

COVID-19 ON 'CONFIDENTIALITY' IN INTERNATIONAL ARBITRATION

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I. Introduction

Globalisation, has been reported to contribute to overall prosperity through new technologies and innovation in response to increased International competition.¹ But few if any could have imagined that the dependence on technology would be bolstered by a global pandemic that would restrict the world to digital activity. The COVID-19 virus that was first detected in Wuhan, China soon brought the entire world to a standstill with travel restrictions to slow the spread of the virus leaving no other option than a virtual connection. Of course, digital globalisation had already begun to soar prior to the pandemic, reducing the cost of international interactions and transactions which is beneficial to businesses.² But COVID-19 restrictions amongst other concerns of a digital world, has brought privacy, data protection and security issues to the surface.

Following recent developments such as the European Commission evaluation report on the General Data Protection Regulation (GDPR) in June 2020,³ the issue on data security and privacy may seem recent as the world is alarmed following increased digitalisation in reaction to the outbreak of COVID-19. But it is important to take cognisance that although seemingly agreed upon in the nick of time in April 2016,⁴ these set of rules including the principle of 'integrity and confidentiality',⁵ have somewhat been regarded as the world's influential framework on data protection and security dating back to the 1990s.⁶ And although originating in the EU and only protecting personal data of natural persons, this set of rules has been praised by the rest of the world as a progressive approach which has led to other rules that expand on protection to both natural persons and businesses as far

¹ INTERNATIONAL MONETARY FUND: *World Economic Outlook*. 2018.04.

² MANYIKA, James et al: *Digital Globalisation: The New Era of Global Flows*. 2016. <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-globalization-the-new-era-of-global-flows> (2020.11.07.).

³ EUROPEAN COMMISSION: *Commission report: EU data protection rules empower citizens and are fit for the digital age*. European Commission, 2020.06.24. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1163 (2020.11.07.).

⁴ Council Regulation (EC) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 which came into effect on 25 May 2018.

⁵ Ld. 4. jegyzet, Chapter II Art. 5 (F).

⁶ Council Directive (EC)95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281.

as South Africa's Protection of Personal Information Act 4 of 2013, largely modelled on the EU Directive.⁷ As well as compared with other similar rules such as in the US,⁸ as security concerns mirror increasing global technological activity.

So, in this era of globalisation and rapid technological development, businesses may benefit but not without regulatory challenges such as with the GDPR.⁹ Likewise, arbitral institutions facing fierce competition in the business of international arbitration, have also attempted to take advantage of the digital world to improve on favourable aspects on flexibility and efficiency that ultimately give international arbitral institutions their competitive edge over national court proceedings.¹⁰ However, even when the resolution of disputes may cost less and resolved expeditiously with the use of information technology tools, the confidentiality aspect in international arbitration is listed as the most important benefit.¹¹ And so the COVID-19 pandemic has put institutions to the test on ensuring confidentiality which determines the quality of the arbitral process as well as the integrity and reputation of the respective arbitration institution.¹²

II. COVID-19 and Cybersecurity

II.1. IT in International Arbitration and Efficiency of Remote Hearings

International arbitration, for years typically preferred to resolve international disputes due to flexible aspects compared to litigation, is meant to be more efficient, cost less and resolve disputes expeditiously.¹³ Because apart from the prestige of an arbitral institution, its set of rules and costs of arbitration & proceedings are important in deciding on suitability.¹⁴ So

⁷ See: MCKENZIE, Baker: *General Data Protection Regulation (GDPR) in Africa: So What?* 2019.07.04. <https://www.bakermckenzie.com/en/insight/publications/2019/05/general-data-protection-regulation> (2020.11.07.).

⁸ See: SINGH, Navdeep K: *What You Need to Know about the CCPA and the European Union's GDPR*. ABA, 2020.02.26. <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2020/what-you-need-to-know-about-the-ccpa-and-the-european-unions-gdpr/> (2020.11.07.).

⁹ GDPR is applicable to every business in the world that processes the personal data or monitors the online activities of EU citizens. *Also see:* RONG CHEN: *Policy and Regulatory Issues with Digital Businesses*. World Bank Policy Research Working Paper 8948, 2019.

¹⁰ KAUFMANN-KOHLER, Gabrielle – SCHULTZ, Thomas: *The Use of Information Technology in Arbitration*. JusLetter 5, 2005. https://jusletter.weblaw.ch/juslissues/2005/354/_4410.html__ONCE&login=false (2020.11.07.).

