

**UNIVERSIDADE DE LISBOA**

**FACULDADE DE DIREITO**



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Universidade de Lisboa

**REMOTE HEARINGS IN INTERNATIONAL ARBITRATION AND DUE PROCESS OR  
THE RIGHT TO BE HEARD**

**LARS-OLOF SVENSSON**

**STUDENT NO. 63834**

**DISSERTATION**

**A MASTER'S DEGREE IN LEGAL PRACTICE  
EXPERTISE INTERNATIONAL ARBITRATION**

**2022**



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**DISSERTATION PRESENTED TO FULFILL THE NECESSARY REQUIREMENTS FOR  
OBTAINING A MASTER'S DEGREE IN LEGAL PRACTICE**

**EXPERTISE INTERNATIONAL ARBITRATION**

**ADVISOR: PROFESSOR JOÃO GOMES DE ALMEIDA**



## **PREFACE**

The idea to this thesis was born because of a claim for setting aside an award handed down by a tribunal sitting in Sweden. I was one of the arbitrators. As I write this, the court of appeal has not yet produced any decision.

The circumstances were as follows. The parties had agreed on dates for a final hearing to the end of May/beginning of June 2020. The agreement translated into a procedural order on the said dates. In March 2020, the COVID-19 pandemic hit Sweden (but no lock down or stay of proceedings was declared; Sweden took its own path through the pandemic, at least initially). Anyway, one of the parties requested the hearing to be vacated and postponed to a later occasion arguing that the party representatives and witnesses on whom they relied were restricted by their employer from making travels within Sweden from places where they lived to Stockholm, where the hearing was to be held, so as to avoid exposure to the virus. They also made some other points, but their case was essentially a case for vacating the hearing because of the pandemic. However, the other party resisted and requested the tribunal to proceed as per party agreement and procedural order.

And so did the tribunal in so far that a venue with a conference room was rented, large enough to allow social distancing and equipped with videoconferencing system. The party that resisted to postpone the hearing accepted either way, in-person or videoconferencing, whereas the other party accepted videoconferencing however under protest. As no imbalance should occur between the parties the tribunal decided to proceed remotely; none of the parties should be present physically unless both were there. The proceedings took place and was conducted as videoconferencing.

The party that requested to vacate and postpone lost and filed a claim to the court of appeal to set aside the award arguing the decision to proceed remotely was a procedural irregularity in that videoconferencing was not an oral hearing as per SAA Sweden article 24; oral could not comprise videoconferencing.

In other words, circumstances very similar to the Austrian Supreme Court Case 18 ONc 3/20s, handed down in July 2020.

This experience as arbitrator became the impetus for me to make a broader analysis of remote hearings and what can be and not be accepted in arbitrations, particularly in

international arbitrations. It has made me embark on a voyage through six jurisdictions to investigate to what extent there are similarities enough to argue there is something that can be said to be international law on this matter. In doing so I have encountered an enormous volume of publications on this issue, it is an ocean of books, journals and articles, but not yet much case law. Simplified one may say the battleground is divided between those who argue oral is oral and nothing but oral (for example not sound transmitted via videoconferencing) and those who look at it more teleologically or from the point of due process. Also, there is almost invariably one argument popping up against remote hearings, demeanour of witnesses is lost if the hearing is remote. I hope this thesis can contribute to look at that argument differently.

It has been a pleasure to do this work and I owe my unreserved gratitude to the Law Faculty of the Lisbon University and my advisor, professor João Gomes de Almeida, which I hold in very high esteem, not the least because he gave me the opportunity to do this investigation. I must not forget my co-arbitrators, advokat Emilia Lundberg and Supreme Court Justice Lars Edlund and my ex-colleagues advokat Harry Bergman and advokat Andreas Rönnheden, with whom I have discussed various issues which this thesis deals with. And I must also mention New York based attorney at law Bertil Nordin, with whom I have discussed various aspects of the 1958 NY Convention, the FAA US and how the 1958 NY Convention has been incorporated into FAA US. Finally, there are two persons without which this thesis would not have come to fruition and to whom I wish to express my gratitude: Caterina Cerqueira, law student and associate with CMS Rui Pena & Arnaut, Lisbon, who has helped me checking the summary in Portuguese and consultant Tiina Janson, Gothenburg, who has helped me with editing and word processing.

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1958 NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958
AA England	Arbitration Act 1996 England and Wales
ASA	Association Suisse de l'Arbitrage
CAC Rules Portugal	Commercial Arbitration Centre Arbitration Rules 2021 Portugal
cf.	compare
CJC UK	Civil Justice Council United Kingdom
CJP Sweden	Code of Judicial Procedure Sweden; in Swedish: <i>Rättegångsbalken</i>
CPC France	Code de Procédure Civil de France
CPC Portugal	Código de Processo Civil de Portugal
CPR England	Civil Procedure Rules 1998 England and Wales
DFT	Decision of the Federal Tribunal. Official collection of Decisions of the Federal Tribunal, Switzerland
DIS	Deutsche Institut für Schiedsgerichtswesen
DIS Rules	Deutsche Institut für Schiedsgerichtswesen Arbitration Rules 2018
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
et al.	et alia
FAA US	The Federal Arbitration Act USA
i.a.	inter alia
i.e.	id est
IBA	International Bar Association
ibid.	ibidem
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce Arbitration Rules 2021

ICCA	International Council for Commercial Arbitration
ICCA Report	Does a Right to a Physical Hearing Exist in International Arbitration? Report presented at the XXVth ICCA Congress. Edinburgh, 2021.
ICSID	International Centre for Investment Disputes
LAV Portugal	Lei de Arbitragem Voluntária Portugal
LCIA	The London Court of International Arbitration
LCIA Rules	The London Court of International Arbitration Rules 2020
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 as amended 2006
NJA	Nytt Juridiskt Arkiv. Swedish law report where cases from the Swedish Supreme court is published
p.	page
PILA Swiss	Federal Act on Private International Law Switzerland
pp.	pages
Rn	Randenummer (German for marginal number)
SAA Sweden	Swedish Arbitration Act
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2017
SchiedsVZ	Zeitschrift für Schiedsverfahren
Swiss Centre	Swiss Arbitration Centre
Swiss Rules	The Swiss Rules of International Arbitration 2021
UNCITRAL	United Nations Commission on International Trade Law

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UNCITRAL Rules	Uncitral Arbitration Rules 2010
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331
ZPO Germany	Zivilprozessordnung Germany
ZPO Swiss	Zivilprozessordnung Switzerland

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## TABLE OF STATUTES AND INSTITUTIONAL RULES

Note: The versions in English of ZPO Germany, PILA Swiss and SAA Sweden are translations only but included as they are referred to in English for presentational purposes. The PILA Swiss in French has been included for reasons of comparison with CPC France. The institutional rules are referred to in their English version only. The CAC Rules are however included in both the Portuguese and English versions so as to be accessible for readers that are not fluent in Portuguese. All hyperlinks referred to last visited on May 15, 2022.

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## RESUMO EM PORTUGUÊS

1. A presente tese versa sobre audiências remotas na arbitragem internacional. Uma audiência remota é aquela que faz uso da tecnologia para conectar de forma sincronizada dois ou mais participantes que se encontram em dois ou mais locais, frequentemente através de videoconferência, e contrapõe-se a uma audiência presencial. Analisam-se as regras de arbitragem voluntária e os regulamentos de arbitragem dos principais centros de arbitragem institucionalizada de seis ordenamentos jurídicos, a saber Alemanha, França, Inglaterra, Portugal, Suécia e Suíça. Analisam-se, também, pelo evidente paralelo, as regras de processo civil destes ordenamentos jurídicos. As audiências remotas não são uma realidade desconhecida. As regras de processo civil destes ordenamentos jurídicos, exceto da Suíça, permitem audiências remotas desde os primeiros anos do século XXI; no entanto, por vezes, apenas para determinados tipos de litígios ou audiências e sob determinadas condições. Em arbitragem, as audiências remotas também têm sido utilizadas, embora as leis de arbitragem voluntária dos ordenamentos jurídicos estudados não se refiram a tais audiências. Em contrapartida, as regras de alguns dos centros de arbitragem institucionalizada preveem expressamente audiências remotas; mas, mais uma vez, frequentemente sob determinadas condições. Isto parece acontecer porque existe um direito geral de ser ouvido que é muitas vezes associado à ideia de uma audiência oral. Há quem defenda que uma audiência oral tem que ser presencial. Coloca-se, então, a questão de saber se uma audiência remota é uma audiência oral, ou se é mesmo uma audiência. E, caso não seja, se uma decisão proferida por um tribunal arbitral que indefere um pedido de uma audiência presencial viola o *due process*, uma noção que corresponde à ideia de processo equitativo no processo civil português, de forma a que a sentença se torne suscetível de ser anulada ou a sua execução rejeitada.

2. O objetivo é descobrir se existe uma regra internacional sobre audiências remotas que se pode deduzir das legislações de arbitragem nacionais e dos regulamentos de arbitragem dos principais centros de arbitragem institucionalizada, ou mesmo das regras de processo civil. São estudados seis ordenamentos jurídicos, o que pode ser considerado um universo demasiado pequeno para poder tirar conclusões, mas alguns destes, como a França, a Suíça e a Inglaterra, são - em todos os aspetos - alguns dos principais *hubs* de arbitragem do mundo. E as outras não são insignificantes.

3. A tese inicia-se com uma parte descritiva composta pelo capítulo 2 em que se analisam as regras de arbitragem voluntária, os regulamentos de arbitragem dos centros de arbitragem institucionalizada e as regras de processo civil dos seis ordenamentos jurídicos sobre audiências remotas e presenciais e o *due process*. Aborda-se ainda a execução de sentenças arbitrais estrangeiras onde se alega que o tribunal realizou uma audiência remota negligenciando um pedido de uma parte para realizar uma audiência presencial.

4. No contencioso civil, as *Civil Procedure Rules* (“CPR”) da Inglaterra, o *Zivilprozessordnung* (“ZPO”) da Alemanha, o Código de Processo Civil (“CPC”) de Portugal e o *Code of Judicial Procedure* (“CJP”) da Suécia autorizam os tribunais a optar por uma audiência remota em determinadas circunstâncias, seja para todo o julgamento ou apenas para produção de prova, mesmo que uma parte solicite a realização de uma audiência presencial. O *Code de Procédure* (“CP”) de França também prevê essa opção, mas sujeita ao consentimento das partes; o ZPO da Suíça, no entanto, não contempla essa possibilidade. Quanto à arbitragem ad hoc, o *Arbitration Act* (“AA”) de Inglaterra, o CP de França e o ZPO da Suíça não conferem às partes o direito a uma audiência, enquanto o ZPO da Alemanha, o *Swedish Arbitration Act* (“SAA”) e a Lei de Arbitragem Voluntária (“LAV”) portuguesa o fazem, esta última apenas para produção de prova. As regras institucionais também estão divididas. Todas, salvo as Regras da Associação de Arbitragem Suíça (“AAS”), conferem às partes o direito de solicitar uma audiência, no caso das Regras do *Deutsche Institution für Schiedsgerichtsbarkeit* (“DIS”) com o adjetivo “oral” adicionado. As Regras do Centro de Arbitragem Comercial (“CAC”) também conferem o direito de solicitar uma audiência, mas apenas para produção de prova. Quanto a audiências remotas, as Regras do *London Court of International Arbitration* (“LCIA”), as Regras da Câmara de Comércio Internacional (“CCI”) e as Regras da AAS autorizam expressamente o tribunal a decidir realizá-las, mesmo que uma parte solicite uma audiência presencial.

5. Perante esta diversidade, não é possível deduzir a existência de qualquer regra internacional sobre audiências e videoconferências em arbitragem internacional, em particular sobre se, quando e como devem ser conduzidas. Também não se pode retirar qualquer conclusão geral dos processos civis nacionais; aliás, como vimos, em França as audiências remotas em processos civis apenas podem ser realizadas com o consentimento das partes e na Suíça não podem de todo.

6. As respostas da Justiça à pandemia da COVID-19 que atingiu a Europa no início de 2020 são exploradas no capítulo 3. Em França, Portugal e Suíça, onde foi decretado o confinamento, as regras de processo civil foram adaptadas de forma a permitir audiências remotas (Suíça) ou alargar as possibilidades já existentes de realização das mesmas (França e Portugal). A Inglaterra também implementou o confinamento, mas como o CPR de Inglaterra já permitia audiências remotas, não foi necessária nova legislação. Por outro lado, a Justiça inglesa tomou medidas firmes para promover audiências remotas, como emitir novas diretrizes aos tribunais, principalmente sobre questões práticas e sobre como funcionar com a tecnologia. A Alemanha e a Suécia nunca implementaram o confinamento, e como as audiências remotas já eram permitidas nos ZPO da Alemanha e CJP da Suécia, não foi necessária nova legislação. Não foi aprovada nova legislação relativamente à arbitragem *ad hoc*, mas foram adaptadas as regras institucionais em alguns casos – Regras da LCIA de 2020, da CCI de 2021, do CAC de 2021 e da AAS de 2021 - para agilizar audiências remotas, mesmo contrariando um pedido de uma audiência presencial por uma das partes. Todas as instituições tomaram medidas para promover audiências remotas.

7. Isto obviamente levou a um aumento de audiências remotas em contencioso civil, com o maior aumento provavelmente na Suécia e em Inglaterra e o menor em França e na Suíça. Além disso, as audiências remotas em arbitragem aumentaram significativamente. Este desenvolvimento está descrito no capítulo 4. Dado este aumento, é surpreendente que tenham sido reportados apenas alguns casos de problemas com este tipo de audiências: um em Portugal, um na Áustria e um na Suíça. O denominador comum nesses três casos foi a pandemia e a necessidade de avançar com os processos, que não podiam ser conduzidos presencialmente devido às restrições que afetaram os tribunais e as deslocações.

O caso português foi decidido pelo Tribunal Constitucional (TC 738/2021). O Tribunal considerou que a contrainquirição de uma testemunha por videoconferência, após uma inquirição presencial pela parte contrária, nas circunstâncias em que foi realizada, não violou princípios processuais fundamentais como a igualdade de armas e o requisito de oralidade do CPC de Portugal, embora a parte que conduziu a contrainquirição tivesse solicitado uma audiência presencial para esse fim.

No caso austríaco, que foi decidido pelo *Oberster Gerichtshof Österreich* (18 ONc 3/20s), foi solicitada a anulação de uma sentença proferida por um tribunal arbitral com sede na

Áustria. Contra o pedido de uma das partes, o tribunal arbitral decidiu realizar a audiência remotamente, o que significou que uma testemunha foi ouvida por videoconferência a partir de Los Angeles. O tribunal não concordou com a alegação do requerente de que o tribunal arbitral violou o direito a um processo justo e o direito de ser ouvido quando realizou a audiência à distância contra o requerimento da parte.

No caso suíço estava em causa uma decisão em realizar uma audiência à distância, sendo que o tribunal ordenou que as partes entrassem em contacto para decidir questões relacionadas com a tecnologia a ser usada. O Tribunal Federal Suíço (DFT 146 III 194, 6 de julho de 2020) concluiu que uma “audiência” no âmbito do ZPO da Suíça era concebida como um evento presencial e sustentou que o artigo 54 do ZPO da Suíça não obrigava o tribunal a realizar uma audiência remota.

8. O aumento das audiências remotas e as alterações a que isso levou na forma de atuação de advogados, juízes e árbitros geraram uma série de pesquisas e inquéritos onde se averiguou se preferiam audiências presenciais ou remotas e quais eram as vantagens e desvantagens cada uma delas. Este tema é aprofundado no capítulo 4 e é baseado em pesquisas e inquéritos realizados pela Civil Justice Foundation/ Legal Foundation (Inglaterra e Gales), pela Universidade *Queen Mary* de Londres, pelo grupo de *trabalho Avenir de l’Audience et de la Plaidoirie* (França), por Anne Sanders e pelo Conselho Consultivo dos Juízes Europeus (“CCJE”), e num estudo feito por Gary Born, Anneliese Day e Hafez Virjee: “Empirical Study of the Experiences with Remote Hearings: A survey of Users’ views”.

9. Estas pesquisas e inquéritos demonstram uma preferência óbvia pelas audiências presenciais, mas, surpreendentemente, foram muitas vezes registadas visões e experiências positivas sobre audiências remotas. Numa das pesquisas, a maioria dos árbitros reportou que as audiências remotas são melhores ou iguais às audiências presenciais em alguns aspetos; por exemplo, na avaliação de provas prestadas oralmente, na eficácia da argumentação e na compreensão do caso pelos tribunais. Num outro inquérito realizado entre advogados, caso as alternativas numa arbitragem fossem suspender o processo ou prosseguir à distância, 79% preferiu prosseguir com uma audiência à distância e apenas 16% preferiu suspender até poder ser realizada uma audiência presencial.

10. Existem muitos argumentos contra as audiências remotas, dos quais três são abordados nesta tese: (i) é mais difícil contrainquirir uma testemunha à distância, (ii) problemas tecnológicos como a qualidade da transmissão e a supervisão de testemunhas e (iii) perda de aspectos comportamentais (pistas não verbais, linguagem corporal, entre outros). Estes problemas são apresentados no capítulo 5.

11. A contrainquirição realizada à distância pode ser tão útil como a realizada pessoalmente, se for bem preparada antecipadamente; tudo se resume ao engenho do advogado que está a inquirir. Além disso, os tribunais em muitos países têm aceitado que as audiências remotas não colocam o inquiridor numa posição materialmente pior do que numa audiência presencial. No mesmo sentido, o Tribunal Europeu dos Direitos Humanos (“TEDH”) concluiu que a contrainquirição através de videoconferência é aceitável (*Schatschaschwili contra Alemanha*, ECtHR 9154/10).

14. Os problemas tecnológicos ou de qualidade da transmissão e as dificuldades para exercer supervisão sobre uma testemunha ouvida à distância através de videoconferência, conforme desenvolvido nos capítulos 5 e 8, podem ser resolvidos por meio de um dos vários protocolos emitidos por instituições internacionais de arbitragem. Por exemplo, o Protocolo de Viena, o Protocolo de Seul ou o Anexo I da Nota da CCI de 9 de abril de 2020, que disponibiliza orientações práticas sobre como fazer uma audiência remota funcionar sem interferências. E, como clarificou o Supremo Tribunal Austríaco no processo ONc 3/20s, ao aplicar algumas medidas práticas é tanto possível supervisionar uma testemunha ouvida à distância como uma testemunha ouvida em tribunal ou numa sala de reuniões.

15. No entanto, o argumento mais comum contra as audiências remotas é o de que o comportamento é mais difícil de ler quando uma pessoa é ouvida e observada por vídeo. Este argumento pressupõe que os advogados ou árbitros são especialmente capazes de detetar mentiras através dos elementos não verbais de comunicação.

16. Esta questão é discutida no capítulo 6 referente à investigação comportamental contemporânea, com especial recurso à obra de Sara Landström e Pär Anders Granhag, Professores de Psicologia, ambos da Universidade de Gotemburgo (Suécia), e de Benjamin Glunz, titular de um doutoramento em direito e jurisprudência pela Faculdade de Direito da Albert-Ludwigs-Universität de Freiburg (Alemanha).

17. A Professora Landström demonstrou, através da sua investigação, que observar uma testemunha através de vídeo não afeta de forma discernível a avaliação dos observadores quanto à veracidade da declaração, em comparação com a observação de uma testemunha presente fisicamente. A haver alguma diferença, há uma taxa de sucesso um pouco melhor (quanto à capacidade de detetar mentiras) ao observar uma testemunha através de vídeo. Os Professores Landström e Granhag também demonstraram que a taxa de sucesso das pessoas comuns é um pouco acima de 50%, ou seja, pouco acima do acaso. Estudos realizados nos EUA parecem indicar que advogados e juízes não têm melhor desempenho; a sua taxa de sucesso também está um pouco acima do acaso. Os Professores Landström e Granhag também demonstraram que o comportamento é praticamente inútil para detetar a verdade – simplesmente não o podemos ler nem compreender. Estas descobertas foram confirmadas por outros investigadores e cientistas e na generalidade coincidem com o que Benjamin Glunz relata na sua tese de doutoramento.

16. A ciência comportamental tem sido pouco observada por advogados, juízes e árbitros. Existem, no entanto, três decisões que se baseiam na perspetiva contemporânea da ciência comportamental: uma decisão do Tribunal Constitucional português (TC 738/21) (onde se refere um artigo que discute, entre outras, as descobertas de Landström e Granhag), a decisão do *Court of Appeal* inglês no processo R (SS) contra Secretário de Estado do Ministério da Administração Interna [2018] EWCA Civ 1931 e uma decisão do supremo tribunal suéco (NJA 2010, página 671). Nos dois últimos casos, os tribunais referem-se à investigação moderna de Psicologia e distanciam-se da importância do comportamento ao avaliar a veracidade dos depoimentos das testemunhas.

17. No capítulo 9 pretende-se perceber se existe alguma definição nas regras de arbitragem e de processo civil que possa dar alguma orientação sobre o que é uma audiência ou o que significa “oral”. Embora seja claro que as regras do contencioso civil concebem as audiências em geral como audiências presenciais, não há uma definição de audiência. Relativamente à arbitragem, apenas o ZPO da Alemanha e o SAA da Suécia estabelecem que a audiência deve ser oral - no entanto, sem qualquer definição de “oral” - enquanto a LAV de Portugal atribui às partes o direito a uma audiência, mas sem mencionar que a mesma deve ser oral. A palavra “audiência” apenas aparece no AA de Inglaterra e no CP de França e não é mencionada na Lei Federal de Direito Internacional Privado suíça, que rege as arbitragens

internacionais com sede na Suíça. As regras institucionais estão igualmente desprovidas de qualquer definição de audiência - cabe à autonomia das partes ou ao tribunal moldá-la.

No entanto, uma audiência deve ser entendida a partir da função que lhe é atribuída. Em geral, a audiência é vista como o momento em que as partes apresentam o seu caso, provas (orais e escritas) e alegações orais. Como tal, a audiência está claramente associada aos requisitos do *due process*, ou seja, ao princípio do contraditório e às garantias processuais. O conceito de audiência é, portanto, um conceito funcional.

18. Tendo chegado a esta conclusão, o próximo tópico a investigar - no capítulo 10 - é o artigo V.1.(b) da Convenção de Nova Iorque de 1958 e se existe uma conexão entre este e o artigo 34 da Lei Modelo. A redação do artigo V 1.(b) pode ser vista como vaga, mas é absolutamente claro que trata do *due process* ou, como este é expresso na frase latina, *audi alteram partem*. O Artigo V 1.(b) é uma norma substantiva cuja violação é suficiente para negar a execução ou reconhecimento de uma sentença arbitral, e deve ser aplicada em conformidade com o sentido que tem no tratado em que se insere.

19. Se a Convenção de Nova Iorque de 1958 é um dos pilares da arbitragem internacional, outro pilar é a Lei Modelo. O Artigo 36(1)(a)(ii) da Lei Modelo é uma reprodução idêntica do artigo V 1.(b), e o artigo 34, que trata da anulação de sentenças, foi concebido com base no artigo 36. O efeito intencional alcançado é o de uma simetria, segundo a qual apenas os fundamentos relativos ao *due process* que sejam suficientes para negar a execução ou o reconhecimento serão suficientes para anular uma sentença. E vice-versa.

Os Estados de todos os ordenamentos jurídicos estudados são partes da Convenção de Nova Iorque de 1958. Apenas a Alemanha é considerada pela UNCITRAL como um país da Lei Modelo, mas as restantes legislações nacionais de arbitragem foram influenciadas pelo artigo 34 e refletem a essência e o espírito do mesmo, na medida em que permitem anular sentenças arbitrais com base em violações do *due process*.

20. Os requisitos mínimos para o respeito pelo *due process* são retirados dos artigos 18 e 24 da Lei Modelo, do artigo 17 das Regras da UNCITRAL e do artigo V 1.(b) da Convenção de Nova Iorque de 1958. Este tema encontra-se discutido no capítulo 11. Essencialmente, estas disposições consagram o direito a apresentar provas, a fazer alegações de facto e de direito e a solicitar uma audiência oral. Mais uma vez, não é clarificado o que se entende por

audiência oral. No entanto, como o conceito de audiência é funcional e como a audiência remota por videoconferência permite que uma parte apresente o seu caso, apresente provas e faça alegações de facto e de direito de forma igualmente idónea à de uma audiência presencial, não ocorre violação do *due process*. Esta é uma visão apresentada em diversos relatórios de países no Relatório da Associação Internacional de Congressos e Convenções (“ICCA”), como, por exemplo, nos relatórios da Inglaterra, Alemanha e Portugal.

21. O último capítulo – o capítulo 12 - é dedicado à denominada *procedural judgment rule*.

Segundo esta regra, os tribunais que apreciam pedidos de anulação de sentenças arbitrais com base em irregularidades processuais – relacionadas com, por exemplo, prorrogação de prazos e reagendamento de audiências – geralmente remetem as decisões sobre esses aspetos para a discricionariedade do tribunal arbitral, exceto quando estão em causa decisões que recusam de todo a realização de audiências ou que determinam a realização de uma audiência apesar do pedido de adiamento de uma das partes.

Oferecer a uma parte que solicita o reagendamento de uma audiência uma audiência remota para salvar um prazo acordado ou fixado não deve ser considerado como uma recusa a realizar uma audiência. As regras da Lei de Arbitragem Federal dos EUA sobre anulação (“vacatur”) são influenciadas pelo Artigo V.1.(b) da Convenção de Nova Iorque de 1958 e refletem a sua proteção do *due process*; portanto, são relevantes para a compreensão dessa disposição. Em dois processos de tribunais federais dos EUA, foi considerado que oferecer uma audiência remota a uma parte que requer o adiamento de uma audiência não viola o *due process* (*Bisnoff contra King*, 154 F. Supp. 2d 630 (S.D.N.Y.) 2001 e *Eaton Partners, LLC contra Azimuth Capital Management IV, Ltd*, 2019 WL 5294934 (S.D.N.Y.) 2019).

## ABSTRACT

This thesis aims at answering if a remote hearing conducted against the request from one of the parties for an oral hearing violates due process. This is done through the prism of civil procedure rules, ad hoc and institutional arbitration rules in England, Germany, France, Sweden, Switzerland and Portugal.

Unlike the civil procedure rules, that for some ten years or more have allowed remote hearings (save for in Switzerland), both hoc and institutional arbitration rules make remote hearing a question of party agreement failing which it is for the discretion of the tribunal to decide. But there is one impediment here, article 24(1) of the Model Law and UNITRAL Rules article 17(3), which both entitles a party a right to an oral hearing, which in any event is what lawyers and judges generally prefer. The question then arises: what is an *oral* hearing?

The analysis shows there is no definition in the civil ordinary proceeding rules of what oral means or that would allow an *a contrario* conclusion that would exclude remote hearings. The same is true for the arbitration acts governing ad hoc arbitrations. What an oral hearing is, appears instead of the functionality allotted to it which in general is to state the case, present the evidence and make the arguments. In this way the functionality has an obvious link to what due process require.

All six jurisdiction are 1958 NY convention. Article V 1.(b) says that an award shall not be enforced or recognized if a party was not able to present his case. This protection has been the model for article 34 of the Model Law, which in its turn has influenced the national arbitrations statutes. So, if the videoconferencing allowed the party to present his case, no violation of due process has occurred. In any event, a decision by the tribunal to proceed on a remote basis against a request for an oral hearing should always, given that the tribunal always must factor in time and cost, be considered to fall within the procedure judgment rule, giving the tribunal a bona fide leeway to balance conflicting interests.

An argument often raised against remote hearings is that it is more difficult to judge veracity and demeanor remotely. Behavioral science does not support that argument. Also, it has been argued that it is more difficult to cross-examine remotely. However, courts have generally accepted remote cross-examinations. So has also the ECtHR.

Key words: Oral hearing, remote hearing, due process, procedural judgment rule, demeanor

## **RESUMO**

*Esta tese tem como objetivo responder se uma audiência remota contra o requerimento de uma das partes para a realização de uma audiência oral (i.e. presencial) viola due process, ou o processo equitativo. O que é realizado sob o prisma dos regulamentos de processo civil, regras de arbitragem ad hoc e institucional em Inglaterra, Alemanha, França, Suécia, Suíça e Portugal.*

*Ao contrário dos regulamentos de processo civil, que durante cerca de dez anos ou mais permitiram audiências remotas (exceto na Suíça), os regulamentos de arbitragem ad hoc e institucional fazem da audiência remota uma questão de acordo entre as partes, caso contrário, fica ao critério da decisão do tribunal. Mas aqui existe um impedimento, o artigo 24(1) da Lei Modelo e o artigo 17(3) das Regras da UNITRAL, que conferem a uma parte o direito a uma audiência oral, que em qualquer caso é geralmente a preferência dos advogados e dos juizes. Surge então a pergunta: o que é uma audiência oral?*

*A análise demonstra que não existe definição do que significa oral ou que permita uma conclusão contrária que exclua audiências remotas nos regulamentos de processo civil comum. Aplica-se o mesmo para a leis de arbitragem que regem as arbitragens ad hoc. O que é uma audiência oral, surge no lugar da funcionalidade que lhe é atribuída que em geral é expor o caso, apresentar as provas e apresentar os argumentos. Desta forma, a funcionalidade tem uma ligação óbvia com o que exige o due process.*

*Todas as seis jurisdições fazem parte da convenção de Nova Iorque de 1958. O artigo V 1.(b) estabelece que uma sentença não deverá ser executada ou reconhecida se uma parte não puder apresentar o seu caso. Esta proteção tem sido o modelo do artigo 34 da Lei Modelo, que por sua vez influenciou os estatutos nacionais de arbitragem. Portanto, se a videoconferência permitiu que a parte apresentasse o seu caso, não existiu violação do due process. Em qualquer caso, uma vez que o tribunal deve sempre ter em consideração o tempo e os custos, uma decisão do tribunal para proceder com audiência remota contra uma solicitação para uma audiência oral deve sempre ser considerada enquadrada na procedural judgment rule, dando ao tribunal uma margem de manobra de boa fé para equilibrar os interesses em conflito.*

*Um argumento que surge frequentemente contra as audiências remotas é de que a veracidade e o comportamento são mais difíceis de julgar à distância. A ciência comportamental não suporta esse argumento. Além disso, foi argumentado que a contrainquirição é mais difícil à distância. No entanto, os tribunais geralmente aceitam contrainquirição à distância. Assim como faz o Tribunal Europeu dos Direitos Humanos.*

*Palavras-chave: Audiência oral, audiência remota, due process, procedural judgment rule, comportamento*

# **1 Introduction**

## **1.1 Limitations**

This thesis centres around due process, oral hearing and videoconferencing in international arbitration. International arbitration is a very wide notion: to limit the subject to something digestible the thesis confines the jurisdictions investigated to England, France, Germany, Portugal, Sweden and Switzerland. They are collectively referred to as “the six” in this thesis. The selection of England, France, Germany, Sweden and Switzerland needs no further motivation than that the arbitration institutions in these countries are the most influential in Europe in terms of cases handled.<sup>1</sup> The CAC of Portugal administers less cases than the others but on the other hand the Portuguese law tradition reaches far outside of Portugal and stretches into the Lusophone lingual community comprising for example Angola, Mozambique and Brazil; language wise Portuguese is the third most spoken European language in the world. Portuguese is also an official language in Macau. An arbitration centre was established there in 1998, WTC Macau Arbitration Centre, to market Macau as a venue to resolve disputes between the Lusophone sphere and China. Macau’s arbitration law is based on the Model Law but broadly, Macau’s legal system is based on Portuguese law and its legal codes are written in Portuguese. And classes in law at the Macau University is in Portuguese. In this indirect way it is reasonable to assume that Portuguese arbitration law and culture has a wider influence internationally than the cases administered annually by the CAC imply.

## **1.2 Terminology**

Hearings with parties or witnesses not physically present in the court room or hearing venue has got many varying names, for example online, videoconferencing or virtual hearing. The most recent is remote, which is advocated by i.a. Maxi Scherer.<sup>2</sup> One of the reasons why she rejects virtual hearing is that it may be understood as something unreal, which a hearing via videoconferencing is not; it is indeed very real. Online hearing may be confused with online dispute resolution or online courts.

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<sup>1</sup> <https://globalarbitrationnews.com/arbitration-statistics-2020/>

<sup>2</sup> SCHERER, Maxi, “The Legal framework of Remote Hearings” in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alpen aan den Rijn: Wolters Kluwer, 2020, pp.65-103, pp. 68-69.

Videoconferencing is to narrow a notion, as a remote hearing also can be conducted via telephone or telepresence. For this reason, Scherer suggests the best term to be used is remote hearing, and I concur.

Still videoconferencing is used in this text to denote a remote hearing when the parties actually use video.

### **1.3 Questions connected to remote hearings but not dealt with**

Remote hearings via videoconferencing trigger other issues in law than just due process, for example cybersecurity and data protection. Those questions are left aside, as are at large technological issues. Technological issues are though touched upon in relation to the discussion on various protocols for remote hearings produced by some of the arbitration institutions for the facilitating of videoconferencing.

Nor is ECHR article 6 dealt with in any detail, as remote hearing seems to have been accepted by ECHR in principle in civil cases.<sup>3</sup>

### **1.4 Translate or not?**

This thesis deals with texts in French, German, Portuguese and Swedish.

As to the French and German, translations have been made only exceptionally, when longer sentences or passages or important terms calls for translation. There are many reasons for this. Firstly, it is difficult to translate legal terminology without losing or tweaking its original meaning. It is therefore sometimes better to explain the function or meaning rather than providing a literal translation. Secondly, the individuals of the European international arbitration community are often knowledgeable in one or two of the major languages apart from English and can read and understand for example French or German even though not fluent in those languages. Thirdly, in many cases the texts in languages other than English are available also in English official or semi-official translations, so it is easy to understand original texts by comparing. For

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<sup>3</sup> *Yevdokimov and others v. Russia*, Applications nos. 27236/05  
[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22\%22CASE%20OF%20YEVDOKIMOV%20AND%20OTHERS%20v.%20RUSSIA\%22%22\],%22itemid%22:\[%22001-160620%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20YEVDOKIMOV%20AND%20OTHERS%20v.%20RUSSIA\%22%22],%22itemid%22:[%22001-160620%22]})

example, all institutional rules are available in English, and the ZPO Germany and the ZPO Swiss and are available in translations to English too.

Swedish is a small language and basically only spoken in Sweden (save for ca. five percent of the population in Finland). Quotes from Swedish have of course been translated.

Portuguese is the sixth biggest language in the world, but a small language in Europe. Although the terminology quoted from Portuguese is similar to French and therefore possible to understand if you read French, translations have been made were appropriate.

All translations are my own.

### **1.5 Arguments from other jurisdictions than the six?**

This is a thesis on international arbitration law. It is a field of law where the international character is very noticeable, not the least because two of the pillars of international arbitration law is made of the 1958 NY Convention and the Model Law. This makes it only natural to study US case law on setting aside because article V 1.(b) of the 1958 NY Convention is incorporated in the Federal Arbitration Act sections 10, 207 and 302 on setting aside – in theory a state court in Sweden or Germany would judge the same circumstances as the US court in the same or similar way, just to take an example. Or a case for setting aside an award allegedly produced in violation of a national statute designed on the Model Law's protection of due process and right to oral hearing is of course relevant, irrespective of wherefrom. That is why a chapter is devoted to the Austrian Supreme Court case 18 ONc 3/20s. Austrian arbitration law has incorporated article 18 of the Model Law on equal treatment and the right to be given a full opportunity to present one's case. The Austrian Supreme Court case is the first case on setting aside an award where a tribunal against the request of a party decided to conduct the hearing via videoconferencing.

That apart, as will be seen the thesis deals also with behavioural science, because that science has researched on taking of oral evidence via video and how courts and judges judge the veracity of such evidence– and the results are very interesting and highly relevant to the arguments for and against remote hearing. Unlike law, psychology is

not nation-bound and is therefore referred to when relevant irrespective of national origin.

### **1.6 Framework for analysis**

The purpose of chapter 2 is to describe the norms governing due process in relation to hearings, notably oral hearings, in the six jurisdictions that this thesis focus on. This will be done not only regarding arbitration in national legislation and institutional rules but also to civil litigation in ordinary civil disputes. The reason is to explore if there is anything that reasonably can be called international law on what an oral hearing is or how an oral hearing should be conducted, or failing any such law, the question might be if one can be inferred from the national regimes for ordinary, civil litigation.

Chapters 3 and 4 center around the COVID-19 pandemic and the extent to which it caused new legislation or changed patterns to make the administration of justice work. As will be seen a substantial amount of the case load in civil cases in state courts and tribunals were held remotely (but varying from country to country). That may give valuable insights on the notions of oral and remote hearings and how they were perceived before, under and after the pandemic.

