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UNIVERSITY OF ROMA TRE – UNIDROIT
7th Annual International Arbitration Lecture
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Flying Solo: From *Arthur Andersen*, to Codes of Conduct, to Covid-19 Virtual Hearings[1]

Lucy Reed[2]

I. INTRODUCTION

Let me begin by reminding you that we come together today to celebrate. This lecture marks the completion of the 7th course of the Roma Tre Certificate in International Commercial and Investment Arbitration, And so, after a week of intensive study and hard work, we celebrate the recipients of the Certificate – 11 in person physically in Rome and 15 virtually in Rome. Congratulations to you all.

Congratulations also to the Directors of the Certificate and the extraordinary faculty – many arbitration friends of mine among them – who pressed forward in the face of pandemic uncertainty to deliver the Certificate program this year, who adjusted quickly to our new reality, and who brought the curriculum to life from various outposts all over the world. In 2014, the founders – Professor Maria Beatrice Deli, Professor Giacomo Rojas Elgueta and Domenico Di Pietro – as visionary and flexible as they are – could not have imagined how much vision and flexibility would be necessary to get through this week. I offer a virtual toast.

I wish I was toasting you in person, and we were all together, at UNIDROIT's impressive headquarters in Rome. We are not. While this is a time for celebration of achievement, we have to acknowledge that it is also a time of isolation of one form or another for most of us.

And that brings us to my theme today: flying solo. Over three seemingly disparate topics, I want to investigate with you how arbitrators – as individuals – confront challenges and adapt to new situations.

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[1] This is the text of the Lecture as delivered remotely on 25 September 2020 (without accompanying slides).
[2] Lucy Reed is an Independent Arbitrator with Arbitration Chambers in New York, currently the President of the International Council for Commercial Arbitration and Vice-President of the Singapore International Arbitration Centre Court. She thanks Ms Lindsay Gastrell, Senior Counsel with Arbitration Chambers (New York), for her invaluable assistance in researching and drafting the first section of this lecture. Ms Gastrell deserves special credit for remaining impartial after disclosing (in the small world department) that her father had been a partner with Arthur Andersen at the relevant time.

My topics will indeed seem disparate. The first is an historical look at the famous – infamous – *Arthur Andersen* ICC arbitration. You all know, or will soon learn, that every international arbitration has good story (or several) at its center, which is what keeps the practice so fresh. The second topic is the present day focus on codes of conduct for arbitrators, in specific, regulation of capacity. The third topic is nothing more than my observations/musings on virtual life as an arbitrator. I hope the connection between the topics will be apparent by the end.

II. PART I – ARTHUR ANDERSEN ARBITRATION

In the spirit of celebration, our first topic is an anniversary: the 20-year anniversary of the final award in the seminal *Arthur Andersen* arbitration.[3]

Considering the outsized impact of this case, I trust that it is familiar to most if not all of you. After 20 years, though, a refresher is in order. I would like to revisit this case from the perspective of the sole – yes *sole* – arbitrator.

I have to admit that, before researching for this lecture, all I remembered about the *Arthur Andersen* case was that, somehow, a sole arbitrator bore the responsibility to make the decision that divided one of the world's leading businesses. But there is more to *Arthur Andersen* than that.

In 1997, the year this arbitration began, Arthur Andersen was the largest accounting firm in the world. It employed more than 85,000 people through 140 member firms across the globe and was bringing in 9.5 billion USD in annual revenue.[4] The arbitration arose out of an internal dispute that had been brewing for years between the two business units of the firm – the traditional auditing/accounting arm known as Arthur Andersen, and the newer and increasingly profitable consulting arm known as Andersen Consulting. In essence, the consultants were unhappy with the profit-sharing arrangements, and they felt that the accountants were trespassing on their business by offering their own consulting services.

Eventually, Andersen Consulting initiated ICC arbitration under the inter-firm agreements that tied the global organization together. The named parties included the 140 member firms around the globe, as well as the organization's umbrella entity based in Geneva, called Andersen Worldwide.

