

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA
PROJECTS

**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

INDIA

Kingshuk Banerjee
Ritvik Kulkarni

INDIA

[Kingshuk Banerjee](#)*

[Ritvik Kulkarni](#)**

a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

When the place of arbitration is in India, it is governed by Part I of the (Indian) Arbitration and Conciliation Act 1996 ("Arbitration Act"). It applies to both domestic and international commercial arbitrations.

The Arbitration Act does not expressly provide for a right to a physical hearing in arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: Unlikely.

The Arbitration Act is based¹ largely on the UNCITRAL Model Law on International Commercial Arbitration² ("Model Law"). Much like Article 24 of the Model Law, subject to the parties' agreement to the contrary, an arbitral tribunal has the discretion to determine whether (i) to hold oral hearings for the presentation of evidence or for oral argument, or (ii) have a documents-only arbitration.³

* Kingshuk Banerjee is a Partner at Khaitan & Co., Mumbai.

** Ritvik Kulkarni is an Associate at Khaitan & Co., Mumbai.

¹ However, India has not formally adopted the Model Law or incorporated it into the Arbitration Act.

² UNCITRAL, Model Law on International Commercial Arbitration, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf> (last accessed 24 November 2020).

³ See Section 24 Arbitration Act ("Hearings and written proceedings"):

"(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

In *Sukhbir Singh v. Hindustan Petroleum Corp.*,⁴ the Delhi High Court clarified the purport of Section 24. The Court observed as follows:

“27. Whether oral hearings are to be held – either for presentation of evidence or for oral arguments – may be a matter upon which the parties have reached agreement. If so, it is clear from the opening words of Section 24(1), and consistent with the doctrine of party autonomy, that their agreement would prevail.

28. Absent such agreement however, the Arbitral Tribunal is vested with discretion to decide this question. It appears from the first proviso to Section 24(1) that the discretion of the arbitrator in this regard is subject to one of the parties requesting an oral hearing. The principle of the provision is that the requirement of due process includes a right to oral hearing at the appropriate stage, if a party so desires. The question to be decided is whether the proviso entitles a party to oral hearing at its option, or leaves this matter to the discretion of the Arbitral Tribunal”.

However, unless the parties agree that no oral hearings will be held, an arbitral tribunal is bound to hold oral hearing(s) at an appropriate stage if such a request is made by a party.⁵ If the arbitral tribunal fails to provide an oral hearing when requested, it is possible that an arbitral award made in such proceedings will be set aside by an Indian court.

In *ADV Consultant vs. Pioneer Equity Trade (India) Pvt. Ltd.*,⁶ the petitioner had challenged a domestic award on grounds that despite its express demand, the tribunal

– Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held;

– Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties”.

⁴ 2020 SCCOnLine Del 228, (2020) 266 DLT 612.

⁵ Proviso to Section 24(1) Arbitration Act.

⁶ 2009 SCC OnLine Mad 1072, (2009) 8 Mad LJ 1578.

refused to hold an oral hearing without assigning any reasons for the same.⁷ Setting aside the arbitral award, the Madras High Court reasoned as follows:

“7. A combined reading of section 24(1) and section 19 of the said Act makes it clear that on the factual situation of this case, *the petitioner has requested for oral hearing, which has been denied by the Arbitrator without assigning any reason*. By virtue of the proviso to section 24(1) of the Act, that is, when one of the parties requests for oral hearing, it is the duty of the Arbitral Tribunal to conduct the same unless consent of the parties have been formulated by the Arbitral Tribunal agreeing not to have oral hearing. In the absence of any reason adduced by the learned Arbitrator, it has necessarily to be construed that *the denial of oral hearing requested by the petitioner, by the Arbitrator is against the provisions of the Act*” (emphasis added).

Accordingly, where a party has specifically requested for an oral hearing, the arbitral tribunal is bound to provide this opportunity. In *Vinay Bubna vs. Yogesh Mehta & Ors.*,⁸ the Bombay High Court made the following observations:

“59. That takes us to the next challenge namely that the petitioners were denied opportunity of leading evidence. The proviso to sub-section (1) of section 24 is clear. If the parties before the arbitral tribunal seek to lead oral evidence it must be granted as the expression is shall hold oral hearings at the request of the parties. It may be that even in the expression ‘shall’ in a limited number of cases wherein in fact no evidence is required to be led, the tribunal can reject such an application. In the instant case, however the petitioner had pointed out the need to examine the witnesses. The tribunal on the express language of the proviso to section 24(1) could not have denied that opportunity. On that count also the Award is liable to be set aside”.

However, the tribunal retains its discretion over the modalities of the hearing – e.g., the length and scope of the hearing, date, time, and arguably also the mode of hearing. The following observations from *Sukhbir Singh* are instructive:

“46. [...] It is always open to the arbitrator to determine the length and scope of oral hearings, which would necessarily depend upon the facts and circumstances of each case. If a party seeks oral evidence, for example, the Tribunal may be able, after hearing the parties, to determine the points on which evidence is to be led. Similarly, arbitrators can set appropriate time limits for oral arguments. The arbitrators can require an application to be filed by the concerned party, setting out the necessary

⁷ See also *Rakesh Kumar v State of HP*, (2005) 3 Arb LR 187, 189 : (2005) 4 RAJ 523 (HP), unless there is an agreement to the contrary, each party is entitled to be granted an oral hearing. If the tribunal refuses such a request for an oral hearing, the award is liable to be set aside on this ground alone.

⁸ 1998 SCC OnLine Bom 399 : 1998 (100) 3 Bom.L.R. 739.

