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New Challenge in International Arbitration: On-Line Hearings

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Secção I

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New Challenge in International Arbitration: On-line Hearings

O Novo Desafio na Arbitragem Internacional: Audiência Online

Bengül KAVLAK²

ABSTRACT: After the outbreak of Covid-19 pandemic, to use the technological tools in judgement process has become a current issue. Particularly in arbitration, on-line hearings have come into prominence. Many of international arbitration centers issued regulations on on-line hearings since April 2020. ICC, CAS, LCIA and ISTAC may be regarded among these. Especially, ICC and ISTAC issued detailed rules on on-line hearings which include the conduct of the hearing, confidentiality of arbitration, equality of arms etc. These regulations and the attitude of international arbitration centers shows the tendency on behalf of on-line hearings during the pandemic and the post-pandemic period. When taking into consideration saving on time and cost saving qualifications of on-line hearings, it is thought that it will continue to be a good option for conducting hearings in arbitration. However, it must be kept in mind that both parties and the arbitral tribunal should exercise due diligence in conducting arbitration process to provide cyber security.

KEYWORDS: on-line hearing, international arbitration, arbitration, alternative dispute resolution, International Chamber of Commerce, The London Court of International Arbitration, Istanbul Arbitration Centre.

RESUMO: Após o surto da pandemia de Covid-19, a utilização das ferramentas tecnológicas no processo de julgamento tornou-se uma questão actual. Particularmente na arbitragem, as audiências em linha têm vindo a ganhar destaque. Muitos dos centros de arbitragem internacionais emitiram regulamentos sobre audiências em linha desde abril de 2020. A ICC, CAS, LCIA e ISTAC podem ser considerados entre estes. Especialmente, a ICC e o ISTAC emitiram regras detalhadas sobre audiências on-line que incluem a condução da audiência, confidencialidade da arbitragem, igualdade de armas, etc. Estes regulamentos e a atitude dos centros de arbitragem internacionais mostram a tendência em nome das audiências on-line durante o período pandémico e pós-pandémico. Ao tomar em consideração a poupança de tempo e de custos das audiências on-line, pensa-se que continuará a ser uma boa opção para a realização de audiências em arbitragem. Contudo, deve ter-se em mente que ambas as partes e o tribunal arbitral devem exercer a devida diligência na condução do processo de arbitragem para proporcionar segurança cibernética.

PALAVRAS-CHAVE: Audição online; Arbitragem internacional; Arbitragem; Resolução alternativa de conflitos; Câmara de Comércio Internacional; Tribunal de Arbitragem Internacional de Londres; Centro de Arbitragem de Instambul.

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Introduction

In a globalized world, international arbitration is one of the most preferred dispute resolution mechanism especially in international commercial disputes. Arbitration is one of the most important alternative dispute resolution mechanisms. It depends on the parties' free will to choose the arbitration method to resolve the dispute among them by an independent arbitrator. In arbitration process, the right to fair trial and equal treatment of parties must be respected, hence the award will be legally binding.

In arbitration, if necessary, the arbitrator or the arbitral tribunal may decide to hold a hearing, usually an in-person hearing. Especially, after the beginning of the Covid-19 pandemic, in-person hearings had to be postponed and couldn't be carried out. By this point, the discussions on on-line hearings were to be made but that was not the main issue. For this reason, the on-line hearings have become a current issue.

Chapter 1. International Arbitration Institutions And On-Line Hearings

International Chamber of Commerce (ICC), Court of Arbitration for Sport (CAS), The London Court of International Arbitration (LCIA) and Istanbul Arbitration Centre (ISTAC) are the most important institutional arbitration centers that provide regulations for on-line hearings.

Section 1.1 ICC Rules of Arbitration

The new ICC Rules of Arbitration entered into force on 1 January 2021. They define and regulate the management of cases received by the International Court of Arbitration from 1 January 2021 on. The Covid-19 pandemic affected all aspects of life as in arbitration. After the Covid-19 is regarded as a pandemic, meetings via Zoom, Teams, Google Meet etc. have become the new normal. Until on-line hearings are formalized in 2021 ICC Arbitration Rules, there was not any formal regulation in ICC Rules about it. On demand of the parties, the tribunal could hold an hearing on virtual format but it had not a clear legal basis. On 9 April 2020, ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of Covid-19 Pandemic and clarified that the hearings could

be conducted virtually¹. In its Guidance Note, the virtual hearings are regulated in detail between the articles 16-34. After that, in 2021 ICC Arbitration Rules virtual hearings are formalized with the new form of article 26.