The pandemic caused several surveys and enquiries being made on how judges, arbitrators and counsels thought about remote hearings and the pros and cons of remote hearings. Among the negative features there is always one coming back, loss of demeanour when a witness or an expert is being heard via videoconferencing, and the difficulties to judge the veracity of oral evidence being taken remotely - because of this loss of demeanour problem. This is however a question the behavioural science has studied and come to conclusions that are quite different from what a general understanding among many lawyers and scholars in the field of law is. This is accounted for in chapters 5-7.

Apart from the loss of demeanour argument, technological issues and problems are often raised against remote hearings. This seems however to be a minor issue, not the least as transmission technology is constantly improved and by adhering to some of the protocols issued by several arbitration institutes, a sort of manual how to conduct a remote hearing efficiently and securely. This is discussed in chapter 8.

Chapter 9 is devoted to an analysis if there is any definition of hearing or oral hearing in national legislation of the six. The findings there form the basis for the continued work in chapters 10-12 in which the 1958 NY Convention article V 1.(b) and the Model Law articles 18 and 34, due process, are discussed. The purpose is to analyse to what extent there is a connection between the rules on refusal of recognition or enforcement of a foreign award on the ground that a party has not been granted the opportunity to present his case and the rules on setting aside an award because of violation of due process, and finally if, when and how a decision by a tribunal to conduct a hearing remotely against a party's request will fall under what is called the procedural judgment rule or be deemed to be a violation of due process.

## **2 Main rules in the six jurisdictions**

### **2.1 England**

#### **2.1.1 The Civil Procedure Rules England and Wales, ordinary civil litigation**

It appears from rule 29.2(1) that the court will determine an ordinary civil litigation in a so called multi-track case only after trial which according to rule 39.2 must be held in public.<sup>4</sup> If facts are to be proved by witness statements, such facts must be proved by their oral statements at trial, rule 32.2, but the court has the discretion to allow the witness to give statement through a video link or by other means, rule 32.3.

In a case from 2006, *Ian McGlenn v Waltham Contractors Ltd*, claimant, an individual, applied for an order being allowed to give evidence through video conferencing which the defendant opposed. The court applied its discretion according to rule 32.3 and allowed claimant to give evidence through videoconferencing as requested.<sup>5</sup> When doing, so the court referred to the Practice Direction that accompanies rule 32.3, Annex III, p.2:

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<sup>4</sup> The CPR England distinguishes between small claims track, fast track and multi-claims track. The two former relates in principle to claims not in excess of 5 000 £ and 15 000 £ respectively whereas the multi-track is reserved for what may be labelled ordinary civil claims in excess of 15 000 £.

<sup>5</sup> *Ian McGlenn v Waltham Contractors Ltd* [2006] EWHC 2322 (TCC). – The court based its order partly on a case from the Supreme Court, *Polanski v Conde Nast Publications* [2005] 1 WLR 637, but in that case Mr. Polanski's request to give evidence through videoconferencing from abroad to the court in England was not controversial as between the parties. The case instead turned on public policy issues; whether or not the requirement on public hearing in rule 39.2 could be satisfied if a witness statement was to be taken through videoconferencing.

*“A judgment must be made in every case in which the use of VCF is being considered, not only as to whether it will achieve an overall costs saving, but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is, or may be, more limited than it can exercise over a witness physically before it.”*

In a case from 2020, *Re Blackfriars Ltd*, the court overruled defendant’s request to adjourn the trial because of the pandemic and instead ordered a remote hearing using videoconferencing.<sup>6</sup>

The order was to a large extent founded on a then recently issued guidance note from the Judiciary of England and Wales, among others one from 20 March 2020, encouraging courts to proceed with cases using videoconferencing because of the pandemic. However, the court also referred to rule 3.1(2)(b), which the court maintained gave it a wide discretion to bring forward a hearing, observing the overriding objective to deal with the cases justly and proportionate at costs.<sup>7</sup>

### **2.1.2 The Arbitration Act, England**

Section 1(a) sets out that the object of arbitration is to “...*obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*” In agreeing the rules for the arbitration, the parties are restricted by mandatory rules of the act, which are listed in Schedule 1 to section 4 and by public policy interest, section 1(b).<sup>8</sup>

Absent any agreement by the parties, the tribunal is given a wide discretion in section 34 to decide all procedural and evidential matters, including whether, when and where any part of the proceedings is to be held and whether and to what extent there should

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<sup>6</sup> *Re Blackfriars Ltd* [2020] EWHC 845 (Ch).

<sup>7</sup> About this case, see SAUNDERS, Matthew, “Chapter 7: COVID-19 and the Embracing of Technology: A ‘New Normal’ for International Arbitration” in Axel Calissendorff, Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2020*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.99-114, pp.108-110.

<sup>8</sup> GILL, Judith, SUTTON, David, *Russel on Arbitration*. 22<sup>nd</sup>. ed. London: Sweet&Maxwell Ltd, 2003, pp. 189-190.

be oral or written evidence or submissions.<sup>9</sup> There is therefore no entitlement to an oral hearing.<sup>10</sup> Nor seems there to be any right to a physical hearing.<sup>11</sup>

The tribunal shall always comply with its general duty to act fairly and impartially, giving each party a reasonable opportunity of putting his case before the tribunal and dealing with that of his opponent, and to adopt procedures suitable to the case, section 33(1)(a).

Serious irregularities may lead to challenge of the award under section 68, provided it caused substantial injustice. Whilst irregularities in relation to the general duty to act fairly and impartially or to observe the principle of natural justice such as to hear evidence on a material issue may qualify as relevant irregularities, the scope for setting aside the award on these grounds are limited to “...*extreme cases where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in the section that justice calls out for it to be corrected.*”<sup>12</sup> The same probably applies to procedural mishaps.<sup>13</sup>

Translated into remote hearings the question of procedural irregularity or mishap coincides with the questions of the quality of the transmission and the possibility to control the witness being heard remotely. Needless to say, if the transmission is seriously substandard or useless or if other persons are present next to a witness but invisible on the screen to the parties or the tribunal or if the witness can read from

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<sup>9</sup> Ibid. pp. 218-219. Cf. ENOCH, Roger, MELIA, Alexandra, “Chapter 6: Ad Hoc Arbitrations” in Julian D.M. Lew et al. (eds.) *Arbitration in England, with chapters on Scotland and Ireland*. The Hague. Kluwer Law International, 2013, pp. 89-104, pp. 97-98

<sup>10</sup> GILL, Judith, SUTTON, David, *Russel on Arbitration*. 22nd. ed. London: Sweet&Maxwell Ltd, 2003, p. 218. See also BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, pp. 587-588 at footnotes 90-92. It appears that Blackaby also means there is no absolute right to an oral hearing in the AA England.

<sup>11</sup> ELGUETA, Giacomo Rojas, HOSKING, James, LAHLOU, Yasmine “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021 and its part about England and Wales by Angeline Welsh and Akash Soneca, pp. 2-3.

<sup>12</sup> GILL, Judith, SUTTON, David, *Russel on Arbitration*. 22nd. ed. London, Sweet&Maxwell, 2003, p 383. See also BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, pp. 587-588 at footnote 91.

<sup>13</sup> GILL, Judith, SUTTON, David, *Russel on Arbitration*. 22nd. ed. London, Sweet&Maxwell, 2003, p 387.

documents without the permission from the tribunal, then this may very well amount to a procedural irregularity.<sup>14</sup>

England has incorporated article V of the 1958 NY Convention into section 103. Its rules on the grounds for refusal of enforcement of foreign awards is reported to have been relied on rarely and as late as 2013, successfully in three cases only.<sup>15</sup> One of them was the *Irvani v. Irvani* case, which bear some relevance to this thesis as the issue at stake was due process.<sup>16</sup> The Court of Appeal found that the tribunal had failed to communicate an investigation relied on by the tribunal and further founded its decision on evidence not available to one of the parties.<sup>17</sup>

A violation of an existing right to a hearing in person is unlikely to warrant a refusal of enforcement of a foreign award in England.<sup>18</sup> A decision by the tribunal to conduct a remote hearing will fall outside the ambit of section article V 1.(b) unless it is proved by the party seeking to avoid enforcement that he was unable to present his case in such terms that natural justice as understood by the courts of England was violated. In other words, English courts apply English law, not the law of the seat. On the other hand, if it is proved that the proceedings were not in accordance with the arbitration agreement or the *lex arbitri*, enforcement may be refused under article V 1. (d). A failure to conduct a physical hearing is against public policy only if “...*that failure ... would have to constitute not only a procedural unfairness but one of such a gravity*”

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<sup>14</sup> ELGUETA, Giacomo Rojas, HOSKING, James, LAHLOU Yasmine “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about England and Wales by Angeline Welsh and Akash Soneca, p.3 and SAUNDERS, Matthew, “Chapter 7: COVID-19 and the Embracing of Technology: A ‘New Normal’ for International Arbitration” in Axel Calissendorff, Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2020*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.99-114, p.106.

<sup>15</sup> CANNON, Craig, TAVENDALE, Andrew, “Chapter 26: Enforcement of Awards” in Julian D.M. Lew et al. (eds.) *Arbitration in England, with chapters on Scotland and Ireland*. The Hague. Kluwer Law International, 2013, pp.563-594, pp.574-575.

<sup>16</sup> [2000] 1 Lloyd’s Rep. 412

<sup>17</sup> GILL, Judith, SUTTON, David, *Russel on Arbitration. 22nd. ed.* London: Sweet&Maxwell 2003, p 374.

<sup>18</sup> ELGUETA, Giacomo Rojas, HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021 and its part about England and Wales by Angeline Welsh and Akash Soneca, p.13.

*that it is offensive.*<sup>19</sup> The relevant public policy is that of England. The courts will therefore not ask what the public policy of the seat of arbitration is.<sup>20</sup>

### **2.1.3 England, the LCIA Rules 2020**

Article 14.1 imposes on the tribunal the duty to at all time act fairly and impartially, giving each a reasonable opportunity of putting its case and dealing with that of its opponent, and to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide fair, efficient and expeditious means for the final resolution of the parties' dispute. This mirrors the gist of the AA England section 33.

When it comes to the discretion of the tribunal to the conduct the proceedings, it however appears that the centre of gravity in the LCIA Rules has been moved somewhat in direction towards the tribunal as compared to the AA England.<sup>21</sup> Whereas section 34 of the AA England subjects the tribunal's power to decide on procedural matters to the parties' right to agree on any such matter, article 14.1-2 subjects the tribunal's wide discretion only to the arbitration agreement itself, and of course to mandatory provisions of any applicable law or any rules of law the tribunal may decide to be applicable.

Save where the parties have agreed on a documents-only procedure, it follows from article 19.1 that the tribunal may decide on a hearing on its own initiative, and that any party has the right to a hearing before the tribunal prior to any ruling of the tribunal on its jurisdiction and authority or any award on the merits.

However, when it comes to the hearing the tribunal is given a very wide discretion in article 19.2 how to design it, subject to consultation with the parties only.<sup>22</sup> According to this provision, the tribunal shall have the fullest authority to establish the conduct

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<sup>19</sup> Ibid. pp.12-14.

<sup>20</sup> Ibid. p.14.- Cf. BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration. 6th ed.* Oxford: Oxford University Press, 2015, p. 628 at footnote 88.

<sup>21</sup> RICHMAN, Lisa, "Chapter 15: Conduct of Proceedings and Default Timetable" in Rémi Gerbay, Lisa Richman, Maxi Scherer (eds.) *Arbitrating under the 2020 LCIA Rules: A User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2020, pp.237-256, p.240

<sup>22</sup> RICHMAN, Lisa, "Chapter 16: Hearing, Witnesses and Experts" in Rémi Gerbay, Lisa Richman, Maxi Scherer (eds.), *Arbitrating under the 2020 LCIA Rules: A User's Guide.* Alphen aan den Rijn: Kluwer Law International, 2020 pp. 257-276, p.259.

of a hearing which includes i.a. a hearing in person, virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places.

## **2.2 Germany**

### **2.2.1 Zivilprozessordnung Germany, ordinary civil litigation**

In ZPO Germany §128 the principle is that the litigation shall be determined only after an oral hearing ("*mündliche Verhandlung*"). With both parties' consent which is valid for three months the court may however determine the case on a documents-only basis, consent to which may be revoked if a material change of the "*Prozesslage*", or the litigation circumstances, would occur.

Although no definition is provided as to what an oral hearing is, it is clear that the format for the *mündliche Verhandlung* envisaged in §§128 and 137 compared to §§ 215 and 219 is a physical hearing.<sup>23</sup> In 2002 the ZPO Germany was however amended such that a new §128a was inserted according to which it was made possible to conduct a *mündliche Verhandlung "im Wege der Bild- und Tonübertragung"*, i.e. by way of transmission of image and sound, or in other words through video.

According to this new §128a the court may on application from either of the parties *or ex officio* permit the parties, their representatives and counsels to participate in the hearing remotely, in which case image and sound shall be transmitted both ways, from and to the court and the remote location. Also taking of oral evidence from a witness, a party to the litigation or an expert may be conducted remotely in the same manner but only on application by either of the parties and therefore not decided *ex officio* by the court.<sup>24</sup> If the person to be so heard and the party (and his representatives and counsels) are participating from different locations, video transmission them in-between must be arranged too.

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<sup>23</sup> GEHRLEIN, Markus, PRÜTTING, Hans. *Zivilprozessordnung Kommentar. 8. Auflage*. Köln: Wolters Kluwer Deutschland GmbH, 2016, p. 599 " *Im Rahmen einer Videokonferenz wird nun nicht mehr vorausgesetzt, dass die Parteien und ihre Vertreter persönlich und gleichzeitig im Gerichtssaal anwesend sind.*"

<sup>24</sup> *Ibid.* 599-600. In both cases the court may consequently decide against the will of one of the parties.

The amendment equals a remote hearing with all types of hearings, not only the *mündliche Verhandlung*, and in all aspects.<sup>25</sup> It would therefore appear that the amendment implicitly equals a remote hearing with a *mündliche Verhandlung*.<sup>26</sup>

The amendment serves the purpose of process economy by way of lowering the costs and accelerating the proceedings.<sup>27</sup>

### **2.2.2 Zivilprozessordnung Germany, arbitration** <sup>28</sup>

In Germany the rules on arbitration are included in the ZPO Germany, in Buch 10 spanning from §1025 to §1066.

In §1042 two fundamental rules are laid down: the parties are to be accorded equal treatment and each of them shall be accorded the right to be heard. This encompasses the same legal standard as applies to a state court in ordinary civil litigation. For example, submissions from one party must be communicated to the other, both parties must be offered equal possibilities to bring anything that to them appears necessary to the tribunal (and not just to one of the arbitrators), right to bring evidence to the proceedings, right to respond to anything the other party invokes or rely on and to participate in the taking of evidence.<sup>29</sup>

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<sup>25</sup> ALBERS, Jan, HARTMANN, Peter, *Zivilprozessordnung. 62. Auflage*. München: Verlag C.H. Beck, 2004, p.601

<sup>26</sup> GEHRLEIN, Markus, PRÜTTING, Hans, *Zivilprozessordnung Kommentar. 8. Auflage* Köln: Wolters Kluwer Deutschland GmbH, 2016, p. 599.

<sup>27</sup> ALBERS, Jan, HARTMANN, Peter, *Zivilprozessordnung. 62. Auflage*. München: Verlag C.H. Beck, 2004, p.601

<sup>28</sup> Germany is one of some 80 countries where the legislation on arbitration has been adopted based on the Model Law, the objectives of which are to unify and harmonise the legal frameworks for international arbitration, cf. BINDER, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions. 3rd ed.* London: Sweet Maxwell/Thomson Reuter, 2010 pp. 7-8. - It is reasonable to assume that the objectives of the UNCITRAL project of the Model Law will influence the interpretation of corresponding national rules and that case law where national legislation built on the Model Law has been tried in tribunals or courts in setting aside or enforcement proceedings will have relevance for other Model Law influenced legislations.

<sup>29</sup> SCHWAB, Karl-Heinz, WALTHER, Gerhard, "Kapitel 15. Besondere Verfahrensvorschriften für das Schiedsverfahren", *Schiedsgerichtsbarkeit Kommentar. 7. Auflage*. Basel: Hellbing&Lichtenhahn, 2005, at Rn2.

There is no specific provision to ensure a time efficient procedure in the ZPO Germany, as there is in the DIS Rules article 27. That duty is considered to apply anyway also in ad hoc arbitrations.<sup>30</sup>

As to the rules for the proceedings, according to §1047 the parties are at liberty to agree on a documents-only procedure, failing which it is for the tribunal to decide whether to hold an oral hearing (“...ob mündliche verhandelt werden soll...”) or to proceed on a documents-only basis. However, unless the parties have agreed to exclude oral hearing, the tribunal must conduct such a hearing if requested by a party. Yet tribunals regularly decide on conducting oral hearings without any prior request which they should refrain from only exceptionally.<sup>31</sup>

There is some support for the notion that *Mündlichkeit* in §128 has another and implicitly wider meaning than *Mündlichkeit* in §1047 and that §1047 therefore not necessarily must be taken to mean hearing in person. It is also added that §128 does not apply at all to arbitration.<sup>32</sup> It is however also suggested that the exclusion of the principle of orality in arbitration means that written submissions already made need not be repeated or restated at the oral hearing, and that there is no requirement to take witness and expert evidence orally at a hearing, it is sufficient if they produce their statements in writing.<sup>33</sup>

As we have seen, §128a allows a state court in civil litigation to decide on a remote hearing, even though a party would claim a hearing in person. This has been taken to

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<sup>30</sup> SCHARDT, Ramona, TRITTMAN, Rolf, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 27: Efficient conduct of the proceedings”, in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 424-450, p.428.

<sup>31</sup> SCHWAB, Karl-Heinz, WALTHER, Gerhard “Kapitel 16. Die Geltung allgemeiner prozessrechtlicher Grundssätze,” *Schiedsgerichtsbarkeit Kommentar. 7. auflage*. Basel: Hellbing&Lichtenhahn, 2005 at Rn 32: “Da aber grundsätzlich nur ein mündliches Verfahren die Garantie einer richtigen Entscheidung bietet, dürfen für Ausnahmen vom Mündlichkeitsgrundsatz nicht lediglich Zweckmässigkeitserwägungen genügen; erforderlich ist ein über solche Erwägungen hinausgehender sachlicher Grund”

<sup>32</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. “Die Virtuelle Verhandlung im Schiedsverfahren.” *SchiedsVZ*, 2020, issue 6, pp. 257-265, p. 262.

<sup>33</sup> LÖRCHER, Torsten, SACHS, Klaus, “Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter V: Conduct of the Arbitral Proceeding, § 1047 – Oral Hearings and Written Proceedings” in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) *Arbitration in Germany: The Model Law in Practice. 2nd ed*. Alphen aan en Rijn: Kluwer Law International, 2015, pp. 278-286, p.279 – 280.

mean that a remote hearing in arbitration even if against a party's request would not be in breach of §1047 (of course, provided that the tribunal does not violate a party agreement on a hearing in person). Also, it has been argued that a virtual hearing does not violate the basic principles in §1042 or equal treatment or the right to be heard.<sup>34</sup>

The same opinion has been advanced in the Germany Country report in the ICCA Report presented at the XXVth ICCA Congress. It is argued that German arbitration law does not confer any right to a party to request a hearing in person, neither explicitly, nor impliedly. The arguments are that the gravity of the procedural settings lies on the right to equal treatment and the right to be heard and that a remote hearing does not violate these principles *per se*.<sup>35</sup> It is further argued that there is no explicit rule providing for a hearing in-person as §1047(1) first sentence speaks about *oral argument*. True, it does so in its official English translation but in the German language §1047 uses the words *mündliche Verhandlung*. It would appear that *mündliche Verhandlung* is not just an exchange of oral arguments.<sup>36</sup>

There are of course arguments in favour of the opposite position, that a tribunal cannot refuse a hearing in person if requested by a party. The arguments for the opposite position seem to focus on that a remote hearing is less expedient and on a legal-technical argument founded on §1048 (3). The subsection 3 deals with the non-appearance of a party at an oral hearing: "*Versäumt es eine Partei, zu einer mündlichen Verhandlung zu erscheinen...*"; *erscheinen* means to appear. The idea is that this § and the word *erscheinen* implies that a party must be present physically.<sup>37</sup> That argument does not appear to be too convincing: the wording of §1048 stems back to 1985 when

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<sup>34</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. "Die Virtuelle Verhandlung im Schiedsverfahren" *SchiedsVZ*, 2020, issue 6, pp.257-265, pp.259-261

<sup>35</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Germany by Barbara Maurer and Anke Meier, p.6.

<sup>36</sup> SCHWAB, Karl-Heinz, WALTHER, Gerhard," Kapitel 16. Die Geltung allgemeiner prozessrechtlicher Grundssätze", *Schiedsgerichtsbarkeit Kommentar*. 7. auflage. Basel: Hellbing&Lichtenhahn, 2005 at Rn 32.

<sup>37</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Germany by Barbara Maurer and Anke Meier, p. 4 and GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. "Die Virtuelle Verhandlung im Schiedsverfahren." *SchiedsVZ*, 2020, issue 6, p. 262.

videoconferencing did not exist and can therefore not have had as its purpose to exclude remote hearings.

§1059 on setting aside closely mirrors article 34 of the Model Law and article V of the 1958 NY Convention.<sup>38</sup> According to article V 1.(b) of the 1958 NY Convention an award may be refused recognition or enforcement if a party has not been properly notified of the appointment of an arbitral judge, or of the arbitration proceedings, or if he was unable to assert the means of defence available to him for other reasons. Even if such words are not used in article V 1.(b) it encompasses the violation of the right to equal treatment provided for in §1042.<sup>39</sup>

Procedural irregularities of this nature may well also violate *ordre public*. In such cases the award will be set aside *ex officio*, i.e without any claim for setting aside the award, §1059 2(2).b.

If it is correct that there is no right to a physical hearing, the tribunal's decision against one party's request to conduct a remote hearing cannot warrant setting aside *per se*.<sup>40</sup> Should however the remote hearing be derailed because of technical problems such that a party could not take part of the documents or not comment on submissions made by the other party or being excluded from information because of insufficient digital capacity, it is possible that the award can be set aside on the ground that the party's right to be heard or the right to equal treatment has been violated.<sup>41</sup>

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<sup>38</sup> SCHWAB, Karl-Heinz, WALTHER, Gerhard, "Kapitel 24. Aufhebungsgründe beim Schiedsspruch", *Schiedsgerichtsbarkeit Kommentar. 7. auflage*. Basel: Hellbing&Lichtenhahn, 2005, at Rn 3 and KRAFT, Peter, KRÖLL, Stefan M., "Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, §1059 – Application for Setting Aside," in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) in *Arbitration in Germany: The Model Law in Practice. 2nd ed.* Alphen aan en Rijn: Kluwer Law International, 2015, pp.383-420, p.386.

<sup>39</sup>SCHWAB, Karl-Heinz, WALTHER, Gerhard, "Kapitel 15. Besondere Verfahrensvorschriften für das Schiedsverfahren", *Schiedsgerichtsbarkeit Kommentar. 7. auflage*. Basel: Hellbing&Lichtenhahn, 2005 at Rn 1.

<sup>40</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Germany by Barbara Maurer and Anke Meier, pp.11-13.

<sup>41</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. Die Virtuelle Verhandlung im Schiedsverfahren. *SchiedsVZ*, 2020, issue 6, pp. 257-265, pp. 259-260.

The tribunal's failure to observe the parties' rights to be heard is relevant only if it has affected the tribunal's decision. It lies on the party who asserts causation to prove it – and what the outcome would have been but for the alleged failure. However, there seems to be no requirement for seriousness apart from the requirement for causation.<sup>42</sup>

Finally, the ZPO Germany incorporates in §1061 by reference the 1958 NY Convention as law. As to enforcement in Germany of a foreign award where it is submitted that the tribunal did decide on remote hearing against a party's request and therefore violated the right to be heard or the right to equal treatment, it is unlikely that Germany would refuse enforcement. In applying article V 1.(b), Germany will apply German law to determine the standard to be applied to article V 1.(b).<sup>43</sup> What matters is then whether the party trying to prevent enforcement actually was prevented from participating in the procedure such that it did not comply with due process.

Should on the other hand the tribunal have neglected a party agreement on a physical hearing it appears that Germany would refuse recognition based on article V 1.(d). The answer is probably the same if the tribunal violated a *lex arbitri* right to physical hearing.<sup>44</sup>

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<sup>42</sup> LÖRCHER, Torsten, SACHS, Klaus, "Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter V: Conduct of the Arbitral Proceeding, §1042 – General Rules of Procedure pp.241-259, p.249, and KRÖLL, Stefan M., KRAFT, Peter, "Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, §1059 – Application for setting Aside" pp.383-420, p. 405 and 409 in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) in *Arbitration in Germany: The Model Law in Practice. 2nd ed.* Alphen aan en Rijn: Kluwer Law International, 2015.

<sup>43</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Germany by Barbara Maurer and Anke Meier, pp.14-15, and KRÖLL, Stefan M., "Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VIII: Recognition and Enforcement of Awards, § 1061 – Foreign Awards" in in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) in *Arbitration in Germany: The Model Law in Practice. 2nd ed.* Alphen aan en Rijn: Kluwer Law International 2015, pp.443-504, p.469.

<sup>44</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Germany by Barbara Maurer and Anke Meier, pp.16-17.

If there are particular strong grounds for asserting violations of article V 1.(b) or (d), the enforcement may be refused on public policy grounds.<sup>45</sup>

### 2.2.3 Germany, DIS Rules 2018

Article 21.1 of the DIS rules sets out that the parties shall be treated equally and that each party shall have the right to be heard, which at large equals the requirement to observe due process.<sup>46</sup> This is considered to coincide with the principles of ECHR article 6.<sup>47</sup> Moreover, the duty of the tribunal in delivering the opportunity to the parties to be heard is essentially no less strict than what applies to state courts.<sup>48</sup> However, there is no similar obligation on the tribunal to direct the parties as envisaged in ZPO Germany §139 in order to ensure that the parties make submission on all relevant facts.<sup>49</sup>

The norm hierarchy in relation to the proceedings is also laid out in article 21.2-4. Firstly applies the agreements between the parties, secondly the DIS Rules and, thirdly, in the absence of any party agreement and DIS Rules, it is for the tribunal to consult with the parties and thereafter to decide on the applicable procedure, in all situations always within the borders of mandatory rules stemming from the relevant *lex arbitri*, in case the tribunal is seated in Germany, German arbitration law. The discretion of the tribunal is considered to be wide.<sup>50</sup>

Article 27 of the DIS Rules obliges the tribunal (and the parties) to conduct the proceedings in time- and cost-efficient manner. The idea is that the conduct of the

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<sup>45</sup> Ibid. p.15

<sup>46</sup> BUSSE, Daniel, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 21: Rules of Procedure”, in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 319-342, p.330. – Interestingly, in the forerunner to DIS Rules 2018, the DIS Rules 1998, the rules on due process, that were laid down in article 26, had a different wording: “Each party shall be given a full opportunity to present his case at all stages of the proceedings.” Cf. RISSE, Jörg, “Part III: Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Section 26 – Due Process” in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) in *Arbitration in Germany: The Model Law in Practice. 2nd ed.* Alphen aan den Rijn. Kluwer Law International, 2015, pp. 675-678, p. 678.

<sup>47</sup> BUSSE, Daniel, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 21: Rules of Procedure”, in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 319-342, p.324.

<sup>48</sup> Ibid. p.324.

<sup>49</sup> Ibid. p.324.

<sup>50</sup> Ibid. p.336.

proceedings shall be thoroughly and appropriately discussed at case management conference(s), and one tool to accomplish the obligation in article 27 is video conferencing for “... *certain hearings where attendance in person is not crucial, and/or impractical in the interest of time and travel expenses.*”<sup>51</sup>

To conduct an oral hearing is mandatory upon request from a party, article 29.1, unless the parties have agreed on a documents-only procedure. In the absence of any agreement or request it is for the tribunal to decide whether an oral hearing shall take place. The tribunal has a wide discretion how to organize and conduct the oral hearing, only confined by the requirements of due process.<sup>52</sup>

However, failure to hold one when an oral hearing should have been conducted makes the award prone to be set aside or not being enforced.<sup>53</sup>

## 2.3 France

### 2.3.1 Code de Procédure Civil de France, ordinary civil litigation

French civil procedural law divides the litigation before the *Tribunal de Judiciaire* (the first instance in ordinary civil litigation) in two phases, *instruction* or *mise en état* on the one hand and thereafter the *débat* or *audience* on the other hand.<sup>54</sup> At large the

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<sup>51</sup> SCHARDT, Ramona, TRITTMAN, Rolf, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 27: Efficient conduct of the proceedings in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.424-450, pp. 441-442.

<sup>52</sup> SCHARDT, Ramona, TRITTMAN, Rolf, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 29: Oral hearing”, in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.473-482, p.479 and RISSE, Jörg, “Part III: Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Section 28 – Oral Hearing” in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) *Arbitration in Germany: The Model Law in Practice. 2nd ed.* Alphen aan den Rijn. Kluwer Law International, 2015, pp.682-683.- Risse’s commentary relates to the DIS Rules 1998, the forerunner to the DIS Rules 2018. As the words “...*the arbitral tribunal shall hold such hearings at an appropriate stage of the proceeding...*” in the DIS Rules 1998 have been deleted, article 29 of the DIS Rules 2018 is more restrictive.

<sup>53</sup> SCHARDT, Ramona, TRITTMAN, Rolf, “§2.05: The Proceedings Before the Arbitral Tribunal, Article 29: Oral hearing”, in Christopher Boog et al. (eds.) *The DIS Arbitration Rules – An Article-by-Article Commentary*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.473-482, p.479, p.478.

<sup>54</sup> The terminology seems not to be all too clear, cf. CHAINAIS, Cécile et al., *Procédure Civil Droit Commun et special du procès civil, MARD et arbitrage*. 35th ed. Paris: Dalloz, 2020, pp. 664-665, 674 and OUDIN, Martin, *Evidence in Civil Law France*. Maribor: Institute for Local Self-Government and Public Procurement, 2015, pp 1-2 of the Introduction chapter. It appears that *instruction* and *mise en état* are used interchangeably, as are *débats* and *audience*. – *Le Tribunal de Grande Instance* and the *Tribunal d’Instance* no longer exist. They were merged to the *Tribunal Judiciaire* by Loi n° 2019-222 du 23 mars

two phases correspond to a general division known from most jurisdictions, the pre-trial period with exchange of written submissions detailing facts and evidence and then finally a hearing or trial.

But there are marked differences. French procedural law distinguishes itself from the other jurisdictions investigated in this thesis insofar that there is no principle of free evaluation of evidence, but instead a mixture of *preuve légale* and *preuve morale*. Only the latter allows for free assessment of the probative value of evidence. In civil litigation it is however the former that is the dominant theory.<sup>55</sup> Albeit not necessarily promoting material truth, its great advantage is considered the simplicity and certainty it entails.<sup>56</sup>

Another salient feature of French civil procedural law is how oral evidence is taken by the court and the relevance oral evidence generally has. The rules governing taking of a witness' oral evidence are found in articles 204-230. Taking of witness evidence usually takes place during the phase of *mise en état* which means that once this phase is closed as per article 799 no more witnesses can be summoned to give evidence, even though the *débat* or *audience* remains (although that exceptionally may occur).<sup>57</sup>

Moreover, the format for examining a witness is such that it is the judge that walks witness through the questions, article 213. The parties are not allowed to examine the witness. If the parties have any questions they want to make, they must put them to the judge and then it is in his discretion to decide if they shall be put to the witness, article 214. This means there is no room for cross examination.<sup>58</sup>

The testimony is recorded in a protocol (*procès-verbal*), article 219. The judge may adduce his observations about the behaviour of the witness to the protocol, article 220. The protocol is signed by the witness and the judge and entered to the ledger and

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2019 de programmation 2018-2022 et de réforme pour la justice, art. 95), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038261631>

<sup>55</sup> OUDIN, Martin, *Evidence in Civil Law France*. Maribor: Institute for Local Self-Government and Public Procurement, 2015, pp. 9-11.

<sup>56</sup> Ibid. p.10

<sup>57</sup> Ibid. p.37

<sup>58</sup> CHAINAIS, Cécile et al., *Procédure Civil Droit Commun et spécial du procès civil, MARD et arbitrage*. 35th ed. Paris: Dalloz, 2020, pp. 551-552.

the file.<sup>59</sup> It is via the *procès-verbal* or the written protocol the evidence from the witness is taken by the judges that will decide the case.<sup>60</sup>

Once the phase of *instruction* or *mis en état* has come to an end, the judge presiding over this phase will declare it closed and transfer the case and the file to the court whereafter the *président* will decide the date for the *débat*, article 799. It is generally oral but if the parties agree it may be in writing.<sup>61</sup> The *débat* is confined to argumentation on law and facts but nothing new will be accepted, articles 430-446.

At the *débat* the court that will decide the case will be composed by three or more judges, one of which may or may not be the judge that presided over the *mise en état* phase.<sup>62</sup>

Which leads to the next questions: the general principles governing French civil procedure, relevant to this thesis, one of which clearly not is directness.<sup>63</sup>

The contradictory principle is laid down in articles 14-17. This principle include the right to be heard, “*Nulle partie ne peut être jugée sans avoir été attendue ou appelée*” and the duty of the court to communicate “*...les moyens, les explications et les documents invoqués ou produits par les parties...*”. The latter encompasses i.a. the possibility to discuss documents produced by the adversary, witness depositions and to participate in taking of evidence, be it from witnesses or experts.<sup>64</sup>

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<sup>59</sup> Ibid. p. 552 – unless the testimony is given before the judge that will decide the case immediately thereafter, article 219 second sentence.

<sup>60</sup> Articles 799 and 804. The judge presiding over the *mis en état* produces a report over the case including the submissions, issues and evidence. The report is transferred to the judges sitting on the case *avant le plaidoirie*.

<sup>61</sup> CHAINAIS, Cécile et al., *Procédure Civil Droit Commun et special du procès civil, MARD et arbitrage*. 35th ed. Paris: Dalloz, 2020 p. 674.

<sup>62</sup> Ibid. p. 677.

<sup>63</sup> OUDIN, Martin, *Evidence in Civil Law France*. Maribor: Institute for Local Self-Government and Public Procurement, 2015, p.8.

<sup>64</sup> CHAINAIS, Cécile et al., *Procédure Civil Droit Commun et special du procès civil, MARD et arbitrage*. 35th ed. Paris: Dalloz, 2020, pp. 613-616.

Equality of arms is also a general principle but it stems from article 6 of the ECHR, everyone shall be entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.<sup>65</sup>

Even though there is a right to an oral hearing, its relevance to the proceedings is much different from the other jurisdiction that are investigated in this thesis. Firstly, lawyers tend to favour written pleadings and so do the judges.<sup>66</sup> Secondly, taking of oral evidence is usually a standard scene in any oral hearing but generally not in France, as the testimonial evidence is taken by the judges deciding the case by the protocol, or the *procès-verbal*. The art of cross examination does not have any role. This reflects a common view among French lawyers and judges: “*The hearing of witnesses is rare. Oral evidence is considered inferior to documentary evidence as proof.*”<sup>67</sup>

Under such circumstances it would perhaps not matter much whether the court can decide on proceedings on a documents-only basis, as such proceedings any way is what lawyers and judges prefer, and as the judges deciding the case usually never will see or hear the witnesses (but only read the protocol, *le procès-verbal*, containing what witnesses have said). Nor would it raise any concern if the witness would be heard remotely or indeed if the *débat* or *audience* would be conducted remotely. (But as will be seen later in chapter 4.3.4, French lawyers seem to be very little in favour of remote hearings in ordinary, civil proceedings).

There is a possibility to remote hearing according to article L111-12 of the *Code de l'organisation judiciaire*, that came into force 2007, however assuming a decision by the chairman sitting on the case and consent from the parties.<sup>68</sup>

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<sup>65</sup> Ibid. p.604-606.

<sup>66</sup> OUDIN, Martin, *Evidence in Civil Law France*. Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 7

<sup>67</sup> PRATT, Bredin, “In Review: The court Proceedings in France” in *The Dispute Resolution Review*. 12<sup>th</sup> ed. 2020.

<sup>68</sup> This possibility has been taken to mean that an oral hearing under CPC France must mean a hearing in person as the videoconference only is available upon consent. See ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about France by Valentina Chessa, Nataliya Barisheva and Arianna Camillacci, pp.5-6.

