



Protocol for Remote Hearings in International Arbitration

January 2021

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“Remote hearings are a viable option in all circumstances”



1. Objective

The following Protocol for Remote Hearings in International Arbitration (the “**Protocol**”) has been prepared by Uría Menéndez (“**UM**”) and Philippi Prietocarrizosa Ferrero DU & Uría (“**PPU**”) in order to propose a series of measures that may help parties, arbitrators and arbitration tribunal prepare and hold remote hearings—also called virtual hearings—, i.e., hearings conducted either partially or completely by videoconference, teleconference or any other form of communication technology by which parties may participate in a hearing from more than one location.¹

International arbitration has seen a surge in the use of remote hearings as a consequence of the COVID-19 pandemic. Remote hearings are a viable option in all circumstances, but they have proven to be especially useful in allowing parties to continue with proceedings in cases in which it is either impossible or too burdensome for parties or other attendants—experts, witnesses, tribunal, etc.—to physically meet for the hearing.

¹ The Protocol was drafted by Heidi López Castro (Counsel, Madrid), Jorge Azagra (Senior Associate, Barcelona), Constança Borges (Senior Associate, Lisboa), and Santiago Rodríguez Senior (Junior Associate, Madrid).



“Remote hearings may save costs that are inherent to in-person hearings”

2. Pros and Cons of Remote Hearings

Remote hearings may save costs that are inherent to in-person hearings, such as reserving a hearing room, travel and accommodation for attorneys and witnesses, etc. In those cases in which the amount in dispute is not particularly significant, or the number of witnesses is limited, remote hearings offer a reasonable alternative to in-person hearings simply because of the concomitant cost savings.

However, it is also true that specific additional costs not associated with in-person hearings may arise if the parties opt for remote hearings. Remote hearings require additional and specific technical preparations that are not associated with in-person hearings and that might entail significant costs. In addition, individuals' attention spans are also thought to be shorter when conducting a hearing virtually and, therefore, parties and tribunals often opt for

conducting the hearing over more days and examine fewer witnesses per day. This may in turn increase the duration of the hearing and thus probably also legal fees. Therefore, whether a remote hearing actually saves costs and, if so, how much, must be analysed on a case-by-case basis.

Remote hearings might also be more eco-friendly and contribute to the reduction of carbon emissions. In a world in which we are striving to become more environmentally conscious, remote hearings offer the international arbitration community a helpful opportunity to contribute to that common goal. This is a top priority for PPU and UM (see [Uría Menéndez 2019 Sustainability Report](#)). While this also must be analysed on a case-by-case basis, remote hearings can at least help reduce air travel, one of the most relevant contributors to carbon emissions.

3. Challenges and reasons for the Protocol

Remote hearings nevertheless present specific additional challenges not associated with in-person hearings. For instance, technical problems may interfere with one party's ability to examine a witness or present their oral arguments. Remote hearings also require specific in depth preparation due to the intrinsic differences in the way they are carried out with respect to in-person hearings.

All things being equal, remote hearings also tend to be more exhausting than in person-hearings—at least until we all become more accustomed to them—, which may affect all attendants' capacity to retain information. Examining witnesses could be more challenging if done virtually since the reading of a witness's body language—and also that of the tribunal and other attendants—will be limited to what is shown on screen. Finally, in some jurisdictions,

there could be a risk that the award may be annulled for denying the parties their right to be heard if one of the parties prefers to conduct an in-person hearing.

These potential risks may be significantly mitigated if the parties take the proper precautionary steps. PPU and UM have prepared the Protocol in order to guide parties **before, during** and **after** a remote hearing. The Protocol is designed to provide general suggestions and comments—based on our experience—on the potential problems that may arise during a remote hearing. Nonetheless, we acknowledge that the Protocol must be adapted on a case-by-case basis—including with regard to confidentiality and the specific seat of the arbitration.



