Remembrance of Things Past

— a reply to Stefan Lindskog's argument that only a traditional hearing is a hearing in arbitration

Av advokaten Kristoffer Löf[1]

I artikeln ”Virtuella slutförhandlingar i skiljeförfaranden mot parts bestridande”, SvJT 2021 s. 293, redogör Stefan Lindskog för sin syn på frågan huruvida en virtuell slutförhandling utgör en muntlig förhandling enligt 24 § 1 st. 2 men. lagen (1999:116) om skiljeförfarande. Lindskog kommer till slutsatsen att endast en fysisk förhandling uppfyller lagens krav på muntlig förhandling. I denna artikel besvaras frågan på motsatt vis: en virtuell slutförhandling utgör en muntlig förhandling i lagens mening och detta finner stöd i en lång rad rättskällor. Lindskogs syn på frågan avviker från vad som anses gälla i andra länder och den svenska debatten i ämnet har därför väckt visst internationellt intresse. Av den anledningen är denna artikel skriven på engelska.

1 Introduction

Stefan Lindskog is arguably the leading authority on Swedish arbitration law. His commentary to the Swedish Arbitration Act is one of those rare works of Swedish legal literature that has reached the standing of quasi-law, regularly being referred to by courts to support their decisions and sometimes used as a legal source of higher hierarchy than the *travaux préparatoires* and case law. We are fortunate as a legal community to have such an authority and prolific commentator in the arbitration field (which is only one of the fields in which Lindskog has reached this standing).

But on the few occasions when Lindskog gives expression to a legal conclusion that is incorrect, this exceptional standing may cause confusion as to the current status of law which

would not have been the case had the incorrect conclusion been expressed by a commentator of lesser standing. In my respectful submission, now is one of those occasions.

In an article in SvJT which has generated debate already in preprint, Stefan Lindskog argues that a 'virtual hearing' in arbitration does not meet the requirement of a hearing under the Arbitration Act. Lindskog has expressed the same view in his commentary to the Arbitration Act, but there the legal rationale for the position is not as articulated as in the article and the conclusion appears to be based on practical preferences.[2] In the SvJT article, Lindskog develops the analysis and argues that the legislator intended a physical hearing when choosing the term 'oral hearing' and that the intended meaning is not affected by technological development. He reaches this conclusion by asserting that the purpose of the rule requiring a hearing (*regeländamål*), is only fulfilled through a physical hearing. Lindskog acknowledges, however, that there may be situations where it is not possible to conduct a traditional (physical) hearing within reasonable time, in which case the asserted right to a physical hearing may have to give way to a virtual hearing. Lindskog concludes that in situations where a physical hearing would be possible to conduct within a reasonable time frame, the arbitral tribunal is prohibited under Swedish law from deciding on a virtual hearing against a party's objection.

Lindskog's position has not only spurred debate in the Swedish arbitration community. It has also created attention outside our jurisdiction's borders, for example by being referenced in international publications on how online or virtual hearings legally qualify in various jurisdictions.[3] As a result, Swedish law comes across as a conservative outlier, out of synch with the technical and practical development of arbitration in particular and dispute resolution in general. If this image of Swedish law were to persevere, it risks damaging Sweden's long since earned reputation as a modern and reliable choice of venue for international arbitration. Hence my decision to write this reply in English.

Lindskog's position is also widely referenced in pending arbitrations having their legal seat in Sweden. I am aware of a handful current examples of this and I am involved in some of those cases myself. The fact that an arbitrator — perhaps a person without direct access to sources of Swedish law — may believe that Swedish law has not settled on whether a virtual hearing is a hearing, creates uncertainty for parties. There is a risk that this uncertainty results in cancelled hearings and delayed or non-accessible justice, thus undermining the very promises of arbitration. I therefore wish to offer an alternative view on this legal issue; a view which, I respectfully submit, has the legal support that Lindskog's position on this point lacks. Since I am one of those commentators of lesser standing than Lindskog, I need to substantiate my conclusion with reference to legal sources and I will endeavour to do so in this contribution to the debate.

As this contribution will show, Swedish law is settled on the question whether a legal requirement to have an oral hearing (*muntlig förhandling*) can be satisfied by having a virtual hearing. The answer to the question is yes. The Supreme Court has confirmed this. Courts of Appeal have confirmed this. The *travaux préparatoires* to the Arbitration Act as well as to the Code of Judicial Procedure confirm this. Due process decisions by the European Court of

Human Rights confirm this. Were it not for Lindskog's deviating view, this would probably be regarded as a legal non-issue.

