

Remote Hearings in International Arbitration during the Pandemic

The onset and development of the Covid-19 pandemic has generated much debate regarding remote hearings in international arbitration. This Article focuses on some of the hot topics in this context and examines real cases from the past couple of years.

Context

The pandemic that broke out in March 2020 affected almost every country in the world and forced all sectors of society to adopt unprecedented restrictive measures. In Spain, Royal Decree 463/2020 of 14 March declared a nation-wide state of emergency in response to the spread of Covid-19.¹ This regulation suspended procedural deadlines and hearings, thus paralysing almost all

¹ Royal Decree 463/2020 of 14 March declaring a state of emergency to address the COVID-19 health crisis (*Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19*).

proceedings in the justice system.² Similar measures were taken in other parts of the world.³

² Second Additional Provision of Royal Decree 463/2020 of 14 March. Specific exceptions were made to the general suspension to allow courts to 'carry out any judicial actions necessary to prevent irreparable harm to the legitimate rights and interests of the parties to the proceedings' (para 4 of the Second Additional Provision of Royal Decree 463/2020). See C. Borges Sacoto and J. Azagra Malo, 'COVID-19 and its impact on arbitrations seated in Spain and Portugal' (2020), 6 *Investment Arbitration Outlook*, p 12.

³ 'Emergency Measures and Covid-19: Guidance' United Nations, Office of the High Commissioner (27 April 2020) <https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf> accessed 1 March 2022; 'COVID-19 Strategy Update, World Health Organization (14 April 2020) <<https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf>> accessed 1 March 2022; 'The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU, European Parliament, Monitoring Group on Democracy, Rule of Law, Fundamental Rights (23 April 2020) <<https://www.sidley.com/en/insights/newsupdates/2020/03/covid19-control-measures>> accessed 1 March 2022; 'Digital rapid response measures taken by banks under Covid-19' ICC Digitalisation Working Group (23 April 2020) <<https://iccwbo.org/content/uploads/sites/3/2020/04/2020-icc-covid-response-banks-3.pdf>> accessed 1 March 2022; 'Covid-19 Transport Brief, International Transport Forum of the OECD (20 May 2020) <<https://www.itf-oecd.org/sites/default/files/air-connectivity-covid-19.pdf>> accessed 1 March 2022; 'Policy measures taken against the spread and impact of the coronavirus, European Commission, Directorate General Economic and Financial Affairs (20 August 2020) <https://ec.europa.eu/info/sites/default/files/coronavirus_policy_measures_20_august.pdf>



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Arbitration was presented with a unique opportunity to establish itself as the leading method for effective dispute resolution

In this context, arbitration⁴ was presented with a unique opportunity to establish itself as the leading method for effective dispute resolution. As we shall see, its distinctive features enabled it to take full advantage of the possibilities presented by this new situation.

accessed 1 March 2022.

⁴ As well as other dispute resolution methods such as mediation.

Regulatory framework

The main international arbitral institutions reacted swiftly to the Covid-19 outbreak. While some stayed procedural deadlines and arbitral activities,⁵ most of them chose to continue proceedings to the extent possible.

Prior to the pandemic, the London Court of International Arbitration ('LCIA') was practically the only arbitral institution to offer the possibility of holding remote hearings.⁶ The other leading institutions

⁵ In communications dated 16 March 2020, the Spanish Court of Arbitration (*Corte Española de Arbitraje* - 'CEA') <<https://www.camara.es/suspension-plazos-arbitrajes-corte-espanola-arbitraje>> accessed 2 February 2022, and the Civil and Commercial Court of Arbitration (*Corte Civil y Mercantil de Arbitraje* - 'CIMA') <<https://arbitrajecima.com/wp-content/uploads/2020/03/MEDIDAS-ADOPTADAS-POR-CIMA-ESTADO-DE-ALARMA.pdf>> accessed 2 February 2022, both notified their decision to suspend all deadlines for ongoing arbitration proceedings, as well as all evidentiary hearings and any scheduled in-person appearances (leaving the possibility open for proceedings to be conducted by telephone if the parties so agreed and subject to the courts' approval). Measures such as these had never been adopted before, let alone on an indefinite basis. In contrast, the Madrid Court of Arbitration (*Corte de Arbitraje de Madrid* - 'CAM') remained operational throughout the pandemic.

