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Viral Changes in ADR During the Pandemic

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Remote Hearings in Arbitration and What Voltaire Has to Do With It

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Dans ses écrits un sage Italien
Dit que le mieux est l'ennemi du bien;
Non qu'on ne puisse augmenter en prudence,
En bonté d'âme, en talents, en science;
Cherchons le mieux sur ces chapitres-là;
Partout ailleurs évitons la chimère.
Dans son état heureux qui peut se plaire,
Vivre à sa place, et garder ce qu'il a !

These are the opening lines of the poem "La Bégueule" from 1772 by the French philosopher Voltaire. This poem is the reason why the saying "the best is the enemy of the good" is often attributed to Voltaire, even though the origin seems to be the Italian "*Il meglio è l'inimico del bene*."[1] The proverb is often cited as meaning that "people are … unhelpfully discouraged from bringing positive change because what is proposed falls short of ideal" and "[i]f we want to make progress, we should … seek improvement rather than perfection."[2] However, put in context, Voltaire's poem suggests quite the opposite. In "La Bégueule" Voltaire tells the story of a woman who is perpetually unhappy. According to the first lines of the poem, when it comes to prudence, goodness, talent, or science, one should strive for excellence. Yet, for other matters, one should avoid falling for the illusion of constant improvement. Instead, one should stay put and "remain in one's place," the value of which is not to be underestimated.

The tension between the two meanings—the one typically attributed to the proverb and the other originally intended by Voltaire—is interesting. It highlights two rather opposing human approaches to uncertainty: on the one hand, a proactive approach aiming for improvement and embracing unknown situations even if they are not perfect; on the other hand, a conservative approach avoiding progress for the mere sake of it and at the risk of making matters worse. In current times of uncertainty due to the COVID-19 pandemic, we are facing many novel issues and often have to choose between being proactive or cautious. International arbitration is no exception. Among other things, parties, counsel and arbitrators must assess whether and to what extent physical hearings that cannot be held due to the above-mentioned pandemic should (proactively) be held remotely using modern communication technologies, or (conservatively) be postponed.

Remote hearings are nothing new, but the COVID-19 crisis has forced international arbitration out of its comfort zone. Most steps in an international arbitration are done remotely nowadays, including holding case management conferences at the outset and/or mid-stream (often organized as telephone or videoconferences rather than as physical meetings) and exchanging written submissions via document share platforms. Possibly the last "piece of the puzzle" that typically remains as physical meetings are hearings, either on the merits or on major procedural issues. But the current COVID-19 pandemic forces international arbitration practitioners to reconsider this point and assess whether those hearings, too, can be held remotely. Depending on its length, the current crisis has the potential of being a real game-changer if international arbitral tribunals, as well as national courts around the globe, become used to holding hearings remotely.[3] Such a paradigm shift might be something that many arbitration users have wanted for some time.[4]

It is important to distinguish between different types of remote hearings. For instance, fully remote hearings, in which every participant is in a different location, raise additional questions compared to semi-remote ones, in which a main venue is connected to one or several remote venues. Moreover, remote legal arguments might require a different analysis from remote evidence taking.[5] In the post-COVID-19 world, hearings might combine these different forms, with some parts of a hearing being held semi-remotely or fully remotely and others with physical meetings.

For all possible forms of remote hearings, parties and tribunals must assess the relevant regulatory framework, including in particular the law of the seat of the arbitration and the arbitration rules, if any. Some national laws or arbitration rules contain specific provisions on remote

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hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely.[6] Others do not contain specific provisions, and remote hearings will therefore be assessed against the backdrop of other provisions, such as the parties' right to a hearing[7] and the tribunal's broad power to determine procedural matters.[8] Irrespective of these differences, arbitral tribunals typically have the power to decide on remote hearings – either as granted under a specific rule, or as part of the tribunals' general broad power to conduct the arbitral proceedings as they deem appropriate.