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

material to enable the Tribunal to determine these matters. Further, the second proviso to Section 24(1) expressly provides for hearings on a day-to-day basis without unnecessary adjournments. The specific insertion of the second proviso to Section 24(1) in our law, which goes beyond the framework of the Model Law, indicates a legislative direction to litigants and arbitrators in the interests of expeditious adjudication. Paragraph 8 of the Analytical Commentary, paragraph 203 of the UNCITRAL Report on Adoption of the Model Law, and paragraph 32 of the Explanatory Note to the Model Law make the limits of Article 24 quite clear – *a party's rights do not extend to determining procedural issues, such as the length or timing of oral hearings. These matters remain squarely in the domain of the Arbitral Tribunal.* In an appropriate case, a request for oral hearing may be found to have been unreasonable or unnecessary, and to have been made for collateral purposes, such as to delay the proceedings. In such a case, Section 31(8) read with Section 31A of the Act empowers the Arbitral Tribunal to make an order of costs in favour of the innocent party. Sections 31A(3)(a) and 31A(4)(e) and (f) in particular permit the Tribunal to make a specific order of costs in relation to a particular stage of proceedings, having regard inter alia to the conduct of the parties. Recourse to these safeguards will check strategic requests for oral hearing, intended only to delay proceedings, without denying parties the fundamental protections of natural justice” (emphasis added).

Arguably, therefore, the arbitral tribunal will retain its power to decide the manner in which an oral hearing is to be conducted. In fact, this is expressly stated to be so under Section 19 of the Arbitration Act, which provides that parties are free to agree on the conduct of the arbitration. But absent such agreement, the arbitral tribunal is free to conduct the proceedings in the manner it considers appropriate. Besides, to the best of our information, there is nothing in the Arbitration Act or any other applicable law to indicate that the right to an oral hearing can be interpreted to include a right to be physically present before the arbitral tribunal.

Finally, it bears noting that there is an obligation cast on an arbitral tribunal to ensure that parties are treated equally, and each party is given a full opportunity to present its case.⁹ If, therefore, an oral hearing necessitates the physical attendance of all concerned in the same room, either due to logistical or technical reasons or for substantive reasons such as, for example, the suspicious disposition of a witness, the tribunal may consider it appropriate, in such circumstances, to direct the physical presence of the parties before the tribunal.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

⁹ See Section 18 Arbitration Act.

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Likely yes.

While there is no express right to be physically heard in civil or criminal litigation in India, an analysis of various legal provisions and case law would indicate that a party to civil or criminal litigation can insist on a physical hearing, generally speaking.

The general rule is that a hearing must be in “Open Court” unless the Court determines otherwise based on justifiable reasons.¹⁰ An Open Court policy is a key feature of the Indian public judicial system. This is borne out from various provisions of Indian law, including Article 145(4)¹¹ of the Constitution of India; Section 327¹² of the Criminal Procedure Code 1973 (“CrPC”); and Section 153-B¹³ of the Civil Procedure Code 1908 (“CPC”).

¹⁰ Sharan JAGTIANI, “Brief Note on Legislative Framework, Practical Perspective and Use of Virtual Platforms For Ad-Hoc Arbitration” (Paper can be provided on request).

¹¹ Article 145(4) of the Constitution of India: “No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court”.

¹² Section 327 of the CrPC (“Court to be open”):

“(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

– Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera:

– Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court”.

¹³ Section 153-B of the CPC (“Place of trial to be deemed to be open Court”):

“The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them:

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Arguably, the aforesaid provisions, as they currently appear in the statute books, make reference to the expressions “court”, “open court”, “place” or “access to the public” in a physical sense.¹⁴ If virtual courts are to be integrated into the justice system on a permanent basis with a provision for public access to virtual hearings, it may still necessitate amendments to the provisions of the CrPC and the CPC as also to other statutes that set up specialized Tribunals.¹⁵ That said, Indian courts have promoted the use of technology and, even, encouraged the conduct of hearings remotely under various circumstances.

In *State of Maharashtra v Dr. Praful B. Desai*,¹⁶ the Supreme Court categorically held that evidence can be recorded by way of video conferencing even in criminal cases. The Court specifically rejected the argument that “the term ‘presence’ in Section 273¹⁷ [of the CrPC] must be interpreted to mean physical presence in flesh and blood in open Court”. The Court held that:

“Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place [...] Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence [...] In fact he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. *In video conferencing both parties are in presence of each other [...] Recording of such evidence would be as per ‘procedure established by law’*” (emphasis added).

On 6 April 2020, in the wake of the Covid-19-pandemic and the nationwide lockdown that was in place in India at the time, the Supreme Court of India issued guidelines for the functioning of “courts” through video conferencing. The Supreme Court expressly held that the Supreme Court and all the High Courts are authorized to

– Provided that the presiding Judge may, if he thinks fit, order at any state of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court”.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ AIR 2003 (4) SCC 601.

¹⁷ Section 273 of the CrPC:

“Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

– Explanation: In this section, ‘accused’ includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code”.

adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technology.

While the order was in favour of conducting hearings remotely by making use of technology, the Supreme Court did clarify that until appropriate rules are framed by High Courts, “[v]ideo conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both parties by video conference”.

However, this order dated 6 April 2020 was reviewed by the Supreme Court on 26 October 2020.¹⁸ The Supreme Court noted that there had been “[a] change in the situation since April 2020. In many States, the situation has eased and it has been possible to even commence hearings in congregation”. The Supreme Court made the following modification:

“We propose to substitute sub-para (vii) of Paragraph 6 with the following : The Video Conferencing in every High Court and within the jurisdiction of every High Court shall be conducted according to the Rules for that purpose framed by that High Court. The Rules will govern Video Conferencing in the High Court and in the district courts and shall cover appellate proceedings as well as trials”.

The aforesaid direction was passed by the Supreme Court in exercise of its powers under Article 142 of the Constitution of India.