Now, let us pause for a moment to appreciate the enormous economic interests at stake. Andersen Consulting requested 1.2 billion USD in damages and, more importantly, it sought to terminate

[3] *Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, ICC Case No. 9797/CK/AER/ACS, Final Award, 28 July 2000 *in* 10 Am. Rev. Int'l Arb. 451 (***Award***).
[4] "Two of the Big Six In Accounting Plan To Form New No. 1," *The New York Times*, 19 September 1997.

the inter-firm agreements, which meant breaking up one of the world's biggest businesses. In turn, the respondent firms asserted a 14.6 billion USD counterclaim, based on the termination provisions of the inter-firm agreements. They also sought to block the consultants from using the Arthur Andersen name, which itself was thought to be worth 7 billion USD.[5] As the claimants' counsel put it, the *Arthur Andersen* arbitration was "a global divorce proceeding of the most extraordinary proportions."[6]

It is hard to believe that under the parties' arbitration agreement, a dispute of this mega-multi-billion-dollar magnitude was left in the hands a sole arbitrator.[7] In fact, Arthur Andersen had tried to persuade Andersen Consulting to agree to a three-member tribunal, but to no avail. Moreover, Andersen Consulting insisted that the ICC Court – which had the appointing authority – could not appoint a sole arbitrator with the same nationality as that of any of the 140-plus parties. The ICC Court agreed, reducing the pool of potential arbitrators by 60-plus nationalities.

Ultimately, the sole arbitrator mantle fell on the shoulders of Dr Guillermo Gamba Posada, the Colombian attorney appointed by the ICC Court. Dr Gamba faced countless challenging decisions in this case, beginning with his own jurisdiction. But for today, given this is the Roma Tre UNIDROIT lecture, I will focus on just one of the issues before him: applicable law.

Try to put yourself in Dr Gamba's place and consider that you are asked to decide this massive dispute according to the following choice-of-law clause (emphasis added):[8]

> *The arbitrator shall decide in accordance with the terms of this Agreement and of the Articles and Bylaws of Andersen, S.C. In interpreting the provisions of this Agreement, the arbitrator* ***shall not be bound to apply the substantive law of any jurisdiction*** *but shall be guided by the policies and considerations set forth in the Preamble of this Agreement and the Articles*

[5] "Divorce ends Andersen's Bitter Dispute," *Chicago Tribune*, 8 August 2000 (chicagotribune.com/news/ct-xpm-2000-08-08-0008080405-story.html).
[6] Barry R. Ostrager, Peter C. Thomas and Robert H. Smit, "Andersen v. Andersen: The Claimants' Perspective," 10 Am. Rev. Int'l Arb. 443 (1999).
[7] The arbitration clause relied upon by Andersen Consulting and ultimately found to be applicable to all parties provided that "any and all disputes which cannot be settled amicably, including any ancillary claims of any party, arising out of or in connection with this Agreement (including the validity, scope and enforceability or this arbitration provision) shall be finally settled by arbitration conducted by a single arbitrator in Geneva, Switzerland. The proceedings shall be conducted pursuant to the then-existing Rules of Conciliation and Arbitration of the International Chamber of Commerce, except that the parties may select an arbitrator who is a national of the same country as one of the parties."
[8] Award, p 455, citing Interim Award in *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, ICC Arbitration Case No. 9797/CK/AER, 29 April 1999 at pp 7-9.

> *and Bylaws of Andersen, S.C.,* ***taking into account general principles of equity.***

Ask yourself: what would you have done?

There are several different approaches one could take. Most arbitrators likely would attempt to define the content of "general principles of equity" on an *ad hoc* comparative law basis. Others might be tempted to conduct a conflict of law analysis and identify the most appropriate national law, despite not being bound to do so under the choice-of-law clause. After all, the vast majority of international contract disputes are governed by a national law. We lawyers find comfort in statutes and case law.

