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Will Virtual Hearings Remain in Post-pandemic International Arbitration?

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Abstract
The pandemic has catalysed to hasten the wider use of virtual hearings in international arbitration. However, the promotion of virtual hearings in international commercial dispute resolution was more complex than commonly thought due to the highlighted concerns of cybersecurity and breach of confidentiality in arbitration. The worries against the wide use of virtual hearings cannot stand because technological innovations can largely improve and solve this. However, virtual arbitration hearings may not be common post-COVID times. Technology shapes how people behave, interact, grow, and develop in their relationships with others and wider communities. Yet greater immersion in the digital world undoubtedly creates new challenges and can adversely affect human-to-human interactions. There is very little scientific study on the psychological impacts of virtual hearings on arbitrators,witnesses and counsels. It is too early to assess its effectiveness from the user's perspective until the much-needed scientific data is released. Virtual hearings are unlikely to replace in-person ones necessary for more complex and high-value disputes requiring greater interaction and personal connection. Strategically, international arbitration is a private initiative-orientated, flexible, and market-driven dispute resolution mechanism. The parties are best positioned to choose the hearing format after balancing off.

Keywords Virtual hearing · International arbitration · Cybersecurity · Confidentiality · Psychological impact · Technology

1 Introduction

The value of digitalisation has been on full display during the pandemic control efforts; for example, the Internet of Things (IoT) provides a platform that facilitates making more informed and data-driven decisions through optimised business

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models; and artificial intelligence (AI) helps analyse data, including clinical studies, medical records and genetic information much faster than human beings to come to a diagnosis. It is fair to say that the COVID-19 pandemic has accelerated the process of digitalisation. Viewed from the UN Sustainable Development Goals (SDGs) perspective, digital revolutions—such as improving governance capacity and wide application of remote work—are now essential for achieving sustainable development via lower production costs, improved resource efficiencies, and reduced emissions. The pandemic has catalysed to hasten the wider use of virtual hearings in international arbitration. However, the promotion of virtual hearings in international commercial dispute resolution was more complex than commonly thought due to the highlighted concerns of cybersecurity and breach of confidentiality in arbitration. This article addresses these concerns from personal experiences as an arbitrator and a law expert witness during the COVID-19 pandemic. Moreover, it attempts to identify the trend of remote hearing in Post-pandemic International Arbitration.

Soon after the Covid pandemic broke out, the near-universal adoption of remote hearings became a new normal in international arbitration.[1] This can be a more efficient and cost-effective way to resolve disputes and to clear the backlog. Virtual hearings eliminate the need for travel and accommodation expenses for participants, including arbitrators, parties, witnesses, and legal representatives, and this reduces overall costs associated with conducting arbitration proceedings.[2] Virtual hearings can be scheduled and conducted more efficiently compared to in-person hearings.[3] Participants can attend from different locations, avoiding the need for travel time. Despite the initial reluctance,[4] most leading arbitration institutions have introduced new virtual hearing guidelines or protocols to facilitate virtual arbitration.[5] This author has personally experienced a number of virtual hearings in commercial arbitrations in China, Hong Kong and Singapore in the capacity of a presiding arbitrator, a party-appointed arbitrator and a law expert. In this article, drawing on user experiences using insights from my own experiences as an arbitrator and an expert

[1] Born Gary, Day Anneliese, and Virjee Hafez. 2020. Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views, in International Arbitration and the COVID-19 Revolution Ch. 7 Alphen aan den Rijn,Wolters Kluwer.

[2] Scherer Maxi, 2020 Remote Hearings in International Arbitration: An Analytical Framework. *Journal of International Arbitration* 37 (4): 1–24.

[3] Goh Allison. 2021.Digital Readiness Index for Arbitration Institutions: Challenges and Implications for Dispute Resolution Under the Belt and Road Initiative.*Journal of International Arbitration* 38(2): 253–290.

[4] Schmitz Amy. 2021. Arbitration in the Age of Covid: Examining Arbitration's Move Online. *Cardozo Journal of Conflict Resolution* 22 (2): 245–292.

[5] For exmaple, The American Arbitration Association International Centre for Dispute Resolution (AAA-ICDR) created a 'COVID-19 Resource Center' on its website, which includes a 'Virtual Hearing Guide for.

Arbitrators and Parties'; the Chartered Institute of Arbitrators published a 'Guidance Note on Remote Dispute Resolution Proceedings'; the Hong Kong International Arbitration Centre (HKIAC), published 'HKIAC Guidelines for Virtual Hearings'; and the International Chamber of Commerce (ICC), issued a 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic; the International Centre for Settlement of Investment Disputes (ICSID) published a 'Brief Guide to Online Hearings' on 24 March 2020.

witness, I argue that the conventional worries against the wide use of virtual hearings cannot stand because technological innovations can largely improve and solve this. I also argue that virtual arbitration hearings may not be common post-COVID times. Technology shapes how people behave, interact, grow, and develop in their relationships with others and wider communities. At its best, technology allows people to bridge gaps, improve communication and enhance the efficiency of complex legal tasks. Yet greater immersion in the digital world undoubtedly creates new challenges and can adversely affect human-to-human interactions. One prime example is the tangible effect of building professional connections among the members of the arbitration community through virtual hearings.[6] The third argument in this article is that in the post-COVID era, remote hearings are likely to gain ground for certain types of arbitration hearings but not for all. Specifically, remote hearings are fit for purpose for a lower stake (amount in disputes), simpler cases (single-issue disputes) with sufficient documentation, and expedited arbitrations. In contrast, in-person and partial-remote hearings will still be preferred for larger value and multi-party disputes involving many expert witnesses. Parties and the Tribunal should consider the type of dispute, location of parties and counsel, location of expert witnesses, time zone differences, applicable laws, and costs and time involved.

In what follows, this article first investigates whether there is a right to a physical hearing in international arbitration. Examining soft international law, arbitration rules and domestic procedure laws, such as Singapore and China, indicates that there is no absolute right to a physical hearing in international arbitration. Second, it assesses the competitive strength of the advantages and disadvantages of virtual hearings from an arbitrator's perspective. Addressing cybersecurity concerns, confidentiality breaches and due process challenges, this article maintains that all these challenges can be overcome with careful planning, such as using case management conferences and following certain protocols. Third, the witness coaching and the lack of demeanour are discussed in detail regarding Lord Leggatt's insightful observations. Finally, this article concludes that it is sensible to continue to use or normalised the remote hearing subject to the party's need and individual circumstances of each case, for example, arbitration under the expedited procedure or arbitration associated with two parties only with sufficient contemporaneous documentation and amenable to mediation or settlements. For complex and multi-party arbitrations involving extensive cross-examination of expert witnesses and language interpretations, the party autonomy should be given precedence over the tribunal's discretion, given the nature of international arbitrations, i.e., a market-driven and party-initiated dispute resolution.

