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Hearing

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CHAPTER 11
Hearing

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In certain international commercial arbitrations, for instance, in expedited proceedings under the auspices of various institutional rules, the tribunal may decide the dispute based on documentary evidence only.[1] However, in most cases, hearings are generally conducted for the tribunal to hear examination of any factual or expert witness and/or for oral argument. It is not uncommon for there to be multiple hearings in a single arbitration, with each hearing focusing on specific procedural or substantive issues. The hearing is therefore a forum for the parties to adduce evidence and/or put forward their legal views in direct confrontation with each other.[2] Its primary purpose is to bring to the tribunal's attention the arguments for and against the positions of both parties.[3] This chapter will primarily focus on the main evidentiary hearing(s) in an arbitration, but the underlying principles are applicable even for hearings on issues that might not involve the examination of any witnesses.

To conduct a hearing in an expeditious, efficient, and fair manner, the tribunal must make various procedural decisions. In making these decisions, the tribunal considers the parties' agreed procedure, commonly elucidated in their choice of institutional rules applicable to the arbitration. The parties' freedom to delineate the

* This chapter is written in the authors' personal capacity, and the opinions expressed in this chapter are entirely the authors' own views.

1. Singapore International Arbitration Centre ('SIAC') Rules 2016, Rule 5.2; International Chamber of Commerce ('ICC') Arbitration Rules 2021, Appendix VI, Art. 3(5) ('ICC Rules 2021'); Hong Kong International Arbitration Centre ('HKIAC') Administered Arbitration Rules 2018, Art. 42.2 ('HKIAC Rules 2018'); London Court of International Arbitration ('LCIA') Arbitration Rules 2014, Art. 9B ('LCIA Rules 2014'); Stockholm Chamber of Commerce ('SCC') Rules for Expedited Arbitrations 2017, Art. 33 ('SCC Rules 2017').
2. Michael Molitoris and Amelie Abt, 'Oral Hearings and the Taking of Evidence in International Arbitration' in Christian Klausegger et al. (eds), *Austrian Arbitration Yearbook 2009* (CH Beck, Stämpfli & Manz 2009) 180.
3. *Ibid*.

scope of the tribunal's procedural authority is only qualified by mandatory requirements of fundamental procedural fairness, which are usually narrowly construed under most international and national arbitration regimes.[4] Some of these, the right to request a hearing, the right to a fair hearing and the right to equal treatment, will be discussed later. The tribunal may also be guided by certain non-binding guidelines. The International Bar Association's Rules on the Taking of Evidence in International Arbitration ('IBA Rules'), for instance, set out certain standards for dealing with document requests, the appearance of factual and expert witnesses at the hearing and the conduct of the hearing itself.[5] The Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'), designed with a civil law focus to increase efficiency in arbitration, may also be of assistance.[6] They encourage the tribunal to adopt an inquisitorial model of procedure and a proactive role in moving proceedings along.[7]

This chapter focuses on the complexities arising in physical and virtual hearings of an international commercial arbitration. In §11.01, Physical Hearings and Procedural Protections, it introduces the conduct of a hearing and the traditional physical hearing. It then discusses potential issues arising from hearings that may implicate the right to be heard and the right to equal treatment. In §11.02, Virtual Hearings and Evidential Issues, the chapter delves into the rise of virtual hearings, the legal and practical concerns that have arisen and gives some thoughts as to the future of virtual hearings.

§11.01 PHYSICAL HEARINGS AND PROCEDURAL PROTECTIONS

[A] The Conduct of a Hearing

[1] Whether to Conduct an Oral Hearing

In international commercial arbitrations, save for certain documents-only hearings, it is common practice for there to be at least one oral hearing. Article 24(1) of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law states that:

> [s]ubject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.[8]

4. Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 2295.
5. IBA Rules 2020; *RR Dev Corp v. Guatemala* (Decision on Provisional Measures) ICSID Case No. ARB/07/23 (15 October 2008) para. 15.
6. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules Working Group 2018) ('Prague Rules').
7. *Id.*, Arts 2 and 3(1).
8. UNCITRAL Model Law on International Commercial Arbitration 2006, Art. 24(1) ('Model Law 2006').

This imposes an obligation on the tribunal to hold oral hearings for the presentation of evidence by witnesses and experts and/or oral arguments so long as one party requests for it. As noted by the Singapore High Court, 'the effect of Art 24(1) is that a party which requires a *viva voce* hearing may veto any proposal to conduct an arbitration documents-only. To exercise this veto, however, the objecting party must *both*: (a) not agree that "no hearings shall be held"; *and* (b) positively make a request for a hearing to be held' (emphasis added).[9] This veto may be exercised even if the tribunal considers a hearing unnecessary or disproportionate to the quantity or quality of the dispute and the issues it comprises. Parties may of course agree that no hearings shall be held if they so wish, and the tribunal should then proceed on a documents-only basis. It is only when none of the parties request a hearing and subject to contrary agreement by the parties that the tribunal may exercise its discretion to determine whether to hold an oral hearing or to conduct the arbitration on the basis of documents and other materials.[10]

It should not be assumed as a matter of course that oral hearings are always appropriate for every arbitration. Disputes vary in nature, size, and complexity. There are inevitable costs and time associated with the preparation and conduct of oral hearings. In each case, the tribunal and parties may benefit from considering whether an oral hearing is appropriate and necessary.[11] The Prague Rules suggest that for the purposes of cost-efficiency, the tribunal and parties should seek to resolve the dispute on a documents-only basis to the extent appropriate for the particular case.[12] This would mean that the parties may adopt a hybrid format where certain issues are designated by the parties to be determined on a documents-only basis, while others need to be ventilated at an oral hearing. The issues determined on a documents-only basis are considered based only on the submission of documents by the parties. Clearly, there are advantages in the form of cost and time savings since 'documents-only' arbitrations negate the need for large parties to travel to a particular location and spend time at the hearing to hear either side present materials.[13]

Generally, if witness testimony or technical expert evidence is important to the resolution of the case, opportunities to cross-examine at an oral hearing should be provided to parties. An oral hearing may be appropriate. Conversely, if it is clear that no issues of credibility arise with regard to the documents and statements produced and oral testimony may not necessarily advance the arbitration, the tribunal could come to a decision simply by considering the documentary evidence and written submissions.[14] Such 'documents-only' arbitrations are often seen in small claims cases in domestic arbitration and international arbitrations conducted under the Rules of the

9. *Vitol Asia Pte Ltd v. Machlogic Singapore Pte Ltd* [2020] SGHC 209, para. 148.
10. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 114.
11. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 400.
12. Prague Rules 2018, Art. 8.
13. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 718.
14. *Id.*, 717-718.

London Maritime Arbitrators Association in connection with disputes arising out of charter parties and related documents.[15]

In such situations, it is crucial for the tribunal to ensure that the parties consent to a 'documents-only arbitration' and have an adequate opportunity to present their case. Under the Model Law and most institutional rules, the parties have a right to present their case by way of oral evidence at a hearing.[16] Critically, a hearing is required unless the parties consent to a 'documents-only' arbitration. For instance, the International Chamber of Commerce 2021 Rules of Arbitration ('ICC Rules') provides that a 'hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties'.[17] Similarly, the UNCITRAL Arbitration Rules ('UNCITRAL Rules') provide that if:

> at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.[18]

The Singapore International Arbitration Centre ('SIAC') Rules are more nuanced in providing that, if either party so requests, the tribunal shall 'hold a hearing for the presentation of evidence and/or for oral submissions on the *merits* of the dispute, including any issue as to jurisdiction'.[19] Generally speaking, if a tribunal decides not to hold an oral hearing even if one of the parties had so requested, it exposes the final award to challenge on the basis of a breach of natural justice.

Where parties consent to a 'documents-only' arbitration after the dispute has arisen, this is uncontroversial. However, there is some dispute as to whether parties may consent in advance of the dispute to a 'documents-only' arbitration. If parties have clearly expressed their intention in the arbitration agreement to have a 'documents-only arbitration', would this always be valid? The right to request a hearing under Article 24 of the Model Law is expressly subject to 'parties' agreement that no hearings shall be held. Generally, a tribunal would be inclined to hold parties to their bargain and give effect to the parties' prior agreement. One may even go further to argue that the reference to arbitration was contingent upon the conduct of a 'documents-only' arbitration, and that is the agreed procedure which the tribunal cannot deviate from.[20]

However, one can also imagine an exceptional situation in which oral testimony of witnesses is so critical to one party's case that it may implicate that party's opportunity to be heard. What happens if one of the parties, upon the dispute arising, argues that oral testimony is so critical to its case that the tribunal would be denying it

15. Blackaby et al. (n. 11) 400.
16. Paul-A. Gelinas, 'Evidence Through Witnesses' in Laurent Levy and Van Vechten Veeder QC (eds), *Arbitration and Oral Evidence*, Vol. 2 (Dossiers (ICC Institute of World Business Law), Kluwer Law International 2004) 31; SIAC Rules 2016, Rule 24.1; HKIAC Rules 2018, Art. 22.4; SCC Rules 2017, Art. 32.
17. ICC Rules 2021, Art. 26.
18. UNCITRAL Arbitration Rules 2013, Art. 17(3).
19. SIAC Rules 2016, Rule 24.1 (emphasis added).
20. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 718-719.

a reasonable opportunity to be heard if no oral hearing is held, notwithstanding its prior agreement to conduct the arbitration 'documents-only'? This would be a difficult issue. Whether there is a breach of Article 18 of the Model Law would depend on whether that party could establish why, on the facts of that case, oral testimony is so critical to its case that the failure to have an oral hearing would constitute a breach of natural justice. If that is a meritorious argument on the facts, it has been suggested that proceeding with the arbitration may potentially render the award vulnerable to challenge on the basis that one of the parties did not have a reasonable opportunity to present its case.[21] It may be argued that the parties' prior agreement to have a 'documents-only' arbitration cannot waive the mandatory due process right that both parties have a reasonable opportunity to present their case.[22] Having said that, such a situation will likely present itself only in highly exceptional circumstances. The prudent thing to do, in any event, would be to ensure that both parties confirm that they consent to a 'documents-only' arbitration upon constitution of the tribunal, and this would be typically recorded by the tribunal in a procedural order.[23]

[2] Pre-hearing Considerations

Insofar as any main evidentiary hearing is concerned, parties are likely to have gone through the process of discovery and have exchanged pleadings, witness statements and other documentary evidence.[24] The conduct of an efficient and fair hearing itself requires substantial pre-hearing preparation and organisation. This is a fluid process where parties can agree on certain issues and inform the tribunal, or consult with the tribunal, or leave it to the tribunal's direction.[25] Typically, at the pre-hearing stage, there will be discussions between the parties and the tribunal at an initial procedural hearing or pre-hearing conference. The following matters are likely to be discussed:[26]

(a) means of communication between parties and tribunal;
(b) clarification of issues presented and relief sought;
(c) identification of any issues considered as preliminary questions;
(d) status of any settlement discussions;
(e) whether there is to be exchange (or reply) of pleadings, witness statements or memorials;
(f) the form and method of written submissions;
(g) fixing a schedule for submission by each party of a summary of the documents or lists of witnesses or other evidence it intends to present;

21. Mauro Rubino-Sammartano, 'Is Arbitration to Be Just a Luxury Clinic?' (1990) 7 J Intl Arb 3, 29-30.
22. Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24 J Intl Arb 327, 327-339.
23. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 718-719.
24. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 115.
25. *Id.*, paras 9-10.
26. *Ibid.*; Iran-US Claims Tribunal: Tribunal Rules of Procedure (Doc. No. 3-3FT 1983) Notes to Art. 15.

