APPRAISING REMOTE ARBITRATIONS ARISING FROM THE PANDEMIC: REALITY CHECK AND THOUGHTS ON KEEPING ARBITRATION GOING

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ABSTRACT

The COVID-19 pandemic is a life-changing calamity that has affected many spheres of our lives including the arbitral industry. When seized by the pandemic, we turned to technology for refuge. With the onset of the pandemic, technology for arbitration was propelled to the forefront when its adoption was lethargic previously. Referred to as virtual or remote arbitration, it is a tool that simplifies, through automation, processes that were previously arduous to undertake and, in some instances, impossible. Given the cross-border nature of international arbitration proceedings, the digital setup has been crucial in keeping arbitration going. However, with the pandemic, the international arbitral community seems to have become both willing and unwilling test subjects of technology and product applications on an unprecedented global scale. There are potential issues that have arisen with the growth of digitizing arbitration.

This article will review the current state of affairs relating to the conduct of virtual arbitration since the start of the pandemic by analysing key empirical evidence from leading organisations. It will also examine the topic of due process in arbitration, which has attracted intense discussion in recent times. This discourse hopes to provide some indications as to the road ahead for the international arbitral community.

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1. INTRODUCTION - THE ARBITRATION WORLD REBOOTS

Though a lot has been written and published on the topic of virtual or remote arbitration, this article stands apart as it deals with the fundamentals and the 'hard truths' facing us today as regards virtual arbitration following COVID-19 ("**the pandemic**"). The core theme of this article is not to be merely fixated on the pandemic but an appraisal of the essence of arbitration in times of 'crisis.' The lessons and experiences of this time are of a versatile nature that will continue to guide us in the near future as well, as arbitration continues to remain an essential cross-border dispute resolution mechanism. In recent times, questions have arisen as to whether or not virtual or remote hearing is here to stay. Indeed, at the outset of the pandemic, arbitration practitioners around the globe may have been sceptical as to how parties would proceed with arbitration in a virtual mode. The pandemic was the 'tipping point' which made many, who were not in favour of virtual hearings or on the fence, accept that technology and law together could work wonders if used correctly.

Starting off with a short reflection on this journey, there is no doubt that technology has played a rather central role in the evolution of arbitration and dispute resolution. In stating the obvious and ubiquitous, for instance, the extensive use of electronic communication for the transmittal of documents, electronic hearing applications or video conferencing is commonplace today. Those from an era or generation before smartphones may not know that video conferencing was a costly set of hardware put together, comprising a cathode-ray tube television, communication box and camera connected to a telephone line. Those who began their professional careers at the turn of the century could relate to the fact that the cost of technology for business communication was prohibitively expensive[1] at that time, so only large and international corporations could invest in video conferencing equipment, while others would need to rent its use for a high price. Today, individuals can conduct or participate in video conferencing using their hand held devices anytime, anywhere. Even commencing the process of arbitration by way of a paper notice was common in the 1990s but is considered outdated today. They are now transmitted electronically in a much cheaper, faster, and reliable way.

1. Matt Rosoff, *Why Is Tech Getting Cheaper?* (The World Economic Forum, 16 October 2015) https://www.weforum.org/agenda/2015/10/why-is-tech-getting-cheaper/ accessed 2 September 2021.

Evolution and progress in the use of technology have been noticed in arbitration proceedings over time. For instance, the UNCITRAL[2] Notes[3] which first came into being in 1996, then updated in 2016, has seen major transitions in its development. The first version of the UNCITRAL Notes suggested non-physical case management meetings such as the use of telefax, conference telephone calls or other electronic means, including electronic means of transmittal of documents. The 2016 version of the UNCITRAL Notes is progressive in addressing the use of 'technological means of communication' in the holding of hearings and meetings as well.[4] This demonstrates how dynamic the international arbitration practice is; it is not trapped in the past and is adjusting to the needs of users globally. Therefore, the advent of technology in arbitral proceedings from the pandemic is perhaps acceleration of not only the process of transition to technological means but also of methods alternative to physical proceedings, such as documents-only arbitration.

The union between technology and law is not incompatible. However, there are pre-existing issues within the law and practice of international arbitration. These issues are carried forward into the present circumstances where we are still coping with the effects of the pandemic. The cornerstone of arbitration is that full opportunity is given to the parties to present their cases and be heard. Any discussion on international arbitration in this respect would be incomplete without mentioning the instruments promulgated by the UNCITRAL. More than forty-five years ago, the first version of the UNCITRAL Arbitration Rules was promulgated in 1976, and then the UNCITRAL Model Law[5] followed in 1985. Both contain provisions pertaining to 'full opportunity' for the parties to present their case.[6] The deprivation of such an opportunity can lead to the serious repercussions of setting aside of an arbitral award, as will be discussed further below.

The use and adoption of computer technology is only one part of the discourse here. The other equally important part concerns the legal aspects of conduct in virtual arbitral proceedings. To put simply, issues relating to arbitration proceedings have been plaguing us since even before the

2. United Nations Commission on International Trade Law.
3. UNCITRAL Notes on Organizing Arbitral Proceedings ('UNCITRAL Notes') (2016).
4. UNCITRAL Notes, para 31.
5. UNCITRAL Model Law on International Commercial Arbitration ('Model Law') (1985).
6. UNCITRAL Arbitration Rules 1976, art. 15(1) and Model Law, art. 18.

pandemic. For instance, due process paranoia,[7] dilatory tactics,[8] and how these may impact the conduct of arbitration in present circumstances. More recently, it is also suggested that virtual arbitration hearings might pose a threat to fair hearing, potentially breaching natural justice, as will be discussed further below.