A step further was taken during the COVID-19 pandemic. On March 25, 2020, new legislation was passed that allowed courts to conduct hearings remotely even without consent from the parties in civil cases, but only during the period that is limited to the state of emergency during the pandemic that was declared in France in on March 23, 2020.<sup>69</sup>

### **2.3.2 Code de Procédure Civil de France, arbitration**

Arbitration is governed by articles 1442 – 1527 of CPC France. They distinguish between *arbitrages interne* or domestic arbitration and *arbitrages international*. Domestic arbitration is defined negatively, what is not an international arbitration is a domestic arbitration.<sup>70</sup>

The definition of international arbitration is set out in article 1504: “*Est international l’arbitrage qui met en cause des intérêts du commerce international*”. Not very clear perhaps but the idea is that only economic factors will determine whether it is an international arbitration. The nationality of the parties or the governing law of the contract in dispute are irrelevant. What matters is if the dispute concerns the cross border flow of goods or services. Domestic arbitration is therefore confined to proceedings which connect the economics in a case to one single country.<sup>71</sup>

The differences governing the two categories of arbitrations are not big, at least not in so far they are relevant to this thesis. They refer to the conduct of the proceedings where the regime for the international arbitration is more liberal, but most of all to the possibilities to appeal against or seek to set aside an award.<sup>72</sup>

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<sup>69</sup> Ordonnance n° 2020-304 du 25 mars 2020 portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété, article 7. Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755577/>

<sup>70</sup> ORTSCHIEDT, Jérôme, SERAGLINI, Christophe, *Droit de l’arbitrage intern et international*. 2nd ed. Issy-les-Moulineaux: L.D.G.J, 2019, p. 47.

<sup>71</sup> Ibid. pp. 47-49 and FOUCHARD, Philippe, GAILLARD, Emanuelle, GOLDMANN, Berthold, *Fouchard, Gaillard Goldmann on International Commercial Arbitration*, pp.55-56. The Hague: Kluwer Law International, 1999. This book was published in 1999, and its references on pp. 55-56 are to CPC France article 1492, which corresponds to article 1504 in its present version. – The authors refer to the *Matter* decision of 1927 as the leading French case. This case held that a transaction will be international where it generates a movement across borders with reciprocal consequences *in more than one country*.

<sup>72</sup> ORTSCHIEDT, Jérôme, SERAGLINI, Christophe, *Droit de l’arbitrage intern et international*. 2nd ed. Issy-les-Moulineaux: L.D.G.J, 2019, p.47

Firstly, a domestic arbitration award may be appealed, article 1489, provided the parties have agreed on that possibility. That is however not an option open against an international arbitration award. Secondly, the grounds for setting aside an international arbitration award are somewhat narrower in that it is not possible to challenge such an award on the grounds that the award is not reasoned or is missing some of the details listed in article 1492.6 (for example not stating the date it was handed down), cf. article 1520. Thirdly, while it is possible to renounce the right to set aside an international arbitration award, that is not possible in relation to domestic arbitration awards.<sup>73</sup> Fourthly, where domestic arbitration awards may be set aside on the ground of violating *ordre public*, international arbitration awards can be set aside only if it violates *ordre public international*, cf. articles 1492.5 and 1520.5, which is a narrower concept than just *ordre public*.<sup>74</sup>

As to the rules governing the procedure, article 1464, which is applicable to domestic arbitration, makes articles 14 and 16 applicable by way of reference. Those two articles set out the fundamental principle of the right to be heard: “*Nulle partie ne peut être jugée sans avoir été entendue ou appelée*, (article 14), detailed such that the tribunal must not found its decision on “*...les moyens, les explications et les documents invoqués ou produits par les parties que si celles-ci ont été à même d'en débattre contradictoirement.*” (article 16).<sup>75</sup>

According to article 1464, article 14 is mandatory. So are also the duties laid down in article 16 for the tribunal and the parties to observe “*... célérité et loyauté dans la conduite de la procédure*”.

Article 1506.3 which applies to international arbitrations refers to article 1464 which is to be applied also in international arbitrations, but only the third sentence of article 1464 which deals with *célérité et loyauté*.

This does not mean that the right to be heard can be contracted out or not is applicable in international arbitrations. According to article 1510 the tribunal must

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<sup>73</sup> Ibid. p.47 at footnote 150.

<sup>74</sup> Ibid. p.989

<sup>75</sup> See *supra* at footnote 64.

always guarantee the equality of the parties and respect the “...le principe de la contradiction.”, or the right to be heard.

So far we have identified two fundamental principles that govern both domestic arbitration and international arbitration. Then apart there is a third, article 6 of the ECHR which guarantees the parties a fair hearing, which applies, if not directly but indirectly through the principles upon which it is designed.<sup>76</sup> These three principles apply as well to domestic arbitration as to international arbitration.<sup>77</sup>

These principles aside the tribunal has a wide discretion to design and conduct the proceedings as it see fit. Both articles 1464 (domestic arbitration) and 1509 (international arbitration) leave it to the parties to agree on the rules governing the procedure failing which it falls on the tribunal to decide. Article 1464 expressly clarifies that in selecting the regime, the parties or the tribunal are not bound to the civil procedure rules applicable to the courts. There is no corresponding provision in the CPC France relative to international arbitration but the same applies there any way.<sup>78</sup>

There is no rule in the CPC France to call for the tribunal to conduct an oral hearing, not even if a party would request it, be it in domestic arbitration or international arbitration.<sup>79</sup> Nor would it *per se* be considered to violate any of the three principles governing the procedure to refuse a party to hold an oral hearing, unless it would qualify as a violation of the right to a fair process, or, in other words due process.<sup>80</sup>

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<sup>76</sup> Ibid. pp. 388 and 810.

<sup>77</sup> Ibid pp. 804 and 809.

<sup>78</sup> Ibid p. 798. Or even more so in international arbitration: article 1509 is said to “...manifeste ...une délégalisation de la procédure arbitrale...”

<sup>79</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about France by Valentina Chessa, Nataliya Barisheva and Arianna Camillacci, p.2 and ORTSCHIEDT, Jérôme, SERAGLINI, Christophe, *Droit de l’arbitrage intern et international. 2nd ed.* Issy-les-Moulineaux: L.D.G.J, 2019, pp. 383 and 807.- Cf. ROUCHE, Jean, POINTON, Gerald H., DEVOLVÉ, Jean-Louis, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (Second Edition)*. Alphen aan den Rijn: Kluwer Law International, 2009, p.126 in Part II, Chapter 5: Arbitral Proceedings: General Remarks on Arbitral Proceedings in French Law, where the procedure before the tribunal is discussed. It is nowhere suggested that there is an absolute right for a party to request an oral hearing. On the other hand it is stressed that a party must be given a fair opportunity to present and argue its case, p.127.

<sup>80</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and

As there is no absolute right to an oral hearing, a party has no right to resist a remote hearing to require an in-person hearing. Consequently, the tribunal may impose a remote hearing against the objections of a party.<sup>81</sup>

In any event, a request for setting aside an award on the ground that the tribunal did not comply with the requirements of due process, article 1492.4 or 1520.4, will only be successful if causation between non-compliance and the award can be established.<sup>82</sup>

Violation of *ordre public* is a particular ground in itself for setting aside, but when it comes to the ground for setting aside in articles 1492.4 or 1520.4, they overlap.<sup>83</sup>

The CPC France grounds for refusing enforcement of foreign awards are found in articles 1525, which refers back article 1520: only the same grounds that will justify the setting aside of an international arbitration award will suffice to refuse enforcement of a foreign award. These grounds will block enforcement in fewer situations than the 1958 NY Convention will and may therefore be said to be arbitration friendly.<sup>84</sup>

The only possible ground to refuse enforcement of a foreign award when a party pleads the tribunal erroneously conducted a remote hearing would therefore be that it violates p. 4, *Le principe de la contradiction n'a pas été respecté*, or the right to be heard which equals due process, or p 3. *“Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée”* which could be the case if the tribunal has

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its part about France by Valentina Chessa, Nataliya Barisheva and Arianna Camillacci, p. 10. Cf. . – Cf. ROUCHE, Jean, POINTON, Gerald H., DEVOLVÉ, Jean-Louis, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (Second Edition)*. Alphen aan den Rijn: Kluwer Law International, 2009, pp. 204, 205 and 239 where hearing and the grounds for challenging an award are discussed (Chapter Part III, Chapter 8: Challenge of Arbitral Awards in French Cours d'Appel). It is certainly stressed that a party must be given a fair hearing but it is not discussed if a denial to comply with a request for an oral hearing would automatically mean the requesting party was deprived a fair hearing.

<sup>81</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about France by Valentina Chessa, Nataliya Barisheva and Arianna Camillacci, pp. 1-3.

<sup>82</sup> ORTSCHIEDT, Jérôme, SERAGLINI, Christophe, *Droit de l'arbitrage intern et international*. 2nd ed. Issy-les-Moulineaux: L.D.G.J, 2019, p.506.

<sup>83</sup> *Ibid.* p 507.

<sup>84</sup> *Ibid.* p.1007.

neglected a party agreement on hearing in-person (either in the arbitration agreement or by reference to institutional rules), but probably not if it violates *lex arbitri*.<sup>85</sup>

It is therefore very unlikely that a foreign award would be refused enforcement in France on the ground that the tribunal refused to abide to a request for a hearing in-person. It will depend on the facts of the individual case and whether it can be established that due process was in fact violated.<sup>86</sup> It also appears that French courts will not apply *lex arbitri* when adjudicating if a party was denied the right to be heard, but rather French law.<sup>87</sup>

### 2.3.3 France, ICC 2021

The seat of an arbitration will govern the mandatory *lex arbitri* applicable to the proceedings and therefore a whole range of issues such as interim measures, time frames within which to raise objections against procedural irregularities, remedies and annulment and challenges to the jurisdiction.<sup>88</sup> The rules on annulment do not directly govern the proceedings but have an indirect impact in that the tribunal will want to conduct the proceedings in a manner not likely to provoke annulment. However, the choice of the seat lies not in the hand of the tribunal. Failing an agreement by the parties it is for the ICC Court to determine the seat, article 18:1.<sup>89</sup> It appears that the ICC Court has an inclination to choose Paris as the seat, if the parties cannot agree.<sup>90</sup>

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<sup>85</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about France by Valentina Chessa, Nataliya Barisheva and Arianna Camillacci, pp.9-12.

<sup>86</sup> *Ibid.* p. 11-12.

<sup>87</sup> *Ibid.* p.12 and HASCHER, Dominique, "Les perspectives françaises sur le contrôle de la sentence internationale ou étrangère", *McGill Journal of Dispute Resolution*. (2015), vol 1:2, pp 1-15, p.3.

<sup>88</sup> GRIERSON, Jacob, van HOOFT, Annet, *Arbitrating under the 2012 ICC Rules*. Alphen aan den Rijn, Kluwer Law International, 2012, pp.114 and 116.

<sup>89</sup> *Ibid.* pp.119-120. The authors refer to article 18:1 of the 2012 version of the ICC Rules, but that article has the same wording in article 18:1 of the ICC Rules 2021. – The Swiss Rules and the SCC Rules place the authority to decide the seat on the institute, if the parties cannot agree. The LCIA Rules, the CAC Rules and the DIS Rules on the other hand authorize the tribunal to decide if the parties cannot agree.

<sup>90</sup> *Ibid.* 119. – Even so, statistics show that only a minority of ICC cases are seated in France. In 2020 France was the seat in 88 ICC arbitrations, same as in the US. England was the seat in 85 ICC cases and Switzerland in 104 cases and Brazil 29. Altogether 133 countries hosted ICC cases. Statistics available in ICC Dispute Resolution 2020 Statistics, [https://file-eu.clickdimensions.com/iccwboorg-avxnt/files/2020statistics\\_icc\\_disputeresolution\\_895.pdf?m=8/30/2021%209:47:51%20AM&\\_cldee=dmIkaW5nZUBvdXRsb29rLmNvbQ%3d%3d&recipientid=contact-fefa610792a3ec11983f000d3adf9e9a-b8716f0e2081497fb47dda6ff0e0ce44&esid=ac733b33-7c40-42f9-8eaa-cd70d2d942ee](https://file-eu.clickdimensions.com/iccwboorg-avxnt/files/2020statistics_icc_disputeresolution_895.pdf?m=8/30/2021%209:47:51%20AM&_cldee=dmIkaW5nZUBvdXRsb29rLmNvbQ%3d%3d&recipientid=contact-fefa610792a3ec11983f000d3adf9e9a-b8716f0e2081497fb47dda6ff0e0ce44&esid=ac733b33-7c40-42f9-8eaa-cd70d2d942ee)

The authority of the different sources that govern an ICC arbitration is determined by article 19. Firstly the ICC Rules applies, to the extent they are silent secondly any agreement made by the parties and thirdly any order made by the tribunal, whether or not national arbitration law thereby is incorporated. To a certain extent the tribunal's discretion is confined by the choice of seat because the seat will govern the mandatory *lex arbitri* applicable to the proceedings but the choice of the seat is as we have seen excluded from the tribunal's discretion.

As to the procedures, no standard rules are given by the ICC Rules. It is instead for the tribunal to consult with the parties in order to design the rules that they consider appropriate to the case, always within the boundaries of any party agreement and always observing the need for a cost-effective and expeditious proceeding, article 22:1-2.<sup>91</sup> The tribunal must also act impartially and give each party a reasonable opportunity to present its case, article 22.4.

An aid to the efforts to design appropriate procedural rules are found in Appendix IV to the ICC Rules. The idea is that the issues listed in Appendix IV shall be discussed at a case management conference and agreed on by the parties, failing which the tribunal may include them in the procedural orders, article 22:2. One such issue is using video conferencing for procedural and other hearings when attendance in person is not essential, Appendix IV (f).

Further, as to hearings article 26:1 states that the tribunal must conduct a hearing if any of the parties so requests. And if so, after having consulted with the parties the tribunal shall decide if the hearing will take place in person or remotely, article 26:1. It is obvious that the tribunal has the discretion to decide on a remote hearing even if a party would request a hearing in person.

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<sup>91</sup> GRIERSON, Jacob, van HOOFT, Annet, *Arbitrating under the 2012 ICC Rules*. Alphen aan den Rijn, Kluwer Law International, 2012, pp. 153-154. – Articles 22:1-2 of the ICC Rules 2012 to which the authors refer correspond to articles 22: 1-2 of the 2021 version of the ICC Rules.

## 2.4 Sweden

### 2.4.1 Code of Judicial Procedure, ordinary civil litigation

Swedish civil procedural law is characterized by the three pillars orality, immediacy and concentration, the purpose of which is to facilitate the application of the principle of free evaluation of evidence.<sup>92</sup>

Consequently, the CJP Sweden chapter 42 section 18, chapter 43 sections 2 and 5 express the norm that a litigation shall only be determined after a trial (in Swedish: *huvudförhandling*) where both parties and witnesses must be present in person and that the trial must be oral (which means that reading from written submissions is allowed only after permission from court, which for practical reason is not unusual in more complex litigations). There are though a few exceptions, for example when a fully-fledged trial is not needed and none of the parties request one, judgment after default or judgment after settlement. The trial is a single event that shall be continued without interruptions until closed; only shorter pauses are allowed, chapter 43 section 11. And the judgment may only be founded on submissions made and facts that were presented during the trial.<sup>93</sup> Witnesses are heard by the parties, first examination in chief, then cross-examination and finally redirect, chapter 36 section 17.

Even though the main principle for parties and witnesses is physical presence in the court room, chapter 5 section 10, the court may allow a witness or a party to give testimony or participate through sound or sound and image transmission, i.e. video.<sup>94</sup> This possibility is not limited to taking of evidence only but may apply to the trial in its entirety. It is the court that decides, and the prerequisites are that it must be reasonable considering costs and inconveniences that a personal appearance otherwise would entail.

Many of the examples in chapter 5 section 10 are designed to the needs to protect witnesses or the aggrieved party from a hostile or threatening environment in criminal

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<sup>92</sup> BOGDAN, Michael, *Swedish Legal System*. Stockholm: JUNO, 2010, under the heading 8.4.2, The Main Principles concerning the Proceedings.

<sup>93</sup> Ibid. under the heading 8.4.3.2, The Main Hearing (Trial) and Judgment - Ch. 17 and 43

<sup>94</sup> BYLANDER, Eric, *Evidence in Civil Law – Sweden*. Maribor: Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 27.

proceedings, but it is intended and can be applied to conduct a trial also in a civil proceeding. This is apparent from the Government Bill where the possibility to hear witnesses and parties via telephone or video was proposed and subsequently approved by the parliament in 1999.<sup>95</sup>

It must though be added that the court must always factor in and consider the views of the parties and should not lightly go against them with a decision on video conferencing, particularly not when it concerns a fully remote trial in a complicated litigation. This is highlighted in a leading commentary to the CJP Sweden.<sup>96</sup>

In summary, the principle is oral trial with both parties present in the court room, and only under special circumstances should the court decide to go against a party's will.

Unlike many other jurisdictions there are no programmatic declarations in the CJP Sweden that aims to guarantee due process. This is most likely so because the design of the civil procedure is such that it in itself complies with due process. The trial shall be public (Chapter 5 section 1), all documents or information pertaining to a case must be recorded separately to each individual case, and all such information and documents are available to the parties (and the public, Chapter 6 section 1), a judgment may not be given for something else or more than that properly demanded by a party and it may not be based on circumstances other than those pleaded by a party as the foundation of his action (chapter 17 section 3), and the preparatory stage before the trial aims to clarify the positions of the parties and the evidence they rely on which must be presented to the other party (chapter 42 sections 5, 6 and 8). Also,

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<sup>95</sup> Proposition 1998/99:65 pp. 12-13 (free translation): *"In the government's view, it should be possible for a party to participate through video conferencing not only in simplified main proceedings held in immediate connection with a case management conference but also in ordinary main proceedings. ... But there should also be a not insignificant space to allow some to participate by videoconference in dispositive litigation in other cases, such as cases concerning greater values and more complicated circumstances."*

<sup>96</sup> FITGER, Peter et.al., *Rättegångsbalken*. Stockholm: JUNO version 91, 2021-12-10, at chapter 5 section 10 (free translation): *"When a decision is made, great consideration should normally be given to the parties' view on the matter. This is especially true in dispositive litigation. In the case of persons who have been relied on for evidentiary purposes, great consideration should normally be given to the party who has relied on the evidence. The other party's opinion may also be important. If on the other hand the reasons for participation through communication technology appear so strong that a party's view cannot be considered to outweigh these reasons, the court may thus decide on such participation against the party's will."*

the Swedish constitution has incorporated provisions that guarantee equality in face of the law and reflect ECHR article 6.<sup>97</sup>

#### **2.4.2 The Swedish Arbitration Act**

Like the English and German arbitration acts but unlike the CPC France, the SAA Sweden applies to both domestic and, provided sufficient connection like seat in Sweden, international arbitration, sections 46 - 47. Save for rules on choice of law applicable to the arbitration agreement and taking of evidence at Swedish courts as assistance to a foreign arbitration proceeding, sections 48 – 50, no different rules apply to international arbitration compared to domestic arbitration.

Sweden is not a Model Law country, but still so for example section 24 on the right to request an oral hearing at large corresponds to section 24 of the Model Law.<sup>98</sup> And, the 1958 NY Convention rules in article V on enforcement have been implemented in the SAA Sweden section 54.<sup>99</sup> Although there are slight differences in the wording, the Swedish Supreme Court has stressed the need to interpret the SAA Sweden section 54 such that it coincides with the NY 1958 Convention.<sup>100</sup>

As to the norm hierarchy governing the procedure, the party autonomy puts the decisions of the parties first, section 21, provided there is no impediment (like mandatory rules) to follow them. In the absence of any party decision or agreement, the tribunal has a wide discretion to conduct the proceedings but must always handle the dispute in an impartial, appropriate or practical and speedy manner.<sup>101</sup> In brief, section 21 expresses the principle of equal treatment. This means that the parties

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<sup>97</sup> The Swedish Constitution (SFS 2011:109) Chapter 1 section 9 and Chapter 2 section 11.

<sup>98</sup> LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 24 at 2.3.

<sup>99</sup> *Ibid.* the commentary to section 54 at 1:2

<sup>100</sup> EWERLÖF, Pontus, "Chapter 11: Application of the New York Convention by Swedish Courts", in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners' Guide. 2nd edition*. Alphen aan den Rijn: Kluwer International, 2021, pp. 361-400, 363-364

<sup>101</sup> JOHNSON, Sara, LÖF, Kristoffer, SKOGMAN, Aron, "Chapter 9: The proceedings" in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners' Guide. 2nd edition*. Alphen aan den Rijn: Kluwer International, 2021, pp. 217-326, 238 and 240.

must be given equal possibilities to act within the proceedings, to argue and to present evidence.<sup>102</sup>

Next to section 21, section 24 is the other cornerstone that governs the proceedings. In its second paragraph it provides for a duty on the tribunal (and certainly on the parties themselves) to communicate anything that has been adduced or entered to the proceedings by either of the parties or a third party, be it submissions, evidence, facts, documents, orally or in writing.<sup>103</sup>

In the first sentence of the first paragraph of section 24 it is further stated that the tribunal must extend to the parties to the extent necessary “...an opportunity to present their respective cases in writing or orally”. In its second sentence a party is given a right to request an oral hearing “...prior to the determination of an issue referred to the arbitrators for resolution”.

There are two important differences between these two rules. Firstly, the second sentence only refers to the *lis* or the very issue for which the parties have appointed the tribunal to settle, i.e. a hearing after which the case is decided on its merits, whereas the first meaning refers to procedural issues. Secondly, the rule of the first sentence is mandatory – but subject to the need which confers a discretion to the tribunal – whereas the second is non-mandatory; a party may abstain from invoking it.<sup>104</sup>

Taken together sections 21 and 24 expresses the principle of due process.<sup>105</sup>

A debate has arisen whether oral hearing also encompasses a remote hearing, or if it is confined to hearings in-person. The most prominent advocate for a narrow

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<sup>102</sup> Ibid. pp. 238-239

<sup>103</sup> Ibid. pp.266-267 and HOBÉR, Kaj, *International Commercial Arbitration in Sweden. 2nd edition.* Oxford: Oxford University Press, 2021, p.191.

<sup>104</sup> JOHNSON, Sara, LÖF, Kristoffer, SKOGMAN, Aron, “Chapter 9: The proceedings” in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners’ Guide. 2nd edition.* Alphen aan den Rijn: Kluwer International, 2021, pp. 217-326, pp. 256-257 and HOBÉR, Kaj, *International Commercial Arbitration in Sweden. 2nd edition.* Oxford: Oxford University Press, 2021, p. 232.

<sup>105</sup> JOHNSON, Sara, LÖF, Kristoffer, SKOGMAN, Aron, “Chapter 9: The proceedings” in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners’ Guide. 2nd edition.* Alphen aan den Rijn: Kluwer International, 2021, pp. 217-326, pp. 238 and 256-257.

interpretation is Stefan Lindskog, former chairman of the Supreme Court and author of the leading commentary on arbitration in Sweden. He argues that oral hearing cannot include a remote hearing but also accounts for opposing arguments from other scholars, Hadar Cars and Bengt Lindell, in his commentary.<sup>106</sup>

There are other opinions in favour of video conferencing than those referred to by Lindskog. Those in favour mean that the requirement on oral hearing must be taken to mean only the opposite to written. As videoconferencing did not exist when the SAA Sweden was prepared back in 1994, the purpose of prescribing oral hearing cannot have been to exclude something that did not exist at the time when the law was passed. In any event, there is no support in the *travaux préparatoire* to support that an exclusion of future technologies was intended. The advocates in favour of remote

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<sup>106</sup> LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 24 at 4.2.3. His arguments go as follows (free translation): “An oral hearing refers to a meeting where the arbitrators and the parties are given the opportunity to develop their case before the arbitrators. A video conference can, in some situations, streamline an arbitration process. A hearing held through such a conference is, however, not to be regarded as oral within the meaning of [section 24] first paragraph, second meaning. If a party requests an oral hearing on the basis of that provision, he thus does not have to settle for a video conference. Different [opinion, my comment] Cars p. 132 and Lindell p. 200. However, the legal text must be considered clear. And in my opinion, a video conference cannot fully replace an oral hearing.”

hearings also refer to fact that remote hearings are permitted in civil litigation, cf.

*supra* at 2.4.1.<sup>107 108 109</sup>

As we have seen the ICCA addressed the question of remote hearings in the ICCA Report presented at the XXVth ICCA Congress in Edinburgh 2021. In the country report for Sweden the authors side with Lindskog and repeat his argument as being the position *de lege lata* for Sweden, however without adducing anything new to reinforce the position.<sup>110</sup>

Section 34 first paragraph p.7 of the SAA Sweden provides for the possibilities to set aside an award if, without fault of the party, there occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.<sup>111</sup>

Although the wording may seem to open up for a wide application, it is intended to be applied restrictively and only if the irregularity influenced the outcome.<sup>112</sup>

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<sup>107</sup> JOHANSSON, Sara, LÖF, Kristoffer, SKOGMAN, Aron, "Chapter 9: The proceedings" in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners' Guide. 2nd edition*. Alphen aan den Rijn: Kluwer International, 2021, pp. 217-326, pp. 264-265.

<sup>108</sup> DANIELSSON, Christer. Skiljeförfaranden under pandemin – praktiska erfarenheter, rättsliga förutsättningar, framtidsutsikter" (free translation: "Arbitral proceedings during the pandemic – practical experiences, legal ramifications, future prospects") in *Festskrift till Jan Kleineman*. Stockholm: Jure, 2021, pp.233-240, p.237. Danielsson writes (free translation): "What the provision [section 24] in question prescribes is that there is an unconditional right to "oral hearing" for a party who so requests. The provision remains unchanged since the original text and had already been proposed in the Report of the Arbitration Inquiry 1994. This was at a time when there was no access to a technology similar to that used in the negotiations I described in the previous section and thus there was no reason to think about what was in the concept of oral hearing. The preparatory work also states that "oral hearing" is to be understood as the opposite of an exclusively written procedure. It could therefore well be argued that a hearing that takes place digitally where everyone can see each other on screen and in speakers hear what is being said falls within the concept of oral hearing. It should be noted that the Arbitration Act does not have a legal definition of the term "oral hearing". Section 24 should therefore be able to be interpreted taking into account the new ways of visual and audio contact that the technical development has brought about."

<sup>109</sup> JANSSON STIERNBLAD, Edward, "Chapter 15: Virtual Arbitration Hearings under Swedish Law" in in Axel Calissendorff and Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2022*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 279-296, pp. 284-286.

<sup>110</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Sweden by Ylli Dautaj and Per Magnusson, pp. 2-3.

<sup>111</sup> Section 34 of the SAA Sweden on setting aside corresponds at large to the Model Law article 34 (2), but there is no explicit counterpart in the Model Law article 34 (2) to section 34 first paragraph p.7 on serious irregularity.

<sup>112</sup> HOBÉR, Kaj, *International Commercial Arbitration in Sweden. 2nd edition*. Oxford:Oxford University Press, 2021, p. 304. Hobér adds that as to due process, only apparent violations may lead to the setting aside of an award, p. 306. Finally, the test for causation is not how the court hearing the case would

Should the true meaning of section 24 be to exclude remote hearings, the consequence of a remote hearing against the request by a party would be that an oral hearing actually never took place if held remotely (you may ask: what was it then and what did the tribunal and the parties do, at all, – if it was not an oral hearing). That would of course entail a procedural irregularity making the award exposed to be set aside.<sup>113</sup> The argument would however be easier to understand if it could be shown that videoconferencing or remote hearings are exposed to some discernible drawbacks or disadvantages that are prone to affect due process as expressed in sections 21 and 24 of the SAA Sweden, but it is not. It is simply maintained that oral hearing in section 24 means exclusively in-person.

The issue then arises on whom it will be to establish the necessary causation between the outcome and the way the proceedings were conducted, i.e. the absence of an oral, in-person hearing. How do you establish the difference between something that never occurred but should have - and on whom will that burden rest? It may well be argued that if no hearing took place but should have it would rest on the party that defend the award that it would have been the same outcome, had a physical hearing been conducted.<sup>114</sup>

Section 33 of the SAA Sweden contains rules that corresponds to the Model Law section 34 (2)(b), the award can be challenged on the ground i.a. that it violates public

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have adjudicated the case but for the irregularity, but how the actual arbitrators would have decided the case, p. 318.

<sup>113</sup> LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 34 at 5.2.1, which deals with the grounds for setting aside an award. Lindskog writes (free translation): *“The fact that a party has not been given the opportunity to present his case to the extent required is perhaps the most typical an imminent procedural irregularity. Thus, the principle of the right to present the case and to communicate must be upheld. However, it can be difficult to determine what is required for a party to have been given the opportunity to present its case to the extent required. The law gives a clear message in only one respect, namely that a party has the right to an oral hearing before the case is decided (see section 24 first paragraph, second sentence).”* – Cf. JANSSON STIERNBLAD, Edward, “Chapter 15: Virtual Arbitration Hearings under Swedish Law” in in Axel Calissendorff and Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2022*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 279-296, pp. 284-286. Jansson-Stiernblad connects the requirement for an oral hearing to due process and finds that remote hearings under Swedish law do not violate due process in principle.

<sup>114</sup> This argument was aired by Lindskog at a webinar arranged by Stockholm Centre for Commercial Law on Feb. 22, 2021.

order. In that case the remedy is not setting aside, but invalidity of the award. A gross procedural error may amount to violation of public order. It is difficult to define the exact border against procedural irregularity that will justify setting the award under section 34 first paragraph p.7, but public order aims to protect the rule of law or the public in general whereas section 34 first paragraph p.7 aims to protect the parties of an arbitration solely.<sup>115</sup> Consequently, for public order to be applied there must be a third party interest like the interest of the general public that warrants protection.

As to enforcement of foreign awards, the SAA Sweden contains in section 54 rules that closely mirrors article V 1 of the 1958 NY Convention. Although there are some differences in wording no decisive differences can be discerned and the Swedish courts have generally been faithful to the Convention when applying section 54.<sup>116</sup>

The potential denial of enforcement of a foreign award on the ground that it was produced following a remote hearing and therefore allegedly neglecting a right to a hearing in-person can be founded on section 54 p.2 or p.4, which correspond to article V 1.(b) and (d) of the 1958 NY Convention.<sup>117</sup>

Article V 1.(b) of the Convention and section 54 p.2 of the Arbitration Act do not - as opposed to article V 1.(d) and section 54 p.4 - make any reference to any law under whose standards it shall be determined if a party was “...unable to present his case”. According to Lindskog, it is though in principle the law of the seat that should deliver the relevant standards not only in cases where section 54 p.4 is relied on but also in

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<sup>115</sup> LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 33 at 4.2.2.

<sup>116</sup> EWERLÖF, Pontus, “Chapter 11: Application of the New York Convention by Swedish Courts”, in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners’s Guide. 2nd edition*. Alphen aan den Rijn: Kluwer International, 2021, pp. 361-400, pp. 373-374.

<sup>117</sup> Interestingly, Lindskog refers the example where a party has requested an oral hearing but was denied one to the ambit of section 54 p.2. The example and its reference to section 54 p.2 must be built on the assumption that the tribunal did not violate any party agreement, nor *lex arbitri*, because in that case the example ought to have been discussed under the commentary to section 54 p.4. See LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 54 at 4.2.2 (free translation): “ In NJA 1953 p. 407 it is stated *obiter* that if a party has not received all the written materials that the other party has submitted to the arbitral tribunal, he cannot be considered to have been given the necessary access to possibility to state his case. So also if an oral hearing has been requested but denied.”

cases under section 54 p.2. Lindskog adds that in case the content of the law of the seat is unclear, Swedish courts should in principle apply Swedish law.<sup>118</sup>

### 2.4.3 Sweden, SCC Rules 2017

Article 2 imposes on SCC, the tribunal and the parties to act in an efficient and expeditious manner and in the spirit of the rules.

Article 23 contain the important obligations for the tribunal to conduct the proceedings impartially, efficiently and expeditiously and to give each party an equal and reasonable opportunity to present its case. In other words, due process. Save for those directions and the SCC Rules in general and any party agreement, the tribunal may conduct the proceedings as it deems appropriate.

As to hearings, article 32 states that a hearing “... shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate.” There is no definition of hearing. What is worth observing is that article 32 does not say “oral”, as the SAA Sweden section 24 does.<sup>119</sup> The Swedish version speaks likewise only about *förhandling* (Swedish for *hearing*) without the adjective *muntlig* (Swedish for *oral*), so it is not a mistake in translation from Swedish to English. It can therefore be argued that article 32 does not exclude a hearing from being a remote one, particularly as the tribunal has a discretion to interpret article 32 also considering the requirements of article 2 (efficiency and expediency). A vague support for the position that a hearing may be conducted remotely is provided by the commentary to the SCC Rules. The commentary says that

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<sup>118</sup> LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: JUNO Version 3, 1 May 2020, the commentary to section 54 at 4.2.1, where Lindskog deals with section 54 p.2, that corresponds to article V.1(b): *Unlike the other obstacles to enforcement, no specific law is referred to. It can therefore be questioned against which legal system and thus standard the review is to be made. In principle it seems that the assessment should be decided according to what follows from the procedural law. But here as elsewhere, in the event of uncertainty regarding what follows from the foreign legal system, in principle Swedish law should apply.*” - As to the relevant law and standard applicable section 54 p.4, see the commentary to section 54 at 4.4.3 at footnote 127: *lex arbitri*. But that follows from the wording itself. - Different opinion, HOBÉR, Kaj, *International Commercial Arbitration in Sweden. 2nd edition*. Oxford: Oxford University Press, 2021, p.342. Hobér argues that Swedish law would be the yardstick.

<sup>119</sup> In a commentary to the SCC Rules it is yet argued that the Rules confer on the parties an absolute right to an oral hearing, see ÖHRSTRÖM, Marie, *En handbok och regelkommentar för skiljeförfaranden*. Stockholm: Norstedts Juridik 2009, p. 198.

*“A hearing does not necessarily need to be held in person but can take place in various forms, including by telephone or by videoconference...”*<sup>120</sup>

Of course not, the parties can agree on that. But the question is what the SCC Rules say if the parties are not in agreement and if the tribunal then may decide against the request of one of the parties to conduct a remote hearing. Unfortunately, it is not clear which situation the authors to the commentary have had in mind.

In section 28 the SCC Rules deals with case management conferences. Here it is clarified that a case management conference *“may be conducted in person or by any other means”*. This may on the other hand invite to an *a contrario* conclusion such that section 32 only allows for hearing in-person as there is no option for a hearing *“by other means”* (than in-person), but that is very uncertain and not a very attractive conclusion.

## **2.5 Switzerland**

### **2.5.1 Zivilprozessordnung Switzerland, ordinary civil litigation**

A case before a Swiss court is in principle handled as an ordinary civil case provided it concerns 30 000 CHF or more. For cases below that threshold there is a simplified procedure.<sup>121</sup>

*Rechtliches Gehör* or due process is dealt with in article 53 of the ZPO Swiss, the purpose of which is to ascertain equal procedural rights to the parties (equality of arms). It confers the right to the parties to be heard and the right to consult the case file and to obtain copies thereof. This may sound as a very slim content for such an important concept, but it is considered that the ZPO Swiss is designed in such a way that the right to be heard is met without further ado, and that no direct reference to constitutional law is necessary, *Die Bundesverfassung der Schweizerischen Eidgenossenschaft 101*, that contains in article 29 the right to equal and fair treatment

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<sup>120</sup> ANDERSSON, Fredrik, RAGNWALD, Jakob, SALINAS QUERO, Celeste E, *A guide to the SCC Rules*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp. 107-108.

<sup>121</sup> DROESE, Lorenz, MARKUS, Alexander R., *Zivilprozessrecht*. Zürich: Schulthess, 2018, p. 148.

and assessment within a reasonable period of time in a judicial procedure (which reflects article 6 of ECHR).<sup>122</sup>

The right to be heard encompasses the opportunity of the parties to express their views in the proceedings and obliges the court to hear, review and take into account the submissions on law and fact of the parties.<sup>123</sup> It further provides for equality of arms and the obligation on the court to ascertain that anything relevant to the case is communicated to parties so as give them the opportunity to comment. Finally, the judgment of the court must be reasoned.<sup>124</sup>

The proceedings are conducted by the court. It may issue the required procedural rulings to enable the proceedings to be prepared and conducted efficiently, article 124. The proceedings are at large divided in two phases before the *Urteilsphase* (when the judgment is handed down), the *Vorbereitungsverfahren* and the *Hauptverhandlung*. The former is the phase during which the case is prepared for trial and the latter the trial itself.<sup>125</sup>

The proceedings during the *Vorbereitungsverfahren* are in writing but the court may summon an *Instruktionsverhandlung*, article 226, which corresponds to a case management conference. The *Instruktionverhandlung* is held to discuss the matter in dispute in an informal manner, to complete the facts, to attempt to reach an agreement and to prepare for the main hearing, but also for taking of evidence.<sup>126</sup>

The rules for taking of oral evidence are found in articles 169-176 and applies both to taking of evidence at *Instruktionsverhandlung* or at *Hauptverhandlung*. In both cases

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<sup>122</sup> Ibid. pp.64-65 and SUTTER-SOMM, Thomas, *Zivilprozessrecht 3.Auflage*. Zürich: Schulthess Verlag, 2017, p.108. Sutter-Somm adds that the purpose of the right to be heard in article 53 is also to promote that the material truth will prevail.