According to the article 26, the tribunal will decide how to conduct the hearing after consulting the parties. The tribunal has to take notice of all relevant facts and circumstances of the case but it is not the tribunal's own initiative to decide how to conduct the hearing. It is regulated that the hearing could be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication. The method of conducting a hearing is not limited with in-person hearings or videoconferencing. The parties are free to choose the most suitable method for themselves. In consideration of the developments in technology, the parties will be able to prefer the latest technological tools to conduct a hearing. The new form of article 26 allows to do so.

ICC issued a Note at 1.1.2021 to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations under the 2021 ICC Rules of Arbitration as well as the practices of the International Court of Arbitration of the International Chamber of Commerce². In the first part of the Note named "General Information", it is stated that unless otherwise indicated, the Note applies to all ICC arbitrations regardless of the version of the Rules pursuant to which they are conducted and the Articles in the Note refer to the 2021 Rules³. In the part VII/C of the Note, on article 95 ff, hearings and especially virtual hearings are regulated in detail. It is suggested that hearings may be in-person, virtual or hybrid hearing.

After consulting the parties, the tribunal has to take into account all relevant circumstances before deciding how to hold the hearing. Those may be the nature of the hearing, the possible existence of travel constraints, the planned duration of the hearing, the number of participants and of witnesses and experts to be

¹ See <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> [viewed date: 09.04.2021]

² <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf> [viewed date:14.04.2021]

³ Philippe, M. Offline or Online? Virtual Hearing or ODR?. *Kluwer Arbitration Blog*, April 26,2020 [viewed date: 25.04.2021]. Available from: <http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/>

examined, the size and complexity of the case, the need for the parties to properly prepare for the hearing, the costs and the gains of efficiency that may be expected by resorting to virtual means of communication and whether rescheduling the hearing would entail unwarranted or excessive delay⁴. A hearing can be conducted not only by physical attendance or videoconference but also via telephone or other appropriate means of communication according to article 26 of ICC Arbitration Rules. These technological options encourage the parties who refrain from technological tools because of not having access to more expensive videoconferencing technologies or lacking adequate internet speeds to support such platforms⁵. The arbitral tribunal may decide to hold a hearing in a virtual format without party agreement. In this case, however, the tribunal must examine all the conditions carefully to ensure the award is enforceable in accordance with the legislation of the parties⁶.

The confidentiality is far more important in international arbitration. The protection of the confidentiality may be an issue in virtual hearings. In ICC Note on the Conduct of Arbitration, the protection of the confidentiality is regulated⁷. According to this, to hold a virtual hearing, the arbitral tribunal and the parties should make a cyber-protocol to comply with the any applicable data privacy regulation and to take measures to provide the privacy of the hearing and the relevant electronic documentation⁸.

There are many videoconference or video sharing platforms available for virtual hearings. However, it may be an issue in providing the data security. In its Note, it is suggested that ICC has licenced access and it provides technical support to Microsoft Teams, Vidyocloud and Skype for Business. Nevertheless,

⁴ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration art. 99.

⁵ Leoveanu, A.; Giosan, R. The 2021 ICC Arbitration Rules: Changes to the Arbitral Tribunal's Powers. *Kluwer Arbitration Blog*, January 4, 2021. [viewed date: 18.04.2021]. Available from <<http://arbitrationblog.kluwerarbitration.com/2021/01/04/the-2021-icc-arbitration-rules-changes-to-the-arbitral-tribunals-powers/>>

⁶ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration art. 100.

⁷ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration art. 101.

⁸ For ICC Checklist For a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings see <https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/> [viewed date:17.04.2021].

the parties and the arbitral tribunal do not have to prefer one of these platforms. Whether it is indicated or not in the Note the parties and the tribunal may use other platforms to conduct a virtual hearing⁹. Licensed platforms may offer further security, confidentiality or data protection than free-to-use public platforms. The crux in this issue is that the parties and the tribunal must ensure the confidentiality and protection and take all measures to provide this. ICC does not take the responsibility of it¹⁰.

Equality is another important factor in international arbitration especially in enforcement process of the arbitral award. That's why the tribunal must respect the equality of the parties and be careful to treat the parties equally. On article 102 of the ICC Note, some elements are regulated to be taken into account while conducting a virtual hearing¹¹. In a virtual hearing, to meet these requirements it is vital to prove that the hearing is conducted within the framework of the principle of equality.

On request of the parties, the tribunal will decide how to conduct the hearing taking into account the fairness of the proceeding and the equal treatment of the parties. Within the period of Covid-19 pandemic, because of the travel restrictions and other public health measures, the parties of the disputes and the arbitral tribunals have experienced the on-line hearings. After the end of the pandemic, the on-line hearings will remain popular as a way to reduce the cost of arbitration especially in international arbitration as the new form of ICC Arbitration Rules allow to do so.

