

# The Right to Physical Hearing in International Arbitration in Times of Pandemic

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## Abstract

The Remote hearing adopted the virtual hearing the most tangible impact of COVID-19 on the arbitration. Across the globe the COVID-19 has sparked the global economy, political, societal and has affected almost every facet of our lives. Arbitration has too no escape, it has to push out from its comfort zone and adopt certain alternatives as virtual hearing. The arbitration rules and national laws got a reality check for the immediate crises and proposed procedural and analytical frameworks for remote hearings in International Arbitration. This article deals with the problems as well as the solutions of the parties, counsel and witnesses grievances regarding the remote hearing procedural. Furthermore, UNCITRAL arbitration rules in this crisis justify the right to be heard. In Article 28(4) of UNCITRAL Law have specified that the arbitral tribunal may direct witnesses and expert testimony to be examined through means of telecommunication, the parties needed not to be physically present at the hearing. Further this article tests the potential challenges to awards which is based on remote hearing, and parties allegations on the breaches of parties' right to be heard and treated equally.

## Introduction

Arbitration is a concept widely accepted in the legal system, where a different approach reflects in the entire legal system. International arbitration is known to be the hybrid form of International dispute resolution. The COVID-19 is one of the most significant contractions of the global economy and it creates an adverse impact in every sector. So the arbitration proceedings have not been immune from this effect as well. It led to adoption and promotion of electronic management of tools. There is also a compulsion on the arbitral tribunals and parties to convene virtual hearing. It is essential that the tribunals and the parties to be informed well mannered in which the arbitration proceedings conduct. It is also equally important that the practitioners and arbitral tribunal become familiar with the new resources which are available in this pandemic, particularly electronic gears.

In April 2020, the ICC issued guidance note “possible measures aimed at mitigating the effects of the covid-19 Pandemic”<sup>1</sup>. A group of leading international arbitral institutions<sup>2</sup> issued a cumulative statement seeking to promote stability and certain unstable economic environment caused due to Pandemic, simultaneously assuring the users of arbitration that “pending cases may continue and that parties may have their cases heard without undue delay”. In the first quarter of 2020 the SIAC tribunals conducted the preliminary case management over telephonic and virtual conferences. Aside, from the dramatic change in the landscape of arbitration, SIAC tribunals have successfully executed numerous hearings remotely, which certainly includes the emergency interim relief and evidentiary hearing.<sup>3</sup>

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<sup>1</sup> ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, International Chamber of Commerce.

<sup>2</sup> The statement was joined, *inter alia*, by: the German Arbitration Institute (“DIS”); the International Court of Arbitration of the International Chamber of Commerce (“ICC”); the American Arbitration Association (“AAA”) and its International Centre for Dispute Resolution (“ICDR”); the International Centre for Settlement of Investment Disputes (“ICSID”); the Korean Commercial Arbitration Board (“KCAB”); the London Court of International Arbitration (“LCIA”); the Milan Chamber of Arbitration (“CAM”); the Hong Kong International Arbitration Centre (“HKIAC”); the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”); the Singapore International Arbitration Centre (“SIAC”); and the Vienna International Arbitral Centre (“VIAC”). This Alert Memorandum will also address the Swiss Chambers’ Arbitration Institution (“SCAI”).

<sup>3</sup> Chahat Chawla, *International Arbitration During COVID-19: A Case Counsel's Perspective*, Kluwer Arbitration Blog (June 4, 2020), [arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/?doing\\_wp\\_cron=1591731619.7565040588378906250000](https://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/?doing_wp_cron=1591731619.7565040588378906250000).

In accordance with all forms of remote hearings, the parties and tribunals must assess relevant regulatory framework. The national laws and arbitration rules contain specific provisions in remote hearing, it certainly allows the tribunal to effectuate hearings remotely.<sup>4</sup>

The arbitral tribunals have the power to decide on the remote hearings to grant under a specific rule. Most national laws are silent on remote hearing. In the absence of any agreement between the parties for remote hearing the onus of proof is upon the party applying it and one resisting it. In the US, the federal rules of evidence under the rule 43 provides that in good cause and situation compelling the court may permit testimony in open court by contemporaneous transmission from different locations.<sup>5</sup> In Australia, the test of court is silent in the statutory provision but it provides that it possesses the power of remote hearing. It has the liberal test of allowing remote hearing in any absence of considerable impediments.