2. VIRTUAL ARBITRATION AND THE PANDEMIC – A REALITY CHECK

A. The use of information technology in the conduct of arbitration

We will look at the current adoption and use of computer technology in arbitration by analysing available empirical evidence and comparing its findings. The two annual Queen Mary University of London ("**QMUL**") international survey reports for the years 2018 and 2020 are of relevance and importance here. The 'pre-pandemic' 2017 survey[9] (the "**QMUL 2018 Survey**") sought the views of 922 respondents from 6 continents[10] and very appropriately touched upon the use of information technology in arbitration. The QMUL 2021 international survey[11] (the "**QMUL 2021 Survey**")[12] involved the widest ever pool of respondents, 1,218 in number,

7. Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, 6 June 2016) http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/ accessed 2 September 2021.
8. Christoph Bruckschweiger, *Possibilities of Arbitral Tribunals to Sanction 'Guerrilla Tactics' by Counsel in the Absence of a Respective Agreement by the Parties* https://wgb-law.li/sites/default/files/news/2018-04/Possibilities%20of%20Arbitral%20Tribunals_CAS%20Research%20Paper_0.pdf accessed 2 September 2021, and, *Guerrilla Tactics in International Arbitration* in Günther Horvath and Stephan Wilske (eds), (Kluwer Law International 2013).
9. Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) QMUL 2018 Survey https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF accessed 3 September 2021.
10. *Id.,* 41. Comprising of private practitioners (47%), full-time arbitrators (10%), in-house counsel (10%), "arbitrator and counsel in approximately equal proportion" (12%), and others (21%). As for the latter, this included, for example, academics, judges, third party funders, government officials, expert witnesses, economists, entrepreneurs, law students and respondents who did not specify their position.
11. Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World'* (2021) QMUL 2021 Survey https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf accessed 3 September 2021.
12. The World Health Organization declared Covid-19 a pandemic on 11 March 2020.

and was conducted between October, 2020 and December, 2020; a very crucial time frame insofar as the pandemic is concerned.[13]

According to the QMUL 2018 Survey, 78% of the respondents 'never and rarely' utilised virtual hearing rooms,[14] but 60% of the respondents 'frequently and always' used video conferencing. Most strikingly, the interviewees explained that 'to make better use of technology in arbitration is to make arbitration a more efficient process'. Apart from this, interviewees stressed that 'one of the most notable advantages of technology in international arbitration is the ability to conduct hearings and meetings via video conferencing, or through any other means of communication that does not require physical presence.'[15] This also translated into substantial savings in terms of time and money.[16] Therefore, it may not be surprising that there is a rise in the endorsement of information technology particularly in the pandemic surveys as compared to the pre-pandemic ones, for reasons like necessity, etc., as elaborated upon earlier. For instance,in the QMUL 2021 Survey, only 26% of the respondents had 'never and rarely' utilised virtual hearing rooms[17] but there was a modest increase, upto 63%, in the number of interviewees who 'frequently and always' used video conferencing.[18]

Further, the QMUL 2021 Survey made a significant observation. When compared with the QMUL 2018 Survey, the results showed that use of some of the forms of information technology has 'remained relatively consistent'. In other words, there was no marked increase in the usage when compared to the pre-pandemic times. Although people would have thought that the pandemic would 'hasten the adoption of these tools.'[19] The QMUL 2021 Survey persuasively offered the possible explanation that those who were already using IT tools in arbitration before the pandemic would continue to do so even during the pandemic. Whereas the infrequent or occasional users of such tools may remain the same way; however, there is a stark increase in the use of virtual hearing rooms in 2021 with 73% of respondents now using it at least 'sometimes', 'frequently' or 'always' as compared to 2018

13. Respondents comprised of consisted of counsel (private practitioners) (43%), full-time arbitrators (15%), in-house counsel (private sector) (7%), in-house counsel (government or state entity) (2%), 'arbitrator and counsel in approximately equal proportion' (11%), arbitral institution staff (5%), and others (17%).
14. QMUL 2018 Survey (n 9) 32.
15. *Id.,* 32.
16. *Id.,* 32.
17. QMUL 2021 Survey (n 11) 21.
18. *Id.,* 21.
19. *Ibid.*

where 78% people reported to have 'never and rarely' used it.[20] It has been quite succinctly summed up with the help of survey conducted in 2020 that 'the pandemic has served as a catalyst to hasten the wider awareness and acceptance for a principle of adaptation'[21] that some users of arbitration had already begun to adopt even before the pandemic. The finding in another survey[22] revealed that since 15 March 2020, out of 350 hearings, only 27 were in-person hearings.[23]

All these findings do not come as a surprise especially to arbitral practitioners who have a first-hand account of the situation on the ground. Those who were involved in arbitration proceedings after 11 March 2020 can recall how they had to put their quick-thinking skills to use, finding alternatives and solutions. It is likely that a majority of those who were prepared for physical hearings might have been shocked. But upon postponement of physical hearings and realizing limited possibility of travel they would have perceived the need for exploring virtual means. The survey discussed above also showed that 38% of hearing dates were not postponed. In 41% of the cases, dates were postponed and new dates were given. While in only 15% of the cases, hearing dates were postponed and no new dates were allotted.[24]

Based on the above data, reasonable conclusions can be drawn that many arbitral hearings are still taking place during the pandemic, either according to pre-pandemic original plans or, modified plans due to postponement of hearing dates. In case of the latter, there is a possibility that the parties were either adopting a 'wait and see' approach or had to eventually figure out a solution. Most likely, parties had to consent to the proposed solution of remote hearings in absence of preparation and experience to deal with such an unprecedented crisis.

20. *Ibid.*
21. *Id.,* 21-22.
22. Gary Born, Anneliese Day QC and Hafez Virjee, *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views* in Maxi Scherer, Niuscha Bassiri and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer 2021).
23. *Id.,* 143.
24. *Id.,* 142.

B. Virtual hearing protocols, tools and guides – much fuss about nothing?

The pandemic was also a time for contemplation; in part due to work-from-home arrangements which spurred creativity and innovation. People got together and suggested protocols, guides and notes for the conduct of virtual or remote hearings. However, how many have adopted or adhered to them? One protocol[25] sighted goes to the extent of specifying not commonly understood technical specifications for video conferencing, etc. This is not to downplay the usefulness of protocols, but in today's world simplicity is a welcome gesture, and the last thing desired in an increasing complicated arbitration world is more complexity. A survey[26] on the preferred video conferencing technology for hearings identified the following five most preferred platforms: Zoom, followed by Microsoft Teams, Cisco Web Ex, Go To Meeting and Blue Jeans. These are 'plug and play' platforms, and are very helpful because they are very easy to use without the need to know anything about computer engineering and coding to operate. They are designed to be 'fuss free'.

