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Christoph Müller | Sébastien Besson |
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New Developments in International Commercial Arbitration 2020

Stämpfli Editions

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Preface

This book contains the written contributions of the speakers at the twelfth bi-annual conference on New Developments in International Commercial Arbitration, organized by the CEMAJ (Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel on 6 November 2020.

The goal of both the conference and this book is to provide practitioners, academics and students with an in-depth analysis of the latest developments in international commercial arbitration. That is why the *New Developments* conferences are not dedicated to a specific theme. The only common denominator of the different contributions is the novelty of their subject matters.

FELIX DASSER reflects on the revision of Chapter 12 of the Swiss Private International Law Act (PILA), which will enter into force on 1 January 2021. He notably reviews the process of the revision going back to the parliamentary initiative by National Councilor Christian Lüscher of 2008 until the final adoption of the revision of Chapter 12 on 19 June 2020 by Parliament. He analyses the main amendments of Chapter 12 and reflects on lessons learned from the revision process.

MATTHIAS SCHERER examines the Swiss Federal Tribunal's rulings on investment treaty awards and explores, in particular, the reasons for the low rate of success of setting aside investment treaty awards. He presents the salient features of investment treaty annulment proceedings before the Swiss Federal Tribunal, including from a procedural and practical standpoint.

ANTONIO RIGOZZI examines the judgment of the European Court of Human Rights in the case of *Mutu* and *Pechstein*

v. Switzerland of 2 October 2018 and its impact on sports arbitration. He analyses the main issues addressed by the Court, e.g. applicability of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in arbitration proceedings, the right to a public hearing, and the requirement of independence and impartiality in arbitration proceedings. He makes concrete proposals as to how to ensure that sports arbitration remains compatible with the requirements of human rights both procedurally and substantively.

CATHERINE ANNE KUNZ presents an overview of the arbitration-related rulings handed down by the Swiss Federal Tribunal from August 2018 to July 2020. She highlights the clarifications and evolution of the case law. This survey is particularly helpful for practitioners who wish to bring themselves up-to-date on the most recent developments of the Swiss Federal Tribunal's decisions concerning international arbitration.

MARTIN BERNET & ARUN CHANDRASEKHARAN's contribution reflects on the projects of establishing International Commercial Courts in Geneva and Zurich. They examine the necessary changes to the Code of Civil Procedure that such projects would require, and discuss some of the characteristics the proceedings conducted before International Commercial Courts, including the language of the proceedings, the taking of evidence, and the appellate proceedings. They emphasize that Switzerland - as a leading forum for international commercial arbitrations – should "exhaust all efforts to expand its offer in the area of dispute resolution by creating International Commercial Courts" in its two internationally best-known cities.

FABRICE ROBERT-TISSOT analyses the impact of COVID-19 outbreak on the world of arbitration. He provides an overview of the measures taken notably by the arbitral institutions and arbitral tribunals to adapt the existing procedural rules to

these exceptional circumstances. He presents the pros and cons, and the practical issues, of e-filing and virtual hearings. He also discusses the potential difficulties related to due process and the right to be heard. As an "excursus", he addresses the validity of virtual hearing in forced (sport) arbitration.

The practical bearing and the variety of the topics addressed in this book serve to evidence the dynamic nature of the law and practice of international commercial arbitration, and thus the importance of keeping abreast of significant developments across jurisdictions and practice areas in the field, which is what the *New Developments* conference is all about.

We are grateful to the authors, who have provided their written contributions well before the conference, thus allowing us to distribute this book during the conference itself – a brand label of this arbitration event. Early publication clearly constitutes an added value for a book devoted to recent developments in a constantly evolving field such as that of international arbitration.

The organization of the conference and the timely publication of this book would not have been possible without the valuable administrative support of Carine Magne, of the Secretariat of the Neuchâtel Faculty of Law, to whom we are grateful.

Neuchâtel, October 2020

Christoph Müller Sébastien Besson Antonio Rigozzi

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How Will the COVID-19 Pandemic Change Arbitral Proceedings?

FABRICE ROBERT-TISSOT[1]

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I. Introduction

There is no doubt that this year 2020 has been very peculiar.

With the COVID-19 outbreak, the world has faced a major health and economic crisis.

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[1] I would like to thank Ms Léa Steudler, Bachelor of Law (University of Geneva) and candidate to the MLaw (University of Zurich), for the assistance in the preparation of this paper.

Many measures had to be taken to contain this pandemic. All sectors have been affected and everyone had to (and must still) adapt quickly in these challenging times.

During the lockdown, the vast majority of companies implemented teleworking,[2] schools developed online teaching and video-conferencing platforms saw a phenomenal increase in the number of users. The well-known Zoom platform grew from 10 million users at the end of 2019 to over 200 million at the beginning of April 2020![3]

The development of technology was thus at the forefront to avoid (mitigate) the collapse of the economy. This IT breakthrough became highly visible on the stock market. While most stock market quotations fell sharply, the Nasdaq jumped by more than 4% in April alone.[4]

The COVID-19 pandemic also had a significant impact in the field of law. Justice could not stop in mid-March 2020 and wait that everything went back to normal before resuming the proceedings.[5] Justice must be done *at any time*.

The courts and the counsels nonetheless encountered an unprecedented situation which severely hampered the efficient conduct of the proceedings. The courts around the world had to close their doors to minimize the risk of contamination. Several mechanisms were put in place during the lockdown to ensure the access to justice.

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2 DELOITTE, L'impact du COVID-19 sur notre quotidien, ou comment un virus démultiplie le travail à domicile, https://www2.deloitte.com/ch/fr/pages/press-releases/articles/wie-covid-19-unseren-alltag-beeinflusst-home-office-schub.html (31.07.2020).

3 SZADKOWSKI/LELOUP.

4 RUCHE.

5 SFC, Ordinance introducing coronavirus-related measures in the field of justice and procedural law, Commentaire des dispositions, p. 2.

The COVID-19 outbreak did not only have an impact on court proceedings. There is no doubt that it also affected international arbitration.

While the vast majority of hearings in person had to be postponed,[6] several mechanisms were swiftly put in place by the arbitration institutions to ensure the proper conduct of arbitral proceedings, in particular e-filing and virtual hearings. These steps enabled tribunals and the parties/counsel to overcome the delays caused by the COVID-19 pandemic.

This paper will first examine the various mechanisms, in particular e-filing and virtual hearings, that were put in place during the COVID-19 pandemic in arbitration (and court) proceedings and how it may change arbitral proceedings in the future (see *infra* Section II.), while keeping in mind that virtual hearings may entail possible risks for the enforcement of the award (see *infra* Section III.). As an *excursus,* this paper will then briefly address the validity of virtual hearings in forced (sports) arbitration (see *infra* Section IV.).

II. E-Filing and Virtual Hearings

A. Overview

COVID-19 had a major impact on arbitral proceedings. Since the lock-down, the pandemic primarily affected the means of filing submissions (and the notification of the awards), as well as the conduct hearings. Since there was an urgent need to avoid human contacts, it was clear that counsel could not be asked to file hard copies of their submissions. Moreover, in-person hearings had to be avoided.

[6] Wilske, p. 12.

The most effective way to avoid significant delays of the proceedings was obviously to facilitate e-filing and the conduct virtual hearings.

Arbitration has shown great flexibility and a capacity to adapt to these exceptional circumstances.[7] One must pay tribute to the arbitral institutions which were very reactive and efficient in implementing the above-mentioned mechanisms.

These mechanisms are not new though and the arbitral institutions implemented existing tools in order to deal with the challenges related to the pandemic.[8] Indeed, it is well-known that arbitration can be paperless[9] and take place remotely.[10]

Already before the crisis, several institutions were offering online services. For example, the Stockholm Chamber of Commerce (hereinafter: "SCC") already offered an e-filing system before the pandemic via a dedicated SCC-platform.[11] The Swiss Rules enacted by the Swiss Chambers' Arbitration Institution (hereinafter: "SCAI") also allow the parties to file their written submissions by email. Indeed, Article 2 para 1 of the Swiss Rules provides that any notice is deemed to have been received if it is delivered to the addressee postal or electronic address.[12]

The vast majority of the rules enacted by the major arbitration institutions provide for flexibility in the organisation of the hearing, including the case management conference.[13] This is for instance the case under Article 25 para 4 of the Swiss

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7 DE VITO BIERI/RENNINGER, paras 1, 6.
8 DE VITO BIERI/RENNINGER, paras 7-8.
9 LEON KOPECKÝ; DE VITO BIERI/RENNINGER, paras 6, 13.
10 SHOPE, p. 77; DE VITO BIERI/RENNINGER, para 6.
11 SCC, SCC Platform – Simplifying Secure Communication From Request To Award, (undated), https://sccinstitute.com/scc-platform/ (31.07.2020).
12 DE VITO BIERI/RENNINGER, para 25.
13 DE VITO BIERI/RENNINGER, para 28.

