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Digital Hearings — In Arbitration and Litigation

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DIGITAL HEARINGS — IN ARBITRATION AND LITIGATION

By
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I. INTRODUCTION

Digital Hearings — Civil Procedure and Arbitration[1] (hereinafter: *Digital Hearings*) comes from editors Mika Savola, Ylli Dautaj, Bruno Gustafsson, and Rolf Åbjörnsson (hereinafter: editors).[2] The editors and contributing authors hail primarily from the Nordic nations[3] and the European Union. *Digital Hearings*, as a consequence, focuses on developments from these regions. The book represents the editors' concerted effort to objectively evaluate digital proceedings'[4] merits across all forms of dispute resolution, with a particular focus on International Commercial Arbitration.[5]

Digital Hearings is an anthology of fourteen essays loosely arranged into three sections: pre-COVID-19 (hereinafter: COVID), Present Day, and post-COVID. Part one outlines digital proceedings' development in the Nordic nations and the European Union. Part two details the current state of digital proceedings, examining experiences with them and sentiments on their validity. Part three looks forward, questioning the future of digital proceedings while attempting to address some pressing issues.

Digital Hearings is a timely book for its publishing date and its subject. First, the book was published on January 9, 2023. Second, three years have passed since the onset of the COVID pandemic and the international dispute resolution space's scramble to stay online. *Digital*s *Hearings* is near enough in time to appreciate those reactionary efforts but

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1. MIKA SAVOLA ET AL., *DIGITAL HEARINGS — CIVIL PROCEDURE AND ARBITRATION* (2023).

2. Mika Savola is a renowned international arbitrator based out of Israel. He has extensive experience as a counsel and arbitrator across various international commercial and investment arbitrations. Ylli Dautaj is a managing partner at DER Juridik/DER Legal, a Teaching Fellow at Durham Law School, an adjunct professor at Penn State Law, and a Ph.D. candidate at the University of Edinburgh. Bruno Gustafsson is a Senior Associate in the Dispute Resolution practice of Rochier, one of the largest law firms in Europe. Mr. Gustafsson's writings on arbitration have been published in journals worldwide. Rolf Åbjörnsson is a leading Swedish attorney with decades of experience in bankruptcy. He now runs Åbjörnsson Advokatbyrå AB, a firm based in Stockholm, Sweden.

3. *See* SAVOLA, *supra* note 1, at 38 (Here, the Nordic nations refer to Denmark, Finland, Norway, and Sweden.).

4. *Digital Hearings* consistently uses "digital proceedings" to mean hearings held fully or partly over video conference software (e.g. Zoom, Microsoft Teams, Skype, etc.). This review will use it in the same manner throughout.

5. *See* SAVOLA, *supra* note 1, at 15.

far away enough to critique them objectively. Furthermore, three years is enough for mature strategies and observable trends to emerge.

Digital proceedings continue to grow more critical in a post-COVID world. Three central considerations ensure the importance of discussing digital hearings now: COVID, technological advancement, and globalism. First, COVID shattered general conceptions of international business and dispute resolution, forcing tectonic changes across industries. The legal field needs to prepare for future global pandemics. Second, advances in technology have made viable previously unprecedented forms of communication. Given the legal field's notoriously glacial adaptation speed, the earlier discussions on implementing this technology happen, the better. Finally, continuing globalization makes an increasingly intertwined global economy an inevitability. The legal community needs to craft cheap, efficient methods of resolving disputes across all corners of the world. Digital proceedings seem to be a critical piece of that puzzle. Even removing potential traveling expenses cheapens the costly endeavor of resolving international commercial disputes. For the foregoing reasons, *Digital Hearings* represents a critical step toward addressing this increasingly important topic.

While *Digital Hearings* focuses on the Nordic nations and the European Union, the United States legal community can learn much from its lessons. As the fourth-largest nation by landmass and a pillar of international commerce, the United States shares many practical concerns with *Digital Hearings*' focus audience. Additionally, *Digital Hearings*' editors and contributing authors represent some of the most influential thinkers in the international dispute resolution space. Their insight has immense value to the U.S. domestic legal scene. Finally, *Digital Hearings*' topic and marshaled talent make the book highly relevant to the ongoing discourse surrounding digital proceedings.