On the other hand, non-binding virtual hearing protocols are no doubt useful but if the parties have agreed for virtual hearings, it is unlikely that it would become a contentious issue to agree on the formalities to be adopted for their virtual hearing. The procedures to be adopted should be pragmatic since parties may not welcome more rules to adhere to; already having to master and comply with a number of arbitral rules or procedural laws. Depending on the parties and counsels and based on general enquiries and observations, it has been noticed that arbitrants tend to be pragmatic. They are concerned only with key issues such as the availability of reliable video and audio infrastructures, as long as all participants can be seen and heard satisfactorily. Popular video conferencing platforms now provide adequate security and only invited participants can access the virtual hearing space.

Protocols have been adapted for this new online platform. In some instances, counsels for the parties may insist on a 360-degrees 'room sweep' to ensure that witnesses are alone or not receiving any help hidden

25. Seoul Protocol on Video Conferencing in International Arbitration, Annex 1, Technical Specifications.
26. Gary Born, Anneliese Day QC and Hafez Virjee, *Videoconferencing Technology in Arbitration: New Challenges for Connectedness (2020 Survey)* (Kluwer Arbitration Blog, 8 July 2021) http://arbitrationblog.kluwerarbitration.com/2021/07/08/videoconferencing-technology-in-arbitration-new-challenges-for-connectedness-2020-survey/ accessed 2 September 2021.

out of the camera's view. The counsel will then attempt to 'sterilize' the room by scrutinising everything in the office (e.g., documents on the work desk or the texts written on the whiteboard in the office). Such pre-hearing steps can consume time and be intrusive towards witnesses. Yet, some counsels appear to consider this step crucial in virtual arbitration, and in any regard, the practice of sizing up witnesses for their credibility is typical in criminal trials. Nevertheless, such an exercise can present procedural impracticability. What if a witness refuses to co-operate, say, the request from the opposing party's counsel to clear the desk or clean up the whiteboard? The possible recourse would be to request the arbitral tribunal to make an order, however, would the arbitral tribunal be prepared to release such a non-compliant witness? Whilst the oral hearing is important, the oral hearing stage alone does not decide the outcome of the entire dispute, nevertheless, protocols and arbitral procedures need to be carefully managed by tribunals.

C. Reluctance towards virtual arbitral hearings

A young lawyer once said to the author that the draw to international arbitration is the opportunity to travel overseas. This is not an inaccurate perception because the nature of cross-border disputes means parties are located in different countries and the place of hearing could be in a foreign location – thus the necessity to physically travel to foreign places. In-person evidentiary hearings are not necessarily dispensable if circumstances permit but, as in the case of the pandemic, parties may have no choice but to proceed with virtual hearings. According to the QMUL 2021 Survey, a clear majority of 79% said they would proceed at the scheduled time as that of the virtual hearing, as compared to 16% who would postpone the hearing until it could be held in person.[27] However, virtual hearings may not be the preferred option, and only Hobson's choice for the parties– the arbitral proceedings could have been commenced before the pandemic, thus the parties would like to conclude the arbitration sooner than later due to vast uncertainty that the pandemic is likely to pose. Further, according to the QMUL 2021 Survey, 45% of the interviewees preferred in-person format for substantive hearings, 48% preferred a mix of in-person and virtual format but only a minority of 8% preferred fully virtual format, post-pandemic.[28] Practitioners were also surveyed for their views about the primary disadvantages of virtual hearing. The three most expressed views

27. QMUL 2021 Survey (n 11) 22.
28. *Id.,* 25.

were that a) counsel and clients have restrictive opportunities to confer during the hearing sessions, b) challenges of time zone, and c) the difficulty in controlling the witnesses and assessing their credibility.[29]

A conclusion cannot be drawn yet given that the pandemic is unprecedented and a developing situation. From the survey, it would appear that arbitral practitioners would prefer returning to normalcy with in-person interaction, or a hybrid, instead of purely a remote set-up. The reality is that the arbitration world has been largely reactive to the pandemic with finding solutions and options, rather than taking a stand about preference for policy choices that will set to govern the industry in times to come. Also, there are other variable factors to be considered in deciding the type of hearings, such as the value of the dispute, case complexity, and geo cultural elements of the parties. Incidentally, virtual hearings can be useful in reducing potential 'friction' between cross-examiners and first-time witnesses. The witnesses are likely to feel less pressured because testifying behind computer screens provide some sense of security and comfort. Nevertheless, what many would agree on at least is that the pandemic has triggered an awakening to the idea that there are alternatives, largely using digital technology, to conduct arbitration, resulting in time and costs savings. After all, these are also the two common disadvantages of arbitration as a method of dispute resolution in recent times. However, these factors alone may not decide the future of arbitral hearings; many a times, when parties have exhausted all avenues and options and turn to arbitration, costs may no longer be a major deterrent.

