



THE ONLY CERTAINTY IS UNCERTAINTY: REMOTE HEARING IN INDONESIAN ARBITRATION

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ABSTRACT

The remote hearing practice emerges as an alternative to in-person hearing as the established practice in arbitration. Yet, the practice of remote hearing does not always agreed upon by the parties in certain circumstances. The lack of certain laws governing its application raises a number of issues surrounding its application in arbitration. This paper examines legal theories and principles in domestic procedure law, international arbitration law, and their implementation in practice through comparative cases, utilizing a normative legal and case analysis method. The study employs a descriptive-analytical approach to describe the relevant legal rules, as well as legal theories and their application in the study object. Secondary data was gathered from primary, secondary, and tertiary sources of law for the study. The study's findings indicate that the laws governing remote hearings in Indonesia are uncertain in terms of confidentiality, the need for consent, mandatory preparation, control, and, very crucially, enforcement of the arbitration award. In contrast, it should address the issues generated by its extensive role in arbitration. The Indonesian government can address the aforementioned issue by enacting a particular procedural legislation that contains provisions for remote hearings in arbitration practice.

Keywords: arbitration law; indonesian arbitration; model implementation of remote hearing; remote hearing in international arbitration; uncertainty in remote hearing practice

I. INTRODUCTION

As a recent development, the remote hearing has picked up as the preferable procedure especially in the current Corona Virus Pandemic 2019 (“Covid-19”) pandemic.¹ In spite of the fact that there is no universal definition of remote hearing, this paper employs a definition by Maxi Scherer whereby she defines that remote hearing as a hearing that is held using communication networks to interact parties in two or even more places at the same time.² Also, according to her, remote hearings are not a radical idea in international arbitration.³ Similarly, they are equally used in court proceedings.⁴ Generally, this is because remote hearing offers expedite and flexibility in conducting a hearing.⁵ The topic in this article will center upon that practice of remote hearings, which is common in arbitration proceedings. However, the paper will also slightly elaborate on the practice of remote hearing in court as a comparison.

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¹ Gary Born, Anneliese Day, and Hafez Virjee, “Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views” in Maxi Scherer, Niuscha Bassiri, et al. (eds), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International, 2020, p. 137.

² Maxi Scherer, “Remote Hearings in International Arbitration: An Analytical Framework”, *Journal of International Arbitration*, Vol. 37, No. 4, 2020, p. 6., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599814.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

The International Centre for Settlement of Investment Disputes ("ICSID") has revealed that, in 2019, the bulk of its proceedings got held remotely.⁶ Furthermore, the Dutch have improved their legislation in this area by amending the Arbitration Act in 2015, which now contains explicit provisions for remote hearing.⁷ Besides that, a recent survey by Gary Born (et.al) shows the frequency of remote hearing was more over 10 times higher in the mid-2020s than at any other period in history.⁸ All of these facts indicate the important role of remote hearing in arbitration globally.

The urgency of conducting the research with this theme is because remote hearing is also becoming increasingly popular in Indonesian arbitraion practice.⁹ The Indonesian National Board of Arbitration ("BANI"), the foremost Indonesian arbitration institution, confirms that forthcoming as well as continuing BANI proceeding may well be performed remotely, in other words such as through video or audio meeting, in the case of a crisis including such natural or non-natural catastrophes, and even special cases that help stop some of the sides or arbitrators from becoming present at the hearing, as described by Decree No. 20.015/V/SKBANI/HU. That practice shows another important role of remote hearing particularly in Indonesia arbitration practice, and yet there are some uncertain aspect of how it should be implemented.

When it comes to Indonesian arbitration practice of remote hearing, the only certainty is uncertainty. Those uncertainty cover problems with regard to enforceability, control, confidentiality, and mandatory preparation, and many more. For all of those problem, a concrete regulation must be inforced so there is certainty to conduct the remote hearing itself. This paper argues that the mere provision of guidelines is insufficient to address the confusion surrounding this lately popular method.

While researches which have similar theme of remote hearing on international practice are spreading, Indonesian practice is not yet discussed as heavily. The most recent publication that details remote hearing practice in Indonesia is an article by Daniel Pakpahan titled "ICCA Projects: Does a Right to a Physical Hearing Exist in International Arbitration?". Remembering the said gap, this paper will fulfill such gap with regard to discussion about remote hearing practice in arbitration under Indonesian Law.

Seeing the aforementioned background and problem, this paper will first establish the remote hearing concept concerning its typology, types, advantages, and disadvantages (A). Further, the paper will analyze challenges found in remote hearing globally and gives a solution to that very challenge (B). In addition, it will elaborate on the international practice of a remote hearing (C). Such practice will be followed by the Indonesian practice (D). Ultimately, the paper will offer recommended regulatory model of remote hearing for Indonesian arbitration practice (E).