<sup>123</sup> DROESE, Lorenz, MARKUS, Alexander R., *Zivilprozessrecht*. Zürich: Schulthess, 2018, pp 65-66. and SUTTER-SOMM, Thomas, *Zivilprozessrecht 3.Auflage*. Zürich: Schulthess Verlag, 2017, pp.109, 111 and 112. Sutter-Somm also include the right to be represented by a lawyer, p. 110.

<sup>124</sup> DROESE, Lorenz, MARKUS, Alexander R., *Zivilprozessrecht*. Zürich: Schulthess, 2018, p.66. and SUTTER-SOMM, Thomas, *Zivilprozessrecht 3.Auflage*. Zürich: Schulthess Verlag, 2017, p.112

<sup>125</sup> DROESE, Lorenz, MARKUS, Alexander R., *Zivilprozessrecht*. Zürich: Schulthess, 2018, p.147.

<sup>126</sup> Ibid. pp. 148-149.

the essential details of the statement of a witness shall be put on record for the file, which shall be signed by the witness.

It is the court that examines the witness, article 171. If the parties have additional questions, they may ask the court to put them to the witness. The court may allow the parties to put the questions themselves, article 173, but no cross examination is permitted.<sup>127</sup>

Once the case has been prepared during the *Vorbereitungsverfahren* the court will, unless both parties agree to abstain from one, summon the parties to the *Hauptverhandlung*, article 233. If not already heard during the *Vorbereitungsverfahren* the witnesses will also be summoned.

The *Hauptverhandlung* is composed by three stages, the opening submissions, article 228, taking of evidence including oral evidence, article 231 and the closing speeches which the parties may do in writing if they so agree, article 232. The design of the *Hauptverhandlung* is clearly conceived as an oral event with both parties present, for example closing speeches are generally delivered orally and the practice is that the judgment is orally presented in the court room at the closing of the *Hauptverhandlung*.<sup>128</sup>

In a case before the *Handelsgericht des Kantons Zürich*, the court summoned the parties to a *Hauptverhandlung* on April 7, 2020, a date the parties had agreed on. At that juncture the pandemic had hit Switzerland and the court decided to conduct the *Hauptverhandlung* by way of a videoconference and encouraged the parties to download Zoom and liaise with the court to prepare such that the technology would

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<sup>127</sup> Ibid p. 202 and SUTTER-SOMM, Thomas, *Zivilprozessrecht 3.Auflage*. Zürich: Schulthess Verlag, 2017, p.215.

<sup>128</sup> DROESE, Lorenz, MARKUS, Alexander R., *Zivilprozessrecht*. Zürich: Schulthess, 2018, pp. 149 and 151. – Cf. SUTTER-SOMM, Thomas, *Zivilprozessrecht 3.Auflage*. Zürich: Schulthess Verlag, 2017, p.107. Sutter-Somm argues that *the advantage* with an oral proceeding over a written is the possibility it offers the court to comply with its “*Fragepflicht*”, its duty to put questions to the parties if their cases are unclear, contradictory, imprecise or incomplete.

work. However, one of the parties protested and did not accept a videoconference and did not participate in the videoconference.<sup>129</sup>

The case was tried by the *Bundesgerichtshof*, the Federal Swiss Tribunal.<sup>130</sup> The question was whether it was within the discretion according to article 124 of the ZPO Swiss conferred on the judge to conduct a *Hauptverhandlung* as a videoconference.

The Federal Swiss Tribunal declared that the ZPO Swiss conceives the *Hauptverhandlung* as an oral hearing in the courtroom with the parties and the member of the court physically present. Interestingly it said that the procedural form embedded in the ZPO Swiss is there to ensure the orderly and legally equitable conduct of the procedure and the enforcement of substantive law.

Having stated this, the Federal Swiss Tribunal found that there were many questions that needed to be addressed before videoconferencing could be allowed such as the quality of the technology used, data protection, the principle of public hearings in article 54 of the ZPO Swiss and if a videoconferencing complied with article 6 ECHR.

The Federal Swiss Tribunal found in summary that the decision to conduct the *Hauptverhandlung* as a videoconference lacked legal foundation. There was no authority for the judge to oblige a party to participate in a *Hauptverhandlung* by way of videoconference.<sup>131</sup>

It should finally be noted that the possibility to proceed with videoconferencing (provided consent from the parties) at the *Hauptverhandlung* was introduced by a regulation that came into force on April 20, 2020.<sup>132</sup> As the events that were tried

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<sup>129</sup> For the sake of completeness, it should be noted that Switzerland issued a regulation that came into force on March 20, 2020, that provided for a standstill in civil proceedings. As the parties however had agreed to the trial to take place on March 7, 2020 (albeit not by way of videoconference), the regulation was not applicable.

<sup>130</sup> DFT 146 III 194 July 6, 2020.

<sup>131</sup> SHARIFI, Roxana, ZAUGG, Niklaus, "Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective". *Kluwer Arbitration Blog*. January 14, 2021

<sup>132</sup> COVID-19-Verordnung Justiz und Verfahrensrecht; SR 272.81, <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2020/234/20201013/de/pdf-a/fedlex-data-admin-ch-eli-cc-2020-234-20201013-de-pdf-a.pdf>

occurred before that date, the court could not apply it. It rather underscored that legislation actually was needed to accept videoconferencing.

**2.5.2 ZPO Switzerland and the Private International Law Switzerland, arbitration**  
Switzerland provides for two tracks of arbitration, domestic arbitration under articles 353 - 399 of Part III of the ZPO Swiss and international arbitration under article 176 - 194 of chapter 12 of the PILA Swiss. Chapter 12 of the PILA Swiss is applicable if the arbitration has its seat in Switzerland but at least one of the parties is not domiciled in Switzerland, has not its habitual residence there or is not seated in Switzerland, article 176 PILA Swiss.<sup>133</sup> An arbitration that is not an international one according to this definition is a domestic arbitration and therefore governed by the ZPO Swiss, article 353 ZPO. However, the parties may at any time change track and by agreement make chapter 12 of the PILA Swiss applicable instead of Part III of the ZPO Swiss, article 353 ZPO Swiss. Article 176 of the PILA Swiss provides for the same possibility to opt out from chapter 12 of the PILA Swiss in favour of articles 353 - 399 of the ZPO Swiss.

The differences between the two types are not very big and for can for the purpose of this thesis at large be disregarded.<sup>134</sup> The principles governing the procedure in so far due process is concerned are identical, but as to set aside there is a difference. Whilst awards in non-international arbitrations can be set aside on the grounds i.a. that the award is arbitrary in that it is founded on facts that obviously are contrary to the facts on the file or because it constitutes an obvious violation of law or equity, and also because the compensation to the tribunal is obviously excessive, an international award is not subject to those grounds for setting aside. On the other hand, an international award may be set aside if it violates public policy. See articles 393 ZPO Swiss and PILA Swiss article 190.

Articles 373 of the ZPO Swiss and 182 of the PILA Swiss are in substance identical as to the determination of the rules for the procedure and due process. The parties enjoy

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<sup>133</sup> The distinction them in between and definition is therefore different compared to the notion of *arbitrage interne* and *arbitrage international* under French law, see at 2.3.2 *supra*.

<sup>134</sup> BERNARDINI, Nicola, JERMINI, Cesare, "Chapter 1, Part II: Domestic Arbitration under the Swiss Code of Civil Procedure", in Manuel Arroyo, *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp. 21-29, p. 22.

autonomy to fixate the procedure by agreement, by referring to institutional rules or to some other procedural law. In the absence of a determination of the parties it is the tribunal that will decide what rules to apply.

In any event the tribunal must always guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings, articles 373 p.4 ZPO Swiss and 182 (3) PILA Swiss. Save for a miniscule provision on taking of evidence in articles 375 of the ZPO Swiss and 184 of the PILA Swiss that in substance are identical and which impose the duty on the tribunal to take evidence, there are no rules on the exchange of written submissions, the procedure for how to take evidence or if a hearing must be conducted. Indeed, the Swiss arbitration rules of the ZPO Swiss and PILA Swiss are very slim and confers on the parties the widest autonomy of the jurisdictions investigated in this thesis.

The equal treatment requires the tribunal from commencement of the arbitration to the handing down of the award to always treat the parties equally. They must therefore be given the equal possibilities to present their case which means i.a. not to refuse one of the parties what was granted the other and not grant one what the other was refused.<sup>135</sup> Like factual situations should be treated alike.<sup>136</sup>

The right to be heard in adversarial proceedings consists of two parts with different origin. The first part, the right to be heard, stems back to article 29 of the *Die Bundesverfassung der Schweizerischen Eidgenossenschaft 101* and its requirement on a fair trial equivalent to ECHR article 6. The second part on adversarial proceedings is more influenced by English and French law.<sup>137</sup>

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<sup>135</sup> KNOLL, Joachim, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 182 [Procedure: principle]" in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp 133-156, pp 143-144.

<sup>136</sup> SCHNEIDER, Michael E., "Article 182" in Stephen V. Berti et.al. (eds.) *International Arbitration in Switzerland An Introduction to and commentary on articles 176-194 of the Swiss international private law statute.* The Hague: Kluwer Law International, 2000, pp. 395-426, p.416

<sup>137</sup> KNOLL, Joachim, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 182 [Procedure: principle]" in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp.133-156, pp.144-145.

In summary this right to be heard encompasses the right of the parties to express themselves on facts relevant to the case, to present arguments and to adduce evidence to make good the facts they assert. Furthermore, the adversarial side consists of the right to comment on what the adversary produces, examine his submissions and evidence and to rebut them.<sup>138</sup>

The view is that the principles of equal treatment and fair hearing in contradictory proceedings corresponds to what constitute an international minimum standard for procedural law.<sup>139</sup>

As in the ZPO Germany, there is no express rule in the ZPO Swiss aiming to promote the time efficient conduct of the ad hoc arbitration proceedings, but the tribunal and the parties are any way bound by the principle of good faith from which it follows a duty to avoid unnecessary delays.<sup>140</sup>

It should be noted that there is no model, neither in ZPO Swiss articles 353 – 399 nor in PILA Swiss articles 176 – 194, to govern how the adversarial proceeding is to be conducted. Nor is there any right stated there for the parties to have an oral hearing, nor indeed a hearing at all.<sup>141</sup>

The rules of sections 393 d of the ZPO Swiss and 190 (2) d of the PILA Swiss on setting aside an award because of violation of the right to due process are identical. The application thereof is restricted to procedural defects where natural justice have been

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<sup>138</sup> Ibid. p. 145.

<sup>139</sup> SCHNEIDER, Michael E., "Article 182" in Stephen V. Berti et.al. (eds.) *International Arbitration in Switzerland An Introduction to and commentary on articles 176-194 of the Swiss international private law statute*. The Hague: Kluwer Law International, 2000, pp. 395-426, p. 411 and GEISINGER, Elliot, DUCRET, Pierre, "Chapter 5: The Arbitral Procedure" in Elliot Geisinger, Nathalie Voser (eds.) *International Arbitration in Switzerland: A Handbook for Practitioners. 2nd ed.* Alphen aan den Rijn: Wolters Kluwer, 2013, pp.73-106 p. 87

<sup>140</sup> KNOLL, Joachim, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 182 [Procedure: principle]" in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp.133-156, p. 142.

<sup>141</sup> Ibid. pp 133-156, pp. 145 and 150 and SCHNEIDER, Michael E., "Article 182" in Stephen V. Berti et.al. (eds.) *International Arbitration in Switzerland An Introduction to and commentary on articles 176-194 of the Swiss international private law statute*. The Hague: Kluwer Law International, 2000, pp. 395-426, p. 424. Schneider accounts for the findings of the Swiss Federal Tribunal in judgment 1 July 1991, DFT 117 II 346, 348 where the tribunal found there was no right to an oral hearing. Schneider disagrees and argues the parties in an international arbitration have a justified expectation that the tribunal will hold an oral hearing because that is the standard procedure.

violated.<sup>142</sup> The way in which procedural errors that justify setting aside are limited means that violation of procedural rules agreed by the parties or in chosen institutional rules will not necessarily suffice to set an award aside.<sup>143</sup>

The rules on setting aside are interpreted narrowly and restrictively and applies only to very serious procedural errors.<sup>144</sup> Neither a denial to hold an oral hearing nor a remotely held hearing without the support of both parties would suffice to set the award aside.<sup>145</sup> For a procedural error to be relevant, it must also be demonstrated “...that it was fit to influence the outcome of the dispute”.<sup>146</sup>

Violation of public order may be relevant as a ground for setting aside an international arbitration award under Chapter 12 PILA Swiss. It however appears that the threshold of applying section 190 (2) e on procedural public policy violations is significantly higher than what is required to set aside an award applying section 190 (2) d. In one case only the ground procedural public policy has been successfully applied, and that one concerned an award where the tribunal had disregarded the principle of *res judicata*.<sup>147</sup>

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<sup>142</sup> BLESSING, Marc, “VII. The Predominant Features of Chapter 12” in Stephen V. Berti et.al. (eds.) *International Arbitration in Switzerland An Introduction to and commentary on articles 176-194 of the Swiss international private law statute*. The Hague: Kluwer Law International, 2000, pp. 171-197, p. 192.

<sup>143</sup> BERTI, Stephen V., SCHNYDER, Anton K, “Article 190” in Stephen V. Berti et.al. (eds.) *International Arbitration in Switzerland An Introduction to and commentary on articles 176-194 of the Swiss international private law statute*. The Hague: Kluwer Law International, 2000, pp. 569-595, p.581 and ARROYO, Manuel, “Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]” in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp. 266-350 pp.303-304.

<sup>144</sup> GEISINGER, Elliot, MAZURANIC, Alexandre, “Chapter 11: Challenge and Revision of the Award” in Elliot Geisinger, Nathalie Voser (eds.) *International Arbitration in Switzerland: A Handbook for Practitioners. 2nd ed.* Alphen aan den Rijn: Wolters Kluwer, 2013, pp. 223-274, p.224.

<sup>145</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Switzerland by Daniel Durante and Paolo Marzolini, pp. 1 and 7. See also SMAHI, Nadia, “Due Process Under the Swiss Rules of International Arbitration”. *ASA Bulletin*, volume 38, issue 4, 2020, pp 930-952, p.940 at footnote 48.

<sup>146</sup> ARROYO, Manuel, “Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]” in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide. 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp. 266-350, p.309.

<sup>147</sup> *Ibid.* p.324.

Finally, as to enforcement of foreign awards article 194 of PILA Swiss incorporates the NY 1958 Convention to directly applicable law, without any amendments or any additions; *“Für die Anerkennung und Vollstreckung ausländischer Schiedssprüche gilt das New Yorker Übereinkommen vom 10. Juni 1958...”*. It is unlikely that Switzerland would refuse enforcement on the ground that no physical hearing was held although one of the parties requested one. The standard used by Switzerland when applying article V 1.(b) of the NY 1958 Convention will be Swiss law (which does not automatically set aside an award because of denial to hold a hearing in-person) but it will include the international practice, so the outcome will probably depend what international practice on this is.<sup>148</sup>

### **2.5.3 Switzerland, Swiss Rules 2021**

Article 19.1 sets out the norm hierarchy such that the Swiss Rules applies first. Then it is for the tribunal to conduct the proceedings as they deem appropriate which expressly includes measures for the efficiency of the proceedings, however within the confinements of the Swiss Rules and the overarching principles of equal treatment and the right to be heard. There is no reference in article 19 to party agreement, which is a difference to the corresponding Rules of DIS, ICC, CAC and SCC but more akin to the very wide discretion conferred on the tribunal by the Rules of LCIA article 14.

As to hearings, article 27.1 empowers the tribunal to hold hearings at any stage for taking of oral evidence or for oral arguments. Directions shall be issued after consulting with the parties. This means there is no absolute right for the parties to claim an oral hearing. Moreover, by article 27.2 the tribunal is authorized to decide to hold hearings in-person or remotely via videoconferencing, provided consulting with the parties first. The same discretion is vested in the tribunal in article 27.5 as to taking of oral evidence, however without the requirement of prior consultation with the parties.

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<sup>148</sup>ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021, and its part about Switzerland by Daniel Durante and Paolo Marzolini, pp.9-11

## 2.6 Portugal

### 2.6.1 Código de Processo Civil de Portugal, ordinary civil litigation

The CPC Portugal article 2 echoes article 6 of the ECHR in that it calls for the right to obtain within a reasonable period a court decision that is the product of a regular proceeding applying the law and possible to be executed.<sup>149</sup> The next cornerstone appears in article 3, which sets out that the court must not resolve a claim without proper service of the allegations on the other party and that the court must always observe and apply the principle of *contraditório*, which is said to mean the court must not settle issues of fact, evidence or law without the parties having been offered the possibility to express their meaning. This include i.a. the right to object the admissibility of the evidence or to adduce counterevidence.<sup>150</sup> A third and last cornerstone is expressed by article 4, which imposes on the court the duty to always ascertain equality of the parties in the exercise of faculties, in the use of means of defence and in the application of orders or procedural sanctions. It is not a question of absolute, formal identity, but merely a matter of an instrument to reach an overall equilibrium between the parties. It is not the purpose to make the court an aid to the parties.<sup>151</sup> The proceedings until the judgment is handed down can at large be divided in three phases. Firstly the *petição inicial* (statement of claim) and the *contestação* (statement of defense), jointly called *fase dos articulados*. Secondly the *fase da gestão processual*, which translates to the case management which aims at preparing the case such that it following trial can be determined on the merits This phase includes the *audiência prévia*, which at large can be translated to case management conference. Lastly and thirdly the *audiência final*, the trial.<sup>152</sup> . The judge in charge has a duty to

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<sup>149</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, pp.3-4 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume I* . Lisboa: AAFDL Almedina da Universidade, 2022, pp 46-47.

<sup>150</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, pp.6-7 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume I* . Lisboa: AAFDL Almedina da Universidade, 2022, pp.48-49 and 101-103.

<sup>151</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, pp.11-12 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume I* . Lisboa: AAFDL Almedina da Universidade, 2022, pp.48 and 99-101.

<sup>152</sup> CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume II*. Lisboa: AAFDL Almedina da Universidade, 2022, pp.7, 78-85.

direct the proceedings such that the truth will prevail, article 411. To this end he may decide, even *ex officio*, all steps that are necessary to promote the proper investigation of facts and the fair composition of the evidence that he will have to evaluate.<sup>153</sup> It is also the judge that defines the object of the dispute and the themes of evidence.<sup>154</sup> It is stressed that no evidence is allowed or may be produced without an *audiência contraditória*, article 415.

Once the exchange of briefs has come to an end, the judge will review the case and direct the parties to make those further submissions that are necessary to clarify the positions of the parties as regards law and facts, article 590.1,2 and 3. Once that has been complied with, the *audiência prévia* will take place, article 591. At this hearing the judge will i.a try to see if the parties are inclined to settle the case, discuss the positions with the parties with a view to limit the issues to be tried and also to make them refine their positions where these are unclear, imperfect or inadequate. Finally, the *audiência final* will be scheduled.<sup>155</sup>

The *audiência final* is a hearing in-person, article 603. The principles for the proceedings are immediacy, orality and concentration.<sup>156</sup>

Witnesses are heard by the parties, first by the party who called the witness and then by the opposing party, article 516. Leading questions are not allowed, neither in examination in chief, nor in cross examination.<sup>157</sup>

Testimony from witnesses may be taken by transmission of image and sound in real time, i.e. videoconferencing, article 502. The prerequisite is that the witness is

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<sup>153</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014 pp. 207-208 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume I*. Lisboa: AAFDL Almedina da Universidade, 2022 p.506

<sup>154</sup> CPC de Portugal article 596 1. and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume II*. Lisboa: AAFDL Almedina da Universidade, 2022, pp.96-98.

<sup>155</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, pp 640-644 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume II*. Lisboa: AAFDL Almedina da Universidade, 2022 p.86.

<sup>156</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, p. 677 and CASTRO MENDES, João de, TEIXEIRA de SOUSA, Miguel, Manual, *Processo Civil Volume II*. Lisboa: AAFDL Almedina da Universidade, 2022 p.103.7

<sup>157</sup> ALEXANDRE, Isabel, LEBRE de FREITAS, José, *Código Processo Civil Anotado Vol.1, 3.a edição*. Coimbra: Almeida, 2014, pp.395-396.

domiciled in another county than the county where the court is situated. The mere request from a party and acceptance by a witness to give evidence via videoconferencing is not sufficient. However, in case of impossibility or serious difficulties to appear in person at the *audiência final*, the court may, provided that both parties agree, decide that a witness shall give testimony via telephone or other means of communication, article 520, however provided that such a mode of taking of evidence is adequate for the facts to be proved.

As in France and Switzerland, because of the Covid-19 pandemic emergency legislation was passed in March 2020 to allow videoconferencing for proceedings. The first law on this subject was Law no. 1-A/2020, March 19. The possibility to conduct a videoconferencing was probably confined to taking of evidence in urgent cases.<sup>158</sup> This was changed through Law no. 4-A/2020, April 6. Now the scope for videoconferencing was widened to all sorts of hearings, not just for taking of evidence. If non urgent, provided that that the parties confirmed that they had adequate means to secure a videoconference. If urgent, videoconferencing was allowed if the physical presence of the parties or other participants was necessary.<sup>159</sup> – It appears that videoconferencing in this way was put on par with physical presence.

This law and its constitutionality was tried by the *Tribunal Constitucional de Portugal* in TC 738/21. The background was a civil proceeding where the State Prosecutor commenced legal action against the legal representatives of an insolvent company. The State Prosecutor requested the court to declare the insolvency *culposa* and that the legal representative would be banned from carrying on business. The State Prosecutor called the bankruptcy administrator to give oral evidence. Once the examination in chief that took place in-person was concluded, there was no time to continue with cross examination, why the court decided that cross examination should take place at a later hearing.

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<sup>158</sup> ALEXANDRE, Isabel, “Audiências à distância em processo civil e princípio da publicidade das audiências (free translation: *Remote hearings in civil proceedings and principle of publicity of hearings*)”, *Revista da Faculdade de Direito de Lisboa*, número 1, 2020, pp. 262-289, p.269.

<sup>159</sup> *Ibid* p.270.

At that later occasion the pandemic had broken out and Portuguese parliament had passed the emergency legislation Law no. 1-A/2020, March 19. The court summoned the bankruptcy trustee to be heard in cross examination applying that emergency legislation and its option to examine a witness remotely via videoconferencing.

Defendants objected and requested the court to summon the bankruptcy administrator to be examined in person, which the court decided not to. This decision was appealed as allegedly being unconstitutional in that it violated articles 13 and 20 of the Portuguese Constitution, that guarantee that all are equal in face of the law and that all have the right to equality of arms in proceedings. The appeal went to the *Tribunal Constitucional de Portugal* that identified the issue to be tried was whether remote hearings under the emergency legislation that allowed cross examination remotely when examination in chief had been performed in person, was consistent with the Portuguese constitution and its articles 13 and 20.

Defendants argued that to cross examine a witness via videoconferencing when examination in chief had been performed in-person did not comply with the requirement for orality, nor the requirement for immediacy and that defendant therefore was put in a worse situation than the prosecutor who had had the possibility to examine the witness in-person. Defendant also argued there was no control from the court's side whether the witness had been alone in the room where he gave testimony via video and that it was not possible to check whether he accessed briefs of the proceedings when giving testimony.

The Tribunal stated that the requirement for orality is met by videoconferencing but agreed that examination of a witness physical present is not entirely and formally comparable to examination via videoconferencing but held that the differences are not substantial and that the parties therefore were still put on par. In arriving at this conclusion the *Tribunal* relied on an article by judge Luís Filipe Pires de Sousa, "*Julgamento presencial versus julgamento com telepresença – a pandemia e o futuro*", that accounts for contemporaneous research on the probative value of oral evidence

taken by the court via videoconferencing.<sup>160</sup> The Tribunal quotes a passage from Sousa that reads as follows (free translation): “ *From this follows, that the physical presence of the witness before the judge, is after all not that essential for the probative value of the evidence. The effective parameters for evaluating the evidence are not significantly prejudiced if the evidence is taken via video*” .<sup>161</sup>

After having accounted for the jurisprudence of the ECtHR on litigations and the use of videoconferencing the Tribunal concluded that the minor differences that a cross examination via videoconferencing create compared to the examination in chief that preceded it and that was held in-person are not such that they cannot be tolerated in the light of other obligations the state had during the pandemic, one of which was to see to it that the administration of justice continues to function and function timely. The Tribunal adds however that under other circumstances the differences between an examination in chief of a witness done in-person that is followed by cross examination via videoconferencing might be such that proceedings do not comply with the requirement of equality of arms. Which they might be were not developed, however.

### **2.6.2 The Portuguese Lei de Arbitragem Voluntária**

Although Portugal does not rank as a Model Law country according to the standards used by UNCITRAL, the LAV Portugal is very much influenced by the Model Law.<sup>162</sup> Like France, the LAV Portugal distinguishes between international and domestic arbitration, which both are governed by the LAV Portugal provided the seat of arbitration is in Portugal, article 61. The definition of international arbitration in article 49.1 is basically

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<sup>160</sup> SOUSA, Luís Felipe Pires de, “Julgamento presencial versus julgamento com telepresença – a pandemia e o futuro”. Revista *JULGAR* no. 44., maio-agosto 2021, pp.13-31. (Free translation: “*Adjudating [cases] in person versus adjudating [cases] remotely – the pandemic and the future*” .)

<sup>161</sup> Ibid. p.22

<sup>162</sup> See [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status). Cf. VICENTE, Dário Moura, “National Report for Portugal 2018-2022”, in Lise Bosman (ed.) *ICCA Handbook on Commercial Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp 1-52, p.2. The differences between the Model Law and LAV Portugal are small and refers essentially to LAV Portugal having chapters on international arbitration, enforcement and recognition of foreign awards and state courts assistance. See also PINTO, Filipe Vaz, “Chapter 2: The Portuguese Voluntary Arbitration Law: History and Overview” in Pereria da Fonseca et.al (eds.) *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.17-30, p. 21.

the same as under CPC France. If the dispute puts into play interests of international trade then it is an international arbitration even though both parties may have their seat in Portugal.

Just as the French definition, not very clear, but the underlying idea is the same as in France: even if the parties are Portuguese legal entities having their seat in Portugal, it is yet an international arbitration if the economics of the dispute concern cross border trade of goods or services. It is therefore basically the commercial nature of the dispute, not solely the nationality or the domicile of the parties, that determines whether it is or not an international arbitration.<sup>163</sup>

The differences between the regimes for the two categories are small and may be disregarded for the purpose of this thesis; the only relevant difference is about the notion of public order: whereas a domestic arbitration award can be set aside if public order has been violated, an international arbitration award can only be set aside if it violates the principles of international public order (and provided that foreign, substantial law has been applied to the merits of the case), articles 54 and 46.3 b) ii). International public order is a narrower concept than just public order and therefore limits the possibilities to set aside an international arbitration award.<sup>164</sup>

Save for the usual requirements of independence and impartiality which are set out in article 9.3, the basic requirements on the procedure are found in articles 30.1 a), b) and c) that declare that the respondent shall be summoned to present its defence, the parties shall be treated with equality and shall be given a reasonable opportunity of presenting their case, in writing or orally, before the final award is issued and that in all

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<sup>163</sup> OLIVEIRA; Elsa Dias, *Arbitragem Voluntária: Uma Introdução*. Coimbra: Edições Almedina S.A., 2020, pp. 211-214. As appears from Oliveira's presentation of this notion international arbitration, it has been much debated. The dividing line goes between formalists and materialists, the former advocating distinct features such as nationality, domicile, place of fulfillment of contract and applicable law whereas the latter argue the relevant factor is whether the economics of the disputed transaction produce effects in more than one country.

<sup>164</sup> VICENTE, Dário Moura, CAPÍTULO IX- Da Arbitragem Internacional Artigo 54 – Ordem pública Internacional in " in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.186-189, p. 188 and PINTO, Filipe Vaz, "Chapter 2: The Portuguese Voluntary Arbitration Law: History and Overview" in Pereria da Fonseca et.al (eds.) *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.17-30, p. 28.

phases of the proceedings the principle of adversarial process shall be guaranteed, with the exceptions set out in the LAV Portugal for preliminary orders or decisions.<sup>165</sup>

In article 34.3 the right of defence is detailed such that all written submissions, documents and information that a party has furnished to the tribunal must be communicated to the other party, as must any expert report if it may be relevant to the forthcoming award.

The basic principles for the procedure corresponds to article 18 of the Model Law with the only exception that the *full* opportunity for the parties to present their cases has been somewhat softened by the adjective *reasonable* which originates from the UNCITRAL Rules.<sup>166</sup> The requirement for equality is not absolute or rigid but allows for flexibility as does the requirement of article 20.4 of the Portuguese constitution in that it imposes on the state courts the obligation to deliver a “*processo equitativo*”.<sup>167</sup> *Processo equitativo* can be translated to due process.<sup>168</sup>

These principles in article 30.1a), b) and c) reflects the minimum requirements on an arbitral procedure that a state must uphold if an award shall be recognized as binding.<sup>169</sup>

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<sup>165</sup> MENDES, Armindo Ribeiro, “CAPÍTULO V – Da condução do processo arbitral” in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.110- 115, p. 111-113 and SERRA e MOURA, Ana, “Chapter 7: The Conduct of Arbitral Proceeding” in Pereria da Fonseca et.al (eds.) *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.97-114, pp 98-103.

<sup>166</sup> MENDES, Armindo Ribeiro, “CAPÍTULO V – Da condução do processo arbitral” in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição, 2019*. Coimbra: Almedina, 2019, pp.110- 115, p. 111. Cf. GERDAU de BORJES MERCERAU, Ana, “Capitulo V Organização, regras e condução do procediemento arbitral” in Catarina Monteiro Pires, Rui Pereira Dias (eds.) *Manual de Arbitragem Internacional Lusófona Volume I*. Coimbra: Almedina, 2020, pp 90-100, p.96.

<sup>167</sup> MENDES, Armindo Ribeiro, “CAPÍTULO V – Da condução do processo arbitral” in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada*. Coimbra: Almedina, 4a. Edição, 2019, pp.110- 115, p.112

<sup>168</sup> MIRANTE, Daniela, MONTEIRO, António Pedro Pinto, SILVA, Artur Flaminio da, *Manual de Arbitragem*. Coimbra: Almedina Edições S.A., 2019, p.279.

<sup>169</sup> GOUVEIA, Mariana França, *Curso de Resolução Alternativa de Litígios, 3a. Edição*. Coimbra: Edições Almedina S.A., 2019, p. 258, MIRANTE, Daniela, MONTEIRO, António Pedro Pinto, SILVA, Artur Flaminio da, *Manual de Arbitragem*. Coimbra: Almedina Edições S.A., 2019, p. 280-288 and OLIVEIRA, Elsa Dias, *Arbitragem Voluntária: Uma Intrusão*. Coimbra: Edições Almedina S.A., 2020, pp. 124-127. See also GERDAU de BORJES MERCERAU, Ana, “Capitulo V Organização, regras e condução do procediemento arbitral” in Catarina Monteiro Pires, Rui Pereira Dias (eds.) *Manual de Arbitragem Internacional Lusófona Volume I*. Coimbra: Almedina, 2020, pp 90-100, p. 96.

According to article 30.2, the parties may agree on the procedure, however within the limits of the fundamental principles of article 30.1 and other mandatory rules of the LAV Portugal. This option for the parties is only open until the first arbitrator has been appointed, because that occurrence represents the juncture at which the procedural powers pass from the parties to the arbitrators.<sup>170</sup>

In the absence of any such agreement and applicable rules of the LAV Portugal, article 30.3 authorizes the tribunal to decide on how to proceed, and the tribunal may if they think fit apply the rules of the CPC Portugal, which in that case requires an explicit order.<sup>171</sup> Applicable rules comprise not only mandatory rules of the LAV Portugal but also non mandatory rules according to Manuel Pereira Barrocas.<sup>172</sup> The consequence of this view seems to be that the authority of the tribunal does not supersede non mandatory rules of the LAV Portugal. Elsa Oliveira seems to be of another opinion as she to applicable rules of the LAV Portugal does not include non-mandatory rules.<sup>173</sup>

Provided the parties have not agreed otherwise, article 34 imposes on the tribunal to decide if to organize a hearing for the purpose of taking of evidence or if the proceedings shall be conducted on a documents-only basis. In any event, the tribunal must organize one for the purpose of taking of evidence upon the request of a party, unless the parties have agreed to not have any hearings.<sup>174</sup>

Even though there is no express provision to that effect in the LAV Portugal, it is considered that the arbitrators have a general duty to promote a time and cost-

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<sup>170</sup> MENDES, Armindo Ribeiro, "Capítulo V – Da condução do processo arbitral" in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.110- 115, p. 112.

<sup>171</sup> Ibid. 112-113. The idea is that the CPC Portugal shall not be applied by way of analogy but can if explicitly decided.

<sup>172</sup> BARROCAS, Manuel Pereira, *Lei de Arbitragem Comentada, 2.a Edição*. Coimbra: Edições Almedina S.A., 2018, p.127.

<sup>173</sup> OLIVEIRA, Elsa Dias, *Arbitragem Voluntária: Uma Introdução*. Coimbra: Edições Almedina S.A., 2020, p.127

<sup>174</sup> BARROCAS, Manuel Pereira, *Lei de Arbitragem Comentada, 2.a Edição*. Coimbra: Edições Almedina S.A., p.136. – Article 34 is modelled on article 24 of the Model Law, but unlike article 24 of the Model Law article 34 of the LAV only deals explicitly with hearings for the purpose of taking of evidence, not for oral arguments. Cf. MENDES, Armindo Ribeiro, "CAPITULO V – Da condução do processo Arbitral" in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.110 - 134,p. 121-122.

efficient proceeding.<sup>175</sup> In any event, an obligation to act swiftly must be considered to follow from article 43, according to which the award must be handed down within twelve months from appointment of the tribunal.<sup>176</sup>

In a post COVID-19 outbreak article by Carolina Pitta da Cunha it is argued that the requirement for an oral hearing does not prohibit the tribunal to conduct a remote hearing even if the parties have agreed not to dispense with an oral hearing.<sup>177</sup>

The same conclusion is arrived at in the Portugal contribution to the ICCA Report. The authors argue that there is no right to a physical hearing under the LAV Portugal.<sup>178</sup> They go on to say: “By reading Articles 19, 20, and 24 from the Model Law as incorporated in the PVAL (=LAV Portugal, my comment) altogether, it is highly unlikely for Portuguese Courts to conclude that parties have a right to a physical hearing, if any, as a default rule in the *lex arbitri*.” and that “Portuguese Courts will likely not focus on the form in which a hearing takes place (whether remotely or physically) but rather on whether the guarantees of due process have been properly met.”<sup>179</sup> It is obvious that the authors mean that their conclusion applies to any hearing, be it for the purpose of taking of oral evidence or for oral arguments.

As to setting aside an award, article 46.3 follows closely although not entirely article 34.2 of the Model Law.<sup>180</sup> According to article 46.3 a) ii) an award can be set aside if it violates the fundamental procedural principles in article 30.1, provided the violation

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<sup>175</sup> SERRA e MOURA, Ana, “Chapter 7: The Conduct of Arbitral Proceeding” in Pereira da Fonseca et.al (eds.) *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.97-114, p. 106.

<sup>176</sup> Cf. GERDAU de BORJES MERCERAU, Ana, “Capitulo V Organização, regras e condução do procedimento arbitral” in Catarina Monteiro Pires, Rui Pereira Dias (eds.) *Manual de Arbitragem Internacional Lusófona volume I*. Coimbra: Almedina, 2020, pp 90-100, p.94.

<sup>177</sup> PITTA e CUNHA, Carolina, “Arbitration in Portugal before and after the COVID-19 pandemic.” *Revista Internacional de Arbitragem e Conciliação*, semestral no. 14-2020, pp.189-208, p. 203. – Cf. MENDES, Sofia Ribeiro “Chapter 9: Evidence” in in Pereria da Fonseca et.al (eds.) *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.131-150, p.138: “Although oral hearings are not legally necessary, most national laws and rules of arbitration applied to international arbitration provide for the holding of an oral hearing, at least when requested by one of the parties.”

<sup>178</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021 and its part about Portugal by Maria Camila Hoyos and, Carolina Botelho Sampaio, p.1.

<sup>179</sup> Ibid. p.5.