3. OPPOSING VIRTUAL HEARING– LEGAL AND PRACTICAL PERSPECTIVES

A. In-person hearing as of right?

Having dealt with the technological perspective of virtual arbitration during the pandemic, it would be imperative for us to look at the *lexarbitri* perspectives which are crucial in determining the legality of dispensing with in-person hearings. A research project was undertaken by the International Council for Commercial Arbitration (ICCA) which compiled

29. *Id.,* 23-24. The biggest disadvantages of virtual hearings were found to be 'difficulty of accommodating multiple or disparate time zones' and the impression that it is 'harder for counsel teams and clients to confer during hearing sessions, i.e., other than in breaks', each chosen by 40% of respondents. Almost as many respondents thought it might be 'more difficult to control witnesses and assess their credibility' (38%).

reports from reporters from New York Convention[30] jurisdictions on the core legal questions arising from the use of remote arbitral hearings due to the pandemic. As of May 2021, 77 country reports have been produced and in summary, none of the surveyed jurisdictions contains any express provision granting a right to a physical or in-person hearing.[31] Notably, in the Netherlands, temporary national legislation[32] enacted to deal with the issues arising from the pandemic contains a provision[33] that if it is not possible to hold a physical hearing in civil and administrative legal proceedings due to the outbreak of the pandemic, the oral hearing can take place by utilising electronic means of communication.[34]

This project is highly commendable and opportune for not only the findings are valuable to clarify doubts on the legality of virtual hearing but also because it charts the future trend for the use of remote hearing method, post-pandemic. The UNCITRAL Model Law does not yet have provisions specifically dealing with remote hearing but neither does it have provisions impeding the same. It already incorporates consideration of electronic means for the arbitration agreement.[35] Thus, in the spirit of its design to be a 'vehicle for harmonization and modernization and in view of the flexibility, it gives to States to prepare new arbitration laws'.[36] We can sanguinely expect the future amendments to provide perhaps provisions for

30. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention').
31. *Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences* (International Council for Commercial Arbitration, 26 May 2021) https://www.arbitration-icca.org/right-physical-hearing-project-newly-released-reports-confirm-core-trends-and-divergences accessed 5 September 2021.
32. The Temporary Covid-19 Act Justice and Security, Kingdom of the Netherlands.
33. *Id.,* art. 2(1) in official Dutch text:
Artikel 2 (mondelingebehandeling in burgerlijkeenbestuursrechtelijkegerechtelijke procedures)
Indien in verband met de uitbraak van COVID-19 in burger lijkeenbestuursrec htelijkegerechtelijke procedures het houden van eenfysiekezittingnietmogelijk is, kan de monde lingebeh and elingpla atsvinden door middel van eentweezijdigelektronischcommunicatiemiddel.
34. Bas van Zelst, *The Netherlands* (International Council for Commercial Arbitration, 18 March 2021). https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Netherlands-Right-To-A-Physical-Hearing-Report.pdf accessed 5 September2021.
35. UNCITRAL Model Law 1985, art. 7(4) (Option I).
36. *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006* (UNCITRAL, 25 March 1985) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed 2 September 2021.

remote hearing, potentially making its way into the future revision work of the UNCITRAL Model Law.

B. Due Process Paranoia – a tale of two cases

As an introduction, even before the pandemic, arbitration was already plagued by Due Process Paranoia (commonly referred to as 'DPP'). Depending on the circumstances, DPP can have quite a dominant effect in delaying or paralysing the arbitral proceedings. With the onset of the wide use of remote arbitration and virtual hearing during the pandemic, an apprehension of DPP remains. In the push for efficiency, allegations that the tribunal has deprived a party of its due process right might have arisen sometimes. From a practical standpoint, prudent arbitral tribunals will always bear in mind the fundamental principle of treating each party with 'equality' and giving them the 'full opportunity of presenting their cases',[37] a tenet in the UNCITRAL Model Law which has found its way into the *lex arbitri* of many countries which have adopted it.

The basic idea is that arbitral tribunals, unlike national court judges, are appointed by the parties in disputes for their own selves and they have made an informed choice while choosing this method of private dispute resolution. The decision is made with the implied expectation of 'fairness' in the proceeding which would include an opportunity to present their case fully. If a party is, or the believes that it is, deprived of the opportunity to present its case, allegations of violation of its due process rights could be levelled against the arbitral tribunal. In practice, a prudent tribunal would avoid getting embroiled in such a situation.[38] However, a party, through the ingenuity of its counsel could employ dilatory tactics intended to derail the arbitral proceedings, masquerading as seeking to exercises its right to due process.

What constitutes fairness and fair process vis-à-vis 'equality' and 'full opportunity' must be examined. Firstly, the *travaux préparatoires* could be analysed to understand the intention of the drafters of the UNCITRAL Model Law which can be found in the Analytical Commentary on Draft Text.[39] It is stated that the fundamental requirements of fairness under

37. Model Law 1985, art. 18.
38. E.g., ICC Rules of Arbitration at art 42 states that '[The] court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'.
39. United Nations, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (A/CN.9/264,25 March 1985)' on (what is now)

the provision 'adopts basic notions of fairness requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case'[40] and the principles make it clear that:

> *"[F]ull opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award."*[41]

Whilst tribunals need to be protected from the constant fear or threat of DPP, it is also equally important for the parties to be safeguarded against unfair treatment by tribunals, as will be discussed below.

1. *The 'Shield' – arbitral tribunal fending attacks by parties*

The Singapore Court of Appeal ("**SGCA**") recently dealt with an application to set aside an arbitral award in China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC[42] ("**China Machine**") on grounds of breach of natural justice. The subject matter dispute pertained to a Singapore seated arbitration; therefore, Art 18 of the Model Law was applied. The SGCA held that the drafters of the Model Law did not intend to create a right of unlimited scope by the use of the word "full" (opportunity) in Article 18. On the contrary, they were conscious of the need to limit its scope so that it could not be abused by parties seeking to delay and prolong the arbitral proceedings.[43] The SGCA also held that the parties' right to be heard is impliedly limited by considerations of reasonableness and fairness and this has especial relevance in *China Machine*, where the complaint was that the failure of the tribunal to grant certain procedural accommodation to a party adversely impacted that party's due process rights'.[44] The SGCA also referred to a Singapore High Court decision in Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd.[45] ("**Triulzi**") that 'the right of each party to be heard does not mean that the Tribunal must 'sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party.'[46]

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art. 18 of the Model Law (art. 19 at para 7). It was picturesquely described as the "Magna Carta of Arbitral Procedure".

40. *Id.*, art. 19 para 7.
41. *Id.*, art 19 para 8.
42. China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2020 SGCA 12.
43. *Id.* [96].
44. *Id.* [97].
45. *Triulzi Cesare SRL v Xinyi Group (Glass) Co. Ltd.* 2015 1 SLR 114.
46. *Id.* [151].