On July, 2020 the Swiss Federal Tribunal issued a decision holding that the Pandemic does not serve as a sufficient reasoning to thrust virtual hearings<sup>6</sup> in court proceedings against the will of a party. In UNCITRAL law connotes “hearing can be held in-person or remotely via technological impediments.”<sup>7</sup> The discretion is upon to hold a hearing in-person or remotely is on the issues at stake, the desirability of witnesses and experts.

### **Statutory and Regulatory Framework of Remote Hearing**

The specific provision and regulatory framework of remote hearing assessment completely depends on chosen arbitration rules and applicable regulatory framework imposing the arbitration agreement of the parties. There is no such right which imposes or prohibits remote hearing in any national law or arbitration rules. If such remote hearing, national law or arbitration rules contain

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<sup>4</sup> “Dutch Civil Procedure Code, art. 1072b(4); UNCITRAL Arbitration Rules 2010, art. 28(4); London Court of International Arbitration (LCIA) Rules, Art. 19.2; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules. International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 20.2; Singapore International Arbitration Centre (SIAC) Rules, Art. 21.2; Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Rules, Art. 28(2)”.

<sup>5</sup> Rule 43(a) of Federal Rules of Evidence on taking the testimony.

<sup>6</sup> Supra note 3.

<sup>7</sup> *UNCITRAL Notes on organizing Arbitral Proceedings*, United Nations New York (2016), [www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf).

specific provision they are in permissive terms. There is no such National laws or arbitration rules that is a mandate for remote hearing binding on the parties.

Few national law and arbitration contain provisions on remote hearing. In respect of pandemic procedural rules were challenging for the claimants and arbitral institution as well. There was a thread emerged in the midst of a pandemic of submission of requests for arbitration by electronic mediums. Both ICC<sup>8</sup> and AAA/ICDR<sup>9</sup> mandates electronic submissions of request of arbitration and any emergency documents. Article 1072b(4) of Dutch Civil Procedure Code provides that “instead of a personal appearance of the a witness, an expert or a party, the arbitral tribunal may determine that the relevant person have direct contact with the arbitral tribunal and insofar as applicable, with others by electronic means”, so “the arbitral tribunal shall determine, in consultation with those concerned which electronic means shall be used to this end and in manner this shall occur.”<sup>10</sup> The LCIA<sup>11</sup> rules states that “the arbitral tribunal shall have the fullest authority under the arbitration agreement to establish the conduct the conduct of a hearing, including hearing take place by video or telephone conference or in person”<sup>12</sup>. Article 28(4) of UNCITRAL (United Nations Commission on International Trade Law) rules provides that the witnesses and experts may be heard remotely. As well remote hearing does not include for legal arguments under the UNCITRAL Rules, and for any hearing of non-emergency arbitration or non- expedited merits under ICC Rules. There is an irony that the UNCITRAL Rules brings out as it's difficult to conceive the denial of legal arguments but testimony by witnesses or experts can be allowed remotely. Moreover, the ICC Rules promotes the use of alternatives of physical hearing efficiently with limited time and cost of consumption.

Most of the national law and arbitration rules is not expressive on the remote hearing it get in a form permissive term. The right to a hearing is a fundamental right in international

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<sup>8</sup> See ICC, “urgent covid-19 message to DRS community ” dated (Mar. 17, 2020).

<sup>9</sup> See AAA/ICDR, “Covid-19”.

<sup>10</sup> Dutch Civil Procedure Code, art 1027b(4).

<sup>11</sup> London Court of International Arbitration rules.

<sup>12</sup> LCIA Rules, Art. 19. 2.

arbitration<sup>13</sup>. There is always a provision on the discretion of parties to request for a hearing<sup>14</sup> or the parties to be agreed to arbitration on documents basis only. According to some authors, remote hearings do not meet the threshold requirement for hearing in National laws or Arbitration Rules. However, answering why a remote hearing would not reach these requirements even applying international arbitration proceedings?. The first argument would be the physicality of the parties, in the exchange of arguments or evidence is simultaneous. The party should get a live mode of discussions. Then the next argument would be the very essential that is the communication technology, there must be vivid transmission of audio and video. The ICC has made explicit on the Guidance Note of COVID-19 that the requirements can be met by remote hearing.<sup>15</sup> In Article 24(2) of ICC rules is referred to as a gearing of various participants exchanging arguments or evidence “in person” with each other, irrespective of any physical meeting or remotely.