Rules.[14] The same flexibility applies in arbitrations administered by the London Court of International Arbitration (hereinafter: "LCIA") (see Article 19 para 2 of the LCIA Rules).[15] The Singapore International Arbitration Centre (hereinafter: "SIAC") frequently conducts case management conferences by video/teleconference.[16]

Moreover, several states, such as France, had already enacted statutory provisions on online arbitration, requiring inter alia that the (certified) service provider implement measures for data protection.[17]

Virtual hearings are also not completely new, although it was rather used before the pandemic for case management conferences and for the testimony of witnesses/experts in certain cases where they could not testify in person.

The Korean Commercial Arbitration Board ("KCAB") published the "Seoul Protocol on Video Conferencing in International

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[14] Article 25 para 4 of the Swiss Rules reads as follows: *"At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)."*

[15] Article 19 para 2 of the LCIA Rules reads as follows: *"The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed."*

[16] Chawla.

[17] LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038261631 (22.09.2020); De Vito Bieri/Renninger, para 18.

Arbitration" (hereinafter: the "Seoul Protocol") in March 2020, i.e. just before the COVID-19 outbreak.[18]

The pandemic nevertheless gave a great boost to these procedural mechanisms.

At the start of the pandemic, a joint statement was released by the major arbitration institutions stressing that collaboration was particularly important in order to ensure the **best use of digital technologies** for working remotely.[19]

Accordingly, several arbitration institutions quickly implemented an online dispute resolution (hereinafter: "ODR") system at the beginning of the pandemic. This was the case in particular for the International Centre for Settlement of Investment Disputes (hereinafter: "ICSID") which proposed that new arbitration requests, post award applications, request for mediation or fact-finding proceedings be filed electronically.[20]

The International Chamber of Commerce (hereinafter: "ICC"),[21] the SCAI,[22] the LCIA[23] strongly advised (or even asked the parties) to submit any communication (including requests for arbitration) by email only.

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[18] KCAB, Seoul Protocol on Video Conferencing in International Arbitration http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014 (22.09.2020).

[19] ICC ET AL., Arbitration and COVID-19, (undated), https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf (22.09.2020).

[20] ICSID, Message Regarding COVID-19 (Update), 19 March 2020, https://icsid.worldbank.org/en/Pages/News.aspx?CID=361 (31.07.2020).

[21] ICC, Urgent COVID-19 Message to DRS Community, 17 March 2020, https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/ (31.07.2020).

[22] SCAI, Important information, (undated), https://www.swissarbitration.org/ (31.07.2020).

[23] LCIA, LCIA Services Update: COVID-19, 18 March 2020, https://www.lcia.org/lcia-services-update-covid-19.aspx (22.09.2020).

With respect to the notification of awards, in all but exceptional cases, the LCIA transmitted awards to parties electronically during the pandemic, with originals and certified copies to follow, once the LCIA office re-opened.[24] The ICC encouraged the parties to agree, whenever possible, to the electronic notification of the award. However, the ICC Secretariat did in principle not proceed with an electronic notification of the award unless explicitly agreed by the parties.[25]

The American Arbitration Association (hereinafter: "AAA") and the International Center for Dispute Resolution (hereinafter: "ICDR") jointly published a communication entitled "AAA-ICDR® COVID-19 Resource Center" proposing a vast variety of dispute resolution tools during the pandemic, including Bankruptcy ADR during the COVID-19.[26]

The ICC also released the "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" (hereinafter: the "ICC COVID-19 Guidance Note"). This note contains a very detailed and useful guidance to parties, counsel and tribunals on possible measures that may be considered to mitigate the adverse effects of the COVID-19 pandemic on ICC arbitrations.[27] Annex I to the ICC COVID-19 Guidance Note further includes a checklist for a protocol on virtual hearings. Annex II contains suggested clauses for cyber-protocols and procedural orders dealing with the organisation of virtual hearings.

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[24] *Id.*

[25] ICC, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, 9 April 2020, pp. 3-4 para 15, https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf (31.07.2020).

[26] AAA & ICDR, AAA-ICDR® COVID-19 Resource Center, (undated), https://go.adr.org/covid-19-resource.html (22.09.2020).

[27] ICC, ICC COVID-19 Guidance Note, *supra* note 25.

The Court of Arbitration for Sport (hereinafter: "CAS") implemented "Emergency Guidelines" (valid until 30 June 2020), by which it amended inter alia Article R31 §3 of the Code of Sports-related Arbitration, in force as from 1 January 2019 (hereinafter: "CAS Code"). The revised Article R31 § 3 provides that written submissions (including statements of appeal[28] and appeal briefs)[29] may be filed by facsimile or email provided that the written submission and its copies are also filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day of the relevant time limit.[30]

Another means that was frequently used to pursue arbitration during the pandemic was the holding of virtual hearings. Again, several institutions were already offering online hearing services. However, COVID-19 boosted the development of this technology during the few months of complete shutdown. For instance, the Hong Kong International Arbitration Centre (hereinafter: "HKIAC") offers a full range of online hearing services[31] and issued specific guidelines to that effect.[32]

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[28] See Article R48 of the CAS Code.

[29] See Article R51 of the CAS Code.

[30] CAS, The Court of Arbitration for Sport (CAS) Emergency Guidelines, https://www.tas-cas.org/fileadmin/user_upload/CAS_Guidelines_COVID-19_15.05.20.pdf (31.07.2020), valid until 30 June 2020. Article R31(4) of the CAS Code already provides that written submissions (including the request for arbitration, the statement of appeal and any other written submissions) may be filed by electronic mail under the conditions set out in the CAS guidelines on electronic filing. Said Guidelines provide that *"The e-filing service can only be activated after the opening of arbitration proceedings by the CAS Court Office. This implies the prior filing of a Request for Arbitration (Article R38 of the CAS Code) or a Statement of Appeal (Article R48) by email, facsimile or courier, within the deadline set out in Article R49 of the CAS Code, as well as the allocation of a case number for the arbitration proceedings in question*.", https://www.tas-cas.org/en/e-filing/e-filing-depot-en-ligne.html (31.07.2020).

[31] HKIAC, Virtual Hearings, (undated), https://www.hkiac.org/content/virtual-hearings (22.09.2020).

[32] HKIAC, Convenient and Efficient: HKIAC E-Hearing, last update: 14 May 2020, https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf (31.07.2020).

Arbitral tribunals also played a crucial role during this challenging period of time. The flexibility provided by the applicable arbitration rules enabled tribunals to find pragmatic and tailormade solutions to continue the arbitral proceedings in good conditions during the pandemic.

For instance, pursuant to Article 24 para 3 of the 2017 ICC Arbitration Rules (the "ICC Rules"), the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable to ensure continued effective case management. There is no doubt that such procedural steps were taken by several ICC tribunals in order to take the appropriate steps to ensure the swift conduct of the proceedings during the pandemic. Such measures may take the form, for example, of written documents only or the use of audio or video conferencing instead of an in-person hearing.[33] This was illustrated for instance in a recent ICC case between J&F Investimentos SA and Paper Excellence: the first week of the hearing was conducted in person. However, due to the pandemic, the tribunal continued the hearing during the second week in virtual mode via the Zoom platform.[34]

There is no doubt that the flexibility offered by arbitration in these challenging times was much appreciated by the users. The pandemic may very well be the turning point in finally bringing ODR to the world of international arbitration.[35] In this respect, it is interesting to make a comparison with the way state courts dealt with the pandemic in these challenging times.

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[33] ICC, ICC COVID-19 Guidance Note, *supra* note 25, pp. 2-3 para 8.
[34] Moloo/Ritwik/Taqui/Tieu/Saul, p. 3.
[35] Benton; De Vito Bieri/Renninger, paras 14 et seq.

B. Virtual Hearings Before State Courts During the COVID-19 Pandemic (an Overview)

Video-conferencing is not completely new before state courts – although it was rather limited to the gathering of evidence until recently. Some jurisdictions (such as the United Kingdom) were more adamant than others in moving to virtual hearings during the pandemic.