Furthermore, the SGCA also noted that the same view holds in non-UNCITRAL Model Law jurisdictions—ASM Shipping Ltd. of India v. TTMI Ltd. of England[47] ("**ASM Shipping**") and PT Reasuransi Umum Indonesia v Evanston Insurance Company, Utica Mutual Insurance Company and AMP United[48] ("**PT Reasuransi**"). In *ASM Shipping*, one of the grounds on which the applicant sought to vacate the arbitral award was the tribunal's refusal to grant the requested adjournment of the proceedings after the requesting party's lead counsel became unavailable. The English High Court refused to set aside the arbitral award and held that the test was whether the decision to refuse adjournment was "so far removed from what could reasonably be expected of the arbitral process that it must be rectified."[49] Morison J also noted that arbitration is supposed to be speedy and whilst tribunals comprising professional arbitrators are often difficult to convene, the 'other party has an interest in the proceedings coming to a timely end'. He saw nothing wrong with the decision of the tribunal to refuse the adjournment which also seemed to have been the right decision in the circumstances.[50] Additionally, the US Southern District of New York Court in *PT Reasuransi*, in assessing whether the arbitrators were guilty of misconduct for refusal to grant an adjournment, applied a test focussing on the reasonableness of the tribunal's decisions and held that '*[w]here there is a reasonable basis for the arbitrator's decision not to grant a postponement, courts are reluctant to interfere with the arbitration award*.'[51]

The *China Machine* case is timely under the current international commercial arbitration practice, as it seeks to clear doubts on increasingly common situations where parties request for extension or adjournment, perhaps more frequently so during the pandemic time and remote hearing. As rightfully stated by the SGCA:

> *This appeal presents us with the opportunity to clarify this important area of arbitration law, so that tribunals may be guided as to the sorts of concerns that may undermine their awards. In our judgment, this should ultimately reduce the opportunity for those attempting to abuse the doctrine of due process.*[52]

47. ASM Shipping Ltd. of India v. TTMI Ltd. of England 2005 EWHC 2238 (Comm).
48. PT Reasuransi Umum Indonesia v. Evanston Insurance Co. Utica Mutual Insurance Co. and AMP United, 1992 WL 400733 (SDNY, 23 December 1992).
49. ASM Shipping Ltd of India v TTMI Ltd of England 2005 EWHC 2238 (Comm) at [38].
50. *Id.* [45].
51. *China Machine* (n 42) [97 d].
52. *Id.* [4].

Separately, the High Court of Malaya's decision of Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch,[53] decided before *China Machine* is also to be noted. It dealt with the issue of the losing party's complaint about breach of due process in arbitration where the Court held that 'Natural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental.'[54] The Court noted that the tribunal cannot be expected to be obliged 'slavishly' to all of the parties' demands in arbitration proceedings. Indeed, just because a party failed to get all of its requests granted or accommodated by the tribunal would not mean that it had been denied a fair opportunity of presenting its case. This decision may have a far-reaching impact on the landscape of the Malaysian position as regards due process paranoia, now and in the future.

2. *The 'Sword' – when the arbitral tribunal erred*

Arbitrators are not infallible and they can err with their judgement in so far as the conduct of the proceedings is concerned. This is precisely the measure by which there may be a refusal of the enforcement of arbitral awards such as those under the New York Convention.[55] Such a case arises where arbitrators have conducted themselves in such a way that the party's due process rights have been violated, and where the aggrieved party seeks the setting aside of awards. Once again, fortuitously, the SGCA dealt with another application in the case of CBS v. CBP[56] ("**CBS**"), circumstances being diametrically opposite to that of the *China Machine.* Given the case's novel circumstances and legal issues, the key background will be set out below.

In *CBS*, CBP ("**Buyer**") the purchaser of coal, and CBS ("**Bank**") the bank, entered into an assignment of trade debts arrangement with the coal seller. The underlying commercial transaction involved two shipments of coal which resulted in a dispute with the second shipment. The Bank sought to recover payment due from the Buyer under the trade financing arrangement. However, the Buyer alleged grounds of incomplete shipment and a meeting with the coal seller that gave rise to an oral agreement to reduce the price

53. Allianz General Insurance Co. Malaysia Berhad v. Virginia Surety Co. Labuan Branch Originating Summons No. WA-24NCC (ARB)-13-03/2018.
54. *Id.* [31].
55. New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, art. V.
56. CBS v. CBP 2021 SGCA 4.

of the coal. The dispute was referred to arbitration under the rules of arbitration of the Singapore Chamber of Maritime Arbitration ("**SCMA Rules**") before a sole arbitrator. The Buyer's original jurisdictional object to the arbitration failed, and they subsequently breached the procedural timelines set by the arbitrator. Eventually, the Buyer filed its defence and counter claim along with a list of seven witnesses it would like to call for oral testimony. However, the arbitrator requested the Buyer to provide its 'position/reasons for calling 7 witnesses and/or the need for their oral testimony', a request unsurprisingly objected by the Buyer stating that an oral hearing was 'required and necessary'.[57]

About nearly a month later, the arbitrator wrote to the parties maintaining his insistence that the buyer provides a detailed written statement from each of the witnesses it planned to call so that the arbitrator could decide if they had substantive value to convene a hearing. The buyer maintained its right to a hearing and examining the witnesses without condition. The arbitrator proceeded to convene a hearing for oral submissions only, which the Buyer chose not to participate in. This resulted in the arbitrator conveying that by virtue of the Buyer failing to submit its witness statements it would be construed as waiving any right to submit witnesses in the event of an oral hearing.[58] A Final Award was eventually rendered in favour of the Bank and the Buyer challenged the award successfully, claiming among others, a breach of natural justice. The SGCA upheld the decision from the Singapore High Court.

