

Do remote hearings in international commercial arbitration violate right to be heard and article v(1)(d) of the New York convention?

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INTRODUCTION

The New York Convention is drafted more than sixty years ago when there was no internet and COVID-19 pandemic. When the arbitral society faced with the COVID-19 reality, a complex issue emerged – whether the arbitral tribunal should conduct remote hearings and if so, can such hearings be arranged even against one of the party's will.

Therefore, in this essay the following issue will be addressed – whether the remote hearing could violate the party's right to be heard and Article V(1)(d) of the New York Convention, especially when a party disagrees on such method.

The pandemic dictates some changes in the arbitration rules. Therefore, trends for remote hearings and resent changes adopted by some selected leading arbitral institutions will be analysed (I). Then the right to be heard will be briefly addressed looking at it through the lenses of Article V(1)(d) of the New York Convention and other relevant provisions (II). Then the principal question will be discussed – whether remote hearings would violate Article V(1)(d) of the New York Convention (III) and relevant conclusions drawn (IV).

TREND FOR REMOTE HEARINGS?

COVID-19 pandemic has impacted many industries and triggered serious changes in the interna-

tional commercial arbitration. When the world's leading economies limit physical entrance into the States, the hearings, as we understand them in original sense, have become impossible. The parties, their representatives and counsel, arbitrators, support staff, witnesses, experts cannot gather at one place to conduct the hearing. This is reality of COVID-19 which came out of the blue in the beginning of 2020.

And you can adapt to this new order or loose. And it seems that the arbitration society starts adapting to the new reality. And there are two possible ways: either to postpone the scheduled hearing or to enter the new mode of remote hearings using modern communication technologies.

Some leading arbitral institutions have already modified their arbitration rules. Article 26(1) of the ICC Arbitration Rules has been amended providing that

[t]he arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.¹

Article 19(2) of the LCIA Arbitration Rules now stipulates that

[a]s to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications

¹ See a compared version of ICC Arbitration Rules <<https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-2017-arbitration-rules-compared-version.pdf>> accessed 1 April 2021.

technology with participants in one or more geographical places (or in a combined form).²

Other institutions draft guides to help the arbitrators with the remote hearings. For instance, in August 2020, SIAC issued a guide “Taking Your Arbitration Remote” “to assist users when considering conducting arbitral proceedings via audio conference, videoconference, or other non-physical means of communication”³.

However, remote hearings are no new phenomena in the arbitration. Even before the pandemic some types of hearings were held remotely. For instance, distant hearings were often used in certain types of cases such as expedited and emergency arbitrator proceedings,⁴ or for case management conferences (CMC) to set up the framework of arbitral proceedings in the particular arbitration.

However, when we think about the main hearings on the merits, the issue emerges whether the distant hearing is in line with the fundamental right to be heard (*audiatur et altera pars*).

RIGHT TO BE HEARD AND ARTICLE V(1)(D) OF THE NEW YORK CONVENTION

Article 18 of the UNCITRAL Model Law provides that each party shall be given a full opportunity of presenting his case.⁵ This provision, in conjunction with Article 19, is described as the ‘Magna Carta of arbitral procedure’⁶ and reflects the right to be heard. Subsequently, Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the UNCITRAL Model Law allow to annul and not recognize the awards when a party is ‘otherwise unable to present his case’⁷.

National arbitration legislations also safeguard the right to be heard. For example, Article 182(3) of the Swiss Law on Private International Law prescribes that ‘Arbitral Tribunal shall ensure <...> the right of the parties to be heard in adversarial proceedings’ when the place of arbitration is Switzerland.⁸

Such requirements have their origin from two provisions of the New York Convention – Articles V(1)(b)⁹ and V(1)(d)¹⁰. Prof. Born

² Article 19(2) of the LCIA Arbitration Rules <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 1 April 2021.