<sup>180</sup> OLIVEIRA, Elsa Dias, *Arbitragem Voluntária: Uma Introdução*. Coimbra: Edições Almedina S.A., 2020, p.178 at footnote 576.

was decisive to the outcome. The principles in question are those that defines *due process*: the right to be heard, equality of arms, the right to be served such that a defence can be organized and the right to produce evidence and arguments in response to the adversary.<sup>181</sup> According to Mariana França Gouveia, violation of those principles will also amount to a breach public order.<sup>182</sup>

It however appears not to amount to a violation of due process in and of itself if a tribunal does not abide to a request for a physical hearing.<sup>183</sup> An award can therefore not be set aside merely on the ground that a party requested a hearing in-person but the tribunal decided to proceed on a documents only basis or remotely via videoconferencing. Should however the parties have agreed on physical hearing, a remote one decided by the tribunal would violate the party agreement and make the award susceptible to be set aside according to article 46.3 a) iii) (provided the party agreement was made before the first arbitrator was appointed).<sup>184</sup>

As to enforcement of foreign awards, article 56 corresponds to article V of the NY 1958 Convention and to article 36 (1) of the Model Law.<sup>185</sup> Failure to observe due process is relevant under section 56.1 a) ii) and iv) which corresponds to article V 1.(b) and (d) and potentially section 56.2 b) ii) which corresponds to article V 2.(b).<sup>186</sup>

It would appear that Portuguese courts would not refuse recognition of a foreign award even though the tribunal would have denied a party a right to a physical

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<sup>181</sup> Ibid. pp. 180-181 and ANDRADE, José Robin de, "CAPÍTULO VII – Da impugnação da sentença arbitral Artigo 46- Pedido de anulação" in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.161-177, p.168.

<sup>182</sup> GOUVEIA, Mariana França, *Curso de Resolução Alternativa de Litígios*. Coimbra: Edições Almedina S.A., 3a. Edição, 2019, p.303.

<sup>183</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*, Edinburgh, 2021 and its part about Portugal by Maria Camila Hoyos and, Carolina Botelho Sampaio p. 9-12.

<sup>184</sup> Ibid. p.9.

<sup>185</sup> VICENTE, Dário Moura, "CAPÍTULO X – Do reconhecimento e execução de sentenças arbitrais estrangeiras Artigo 55 – Necessidade do reconhecimento" in Dário Moura Vicente et.al., *Lei da Arbitragem Voluntária Anotada, 4a. Edição*. Coimbra: Almedina, 2019, pp.189-196, pp.192-193.

<sup>186</sup> CAMELO, António Sampaio, *O Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras*. Coimbra: Edições Almedina S.A., 2016, pp.154-160.

hearing, unless its effects translate to “...*gross deviance to Portugal’s international public policy.*”<sup>187</sup>

As to the question which law to be used to measure if due process has been neglected, there is one case from the Portuguese Supreme Court where the law of the seat of the arbitration was the only standard to be applied to determine if proper service was made.<sup>188</sup> This is however not an uncontested view. There are authors who concur in the opinion that the better view is an autonomous interpretation of the 1958 NY Convention.<sup>189</sup>

### **2.6.3 Portugal, Commercial Arbitration Center Arbitration Rules 2021**

While article 10.1 sets out as an indispensable requirement on the arbitrators of impartiality and independence, article 17.2 requires them to conduct the proceedings expediently and efficiently but always with due respect to the parties’ rights to plead their case, equal treatment and to be heard.

It is for the parties to agree on procedural rules, always within the non-derogable provisions of the rules, failing which the tribunal is authorized to conduct the proceedings as they deem most appropriate and to establish procedural rules, however with the same limitations as applicable to the parties, article 17.1-3 (due process).

As to hearings, article 31.2 imposes on the tribunal to conduct a hearing for the taking of evidence, whenever requested by a party. The tribunal is authorized to determine the format for the hearing, be it in-person or remotely, article 14.2. The only limitations for the tribunal’s authority seems to be those in article 17.1-3. However, videoconferencing for the purpose of taking of evidence may only be held after

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<sup>187</sup> ELGUETA, Giacomo Rojas HOSKING, James, LAHLOU, Yasmine, “Does a Right to a Physical Hearing Exist in International Arbitration?” *Report presented at the XXVth ICCA Congress, Edinburgh, 2021* and its part about Portugal by Maria Camila Hoyos and, Carolina Botelho Sampaio p. 13.

<sup>188</sup> Ibid. p. 14.

<sup>189</sup> PINHEIRO, Luís de Lima, “O Reconhecimento de Decisões Arbitrais “Estrangeiras” ao Abrigo da Convenção de Nova Iorque - Perspetiva Atual” in António Menezes Cordeiro (ed.) *Arbitragem Comercial*. Coimbra: Edições Almedina S.A., 2019, Tomo II, pp. 665-700, pp. 677-678 and CAMELO, António Sampaio, *O Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras*. Coimbra: Edições Almedina S.A., 2016, p. 160-161.

consulting the parties and ensuring due process, article 14.3. The same applies to preparatory hearings, article 29.2.

## **2.7 Concluding Observations**

### **2.7.1 Ordinary civil litigation**

In ordinary civil litigation in the six the general principle is that the hearing is an event where the parties will bring to the court the facts, evidence and arguments that will form the foundation for decision of the court. It has an obvious link to the right to equal treatment and to be heard, produce and rebut evidence and comment on anything relevant in the proceedings or in other words *due process*. The hearing may be a fully-fledged hearing for taking of evidence and oral arguments or for taking of evidence or oral arguments only. There is however no definition what a hearing is but it appears from the *functionality* that is ascribed to it that the format the lawmakers have had in mind is most often personal presence in the court room.

Even though the hearing is often said be oral there is no definition of this term oral that would allow the conclusion that a remote hearing which allows to listen, hear and debate as good as if in person is not oral. It may well be that this is so because the regimes for civil litigation were drafted before remote hearings had made its entrance and that it was no need for the lawmakers to address this issue then.

In all jurisdictions investigated there are rules on remote hearings, however. England, Germany and Sweden allow remote hearing for taking of evidence and oral arguments even if a party would resist it (but given the discretion of the court), in Portugal for taking of evidence. France has a different civil procedure but also in France there is a possibility to remote hearings provided party consent and a decision by the presiding chairman. Switzerland is the only country where remote hearings is not a possibility. However, COVID-19 emergency legislation passed in 2020 allowed for remote hearings in Switzerland. Also, in France and Portugal emergency legislation 2020 opened for a wider application of remote hearings than just in cases where both parties consented, or as in Portugal, also where the witness was domiciled in another county than where the hearing was to take place.

### **2.7.2 Ad hoc arbitration**

All national regimes for ad hoc regimes on arbitration investigated submit to due process, although the wording may vary.

England, France and Sweden impose an express duty on the tribunal to observe that time is of essence when conducting the arbitral procedure. Even though the time factor is not expressly stressed in the ZPO Germany, the ZPO Swiss or PILA Swiss or in the LAV Portugal, it is considered to apply anyway.

Neither the AA England, the PILA Swiss Chapter 12 or ZPO Swiss, nor the CPC France confer any right to an oral hearing to the parties, let alone a physical one. Absent any party agreement to conduct a hearing, it is left to the discretion of the tribunal to decide if one should be organized.

The ZPO Germany and its part on arbitration in its entirety and the SAA Sweden and the LAV Portugal as to hearings are designed on the Model Law. They therefore confer the right to a party to request an oral hearing as does article 24 of the Model Law, in the case of Portugal however confined for the purpose of taking of evidence.

Remote hearings are not expressly regulated in any of the national arbitration regimes. In the absence of any such regulation or a party agreement prescribing hearing in person, the question arise how the national regimes would deal with a request for setting aside an award, where it is alleged that the tribunal refused to comply with a request for a hearing in-person and instead proceeded with a remote hearing.

England, France and Switzerland, where there is no right to a hearing, the absence of a hearing in an arbitration will be dealt with as a matter of due process or natural justice. Only if due process or natural justice was violated as a consequence of the absence of a physical hearing, an award may be set aside, however provided causation between the violation and the outcome, either proved or as in Switzerland, presumed.

In Germany, Sweden and Portugal, whose arbitration acts confer a right to an oral hearing, the question seems to start with to be what is meant by an oral hearing: does it include or exclude a remote hearing? If a remote hearing is included or equated with an oral hearing, no violation has occurred that could warrant setting aside. In all three countries, there is a discussion in the doctrine about this issue, but yet no precedence.

In Portugal there is a case from the *Tribunal Constitucional* that to some extent may be taken as supporting remote hearings for the purpose of taking of evidence even though there is no explicit support for that in statutory law if a party would resist it, however provided the need for timely administration of justice under special circumstances.

If, on the other hand, oral hearing is taken to mean a physical hearing, the question will be if a remote hearing when a physical one should have been conducted will be sufficient to set aside the award. Common to Germany, Portugal and Sweden is the requirement for causation, the violation must have had an influence on the outcome. That apart Sweden limits the application in so far that the setting aside because of procedural irregularities shall be applied restrictively. The same probably applies to Germany, it is said to lie inherently in the requirement for causation and to Portugal in that it is only the violation of the fundamental procedural principles that may warrant setting aside.

It is doubtful if public order can contribute to the clarification of the potential conflict between remote hearing and due process, whether violation of procedural public order overlaps violation of due process or not. In the former case it appears to be just two different labels on the same substance whereas as in the latter case as illustrated by the case from Switzerland, where an award neglected the principle of *res judicata* and therefore was held to violate public order, it appears not to deal with procedural irregularities or due process of the specific process but to something external to the arbitration procedure.

Finally, as to enforcement of foreign awards all investigated jurisdictions are 1958 NY Convention states. England, Germany and Switzerland have incorporated the convention to law by reference. Sweden, Switzerland and Portugal have transposed the convention to rules that closely mirror the convention. France has taken a more liberal view and allows enforcement in cases where the Convention would not. Which standard to apply for judging whether due process as expressed in the Convention article V 1.(b) has been violated varies. England and France favour their national standard of due process, whereas Sweden and Portugal apply the law of the seat of the arbitration. Germany and Switzerland would as England and France apply their

national law but probably considering the international character of the case. It should be borne in mind that the conclusion on which standard the various countries apply are supported only by a few precedents, in some cases only one and on opinions in the doctrine which seldom are consistent with one and another. The exception seems to be France, that is firm in its application of French law.

### **2.7.3 Institutional arbitration**

As to due process there is a tendency in the institutional rules to be more detailed or elaborated than the corresponding rules of the national arbitration or civil procedure law, although no difference in substance can be discerned. There is also a tendency to widen the powers or discretion of the tribunal compared to what national arbitration law provides for.

Generally, the institutional rules stress the time factor and the need for a time and cost-efficient procedure.

The LCIA Rules and the ICC Rules confer a right to a party to request a hearing (the adjective oral is not used), but the tribunal is vested with the authority to decide the format and may decide on a remote hearing after consulting the parties. Unlike the LCIA Rules and the ICC Rules, the Swiss Rules do not confer any right to the parties to request a hearing, but authorize the tribunal to decide if and when to conduct a hearing and also the format for the hearing, for example via videoconferencing, always provided the tribunal consult the parties before deciding on the hearing.

The CAC Rules extends a right to a party to request a hearing for the purpose of taking of evidence, but the tribunal may override a request for a physical hearing and, after consulting the parties, decide on a remote hearing.

In the DIS Rules it is mandatory to conduct an oral hearing if a party request one. Although it is considered the tribunal has a wide discretion to decide on the format for the hearing it is not obvious if the tribunal can decide on a remote one against a party's protest.

The SCC Rules finally gives a party a right to request a hearing (however without using the adjective oral). Nothing is said about the format for the hearing. As to case management conferences it is though said they may be held in person or by other

means, which may be argued that an *a contrario* conclusion is intended for hearings. But, again, that seems to be an unattractive conclusion.

As is apparent, the post COVID-19 vintages of the institutional rules explicitly deal with remote hearings. The reason is of course the experiences of the pandemic. This will be accounted for in chapter 3.

#### **2.7.4 Inference from national legislation on civil procedure, or is there an international law on remote hearing in international arbitration?**

To start with, the question is probably not correctly put. National laws seldom flow upstream, but if a legal issue in litigation or arbitration is resolved in a similar way in many countries and if for example the industry dealing with contentious matters follow the same pattern or do things in litigation or arbitration in the same way it may be argued there is a usage or practice that amounts to international law. Six countries may of course be too small a basis to draw from but on the other hand the institutional rules this thesis deal with and therefore also the national jurisdictions they are footed on, are important and influential in international arbitration far outside of their national origin.

The descriptive part on due process, oral hearings and videoconferencing in chapters 2.1-2.6 shows there are similarities, but also significant differences. Videoconferencing may be ordered against the objection of a party in Sweden, Germany and England in civil proceedings. In ad hoc arbitrations in Sweden and Germany the national laws confer a right to oral hearing if a party requests one, in Portugal too but confined to hearings for taking of evidence. In England, Switzerland and France there is no such right in ad hoc arbitrations. In institutional arbitrations, all rules save for the Swiss Rules allow a party the right to request a hearing, in Portugal however confined for the purpose of taking of evidence. The LCIA Rules, ICC Rules and the CAC Rules empowers the tribunal to decide if the hearing shall be conducted remotely, provided consultation with the parties. The SCC Rules and DIS Rules are silent on that issue, but whereas the SCC Rules simply uses the word “hearing”, the DIS Rules uses the wording “oral hearing”. Whether or not the discretion of the tribunal would allow the tribunal to go against a request from a party to hold hearing in person and instead conduct one remotely has not yet been tried by courts in Germany or Sweden. And the Swiss Rules

do not confer any right to an oral hearing, let alone a hearing, to the parties – not even if requested. On the other hand the Swiss Rules empowers the tribunal to decide on remote hearings, however after consulting the parties.

Given this diversity, it is not possible to construe a common denominator or to make an inference on any international law on oral hearings or remote hearings.<sup>190</sup> As will be accounted for in chapters 3-4, what can be said is that courts and judges in general have become more acquainted to remote hearings and accept them (however not overtly enthusiastically), and also lawyers, perhaps save for French lawyers. But the more frequent remote hearings become, the more likely it is that judges will have a less critical view on remote hearings should they try a case for setting aside on the ground that a remote hearing was conducted against the objection of a party.<sup>191</sup> That does however not amount to law but sociology; what professional judges do in the courts will naturally impact how they would view a case for setting aside where the argument is that what is accepted in the courts is unacceptable in arbitration.<sup>192</sup>

### **3 The COVID-19 pandemic and remote hearings. Introduction**

#### **3.1 The outbreak of the pandemic**

The pandemic has no relevance in itself to the issue that is the subject for this thesis. Remote hearings and videoconferencing existed before the pandemic and was used both in courts and in arbitrations, but to a lesser degree. However, the pandemic caused a stalemate in the administration of justice and necessitated adapted policies or legislation to make the court system work. Likewise, the arbitration institutions adapted to the situation and issued policy guidelines and in some cases amended the rules with a view to facilitate the timely continuation of the arbitration procedures.

In brief, both civil procedures and institutional arbitration rules were widened to promote or allow remote hearings if not already allowed and more disputes were

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<sup>190</sup> Cf. BESSON, Sebastián, POUDRET, Jean François, *Comparative Law of International Arbitration*, Second ed. London: Sweet&Maxwell Ltd, 2007, pp. 483-485.

<sup>191</sup> This is a development that is likely to increase if the proposal of the European Commission on videoconferencing in cross-border civil, commercial and criminal matter will be passed, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0759>

<sup>192</sup> DECOCQ, Georges, “L'influence d'internet sur la pratique de l'arbitrage”, *Revue de l'arbitrage*, Volume 2012 issue 4, pp. 769-777, pp. 770, 772.

decided after remote hearings than before. The deliberations behind these changes, the discussion it triggered and in a few instances court decisions that ensued may be useful for the understanding of the potential dichotomy between due process and remote hearings. That is why this development earns an outline in this thesis.

### 3.2 Changes in civil procedure rules

In a message to the civil and family courts of 19 March 2020, the Lord Chief Justice in England addressed the courts and the public, declaring that the default position in all jurisdictions should be to conduct hearings with one or all participants participating remotely. He added that final hearings with contested evidence also would inevitably be conducted using technology, i.e. videoconferencing, otherwise there would be no hearings and access to justice would be a mirage.<sup>193</sup> And in a Protocol regarding remote hearings issued by the Judiciary of England and Wales of 26 March 2020, it was stressed that remote hearings should be used wherever possible and that a remote hearing for all purposes was a hearing under the CPR England (but that they always must be decided by the judge applying the normal CPR England rules).<sup>194</sup>

In France, the courts were closed through emergency legislation via a government order of 16 March 2020; only in essential cases hearings or trials were to be allowed to go forward. On 25 March 2020 the government however issued an order that allowed the courts to decide on remote hearings using videoconferencing or to decide the cases without a hearing (*audience*) at all, (in the latter case only if the parties were represented by lawyers).<sup>195</sup>

Later the constitutionality of the possibility to proceed without a hearing was tried by *Le Conseil Constitutionnel*. In a decision 19 November 2020 *Le Conseil Constitutionnel* found that proceedings without a hearing did not violate the guarantees of the French Constitution as to the right to be heard, nor the right to an equitable process, basically

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<sup>193</sup> <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

<sup>194</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf)

<sup>195</sup> <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041755577/>, articles 7 and 8.

as the contested rules pursued the objectives of the constitution of health protection and contributed to the continued functioning of the justice.<sup>196</sup>

Portugal adopted likewise emergency legislation, Law no. 1-A/2020, March 19, later amended by Law 4-A/2020, April 6. All time limits in all proceedings save for urgent proceedings were suspended. Where the parties confirmed they accessed relevant technical equipment they were however allowed to proceed on a remote basis in non-urgent cases, and in urgent cases where physical presence were necessary the court could order remote hearings instead, obviously as an acceptable substitute to physical presence.<sup>197</sup>

Also, on 16 April 2020 Switzerland passed legislation to allow remote hearings or taking of witness evidence or expert evidence if both parties consented or if any of the parties or members of the court were vulnerable to the COVID-19 or, finally, if there were important reasons, in particular urgency for trial.<sup>198</sup>

Unlike in France and Portugal, the courts of Germany and Sweden were never subject to any restrictions. Neither Germany, nor Sweden passed any new legislation to facilitate remote hearings, as that possibility already existed.

It should be added that the adaption to the legislation accounted for have been changed in most cases several times since inception. In some instances they have also necessitated adaptations to the format for remote hearings such that they comply with the ECHR article 6 and national requirements on a public hearing.

### **3.3 Changes in arbitration rules**

No adaptations or changes were made to the national arbitration acts relevant to remote hearings in any of the investigated jurisdictions in this thesis, but on the other hand the arbitration institutes issued policy guidelines and, in some cases, changed the

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<sup>196</sup> <https://www.conseil-constitutionnel.fr/decision/2020/2020866QPC.htm>

<sup>197</sup> See *supra* at 2.6.1 - For a comprehensive account of the Portuguese response to the pandemic and the administration of justice in state courts, see CASALEIRO Paula et.al, "Judicial Responses to COVID-19 Attack: Impacts on the Working Conditions of Portuguese Courts", *International Journal for Court Administration*. 2021 12:(2), pp.1-14

<sup>198</sup> <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2020/234/20201013/de/pdf-a/fedlex-data-admin-ch-eli-cc-2020-234-20201013-de-pdf-a.pdf>, article 2 and 3.

institutional rules to promote remote hearings or allow such hearings if not already allowed.

Article 19.2 of the LCIA 2014 Rules conferred the fullest authority to the tribunal, in consultation with the parties, to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place and further stated that as to form, a hearing may take place by video or telephone conference or in person (or by a combination of all three).

The wording of article 19.2 was changed in the LCIA 2020 Rules, “video” in the 2014 version of article 19.2 was changed to “videoconference” and “virtual” was added in the 2020 version. This seems to entail no difference in substance but a mere confirmation of what already was established in the LCIA 2014 rules, that remote hearings by way of videoconferencing may be conducted.<sup>199</sup>

The ICC 2017 Rules article 25.2 imposed the duty on the tribunal to conduct a hearing for the purpose of taking of evidence, if requested by a party. This right for a party to request a hearing was thus limited to evidentiary hearings and was explicitly stated to be conducted in person. There was, as appears of its English version, no wording that gave the tribunal the discretion to decide to conduct the hearing remotely.<sup>200</sup> In a guidance note issued 8 April 2020, the ICC however pronounced its opinion that article 25.2 in its French version of the then applicable ICC 2017 rules allowed the interpretation that the hearing could be held remotely.<sup>201</sup>

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<sup>199</sup> GERBAY, Rémi, RICHMAN, Lisa, SCHERER, Maxi, *Arbitrating under the 2020 LCIA Rules: A User's Guide*. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 259-261 and SAUNDERS, Matthew, “Chapter 7: COVID-19 and the Embracing of Technology: A ‘New Normal’ for International Arbitration” in Axel Calissendorff and Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2020*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.99-114, p.107.

<sup>200</sup> Cf. GRIERSON, Jacob, van HOOFT, Annet, *Arbitrating under the 2012 ICC Rules*. Alphen aan den Rijn: Kluwer Law International, 2012, pp. 181-182, 187-188.- The commentary by Grierson and van Hooft relates to the ICC 2012 rules, but article 25.2 was identical in both versions, 2012 and 2017.

<sup>201</sup> <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>, see section 24. This interpretation is based on the French version of the Rules, where *contraditoirement* is the French word used where the English uses *in person*. The idea is obviously that hearing is held *contraditoirement* if held remotely via videoconferencing. About this interpretation, see SCHERER, Maxi, “The Legal framework of Remote Hearings” in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.65-103. p.75.– See also BÜCHELER, Gephard, FLECKE-

In the ICC 2021 Rules the right for a party to request a hearing was moved to article 26.1 and widened to any type of hearing. A new provision was also entered in article 26.1 authorizing the tribunal after consulting the parties to decide whether to hold the hearing in person or remotely via videoconferencing.<sup>202</sup>

In Germany, no changes were made to the DIS 2018 Rules. In a joint statement with other arbitration institutions published in April 2020 DIS encouraged the use of case management techniques that might permit arbitrations to substantially progress without undue delay despite impediments caused by the health crisis.<sup>203</sup> It would appear that one of the case management techniques DIS must have had in mind was remote hearings.

Like in Germany, no changes were made in Sweden to the SCC Rules. On 27 March 2020 SCC posted a guidance note where SCC clarified that it was expected that parties complied with the obligations of the SCC rules as to time limits, i.a. through transferring the proceedings to a fully digital environment using videoconferencing.<sup>204</sup>

When the pandemic broke out, the then prevailing rules of the Swiss Rules of International Arbitration issued by the Swiss Chambers' Arbitration Institution (the forerunner to the Swiss Centre) were from 2012. They conferred a wide discretion on the tribunal to decide if a hearing should take place and if so, the format for it, article 15.1-2. It also authorized the tribunal to decide on remote hearings, however confined for the purpose of taking of evidence, article 25.4. In the amended Swiss Rules that came in to force in June 2021, the authority for the tribunal to decide on a remote

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GIAMMARCO, Gustav, Gebhard, ZAHNER, Lena, "Arbitration in Uncertain Times – Institutional Responses to COVID-19". *SchiedsVZ*, volume 18, issue 3, 2020, pp. 133-138, p. 136.

<sup>202</sup> In line with the ICC guidance note and its explanation of the meaning of the rules based on its version in French (see the foregoing footnote) it has been suggested that the new provision in section 26.1 merely confirms the right for the tribunal to decide to conduct a hearing remotely, see KIFFER, Laurence, "National Report for France (2020 through 2021)", in Lise Bosman (ed.) *ICCA Handbook on Commercial Arbitration*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp. 1-122, p. 115.

<sup>203</sup> [https://www.disarb.org/fileadmin/user\\_upload/Ueber\\_uns/Covid-19\\_Joint\\_Statement.pdf](https://www.disarb.org/fileadmin/user_upload/Ueber_uns/Covid-19_Joint_Statement.pdf). – It does not appear from the web page of DIS when it was published, but the same joint statement was posted by the SCC on 16 April 2020, <https://sccinstitute.com/about-the-scc/news/2020/arbitration-and-covid-19-institutions-speak-with-one-voice/>

<sup>204</sup> <https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/>

hearing was widened to also encompass hearings for oral arguments, article 27.1-2. That apart the Swiss Centre did not issue any guidance note, nor any policy guidelines for the tribunals or parties as to the COVID-19 pandemic, and the Swiss Centre was not one of the co-signatories to the Covid-19 joint statement posted by i.a. DIS and SCC.

In Portugal the 2014 version of the CAC Rules were in force when the pandemic hit Portugal. They gave a party the right to request a hearing for the purpose of taking of evidence, article 31.2, but not for oral arguments in general. Article 18.1-2 authorized the tribunal to conduct the proceedings as they deemed appropriate, however always conferring a reasonable opportunity on the parties to assert their rights to equal treatment and to be heard. In article 15 that dealt with the place of arbitration it was said the tribunal could decide on sessions, hearings or meetings in any other place (than the place of the arbitration).

In the CAC 2021 Rules those rules were changed only in so far that in article 14 (which corresponds to article 15 in the CAC 2014 Rules) it was added in 14.2 that hearings, sessions or meeting could be held virtually or by videoconferencing and further, in 14.3 i.a. that a virtual hearing only could be conducted after consulting the parties and ensuring due process.

The emergency legislation Law no. 1-A/2020, March 19 incepted an automatic stay in all proceedings, arbitration proceedings included. As accounted for in chapter 2.6.1 *supra*, it also introduced the possibility to order videoconferencing, probably limited to taking of evidence in urgent cases, later widened through Law 4-A/2020, April 6 to all sorts of hearings, not just for taking of evidence. If non urgent, provided that that the parties had adequate means to secure a videoconference. If urgent, videoconferencing was allowed if the physical presence of the parties or other participants was necessary. It is though unclear to what extent these powers have been used in arbitrations.<sup>205</sup>

Given the emergency legislation and its application to arbitration, the possibilities for the Portuguese CAC to encourage remote hearings must have been limited. No

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<sup>205</sup> AGUILAR de CARVALHO Fernando, BORGES SACOTO Constança, NUNES Diana, "The arbitration European Review 2022: Portugal". *Global Arbitration Review*, 17 November 2022, pp. 102-119, p.104.

guidance policy or note similar to what DIS or SCC posted was published by the CAC, but the ICC guidance note of 8 April 2020 note was well accepted by the Portuguese arbitral community.<sup>206</sup>

## **4 Remote hearings during the pandemic**

### **4.1 Introduction**

Given the response from legislators and judiciaries to the pandemic accounted for in chapter 3.2 *supra* it is not surprising that remote hearings increased during the pandemic in state courts. To what degree varied from country to country, in what type of case and within a type of case, for what purpose.<sup>207</sup>

The same can be said about arbitration. One of the very reasons why parties opt for arbitration to resolve a dispute is speed, often consecrated in national arbitration acts and almost invariably in institutional rules as a duty for the arbitrators to promote. This is also why many arbitration institutions encouraged tribunals and parties to keep up with time limits using videoconferencing and conducting remote hearings and, in some instances, clarified or widened the rules such that remote hearings should be the choice of the parties or the tribunals rather than vacating and postponing hearings.

### **4.2 The increase**

There are several reports and papers that account for the development and the increase of remote hearings. The quality and richness in details varies but the overall conclusion can be but one: they increased.

#### **4.2.1 Courts**

In England, the lockdown and the ensuing policy declarations made by the Lord Chief Justice and the Judiciary caused a substantial change in the way the courts handled the cases, from in-person hearings to remote hearings, that became the default position of the courts. Already in April 2020, 85% - 90% of all hearings including substantial trials were remote.<sup>208</sup> The Commercial Courts did close to 100% of its hearings remotely

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<sup>206</sup> Ibid. pp. 104-105.

<sup>207</sup> It should be noted that remote hearings in state courts may encompass all sorts of cases, small and big and criminal for example.

<sup>208</sup> IBA LITIGATION COMMITTEE, Jeff Galway, Urs Hoffman-Nowotny (eds.) in *Impact of Covid-19 on Court Operations & Litigation Practice*. June 2020, p. 32.

during the first seven months of the pandemic. And in the business and property courts very few in-person hearings were conducted.<sup>209</sup> In absolute numbers it can be mentioned that 493 remote hearings were conducted during the period March - September 2020 in the commercial courts.<sup>210</sup> In a survey prepared under the auspices of the Consultative Council of European Judges (CCJE), it was said that “*The change from physical hearings to having almost none conducted face-to-face was made in impressive speed by the judiciary of England and Wales*”.<sup>211</sup>

In Germany the tendency during the first seven months of the pandemic was rather to vacate and postpone, even though there is some evidence of an increased use of remote hearings but at a low rate.<sup>212</sup> Later during the pandemic there was an acceleration of remote hearings.<sup>213</sup>

The information about remote hearings in England and Germany comes from three IBA-reports and one article published in the International Journal for Court Administration. That article was as already pointed out prepared in cooperation with the CCJE. Although all four sources contained information about the situation in France, there are no figures or no information about the frequency of remote hearings in France in these sources. However, also in France the pandemic and the emergency legislation it generated obviously have generated some remote hearings but like in Germany at a low rate.<sup>214</sup>

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<sup>209</sup> IBA, Kim Rooney (ed.) in *The Global Impact of the Covid 19 Pandemic on Commercial Dispute Resolution in the First Seven Months*, October 2020, and its part about England and Wales in Part II.

<sup>210</sup> IBA, Kim Rooney (ed.) in *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Year*, June 2, 2021, and its part about England and Wales in Part II.

<sup>211</sup> SANDERS, Anne “Video-Hearings in Europe Before, During and After the COVID-19 Pandemic”. *International Journal for Court Administration*. 12 (2):3, 2 May 2021, pp.1-21, p.16

<sup>212</sup> IBA LITIGATION COMMITTEE, Jeff Galway, Urs Hoffman-Nowotny (eds.) in *Impact of Covid-19 on Court Operations & Litigation Practice*. June 2020, p.43 and IBA, Kim Rooney (ed.) in *The Global Impact of the Covid 19 Pandemic on Commercial Dispute Resolution in the First Seven Months*. October 2020, and its part about Germany in Part II.

<sup>213</sup> IBA, Kim Rooney (ed.) in *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Year*, June 2, 2021, and its part about Germany in Part II and SANDERS, Anne, “Video-Hearings in Europe Before, During and After the COVID-19 Pandemic”. *International Journal for Court Administration*. 12 (2):3, 2 May 2021, pp.1-21, 16-17.

<sup>214</sup> CONSEILS NATIONAL DES BARREAUX LES AVOCATS, *L’Audience: état des lieux et réflexions*. Groupe de travail Avenir de l’Audience et de la Plaidoirie. November 2020, pp. 9 and 22.

As to Sweden, like in Germany no lock down was decided and since before the pandemic remote hearing was an option. Remote hearings increased significantly.<sup>215</sup> During May 2020 for example, there was 2900 remote hearings per week in the courts as compared to year 2019, when there was 1600 per week during the same period.<sup>216</sup> Switzerland adopted emergency legislation in April 2020 that allowed remote hearings. The commercial court in Zürich and the judiciary of Geneva encouraged or were in favour of remote hearings but as the courts are cantonal and many did not have video equipment there seems to have been initial hurdles to overcome. Also, the emergency legislation was initially scheduled to remain in force no longer than to end of September 2020.<sup>217</sup> But most of all there was structural problems in the court organization that made the emergency legislation not implemented as intended.<sup>218</sup> Anyway, there are no available figures in the reports referred to in this thesis as to remote hearings in Switzerland.

Finally, as in France and Switzerland, Portugal also incepted emergency legislation. To facilitate the implementation of the use of videoconferencing the *Conselho Superior de Magistratura* issued a guideline on 21 April 2020 to the courts on the technology installed in the courts and how to use it.<sup>219</sup>

Even though public statistic is not available in Portugal, other information confirms that Portugal saw an increase in remote hearings during 2020. 157 virtual hearing rooms came into operation and preliminary hearings or trials were held and non-urgent cases that could be carried out remotely were performed.<sup>220</sup> Remote hearings

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<sup>215</sup> SANDERS, Anne, "Video-Hearings in Europe Before, During and After the COVID-19 Pandemic". *International Journal for Court Administration*. 12 (2):3, 2 May 2021, pp.1-21, pp. 5 and 17.

<sup>216</sup> IBA LITIGATION COMMITTEE, Jeff Galway, Urs Hoffman-Nowotny (eds.) in *Impact of Covid-19 on Court Operations & Litigation Practice*. June 2020, p.100.

<sup>217</sup> Ibid. p.103

<sup>218</sup> KETTIGER, Daniel, LIENHARD, Andreas, "Swiss Courts Facing the Challenge of COVID-19. *International Journal for Court Administration*. 12 (2):5, 06 May 2021, pp 1-9, pp.7-8.

<sup>219</sup> <https://www.csm.org.pt/2020/04/21/informacao-relativa-ao-uso-da-plataforma-informatica-cisco-webex-meetings/>

<sup>220</sup> GOMES da CRUZ, Inês, *Portuguese Courts are Up and Running*. Expertguides, 3 September 2020.

became the rule, was it reported later by the law firm PLMJ.<sup>221</sup> Rule or not, it is confirmed anyway by Paula Casaleiro that “... *many of the necessary proceedings in a judicial process were possible to be done*”.<sup>222</sup>

#### 4.2.2 Arbitrations

It is almost invariably reported an increase of remote hearings in arbitrations, particularly international, during the pandemic, although quite a part of the evidence is not based on statistical enquiries.

To start with, two enquires under the auspices of IBA generated the two papers already referred to in relation to civil litigation. Part III in these two papers is devoted to arbitrations and one question was how arbitrations had developed during the pandemic. In the first paper only England and Wales, Germany and Sweden of the countries this thesis focusses on were investigated, and in the second France was included plus updates from England and Wales and Germany. The general trend in the first report is an increase of remote hearings, also for evidentiary hearings, which is accelerated in the second report.<sup>223</sup>

Queen Mary University of London published a survey in 2021, *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views*, which was the 12th empirical survey conducted by the School of International Arbitration at Queen Mary University of London. More than 1200 respondents – arbitrators and counsels - from 39 countries participated and some 200 interviews were conducted.<sup>224</sup> One of the issues was the pandemic and international arbitration. Although the issues centered around pros and cons with remote hearings compared to in-person hearings and what

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<sup>221</sup> GOMES da CRUZ, Inês and SAMORENO, Rita, *Litigation and Enforcement in Portugal*. Practicallaw, 2020.

<sup>222</sup> CASALEIRO Paula et.al, “Judicial Responses to COVID-19 Attack: Impacts on the Working Conditions of Portuguese Courts”, *International Journal for Court Administration*. 2021 12:(2), pp.1-14, pp.11-12.

<sup>223</sup> IBA, Kim Rooney (ed.) in *The Global Impact of the Covid 19 Pandemic on Commercial Dispute Resolution in the First Seven Months'*, October 2020, and its Part III about England and Wales, Sweden and Germany and *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Year*, June 2, 2021, and its part III about France and the updates about England and Wales and Germany.

<sup>224</sup> FANOU, Maria, GALLAGHER, Norah. *International Arbitration Survey: 2021 Adapting Arbitration to a Changing World*. Queen Mary University of London, School of International Arbitration, p. 35.

preferences the arbitral community had, the survey reported an increase in remote hearings.<sup>225</sup>

Another scholarly work is the article *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views*.

This is the title of a contribution by Gary Born, Anneliese Day and Hafez Virjee to the book *International Arbitration and the COVID-19 Revolution*.<sup>226</sup> The survey was promoted by a very large number of arbitration institutes (amongst them all institutions from the countries involved in this thesis save for the Swiss Arbitration Centre) and was considered by 201 respondents from 43 jurisdictions.

The survey accounts for a spike in remote hearings during the period 15 March – 30 June 2020, during that period they increased by more than 300 % compared to the open-ended preceding period and on an annualised basis, the increase was 1 100 % compared to what they had been at any time before.<sup>227</sup>

Also in Switzerland remote hearings most likely increased during the pandemic.<sup>228</sup> The same is true for Portugal.<sup>229</sup> As to Sweden, the SCC made a survey and found that during 2020 40 % of all arbitrations were conducted remotely.<sup>230</sup>

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<sup>225</sup> Ibid. 3 and 11.

<sup>226</sup> BORN, Gary, B., DAY, Anneliese, VIRJEE, Hafez, "Empirical Study of Experience with Remote Hearings: A Survey of Users' Views" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.137-151

<sup>227</sup> Ibid. pp.140-141.