We have had arbitrations in India, where parties have insisted on physical hearings or otherwise opposed recording of evidence through video conferencing on the basis of the aforesaid order of the Supreme Court of India. However, different tribunals have ruled differently. While there is no publicly available data or information in this regard, the general consensus seems to be (and this is also the view of the Authors) that the aforesaid order is not strictly applicable to arbitrations. As stated above, the conduct of arbitrations is governed by the agreement of parties, absent which, the arbitral tribunal will have the discretion to decide the mode and manner of the proceedings.¹⁹

The Delhi High Court issued a guidance note²⁰ for conducting arbitration proceedings through videoconference. Among other things, it provides that “[a]vailing the physical infrastructure of [Delhi International Arbitration Centre] is not compulsory in the arbitrations governed by the [arbitration rules of the Delhi International Arbitration Centre]. Hence, the arbitrators can conduct hearings by the way of Video-

¹⁸ Supreme Court of India, “In Re Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic”, order dated 26 October 2020.

¹⁹ As set out in Section 19 of the Arbitration Act.

²⁰ See measures set out by the Arbitration Committee chaired by J. R. Midha, J. The measures came into force with effect from 8 June 2020 until further orders. Delhi High Court, “Guidance Note for Conducting Arbitration Proceedings by Video Conference” (2020) at <http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_QS9BF6S2KSA.PDF> (last accessed 24 November 2020).

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Conference ('VC'). However, where the proceedings through VC may not seem feasible, the arbitrators are at the liberty to conduct proceedings in a restricted environment”.

Indian courts have long acknowledged a need for the law to remain dynamic. In *National Textile Workers' Union vs P.R. Ramakrishnan & Others*,²¹ speaking for a five-judge (constitutional) bench of the Supreme Court, P. N. Bhagwati, J. made the following observations:

“We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adopting itself to the fast-changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation”.

In hindsight, the Supreme Court in *National Textile Workers' Union* may have inadvertently, or perhaps prophetically, just authored an epilogue for India's current response to the COVID-19 pandemic.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: Not likely.

Procedural matters of Indian civil courts are governed mainly by the Code of Civil Procedure, 1908 (“CPC”). Similarly, matters of *inter alia* taking evidence are governed by the Indian Evidence Act, 1872 (“Evidence Act”).

When it comes to arbitral proceedings, Section 19(1) of the Arbitration Act categorically clarifies that “[t]he arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)”. Therefore, even assuming that parties have a right of physical hearing in litigation, such a right cannot be readily extended to arbitration. As long as both parties are provided an equal and adequate opportunity of being heard,²² witness evidence can be taken in a remote hearing.

²¹ 1983 AIR 75.

²² See *ONGC Ltd. vs. Western Geco International Ltd.*, (2014) 9 SCC 263 [*Western Geco*]: “38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and

In *Stemcor (S. E. A.) Private Limited, Singapore and another v Mideast Integrated Steels Limited, New Delhi and others*,²³ the respondents in a Mumbai-seated international arbitration had sought the claimants' assent to recording the evidence of a witness by video conferencing. This is mainly because the witness was a resident of Singapore, whereas the arbitral proceedings were being conducted in India. The claimants refused. Accordingly, the respondents made an application under Section 19 before the sole arbitrator seeking that the said witness be heard by way of video conferencing in Singapore. After several orders, the arbitrator directed the respondents to approach the court for its assistance under Section 27²⁴ of the Arbitration Act. The Bombay High Court not only validated and allowed the respondents' request, but also directed that a commission be set up in Singapore for taking the witness's evidence by video conference.

The High Court relied on the Supreme Court's decision in *Dr. Praful Desai* to observe that "[t]he accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video conferencing. No prejudice whatsoever nature would be caused to the accused".

The Bombay High Court also expressed its agreement with the Delhi High Court's decision in *International Planned Parenthood Federation (IPPF) v. Madhu Bala Nath*.²⁵ In doing so, the Bombay High Court made the following observations:

obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law".

Relying on *Western Geco*, the Supreme Court has recently confirmed in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India*, 2019 (3) ArbLR 152 (SC): 2019 SCCOnline SC 677 that "insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award".

²³ Arbitration Petition No. 332 OF 2018 (Bombay High Court), judgment dated 8 June 2018.

²⁴ Section 27 Arbitration Act ("Court assistance in taking evidence"): "(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence".

²⁵ FAO(OS)416/2015, Delhi High Court (decision dated 7 January 2016).

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

“Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the parties as well as to the witnesses, such facilities should be resorted to. *Merely because a witness is traveling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court. The Court should take a pragmatic view.* In [IPFF], the application was made for recording evidence through video-conferencing on the ground that the witness holds an important position in her organization and has to travel world over. The Delhi High Court held that such a request was not unreasonable [...] I am in agreement with the views expressed by the Delhi High Court” (emphasis added).

The Court went on to observe that any evidence taken at the remote hearing will be deemed to be read as evidence only once it is duly recorded into evidence by the arbitrator at Mumbai.²⁶ The Court then went on to allow the respondents’ request to set up a commission for taking witness evidence in Singapore by way of videoconferencing. The Court was also pleased to issue a letter of request²⁷ to the High Court of Singapore

²⁶ See the Court’s reasons at paragraph 42:

“This Court in the case of *Vithaldas Damodar Vs. Lakhmidas Hatjiwan & Anr.* (supra) while dealing with provisions of Order XXVI Rules 7 and 8 of the Code of Civil Procedure has held that the evidence which is recorded on commission has got to be read as evidence before it becomes evidence. It is held that evidence taken under a commission shall not be read as evidence in the suit without consent of the party against whom the same is offered until the conditions laid down in clause (a) of that rule are satisfied. Under Rule 7 of Order XXVI, the evidence taken on commission forms part of the record in the same way as pleadings, affidavits and other documents of a suit from part of the record of that suit. It is held that the Commissioner who takes evidence on commission has no authority to reject any evidence. All that he can do is to note the objections taken by counsel appearing on behalf of the party while commission evidence is being taken, and after having noted the objections he has got to record the evidence given by the witnesses. It is only when the evidence is read before the Court and tendered as evidence that the questions of admissibility and relevancy are considered”.