However, the tribunal's power to decide on remote hearings is not without limits. One important limit is the parties' agreement. If the parties agree on certain conduct (e.g. whether or not to hold a remote hearing), absent specific circumstances, arbitral tribunals should follow the parties' agreement. The opposite situation, e.g. where one party requests a remote hearing while the other insists on a physical hearing, also raises delicate questions. Arbitral tribunals must balance the parties' right to be heard and treated equally[9] with its obligation to conduct the proceedings in an efficient and expeditious manner.[10]

Arbitral tribunals typically have the power of ordering remote hearings over the opposition of one party, but the exercise of that power requires careful consideration. This balancing exercise must contain a multi-factorial approach, including, for instance, assessing the reason for, and content of, the remote hearing, as well as its envisaged technical framework. The envisaged timing for the hearing and any potential delay if it is held physically, and a comparison between the costs for a remote hearing and a physical one, might also be relevant.[11]

Among other things, a concern often raised in the context of remote witness and expert testimony is the alleged prejudice to the cross-examining party and the tribunal's supposed inability to assess the credibility of a remote witness or expert. However, a proper analysis of case law from around the world shows that these fears are often overblown and typically can be counterbalanced by appropriate technological solutions. For instance, as early as 2001, a Canadian court downplayed the alleged risks of remote testimony, while warning against the overstated usefulness of the witness' demeanor and body language.[12]

The previous point emphasizes the importance of careful planning and organization of remote hearings. Existing soft law instruments on remote hearings provide guidance for the actual set-up of remote hearings,[13] but the planning thereof may start much earlier. This includes considering specific language regarding remote hearings in the parties' arbitration agreements or the tribunal's first procedural order.[14]

Finally, the ultimate test is whether awards based on remote hearings withstand potential challenges in recognition/enforcement or set aside proceedings. The author is aware of no reported cases in which such challenges were successful. The most likely grounds for challenges are the parties' right to be heard and treated equally, for instance, under Article V(1)(b) of the New York Convention. However, absent specific circumstances, remote hearings in and of themselves do not violate any of these principles.

For instance, in *China National Building Material Investment v. BNK International*,[15] a Texas district court dealt with a party's objection to the enforcement of an arbitral award, among other things, on the basis of Article V(1)(b) of the New York Convention. The party argued in particular that the arbitral proceedings were "fundamentally unfair" because one of its witnesses suffered from a medical condition and could not attend the hearing.[16] The court noted that the arbitral tribunal had offered to hear the witness remotely via videoconference, but the party insisted on a physical hearing. In those circumstances, the courts found no breach of Article V(1)(b), stressing that "Mr. Chang failed to personally appear – either in person, via videoconferencing, or through his Hong Kong attorneys – at a hearing at which every reasonable accommodation was made for him, and he did so at his own peril."[17] Had the court found that the remote hearing of a witness was in and of itself a breach of the party's right to be heard, it would not have listed it as a possible alternative to a physical hearing.

Similarly, in 2016, a Virginia district court confirmed that remote hearings in and of themselves are no issue under Article V(1)(b) of the New York Convention. In *Research and Development Center v. Ep International*,[18] a party resisted enforcement of an award on the basis that it was not physically present at the hearing. In this context, the court noted that "[w]hen a party asserts that its physical presence at arbitration is prevented, it is generally unable to prevail on such a defense if there are available alternative means of presenting its case."[19] In the case at hand, the applicant had not demonstrated that it was unable to present its case before the arbitral tribunal because the relevant institutional arbitration rules specifically allowed appearance by videoconference – something the application had failed to request, according to the court.[20] This makes clear that participation by videoconference would have satisfied the parties' right to be heard (as did the mere possibility to be able to request it).[21] Case law from other jurisdictions confirms this trend.[22]

In Voltaire's poem, cited at the outset of this article, the discontent woman eventually returns to her husband and lives a happy life, but not without taking a secret lover. Leaving aside questions of morality, and pushing the interpretation of the poem to its limits, it shows that solutions cannot be found by imposing a principled approach, but are better if they are specific to each individual case, taking into account all relevant circumstances. In any event, the fact that many arbitral tribunals, as well as national courts, are growing their experiences with

remote hearings is an opportunity that should not be underestimated. It allows users of international arbitrations—parties, counsel, and arbitrators alike – to increase their toolbox and find the best-suited solution for any given case.