(h) fixing a schedule of submission of any documents, exhibits or other evidence which the tribunal may require;
(i) whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs;
(j) desirability of appointing experts, meetings of experts, possible dispensation of cross-examination of the experts or witness conferencing (i.e., hot-tubbing);
(k) determining what documentary evidence will require translation;
(l) fixing a schedule of hearings;
(m) fixing the place of the arbitration;
(n) fixing the language of the arbitration;
(o) whether to hold a hearing (physically or virtually) and the logistics for any hearing;
(p) whether the hearing should be transcribed;
(q) inspection of site, property, or goods; and
(r) joinder, consolidation, and bifurcation.

The dates of the hearing are normally decided first to ensure the availability of the participants. The length of the hearing naturally depends on the complexity of the issues, evidence, and the number of witnesses to be heard.[27] In relation to the list of witnesses, the IBA Rules state that the tribunal normally sets out a time period in which each party shall inform the tribunal and the other parties of the factual and/or expert witnesses whose appearance it requests.[28] The parties are responsible for making available their own witnesses at the hearing if the other parties or the tribunal wishes to examine that witness.[29]

After the applicable issues have been discussed, the tribunal will make its directions in a procedural order. It is typical for the tribunal to provide, in consultation with the parties, a preliminary schedule in advance of the hearing which prescribes the anticipated order, timing and length of legal submissions, the order and estimated timing and length of fact and expert witness evidence, the expected sitting times and the order and timing of any closing submissions.[30] This will ensure that parties have sufficient knowledge and time to prepare for the hearing. If it is necessary, the schedule may subsequently be altered as the hearing progresses.

[3] The Structure of an Oral Hearing

The tribunal has broad discretion to determine the structure or order of an oral hearing.[31] Generally, the hearing commences with introductory and organisational

27. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, paras 116-117.
28. IBA Rules 2020, Art. 8(1).
29. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 123.
30. Born (n. 4) 2439; Gelinas (n. 16) 39-40.
31. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 127.

statements from the tribunal (usually the presiding arbitrator). This is followed by opening statements made by the claimant's counsel and then the respondent's counsel. Then, the taking of evidence from witnesses, which is normally the central focus of an oral hearing, begins.[32] Naturally, this consists of examination-in-chief and then cross-examination of the witnesses. In the interests of expediency, one tendency is for the tribunal to treat the witness statements as evidence-in-chief and begin with cross-examination.[33] If appropriate, the counsel may respectively give closing statements before the end of the arbitration.[34] As considered necessary by the tribunal, the order of the oral hearing may be varied in order to increase efficiency and reduce costs.

In relation to the taking of oral testimony by factual witnesses and expert witnesses, the general structure of the evidential hearing as stated in the IBA Rules is as follows:[35]

> a. the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
> b. following examination in chief of the witness, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Party's questioning;
> c. thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
> d. the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
> e. if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;
> f. the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);
> g. the Arbitral Tribunal may ask a witness questions at any time.

It is customary before the close of the hearing for the tribunal to make a declaration that the arbitration has closed and to ask the parties if they have any comments as regards the conduct of the hearing.[36] This allows the tribunal the opportunity to consider any concerns raised by the parties during the hearing and address them in a timely manner. Ideally, this reduces the possibility that a party may assert errors or breaches of natural justice when adverse findings have been made

32. Born (n. 4) 2440-2441.
33. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 719.
34. Born (n. 4) 2440.
35. IBA Rules 2020, Art. 8(4).
36. ICC Rules 2021, Art. 27.

against it.[37] After the close of the proceedings, no further submission or arguments may be made or evidence produced, with respect to the matters decided in the award, unless requested or authorised by the tribunal.[38]

[4] The Tribunal's Conduct of Oral Hearings

In presiding over the oral hearing, arbitrators from countries with different legal traditions may differ in taking a more passive or active role. Generally, arbitrators with a common law background tend to maintain a more passive demeanour, while arbitrators with a civil law background tend to be more active in conducting the proceedings.[39] This may be indicative of influence from the adversarial system in common law and the inquisitorial system in civil law. As mentioned earlier, the Prague Rules, inspired by the civil law background, advocate for a more active role for the tribunal. Generally, the trend seems to be for arbitrators in international arbitration to be more involved in questioning the witnesses and moving proceedings along in the interests of efficiency. In doing so, the tribunal may also be inclined to call relevant factual witnesses or require independent expert evidence on its own initiative.

What is common is the objective of the tribunal to manage the proceedings with reasonable efficiency. While the parties must have a reasonable opportunity to adduce evidence in support of their case and persuade the arbitrator, it is for the tribunal to control the conduct of proceedings and determine what is reasonable.[40] These could relate to several different aspects of the proceedings.

First, the tribunal may have to manage the counsel's conduct. Occasionally, counsel may spend excessive time on irrelevant submissions, take too long to make a point that has been made, excessively object to procedural issues like the behaviour of witnesses or opposing counsel, or encourage witnesses of fact to express opinions or repeat themselves unduly.[41] The most common waste of time is lengthy cross-examination of a witness on an issue which is only of peripheral importance or even completely irrelevant. The tribunal may have to be firm in pointing out its observations and encouraging counsel to move the proceedings along expeditiously.

Second, before allowing witnesses to provide oral testimony at the hearing, the tribunal should ensure that the witnesses swear an oath or make an affirmation that they will testify truthfully. As stated in the IBA Rules, a factual witness shall first affirm, in a manner deemed appropriate by the tribunal, that the witness commits to tell the truth. An expert witness shall state that the expert genuinely believes in the opinions expressed at the hearing. If the factual or expert witness has submitted a report to the tribunal, the witness shall confirm it.[42]

37. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 726.
38. ICC Rules 2021, Art. 27.
39. Molitoris and Abt (n. 2) 181.
40. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 723.
41. *Id.*, 738.
42. IBA Rules 2020, Art. 8(5).

Issues relating to whether arbitrators are allowed to administer an oath and the potential liability for the giving of false evidence by a witness are presumptively subject to the procedural law of the arbitration (i.e., the law of the arbitral seat).[43] However, this may not necessarily be the case. Arbitration laws and practices in different jurisdictions vary in their treatment of these issues.[44] Some jurisdictions allow arbitrators to administer an oath. Others forbid arbitrators from doing so on the basis that it is improper since only a judge or notary in that jurisdiction is empowered to administer oaths. As for the giving of false evidence, it may be necessary to determine the applicable criminal law. For instance, if a witness gives false evidence in an arbitration seated in country A but held in country B and this causes harm to a party from country C, it is plausible that the witness may have incurred criminal liability under the laws of countries B (i.e., where the acts took place) and C (i.e., where the harm occurred).

If no oath is administered, it is also common for the tribunal to require witnesses to affirm that they will abide by their duty to testify truthfully and warn them of any potential liability for the giving of false evidence. Under Swiss law, for example, a tribunal might warn a witness as follows: 'You must tell the truth, the whole truth and nothing but the truth and, should you not tell the truth – intentionally not tell the truth – this would be punishable under Swiss law by imprisonment up to five years or a fine or both.'[45] The tribunal should ascertain the potential liability to witnesses under the law of the arbitral seat and provide due warning to the witnesses. In some jurisdictions, witnesses may enjoy significant immunity from civil liability. In others, there may be criminal liability even if the witness did not swear an oath.[46]

Third, the tribunal must manage the requests of parties for translation of oral evidence and issues arising from interpretation.[47] The usual practice is for each party to ensure translation of the relevant documents into the language of the arbitration at first instance. If witnesses intend to give evidence at the hearing in their native language which is different from the language of the arbitration, an interpreter must be arranged for. It is not uncommon that the opposing party will have on standby native speakers to help verify or check the accuracy of the interpreter's translation.

Fourth, it is usual for the tribunal to adopt the general position that witnesses of fact should not be allowed in the hearing room unless they are testifying at that moment.[48] The rationale is to prevent these witnesses from being influenced by the testimony of other factual witnesses. It is for this reason that factual witnesses should not be discussing their testimony with any other persons during break times. However, where factual witnesses are also representatives of a party, they may be allowed to be present if it is necessary for them to oversee the presentation of their case.[49]

43. Born (n. 4) 2460-2461.
44. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 126.
45. 'Actes de la Procedure Arbitrale' (1993) 11 ASA Bull 567, 591.
46. Born (n. 4) 2460-2461.
47. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 740.
48. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 131.
49. *Id.*, para. 132.

[B] Physical Hearing

A physical hearing is an in-person meeting where the arbitrators, counsel, witnesses, and parties are gathered in a particular location for an oral hearing even if videoconferencing may be necessary for a witness who is unable to appear for the hearing. Traditionally, international arbitration has been reliant on physical hearings as the default. However, in recent times (specifically since the COVID-19 pandemic), virtual hearings have become increasingly popular. This will be discussed in §11.02, Virtual Hearings and Evidential Issues, of the chapter.

[1] Advantages and Disadvantages of Physical Hearings

There are several advantages of having a physical hearing. First, physical hearings allow for effective instantaneous interaction between the tribunal, counsel, witnesses and parties. Participants can readily read each other's verbal and non-verbal cues, and this enriches interaction. Second, it is convenient for parties to provide physical evidence and illustrate technical concepts better. Demonstrative evidence (e.g., scale models of power plants) may be readily brought to the arbitration to give the arbitrators a three-dimensional view of the subject matter.[50] The physical whiteboard may be used by witnesses to aid their oral evidence and by experts to present drawings or diagrams for more technical explanations.[51] Third, some believe that the gravitas of official proceedings such as a hearing may encourage witnesses to be more truthful. Their demeanour may also give useful indications to the tribunal of the accuracy of their evidence although it is commonly acknowledged that a factfinder's assessment of witnesses' demeanour is by no means invariably correct. Finally, in-person meetings may provide opportunities to build camaraderie among the tribunal, counsel and parties. This could organically encourage concurrent settlement discussions in the midst of the arbitration.

However, there are significant challenges in physical hearings as well. First, the paramount downside of physical hearings is the expense incurred on travel to the location of the hearing (usually another jurisdiction in international arbitrations), accommodation for the teams and the tribunal for the duration of the hearing, and the booking of physical hearing locations with adequate facilities. Second, physical hearings are generally more time-consuming since parties are required to travel to gather at the place of the hearing. The time freed up from not having to travel could be used for more hearing dates. Finally, in circumstances of public health issues such as a pandemic, it may not be possible to hold physical hearings in consideration of the health of the participants and the public.

50. Gelinas (n. 16) 48-49.
51. *Ibid*.

[2] Organisation of Physical Hearings

Physical hearings usually require a hearing room that can accommodate a sizeable number of people. This normally consists of at least fifteen persons (counting the tribunal, counsel, parties, stenographers, witnesses) or more depending on the complexity of the matter.[52] It is also common for there to be 'break-out' rooms where the parties and the tribunal may utilise during breaks or before and after the hearing and a separate holding room for sequestered factual witnesses. Additionally, physical hearings may require the taking of evidence from certain witnesses through videoconferencing. Hearing rooms should be equipped with audiovisual capabilities such as microphones, projectors, screens, and video equipment. The availability of printing facilities and a stable Wi-Fi connection is also deemed essential.[53] Such facilities are usually found in a conference room at a hotel, an office or specialised hearing centres.