### Remote Hearing in Absence of Parties Agreement

In this part of it deals with the cases where one party requests for a remote hearing contrarily the other party opposes the procedure and asserts for a physical hearing. In this scenario, the arbitral tribunal has to be considerate and balance on the importance of right to be heard equally<sup>16</sup> and the tribunal's obligation to conduct the proceedings in an expeditious course of action.<sup>17</sup>

- i. Tribunal's Power to order for remote hearing: Two parties in conflict on remote hearing the tribunal have to decide to conduct remote hearing. This decision is viewed on the basis of the right to request a hearing. As detailed before some of the national laws and arbitration laws have the principle. In Article 25(2) of ICC Rules it is provided that “the arbitral tribunal shall hear the parties together in person if any of them so requests” which does not bar the parties

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<sup>13</sup> The UNCITRAL Arbitration rules: A commentary 601( 2013).

<sup>14</sup> Swedish Arbitration Act, § 24(1), Arbitration Law of the people's Republic of China Art. 47.

<sup>15</sup> “Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic”, ICC (9 Apr. 2020).

<sup>16</sup> The UNCITRAL Arbitration rules: A commentary 601(oup 2013).

<sup>17</sup> Dutch Civil Procedure code art 1036, English arbitration act Section 33(1)(1), French Civil procedure code Art. 1510, Swiss Private International Law Act, Art. 183(3).

from remote hearing procedure in absence of any agreement between the parties'. ICC Guidance Note held that "if the parties agree, or the tribunal determines implies the possibility to proceed with remote hearings in the absence of parties' agreement."<sup>18</sup> Though there is the power of the tribunal to conduct remote hearing still its stands incorrect as there is unrestricted power provided to the tribunal. The tribunals must be careful along with all the circumstances to determine whether a remote hearing is appropriate in the specific circumstances or case.

- ii. Onus on the party one applying for Remote Hearing and the party resisting the remote hearing: There is an important question of the party having the onus of proof. The party bears the onus of proof as to whether a remote hearing should proceed and to which party should bear onus of proof to be upon the discretion of the Courts. As earlier, its mentioned that remote hearings are not specific to international arbitration<sup>19</sup>. In the case *Anil Sawant v. Geoffrey Ramsey*<sup>20</sup> the onus of showing "compelling circumstances" which the party applied for remote hearings. In the case of *Australian Medical Imaging Pty ltd. v. Marconi Medical system Australia Pty ltd.*<sup>21</sup> The court applied a stringent test imposing the party to test onus of proving why it would be necessary for the party to apply for remote hearing. So there could be an intermediate solution whereby the court does not require to have either to show for or against the conduct of remote hearing. But it could be the most effective provision and solution for court and parties to remote hearing with the consent of parties.

### **Witness and Expert Testimony**

If there is a remote hearing of testimony and witness the question arises whether their cross-examination is effective as to where the witness or expert is physically present?. It would be an uncertainty to access the credibility of witness or testimony as of no verbal cues and trick to scrutinize the person's witnesses. The National courts sometimes refer to the essence of oral

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<sup>18</sup> ICC, Guidance Note.

<sup>19</sup> Supra note 3.

<sup>20</sup> Civil Action No. 3:07-cv-980 (VLB).

<sup>21</sup> (2001) 53 NSWLR .

exchange between the parties, witnesses and counsel<sup>22</sup>, and it stated that technical difficulties “are considerable and markedly interfere with the giving of the evidence and particularly, with cross examination.”<sup>23</sup>

In Article 28(4) of UNCITRAL Law have specified that the arbitral tribunal may direct witnesses and expert testimony to be examined through means of telecommunication, the parties needed not to be physically present at the hearing.<sup>24</sup>

In a case *SGS Societe Generale de surveillance S.A. v. Republic of Paraguay*<sup>25</sup> the witness statement was accepted by the remote hearing. This international arbitration seated in Singapore applied the SIAC rule of 2016 of conducting an oral hearing virtually including participants of witnesses, arbitrators, experts from different time zones.<sup>26</sup> The tribunal requested the parties to be flexible and cooperative to each other to explore and seat for the new method of conducting expert witness conferencing by way of a video conferencing.

However, courts around the world aligned with the view that remote cross examination can be done efficiently and there shall be no such disadvantages for the cross-examination because of virtual hearing.<sup>27</sup> The cross-examination concerns that a heard witness or expert might be in any cause tampered or with undue influence. Through in practice a representative is sent by the cross-examining party to sit with the person who testifies to ensure that the witness is free from any undue influence. However, without the physical presence of a person with the witness might be impossible and expensive as well in this pandemic. This risk should not prevail as it requires a good amount of highly dishonest behaviour on the side of the party that the tribunal could very well notice and thus destroy the credibility of the witness and expert.