“Potential risks may be significantly mitigated if the parties take the proper precautionary steps”

4. Before the Remote Hearing

It is crucial to ensure that, according to the law of the seat of arbitration, the law applicable to the case and any applicable rules and regulations, it is possible to hold remote hearings without any issues arising concerning the **validity of the final award** that may cause its **annulment**. It is therefore advisable to research the law and case law of the jurisdiction in which enforcement may potentially be sought regarding its stance on remote hearings, and whether virtually examining witnesses or presenting arguments contravenes that

confidentiality, the arbitral tribunal may order that a specific document establishing that undertaking must be signed by all those who attend the hearing. Additionally, the number of authorised participants—or attendees—in the hearing should be limited to essential personnel and allow only one IP address to use the provided log-in credentials.

An **instant means of communication** among the team should also be set up to allow the team—if not located in one place—to communicate during the hearing.



jurisdiction's position on the right to be heard. In any case, parties should sign a statement agreeing **not to challenge the arbitral award** on the basis that the arbitral hearing was not held in person.

Confidentiality should be ensured throughout the hearings, namely by requiring all third parties to be bound by confidentiality rules—e.g. witnesses should not disclose any information on the hearings or about documents or any evidence they have seen. In order to guarantee

Test, test, test... Each legal team should go through at least one mock trial to attempt to recreate the hearing environment and to be able to anticipate any potential problems. Furthermore, a test hearing should be included in the hearing schedule—which should take place a couple of days before the first hearing day—between the parties and the arbitral tribunal to ensure that everything goes smoothly during the hearings.

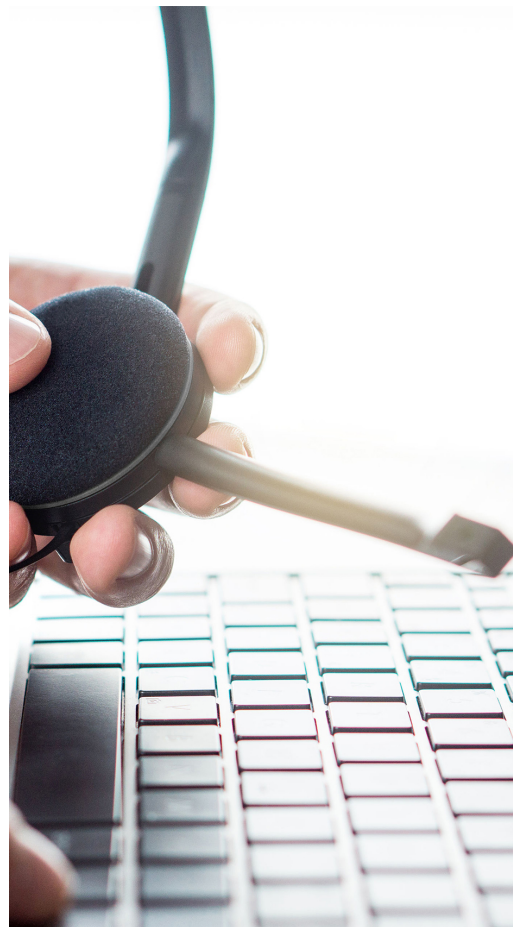
In order to regulate and avoid any potential technical problems, it is important to have a

detailed **protocol on the conduct of the remote hearing**, agreed between the parties and the arbitral tribunal, which should cover the following main topics:

- i) Identification of all and each of the participants, from the Tribunal, parties and witnesses, including their location, number of people and whoever will be present in the rooms where each participant will be during the hearings. The Tribunal should take steps to verify the identity of each individual present at the start of the videoconference;
- ii) In the event that the parties decide to have live transcriptions during the hearing, it would be advisable to make a list beforehand of the people who will have access to the live transcription and consider limiting the number of people with access;
- iii) Establish that all parties will connect to the remote hearing at least 15 minutes before the hearing is set to start
- iv) Set virtual break-out rooms for the parties and for the arbitral tribunal and the rules that must be followed in those rooms—no recording, confidentiality, etc.—, preferably those that would not require the attendants to disconnect from the application used for the hearing;
- v) Choose either to install 360° cameras, place multiple cameras in the room where the witness will testify, or, to the extent possible, agree on the name of a representative of each party who will be physically present

with the witness when he/she testifies to make sure there is no witness tampering;

