

[Home](#)[Editorial](#)[COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees](#)[Non-Precluded Measures Clauses in Times of COVID-19](#)[COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal](#)[Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal](#)[COVID-19 and Online Hearings](#)[COVID-19 Pandemic and Standards of Investment Protection – A Cooperative Approach](#)[COVID-19 and Investment Claims: What Role for War and Emergency Clauses?](#)[COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure](#)[COVID-19, *Rebus Sic Stantibus* and the Law of Treaties](#)[Investment Arbitration: Contact Lawyers](#)

COVID-19 and Online Hearings

The crisis generated by the COVID-19 pandemic has shaken the entire world. From financial markets to law firms, every industry has been forced to adapt to survive the resulting hardships.

With regard to international arbitration, arbitral tribunals (tribunal(s)) have been forced to find unorthodox solutions for hearings. Ultimately, tribunals have been compelled to decide amongst three options: (i) suspend hearings; (ii) cancel hearings; or (iii) conduct virtual hearings.

There are convincing arguments both in favour and against each option. However, it is likely that, as a consequence of the COVID-19 pandemic, virtual hearings will emerge as a growing trend in the international arbitration community in the near future and perhaps remain as a permanent feature for certain types of hearings.

Should Hearings be Suspended or Cancelled?

The contractual or procedural rules of the arbitration may be silent on how

to proceed if a force majeure event frustrates the possibility to conduct the hearing. Under that scenario, the tribunal will have to intervene and decide how to proceed.¹ Any decision taken by the tribunal must preserve the parties' procedural rights, which include the right to be heard, the right to equal treatment, the principle of party autonomy, and the right to efficient proceedings.²

The tribunal could potentially opt for what appears to be the safest choice: suspend the hearing indefinitely and wait until the force majeure event ceases. This would undoubtedly be the most cautious approach for the tribunal, since guaranteeing that the hearing takes place in-person would

¹ Gary Born, *International Commercial Arbitration* (Second Edition 2014) 2153.

² *Ibid* 2149.



Santiago Rodríguez Senior
International Arbitration and Litigation



A Third Way? The Case for Virtual Hearings

Virtual hearings are hearings conducted by videoconference. This technology allows for all relevant parties to be connected simultaneously from anywhere in the world and conduct the hearing remotely.

A virtual hearing would entail oral arguments and witness examinations being conducted by videoconference. Given that all the parties, witnesses and the tribunal would be in separate locations, the logistics of organizing a virtual hearing differ significantly from in-person hearings.

The parties would have to agree beforehand on the ground rules to conduct the virtual hearing. There are already draft procedural orders published that contemplate the points that the parties would have to agree on in order to hold a virtual hearing.⁷ Some of these points on which the parties would need to agree include the videoconferencing platform used for the hearing, whether live transcriptions will be available, which parties will have access to the video link, whether the parties will hire a hearing-support provider, or how many mock sessions would be conducted (if any).⁸

⁷ R.F. Ziegler, 'Draft Procedural Order to Govern Virtual Arbitration Proceedings' (*Transnational Dispute Management*, 9 April 2020) < <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1814> > accessed 25 April 2020.

⁸ *Ibid.*

Although these are valid reasons for preferring an in-person hearing over a virtual hearing, the question in force majeure circumstances —such as that created by the COVID-19 pandemic— is whether it is preferable to suspend or cancel the hearing as opposed to conducting a virtual hearing

avoid the risk of the award ultimately being annulled for potentially denying a party's right to be heard.³ However, this approach also carries various risks.

If the tribunal decides to wait indefinitely for the hearing to take place, the decision could increase both the time and costs of the procedure. This would be contrary to the right to an efficient procedure

³ Article V(1)(b) of the New York Convention lists the breach of the parties' right to be heard as a potential ground for denying recognition of the award.

protected under various instruments, including article 17(1) of the UNCITRAL Arbitration Rules.⁴

On the other hand, the tribunal may decide to cancel the hearing if it considers that the parties had reasonable opportunities to present their respective case.⁵ Taking this step could run the risk of one party requesting the annulment of the award

⁴ UNCITRAL Arbitration Rules, as revised in 2010.