¹¹ PRYLES, Michael: *Chapter 19 Confidentiality' in the Leading Arbitrators' Guide to International Arbitration*. Juris Publishing, Inc. 2004, 2nd edition, 2008.

¹² SINGER, David C: *Arbitration Privacy and Confidentiality In the Age of (Coronavirus) Technology*. Alternatives to the High Cost of Litigation, 2020 Jul-Aug; 38(7). 107–108. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7361227/> (2020.11.07.).

¹³ See: KERR, Michael: *International Arbitration v. Litigation*. J. Bus. L. 1980. 164.

Stating that arbitration clauses are found in the vast majority of international commercial contracts. Also supported by studies in recent years reporting that businesses continue to show a preference for using arbitration over litigation for transnational disputes such as Queen Mary University of London and PWC, *Corporate choices in International Arbitration Industry perspectives*. PWC, 2013. <http://www.arbitration.qmul.ac.uk/research/2013/#> (2020.11.07.).

¹⁴ See: UNITED NATIONS: *Dispute Settlement- International Commercial Arbitration- The Arbitration Agreement, United Nations Conference on Trade and Development*. 2005. *Also see:* HACKING, Lord David – SCHNEIDER,

institutions are chosen on a good track record for time and cost efficiency, as some may act under rules which are not adequately drafted, delaying proceedings that add to the cost.¹⁵ Not ignorant to this, various institutions have issued guidelines to reduce time and cost towards efficient arbitration.¹⁶ The definition of time and costs is found in the institutional rules. However, even with rules in place, international arbitration has attracted criticism for more than significant expense and delay.¹⁷ Off course some of the responsibility rests on the parties to a dispute which arbitral institutions may not have direct control.¹⁸ But others ways to reduce costs are directly under the control of lawyers and arbitrators.¹⁹ And because arbitral institutions are ultimately competing for business, they make sure to differ in their professional oversight as well as the cost and speed at which they finalise hearings, to be as competitive as possible.

One method of remedying the excessive duration and costs of arbitration is to resort to information technology (IT) tools to accelerate and facilitate the arbitration.²⁰ In fact, in a 2018 survey, respondents stated that they expected improvements in technology to be utilised in future arbitrations.²¹ And so bringing online dispute resolution (ODR) to international arbitration in the form of virtual hearings is understandably presented and promoted to save time and costs.²² Arbitrations are often document intensive exercises with large volumes of trial bundles so managing these intensive arbitration documents electronically and subsequently referring to these during a remote hearing saves time and

Michael E: *Towards More Cost- Effective Arbitration*. IBA Arbitration and ADR, 1998. <https://www.lalive.law/publications/> (2020.11.07.).

¹⁵ See: Pinsent MASONS: *Institutional vs. 'ad hoc' arbitration*. Pinsent Masons, 2011.08.12. <https://www.pinsentmasons.com/out-law/guides/> (2020.11.07.).

¹⁶ For instance, LCIA Arbitration rules (2014), Article 14(2) "shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration" and ICC Arbitration rules (2017) Article 22(1) "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute". New ICC rules have been revised and updated, set to come into force on 1 January 2021. See: *ICC Arbitration Rules 2021*. <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/> (2020.11.07.).

¹⁷ See: FORTESE, Fabricio – HEMMI, Lotta: Procedural Fairness and Efficiency in International Arbitration. *Groningen Journal of International Law* 2015/3(1). 110.

¹⁸ There are cases where the behaviour of parties can cause delays to punish the other. Delay tactics such as inability to attend a hearing at a particular time or inability to deliver documents, for instance. And because arbitral tribunals attend to the cost issues only at the end of the matter, there is little deterrence for the bad behaviour of parties.

¹⁹ Ld. 10. jegyzet.

²⁰ Ld. 10. jegyzet.

²¹ See: QUEEN MARY UNIVERSITY OF LONDON – WHITE AND CASE: *2018 International Arbitration Survey: The Evolution of International Arbitration*. White & Case, 2018.05.09. <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration> accessed 7 November 2020. Also see: Queen Mary University of London School of International Arbitration Survey findings at <<http://www.arbitration.qmul.ac.uk/research/2018/>> (2020.11.07.). 'Information technology is widely used in international arbitration and respondents welcome increased use of such tools to aid efficiency'.