³ SIAC Guides Taking Your Arbitration Remote <<https://www.siac.org.sg/69-siac-news/672-release-of-the-siac-guides-taking-your-arbitration-remote>> accessed 1 April 2021. Other institutions also prepare relevant guides; see eg ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic <<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>> accessed 1 April 2021.

⁴ See eg ICC Arbitration Rules, Appendix V, Art. 4(2), Appendix VI, Art. 3(5).

⁵ UNCITRAL Model Law on International Commercial Arbitration, United Nations documents A/40/17, annex I, Article 18.

⁶ Dr. Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (3rd edn, Sweet & Maxwell 2010) paras. 5-004 and 5-014; see also UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration A/CN.9/264, p 44.

⁷ UNCITRAL Model Law on International Commercial Arbitration, Articles 34(2)(a)(ii), 36(a)(ii). Both provisions should be interpreted in conjunction with Article 18; see Howard M. Holzmann, Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) p 1059.

⁸ Other jurisdictions also protect this fundamental right, see, eg English Arbitration Act, 1996, Sections 33, 68(2)(a) (failure by the tribunal to comply with a general duty to give each party a reasonable opportunity of putting his case); French Code of Civil Procedure, Articles 1520(4), 1525 (recognition and enforcement of the award may be denied, ‘if the right to be heard has not been respected’); Singapore International Arbitration Act, Section 24(b) (the award in question may be annulled if ‘a breach of the rules of natural justice occurred <...> by which the rights of any party have been prejudiced’).

⁹ Which states that recognition and enforcement of the award may be refused if the aggrieved party was otherwise unable to present his case.

¹⁰ Which stipulates that recognition and enforcement of the award may be refused if the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

explains that under Article V(1)(b) of the New York convention recognition of the award may be denied on denial of an opportunity to present a party's case.¹¹ However,

[t]his exception to the presumptive enforceability of an award is distinguishable from, but related to, a tribunal's failure to comply with the procedural requirements of the parties' arbitration agreement or the procedural law governing the arbitration (dealt with under Article V(1)(d) of the Convention) and to the application of procedural public policies under Article V(2)(b). (Footnotes omitted).¹²

In other words, Article V(1)(d) provides two grounds for non-recognition of the award in question:

Non-compliance with the arbitral procedures agreed by the parties; and

If there is no such parties' agreement, a failure to comply with the *lex loci arbitri*.¹³

Although Article V(1)(d) interlinks with Article V(1)(b), the latter focuses on fundamental and mandatory standards of due process, when the former deals with non-compliance either with the parties' agreement or applicable *lex loci arbitri*.¹⁴ But despite the difference between these two provisions, their purpose is to safeguard the right to be heard.

If we look into first prong of Article V(1)(d), parties could agree on the hearing procedures in numerous ways:

Parties expressly agree on the hearing mode in the arbitration clause. Then such agreement supersedes the national law of the seat of arbitration. However, if the parties refer to the particular set of arbitration rules in their clause, a number of the arbitral insti-

tutions give the tribunal broad discretion not to follow this agreement in the interest of efficiency of the proceedings.¹⁵ Prof. Born further explains that '[i]n these cases, Article V(1)(d)'s first prong should provide no basis for non-recognition, even if the parties' agreed arbitral procedures are not complied with, since the parties' procedural agreement contemplates just such non-compliance by the arbitral tribunal.¹⁶

The arbitration rules chosen by the parties set forth the procedure for conduct of the hearing. If the parties refer to the arbitration rules that allows, for example the remote hearing,¹⁷ the arbitral tribunal can disregard the party's request to arrange physical hearings.

However, does the distant hearing violates Article V(1)(d) of the New York Convention if both the applicable arbitration rules and the law of the place of arbitration are silent on the tribunal right to arrange distant hearing and one of the parties objects to such hearings mode?