⁶ Specifically, Art 19.2 of the regulation approved on 1 October 2014 stated:

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, form, content, procedure, time-limits and geographical place. *As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).* As to content, the Arbitral Tribunal may require the parties to address a list of specific questions or issues arising from the parties' dispute. [emphasis added]

Additionally, the LCIA's 'Notes for Arbitrators' (2017) <<https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx>> accessed 3 February 2022, already included some recommendations regarding how to conduct remote hearings:

³³ It might, in some cases, be appropriate for certain hearings (for example, procedural conferences) to be

held by telephone or by videoconference, rather than in person. The Arbitral Tribunal should also consider, where appropriate, whether some or all of those who must attend any meeting or hearing might do so by video conference, rather than in person (for example, if a witness is unable to travel due to health issues).

- Publishing detailed practical guides with technological, procedural and logistical recommendations for remote arbitration proceedings.⁷
- Setting up tailor-made technological platforms to conduct remote hearings.⁸

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⁷ Guides published by the most important arbitral institutions include the following: *Centro Internacional de Arreglo de Diferencias Relativas a Inversiones* ('CIADI'), '*Guía Breve para Audiencias Virtuales en el CIADI*' (23 March 2020); Chartered Institute for Arbitrators ('CIArb'), '*Remote Hearings Guidance Note*' (8 April 2020); *Cámara De Comercio Internacional* ('CCI'), '*Nota de Orientación de la CCI sobre Posibles Medidas Destinadas a Mitigar los Efectos de la Pandemia del COVID-19*' (9 April 2020); CAM, '*Nota sobre organización de audiencias virtuales*' (21 April 2020); China International Economic and Trade Arbitration Commission ('CIETAC'), '*Guidelines on Proceeding with Arbitration Actively and Properly during the Covid-19 Pandemic (Trial)*' (28 April 2020); Australian Centre for International Commercial Arbitration ('ACICA'), '*Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk*' (April 2020); Hong Kong International Arbitration Centre ('HKIAC'), '*HKIAC Guidelines For Virtual Hearings*' (14 May 2020); CIMA, '*Reglas de CIMA para las audiencias de pruebas testificales y periciales por medios audiovisuales*' (8 June 2020); CEA, '*Recomendaciones sobre procedimientos de audiencias virtuales CEA*' (2020); *Centro Internacional de Arbitraje de Madrid* ('CIAM'), '*Nota sobre organización de audiencias virtuales*' (2020); American Arbitration Association - International Centre for Dispute Resolution ('AAA-CIRD'), '*Virtual Hearing Guide for Arbitrators and Parties*' (2020).

⁸ Examples of arbitral institutions that have created new platforms to conduct arbitrations are: (i) CEA <<https://www.cearbitraje.com/es/plataforma-virtual-cea>> accessed 3 February 2022; (ii) LCIA <<https://onlinefiling.lcia.org>> accessed 3 February 2022; and (iii) ICSID. Other institutions such as the ICC have not developed specific technological platforms, but recommend in their guidance

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- Modifying arbitral rules to avoid doubts about the possibility of holding hearings.⁹

In short, arbitral institutions reacted extremely quickly and provided parties and tribunals with the means to continue proceedings. While successful in terms

notes three specific platforms for sharing documents: Opus, TransPerfect and XBundle.