²⁷ See the Court’s reasons at paragraph 71:

“[...] Supreme Court in the case of *M/s. Filmistan Private Ltd., Bombay Vs.M/s.Bhagwandas Santprakash and Anr.* -AIR 1971 SC 61 1970 Indlaw SC 466 has construed Sections 75 and 77 of the Code of Civil Procedure and has held that powers of Court to issue commission is discretionary. The fact that witnesses examined on commission cannot be effectively cross-examined on their examination will entail heavy costs are not sufficient circumstances to interfere with discretion of the Court in appeal. Section 77 of the Code of Civil Procedure read with Section 75 empowers the Court to issue a Letter of Request to any person other than the Court to examine witnesses residing

to issue appropriate directions for the examination of the witness in the manner provided under Order 39, Rules 5 to 10, 11(1) and 11(2) of the Supreme Court of Judicature Act and under Order 39 Rule 14 or fees and expenses, if any, due to the examiner in respect of the examination or under any other applicable provisions of law for the purpose of such commission. The High Court of Singapore was also requested to transmit the testimony of the witness along with report, if any, to the Bombay High Court.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

Not applicable.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: Where it is expressly agreed that hearings will be held physically, an arbitral tribunal would be expected to adhere to such agreement.

The Arbitration Act is premised on the principle of party autonomy. If the parties have categorically agreed to hold hearings only by physical means, an arbitral tribunal would be bound to respect the parties' choice. The tribunal's failure to do so, by nevertheless holding a remote hearing or otherwise, may be tantamount to a violation of the parties' right under Section 19(2)²⁸ of the Arbitration Act and constitute a ground for setting aside the arbitral award.

at any place not within India. This power of the Court is not subject to any reciprocal agreement between the Governments. In my view the principles of law laid down by the Supreme Court in the case of *M/s. Filmistan Private Ltd., Bombay Vs.M/s.Bhagwandas Santprakash and Anr.* (supra) would apply to the facts of this case. This Court has ample power to issue a Letter of Request by exercising such powers under Sections 77 and 75 along with Order XXVI Rules 7 and 8 of the Code of Civil Procedure, 1908 and also read with Section 27(6) of the Arbitration and Conciliation Act, 1996".

²⁸ Section 19(2) of the Arbitration Act:

"(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings".

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Assuming such a right was recognized in certain circumstances, yes.

We have answered above that there is no express right under the Arbitration Act to a physical hearing in arbitration. That said, assuming such a right can be inferred from any other statute collaterally or emanates from a parties' express agreement, failure to raise a breach of such right would constitute a waiver and disentitle a party to challenge the arbitral award on this ground.

Section 4 of the Arbitration Act ("Waiver of right to object") specifically provides for circumstance where a party is deemed to have waived its right to object in arbitral proceedings. It reads as follows:

"A party who knows that –

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object" (emphasis added).

In *Mallikarjun v Gulbarga University*,²⁹ both parties had been provided with the full opportunity of leading evidence in the arbitral proceedings. They based their case entirely on the basis of the documents on record; and did not ask for an oral hearing. During the course of the arbitral proceedings, no party raised an objection on grounds that no oral hearing was held or that the arbitration clause was invalid because it did not expressly provide for a right to an oral hearing. Accordingly, the Supreme Court held

²⁹ AIR 2004 SC 716 : (2004) 1 SCC 372:

"[...] The learned Arbitrator in his Award recorded that the parties were given full opportunity to present their case and have their say on each of their claims and contentions in the meeting held in his office on 5.3.99. The Arbitrator in his Award further stated that as the parties based their cases only on the documents and did not pray for adduction of oral evidence and in that view of the matter, in our opinion the Award cannot be faulted".

that it was correct on the part of the execution court³⁰ to have rejected these objections when raised at the stage of enforcement of the arbitral award.

In fact, where a party fails to raise the requisite objection during the arbitral proceedings, the Supreme Court has observed that a party may be deemed to have waived even a seemingly mandatory provision of the Arbitration Act.³¹

If a party does not raise this objection during the arbitration proceedings or raises it only after undue delay, an Indian court will likely refuse an objection to an arbitral award on grounds that a physical hearing was not held.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

Not applicable.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: Depends.

Section 34 of the Arbitration Act lays down exhaustive grounds for judicial review of arbitral awards. There is nothing in Section 34 which expressly provides for an award to be set aside on the ground that a party was not granted a physical hearing in the arbitral proceedings.

³⁰ An execution court is one which has the jurisdiction to enforce the arbitral award as in the same manner as if it were a decree (see Section 35 of the Arbitration Act). The same is applicable to foreign awards (see Section 49 of the Arbitration Act).

³¹ See *Narayan Prasad Lohia vs. Nikunj Kumar Lohia and Ors (Lohia)* (2002) 3 SCC 572. Section 10 of the Arbitration Act expressly requires that an arbitral tribunal shall not be constituted of an even number of arbitrators. The parties had agreed upon a tribunal of two members. None of the parties objected in the course of arbitration. The award-debtor then challenged the award on grounds that it was in violation of Section 10 of the Arbitration Act. On a conjoint reading of Sections 16 (the tribunal's power to decide its own jurisdiction and all objections thereto) and 10 of the Arbitration Act, it was held that Section 10 of the Act was derogable. By failing to object, the award-debtor had waived its right to object within the meaning of Section 4.

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

That said, an arbitral award can be set aside *inter alia* where the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case.³² Separately, an award can be set aside if a Court finds that the award is in conflict with the public policy of India.³³

If a case reasonably warrants a physical hearing and the arbitral tribunal chooses to nevertheless proceed with the hearing online, it could be a fit case for challenge. The aggrieved party will have to demonstrate that the conduct of the proceedings remotely was in violation of Sections 18 and/or 19 of the Arbitration Act. As stated above, Section 18 requires a tribunal to treat parties equally and provide both parties a full opportunity to present their respective cases. Section 19 requires an arbitral tribunal to respect parties' agreement as to the procedure to be followed in the conduct of the arbitration and, only, in the absence of such agreement can an arbitral tribunal proceed in a manner it considers appropriate.