DOES REMOTE HEARINGS VIOLATE ARTICLE V(1)(D) OF THE NEW YORK CONVENTION

Despite the pandemic, most national laws and institutional arbitration rules still remain silent on remote hearings.¹⁸ In the absence of express or implied parties' agreement or *lex loci arbitri* for remote hearing, such conduct of the proceedings may raise the following issues related to right to be heard reflected in Article V(1)(b) and Article V(1)(d) of the New York Convention:

In-person hearings are the norm in international commercial arbitration and the arbi-

¹¹ Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 3820.

¹² *Ibid* p 3821.

¹³ *Ibid* p 3902

¹⁴ *Ibid* pp. 3902-3903.

¹⁵ See, eg ICC Arbitration Rules, Article 22(2); SIAC Arbitration Rules, Article 19(1); LCIA Arbitration Rules, Article 14(2).

¹⁶ Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 3907.

¹⁷ See, eg ICC Arbitration Rules, Article 26(1); LCIA Arbitration Rules, Article 19(2).

¹⁸ Maxi Scherer, 'The Legal Framework of Remote Hearings' in Maxi Sherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 74.

tration disputes retain a strong preference for face-to-face hearings;¹⁹

Thus, remote hearing is a departure from the norm. For instance, the Swiss Supreme Court recently held that the COVID-19 pandemic does not serve as a justification to impose remote hearings in state court proceedings against a party's will;²⁰

The cross-examination of witnesses and experts is less effective at the remote hearings. For example, it is more difficult to assess body language of the witness or expert, some technological delays may break the flow of questioning and thus disrupt the parties' ability to implement the principle of right to be heard;²¹

In-person hearing precludes the risk of witness tampering. Remote hearing provides new possibilities for improperly influencing witnesses: the arbitrators usually cannot see the witnesses' surroundings and to observe all their actions. Moreover, the witnesses can use notes, receive messages on their screen or mobile phone or consult other persons without this being noticed;

A remote hearing can cause technical difficulties. The participants of the hearing may log in from different locations with different quality of internet connection and technical support. Therefore, the parties could be interrupted or might not hear the other party because of connection issues. This would

prevent a party from adequately presenting its case;

The simultaneous translation could be difficult. Despite the available technological solutions, the simultaneous translation process would be inherently unstable and more complicated and could prevent a party from effectively presenting its case;

There is usually no violation of a party's right to an oral hearing where the arbitral tribunal has such discretion,²² but recognition and enforcement of the award will be denied, when, in violation of the parties' express agreement or request, no oral hearing is held.²³

Indeed, these are serious allegations. However, despite some critique, there are solid arguments in favour of the remote hearings:

Prof. Scherer argues that it remains unexplained why a remote hearing would not meet the requirement of the "hearing".²⁴ On the contrary, in both scenarios, arguments are presented orally and simultaneously with the mere difference of using communication technologies during the distant hearing;²⁵

National laws based on UNCITRAL Model Law usually provides that, absent any agreement by the parties, the arbitral tribunal may 'conduct the arbitration in such manner as it considers appropriate.'²⁶ This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organizing the arbitration, conducting

¹⁹ Jeffrey Maurice Waincymer, 'Online Arbitration' (2020) vol IX(1) Indian Journal of Arbitration Law 1.

²⁰ Decision DFT 146 III 194 Federal Supreme Court of Switzerland (2020).

²¹ Jeffrey Maurice Waincymer, 'Online Arbitration' (2020) vol IX(1) Indian Journal of Arbitration Law 1, 20.

²² Herbert Kronke et al (ed), *Recognition and Enforcement of Foreign Arbitral Awards. A Global Commentary on the New York Convention* (Wolters Kluwer Law Business 2010), p 294; see also OLG Bremen [1999] YCA XXVI, 326; OLG Hamburg [1998] YCA XXV, 641; *Intercarbon Bermuda, Ltd v. Calex Trading and Transport Corp.* [1994] YCA XIX, 802.

²³ Herbert Kronke et al (ed), *Recognition and Enforcement of Foreign Arbitral Awards. A Global Commentary on the New York Convention* (Wolters Kluwer Law Business 2010), p 294.