Dr Gamba took a different approach. He turned to the *UNIDROIT Principles of International Commercial Contracts*. As he explained in the award:[9]

> *The UNIDROIT Principles of International Commercial Contracts are a reliable source of international commercial law in international arbitration for they "contain in essence a restatement of those 'principes directeurs' that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice."*

Today, we are all familiar with the Principles as a successful soft law instrument setting out rules for international contracts – in shorthand, a global contract law. Some 200 arbitral tribunals have by now referred to the Principles in numerous awards and – very occasionally, including in an award upheld by the Cour d'appel de Paris earlier this year – applied the Principles as governing law.[10]

But remember that the Principles were first released in 1994, just three years before the *Arthur Andersen* arbitration began in 1997. Although Dr Gamba was not the first arbitrator to look to the Principles, they still constituted a new and uncharted approach. Most arbitrators would not have been so brave as to test the still-green Principles against one of the most significant commercial disputes ever brought.

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[9] Award, p 455, *citing* Award on Preliminary Issues in ICC case No. 7375/CK, 5 June 1996.
[10] Cour d'appel de Paris, Arret du 25 February 2020, n° 17/18001. The UNILEX database lists 205 awards that mention the Principles, although in most of these cases, the Principles were not applied as the governing law (http://www.unilex.info/principles/cases/arbitral_award).

Dr Gamba went on to base many of his central conclusions on the UNIDROIT Principles. For instance, he found that Andersen Worldwide – the umbrella entity – had a duty to exercise its "best efforts to ensure cooperation, coordination and compatibility among the member firms' practices."[11] That "Duty of Best Efforts" flows from Article 5.4 of the Principles. Based on the factual record, he found that Andersen Worldwide had breached this obligation by failing to act even when the relationship between Andersen Consulting and Arthur Andersen deteriorated.

Dr Gamba then applied the criteria in Article 7.3.1(2) to determine whether Andersen Worldwide's breach amounted to a fundamental non-performance of contract.[12] He decided that it did, thereby permitting Andersen Consulting to terminate the inter-firm agreements. Ultimately, Dr Gamba concluded that Andersen Consulting was not liable to Arthur Andersen (Accounting) for **any** termination payments, but it would have to cease using the Arthur Andersen name.

This outcome was seen as a huge win for Andersen Consulting, as industry experts had predicted that the consultants would have to pay billions of dollars to escape the organization.[13] In interview, one of the claimants' lawyers described how he reacted when he received the award and – as we always do – turned to the last page:[14]

> *I was looking crazily for dollar signs … Then it hit me: There weren't any. I just said, 'Oh, my God! Oh, my God!*'

Dr Gamba's award, which was made public almost immediately, was not without critics. Even the strongest proponents of the UNIDROIT Principles, while applauding Dr Gamba's choice to apply them as governing law, observed that he did not apply certain Articles properly and, in some cases, did not apply the most appropriate Article.[15] But, realistically, no arbitral award of such

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[11] Award, p. 500.
[12] Award, p. 502.
[13] "After arbitration jolt, Andersen regroups," *Crains*, 11 November 2000 (https://www.chicagobusiness.com/article/20001111/ISSUE01/100015374/after-arbitration-jolt-andersen-regroups) ("According to calculations by Ashish Nanda, an associate professor at Harvard Business School, Arthur Andersen partners might have realized some $10 billion — a lump sum of more than $5 million each for the 1,700 full equity partners — from an outright sale of Andersen Consulting, based on what a less-fractious Ernst & Young LLP got from a similar divestiture"); "Arbitrator Splits Andersen Firms," *AP News*, 7 August 2000 (https://apnews.com/cb25632c574f00d9b5edc2edfb209648). *See* "Andersen Split Into Two Firms By Arbitrator," *The New York Times*, 8 August 2000 (https://www.nytimes.com/2000/08/08/business/andersen-split-into-two-firms-by-arbitrator.html).
[14] Nathan Koppel, "Going for Broke," *Law.com*, 31 October 2000 (https://www.law.com/almID/900005517759/) (quoting Peter Thomas of Simpson Thacher & Bartlett).
[15] Michael Joachim Bonell, "A 'Global' Arbitration Decided on the Basis of the UNIDROIT Principles: *In re Andersen Consulting Business Unit Member Firms* v. *Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*," *Arbitration International*, Vol. 17, No. 3, p. 260 ("The way in which in the *Andersen* case the Arbitral Tribunal applied the UNIDROIT Principles is not always entirely convincing"). *See* Fabrizio Marrella, "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts," *36 Vanderbilt Journal of International Law* 1137, 1166 (criticizing the

import would be universally praised, especially one embarking down a new road. Experience tells us that one price of innovation is criticism.