⁹ Some examples: (i) New ICC Rules, in force since 1 January 2021, replacing the 2017 Rules. The most significant modification for our purposes is the one contained in Art 26.1, whereby the tribunal is given discretion to decide – after consulting the parties – whether the hearing should be held remotely; (ii) New LCIA Rules, in force since 1 October 2020, updating the previous 2014 version. The new wording of Art 19.2 gives the arbitral tribunal full freedom to decide on how the hearing will be held; and (iii) New version of the IBA Rules on the Taking of Evidence in International Arbitration, approved on 17 December 2020, replacing the 2010 version. The modification of Art 8.2 stands out the most for establishing that the tribunal, *ex officio* or at the request of a party, may decide that the hearing be held remotely.

of maintaining and even strengthening the position of arbitration, this process has not been without its difficulties. We examine three specific issues in the following sections.

Can an arbitral tribunal order a remote hearing?

The question arises as to whether an arbitral tribunal can order a hearing to be held remotely against the will of one or both of the parties. The answer will depend on the provisions of the *lex arbitri* and the rules of the institution to which the parties have submitted the dispute.

Unless expressly regulated or the parties agree on an alternative, 'the arbitral tribunal may [...] conduct the arbitration in such manner as it considers

The main international arbitral institutions reacted swiftly to the Covid-19 outbreak

appropriate' (UNCITRAL Model Law, Article 19(2)). This creates two possible scenarios, depending on whether or not the parties agree to hold the hearing remotely:

- The parties agree to hold the hearing remotely: in this case, the arbitral tribunal should generally respect their wishes (notwithstanding unassailable logistical obstacles). At the same time, if the parties agree that they do not want a remote hearing and prefer

to wait until a face-to-face hearing can be held, it is difficult to imagine circumstances in which the tribunal would go against their wishes. While it is true that arbitral tribunals have a duty to manage the arbitration in an expeditious and diligent manner,¹⁰ and waiting for a face-to-face hearing could cause delays, they also have a duty to respect the will of the parties, and this latter duty should take precedence if the parties both agree not to hold a remote hearing.

- The parties do not agree to hold a hearing remotely: if one party wishes to hold a remote hearing and the other does not, the tribunal must balance the parties' right to be heard against its own obligation to conduct the arbitral proceedings in an efficient and expeditious manner.

Certain authors argue that, on the basis of the parties' right to request a hearing, hearings can only be held remotely if the parties agree to it.¹¹ Conversely, some believe that the right to request a hearing does not include the right to request that it be held in person. According to the

¹⁰ See, for instance, AAA-ICDR Rules, Art 20.2; HKIAC Rules, Art 13.5; ICC Rules, Arts 22.1 and 25.1; LCIA Rules, Art 14.4(ii); SCC Rules, Art 23(2); SIAC Rules, Art 19.1; UNCITRAL Rules, Art 17.1; Vienna Rules, Art 28(1).

¹¹ See Sweden: S. Lindskog, 'Skiljeförfarande: En kommentar' *Eng.: Arbitration: A Commentary* (Norstedts Juridik: 2012); Germany: F. Spohnheimer, 'Gestaltungsfreiheit bei antezipiertem Legalanerkennnis des Schiedsspruchs' (Mohr Siebek: 2010), p 308. All cited in Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020), vol 37, issue 4, *Journal of International Arbitration* (Kluwer Law International), p 4.

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latter view, the essence of a hearing is the simultaneous oral exchange of arguments and evidence and that is preserved in virtual hearings, thus respecting the principles of orality and immediacy.¹² In line with this, the Covid-19 Guidance Note issued by the International Chamber of Commerce ('ICC') found that these requirements are equally satisfied in both face-to-face and remote hearings, provided that the latter uses communication technologies to transmit audio or video, or both, so as to allow for a simultaneous exchange of oral arguments and evidence.¹³

In both scenarios, arbitral tribunals must first assess a series of circumstances (such as the reasons for holding the hearing remotely, how long the hearing will be delayed if it is not held virtually, costs considerations, etc.) and then decide what is best on a case-by-case basis.¹⁴

In *Biljana Capic v Ford Motor Co. of Australia Ltd.*,¹⁵ an Australian court

weighed the health risks posed by Covid-19 against the principle of resolving disputes 'according to law and as quickly, inexpensively and efficiently as possible'.¹⁶ The court concluded that the 'technological limitations' associated with remote hearings are often unavoidable and therefore tolerable, and as such should not necessarily lead to the conclusion that, when they do happen, 'the trial will be unfair or unjust'.¹⁷

In our opinion, ordering a remote hearing in the absence of an agreement would be compatible with the principle of party autonomy if one party sought a remote hearing and the other opposed

Federal Court of Australia, (Adjournment), FCA 486 (15 April 2020).