In the United Kingdom, the Code of Civil Procedure also allows the use of video-conferencing for the testimony of witnesses.[36] Video conferencing can also be used for interim applications, case management conferences, and pretrial reviews.[37] During the pandemic, the UK government *"… put in place arrangements to use telephone, video and other technology to continue as many hearings as possible remotely"*.[38] These provisions were included in the Coronavirus Act 2020[39] to amend existing legislation and to enable the UK courts to move to entirely virtual hearings.[40] For instance, in the case *National Bank of Kazakhstan & Another v The Bank of New York Mellon & Ors*, the first virtual hearing was ordered by the Commercial Court to secure the continuation of the trial despite COVID-19.[41]

In France, the COVID-19 pandemic also slowed down procedures. In fact, as of the 20 March 2020, the courts closed

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[36] Civil Procedure Rules, Part. 32, Rules 32.3; Virtual Civil Trials, p. 19.

[37] Civil Procedure Rules, Practice Direction 32; Virtual Civil Trials, p. 19.

[38] MESSAGE FROM LORD CHIEF JUSTICE, Courts and Tribunals Judiciary, Review of Court Arrangements due to COVID-19 dated 23 March 2020, https://perma.cc/36KL-ECKT (25.08.2020).

[39] Coronavirus Act 2020, 25 March 2020, https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted (25.08.2020).

[40] https://www.loc.gov/law/help/virtual-civil-trials/england.php (25.08.2020).

[41] See *e.g. "The first virtual trial in the commercial court: Stewarts secures continuation of trial despite COVID-19",* https://www.stewartslaw.com/news/the-first-virtual-trial-in-the-commercial-court-stewarts-secures-continuation-of-trial-despite-covid-19/ (25.08.2020).

their doors. To counter this decline, the French government enacted three ordinances concerning civil, administrative and criminal law disputes. In the three cases, the civil, administrative and criminal courts could hold their hearings by video-conference.[42] It should be noted that in criminal proceedings, the consent of the parties to the use of video-conferencing was not required,[43] while the use of videoconferencing cannot be appealed in administrative law matters[44] and civil matters.[45] In practice, the choice of a virtual hearing was left to the heads of courts (so-called *"chefs de jurisdiction"*).[46] The French courts resorted swiftly to remote hearings. For example, the commercial courts of Lilles and Caen used video-conferencing in several proceedings.[47]

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[42] Article 7 para 1 of the *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* (Ordinance n°2020-304 of 25 March 2020 adapting the rules applicable to the courts of law ruling in non-criminal matters and to co-ownership syndicate contracts dated 25 March 2020) (hereinafter: "Ordonnance n°2020-304"); Article 7 para 1 of the *Ordonnance n° 2020-305 du 25 mars 2020 portant adaptation des règles applicables devant les juridictions de l'ordre administratif* (Ordinance n°2020-205 of 25 March 2020 adapting the rules applicable before the administrative courts dated 25 March 2020) (hereinafter: "Ordinance n°2020-305"); Article 5 para 1 of the *Ordonnance n° 2020-303 du 25 mars 2020 portant adaptation de règles de procédure pénale sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19* (Ordinance n°2020-305 of 25 March 2020 adapting the rules of criminal procedure on the basis of the Law n° 2020-290 of 23 March 2020 as a matter of urgency to deal with the COVID-19 pandemic dated 23 March 2020) (hereinafter: "Ordinance 2020-303").

[43] Article 5 para 1 Ordinance 2020-303.

[44] Article 7 paras 1 and 3 Ordinance 2020-305.

[45] Article 7 paras 1 and 3 Ordinance 2020-304.

[46] Flatrès/Poirson/Cousteau, COVID-19: des audiences toujours possibles par visioconférence, 22 April 2020, https://www.lemondedudroit.fr/decryptages/69662-covid-19-audiences-toujours-possibles-visioconference.html (23.08.2020).

[47] Le Breton, Confinement. À Caen, le tribunal de commerce va tester l'audience virtuelle, 31 March 2020, https://www.ouest-france.fr/sante/virus/coronavirus/coronavirus-caen-un-tribunal-teste-l-audience-en-mode-confine-6796472 (23.08.2020); Morlans, Coronavirus: des audiences pourraient se tenir par visioconférence au tribunal de Lille, 1 April 2020, https://www.francebleu.fr/infos/faits-divers-justice/coronavirus-des-audiences-

While virtual hearings were permitted, in-person hearings were maintained for certain types of disputes. For example, this was the case for criminal hearings ("*audiences correctionnelles*"), pre-trial detention and judicial review measures and hearings concerning educational assistance.[48]

With regard to international courts, the Court of justice of the European Union preferred the solution of suspending hearings until 11 June 2020.[49] After this deadline, hearings in person resumed. Nevertheless, if a party cannot be present on the day of the hearing in Luxembourg, only this party will be able to participate in the hearing via video-conference, subject to certain conditions. Another possibility of replacing the hearings is a written Q&A session instead of the oral arguments.[50] The Court of justice has also set up a dedicated platform allowing e-filing for the filing and service of procedural documents.[51]

The European Court of Human Rights (hereinafter: "ECtHR") took exceptional measures including the extension of the 6-month deadline for lodging an application (extended for a one-month period from 16 March 2020, and then extended for a further two-month period from 16 April 2020 to 15 June 2020 inclusive). In addition, it set up a system of remote hearings

pourraient-se-tenir-par-visioconference-au-tribunal-de-lille-1585671414 (23.08.2020).

48 MINISTÈRE DE LA JUSTICE, Information Coronavirus COVID-19 – Le fonctionnement de votre tribunal, 8 April 2020, https://www.justice.fr/info-coronavirus (23.08.2020).

49 COURT OF JUSTICE OF THE EUROPEAN UNION, Covid-19 – Informations, 15 July 2020, https://curia.europa.eu/jcms/jcms/p1_3012067/fr/ (23.08.2020).

50 COURT OF JUSTICE, Important messages for parties, 5 May 2020, https://curia.europa.eu/jcms/jcms/P_97552/en/ (25.08.2020); COURT OF JUSTICE, Covid-19 – Information - Parties before the Court of Justice, 15 July 2020, https://curia.europa.eu/jcms/jcms/p1_3012064/en/ (25.08.2020).

51 COURT OF JUSTICE, The Court of Justice of the European Union adapts in order to guarantee the continuity of the European public administration of justice, 3 April 2020, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200046en.pdf (25.08.2020).

to avoid any delays.[52] In order to guarantee the principle of publicity, all hearings are broadcasted on the website of the European Court of Human Rights the day after.[53] Three virtual hearings have been held since the beginning of the health crisis until the start of July 2020.[54]

Even before the health crisis, Swiss law already provided for the testimony of parties and/or witnesses by video-conference. This is the case for federal administrative proceedings conducted under the Federal Administrative Procedure Act dated 20 December 1968 (hereinafter: "PA").[55] The Swiss Criminal Procedure Code dated 5 October 2007 (hereinafter: "CrimPC") also allows the use of video-conferencing for witnesses' testimonies in criminal proceedings.[56] However, the CrimPC does not provide that the entirety of the proceedings (e.g. oral submissions) may be conducted by video-conference.[57]

In addition to the suspension of the deadlines to appeal before Swiss courts,[58] the COVID-19 outbreak led the Swiss Federal

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52 ECtHR, Extension of exceptional measures at the European Court of Human Rights, 9 April 2020, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/EN_PDS_20200316_ECHR-is-taking-exceptional-measures.pdf (25.08.2020).

53 ECtHR, La Cour européenne des droits de l'homme prend des mesures exceptionnelles, 16 March 2020, https://hudoc.echr.coe.int/fre-press#{"itemid":["003-6666763-8866144"]} (25.08.2020).

54 ECtHR, https://www.echr.coe.int/Pages/home.aspx?p=hearings&c (25.08.2020).

55 RS 172.021. However, several scholars opine that the testimony of witnesses cannot be conducted by video-conference. See Ordonnance du 16 avril 2020 instaurant des mesures en lien avec le coronavirus dans le domaine de la justice et du droit procédural (Ordonnance COVID-19 justice et droit procédural), Commentaire des dispositions dated 16 April 2020 (hereinafter: "Ordinance COVID-19 – Commentary"), p. 3, in French: www.ejpd.admin.ch/erlaeuterungen-covid19-justiz-f.pdf; in German: file:///C:/Users/frt/Downloads/erlaeuterungen-covid19-justiz-d.pdf (31.07.2020).

56 Article 144 CrimPC, RS 312.0.

57 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 3.