That brings me to another question for you: if the *Arthur Andersen* ICC tribunal had been composed of three arbitrators, rather than one arbitrator flying solo, would the decision on applicable law have been different? Would three arbitrators have been able to agree to apply the new UNIDROIT Principles? I do not have the answer, but counsel for Andersen Consulting made a telling observation after securing the win for their client. They explained, albeit with the benefit of hindsight, that they had insisted on a sole arbitrator in part to "avoid[] the tendency of three-member arbitral tribunals to reach compromise results."[16]

In another sense, though, I like to think that Dr Gamba was not entirely on his own. Through application of the UNIDROIT Principles, he was reaching out to a learned community – those international practitioners and scholars who had spent more than a decade researching, negotiating and drafting the Principles. Their efforts supported Dr Gamba in reaching what I imagine were some of the most challenging decisions ever before him. One could say that, even when flying solo, he had a ground crew below him.

III. PART III - CODES OF CONDUCT FOR ARBITRATORS

Now, I ask you to take a not-so-obvious jump – or flight? – from 1997 to the present and the front-burner issue of codes of conduct for international arbitrators. Due largely to controversy around investment treaty arbitration, arbitrator conduct is under intense scrutiny. The issues are many and intertwined, ranging from actual and apparent conflicts of interest to actual and apparent issue conflicts. The focus is on repeat party-appointments by States and investors; so-called "double-hatting" by one person as arbitrator, counsel and/or expert; lack of gender diversity and other forms of diversity; civility; arbitrator availability.

Many new generation investment treaties find the solutions in standing tribunals, which will mark an end to the party appointment process. For example, the investment chapter of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) calls for a standing first instance tribunal of arbitrators and a permanent appellate tribunal, with appointees prohibited from acting as counsel in any other ISDS cases.[17] The proposal of the European Union for the investment chapter of the

Andersen award for referring not only to the UNIDROIT Principles but also the Principles of European Contract Law (PECL), because reference to the UNIDROIT Principles "could have sufficed").

[16] Barry R. Ostrager, Peter C. Thomas and Robert H. Smit, "Andersen v. Andersen: The Claimants' Perspective," 10 Am. Rev. Int'l Arb. 443, 449 (1999).

[17] CETA, Article 8.27 and 8.28.

Transatlantic Trade and Investment Partnership (TTIP) calls for a Tribunal of First Instance, again with no place for party appointments.[18]

Most visible is the "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement," prepared jointly by the Secretariats of ICSID and UNCITRAL (the ***Draft ISDS Code***).[19] Public comments are due by 30 November 2020.[20] Based on the number of webinars on the Draft ISDS Code, those comments will be fast and furious. The draft Articles attracting most attention seem to be Article 4 (Independence and Impartiality), Article 5 (Conflicts of Interest: Disclosure Obligations), Article 6 (Limits on Multiple Roles) and Article 8 (Availability, Diligence, Civility and Efficiency).

Let me be clear and on the record that I am not against codes of conduct for international arbitrators, or for counsel in international arbitration. I applaud the LCIA for being the trailblazer in 2014 by adding the "General Guidelines for the Parties' Legal Representatives" as an Annex to the Arbitration Rules.[21] I well remember the late Johnny Veeder insisting at the time that if international arbitration practitioners did not regulate themselves, others – who do not know international arbitration – would do so.

Johnny and others well recognized that the process of creating such codes is different, and in certain ways far more difficult, than collecting, say, international commercial contract principles. This is because such codes focus on regulating, however "softly," personal professional conduct rather than transactional conduct.

As I have heard Professor Catherine Rogers and others say during discussions about the Draft ISDS Code, it is a thankless and perhaps ultimately impossible task to write a code of international arbitrator conduct that bridges so many national legal and ethical regimes. Nonetheless, the very process of trying to compile such a code is worth it, because the conversation itself is valuable. All learn in the process, if only by hearing that their professional ethics standards make no sense to others.