[6] Schiersing Niels & Robbins Tim. 2022. Digital Hearings-The Arbitrator's Perspective. in Mika Savola (ed al) *Digital Hearings: Civil Procedure and Arbitration*, 90, Norstedts Juridik.

2 Is There a Right to a Physical Hearing in International Arbitration?

The use of virtual hearings in international arbitration is of recent vintage. Conducting a virtual hearing was carried out under limited and exceptional circumstances. The COVID pandemic is a game changer by turning virtual hearings into a new normal in arbitral practice. At the heart of this transformation is whether there is an absolute right to a physical hearing in international arbitration. The virtual hearing will not be viable despite its perceived advantages if the answer is yes. This is because conducting virtual hearings violating an absolute right held by a party would not survive the judicial review when the award is sought to be enforced.

Some parties have argued that there is a right to a physical hearing and opposed a virtual hearing on that basis. With scrutiny, there is no absolute right to a physical hearing in the leading international soft law, such as the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law")[7] and the International Bar Association Rules on the Taking of Evidence in International Arbitration (the "IBA Rules of Evidence").[8] Instead, international arbitration is a flexible and consensual process, and the parties can agree on the procedures governing their arbitration. This includes whether a physical hearing will occur and when and where it will occur. Under the UNCITRAL Model Law, which many countries have adopted as their domestic arbitration law, parties are generally entitled to a hearing. Article 24 (1), with the heading of hearings and written proceedings, clearly states that.

> (1) Subject 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.

However, the law does not specify whether this hearing must be physical or virtual. In other words, it would be preposterous to interpret the notion of "oral hearing" as "physical hearing" only. This means that the parties are free to agree on the format of the oral hearing.

The discretion exercised by the tribunal on whether to conduct the hearing physically or virtually was further supported by Article 19 of the UNCITRAL Model Law, which I reproduce below:

> *Article 19. Determination of rules of procedure*
> *(1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

[7] The original version was introduced in 1985, amended in 2006.
[8] The 2020 version.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Here, the Model Law confers on the tribunal a wide discretion and power on the manner of procedure absent a parties' agreement. This is to say, if there is no consensus between the parties to conduct the hearing virtually, the tribunal is in a position to decide as it thinks fit and appropriate, taking into account the relevant factors.

Nonetheless, Article 18 stipulates that "*the parties shall be treated with equality, and each party shall be given a full opportunity of presenting his case*."[9] It would be far-fetched to argue that the parties would not be equally able to present his case in the format of a virtual hearing. Therefore, one cannot conclude that there is an absolute right to a physical hearing under the UNCITRAL Model Law.

The 2020 version of the IBA Rules expressly recognises the increasing use of technology in international arbitration and guides the conduct of virtual hearings. The IBA Rules of Evidence apply to all forms of evidence-taking, including witness testimony, expert reports, and documentary evidence. The IBA Rules of Evidence state that the tribunal has the discretion to determine how the hearing will be conducted, including the use of technology. The tribunal should consult with the parties on using virtual technology and the hearing format. Article 8 (2) of the IBA Rules of Evidence provides.

At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address:
(a) the technology to be used;
(b) advance testing of the technology or training in use of the technology;
(c) the starting and ending times considering, in particular, the time zones in which participants will be located;
(d) how Documents may be placed before awitness or the Arbitral Tribunal; and
(e) measures to ensure that witnesses giving oral testimony.[10]

In summary, under the IBA Rules of Evidence, the decision to hold a remote or in-person hearing is ultimately up to the tribunal, considering the parties' preferences and the case's specific circumstances. Again, there is no absolute right to a physical hearing.

The party autonomy principle has been highlighted in the above influential soft law. In the context of party autonomy, virtual hearings are consistent with the

[9] Article 18 of the UNCITRAL Model Law.
[10] Article 8 (2) of the IBA Rules of Evidence.

principle that parties are free to agree on the procedures governing their arbitration. This includes the hearing format, which can be physical, virtual, or combined. The parties may also agree on the technology for the virtual hearing, such as video conferencing or other online platforms. The party autonomy principle is recognised in most national arbitration laws and the rules of leading international arbitral institutions. The International Council for Commercial Arbitration has recently published a series of reports that, in the 78 counties examined, "none of the surveyed jurisdictions' laws governing arbitration proceedings contains an express provision granting parties to an arbitration the right to a physical hearing".[11] For institutional rules, the ICC, the LCIA, and the SCC's most recent Rules all provide that the parties may agree on the hearing format, and the tribunal can determine the hearing format if there is no agreement on conducting a virtual hearing in part or fully.[12]

It is worth mentioning the Singaporean and Chinese positions in this regard. Would the courts in Singapore and China set aside an arbitral award if the tribunal decided to conduct virtual hearings without the parties' agreement? A party can challenge an award where it was "unable to present his case,"[13] Further, Sect. 24(b) of the Singapore International Arbitration Act provides that an arbitral award may be set aside if "*a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced*".[14] The Singapore position is best illustrated in the Singapore Court of Appeal ("SGCA") decision in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*[15]. In this case, the Appellant applied to the SGCA to set aside the award, contending that it was not given a full opportunity to present. The SGCA held that "the Art 18 right to a "full opportunity" of presenting one's case is not unlimited."[16] Considerations of reasonableness and fairness impliedly limit it. "What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case."[17] Consequently, it is reasonable for a tribunal to direct a virtual hearing against the wishes of a party.

However, the Chinese law position is worth mentioning for its peculiarity. The Chinese Arbitration Law does not address virtual hearings as the technical

[11] Elgueta Giacomo Rojas, Hosking James, Lahlou Yasmine (eds) volume 10 of the ICCA Reports Series, *Does a Right to a Physical Hearing Exist in International Arbitration?* 11. Available at https://cdn.arbitration-icca.org/s3fspublic/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf Accessed 26 August 2023.