Endnotes

1. Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* 389 (OUP 2011).
2. Richard Susskind, *Online Court and the Future of Justice* 89-90, 182 *et seq.* (OUP 2019).
3. On remote hearings in national courts generally, see e.g. https://remotecourts.org/.
4. Queen Mary School of International Arbitration Survey, *The Evolution of International Arbitration* chart 36 (2018) (89% of the survey participants expressed the view that videoconferencing should be used more often as a tool in international arbitration; 66% said the same about virtual hearing rooms).
5. *See e.g.,* Meghan Dunn & Rebecca Norwick*, Report of a Survey of Videoconferencing in the Courts of Appeal* (Federal Judicial Center 2006).
6. *See e.g.* Dutch Civil Procedure Code, art. 1072b(4); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Rules, s. 30.6; London Court of International Arbitration (LCIA) Rules, art. 19.2; United Nations Commission on International Trade Law (UNCITRAL) Rules 2010, art. 28(4).
7. *See e.g.* German Civil Procedural Code (ZPO), s. 1047(1); Swedish Arbitration Act, s. 24(1); People's Republic of China Arbitration Law, art. 47; International Chamber of Commerce (ICC) Rules, art. 25(6); Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Rules, art. 32(1); Singapore International Arbitration Centre (SIAC) Rules, art. 24.1; UNCITRAL Rules, art. 17(3).
8. UNCITRAL Model Law, art. 19(2); English Arbitration Act, s. 34(1); Swiss Private International Law Act, art. 182(2); Hong Kong International Arbitration Centre (HKIAC) Rules, arts. 13.1, 22.5; ICC Rules, arts. 19, 22(2); International Centre for Dispute Resolution (ICDR) Rules, art. 20.1; LCIA Rules, art. 14.5; SCC Rules, art. 23(1); SIAC Rules, arts. 19.1, 25.3; UNCITRAL Rules, arts. 17(1), 28(2).
9. *See e.g.* Dutch Civil Procedure Code, art. 1036; English Arbitration Act, s. 33(1)(1); French Civil Procedure Code, art. 1510; German Civil Procedure Code ZPO, art. 1042; Hong Kong Arbitration Ordinance, s. 46; Swiss Private International Law Act, art. 182(3); UAE Federal Law, art. 26; UNCITRAL Model Law, art. 18; HKIAC Rules, art. 13.1; SCC Rules, art. 23(2); UNCITRAL Rules, art. 17(1).
10. *See e.g.* HKIAC Rules, art. 13.5; ICC Rules, arts. 22.1, 25.1; ICDR Rules, art. 20.2; LCIA Rules, art. 14.4(ii); SCC Rules, art. 23(2); SIAC Rules, art. 19.1; UNCITRAL Rules, art. 17.1; Vienna International Arbitration Centre (VIAC) Rules, art. 28(1).
11. For a more detailed analysis of the various factors, *see* Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework*, 37(4) J. Int'l Arb. 407-488. (2020).
12. *Pack All Manufacturing Inc. v. Triad Plastics Inc.,* [2001] O.J. No. 5882, ¶ 6 (Ontario Super. Ct. Just.). For further case law analysis, see Scherer, *supra* n. 11.
13. See e.g. AAA-ICDR, *Virtual Hearing Guide for Arbitrators and Parties*; Delos, *Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19* (Mar. 20, 2020); HKIAC, *Precautionary Measures in Response to COVID-19* (Mar. 26, 2020); ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID-19 Pandemic* (Apr. 9, 2020); ICSID, *A Brief Guide to Online Hearings at ICSID* (Mar. 24, 2020); KCAB, *Seoul Protocol on Video Conferencing in International Arbitration* (2020); Africa Arbitration Academy, *Protocol on Virtual Hearings in Africa* (Apr. 2020); American Chamber-Peru, Virtual Arbitration Guide (May 2020); Chartered Institute of Arbitrators, *Guidance Note on Remote Dispute Resolution Proceedings* (2020).
14. For sample clauses, *see* Scherer, *supra* n. 11.
15. *China Nat'l Bldg Mat. Inv. Co., Ltd. v. BNK Int'l LLC*, 2009 WL 4730578, at *7 (W.D. Tex. Dec. 4, 2009).
16. *Id.*
17. *Id*.
18. *Research & Dev. Ctr "Teploenergetika," LLC, v. Ep Int'l, LLC*, 182 F.Supp.3d 556 (E.D. Va. 2016).
19. *Id*. at 566, referring to *Rive v. Briggs of Cancun, Inc*., 82 F.App'x 359, 364 (5th Cir. 2003*); Empresa Constructora Contex Limitada v. Iseki, Inc*., 106 F.Supp.2d 1020, 1026 (S.D. Cal. 2000).
20. *Research & Dev. Ctr., "Teploenergetika," LLC*, *supra n. 19,* at 570.
21. *See also* for participation by telephone, *China Nat'l Bldg Mat. Inv*., *supra* n. 15, at *7.
22. For further analysis, *see* Scherer, *supra* n. 11.