⁵ Born (n 1) 2153.

on the basis that they were unable to fully present their case.

Legal scholars nevertheless agree that the right to be heard does not invariably include the right to hold a hearing.⁶ Therefore, under force majeure circumstances, it could be argued that the tribunal is empowered to cancel the hearing and conduct a documents-only arbitration.

⁶ *Ibid* 2179.

As a result of the COVID-19 pandemic, several major arbitral institutions and organizations have published guidelines to help parties and tribunals navigate the crisis.⁹ These guidelines address issues such as the limits to the tribunals' discretionary powers to conduct the proceeding, as well as provide practical suggestions on how to conduct an efficient virtual hearing.

For example, the ICC Guidance Note explains the tribunals' options in the event that the hearing is suspended and the parties are unable to agree on whether to wait indefinitely for the hearing to take place or conduct a documents-only arbitration. Accordingly, tribunals will have discretion to decide how to proceed on a case-by-case basis:¹⁰

Article 25(1) broadly provides that the tribunal 'shall proceed within as short a time as possible to establish the facts of the case *by all appropriate means*' (emphasis added). In context, Article 25(2) is structured to regulate whether the tribunal can decide the dispute based on written submissions and documents only or whether there should also be a live hearing ... Hence the Secretariat's Guide to ICC Arbitration notes that 'whether the arbitral tribunal construes Article 25(2) as requiring a face-to-face hearing, or whether the use of video or teleconferencing suffices, will depend on the circumstances of the case.'

9 See e.g. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ('ICC Guidance Note'), 9 April 2020 and CIARB Guidance Note on Remote Dispute Resolution Proceedings ('CIARB Guidance Note'), 8 April 2020.
10 ICC Guidance Note, para 24.

In addition, these guidelines provide helpful suggestions that would mitigate the risk of potential problems when conducting a virtual hearing, such as:

- i. Exchanging electronic bundles of documents beforehand;¹¹
- ii. reviewing domestic laws on enforcement and the validity of the outcome of virtual hearings;¹²
- iii. agreeing to the use of 360° cameras to view all participants in the room;¹³
- iv. preliminarily confirming the compatibility of the platforms that will be used for the virtual hearing;¹⁴
- v. performing tutorials for participants that are unfamiliar with this technology;¹⁵
- vi. running mock sessions to test connectivity;¹⁶ and
- vii. organizing how to conduct the examination of witnesses and experts beforehand.¹⁷

The Arguments in Favour and Against the Use of Virtual Hearings

The COVID-19 pandemic has forced tribunals to answer a difficult question:

11 CIARB Guidance Note, clause 4(3).
12 Ibid, Appendix I (3).
13 ICC Guidance Note, Annex I Clause A(iii).
14 Ibid, Annex I Clause B(ii).
15 Ibid, Annex I Clause B(iii).
16 Ibid, Annex I Clause B(v).
17 Ibid, Annex I Clause E(iii).



should hearings be suspended, cancelled or held virtually? As explained, there are significant problems with suspending or cancelling the hearing, such as the risk of breaching the parties' right to an efficient procedure or the potential annulment of the award for denying one party's right to be heard.

With regard to virtual hearings, there are strong arguments both in favour and against them. One of the main benefits of virtual hearings is that they avoid specific expenses inherent to in-person hearings, e.g. travel expenses, accommodation for legal counsel and witnesses, the cost of hearing facilities, and printing and sending bundles of documents to the hearing location.

In addition, another benefit of virtual hearings is that they preserve the parties'

procedural rights. Indeed, if we accept that virtual hearings are useful in some exceptional circumstances to examine a witness—e.g. when it is impractical to summon a witness to a hearing—we are nevertheless accepting that the parties' procedural rights remain protected. Otherwise, we could not accept virtual hearings under any circumstance.