<sup>228</sup> DASSER, Felix, "The times are a changin' (Fine but how much and for how long, exactly? And what does it all mean for us?)". *ASA Bulletin*, volume 38, issue 2, 2020, pp. 277-278, p.278, CARDUCCI, Guido, "Remote or Virtual Arbitration Hearings as "New Normal": Governing Law and Rules, Seat, Annulment, Recognition and Enforcement". *ASA Bulletin*, volume 39, issue 3, 2021, pp.656-664, p.663 and HIRSIGER-MEIER, Valentina, "Impact of the COVID-19 pandemic on (physical) litigation and international arbitration proceedings in Switzerland." *Baker McKenzie Blog*, June 12, 2021

<sup>229</sup> AGUILAR de CARVALHO Fernando, BORGES SACOTO Constança, NUNES Diana, "The Arbitration European Review 2022:Portugal". *Global Arbitration Review*, 17 November 2022, pp.102-119, p.104.

<sup>230</sup> CALISSENDORFF, Axel, "2020 – ett genombrott för virtuella skiljeförfaranden" (free translation:) *2020 – a breakthrough year for virtual arbitrations*) in Sara Göthlin, Algot Bengtsson and Mårten Schultz (eds.) *Stockholm Centre for Commercial Law, Årsbok XII*. Stockholm : Stockholm Centre for Commercial Law, 2020, pp.115-119. p.116

### **4.3 Reactions: what do lawyers and judges prefer - physical or remote hearings?**

#### **4.3.1 Surveys and enquiries: introduction**

There are quite a few research done on how judges and lawyers responded to the efforts to channel more of the caseload through the pandemic as remote hearings using videoconferencing, both in civil commercial cases before state courts and in arbitrations (but very little about what the parties thought about it). Some of the research is country-specific, and some span over a wide number of countries.

Although there are differences from country to country, from proceedings before state courts and arbitration tribunals, between type of case and between judges and lawyers, the tendency is clear. In general they prefer in-person hearings but can accept remote hearings as a substitute (often under the proviso the technology is working sufficiently well) but sometimes preferably only for selected sections of a proceeding.

#### **4.3.2 Civil Justice Council and The Legal Foundation (England and Wales)**

There are two reports from the Civil Justice Council and The Legal Foundation, one from May 2020 and one from June 2021 respectively, *The impact of COVID-19 measures on the civil justice system* and *Understanding the impact of COVID-19 on tribunals –The experience of judges*. The first centers on professional users of court services. Of 1077 users that participated in the investigation, 871 were lawyers and the balance lay users. The second report centers on the judges' experiences. 1507 judges participated in the investigation.

Of the lawyers, 71,5 % had a positive experience of remote hearings but a majority yet thought remote hearings were worse the physical hearings.<sup>231</sup> 10% thought remote hearings were better, 25,9% they were equal to physical but 63,9% thought that remote were worse than physical hearings.<sup>232</sup>

There is no such clear answer given in the second report about what judges prefer, remote or physical. Instead their view on various aspects are accounted for such as remote hearing and technology, access to justice, effective hearings and the possibility

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<sup>231</sup> BYROM, Nathalie, BEARDON, Sarah, KENDRICK, Abbey. *The impact of COVID-19 measures on the civil justice system*. Civil Justice Council, The Legal Education Foundation. May 2020, pp. 8-9.

<sup>232</sup> Ibid. p.53.

for the parties to put their case. For example, respondent judges believed remote hearings worked best for short, straightforward hearings which concerned points of law, rather than live evidence.<sup>233</sup> On the other hand, 57.6% of the respondent judges reported that video hearings were mostly effective or effective in enabling parties to participate and put their case effectively.<sup>234</sup> But given the overall tenor of the opinions aired by the judges one can but agree that the foreword to the report of the Senior President of Tribunals, Sir Kenneth Lindblom, probably expresses a general understanding of the judges, “*But we are eager to move back to in-person hearings as soon as we can in cases where that is more appropriate*”.<sup>235</sup>

#### **4.3.3 Queen Mary University of London, 2021 The International Arbitration Survey: Adapting Arbitration to Changing World**

This is the report referred to *supra* at footnote 224 directed by scholars at the Queen Mary University where one of the topics is the use the technology and remote hearings in arbitrations. As said, more than 1200 respondents – arbitrators and counsels - from 39 countries participated and some 200 interviews were conducted. The respondents were asked if they believed the increase towards remote hearings during the pandemic would survive the pandemic or if the pre-pandemic, normal service would be resumed. To answer this question the respondents were asked which of three alternatives they preferred for hearings, in person, remote, or a mix between remote and in-person.

For procedural hearings, 48 % preferred remote hearings whereas 45 % preferred a mix of in-person and remote. As to substantial hearings 48% preferred in-person hearings while 45 % preferred a mix. Only 8 % preferred a fully remote hearing for substantial hearings.<sup>236</sup> As to the future, the general understanding seems to have been that for substantial hearings with a complex factual background, fully remote hearings is less likely to be the prevalent choice.<sup>237</sup> However, if the alternatives in a

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<sup>233</sup> BYROM, Nathalie, BEARDON, Sarah. *Understanding the impact of COVID-19 The experience of tribunal and judges*. Civil Justice Council, The Legal Education Foundation. June 2021, p.11.

<sup>234</sup> *Ibid.* p.14.

<sup>235</sup> *Ibid.* p.7.

<sup>236</sup> FANOU, Maria, GALLAGHER, Norah. *International Arbitration Survey: 2021 Adapting Arbitration to a Changing World*. Queen Mary University of London, School of International Arbitration, pp. 25-26.

<sup>237</sup> *Ibid.* p.27.

case would be to vacate and postpone or to continue on a remote basis, 79% would prefer to proceed remotely whereas only 16 % preferred to wait until a hearing could be held in-person.<sup>238</sup>

#### **4.3.4 L’Audience: état des lieux et réflexions. Groupe de travail Avenir de l’Audience et de la Plaidoirie**

This is a report prepared by Conseil National des Barreaux Les Avocats in France published in November 2020. It centers around the experiences from the COVID-19 emergency legislation that allowed remote hearings in civil procedures and what conclusions that can be drawn for the future of the *audience*, the oral part of the civil procedure.<sup>239</sup> It is based on 67 hearings with lawyers and court officials.<sup>240</sup>

Although various opinions were aired, the conclusion of the report is that videoconferencing is a degraded format for a hearing that only should have its place during the preparatory stage, the *mis en état*, and should be accepted as a substitute to the oral hearing, *l’audience*, only exceptionally and always provided consent from the lawyers.<sup>241</sup>

#### **4.3.5 Video-Hearings in Europe Before, During and After the COVID-19 Pandemic**

This article by Anne Sanders, prepared under the auspices of the CCJE and referred to *supra* at footnote 211, accounts for an enquiry with judges from 24 countries in Europe about i.a. their experiences of videoconferencing during the pandemic. The views of the judges vary apparently from country to country, often depending on the quality of the technology that in many instances was new and untested. The overall attitude was that remote hearings was necessary during the pandemic but not preferable to face-to-face hearings.<sup>242</sup>

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<sup>238</sup> Ibid. p.3.

<sup>239</sup> CONSEILS NATIONAL DES BARREAUX LES AVOCATS, *L’Audience: état des lieux et réflexions*. Groupe de travail Avenir de l’Audience et de la Plaidoirie. November 2020, pp.4, 22 and 27.

<sup>240</sup> Ibid p.4.

<sup>241</sup> Ibid. pp. 4,6 and 27.

<sup>242</sup> SANDERS, Anne, “Video-Hearings in Europe Before, During and After the COVID-19 Pandemic”. *International Journal for Court Administration*. 12 (2):3, 06 May 2021, p. 18. The conclusion is said to be based on private conversation with judges, the UK Report from the Civil Justice Council and the Legal Foundation and answers from two countries.

#### 4.3.6 Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views

This is the title of a contribution by Gary Born, Anneliese Day and Hafez Virjee to the book *International Arbitration and the COVID-19 Revolution* referred *supra* at footnote 226. As pointed out, the survey was promoted by a very large number of arbitration institutes and was considered by 201 respondents from 43 jurisdictions.<sup>243</sup> One of the questions was how users' experience of remote hearings compared to in-person hearings.

The question was divided into nine features: giving expert evidence, defending witness and experts, hot tubbing of witness and experts, cross examination momentum, effectiveness of advocacy, putting questions to witness and expert, assessing witness and experts evidence (as tribunal), putting questions to counsel (as tribunal), your understanding of the case at end of hearing (as tribunal).<sup>244</sup>

In the three features that related to the tribunals' views, a majority placed remote hearing equal to semi-remote or in-person. Overall however the respondents held remote hearing less good than semi-remote or in-person hearings. This was particularly so regarding putting questions to witnesses or experts, be it in cross examination or not.<sup>245</sup>

A very important conclusion is however that from the viewpoint of the tribunal, fully remote hearings were seen as better than in-person hearings for putting questions to counsel and that a majority held remote hearings and in-person hearings as equal for assessing oral evidence, the effectiveness of advocacy and tribunals' understanding of the case.<sup>246</sup>

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<sup>243</sup> BORN, Gary, B., DAY, Anneliese, VIRJEE, Hafez, "Empirical Study of Experience with Remote Hearings: A Survey of Users' Views" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.137-151, pp.137-140.

<sup>244</sup> Ibid. pp.144-145.

<sup>245</sup> Ibid. pp.144 and 146.

<sup>246</sup> Ibid.p. 146.

### 4.3.7 Conclusion

Justice must not only be made but must also be seen or perceived to be made.<sup>247</sup>

However, there is nothing in these enquires that would make one suspect that remote hearings is not seen or perceived as making justice, although preferences may weigh in favour of in-person hearings for some types of cases.

For example, cases with 1000 of documents and with tens of experts, perhaps heard in hot-tubbing - imagine a big construction case - may be more apt to conduct as in-person hearings.<sup>248</sup> This is not an argument *per se* against remote hearings. It is only a reminder the tribunal ought to use its discretion to tailor-make a hearing that is fit to the circumstances. That is something judges do in state courts too: wide screens are available in court rooms to display designs for example, or video equipment to allow taking of demonstrative evidence through video recordings.

## 5 The arguments against remote hearings

### 5.1 Introduction

There are many arguments against remote hearings, and they are very different from one and another. Some of them are clearly not relevant to arbitration. Among them can be mentioned the solemnity that the architecture and setting of the court scene and the roles played by judges with their wigs and robes have in society is lost at remote hearings.<sup>249</sup> Or the potentially negative impact the videoconferencing has on how society perceive judges' performance or enactment of their authority in their courtroom to assert the legitimacy of the law.<sup>250</sup>

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<sup>247</sup> PAULSSON, Jan, *The Idea of Arbitration*. Oxford: Oxford University Press, 2013, p.91.

<sup>248</sup> ASHFORD, Peter, "The right to an "in-person" Hearing in International Arbitration". *The International Journal of Arbitration, Mediation and Dispute Management*, 2021, volume 87, issue 4, pp. 575-596, p. 592 and MADYOON, Nika, "Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement", *The International Journal of Arbitration, Mediation and Dispute Management*, 2021, volume 87, issue 4, pp.596-611, p.606

<sup>249</sup> CONSEILS NATIONAL DES BARREAUX LES AVOCATS, *L'Audience: état des lieux et réflexions*. Groupe de travail Avenir de l'Audience et de la Plaidoirie. November 2020, p.16: "L'audience a un rôle primordial vis-à-vis de cette transparence et Béatrice WEISS-GOUT la qualifie même de « vitrine de la Justice pour le justiciable »"

<sup>250</sup> ROWDEN, Emma, WALLACE, Anne, "Remote judging: the impact of video links on the image and the role of the judge". *International Journal of Law in Context* (2018), 14, pp. 504–524, p.506.

## 5.2 Difficulties to cross examine remotely

Also, it has been argued that it is more difficult to efficiently cross examine a witness or an expert attending via video. Partly this argument seems to be based on the technological aspects or the general sense of remoteness that would hinder a more vivid and efficient line of questioning.<sup>251</sup> This might be a viable argument as the right to cross examine may be said to be a part of due process.<sup>252</sup>

However, there is not much support in court precedence for the argument that video would not allow efficient cross examination. To the contrary courts in many countries have accepted that remote hearings do not put the cross examiner in a materially worse position than if the hearing would be conducted in person. Wendy Miles, QC, has worked out how a useful cross-examination via videoconferencing may be prepared so as to adapt to the video format for the hearing. As she correctly puts it, it comes down to advocacy.<sup>253</sup> Also, the ECtHR has found cross-examination via videoconferencing acceptable.<sup>254</sup>

## 5.3 Technological difficulties

Other arguments against may be relevant but relates to technological issues such as the quality of the transmission, how the work of the lawyers are best organized, how to share documents on the screen, how to cooperate within the legal team, screen fatigue, how to cope with different time zones or how to control witnesses.<sup>255</sup> These

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<sup>251</sup> FANOU, Maria, GALLAGHER, Norah. *International Arbitration Survey: 2021 Adapting Arbitration to a Changing World*. Queen Mary University of London, School of International Arbitration, p. 25.

<sup>252</sup> KURKELA, Matti S., TURUNEN, Santtu, *Due Process in International Commercial Arbitration*. 2nd edition. New York: Oxford University Press, 2010, p. 145.

<sup>253</sup> SCHERER, Maxi, "The Legal framework of Remote Hearings" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp. 65-103, pp. 84-85 and MILES, Wendy, "Remote Advocacy, Witness Preparation & Cross Examination: Practical Tips & Challenges" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp. 121-135, pp. 129-131 and the eight tips she advocates to make cross-examination be effective in a videoconferencing.

<sup>254</sup> *Schatschaschwili v. Germany*, ECtHR 9154/10, at 127, 138 and 147 of the Grand Chamber's assessment.

<sup>255</sup> BYROM, Nathalie, BEARDON, Sarah, KENDRICK, Abbey. *The impact of COVID-19 measures on the civil justice system*. Civil Justice Council The Legal Education Foundation. May 2020, p. 56, BYROM, Nathalie, BEARDON, Sarah. *Understanding the impact of COVID-19 on tribunals The experience of tribunal judges*. Tribunals Judiciary The Legal Education Foundations. June 2021, p. 14, FANOU, Maria, GALLAGHER, Norah. *International Arbitration Survey: 2021 Adapting Arbitration to a Changing World*. Queen Mary University of London, School of International Arbitration, pp.24-25, SANDERS, Anne, "Video-Hearings in

problems can be resolved or mitigated by training and planning, for example by making use of any of the protocols for videoconferencing produced by arbitration institutes.<sup>256</sup> (This will be discussed more in detail in Chapter 15). Whilst the quality of transmissions certainly has been a problem, with the use of fibre or 4G (or faster) it is not (save for occasional disturbances on the internet).<sup>257</sup>

#### 5.4 Non-verbal cues: demeanour

But there is one argument that potentially goes to the root of what doing justice is and therefore relevant to arbitration: in remote hearings non-verbal cues of a witness (or, expert) such as demeanour is said to get lost and it becomes more difficult to distinguish truth from lie.<sup>258</sup> This is well illustrated in an article by Felix Dasser, professor of law and vice-president of the Association Suisse de l'Arbitrage (ASA): *The palpable unease of a witness starting to sweat in a well-air-conditioned room and furtively shuffling his or her feet under the table is easily lost on a screen.*<sup>259</sup> But what does it tell us, really? We will start with examining this argument in next chapters 6 and 7 and then follow up with the technological issues and the possibility to control a witness being heard remotely in chapter 8.

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Europe Before, During and After the COVID-19 Pandemic". *International Journal for Court Administration*. 12 (2):3, 06 May 2021, pp.16-17 and SCHERER, Maxi, "The Legal framework of Remote Hearings" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alpen aan den Rijn: Wolters Kluwer, 2020, pp.65-103, pp.84-87.

<sup>256</sup> Like for example the Seoul-protocol, available at <https://sccinstitute.com/media/1708389/seoul-protocol.pdf>

<sup>257</sup> If the latency - the time for a signal to travel from sender to receiver - is 200 milliseconds or more, there is a problem in quality, GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012, p. 78. With 4G, the latency is only 50 milliseconds , <https://spectrum.ieee.org/breaking-the-latency-barrier>

<sup>258</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. "Die Virtuelle Verhandlung im Schiedsverfahren". *SchiedsVZ*, volume 18, issue 6, 2020, pp. 257-265, pp.263, FANOU, Maria, GALLAGHER, Norah. *International Arbitration Survey: 2021 Adapting Arbitration to a Changing World*. Queen Mary University of London, School of International Arbitration, p.25, DUMOULIN, Laurence, LICOPE, Christian, *Les audiences à distance Genève et institutionnalisation d'une innovation*. Institut des Sciences sociales du Politique. Rapport Final Janvier 2009, p.195.

<sup>259</sup> DASSER, Felix, "The times are a changin' (Fine but how much and for how long, exactly? And what does it all mean for us?)". *ASA Bulletin*, volume 38, issue 2, 2020, pp. 277-278. See also OGENAE, Kevin, PIERS, Maud, "Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework", *Journal of International Arbitration*, 2021, vVolume 38 Issue 1, pp. 27-58, p. 40.

## **6 What the behavioural science says about the use of video and taking of evidence**

### **6.1 Introduction**

It should be readily admitted that a remote hearing via videoconferencing in many ways is a very different experience from an in-person hearing. To start with, it is not possible to establish a true, bilateral eye-to-eye contact.<sup>260</sup> Psychological science has shown that persons observed through video instead of in real life are judged less intelligent, attractive, competent, reasonable or reliable.<sup>261</sup> Moreover, the dialogue between participants at a videoconference becomes less spontaneous.<sup>262</sup> Finally, compared to an encounter in real life, the meeting on the screen is felt less vivid and may arguably therefore impact how veracity is perceived.<sup>263</sup> And, most of all, verbal cues like body language is lost or more difficult to read, and therefore it becomes more difficult to detect deception. Or, at least that is how the saying goes.<sup>264</sup>

### **6.2 This is what the psychological science says about veracity of witness statements via video and body language as a truth teller**

To start with, it would appear that the standpoint of contemporaneous psychological science is that, although that the presentation mode - in-person or video - impacts the viewer's opinion about the witness, it does not produce any discernible similar difference in how the veracity of statements from hearings in-person or remotely is perceived.<sup>265</sup> As far as perception of veracity is concerned, the two presentation modes seems to be equal.

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<sup>260</sup> GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012, pp. 81-82.

<sup>261</sup> Ibid. 171.

<sup>262</sup> Ibid. 172.

<sup>263</sup> LANDSTÖM, Sara, *CCTV, Live and Videotapes How Presentation Mode Affects the Evaluation of Witnesses*. Gothenburg: Intellecta Docusys, 2008, pp.5-6.

<sup>264</sup> GRANHAG, Pär Anders, HARTWIG, Maria, VRIJ, Aldert, "Reading Lies: Nonverbal Communication and Deception". *Annual Review of Psychology*, 2019.70, pp.295-317, p.311 and GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012, p.175.

<sup>265</sup> LANDSTRÖM, Sara, *CCTV, Live and Videotapes How Presentation Mode Affects the Evaluation of Witnesses*. Gothenburg: Intellecta Docusys, 2008, pp.5-7 and 27 and GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012, p.189. – It should be noted that Landström yet suggests that the presentation mode may impact the perception of the statement, but not how, *ibid.* 35, but that conclusion is based on statements from children specifically.

The quote of Felix Dasser at footnote 259 *supra* yet reflects a common belief of demeanour as key to detect deception. It is a belief with a long tradition. Sigmund Freud wrote: “*He who has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore.*”<sup>266</sup> This belief has transpired into interrogation manuals for police officers and other legal professions that have been in use for most of the 20<sup>th</sup> century in many countries – but that has been proved to be of little value.<sup>267</sup>

Because psychological tests have shown that non-verbal cues, or body language or demeanour, is not a very good source to use when distinguishing lie from truth.<sup>268</sup> It rather seems that watching the witness giving evidence compared to just listening leads to a lower probability to detect a lie.<sup>269</sup>

Sara Landström, Pär Anders Granhag and Maria Hartwig, Gothenburg University Department of Psychology made a test in 2005 designed to find out if observers perceive and evaluate a witness statement differently if observed in-person or via video. A car accident was staged that was observed by twelve witnesses of whom six were instructed to tell the truth and six to lie about what had happened and what they had observed. They were first interviewed by a “police officer” about their observations, which were tape recorded. Three weeks later their statements were presented in a live “court-room” for a group of observers and through video to another group. The witnesses were interrogated by two interrogators (other than the “police officer”) putting questions to the witnesses. Altogether 122 observers

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<sup>266</sup> GRANHAG, Pär Anders, HARTWIG, Maria, VRIJ, Aldert, “Reading Lies: Nonverbal Communication and Deception”. *Annual Review of Psychology*, 2019.70, pp.295-317, p.297.

<sup>267</sup> GRANHAG, Pär Anders, STRÖMWALL, Leif A., “Practitioners’ Belief about Deception” in Pär Anders Granhag and Leif A. Strömwall (eds.) *The Detection of Deception in a Forensic Context*. Cambridge: Cambridge University Press, 2004, pp.229-250, pp.236-237.

<sup>268</sup> GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012, pp.175-176 and LANDSTÖM, Sara, *CCTV, Live and Videotapes How Presentation Mode Affects the Evaluation of Witnesses*. Gothenburg: Intellecta Docusys, 2008, p.10.

<sup>269</sup> LANDSTÖM, Sara, *CCTV, Live and Videotapes How Presentation Mode Affects the Evaluation of Witnesses*. Gothenburg. Gothenburg: Intellecta Docusys, 2008, p. 10: “*That is, one can predict that those who listen to a testimony via an audiotape might be better lie catchers than those who watch the testimony live or on video.*”

(undergraduate law students) participated, divided in two groups.<sup>270</sup> The findings were as follows.

Live observers had a more positive view of the witnesses than had video observers. Likewise, live observers thought the witnesses more honest than the video observers did.<sup>271</sup> This difference in perception did however not “...translate into any differences in terms of deception detection accuracy, nor to any differences in terms of judgment biases.”<sup>272</sup> As to assessing veracity – i.e. the capacity to detect a lie - live observers were not better than video and none of them better than chance.<sup>273</sup> Another striking result was that live observers believed they had a better memory of the witness statements than the video observers, which proved to be an incorrect belief.<sup>274</sup>

### **6.3 Can we trust the psychologists?**

Unlike in the science of law, there is no supreme court that can determine what theory or principle of psychology that is correct or true – and to pretend to do that is of course not possible within the science of law, if at all. What one can say about the articles and books referred to in chapter 6.1-2 *supra* is that the articles are published in well recognized journals within their field of science, the book by Sara Landström and the book by Benjamin Glunz are doctoral dissertations and the book by Pär Anders Granhag and Leif Strömwall (eds.) is published by Cambridge University Press; the contributors are professors or researchers in behavioural sciences at well reputed universities. The works have all gained large numbers of quotations.<sup>275</sup>

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<sup>270</sup> GRANHAG, Pär Anders, HARTWIG, Maria, LANDSTRÖM, Sara, “Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory”. *Applied Cognitive Psychology* (2005), 19 pp. 913-933, pp. 916-919.

<sup>271</sup> Ibid.p. 928.

<sup>272</sup> Ibid.p. 930. – Generally, the hit rate for detection deception usually lies around or just above 50% in psychological tests made or equal to what chance produces. Perhaps surprisingly, this also goes for police officers, lawyers and judges according to a test made, EKMAN, Paul, O’SULLIVAN, Maureen, “The Wizards of Deception Detection” in in Pär Anders Granhag and Leif A. Strömwall (eds.) *The Detection of Deception in a Forensic Context*. Cambridge: Cambridge University Press, 2004, pp.269-285, p.269.

<sup>273</sup> Ibid.pp. 923 and 929.

<sup>274</sup> Ibid. p.930.

<sup>275</sup> For example: GRANHAG, Pär Anders, HARTWIG, Maria, VRIJ, Aldert, “Reading Lies: Nonverbal Communication and Deception”. *Annual Review of Psychology*, 54 citations, GRANHAG, Pär Anders, STRÖMWALL, Leif A., “Practitioners’ Belief about Deception”, 81 citations and GRANHAG, Pär Anders, HARTWIG, Maria, LANDSTRÖM, Sara, “Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory”, 57 citations, figures available at

Specifically, the test made by Sara Landström accounted for in chapter 6.2 *supra* has been reviewed i.a. by Michael Green in an article published in *The International Journal of Evidence & Proof*. Green writes: “The scientific evidence, as set out above, is but a small part of a much wider literature. This body of research, which is subject to the usual rigorous standards of scientific peer review, is consistent in its findings, which appear to be remarkably generalisable.”<sup>276</sup>

To conclude, scientific psychological works do not support the notion that in-person hearings are necessarily better than video hearings in terms of judging veracity or detecting deception. It almost appears as if modern psychology rather pays tribute to Socrates who said, “Speak up so that I can see you”.

## **7 To what extent have courts and the legal profession taken aboard the findings of behavioural science?**

### **7.1 Introduction. TC 738/21(Portugal): the lonely voice in the desert?**

It would not be surprising if the findings of the behavioural science referred to in chapter 6 *supra* above would have made a great impact on how judges and lawyers perceive remote hearings and not the least how they understand their own capacity to judge veracity. After all, what psychologists say is that video hearings are as good as in-person hearings and demeanour is of little value as a tool to distinguish lie from truth. In tests they have also found that judges and lawyers are not better than people in general to judge veracity – which leads to the very unsatisfactory conclusion that judges and lawyers are just little better than chance.<sup>277</sup> Not what they believe, one can imagine.

The increased use of remote hearings in arbitration in general and in international arbitration specifically during the COVID-19 pandemic has led to an intense debate on videoconferencing and the respect of due process, specifically if a tribunal can order a remote hearing against the protest of one of the parties. But, as far as the author of

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<https://www.researchgate.net>. Pär Anders Granhag and Sara Landström have been cited 8 457 and 774 times respectively, figures likewise available at <https://www.researchgate.net>.

<sup>276</sup> GREEN, Michael, “Credibility Contests: The Elephant in the Room”. *The International Journal of Evidence & Proof*, vol. 18, 2014, pp. 28-40., pp. 35-36

<sup>277</sup> See *supra* at footnote 272.

this thesis has been able to verify, save for the Portuguese case from the *Tribunal Constitucional* TC 738/21 and the article by Luís Felipe Pires de Sousa referred to in that case, there is not much in court precedence or literature that confirms that courts or scholars have observed the standpoint of behavioural science as to remote hearings, deception detection, body language and demeanour.<sup>278</sup> Not even in the very powerful *plaidoyer* for remote hearings, the book *International Arbitration and the COVID-19 Revolution*.<sup>279</sup> Instead Maxi Scherer, one of the editors and contributors, yield to the loss-of-demeanour argument but rebut it by saying demeanour can be “..picked up in remote hearings if it includes some form of video-transmission and if multiple cameras allow to see both a frame of the witness as a whole and a frame of his or her face/torso.”<sup>280</sup> Of course it can, but the real issue is if the loss-of-demeanour argument has any relevance.

Another contributor to the book *International Arbitration and the COVID-19 Revolution* is Wendy Miles, QC. She discusses memory and witness testimony in general and argues, probably correctly, that “*We know that memory is unreliable and truthful recollection is patchy and incomplete*” and “*...if we were to accept the neuroscience as to the unreliability of witness recollection and memory...then perhaps we might be less concerned about insisting that the entire witness process be conducted physically in person.*”<sup>281</sup>

The fact that memory has its vagaries and weaknesses is a however germane to witness statements in general, howsoever taken by the court - in-person or remotely - and is not an argument against or in favour of remote hearings or in-person hearings. What the discussion ought to center around is, again, if taking of witness statement

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<sup>278</sup> See about the Portuguese case TC 738/21 and the article by Luís Felipe Pires de Sousa chapter 2.6.1 *supra*.

<sup>279</sup> Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020.

<sup>280</sup> SCHERER, Maxi, “The Legal framework of Remote Hearings” in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.65-103, p. 85.

<sup>281</sup> MILES, Wendy, “Remote Advocacy, Witness Preparation & Cross Examination: Practical Tips & Challenges” in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.121-135, p.124.

remotely will impact how the court judges its veracity, a question which is connected to the question of demeanour.

The fact that the behavioural science seems to have been more or less forgotten by lawyers and judges in this debate does not mean it has not been observed at all by the law profession or law science. In fact it has been observed, but to lesser degree than it warrants.

## **7.2 Observations in Sweden and Germany.**

In 2012, a peer-reviewed article was published in the Swedish journal *Svensk Juristtidning* by the authors Eric Bylander, Sara Landström and Rebecca Willén.<sup>282</sup> The title translated to English is "*Legal practioners' view on modern sound- and image technique in the courtroom – a legal-psychological research.*"<sup>283</sup>

The authors discuss non verbal cues as body language and its reliability as true-teller and note (free translation):

*"In addition, it seems that the courts still attach some importance to the general impression given by an interrogated and other non-verbal factor. This is even though behavioural science research has shown that this is such an unreliable basis for determining whether someone is lying or telling the truth that such information is largely useless."*<sup>284</sup>

Two years before the article was published the Swedish Supreme court tried a criminal case, NJA 2010 p.671.

In that case the Supreme Court laid down guidance for the probative evaluation of oral statements. The court concluded (free translation):

*"Behavioural science research shows that erroneous assumptions are often made about which circumstances are relevant for the credibility assessment (see Lena*

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<sup>282</sup> BYLANDER, Eric, LANDSTRÖM, Sara, WILLÉN, Rebecca, "Rättspraktikers inställning till modern ljud – och bildteknik i rättsalen – en rättspsykologisk studie." (Free translation: "*Legal practioners' view on modern sound- and image technique in the courtroom – legal-psychological research*"), *Svensk Juristtidning* 2012, pp. 197-218.

<sup>283</sup> Sara Landström has already been presented, she is docent in psychology. Rebecca Willén is doctor in psychology and Eric Bylander is professor in civil procedure civil law.

<sup>284</sup> Ibid. p.211.

*Schelin, Evidence evaluation of statements in criminal cases, 2006, p. 397). It is particularly difficult to assess credibility on the basis of, for example, the general impression given by the plaintiffs or on non-verbal factors in general, such as degree of nervousness or security, tendency to fixate or lower one's gaze, voice, emotional reactions, gestures or movement patterns.*"<sup>285</sup>

As noted by Bylander et al., this conclusion by the Swedish Supreme court is supported by and in line with behavioural science.<sup>286</sup> At least four articles have been published in Swedish law journals after the outbreak of the COVID-19 pandemic and remote hearings, but none has observed the arguments offered by Bylander et al. or by NJA 2010 p.671.

Benjamin Glunz presented his thesis 2012 at the Law Faculty of the Albert-Ludwigs-Universität in Freiburg, Germany, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*.<sup>287</sup> His findings largely coincide with those of Sara Landström. His work has obviously been appreciated in the German debate on remote hearings as is shown by an article by Gielen et al.<sup>288</sup>

### **7.3 R (SS) v Secretary of State for the Home Department [2018] EWCA Civ 1931**

Finally, there is an English asylum case, *R (SS) v Secretary of State for the Home Department [2018] EWCA Civ 1931*, where the Court of Appeal discuss demeanour, the current status of the behavioural science and how a good judge would go about to discern truth from lie. It contains a very illustrative and educative discussion about these issues. The court (Lord Justice Lewison, Lord Justice Legatt and Sir Colin Rimer) says:

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<sup>285</sup> NJA 2010 p.671, pp. 689.

<sup>286</sup> BYLANDER, Eric, LANDSTRÖM, Sara, WILLÉN, Rebecca, "Rättspraktikers inställning till modern ljud – och bildteknik i rättsalen – en rättspsykologisk studie." (In English: "Legal practioners' view on modern sound- and image technique in the courtroom – legal-psychological research"), *Svensk Juristtidning* 2012, pp. 197-218, p.208.

<sup>287</sup> GLUNZ, Benjamin, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik*. Tübingen: Mohr Siebeck, 2012.

<sup>288</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. "Die Virtuelle Verhandlung im Schiedsverfahren". *SchiedsVZ*, volume 18, issue 6, 2020, pp. 257-265, where Glunz is referred to ten times.

*"36. Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:*

*" I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fulness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps for shyness or natural timidity? For my part I rely on these considerations as little I can help."*

*" 39. To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in American law journals follows:*

*"Psychologists and other students of human communication have investigated many aspects of deceptive behaviour and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanour as a scientific hypothesis. With*

*impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanour in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments.”*

The court then makes the observation in section 39 that the consistent findings to which they refer (and to which they give references) were about ordinary people and their ability to detect deception. Now, an English judge sitting in the Court of Appeal is perhaps not ordinary people when it comes to judging veracity one may think, but the court goes on to say “...there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.” This is a conclusion which indeed is supported by psychological research: lawyers and judges do not perform any better than ordinary people in tests on detecting deception, just slightly above chance, i.e. circa 54 %.<sup>289</sup>

Having played down demeanour as the key to detect deception, the court makes at 41 an almost programmatic declaration how the good judge should go about to evaluate veracity of oral evidence:

*“41. No doubt it is impossible, and perhaps undesirable to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or another aspects of their behaviour in answering*

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<sup>289</sup> EKMAN, Paul, O’SULLIVAN, Maureen, “The Wizards of Deception Detection” in in Pär Anders Granhag and Leif A. Strömwall (eds.) *The Detection of Deception in a Forensic Context*. Cambridge: Cambridge University Press, 2004, pp.269-285, p.269.

*questions. Rather than attempting to assert whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including of what the witness has said on other occasions) and with known or probable facts.”*

This may serve as the last word about demeanour and the need to observe a witness in person. The behavioural science does not support it and at least some courts and judges have come to the same conclusion; demeanour is not useful, it is almost useless. Loss of observing demeanour - if it is lost - in remote hearings is therefore no argument against remote hearings. Tribunals should rather forget about the loss of demeanour argument and concentrate on the content of the statement.

## **8 Technological issues. Remote hearings and the possibility to control a witness**

### **8.1 The problems**

Generally, to conduct a remote hearing requires a certain level of cooperation between the tribunal and the parties. It is not just like as to appear in a conference room where everything is set. Here, the parties must access the same type of technology, and have hardware and software that will allow to communicate – transmit and receive - as intended, and they are also dependent on third party providers of services such as fibre or mobile telephone operators. Standards and technologies must be aligned.

A witness may not read aloud from documents (without the permission of the court) and must not be coached during the testimony. And during pauses the tribunal may order that the witness shall be sequestered from the parties. To exert such a control when the witness is giving evidence via video may be difficult, but not impossible.

If the transmission is seriously substandard or if a witness is being coached or prompted when giving testimony via video, the award may of course be susceptible to be set aside. But there are ways and means to avoid any such calamities.

## 8.2 The solution

Several initiatives have been taken by the international arbitration industry to identify the problems that may arise when witnesses are giving testimony via video and to ensure a secure mode of taking of evidence such that the tribunal can exert control over the witness. These initiatives do also consider other issues relevant to the well-functioning of remote hearings in general such as different time zones, screen fatigue, cybersecurity and the setting of the venues where participants are located. Much of these other issues falls outside the scope of this thesis and will not be dealt with here.

The first initiative appears to have been the so-called Seoul Protocol.<sup>290</sup> It was drafted by practitioners at 7th Asia Pacific ADR Conference, held in Seoul on 5-6 November 2018 and since then revised and upgraded to reflect comments from the Seoul International Dispute Resolution Centre (SIDRC) and finally floated on 18 March 2020.

It should be remembered that such protocols must be agreed on or subject to a procedural order by the tribunal to be effective.

Article 1 deals with witness examination generally. The parties undertake to ensure that the venues (places where the tribunal, parties or witnesses are participating in the remote hearing from) meet logistical and technological requirements. The cameras must show a reasonable part of the room and the face of the witness sufficiently close to give a clear picture. The witness shall sit at an empty desk or stand at a lectern. A computer and email facility should be available at the venues.

Article 2 imposes on the parties to ensure good connectivity and transmission between the venues such that sound and image are properly aligned. There shall always be an on-call person available to assist with technological issues.

To make sure witnesses not are coached, observers may be present in the remote venue where the witness is giving evidence, article 3.

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<sup>290</sup> <https://www.kluwarbitration.com/document/kli-ka-psm-2021-085-kcab?q=Seoul%20protocol>

Documents shall be made available to the witness through an agreed bundle of documents, duly identified and paginated. The parties may also agree on shared virtual documents available through computers at the venues, article 4.

As to the transmission speed, it must not be less than 256 kbs/second or 30 frames per second, article 5.<sup>291</sup> And, all equipment must be tested in advance, article 6.