II. DISCUSSION AND RESULTS

A. Remote Hearing Concept

A remote hearing is one that takes place using telecommunication networks to deliver parties across several or even more places at the same time.¹⁰ Such procedure could include communication through telephone or videoconference.¹¹ Remote hearing is also called virtual hearing or online

⁶ ICSID, "A Brief Guide to Online Hearings at ICSID", <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid>, accessed on April 18th 2021

⁷ Bas Van Zelst, "Similar ≠ Equal – a Nuanced Approach to Remote Hearings: A Dutch Perspective", *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 87, Issue 1, p. 1.

⁸ Gary Born, Anneliese Day, and Hafez Virjee, *Op. Cit.*, p. 137.

⁹ Assegaf Hamzah & Partners, "Indonesia: BANI Moves Arbitration Online", 3 June 2020, <https://www.mondaq.com/arbitration-dispute-resolution/948320/bani-movesarbitration-online>, accessed August 5th 2021

¹⁰Maxi Scherer, *Op. Cit.*, p. 6.

¹¹ *Ibid.*

hearing.¹² To avoid any misconception, the term ‘remote hearing’ will be used throughout this paper. Furthermore, this paper focuses primarily upon remote hearing via a video - conferencing link.

International arbitration are not the only ones that use remote hearing.¹³ They are equally used in court proceedings.¹⁴ They are just as common in courtrooms.¹⁵ From these facts, we can see that remote hearing has been used as a standard practice in various dispute resolution forums. However, this paper only focus on remote hearing practice for arbitration.

There are two different forms of remote hearing, each with a different degree of remoteness.¹⁶ *First*, a semi-remote hearing is one in which single primary location or even more remote locations are employed.¹⁷ *Second*, a fully remote hearing is one in which all participants are in separate places and there is no main hearing location. Fully remote hearing have been seldom used in international arbitration, although they are now being considered in any procedures with Covid-19-related restrictions. Fully remote hearing, on the other hand, not only faces technological challenges due to the increasing number of remote sites, yet it involves a distinction due to the lack of a true hearing chamber.¹⁸ With that in mind, this paper will maintain to use the term ‘remote hearing’ to encompasses both semi-remote hearing and fully remote hearing.

Although we commonly talk about ‘in-person hearings’ and ‘remote hearings’, not everyone in a case has to participate in the same way. One side may appear in front of the adjudicator in person, while the other participates virtually. Both parties can participate from a distance and adjudicator, sometimes from the same site, sometimes from different locations.

In practice, arbitration conducted remotely may pose technical and legal issues. From a technical point of view, the smooth process of remote arbitration depends heavily on technology and how it is managed. Meanwhile, from a legal point of view, legal basis is definitely required to ensure legal clarity and certainty for the portions of arbitral proceedings in settling disputes in a remote manner, for instance, in terms of material evidence examination, cross-examining a witness, through videoconference. A number of crucial matters, such as confidentiality, parties to the dispute’s consent, necessary preparation, management or control of arbitral proceedings, and enforcement of the arbitral award, highlighted by the author, might also be subject to how remote arbitral proceedings are conducted.

Further, it is possible that a witness or interpreter may be needed. In an ordinarily in-person hearing, a witness or interpreter can participate remotely. A witness or interpreter may, in fact, at various stages of a case. Those participants can engage in a variety of ways, including in person at an initial hearing and via phone on the latter hearing.

Remote hearing provides the advantage of evading restrictions on travel or social distancing procedures during the Covid-19 outbreak. Nevertheless, looking beyond the current outbreak, a variety of possible benefits, such as enhanced flexibility and efficiency, as well as cost and time savings, may be anticipated. On the other hand, there are drawbacks such as technological issues, cybersecurity, and unfamiliarity.

¹² *Ibid.*

¹³ *Ibid.*, p. 7

¹⁴ *Ibid.*

¹⁵ Art. 10(4) EU Council Regulation No 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters; Article 9(1) (EC) No 861/2007 of 11 July 2007 Establishing a European Small Claims Procedure,

¹⁶ Maxi Scherer, *Op. Cit.*, p. 8.

¹⁷ *Ibid.*

¹⁸ Queen Mary Survey, “The Evolution of International Arbitration”, 2018, p. 32.

In practice, remote hearing issues are typically addressed by the arbitral tribunal just at outset of a case. They may be confirmed and clarified further at a hearing before the designated hearing itself.¹⁹ Even so, it is still customary to hold a hearing in person. However, whenever a person is truly unwilling to join the hearing in person, whether due to age, sickness, or travel restrictions, a remote hearing may be suitable.²⁰

B. Remote Hearing Problems and Ways to Solve It

Remote hearing problems ranging from technical problems, cybersecurity, and unfamiliarity to use remote hearing platforms. This section will elaborate on those problems and their consequences. Not only that, it will give the solution to each of the problems. The solution to each of the problems may overlap each other.