²² Remote hearings are also sometimes called virtual hearings but to avoid any misconceptions about the physical reality of remote hearings, the terminology of virtual hearings should be avoided or used sparingly. See: SCHERER, Maxi: *Remote Hearings in International Arbitration: An Analytical Framework*. Queen Mary University of London, School of Law Legal Studies Research Paper No. 333/2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599814 (2020.11.07.).

cost.²³ And without travelling costs to different locations across the world, costs associated with the arbitral process are further reduced.²⁴ The use of IT in the arbitral process is in its infancy, but it is increasingly gathering a strong momentum.²⁵ Particularly with the COVID-19 pandemic giving a chance to arbitral institutions to prove that remote hearings can enhance efficiency.²⁶

It would be dishonest not to also mention the aversion to remote hearings.²⁷ Particularly from lawyers who generally prefer conservatism and avoid risking the client's confidence.²⁸ And there have not been significant detailed analyses in arbitration law journals on these earlier initiatives on remote hearings. So, the COVID-19 pandemic is probably the turning point to this aversion and lack of analysis of remote hearings. There may have been an aversion on rethinking the need for oral hearings but travel restrictions have made stakeholders realise that it is possible to embrace new approaches that can reduce costs and delays.²⁹ Although not completely inconceivable to revert to the normal face-to-face physical arbitration after the pandemic,³⁰ new developments indicate that virtual hearings may indeed become the norm rather than exception or at least a reversion to the mean of physical hearings with the inclusion of some 'virtual' aspects.³¹

²³ Ld. 10. jegyzet.

²⁴ Ld. 10. jegyzet.

²⁵ Ld. 10. jegyzet

²⁶ 'Remote hearings might prove to be helpful in controlling time and costs related to international arbitration proceedings'. Ld. 22. jegyzet.

²⁷ Most lawyers, when advised to implement some IT solution in their practice, voice the same concerns: first, electronic communications create a particularly important risk of security breaches. Ld. 10. jegyzet.

²⁸ 'Because arbitration is a quasi-judicial process, it must comply with procedural guarantees, which impose certain constraints on the process. Hence, there is fear that resorting to IT may jeopardize procedural rights and create grounds for useless procedural complications or even annulment of arbitral awards.' Ld. 10. jegyzet.

²⁹ Ld. 10. jegyzet. 'Most lawyers, when advised to implement some IT solution in their practice, voice the same concerns: first, electronic communications create a particularly important risk of security breaches; second, technology is unreliable and usually breaks down at the most inconvenient time; third, faking identities is relatively easy on the Internet and consequently it may be difficult to trust the authenticity of a message; and fourth, professionals have their working habits and are afraid that changing them to adapt to IT may decrease their productivity'. Also see: Sue Hyun LIM – MARKERT, Lars: *Rethinking Virtual Hearings*. Kluwer Arbitration Blog, 2020.07.19.

<http://arbitrationblog.kluwerarbitration.com/2020/07/19/rethinking-virtual-hearings/> (2020.11.07.).

³⁰ *Although virtual hearings are possible, it is unlikely that they will become the new normal, particularly in complex cases*. See: REDDING, Whitney R et al: *Virtual International Arbitration and the COVID-19 Pandemic: One Institution's Approach*. Troutman Pepper, 2020.04.15. <https://www.troutman.com/insights/virtual-international-arbitration-and-the-covid-19-pandemic-one-institutions-approach.htm> (2020.11.07.). 'In fact, some users that are perhaps more risk averse and or are occasional parties to arbitrations, may also be willing to pay again a premium for that more traditional style of physical in person arbitration'. See: NOTTAGE, Luke: *Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?* Kluwer Arbitration Blog, 2020.07.16.

http://arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration/?doing_wp_cron=1594879199.7058219909667968750000&print=print (2020.11.07.).