[C] Procedural Protections for a Hearing

In most jurisdictions, there are mandatory procedural protections for the parties which usually consist of, at minimum, the right to be heard and the right to equal treatment. Article 18 of the Model Law encapsulates these requirements by stating that '[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'.[54] This approach is followed in major institutional rules, for instance, the UNCITRAL Rules, the ICC Rules, the London Court of International Arbitration Rules ('LCIA Rules') and the International Centre for Dispute Resolution Arbitration Rules ('ICDR Rules').[55] These principles are so fundamental that they take precedence over both parties' procedural autonomy and the arbitral tribunal's procedural discretion. They apply throughout the conduct of the arbitral proceedings.

[1] The Right to Be Heard

The right to be heard is formulated quite broadly. While the detailed demands of natural justice turn on the proper construction of an arbitration agreement, the nature of the dispute and inferences properly drawn from arbitrators known to have special expertise, each party must be given a full opportunity to present its case. In the absence of express or implied provisions to the contrary, it generally requires that:

> each party is given an opportunity to understand, test and rebut its opponent's case; proper notice is given of hearings; and the parties and their advisers have the opportunity to be present throughout the hearings; and each party is given reasonable opportunity to present evidence and argument in support of its case,

52. Born (n. 4) 2440.
53. Blackaby et al. (n. 11) 401.
54. Model Law 2006, Art. 18.
55. UNCITRAL Arbitration Rules 2010, Art. 17(1); ICC Rules 2021, Art. 22(4); LCIA Rules 2020, Art. 14.1(i); ICDR Rules 2021, Art. 22(1).

test its opponent's case in cross-examination, and rebut adverse evidence and argument.[56]

What is reasonable, of course, depends on the facts and circumstances of each case. Procedural protections that give effect to the right to be heard in international arbitration include the following:[57]

(a) adequate notice of the proceedings, including notice of the major steps in arbitration;
(b) adequate notice of the claims, evidence and legal arguments of other parties to the arbitration;
(c) representation by counsel of the party's choice (except where specifically waived);
(d) adequate time to present a party's claims or defences, evidence and legal arguments, including, in most cases, at an oral evidentiary hearing in the presence of the arbitral tribunal;
(e) adequate time to prepare claims or defences, evidence and legal arguments, including responses to the claims or defences, evidence and legal arguments of other parties to the arbitration;
(f) an impartial and independent tribunal;
(g) a decision based on the evidence and legal arguments submitted by the parties, and not upon ex parte communications or the tribunal's independent factual investigations (except where specifically agreed to the contrary); and
(h) protection against 'surprise' decisions, not based upon factual or legal grounds that a party had no opportunity to address.

While the tribunal must ensure the parties' right to be heard, this does not mean that it should sacrifice all efficiency to accommodate unreasonable procedural demands by the parties.[58] The term 'full opportunity' does not mean that a party is entitled to present any case it pleases, any time it pleases, no matter how long the presentation should take.[59] For instance, the right to be heard is not violated if the tribunal declines to admit evidence that is irrelevant or to prove facts that have been already established by other means of evidence.[60] The right to be heard is also not intended to protect a party from its own failures or strategic choices made in the arbitration.[61] The following are also not considered essential for the right to be heard:[62]

56. *Trustees of Rotoaira Forest Trust v. Attorney-General* [1999] 2 NZLR 452 (Comm) 463.
57. Born (n. 4) 2343.
58. Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 551.
59. *Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No 1)* [2012] HKCA 200, [2012] 4 HKLRD 1, para. 95.
60. Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Nomos 2016) 207 and 220.
61. *Mango Boulevard Pty Ltd v. Mio Art Pty Ltd and another* [2018] QCA 39, para. 84.
62. Born (n. 4) 2344.

(a) a substantively correct decision, including a decision choosing and applying the correct substantive law;
(b) a reasoned award;
(c) arbitral procedures that resemble those of a party's home jurisdiction;
(d) disclosure or discovery;
(e) hearings open to the public;
(f) advance notice of the contents of the tribunal's decision and an opportunity to comment thereon;
(g) unlimited time to prepare or present a party's case;
(h) a verbatim transcript;
(i) a hearing in the physical presence of the tribunal and all witnesses; or
(j) financial assistance to ensure that a party has resources equivalent to those of a counterparty to present its case.

[2] The Right to Equal Treatment

The right to equality means that parties must be afforded an equal position in the arbitration generally.[63] The tribunal is expected to act impartially and fairly in ensuring that parties are treated equally. The right to equal treatment implies that 'the proceedings must be organized and conducted in such a way that each party has the same possibilities to present its case'.[64] Parties should be subject to the same procedural rules and afforded the same procedural rights and opportunities.[65] None of the parties may be given preferential treatment, favour or dispensation by virtue of its identity, nationality, or any other factor extraneous to the arbitration process.[66] Parties should be treated equally in factually similar situations while parties in factually different situations may be treated differently after taking all relevant circumstances into consideration.[67]

The determination of whether the right to equal treatment has been implicated requires a careful consideration of the particular context of the relevant treatment. Practically, one cannot expect identical treatment in all procedures. For instance, just because a tribunal conducts the arbitral hearing at a location closer in geographical distance to one party or conducts the arbitration in a language that is the official language of one party's home state (and not the other party) does not mean that the right to equal treatment has been implicated. The tribunal has to consider the arbitration agreement (which may have elements of inequality) and the circumstances of the parties' positions, claims and evidence within the arbitral process as a whole. In

63. Albert Marsman, *International Arbitration in the Netherlands: With a Commentary on the NAI and PCA Arbitration Rules* (Kluwer Law International 2021) para. 8-004.
64. Judgment of 25 July 2017 (Swiss Fed. Trib.), DFT 4A_80/2017, para. 3.1.1.
65. Girsberger and Voser (n. 60) 207 and 220.
66. Born (n. 4) 2337.
67. Michael Kramer, Guido E. Urbach and Reto M. Jenny, 'The Arbitrator and the Arbitration Procedure: Equal Treatment in Multi-Party Arbitration and the Specific Issue of Arbitrators' in Christian Klausegger et al. (eds), *Austrian Arbitration Yearbook 2009* (CH Beck, Stämpfli & Manz 2009) 151.

many situations, the challenge is to ensure that parties are treated in a 'like' manner despite being in an 'unlike' position by virtue of the differences in their claims, evidence and arguments.[68]

[D] Issues that Implicate the Right to Be Heard and the Right to Equal Treatment

Aside from fairness in substantive decisions, there must also be an emphasis on ensuring fairness in procedural decisions. As often said, justice must not only be done but also be seen to be done. When there is procedural inequality between the parties, perceptions of unfairness may arise. In serious cases, this may well impugn the substantive decision and render it liable to setting aside. There are a multitude of procedural decisions that could potentially implicate the right to be heard and the right to equal treatment which may lead to resulting challenges to the award's validity:[69]

(a) appointment of the arbitral tribunal;
(b) cost issues;
(c) order of deciding points at issue during the hearing;
(d) manner in which the parties will participate in hearing witnesses;
(e) handling of late submissions;
(f) appointment of experts and the participation of the parties in considering the expert reports; and
(g) scheduling of hearings, including the order in which the parties will present their arguments and evidence at the hearing.

For instance, issues of equal treatment may arise if one party was denied the right to counsel while its counterparty was not; if one party was only permitted five days to prepare its written submissions while the other party was permitted five weeks; or if one party was subject to a ten-page memorial limit while the counterparty was allowed to submit a fifty-page memorial.[70] This section will focus on some of the more common instances where the right to equal treatment or the right to be heard may be breached by the tribunal's conduct of the hearing.

[1] Time Allocation in the Hearing

Hearing time is a precious and scarce commodity in international arbitration. Parties normally wish to be afforded maximum time to present their case. Unequal hearing time may give a party the perception that it had less opportunity to be heard by the tribunal as compared to its counterparty. It is crucial therefore for the tribunal to carefully manage the time allocation in a hearing.

68. Born (n. 4) 2237-2338.
69. Kramer, Urbach, and Jenny (n. 67) 153.
70. Born (n. 4) 2337.

As a starting point, the tribunal will likely allocate equal time to both sides in the hearing. This widely used approach is sometimes called 'chess clock arbitration' or the 'Böckstiegel Method'.[71] Each side may allocate their time to opening statements, cross-examination or examination-in-chief of witnesses or oral arguments. Commonly, the tribunal (or its secretary) will monitor the time and give certain allowances for the other side's objections. This is intended to ensure equality of treatment between the parties. It has been observed that this method encourages parties to avoid duplication, selectively present material evidence, adopt surgical cross-examination and efficient document assembly, and emphasises the importance of written advocacy.[72] It has also been suggested that the following must be present for this method to be effective:[73]

(a) sufficient early familiarity with the case to make a serious assessment of the amount of hearing time the case warrants;
(b) consultation with the parties;
(c) notice to the parties of the purposes of the hearing;
(d) notice to the parties of time available to each side;
(e) freedom of parties to use time as they wish; and
(f) suppression of unnecessary disruption by counsel, witnesses and even the arbitrators.

However, this method is not universally applicable. In certain cases, one party may need to call many more witnesses than the other party, require more detailed factual proof in order to make out its case, or even have a larger number of claims to present. Some witnesses may require consecutive interpretation, and it may be necessary to deduct the time required for interpretation from the duration of hearing time.[74] Occasionally, witnesses may be difficult, evasive and even obstructive during cross-examination. Arguably, the principle of equal treatment in these circumstances may dictate that the tribunal gives additional time to the counterparty to manage such circumstances. Ultimately, the aim is not a purely mechanical equality of time but to ensure that parties have a reasonable and equal opportunity to present their case in the context of different circumstances as between the parties.[75]

The tribunal should also be proactive in controlling the proceedings to prevent any party from opportunistically using different ways to consume their counterparty's time such as encouraging witnesses to give lengthy testimony on irrelevant points, making repeated objections on trivial matters, and disputing minor translation differences.[76] The tribunal may need to remind counsel to manage time effectively and refrain from conduct that may disrupt the counterparty. On rare occasions, the president of the arbitral tribunal may also have to exert some control to prevent

71. *Id.*, 2443; Jan Paulsson, 'The Timely Arbitrator: Reflections on the Böckstiegel Method' (2006) 1 Arb Intl.
72. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 728.
73. Paulsson (n. 71) 26.
74. Gelinas (n. 16) 46.
75. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 730.
76. Born (n. 4) 2446.

excessive intervention from other members of the tribunal.[77] It would be useful to cater for additional time in advance so that these risks can be managed.