¹⁶ Ibid, para 2.

¹⁷ Ibid, paras 10, 13.

it, provided that in the circumstances of the case holding a remote hearing is the most suitable way of conducting the arbitration.¹⁸

Do remote hearings compromise the principle of equality of arms?

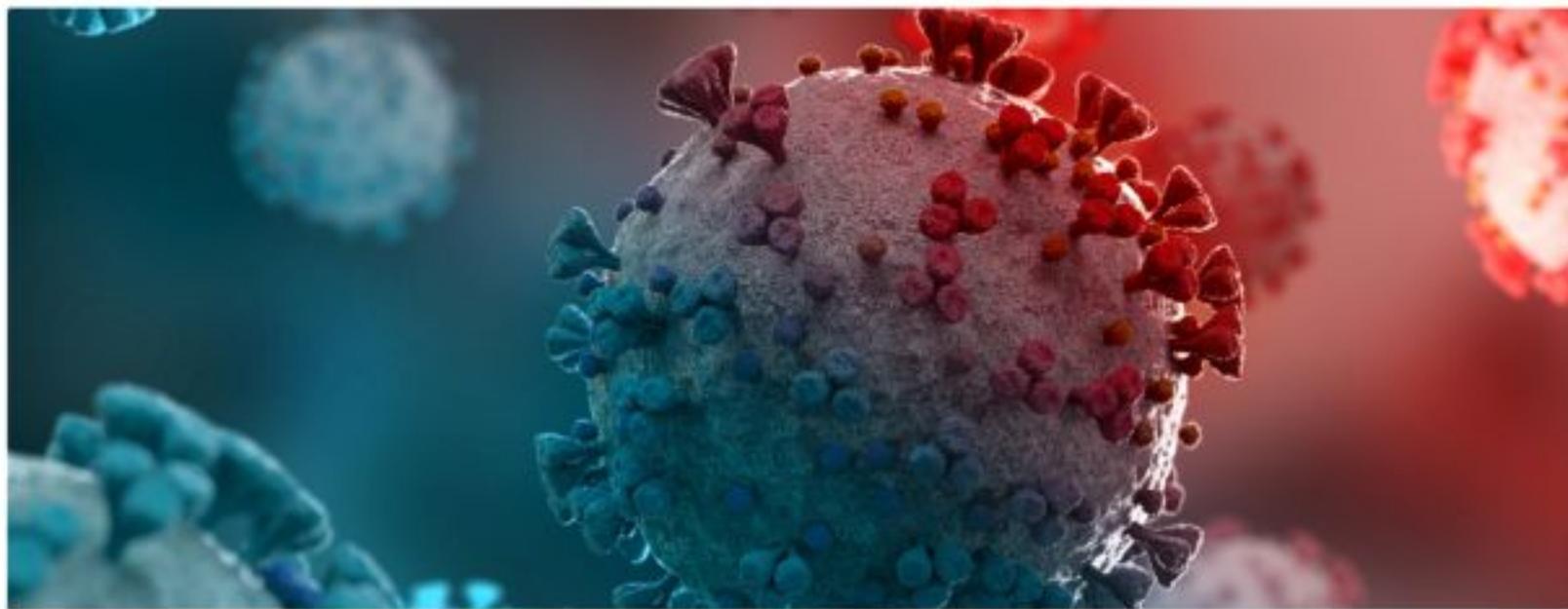
A further question arising in connection with remote hearings is whether they risk giving rise to inequality between the parties and, consequently, the possibility

¹⁸ Such circumstances would include examining for how long the proceedings could be delayed if the hearing is not held remotely, the harm that such a delay might cause, and other travel-related, timing, and cost considerations. We believe that other aspects such as the parties' and arbitral tribunal's age and experience with technology should also be considered, as holding a remote hearing could entail 'Zoom fatigue' or other psychological effects that might influence the award. See C. Bao, S. Puchkov and A. Masser, 'The Psychological Impact of Remote Hearings' (2021), Berkeley Research Group.