⁹ Zoom, Blue Jeans and GoToMeeting are the other options for virtual hearings which are stated in the Note but it is not limited.

¹⁰ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration art. 104-108.

¹¹ These elements are as follows: Different time zones in fixing the hearing dates, start and finish times, breaks and length of each hearing day; Logistics of the location of participants, including, but not limited to, the total number of participants, the number of remote locations, the extent to which any participants will be in the same physical venue, the extent to which members of the arbitral tribunal may be in the same physical venue as one another and/or any other participants, and the availability and control of break out rooms; Use of real-time transcript or another form of recording; Use of interpreters, including whether simultaneous or consecutive; Procedures for verifying the presence of and identifying all participants, including any technical administrator; Procedures for the taking of evidence from fact witnesses and experts to ensure that the integrity of any oral testimonial evidence is preserved; Use of demonstratives, including through shared screen views; and use of an electronic hearing bundle hosted on a shared document platform that ensures access by all participants.

Section 1.2 CAS – Code of Sport

The Court of Arbitration for Sport (CAS) is an international body established to settle disputes through arbitration. CAS issued the 2020 version of the Code of Sports – related to Arbitration and it is in force as from 1 July 2020. The subject of hearing is regulated on Article R44.2 of the Code of Sports. In this regulation on-line hearing is not handled in detail as it is on ICC Arbitration Rules R44.2 authorizes the President of the Panel to decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. In aforementioned article, the other means of communication to conduct a hearing are not indicated.

Section 1.3 LCIA Arbitration Rules

The London Court of International Arbitration (LCIA) which is one of the world's leading international institutions for commercial dispute resolution also issued the 2020 version of Arbitration Rules. In reference to LCIA Arbitration Rules article 19.2, the Arbitral Tribunal is fully endowed with authority to organise the conduct of any hearing. Accordingly, the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, in consultation with the parties. The hearing may be conducted in-person, virtually by conference call, videoconference or using other communication methods with participants from other regions or in a combined form.

Section 1.4 ISTAC Arbitration and Mediation Rules

The other dispute resolution institution that we urge on is the Istanbul Arbitration Centre (ISTAC). ISTAC is an independent, neutral and impartial institution providing efficient dispute resolution services for both international and domestic parties. Given Turkey's key geographical location, the ISTAC shall be an international centre for the resolution of commercial disputes among European, Asian and Middle Eastern countries¹².

¹² For more information see <http://istac.org.tr/en/> [viewed date:19.04.2021].

The matter of hearing is regulated on article 30 of the ISTAC Arbitration and Mediation Rules¹³. The Sole Arbitrator or the arbitral tribunal is fully authorized in conduct of hearing. However, article 30 does not involve detailed information about on-line hearings. At an early stage of Covid-19 pandemic, ISTAC issued ISTAC Online Hearing Rules and Procedures in April 2020¹⁴. ISTAC acted more quickly than the other arbitration institutions to regulate online hearing rules which have become a necessity during the pandemic because of the restrictions. ISTAC Online Hearing Rules are made up of 10 articles. They are about the aim and scope of application, decision to hold hearings, hearing preparations, people to attend the hearing, conduct of the hearing, presenting documents at the hearing, having witnesses or experts heard during the hearing, use of interpreter and record of the hearing. It is suggested that at the request of any party or in cases where the Sole Arbitrator or the Arbitral Tribunal deems appropriate, hearings or meetings may be conducted through videoconference or teleconference on article 2. In aforementioned article, it is indicated that on-line hearings may be conducted through videoconference or teleconference, nevertheless it is crucial to state that the other technological tools may be preferable depending on the technological developments.

In ISTAC On-line Hearing Rules, the regulations are provided to guarantee the right to be heard, the equality and the confidentiality. For this purpose, a special provision that regulates the right to heard is issued on article 7. Beside this, to record any audio or visions during any stage of the hearing is forbidden to provide confidentiality on article 10.

Section 1.5 The Seoul Protocol on Video Conferencing in International Arbitration

The other important step is taken by the adoption of the Seoul Protocol on Video Conferencing in International Arbitration¹⁵, which was introduced at the 7th Asia Pacific ADR Conference, held in Seoul, Korea on 5-6 November

¹³ https://istac.org.tr/wp-content/uploads/2016/03/istac_tahkim_kurallari_v3_EN_2020.pdf [viewed date:19.04.2021].