[18] EU Commission Draft Text, Transatlantice Trade and Investment Partnership, Ch II – Investment, Section 3, Article 9.
[19] United Nations Commission on International Trade Law and the International Centre for Settlement of Investment Disputes, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement" (2020) (***Draft ISDS Code***).
[20] United Nations Commission on International Trade Law and the International Centre for Settlement of Investment Disputes, "ICSID and UNCITRAL Release Draft Code of Conduct for Adjudicators," Press Release, 1 May 2020.
[21] LCIA Arbitration Rules (2014), Annex. In the latest version of the LCIA Rules, effective 1 October 2020, the Annex is named "General Guidelines for the Authorised Representatives of the Parties."

At the end of the day, one outcome might be a code of conduct at the "10 Commandments" level, reciting the most obvious standards. Who could argue against guidelines directing ISDS arbitrators not to sit in cases involving their own clients and relatives, not to take bribes, not to stint on disclosures, not to take on too many cases? Such codes would not provide guidance for the difficult real-life ethical dilemmas. But such codes would do little if any harm.

Another outcome might be codes of conduct with bright-line rules. The Draft ISDS Code contains some such rules, mostly in brackets for discussion during the comment period. For example, Article 5.2(d) (in Disclosures for Conflicts of Interest) calls for an arbitrator or candidate to disclose **all** of her publications, whether relevant to ISDS or not. Article 6 (Limit on Multiple Roles) directs arbitrators to refrain from acting, or possibly just to disclose that they act, as counsel "at the same time as they are they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty]."[22] The number of [X years] is not yet set – I have heard 2 years, 5 years, 10 years.

Codes with such bright-line rules could be harmful. Among other reasons, they take professional responsibility away from the arbitrator or candidate.

An international arbitrator, by definition, stands alone – flies solo – when he examines potential conflicts of interest and other ethical standards and prepares disclosures. It does not matter whether he is sitting as a sole arbitrator or as a member of a panel. There is no group ethical standard for international arbitration tribunals.

It is my firm conviction that the ultimate responsibility for integrity – for ethics and capacity – rests on the individual international arbitrator. No code of conduct can substitute for this responsibility – this flying solo.

Rather than try to tackle the whole ethical universe, I want to look at the question of arbitrator capacity and availability. Article 8.2 of the Draft ISDS Code raises the possibility of limiting an ISDS arbitrator to a fixed number of arbitrations, designated again as [X]. The text is as follows, all in brackets:[23]

> *[Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions].*

I firmly oppose setting a bright-line number of [X] cases.

[22] Draft ISDS Code, Article 6.
[23] Draft ISDS Code, Article 8.2.

The concept of [X], though, brings me to my efforts to develop the work started by the late Professor David Caron in his Opening Lecture of the 2017-2018 MIDS Academic Year, MIDS being the Masters in International Dispute Settlement at the Graduate Institute in Geneva.

The intriguing title for David's lecture was "Arbitrators and the Rule of X." You can find the lecture on SSRN, "as delivered" before David's death.[24] You can find my description of it, in a talk I gave in Berkeley in 2019 in a celebration of David's life.[25]

In brief, David posited that the primary driver for international arbitrators is reappointment – not for greed, but to be "reappointed by virtue of their reputation."[26] An arbitrator can damage her reputation with the disruptive practice of over-trading, which can cause delayed awards and lower-quality arbitration overall. The relatively new requirements of the ICC, ICSID and other arbitral institutions that candidates disclose how many cases they have and fill in calendars serve only to provide a minimum of information to the parties. This is not, according to David, "what arbitrators professionally should demand of themselves and each other."[27]

David observed that the disruptive practice of over-commitment is "more nuanced and widespread" than the particularly packed schedules of particularly busy arbitrators. It is also the province of the practicing lawyer who has only one or two arbitrator appointments, "which are difficult to mix with the unrelenting demands of clients."[28] It is also the province of the academic with only one or two appointments, "which are difficult to accommodate within teaching schedules."[29]

For this reason, David was against uniform case limits on service, and would have opposed the [X] factor in the Draft ISDS Code – whether 2, or 5 or 10 ISDS arbitrations. In David's words, "the individual circumstances and capacities of arbitrators vary tremendously."[30]