³¹ See: GUDEN, Ali – NIHAL, Dilara: *How was International Arbitration Law Affected by the COVID-19 Pandemic?* CEE Legal matters, 2020.05.14. <https://ceelegalmatters.com/guden/13539-how-was-international-arbitration-law-affected-by-the-covid-19-pandemic> (2020.11.07.). ALSO SEE: WILSKE, Stephan: *The Impact of COVID-19*

But increased activity in cyberspace further exposes proceedings and made them more vulnerable to the risk of confidential information and documents being accessed by unauthorized parties, in this digital space.³² Law firms are depositories of their clients' data and documents generally covered by privilege and/or a duty of confidentiality. So law firms are already a prominent target for hackers to attain this information that is not in the public domain.³³ Indeed, as we have learnt from the hacking of law firms as well as the Permanent Court of Arbitration's (PCA) website that was quietly breached and implanted with malicious code posing a potential risk to lawyers, there already exists cybersecurity risks whether with or without offering remote hearings.³⁴ So obviously cybersecurity has been a concern prior to COVID-19 but not much thought has also been given so far on how to deal with the possibility of remote hearings in drafting dispute resolution clauses.³⁵ Unfortunately, confidentiality and privacy are critical features of arbitration as users of international arbitration still want to protect their trade secrets and confidential information even when they exercise the advantage of disputes being resolved in an expeditious and cost effective manner. And more clients are becoming aware of their vulnerabilities while working remotely but the legal industry has only recently started to address the cybersecurity risks in during a 'remote' arbitral process.³⁶ So now, these efficiency advantages of arbitration (that were promoted by remote hearings) may be eroded by cybersecurity threats.³⁷

on International Arbitration—Hiccup or Turning Point?. Contemporary Asia Arbitration Journal. 2020/13(1). 7-44.

³² Ld. 12. jegyzet.

³³ 'Every law firm assessed was unwantedly targeted for confidential client data' See: LOGICFORCE: *Law Firm Cybersecurity Scorecard*. 2019. <https://www.logicforce.com/2019/10/07/cyber-security-scorecard-q4-2019/> (2020.11.07.). Also: ROBERTS, Hannah: *Discovered: Espionage Group That Has Targeted Law Firms For 'Almost A Decade*. Law.com International, 2020.07.31. <https://www.law.com/international-edition/2020/07/31/discovered-espionage-group-that-has-targeted-law-firms-for-almost-a-decade/> (2020.11.07.). Also see: Smith, Chloe: *M&A hack attack on 48 elite law firms*. The Law Society Gazette, 2016.04.04. <https://www.lawgazette.co.uk/practice/manda-hack-attack-on-48-elite-law-firms/5054524.article> (2020.11.07.); See: DEPARTMENT OF JUSTICE: *Russian National Charged with Decade-Long Series of Hacking and Bank Fraud Offenses Resulting in Tens of Millions in Losses and Second Russian National Charged with Involvement in Deployment of "Bugat" Malware*. US Department of Department, 2019.12.05. <https://www.justice.gov/opa/pr/russian-national-charged-decade-long-series-hacking-and-bank-fraud-offenses-resulting-tens> (2020.11.07.). And recently: BBC: *Hackers hit A-list law firm of Lady Gaga, Drake and Madonna*. BBC, 2020.05.12. <https://www.bbc.com/news/technology-52632729> (2020.11.07.).

³⁴ The website of the Permanent Court of Arbitration was hacked, infecting the computer systems of visitors landing on the affected page (ie. lawyers and others with an interest in the China-Philippines case would have visited the PCA case page for this arbitration). Also see: ROSS, Alison: *Cybersecurity and confidentiality shocks for the PCA*. Global Arbitration Review, 2015.07.23. <https://globalarbitrationreview.com/cybersecurity-and-confidentiality-shocks-the-pca> (2020.11.07.).

³⁵ Ld. 22. jegyzet.

³⁶ Ld. 22. jegyzet. Also see: KREBS, Cathy: *Privacy and Confidentiality Tips for Virtual Hearings*. ABA, 2020.07.01. <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/privacy-and-confidentiality-tips-for-virtual-hearings/> (2020.11.07.).

³⁷ 'Most people are more concerned about security in «cyberspace» than in the «real world». Some reasons account for that. On the one hand, most people are confused by the apparent complexity of computers, which are thereby associated with the sense of lacking control. On the other hand, common knowledge about computer security is much lower than the general understanding of security in the «real world», because concerns relating to the latter have been around for much longer.' Ld. 10. jegyzet. Also see: WARD, Stephanie Francis: *How*