CBS examined the extent of the rights and opportunities of parties to present its case in arbitral proceedings. Central to the case was also the issue of whether witness-gating[59] or the arbitrator's decision to prohibit the presentation of witness relevance to the issue at the arbitral proceedings was tantamount to a breach of natural justice. The SGCA reaffirmed that parties' right to be heard in legal proceedings is a fundamental rule of natural justice. That this is protected in the arbitration context and is enshrined in Article 18 of the Model Law which accords to the parties the 'full opportunity' of presenting its case and equality.

The Court also tempered this with caution that the threshold for finding a breach of natural justice is a high one, and hence, courts would be slow to

57. *Id.* [19].
58. *Id.* [25].
59. CBS (n 56) [35].

intervene in cases of technical and inconsequential breaches.[60] As previously held by the Court in *China Machine*, 'full opportunity' of presenting one's case is not an unlimited one and must be balanced against considerations of reasonableness, efficiency and fairness. What constitutes 'full opportunity' is a fact-sensitive inquiry that can only be meaningfully assessed within the specific context of the particular facts and circumstances of the complaint, where the overarching inquiry is whether the proceedings were conducted in a fair manner. The test asks what a reasonable and fair-minded tribunal in those circumstances might have done and in asking that question, the court places itself in the position of the tribunal at the material time.[61]

In *CBS*, the breach of natural justice occurred when the arbitrator proceeded with the oral hearing without all of the Buyer's witnesses despite repeated requests. Further, according to the SCMA Rules, unless the parties agree to a documents-only arbitration or to dispense with a hearing, the tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.[62] Whilst the arbitrator has general and broad case management powers (i.e. to ensure the just, expeditious, economical and final determination of the dispute),[63] those procedural powers are not unfettered and must be balanced against the rules of natural justice.[64] It is crucial to note the SGCA's view that it did not approve the Buyer's dilatory tactics and acknowledged that the Buyer was less than cooperative in the proceedings[65] – perhaps the arbitrator acted out of exasperation due to the Buyer's uncooperative attitude.[66]

In conclusion, *CBS* is under no circumstances a *carte blanche* for any parties in arbitration to chart their next dilatory tactic in arbitration proceedings. Experienced arbitrators can spot when a dilatory tactic is at play especially amongst respondents to an arbitral claim. It is also common that respondents will refuse to contribute towards the institution deposit payment. However, all is not lost as it is common for a party to request for costs to be ordered against another who had been disruptive in the proceedings. *CBS* is a cautionary tale for arbitrators to restrain themselves from getting carried away by a party's conduct, whether dilatory or

60. CBS (n 56) [50].
61. *Id.* [51].
62. SCMA, r. 28.1.
63. SCMA, r. 25.1.
64. CBS (n 56) [35].
65. *Id.* [78].
66. *Id.* [71].

otherwise. In the conduct of arbitration during the pandemic time where delays are inevitable, the tribunals may wish to conduct the proceedings efficiently and expeditiously. For instance, the tribunals may order for documents-only arbitration or to abbreviate the procedures potentially resulting in objections by the other party. The tribunals may also err on the side of caution when deciding on ordering the conduct of evidentiary hearings virtually to consider extraordinary circumstances amidst potential objections by a party.

C. Issues faced by stakeholders: Arguments and excuses

There are several conceivable arguments by arbitrants on how remote hearing could disadvantageously impact their cases, potentially depriving the parties of a full opportunity of presenting their case. Some potential arguments can be found in the recent QMUL 2021 Survey[67] where interviewees were asked what they thought were the main disadvantages of virtual hearings. The table below tabulates the most reasons collected and possible responses:

	Reasons	Response/ Potential Remedy
i	Difficulty in accommodating multiple time zones	Time zone difference results in largely causing inconvenience to one's natural sleep-wake cycle only rather than potential breach of natural justice. It is possible for parties sitting in Europe and Asia to compromise on suitable timing that can accommodate each other.
ii	Difficulty in controlling witnesses in cross-examination as well as the inability to assess their credibility	Much has been said in recent times about 'body language' in arbitration. It is possible to cross-examine witnesses virtually although in-person cross-examination is much preferred as a matter of long-standing practice only.
iii	The difficulty for counsels and parties to confer during the hearing if they are located in different physical locations and time zones.	It is indeed a challenge when counsels and parties could not confer during the hearing. However, this is a weak argument for a party to reject virtual hearing.
iv	Technical malfunction and unreliable technology	Virtual conferencing platforms have improved tremendously in recent times.

67. QMUL 2021 Survey (n 11) 24.

	Reasons	Response/ Potential Remedy
v	The difficulty for participants to maintain concentration due to 'screen fatigue'	Appropriate breaks or intervals can and should be given by the tribunal.
vi	Difficulty in 'reading' the arbitrators and other remote participants	Does not constitute a breach of due process as the parties' case does not hinge on the body language of the arbitrator during the oral hearing alone.
vii	Confidentiality and cyber security concerns	Security of virtual hearing platforms has improved tremendously to ensure adequate security.

Though the above list of reasons is not exhaustive, they are collectively the views of current international arbitral practitioners. These have typically constituted grounds (or excuses) for postponement of hearing (regardless of in-person or remotely) or even refusal of a virtual hearing. However, there is now greater awareness and transparency of thwarting frivolous and vexatious requests aiming at delaying or derailing the arbitral proceedings. The Claimants and Respondents are almost certainly going in different directions with head-on clashing objectives; the claimants and respondents to proceed quickly, to win and to enforce the awards against the losing party. Whereas, the respondent generally aims to slow down the process so that if they are found liable, they can buy time; to frustrate the claim so that the claimant may eventually drop the matter or for various reasons, be unable to proceed.