Finally, another significant benefit virtual hearings possess over in-person hearings is their flexibility. The COVID-19 pandemic has created a scenario under which some of the parties may gather together to hold the hearing, but not all of the relevant parties or persons. Virtual hearings are ideal for such situations, since they enable the possibility of conducting hearings either entirely or partially by videoconference.

Home

Editorial

[COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees](#)

[Non-Precluded Measures Clauses in Times of COVID-19](#)

[COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal](#)

[Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal](#)

COVID-19 and Online Hearings

[COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach](#)

[COVID-19 and Investment Claims: What Role for War and Emergency Clauses?](#)

[COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure](#)

[COVID-19, *Rebus Sic Stantibus* and the Law of Treaties](#)

Investment Arbitration: Contact Lawyers

Indeed, it could be the case that the lawyers and parties are all located in the same city, but travel restrictions have not been lifted for that country and the tribunal is unable to travel to where the lawyers and parties are at. Under such scenario, the tribunal could opt for conducting a partial virtual hearing, in which some of the parties are able to physically gather together, while the tribunal is connected by videoconference.

However, many lawyers and parties are wary of virtual hearings. This is why 78% of arbitration practitioners and parties surveyed in a recent study indicated they had either never or rarely used the technology.¹⁸

Two of the main criticisms and concerns regarding virtual hearings are:¹⁹

- i. The possibility of technical problems; and
- ii. Problems with ensuring the Tribunal's attention when presenting oral arguments or examining witnesses.

With regard to potential technical problems, there is no way to guarantee that the hearing will not have technical

¹⁸ Queen Mary University of London 2018 International Arbitration Survey (2018) <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDE](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDE)> accessed 25 April 2020.

¹⁹ Janet Walker, 'Virtual hearings the new normal' (*Global Arbitration Review*, 27 March 2020) <<https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal>> accessed 25 April 2020.

issues if conducted entirely by videoconference. Various problems are simply out of the parties' control, especially if one party is in a remote location with poor connectivity.

Nevertheless, there are companies that provide support services for arbitration procedures that have anticipated many of these potential problems.²⁰ These companies may include, as part of their package of services, the appointment of a case manager who handles video links and provides electronic-hearing bundles. This may mitigate the risk of technical issues such as poor video or audio quality during the hearing.

The second point, regarding the ability to draw the Tribunal's attention in an electronic hearing, is likely to be the most concerning for legal counsel. Inevitably, the effect on a Tribunal in terms of being physically present and observing how a witness reacts to a specific line of questioning is not the same as in a videoconference. It is also not the same for a witness to be examined in a hearing room as in the comfort of their own home.

Nevertheless, although these are valid reasons for preferring an in-person hearing over a virtual hearing, the question in force majeure circumstances—such as that created by the COVID-19 pandemic—is whether it is preferable to suspend or cancel the hearing as opposed to conducting a virtual hearing.

²⁰ See e.g. 'Virtual hearings, powered by Opus 2' <<https://www.opus2.com/virtual-hearings>> accessed 25 April 2020.

When answering this question, we must return to the procedural rights that must at all times be protected in an arbitration: the right to be heard, the right to equal treatment, the principle of party autonomy, and the right to efficient proceedings.

If it is accepted that the parties' procedural rights are protected when conducting virtual hearings, then Tribunals would have to weigh the potential shortcomings of conducting the hearing by videoconference against the fact that the parties will have their opportunity to present their case before the Tribunal in a timely manner.

In addition, with sufficient resources and organization, conducting a virtual hearing is not necessarily as egregious as some may think. Indeed, there are already

What might have initially been considered as a temporary solution to an exceptional situation may ultimately become, in the near future, common practice in international arbitration when conducting hearings

many successful examples of virtual hearings conducted during the COVID-19 crisis, in which the Tribunals and parties were pleased with the results.²¹

Finally, even if attorneys dislike the idea of presenting their arguments and examining witnesses by videoconference, at the end of the day it is the parties who decide whether or not to opt for conducting the hearing virtually. Therefore, parties could likely prefer to conduct a virtual hearing—with all of their potential shortcomings—over waiting indefinitely for an in-person hearing or conducting a documents only arbitration.