A sample 'chess clock' protocol which can be adapted is set out below:

1.1 Subject to any contrary direction by the Arbitral Tribunal, each Party shall be allocated an equal amount of time for the presentation of its case at the Main Evidential Hearing.
1.2 Unless otherwise directed by the Arbitral Tribunal, time shall be deducted from a Party's remaining time as a result of it:
  (a) making oral submissions (including opening and closing statements);
  (b) examining a witness (irrespective of who proposed the witness, but subject to adjustment upon application in the event of insistent unresponsiveness and translation delays);
  (c) making an objection which ultimately proves unjustified (thus, an unsuccessful objection is generally to be charged against the Party who made it, and a successful objection against the Party which resisted it);
  (d) arriving late; and
  (e) setting up displays while the Arbitral Tribunal is sitting.
1.3 Unless otherwise directed by the Arbitral Tribunal, time shall be deducted equally from all Parties' remaining time as a result of:
  (a) interventions by the Arbitral Tribunal lasting more than 10 minutes;
  (b) a procedural application;
  (c) caucuses between the Parties while the Arbitral Tribunal is sitting; and
  (d) time incurred through no fault of the Parties.
1.4 The Parties shall agree upon a daily record of time taken by each Party and advise that record on the next hearing day to the Administrative Secretary. Any disagreement shall be dealt with outside sitting hours wherever possible and referred to the Arbitral Tribunal only as a last resort. The Administrative Secretary will maintain a record of the time used by each Party and will advise the Parties and the Arbitral Tribunal at the conclusion of each day of the amount of time used by each Party on that day, as well as the remaining time for use by each Party in the Main Evidential Hearing.

[2] Hearing of Evidence

The tribunal's power to control the proceedings is broad. The Model Law states that the tribunal may conduct the arbitration in such manner as it considers appropriate including the power to determine the admissibility, relevance, materiality and weight of any evidence.[78] However, these broad powers are subject to the tribunal's duty to ensure the parties' right to be heard, equal treatment and observance of the rules of natural justice. This does not mean that it is always obliged to accede to all of the parties' requests to expound on or call witnesses for every issue that arises in the arbitration.[79] As regards the hearing of evidence, the IBA Rules provide that the tribunal 'may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial,

77. Waincymer, *Procedure and Evidence in International Arbitration* (n. 13) 732.
78. Model Law 2006, Art. 19(2).
79. Gelinas (n. 16) 37.

unreasonably burdensome, duplicative or otherwise covered by a reason for objection in Articles 9.2 or 9.3'.[80]

In exceptional cases, the tribunal may consider that oral evidence is unnecessary. In *Dalmia Dairy Industries Limited (India) v. National Bank of Pakistan*, an ICC arbitration conducted in England, the arbitrator refused to hear any oral evidence on the basis that the oral evidence was completely unnecessary since the dispute before him was exclusively of a legal nature and parties had ample opportunity to present and argue the case.[81] The award was unsuccessfully challenged, on the grounds of a breach of natural justice, before the English High Court and the Court of Appeal.[82] The court affirmed that whether the arbitrator ought to hear evidence depends on the particular circumstances. There was no absolute obligation on an arbitrator to hear oral evidence and especially whatever oral evidence a party wishes to adduce. This is unless the reference to arbitration requires the arbitrator to hear evidence in order to decide the dispute, in which case a refusal to examine witnesses for a party would be considered judicial misconduct which may warrant a setting aside of the award. However, if there is nothing to show that the arbitrator had exercised its discretion wrongly and where the arbitrator, in the exercise of prudent and wise discretion, declined to summon witnesses because the evidence was unnecessary, the award would be upheld.[83] It is critical to observe that this decision was made in the context that the Model Law did not apply, and Article 24 of the Model Law was not considered.

If the tribunal decides to hear oral evidence, it may refuse to hear witnesses on particular points without denying parties the right to be heard.[84] These cases often concern oral evidence that is lengthy, repetitive and irrelevant. The tribunal may consider that other admitted evidence has made clear particular points such that the additional oral testimony on those points may simply be repetitive.[85]

However, it is more dangerous if the tribunal refuses to hear one or more witnesses at all, sometimes known as 'witness gating', without very convincing reasons. The tribunal may take the view that the oral evidence of a particular witness is irrelevant or that the resources required to bring that witness forward may involve disproportionate cost to the value of the testimony.[86] However, witness gating may cause the award to be challenged based on grounds of natural justice, including the right to be heard and the right to equality. For instance, an issue of unequal treatment may arise when one party was restricted to offering testimony from only three witnesses while the counterparty was allowed to offer testimony from thirteen

80. IBA Rules 2020, Art. 8(3).
81. *Dalmia Dairy Industries Limited (India) v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA) 269-270.
82. *Ibid*.
83. *Ibid*.
84. Gelinas (n. 16) 38.
85. Judith Levine, 'Can Arbitrators Choose Who to Call as Witnesses (And What Can Be Done If They Don't Show Up)?' in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (International Council for Commercial Arbitration Congress Series No. 18, Kluwer Law International 2015) 336-337.
86. *Ibid*.

witnesses.[87] Most commentators take the view that it would only be in exceptional situations where a tribunal would refuse to hear a witness if a party requests for the appearance of the witness.[88]

The Court of Appeal, in *CBS v. CBP*, affirmed the setting aside of an arbitral award by the Singapore High Court in which the arbitrator had denied the entirety of witness evidence from one party to the arbitration and only allowed a hearing for oral submissions. The Singapore courts considered it a clear case of a serious breach of natural justice that the parties did not have the opportunity to be heard by the tribunal.[89] The arbitration was conducted under the Rules of the Singapore Chamber of Maritime Arbitration (3rd Edition, 2015) ('SCMA Rules').[90]

CBS, a bank, commenced arbitration against CBP, the buyer under a coal contract, for an outstanding sum under a bill of exchange drawn by the seller under the contract to the buyer.[91] CBS took the position that the dispute turned 'primarily on the contractual interpretation' of the contract and the arbitration should proceed on a documents-only basis, or alternatively, a hearing should only be held for oral submissions instead of the taking of oral evidence from witnesses.[92] CBP argued that an oral hearing was 'required and necessary' though without giving much detail.[93] The arbitrator directed that before ruling on whether the arbitration will be on a documents-only basis or whether a hearing ought to be held (and if so, in what form), the parties were to submit detailed written statements from each of the witnesses planned to be called.[94] CBP replied that the calling of witnesses was within its entitlement and did not submit the witness statements. The arbitrator stated that if CBP still did not submit its witness statements, it would be taken as having waived 'any right to submit witnesses in the event of an oral hearing'.[95] CBP replied to the arbitrator that the denial of witness examination was 'a violation of [the] principles of natural justice and also against the principles of [a] full and fair hearing'. The hearing would be a 'mere formality' and the arbitrator had prejudged the matter.[96] Eventually, the arbitrator decided to conduct the hearing via telephone and allowed CBS to make oral submissions. CBP did not appear at the hearing.[97] After the award was made in favour of CBS, CBP applied to set aside the award in the Singapore High Court and succeeded.[98]

The Singapore Court of Appeal considered the interpretation of Rule 28.1 of the SCMA Rules which reads: '[*u*]*nless* the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal shall hold a hearing for the

87. Born (n. 4) 2337.
88. Levine (n. 85) 337.
89. *CBS v. CBP* [2021] SGCA 4, paras 34 and 79.
90. *Id.*, para. 4.
91. *Id.*, paras 2-13.
92. *Id.*, para. 18.
93. *Id.*, para. 19.
94. *Id.*, paras 21-25.
95. *Id.*, paras 25-26.
96. *Id.*, para. 28.
97. *Id.*, para. 29.
98. *Id.*, paras. 32 and 34.

presentation of evidence by witnesses, including expert witnesses, *or* for oral submissions'.[99] The dispute was whether the word 'or' in the last part of Rule 28.1 should be read disjunctively such that the arbitrator could decide whether to hold a hearing for the presentation of evidence *or* only for oral submissions, which was what the arbitrator had done.[100] The court held that Rule 28.1 provided for only two situations where a hearing need not be held. First, where the parties have agreed to have a documents-only arbitration. Second, where the parties agree that no hearing shall be held (even for oral submissions). Outside of these two situations, the tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses.[101] The court held that the arbitrator had erred by proceeding on the mistaken premise that he was entitled to decide between holding a documents-only arbitration or an oral hearing only for submissions.[102] Accordingly, the arbitrator's denial of the entirety of witness evidence from CBP constituted a breach of natural justice and the award was set aside.[103]

Where relevance cannot be seen at first glance, the tribunal should at least afford counsel the opportunity to explain the potential relevance of the oral evidence offered before deciding whether or not to hear the witness. If the tribunal decides not to hear from a witness, it should be specific about the reasons why.[104] In practice, tribunals are likely to err on the side of caution and hear virtually all witnesses whom the parties wish to present.[105] Ultimately, the tribunal must be sensitive to balance giving effect to the parties' right to be heard and procedural efficiency.

[3] Witnesses

In relation to witnesses, the list of witnesses will generally have been confirmed by the parties and the tribunal prior to the hearing. It is the responsibility of the parties to ensure that the witnesses scheduled to be present turn up for the physical hearing on time and in the sequence arranged for. The counterparty and the tribunal may have prepared questions for the particular witness and the counterparty would have prepared for the hearing on that basis. As such, it is considered unfair for one of the parties to retract the attendance of one of its witnesses or to present an unannounced witness suddenly.[106] This could amount to unequal treatment. If a party decides not to produce a witness that has been announced, it is proper for the party to arrange for the witness' presence at the hearing so as to grant the counterparty the opportunity to question the witness if required.

In these cases, the tribunal has a measure of flexibility in dealing with such situations. It is open to the tribunal to draw adverse inferences against the party who

99. *Id.*, para. 52 (emphasis in original).
100. *Id.*, para. 34.
101. *Id.*, para. 56.
102. *Id.*, para. 76.
103. *Id.*, para. 79.
104. *Tempo Shain Corp. et al v. Bertek Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).
105. Levine (n. 85) 337.
106. Gelinas (n. 16) 36.

did not make a witness within its control available unless the tribunal is satisfied that there were valid reasons not to.[107] It has been suggested that the following requirements should be satisfied before an adverse inference is drawn:[108]

(a) the party seeking the adverse inference must produce all available evidence corroborating the inference sought;
(b) the requested evidence must be accessible to the counterparty;
(c) the inference sought must be reasonable, consistent with the facts in the record and logically related to the likely nature of the evidence withheld;
(d) the party seeking the adverse inference must produce prima facie evidence; and
(e) the counterparty must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.

The IBA Rules provide that if a witness whose appearance has been requested fails without a valid reason to appear at the hearing, the tribunal shall disregard any witness statement related to that hearing by that witness unless, in exceptional circumstances, the tribunal decides otherwise.[109] This helps to deter strategic behaviour by parties. Where it is appropriate to do so, the tribunal may also choose to give less weight to such witness statements.[110] This will depend on the sufficiency of the reasons provided by the party who was not able to produce its witness. Valid reasons could include sudden medical conditions or legal impediments.