[12] ICC Rules 2021, Art. 26 (1): 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 remotely by videoconference, telephone or other appropriate means of communication. The similar provision can be found in Art. 19 (2) of the LCIA Rules 2020 and Art. 32 (1) & (2) of SCC Rules 2023.

[13] Article 34(2)(a)(ii) of the UNNCITRAL Model Law, which is incorporated into Singapore law under the International Arbitration Act (Cap. 143A) ("IAA ").

[14] S 24 (b) of SIAA.

[15] [2020] SGCA 12.

[16] [2020] SGCA 12 Para. 104 (b).

[17] [2020] SGCA 12 Para. 104 (c).

conditions for virtual hearings were not yet available in 1994, when it was enacted without any significant amendments until now. Article 39 of the Chinese Arbitration Law provides that "arbitration shall be conducted through oral hearing. Where the parties agree to omit oral hearing, the Arbitration Tribunal may make an award according to the application for arbitration, the statement of defence and other submissions."[18] Similarly to the UNCITRAL Model Law, it could be argued that Chinese law does not confer an absolute right to a physical hearing as the oral hearing may potentially entail the virtual hearing. Does it mean that Chinese arbitration institutional rules grant the tribunal the power or discretion to conduct a virtual hearing when one of the parties expressly objects to it?

As the Arbitration Law does not answer this question, it is necessary to refer to what Chinese courts' approach to this. The Supreme People's Court issued the *Notice on Strengthening and Regulating Online Litigation during the Prevention and Control Period of the COVID-19 pandemic*. (SPC Notice)[19]which states that:

> "*In promoting online litigation, people's courts at all levels must take into full consideration factors such as the type, difficulty and priority of the case, as well as effectively safeguard the legitimate litigation rights and interests of the parties, respect the parties' right to choose the mode of handling the case. The People's Court should fully inform the parties of their rights and obligations and the legal consequences of online litigation. Suppose the parties agree to handle the case online. In that case, it should be so confirmed … If the parties do not agree to the online processing of cases and apply for postponement, the people's court shall grant permission and not compel the online hearing...*"[20]

Chinese courts cannot order to conduct virtual hearings on their inherent power when there is no consensus among the parties. Against this background, almost all the leading arbitration institutions in China have introduced remote hearing guidance to facilitate virtual hearings based on the parties' consent. Virtual hearings have gained popularity in China due to the COVID-19 pandemic. Several arbitral institutions in China have adapted to the virtual hearing trend. For instance, the Shanghai International Arbitration Centre (SHIAC) has introduced an online platform to enable virtual hearings.

Similarly, the Beijing International Arbitration Centre (BIAC) has developed an online hearing system to allow parties to attend virtual hearings. Despite these practices, nearly all the arbitration rules did not confer an arbitration tribunal the power or discretion to conduct the virtual hearing without the parties' consensus.[21] For example, Article 67 of the Shenzhen Court of International Arbitration (SCIA)

[18] Article 39 of the PRC Arbitration Law.

[19] The Notice on Strengthening and Regulating Online Litigation during the Prevention and Control Period of the Covid Pandemic (the SPC Notice) issued the Supreme People's Court on 14 February, 2020.

[20] Article 2 of the SPC Notice on Strengthening and Regulating Online Litigation during the Prevention and Control Period of the Covid COVID-19 Pandemic.

[21] A notable exception is the Beijing Arbitration Commission Rules effective on 1 February, 2022. Article 41 (2) states that the Arbitral Tribunal may decide an audio or video record of the hearing.

2019 Rules states that Unless otherwise agreed by the parties, the SCIA or the arbitral tribunal may decide to conduct all or part of the arbitral proceedings by virtue of information technology, including but not limited to online registration, service, oral hearing, and examination of evidence.[22] Another example is seen in the CIETAC approach. CIETAC published "Guidelines on Positive and Steady Promotion of Arbitration Procedures during the Covid-19 (Trial)" in April 2020, which states that virtual hearings are a specific way to hold hearings and are under the arbitration rules. For cases heard in session during the COVID-19 pandemic, it is recommended that the arbitral tribunal prioritise the feasibility of a virtual hearing.[23] However, the CIETAC Guidelines were clearly stated to be repealed at the end of the pandemic, and it does not constitute a part of the CIETAC Arbitration Rules.[24]

The Chinese approach appears to place a heavy premium on party autonomy. However, the downside of the story is that this can also be abused by some parties who play a delay strategy. This author has experienced two times where a party nominates him as an arbitrator but refuses to conduct a virtual hearing, knowing he is based in the UK, but the seat and hearing place is in Beijing. Unless you are content with the long-distance flight with a few stopovers (no direct flight during the Covid) and the mandatory quarantine in a designated hotel for 3 weeks before the hearing, the only viable way out of this hassle is to quit the arbitrator appointment. Then, the nominating party will be given another chance to nominate, and such a change of the tribunal member must be communicated to the other party via the secretariat. All of these procedures take time, which tunes into the delay strategy. Although there are no reported cases of setting aside an award on the grounds of the tribunal's decision on a virtual hearing where there is no consensus by the parties,[25] to the best knowledge of this author, almost all the arbitration institutions (a notable exception is Beijing Arbitration Commission) have played safe by allowing the postponement to be risk-averse.

However, this does not mean China recognises the absolute right to a physical hearing. On the contrary, China is a vanguard in promoting the virtual hearing by setting up Internet Courts before the Covid pandemic broke out.[26] Chinese judiciary is user-friendly to virtual hearings with technological support, and perhaps the judiciary is wary of the sheer number of virtual hearings flocking into Chinese courts. Further, it would allow Chinese courts to clear the backlog in caseload at the

[22] Article 67 of the Shenzhen Court of International Arbitration 2019 Rules (amended in 2020 and 2022 subsequently).

[23] Available at http://www.cietac.org/index.php?m=Article&a=show&id=17048 accessed 10 September 2023.

[24] Ibid.

[25] Chen Lei, Wang Hao. (2020). Judicial Control of Arbitral Awards in Mainland China. In L. DiMatteo, M. Infantino, & N. Potin (Eds.), The Cambridge Handbook of Judicial Control of Arbitral Awards 210–225. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316998250.018

[26] Łagiewska, Magdalena. 2022.The New Landscape of Arbitration in View of Digitalization. *The Impact of Covid on International Disputes*. Brill Nijhoff, 208–217; Guo, Meirong. 2021. Internet court's challenges and future in China. *Computer Law & Security Review*. 40 (2), 105,522. https://doi.org/10.1016/j.clsr.2020.105522

beginning of the pandemic. In any event, China does not enshrine a fundamental right to a physical hearing for the parties.