It is a separate matter that it may not always be appropriate to decide on a virtual hearing against one party's objection. In situations where it would not lead to any delay in holding a physical hearing and when there are no other compelling reasons for refusing a physical hearing (such as considerable costs or practical difficulties), the good arbitrator will probably find that the appropriate decision is to conduct the hearing physically. But there are many examples of decisions that an arbitral tribunal can make that are inappropriate, but not challengeable. The quality of individual arbitrators' handling of a case varies greatly. The remedy against poor case management is not to set aside the arbitral award, unless that poor case management has resulted in errors and procedural irregularities that impede a party's due process rights in a way that may have affected the outcome of the arbitration. As long as the parties have been treated equally, have been afforded opportunity to present their respective cases orally or in writing, and, if a party has so requested, a hearing has been held either in the manner agreed by the parties or, failing agreement, as determined by the arbitral tribunal, it is difficult to see that due process has not been observed. A virtual hearing is a hearing and to order such a hearing is therefore not in itself a challengeable error.

2 The meaning of 'oral hearing' under Swedish law

2.1 How the term is used in the Arbitration Act and in other procedural legislation

The requirement to have a hearing if a party so requests is found in section 24 of the Arbitration Act:

'The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. *If a party so request, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution.*' (Emphasis added.)

The first sentence differentiates between oral and written presentation of the case; a party must be given an opportunity to present its case in writing *or* orally. A party's right to present its case can thus be satisfied by affording the party opportunity primarily to develop its case in writing. However, even if a case has been presented in writing, an oral hearing must be held in addition to the written pleadings, if a party so requests. The right to a hearing is not unlimited in the extent or number of hearings and a party's right to present its case does not entail that it must be afforded a right to present every aspect of the case orally, if the party already has been given opportunity to present the case in writing.[4] A literal interpretation of the paragraph's two sentences thus suggests that 'oral' is to be understood as opposed to 'in writing'.

Accordingly, the qualitative requirement on the hearing set out in the Arbitration Act is that it be oral.[5] Apart from that, the Act says nothing about how the hearing is to be conducted, whether in terms of length, space, setting or procedure, in order to constitute a hearing. In the *travaux préparatoires* to the Arbitration Act, the legislator clarifies that it is for the arbitral tribunal to determine the manner in which the hearing is to be conducted, should the parties not agree on this.[6] This is thus in line with most issues when it comes to arbitration.[7]

The legislator also mentions examination of witnesses 'via telephone or TV-monitor' (this was in 1998, before Teams and Zoom) as an alternative to physical presence at the hearing and explicitly recognises that 'the boundaries are not determined by law, but by the available technology'.[8] The legislator thus had the foresight not to legally limit future users of arbitration from benefitting from the possibilities that technology may bring, thus delivering on the promise that arbitration is to be flexible and pragmatic.[9]

The Arbitration Act is obviously not the only legislative act in Swedish law that requires a hearing to be held. The same requirement is found, most prominently, in the Code of Judicial Procedure. The Code explicitly mentions telephone and video as alternatives for participating in hearings, albeit the main rule is for the participants to be physically present at the meeting.[10]

In a case under the Code, however, the hearing plays a role far more important than in arbitration. Under the Code, the court may only rule on requests for relief, facts and evidence that have been presented at the hearing.[11] In arbitration, the opposite applies: There is no requirement that facts be invoked or evidence presented orally in order for the arbitral tribunal to consider them. It suffices that the party has made its case clear in writing; the Swedish judicial principles of orality and immediacy, which applies in Swedish litigation, do not apply in arbitration.[12] Thus, if a virtual hearing may qualify as a hearing in a case under the Code, it ought to be obvious that it qualifies as a hearing under the Arbitration Act.

In the *travaux préparatoires* to the changes made to modernise the Code some decade ago, the legislator explains that the purpose and rationale behind the hearing requirement coincide with and satisfy the purposes and objectives underpinning Article 6 of the European Convention on Human Rights (ECHR).[13] Pursuant to chapter 5 section 10 of the Code of Judicial Procedure, the court may decide that a party or other person who is to be present at a meeting, such as a hearing, is to participate by audio only or audio-visually.[14] If someone participates in that way, that person is deemed to be participating in the hearing. When introducing this possibility to participate in a hearing, the legislator specifically considered Article 6 ECHR and concluded that the proposed (and subsequently enacted) legislation complied with the requirements of the article.