58 See Article 1 para 1 of the *Ordonnance sur la suspension des délais dans les procédures civiles et administratives pour assurer le maintien de la justice en lien avec le coronavirus (COVID-19)* (Ordinance on the Suspension of Time Limits in

Council (*Conseil fédéral*; hereinafter: "SFC") to enact a special Ordinance dated 16 April 2020 introducing measures relating to coronavirus in the field of justice and procedural law (hereinafter: the "Ordinance COVID-19")[59] which only applies in civil matters.[60]

The Ordinance COVID-19 provides that the virtual hearings can be held by videoconference or teleconference until 30 September 2020 in cases where the health recommendations of the Federal Office of Public Health (hereinafter: "FOPH") cannot be complied with.

However, specific requirements must be met:[61]

(i) The use of videoconference for the conduct of hearings must remain the **exception**.[62] Indeed, it is necessary that **all parties consent to it**. The parties do not need to give any ground for their refusal to accept a virtual hearing. However, in view of the duty of good faith (Article 52 of the Swiss Civil Procedure Code [CPC])[63] and the duty to cooperate (Article 164 CPC), it is nonetheless advisable for the parties to briefly explain the reasons for their refusal and/or to suggest alternative options (such as the limitation of the

Civil and Administrative Proceedings for the Maintenance of Justice in Relation to Coronavirus (COVID-19)), dated 20 March 2020, RS 173.110.4. By virtue of said ordinance, the SFC extended the suspension of civil time limits until 19 April 2020. This included the 30-day deadline to file setting aside applications against arbitral awards before the Swiss Federal Tribunal (*Tribunal fédéral*; hereinafter: "SFT").

59 RS 272.81.

60 The SFC renounced to issue specific rules for criminal proceedings because of delicate issues arising from the need to have public deliberations, the difficulty to ensure the "immediacy" in evidence gathering ("*l'immédiateté des débats dans l'administration des preuves*"), the risks that the presumption of innocence may be affected in case of non-authorised access to the audio recordings and several practical difficulties, such as the sequestration/protection of witnesses. See SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 3.

61 SFC, Ordinance COVID-19, Article 2(1).

62 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 5.

63 RS 272.

virtual hearings to specific procedural steps, technical arrangements, etc.).[64]

(ii) In the absence of consent, a virtual hearing would be possible only if there are **justified grounds** ("*justes motifs*") for doing so, e.g. in case of emergency.

By contrast, the testimony of witnesses and experts may be conducted by videoconference,[65] even in the absence of the parties' consent.[66]

For data protection purposes,[67] Swiss law further requires the use of an end-to-end encrypted platform as well as the presence of the server in the European Union or Switzerland for virtual hearings conducted by Swiss state courts.[68] However, the vast majority of virtual platforms (such as Skype, Zoom, Whatsapp, …) do not seem to fulfil such requirements.[69]

In a very recent decision, the Swiss Federal Tribunal held that (currently) the CPC does not empower state courts to impose virtual hearings (saved in case of justified grounds; see below) even during the pandemic.[70]

It must be noted that some of the (provisional) mechanisms included in the Ordinance COVID-19 have been implemented in the ongoing revision of the CPC. In particular, the rule according to which the testimony of witnesses and experts

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64 Bastons Bulleti, Crise du Covid-19 et évolution des audiences en procédure civile, in: « Justice – Justiz – Giustizia » 2020/2, Weblaw 2020, p. 7 para 17.

65 SFC, Ordinance COVID-19, Article 2(2).

66 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 5.

67 See Becker/Chuffart-Finsterwald/Hari/Giroud/Güney King/Sohrabi, Procédures par vidéoconférence et justice digitale: l'exemple genevois, in: Revue de l'avocat, 09/20, pp. 357 et seq.

68 SFC, Ordinance COVID-19, Article 4 lit. c and the Ordinance COVID-19 – Commentary, *supra* note 55, p. 6.

69 Bastons Bulleti, *supra* note 64, p. 9 note 44.

70 See SFSCD 4A_180/2020 dated 6 July 2020, para 3. See also SFSCD, press release, 7 August 2020, https://www.bger.ch/files/live/sites/bger/files/pdf/fr/4A_180_2020_2020_08_07_T_f_14_19_58.pdf (19.08.2020).

may be conducted by videoconference, even in the absence of the parties' consent (Article 170a of the revised CPC).[71] Moreover, the ongoing "Projet Justitia 4.0" is also aimed at furthering the digitalisation in the field of justice in Switzerland.

It seems that the Swiss courts are rather reluctant to conduct virtual hearings. For instance, in Geneva, there have been many difficulties in setting up the required technological equipment and adopt the necessary user protocols allowing virtual hearings. Above all, it is necessary to have the authorization of the judge. Once his/her consent has been obtained, the lawyers and their party must in turn decide whether or not they want a virtual hearing. Only a few hearings have been able to be held remotely.

In view of the foregoing, while remote testimonies can be carried out before state courts, (Swiss) courts are rather reluctant to conduct virtual hearings. As a result, the state justice system has taken a considerable backlog which will take several months before it is completely absorbed.

C. Right to an In-Person Hearing?

It stems from the above that, in certain jurisdictions (in particular Switzerland), virtual hearings can take place provided that all parties involved consent to it.

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[71] See the SFC's "Message" and the draft bill dated 26 February 2020 on the amendment of the CPC, FF 2020 2607 et seq., pp. 2628, 2658, https://www.admin.ch/opc/fr/federal-gazette/2020/2607.pdf (21.08.2020). Pursuant to the new Article 170a of the CPC, the parties may also be heard by videoconference. With respect to the digitilisation in the field of justice in Switzerland (the so-called "Projet Justitia 4.0"): see https://www.justitia40.ch/fr/ (21.08.2020).

According to certain authors, in international arbitration, the right to an oral hearing is a fundamental principle.[72]

By contrast, the Swiss Federal Tribunal ruled that the parties do not have a right to an oral hearing under Swiss arbitration law.[73] If a right to be heard orally is not guaranteed, *a fortiori* a right to an in-person hearing is even less guaranteed.

In any event, it is undisputed that the parties may waive the right to an oral hearing. Accordingly, several institutions have set up a system for resolving disputes solely on the basis of written documents.[74]

One must therefore examine what situation prevails in arbitration and, in particular, whether there is a right for an in-person hearing (i.e. when the parties have not agreed to resolve the dispute solely based on written documents).

The answer is negative: save where the parties have agreed otherwise and/or a contrary provision in the applicable arbitration rules and/or in the *lex arbitri*, there is **no right for an in-person hearing in international arbitration**.

Accordingly, although the arbitral tribunal will generally consult the parties, there is no rule requiring that the parties must consent to virtual hearings. As a matter of principle, the arbitral tribunal has a broad procedural authority with respect to the conduct of the arbitral proceedings (see e.g. Article 22 para 2 of the ICC Rules; Article 15 of the Swiss Rules).[75]

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[72] Scherer, p. 4; Born, p. 2264, referring inter alia to Article 17 para 3 of the 2010 UNCITRAL Rules.

[73] SFSCD 117 II 346, para 1 (b) (aa); 4A_199/2014 of 8 October 2014, para 6.2.3; 4A_404/2010 of 19 April 2011, para 5 and the references; 4A_220/2007 of 21 September 2007, para 8.1; Kaufmann-Kohler/Rigozzi, p. 281 para 6.31.

[74] Article 15 Swiss Rules; Article 25 para 6 ICC Rules.

[75] See also ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 paras 21-22: "*If the parties agree, or the tribunal determines, to proceed with a virtual hearing, …*"; "*If a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection,…*" (emphasis added).

The arbitral tribunal has the duty inter alia to ensure that the proceedings are conducted in an "expeditious and cost-effective manner" (Article 22 para 1 of the ICC Rules). Accordingly, it may "impose" virtual hearings to the parties to ensure that the proceedings are conducted swiftly, typically in case of exceptional circumstances such as the COVID-19 pandemic and where is it is impossible to meet in person.[76]

The English version of Article 25 para 2 ICC Rules may be confusing in this respect as it expressly requires the arbitral tribunal to hear the parties together "*in person*" after the exchange of written submission. However, this does not mean that there is an obligation for the arbitral tribunal to hear the parties in a physical hearing. As explained in the ICC COVID-19 Guidance Note, the term "*in person*" should be interpreted broadly to mean that a live oral exchange between the different parties is sufficient.[77] Whether in person or virtual is therefore irrelevant. As stated in the French version of the ICC Rules, what matters is that the hearing is held "*contradictoirement*".[78] Such requirement may also be satisfied through virtual hearings.

Finally, before deciding to impose a virtual hearing, the arbitral tribunal will also have the duty to make sure that the arbitral award will be enforceable (see Article 42 of the ICC Rules).[79]

Arbitral tribunals may conduct (or even impose) virtual hearings, provided that such hearing ensures equal treatment of the parties and their right to be heard (see Articles 182 para 3 of the Swiss Private International Act ("PILA"); 373 para 4 CPC; see also Article 15 para 1 of the Swiss Rules).