Digital Hearings' greatest strength lies in its ability to present an unbiased view of digital proceedings and effectively advocate for its application in international arbitration. Its various essays are well-written and well-edited. Each author has a distinct voice which helps engage the reader. Despite being written by and for professionals, it is approachable for students and interested laypersons. The book has a profoundly functional perspective, unsurprising given its subject and authors, but still handles more significant, more philosophical questions with aplomb. The editors worked to answer the "why," "when," and "how" of digital proceedings. In sum, *Digital Hearings* is informative, thought-provoking, and entertaining.

This review contains two halves. The first parallels *Digital Hearings*' pre-COVID, Present Day, and post-COVID structure to summarize and critique each essay focusing on identifying overarching lessons regarding digital proceedings. The second section works to apply these lessons to the U.S. domestic arbitration scene, focusing on potential practical and cultural imcompatabilities. Finally, the conclusion presents some final thoughts and critiques.

II. PRE-COVID

By the time of the COVID pandemic, domestic legal systems had already been integrating digital proceedings.[6] Part one of *Digital Hearings* focuses on these pre-COVID developments in Sweden, the larger Nordic region, and the European Union.[7] These essays look to identify expected benefits and challenges to digital proceedings and the validity of those challenges.

Chapter two, written by a Swedish judge, outlines the development of digital hearings in Swedish courts.[8] In Sweden, in-person hearings are the default, with remote participation allowed for "just cause."[9] When deciding on remote participation requests, Swedish courts engage in a nuanced analysis that includes: the appropriateness of a remote hearing, the demands of the Swedish Constitution and other international conventions, due process concerns, and the non-moving party's objections.[10] The author identifies some common objections to remote participation requests, which include complications in cross-examining witnesses, difficulty assessing evidence, and problems operating the technology needed for a digital proceeding.[11] The author's experience has found each concern generally overblown and often with simple workarounds.[12] The author notes that fears of cross-examination, the truthfulness of witnesses over remote software, or a party's ability to operate video technology can be solved by having witnesses go to their local court.[13] Equipping local courts to function as neutral hosting sites presents a fascinating solution to concerns about digital proceedings.

Chapter two also examines the due process concerns of non-mutual digital hearings. Often cases have one party who wants an in-person hearing while the other wants a remote one.[14] When either request is denied, what happens to a party's right to a fair trial? Is it equally prejudicial to demand an in-person hearing[15] as it is to compel a remote hearing?

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6. SAVOLA, *supra* note 1, at at 25.

7. *Id.* at 19-20.

8. *Id.* at 25.

9. *Id.* at 26.

10. *See id.* at 27.

11. SAVOLA, *supra* note 1, at 29, 31.

12. *Id.* at 36.

13. *Id.* at 31-32.

14. *Id.* at 32.

15. *See* IMS Consulting & Expert Services, *Global Dispute Resolution: The Future of Virtual Legal Proceedings is Shaped by Soaring Travel Costs*, ARTICLES (Jan. 19, 2024, 7:42 PM), https://www.expertservices.com/insight/virtual-proceedings-travel-costs/ (calculating the total travel costs of 10 people to London for one week at $80,385).

The author notes that, in their experience, "virtual testimony rarely raises significant due process concerns."[16] Given the centrality of due process to arbitration and litigation, this summary dismissal seems unsatisfying. Providing an example or offering more nuanced support substantiated the author's position. Thankfully, the due process ramifications of non-mutual digital proceedings are discussed throughout *Digital Hearings*.

Chapter three examines developments in the Nordic Jurisdictions and the European Union.[17] The author uses three metrics to measure the development of the Nordic Jurisdictions' and European Union's approaches: online case management portals, remote hearings' availability, and digital proceedings' inclusion into domestic statutory codes.[18] Pre-COVID, continuing until today, the Nordic Jurisdictions' requirements of orality and immediacy have slowed digital proceedings' wholesale adoption.[19] COVID, with its logistical complications and ensuing docket backlogs, forced an intense reprioritization across the Nordic Jurisdictions, resulting in greater reliance on digital proceedings.[20] For example, adopting statutory provisions granting courts broad discretion in allowing remote participation.[21] These adaptations resulted in generally positive experiences with digital proceedings.[22] Despite this, in-person main hearings remain the default.[23] Additionally, Finland and Norway explicitly prohibit non-mutual digital proceedings in a main hearing.[24] Even with the progress spurred on by COVID, in-person hearings will remain the Nordic Jurisdictions' default for the foreseeable future.[25]

The European Union has been working to "digitize justice" since the 2002 establishment of the Council of Europe European Commission for the Efficiency of Justice (CEPEJ).[26] Since 2002, CEPEJ has worked to develop standards and reform courts to

16. *See* SAVOLA, *supra* note 1, at 32.