- vi) Define a hearing schedule, which should include breaks of at least ten minutes after each oral argument or after each party examines a witness. Take into consideration that remote hearings—like any virtual interaction—tend to be more demanding than in-person hearings, so it may be advisable to conduct the remote hearing over more days and simply conduct fewer oral arguments or witness examinations per day;



- vii) Choose external service providers to assist and support the parties in ensuring that all the technical requirements to conduct a remote hearing are satisfied. This includes agreeing on, and testing, the following technical issues: (i) which online platform will be used—which should allow virtual breakout rooms—; (ii) a secure internet connection; (iii) a translator who can work together with the external service provider to provide translations in real time; (iv) preparing an electronic bundle for the hearing; (v) live or same-day transcription services of the hearing; (vi) testing the minimal equipment required and its specifications to ensure an adequate participation in the hearing—e.g. types of cameras, screens and microphones—; (vii) tutorials for participants who are not familiar with the technology, platform, applications or equipment to be used at the hearing;
- viii) Define contingency measures to be followed in cases of technical failures—including an IT support team to assist at any time during the hearing. This may also include creating a group chat between all participants in the hearing in order to communicate any technical failures;
- ix) Identify the names of back-up expert witnesses. This is particularly important while the COVID-19 pandemic is still not under control and any witness or party may test positive just imminently before the hearing and become unavailable to attend

the hearing. Expert reports are frequently signed by multiple experts. In such cases, it is recommendable that both parties identify a back-up expert witness in order to avoid the necessity of suspending the hearing in the event that the lead expert witness becomes unavailable days before the hearing;

“Have a detailed protocol on the conduct of the remote hearing”

- x) Rules to be followed during the hearing, including identifying lead speakers, a potential non-interruption rule—which would establish ground rules as to how a party may interrupt another during his/her examination of a witness—, the examination of witnesses and experts—including their location—, observing reasonable and responsible use of the platform and bandwidth, avoiding the use of equipment that interferes with connectivity or allows illicit recording, agreeing a procedure for objections, etc.;
- xi) Recording the hearing and deciding who will have access to the recording; and
- xii) In all cases, grant the tribunal the power to adapt the conduct of the proceeding as it deems appropriate to adapt to unforeseeable circumstances.

5. During the Remote Hearing

The first concern when attending a remote hearing should be creating a **professional environment** in the location from which each participant will connect to the remote hearing. It is highly recommended that participants attend from their office spaces; however, if that is not possible, it is important to create a business environment wherever the remote hearing will be conducted. For these purposes, it would be advisable to use a room that is a neutral venue—i.e. it does not have any distractions in the background—, with sufficient internet coverage and to use artificial light.

“Creating a professional environment”

In addition, whenever possible it would be suggested to have all members of the legal team present in the same room, regardless of where the witnesses, experts or counsel for the other team are connecting from. This is helpful not only to facilitate communications between the team during the hearing, but it also contributes to creating a more professional environment for the hearing.

It is recommended to have at least three **monitors** when conducting a remote hearing. One monitor would be necessary to see all the parties connected to the remote hearing. A second monitor would be used to see the documents being discussed. A third monitor would be useful to show the live transcript of the hearing or to project any group chat open with



the rest of the team in order to be able to give instructions in real time.

Most virtual platforms allow you to enter the remote hearing room while both the camera and microphone are turned off. Take this opportunity to ensure, before turning on audio and video, that the image the others will see on screen is clear, with no problems with lighting or shadows, and that the **framing is adequate**. If possible, it is recommended that you clearly show both your face and the top of your neck, being neither too close to nor far from the camera.

It is important to check that the **quality of the audio** others will receive from you is adequate—with no ambient noise or interference, and at an appropriate volume. It is highly recommended to use **earphones** rather than the computer audio in order to avoid echoes. In addition, it is also advisable to use a **standalone microphone**, and not rely on the computer's microphone, to ensure that others hear you properly. Once you are ready, try to look at the camera and focus on the hearing, avoiding unnecessary distractions.