In *Capic* v. *Ford Motor Co. of Australia Ltd.*[68] ("**Capic**"), the learned Judge offered some valuable lessons on the use of technology during the pandemic and perhaps also in a world where technology plays a more pivotal role. In *Capic*, Perram J dismissed the application for an adjournment of a six-week trial commencing on 15 June 2020 (the case was first commenced in 2016). He implied 'dilatory tactics' employed, the case having a 'tortured procedural history and has already been set down for trial twice', then an application on the grounds of the pandemic.[69] It is interesting to note that the Respondent raised several issues such as technological limitations, intermittent internet connection, the inability of counsels to be together in one place, witness coaching and inabilities to read the body language of participants online. Perram J held that the first two issues were easily remedial and not insurmountable challenges.[70] That counsels were not in

68. Capic v. Ford Motor Co. of Australia Ltd. 2020 FCA 486.
69. *Id.* [1].
70. *Id.* [10]-[12].

one place did not mean the trial would be unfair or unjust.[71] Furthermore, Perram J acknowledged that the question of witness coaching was a fact-specific consideration, and given that the case was not a criminal trial, it was not a critical issue for the witnesses to testify virtually.[72] On the common grievances towards virtual hearing due the inability to 'read the body language' or demeanour of witnesses during cross-examination through video-link, Perram J said the following:

> *My impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court.*[73]

Of significant interest is also Lee J's observation in Australian Securities and Investments Commission v. GetSwift Ltd.[74] on the role of demeanour on the evidence of witnesses that:

> *Indeed, I would go further and say that at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and (in the Court in which I am currently sitting) distant witness box.*[75]

As such, it can be argued that the nagging question of 'body-language' in litigation (likewise to arbitration) could finally be put to rest peacefully.

D. Response by the international arbitral community on virtual hearings

Arbitral bodies all over the world were conscious of the challenges posed to the conduct of arbitration due to the pandemic. The ICC[76] quite promptly issued a document titled 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' ("**ICC Note**") on 9 April 2020. It sought to provide guidance to parties, counsels and arbitral tribunals involved in ICC arbitrations on possible measures that they may consider. In summary, the ICC Note recalls the existing procedural framework available to the parties and the greater need to implement case

71. *Id.* [13].
72. *Id.* [16].
73. *Id.* [19] (emphasis added).
74. Australian Securities and Investments Commission v. GetSwift Ltd., 2020 FCA 504 (9 April 2020).
75. *Id.* [33].
76. The International Chamber of Commerce, world's most preferred arbitral institution according to the QMUL 2021 Survey.

management techniques during the pandemic to ensure the fairness and efficiency of ICC arbitrations. The ICC Note also provides guidance on the organisation of virtual hearings, including a useful checklist for remote hearing protocols. Most notably, the ICC Note highlighted the following points:

(a) The arbitral tribunal in deciding the appropriate procedural measures to adopt in proceeding with the arbitration expeditiously and cost-efficient should evaluate the circumstances of the dispute (i.e. nature, length of the hearing, the complexity of the dispute, etc.) so as to enable the case to proceed without delay. Also in consideration would be whether any adjournment would lead to inordinate delay, including the parties' capacity to prepare properly.[77]

(b) The arbitral tribunal should consider carefully all circumstances and subsequent enforceability of the award at law (including potential challenges on the arbitral award on grounds of due process) in the event that the tribunal chooses to proceed with a virtual hearing without the agreement of the parties or with objection. In making these decisions, the tribunal is advised to consider its procedural powers under the ICC Arbitration Rules and after consulting the parties, adopt the appropriate measures so long as they are not contrary to any agreement of the parties.[78]

(c) The pandemic is an impediment to face-to-face hearing and the wait for it to be finally over, would possibly produce undue and even prejudicial delay. Therefore, the arbitral tribunal should adopt the appropriate approaches dependent on circumstances (e.g. whether a document-only or live hearing) as it exercises its authority. Under the ICC Rules of Arbitration, the tribunal in establishing suitable procedures should also perform its overriding duty in conducting the arbitration expeditiously and cost-efficiently.[79]

Meanwhile, the global professional body for arbitrators, the Chartered Institute of Arbitrators, has also responded by producing guidance on remote hearing[80] that can be applied not only to arbitration but other ADR

77. ICC Note para 18.
78. *Id.* para 22.
79. *Id.* paras 24 and 25.
80. *Guidance Note on Remote Dispute Resolution Proceedings* (Chartered Institute of Arbitrators) https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf accessed 10 September 2021.

methods such as mediation, negotiation, adjudication, expert determination, etc. The guidance note provides a useful framework for the use of parties when arranging for remote or virtual hearings. It is of no binding effect, neither is it intended to be a 'soft law', however parties in arbitration can certainly benefit from adopting some of the helpful suggested notes and checklist.

E. Considerations of other procedural issues

To state briefly, it is rudimentary to ensure that the party against whom the arbitration is commenced should be given proper notice of the arbitral proceedings or appointment of arbitrators. This is not an issue unique only to virtual arbitration because, with the increasing use of emails, communications by claimants to respondents are commonly transmitted digitally. There must be proof of transmission or record of the sending to the last known email and physical address of the other party, a well-established principle in international arbitration law that will not be elaborated in this article. The failure of the claimant to communicate properly and effectively to the respondent could give rise to a breach of due process and natural justice as the respondent could be deprived of the opportunity to present its case. This would be tantamount to grounds under the New York Convention for the refusal of enforcement of the arbitral award.[81] Finally, whilst thought to be rare or perhaps hypothetical, an arbitration agreement providing for the parties to opt-out from any virtual or remote proceedings except for in-person conduct must be followed by the tribunal. Unless varied by both parties, if the tribunal proceeds at the request of one party to conduct the arbitration remotely (against the will of the other party), enforcement of the award may be eventually challenged on grounds under the New York Convention[82] that the arbitral procedure is contrary to the agreement of the parties.

4. KEEPING ARBITRATION GOING – IS VIRTUAL ARBITRATION AND THE USE OF TECHNOLOGY A TRANSFORMATIVE PHENOMENON?

At the core of the purpose, meaning and conduct of arbitration is the trinity of factors: party autonomy, access to justice and due process, along with final and binding decision. Party autonomy in arbitration, unlike other legal dispute resolution processes, provides the parties with the flexibility to select procedures to be followed. Following due process is essential as

81. New York Convention 1958, art. V(1)(b).
82. *Id.,* art. V(1)(d).

parties want a fair and full opportunity to be heard and finally, a binding outcome which is the result of the arbitration process. The use of technology, whether in full or hybrid combination, is simply ancillary to the means of achieving the said objectives. The core remains the same.