In summary, a glimpse of the soft international law, national arbitration laws, and leading arbitration institutional rules show that the argument for a right to a physical hearing does not hold. Instead, the tribunal and parties may wish to consider whether they may proceed with a virtual hearing based on the arbitration agreement, applicable laws and arbitral rules.[27] Many domestic laws and arbitration rules give the tribunal the discretion to determine the hearing format as it thinks fit and appropriate in the individual circumstances of each case.

3 Virtual Hearing—The Arbitrator's Perspective

3.1 Access to Technology

An arbitrator must become familiar with the technology and software used for the virtual hearing. This may include video conferencing platforms, document-sharing tools, and other communication technologies. It is important to ensure that the parties and counsel are familiar with the technology and that any technical issues are resolved before the hearing begins. Clear rules and procedures for the virtual hearing are needed, including communication guidelines, evidence presentation, and cross-examination.[28] All parties should agree upon these rules before the hearing begins, and they should be strictly followed to ensure a fair and efficient hearing. Best practice recommends using some 'dry-run' sessions with all participants before the hearing to check the internet connection.

There are three major concerns over the risk of using virtual hearings in international arbitration: cybersecurity and data protection, breach of confidentiality and due process challenges. I argue that they are valid concerns but can be solved with technology.

3.2 Cybersecurity

Cybersecurity concerns have become significant as virtual hearings in international arbitration become state-of-the-art. The use of remote hearings has increased the risk of cybersecurity, which can compromise the integrity and security of the information shared during the hearing.[29]

[27] Scherer, Maxi. 2020. Remote Hearings in International Arbitration: An Analytical Framework. *Journal of International Arbitration* 37(4)439–441.

[28] AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties; Africa Arbitration Academy Protocol on Virtual Hearings in Africa; CIArb Guidance Note on Remote Dispute Resolution Proceedings; Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19; International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration; ICC Guidance Note on mitigating the impacts of COVID-19.

[29] Ling, Daniel Tien Chong. 2022. Cybersecurity in International Arbitration: An Untapped Opportunity for Arbitral Institutions. *Singapore Academy of Law Journal* 34 (2): 432–468.

Some common cybersecurity issues include 1) unauthorised access to hearing materials: If unauthorised parties gain access to hearing materials, they can compromise the confidentiality and integrity of the arbitration proceedings; 2) Unsecured virtual platforms can be vulnerable to eavesdropping, which can allow unauthorised individuals to listen in on the hearing and gain access to confidential information; 3) Hackers can use malware, phishing, or other cyber-attacks to compromise the virtual platform or steal information.

Technology can be crucial in addressing cybersecurity issues in virtual hearings. To mitigate these cybersecurity risks, parties can take various measures, such as using secure virtual platforms with robust encryption and access controls, implementing multi-factor authentication, and conducting regular security audits. Parties can also agree on protocols for exchanging and handling hearing materials and confidential information. For example, Article 3.1 (e) of the HKIAC Arbitration Rules 2018 allows parties to select a secured online repository to protect sensitive and confidential information.[30] Parties may agree to use their own repositories or a dedicated repository provided by HKIAC. In my experience, parties prepared an agreed e-hearing bundle that is properly hyperlinked so that documents can be easily called up and presented via screen share during the hearing. Ensuring cybersecurity in virtual hearings requires a proactive approach and close collaboration among all parties involved.

According to an empirical survey, 2021 International Arbitration Survey: Adapting arbitration to a changing world, confidentiality and cybersecurity concerns combined were perceived to be less of a disadvantage of a virtual hearing than concerns such as the difficulty of accommodating multiple or disparate time zones, harder for counsel teams and clients to confer during hearing sessions, difficulty in controlling witnesses and assess their credibility, Technical malfunctions and limitation, and difficulty for participants to maintain concentration due to 'screen fatigue'.[31] More to the point, this survey report indicates that the amount of consideration given to cybersecurity largely depends on the nature of the dispute and the interests and identity of the parties.[32] For example, interviewees thought cybersecurity was likely a significant concern when a dispute involved a state or public interest issue.[33] This survey result resonates with this author's experiences. With careful planning and the availability of reliable digital platforms, cybersecurity is not as insurmountable as it was initially perceived. In most international commercial arbitration involving two or more private entities without the presence of a state or public interest, cybersecurity is not a major concern.

[30] 2018 HKIAC Administered Arbitration Rules (Effective from 1 November 2018) Article 3.1: Any written communication pursuant to these Rules shall be deemed to be received by a party, arbitrator, emergency arbitrator or HKIAC if …(e) uploaded to any secured online repository that the parties have agreed to use.

[31] Available at https://www.whitecase.com/sites/default/files/2021-04/qmul-international-arbitration-survey-2021-chart16.pdf accessed 10 September 2023.

[32] Available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2021-International-Arbitration-Survey-Adapting-arbitration-to-a-changing-world.pdf accessed 11 September 2023.

[33] Ibid.

However, it is important to note that technology alone cannot guarantee complete protection against cyber threats. There are still risks associated with technology, and adopting best practices and protocols to sminimise these risks is important. One way to enhance cybersecurity in virtual hearings is through the use of secure online platforms that are specifically designed for arbitration proceedings. These platforms often come with built-in security features such as encryption and access controls that can help prevent unauthorised access or data breaches. Additionally, parties can employ various measures to ensure secure communication, such as using secure networks and encrypting sensitive documents and communications.

3.3 Breach of Confidentiality

Some empirical studies have been conducted on confidentiality concerns in virtual hearings in arbitration. For example, a survey conducted by the SIDRA found that 69% of participants referred to confidentiality as an important factor in selecting arbitration to settle their disputes.[34] The perception was that confidentiality was more difficult to protect in virtual hearings than in-person hearings.[35] Confidentiality concerns are valid in virtual arbitration hearings, and more secure technology and protocols may be necessary to address these concerns.