II.2. Confidentiality in International Arbitration

Parties to a dispute opt for arbitration as a private dispute resolution procedure instead of going to court. And confidentiality which users believe should be an ‘opt-out, rather than an opt-in’ feature, is also the hallmark of international arbitration.³⁸ But although, international arbitration may be private as a general rule,³⁹ confidentiality may also be desired but it should rather be seen as an extension on privacy and not be assumed.⁴⁰ It extends on proceedings held privately by prohibiting parties from disclosing proceedings- includes evidence, submissions, arbitral awards or even disclosing the existence of the proceeding itself and the identities of the parties involved in the proceeding.⁴¹ Rather, the duty and scope of confidentiality is uncertain as it may be on agreement between the parties, be it express or implied in an arbitration agreement but can also be based on institutional arbitration rules, or on national law which differs across jurisdictions.⁴² And while implied confidentiality may be accepted in some jurisdictions, it is not recognised in others.⁴³ It is understood that absolute confidentiality nonetheless does not exist but the recent trend in international arbitration to question ‘confidentiality’ and consider its total elimination does bring discomfort to users.⁴⁴ Particularly with the promotion of remote hearings when almost all participants in international arbitration are of the view that cybersecurity is an important issue.⁴⁵

In fact, confidentiality is regarded as being most relevant matter to a cybersecurity strategy with the two factors; ‘the level of sensitivity/commercial value of the documents and the consequences for the parties if someone were to gain unauthorised access to the documents/information’.⁴⁶ Parties may agree to confidential arbitration proceedings which

scams multiply during the COVID-19 crisis and why lawyers are not immune. ABA, 2020.03.31. <https://www.abajournal.com/web/article/scams-multiply-during-covid-19-crisis-lawyers-are-not-immune> (2020.11.07.).

³⁸ Ld. 21. jegyzet.

³⁹ The Privacy of international arbitration concerns that proceedings are not open to the public so only parties to the arbitration may attend hearings and participate in the arbitral proceedings. See: MAYANK, Samuel: *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?* Kluwer Arbitration Blog, 2017.02.21. <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> (2020.11.07.). Also see: Ld. 12. jegyzet.

⁴⁰ See: MAYANK: i. m.; Ld. 12. jegyzet.

⁴¹ See: MAYANK: i. m.

⁴² Also see: TRAKMAN, Leon E: *Confidentiality in International Commercial Arbitration.* Arbitration International. 2002/18(1). 1-18.

⁴³ See: KOURIS, Steven: *Confidentiality: is international arbitration losing one of its major benefits.* J. Int’l Arb. 2005/22. 127.

⁴⁴ Ld. 43. jegyzet.

⁴⁵ *BCLP Annual Arbitration Survey. Cybersecurity in International Arbitration: Don’t be the weakest link.* 2019.02.06. <https://www.bclplaw.com/en-US/insights/bclp-annual-arbitration-survey.html> (2020.11.07.). ‘90% of respondents said that it was an important issue in international arbitration, with 11% of respondents indicating that they had had experience of a breach in cybersecurity (i.e. someone was able to obtain unauthorised access to electronic documents or other information)’.

⁴⁶ ‘The two factors regarded by the largest number of respondents as being relevant to a cybersecurity strategy were the level of sensitivity/commercial value of the documents to be used in an arbitration (94%) and the consequences for the parties if someone were to gain unauthorised access to the documents/information (78%).’ Ld. 45. jegyzet.

will be provided for in the contract and checked against the institution rules and law of the arbitral seat. However, there is no complete guidance on what the cybersecurity measures entail.⁴⁷ This lack of hard guidance may have significant consequences because a breach of the security of sensitive information may amount to the violation of confidentiality -which will impact the whole proceeding by inflicting reputational damage to arbitral institutions, arbitrators, and counsels, as well as undermine the integrity and viability of international arbitration overall, as a dispute resolution mechanism.⁴⁸ And the permanent nature of arbitral institutions are particularly well positioned to implement systemic solutions to cybersecurity risks;⁴⁹ something that a risks-based approach by which risks are assessed and dealt with by parties and tribunals on a case-by-case basis is less likely to achieve.⁵⁰ So institutions that seize the initiative on cybersecurity may gain a competitive advantage.⁵¹

II.3. International Laws and Rules on Cybersecurity and Confidentiality

There are doubts on the effectiveness of international the law on cybersecurity.⁵² Indeed there is Budapest Convention on cybercrime which is the first treaty to address cybersecurity but generally considered ineffective due to its limited scope but also considering that other

⁴⁷ Few arbitral institutions have offered detailed guidance on video conferencing .With the exception of The International Chamber of Commerce (ICC) Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic that suggests that the tribunal and the parties should consult to develop a cyber-protocol and the LCIA new rules that came into effect on 1 October 2020 expanding provisions to accommodate the use of virtual hearings directly into its rules and ‘also supporting arbitrations taking place in the new normal where all hearings can now be conducted virtually’, with broad provision for the use of “other communications technology” between “participants in one or more geographical places (or in a combined form)”. Ld. 30. jegyzet; Also see: LCIA: *Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules*. 2020. <https://www.lcia.org/lcia-rules-update-2020.aspx> (2020.11.07.); Also see: *LCIA Arbitration Rules 2020*. Article 19.2. https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2019 (2020.11.07.).