²¹ Neil Kaplan, 'How we must adapt to COVID-19' (*Global Arbitration Review*, 30 March 2020) <<https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19>> accessed 25 April 2020.



Home

Editorial

COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees

Non-Precluded Measures Clauses in Times of COVID-19

COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal

Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal

COVID-19 and Online Hearings

COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach

COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure

COVID-19, *Rebus Sic Stantibus* and the Law of Treaties

Investment Arbitration: Contact Lawyers

Virtual Hearings: The Way of the Future?

Having explained how virtual hearings work, and the likelihood that they will be used during the COVID-19 pandemic over the option to suspend or cancel the hearing, it is not unrealistic to assume that parties will increasingly push for virtual hearings after having experienced them.

It can reasonably be assumed that a winning party will be satisfied with the result of the hearing, while simultaneously satisfied with the significant savings compared to in-person hearings. In this scenario, it can be assumed that the winning party would use again, or recommend, the use of virtual hearings.

It could also be the case that a winning party may not be satisfied with how the virtual hearing was conducted, despite having won, and would nevertheless have preferred to hold in-person hearings. However, in this scenario, the party would have to weigh their dissatisfaction with how the virtual hearing was conducted against their satisfaction with the fact that they had the opportunity to present their case in a timely manner and the costs that the party saved in comparison with those that would have been incurred had an in-person hearing taken place.

This scenario has no absolute answer and would have to be analysed on a case-by-case basis. However, there will likely be cases in which the party's dissatisfaction with how virtual hearings

work is outweighed by the party's satisfaction with other considerations.

Indeed, virtual hearings seem tailor-made to arbitrations involving small claims or those that must be resolved urgently. Arbitrations that involve complex logistics, such as several rounds of witness examinations, would likely be more complicated to handle by virtual hearings. Therefore, there would still likely be an increase in the use, or recommendation, of virtual hearings for certain types of disputes even if the party won and is not entirely pleased with the way virtual hearings work.

On the other hand, the losing party might blame the virtual hearing at least in part for the outcome of the arbitration, in which case it would be unlikely that

they would resort to, or recommend, virtual hearings in the future. In this scenario, if the party is convinced they lost mainly as a result of the nature of the virtual hearing and that the quality of the parties' submissions or evidence had little or no bearing on the outcome of the dispute, then it is unlikely that the party would use virtual hearings again or recommend their use.

Nevertheless, it may also be the case that the losing party acknowledges that they lost because the counterparty's pleadings and evidence were more compelling and the nature of the virtual hearing itself had no significant impact on the result of the dispute. Under this set of circumstances, it can be assumed that the losing party would be grateful for the significant cost savings of a virtual hearing. Therefore, under this scenario, we can also assume that the losing party would potentially use virtual hearings again or recommend their use in the future.

Ultimately, there are strong arguments both in favour of and against holding virtual hearings. We are currently living through an unexpected test trial of virtual hearings as an efficient alternative to in-person hearings in international arbitration. Only time will tell whether parties' experiences with virtual hearings are satisfactory. In any event, what might have initially been considered as a temporary solution to an exceptional situation may ultimately become, in the near future, common practice in international arbitration when conducting hearings.



Home

Editorial

[COVID-19 and Interim Relief for Stay of Enforcement of Bank Guarantees](#)

[Non-Precluded Measures Clauses in Times of COVID-19](#)

[COVID-19 and its Impact on Arbitrations Seated in Spain and Portugal](#)

[Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal](#)

COVID-19 and Online Hearings

[COVID-19 Pandemic and Standards of Investment Protection — A Cooperative Approach](#)

[COVID-19 and Investment Claims: What Role for War and Emergency Clauses?](#)

[COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure](#)

[COVID-19, *Rebus Sic Stantibus* and the Law of Treaties](#)

Investment Arbitration: Contact Lawyers