In addition to the caseload and calendar information required by the external institutions, David identified a need for internal discipline. Again in David's words, arbitrators – and students –

[24] David D. Caron, Arbitration and the Rule of X, King's College London Dickson Poon School of Law Legal Studies Research Paper No. 2017-41 (Sept. 28, 2017), https://ssrn.com/abstract - 3062537 ("**David Caron *Rule of X***").
[25] 37 *Berkeley Journal of International Law 163* (2019); 46 *Ecology Law Quarterly* 9 (2019).
[26] David Caron Rule of X, p 3.
[27] David Caron Rule of X, p 3.
[28] David Caron Rule of X, p 10.
[29] David Caron Rule of X, p 10.
[30] David Caron Rule of X, p 11.

"need to reflect on the amount of appointments they are reasonably able to handle … and the needed internal commitment is gained by … the Rule of X." That is, David Caron's Rule of X.

To elaborate, each arbitrator should "set a number – X – as the upper limit of cases that he or she is capable of responsibly sitting on at the same time,"[31] to ensure a reputation for excellence. This necessarily varies with individual circumstances: experience, age, energy, full versus part-time arbitrator status, the nature of other work – practice or academics?, legal culture, use of tribunal secretaries. X should vary over time and over a career. David identified one variable of X to be the number of chair appointments, which can double the work.

In my talk at Berkeley, I added this:[32]

> *If* [David] *had had more time, no doubt he would have expressly elaborated on more variables: treaty vs. commercial cases, complex vs. modest cases, personal factors like family-life balance, intellectual challenge, the sheer fun that can come with sitting with certain other arbitrators and hearing certain counsel.*

Regardless of the variables, David considered that "the consequences of having an X are profound."[33] Among other things, having an X number forces an arbitrator to assess each potential appointment more carefully, especially when one is at X-minus-1.

The point I want to emphasize today is that the David Caron Rule of X is a self-imposed discipline. No bright-line X case limit in a code of conduct can substitute for the David Caron Rule of X. The individual arbitrator – flying solo – has to do the algebra to reach his or her X.

I want to mention one other aspect of the Draft ISDS Code relevant to this lecture. Article 4.2(a) provides that arbitrators shall not "[b]e influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or **fear of criticism**."[34]

The fear of criticism is something rarely addressed in arbitrator ethics, and I am glad to see it so clearly in the Draft ISDS Code. We all fear criticism. Here, the context is that criticism of a procedural decision, or an award or a dissent may narrow the prospects of future appointments. For example, when an arbitrator makes a decision contrary to what others accept as *jurisprudence constante*, based on his assessment of the facts and applicable law in the case before him, he is

[31] David Caron Rule of X, p 11.
[32] 37 *Berkeley Journal of International Law* 163, 166; 46 *Ecology Law Quarterly* 9, 12.
[33] David Caron Rule of X, p 12.
[34] Draft ISDS Code, Article 4.2(a) (emphasis added).

bound to face criticism. More prosaically, every arbitrator must expect to be criticized by the losing party and counsel – and even by the winners – more or less publicly.

In my view, whether recited in an external code of conduct or not, an arbitrator is obligated to make her best decision regardless of anticipated criticism. To rule reasonably and fairly, especially publicly and on an issue that may recur, is to take the chance that one will never be appointed again. Speaking personally, I approach every case as if it might well be my last. This is another aspect of all arbitrators flying solo.

IV. PART III - COVID-19 VIRTUAL HEARINGS

Now I will make my last jump – flight? – to my final topic, which relates to the new normal of COVID-19 virtual hearings.

There is now excellent commentary on the practical and procedural aspects of virtual in-person hearings. I can recommend, among others, articles and checklists by Professor Maxi Scherer and Professor Dr Mohamed Abdel Wahab.[35] At ICCA, we are collaborating on a comparative research project on whether a right to physical in-person hearings exists in international arbitration, in key jurisdictions.

What I have been pondering lately is something different. That is the new isolated role of arbitrators, whether serving as sole arbitrators or on three-person tribunals, participating in hearings sitting alone in front of their screens.