¹⁴ <https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/> [viewed date:20.04.2021].

¹⁵ [http://www.sidrc.org/static_root/userUpload/data/\[FINAL\]%20Seoul%20Protocol%20on%20Vid eo%20Conference%20in%20International%20Arbitration.pdf](http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Vid eo%20Conference%20in%20International%20Arbitration.pdf) [viewed date:20.04.2021].

2018, long before the Covid-19 pandemic. Like many other arbitral institutions, The Korean Commercial Arbitration Board addressed the emergence of videoconferencing in its rules and legislations. It is indicated in its introduction that the Seoul Protocol is intended to serve as a guide to practice the best for planning, testing and conducting videoconferences in international arbitration and it regulates the witness examination, video conferencing venue, observers, documents, technical requirements, recordings etc. Also it states the minimum standards of technology which are necessary to conduct the hearings properly¹⁶.

Chapter 2. Judicial Decisions Concerning On-Line Hearings

On 23 July 2020, the Austrian Supreme Court rendered a decision on on-line hearings for the first time worldwide. Indeed, it is the first national supreme court to handle this issue in international arbitration¹⁷. In its decision, the Court pointed out that being in different time zones is not a disadvantage for the parties as the hearing does not have to take place during business hours for all parties within the objections. In addition to this, the Court concluded that the possibility of misuse of witnesses in videoconferencing also exists in in-person hearings. The Court stated some measures to control witnesses against seduction which include the ability of all participants to observe the person to be examined closely and from the front, the possibility to record the evidence, the option to instruct the witness to look directly into the camera and keeping his or her hands visible onscreen at all times and showing the room in which he or she is testifying. Therefore, the allegations on being in different time zones and the possibility of misuse of witnesses are not reasonable grounds to exclude to hold a hearing remotely.

¹⁶ For further information see Shope, M.L. The International Arbitration Institution Response to COVID-19 and Opportunities for Online Dispute Resolution. *13 CONTEMP. Asia ARB. J.* 67 (2020). Pp. 67-84. ISSN 1999-9747.

¹⁷ Scherer, M.; Schwarz, F.; Ortner, H.; Jensen, J.O. In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns. *Kluwer Arbitration Blog*, October 24, 2020. [viewed date:20.04.2021]. Available from < <http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/?print=print>>

Aforementioned court decision is a milestone decision to get across the important issues generating the conduct of on-line hearings. Within the increase of practices of on-line hearings, new disputes arising from conducting of hearings will reflect on court decisions.

Chapter 3. Consideration of Pros and Cons of On-Line Hearings

Actually, to conduct a hearing with videoconference, teleconference or the other means of communication is not new. It comes to forefront because of the circumstances caused by the pandemic. On-line hearing is regulated by the arbitration rules of ICC, CAS, LCIA and ISTAC and it is not limited. These rules regulate on-line hearings in detail from the perspectives of hearing preparations, people to attend the hearing, right to be heard at the hearing, having witnesses or experts heard during the hearing, record of the hearing etc. Providing detailed rules on on-line hearings is an important step to generalize them and resolve the problems arising from the practice of on-line hearings.

It is possible to subsume the problems that may arise from the use of videoconference, teleconference etc. in arbitration under three titles. These are the confidentiality, the equality and the problems that are deriving from the use of technology.

Confidentiality and privacy are the main characteristics of arbitration and they are usually the main reasons for people to prefer international arbitration for dispute resolution. Hence, it is impossible to jeopardize these key factors to apply on-line hearings. It is much more easy to control privacy in in-person hearings as it is restricted to use microphone, voice recorder etc. in a meeting room. The arbitrator or the arbitral tribunal have the power to determine who shall be present at the hearing. However, the situation changes when it comes to on-line hearings¹⁸. The violation of privacy is possible especially by using technological tools.

In practice of on-line hearing, the parties and the arbitrator/arbitral tribunal must take some measures to provide privacy and confidentiality. Taking into

¹⁸ Meltzer, C.R. From Conference Rooms to Chat Rooms: The Need to Protect Confidentiality in Online Mediation. *The Ohio State Journal on Dispute Resolution*. Volume:11. Issue: 1. 1-24. ISSN 1046-4344.

account that applying to arbitration is an agreement, the special rules concerning confidentiality and privacy may be adopted in the contract. These rules may vary from the needs of the parties and the qualification of the concrete case. To provide privacy and confidentiality, an alternative is to prepare a cyber-protocol. Actually, the parties may prepare a cyber-protocol concerning data protection, protection of the confidential document etc. if the on-line hearing is to be conducted during the arbitration process likewise it is regulated art. 101 of the ICC Note.