In *Ganges Waterproof Works (P) Ltd. v. Union of India*,³⁴ the award was challenged *inter alia* on grounds that the arbitrator in one of the sittings heard the parties hardly for five or seven minutes, in which limited time, it was submitted that no real hearing could have taken place. Having heard the parties, the Supreme Court held that the aforesaid ground was devoid of any merit. It was clarified that it was the petitioner's burden to prove that the alleged conduct was tantamount to an actual misconduct on part of the arbitrator. The petitioner in this case had led no evidence to substantiate its claim. Even the counsel, who would be the best person to depose as to what happened at the hearing, did not file any affidavit to corroborate the petitioner's claim. Even otherwise, no timely protest was raised before the arbitrator. Accordingly, the Supreme Court rejected the petitioner's objections and upheld the validity of the award.

Where a party alleges that it was prevented from presenting its case on account of the arbitrator's failure/misconduct, the party complaining violation of natural justice will have to prove the misconduct of the arbitration tribunal in denial of justice to them. The inability to present one's case must arise out of a situation where the matters were outside

³² Section 34(2)(a)(iii) of the Arbitration Act.

³³ See Section 34(2)(b)(ii) of the Arbitration Act. This provision is qualified by the following explanations:

- “– Explanation 1. For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,
- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
 - (ii) it is in contravention with the fundamental policy of Indian law; or
 - (iii) it is in conflict with the most basic notions of morality or justice.
- Explanation 2. For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute”.

³⁴ (1999) 4 SCC 33 : 1999 Indlaw SC 1572.

the aggrieved party's control – not because of one's own failure to take advantage of an opportunity duly accorded.³⁵

In *Sohan Lal Gupta v. Asha Devi Gupta*³⁶ the party raising a challenge had not previously said that it had any difficulty in appearing before the tribunal or asked for an adjournment. The Supreme Court categorically clarified that “[e]ven otherwise, a party has no absolute right to insist on his convenience being consulted in every respect. The matter is within the discretion of the arbitrator and the Court will intervene only in the event of positive abuse”.

Separately, in *Centrotrade Minerals and Metals INC v Hindustan Copper Limited*³⁷ (*Centrotrade*), the Supreme Court held that “[a]n arbitrator's refusal to adjourn the proceedings at the behest of one party cannot be said to be perverse, keeping in mind the object of speedy resolution of disputes of the Arbitration Act”.

Accordingly, where the tribunal has scheduled a remote hearing, it is possible that a party would request for an adjournment on grounds that it is entitled to a physical hearing. However, if the said party does not set out why a remote hearing will cause prejudice to the said party, Indian courts are unlikely to interfere with a tribunal's decision to proceed with a remote hearing.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: It depends on whether the aggrieved party has been demonstrably prejudiced by the arbitral tribunal's decision to hold a remote hearing.

India is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (“New York Convention”). In order to provide for enforcement of foreign awards within the territory of India, the Indian Parliament had enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 (“1961 Act”). The 1961 Act was then repealed and then incorporated with suitable amendments in Part II, Chapter 1, of the Arbitration Act.

Under the Arbitration Act, a New York Convention award (“Foreign Award”) can be brought to India for recognition and enforcement without having first been confirmed

³⁵ *Sohan Lal Gupta v. Asha Devi Gupta* (2003) 7 SCC 492 at paragraph 28.

³⁶ (2003) 7 SCC 492.

³⁷ 2020 Indlaw SC 352.

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

(or decreed) by the seat court.³⁸ Section 47 sets out the formal requirements³⁹ of a Foreign Award. If the enforcing court in India does not find any reason to refuse enforcement, the Foreign Award becomes executable in the same way as it were a decree passed by that court.

Article V of the New York Convention sets out the grounds for recognition and enforcement of foreign awards in the country where enforcement is sought. The provisions of Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure), and V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention have been incorporated into Section 48⁴⁰ of the Arbitration Act.

³⁸ See *Government of India v. Vedanta Limited and Ors.* Civil Appeal No. 3185 of 2020, decision dated 16 September 2020.

³⁹ Section 47 provides that an application seeking enforcement of a foreign award must be filed with the following evidence: (i) the original award, or an authenticated copy, in accordance with the laws of the seat of arbitration; (ii) the original arbitration agreement, or certified copy thereof; (iii) such evidence, as may be necessary to prove that the award is a foreign award.

⁴⁰ Section 48 of the Arbitration Act (“Conditions for enforcement of foreign awards”):

“(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that:

- (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or *was otherwise unable to present his case*; or [...]
- (d) the composition of the arbitral authority or 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;
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that: [...]

(b) *the enforcement of the award would be contrary to the public policy of India.*

– Explanation 1. For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

A foreign award can be refused enforcement only on the exhaustive grounds set out in Section 48 of the Arbitration Act. In fact, where the grounds of challenge are linked to party interest alone, Indian courts retain their discretion to accord enforcement even where these grounds are met.⁴¹

Like in the case of Section 34 for domestic arbitration, there is no express language in Section 48 of the Arbitration Act to infer that a Foreign Award will be refused enforcement on the sole ground that the aggrieved party was not afforded a physical hearing in arbitration.

Section 48(1)(b) of the Arbitration Act, which is derived from *Article V(1)(b) of the New York Convention*, provides for refusal of enforcement to a Foreign Award on grounds *inter alia* that the applicant party was unable to present its case in the arbitration. The Supreme Court has categorically held that the expression “was otherwise unable to present his case” occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In *Centrotrade*, the Supreme Court further made the following observations:

“76. Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, *the expression ‘was otherwise unable to present his case’ occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase.* In short, *this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties.* Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in *Ssangyong* (supra). *A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set*

– Explanation 2. For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute” (emphasis added).