²⁴ Maxi Scherer, 'The Legal Framework of Remote Hearings' in Maxi Scherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 75.

²⁵ *Ibid* p 75.

²⁶ UNCITRAL Model Law on International Commercial Arbitration, United Nations documents A/40/17, Annex I, Article 19(2). Institutional arbitration rules contain similar provisions; see eg UNCITRAL Arbitration Rules, Articles 17(1) and 28(2); HKIAC Arbitration Rules, Articles 13.1 and 22.5; AAA-ICDR Arbitration Rules, Articles 19 and 22(2).

individual hearings or other meetings.²⁷ Such broad power should encompass also modalities of the hearing²⁸ and even gives to the tribunal the power to order distant hearings in the absence of the parties' agreement;²⁹

The emerging case law also supports arbitral tribunal's power to hold remote hearings over the party's objection. The award can be set aside only on serious procedural violations. When the court applies due process provisions of the New York Convention,³⁰ it also addresses 'fundamental deviations from the agreed procedure'.³¹ The Austrian Supreme Court held that a remote hearing against the objection of a concerned party does not meet this threshold and the arbitral tribunal enjoys broad discretion in organising the conduct of proceedings;³²

There are bunch of tools for cross-examining witnesses at remote hearings to overcome the witness couching during the remote hearings. For instance, members of the tribunal can have a large screen that helps noticing the changes of witness eyes' focus during the examination (if the witness suddenly shifts his or her attention from the camera to the text on the screen).³³ The members of both parties' team can also attend physically with

the witness to prevent his or her mocking. Some guidelines provide useful tips for the cross-examination and suggest: (a) directing that a witness give evidence from behind an empty desk (save for the hearing bundle), no personal items should be on the table; (b) requiring the witness to remain within the camera frame at all the times during testimony; (c) discussing in advance how to manage breaks for witnesses or when they need to move off camera (for example, to pick up a document that has fallen); (d) requiring the witness to provide a 360 degree view of the room that he or she is giving evidence from so as to ascertain the security and suitability of that witness' location;³⁴

The caselaw also provides specific tools against witness tampering: (a) the technical ability of all participants to observe the examined person closely and from the front; (b) the possibility to record the evidence; (c) the option to instruct the witness to look directly into the camera and keeping hands visible onscreen all the times thus making it impossible to read any chat messages; and (d) showing the room in which the witness is testifying (ensuring that no other person is present).³⁵ Also it is possible to "share" the

²⁷ UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration A/CN.9/264, p. 45.

²⁸ Maxi Scherer, 'The Legal Framework of Remote Hearings' in Maxi Scherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 76.

²⁹ *Ibid* pp. 78-79.

³⁰ Eg New York Convention, Articles V(1)(b) or V(1)(d).

³¹ International Council for Commercial Arbitration (ICCA), *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011) p 98; see also Erica Stein, 'Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings', Maxi Scherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 170.

³² Maxi Scherer, Franz Schwarz et al., *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 <<http://arbitrationblog.kluwerarbitration.com>> accessed 3 April 2021.

³³ See also Wendy Miles, 'Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges' in Maxi Scherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) pp. 127-128.

³⁴ SIAC Guides Taking Your Arbitration Remote <<https://www.siac.org.sg/69-siac-news/672-release-of-the-siac-guides-taking-your-arbitration-remote>> accessed 4 April 2021.

³⁵ Maxi Scherer, Franz Schwarz et al., *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 <<http://arbitrationblog.kluwerarbitration.com>> accessed 3 April 2021.

relevant documents on the screen and highlight the relevant parts of the documents for the examination.