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[76] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 paras 21-22.
[77] *Id.*, p. 5 para 23.
[78] *Id.*, p. 5 para 24.
[79] *Id.*, p. 4 para 22.

Notwithstanding the above, the general expectation is that there will be an in-person hearing.[80] Accordingly, virtual hearings must meet the same requirements as an in-person hearing. In particular, the parties must be able to present their case, i.e. they must have the opportunity to submit their arguments orally during the hearing.

Virtual hearings are not without risks, in particular with respect to witness testimonies/cross-examination.[81] Technological problems may be encountered and, in order to preserve the parties' right (and the enforcement of the award),[82] specific protocols must be put in place.

D. The Emergence of Virtual Hearings' Protocols

In order to ensure the swift conduct of virtual hearings, it is crucial that the arbitral tribunal put in place user protocols and guides ahead of the hearing.

During the pandemic, the world of arbitration has seen quickly the emergence of soft laws on the conduct of virtual hearings. Indeed, several arbitral institutions published protocols and guides on the conduct of virtual hearings to assist the arbitration community during the COVID-19 pandemic.

As an example, the ICC published the ICC COVID-19 Guidance Note. First and foremost, it aims to reduce delays caused by COVID-19 through improved efficiency of parties, counsels and tribunals. Secondly, it is a guide for the practical organization of virtual hearings to avoid problems as much as possible.[83]

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[80] Born, p. 2264.
[81] Scherer, p. 4.
[82] See *infra* Section III.
[83] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 1 para 2.

The Australian Centre for International Commercial Arbitration (hereinafter: "ACICA") also issued the Online Arbitration Guidance Note.[84] It is a "*form of a checklist of relevant considerations for parties to take into account in preparing for an online arbitration*".[85] It is of course not binding. Its purpose is to facilitate the conduct of the hearing and avoid problems during the hearing.

The HKIAC has done the same with the HKIAC Guidelines for Virtual Hearings.[86]

The ICSID has also issued a brief guide to online hearing at ICSID.[87]

The Chartered Institute of Arbitrators also issued a dedicated note on virtual hearing during the COVID-19 pandemic, i.e. the so-called "Guidance Note on Remote Dispute Resolution Proceedings".[88] In preparation of the hearing, the practitioners will also find it useful to resort to the "Delos checklist on holding arbitration and mediation hearings in times of COVID-19".[89]

It is also advisable to agree upon a specific protocol with the parties ahead of the hearing setting out key issues for the success of the virtual hearings, such as the technical requirements to ensure the smooth proceedings without

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[84] ACICA, Online Arbitration Guidance Note, (undated), https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf (31.07.2020).

[85] *Id.*, p. 1.

[86] HKIAC, *supra* note 32, p. 1.

[87] ICSID, A Brief Guide to Online Hearings at ICSID, 24 March 2020, https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid (25.08.2020).

[88] CIARB, Guidance Note on Remote Dispute Resolution Proceedings, (undated), https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf (25.08.2020).

[89] DELOS, Delos checklist on holding arbitration and mediation hearings in times of COVID-19, 20 March 2020, https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/ (25.08.2020).

disruption and distraction, the choice of video conferencing platform and any security concerns, the appropriate behaviour rules (including the necessity for the parties/counsel to put their microphone on mute when there are not talking!), the method of document sharing, the examination process (including sequestration of witnesses) and fall-back plans in case of any disruption of the hearing.[90]

For instance, the CAS frequently ask the parties to agree to a specific protocol setting out these key issues prior to the hearing.

E. Filing and Virtual Hearings: Pros and Cons

E-filing and virtual hearings are cost and time effective and even necessary in these times of pandemic. There is no doubt that e-filing and virtual hearings will be used more frequently in arbitration (and in court proceedings?), even after the COVID-19 pandemic, for the simple reason that the users will very soon realise that they can save significant amount of money and time.[91]

However, one must also bear in mind that virtual hearings are not universal panacea. In particular, they may not be necessarily suitable for all kinds of disputes.

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[90] See von Wunschheim/Roney, webinar jointly organised by the ASA and the SCAI entitled "Virtual Hearings in International Arbitration: Key Challenges and Emerging Best Practices", 18 June 2020, https://www.youtube.com/watch?v=7NCK_nxZklE (25.08.2020).

[91] See the statement made by the CAS's Director General, Mr Matthieu Reeb, on 20 August 2020: *"The CAS users will probably realize that they can save significant money with the use of electronic filing and with hearings by video-conference"*, in: Football Legal, https://www.football-legal.com/content/matthieu-reeb-the-cas-users-will-probably-realize-that-they-can-save-significant-money-with-the-use-of-electronic-filing-and-with-hearings-by-video-conference (25.08.2020).

1. Advantages

The first advantage of using e-filing and virtual hearings is reduced costs, speed of the procedure and positive ecological impact.[92] Of course, it will be necessary to invest in an efficient technological system for both secured e-filing and virtual hearings. However, this additional cost will be offset by reductions in the parties' travel and accommodation costs and the rental of premises for the hearing.[93]

Arbitration is meant to be fast and flexible, but an in-person hearing can be very long. Witnesses or experts may not be available or able to travel to another country on the day of the hearing for several weeks or months. The in-person hearing may be scheduled months later. A virtual hearing can avoid all these delays. It is more flexible because each party, lawyers and arbitrator do not have to travel to a common location. The waiting time is thus considerably reduced.[94]

There is no doubt that e-filing and virtual hearing have a positive ecological impact. Avoiding flying and printing thousands of pages reduces our (i.e. arbitration's) carbon footprint

Another important advantage of virtual hearings is the need for discipline (which nonetheless also applies in in-person hearing!). In case of virtual hearings, lawyers must respect their colleagues' speaking time without interrupting them incessantly. The use of the mute-unmute function allows for some discipline in the hearing "room". In addition, to keep the attention of all parties during a virtual hearing, it is necessary for counsel to be clear, concise and to get straight to the point.

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92 WILSKE, p. 29.
93 SCHERER, p. 11.
94 *Id.*

They need to focus on what is important, and therefore this may improve the efficiency of the hearing.[95]

Finally, the possibility of reviewing the video of a witness statement is a considerable advantage for the arbitrators before making their decision.[96]

2. Drawback

Nevertheless, virtual hearings have some downsides, some of which can be avoided and some of which cannot.

The first disadvantage is the platform used for the hearing. Indeed, the fact that the procedure is entirely on the net makes it much more likely that confidentiality and data protection problems may arise. During an in-person hearing, the confidentiality of the dispute is respected because everything is said orally without a microphone or camera. However, during a virtual hearing, everything that is said or shown passes through the web platform with the risk of hacking and/or hijacking.[97]

Moreover, since the data is stored by the platform owner, several questions arise. Where is this data stored? What is the holder going to do with it? When choosing the platform, one must be aware of this risk, i.e. the problem of secured data and confidentiality, potential sales of the data, etc.[98]

Virtual hearings are also exposed to the risks of cybercriminality, such as the unauthorized access by third parties ("Zoombombing") that can interfere with the

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[95] See e.g. LawInSport, *"The Impact of COVID-19 on procedures in Sport Disputes Resolution"* – First Report 12 June 2020 (hereinafter: LawInSport's First Report), para 13, https://www.lawinsport.com/topics/covid19-impact/item/the-impact-of-covid-19-on-procedures-in-sport-disputes-resolution-first-report-12-june-2020 (25.08.2020).

[96] Scherer, p. 9.

[97] Lo, p. 90.

[98] Scherer, p. 12; De Vito Bieri/Renninger, para 42.

hearing.[99] Passwords may be hacked and unrelated third parties may enter into the e-room and take part in the discussions and thus disrupt the smooth running of the hearing, something that is very rare in an in-person hearing.

As an example, the Zoom platform (used for example by the International Centre for Dispute Resolution division of the American Arbitration Association (hereinafter: "AAA-ICDR"))[100] has been criticized throughout the pandemic for its confidentiality problems.[101] Indeed, Zoom was accused of having sent its users' data to Facebook without their consent. Zoom also lacks end-to-end encryption, a mechanism that ensures the confidentiality of its users' data.[102] It should be noted that all these allegations quickly led the platform's managers to take action. As of 1st April 2020, Zoom has put in place a 90-days plan to address all these issues. Following these 90-days, Zoom assures in a report that *Zoombombing* was placed under control and that encryption was strengthened. Nevertheless, there are still several points that need to be improved, such as the publication of a transparency report by the platform.[103]

Moreover, as the data (notably Zoom data) is stored in the United States or Europe,[104] this could have an impact on the willingness to proceed with a virtual hearing if one of the parties refuses to allow their data, which may be sensitive, to be handed over to a specific country. In this respect, it is interesting to note that the Commercial Court of Zurich

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[99] WILSKE, p. 15; WAKEFIELD. See also DE VITO BIERI/RENNINGER, paras 42 et seq.