17. *Id.* at 38.

18. *Id.* at 39-45.

19. *Id.* at 39-45.

20. *Id.* at 47-52.

21. *See* SAVOLA, *supra* note 1, at 51.

22. *Id.* at 50 (Sweden's digital hearings "resolve[d] a record amount of cases compared to the previous year.").

23. *Id.* at 39-45.

24. *Id.* at 45.

25. *Id.* at 52.

26. *See* SAVOLA, *supra* note 1, at 54-55.

increase efficiency.[27] Naturally, this resulted in a concerted initiative to incorporate technology into the courts.[28] Before the pandemic, the EU had begun normalizing videoconferencing for certain proceedings.[29] Unsurprisingly, the pandemic resulted in the rapid adoption of digital hearings, similar to the Nordic jurisdictions.[30] The EU's pandemic response focused on cross-border evidence.[31] The Evidence Regulation was amended to make digital proceedings mandatory for cross-border court interactions even before the pandemic.[32]

Chapter three serves as the logical extension of chapter two. Chapter two introduces the reader to the discourse surrounding digital hearings within the Swedish context. Chapter three invites the reader to consider regional and supranational interactions with digital proceedings. The Nordic jurisdictions' orality and immediacy requirements present exciting opportunities to evaluate digital proceedings from functionality and due process perspectives. In contrast, the EU does not seem to have that same constraint and, as a result, has placed greater emphasis on digitization. Pragmatism dominates the discussion at all levels. Digital proceedings offer solutions to current and future problems. To this end, the question seems to be less "why should digital proceedings be used" and more "why shouldn't digital proceedings be used"?

III. PRESENT DAY

Chapters four through ten examine current practices. Notably, this section provides the international arbitrator's perspective on digital proceedings, best practices, and the relationship between digital proceedings and arbitration institutions.

Chapter four distills arbitration to its fundamental principles and evaluates its compatibility with digital proceedings, particularly non-mutual ones.[33] The author identifies party autonomy, efficiency, a reasonable opportunity for each party to present its case (reasonable opportunity), and equal treatment of both parties as arbitration's fundamental principles.[34] Tribunals enjoy enormous discretion to control parts of a proceeding not already decided by statute or contract. These core principles limit a

27. SAVOLA, *supra* note 1, at 55.

28. *Id.*

29. *Id.*

30. *Id.* at 58

31. *See id.* at 58.

32. SAVOLA, *supra* note 1, at 58.

33. *Id.* at 61.

34. *Id.* at 63.

tribunal's discretion in any field not dominated by law or contract.[35] For example, in the absence of a prescribed schedule, Efficiency, and Reasonable Opportunity force tribunals to intentionally schedule proceedings, precluding arbitrary scheduling decisions which could prejudice one party. To this end, the fundamental principles often empower each other. In the example above, Efficiency and Reasonable Opportunity work together to uphold Equal Treatment.

According to the author, the tribunal's discretion holds the key to decoding the compatibility of arbitration and digital proceedings.[36] Whether to have a digital proceeding is subject to the tribunal's discretion.[37] Should a tribunal order a non-mutual digital proceeding (against one party's wishes), such an order must be tested against those fundamental principles.[38] One should use "the same assessment as is made for any issues pertaining to the conduct of the arbitration."[39] Specifically, (1) did the parties agree to another form of proceeding?; (2) does a digital proceeding uphold efficiency in this case?; (3) would a digital proceeding prevent one party from presenting their case?; and (4) would a digital proceeding prejudice a party in some way?[40] Treating digital proceedings as any other procedural decision increases their compatibility with the current arbitral framework and makes them more approachable to existing tribunals and parties.[41] This essay argues that arbitration and digital proceedings, including nonmutual digital proceedings, are fundamentally compatible.[42]

Chapter four continues the very functional, pro-digital proceedings attitude demonstrated by the preceding essays. The four fundamental principles it proposes—party autonomy, efficiency, reasonable opportunity, and equal treatment—are intuitive and critical aspects of arbitration. Furthermore, this essay accurately outlines the dynamic between these principles and a tribunal's discretion. Finally, these insights are not constrained to international arbitration but can also apply to domestic systems within the bounds of local law.[43] This chapter offers salient insight into arbitration and digital proceedings and provides easily applicable advice.