It is crucial to take measures to avoid any inequality of arms

of an arbitral award being annulled essentially due to the remote nature of the hearing.

Equality of arms is respected in a remote hearing if (i) both parties have the opportunity to present their case, and (ii) arguments and evidence are exchanged orally and simultaneously. As previously mentioned, the ICC has declared that remote hearings do not violate Article 25.2 of its Rules (and thus the principle of equality of arms between the parties) or the requirement that the arbitral tribunal



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hear the parties jointly *in person*, since this does not require physical presence but rather that the parties are able to communicate with each other orally and simultaneously.¹⁹

In any case, we can certainly imagine factors that could lead to an inequality of arms, such as unequal access to technology or a significant difference in the time zones where the parties are physically located.²⁰ One of the parties could therefore potentially argue that it was unable to exercise its right of defence as a ground to have the award annulled.²¹ Such an argument, which could be based on a national statutory provision or the rules of the arbitration institution, would necessarily entail the assertion that the right of defence requires a face-to-face hearing – which as we have seen above is difficult, if not impossible, to contend. In any event, many academics believe that equivalence can be achieved between remote and face-to-face hearings by ensuring that the technology used is of an adequate standard.²²

In fact, case law in various countries has confirmed that remote hearings respect both the principle of equality

¹⁹ Art 25(2) of the ICC Rules. See footnote 13.

²⁰ Remote hearings are commonly attended by people across the globe. If the hearing is held, for example, at 11:00 am in New York, it will be midnight for a party connecting from Hong Kong and they will have to conduct all their questioning and pleadings in the early hours of the morning, which will undoubtedly affect their mood and energy.

²¹ Art V(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Arts 34(2)(a)(ii), 36(1)(a)(ii) of the UNCITRAL Model Law.

²² Maxi Scherer, *op. cit.*, p. 14.

of arms and the right to present one's case – and, to date, we are not aware of any case in which an arbitral award has been annulled because the hearing was held remotely.²³ For instance, we cite the following pre- and post-Covid cases:²⁴

- Judgment of the Federal Court of Australia dated 13 September 2016:²⁵ an action for annulment was brought against an award, based on alleged inequality of arms. Owing to a technical issue, a witness had to give testimony via video conference while the audio was provided by mobile phone. The claimants argued that this had caused a delay between the video image and the sound. The action was dismissed, as the court considered that the party alleging inequality of arms could have avoided the situation's ill effects by being more diligent (e.g. by carrying out sound tests or requesting

²³ In any case, we cannot fail to mention the Singapore Court of Appeal's recent judgment of 20 January 2021 in *CBS v CBP* [2021] SGCA 4 <<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/ca-30-of-2020---20012021-final-pdf.pdf>> accessed 2 February 2022, in which an award was annulled on the grounds that the arbitrator did not allow a hearing for oral witness evidence. The court ruled that the arbitrator's decision amounted to a violation of *natural justice* as well as an overreaching of their power, despite the fact that the party seeking the annulment of the award refused to submit written witness statements.

²⁴ Other cases ruling that the hearing being held remotely was not a sufficient ground to allege a lack of opportunity for the parties to present their case and that therefore, in principle, this did not pose a risk to an award being enforced, include: *China National Building Material Investment Co., Ltd. (P.R. China) v BNK Int'l LLC (US)*, United States District Court of the Western District of Texas (4 December 2009); *Research & Development Center 'Teploenergetika', LLC v Ep Int'l, LLC*, United States District Court of the Western District of Texas (26 April 2016).

²⁵ *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*, Federal Court of Australia, NSD 1333 of 2016 (13 September 2016).