However, this is not a new issue at all. Before the pandemic, the Cybersecurity Protocol in International Arbitration was launched in late November 2019 by the International Council for Commercial Arbitration (ICCA), the New York City Bar Association, and the International Institute for Conflict Prevention and Resolution (CPR).[36] Cybersecurity and data protection issues are closely connected, mainly because there is increasing regulation around the globe governing the processing of personal data. The legitimacy of the process requires that data can be exchanged virtually without compromising confidentiality and data privacy. To preserve confidentiality, parties and the tribunal should agree beforehand to a list of approved participants in the virtual hearing room. Every participant is provided preassigned log-ins and passwords and must always switch on their cameras to ensure that no unauthorised personnel are chipping in. In essence, as with the cybersecurity issue, the confidentiality concern can be effectively solved by technology and careful coordination with effective protocol and guidance. *The Future of Disputes: Are Virtual Hearings Here To Stay* report conducted by Baker & Mackenzie in 2021 indicates

[34] The Singapore International Dipspute Resolution Academy (SIDRA) International Dispute Resolution Survey Final Report 2020, Available at https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/36/index.html accessed 13 September 2023.

[35] Egan M & Yu H (2022) Intersecting and Dissecting Confidentiality and Data Protection in Online Arbitration. *Journal of Business Law*, 2022 (2), 135–163.

[36] ICCA has joined forces with the New York City Bar Association (NYC Bar) and the International Institute for Conflict Prevention and Resolution (CPR) to launch the Cybersecurity Protocol in International Arbitration (2020) edition. The Working Group launched the 2022 Edition of its Protocol at the ICCA Congress in Edinburgh on 19 September 2022. Available at https://www.arbitration-icca.org/icca-reports-no-6-icca-nyc-bar-cpr-protocol-cybersecurity-international-arbitration accessed 08 September 2023.

that only 27.8% of respondents believe virtual hearings may be less secure/confidential.[37] In other words, most respondents do not think confidentiality is a major obstacle to virtual hearings.

Another dimension, perhaps, is to maintain a balance between transparency and confidentiality in international arbitration. The English Law Commission's position, as articulated in its Consultation Paper: Review of the Arbitration Act 1996, is that "we are not persuaded that confidentiality should be the presumption in all types of arbitration."[38] Further, it pointed out that "there is a trend towards transparency, at least in some respects, such as the publication of awards. And there is a further debate to be had in other contexts, for example with some public procurement contracts, about the extent to which hearings should be open to public scrutiny."[39] In short, the English Law Commission recommended that the Arbitration Act 1996 should not include provisions dealing with confidentiality when it was reformed. In the United States, the Federal Arbitration Act (the FAA) contains no provisions on the confidentiality of arbitral proceedings or awards.[40]Confidentiality is typically provided for in the parties' agreement or by the arbitration rules the parties select. Without such an agreement, there may not be an enforceable right to prevent the disclosure of confidential information from the arbitration. US case law often rejects an implied duty of confidentiality.[41] As such, parties may contractually opt out of confidentiality. In light of the above, it becomes more difficult than ever to convince the court to set aside the award on the ground of breach of confidentiality in virtual hearings, particularly when the parties knew the risks but agreed to do so. It is important to know the risks of confidentiality breaches in virtual hearings. By protecting confidential information, parties and arbitrators can help ensure that confidential information is not disclosed.

3.4 The Due Process Challenge

As regards the due process challenge, there are two concerns. First, if the proceedings have been disrupted by technical glitches, such as poor connectivity or software malfunctions, which can disrupt the hearing and compromise its integrity, in a way,

[37] Published in February, 2021, Available at https://www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--baker-mckenzie-and-kpmg-report_010221.pdf accessed 05 September 2023.

[38] Available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf accessed 10 September 2023.

[39] Ibid.

[40] David M Orta, Julianne Jaquith, Gregg Badichek, Ana Paula Luna Pino and Woo Yong Chung, Commercial Arbitration: USA, Global Arbitration Review, available at https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/usa accessed 11 September 2023.

[41] For example, *Contship ContainerLines, Ltd. v. PPG Indus., Inc*., No. 00 Civ. 0194, 2003 WL 1948807, (S.D.N.Y. 23 April 2003) (court rejected plaintiffs' argument that confidentiality implied at law was part of their agreement to arbitrate); *United States v. Panhandle* E. Corp., 118 F.R.D. 346, 349–351 (D. Del. 1988) (court rejected defendant's arguments that arbitration rules required confidentiality).

the party's right to be heard might be curtailed.[42] Second, because the arbitrators, parties, witnesses, and experts are not physically present in the same room, this can cause difficulties for arbitrators to assess the demeanour and credibility of witnesses and parties. Creating an appropriate atmosphere for taking evidence and expert testimony may also be harder. For example, cross-examination may be limited by technical difficulties, which can impact the ability of counsel to challenge the witness's evidence. There may also be challenges in controlling the hearing environment, such as ensuring that witnesses are not coached during breaks.

The second concern will be discussed in more detail in the next session when I share my experiences as an expert witness in virtual hearings. Now, I turn to the concern about the potential impact on the party's right to be heard. The question is what a tribunal can do if one party in an arbitration hearing does not have a strong internet connection. Certainly, if a party's weak internet connection leads to technical difficulties during the arbitration hearing, such as dropped calls or poor audio quality, it could disrupt the proceedings and cause delays. In this circumstance, the arbitrator may adjourn the hearing and reschedule it later. What if the connection quality is not so poor that you can still hear the sound, but not so unclear in the audio? There may constitute a breach of protocol, but the other party does not agree to reschedule the hearing. In this circumstance, as this author experienced, the sensible way is to adjourn the hearing for one hour and request the party with a weak connection to fix the connection or to change the venue with a strong connection.

Overall, as an arbitrator in a virtual hearing in international arbitration, it is important to be adaptable and proactive in addressing any issues or concerns that may arise during the hearing. With proper preparation and attention to detail, virtual hearings can be an effective and fair alternative to in-person hearings.

3.5 Case Management Conference

Case management conferences (CMCs) are crucial in addressing all the above concerns.[43] CMCs are typically held before the main hearing and allow the parties and the arbitrator to discuss various procedural and administrative matters. In the context of virtual hearings, CMCs can serve several purposes, including:

First, to implement the various protocols and guidance, CMCs can be used to ensure that all parties have the necessary equipment and technical expertise to participate in the virtual hearing. This may include dry-run sessions, ensuring all parties access the appropriate software and hardware, and addressing technical issues. CMCs can coordinate the procedural aspects of the virtual hearing, including the

[42] Lee Ryce and Allison Goh Allison, 2021. Boom and Bust? Users' Views on the Post-Pandemic Potential of Remote Hearings in International Arbitration, 23 *SAL Practitioner*, available at https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Arbitration-andMediation/ctl/eFirstSALPDFJournalView/mid/590/ArticleId/1640/Citation/JournalsOnlinePDF accessed 11 September 2023.