Additionally, surprise tactics should be heavily discouraged. A witness that suddenly appears at the hearing should not be heard unless there were extraordinary reasons why the witness was not announced prior to the hearing. Similarly, new evidence will not usually be accepted during a hearing unless there are exceptional circumstances.[111] This is to prevent the counterparty from being taken by surprise. It would be unfair for the tribunal to hear such an unannounced witness without the counterparty's consent. If the tribunal decides to hear such a witness, it would at the very least be appropriate to consider if further evidence or submissions are necessary so that the counterparty has the chance to respond to the new witness or evidence. If any such conduct indicates that a party had failed to conduct itself in good faith, the tribunal may take such failure into account in its decision on the costs of the arbitration.[112]

107. IBA Rules 2020, Art. 9(7).
108. Jeremy K. Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence' (2006) 22 Arb Intl 549, 551. *See* Chapter 16 in this edition by Jeremy K. Sharpe entitled *Adverse Inferences*.
109. IBA Rules 2020, Art. 4(7).
110. UNCITRAL Notes on Organizing Arbitral Proceedings 2016, para. 124.
111. *Id.*, para. 133.
112. IBA Rules 2020, Art. 9(8).

[4] Decision-Making

In relation to the tribunal's decision-making after the hearing, it would be prudent to ensure that the building blocks of the tribunal's reasoning in the award arise from the parties' submissions. During the hearing, the tribunal should apply its mind to the necessity of calling for further submissions on important points which may affect the end result. If the tribunal makes an award based on a critical point which the tribunal has brought up on its own initiative without the parties having been heard on it, the tribunal effectively surprises parties and deprives them of their right to address full arguments on the case to be answered.[113] This stems from the fundamentally adversarial system of justice employed in arbitration where the function of the tribunal is to adjudicate on the issues presented by the parties.[114]

The Singapore High Court, in *JVL Agro Industries Ltd v. Agritrade International Pte Ltd*, set aside an arbitral award for breach of natural justice. The tribunal decided a contractual dispute on the basis of the collateral contract exception to the parol evidence rule despite that submission not being advanced by the winning party as part of its case. The court took the view that the reasoning by the majority of the tribunal had no nexus to the case advanced by the winning party and created surprise. The losing party was deprived of its right to present evidence and address submissions on the question of the collateral contract exception.[115] The court also set out principles relating to a party's right to have a reasonable opportunity to respond to the case made against it.[116] A tribunal may deny a party this opportunity if it either requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice or unreasonably curtails a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case.[117]

A party may also be denied a reasonable opportunity to present its case if the tribunal follows a chain of reasoning which has no nexus to the case advanced by the parties, unless the parties have been put on notice in some other way that they are expected to address that chain. There is the necessary nexus if the particular chain of reasoning: (i) arises from a party's express pleadings; (ii) is raised by reasonable implication by a party's pleadings; (iii) does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (iv) comprises links in a chain of reasoning which flows reasonably from the arguments actually advanced by either party or are related to those arguments.[118] Alternatively, there is the necessary nexus if a reasonable party to the arbitration could objectively have foreseen the

113. Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989) 312.
114. *Al-Medenni v. Mars UK Limited* [2005] EWCA Civ 1041, para. 12.
115. *JVL Agro Industries Ltd v. Agritrade International Pte Ltd* [2016] SGHC 126, [2016] 4 SLR 768, para. 215.
116. *Id.*, paras 163-180.
117. *Id.*, para. 147.
118. *Id.*, para. 159.

tribunal's chain of reasoning.[119] If the tribunal bases its decision on matters not submitted or argued before the tribunal, there are likely to be serious and sustainable challenges to the resulting award.[120]

§11.02 VIRTUAL HEARINGS AND EVIDENTIAL ISSUES

[A] The Rise of Virtual Hearings

In response to the disruptions caused by the COVID-19 pandemic, the use of virtual meetings and hearings has increased dramatically. Gary Born, Anneliese Day QC and Hafez Virjee conducted an empirical survey on virtual hearings ('Virtual Hearings Empirical Study') that ran from 10 June to 6 July 2020 with 201 respondents from 43 different jurisdictions. The survey demonstrated that the prevalence of fully virtual hearings in the second quarter of 2020 was significantly greater than at any time previously.[121] The Hong Kong International Arbitration Centre ('HKIAC') estimated that in April and May 2020, approximately 85% of all hearings were virtual, including a forty-day construction hearing that was conducted virtually.[122]

Arbitration is often touted as offering parties an efficient way of resolving disputes by being flexible and adaptable to their needs.[123] However, users have become frustrated as arbitration has become increasingly expensive and drawn out. Thus, virtual hearings come at a time where many users are happy to embrace technology in a bid to increase efficiency and lower costs. At the same time, others view virtual hearings as only a short-term expedient.[124] For instance, with regard to high-value arbitrations, some practitioners retain a preference for physical hearings. Nevertheless, the general sentiment arising out of the pandemic seems to be shifting in favour of virtual hearings.

Alongside the rise of virtual hearings, legal and practical concerns have arisen. In April 2020, arbitral institutions from around the world issued a Joint Statement on 'Arbitration and COVID-19' in which tribunals and parties were encouraged to mitigate the effects of any impediments while ensuring the fairness and efficiency of arbitral proceedings.[125] In line with this, several arbitral institutions issued guidelines on virtual hearings. This includes the ICC Guidance Note on Possible Measures Aimed at

119. *Id.*, para. 160.
120. *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28, [2007] 3 SLR(R) 86, para. 65.
121. Gary Born, Anneliese Day and Hafez Virjee, 'Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views' in Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 137.
122. Ernest Yang and Gitanjali Bajaj, *Asia Pacific Arbitration Virtual Hearings* (DLA Piper Publications 2020) 5.
123. Michael Ostrove et al., *Online Arbitration Hearings: A Review of Key Developments in Response to Covid-19* (DLA Piper Publications 2020) 9.
124. Jeffrey M. Waincymer, 'Online Arbitration' (2020) 9 Indian J Arb L 1, 2.
125. 'Arbitral Institutions Covid-19 Joint Statement' (*ICC* April 2020) https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf accessed 6 April 2021.

Mitigating the Effects of the COVID-19 Pandemic ('ICC Guidance Note'), the Seoul Protocol on Video Conferencing in International Arbitration ('Seoul Protocol'), Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 ('Delos Checklist'), the American Arbitration Association International Centre for Dispute Resolution ('AAA-ICDR') Virtual Hearing Guide for Arbitrators and Parties, the Vienna Protocol – A Practical Checklist for Remote Hearings ('Vienna Protocol') by the Vienna International Arbitral Centre ('VIAC'), the International Centre for Settlement of Investment Disputes ('ICSID') Guide to Online Hearings, the International Institute for Conflict Prevention and Resolution Annotated Model Procedural Order for Remote Video Arbitration Proceedings ('CPR Model Procedural Order'), the HKIAC Guidelines for Virtual Hearings, the SIAC Guide to Taking Your Arbitration Remote, the Chartered Institute of Arbitrators ('CIArb') Guidance Note on Remote Dispute Resolution Proceedings ('CIArb Guidance Note') and the Protocol on Virtual Hearings in Africa released by the Africa Arbitration Academy ('Protocol on Virtual Hearings in Africa'). These institutional notes offer detailed guidance on logistics, presentation of evidence, cybersecurity, and even include model procedural orders and checklists, in order to aid tribunals in conducting a virtual hearing fairly and efficiently.

[B] Is There a Right to a Physical Hearing?

In September 2020, the International Council for Commercial Arbitration launched a research project focusing on whether a right to a physical hearing exists in international arbitration ('ICCA Reports'). Among the seventy-seven New York Convention jurisdictions surveyed, none of the jurisdictions' *lex arbitri* contained an express provision setting out a right to a physical hearing, albeit a small group of jurisdictions such as Ecuador suggest that such a right can be inferred by way of interpretation.[126] Generally, however, such a right can in fact be *excluded* by looking at three main indicia, namely, the broad procedural discretion of the arbitral tribunal as to the modalities of the hearing, the possibility to order documents-only arbitrations, and provisions in the arbitration rules of institutions expressly allowing virtual hearings. In most of these jurisdictions, the arbitrators' procedural discretion is essentially limited by their duty to safeguard the parties' due process rights.[127] Interestingly, the laws regulating arbitration in the United Arab Emirates ('UAE') (including in Abu Dhabi Global Market) expressly assign to the arbitrators the discretion to hold virtual hearings.[128]

126. Giacomo R. Elgueta, James Hosking and Yasmine Lahlou, 'Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences' (*International Council for Commercial Arbitration*, 26 May 2021) www.arbitration-icca.org/right-physical-hearing-project-newly-released-reports-confirm-core-trends-and-divergences accessed 2 June 2021.
127. Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou, 'Right to a Physical Hearing Project: The Release of 22 New Reports Reveals Interesting Trends and Significant Convergences' (*International Council for Commercial Arbitration*, 8 February 2021) www.arbitration-icca.org/right-physical-hearing-project-release-22-new-reports-reveals-interesting-trends-and-significant accessed 6 April 2021.
128. Elgueta, Hosking and Lahlou, 'Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences' (n. 126).

Indeed, arbitral tribunals have a wide discretion to determine the procedure of the arbitration, subject to certain minimal standards of procedural fairness found in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') and the 2006 UNCITRAL Model Law. As discussed above, Article 18 of the Model Law provides that parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the Model Law further provide for annulment or non-recognition of an award if the party against whom the award is invoked was unable to present his case.

With regard to the decision to hold a virtual hearing, a tribunal should ideally obtain the parties' consent to avoid potential challenges to enforcement. According to the CIArb Guidance Note, a record of parties' affirmative agreement to use virtual proceedings should be made. The ICC Guidance Note states that if a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances, assess whether the award will be enforceable at law, and provide reasons for that determination. This includes the nature and length of the hearing, the complexity of the case and number of participants, whether there are reasons to proceed without delay, and whether rescheduling the hearing would entail unwarranted or excessive delays. According to the Delos Checklist, dialogue among the tribunal and the parties is key. Tribunals should decide each matter on the basis of its individual circumstances, taking into account the provisions of the dispute resolution agreement (e.g., time limits for pre-arbitral steps, fast-track arbitration), the specific characteristics of the case (such as a pending request for interim measures) and requirements at the seat of arbitration.[129]

In practice, this will require a balancing of two key considerations. On the one hand, due process requires a case-by-case fact-specific evaluation of whether the parties have an effective opportunity to present their case. This must be balanced against considerations of access to justice and the duty to decide the dispute without undue delay (especially in jurisdictions where Article 6 of the European Convention on Human Rights ('ECHR') is applicable).[130] According to the ICCA Reports, the tribunal may order a virtual hearing despite parties' agreement if respecting the parties' agreement would delay the conclusion of the arbitration beyond the statutory time limit (UAE) or violate the arbitrators' duty to conduct the proceedings without undue delay (Croatia, Iran and Qatar). Further possible justifications include the integrity of the arbitral process and the equal treatment of the parties (Venezuela), as well as consideration of principles of independence, impartiality, concentration, publicity, immediacy, and access to justice (Ecuador).[131]

According to the ICCA Reports, in many jurisdictions, holding a virtual hearing against the parties' agreement could lead to setting aside the award, but this ground is

129. Delos Dispute Resolution, 'Checklist on Holding Arbitration and Mediation Hearings in Times of Covid-19' (*Delos*, 20 March 2020) https://delosdr.org/checklist-on-holding-hearings-in-times-of-covid-19/ accessed 12 February 2022.
130. Elgueta, Hosking and Lahlou, 'Right to a Physical Hearing Project: The Release of 22 New Reports Reveals Interesting Trends and Significant Convergences' (n. 127).
131. Elgueta, Hosking and Lahlou, 'Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences' (n. 126).