Consequently, even in procedures pursuant to the Code of Judicial Procedure, it may be possible to conduct a hearing virtually. And it is still a hearing. This has also been confirmed by courts.

In September 2020, the Court of Appeal for Western Sweden ruled that a district court erred when cancelling a hearing in a commercial dispute with reference to the Covid-19 pandemic. In its decision, the Court of Appeal pointed to the district court's obligation to conduct the

proceedings in an expeditious manner (an obligation on which there is even more emphasis in arbitration) and the court's authority to allow for participation in meetings through telephone or video conference. The Court of Appeal concluded that, instead of cancelling the hearing, the district court should have consulted the parties and taken the appropriate measures to proceed with the hearing, using technology that allows for remote participation if necessary. [15] The Court of Appeal's reasoning ought to be equally applicable to arbitrations in Sweden and, in my view, the ruling confirms that under Swedish law a remote hearing fulfils a requirement that a hearing be held.

Last but certainly not least, the Supreme Court has confirmed that a statutory right to have an oral hearing may be satisfied by means of a video hearing. [16] The case Ö 1023-20 regarded the issue of whether the requirement of a 'hearing' under the Extradition Act (1957:668) could be satisfied by means of a video hearing. The Supreme Court said yes. Pursuant to section 18 of the Extradition Act, a hearing must not be refused, unless (i) a hearing has already been held and is deemed satisfactory, or (ii) the matter of the case is manifestly obvious. [17] In the case, none of the exemptions were activated and, thus, there should be a hearing. The defendant was held in custody in Helsingborg and wanted to be transferred to Stockholm to be physically present in the Supreme Court for the hearing. He also invoked that he believed the quality of the hearing would suffer, should he participate audio-visually. The Supreme Court referred to chapter 5 section 10 of the Code of Judicial Procedure, concluding that the court may decide that a party or other person who is to be present at a meeting, such as a hearing, is to participate by audio only or audio-visually. The Supreme Court thus confirmed that there is no absolute requirement for a hearing to be conducted with the participants physically present, not even when one of them is a person facing potential extradition. The Supreme Court then considered other aspects, such as whether remote participation would be inappropriate, but concluded that remote participation would be satisfactory in that case.

The Supreme Court has thus determined that a statutory requirement that a hearing be held may be satisfied by means of a video conference against a party's objection. The case should be relevant for the understanding of the Arbitration Act as well. It would be odd indeed if Swedish law were to give the word hearing a stricter and more narrow meaning in the Arbitration Act than in other legislation where the same requirement is found.

2.2 Further on the purpose of the rule requiring a hearing to be held

As explained above, as far as I have been able to ascertain, ordinary sources of law do not support a view that the term oral hearing is legally to be understood as physical hearing. To the contrary; numerous sources of law indicate that the term is to be understood in accordance with its wording. Then how does Lindskog reach the conclusion that only a traditional physical hearing is a hearing pursuant to the Arbitration Act?

As already alluded to, the main argument advanced by Lindskog for reaching his conclusion, is the purported purpose of the rule (*regeländamålet*). However, that purpose is defined by Lindskog himself. He asserts that the purpose of a hearing is to have a physical meeting, thus

establishing his ultimate conclusion as a premise for the analysis that is to lead to the conclusion. This purpose of the rule is not expressed in any of the *travaux préparatoires* to the procedural law legislation in which the requirement of a hearing can be found.

However, in the *travaux préparatoires* to the Arbitration Act, the legislator points out that the right to a hearing under the Act is in line with the fundamental right to a fair trial pursuant to Article 6 ECHR.[18] It may therefore be inferred that the purposes of the hearing requirement in the Arbitration Act coincide with (and are motivated by) the same purposes as underpinning Article 6 ECHR. In other words, if the requirements of Article 6 are fulfilled, the purposes of the hearing requirement in the Arbitration Act are also fulfilled.