Chapter five assumes an international arbitrator's perspective to evaluate digital proceedings' impact on the tribunal's dual obligations "to ensure the due process rights of

35. SAVOLA, *supra* note 1, at 64.

36. *Id.* at 75-76.

37. *See id.* at 74-76.

38. *Id.* at 76.

39. *Id.*

40. SAVOLA, *supra* note 1, at 76.

41. *Id.*

42. *See id.* at 76.

43. *Id.* at 75.

the parties[44] are respected and to render valid and enforceable arbitral awards."[45] Article V(1) of the New York Convention hinges an award's validity and enforceability on an arbitration's procedure complying with the parties' agreements, the law of the seat, and the law of wherever enforcement is sought.[46] As digital proceedings become common, tribunals must understand its potential consequences on arbitration procedures, a dispute's merits, and other extrinsic concerns to uphold these obligations.[47]

Digital proceedings offer tribunals much greater procedural efficiency when compared to in-person hearings.[48] Tribunals employing digital proceedings enjoy increased scheduling flexibility, better transfer and presentation of evidence, and access to exciting technology like simultaneous translation.[49] These benefits all make sense. Logging into a video conference software allows parties to participate from anywhere worldwide, eliminating the need for travel and its associated costs.[50] Similarly, forgoing hard copies in favor of digital documents reduces paper waste, costs, and other inefficiencies.[51] Consequently, digital proceedings present new challenges for the international arbitrator. For example, time zones are nearly irrelevant for in-person hearings but can cripple digital proceedings.[52] Unequal access to, or fluency with, technology turns an in-person annoyance into a significant due process issue online.[53] Ultimately, chapter five shows that these problems are surmountable with proper planning and communication.

Despite digital proceedings' generally positive impact on arbitration procedures, the impact on a dispute's merits raises concerns.[54] These adverse effects include diminishing a counsel's ability to cross-examine and assess a witness effectively;[55]

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44. Chapter four outlined the components of due process: (1) a reasonable opportunity to present one's case and (2) equal treatment of both parties.

45. *See* SAVOLA, *supra* note 1, at 75.

46. *Id.*

47. *Id.* at 77.

48. *Id.* at 78-82.

49. *Id.*

50. *See* SAVOLA, *supra* note 1, at 78.

51. *Id.* at 80.

52. *Id.* at 79.

53. *Id.* at 80-81.

54. *Id.* at 82-86.

55. *See* SAVOLA, *supra* note 1, at 83.

threatening proper witness sequestration;[56] and reducing the quality of party-to-party, party-to-client, and party-to-tribunal interactions.[57] Despite the potential severity of these issues, none endanger the use of digital proceedings. Parties and tribunals can work together to host meetings at neutral sites (like courthouses), use multiple cameras to eliminate possible off-screen coaching, and conduct hybrid proceedings with the tribunal and counsel in person while other relevant parties attend remotely. Arbitration is a creature of contract and commercial reality. How can one circumvent these potential problems? Simple. Plan and prepare.

Chapter five also considers various extrinsic factors, including environmental benefits, cost reduction, "Zoom fatigue," and professional connections.[58] The environmental benefits seem straightforward. Digital proceedings remove most travel requirements leaving a much lower carbon footprint than in-person hearings.[59] Fully digital proceedings are likely to be paperless, reducing shipping and material needs which implicate cost reductions.[60] Furthermore, travel and accommodations save parties time and money. Since travel and accommodations are a small part of a party's overall bill, these savings should be appreciated but not overblown.[61] Environmental and cost savings are ancillary benefits and should not be the sole basis for ordering a remote hearing.[62]

Conversely, "Zoom fatigue"[63] and professional concerns should not be the sole basis for dismissing a proposed remote hearing. Fatigue can tangibly impact a proceeding's quality as counsel might miss key moments to object, and tribunals may not heavily scrutinize weak arguments. Similarly, In-person hearings serve as important networking opportunities.[64] Digital proceedings can be too rigid to allow for critical, informal interactions that can advance a counsel or arbitrator's career.[65] Naturally, both of these have easy solutions. Regular breaks, including standing up and not looking at screens, work to combat "Zoom fatigue." Career-minded counsel and arbitrators can replace passive networking with intentional networking. The discussion of Zoom fatigue seems misplaced here. Specifically because, unlike environmental impact and networking, fatigue impacts

56. SAVOLA, *supra* note 1, at 83-84.

57. *Id.* at 85.