often qualified by the further requirement that the violation of the parties' agreement must have had a material impact on the outcome of the case or caused substantial injustice.[132] In *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and Another*, the Singapore Court of Appeal found that the right to a full opportunity to present one's case is not an unlimited one. The parties' right to be heard is impliedly limited by considerations of reasonableness and fairness, especially in cases where the complaint is that the failure to grant some sort of 'procedural accommodation' to a party has adversely impacted that party's due process rights. The overarching enquiry is whether the proceedings were conducted in a manner which was fair. The court will examine whether the tribunal's conduct, in balancing both parties' competing interests, falls within the range of what a 'reasonable and fair-minded' tribunal in those circumstances might have done. The Court of Appeal further observed that the court should accord 'a margin of deference' to the tribunal in the exercise of its wide procedural discretion in the conduct of the arbitration.[133]

In July 2020, the Austrian Supreme Court (*Oberster Gerichtshof*, OGH) rendered a decision examining whether conducting an arbitration hearing by videoconference over the objection of a party may violate due process.[134] The Respondents in an arbitration seated in Vienna and administered by the VIAC had challenged the arbitral tribunal over its decision to conduct an evidentiary hearing virtually by videoconference. The OGH held that arbitrator challenges based on allegations of procedural irregularity can succeed under Austrian law only if the tribunal's conduct of the proceedings were to result in serious procedural violations or in permanent and significant disadvantages to a party.[135] The court found that holding a virtual hearing against the objection of a party does not meet this high threshold. Specifically, the OGH confirmed that virtual hearings are generally permissible under Austrian arbitration law, that the arbitral tribunal enjoys broad discretion as to the organisation and conduct of the proceedings, and that the alleged inadequacies of virtual hearings do not exist (or can be remedied). The OGH therefore rejected the Respondents' challenge.[136] Notably, the OGH then expressly confirmed that, as a general rule, virtual arbitration hearings are not only permissible if both parties agree but also over the objection of one of the parties. For this, the court relied on Article 6 of the ECHR. Article 6 ECHR provides for a party's entitlement to effective access to justice and to be heard.[137] As

132. *Ibid*.
133. *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and Another* [2020] SGCA 12, paras 97-104; Yvonne Mak, 'Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from 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 6 April 2021.
134. Case No. 18 ONc 3/20s.
135. 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 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/ accessed 6 April 2021.
136. *Ibid*.
137. *Ibid*.

such, balanced against the tribunal's duty to conduct hearings efficiently and expediently, proceeding with a virtual hearing will not necessarily constitute a breach of due process so long as parties are provided equal and ample opportunity to present their case.[138]

With increasing recognition of the need for virtual hearings, arbitral institutions have updated their rules to reflect this new normal. For instance, the LCIA Rules were updated to accommodate the use of virtual hearings, and also confirmed the primacy of electronic communication and facilitation of electronically signed awards.[139] Article 26 of the ICC Rules expressly states that the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or virtually by videoconference, telephone or other appropriate means of communication.

[C] Conduct of a Virtual Hearing

Parties and their counsel may be concerned that virtual hearings may lead to a lesser or compromised form of justice.[140] Hence, the manner in which the virtual hearing is conducted is extremely important. According to the CPR Model Procedural Order, obtaining an agreement by all parties that they are agreeable to conduct the hearing by a virtual process is ideal. At the same time, the Model Law also notes that such a stipulation will not bar a party from challenging an award based upon the manner in which a virtual proceeding was actually conducted. Thus, it is incumbent on the tribunal to monitor the proceedings to ensure that every party's right to present its case has not been jeopardised, and to act quickly to rectify any incident that may have been prejudicial to one or more parties.

[1] Virtual Hearing Protocol

Article 8(2) of the IBA Rules provides that the tribunal may, after consultation with the parties, order that the Evidential Hearing be conducted as a virtual hearing. It also recommends that the tribunal consults with the parties with a view to establishing a virtual hearing protocol to conduct the virtual hearing efficiently, fairly and, to the extent possible, without unintended interruptions.

A proactive and experienced arbitrator should therefore seek to implement a virtual hearing protocol, in consultation with the parties. Several arbitral institutions offer model procedural orders, and arbitrators are encouraged to adopt such protocols or guidelines for their own use. A virtual hearing protocol can cover matters such as:

138. Mak (n. 133).
139. LCIA, 'Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020)' (*London Court of International Arbitration*, 2020) www.lcia.org/lcia-rules-update-2020.aspx accessed 6 April 2021.
140. Jean-Pierre Douglas-Henry and Ben Sanderson, *Virtual Hearings: Empirical Evidence from Our Global Experience Virtual Hearings* (DLA Piper Publications 2020) 13.

the videoconferencing platform, the required hardware (screens, cameras, microphones, etc.), how documents are to be managed and shared on-screen, and by whom; witness examination procedure (sequence of witnesses, how to ensure that no one is in the room with a witness) and other practical issues (who should be muted or video off, only one person should speak at a time, etc.).[141] An agreement on hearing etiquette, schedule and procedure will facilitate the smooth progress of the virtual hearing. In the OGH case mentioned above, the tribunal issued a procedural order at the outset of the proceedings which stated that witness evidence could be taken virtually. This leaves little room for tactical objections by the parties later on.[142]

[2] Pre-hearing Preparations

Tribunals and parties should be well acquainted with the virtual hearing technology before the hearing. The CPR Model Procedural Order recommends parties to undergo an orientation programme with the company that provides the platform for the virtual hearing, and to also do a test session. The Seoul Protocol notes that as a general principle, testing of all videoconferencing equipment shall be conducted at least twice: once in advance of the hearing and once immediately prior to the videoconference itself. The Seoul Protocol also recommends that the venue shall have at least one on-call individual with adequate technical knowledge, and to ensure adequate backups in place.[143] Parties can also rely on institutional support. For instance, HKIAC is able to provide hearing managers to provide IT support and will also arrange a backup system in consultation with the parties.[144]

DLA Piper conducted a survey on virtual hearings in 2020, gathering empirical evidence from their lawyers and clients from around the world to examine how virtual hearings have been received ('DLA Piper Survey'). According to the survey, Zoom, BlueJeans and Microsoft Teams were the most popular platforms of choice. The choice of platform concerns not only useability but also access. For instance, certain video platforms are blocked in the Middle East and China.[145] Appendix A to the SIAC Guide to Taking Your Arbitration Remote provides guidance to users to choose the right virtual hearing platform (e.g., self-managed or institutionally managed platform). Other considerations include technical requirements, the maximum capacity of participants, technical features, cybersecurity capabilities and availability of technical support.

The protocol should also seek to balance the logistical hardships for all participants in a fair manner. Indeed, this is especially acute in an international arbitration where participants, such as the tribunal, parties, counsel and witnesses, may be

141. Nicholas Cousino, 'Concurrent Expert Evidence in a Post-Pandemic World' (*Ankura*, 25 February 2021) https://ankura.com/insights/concurrent-expert-evidence-in-a-post-pandemic-world/ accessed 6 April 2021.
142. Scherer et al. (n. 135).
143. Seoul Protocol, Arts 2.1 and 6.
144. HKIAC Guidelines for Virtual Hearings, Guidelines 6 and 7.
145. Douglas-Henry and Sanderson (n. 140) 10.

located in different time zones. An agreement on a hearing schedule managing the time zone differences between the tribunal, parties, counsel and witnesses will be critical to ensure that each party is given a reasonable opportunity to be heard. The Vienna Protocol recommends shorter hearing days to accommodate different time zones, and because virtual hearings often require increased focus from the participants, the protocol also recommends tribunals to include breaks to allow parties and counsel who are not at the same physical location to consult privately.[146] According to the DLA Piper Survey, a number of respondents noted that additional time had to be provided with virtual hearings as the proceedings could potentially be slower. For example, each participant had to find their way around the electronic bundles individually rather than centrally, questioning of witnesses had to be taken at a slower pace, and additional breaks had to be provided for.[147] A unique approach was undertaken by one tribunal to keep hearing timings on track. The tribunal requested that the parties each submit their video-recorded oral opening statements a couple of days in advance of the hearing.[148] This demonstrates that technology can not only help to align virtual hearings with physical hearings but also in some cases help to enhance the user experience.

[D] Cross-Examination of Witnesses and Experts

[1] Cross-Examination of Witnesses

One of the biggest concerns that users have in relation to virtual hearings is with regard to cross-examination. Cross-examination is seen as a vital opportunity to assess the credibility of a witness, inconsistencies in the evidence presented, as well as independence and impartiality.[149] In virtual proceedings, there may be greater difficulty in assessing body language and any technological hiccup may break the flow of questioning.[150] According to the Virtual Hearings Empirical Study, fully virtual hearings were consistently rated by respondents as being less good than in-person and semi-virtual hearings (a 'semi-virtual hearing' is if it uses one main venue, and one or several virtual venues),[151] whether this related to giving expert evidence, cross-examination momentum, defending a witness or expert, putting questions to witnesses and experts (as counsel or tribunal), hot-tubbing/conferencing of witnesses and experts, or the tribunal assessing the evidence of witnesses and experts.[152] The most recurring comment was the difficulty in reading non-verbal cues and body language

146. Vienna Protocol, Part III, Art. 1.
147. Douglas-Henry and Sanderson (n. 140) 10.
148. *Id.*, 11.
149. *Id.*, 12.
150. Waincymer, 'Online Arbitration' (n. 124) 20.
151. According to the survey, a 'semi-remote hearing' is if it uses one main venue, and one or several remote venues. It is 'fully remote' if all participants are in different locations, with no existing main hearing venue.
152. Born, Day and Virjee (n. 121) 146.

during virtual examinations and oral submissions, and the importance that respondents attached to this feedback and its immediacy.[153]

At the same time, a majority of respondents in the Virtual Hearings Empirical Study considered the tribunal's understanding of the case to be the same in all types of hearings. A majority of respondents considered fully virtual hearings and in-person hearings to be the same when it came to assessing the evidence of witnesses and experts, the effectiveness of advocacy, putting questions to counsel, and tribunals' understanding of the case.[154] Thus, while the study suggests witness examination procedure may be impacted for fully virtual hearings (from counsel's perspective), the majority of respondents did not believe the tribunal's understanding of the case to be affected. Moreover, using sophisticated video technology negates simplistic challenges about body language and visualisation of witness behaviour.[155] As tribunals and parties have more experience in virtual hearings, the growing pains of adopting new technology will likely be overcome. It would perhaps only be in the minority of cases where there would be actual loss to the arbitral process in not being able to explore fully the credibility of a witness.[156]

[2] Rethinking Witness Evidence Procedure

Toby Landau QC has observed that memory is a fragile, delicate, fallible, and unreliable mechanism.[157] If we start by acknowledging that witness testimony mainly serves as a vehicle through which to 'tell a story' or present the 'human element' of the case, as opposed to evidence to prove the truth, we might be better able to assess perceived challenges in virtual proceedings.[158] Accordingly, calls have been made to rethink the witness evidence procedure and to redefine the role and proper ambit of witness evidence.