⁴¹ See *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*, Civil Appeal No. 1544 of 2020 at paragraph 54:

“On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, *that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a Court may well enforce a foreign award, even if such ground is made out [...]*” (emphasis added).

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

aside on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48” (emphasis added).

In our view, Indian courts are at the very least likely to apply the laws and legal principles of India while adjudicating a challenge under Section 48(1)(b). It is likely, therefore, that the standard for refusing enforcement under Section 48(1)(b) will at the least be the same as that for setting aside a domestic award for violation of Sections 18 and/or 19 of the Arbitration Act.⁴²

Section 48(1)(d) of the Arbitration Act corresponds to *Article V(1)(d) of the New York Convention* and Section 7(1)(iv)⁴³ of the 1961 Act.

In *Transocean Shipping Agency P. Ltd. v. Black Sea Shipping*,⁴⁴ the appellant challenged a Foreign Award under Section 7(1)(iv) of the 1961 Act on grounds *inter alia* that the arbitration was not conducted in accordance with the laws of its seat, i.e., Ukraine. However, in its initial application before the Bombay High Court, the appellant had failed to produce any material to show that the award was passed in violation of Ukrainian law or that the procedure followed by the tribunal was otherwise incorrect.⁴⁵

Rejecting the appeal and challenge against the Foreign Award, the Supreme Court observed as follows:

“It is for the party against whom a foreign award is sought to be enforced, to prove to the court dealing with the case that the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place. The burden to prove in this regard is expressly placed on the challenger by the statute. *This section is in conformity with Article V of the New York Convention which provides ‘(1) recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proves that... (d) the composition of the arbitral authority or the arbitral*

⁴² See sub-paragraph d.9 above.

⁴³ Section 7 of the 1961 Act (“Conditions for enforcement of foreign award”):

“(1) A foreign award may not be enforced under this Act:

(a) If the party against whom it is sought to enforce the award proves to the Court dealing with the case that: [...]

(iv) the composition of the arbitral authority or 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 [...].”

⁴⁴ (1998) 2 SCC 241.

⁴⁵ *Ibid* at paragraph 15.

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.....’. It was, therefore, entirely for the appellants to prove before the High Court that the appointment of the second respondent or the procedure of arbitration was not in accordance with the law of Ukraine. The appellants, however, did not produce any relevant law of Ukraine in this connection apart from raising the bare contention” (emphasis added).⁴⁶

The Supreme Court also disallowed the appellant’s request to produce before the Court the arbitration law of Ukraine, which was allegedly violated. This is because the appellant had failed to produce such material before the Bombay High Court. It was noted that the practice of filing fresh documents or evidence for the first time before the Supreme Court, when the High Court had rejected the claim in the absence of such material, must be deprecated. The Supreme Court further noted that the appellant had not taken any steps to challenge the Foreign Award before the competent authority in Ukraine. The Foreign Award had thus become binding.⁴⁷

Accordingly, where enforcement of a Foreign Award is challenged under Section 48(1)(d) of the Arbitration Act, the challenger will be required to establish that the arbitral procedure was not in accordance with the parties’ agreement. The challenger may also have to demonstrate if she has successfully challenged the Foreign Award before the seat court. Indian courts are unlikely to allow the challenger to rely on fresh material if not produced before the court of first instance, i.e., where the application of enforcement is filed. The foregoing standards should apply equally to claims where enforcement of a Foreign Award is being resisted on grounds that the challenger was not provided a physical hearing(s) in the arbitration.

The language of *Article V(2)(b) of the New York Convention* is incorporated in Section 48(2)(b), which allows Indian courts to refuse enforcement of a foreign award on grounds that the award would be contrary to the public policy of India.

⁴⁶ *Ibid* at paragraph 16.

⁴⁷ *Ibid* at paragraph 18.

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

The Supreme Court has long held⁴⁸ that the term “public policy” is required to be construed in a narrow manner – which was further narrowed by an amendment to the Arbitration Act in 2016.⁴⁹

In *Renusagar Power Co. v General Electric Co.*,⁵⁰ the Supreme Court was also required to determine when it can be said that the basic notions of justice are violated in a foreign award. The Court took a leaf out of a decision of the U.S. Court of Appeals for the 2nd Circuit in *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De L'industrie du Papier (RAKTA)*⁵¹ – where it was *inter alia* held that the public policy defence must be interpreted in a narrow manner.

As such, it is unlikely that a Foreign Award will be set aside under Section 48(2)(b) merely because a party was not provided with a physical hearing.

⁴⁸ See *Renusagar Power Co. v General Electric Co.*, 1994 Spp (1) SCC 644 at paragraph 66: “Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression ‘public policy’ in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that ‘public policy’ in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression ‘public policy’ in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality” (emphasis added).

⁴⁹ See *Government of India v. Vedanta Limited and Ors.*, Civil Appeal No. 3185 of 2020, decision dated 16 September 2020:

“We find that these are substantive amendments, which have been incorporated to make the definition of ‘public policy’ narrow by statute. It is relevant to note that the 2016 Amendment has dropped the clause ‘interests of India’, which was expounded by the *Renusagar* judgment. The newly inserted Explanation 2 provides that the examination of whether the enforcement of the award is in conflict with the fundamental policy of Indian law, shall not entail a review on the merits of the dispute”.

⁵⁰ 1994 Spp (1) SCC 644.

⁵¹ 508 F. 2d 969 (2nd Cir 1974).

f. COVID-Specific Initiatives

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: Indian courts have taken various measures to provide for holding remote hearings in litigation.

The Indian Judiciary seems to have responded deftly to the current crisis. To begin with, on 13 March 2020, the Supreme Court of India issued a notification⁵² directing that the functioning of courts from 16 March 2020 would be restricted to urgent matters. No persons, except the lawyers appearing in a matter and one assisting litigant, were to be permitted to enter the courtroom. Thereafter, the Court gradually reduced its physical functioning before shifting entirely to remote hearings.