Another similar instrument is the Vienna Protocol, prepared by the Vienna International Arbitral Centre (June 2020).<sup>292</sup> It deals with at about the same issues as does the Seoul Protocol and in a similar way. One noteworthy difference is that the preference is to have cameras covering 360°, (see 2. Pre-Hearing Organizational Conference, p. 5). Yet another is Annex I to the ICC Guidance Note of April 9, 2020. The annex contains a checklist for a protocol for virtual hearings.<sup>293</sup>

To what extent these instruments are in use is difficult to tell but many of the institutional rules or the institutions encourage the tribunals and the parties to observe and consider the issues a remote hearing will entail and to make the remote hearing working and to be secure.<sup>294</sup>

Adhering to a protocol such as the Seoul protocol or some other similar will ensure and secure the technological standard of the hearing and a reasonable control of the witness, particularly if the parties agree on observers as is suggested by the Seoul-protocol, which however may be an expensive method if many witnesses are to give evidence from various venues. A less expensive method is technology that allows 360 degrees coverage. Another way to secure that a witness is not prompted is to use screens that are closed to input from any other source than the one used by the tribunal. That would exclude the risk that messages are being sent to the witness from an outside source possible to read on the screen. However, this solution only works as

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<sup>291</sup> Which is a surprisingly low speed.

<sup>292</sup> [https://www.viac.eu/images/documents/The\\_Vienna\\_Protocol\\_-\\_A\\_Practical\\_Checklist\\_for\\_Remote\\_Hearings\\_FINAL](https://www.viac.eu/images/documents/The_Vienna_Protocol_-_A_Practical_Checklist_for_Remote_Hearings_FINAL).

<sup>293</sup> <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf>

<sup>294</sup> SAUNDERS, Matthew, "Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration" in Axel Calissendorff and Patrik Schöldström (eds.) *Stockholm Arbitration Yearbook 2020*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.99-114, p.109.

intended combined with some arrangement that secures that the witness does not use any other it-device too, like in commercial and external hearing venues where a part of the service is some kind of surveillance that secures the non-use of other it-devices.

## **9 What is a hearing – and an oral one?**

### **9.1 Is there a definition in law?**

In Germany, Switzerland and Sweden the hearing in civil proceeding is divided into three phases, (i) presentation of the allegations and the defence, (ii) presentation of the evidence and then (iii) the closing arguments and in Portugal in the two latter phases, taking of evidence and closing arguments.<sup>295</sup> Although since some twenty years the possibility to hear witnesses by telephone or even to conduct a hearing entirely remotely has been made possible in some of those countries, it is obvious that the basic format for the hearing is conceived as an in-person hearing, as both parties and witnesses are to be summoned to be present.<sup>296</sup>

In England there is less guidance in the CPR England on what a hearing is. The judge has a wide power and discretion to decide if a hearing is to be held and how it will be organised as to content and format. The only must is if a fact is to be proved by oral evidence, then that must be done at a trial held in public.<sup>297</sup>

France, finally, has a civil procedure regime that differs in many ways from the other five. The phase during the *mis en état* is generally in writing.<sup>298</sup> But if a party relies on oral evidence, it is generally during this phase taking of oral evidence takes place and if so at a hearing where the parties are present.<sup>299</sup> Once the *mis en état* is closed, the *débat* will take place in public but it is confined to what can be characterised as closing arguments.<sup>300</sup>

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<sup>295</sup> ZPO Germany §§ 137, 279, ZPO Swiss articles 228, 231 and 232, CJP Sweden chapter 44 sections 7-9, CPC Portugal articles 603 and 604.3

<sup>296</sup> ZPO Germany §§ 141, 273 and 380, ZPO Swiss article 54, 170 and 176, CPC Portugal articles 500 and 591.1 g), and CJP Sweden chapter 43 section 2.

<sup>297</sup> CPR England sections 1.4, 3.1, 29.9 and 32.2- (1) (a)

<sup>298</sup> See chapter 2.3.1 *supra*.

<sup>299</sup> CPC France articles 208, 209.

<sup>300</sup> CPC France 799, 433, 440 and 442.

The national arbitrations acts are even less helpful. The ZPO Germany says the tribunal shall summon the parties to a *mündliche Verhandlung* (literally an oral hearing) and that if a party fails to appear, then the tribunal can yet determine the case. The wording implies an in-person hearing, but on the other hand the tribunal is given a wide discretion to decide on the admissibility of evidence and how to take the evidence.<sup>301</sup> The PILA Swiss is less rich in content on hearing, the word hearing does not even exist in the PILA Swiss. It is instead for the tribunal to work out the rules for the procedure should the parties have not agreed on them.<sup>302</sup> The SAA Sweden is a little bit more enlightening in that at the request of a party it provides for an oral hearing to be held for the purpose of determining the case on the merits.<sup>303</sup> However, there is nothing about how the oral hearing is to be organized or what the procedure will be like. It is again for the parties to agree, failing which it is for the tribunal to decide the procedure.<sup>304</sup> The LAV Portugal empowers a party to request a hearing (*audiência*) which clearly is the opposite to proceeding in documents only, however confined to for the purpose of taking of evidence. In the absence of any party agreement, it is for the tribunal to decide on the procedural rules.<sup>305</sup> The CPC France is as meagre as the PILA Swiss on rules on hearing, the word hearing or *audience* does not exist in CPC France articles 1442 – 1527; the closest it gets to it is article 1467 that empowers the tribunal to hear any person (*audition*) and if they do they shall do so without oath from the witness. That apart the tribunal, failing party agreement, is given a wide discretion how to organise the proceedings.<sup>306</sup> Finally, the AA England is very lean on rules for the procedure. It is instead put in the hands of the tribunal to work out procedural rules suitable to the case, including to decide whether there

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<sup>301</sup> ZPO Germany §§ 1047, 1048 and 1042.

<sup>302</sup> PILA Swiss article 182

<sup>303</sup> SAA Sweden article 24.

<sup>304</sup> Strikingly, there is no general rule in the SAA Sweden on the powers or discretion of the tribunal to make out the procedural rules if the party have not agreed on them, but it is yet understood the tribunal has wide discretion in this regard, JOHNSON, Sara, LÖF, Kristoffer, SKOGMAN, Aron, “Chapter 9: The proceedings” in Anette Magnusson, Jakob Ragnwaldh, Martin Wallin (eds.) *International Arbitration in Sweden: A practitioners’ Guide, 2nd edition*. Alphen aan den Rijn: Kluwer International, 2021, pp.217-326, p. 241.

<sup>305</sup> LAV Portugal articles 34 and 30.

<sup>306</sup> CPC France article 1464.

should be oral or written evidence or submissions.<sup>307</sup> The word hearing only appears in section 35, where it is said that the tribunal may not decide on concurrent hearings, i.e., two individual hearings in two separate cases held in parallel at the same time.

To sum up, none of the civil ordinary proceeding regimes investigated has a definition of what a hearing is. The same is true for the national arbitration regimes.<sup>308</sup> Instead, what a hearing is, is understood from the *functionality* allotted to it. In general, it is focussed on presentation of oral evidence and oral arguments. Although there is no definition it appears as evident that the basic or original format for hearing contemplated by the legislators has been in-person, simply because that was the self-evident format if a judge or a party were to be able to hear what was being said. However, by time and the development of new technologies that presupposition has changed.

Nor is there any definition of what an *oral* hearing is that would allow an *a contrario* conclusion such that a hearing that is not in-person is not an oral hearing even though the participants very well can communicate orally and even see each other.

Admittedly, there are rules in CPC Portugal, CJP Sweden, CPR England and ZPO Germany on video hearings that may be taken to mean that videoconferencing is not an *oral* hearing; why else would there be a need for legislation on video conferencing if videoconferencing was to be understood as an oral hearing anyway.

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<sup>307</sup> AA England sections 33 and 34.

<sup>308</sup> Unsurprisingly, there is no definition of what a hearing is in for example in Chapter 21 Arbitration Procedure, pp. 521-551, in LEW, David Matthew, MISTELIS, Loukas A., KROLL, Stefan Michael, *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003. The same is true for Chapter 15: Procedures in International Arbitration in BORN, Gary, B., *International Commercial Arbitration, 3rd ed.* Alphen aan den Rijn: Kluwer Law International, 2021. Instead, what a hearing should be is discussed from the viewpoint of due process, see for example pp. 2332, 2333 and as to remote hearings pp. 2435-2436. The presentation in Chapter 6. Conduct of the Proceedings in BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration, 6th ed.* Oxford: Oxford University Press, 2015, is likewise void of any definition of what hearing is. The presentation is instead basically descriptive, how a hearing usually is conducted, for example on pp.400-401: “*However, in mainstream international arbitration, it is unusual for the arbitral proceedings to be concluded without at least a brief hearing at which the representatives of the parties have an opportunity to make oral submissions to the arbitral tribunal, and at which the arbitral tribunal itself is able to ask for clarification of matters contained in the written submissions and in the written evidence of witnesses.*”

But the need for legislation to allow video conferencing in civil proceedings before state courts has had little to do whether video conferencing is *oral* – the legislation projects have rather, practically speaking, confirmed that a videoconference is as much oral as an in-person hearing. The reasons why legislation has been required to allow video-conferencing is probably best illustrated by the concerns raised by the Swiss Federal Tribunal in decision DFT 146 III 194 dated 6 July 2020: the courts may not order video conferencing until legislation is in place that governs issues such as the quality of the technology used, data protection, the principle of public hearings in article 54 of the ZPO Swiss and if a videoconferencing complies with article 6 ECHR.<sup>309</sup> And, of course the apparent need to provide rules for how parties and witnesses shall be summoned to a remote hearing and where.

Standard of technology is practically no longer a problem if using one of the widely used platforms such as Teams. Data protection and cybersecurity can be resolved, if not by agreement, by the tribunal using its powers to structure the hearing and order the application of for example the Seoul-protocol or the Vienna-protocol. And the requirement of ECHR article 6 on public hearing is not applicable to arbitrations.<sup>310</sup>

The institutional rules are equally devoid of any definition of what a hearing is, or for that part what oral is. Instead, the CAC Rules, the ICC Rules, the Swiss Rules and the LCIA Rules expressly empowers the tribunal to tailor the hearing as they deem fit or appropriate, including to decide a remote hearing provided consulting with the parties.<sup>311</sup> The DIS Rules, and SCC Rules are less explicit but both empower the tribunal to decide how to design a hearing.<sup>312</sup> As to remote hearings, the DIS Rules and the SCC Rules are silent on that issue, although the DIS Rules state that an oral hearing

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<sup>309</sup> See chapter 2.5.1 *supra*.

<sup>310</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*, 6th ed. Oxford: Oxford University Press, 2015, p. 589.

<sup>311</sup> The CAC rules article 29.3 d) and 14.3, the ICC Rules articles 22 and 26.1, the Swiss Rules articles 16.1, 19 and 27.1 and the LCIA rules articles 14.2 and 19.2.

<sup>312</sup> The DIS Rules articles 21.3, 27.4 and Annex III G, and 29.1 and the SCC Rules articles 2, 23,28.1 and 32.

shall be conducted if a party so requests, whilst the SCC on the other hand confines itself to allow a hearing without adducing the adjective oral.<sup>313</sup>

Definition or not, it cannot be seriously denied that a remote hearing via video conferencing transmitting image and sound is oral.<sup>314</sup> It is oral for the self-evident argument that is perfectly possible to hear the other participants and to talk to them as if present in the same room.<sup>315</sup>

## **10 Article V 1.(b) of the 1958 New York Convention and article 34 of the Model Law**

### **10.1 Introduction**

According to article V 1.(b) of the 1958 NY Convention an award may be refused recognition and enforcement if *“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case.”*

Unable to present his case may sound as something that lies on the side of the party rather than something that can be attributed to the arbitral proceedings or the tribunal as a possibility to refuse recognition or enforcement, but the version in French indicates something different: *“Que la partie contre laquelle la sentence est invoquée n’a pas été dûment informée de la désignation de l’arbitre ou de la procédure d’arbitrage, ou qu’il lui a été impossible, pour une autre raison, de faire valoir ses moyens;”*

*“Moyens”* is a legal technical term that denotes all arguments a party may invoke to rebut the other party’s case on its merits, be it arguments in law, facts or evidence, CPC France article 71. The version in French therefore rather indicates that this ground for refusal concerns a party’s right to defend itself and to state his case. In the same

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<sup>313</sup> The DIS Rules article 29.1 and the SCC Rules article 32.

<sup>314</sup> BORN, Gary, B., *International Commercial Arbitration*, 3rd ed. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2435-2436: *“A “remote hearing” is, in every meaningful sense, a “hearing.”*” and GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. *“Die Virtuelle Verhandlung im Schiedsverfahren”*. *SchiedsVZ*, volume 18, issue 6, 2020, pp. 257-265, p. 262.

<sup>315</sup> SCHERER, Maxi, *“The Legal framework of Remote Hearings”* in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.65-101, p. 79.

direction speaks the version in Spanish, as it verbatim mentions a party's means of defence: "*Que la parte contra la cual se invoca la sentencia arbitral no ha sido debidamente notificada de la designación del árbitro o del procedimiento de arbitraje o no ha podido, por cualquier otra razón, hacer valer sus medios de defensa;*".

In fact, what article V 1.(b) deals with is the basic procedural guarantees which is expressed by the latin phrase *audi alteram partem*, literally hear the other side or broadly speaking no one will be judged without a fair hearing which corresponds to due process or natural justice.<sup>316</sup> According to Gary Born the better understanding of article V 1. (b) is however to say it that it opens for refusal of recognition or enforcement where "...international standards of procedural fairness in international arbitral proceedings" have been violated.<sup>317</sup>

As the provision in question, article V 1.(b) is part of an international treaty, it should be interpreted according to articles 31-32 of the 1969 Vienna Convention: national rules of interpretation do not apply and the convention in question should be interpreted in an autonomous manner and in conformity with the purpose of the convention.<sup>318</sup> In this sense it is of course natural and imperative that article V 1.(b) should not be dressed in any national law straitjacket but instead interpreted in a uniform manner wherever applied.<sup>319</sup> It is therefore only natural that article V 1.(b) as opposed to article V 1.(d) does not contain any choice of law rule; whether due process was breached shall not be determined by the law where enforcement is

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<sup>316</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration, 6th ed.* Oxford: Oxford University Press, 2015, p. 627, FERRARI, Franco, ROSENFELD, Friedrich Jakob, CZERNICH, Dietmar, "Chapter 1: General Report" in Franco Ferrari, Friedrich Jakob Rosenfeld, Dietmar Czernich (eds.) *Due Process as a Limit to Discretion in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.1-40, p.3 and SANDERS, Pieter, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*. Alphen aan den Rijn: Kluwer Law International, 2011, p.79.

<sup>317</sup> BORN, Gary B, *International Commercial Arbitration, 3rd ed.* Alphen aan den Rijn: Kluwer Law International, 2021, pp. 3821-3822.

<sup>318</sup> SANDERS, Pieter, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 12-13.

<sup>319</sup> Ibid. pp.13-14.

sought, nor by the law of the seat. Article V 1.(b) is an international substantive rule, the violation of which is sufficient to refuse recognition and enforcement.<sup>320</sup>

Whether one should accede to the terminology suggested by Gary Born, *international standards of procedural fairness*, or rather use the more frequent *due process* as the notion to which article V 1.(b) connects is not a big issue as long as one bears in mind the international context and the rules on how to interpret the 1958 NY convention according to the Vienna Convention: autonomously.

Due process is the notion used in connection with article V 1.(b) by many commentaries.<sup>321</sup> In this thesis the notion due process will therefore be used as the notion to which article V 1.(b) connects, but also, as will be shown in next chapter 10.2, because there is a kinship between the substantial content of article V 1.(b) and the Model Law article 34 on setting aside awards. And due process is the notion used by for example *Redfern and Hunter on International Arbitration* to denote the procedural guarantees that has been derived from the Model Law.<sup>322</sup>

The question is if this similarity in substantial content also translates into a similarity in interpretation and by extension to national arbitration law that has been modelled on the Model Law or influenced by it as to the protection of due process.

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<sup>320</sup> FOUCHARD, Philippe, GAILLARD, Emanuelle, GOLDMANN, Berthold, *Fouchard Gaillard Goldmann on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, pp. 985- 986.

<sup>321</sup> Ibid. p. 985, LAHLOU, Yasmine, POPLINGER, Andrew, WALTER, Gretta, "Chapter 9: Substantive Barriers to Recognition and Enforcement of Foreign Awards under Article V(1) of New York and Panama Conventions" in Andreas A. Frischknecht et al. (eds.) *Enforcement of Foreign Arbitral Awards and Judgments in New York*. Alphen aan en Rijn: Kluwer Law International, 2018, pp. 115-152, p. 125 at footnote 54, PAULSSON, Marike, R.P. *The 1958 New York Convention in Action*. Alphen-aan-den Rijn: Kluwer Law International, 2016, p. 182, SCHERER; Maxi, "F.Violation of Due Process, Article V(1)(b)" in Reinmar Wolff (ed.), *New York Convention Second Edition Article-by-Article Convention*. München: C.H Beck oHG, 2019, pp.291-321, p. 291.

<sup>322</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration, 6th ed.* Oxford: Oxford University Press, 2015, p.600.

## 10.2 Is there a connexus between the 1958 NY Convention article V 1.(b) on the grounds for refusal and recognition of awards and article 34 of the Model Law on setting aside awards?

The 1958 NY Convention has proved to be one of the most successful international treaties on any subject.<sup>323</sup> It has been ratified by 166 countries (December 2021). It is together with the Model Law one of the two pillars of international arbitration.<sup>324</sup>

The Model Law on arbitration also contains rules on recognition and enforcement of foreign awards (or, rather, when recognition and enforcement may be refused), article 36. The wording of article 36 is, if not 100% identical, almost entirely identical and implements de facto article V of the 1958 NY Convention into the Model Law.<sup>325</sup>

In its turn, article 34 of the Model Law on setting aside an award is copied from article 36, the only relevant difference is that the ground for refusing recognition or enforcement that the award has not yet become binding or been set aside of course has not any counterpart in article 34.

No surprise, this is precisely what was the purpose: the grounds for setting aside should only be those on which recognition or enforcement could be refused under the 1958 NY Convention.<sup>326</sup>

The idea was to oppose national peculiarities that would allow setting aside an award by implementing a unified and limited number of grounds to set aside and thereby diminishing the impact of the place of arbitration.<sup>327</sup> And, by designing articles 34 and 36 as each other's mirror images, a dual defence system building on identical grounds would be achieved.<sup>328</sup> Or, as put in Redfern and Hunter on International Arbitration: *"There is a pleasing symmetry here: Article V of the New York Convention sets out the grounds on which recognition and enforcement of an international award may be*

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<sup>323</sup> FOUCHARD, Philippe, GAILLARD, Emanuelle, GOLDMANN, Berthold, *Fouchard Gaillard Goldmann on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p. 966.

<sup>324</sup> SANDERS, Pieter, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*. Alphen aan den Rijn: Kluwer Law International, 2011, p.xi in the foreword.

<sup>325</sup> BINDER, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed. London: Sweet Maxwell/Thomson Reuter, 2010, pp. 379-380

<sup>326</sup> Ibid. p.378

<sup>327</sup> Ibid. p.378-379.

<sup>328</sup> Ibid. p.379-380.

*refused, while Article 34 of the Model Law sets out the same grounds (with only slight differences of language) on which an award may be set aside.”*<sup>329</sup>

So the answer is clearly yes. There is a connexus, the wordings are (almost entirely) the same and the purpose was to align the field of application of setting aside with those for refusing recognition or enforcement.

### **10.3 To what extent has the Model Law section 34 been implemented to or influenced the jurisdictions investigated?**

Of the six jurisdictions that this thesis focusses on, only Germany is a Model Law country according to the standard used by UNCITRAL.<sup>330</sup> This means that Germany has at large incorporated not only article 34 into § 1059 but the entire Model Law provisions verbatim into ZPO Germany.<sup>331</sup> Of the other jurisdictions, the SAA Sweden and the LAV Portugal have as to setting aside been influenced by the Model Law. SAA Sweden section 34 corresponds to section 34 of the Model law.<sup>332</sup> As to Portugal the same is true for article 46 of the LAV Portugal, it corresponds to section 34 of the Model Law.<sup>333</sup>

CPC France deals with enforcement of foreign awards in article 1525. Only those grounds that are capable to set aside an award according to article 1520 will allow the courts to refuse the recognition of a foreign award. No.4 of article 1520 says: “4° *Le principe de la contradiction n'a pas été respecté*”. This principle has been called the

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<sup>329</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*, 6th ed. Oxford: Oxford University Press, 2015, p. 582.

<sup>330</sup> [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status)

<sup>331</sup> BÖCKSTIEGL, Karl.Heinz, KRÖLL, Stefan M., NASCIEMENTO, Patricia (eds.) in *Arbitration in Germany: The Model Law in Practice*, 2nd ed. Alphen aan en Rijn: Kluwer Law International 2015, Preface p. ix.

<sup>332</sup> KNUITS, Gisela, “Chapter 10: Recourse to the Courts Against an Arbitral Award” in Anette Magnusson, Jakob Ragnwaldh, Marin Wallin (eds.) *International Arbitration in Sweden: A practitioner’s guide*, 2nd edition. Alphen ann den Rijn: Kluwer International, 2021, pp. 327-359, p. 328 and LINDSKOG, Stefan, *Skiljeförfarande: en kommentar*. Stockholm: Juno version 3, 1 June 2020 , the commentary to section 34 at 2.3.2 (free translation): “*The most important differences between the Model Law and SAA are that the grounds for challenge included in the Model Law, in contrast to the grounds for challenge in SAA, are optional (cf. 8.1.1 below), and that there is no equivalent to the provision in [article 34] first paragraph p. 7 p SAA in the Model Law*”.

<sup>333</sup> ANDRADE, José Andrade de, “CAPÍTULO VII – Da impugnação da sentença arbitral Artigo 46- Pedido de anulação” in Dário Moura Vicente et. al., *Lei da Arbitragem Voluntária Anotada*, 4a. Edição Coimbra: Almedina, 2019, pp.161-177, p. 167.

adversarial principle (but also translated to due process).<sup>334</sup> The grounds in article 1520 of CPC France for setting aside are at large designed in the same manner as are the grounds for refusing recognition and enforcement in section 36 of the Model Law.<sup>335</sup> And as section 34 of the Model Law is a mirror image of section 36, in this indirect way the Model Law and section 34 on setting aside has got its equivalent in the CPC France article 1520.

Switzerland has incorporated the 1958 NY Convention as law, PILA Swiss article 194. The provisions on setting aside an award are laid down in PILA Swiss article 190 and ZPO Swiss article 393. They are at large identical to article 1520 of the CPC France, which is said to follow the Model Law section 36 and therefore indirectly also section 34 (see the preceding paragraph).<sup>336</sup> One of the grounds to set aside an award according to PILA Swiss article 190 (2) is if “(d) *the principle of equal treatment of the parties or their right to be heard in adversarial proceedings was violated;*” This principle corresponds to due process, or the right to be heard according to article V 1.(b) of the 1958 NY Convention.<sup>337</sup> The scope of applications of both articles are probably identical; the protection of the right to be heard under the New York Convention is not wider than what is protected by PILA Swiss articles 182(3) and 190(2)(d) on due process.<sup>338</sup> In this meaning, however limited to issue of due process, PILA Swiss is designed in the same way as sections 34 and 36 of the Model Law.

PILA Swiss article 182(3) imposes on the tribunal to ensure equal treatment of the parties and their right to be heard in adversarial proceedings. This guarantee

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<sup>334</sup> KLEINER, Caroline, “Chapter 7: Country Report: France” in Dietmar Czernich, Franco Ferrari and Friedrich Jakob Rosenfeld (eds.) *Due Process as a Limit to Discretion in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.157-176, p. 157.

<sup>335</sup> Ibid. p 160.

<sup>336</sup> The version in French of PILA Swiss article 190(2) is literally almost identical to CPC France article 1520.

<sup>337</sup> BESSON, Sebastián, POUDRET, Jean François, *Comparative Law of International Arbitration, Second ed.* London: Sweet&Maxwell Ltd, 2007, p. 720, ARROYO, Manuel, “Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]” in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide, 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp. 266-350, pp. 292-293, GIRSBERGER, Daniel, VOSER, Nathalie, *International Arbitration: Comparative and Swiss Perspectives (Third Edition)*. Alphen aan den Rijn: Kluwer Law International, 2016, p.396.

<sup>338</sup> HOHLER, Simon, “Chapter 18: Country Report: Switzerland” in in Dietmar Czernich, Franco Ferrari and Friedrich Jakob Rosenfeld (eds.) *Due Process as a Limit to Discretion in International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.375-397, p. 382.

corresponds to section 18 of the Model Law.<sup>339</sup> Also in this way PILA Swiss reflects the Model Law, although Switzerland has not adopted it. In any event, the grounds for setting aside are confined and replicates the grounds for refusing recognition or enforcement under the 1958 NY Convention.<sup>340</sup>

Finally, the AA England deviates from the systematics of the Model Law as to the grounds for setting aside an award, probably because it codifies case law that has evolved over time.<sup>341</sup> In any event, section 68 sets out that an award may be challenged on the ground that a serious irregularity has affected the proceedings or the award, and in subsection (2)(a) the following example of a serious irregularity is given. “(a) *failure by the tribunal to comply with section 33 (general duty of tribunal)*. That general duty imposes on the tribunal to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent. Or, in other words due process or the right to be heard, which is what article V 1.(b) deals with.<sup>342</sup>

That general duty of section 33 of the AA England and the procedural guarantee it entails is derived from the Model Law section 34.<sup>343</sup> Although the AA England section 68 never adopted section 34 of the Model Law, there is clear evidence that the intention was that section 68 should reflect the internationally accepted views how to correct serious failure to comply with the due process of arbitral proceedings as laid down in the Model Law section 34.<sup>344</sup>

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<sup>339</sup> ARROYO, Manuel, “Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]” in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner's Guide, 2nd ed.* Alphen aan den Rijn: Kluwer Law International, 2018, pp. 266-350, p.292.

<sup>340</sup> GIRSBERGER, Daniel, VOSE, Nathalie, *International Arbitration: Comparative and Swiss Perspectives (Third Edition)*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 396 at footnote 1758.

<sup>341</sup> BESSON, Sebastián, POUDRET, Jean François, *Comparative Law of International Arbitration, Second ed.* London: Sweet&Maxwell Ltd, 2007, p. 721.

<sup>342</sup> Ibid. p.720.

<sup>343</sup> CHARLSON, Susanna, WOLFSON, David, “Chapter 25: Challenges to Arbitration Awards” in Julian D.M. Lew et al. (eds.) *Arbitration in England, with chapters on Scotland and Ireland*. The Hague. Kluwer Law International, 2013, pp.527-562, p. 561.

<sup>344</sup> GALLAGHER, Norah, “Serious Irregularity: The Enduring Power of Egmatra” London: *Hands out, School of International Arbitration, Queen Mary University*, 2009, p. 2.

Although the lineage from section 34 of the Model Law to section 68 (2)(a) of the AA England, article 1520 4 of the CPC France and article 190 (2)(d) of the PILA Swiss is not as clear as is the lineage from article 34 of the Model Law to the corresponding rules of the LAV Portugal, SAA Sweden and the ZPO Germany, it is obvious that all national laws here investigated in what they relate to due process are at least influenced by article 34 of the Model Law. Even if they are not Model Law formally (save for the ZPO Germany), they are it in substance when it comes to due process.

This finding will allow for a cross-fertilisation of jurisprudence and doctrine evolved from the 1958 NY Convention, as section 34 of the Model Law via section 36 mirrors the grounds for refusing enforcement or recognition in article V 1.(b).<sup>345</sup> One consequence would be that a serious irregularity or violation of due process would only lead to setting aside the award if the same serious irregularity or violation of due process would be sufficient to refuse recognition or enforcement of the award. After all, this is precisely the idea behind the two sets of rules.<sup>346</sup>

It may though be argued that that each state determines to what extent they will exert control over arbitrations through rules on setting aside an award.<sup>347</sup> For example, the AA England protection against procedural irregularities in section 68 (2)(c),(d),(f) and (i) probably goes farther than article V 1.(b).<sup>348</sup> The point is however that as to due process as expressed in article V 1.(b) and by extension the Model Law section 34 (via section 36), the jurisdictions investigated have not deviated from the notion of due process and the protection awarded to it by article 34 of the Model Law but rather been influenced by and adapted to it.

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<sup>345</sup> HILL, Jonathan, "Setting aside of arbitral awards under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration: failure to deal with all the issues." *Bristol: University of Bristol Law School, 2017, blogpost*, see under the heading Conclusion.

<sup>346</sup> BINDER, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed. London: Sweet Maxwell/Thomson Reuter, 2010, p.10.

<sup>347</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*, 6th ed. Oxford: Oxford University Press, 2015, p. 581.

<sup>348</sup> BESSON, Sebastián, POUDRET, Jean François, *Comparative Law of International Arbitration*, Second ed. London: Sweet&Maxwell Ltd, 2007, p. 721.

## **11 Due process and article V 1.(b) of the 1958 New York Convention**

### **11.1 The minimum guarantees for a fair arbitral procedure**

The Model Law section 18 imposes on the tribunal to treat the parties with equality and to give each party a full opportunity of presenting his case, and article 24 to hold oral hearing at an appropriate stage of the proceedings, if requested by a party.

The UNCITRAL Rules article 17. 1 and 3 sets out, slightly abbreviated, that the tribunal may conduct the arbitration as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case and to hold hearings for taking of evidence or oral arguments, adding that the arbitral tribunal shall avoid unnecessary delay and expense.

And, as has been accounted for, the 1958 NY Convention allows a court to refuse recognition or enforcement if a party was unable to present its case.

These international instruments, which at large are reflected in the national arbitration laws investigated (even though there are differences in wording) express the minimum guarantees for a fair arbitral procedure, or, due process.<sup>349</sup>

Commenting on article V 1.(b) of the 1958 NY Convention, Maxi Scherer attributes to due process the right to (i) submit evidence, (ii) make legal or factual submissions to the tribunal which includes the right to an oral hearing if requested, (iii) and to comment on evidence and submissions on the case file.<sup>350</sup>

Matti Kurkela and Santtu Turunen have a more detailed list of rights of due process rights, which they consolidate under the heading "The Right to present one's case". Here belongs the right to (i) timely information of all submissions, (ii) full access to all communications, pleadings, arguments and testimony, (iii) presence in physical or remote hearings (iv) full access to all written documents (v) submit claims and argue in support of them, to raise material and procedural defences (vi) submit relevant

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<sup>349</sup> REED, Lucy F. "Ab(use) of due process: sword vs shield". *International Arbitration*, volume 33, issue 3, 2017, pp. 361-377, pp. 367-372.

<sup>350</sup> SCHERER, Maxi, "F.Violation of Due Process, Article V(1)(b)" in Reinmar Wolff (ed.), *New York Convention Second Edition Article-by-article-Commentary Edition*. München: C.H Beck oHG, 2019, pp.291-321, pp. 291, 315

documentary evidence in defence or support of claims, (vii) cross-examine, (viii) to comment on any statement made, (ix) to bring further evidence as may be necessary to fully elucidate one's position and (x) adequate notice of closing of the proceedings.<sup>351</sup>

As is obvious, the right to oral hearing is not listed by Kurkela and Turunen under this heading, The Right to present one's case, which they refer to as the most fundamental due process rule.<sup>352</sup> In connection therewith they go on to say that the fundamentals of any arbitral proceeding is to (i) identify the applicable laws and procedural rules, (ii) establishing the relevant facts, the evidence and the burden of proof and (iii) the management of the proceedings at the discretion of the tribunal.<sup>353</sup> Establishing the facts is something that usually necessitates an evidentiary hearing, and Kurkela and Turunen advise that the panel should only in exceptional circumstances and for material grounds refuse to conduct a hearing if requested by a party.<sup>354</sup> As this statement is made under the heading "*Organizing the Evidentiary Hearings*", it appears not to apply to hearings for oral arguments.

As to taking of oral evidence, Kurkela and Turunen refer the right to cross-examine a witness to due process.<sup>355</sup> However, as to the format for the hearing it appears they are prepared to accept videoconferencing, at least for taking of oral evidence.<sup>356</sup>

Although Kurkela and Turunen are richer in detail one may wonder if there is any difference in substance compared to Scherer's presentation of due process. As is argued by Lucy Reed, the meaning of due process is "*...profoundly simple, meaning simple in a profound way*"<sup>357</sup>. According to Reed, the elements of due process are : (i) a party must be given notice of the case against it; (ii) so the party has an opportunity

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<sup>351</sup> KURKELA, Matti S., TURUNEN, Santtu, *Due Process in International Commercial Arbitration, 2nd edition*. New York: Oxford University Press, 2010, pp.182-184.

<sup>352</sup> Ibid. p. 18.

<sup>353</sup> Ibid. pp. 18-19.

<sup>354</sup> Ibid. pp. 134-135.

<sup>355</sup> Ibid. p. 145.

<sup>356</sup> Ibid. p.145

<sup>357</sup> REED, Lucy F. "Ab(use) of due process: sword vs shield". *International Arbitration*, volume 33, issue 3, 2017, pp. 361-377, p. 367.

to present its case and respond to the case put against it; (iii) before an impartial and independent tribunal; (iv) that treats all parties with equality.<sup>358</sup>

No doubt there is a nucleus of principles that are common to Scherer, Reed and Kurkela and Turunen.<sup>359</sup> An oral hearing if requested is probably part of those principles, not the least as this is something that follows not only from the Model Law but also from the UNCITRAL Rules.

### **11.2 Does a remote hearing meet the requirements for due process?**

A remote hearing via video that allows the participants to communicate orally is of course an oral hearing, cf. *supra* at 9.1. But the question is if a remote hearing allows the parties to do all the things for example listed by Kurkela and Turunen and in a way effectively no worse than in an in-person hearing.

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<sup>358</sup> Ibid. p.366.

<sup>359</sup> Cf. BORN, Gary, B., *International Commercial Arbitration*, 3rd ed. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2327, 3491-3492; Born refers to articles 18 and 34 of the Model Law and article V 1.(b) of the 1958 NY Convention as the basic sources of due process, BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration*, 6th ed. Oxford: Oxford University Press, 2015, p. 589 (“*In short, the aim is to ensure that the parties are treated with equality and are given a fair hearing, with a proper opportunity to present their respective cases*”), ARROYO, Manuel, “Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]” in Manuel Arroyo (ed.) *Arbitration in Switzerland: The Practitioner’s Guide*, 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2018, pp. 266-350 pp. 292-293; Arroyo refers to article 18 of the Model Law and emphasize the right to be heard in equal and adversarial proceedings, FOUCHARD, Philippe, GAILLARD, Emanuelle, GOLDMANN, Berthold, *Fouchard, Gaillard Goldmann on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p 948 (“*The principle of due process is also closely related to the principle of equal treatment of the parties. Due process implies that the parties should be given an equal opportunity to present their case.*”), KRAFT, Peter, KRÖLL, Stefan M., Part II: “Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, §1059- Application for Setting Aside” in Karl-Heinz Böckstiegl, Stefan M. Kröll, Patricia Nacimiento (eds.) *Arbitration in Germany: The Model Law in Practice*, 2nd ed. Alphen aan en Rijn: Kluwer Law International, 2015, pp.383-420, p.405 (“*In summation, it can be said that a party may only defend itself properly if it is informed in due time about the submission of the other side (129) and the facts upon which the arbitral tribunal wants to rely.*”), SAMPAIO, Caramelo, Chapter 14: “Challenge of Arbitral Awards”, *International Arbitration in Portugal*. Alphen aan den Rijn: Kluwer Law International, 2020, pp.97-114; Caramelo points out that article 30 of the LAV Portugal has been much influenced by article 18 of the Model Law and that the fundamental procedural principles of article 30 of the LAV Portugal “...means that each party must be given an effective opportunity to be heard and to influence the development of those proceedings, comprising the possibility of making observations on all arguments submitted and evidence furnished by its opponent and on all the crucial points of the reasoning that the tribunal intends to adopt”, KNUTS, Gisela, “Chapter 10: Recourse to the Courts Against an Arbitral Award” in Anette Magnusson, Jakob Ragnwaldh, Marin Wallin (eds.) *International Arbitration in Sweden: A practitioner’s guide*, 2nd edition. Alphen ann den Rijn: Kluwer International, 2021, pp.327-359, p. 328, Knuts point out that the SAA Sweden as to setting aside conform with the Model Law.