First, the presumption of the supposed value of cross-examination is questionable. Psychological studies show us that we are more likely to be persuaded by the more confident liar than the individual with the best recollection. People generally do poorly on psychological tests directed at discerning whether a person is lying.[159] Moreover, a witness may also be speaking entirely truthfully, but be wrong about what he heard or saw. Therefore, even in the narrow category of situations where witness testimony might meaningfully impact fact-finding, it is frequently unreliable.[160]

The emphasis on cross-examination also reflects common law preferences. For common law advocates trained to test credibility in cross-examination, anything other

153. *Id.*, 149.
154. *Id.*, 146.
155. Waincymer, 'Online Arbitration' (n. 124) 23.
156. Douglas-Henry and Sanderson (n. 140) 12.
157. Wendy Miles, 'Remote Advocacy, Witness Preparation & Cross Examination: Practical Tips & Challenges', in Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 122.
158. *Id.*, 124.
159. Waincymer, 'Online Arbitration' (n. 124) 20.
160. Miles (n. 157) 128.

than the face-to-face theatre of lengthy cross-examinations may be undesirable.[161] However, for all the time taken, one might ask how often does this really change the outcome? Leggat J in *Gestmin SGPS SA v. Credit Suisse Securities (Europe Limited)* considered that in commercial cases, little reliance should be placed on witness recollections, and instead, factual findings and inferences should be drawn from documentary evidence and known or probable facts.[162] Thus, while witness statements might provide a useful repackaging of facts otherwise evidenced in the documents, it has been suggested that the more reliable evidence in commercial disputes will typically be contemporaneous documentary records.[163]

[3] Expert Witness

A closely related issue is the cross-examination of expert witnesses. According to the DLA Piper Survey, the lack of 'feel' for the hearing room – a loss of chemistry between counsel and the opposing side, the tribunal and the witnesses – was seen as a key drawback.[164] One respondent noted that cross-examination of the opposing party's expert proved considerably more difficult without the legal team and his party's witness at his side helping to identify weaknesses in the testimony. While instant messaging options provide a quick and easy method to communicate, it was felt that this fell short of the usual hearing experience.[165] Where there are more pauses, time delays, technological interference, or other opportunities for the expert to exploit, it could be more difficult for counsel to get to the point of each line of cross-examination or, conversely, for the expert to make their points clearly and effectively.[166]

Some experts have suggested that it may be more challenging to engage the members of the tribunal through a screen.[167] The immediacy of a response and also the observable body language of an expert may reveal something regarding their opinion about the case (or allow for a better assessment of witness credibility).[168] Respondents in the DLA Piper Survey noted that complex construction disputes, where detailed technical presentation and models may be required, would not be well suited for virtual hearings. It was felt that it would be crucially important to have a more direct connection with the tribunal during such presentations to ensure that the pacing was

161. Waincymer, 'Online Arbitration' (n. 124) 23.
162. *Id.*, 20; *Gestmin SGPS SA v. Credit Suisse (UK Limited) and Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) para. 22.
163. Miles (n. 157) 123.
164. Douglas-Henry and Sanderson (n. 140) 12.
165. *Id.*, 12.
166. David Stern, Neil Ashton and Daniel Langley, 'Remote Expert Evidence: Can It Work Effectively?' (*StoneTurn*, 12 May 2020) https://stoneturn.com/insight/remote-expert-evidence-can-it-work-effectively/ accessed 6 April 2021.
167. Margarita Papaioannou, 'Remote Hearings: Is This the Future? Thoughts from a Testifying Expert's Point of View' (*Blackrock Expert Services Group*, 18 June 2020).
168. Stern, Ashton and Langley (n. 166).

correct.[169] According to one forensic account expert, 'eye contact is so important when giving evidence on complex expert issues'.[170]

However, there are advantages to a virtual hearing. According to the Virtual Hearings Empirical Study, parties tend to wait and listen more, and tribunals have a better chance of asking questions in virtual hearings. Witnesses and experts are seemingly less on the spot, and in being more relaxed, are sometimes clearer in their testimony.[171] From a testifying expert's point of view, giving evidence virtually may offer a less intimidating environment. That may represent an advantage to the outcome of the hearing, with the testifying expert being less defensive to aggressive cross-examination techniques, and therefore better able to assist the tribunal with their evidence.[172] More confident and composed witnesses tend to provide more concise and useful evidence for the tribunal.[173]

[4] Hot-Tubbing

Hot-tubbing is a departure from the traditional sequential examination of expert evidence. The process of hot-tubbing provides that experts in the same disciplines are affirmed together and often sit in the witness box at the same time. The tribunal probes the evidence and allows a simultaneous comparison of the experts' respective evidence.[174] Hot-tubbing allows for the tribunal to take on a more proactive role in initiating questioning, and can help to distil expert evidence which can result in shorter and more efficient hearings.[175]

The use of hot-tubbing in a virtual environment is not without practical challenges. Tribunals may find it harder to assess the relative strengths of opposing experts' opinions once the physical proximity between them and the immediacy of each expert's response to the others' opinions is lost.[176] At the same time, whether in litigation or arbitration, much of the work performed by an expert witness is already undertaken virtually. While the lack of face-to-face interaction between the expert (and their team) and the others involved may take some getting used to, these issues are surmountable.[177] According to the Virtual Hearings Empirical Study, experts considered fully virtual hearings to provide a similar experience to in-person hearings with respect to hot-tubbing. However, semi-virtual hearings (where there is one main venue, and one or several virtual venues) were decidedly less satisfactory, which may be due to taking the vantage point of being the expert in the room during an expert conferencing session whereas the other expert is connected virtually.[178]

169. Douglas-Henry and Sanderson (n. 140) 14.
170. *Id.,* 12.
171. Born, Day and Virjee (n. 121) 148.
172. Papaioannou (n. 167).
173. Stern, Ashton and Langley (n. 166).
174. Cousino (n. 141).
175. Stern, Ashton and Langley (n. 166).
176. *Ibid.*
177. *Ibid.*
178. Born, Day and Virjee (n. 121) 148.

Although many protocols have now been devised on the subject of virtual hearings, they are often silent on how concurrent expert evidence can, and should, be heard in a virtual hearing, instead of assuming a sequential approach to the presenting of expert witness evidence.[179] It is timely for virtual hearing protocols to specifically address terms for virtual expert witness conferencing, and in particular, terms for hot-tubbing.[180] A tribunal should include provisions that address the specific challenges of a virtual hot tub, such as: the location from which each expert witness is to give their evidence; whether the oaths or affirmations given by the expert witnesses need to be expanded (e.g., to include the confirmations that: there are no other persons in the room with the expert; the experts are not in communication with anyone outside the virtual hearing; and the experts are only using clean copies of any statements or reports); specifying the use of an electronic document repository and/or separate display screens for viewing documents during the conference; setting out an agreed running order for witnesses' examination by the tribunal or counsel; making it clear that the tribunal or counsel may intervene during expert witness presentations, counsel's examination of the witnesses or witness discussions; and setting out how any tribunal or counsel interventions or interruptions should be signalled.[181] The above considerations mean that tribunals will need to be more proactive in order to ensure that the evidence gathered is clear and tested appropriately.[182]

Interestingly, hot-tubbing of expert witnesses does not appear to be used as widely in international construction arbitrations as some might expect. The use of hot-tubbing in construction arbitrations often only comes at the behest of the arbitral tribunal, rather than the parties or their counsel. This may reflect the perceived disadvantages of hot-tubbing, such as a sense of loss of control to the extent the examination of the experts is led by the tribunal. Some practitioners have criticised hot-tubbing for letting very poor experts off the hook without a searching cross-examination. In addition, some experts have a more dominant personality than others, such that the other expert(s) fails to be effective in presenting their opinions. There are also concerns that hot-tubbing may create a setting that leads experts to dig in and entrench their positions when the expert might fear losing credibility in front of clients, the opposing expert or the tribunal. Although the use of hot-tubbing would be expected to reduce a hearing's duration, and therefore its cost, it has been said that both counsel and experts require more preparation time. The existence of such barriers to the use of hot-tubbing puts into question what impact the move towards virtual hearings will have on its future use.[183] It may be argued that remoteness may serve to remedy some of the more common complaints around hot-tubbing, such as that it is more of a test of personality than opinion, whereby experts with more overbearing personalities are likely to be perceived as having performed better than their counterparts.[184]

179. Cousino (n. 141).
180. *Ibid*.
181. *Ibid*.
182. Stern, Ashton and Langley (n. 166).
183. Cousino (n. 141).
184. Stern, Ashton and Langley (n. 166).

[5] Witness Coaching

In a virtual setting, what is to prevent a witness or expert from having access to material that the opposing party/expert is unable to see or to receive and exchange texts or instant messages with team members listening in to assist with the process of giving evidence? It will also be more difficult to enforce any direction from the tribunal that the experts should not discuss their evidence with anyone during breaks.[185]

To ameliorate such issues, several institutional protocols have suggested countermeasures. For instance, the Seoul Protocol states that the witness shall give his/her evidence sitting at an empty desk or standing at a lectern, and the witness' face shall be clearly visible.[186] Parties can also arrange for a 360-degree viewing of the room by video at the beginning of each session, or at any time at the request of the tribunal, to ensure the integrity of the room, and/or for the witness or expert to undertake an oath, declaration, or affirmation. The protocol can also prescribe other details to ensure uniformity, such as ensuring that all witnesses and counsel are at an optimal distance from the screen, and the type of background. HKIAC suggests that a hearing invigilator can also be arranged to attend at the same premises as the witness or expert, to ensure the integrity of the premises (i.e., that there is no person or recording-device present that was not approved or agreed).[187]

[E] Opportunity to Rethink Formulaic Practices

Although arbitration is intended to be a formal yet flexible process, it has been observed that there is an increasingly rigid approach to arbitration procedures. Virtual proceedings herald an opportunity for a different approach to arbitration and advocacy.[188] Instead of searching for ways to emulate our pre-COVID-19 practices in a virtual environment, it is an opportune time to rethink existing practices and adapt them for the better.[189]

[1] Fairness Versus Efficiency

International arbitration has become a process that focuses heavily on the hearing, as an opportunity for a party to present its case and to seek to discredit the factual and expert evidence adduced by the opposing party, a process which leans heavily on common law influences. Alternatives have been proposed (most notably, the Prague Rules) which seek to enhance procedural efficiency and reduce costs by adopting a more-streamlined, civil law approach to evidence.[190] A disputes partner from Amsterdam noted that in the Dutch courts, like in other civil law jurisdictions, hearings tend

185. *Ibid.*
186. Seoul Protocol, Art. 1.3.
187. HKIAC Guidelines for Virtual Hearings, Guideline 11(a).
188. Miles (n. 157) 133.
189. *Id.*, 135.
190. Ostrove et al. (n. 123) 8.

to be much shorter and far less theatrical as witnesses play a much smaller role than in England or the United States. As such, civil law lawyers may find the transition to virtual hearings easier than their common law counterparts.[191]

The switch to a greater reliance on technology because of the global pandemic should be seen as an opportunity to re-evaluate existing practices. While there is a need to preserve procedural fairness, there is also a competing need for efficiency. Virtual hearings can potentially be a real driver for costs and efficiency in dispute resolution in that travel and accommodation costs can be greatly reduced, and the coordination of tribunal members' diaries will be easier by taking travelling out of the equation. Reducing travel and the increased use of electronic bundles also have a positive environmental impact.[192]

Crucially, the use of virtual hearings can help to promote shorter and more focused hearings, which will help drive time- and cost-efficiencies sought by clients.[193] The growth curve on volume of material submitted in arbitration seems to be steadily increasing, whereas the capacity of the tribunal to absorb material remains constant.[194] Tribunals should also take a more active role in the examination of witnesses, focusing on the areas of evidence that they would most like to be clarified. The time has come to rethink the importance and value of lengthy witness testimony in a hearing, lengthy submissions, countless documentary evidence, or even a hearing at all, as perhaps a documents-only approach could suffice.

