

Law Bulletin

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VIRTUAL ARBITRATION HEARINGS

During the COVID-19 pandemic, various arbitral institutions, such as the International Court of Arbitration (ICC), the American Arbitration Association (AAA), the Hong Kong International Arbitration Centre (HKIAC), the International Centre for Settlement of Investment Disputes (ICSID) and the London Court of International Arbitration (LCIA) declared their intention to ensure that international arbitration proceeds in a stable and foreseeable manner during this period, by publishing a joint statement. In this context, virtual hearings are explicitly permitted in some of the arbitral institutions' rules. Virtual arbitration rules differ according to the authorized arbitral institution.

By publishing its Online Hearing Rules and Procedures in April 2020, the Istanbul Arbitration Centre (ISTAC) has become the first arbitral institution that provides rules specifically for virtual arbitration hearings.

1. How to Conduct a Virtual Arbitration Hearing

Various video conferencing platform options are available for conducting virtual hearings, such as customized hearing platforms offered by some hearing centers, licensed publicly available platforms and free of charge publicly available platforms. Customized or licensed, fee-based video conferencing platforms may offer greater security, confidentiality and data protection than free of charge, publicly available platforms.

Upon the parties' request, the ICC also offers remotely available technical support for issues, such as using online platforms, joining a meeting (or hearing), operating in-meeting audio and video functions and operating screen sharing functions.

2. Overview of Virtual Arbitration Hearing Rules and Procedures

Within the scope of procedural equality and right to a fair trial, each party shall be given equal opportunity to present their case during a virtual hearing, just like a physical hearing. Prior to the virtual hearing, it is necessary to agree on matters, such as the platform on which the hearing will be held, where the arbitral tribunal, parties and factual witnesses will join the virtual hearing and when the hearing will be held, considering the different time zones the parties are in. A checklist from which the arbitral tribunal may benefit, is presented in the attached Annex I to the ICC Guidance Note. Accordingly, primary procedural rules regarding virtual arbitration hearings are as follows:

- A preliminary check shall be performed on the compatibility of selected platform and technology to be used for the virtual hearing in order to ensure that everything is in order in terms of technical issues.
- The parties' agreement as to the proceeding being conducted through a virtual hearing shall be confirmed or, in the absence of the parties' agreement, the legal basis of conducting the process by means of a virtual hearing shall be determined. Otherwise, the recognition or enforcement of the arbitral award may face some obstacles.
- Upon their consultation, the arbitral tribunal and the parties may decide that the virtual hearing will remain private and confidential to the participants, or to make the hearing public and to allow outside participants to access the platform. In addition, in terms of confidentiality and privacy, whether or not the virtual hearing can be recorded and the minimum requirements of encryption in case of any illicit access will be agreed to.
- Providing the use of an electronic hearing bundle (*e-bundle*) hosted on a shared document platform that all participants can access is often considered beneficial. Efficient access to relevant documents is necessary to secure the flow of the hearing and to avoid the lack of communication with the arbitral tribunal.
- If any factual witness or other participants require the use of an interpreter, the arbitral tribunal, in consultation with the parties, shall determine whether interpretation services shall be simultaneous or consecutive. In practice, it is argued that in terms of virtual hearings held via video conference, simultaneous interpretation may not be an appropriate method, taking into account the technical malfunctions that may occur in video, audio or internet connection, and that simultaneous interpretation shall be adopted only if the arbitral tribunal concludes that it may be efficient and useful, after conducting trial runs prior to the hearing.
- There shall be an agreement on whether or not the factual witnesses shall be alone in the room during the testimony, whether or not they can have before them marked documents with prepared explanations related to the case file and, if agreed to, how this will be monitored. In order to be able to monitor the integrity of the factual witness' statements, it is recommended to have a rotating camera that allows the environment

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in which the factual witness is located to be observed, or a camera to be positioned to show a reasonable amount of the said environment.

3. ISTAC's Rules and Procedures for Virtual Hearing

The ISTAC Online Hearing Rules and Procedures determine the rules and principles applicable when it is decided that the hearings will be held virtually upon the request of any party, or upon the approval of the arbitral tribunal, during arbitration proceedings, subject to the ISTAC Rules. These rules and procedures are comprised of ten articles and include provisions on fundamental principles, such as the hearing preparations, hearing the participants and the right to be heard at the hearing.

Hearing participants shall provide themselves with the technical equipment required for their participation in the hearing and the security of the place in which they are located. At the request of the arbitral tribunal or the parties, just like the ICC, the ISTAC Secretariat will, as well, provide technical support for the hearing, within its means.

In order to respect the confidentiality of the arbitration proceeding, the parties shall notify the arbitral tribunal of the hearing participants and, during the hearing, no third party, other than those notified and permitted by the arbitral tribunal may attend the hearing. Information that will be provided to the arbitral tribunal prior to the hearing includes the credentials of the interpreters who will be used if deemed necessary. It is forbidden to record any visuals or audio during any stage of the hearing, without the approval of the sole arbitrator or the arbitral tribunal.

Another important issue that is explicitly regulated under the ISTAC Online Hearing Rules and Procedures is the right to be heard at the virtual hearing. In cases where the arbitral tribunal is convinced that one of the parties' right to be heard has been violated, it may end the hearing at any time by giving its reasons for doing so. In addition, the factual or expert witness being heard during the hearing shall be present in front of the camera with their face clearly visible. Observing these individual's gestures and facial expressions during the testimony is important for the arbitral tribunal's assessment.

4. Matters to be Considered at a Virtual Hearing

Confidentiality and Cyber Security

Confidentiality of the hearing and data privacy are the primary issues in terms of virtual hearings. The arbitral tribunal should ensure that any video sharing platform that is used for virtual hearings is licensed and that maximum security settings will be set by consulting the parties. To preserve confidentiality, for example, technical restrictions may be envisaged by the arbitral institutions or service providers to prevent access to the virtual hearing venue before the hearing commences.

For audio or visual recordings of the hearings, the parties shall definitely be informed of the recording and their explicit consent shall be obtained. With the aim of ensuring compliance with the data privacy regulations and ensuring the implementation of the adequate measures,

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the ICC Guidance Note proposed the preparation of a "Cyber-Protocol" between the arbitral tribunal and the parties regarding the protection of the confidentiality of the hearing and the electronic document platform within the arbitration proceedings.

Integrity of Factual Witness' Statements

Upon the parties' agreement or the arbitral tribunal's order, it may be decided that the camera of the factual witness giving evidence shall have a 360-degree visual angle, or that there shall be two cameras positioned one in front and one behind the factual witness, and/or that an supervisor shall be present in the room where the factual witness is giving evidence during the testimony. For example, in cases where the factual witness' connection is lost due to "technical malfunctions" during the testimony just after a critical question was addressed, or where it is obvious that the factual witness is being directed by the opposing party's counsel, it may be agreed not to take into consideration the factual witness' statement, at the expense of time and money.

Order and Etiquette of Virtual Hearings

Scientific evidence has revealed that for various reasons virtual hearings progress more slowly than physical hearings and are more taxing on all participants. Therefore, while determining the timetable and schedule of the hearings, it may be beneficial to factor in the extra time and add frequent breaks, in terms of preventing possible delays and the healthy progress of the hearing.

Under the ISTAC Online Hearing Rules and Procedures, during the hearing, only one person is permitted to speak at any one time and the participant seeking to speak, shall do so by permission of the arbitral tribunal. Similarly, under Annex I to the ICC Guidance Note, non-interruption of the speaker and observing reasonable and responsible use of the platform and bandwidth, are required during the hearing.

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