The self-evident answer is yes, however provided planning of the remote hearing.<sup>360</sup> It is perfectly possible to make an opening speech, state one's case, present the evidence, written or oral, cross-examine, discuss various issues with the tribunal, asking for clarifications from the other side and then make closing submissions on legal issues. This is well illustrated by the country report for England in the ICCA Report *"However, it is expected that the circumstances in which a party will not be able to put its case or deal with that of its opponent remotely will be very limited given that it is possible to conduct arbitration proceedings (including key aspects such as making oral submissions, cross-examination of witnesses, tribunal deliberations, party and counsel communications etc) on a remote basis."*<sup>361</sup>

Another example from the Report, that of Germany: *"However, as stated above, German arbitral law requires the observance of the right to be heard as well as procedural equality, see Sec. 1042 par. 1 of the ZPO. 20 Thus, as also elaborated above, the focus of the German arbitral law is less on the location of a hearing and more on the way the hearing itself is conducted, i.e., it must be held in an effective and fair manner. A hearing by videoconference does not per se violate these principles."*<sup>362</sup>

This holding, as expressed by the country reports from England and Germany, is underpinned by the enquiries and surveys made by, for example, the Civil Justice Council and The Legal Foundation, Queen Mary University of London and by Anne Sanders in cooperation with the CCJE.<sup>363</sup> It is nowhere suggested that remote hearings would not allow the parties to perform a hearing that comply with due process.<sup>364</sup>

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<sup>360</sup> BASSIRI, Niuscha, "Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.105-120, pp. 106, 109-110.

<sup>361</sup> See the country report for England by Akash Sonca and Angeline Welsh in ELGUETA, Giacomo Rojas, HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*. Edinburgh, 2021, p. 3.

<sup>362</sup> See the country report for Germany by Barbara Maurer and Anke Meier in ELGUETA, Giacomo Rojas, HOSKING, James, LAHLOU, Yasmine, "Does a Right to a Physical Hearing Exist in International Arbitration?" *Report presented at the XXVth ICCA Congress*. Edinburgh, 2021, p. 6.

<sup>363</sup> Chapters 4.3.2, 4.3.3 and 4.3.5 *supra*.

<sup>364</sup> The most outspoken resistance against remote hearings comes from France, see chapter 4.3.4 *supra*. Why that is so is a question that is beyond the scope of this thesis, but yet an attempt to an explanation may be excused. As we recall from chapter 2.3.1 *supra*, the French civil proceeding is basically written

### 11.3 Does oral mean in-person?

First of all, not all national arbitration rules or institutional rules call for an oral hearing. The CPC France, the AA England and the PILA Swiss do not. The SAA Sweden and the ZPO Germany do if a party requests one, and also the CPC Portugal, the latter however only for the purpose of taking of evidence. They are all silent on whether the hearing may be held remotely.

Of the institutional rules, the ICC Rules and the LCIA Rules empower a party to request a hearing but it remains with the tribunal to decide whether the hearing shall be conducted remotely or in-person. The same applies to the CAC Rules, but again only for the purpose of taking of evidence. The Swiss Rules do not confer any right to the parties to request a hearing at all, that decision is for the discretion of the tribunal that also decides whether the hearing shall be held remotely or in-person. The SCC Rules and the DIS Rules empowers a party to request a hearing and oral hearing respectively but are tacit on remotely or in-person. The UNCITRAL Rules gives a party the right to request a hearing but the tribunal may decide that a hearing for taking of oral evidence shall be held remotely.

Can it be inferred that absent clear words that allow remote hearing, a hearing or an oral hearing must be in-person? The habitual in-person format of hearings is a by-product from the requirement for orality; only if the parties, the arbitrators, witnesses and experts were present in the same room at the same time they can communicate orally and synchronously. But, that presumption does not apply to synchronous sound and image transmission via video, for example. That apart, the provisions in law and in the institutional rules have never focussed on the physical presence of the parties *per se*, but on the orality. If looked at the reason for orality, there is no merit in requiring

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and built on legal evidence theory, leaving very little space for oral evidence, or orality at all. The moment in court is limited to the *audience* where *les plaidoiries* at least in theory plays a big role. In practice however the workload of the courts and the need to bring down the number of cases vacated has increasingly reduced the role of *les plaidoiries*, and now the lawyers are encouraged to abstain from *les plaidoiries* and instead to submit their closing speech in writing. See CHAINAIS, Cécile et.al., *Procedure Civil Droit Comun et special du procès civil, MARD et arbitrage*. 35th ed. Paris: Dalloz, 2020, p. 679. Facing this unwanted development towards an unpersonal format for the procedure, it is perhaps understandable that remote hearings would be seen as a threat to the only possibility to appear before the court and judges in-person to make a difference or an impact.

physical presence if the hearing is oral even though the parties are not present physically.<sup>365</sup>

## **12 The procedural judgment rule**

### **12.1 Genesis**

National laws on arbitration and institutional rules are lean on procedural rules. Instead, to the extent not governed by mandatory law or party agreement, it is left to the tribunal's discretion to design the procedure as they deem fit or appropriate, taking into consideration the complexity of the case and value of the dispute. It is a standard phrase in almost any commentary on national or international arbitration law, that the discretion of the tribunal how to shape the procedure is considered wide. It is also a standard requirement in almost any arbitration law or institutional rules that the tribunal shall conduct the proceedings in an expeditious manner, i.e., swiftly.

Despite this wide discretion to which arbitration community confesses, it is common that arbitrators that are facing claims on procedural decisions on for example to extend a deadline or to reschedule a hearing are anxious that a challenge will follow, if they do not yield. This has often made arbitrators overtly cautious and to relinquish the steady hand they are supposed to have over the procedure. However, courts have generally been slow to interfere with procedural decisions by tribunals and have rather deferred to them. Case law suggest that something that has been labelled "the procedural judgement rule" has evolved, meaning that if the tribunal has made a bona fide assessment that is reasonable considering the relevant circumstances, the courts should not set aside the award for an alleged procedural irregularity.<sup>366</sup>

### **12.2 Under what circumstances during an arbitration would a tribunal consider a remote hearing?**

First, if the parties have agreed on a hearing in-person, the tribunal cannot but accept it - and they would normally have no reason to not accept it. Likewise, if the parties

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<sup>365</sup> GIELEN, Nico von, WAHNSCHAFFE, Christian Johannes. "Die Virtuelle Verhandlung im Schiedsverfahren". *SchiedsVZ*, volume 18, issue 6, 2020, pp. 257-265, p. 262.

<sup>366</sup> BERGER, Klaus Peter, JENSEN, Ole, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators". *International Arbitration*, volume 32, issue 3, 2016, pp. 415-435, pp. 423, 428 and REED, Lucy F. "Ab(use) of due process: sword vs shield". *International Arbitration*, volume 33, issue 3, 2017, pp. 361-377, pp. 372-373.

have agreed on a remote hearing, the tribunal should accept that too. To go against a party agreement would normally make the award susceptible to be set aside or not enforced.

Typically, the following situations may occur:

- (i) There is no party agreement. One of the parties request a hearing. The tribunal considers a remote hearing but the requesting party requests an in-person hearing.
- (ii) A date for an in-person hearing has been agreed or ordered and scheduled. One of the parties claim the hearing must be vacated and rescheduled since one of its witness or the party himself cannot attend. The tribunal considers suggesting a remote hearing to stick to the applicable schedule, which the other party does not want to abandon.
- (iii) A witness asks to be heard via videoconferencing. The party relying on the witness accepts it, but the other party requests the witness to be cross-examined in-person.

Before discussing the three scenarios, a judgment from the Oberste Gerichtshof in Austria, case No. ONc 3/20c shall be accounted for.

### **12.3 The Austrian Supreme Court judgement Case No. 18 ONc 3/20s, July 23, 2020.**

An arbitration administered by the Vienna International Arbitral Centre was conducted in Vienna. The hearing was initially scheduled to be conducted on March 10, 2020. On January 15, the hearing was postponed to be held on April 15. The request to postpone was made by the party that later came to claim to set aside the award. On March 19, the tribunal and the parties discussed the impact on the scheduled hearing of the travel restrictions due to the COVID-19 pandemic. It was indicated by the parties that they would agree to let the case be decided without a hearing. On April 2, the party that earlier had requested the rescheduling of the hearing protested against a hearing by way of videoconferencing and requested the hearing to be rescheduled at yet a later time when it could be conducted in-person. The tribunal did not yield to this request but decided instead on April 8 that the hearing should be held as scheduled on April 15, but via videoconferencing. It should commence at 15 pm which meant that a

witness that lived in Los Angeles should be heard at 6 AM local time in Los Angeles. The party that resisted the videoconferencing lost the case and challenged the award to the Austrian Supreme court but lost. The award was not set aside.

To start with, claimant did not rely on any concrete violation of any procedural rule by the tribunal but argued that videoconferencing generally violated the right to a fair process and the right to be heard. The court responded to this by just saying that the allegation could not be supported (“*ableiten*”, literally derived or deduced) by anything the claimant had submitted.<sup>367</sup> One could have thought no more reasons for the judgement would be needed but the court added five more arguments.

First it said that videoconferencing was accepted and common in civil proceedings and arbitrations alike.<sup>368</sup> Second, the COVID-19 pandemic had entailed the court system to promote videoconferencing, which also commentators had done in the field of arbitration.<sup>369</sup> Third, a videoconferencing against the protest of a party does not violate ECHR article 6, as the courts – and tribunals - must not only consider the right to be heard but also factor in the need for effective legal protection and the possibility to effectively enforce a claim.<sup>370</sup> Fourth, the possibility to control the witness was no less good than in an in-person hearing as the witness could be controlled by asking the witness to sit close to the camera keeping his gaze directed to the camera, his hands visible and to show the room. Also, it could be recorded.<sup>371</sup> Fifth, the difference in time zone (the witness in Los Angeles had to be up very early) did not matter. The court held that to get up early in the morning to give evidence at 6 AM is less an interference in daily life for a US citizen compared to travel to Vienna, particularly if the witness can participate in the hearing from home.<sup>372</sup>

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<sup>367</sup> The judgment at 11.2.1

<sup>368</sup> The judgment at 11.2.2

<sup>369</sup> The judgment at 11.2.3

<sup>370</sup> The judgment at 11.2.4

<sup>371</sup> The judgment at 11.2.5-6

<sup>372</sup> The judgment at 10.2.8

The judgment has been commented by Maxi Scherer.<sup>373</sup> She concludes that even if the case was played out in the context of the COVID-19 pandemic, the outcome has a general and wider relevance, as the court found that „*...as a general rule, there is no violation of these core due process rights if an arbitral tribunal decides to hold a hearing remotely, even over the objection of one of the parties*”. Scherer identifies three pillars as the *ratio decidendi* to the outcome, (i) the broad discretionary power of the tribunal, (ii) the requirement of ECHR article 6 on efficient legal protection, and (iii) the strong presumption that remote hearing is legitimate.

It can be added that Austria has adopted article 18 of the Model Law (equal treatment and a full opportunity to present the case) into § 594 (2) of the Austrian Zivilprozessordnung.

#### **12.4 The three scenarios**

Scenario (i) brings the matter to a head: what if the tribunal decides to conduct the hearing requested by a party as a remote hearing but for no particular reason, simply arguing that a remote hearing is as good as an in-person hearing that one of the parties prefer? To start with, to decide on a remote hearing (instead of an in-person hearing) for no particular reason would be seen as very unresponsive, insensitive and even indifferent. It would almost certainly call into question if the tribunal’s decision was dictated by their own convenience rather than what was in the party’s interest and therefore a breach of the arbitrators’ duty of loyalty. It is therefore not very likely a tribunal would do so unless it has good reasons but that does not answer the question.

However, in line with the findings accounted for in this thesis, the award will not be set aside only on the ground the tribunal conducted a remote hearing rather than a hearing in-person. For that to be the outcome, something concrete must have occurred during the hearing that would impact the protesting party’s due process rights, precisely as the Austrian Supreme Court held. And, generally, that impact must

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<sup>373</sup> SCHERER, Maxi 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*, October 24, 2020.

be of a certain magnitude and there must be a causative link to the outcome, although not necessarily very strong in terms of evidence.

What however may be called into question is the Austrian Supreme Court's reference to ECHR article 6, it underscored that article 6 also aims at safeguarding an effective legal protection and the possibility to effectively enforce a claim. That means in simpler words, time and costs matters too. What if in a particular case the decision to conduct the hearing remotely would not save time or costs compared to an in-person hearing, or in other words: is the meaning of the Austrian case that there always must be a good reason for the tribunal to decide on a remote hearing against the request of a party?

The answer to that question may depend on how the reasoning of the Austrian Supreme Court is to be understood. Either the reference to ECHR article 6 is to be understood as a *condition* for the permissibility for the tribunal to conduct a remote hearing against the protests of a party; only if the assessment is that time or costs can be saved so as to produce efficient legal protection, the tribunal may go against a party that requests an in-person hearing and conduct a remote hearing. Or, the reference to ECHR article 6 only explains in general terms why arbitration as a method to resolve disputes may be held remotely against a protesting party: because arbitrations must be conducted swiftly and that is an objective that not is in conflict with ECHR article 6.

This is how the court couched the wording in this respect:

*“ Eine Verfahrensführung durch Videokonferenz kann Kosten und Zeit sparen und fördert damit die Rechtsdurchsetzung unter gleichzeitiger Wahrung des rechtlichen Gehörs.”*<sup>374</sup> This sounds as a very general remark, but then the Court goes on to say:

*“ Gerade bei einem drohenden Stillstand der Rechtspflege im Zuge einer Pandemie bietet die Videokonferenztechnologie eine rechtsstaatlich gedeckte Möglichkeit, die*

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<sup>374</sup> The judgment at 11.2.4. In English (free translation): *“ Proceedings via video conference can save costs and time and thus promote the enforcement of rights while at the same time protecting the right to be heard.”*

*Ansprüche auf effektive Rechtsdurchsetzung und auf rechtliches Gehör harmonisch zu vereinen.”<sup>375</sup>*

Does this mean that if there had not been a pandemic or any other similar impediment, the Court would have found that the decision to conduct the hearing remotely would not have been supported by (or not in conflict with) ECHR article 6? Potentially yes, at least if the rule for writing a judgement in Austria is to not base the conclusion on anything more than is needed to justify the outcome.

Assuming the narrower alternative is the correct construction of the Austrian Supreme Court decision, then the mere decision to hold and conduct a hearing remotely against the protest of a party could be construed as a violation of due process. One may wonder how that construction fits with the general finding of the Court, which according to Maxi Scherer is that in general there is no violation of due process rights if an arbitral tribunal decides to hold a hearing remotely against the objection of one of the parties.<sup>376</sup> In any event, if it would amount to a violation of due process rights, it must be submitted and demonstrated the outcome would have been different had the hearing been conducted in-person.

Scenario (ii) is easier to deal with. Assuming that the witness can attend a video conference, there is no reason to vacate and reschedule previously agreed or ordered hearing date(s) against the protest of the other party. This is in line with what the Austrian Supreme Court case No. 18 ONc 3/20s says.<sup>377</sup>

Scenario (iii) does not entail any violation of due process rights, as both parties are treated equally and cross-examination can be performed also via videoconferencing.<sup>378</sup>

– The prerequisites can be varied to resemble those in the Portuguese case from the

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<sup>375</sup> Ibid. at 11.2.4. In English (free translation): *“Especially when it is an imminent standstill of the administration of justice in the course of a pandemic, the video conferencing offers a technology covered by the rule of law a possibility to enforce claims effectively and unite them harmoniously with due process.”*

<sup>376</sup> SCHERER, Maxi 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*, October 24, 2020

<sup>377</sup> The judgment 18/ONc 3/20s at 11.2.4.

<sup>378</sup> See *supra* chapter 5.2 and footnotes 253-254.

*Tribunal Constitucional de Portugal*, see chapter 2.6.1 *supra*. Suppose time has run out for cross-examination and that the only possibility to schedule time for cross-examination within agreed or ordered hearing dates or before last date to hand down the award would be to arrange the cross-examination via videoconferencing. And suppose the parties cannot agree on postponing and rescheduling to make the witness appear in-person for cross-examination.

In analogy with the outcome in the Austrian Supreme Court case, no violation of due process would follow if the tribunal would refuse to postpone and instead propose that the cross-examination be performed remotely.

### **12.5 The Procedural Judgement Rule revisited.**

The absence of detailed procedural regimes in national arbitration laws and institutional rules is as discussed in chapter 12.1 *supra* substituted by a wide discretionary power of the tribunal to design the procedure as it deems fit or appropriate. The requirement for balancing time and cost against a party's right to make a full presentation of his case, as it is expressed in the Model Law article 18, often causes difficulties for the tribunal. To avoid awards to be challenged something called due process paranoia has evolved, which denotes that tribunals without good reasons yield to dilatory actions or unsubstantiated procedural claims by the parties.<sup>379</sup>

The review of court cases made by Klaus Peter Berger and Ole Jensen demonstrates however that the due process paranoia is unfounded. The courts have generally deferred to decisions by tribunals on for example request for extension of deadlines or rescheduling of time plans.<sup>380</sup> The procedural judgement rule that can be distilled from court cases means that if a decision "*... is grounded in a bona fide assessment of the case and is reasonable under the circumstances...*" then courts will not interfere in the tribunal's exercise of its procedural judgment.<sup>381</sup> It may therefore be that the test

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<sup>379</sup> BERGER, Klaus Peter, JENSEN, Ole, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators". *International Arbitration*, volume 32, issue 3, 2016, pp. 415-435, pp. 421-422.

<sup>380</sup> *Ibid.* pp.425, 427-428.

<sup>381</sup> *Ibid.* p.428.

is not whether a party was offered a *full opportunity* to present his case but a *reasonable*, as is the wording in the UNCITRAL Rules article 17.<sup>382</sup>

Lucy Reed has developed the procedural judgement rule further. She agrees with Berger and Jensen that decisions on whether to (i) grant an extension of a deadline; (ii) accept an unsolicited submission; (iii) accept evidence after a cut-off date; (iv) admit claims introduced late; or (v) reschedule a hearing will normally fall within the procedural judgement rule.<sup>383</sup> On the other side of the border, in the due process area, fall “*egregious procedural lapses*” of which she mentions i.a (i) refusal to hold a hearing at all, if requested; (ii) failure to give a party notice of a hearing or a submission; and (iii) going forward to hearing, despite a party's legitimate inability to attend.<sup>384</sup>

The question is then if a remote hearing to save an agreed or ordered time plan for a hearing or delivery of the award is analogous with Reed’s three examples of “*egregious procedural lapses*”. Neither the Austrian Supreme Court case, nor the case from the Portuguese Tribunal Constitucional supports such an analogy, quite to the contrary. After all, in those cases the parties that complained were not denied a hearing *at all*. They were offered a hearing but via videoconferencing.

## **12.6 The 1958 New York Convention and oral hearing**

There is, as shown in chapter 10.1-2, a relation between article V 1.(b) of the 1958 NY Convention and article 34 of the Model Law. Further, being a convention, as is discussed in chapter 10.1, article V and national rules that are designed on the basis of article V should be given an autonomous construction according to articles 31-32 of the 1969 Vienna Convention. Therefore, a case from one country on recognition and enforcement may be relevant in other convention countries too. Finally, as also has been demonstrated in chapter 10.3, the national arbitration rules in the jurisdictions studied on setting aside have all been influenced by article 34 of the Model Law.

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<sup>382</sup> Ibid. 422 at footnote 34.

<sup>383</sup> REED, Lucy F. “Ab(use) of due process: sword vs shield”. *International Arbitration*, volume 33, issue 3, 2017, pp.361-377, p. 372-373.

<sup>384</sup> Ibid. p.373.

One consequence of this relation is that the same circumstances under which an award would be denied recognition or enforcement would also be sufficient to set aside an award. And vice versa. If a state court would not set aside an award where the tribunal conducted a remote hearing against the request of a party, it could be expected they would not refuse enforcement or recognition on the same grounds.

This is, as discussed in chapter 10.2, no coincidence but one of the main objectives behind the drafting article 36 and 34 of the Model Law as mirror images of article V of the 1958 NY Convention.

Refusal to hold an oral hearing when one is requested by a party constitutes ground for non-recognition or non-enforcement of foreign awards under the 1958 NY Convention article V 1.(b).<sup>385</sup> Article V grounds for refusing recognition and enforcement have been incorporated to the FAA US Chapter 1 § 10 (setting aside of domestic awards) and Chapter 2 § 207 (recognition and enforcement of foreign awards).<sup>386</sup>

On the basis of these rules of the FAA US, US courts generally hold that refusal to conduct an oral hearing when requested by a party constitutes ground to refuse enforcement or recognition - and to set aside the award if domestic.<sup>387</sup>

The protection of due process in both chapter 1 and chapter 2 of the FAA US is similar in substance to what is protected by article V 1.(b) and section 34 of the Model Law (although the US has not adopted the Model Law): *“Comparable due process grounds for vacatur or set aside contemplated by both statutes include that a party did not receive proper notice or an opportunity to present its case, that arbitrators improperly refused to postpone the hearing upon the request of a party that had shown sufficient*

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<sup>385</sup> SCHERER, Maxi, “F.Violation of Due Process, Article V(1)(b)” in Reinmar Wolff (ed.), *New York Convention Second Edition Article-by-article-Commentary Edition*. München: C.H Beck oHG, 2019, pp.291-321, p.315.

<sup>386</sup> SHANNON, Victoria Sahani, “Chapter 1: Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration” in Tai-Heng Chen et al. (eds.) *International Arbitration in the United States*. Alphen aan den Rijn: Kluwer Law International, 2017, pp. 15-30 , p.24 and footnotes 65 and 66.

<sup>387</sup> BLACKABY, Nigel et al., *Redfern and Hunter on International Arbitration, 6th ed.* Oxford: Oxford University Press, 2015, p. 587-588.

*cause to postpone, that the arbitrator refused to hear material and relevant evidence, or that the arbitrator's inappropriate conduct prejudiced a party in some other way.*<sup>388</sup>

However, to the best of the author's knowledge there is no published case on the application of article V 1.(b) in relation to remote hearings that potentially could be illustrative to how the same circumstances would be dealt with under a claim for setting aside an award under rules that have been modelled on article 34 of the Model Law.

But there are two cases from a New York federal court on setting aside an award that is of relevance, the first one being *Bisnoff v. King*, 154 F. Supp. 2d 630 (S.D.N.Y. 2001).<sup>389</sup>

In that case defendant requested a scheduled hearing in the arbitration proceedings to be adjourned as he had become ill and requested a new date for what obviously was an in-person hearing. The tribunal refused to adjourn the hearing and offered defendant the possibility to participate and give evidence via telephone or recorded videotape (this was in year 2000), i.e. a remote hearing.

The court held that the expeditious resolution of the dispute requires a broad discretion for the tribunal in determining procedural issues. For the award to be set aside, the court held that a tribunal's decision must violate principles of fundamental fairness, but here the tribunal's decision not to delay the hearing was fundamentally fair, as the tribunal provided petitioner with an opportunity to appear via telephone or videotaped deposition, which petitioner did not take advantage of.

The same court that tried the *Bisnoff v. King* case has in a case from 2019, *Eaton Partners, LLC v. Azimuth Capital Management IV, Ltd.* 2019 WL 5294934 (S.D.N.Y., 18 Oct. 2019), tried a request to set aside an award on the ground that the tribunal did

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<sup>388</sup> SHANNON, Victoria Sahani, "Chapter 1: Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration" in Tai-Heng Chen et al. (eds.) *International Arbitration in the United States*. Alphen aan den Rijn: Kluwer Law International, 2017, pp. 15-30, p. 24 and footnote 67.

<sup>389</sup> About this case, see LAHLOU, Yasmine, POPLINGER, Andrew, WALTER, Gretta, "Chapter 11: Vacatur and Modification or Correction of Convention Awards" in Andreas A. Frischknecht et al. (eds.) *Enforcement of Foreign Arbitral Awards and Judgments in New York*. Alphen aan en Rijn: Kluwer Law International, 2018, pp.173-198, pp.184-185 and footnote 73.

not accept defendants request to adjourn a hearing.<sup>390</sup> The court found on the evidence that the tribunal had not in fact denied a request for adjournment. The court added *obiter dicta*: “Even if the Arbitrator had in fact refused to adjourn the hearing and only allowed Montemurro to appear by video, this would not have constituted a deprivation of Azimuth's right to a fundamentally fair hearing. See *Bisnoff v. King*, 154 F.Supp.2d 630, 639 (S.D.N.Y. 2001) (holding hearing was fundamentally fair even when arbitration panel refused to postpone hearing for unavailable witness when it provided witness with opportunity to appear by telephonic or video conference).

It should be stressed that both these cases for setting aside were tried on the basis of the FAA US Chapter 1, which incorporates the protection of due process from the 1958 NY Convention article V 1.(b) and which as to the parties’ ability to present his case also is similar to section 34 of the Model Law.<sup>391</sup>

As US courts generally set aside an award if the tribunal has refused to hold an oral hearing if requested by a party, a reasonable conclusion of the outcome must be that the New York court equalled the remote hearing offered to the defendant with an in-person hearing. The relevance of this case is that the rules the New York court applied when assessing the alleged ground for setting aside were based on the 1958 NY Convention. By extension, if a New York court was to try a case for refusal to recognize or enforce a foreign award where the tribunal had refused to comply with a request for an oral hearing but offered a remote hearing, the New York court would not refuse recognition or enforcement.

This is not to say that this conclusion corresponds to the position *de lege lata* in just any convention state, but as the convention shall be construed autonomously and in conformity with the convention itself, it produces an argument in favour of remote

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<sup>390</sup> MADYOON, Nika, “Virtual Hearings in International Arbitration: Challenges, Solutions, and Threats to Enforcement”. *The International Journal of Arbitration, Mediation and Dispute Management*, 2021, volume 87, issue 4, pp.596-611, p.610.

<sup>391</sup> SHANNON, Victoria Sahani, “Chapter 1: Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration” in Tai-Heng Chen et al. (eds.) *International Arbitration in the United States*. Alphen aan den Rijn: Kluwer Law International, 2017, pp. 15-30, p. 24 and footnotes 65-67.

hearings, or at least that a decision on remote hearing lies within the boundaries of the procedural judgment rule.

Finally, even if a due process violation would occur, there still remains an ultimate hurdle to be removed if the award is to be set aside or refused recognition, the causative link to another, potential outcome but for the violation. In the case *Gold Reserve Inc v Venezuela*, the latter tried to have the court to refuse recognition of an award against it on the ground that it had been unable to present its case since time for examining witnesses had not been equal. The court dismissed Venezuela's case, holding that Venezuela must show *how* the denial to have extra time *had prevented it from presenting its case*.<sup>392</sup>

### **13 Final observations**

The national rules on civil litigation of the six display significant differences on remote hearings. The majority empower the courts to order a remote hearing under certain circumstances, either for a full trial or for taking of evidence only, even if a party requests a hearing to be conducted in-person. CPO France and ZPO Swiss do not. As to ad hoc arbitration none of the AA England, CPO France or ZPO Switzerland confer a right to a hearing at all to the parties, whereas the ZPO Germany, SAA Sweden and LAV Portugal do, the latter for taking of evidence only. The institutional rules are also divided. All of them save for the Swiss Rules confer the right to a party to request a hearing, in the case of the DIS Rules with the adjective oral added. The CAC Rules also confer the right to request a hearing but for taking of evidence only. As to remote hearing, the LCIA Rules, ICC Rules and the Swiss Rules expressly empowers the tribunal to decide one, even if a party would request an in-person hearing.

Against this diversity it is not possible to distil any international law on hearings and videoconferencing in international arbitration - if, when and how to be conducted. Nor can any general inference be drawn from national civil proceedings, suffice to say that

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<sup>392</sup> REED, Lucy F. "Ab(use) of due process: sword vs shield". *International Arbitration*, volume 33, issue 3, 2017, pp.361-377, p. 374. – Although the arbitral proceedings for the award that was sought to not be enforced were handled under the ICSID-convention, for rather unusual circumstances the New York court that tried the request for recognition and enforcement found that the 1958 NY Convention was applicable. See p. 7 of the judgment.

in France remote hearings in civil proceedings can only be arranged with party consent and provided the presiding judge concurs, and in Switzerland not at all.

The COVID-19 Pandemic and the restrictions it entailed risked to lead to a stalemate in the administration of justice in state courts and the timely proceedings in arbitration alike. The obvious solution was to proceed on a remote basis. France and Portugal passed emergency legislation to empower courts a broader mandate to allow litigation to proceed remotely. Switzerland also passed emergency legislation to allow remote hearings in civil litigation. England did not (as the CPR already allowed videoconferencing) but adopted new guidelines and procedures to promote remote hearings. No new legislation was adopted as to national arbitration laws but the institutions adapted the rules (The LCIA Rules, the ICC Rules, the CAC Rules the Swiss Rules, but not the DIS Rules or the SCC Rules). All of the institutions save for the Swiss Centre issued guidelines to encourage parties to proceed on a remote basis.

This of course led to an increase of remote hearings in civil litigation, the strongest increase probably in Sweden and England, least in France and Switzerland. Also, arbitration hearings held remotely increased significantly. Against this development it is surprising that only a few cases on setting aside or refusal to enforce or recognize have been reported, one from Portugal and one from Austria (although there may be more in the coming, for example one case pending before the Svea Court of Appeal in Stockholm).

The Portuguese case was decided by *the Tribunal Constitucional*. It held that a cross-examination of a witness via videoconferencing after the examination in chief had been conducted in-person under the circumstances was not in breach of fundamental procedural principles such as equality of arms and the requirement for orality of the CPC Portugal, even though the party conducting the cross-examination had requested an in-person hearing for the purpose of the cross-examination.

In the Austrian case, that was decided by the *Oberster Gerichtshof Österreich*, an award produced by a tribunal that had its seat in Austria was requested to be set aside on the ground that the tribunal against the request of one of the parties had decided to conduct the hearing remotely which meant that a witness was heard via

videoconferencing from Los Angeles. The court did not agree in petitioner's principle-oriented allegation, that the tribunal violated the right to a fair process and the right to be heard when it conducted the hearing remotely against the request of the party. One would have thought no more arguments would have been needed but the court underpins the outcome with yet five more arguments one of which is the pandemic and the need to bring cases forward to decision. That argument is problematic as it may be taken to restrict the relevance of the case.

The pandemic and the movement towards remote hearings in civil litigation and arbitrations brought a number of enquiries and surveys of judges', arbitrators' and counsels' experiences of remote hearings. There is an obvious preference for in-person hearing but positive views on remote hearing were surprisingly often accounted for. Particularly by arbitrators that in one survey were reported to mean that in a number of aspects remote hearing were better than in-person hearing. Also, in another enquiry among counsels, if the alternatives in an arbitration would be to vacate or to proceed remotely, 79% preferred to proceed with a remote-hearing whereas only 16 % preferred to vacate until a hearing could be held in-person.

There are a number of arguments that usually surface against remote hearing, one of which is technological issues by which is meant quality and status of equipment, transmission standards and the difficulties to exert control over a witness heard remotely via videoconferencing.

Such issues can no doubt be resolved and controlled by using one of several protocols issued by international arbitration institutes, for example the Vienna Protocol, the Seoul Protocol or the Annex I to the ICC Guidance Note of April 9, 2020. And as the Austrian Supreme court have made clear, by suggesting a few practical measures it is possible to control witness heard remotely as much as it is in a court or conference room. To resolve these issues take only a little bit of foresight, planning and training by the tribunal.

Then we have the argument against remote hearing which says that demeanour is getting lost if a witness is heard remotely and by extension the difficulty to judge veracity of a statement made via videoconferencing. Connected to this argument is

also the argument that is more difficult to perform a cross-examination via videoconferencing.

The demeanour argument is not supported by behavioural science. To the contrary, psychological scientific research has consistently shown that demeanour is useless as a truth-teller, and also that veracity of a statement is not judged differently if a witness is examined via videoconferencing. It rather appears the hit rate – the capacity to detect deception - is just slightly better if the witness is heard remotely.<sup>393</sup>

Cross-examination via videoconferencing may of course be a challenge. But, as pointed out by Wendy Miles, it is perfectly possible to prepare for cross-examination for it to be as useful as if made in-person. What it all comes down to is advocacy. What is required from the interrogator is to be clear and to the point, one fact per question, slow, coherent and concise, in short more focused questions and cutting of unnecessary repetitions and fruitless debates with the witnesses.<sup>394</sup> Which counsels should strive for anyway in any type of examination.

Unfortunately, the psychological research has been little observed by lawyers, arbitrators and judges. The author has found only sparse references to it in the literature that form the basis for this thesis.<sup>395</sup> However, in three cases there are evidence that some have noticed it.<sup>396</sup>

It may be argued, and rightly, that the perspective on remote hearing that colours this thesis is not so much the individual party's perspective but rather the dispute seen from the angle of the judge or the arbitrator or if you like from the general public. True, a party has a right to an oral hearing but the question remains what that is and

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<sup>393</sup> LANDSTÖM, Sara, *CCTV, Live and Videotapes How Presentation Mode Affects the Evaluation of Witnesses*. Gothenburg. Intellecta Docusys, 2008, p. 27

<sup>394</sup> MILES, Wendy, "Remote Advocacy, Witness Preparation & Cross Examination: Practical Tips & Challenges" in Niuscha Bassiri, Mohamad S. Abdel Wahab, Maxi Scherer (eds.), *International Arbitration and the COVID-19 Revolution*. Alphen aan den Rijn: Wolters Kluwer, 2020, pp.121-135, pp. 130-131,

<sup>395</sup> Actually, the only examples are the articles by Luís Felipe Pires de Sousa, see footnote 160 *supra* and by OGENAE, Kevin, PIERS, Maud, "Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework", *Journal of International Arbitration*, 2021, volume 38 Issue 1, pp. 27-58, at footnote 82: "The authors of this article are in any case convinced by the scientific studies that prove that this type of 'demeanor evidence' is highly unreliable."

<sup>396</sup> NJA 2010 p. 671 (Sweden), TC 738/2021 (Portugal) and R (SS) v Secretary of State for the Home Department [2018] EWCA Civ 1931 (England).

whose perspective that shall prevail. The best view is, in the eyes of the author, the one expressed by the Swiss Federal court in DFT 146 III 194, July 6, 2020: the procedural form embedded in the ZPO Swiss is there to ensure the orderly and legally equitable conduct of the procedure *and the enforcement of substantive law*.

Taking it from there, the question should be if the format for the hearing allows a party to do all the things he reasonably requests to do and as good as it reasonably can be done in an in-person hearing, then the format for the hearing ensures what the Swiss Federal court expressed, the orderly and equitable procedure and the enforcement of substantive law.

One should therefore adopt a functional test: if the format for the hearing allows a party to do what due process requires than the format complies with due process, irrespective of format.

The answer to that question is yes.<sup>397</sup> A party may present his case as good in a remote hearing as in an in-person hearing, including taking of oral evidence. And the remote hearing via synchronous sound and image transmission is oral, just as oral as any in-person hearing. The original by-product from the requirement of orality, physical presence, is therefore superfluous. To press the requirement for orality to exclude orality via synchronous sound and image transmission and to include a requirement for physical presence is simply ill-founded.

What it comes down to is if, in fact, a party during the remote hearing, as the wording is couched in article V 1.(b) of the 1958 NY Convention, *was unable to present his case*. Of course he was not if the tribunal could see the parties, listen to their oral arguments, follow the presentation of documents or written evidence and listen to the witnesses and parties and where needed, the tribunal could put questions to them - and if the parties themselves could also in the same manner follow and participate in

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<sup>397</sup> ASHFORD, Peter, "The right to an "in-person" Hearing in International Arbitration". *The International Journal of Arbitration, Mediation and Dispute Management*, 2021, volume 87, issue 4, pp. 575-596, p. 578.

the proceedings. As Lucy Reed puts it, due process is profoundly simple, meaning simple in a profound way.

As has been shown in chapter 10, there is a clear relation between on the one hand article V 1.(b) of the 1958 NY Convention and article 34 of the Model Law, they are each other's mirror images. Only those circumstances that would suffice to set aside an award are sufficient to refuse recognition or enforcement. And vice versa. The six are all 1958 NY Convention countries and their national arbitration laws, even section 68 (2) (a) of the AA England, reflects the substance and grounds of article 34 the Model Law.

Article V 1.(b) of the 1958 NY Convention contains no choice of law rule but should be interpreted autonomously and in conformity to the text and purpose of the convention. It is reasonable to assert the same applies to article 34 of the Model Law and the national laws footed on article 34 in so far it relates to violation of due process. Otherwise, these two pillars of international arbitration law would not fulfil its purpose of harmonisation of the rules, instead a variety of parochial rules on setting aside would surface.

Having arrived at this conclusion, the last argument is about the procedural judgment rule. As is abundantly clear, both national arbitration rules and even more so institutional rules provide the tribunal with a wide discretion to organize and conduct the proceedings in the way they deem fit or proper. In doing so they have invariably an obligation to observe the time factor and costs, the proceedings must be conducted in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute, as the wording is in article 22 of the ICC Rules. If the rule is such that there always must be a reason for conducting a remote hearing instead of an in-person, it is likely the courts will defer to the balancing exercise between due process and time/costs the tribunal has made.<sup>398</sup> The few cases there are support this view.

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<sup>398</sup> Cf. BERGER, Klaus Peter, JENSEN, Ole, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators". *International Arbitration*, volume 32, issue 3, 2016, pp. 415-435, pp. 423-429.

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