The ECHR accepts video conferencing as a means of fulfilling the requirements for a fair trial. The European Court of Human Rights has established that even the minimum right of a person charged with a criminal offence to be able to cross-examine any witness in the case, set out in Article 6.3 ECHR, may be satisfied by means of video conferencing.[19]

Lindskog argues that a physical hearing but not a virtual one increases the parties' confidence in the procedure and that, should an arbitral tribunal decide to conduct a virtual hearing against a party's will, this would diminish said party's confidence in the proceedings. The same could be said for all decisions by the arbitral tribunal that go against one of the parties, be it with respect to the conduct of the hearing or other procedural issues. But this does not mean that such decisions constitute challengeable errors. As mentioned above, the legislator determined such issues to be within the arbitral tribunal's discretion when the parties disagree.

I also do not believe it to be correct that a party's confidence in the proceedings is negatively affected by a decision to conduct a virtual hearing. The parties to arbitration are commercial entities. In my experience, they want their dispute to be decided expediently and in a practical, professional manner. They themselves conduct their business with the use of modern technology — otherwise they will soon be irrelevant — and they expect commercial arbitration to develop alongside them.

Importantly, the hearing cannot be an end, but a means to an end. At least from a practical perspective, the purpose of a party's right to a hearing ought to be the benefits obtained through such a hearing. The questions should thus be: What are the benefits obtained through a (traditional) hearing and are those possible to obtain or safeguard also through a virtual hearing?

A hearing allows a party the right to summarise and argue its case in the direct presence of the arbitral tribunal and the counterparty. This direct presence enables the parties and the arbitral tribunal to immediately react, intervene and ask questions in a way which is not possible in writing. Fulfilment of such purposes requires the participants to be able to interact *at the same time*, regardless of whether this is done in the same physical room or through a virtual platform. One may think that this is more difficult in a virtual environment than a physical, but my personal experience (from close to 40 virtual hearing days in the past year) is that a well-organised virtual hearing provides a closer, more direct atmosphere than many

physical hearings, where the room is sometimes large, poorly set up and where you perhaps can see the arbitrators only slightly from the side.

Apart from the possibility to interact simultaneously, another important purpose of the hearing is of course the taking of the oral evidence — to conduct examinations and, more importantly from a due process point of view, cross-examinations of experts and fact witnesses. It is primarily in this respect that Lindskog has reservations as to the quality possible to achieve in a virtual hearing.[20] At the same time, however, witnesses examination through video is possible also in Lindskog's understanding of the word hearing, so this cannot be the issue. Be that as it may; some of the most effective cross-examinations that I have witnessed, have taken place through video both before and during the pandemic, and the witnesses' reactions appear in better view through a well-arranged camera than in most hearing rooms.

Thus, if a hearing is a means to the ends of simultaneous interaction and the efficient taking of oral evidence, a well-conducted virtual hearing meets both those ends. At the same time, a poorly managed and conducted physical hearing can fail to achieve those same ends.

3 The pace of change and where the future will take us

As mentioned above, as another and perhaps the real reason for not acknowledging a virtual hearing as a hearing, Lindskog points to the pace at which change has happened. According to Lindskog, the development towards virtual hearings is very recent — a novelty of the pandemic — and the asserted purpose and meaning of what is meant by 'oral hearing' cannot change in such a short period of time.[21]

As a factual matter, the change did not happen overnight. The main documents of arbitration to turn to when ascertaining the common understanding of the current state of arbitral practice, are the rules and guidelines produced by the International Bar Association (IBA).[22] With respect to organising the hearing and the taking of evidence, parties and arbitrators in close to every major arbitration refer to the IBA Rules on the Taking of Evidence in International Arbitration. In the new edition of the rules issued in 2021, remote hearings are acknowledged.[23] However, already the 2010 edition of the rules defines 'evidentiary hearing' as 'any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence'.[24]

Today's use of digital and virtual elements in arbitration is thus not new to the pandemic, although the pandemic certainly has accelerated change and people's willingness to find new solutions. With change happening fast, it seems that there is a need for a Madeleine cake to connect to things past. Maybe a classical hearing, in a court room-like setting, can serve as such a cake.

The 'past giants in arbitration', held in remembrance in Lindskog's article,[25] would indeed be perplex had they taken part in an arbitration today. They would have been as perplexed by

entering a 21st century law office. It would have been difficult for an arbitration lawyer of the 1970s to suddenly accommodate himself (because it was a 'he') to the life of laptops and smartphones, instant messaging and emails, e-briefs, electronic filings on e-platforms set up by the arbitral institutions, data bases with AI-functionality for analysis of written evidence, and colleagues who have never operated a fax machine, let alone heard of a telex.