As also shared above, the Supreme Court on 6 April 2020 exercised its *suo-motu* power *In Re Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic*⁵³ to frame suitable guidelines for courts to function through video conferencing during the pandemic. Among other things, the Court also sought to address concerns regarding the possible inability of some litigants and advocates to have access to the technology needed to participate in remote hearings. It was directed that the Court will duly notify and make available facilities of video conferencing for litigants who do not have the means or access to video conferencing. The Court also directed that wherever necessary, an *amicus-curiae* may be appointed to make video conferencing facilities available to such persons.

Several High Courts and tribunals have since followed suit, introducing a mechanism for holding hearings by way of video conferencing.⁵⁴

⁵² Notification dated 13 March 2020, Supreme Court, available at <[https://scobserver-](https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/384/Hearing_of_only_Urgent_Matters.pdf)

[production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/384/Hearing_of_only_Urgent_Matters.pdf](https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/384/Hearing_of_only_Urgent_Matters.pdf)> (last accessed 26 November 2020).

⁵³ Supreme Court of India, “In Re Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic”, fn. 18 above.

⁵⁴See Delhi High Court, “Standard Operating Procedure for Physical Functioning of the Delhi High Court” (1 September 2020) at <http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_EDMNZZ_AST6S.PDF> (last accessed 26 November 2020); Delhi High Court, “FAQs on Video Conferencing Rules of the Delhi High Court” (1 July 2020) at <<http://delhihighcourt.nic.in/pdf/FAQVideoConferencing.pdf>> (last accessed 26 November 2020); DIAC, “Guidance Note for Virtual Arbitration Hearings of the Delhi International Arbitration Centre (DIAC)” (8 July 2020) at <http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_QS9BF6S2

KSA.PDF> (last accessed 26 November 2020); Bombay High Court, “Special Procedure for Physical Hearings” (25 August 2020) at <<https://bombayhighcourt.nic.in/writereaddata/sittinglist/PDF/sitlistbomos2020825185353.pdf>> (last accessed 26 November 2020); Bombay High Court, “Special Procedure for Hearing exclusively through Video-Conferencing” (25 August 2020) at <<https://bombayhighcourt.nic.in/writereaddata/sittinglist/PDF/sitlistbomos2020825185252.pdf>> (last accessed 26 November 2020); Gujarat High Court, “Standard Operating Procedure for Limited Physical Hearing” (12 September 2020) at <[https://gujarathighcourt.nic.in/hccms/sites/default/files/miscnotifications/Standard%20Operating%20Procedure%20\(STANDARD%20OPERATING%20PROCEDURE\)%20for%20resumption%20Physical%20Hearing%20at%20High%20Court%20of%20Gujarat.pdf](https://gujarathighcourt.nic.in/hccms/sites/default/files/miscnotifications/Standard%20Operating%20Procedure%20(STANDARD%20OPERATING%20PROCEDURE)%20for%20resumption%20Physical%20Hearing%20at%20High%20Court%20of%20Gujarat.pdf)> (last accessed 26 November 2020); Gujarat High Court, “Circular for virtual hearing” (22 March 2020) at <<https://gujarathighcourt.nic.in/hccms/sites/default/files/miscnotifications/Methodology%20for%20e-filing%20and%20video%20conferencing%20-%20Gujarat%20High%20Court.pdf>> (last accessed 26 November 2020); Gujarat High Court, “Maximizing Judicial Work through Video-Conference” (26 July 2020) at <<https://gujarathighcourt.nic.in/hccms/sites/default/files/miscnotifications/Circular-Gujarat-High-Court-Maximum-Possible-Judicial-Work-through-Video-Conferencing.pdf>> (last accessed 26 November 2020); Telangana High Court, “Standard Operating Procedure for Video Conferencing Hearings”, available at <https://tshc.gov.in/documents/admin_2_2020_04_18_21_04_46.pdf> (last accessed 26 November 2020); Telangana High Court, “Standard Operating Procedure for Video Conferencing Hearings” (4 September 2020) at <https://tshc.gov.in/documents/splofficer_2_2020_09_04_11_57_00.pdf> (last accessed 26 November 2020); Karnataka High Court, “Standard Operating Procedure for limited Physical Hearings and video conferencing” (3 September 2020) at <<http://www.karnatakajudiciary.kar.nic.in/noticeBoard/new-Standard-Operating-Procedure-03092020-v5.pdf>> (last accessed 26 November 2020); Patna High Court, Causelist for 10 April 2020, available at <<http://www.patnahighcourt.gov.in/pdf/UPOADED/3578.PDF>> (last accessed on 26 November 2020; contains the guidelines for videoconferencing); Jharkhand High Court, “Standard Operating Procedure for Video-Conferencing”, available at <https://jharkhandhighcourt.nic.in/sites/default/files/SOP_vc.pdf> (last accessed 26 November 2020); Jharkhand High Court, “Report of the Steps Taken by the Jharkhand HC for Virtual Hearings”, available at <https://jharkhandhighcourt.nic.in/node/display_pdf/steps_taken_sop_07042020> (last accessed 26 November 2020); Kerala High Court, “Guidelines on Videoconferencing” (13 March 2020) at <http://164.100.93.217/downloads/notice_guidelines_13042020.pdf> (last accessed 26 November 2020); Punjab and Haryana High Court, “Standard Operating Procedure for video conferencing” (8 July 2020) at <https://highcourthd.gov.in/sub_pages/left_menu/covid19/covid19_pdf/guide_line_08052020_c50.pdf> (last accessed 26 November 2020); Jammu and Kashmir High Court, “Circular for Physical Hearings” (9 July 2020) at