[100] AAA-ICDR, AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM, (undated), https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf (31.07.2020).

[101] SCHERER, p. 12; WILSKE, p. 15.

[102] WAKEFIELD.

[103] YUAN.

[104] ZOOM, Zoom Privacy Statement, last updated: July 2020, https://zoom.us/privacy (25.08.2020).

(*Zürcher Handelsgericht*) entered into a special agreement with Zoom for data protection[105] (the so-called Global Data Processing Addendum with Zoom).[106] An example that may be followed by arbitration institutions.

Nevertheless, Zoom does not have a monopoly on video conferencing platforms. Microsoft Teams or Maxwell Chambers ADRE Hearing Solutions have been used by SIAC.[107] As for the CAS, it uses the Cisco-Webex platform.[108] The privacy of video-conferencing appears to be better safeguarded with these platforms.

In any event, arbitral tribunals generally seek the parties' approval with respect to the choice of the specific platform to be used and may warn them of the specific risks that it entails, in particular with respect to the confidentiality of the proceedings. Annex II to the ICC COVID-19 Guidance Note contains suggested clauses for cyber-protocols and procedural orders dealing with the organisation of virtual hearings.[109]

A more pragmatic solution would be to create/install dedicated platforms for hearings to enhance the security of the video recordings and ensure proper and secured data storage. This is the case, for example, with ACICA, which offers a virtual room rental service.[110]

A second negative point is that virtual hearings entail specific challenges in respect of the so-called immediacy in the gathering of evidence ("*l'immédiateté dans l'administration*

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[105] De Vito Bieri/Renninger, para 48 and the references.
[106] Zoom, Zoom Video Communications, Inc. Global Data Processing Addendum, https://zoom.us/docs/doc/Zoom_GLOBAL_DPA.pdf (22.09.2020).
[107] Chawla, International Arbitration During COVID-19: A Case Counsel's Perspective.
[108] LawInSport, LawInSport's First Report, *supra* note 95, para 57.
[109] ICC, Annex II to the ICC COVID-19 Guidance Note, *supra* note 25.
[110] ACICA, Important Information for ACICA Users – COVID-19 Update, (undated), https://acica.org.au/important-information-for-acica-users/ (31.07.2020).

des preuves").[111] In particular, the effectiveness of the cross-examination may be compromised in certain instances.

Firstly, it is difficult to interrogate a witness/expert in case of a technical problem, i.e. video or sound constantly interrupted because of a bad internet connection, bad equipment, etc.[112] It is absolutely imperative that each party is furnished with adequate equipment and a flawless (wifi) connection. If problems occur, the losing party may challenge the award on the ground(s) of a violation of its right to be heard and/or for the breach of the right of equal treatment in the (rather exceptional) circumstances that will be detailed below.[113]

Secondly, an arbitration procedure, especially in international disputes, between several parties from different states requires translators/interpreters. Many witnesses or experts are not fluent in English and prefer to express themselves in their mother tongue, hence the need for translators. However, simultaneous translation may be difficult to implement in virtual hearings. Consecutive translation may be used but it may also entail a considerable waste of time during the cross-examination as the message is said twice in a row.[114]

Thirdly, a virtual audience allows everyone to be alone in a quiet place. A witness could then be helped and influenced by a person, which could put at risk the evidentiary value of the testimony and the integrity of the proceedings (and, possibly, the enforceability of the award).[115]

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[111] It must be noted however that, as a matter of Swiss law, the principle of "immediacy and oral proceedings" ("*principe de l'immédiaté et de l'oralité*") rather applies in criminal proceedings. See e.g. SFSCD 6B_24/2015 of 2 December 2015, para 2; 6B_845/2014 of 16 March 2015, para 2.1; 1B_302/2011 of 26 July 2011, para 2.2.1 and the references.

[112] LO, p. 90; WILSKE, p. 15.

[113] See *infra* Section III.

[114] LO, p. 90.

[115] See *infra* Section III.

Moreover, the client will be most likely alone in a room without his/her lawyer. The client may therefore stand on his/her own in front of the court, while the presence of his/her lawyer may be reassuring, for instance during the cross-examination of said client. A virtual hearing may therefore not be appropriate in such circumstances.

Fourthly, during a virtual cross-examination, the body language is much less perceptible than in reality. Voice intonation and stress are more difficult to detect. The gestures can be more easily hidden, as the screen allows only the upper body to be seen. The "human touch" is missing. The arbitral tribunal and the parties must be able to "feel the witness" in order to fully grasp his/her credibility.[116]

In view of the above, virtual hearings may not be appropriate in all instances to hear witnesses/experts. In the near future, the technology may however considerably improve image and sound quality, i.e. to create a complete immersive video-conferencing system incorporating virtual reality (VR), such as holoportation.[117]

III. Risks for the Enforcement of the Award?

One of the main reasons for the recourse to arbitration is that the award will be recognised and enforced (nearly) worldwide through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (hereinafter: "NY Convention").[118]

[116] Wilske, p. 14; De Vito Bieri/Renninger, para 42.
[117] See https://spatial.io/ (04.10.2020).
[118] RS 0.277.12.

Another reason for choosing arbitration is speed and flexibility in the conduct of the proceedings.[119]

However, the arbitral tribunal must, at the same time, ensure that the right to be heard of the parties is fully respected (see Articles 182 para 3 PILA; 373 para 4 CPC).

There will be inevitably a tension between the principle of celerity and these fundamental guarantees. During the pandemic, virtual hearings has made it possible to avoid a postponement of several hearings to an undetermined date in view of the uncertain situation.[120] The principle of celerity is then guaranteed as well as the right to be heard, which would not be the case if the hearing is postponed indefinitely, as the parties do not have the opportunity to present and defend their case.

One must nevertheless examine whether the fact that the arbitral tribunal decided to have (or even imposed) a virtual hearing may put at risk the arbitral award.

Indeed, the losing party may seek to challenge the award and/or to oppose the enforcement of the award on the ground that it was not able to defend its case properly, i.e. it may invoke a violation of its right to be heard (see Articles 190 para 2 lit. d PILA; 393 lit. d CPC).[121]

As stated above, the arbitral tribunal should therefore carefully assess the situation before ordering a virtual hearing in order to ensure that the award to be rendered will be enforceable (see Article 42 of the ICC Rules).[122]

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[119] KAUFMANN-KOHLER/RIGOZZI, p. 14 paras 1.43-1.44.

[120] SCHERER, p. 15.

[121] See also Article V para 1 lit. b NY Convention, which provides that the award shall not be recognised if "*[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*".

[122] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 para 22.

Two main grounds may be raised by the losing party against an award in case the arbitral tribunal ordered a virtual hearing: *(i)* the violation of the right to be heard and *(ii)* the violation of the principle of equal treatment.[123]

A. Violation of the Right to Be Heard

The right to be heard includes the right to present one's case. It includes the right "to make fact allegations and legal submissions, to submit the necessary evidence, to attend the hearing, and to be represented or assisted in front of the court".[124]

The violation of the right to be heard in case of a virtual hearing can take several forms.

First, a party may argue that its right to be heard was breached on the ground that it was entitled to an in-person hearing.[125] However, as mentioned above, while the parties have the right to be heard, this does not require that the hearing be conducted in person (at least under Swiss arbitration law).[126] It is therefore unlikely that an award may be set aside on this ground.

Secondly, the losing party may claim that it could not properly present its case through the witnesses and experts it brought on the ground that they would have been more persuasive/effective at an in-person hearing.[127] Their testimonies/findings could have been better heard in person than virtually, as the arbitrators could better observe them and analyse their behaviour. This line of argument may be

[123] Scherer, pp. 13 et seq; Shope, p. 77.
[124] SFSCD 133 III 139, para 6.1; Kaufmann-Kohler/Rigozzi, p. 481 para 8.174.
[125] Scherer, p. 14.
[126] See *supra* Section II.C.
[127] Scherer, p. 14.

valid but it may be difficult to set aside the award based on this objection.