The technological development has gradually changed how we work and communicate. It has also changed how we meet. This applies to commercial life at large and of course also to commercial arbitration. Conference calls and increasingly video meetings have since long replaced some of the physical meetings and case management conferences in arbitration.

The development started well a decade before the pandemic. One important driver of change has been the desire to save time and cost, combined with the technology enabling such savings. On some past occasions, the change has been driven out of sheer necessity; the travel restrictions caused by the eruption of the volcano Eyjafjallajökull in 2010 are one example. In recent years, awareness of the climate crisis has been an important driver of change towards avoiding travel for shorter meetings.

Despite this development towards more remote meetings, the merits hearing (*slutförhandling*) of most arbitrations has, in pre-pandemic times, been held with participants in physical presence in the same room.[26] But also the physical merits hearings, in arbitrations and in courts alike, have changed with technology, in a transformation that began long before the pandemic. Oral submissions by counsel are almost without exception accompanied by electronic presentations displayed on screens. Since many years, examinations of witnesses and experts have in some instances been conducted through video conferencing. Written evidence is being referenced electronically and often accessed through hyperlinks instead of physical binders. That evidence is also displayed to witnesses on screens. In the larger arbitrations, transcripts are produced live, giving all participants real-time subtitles to what is being said and enabling participants to follow the hearing from an adjacent room or another location. For the arbitrators and other participants to be able to follow all this in a physical arbitration hearing, they all typically have several screens in front of them. In a way, the main difference between a modern physical hearing and a virtual hearing, is whether those screens are connected to the internet or merely to a local area network.

Going forward, we will likely in some respects go back to how things were done before the pandemic. Humans are social animals and personal meetings will continue to be the norm. But I doubt that anything will be exactly as before. What we have learned during the pandemic — the methodologies and solutions that we have been forced to invent and to master — will follow us into the future.[27] That is a good thing coming out of this terrible crisis. Already today, the Stockholm International Hearing Centre has set up a hearing room for hybrid hearings, where each actor in the hearing is fronted by a camera, and each actor can also attend remotely and be visible on screens in front of each participant in the room. Everyone, whether in the room or on the other side of the world, will clearly see the person speaking from straight ahead and everything can be recorded. Parts of such solutions will likely be normal features in many future arbitral hearings.

When technological development offers new possibilities, it is for arbitrators and counsel to adapt. In the same way counsel has always had to adapt to the specificities of the medium through which the case is argued, be it with or without technical aids such as Powerpoint, laser pointers or microphones. Be it in a large court room, a small conference room at a law firm, or an intimate hotel room. Or be it through a camera.

It may be a challenge for the individual to adapt to a new setting or a new technology — as it was for Richard Nixon in the 1960 US presidential election, when John F Kennedy excelled in the then new television medium — but that is not in itself an argument against progress.

Under certain circumstances and since the necessary technology is now available, use of technology may be the only way to comply with the fundamental requirements to conduct the proceedings efficiently and expeditiously. Efficiency is what industry and business expect of commercial arbitration, with adherence, of course, to the principles of party autonomy and due process, the latter manifested in equal treatment of the parties and a reasonable opportunity for each party to present its case in writing *or* orally.

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[2] Lindskog, *Skiljeförfarande — en kommentar*, JUNO Online version, 2020, Article 24, para 4.23 (in translation): 'A video conference may in certain cases make an arbitration more effective. A virtual hearing is however not to be considered as an oral hearing under [Article 24 of the Arbitration Act].' Further in footnote 528 (in translation): 'In my opinion a video conference cannot in a satisfactory way replace a physical hearing.'

[3] International Council for International Arbitration (ICCA), ICCA Projects, *Does a Right to a Physical Hearing Exist in International Arbitration?*, accessible at https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbit... (http://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration), with commentary by co-editors Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou 18 March 2021. In the commentary, Sweden stands out. The Swedish chapter is authored by Ylli Dautaj and Per Magnusson, who conclude that a virtual hearing is not a hearing, based solely on Lindskog's position. *See also* Jesper Tiberg and Olof Olsson, *Do parties have an absolute right to dispute in person in Sweden?*, in International Law Office (ILO), Newsletter, 8 April 2021. The authors point to the uncertainties caused by the current debate but conclude that it would be surprising if a court set aside an award with reference to the arbitral tribunal's decision to conduct the hearing virtually since, amongst other reasons, an arbitral tribunal has a duty to conduct the proceedings in an expeditious manner, statements in the *travaux préparatoires* to the Arbitration Act imply that a hearing may be virtual, and the use of video conference has been a common feature in Swedish courts for over a decade.