[43] Jones Douglas and Mance Jonathan. 2023.Shaping the Future of International Dispute Resolution, in Menon Sundaresh and Reyes Anselmo (eds). *Transnational commercial disputes in an age of anti-globalism and pandemic*, Oxford, Hart Publishing, 294–296.

order of witnesses, the length of witness statements, and the timing of breaks. This can help to ensure that the hearing runs smoothly and efficiently.

Second, CMCs can be used to establish security protocols for the virtual hearing, including using passwords and encryption to protect against unauthorised access. This helps to minimise the risk of cybersecurity breaches and ensure the confidentiality of the proceedings.

Third, CMCs discuss the presentation of evidence in the virtual hearing, including the format and submission of documents, the use of exhibits, and the examination of witnesses. In this way, the hearing would be conducted fairly and efficiently.

Overall, CMCs can be a valuable tool in virtual hearings in international arbitration, helping to ensure that the proceedings are conducted smoothly, efficiently, and securely. By addressing technical, procedural, and security issues before the main hearing, CMCs can help minimise the risk of disruptions and ensure that the parties can present their case effectively.

3.6 Impact on Professional Connection and Delegating to the Tribunal Secretary

Virtual hearings will impact the professional connection for arbitration practitioners. Virtual hearings can make it more difficult to build relationships with other practitioners, and this is because virtual hearings often lack the personal touch of in-person hearings. For example, in an in-person hearing, arbitrators and practitioners can shake hands, make eye contact, and engage in small talk. These interactions can help to build rapport and trust, which can be important in arbitration.

In addition, virtual hearings can make it more difficult to network with other practitioners. This is because virtual hearings limit the opportunities for practitioners to meet and talk with each other. For example, practitioners can mingle during breaks and lunch in an in-person hearing. These opportunities can help practitioners to learn about each other's work and to build relationships.

It has been argued that virtual hearings may have a negative impact on the tribunal's decision-making. Virtual hearings can make it more difficult for the tribunal to assess witnesses' credibility and understand the evidence presented. Additionally, virtual hearings can make it more difficult for the tribunal to build rapport with the parties and to create a sense of fairness.

However, I also think virtual hearings can positively impact the professional connection of arbitration practitioners. Virtual hearings can make it easier for practitioners to connect with others from all over the world. In a way, your professional network has been extended, and this is because anyone with an internet connection can attend virtual hearings.

In my experience in virtual hearing, I see both arguments hold. On the one hand, I do not feel I have built the same professional bond and friendship with my tribunal members as in a physical hearing. On the other hand, I have indeed collaborated with more arbitrators by conducting virtual hearings. Overall, I think virtual hearings will positively and negatively impact the professional connection of arbitration practitioners. It is important to be aware of virtual hearings' challenges and opportunities. In any event, I do not believe there is any negative impact on the

decision-making among the tribunal members. First, a good arbitrator is a professional arbitrator, regardless of the hearing format. All the expressed opinions by the tribunal members are backed up with reasons. Second, when there is a disagreement between the tribunal members, I suspect such a disagreement would arise if held in a physical hearing. My understanding is that the divergence of opinions between the tribunal members has nothing to do with the hearing formats.

Another feature of virtual hearings is that arbitrators may need to delegate more work to the tribunal secretary, such as examining the authenticity of documentary evidence when one party is absent from the virtual hearing. For example, it can be difficult for the arbitrator to assess the credibility of the other party's evidence. In a physical hearing, when one party is absent, the tribunal members will exercise extra care to examine the authenticity of the submitted documentary evidence. However, in a virtual hearing, the tribunal secretary can help address this challenge by reviewing the documentary evidence before the hearing and providing the arbitrator with a summary of the evidence. This can help the arbitrator to make informed decisions about the admissibility and weight of the evidence.

Supposedly, the sole arbitrator or arbitral panels and the parties should engage early and directly on evidentiary issues via case management conferences. However, in the arbitration practice in China, often, these issues are not addressed until the hearing begins, and certain issues are never directly addressed or resolved. For example, this author has experienced one technical difficulty in arbitration proceedings in China. It is common for a party to submit new evidence one day before or on the hearing date when the other party is absent. The arbitrators need to decide on whether to take the last-minute evidence. Very often, the party submitting the evidence close to or on the hearing date would assert how critical the new evidence is; if not taken, that would significantly impact the fact-finding. Additionally, it explains the reasons why they could not submit earlier. Some are with good reasons, and others are not. In this circumstance, the tribunal does not have time to check the authenticity of new evidence. The tribunal can refuse to take the new evidence stipulated in most arbitration rules.[44] To be safe, particularly when there are good reasons to justify the late submission, one possible solution would be to determine the admissibility and weight of the new evidence after the hearing but delegate the tribunal secretary to the hearing venue to check and collect the photocopies of the documents. Therefore, in this context, it is important to note that arbitrators should only delegate tasks to the tribunal secretary that do not affect their independence or

[44] Article 42 (1) of the Shenzhen Court of International Arbitration Rules provides that The arbitral tribunal may specify a time period for the parties to produce evidence and the parties shall produce evidence within the specified time period. The arbitral tribunal shall have the power to refuse to admit any evidence produced after that time period; Article 41 (2) of Guangzhou Arbitration Commisison Rules states that The parties shall complete their proofs within 15 days from the date of receipt of the notice of admissibility/notice of arbitration. The arbitral tribunal shall decide whether to accept any late submission. If the parties have genuine difficulties in submitting evidence within the time limit for proof, they may apply in writing for an extension of the time limit for proof before the expiry of the time limit, and the arbitral tribunal shall decide whether or not to extend the time limit.

impartiality. Arbitrators should not delegate tasks such as deciding on the admissibility of evidence or making rulings on procedural matters.

4 Virtual Hearing—The Expert Witness Perspective

This author has appeared before the tribunal or courts a few times as a Chinese law expert in virtual hearings during the pandemic. As an expert witness, it is important to know your body language, tone of voice, and other non-verbal cues that may affect your credibility and persuasiveness. Because virtual hearings may limit face-to-face interaction, paying close attention to these factors and adapting your presentation is important. To ensure an effective and persuasive presentation, an expert witness in a virtual hearing in international arbitration needs to be well-prepared, adaptable, and responsive. With proper preparation and attention to detail, virtual hearings can be an effective forum for presenting expert testimony and evidence.