58. *Id.* at 86-90.

59. *Id.* at 86.

60. *See id.* at 86.

61. SAVOLA, *supra* note 1, at 89-90.

62. *Id.*

63. *Id.* at 87-88 ("Zoom fatigue" is the general exhaustion arising from being on video calls for long periods).

64. *Id.* at 90.

65. *See id.* at 90.

counsel and tribunal's performance in the dispute. Accordingly, the essay should have included it in the earlier section. By placing Zoom fatigue alongside factors like environmental impact obfuscates the genuine danger it poses.

Chapter five offers critical insight into how those who order the digital proceeding, i.e., the tribunal, think and what they value in an arbitral proceeding. Like chapter four, this insight transcends any particular form of arbitration and enjoys easy cross-jurisdiction applicability. Generally speaking, all domestic and international tribunals want to uphold due process and render enforceable awards. These two components are necessary for arbitration to work. If arbitration does not work, then disputes funnel back into the courts. To this end, the quest to understand how best to implement digital proceedings transcends jurisdiction.[66] This chapter does a great job of contextualizing digital proceedings' strengths and weaknesses. Generally, the benefits are qualified with legitimate concerns, and the weaknesses are blunted with common sense solutions. Despite raising the same problems as chapter two (a common flaw in anthologies), chapter five's fresh perspective elevates *Digital Hearings* as a whole.

Chapter six compiles various tips, tricks, and best practices, functioning as a one-stop shop for conducting a digital proceeding.[67] The sheer volume of information within this chapter is impressive. It covers broader ideas, such as only using technology proportionate to the situation[68], as well as the minutiae, including recommended display resolutions and WiFi router features.[69] While this chapter is handy for any practitioner—tribunal or counsel—an in-depth review is impractical with the space available. Consequently, only some brief highlights will be discussed.

Chapter six's highlights include using technology transparently; picking software with available helpdesks, third-party hosting, and built-in party-based authentication; and establishing speaking protocols. Ensuring fair and transparent technology use protects both parties' due process rights.[70] For example, some programs are not available in every language. Tribunals should never approve programs that do not have a necessary language. Doing so jeopardizes a party's right to a fair trial.[71] Picking software with helpdesks or available third-party hosting can alleviate discrepancies in technology fluency.[72] Available software support allows parties to understand the chosen program fully. Transparent use includes requiring parties to share information about a program's critical functions so proceedings can progress apace. Tribunals should advocate for software with built-in

66. Naturally, different tribunals may be bound by jurisdictional idiosyncrasies, but the general thrust remains true.

67. *See* SAVOLA, *supra* note 1, at 93-105.

68. *Id.* at 95.

69. *Id.* at 99-100.

70. *Id.* at 95.

71. *Id.*

72. *See* SAVOLA, *supra* note 1, at 99

validation to protect the proceeding's security and confidentiality.[73] Finally, due process rights require some form of speaking protocol.[74] Digital proceedings' structure creates a reasonable fear of one party monopolizing the time and another being unable to interject when needed. Speaking protocols mitigate this danger. These are just some of the best practices outlined in chapter six. Overall, this functional chapter would have been better served in a separate section (at the very end, for example) coupled with chapter ten, not hidden in the middle of the book. This would allow practitioners to refer back to it quickly.

Chapter seven provides various recommendations for updating the 1992 Finnish Arbitration Act ("the 1992 Act").[75] Since 1992, the world has seen upheaval and progress, particularly regarding digitization, and Finland is no different.[76] For example, Finland's GDP has over doubled since the passage of the 1992 Act.[77] These developments have made certain deficiencies in the 1992 Act undeniable.[78] In 2018, the Finnish Ministry of Justice, recognizing this, began reforming the 1992 Act.[79] This essay identifies some critical flaws of the 1992 Act—namely, its imposition of outmoded writing and signature requirements that exclude digital communications[80]—and offers solutions. These changes' primary purpose seems to be so "that the dispute resolution mechanism in contracts matches the way that contracts are negotiated, entered into, and eventually performed."[81] Chapter seven reaffirms arbitration as a creature of contract and commercial reality. It notes that "[a]rbitration is often referred to as a service. . . . [and] it will only be relevant if its users consider the service relevant for its purposes . . . [to do this] arbitration must adapt to the modern ways of doing business and offer concrete solutions for their disputes."[82] Overall, chapter seven is a good, well-written essay that shows how a statute could be updated to include pro-digital proceeding language. The fact that the 1992 Act's structural hostility to digital proceedings was a sufficient reason to begin a significant reform further reinforces that digital proceedings are here to stay.