[4] *See* for example *Poland* v. *PL Holding*, decision by the Svea Court of Appeal on 22 February 2019 in cases T 8538-17 and T 12033-17. The case concerned a challenge of an award on a number of bases, one of them being that the arbitral tribunal had denied a request for an additional hearing, at which the party wanted to comment on some material that had not been the subject of the first hearing. The challenging party claimed that the arbitral tribunal had thereby exceeded its mandate or committed an irregularity, which probably had influenced the outcome of the case (section 34(1) of the Arbitration Act). The Svea Court of Appeal rejected this argument. It concluded that since a hearing on the issues in question had already taken place, the parties had already been granted a hearing in accordance with section 24(1) of the Act. The court concluded that it was thus for the arbitral tribunal to determine whether it was necessary to have another hearing. Considering the fact that the arbitral tribunal had given the challenging party an opportunity to comment on the relevant issues in writing, the party was deemed to have been given an opportunity to present its case to the extent necessary. The judgment confirms that the right to a hearing does not entail that a party in an arbitration has a right to present everything both in writing and orally. (The case has been appealed to the Supreme Court, primarily with reference to other grounds for challenge invoked by the challenging party, and has not been finally decided at the time of this article.)

[5] At a seminar about virtual hearings organised by the Stockholm Centre for Commercial Law on 22 February 2021, Stefan Lindskog outlined the arguments that was later elaborated in his SvJT article. The seminar was held on Zoom (i.e. a virtual seminar). Commenting on Lindskog's presentation, *advokat* Claes Zettermarck put the apt rhetorical question: 'Is this seminar held orally or in writing?', thus highlighting the straightforward way of ascertaining what is meant by 'oral hearing'.

[6] Govt. bill 1998/99:35, 110 f. and Swedish government report SOU 1994:81, 144.

[7] *See* Jernej Sekolec and Nils Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A Comparison,* in *The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses*, (Heuman and Jarvis eds), JurisNet, 2006, 214, Thorsten Cars, *Lagen om skiljeförfarande*, Jure AB, 2001, 122 and 140, Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, Juris Publishing Inc, 2003, 479 and Jakob Ragnwaldh et al., *A Guide to the SCC Arbitration Rules*, Wolters Kluwer, 2019, 38, 75 and 107.

[8] Govt. bill 1998/99:35, 114.

[9] While the Swedish Code of Judicial Procedure regulates the proceedings in detail, with no less than 39 chapters (Chapters 10–48) and a total of 574 articles addressing the procedure in the first instance alone, the Arbitration Act contains only eight articles about the proceedings. This is an important aspect of what signifies arbitration: The unregulated procedure allows each arbitration to adapt to the circumstances and to provide a practical and efficient way to resolve the case. That is not to say that each arbitration is invented from scratch — it is not. Typically, the basic rules of the arbitration are set out in a first procedural order, which is proposed by the chairperson based on his or her previous arbitrations and then adjusted by counsel based on their experiences. As a result, a good arbitration follows a common and

ever-evolving 'best practice' which has shown to promote both efficiency and due process. However, the parties and the arbitral tribunal are not bound by any such 'best practice'. If one way of doing things has shown to be suboptimal or, in case of travel and meetings restrictions, impossible, the arbitration can adapt without any need for legislative change.

[10] *See* Govt. bill 2018/19:81, 28–31.

[11] Two fundamental principles in the Code are orality and immediacy. With the exception of a limited possibility to summarily refer to the written record at the hearing, a judgment must be based solely on what has occurred during the main hearing (chapter 17 section 2 of the Code). A purpose of introducing the principle of orality (*i.e.* to hold oral hearings instead of a fully written procedure) mentioned in the original *travaux préparatoires* to the Code was to make the parties' submissions more understandable and to allow the court to guide the parties (the proposal of *Processlagsberedningen,* NJA II 1943, 538 *et. sec.*).

[12] Govt. bill 1998/99:35, 40.

[13] Govt. bill 1998/99:65, 18 and Govt. bill 2004/05:131, 89 *et. sec.*

[14] For the *travaux préparatoires*, *see* Govt. bill 2018/19:81, 27–32. *See also* Govt. bill 2004/05:131, 88–95, and Govt. bill 1998/99:65, 18.