“Have proper audio and video equipment”

Each legal team must be able to communicate by using a **text-based “group chat”** program or email. The tribunal can also facilitate intra-team communications by scheduling frequent

breaks, during which the parties may mute or disconnect from the remote hearing to converse privately by teleconference or videoconference.

It is recommended that each party have **technical support** available *in situ* to resolve

“Have technical support *in situ*”

problems that may arise during the hearing. The parties can also appoint a shared technical support team—often staff of the videoconferencing platform that the parties have chosen—to assist them with any problems that may arise while using the platform.

If needed, there are numerous translation programs that provide **simultaneous interpretation services** and only require a connection and a device such as a laptop, tablet or smartphone. This can nevertheless be a source of various technological problems. When such services are used, it is suggested to leave a reasonable amount of time between sentences so that attendees receive a complete translation and can process it.

One of the advantages of remote hearings is that most platforms allow their users to use **screen sharing** or display specific documents stored in a cloud-storage system with shared access. These tools make remote hearings more dynamic when referring to specific pages, data or phrases within the proceedings' documents, as everyone has nearly instantaneous access to the document and

page being referred to. This tool can also be very useful to both lawyers and the tribunal for supporting their conclusions, examining witnesses and focusing the debate on the actual facts of the case. **External document-management services** are also often offered with many platforms used for hearings and their use often makes hearings go smoother.

The audio may sometimes fail during the hearing or constant interferences from other parties may cause disruptions during the hearing. In these cases, and especially during witness examinations, it is recommended to agree on a **visual sign** in case, for example, one party objects to questions posed to the

witnesses so that the tribunal can retain control of the situation and allow for the intervention in a convenient time.

Lastly, it is very likely that, in spite of having followed all the recommendations and taken all the precautions for the correct functioning of a remote hearing—and in the manner most similar to a regular hearing—, **technical problems may nevertheless arise**—as may also happen during an in-person hearing. In these cases it is important to **remain calm**, be proactive, propose solutions and understand the positions of all parties involved in the hearing.



6. After the Remote Hearing

Post-hearing briefs are an optional tool that allows parties to summarise their arguments and conclusions a final time before the tribunal hands down an award. As previously explained, remote hearings carry the risk of technical problems or that the tribunal does not retain as much information as in an in-person hearing. Therefore, when opting for a remote hearing, it is advisable to seriously consider having post-hearing briefs in order to ensure that the tribunal has heard and understood the statements made during the remote hearing.

Remote hearings tend to require that an electronic bundle of documents be prepared for

the hearing. These bundles are commonly prepared by an external company hired to assist the parties conduct the remote hearing. However, after the hearing ends, it is not always clear whether the electronic bundle must be kept available for the tribunal to access until an award is handed down. If so, it must be agreed which party pays the corresponding maintenance fee. It is therefore advisable to establish in the procedural order that will govern the rules of the remote hearing whether electronic bundles will be kept available until an award is handed down and, if so, which party bears the maintenance costs of doing so.



7. Contact lawyers



**Jesús
Remón**

Spain
jesus.remon@uria.com



**Gabriel
Bottini**

Spain
gabriel.bottini@uria.com



**Álvaro
López de Argumedo**

Spain
alvaro.argumedo@uria.com



**Cristian
Gual**

Spain
cristian.gual@uria.com



**Gillian
Cahill**

Spain
gillian.cahill@uria.com



**Heidi
López**

Spain
heidi.lopez@uria.com



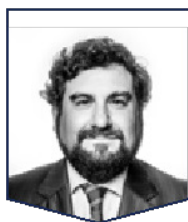
**Tito
Arantes Fontes**

Portugal
tito.fontes@uria.com



**Fernando
Aguilár de Carvalho**

Portugal
fernando.aguilar@uria.com



**Jorge
Vial**

Chile
jorge.vial@ppulegal.com



**Ramiro
Portocarrero**

Peru
ramiro.portocarrero@ppulegal.com



**Héctor
Hernández**

Colombia
hector.hernandez@ppulegal.com

BARCELONA
BILBAO
LISBOA
MADRID
PORTO
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BRUXELLES
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