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73. SAVOLA, *supra* note 1, at 101.

74. *Id.* at 96.

75. *Id.* at 107-130.

76. *Id.*

77. *See id.* at 107-130.

78. *Id.* at 128.

79. *Id.* at 107.

80. *Id.* at 112-114.

81. *Id.* at 108.

82. *See* SAVOLA, *supra* note 1, at 108.

Chapter eight attempts to answer if an absolute right to a physical hearing exists in international arbitration.[83] Adopting the "transnational approach,"[84] the essay employs various soft laws, including the UNCITRAL Model Law of 1985 (as amended in 2006), the rules from multiple international arbitration institutions, and the IBA Rules of Taking Evidence in International Arbitration.[85] The essay then uses Denmark's *lex arbitrii* as a point of comparison.[86] Articles 18, 19(2), and 24(1) of the UNCITRAL Model Law all support no absolute right to a physical hearing. Article 18 imposes the duty on the tribunal to uphold the parties' due process rights.[87] Article 19(2) empowers the tribunal "to 'conduct the arbitration in such manner as it considers appropriate'" absent the parties' agreement.[88] Finally, Article 24(1) establishes the parties' sole right to choose whether or not to have an oral hearing.[89] The UNCITRAL Model Law only requires that the tribunal uphold due process by enforcing the parties' agreement on oral hearings. Absent an agreement, the tribunal may conduct the arbitration however it finds appropriate. Digital proceedings fulfill these requirements.[90] The various arbitration institutions' rules often specifically authorize digital proceedings or have published some form of endorsement.[91] Furthermore, the IBA Rules on the Taking of Evidence have allowed remote evidentiary hearings for a decade.[92] The COVID-era rise of remote evidentiary hearings has made the current rules more favorable.[93]

While the transnational approach operates independently of individual jurisdictions' *lex arbitrii*, it is still based on them.[94] Should most jurisdictions provide an

83. SAVOLA, *supra* note 1, at 131.

84. *Id.* at 133 (The "transnational approach" refers to a philosophical position that attributes the validity and legitimacy of arbitration agreements and any ensuing awards "to the vast number of States that are prepared to recognize an award that meet certain criteria.").

85. *Id.* at 133-140.

86. *Id.* at 141-142.

87. *See id.* at 134.

88. SAVOLA, *supra* note 1, at 135.

89. *Id.* at 134.

90. *Id.* at 135.

91. *Id.*

92. *See id.* at 140.

93. SAVOLA, *supra* note 1, at 140 ("Furthermore, the increased focus on non-physical hearings in the IBA Rules in 2020, building on the 2010 definition of hearings that included videoconferencing, suggests that there is no absolute right in international arbitration to request a physical hearing.").

94. *Id.* at 141.

absolute right to a physical hearing, it could support claims of this right in international arbitration.[95] Interestingly, a survey of Denmark and 77 other New York Convention jurisdictions reveal none contain an absolute right to a physical hearing separate from party agreement.[96] Various jurisdictions' domestic civil procedures can support inferring this right.[97] For example, Denmark's orality requirement could support such an inference. Still, without an express mandate for physical attendance in court, this is a more strained logical leap than it first appears. Chapter eight persuasively argues that, under the transnational approach, parties have no absolute right to a physical hearing independent of party agreements and the tribunal's due process mandate.[98]