Nonetheless, there are several challenges that an expert witness may face in a virtual hearing in international arbitration. Apart from the technical disruptions addressed above, reading body language and facial expressions in a virtual hearing may be difficult, impacting the expert witness's ability to establish rapport and credibility with the tribunal.[45] There is limited interaction with the tribunal, and it may be more difficult for the expert witness to establish a rapport with the tribunal or to respond to questions and concerns in real-time. There is a concern that virtual hearings will curtail the tribunal's ability to assess the credibility and strength of the evidence. There is a risk that the expert witness communicates with someone outside the virtual hearing. More to the point, expert witnesses are more likely to lie in virtual hearings than in physical ones. Therefore, the number of experts/witnesses seems to be a deal breaker in holding a virtual hearing in international arbitration. In one empirical study, practitioners are likelier to propose a fully remote hearing for four witnesses/experts. However, for five or more witnesses/experts, "practitioners lean increasingly towards in-person or semi-remote hearings over fully remote ones."[46]

4.1 Witness Coaching

Expert witnesses need to be well-prepared for the technical glitch and have contingency plans in place in case of technical issues or other disruptions. On the procedural concerns, virtual hearing protocols need to be adopted by all the parties and counsels and the tribunal to specifically include provisions that address the specific challenges of a virtual hot tub, such as agreeing on the location from which each expert witness is to give their evidence; determining whether the oaths

[45] Walker Janet. 2020. Courts in Lockdown: Lessons from International Arbitration.*Revue internationale de droit processuel* 2: 188–190.

[46] Hafez Virje,, Born Gary. 2021. Remote Hearings (2020 Survey): A Spectrum of Preferences. *Journal of International Arbitration* 38 (3) 291.

or affirmations given by the expert witnesses need to be expanded, for example, 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.

Witness coaching provides witnesses with information or assistance to improve their testimony. This can include providing the witness with a copy of their witness statement, rehearsing their testimony, or even answering questions they may be asked. Virtual participation is difficult to ensure that the witness is not being coached or reading from a script hidden from the tribunal's view.[47] This casts doubt on the reliability of a witness' virtual evidence.[48] However, witness coaching is not unique to virtual hearings.[49] Witnesses can be told they cannot communicate with their lawyers during the hearing and should not look at any documents or notes. Using a video conferencing platform allows the tribunal to see the entire room where the witness sits. This will help ensure that the witness is not coached by anyone else in the room.

For example, some institutions require that witnesses be located in a neutral location with a reliable internet connection and appropriate equipment and that a neutral third party be present to address any technical issues that may arise during the hearing. Regarding personal experiences, I was asked to be at the video conference room of the law firm's London office (where this author is based) to conduct the cross-examination in the presence of a neutral third party, ensuring the hearing was conducted fairly. This step prevents witness coaching so that the evidence is presented in a reliable and trustworthy manner.

In virtual hearings, rather than making it difficult to observe a witness's demeanour, it enhances the focus on expert witnesses' facial expressions and body language. Video cameras allow for "enhanced focus" on the witness's face. In a physical hearing, the witness is several metres away and may not be making eye contact with the tribunal when answering the questions from the counsel and looking at the relevant files. In contrast, in a virtual hearing, the witness is always in 'close up', only centimetres away from the camera.[50] This made it easier to assess the witness's credibility.[51] There is indeed no foolproof way to prevent witness coaching in virtual hearings. But under such a circumstance, it is almost impossible for the examined expert witness to engage in multi-tasking by communicating with someone outside of the virtual hearing. Often, counsel will examine areas of the expert's evidence to

[47] Madyoon Nika. 2021. Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement. Arbitration. *The International Journal of Arbitration, Mediation and Dispute Management*, 87(4): 597–611.

[48] Janet Walker. 2020. Courts in Lockdown: Lessons from International Arbitration. *Revue internationale de droit processuel* 2:179–190.

[49] Laurent Hirsch, Reece Rupert, and Reisder Roxane. 2019. Expert Witnesses in International Arbitration. *International Business Law Journal*,2019 (3): 247–258.

[50] Brown Chester, McNeill Mark, and Sharpe Jeremy. 2020. First Impressions of a Virtual Hearing at ICSID. *ICSID Review—Foreign Investment Law Journal*, 35 (1–2): 214–222, https://doi.org/10.1093/icsidreview/siaa030.

[51] Ibid.

best advance their client's case without necessarily focusing on the specific issues of disagreement between experts or issues contained in the written expert reports. This is to say, the expert witness, when examined, needs to answer many issues beyond their preparations per the submitted reports provided by experts on both sides but issues which the counsel insists are relevant to the case.

Furthermore, the examination of each expert can take several hours or even days. For a foreign law expert, it is hard to imagine another law expert who is more experienced and knowledgeable to coach the expert in the virtual hearing. Otherwise, why not appoint the coach as an expert in the first place? My experience as a foreign law expert shows that a virtual hearing was 'very stressful during cross examination', as tense as in a physical hearing room. Therefore, the expert must stay focused throughout the process. One could argue that when a foreign law expert whose English language level, being the hearing language, is not up to the expected standard, witness coaching could be employed. But if that happens, the language interpretation service can be legitimately requested. As far as a foreign law expert is concerned, I do not think witness coaching is a real issue in practice.

4.2 Assessing Demeanour for Truth

The next question is whether it is empirically proven that expert witnesses are more likely to lie in virtual hearings than in physical ones. A concern has been cautioned that "witnesses … may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression…which can never be reproduced in the printed page.[52] On that basis, some concerns were expressed against the effective use of virtual hearings in conducting the cross-examination of the expert witness.

> "A remote hearing would give a claimant an opportunity to receive off-camera coaching on how to respond. Often, a thorough cross-examination of a claimant results in further lies and conflicting evidence. That process is naturally slower via video, giving opportunity for a claimant to think a little further and get the story straight."[53]

This view has been widely shared in pre-pandemic times but has never been empirically proven. This article does not and cannot provide an empirical study to prove or challenge this view but offers some counterarguments based on experience-including that of this author. First, as Jones and Mance argued, this view might be relevant in litigation because the "majesty" or "solemnity" of a courtroom setting

[52] Per Lord Shaw of Dunfermline, *Clarke v. Edinburgh and District Tramways Co.,* 1919 S.C.(H.L.) 35 at p. 36.