These measures have largely been successful. As of August 2020, the Supreme Court had reportedly disposed of around 4,300 cases out of the 15,596 that were listed on their hearing board.⁵⁵ Many more would have been heard and disposed of by High Courts in various States of India. Furthermore, the Gujarat High Court has become the first Indian court to make available a live streaming of its proceedings (on YouTube)⁵⁶, albeit on an “experimental basis”. In November 2020, the Supreme Court also set up a committee to frame rules on live streaming of cases.⁵⁷

On 12 September 2020, the Supreme Court introduced guidelines for holding physical hearings in a limited manner.⁵⁸

Thereafter, on 26 October 2020, as stated above, the Supreme Court reviewed its directions passed on 6 April 2020. It was noted that there had been “[a] change in the situation since April 2020. In many States, the situation has eased and it has been possible to even commence hearings in congregation”. The Court also noted that the system of Video Conferencing had been extremely successful in providing access to justice. Nevertheless, the Supreme Court retained its previous directions, with only a minor exception.⁵⁹

<http://jkhighcourt.nic.in/doc/upload/orders&cir/cir_212_09072020.pdf> (last accessed 26 November 2020); Sikkim High Court, “Rules on Videoconferencing” (3 June 2020) at <<https://districts.ecourts.gov.in/sites/default/files/Rules%20for%20Video%20Conferencing%20for%20Court%2C2020.pdf>> (last accessed 26 November 2020); Calcutta High Court, “Rules for Virtual Hearing” (4 August 2020) at <<https://www.calcuttahighcourt.gov.in/Notice-Files/general-notice/2959>> (last accessed 26 November 2020); Andhra Pradesh High Court, modified notification for videoconferencing guidelines (13 July 2020) at <<http://hc.ap.nic.in/docs/functioningofhighcourt.pdf>> (last accessed 26 November 2020); Income Tax Appellate Tribunal, Mumbai, “Guidelines for Resumption of judicial work in a gradual manner” (5 June 2020) at <<https://www.itat.gov.in/files/uploads/categoryImage/1591457018-public%20notice%20i-%20corrigendum-merged.pdf>> (last accessed 26 November 2020).

⁵⁵ “Coronavirus lockdown | Virtual court system in Supreme Court hits a century”, *The Hindu* (19 August 2020) at <<https://www.thehindu.com/news/national/virtual-court-system-in-supreme-court-hits-a-century/article32396629.ece>> (last accessed 26 November 2020).

⁵⁶ Mahesh LANGA, “Gujarat High Court the first to live stream proceedings”, *The Hindu* (26 October 2020) at <<https://www.thehindu.com/news/national/other-states/gujarat-high-court-begins-live-streaming-of-proceedings-on-trial-basis/article32944091.ece>> (last accessed 26 November 2020).

⁵⁷ Bhadra SINHA, “SC committee to frame rules for live streaming of cases in high courts and district courts”, *The Print* (3 November 2020) at <<https://theprint.in/judiciary/sc-committee-to-frame-rules-for-live-streaming-of-cases-in-high-courts-and-district-courts/536089/>> (last accessed 26 November 2020).

⁵⁸ Supreme Court of India, “Limited Physical Hearings in Supreme Court of India, In Wake of COVID-19 Pandemic” (12 September 2020) at <https://main.sci.gov.in/pdf/LU/12092020_105000.pdf> (last accessed 22 January 2021).

⁵⁹ Supreme Court of India, “In Re Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic”, fn. 18 above: “We propose to substitute sub-para

DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

Thereafter, several Indian courts have commenced physical hearings.⁶⁰ The Delhi High Court has allowed parties to request a remote hearing, provided that the parties provide an advance intimation.⁶¹

We understand that the Supreme Court is very soon likely to reassess its position on physical hearings.⁶²

It is hoped that the Supreme Court will continue taking a dynamic approach to the prevailing situation in order to ensure access to justice to all in the best manner possible.

(vii) of Paragraph 6 with the following : The Video Conferencing in every High Court and within the jurisdiction of every High Court shall be conducted according to the Rules for that purpose framed by that High Court. The Rules will govern Video Conferencing in the High Court and in the district courts and shall cover appellate proceedings as well as trials”.

⁶⁰ Delhi High Court, “Office Order. Extension of present system of hearing of matters before the Delhi High Court till 20.02.2021” (14 January 2021) at <http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_Z5TMIU8DGQN.PDF> (last accessed 22 January 2021): “[i]n view of the decline in the intensity of spread of Covid-19 pandemic in the NCT of Delhi, Hon’ble the Full Court has been pleased to order that 11 Benches of this Court [2 Division Benches, 3 Single-Benches (Civil Side), 3 Single-Benches (Criminal Side) and 3 Original Jurisdiction (Civil)] shall hold physical Courts w.e.f. 18.01.2021, while the remaining Benches shall continue to take up the matters through Video Conferencing as per the roster to be notified on the website of this Court”. See also “Bombay High Court to continue with physical hearings after Chief Justice finds it smooth with no overcrowding”, Bar and Bench (4 December 2020) at <<https://www.barandbench.com/news/litigation/bombay-high-court-physical-hearing-continue>> (last accessed 22 January 2021).

⁶¹ See Delhi High Court, Office Order (22 January 2021) at <https://images.assettype.com/barandbench/2021-01/4e988429-301c-408a-8a17-a286b2a6a88f/Delhi_HC_Order_re_Hybrid_System.pdf> (last accessed 22 January 2021): “[M]atter shall be taken through physical mode as per the Roster of Sitting of the Hon’ble Judges of this Court. However, request for taking up any such matter through virtual mode shall be entertained by the Court wherever advance intimation is provided”.

⁶² Debayan ROY, “Supreme Court likely to reassess situation on resumption of physical hearing”, Bar & Bench (20 January 2021) at <<https://www.barandbench.com/news/litigation/breaking-supreme-court-likely-to-take-a-call-soon-on-resuming-physical-hearing>> (last accessed 22 January 2021).