the parties about appropriate procedural measures.<sup>160</sup> Additionally, the United Kingdom branch of the ICC held webinars on virtual hearings to increase understanding and usability and to assist attorneys and arbitrators who are less technologically-savvy in the transition to virtual hearings.<sup>161</sup> Other institutions urge arbitrators and parties to use technological platforms to hold hearings and file documents; many of these platforms were previously available, but unutilized.<sup>162</sup> Arbitral institutes should follow this trend and implement more secure, electronic platforms to continue the movement toward more permanent use of virtual arbitration.

Although many arbitral institutions’ rules already include guidelines for holding virtual proceedings and processing virtual documents and filings, some still need to implement rules that allow for more flexibility with electronic proceedings. For example, South Korean law has expressly allowed for virtual dispute resolution with flexibility based on the parties’ preferences for some time now.<sup>163</sup> On the other hand, Indian law does not expressly provide for virtual hearings and the sudden shift to virtual litigation and dispute resolution proceedings resulted in backlogged cases and frustration with the new systems, as well as a lack of guidelines and rules to govern virtual hearings.<sup>164</sup> Express law guiding virtual proceedings would prevent future issues like confusion on how to conduct

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158. Naón & Arp, *supra* note 97.

159. *Id.* See also Guidance Note, *supra* note 98.

160. Guidance Note, *supra* note 98, ¶ 22.

161. Connerty, *supra* note 80.

162. See *id.* (referring to the Arbitration and Mediation Center of the Santiago Chamber of Commerce’s E-CAM system, which has been in place since 2013.).

163. Kim M. Rooney, *The Global Impact of the COVID-19 Pandemic on Commercial Dispute Resolution in the First Seven Months*, INT’L BAR ASS’N (Oct. 13, 2020), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaaccd5f53> [<https://web.archive.org/web/20210118204339/https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaaccd5f53>].

164. *Id.*

the virtual proceeding (i.e. ensuring parties agree on the platform to be used, or possibly mandating a virtual arbitration clause within the arbitration agreement), regardless of parties' pre-approval of virtual proceedings. All countries should introduce legislation to support virtual arbitration proceedings and enforcement of awards to accommodate this new normal in addition to arbitral institutions providing rules and guidelines. However, legislative support may be difficult to come by, as legislatures around the world deal with more pressing issues, such as COVID prevention. Arbitral institutions should support legislation at the proper time in the future. Currently, arbitral institutions can amend their rules to reflect future legislative changes and create an overall smoother transition process in policy amendments.

Challenges to arbitration awards will likely be more frequent as virtual hearings continue. Award challenges generally occur when parties feel a procedural imbalance occurred throughout part of or all the arbitral proceedings, or that due process was violated.<sup>165</sup> As discussed earlier,<sup>166</sup> parties may argue due process violations due to witness testimonies during the hearing. In the future, a party may challenge an award if one party's witness testifies in person, while the other, perhaps due to health restrictions, is forced to testify remotely. To prevent these situations and uphold the fairness standard arbitration is meant to promote, arbitral institutions should put in place rules to ensure that all witnesses are heard either virtually or in person. Even if only one party needs remote proceedings, both parties should agree to it in order to minimize bias and ensure witness credibility is equal. This places all parties involved on the same playing field in terms of witness testimony and cross-examination.

Under the New York Convention,<sup>167</sup> awards may only be challenged if procedural regularity or fairness was violated in the process.<sup>168</sup> It is easy to imagine a party challenging an award resulting from a virtual hearing for lack of "procedural regularity" because traditionally, procedural regularity includes an in-person hearing. However, it is not clear if a party's right to a hearing means a right to a *physical* hearing.<sup>169</sup> Some arbitral institutions' rules, like the ICC Rules, do not contain the words "in person," but say "shall summon the parties to appear before [the tribunal]."<sup>170</sup> Interpreting this broadly implies that parties may appear in person or before the tribunal via video, but it is not clear. Accordingly, as

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165. See Coop & Volterra, *supra* note 148.

166. See *supra* Section III.C.2

167. See *supra* Section II.B.

168. Born, *supra* note 28, at 124; see also Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2517.

169. Scherer, *supra* note 59, at 11.

170. ICC Rules, Article 26(1) (2021).

long as a virtual hearing meets the requirements for a hearing, generally oral testimony and simultaneous exchange of arguments or evidence, it should not be considered a procedural irregularity.<sup>171</sup> Therefore, the argument of procedural irregularity as a challenge to an award lacks merit. Amending institutional rules to clarify whether a hearing must be in person to count as a hearing in accordance with the parties' rights would be beneficial to prevent this type of challenge in the future.

#### IV. CONCLUSION

After quickly learning to adapt to a new normal in the midst of a global pandemic, the international arbitration world should continue to utilize remote arbitration proceedings even after the pandemic ends. Virtual proceedings uphold the integrity of international arbitration and its procedures, and even increase cost effectiveness and efficiency.<sup>172</sup> Additionally, to compensate for the possible complications and negatives that accompany virtual arbitration,<sup>173</sup> arbitral institutions around the world should adapt their current rules to allow more flexibility in international arbitration conduction, and inclusive procedures for parties new to virtual proceedings.<sup>174</sup> The adaptation of fully virtual and hybrid international arbitration proceedings will greatly benefit the legal industry if continued in the future.

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171. Scherer, *supra* note 59, at 11.

172. *See supra* Part III.C.1.

173. *See supra* Part III.C.2.

174. *See supra* Part III.D.