Chapter ten examines how digital proceedings have been conducted under the International Chamber of Commerce arbitration rules.[99] This essay aggregates the lessons gathered from 45 ICC arbitrations conducted at varying stages of the pandemic.[100] This chapter has two primary parts: (1) a history of the ICC rules and digital proceedings and (2) a compilation of the various lessons gained from the 45 cases. The first part offers valuable insight into how a major international arbitration institution understood the need for digital proceedings and its attempt to facilitate them best. The digitization of the arbitration industry was already underway before COVID rapidly accelerated it.[101] By April 9, 2020, the ICC, in an attempt to prevent total dispute resolution gridlock, published a Guidance Note.[102] This note reaffirmed "that the tribunal and the parties 'shall make every effort to conduct the arbitration in an expeditious and cost-efficient manner.'"[103] Additionally, the Guidance Note offered an alternate interpretation of Article 25(2)—the "in-person" provision—as a stop-gap to allow for remote hearings so long as "the parties have[] the opportunity for a live, adversarial exchange."[104] On January 1, 2021, the ICC released its new rules, including an express authorization to use digital proceedings in the form of the new Article 26.

Like chapter six, chapter ten is too detailed to review at any length. However, it provides invaluable insight and information to practitioners involved in remote hearings.

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95. SAVOLA, *supra* note 1, at 141.

96. *Id.* at 141.

97. *See id.* at 141.

98. *Id.* at 142.

99. *Id.* at 155.

100. SAVOLA, *supra* note 1, at 155.

101. *Id.*

102. *See id.* at 157.

103. *Id.* at 157.

104. *Id.* at 158 (citing ICC Guidance Note, paragraph 23).

Nearly every part of a proceeding is covered, from keeping time to strategies to protect a hearing's confidentiality. Overall, this chapter contextualizes the lessons learned throughout the early pandemic. Chronologizing the ICC's stop-gap Guidance Note and its updated rules show its understanding of digital proceedings rapidly evolving. Furthermore, this chapter pairs with chapter six and provides a comprehensive blueprint for effective digital proceedings. The two should have been paired into a separate procedural toolbox section and advertised on the front cover.

IV. POST-COVID

Chapters eleven through fourteen propose future variations of digital proceedings. These include digital expedited arbitration, digital proceedings in ICSID arbitration, digital proceedings and climate change, and the psychology of digital proceedings.

Chapter eleven presents an interesting question, "whether 'a world can exist where *digital* expedited arbitration becomes the default procedure?"[105] Expedited arbitration is an informal arbitral framework that is an efficiency-focused alternative to international commercial arbitration (ICA).[106] It arose as a response to ICA's increased procedural ossification.[107] Expedited arbitration "is 'designed for parties who consider time to be of the essence and who are willing to accept the marginal reduction in legal security for greater speed and lower costs.'"[108] Expedited arbitration has enjoyed increased prominence over the years, with the ICC making it available for commercial disputes in 2017, making it increasingly crucial within international arbitration.[109] Naturally, expedited proceedings incompatible with various disputes, especially multi-party, complex, and high-stakes controversies, mean that ICA will remain relevant.[110] Even so, the essay frames digitization as expedited arbitration's next evolution.[111] Since some expedited proceedings are already being conducted without hearings and others on a "documents only" basis, remote hearings represent a more conservative development.[112] Chapter eleven makes a convincing case that digital proceedings and expedited arbitration are fundamentally compatible. For example, both prefer smaller-scale, less complex disputes, so digital expedited arbitration combines their strengths. Chapter eleven is a high point of the book. It combines the lessons

105. SAVOLA, *supra* note 1, at 199.

106. *Id.* at 201.

107. *See id.* at 202.

108. *Id.* (citing Pualsson, 1995).

109. *Id.*

110. SAVOLA, *supra* note 1, at 202-03.

111. *Id.* at 205-06.

112. *See id.* at 206.

woven throughout Digital Hearings with an inventor's spirit and a deep understanding of arbitration's fundamental goals. *Digital Hearings* consistently characterize the proliferation of digital proceedings as a necessary reaction to COVID. Conversely, this essay views them as a key to unlocking international arbitration's potential. In many ways, chapter eleven returns arbitration to its practical, informal, and expeditions roots by embracing a bright future.