Our adoption of technology does not mean that some of the inherent issues found in arbitration practice have been eradicated. In some cases, perhaps, technology could exacerbate it. For instance, a new relevant arbitration tactic is a 'guerrilla tactic',[83] which was raised in the Singapore High Court case of China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC.[84] In arbitration, requests for document production are typical but it can very quickly turn into a conscious tactical act by one party to dump a massive volume of data on the other party, which can delay the proceedings. The Singapore High Court defined guerrilla tactics as 'intended aim to obstruct, delay, derail and/or sabotage the arbitral proceedings.'[85] In the present case, one of the grounds cited by the party as tantamount to such a tactic involved the uploading of inordinate volumes of 'disorganised electronic documents to the Data Room, some also not entirely legible, redacted and unindexed.'[86] Excessive volume of information in poor form can present a challenge to anyone going through it and technology alone does not solve the problem. Modern digital technology age does not mean that data is necessarily easy to go through. In Pyrrho Investments Ltd. v. MWB Property Ltd.[87], the English High Court had to consider, for the first time, and approved the use of 'predictive coding'[88] in electronic discovery. The relevant document disclosure process originally involved more than 17.6 million electronic files, which were then reduced to 3.1 million.[89]

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83. *Introduction to Guerrilla Tactics in International Arbitration* in *Guerrilla Tactics in International Arbitration* in Günther J Horvath and Stephan Wilske (eds), (Kluwer Law International, 2013) referred to in China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2018 SGHC 101 [201].
84. China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2018 SGHC 101.
85. *Id.* [201].
86. *Id.* [208].
87. Pyrrho Investments Ltd. v. MWB Property Ltd. 2016 EWHC 256 (Ch).
88. *Id.* [17] '[The] term 'predictive coding' is used interchangeably with 'technology assisted review', 'computer assisted review', or 'assisted review'. It means that the review of the documents concerned is being undertaken by proprietary computer software rather than human beings. The software analyses documents and 'scores' them for relevance to the issues in the case. This technology saves time and reduces costs. Moreover, unlike with human review, the cost does not increase at the same rate as the number of documents to be reviewed increases'.
89. *Id.* [5].

During the pandemic, we have experienced acceleration in the use of digital technology and virtual arbitration, however, it can be argued to be merely crisis management; thus, we cannot be yet certain whether these will become permanent features in future arbitrations. It should also be borne in mind that the use of technology in arbitration predates the pandemic. Meanwhile, the users of arbitration are now more aware of the choices and solutions available to them with the use of technology. A hybrid of virtual and in-person arbitration can reduce costs and increase efficiency[90] compared to entirely in-person proceedings, where only the key and essential phases of the arbitration will be conducted physically as necessary. Ultimately, arbitrants are more concerned about the outcome of the arbitration rather than its processes.

5. CLOSING–THE PANDEMIC AMIDST A CHANGING ARBITRATION WORLD

In conclusion, this article has set out to appraise the use of virtual arbitration covering the findings, statistics, trends, and legal issues attached to it. Even before the pandemic, were already plagued by pestilence in the form of dilatory and due process allegations in arbitration proceedings that seek to delay or derail it and these issues can continue to manifest themselves even in virtual hearing settings. Arbitration is not without its complaints from users, most commonly high costs, lack of efficiency and procedural complexity. All along, it is also felt that there is a disconnect between arbitral users and practitioners. But the pandemic might have fuelled expedited transformation in terms of technological connectivity to the conduct of arbitration, which could, in turn, solve some of the arbitration's nagging problems. Perhaps this is an impetus for more innovation in addition to merely virtual arbitration or 'Online Dispute Resolution' (ODR), a term widely used now.

Virtual arbitration platforms and tools are becoming increasingly improved to replicate the experience of in-person hearing and to make it as satisfactory as possible. Software developers and engineers are listening to the feedback of users – features such as real-time electronic transcripts

90. Virtual case management, preliminary, and all other procedural meetings are generally easier to arrange because the parties, counsels, and arbitrators are not required to meet physically, particularly in international arbitrations where some participants may be located in different geographical locations. In-person meetings that require overseas travel can be time-consuming and inefficient because they require more planning on the part of those involved, such as scheduling time away from the office or home base, travel arrangements, applying for visas, etc. In the case of travel during the pandemic, reduced air transportation and strict health protocols also make travel difficult.

and cloud-based electronic bundles are immensely helpful in making the virtual hearing experience close to, if not equivalent, an in-person hearing. In cross-examinations for instance, witnesses will be referred to the common electronic bundle accessible to all parties and the tribunal. Live transcription also allows the tribunal and counsels in the hearing to review the transcripts on the spot and a copy of the entire day's proceedings is then made available at the end of each day. However, these platforms do not necessarily come cheap but with increasing competition among developers and service providers, a wider choice is soon expected as is the case with technology.

Finally, we must also not underestimate the long-term effect of the pandemic on the arbitral industry. Renowned expert and proponent of information technology in law, Professor Richard Susskind, has propagated the notion that the legal industry will be impacted by computer technology.[91] New vocations and jobs proving to be disruptive can be expected to emerge, such as legal technologists, ODR system architects and designers, dispute management executives, legal engineers, data auditors or document controllers. After all, technology has constantly made jobs redundant; for example, a curious profession in Britain called 'Knocker-uppers' that woke people up every morning because alarm clocks were neither cheap nor reliable, vanished in the 1970s. By the time this article[92] goes to print, we can expect the pandemic to have evolved in many more folds; there is only a question of which direction it is heading in. Citing the learned Judge in *Capic* referring to the pandemic," "Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be."[93] We certainly will be watching this space.

91. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (OUP, 2008) 27.
92. Written on 24 September 2021.
93. *Capic* (n 67) [23].