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<sup>22</sup> Maxi Scherer, 2020, 'Remote Hearings in International Arbitration: An Analytical Framework', *Journal of International Arbitration*, vol. 37, no. 4.

<sup>23</sup> *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* [2007] FCA 1502, (Federal Court of Australia). *Hanson- Young v. Leyonhjelm* (No 3) [2019] FCA 645 at (Federal Court of Australia).

<sup>24</sup> *See*, UNCITRAL Law art.28(1).

<sup>25</sup> *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29.

<sup>26</sup> Kluwer Arbitration blog, [arbitrationblog.kluwerarbitration.com](http://arbitrationblog.kluwerarbitration.com).

<sup>27</sup> *ICI Australia Ltd. v. Commissioner of Taxation* (29 May 1992, unreported, *Commissioner of taxation v. grbich*.1993.



In a physical hearing the witnesses might be stressed and confused in the courtroom. The witness is less likely to “remain conscious of the nature and solemnity of the occasion and of his or her obligations”<sup>28</sup>. So, the witness has to be examined under the eyes of the counsel and party, which might lead to conscious or unconscious interference in absence of remote testimony.

Apart from all the hurdles the remote hearing involves witness or expert testimony to be vigilant and judicious preparation. There are also technical frameworks that the court shall take into account. Before the parties, witnesses, expects to participate in remote hearing tribunals must ensure a stable and good interest connection and electronic impediments. This cannot be taken granted in the national court proceedings,<sup>29</sup> since the tribunal cannot match the accurate set-up but can nevertheless be less acute in international arbitration proceedings. Moreover, the tribunal make certain that there are not many connections as it likely to be issue in the connections and other technical errors. The Singapore International Commercial court has test remote set-up before deciding “whether it was sufficiently satisfied with the quality in order to proceed with the remote hearing”<sup>30</sup>. The tribunals first go for testing round whether to proceed with remote hearing or not then go for test for set-up. Though this procedure might add up some extra costs still the courts consider it be of importance for a fair and just remote hearing.

There a question arises “**Does the lex arbitri provide for a right to physical hearing in International Arbitration?**”

To this Australia<sup>31</sup>, focus of the report is on international arbitration under the IAA. The IAA adopts and gives effect to model law which “has the focus of law in Australia.”

It certainly refuses any rights to a physical hearing in arbitration as expressly mentioned. The only express rights are for the parties to be treated “with equality” and have a “reasonable opportunity”. The “reasonable opportunity” test is modification of the “full opportunity” required by model

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<sup>28</sup> Supra note 22.

<sup>29</sup> See Capic, para 85, Menin, supra n. 6 (“noting that the so-called cyber-divide can be an important issue when considering the use of technology in national courts”).

<sup>30</sup> Supra note 22.

<sup>31</sup> Lucy Martinez & Jay Tseng, Australia arbitration law review survey, [cdn.arbitration-icca.org/](http://cdn.arbitration-icca.org/).



law<sup>32</sup>. the modification confirms that it “is intended to give arbitral tribunals a wider degree of flexibility in controlling arbitral proceedings without removing requirements for the parties to be treated with equality and have an appropriate opportunity to make out their case”<sup>33</sup>. Thus under IAA, the arbitration targets for the fair and equal chances for physical hearing. The courts have rejected challenges to award issued after remote hearing, thus this an implied connotation for rejecting any right to a physical hearing in arbitration. In the case of *Sino Dragon Trading Ltd. V. Boble Resources International Pte Ltd*<sup>34</sup> many of the disputes arose regarding the remote hearing which was resolved by UNCITRAL arbitration. There were various “technical difficulties in the mode of communication”. The planned video link did not work, a “split format” was adopted, witnesses unable to access relevant documents. Here the tribunal noted that “highly unusual circumstances” leads to the unsatisfactory examination facts. The FCA stated that “the conduct of the party who complains of a lack of procedural fairness or a lack of equality is relevant to any asserted inability to present its case or any asserted lack of opportunity in that respect”<sup>35</sup>. Finally the FCA found that ““the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce ‘real unfairness’ or ‘real practical injustice’”<sup>36</sup>.

### **Procedural Structure of Remote Hearing**

Onset of remote hearing there are numerous issues the tribunal and the parties need to consider before the remote hearing. The procedural orders must include as follows:

- The Technical set-up of equipment and other connections impediments.