Indeed, despite the formal nature of the right to be heard, the Swiss Federal Tribunal held that the applicant must not only establish that its right to be heard was violated in connection with an important issue of the case, but also show that such violation was likely to have an adverse impact on the outcome of the case.[128] Evidencing such causal nexus[129] between the violation of the right to be heard and the (hypothetical) outcome of the case is very difficult to prove: how can the applicant establish that the outcome of the testimonies/expert evidence (and/or the assessment of such evidence) would have been different in case of an in-person hearing? This may be tantamount to a probatio diabolica – which will be difficult (if not impossible) to satisfy before the Swiss Federal Tribunal.

Thirdly, the losing party may argue that there were technical/computer problems such as a bad connection, video or audio that constantly cut off. It is true that in these circumstances, a party's right to be heard may be violated if the court does not stop the hearing.[130] Nevertheless, such a problem can be avoided by means of protocols or guides explaining the procedure to be followed in the event of technical problems. The CAS, for example, sends a "Cisco Webex Protocol" to the parties before the hearing to inform them about the use of the platform.[131] Finally, if anything was unclear during the hearing, the arbitral tribunal may consider alternative means to grant the parties the opportunity to clarify this point, for instance by ordering the filing of post-hearing briefs.

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[128] See e.g. SFSCD 4A_424/2018 of 29 January 2019, para 5; 4A_247/2017 of 18 April 2018, para 5.1.3.
[129] See in state courts' proceedings: BASTONS BULLETI, *supra* note 64, p. 67 para 35.
[130] LO, p. 93.
[131] LAWINSPORT, LawInSport's First Report, *supra* note 95, para 57.

In any event, the party invoking a violation of its right to be heard must have duly objected to the conduct of the virtual hearing during the arbitral proceedings. Otherwise, it will be deemed to have forfeited its right to complain about the violation of its right to be heard.[132] In particular, in the event of a connection problem, the lawyers must object immediately. If they do not do so, they cannot later challenge the decision on the grounds of a violation of the right to be heard.[133]

B. Violation of the Right to Be Treated Equally

A violation of the right to be treated equally may be invoked to challenge the award (see Articles 190 para 2 lit. d PILA; 393 lit. d CPC)[134] and/or oppose the enforcement of the award. Indeed, while not being expressly incorporated in the NY Convention, this guarantee is an integral part of Article V para 1 lit. b.[135]

For instance, the violation of this principle could be invoked in cases where a witness was helped/manipulated by a party during the virtual hearing. The testimony would be distorted and therefore one party would find itself at an advantage over the other.[136]

In any case, as stated above, for an award rendered to be neither recognised nor enforced, the violation of the due process rights must have changed the outcome of the

[132] See e.g. SFSCD 4A_40/2018 of 26 September 2018, para 3.3; 4A_247/2017 of 18 April 2018, para 5.1.2; 119 II 386, 388 para 1a.
[133] See also in state courts' proceedings: Bastons Bulleti, *supra* note 64, pp. 13-14 para 34, referring to the "*respect préalable du devoir de réaction immédiate*".
[134] SFSCD 133 III 139, para 6.1.
[135] Scherer, NY Convention Commentary, p. 310 para 170.
[136] Scherer, p. 16.

award.[137] This requires a **serious** "*denial of a reasonable opportunity to present arguments or evidence*" (and of the corresponding right to be treated equally).[138]

In view of the above, it will be difficult to set aside an award (respectively to oppose the enforcement thereof) based on the above-mentioned grounds. In particular, the applicant must satisfy the "*but for*" test, i.e. it must show that, in case of an in-person hearing, the arbitrators would have radically changed their assessment of the case and/or of the evidence brought by the parties. The threshold is obviously high.

IV. Validity of Virtual Hearings in Forced (Sports) Arbitration (*Excursus*)

What about the possibility to impose virtual hearings in a **forced arbitration**?

One must examine whether the situation is similar to traditional (voluntary) arbitration (discussed above). Indeed, since arbitration is of a conventional nature, the parties voluntarily agree to waive their right to be heard by a state court within the meaning of Article 30 para 1 of the Swiss Federal Constitution (hereinafter: "Fed. Cst.")[139] and Article 6 § 1 of the European Convention on Human Rights (hereinafter: "ECHR").[140] Moreover, the right to have a public hearing does not apply in traditional arbitration (being noted that said arbitrations may also be confidential).[141] In accordance with the principle of the parties' autonomy, the parties are free to organise the arbitral proceedings as they

[137] See SCHERER, NY Convention Commentary, p. 298 para 142; BORN, pp. 3535 et seq.
[138] BORN, p. 2158.
[139] RS 101.
[140] RIGOZZI/ROBERT-TISSOT, p. 63.
[141] DE VITO BIERI/RENNINGER, para 20.

deem fit (Articles 182 para 1 PILA; 373 para 1 CPC), including providing for virtual arbitration.

The situation may however by different in the field of sports arbitration. Indeed, as stated by the Swiss Federal Tribunal in the landmark *Cañas* case,[142] the athletes have no other choice than to submit to the procedure before the CAS based on the arbitration clauses contained in the regulations of sports federations.[143] Accordingly, CAS arbitration (more specifically, CAS appeal proceedings under Articles R47 et seq. of the Code of Sports-related Arbitration (hereinafter: "CAS Code")) is mandatory for athletes, i.e. there is no voluntary waiver of the guarantees set out in Article 30 para 1 of the Fed. Cst and in Article 6 § 1 ECHR.[144]

According to the Swiss Federal Tribunal, forced arbitration before arbitral tribunals is nonetheless valid provided that the arbitral tribunal concerned is independent and impartial. The CAS is deemed to be as independent and impartial as a state court. Secondly, a procedure before the CAS will be faster than proceedings before state courts.[145] Accordingly, athletes renounce to state justice in exchange of a similar procedure before an arbitral tribunal, i.e. there is a valid *quid pro quo*.[146] Therefore, the arbitration clauses in favour of CAS contained in the regulations of sports federations are valid and enforceable.

In the *Mutu & Pechstein* case, the ECtHR confirmed that the fundamental guarantees enshrined in Article 6 § 1 ECHR fully apply in arbitral proceedings before the CAS, unless the parties have waived **freely, lawfully and in an unequivocal**

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[142] SFSCD 133 III 235.
[143] SFSCD 133 III 235, para 4.3.2.2.
[144] See also the very recent decision issued in the seminal *Caster Semenya* case: SFSCD 4A_248/2019 & 4A_398/2019 of 25 August 2020, para 5.
[145] SFSCD 133 III 235, para 4.3.2.3.
[146] Rigozzi/Robert-Tissot, pp. 66 et seq.; Kaufmann-Kohler/Rigozzi, p. 120 para 3.96; Beffa/Robert-Tissot, p. 234.

manner their rights to the guarantees provided for by Article 6 § 1 ECHR.[147] Accordingly, in case where there is no voluntary arbitration *per se* (such as in the case at hand), the guarantees set out in Article 6 § 1 ECHR **directly** ("*pleinement*")[148] apply to the proceedings.

This principle was recently confirmed by the ECtHR in another (sports) case:[149] *"… a distinction must be drawn between voluntary arbitration and compulsory arbitration. If arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 § 1 of the Convention…"*.

As stated above, although the parties have a right to be heard, the right to be heard orally is not part of it under Swiss arbitration law.[150] However, one must examine whether the situation is different in sports (forced) arbitration by virtue of Article 6 § 1 ECHR.

In several decisions, the ECtHR has recognized a **right to an oral hearing** before single instances or trial courts, except in exceptional circumstances.[151] An oral hearing is also required

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147 ECTHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, para 95.

148 HIRSCH, Commentaire de l'arrêt Mutu et Pechstein, L'arbitrage sportif encadré par la Cour européenne des droits de l'homme, in: Jusletter of 11 March 2019, p. 4 para 15, p. 6 para 26 and the note 24.

149 ECTHR, *Ali Riza et al v Turkey*, applications nos. 30226/10 and 4 others, 28 January 2020, para 174.

150 SFSCD 117 II 346, para 1 (b) (aa); 4A_199/2014 of 8 October 2014, para 6.2.3; 4A_404/2010 of 19 April 2011, para 5 and the references; KAUFMANN-KOHLER/RIGOZZI, p. 281 para 6.31.

151 ECTHR, *Selmani and others v. the former Yugoslav Republic of Macedonia*, application No. 67259/14, judgement of 9 February 2017, para 37; ECtHR, *Göç v. Turkey*, application No. 36590/97, judgement of 11 July 2002, para 47. See also SFC, Ordinance COVID-19 – Commentary, *supra* note 55, pp. 6-7: *"Le droit à une audience orale publique au sens de l'art. 6, ch. 1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH) doit être garanti dans tous les cas…"*. In free translation: *"The right to a public oral hearing*

in **disciplinary proceedings** because of the importance of the sanctions taken against a party (financial penalties, end of professional career, etc.).[152]

In the *Mutu & Pechstein* case, the ECtHR further held that the athlete is entitled to request a **public hearing** in disciplinary proceedings before CAS under Article 6 § 1 ECHR (a waiver of this principle by one of the parties being perfectly possible).[153]

Accordingly, one must distinguish to distinct issues:

(i) Is there is a right to an in-person hearing before CAS under Article 6 § 1 ECHR? Can the CAS impose virtual hearings upon the athletes?