⁴⁸ The LCIA is the first institution to introduce provisions dealing with the inclusion of data protection and information security in its 2020 arbitration rules. But given he competitive nature of arbitral institutions, others will probably follow suite. See: *Podcast: LCIA Rules Update 2020*. LCIA, 2020.10.29. <https://www.lcia.org/podcast-lcia-rules-update-2020.aspx> (2020.11.07.). ‘ Cybersecurity and data protection are particularly important concerns in today’s digital age, and therefore, these amendments are likely to improve user confidence in LCIA arbitrations.’ See Dipen SABHARWAL QC – Viraen VASWANI: *LCIA Introduces New Arbitration Rules for New Era*. White & Case, 2020.08.13. <https://www.whitecase.com/publications/alert/lcia-introduces-new-arbitration-rules-new-era> (2020.11.07.). Also see: *LCIA Arbitration Rules 2020*. Article 30A. https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2019 (2020.11.07.).

⁴⁹ See: DE WESTGAVER, C Morel: *A Systemic Approach to Cybersecurity in International Arbitration – Imperative and Implementation*. Transnational Dispute Management, 2019. <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1751#citation> (2020.11.07.).

⁵⁰ Such as clarified in the first principle of the Cybersecurity Protocol for International Arbitration that does not aim to be a “one size fits all” solution, recognising the need for an approach based on a case-by-case analysis.

⁵¹ In response to the role of arbitral institutions in cybersecurity. Ld. 45. jegyzet.

⁵² Also see: FIDLER, David P: *Recent Developments and Revelations Concerning Cybersecurity and Cyberspace: Implications for International Law*. American Society of International Law. 2020/16(22).

important countries have not adopted the treaty.⁵³ It's been seen as needing an update but a new UN treaty on cybercrime led by Russia and China may have passed a vote in December 2019 despite opposition by Western States.⁵⁴ Until the outcome of these developments, it still stands that the issue of whether mandatory laws apply in international arbitration and which laws for that matter, is difficult. Because even if one takes the view that rules such as GDPR are mandatory law, the next question is whether the activities in the arbitration fall within their scope. For instance, participants in the arbitral process may fall within the territorial scope of GDPR⁵⁵ which is clarified in its recitals⁵⁶ but the material scope relating to the type of activities does not go unchallenged as we have seen argued by Canada.⁵⁷ The argument that GDPR is not generally applicable to arbitration proceedings was accepted although this was premised on investment arbitration and not commercial arbitration which is yet to be questioned. But if the GDPR is accepted to apply in arbitration, institutions will have to also consider safe data processing measures to ensure compliance towards cybersecurity.

Generally, cybersecurity standards in international arbitration are driven by soft law, prominently the Protocol on Cybersecurity in International Arbitration which raised significant awareness of data protection in arbitration before the COVID-19 pandemic starting with its draft in 2018.⁵⁸ And in the absence of a hard law on cyberspace, it is proposed to seek guidance from customary international law based on the consistent practice of States.⁵⁹ But the lack of hard law in international law on cyberspace, is hardly effective and more difficult to be imposed. Perhaps all a product of 'digital sovereignty' which

⁵³ I.e. Russia, China, India, Brazil. Interestingly, BRICS countries together agreed on the establishment of an expert working group on cyber-security, cberBRICS. See: *CyberBRICS* <https://cyberbrics.info/about-us/> (2020.11.07.).

⁵⁴ See: *United Nations (UN) A/74/401 Countering the use of information and communications technologies for criminal purposes*. Agenda item 107, 2019. <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2F74%2F401&Language=E&DeviceType=Mobile> (2020.11.07.). Also see: COLLIER, Kevin: *27 countries sign cybersecurity pledge with digs at China and Russia*. CNN, 2019.09.23. <https://www.cnn.com/2019/09/23/politics/united-nations-cyber-condemns-russia-china/index.html> (2020.11.07.).