Whether remote hearings can be validly held depends on the applicable regulatory framework, arbitration rules and law of the seat of arbitration

that the hearing be rescheduled or repeated, which they did not do). In short, the court found that a violation of the principle of equality of arms cannot successfully be claimed when the party invoking it fundamentally caused the violation itself.

- Judgment of the Spanish Supreme Court dated 22 July 2021:²⁶ this judgment relates to a criminal case, but its rationale can be applied to a remote arbitration hearing. The court approved the decision of a criminal judge to hold a virtual hearing, in which the defendant was not physically present, given that (i) there was an exceptional situation – the pandemic – which justified exceptional decisions; and (ii) holding a virtual hearing was proportionate, since holding a face-to-face hearing would have caused delays that would have extended the defendant's stay in pre-trial detention.

In any case, it is crucial to take measures to avoid any inequality of arms, such as

²⁶ Judgment of the Spanish Supreme Court, Second Chamber, No 652/2021, rec. 10618/2020 (22 July 2021).

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preparing a detailed protocol explaining each aspect of the remote hearing, using adequate technology and organising sessions to train attendees on the technological and logistical aspects of remote hearings.

Could privacy and confidentiality be at higher risk during remote hearings?

Finally, the argument has been raised that remote hearings pose a higher risk of confidentiality breaches, which can be extremely serious given the sensitive matters that are often decided in arbitration. The main challenges faced in the context of remote hearings include preventing third parties from gaining access to the hearing and preventing the owner of the digital platform from accessing any information that is shared.²⁷

It is therefore highly advisable to carefully follow the recommendations of the arbitral institutions on how to avoid these risks (typically contained in their guidance notes). These recommendations include using a private Wi-Fi connection, controlling access to the virtual hearing room with the password provided by the tribunal's secretary, or having the parties sign a strict confidentiality agreement in advance.²⁸

²⁷ In fact, the CIAM, in its aforementioned Note on organising virtual hearings dated 21 April 2020, expressly warns about the risk of using virtual platforms, and excludes any liability of the parties for the adverse consequences of using them. See para 3.1.6, p 4.

²⁸ See, for instance, 'Reglas de CIMA para las audiencias de pruebas testificales y periciales por

Conclusions

- The Covid-19 pandemic has brought remote hearings to the fore in arbitration, as they have become the main way of allowing proceedings to continue and have prevented this dispute resolution system from coming to a standstill. Arbitral institutions have reacted swiftly to the situation by creating guidelines, amending their rules and setting up virtual platforms to enable arbitration proceedings to continue.
- Whether remote hearings can be validly held depends on the applicable regulatory framework, arbitration rules and law of the seat of arbitration.
- Arbitral tribunals generally have the power to decide whether to hold a remote hearing. However, this discretion is not unlimited, particularly when both parties reach an agreement on whether to accept or reject the possibility of holding a remote hearing.
- It is difficult to successfully argue that remote hearings compromise the principle of equality of arms, as they have generally been considered proportionate in exceptional circumstances such as the pandemic. Moreover, remote hearings offer the parties the opportunity to

medios audiovisuales' CIMA (8 June 2020) <<http://www.arbitrajecima.com/wp-content/uploads/2020/06/REGLAS-CIMA-PARA-AUDIENCIAS.pdf>> accessed 6 February 2022.

It is difficult to successfully argue that remote hearings compromise the principle of equality of arms, as they have generally been considered proportionate in exceptional circumstances such as the pandemic

- simultaneously exchange oral arguments and present evidence. In any case, it is crucial to take measures such as preparing a detailed protocol explaining each aspect of the hearing, using adequate technology and training the attendees on technological and logistical aspects of the remote hearing.
- Measures should also be taken to avoid the risk of privacy and confidentiality breaches during remote hearings. Guidance from the international arbitration institutions should be followed in this regard.
- All in all, the role of arbitration as an effective alternative to litigation has been strengthened during the pandemic, thanks to international arbitral institutions' quick reaction and their determination to make arbitration a truly effective dispute resolution system.

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