(ii) Does a virtual hearing before CAS fulfil the requirements of a public hearing?

In our opinion, provided that the above-mentioned due process requirements are fulfilled (i.e. right to be heard and equal treatment of the parties), there is **no reason to conclude that virtual hearings do not enable a party to present its case under Article 6 § 1 ECHR.**

Nor is there any reason to conclude that the CAS (similarly to arbitral tribunals in voluntary arbitration) is not empowered to impose virtual hearings without the parties' consent.

As stated above, the duty to conduct an oral hearing does not entail that said hearing must necessarily take place in person. What matters is that the hearing is held "*contradictoirement*"[154] which is also the case for virtual hearings.

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pursuant to Article 6, para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms must be guaranteed in all instances".

[152] ECtHR, *Ramos Nunes de Carvalho E Sà v. Portugal*, applications nos. 55391/13, 57728/13, 74041/13, judgement of 6 November 2018, para 208.

[153] ECtHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, paras 175-184.

[154] See *supra* Section II.C.

Moreover, the principles of orality and immediacy only apply *stricto sensu* in criminal proceedings, i.e. they do not directly apply in arbitration, including before CAS.[155]

Therefore, virtual hearings before CAS can be considered as proper/valid oral hearings which fulfil the requirements of Article 6 § 1 ECHR.

This is further confirmed by the ECtHR's case law, according to which Article 6 ECHR does not give a right to be personally present at the hearing but rather an effective right to present one's case.[156]

The ECtHR further addressed the question of the compatibility of a videoconference with the fair trial provided for in Article 6 ECHR mainly in the criminal field. It concluded that videoconferencing is not incompatible with Article 6 §§ 1 & 3 ECHR,[157] provided that the use of videoconferencing "*pursues a legitimate aim and that the manner in which it is conducted is compatible with respect for the rights of the defence, as provided for in Article 6 ECHR*".[158] However, it is necessary that the parties can confer with their counsel in an effective and confidential manner and that no technical problems hinder the smooth running of the hearing.[159]

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[155] Pursuant to the CAS's jurisprudence, the CAS panels are not bound by the procedural rules of the Swiss civil and criminal courts. See e.g. CAS 2009/A/1879 *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*, award of 16 March 2010, paras 99 et seq.; CAS 2011/A/2426 *Adamu*, award dated 24 February 2012, paras 62 et seq.

[156] ECtHR, *Yevdokimov and Others v. Russia,* applications nos 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 14919/12, 19929/12, 57043/12, 67481/12, judgement 16 February 2016, para 22.

[157] ECtHR, *Marcello Viola v. Italy*, application No. 45106/04, judgement of 5 October 2006, para 67; ECtHR, *Sakhnovski v. Russia*, application No. 21272/03, judgement of 2 November 2010, para 98.

[158] ECtHR, *Marcello Viola v. Italy*, application No. 45106/04, judgement of 5 October 2006, para 67.

[159] ECtHR, *Sakhnovski v. Russia*, application No. 21272/03, judgement of 2 November 2010, para 98.

With regard to civil proceedings, the ECtHR stated in *Yevdokimov and Others v. Russia* that the use of video-links is not contrary to Article 6 ECHR as long as the parties can be heard without technical issues.[160]

In *Igranov and Others v. Russia*, the ECtHR even stated that if an in-person hearing cannot be conducted and the courts do not consider the option of a virtual hearing, the parties' right to a fair trial under Article 6 para 1 ECHR is violated.[161]

In view of the above, in both civil and criminal matters, the use of videoconferencing is possible to guarantee the right to a fair trial. The very fact of not considering it in circumstances where in-person hearing is not possible (typically during the COVID-19 pandemic) may even lead to a violation of Article 6 ECHR. Put differently, under this provision, **there might even be a duty for the court to conduct virtual hearings** in order to guarantee the parties' right to a fair trial.

In this respect, one must distinguish the issue of whether the parties are entitled to an in-person hearing (which is not the case) on the one hand, and the issue of whether they have the right to a public hearing as per Article 6 § 1 ECHR on the other hand.

As stated above, the ECtHR held that the athlete is entitled to request a public hearing in disciplinary proceedings before CAS.[162]

In our view, this does not prevent the CAS to conduct virtual hearings. In particular, the parties' right to (request) a public hearing is not breached if the full video recordings are re-

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[160] ECtHR, *Yevdokimov and Others v. Russia,* applications nos 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 14919/12, 19929/12, 57043/12, 67481/12, judgement 16 February 2016, para 43.

[161] ECtHR, *Igranov and Others v. Russia*, applications nos. 42399/13 and 8 others (see appended list), judgement of 20 March 2018, para 35.

[162] ECtHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, paras 175-184.

transmitting through live-streaming or immediately after the hearing (as this is the case before the ECtHR itself).[163]

To sum up, the CAS is perfectly empowered to resort to virtual hearings. In fact, the CAS may even have the duty to conduct virtual hearings in certain cases, in particular to ensure the swift conduct of the proceedings. If requested by the parties, the (virtual) hearing can be broadcasted in order to guarantee the right to a public hearing.

V. Conclusion

COVID-19 had a considerable impact in the world of arbitration.[164]

It certainly demonstrated that arbitration was an extremely flexible means of dispute resolution that could adapt to exceptional circumstances. The various arbitral institutions were able to respond quickly to the new needs of arbitration by allowing, in particular, the use of e-filing and e-hearing. To avoid wasting invaluable time, the arbitral institutions did not hesitate to issue users' guides and protocols to provide maximum assistance to the parties and the tribunals. COVID-19 has created an impetus for cooperation amongst the arbitration community.

The pandemic demonstrated that many of the steps in a procedure could now be carried out through video-conferencing platforms, including virtual hearings. We believe that virtual arbitration will (and should) continue to develop thanks to technological developments.

However, not all cases are suitable for virtual hearings. Cases of low complexity and urgency, and possibly oral submissions, can undoubtedly be conducted online. Nevertheless, for cases

[163] See *supra* Section II.B.
[164] SCHERER/BASSIRI/MOHAMED [to be published].

in which witnesses and/or experts are involved, online hearings can be difficult. It is imperative that the arbitrators be able to analyse the credibility of the persons being heard, which is more difficult when they are not in the same room. It is also crucial to guarantee that the parties' right to be heard is preserved and the counsel can provide the necessary assistance to their clients.

Once the health crisis will be behind us, COVID-19 will leave its print on arbitration. It will have succeeded in accelerating the efficiency of an arbitration procedure (which is meant to be fast and flexible) without changing the fundamental aspects that characterise international arbitration, i.e. a fair, impartial, independent and balanced decision.[165]

But should we go further?

What is the next step?

There will be a time when the arbitration community will have to consider E-justice, i.e. the administration of justice via artificial intelligence.

Indeed, one cannot exclude that judges and arbitrators may sooner or later be replaced by robots, at least for certain types of claims.

Two studies have been done on the ability of artificial intelligence to make judgments similar to those of a human judge. The first was conducted by the United States Supreme Court on more than 7,700 decisions. The result is that 70.9% of the judgments rendered by artificial intelligence are identical to those of the Supreme Court.[166] The second was conducted by the ECtHR: in this study 79% of the judgments rendered by artificial intelligence are comparable to those rendered by the ECtHR's judges.[167] One may expect that this

[165] Wilske, p. 33.
[166] Katz/Bommarito/Blackman, p. 2.
[167] Aletras/Tsarapatsanis/Preotiuc-Pietro/Lampos, p. 2.

percentage will be even higher in the next future with the development of artificial intelligence.

Estonia, for its part, has passed the stage of the study and is in the process of setting up a system in which artificial intelligence will render justice for minor offences whose damage will not exceed 7,000 Euros.[168]

Fiction is beginning to overtake reality.

The robotization of justice is developing faster than one might think and COVID-19 could speed up the process. And robots do not fall sick…

However, with the ever-increasing developments in technology and the digitalisation of the law, are we not heading towards a dehumanisation of justice? This might be the next challenge that will arise with the irruption of technology in the field of justice.

[168] ZORAB, p. 1.

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