⁵⁵ GDPR applies to any business in the EU, as well as to one outside the EU if it offers goods or services to EU citizens.

⁵⁶ Reference to 'out-of-court procedure' in recitals. For instance: Recital 52, 111. See: *GDPR Recitals April 27th 2016* <https://gdpr-info.eu/recitals/> (2020.11.07.).

⁵⁷ *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54.

⁵⁸ The ICCA launched a Working Group on Cybersecurity in International Arbitration which published an initial Consultation Draft Protocol that was released in April 2018. In partnership with the New York City Bar Association (NYC Bar), the 2020 Cybersecurity Protocol for International Arbitration was released during the New York Arbitration Week in November 2019. See: ICCA: *Cybersecurity in International Arbitration ICCA-NYC Bar-CPR Working Group*. 2020. <https://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html> (2020.11.07.). Also see: *Cybersecurity protocol will raise awareness of data protection in arbitration, says expert*. Pinsent Masons, 2019.11.26. <https://www.pinsentmasons.com/out-law/news/cybersecurity-protocol-will-raise-awareness-of-data-protection-in-arbitration> (2020.11.07.).

⁵⁹ See: BROWN, Gary – POELLET, Keira: *The Customary International Law of Cyberspace*. Strategic Studies Quarterly. 2012/6(3). CYBER SPECIAL EDITION (FALL 2012). 126-145. https://www.jstor.org/stable/26267265?seq=1#metadata_info_tab_contents (2020.11.07.). Also see: POLAŃSKI, Paul Przemysław: *Cyberspace: A new branch of international customary law?* Computer Law & Security Review. 2017/33(3). 371-381. <https://www.sciencedirect.com/science/article/abs/pii/S026736491730078X> (2020.11.07.).

makes progress on an agreeable international law on cyber security more difficult.⁶⁰ And so it should not be of any surprise for international arbitration, a field that operates in international law to mirror the status quo on cybersecurity.⁶¹ But being in the forefront and primary targets of cyber attacks that threatens the core aspect of international arbitration as a potentially confidential dispute resolution mechanism, institutions cannot afford to remain silent or vague. Confidentiality in previous attempts by the industry to promote remote hearings may have gone unquestioned but the force of COVID-19 has put the reputation of international arbitration and its participants in the spotlight.⁶²

Indeed, institutions have issued rules on how remote hearings ought to be conducted in attempt to guarantee confidentiality.⁶³ These institutional rules entitle parties to incorporate measures they deem necessary to safeguard the proceedings such as confidentiality in order to protect sensitive and confidential information.⁶⁴ So the degree of confidentiality varies across institutions. And anyways, most international arbitration rules make provision for privacy of arbitration hearings⁶⁵ but only partially regulate the issue of confidentiality which excludes parties to the dispute and only imposes the duty of confidentiality on the institution and arbitrators.⁶⁶

III. Conclusion

It can only mean that with increased competition to offer efficiency, arbitration institutions will now in addition have to compete on the guarantee of 'confidentiality'. Although cybersecurity has always been a concern, COVID-19 travel restrictions has brought the issue to the surface in light of increased activity in cyberspace. It is clear that rules are required to address this but still not sufficient in securing confidentiality which is important in maintaining the reputation of the entire arbitral process. So, in addition to cost and speed, the parties' choice of arbitration institution will also most likely be influenced by

⁶⁰ See: AYERS, Cynthia E: *Rethinking Sovereignty in the Context of Cyberspace*. United States Army War College CSL, 2016. <https://www.hsdl.org/?search=&searchfield=&all=Rethinking+Sovereignty+in+the+Context+of+Cyberspace&collection=public&submitted=Search> (2020.11.07.).

⁶¹ 'No field of legal scholarship or practice operates in the world of private international law as continuously and pervasively as does international arbitration'. See: BERMANN, George A: *International Arbitration and Private International Law*. Books, 2017. 47. <https://scholarship.law.columbia.edu/books/47> (2020.11.07.).

⁶² For example, Protocol for online case management, which in response to COVID-19 been updated and released for public comment by large international law firms, the Seoul Protocol on Video Conferencing in International Arbitration, and some procedures found in most rules such as the provision for documents only arbitration, which were probably not as detailed pre-pandemic but have now been updated and more detailed – Such as the ACICA draft Procedural Order for the Use of Online Dispute Resolution Technologies, finalised in 2016 but now updated.