Choosing the technologic platform which the on-line hearing is to be conducted through is the other significant issue to ensure the security. The licensed programmes may provide much more cybersecurity than public-free ones. The parties and the arbitrator/arbitral tribunal must examine closely the platform if it is convenient in the recent case. In particular, it must be paid attention to the following issues: if each participant has secure internet access, access to the hearing is limited to participants agreed by the parties, ensure the safety of the documents provided by the parties, provide a rule for recording of the hearing¹⁹. In case of exchange of the documents, it is important to provide protection against sharing these documents with the third parties. Similarly, if it is agreed on recording the hearing, it must be laid down a rule on the storage, usage and protection of the records against the third parties. In any case, it is not obligatory to record the hearings. It could be decided not to record the hearing electronically and not permit anyone else to do so. This may include taking screen shots, too²⁰.

Absolutely, as the confidentiality and the data transfer is very important in arbitration, all necessary measures must be taken in on-line hearings to ensure the confidentiality to improve its preferability²¹.

¹⁹ Singer, D.C. Arbitration Privacy and Confidentiality In The Age of (Coronavirus) Technology. *Alternatives to the High Cost of Litigation*. V:38, No:7, July/August 2020, 107-108. ISSN 1549-4381; Gonzales, W./ Masummy, N. Online Dispute Resolution Platforms: Cybersecurity Champions in the Covid-19 Era? Time For Arbitral Institutions to Embrace ODRs. *Kluwer Arbitration Blog*, September 25, 2020 [viewed date: 25.04.2021]. Available from <<http://arbitrationblog.kluwerarbitration.com/2020/09/25/online-dispute-resolution-platforms-cybersecurity-champions-in-the-covid-19-era-time-for-arbitral-institutions-to-embrace-odrs/?print=pdf>>

²⁰ Singer, p. 108.

²¹ Philippe, M. Offline or Online? Virtual Hearing or ODR?. *Kluwer Arbitration Blog*, April 26,2020 [viewed date: 25.04.2021]. Available from:

On the other hand, equality and in association with equality, the equality arms principle and the principle of right to heard are the other important issues that may cause problems in on-line hearings. In court hearings, especially in criminal court hearings, making a defence in a virtual format may not be preferable. Moreover, it may infringe the right to be heard in some cases. Ignoring the fact that virtual hearings may cause a trouble concerning the equality principle in court hearings, using technology in arbitration has many advantages. Infringement of the principle of equality in on-line hearings is a risk but the arbitrator/arbitral tribunal should take the measures to prevent this. It is regulated distinctively in some of the arbitration rules of the institutions. This risk could not be a reason for desisting from on-line hearings.

It is possible to arise some problems on issues relating to determination of seat of arbitration in the arbitration process that are conducted totally online. For example, there may be some difficulties in determining the nationality of an arbitral award on the basis of seat of arbitration. However, it is not a reasonable ground to avoid the practice of on-line hearing likewise in a case where there are some other measures to identify the foreign arbitral award²².

Conclusions

A large number of tribunals as mentioned above have already adopted specific regulations on on-line arbitration proceeding. This perspective has made arbitration sustainable during the restrictions of Covid-19 pandemic. Formerly, on-line hearings were still an option for conducting a proceeding. However, it has become a necessity after the Covid-19 breakout because of the restrictions that make it impossible to conduct in-person hearings.

After the end of this pandemic, it is thought that on-line hearings in arbitration system will keep going and they may even take the place of in-person hearings as well due to their flexibility and efficiency. The benefits of on-line hearings include saving time, reducing the cost of travelling and saving the

<<http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/>>

²² For further information see Ziemblecki, B. Going Online - Is The World Ready to Replace Litigation With Online Dispute Resolution Mechanisms?. *Wroclaw Review of Law, Administration & Economics*, Vol.5:2 (2015).pp. 40-51. ISSN 2084-1264; Legg, M. The Covid-19 Pandemic, The Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality, Forthcoming (2021) 49 *Federal Law Review* [2020] UNSWLRS 46. pp. 1-24. ISSN 1444-6928.

environment, considering that climate change is at the centre of the world's preoccupation today. The way people now interact with technology has removed barriers which were difficult to be removed before the outbreak. On-line hearings will, in the near future, become the norm. The sooner we start practicing on-line hearings, the easier it will be to move procedures online²³.

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²³ Philippe, M. Offline or Online? Virtual Hearing or ODR?. *Kluwer Arbitration Blog*, April 26,2020 [viewed date: 25.04.2021]. Available from: <<http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/>>

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