[53] Bickerstaffe Michael, Some people are better at lying than others: fraud and remote hearings, https://kennedyslaw.com/thought-leadership/blogs/fraud-blog-fundamentally-honest/some-people-are-better-at-lying-than-others-fraud-and-remote-hearings/ accessed 11 September, 2023.

may psychologically impact witnesses.[54] The international arbitration will be held in a conference room, not a courtroom, even in a physical hearing, so this point will be irrelevant.[55] Second, to what extent will the demeanour be a useful and reliable guide to truthfulness under the international arbitration context? A determined liar will lie no matter where the hearing is held and whether it is in-person or virtual. In addition, many witnesses, whether law, fact or quantum experts, are from different countries and cultures in international commercial arbitration. There is shelve-straining literature in behavioural sciences, psychology and cultural studies[56] indicating that relying too much on facial expressions or body language in arbitration proceedings where the participants are from different cultures is risky. On average, accuracy in judging veracity from demeanour is 54%.[57] Moving to the legal field, Lord Leggatt of the Supreme Court of the UK delivered a speech sounding out a powerful view that "*if you rely on demeanour to assess honesty, your judgments are liable to be biased by impressions that are more likely to mislead than to provide any insight into the speaker's actual veracity.*"[58] In Lord Leggatt's view, the best approach in a commercial case is to place the primary basis on an evidentiary finding supported by contemporaneous documentation and inherent probabilities rather than withness's collections. This is not to suggest, to this author's understanding, to scrap off the relevance and function of the cross-examination completely. Rather, it reminds the practitioners that overemphasis on demeanour to determine the truth is neither strictly necessary nor scientific. In certain circumstances, the cross-examination of the witness should be done and relied on, for example, in a case where the facts cannot be primarily found in contemporaneous documents. Jones and Mance and many other leading figures in international arbitration have echoed this view.[59]

Virtual hearings can be as effective as a physical counterpart with time, practice and adaptations. Those concerns about the witness coaching and lack of demeanour in a remote environment are merely assumptions without being scientifically proven and, therefore, unconvincing. More to the point, many assumptions are not unique to the virtual hearings but also the physical hearings. It is argued that people need to get used to the immanent feature of new technologies to embrace virtual hearings.

[54] Jones Douglas. Mance Jonathan. 2023. Shaping the Future of International Dispute Resolution, Hart Publishing, 300.

[55] Ibid.

[56] For exmaple, Archer, D. 1997. Unspoken diversity: Cultural differences in gestures. *Qualitative sociology*, 20(1), 79; Kleinsmith, A., De Silva, P. R., & Bianchi-Berthouze, N. 2006. Cross-cultural differences in recognizing affect from body posture. *Interacting with computers*, 18(6), 1371–1389; Ekman, Paul. 1993 Facial expression and emotion. *American psychologist* 48(4): 384.

[57] Bond CF and DePaulo BM.2006. Accuracy of deception judgments, *Personality and Social Psychology Review* 10, 214–234.

[58] Lord Leggatt of the UK Supreme Court, Keynote address "Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony", 12 October 2022, available at https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf accessed 02 September, 2023.

[59] Jones Douglas, Mance Jonathan. 2023. Shaping the Future of International Dispute Resolution, 2023, Hart Publishing, 301…

5 Conclusion

As Wu Guanzhong wrote for a solo exhibition of his paintings at the British Museum in 1992, "tradition is like a river; it always flows towards new ground."[60] The pandemic forced many arbitrators, parties, and counsel to adapt to virtual hearings due to travel restrictions, health concerns, and the need for social distancing. As a result, virtual hearings will likely become a more common practice in international arbitration after the COVID-19 pandemic. Virtual hearings offer several advantages, including cost savings, increased efficiency, and greater flexibility in scheduling. They also make it easier for participants to join from different locations worldwide, reducing the need for travel and accommodation expenses. However, virtual hearings are not without difficulties and are unlikely to replicate in-person hearings. Some disadvantages to virtual hearings exist, such as technical difficulties, the potential for distractions, and the lack of face-to-face interaction that can affect the quality of communication and the ability to assess credibility. Virtual hearings work best if there is a high degree of mutual trust and cooperation between the parties and the tribunal.

However, unlike the practice during the COVID time, conducting virtual hearings becomes a choice rather than a necessity. The question is no longer "Do you think the virtual hearing is a good alternative to in-person hearing?". Rather, it is about "What is the most appropriate hearing format based on the individual circumstances of each case?".

Currently, there is very little scientific study on the psychological impacts of virtual hearings on arbitrators, witnesses and counsels. It is too early to assess its effectiveness from the user's perspective until the much-needed scientific data is released. Still, many view the very function of an oral hearing as providing the parties with a chance to plead their case in front of the tribunal. This is believed to ensure both parties an equal chance to influence the arbitrators' views and opinions by engaging in a live, adversarial exchange with the opposing party and challenging the other party's witness evidence. However, a good counsel is a good counsel in any environment, whether in-person or remote, and the decision whether to choose an in-person or a remote hearing should be made on one basis only: what is best for the client. Therefore, the arbitration community needs to answer how we preserve the essence of an oral hearing while using the virtual hearing to streamline procedures. Perhaps this question would become less prevalent with more time, practice and adaptations.

The decision to use a virtual hearing is situational. Life is back to normal with the ease of Covid COVID-19 travel restrictions. We have seen a trend towards in-person hearings and hybrid hearings. Virtual hearings are unlikely to replace in-person ones necessary for more complex and high-value disputes requiring greater interaction and personal connection. Technically, as argued above, the number of witnesses in an arbitration proceeding is a relevant factor. Strategically, international arbitration is a private initiative-orientated, flexible, and market-driven dispute resolution mechanism. The parties are best positioned to choose the hearing format after

[60] Achived in the British Musem China Exhibition Hall.

balancing off. Where travel costs are regarded as just a tiny portion of the expenditure by some parties, the virtual hearings may not be so attractive. Nonetheless, this article contends that instead of focusing on the hearing format, it may be useful for parties to pause and ponder whether oral hearings and cross-examinations are essential for every type of dispute. Smaller contract disputes accompanied with sufficient documentation, or single-issue disputes in which facts are undisputed, may be resolved through a virtual hearing if not a documents-only procedure.