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<sup>32</sup> Article 18 of the Model law, “a party to arbitral proceedings is taken to have been a full opportunity to present the party’s case if the party is given a reasonable opportunity to present the party’s case.”).

<sup>33</sup> Revised Explanatory Memorandum, International Arbitration Bill 2010.

<sup>34</sup> *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131.

<sup>35</sup> Supra note 33.

<sup>36</sup> Supra note 33.

- There must be training sessions for the parties, council and witnesses and provide technical assistance as required.
- Assigning potential time zone differences between participants.
- The preparation and use of hearing impediments, electronic documents shared during remote hearing.
- The procedure to deal with connectivity issues and tribunal communication between parties to be addressed by the tribunal, in any difficulties the tribunal may stop the proceedings.
- The permission for the witness and testimony or expect. There must be a representative of the cross-examination party at the witness place to avoid any such undue influence in the statement of the witness.
- Use of demonstratives and share during the remote hearing.
- Use of transcripts
- The entire remote hearing must be recorded

If there is a systematic procedural planning for the remote hearing then the occurrence of unforeseen issues reduces. Pre-established procedures are very well with the issues that the tribunal faces at times of remote hearing. There also the issue arises of data breach and relevance of confidentiality information on the both parties regarding the arbitration manner. This upon the tribunal for the fair play and granting justice to the parties. The tribunal can very well stop the proceedings if any such breach is to be found<sup>37</sup>. However the party might argue for award breaches and right to physical hearing persists. The international arbitration and national laws rules grants party to have a right to hearing and this would be necessarily mean.<sup>38</sup> The parties even might argue that its right to be heard was breached because no effective arguments and evidence in a remote

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<sup>37</sup> Supra note 18.

<sup>38</sup> Singapore International Arbitration Centre (SIAC) Rules.

hearing. In a case law *China National Building Material Investment v. BNK international*<sup>39</sup> it was held that the remote hearing is no cause of breach of parties' right to be heard. The party argued that the proceedings were "fundamentally unfair" as one of its witnesses was concerned about medical conditions. Here the court recorded that an arbitral tribunal had offered to hear the witness by video conference, but part insisted on a physical hearing. Nevertheless, there are instances where the principle that a remote hearing does not breach the parties' right to hear.

Moreover, there are some feasibility that the right to be heard might be affected in the pandemic COVID-19. Refusing or postponement is in no way helpful for the resolution for the issue, justice shall prevail irrespective of any difficulties.

## Conclusion

Considering that COVID-19 can be a revolutionized arbitration. The COVID-19 has proven that dispute resolution or arbitral process is capable enough to carry out swift and cost-effective resolution by virtual means. There is no doubt that the disputes are certain for leap parties for in-person hearing but at the same time the arbitration process stands effective and efficient hearing in this time. The main inhibitor for innovation and change is psychological. In a Queen Mary survey in 2018<sup>40</sup> there is a proviso that the practitioners are reluctant to recall and familiarize the parties, councils, witnesses/experts to the new technological impediments. So at the time of COVID-19 it forced the practitioner to get out of their comfort zone and assist the revolution. Although with the advancements of technology and advancement the dispute resolution must keep on his pace. It must be in place to ensure fairness and equality between the parties. The opportunity of parties to be heard must not be violative of the virtual hearing procedure.

This COVID-19 circumstances is a kick start which embers the spark in the flame of revolution. Parties, counsel and arbitrators assess to proceed with planned hearings. Many proceedings have already been conducted remotely, the hearing could be seen as the "last bastion" of physical

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<sup>39</sup> *China National Building Material Investment Co., Ltd. (PR China) v. BNK International LLC (US)* (W.D. Tex. 2009).

<sup>40</sup> *Evolution Of International Arbitration*, 2018 International Arbitration Survey, pg. 32.



heating. This has been changed in the current scenario of pandemic. The findings emphasize the importance of organization and preset-up procedural of remote hearing. The existing national laws and arbitration rules focus on the witness testimony and not the legal arguments, It is an irony of the remote hearing that the arbitration law holds on. The article discusses the grounds for challenging the parties' right to be heard and treated equally. Thus, there are no specific circumstances, where remote hearing violates any of the principles.

The assessment of remote hearing is an exquisite concern and the analytical framework help the parties, counsel and tribunals in making this assessment. The arbitral tribunals as national courts are growing and acquiring experiences with remote hearing is an opportunity that must not be undermined. The users of the international arbitration are alike to increase their toolbox and get themselves a best-suited solution to any dispute resolution case.