⁶³ Such as the ICC, SIAC, and LCIA that have introduced comprehensive rules. Ld. 10. jegyzet.

⁶⁴ Ld. 10. jegyzet.

⁶⁵ Ld. 10. jegyzet. Such as AAA , the ICC , the Stockholm Chamber of Commerce , the Arbitration Court at the Russian Federation Chamber of Commerce , and the CEPANI, as well as the UNCITRAL Arbitration Rules.

⁶⁶ Ld. 10. jegyzet. A minority of arbitral institutions have more detailed rules on confidentiality, such as the AAA , the LCIA , and the WIPO Arbitration and Mediation Center , the China International Economic and Trade Arbitration Commission , the Japan Commercial Arbitration Association and the Swiss Rules of International Arbitration.

technological infrastructure to provide secure digital environments that somewhat ‘guarantee’ confidentiality. And as reputation is an important factor in selecting the arbitral centre, it will be determined by the jurisdictions openness to remote hearings but also well funded national courts will determine the seats infrastructure and thus reputation.⁶⁷

Although less open to remote hearings, we have increasingly seen emerging arbitral centres promoting themselves to have a lower cost base compared to Europe and North America.⁶⁸ Emerging centres are also beneficial for diversity in international arbitration by narrowing geographical and cultural disparities.⁶⁹ And so have been increasing in popularity as preferred centres for international arbitration most especially within their respective regions.⁷⁰ But in this highly competitive International arbitration space, questions have still been raised on whether institutions in emerging markets can withstand competition without the support of the well established Western institutions.⁷¹ With already existing doubt and infrastructural demands, what does it mean now in a digital environment requiring a reputation that can convince users of an infrastructure to support cybersecurity, and the ability to ensure and maintain confidentiality? Further research is required on how arbitral centres adapt and whether emerging markets may see a reversal of fortunes as reputation is further threatened by the guarantee of ‘confidentiality’. An indication on how the arbitration community adapts to the rapid increase in the use of technology after the pandemic is the first step in identifying what changes will endure after the pandemic.⁷²

⁶⁷ Reputation is a popular reason for selecting a seat based on the Queen Mary and White and Case International Arbitration survey. Ld. 21. jegyzet.

⁶⁸ INTERNATIONAL BAR ASSOCIATION: *The Current State and Future of International Arbitration: Regional Perspectives*. IBA, 2015. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=2102CA46-3D4A-48E5-AA20-3F784BE214CA> (2020.11.07.).

⁶⁹ See: BLP: *Diversity on Arbitral Tribunals: Are we getting there?* BLP, 2017.01.12. <https://www.bclplaw.com/en-GB/insights/diversity-on-arbitral-tribunals-are-we-getting-there.html> (2020.11.07.).

⁷⁰ For instance, ‘an increase in the number of cases administered by top African arbitral institutions may be a sign that these institutions are coming of age and developing their reputations’ However, some African arbitral institutions need to review their rules that make provision for expedited procedures’. See: Wheal, Robert – OGER-GROSS, Elizabeth– OBAMUROH, Tolu– LONGE, Opeyemi: *Institutional arbitration in Africa: Opportunities and challenges* in *Africa Focus: Autumn 2020*. White & Case, 2020.09.17. <https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges> (2020.11.07.). Ld. 68. jegyzet.

⁷¹ Prior to the pandemic, we have seen these leading institutions enter into joint venture agreements with arbitral institutions in emerging markets, to market their services in these emerging markets but also with the claim of offering support to these institutions that aim to be modern arbitration centres. For instance, the LCIA joint ventures that have now, without much clarity, come to an end (with the exception of the Dubai International Financial Centre JV) has had many question whether these institutions will be able to withstand competition without the JV with LCIA. And also, ‘top arbitration institutions in Africa use substantially the same sets of rules as those of the LCIA and the ICC’. Ld. 70. jegyzet.

⁷² The Queen Mary and White and Case International Arbitration survey, to be available in May 2021, aims to identify how the arbitration community adapted including the rapid increase in the use of technology. See: WHITE & CASE: *White & Case and Queen Mary University of London Launch 2020 International Arbitration Survey*. White & Case, 2020.10.08. <https://www.whitecase.com/news/press-release/white-case-and-queen-mary-university-london-launch-2020-international> (2020.11.07.).

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