Lawyers will also need to adapt their advocacy skills to suit the online forum. Long opening and closing submissions may need to be rethought, and technology should be harnessed to make presentations more effective. Electronic presentations and graphics are thus likely to become increasingly valuable tools for communicating effectively via a screen.[195]

[2] Benefits of Virtual Hearings

The debate on virtual hearings should not be fixated on replicating existing practices. Digitisation should drive us to redesign dispute resolution.[196] If we focus solely on what aspects may be lost in virtual hearings, we are missing out on what is better about virtual hearings. Virtual hearings mean that more clients are able to 'attend' hearings and observe counsels in action. Anecdotally, in-house counsels have remarked that they are far more likely to attend hearings now that they can do so from their desktop than in the past. That in turn has benefits for quality control and cost control for the client.

In an ICC hearing, respondents noted that the virtual hearing created a better client experience. In a large hearing room, clients (who often sit behind counsel) can

191. Douglas-Henry and Sanderson (n. 140) 11.
192. Papaioannou (n. 167).
193. Douglas-Henry and Sanderson (n. 140) 13.
194. Miles (n. 157) 134.
195. Ostrove et al. (n. 123) 9.
196. Douglas-Henry and Sanderson (n. 140) 14.

feel a little disconnected from the proceedings and do not have a clear view of all the advocates, the tribunal members and their commercial counterparts. The feedback from the clients was that they felt 'much more connected with the proceedings', as all participants were on an equal footing and had an identical experience of the virtual hearing room.[197] DLA Piper's global arbitration team reports how a two-day–in-person ICC arbitration hearing in Singapore was moved at short notice to a virtual platform with some fifty separate connections. Respondents were very impressed by the tribunal's mastery of the technology and the transition was seamless as a result of various test calls being conducted in advance.[198]

Technology can optimise the hearing room experience. Using documents in screen share or a shared platform is a terrific way to keep the attention of the tribunal during submissions. A shared platform has the additional advantage that the tribunal members can mark up the documents themselves.[199] Separate cameras or split screens may be utilised such that key documents are considered at the same time that witnesses are cross-examined about them.[200] Written submissions might include more dynamic content, such as video links or interactive demonstratives, to enhance those reports and bring them more to life before the hearing.[201] Technology can enhance the user experience with respect to simultaneous translation. Zoom allows the host to assign certain participants the role of 'interpreter' and the remaining participants can then select their preferred audio channel. The Permanent Court of Arbitration is reported to have used this system successfully on a number of occasions.[202]

According to the Virtual Hearings Empirical Study, one leading institution noted that virtual hearings seem to push tribunals to put more effort into managing the hearing and parties to be more respectful of the organisation of the hearing.[203] For higher-value complex arbitrations, parties typically work back from the tribunal members' calendars to see the earliest time that such a hearing is possible, and then set stages accordingly. With virtual hearings, parties can choose to conduct proceedings differently, and hearings can be broken into separate parts. This may have added benefits, for example, separating out fact witnesses and then giving experts the time to consider their testimony before giving evidence.[204]

Virtual hearings mean that parties are not forced to congregate in one place, and timelines become more flexible. There is greater geographic flexibility in appointments as arbitrators no longer need to be selected from a place close to the legal seat.[205] The increased demand for technical skills may also create new opportunities for tech-savvy

197. *Id.*, 14.
198. *Id.*, 7.
199. Miles (n. 157) 133.
200. Waincymer, 'Online Arbitration' (n. 124) 21.
201. Miles (n. 157) 132.
202. Douglas-Henry and Sanderson (n. 140) 12.
203. Born, Day and Virjee (n. 121) 148.
204. Waincymer, 'Online Arbitration' (n. 124) 12.
205. Catherine Rogers and Fahira Brodlija, 'Arbitrator Appointments in the Age of COVID-19' in Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) 58.

or younger arbitrators to receive more appointments, especially in small-claim arbitrations.[206] At the same time, well-established arbitrators could utilise the flexibility offered by virtual hearings to accept significantly more appointments (the so-called twenty-four-hour arbitrator problem).[207]

[3] Challenges of Virtual Hearings

While virtual hearings can bring about increased efficiency and lowered costs, there are also unique challenges – the first being access to technology. A party may feel prejudiced because of a disparity in resources. To ameliorate this, arbitration centres have invested in facilities and there are also specialised hearing centres. For instance, the Arbitration Place, the International Dispute Resolution Centre, and Maxwell Chambers have joined forces to form the International Arbitration Centre Alliance to offer integrated services for virtual hearings. According to the Protocol on Virtual Hearings in Africa, where any of the parties do not have access to the technology to be used for virtual hearings, parties may solicit arbitral institutions or other centres in Africa that can offer their venues or services.[208] Further, the cost savings from not having to travel for a hearing also help to bridge the resource gap.

In any case, even in physical hearings, parties often have different quality of counsel, professional training, and proficiency in the language of the arbitral proceeding. It will likely have to be an extreme case of technological inadequacy, where one could say that the treatment is materially unequal in a due process sense.[209] Nevertheless, tribunals should make ongoing assessments on the implications of any technical difficulties and overall circumstances of both parties and be prepared to adjourn a hearing if the right to be heard is indeed being detracted from.[210]

Another concern of virtual hearings is its underlying security risks. The ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration ('ICCA Protocol'), the IBA Cybersecurity Guidelines and the ICCA-IBA Roadmap to Data Protection in International Arbitration stress the importance of having a cybersecurity protocol and for parties to be mindful of their data protection obligations. The Protocol on Virtual Hearings in Africa provides that parties and tribunals should abide by the minimum cybersecurity standards detailed under Annex I of the protocol, including network security, audio, and video encryption, and to also be guided by the ICCA Protocol. The ICCA Protocol provides guidelines on determining reasonable cybersecurity measures. Principle 6 states that in determining which specific information security measures are reasonable for a particular arbitration, the parties and the tribunal should consider *inter alia* the risk profile of the arbitration; the existing information security practices,

206. *Ibid*.
207. Maria Fanou and Kiran N. Gore, '2020 in Review: The Year of Virtual Hearings' (*Kluwer Arbitration Blog*, 2 February 2021) http://arbitrationblog.kluwerarbitration.com/2021/02/02/2020-in-review-the-year-of-virtual-hearings/ accessed 6 April 2021.
208. Protocol on Virtual Hearings in Africa, Art. 2.1.6.
209. Waincymer, 'Online Arbitration' (n. 124) 8.
210. *Ibid*.

infrastructure, and capabilities of the parties, arbitrators, and any administering institution; the burden, costs, and the relative resources of the parties, arbitrators, and any administering institution; proportionality relative to the size, value, and risk profile of the dispute; and the efficiency of the arbitral process.

In their Guidelines for Virtual Hearings, the HKIAC notes that it is of critical importance to ensure the confidentiality and security of virtual hearings, particularly when using cloud-based platforms.[211] The Seoul Protocol similarly notes that cross-border connections should be adequately safeguarded so as to prevent unlawful interception by third parties, for example, by using IP-to-IP encryption.[212] The AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom provides recommended Zoom security settings. Institutional protocols also remind parties to have a plan in the event of a security breach. For instance, the CPR Model Procedural Order recommends that the tribunal should devise a notification plan wherein parties should promptly notify the tribunal of any security incident.[213]

The security standards equally apply to file sharing. The SIAC Guide to Taking Your Arbitration Remote notes that the use of platforms, and the storage, hosting and exchange of arbitration documents and data through a third party (for instance, through a document management services provider) may create cybersecurity risks. It will be useful to implement a data protection/data retention protocol, particularly in cases involving proprietary information or trade secrets.[214] Recognising the importance of having a secure file sharing platform, the Stockholm Chamber of Commerce ('SCC') has invested extensively in such a platform. The SCC Platform ensures secure, digital information-sharing in arbitration proceedings. All files are kept in cloud-based storage in high-security facilities with separate backup facilities. All data is encrypted using military-grade encryption and all files are scanned for malware and viruses when uploaded.[215]

Finally, most of the institutional guidelines, including the Seoul Protocol and the CPR Model Procedural Order, prohibit participants from recording any part of the proceeding without the authorisation of the tribunal, including taking screenshots. The Seoul Protocol recommends that no recordings shall be taken without leave of the tribunal, and any recordings of the videoconference shall be circulated to the tribunal and the parties within twenty-four hours of the end of the videoconference.[216] The CPR Model Procedural Order also states that if a recording has been authorised, the tribunal shall determine in consultation with the parties whether the stenographic record, if created, shall be the sole official record of the proceeding.[217]

211. HKIAC Guidelines for Virtual Hearings, Guideline 5.
212. Seoul Protocol, Art. 2.1(c).
213. The CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, s. C(4).
214. SIAC Guide to Taking Your Arbitration Remote, Issue 16.
215. Arbitration Institute of the SCC, 'Security on the Platform' (*SCC Institute*, 2020) https://sccinstitute.com/scc-platform/security/ accessed 6 April 2021.
216. Seoul Protocol, Art. 8.2.
217. The CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, s. C(8).

[F] Future of Virtual Hearings

Virtual proceedings herald an opportunity for a different approach to arbitration and advocacy. The harnessing of technology has arguably revitalised formulaic arbitration procedures, and if harnessed well, can create an elevated experience for users while maintaining a balance between fairness and efficiency.[218]

While there are challenges, given the multitude of benefits, virtual hearings are likely to become commonplace in international dispute resolution even in the post-pandemic future. A respondent in the DLA Piper Survey commented that 'the COVID-19 experience has simply accelerated the reality we all knew was coming'.[219] Similarly, according to the Virtual Hearings Empirical Study, those with experience of virtual hearings reported a greater willingness to propose them in the future. In particular, smaller value cases or cases with fewer witnesses and experts are more likely to be conducted as fully or semi-virtual hearings given the benefits that can be achieved in terms of time and cost.[220]

Finally, a hybrid approach may also be adopted (i.e., a combination of physical and virtual hearings).[221] For instance, some matters could be dealt with documents-only, and online hearings retained for witness examination and expert witness conferencing, with only necessary questions posed to counsel.[222] Alternatively, a semi-virtual hearing can be adopted, where only lead advocates attend the hearing in person.[223] Ultimately, if virtual hearings can deliver on the promise of time- and cost-efficiencies, while ensuring that parties are given adequate opportunity to present their case, the future of online hearings as the new normal may be secured.[224]

218. Douglas-Henry and Sanderson (n. 140) 13.
219. *Id.*, 7.
220. Born, Day and Virjee (n. 121) 138 and 150.
221. Ostrove et al. (n. 123) 10.
222. Waincymer, 'Online Arbitration' (n. 124) 12.
223. Douglas-Henry and Sanderson (n. 140) 7.
224. Ostrove et al. (n. 123) 10.