I have not seen a serious impact from the pandemic on the way arbitrators interact in their work before a hearing, which is mostly by email anyway. In some respects, the forced virtual platform makes certain communal tribunal roles easier: procedural planning before a hearing by Webex, deliberations after a hearing by Zoom. Less travel means that many of us have more time for such sessions.

Hearings are different. During hearings (of any kind), the arbitrators are limited to superficial social contact with the parties, counsel and witnesses, at most over coffee breaks. The arbitrators

[35] Prof. Dr. Mohamed S. Abdel Wahab, "Exculpating the Fear to Virtually Hear – A Proposed Pathway to Virtual Hearing Considerations in International Arbitrations," *NY State Bar Association Dispute Resolution Lawyer* (Summer 2020 Volume 13, No. 20); Professor Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework," *Journal of International Arbitration* (Kluwer Law International 2020, Volume 37, Issue 4).

of necessity are a closed social group, whether they like each other or not – and they usually do. The tribunal operates like a safe COVID-19 "pod."

To push the pilot analogy, think of it as flying in formation, which takes a great deal of communication and coordination.

In a physical in-person hearing, there is steady communication in this closed tribunal group, both express and subtle. For hours every day, arbitrators sit elbow-to-elbow at the tribunal table, whisper in sidebars, chat during breaks, over coffee, drinks, meals. Much substance is discussed, of course, and that is important.

But it is also important that, as the arbitrators get to know and trust each other, we become willing to share our early views, without concerns about being held to those views as the testimony and arguments evolve. We learn to read each other, learn how to elicit views and perhaps influence views. This is most important for the presiding arbitrator, whose task it is to bring the tribunal together if possible and to steer dissents, if necessary, to a positive tone.

The personal dynamic in a virtual hearing could not be more different. Each arbitrator is solitary, sitting alone in front of his screen, often continents apart. The tribunal interaction is two-dimensional, except for a parallel email or chat channel, which has no nuance. It becomes important to keep a poker face, because the screen exaggerates all expressions: surprise, boredom, irritation. The invisible link, or nearly invisible link, between the three arbitrators is necessarily lost – the raised eyebrow, the shift in the chair, the note passed, the spontaneous sidebar.

Do I think this new arbitrator role of "flying solo" – digitally flying solo – will have an impact on the dispositive outcome of an arbitration? No. Each arbitrator always listens to the advocacy and testimony alone anyway, and there will still be robust deliberations. As I mentioned, virtual deliberations may even be more frequent and in-depth following the hearing, with lighter travel schedules.

Do I think this new arbitrator role of "flying solo" will have an impact on the **perception** of the dispositive outcome from parties and counsel, who have not had their **own** physical connection with the tribunal? Probably not, given the social barrier separating the parties and counsel from the tribunal during a physical hearing.

The impact is on the very role – the fabric or texture – of sitting as an arbitrator in a physical hearing. The shared responsibility of coming to the right outcome is not lost, but some of the sheer

interest – and fun – in the process of getting to that outcome is inevitably lost. Remember, I would include an element of fun as a variable in my own David Caron Rule of X.

Maybe all I am saying is this: now that we are arbitrators in a virtual hearing world, even with the most collegial and tech-savvy co-arbitrators, we now have a better sense of how Dr Gamba may have felt as the sole arbitrator in *Arthur Andersen*, flying solo.

You fairly should be wondering whether there is any relevance to my reflections on virtual arbitrator loneliness. There is. I am picking up concern in online chatter that international arbitrators are becoming so enamored of virtual hearings – hearings from home – that they will resist physical hearings when they are doable again. I think not. Even putting aside the accepted benefits of hearing significant witnesses in the flesh, I sense that most arbitrators miss the professional and personal camaraderie – the tribunal "pod."

V. CONCLUSION

To conclude, I leave you with two thoughts.

First, even though co-arbitrators are necessarily flying solo in this temporarily all-virtual arbitration world, in the sense of sitting in isolation, we would do well to remember that we are still flying in three-member formation – with all the communication and coordination skills that requires.

Second, the same applies to you as successful recipients of the Roma Tre Certificate. If only virtually, you now know each other. I urge you to stay in touch, to help each other out, to fly together.

Thank you.