Where chapter eleven sought to mix digital proceedings with a less complex form of arbitration, chapter twelve examines how digital proceedings interact with one of the most complex forms, investment treaty arbitration (ITA).[113] It looks at the 2022 Regulations and Rules promulgated by the Centre for Settlement of Investment Disputes (ICSID). Investment disputes, also called investor-State dispute settlement (ISDS), arise when a foreign investor claims a State has wronged them under an applicable bi-lateral or multi-lateral investment treaty. The 2022 ICSID Regulations and Rules increase the digitization of ITA, liberalizing the requirements for various filings and allowing for remote hearings.[114] The essay praises this development and predicts that the 2022 Regulations and Rules will become a platform for ICSID to develop a more digitized ITA. However, this essay lacks a discussion of the impact of greater digitization on traditionally impoverished areas—for example, the Global South—which can often be the subject of ISDS. Does this make ISDS, long criticized as heavily favoring the wealthy Global North, more equal? Will less developed regions be able to capitalize on these developments fully? These are essential questions when plotting the course of a global dispute resolution format. Despite this shortcoming, this paper seeks to push the boundaries of what digital proceedings are capable of.

V. APPLICABILITY TO US DOMESTIC ARBITRATION

While *Digital Hearings* focuses on digital proceedings in international arbitration, it is a must-read for arbitration practitioners and scholars in the United States. Many of its lessons are profoundly applicable to U.S. domestic arbitration. For example, parties in the United States and Europe often interact over vast distances. Parties in Palmer, Alaska, and South Kingstown, Rhode Island, are a thousand miles farther apart than parties in Stockholm, Sweden, and Lisbon, Portugal, and cross more timezones. To this end, digital proceedings' cost-saving and logistical simplifications are equally attractive to U.S. and European parties. The United States and the European Union also have immense internal economies.[115] Naturally, more money creates more disputes.[116] The docket backlog

113. SAVOLA, *supra* note 1, at 210.

114. *Id.* at 214.

115. THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU-US (last visited Mar. 20, 2022) (The United States's 2021 GDP was $ 23.32 trillion, while the European Union's 2021 GDP was $ 17.18 trillion).

116. ICC, *Dispute Resolution 2022 Statistics*, https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf (In 2020, the ICC saw 1,833 cases administered under its rules. This does not

following COVID shows that more disputes create an increasingly pressing need for flexible, efficient dispute resolution frameworks. As seen with chapter eleven's arguments for digital expedited arbitration, digital proceedings accentuate arbitration's natural strengths, making them more desirable for U.S. and European companies. Functionally, U.S. practitioners must care about digital proceedings because their clients will care about the possible benefits. Consequently, scholars need to care about digital proceedings because practitioners, and their clients, will push the discipline that way regardless. In light of this practical reality, *Digital Hearings* is a cross-jurisdictional triumph that U.S. practitioners and scholars must read.

VI. CONCLUSION

Digital Hearings distills industry-leading professionals' and academics' experience, wisdom, and insight into an approachable anthology. It objectively presents the strengths and weaknesses of digital proceedings in an approachable manner. Importantly, *Digital Hearings* models a mode of thinking about arbitration as a discipline. The authors remain undaunted by legitimate concerns surrounding the wholesale adoption of digital proceedings. Furthermore, this indefatigable will is matched only by their ingenuity. Rarely is a problem presented that a reasonable, functional solution does not follow. Newer professionals, students, and interested laypersons should read this book to familiarize themselves with how these experts think. Even with this pragmatic mindset, the book maintains a level of curiosity and excitement about the possibilities of digital proceedings. Again, chapter eleven comes to mind as the book's zenith. The editors invite the reader to enter a nuanced subject with refreshing candor.

Like any book, *Digital Hearings* has various limitations. The most pressing comes from its tight geographic focus. Most authors are from northern Europe, and the discussions, especially in the earlier chapters, are generally euro-centric. Thinkers from other regions, possibly East Asia or the Global South, would have been a valuable foil to the European perspective and values. Generally, the international relevance and cross-jurisdictional applicability of *Digital Hearings*' topics blunt this shortcoming. Beyond this, some organizational curiosities do not truly allow some of the book's best elements to shine. For example, chapters six and ten are goldmines of practical information and advice. Even limited time in these chapters would allow a practitioner to plan an effective digital proceeding. Also, clients have a vested interest in these chapters as well. Therefore, they would have been better served in an independent section with more attention drawn to them. Ultimately, limitations fade in the background when juxtaposed with the veritable treasure trove of insight, wisdom, and experience jumping from each page. In conclusion, *Digital Hearings* is a triumph that interested laypersons, students, practitioners, and scholars should read.

include arbitrations conducted under domestic institutions like JAMS (formerly: Judicial Arbitration and Mediation Services) or the American Arbitration Association (AAA), or civil litigation).