Minor inconveniences of the remote hearing outweigh the risk of significant slowdown of the arbitral proceedings. The situation with pandemic remains unsolved and unstable. Therefore no one can state when traveling and in-person meetings will be available. Therefore, if the arbitral tribunal decides to conduct physical oral hearings, it can significantly delay the proceedings. By contrast, there is no risk of delay with remote hearings;³⁶

Consecutive interpretation could be effectively used in remote hearings. It is true that there are technical solutions for the simultaneous translation. For instance, the Zoom platform provides a possibility of having separate channels, or virtual “booths”, for simultaneous interpretation. However, this area remains untested and depends on quality of internet connection and technical experience of the participants of the hearings. Moreover, as the witness, interpreter, parties’ counsel and their team members, and the members of the arbitral tribunal may remain in different locations, the chance of misunderstanding each other increases in remote context.³⁷ Thus, the arbitral tribunal could use the consecutive interpretation against the backdrop of the increasing length of the witness’ examination.

In my opinion, there are technical solutions to conduct remote hearings in international commercial arbitration as similar as possible to the in-person hearings. And remote hearings harm less than the significant delay in proceed-

ings when waiting for the ease of travel and gathering restrictions.

Therefore, if the arbitral tribunal ordered the remote hearings even when a party objects to such mode of proceedings, this should not endanger the recognition and enforceability of the subsequent award. This is because national laws and applicable arbitration rules give to the arbitral tribunal broad discretion to conduct the proceedings as effective as possible. More importantly, to successfully invoke Article V(1) (b) or V(1)(d) of the New York Convention, the substantive, or fundamental, breach of due process must be established. As discussed, emerging case law and legal authorities suggest that this is not the case with the distant hearings.

And even the concept of “hearing” should not by definition mean the “oral hearing”. Historically, the public character of civil procedure developed in Europe namely in conjunction with the acceptance of orality in civil proceedings.³⁸ In other words, publicity and openness of the court proceedings led to necessity for oral hearings. In contrast, one of the specific features and advantages of the international commercial arbitration is its confidentiality.³⁹ Then two conclusions follow: (a) we cannot compare provisions for oral hearing in the civil procedure with that of in international commercial arbitration; (b) confidential origin of the arbitration diminishes need for oral hearings.

Despite this, there are some grey areas in conducting the remote hearings such as stable internet connection, simultaneous vs. consecutive translation, loss of focus and different dynamic of the distant hearings. However, these issues are not so fundamental and should not be ground for challenging the enforcement of

³⁶ Erica Stein, ‘Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings’ Maxi Sherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 172.

³⁷ Erica Stein, ‘Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings’ Maxi Sherer et al. (eds), *International Arbitration and COVID-19 Revolution* (Kluwer Law International 2020) p 175.

³⁸ M. Cappelletti and B. G. Garth, ‘Introduction – Policies, Trends and Ideas in Civil Procedure’ in Mauro Cappelletti (Ed.) *International Encyclopedia of Comparative Law* (Vol. XVI Civil Procedure 1987) para. 1-20.

³⁹ See, eg Alan Redfern et al., *Law and Practice of International Commercial Arbitration* (4th edn, Thomson Sweet & Maxwell 2004) para. 1-53.

the award in question under Articles V(1)(b) or V(1)(d) of the New York Convention.

CONCLUSIONS

Pandemic has raised numerous challenges for the international commercial arbitration. One of them – organizing the remote hearing against the will of one of the parties. At first sight, such scenario would undermine the concerned party's fundamental right to be heard and could trigger application of Article V(1)(b) of the New York Convention. Or in such situation agreement of the parties could be breached (Article V(1)(d) of the Convention).

However, analysis of the emerging case law and legal authorities allows us to state that

remote hearings *per se* should not lead to the non-enforcement of the arbitral award in question. Moreover, the arbitral tribunal usually has a broad discretion how to prepare for and organize the hearings. However, the arbitral tribunal should seek for balance between parties' rights and assess whether the conduct of remote proceedings could endanger a party's right to be heard. And this must be assessed on case-by-case basis evaluating all particular facts of the particular arbitration.

In light of foregoing, despite some logistic pitfalls of remote hearings, such conduct of proceedings should not *per se* violate the right to be heard and Article V(1)(d) of the New York Convention.