[15] *See Valbruna Nordic AB* v. *Consto AB*, the Court of Appeal for Western Sweden, 4 Sep. 2020, case no. Ö 4485-20.

[16] See the Supreme Court's decision 31 March 2020, case no. Ö 1023-20.

[17] '*Om det finnes erforderligt, skall förhandling hållas. Förhandling må ej vägras, med mindre tidigare förhandling måste anses tillfyllest eller saken finnes uppenbar.*'

[18] Govt. bill 1998/99:35, 110.

[19] *See Schatschaschwili v. Germany*, case no. 9154/10, and *Al-Khawaja and Tahery v. The United Kingdom*, case nos 26766/05 and 22228/06. The Swedish Supreme Court has come to the similar conclusion with reference to the ECHR, in a matter decided by Stefan Lindskog when he was at the court; see *NJA 2017 s. 955*, 24 Nov. 2017, case no. B 279-17. In the case, which concerned a criminal case, the Supreme Court found that the lower court's decision to allow for the victim (and accuser of the crime) to participate in the hearing by telephone had not violated the prosecuted person's right to a fair trial. The Supreme Court stated that the lower court has the ultimate responsibility for ensuring due process in these respects. In this regard, the court should consider the requirements for a fair trial under the ECHR.

[20] Lindskog writes as follows in the article (in translation): 'I am not arguing that a virtual hearing — depending on how it is organised — cannot be equally as "good" as a physical hearing (<u>even if I — especially regarding the examination of witnesses — might be more sceptical than others</u>) and bring practical benefits when compared to a physical hearing.' ('*Med detta inte sagt att inte en v-förhandling — beroende på hur den arrangeras — kan i rrf-bestämmelsens mening vara lika "bra" som irl-förhandling (<u>även om jag i särskilt vissa hänseenden — främst när det gäller förhör — kanske är mer skeptisk än många andra</u>) och särskilt ha många praktiska fördelar framför en irl-förhandling.*') (Emphasis added.)

[21] Lindskog writes as follows in the article (in translation): 'There is nothing in principle saying that "oral hearing" could not have a different meaning today than before. The purpose of a rule could change over time, consequently changing also the meaning of a word. But surely not in a year's time. And not as a consequence of the pandemic.' ('*Och det finns heller inget principiellt hinder mot att "muntlig förhandling" skulle kunna betyda något annat idag än tidigare. Ändamålsförskjutningar över tid med betydelseförskjutningar som följd är tänkbara. Men knappast på ett år. Och inte till följd av pandemin.*')

[22] For further references with respect to sources of best practice and their standing, *see* Robin Oldenstam and Kristoffer Löf, *Best practice in international arbitration,* in Avtalt prosess — Voldgift i praksis, Borgar Høgetveit Berg, Ola Ø. Nisja (ed.), Universitetsforlaget, 2015.

[23] Article 8.1 of the 2021 edition of the rules provide that '[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing'.

[24] The 2010 and 2021 editions of the rules are available to download at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

[25] Lindskog writes as follows in the article: 'Past giants in the arbitral community, such as Ulf K. Nordenson, Gotthard Calissendorff and Lars Welamson, would not have been able to recognise procedures of today.' ('*Forna giganter i skiljemannakretsar som Ulf K. Nordenson, Gotthard Calissendorff och Lars Welamson skulle inte ha känt igen sig i dagens handläggningsordningar.*')

[26] I write 'most' because I am aware of fully virtual merits hearings on Skype in smaller and expedited arbitrations dating as far back as a decade.

[27] A true giant in international arbitration in recent years, the French arbitrator and counsel Emmanuel Gaillard, who passed away when this article was being authored, concluded already at the beginning of the pandemic that the lessons learned from the pandemic will positively affect arbitration going forward, by reducing costs and improving efficiency; *Will COVID-19 Revolutionize Arbitration? What's Next for Business and Arbitration?*, TGS Baltic Webinar, 11 May 2020. Gaillard also called upon the arbitral community to make an effort to reduce 'arbitral waste', by not filling hearing rooms with loads of binders and producing copies of the same documents over and over again throughout an arbitration. Another way to reduce such waste (time, money, climate effect) is of course to increase the use of technology so as to become more efficient.