1. Confidentiality Problem

In essence, the concept of confidentiality is predicated on the arbitration's private character.²¹ Parties and tribunals should address data security and privacy problems when it comes to confidentiality.²² Some systems that have already been promoted as the preferable site for global arbitration proceedings were also discovered to have serious security issues.²³ At the very least, the parties and the arbitral tribunal should address these concerns, taking into account two connected but separate elements.

The *first* is security of data, often known as information security, that guarantees the unauthorized party persons do not have authorization to the remote proceeding. On a few occasions, international arbitration has examined information security, and the scheduling of remote hearings may not be the only weak link. Systems that support end-to-end encryption, as well as password protection at the very least, are chosen as a solution. *Second*, information security or data protection if the remote hearing operator and any other third party involved in the remote hearing who saves, distributes, or otherwise obtains access to information during the remote hearing can misuse this outside the arbitration process. Certain video conferencing systems' basic terms and conditions grant the operator full ownership over the information sent during video - conferencing. As a result, the operator can transfer or use the information, which complicates private arbitration process. To this second issue, The parties can evaluate the general terms of the service and choose the provider with a better data privacy policy than the others.

2. Consent of the Party Problem

The arbitrator's power to decide on remote hearings is limited. The arbitrator's power is limited by the parties' agreement, among other factors.²⁴ In contrast, several academics contend that a remote hearing is indeed possible when all participants agreed.²⁵ Such viewpoint is predicated on the notion that a participant seems to have the right to demand a hearing. This concept can be found in several national laws as well as institutional arbitration procedures

¹⁹Gabrielle Nater-Bass and Stefanie Pfisterer, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 25 [Evidence and hearings, II]*, in Arroyo, Manuel, (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, Second Edition, Kluwer Law International, 2018, p.7, paras. 56-58:

²⁰*Ibid.*

²¹Reto M. Jenny, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 44 [Confidentiality]* in Arroyo (ed.), *Manuel Arbitration in Switzerland: The Practitioner's Guide*, Second Edition, Kluwer Law International, 2018, p. 1, para. 1.

²²Chartered Institute of Arbitrators (CIArb), *Guidance Note on Remote Dispute Resolution Proceedings*, 2020, para. 1.5.

²³Maria Ponnezhath and Shubham Kalia, "Zoom Sued for Overstating, not Disclosing Privacy, Security Flaws," Reuters, 2020, <https://www.reuters.com/article/us-zoom-video-commn-privacy-lawsuit-idUSKBN21Q10V>

²⁴Maxi Scherer, *Op. Cit.*, p.13

²⁵*Ibid.*, p. 15.

through interpretation. The basic right of a participant to a hearing, however, does not entail that the hearing must always be held in the presence of all parties. As far as there is an oral as well as synchronous flow of arguments or evidence, the threshold criteria for a hearing are met.

In contrast to the notion that a participant does have the right to seek a physical hearing, no particular law in any of the nations surveyed grants a right to a physical hearing.²⁶ The presence of a physical hearing contract between the participants adds to the difficulties of the arbitration tribunal's power.²⁷ In certain jurisdictions, arranging a remote hearing towards the participants' agreement may result in the award being thrown out.²⁸

Some argue, on the other hand, that arbitral tribunals should have discretion in deciding on remote hearing.²⁹ True, arbitrators possess broad discretion in determining the appropriate arbitration method, which includes deciding on a remote hearing. However, it is incorrect to believe that this power grants the tribunal limitless authority or discretion. The remedy is for the arbitrator to confer with the participants about their readiness. Only then should the arbitrator carefully consider all of the facts to determine if a remote hearing is suitable in the individual instance.

3. Familiarity to use the Platform Problem

The fact that this issue might arise from a lack of skills or information about how to use the various internet platforms demonstrates the severity of the situation.³⁰ Remote hearing are new to the majority of arbitrators.³¹ Participants could have made advantage of internet file sharing and teleconference, but they are unfamiliar with the notion of hearings held in many places. Furthermore, their remote involvement experience has been plagued by technical failures, leaving them wary of expanding their reliance on technology.

Given the critical importance of this platform in permitting the conduct of a distant hearing, the arbitrators may decide that it must be best to not continue with a remote hearing in anyway. If they continue, more precautions are needed, for example, postponing the meeting until all platform problem are fixed if such problem occur during the meeting. For this issue, the arbitrator may learn from some training from the institution on how to use the various internet platforms. However, this solution may results in another problems in relation to cost and time efficiency. Therefore, this problem is still the trickiest problem with the remote hearing practice.

4. Effectiveness Problem

In the absence of documentary evidence, witness testimony is still one of the most effective ways to figure out what happened.³² This is a frequent practice in international arbitration, unlike in many civil law nations.³³ Expert evidence has a crucial and sometimes decisive role in determining a dispute in international arbitration. Expert testimony can be used in a variety of situations, including damage quantification, legal concerns such as legislative interpretation, and

²⁶International Council for Commercial Arbitration (ICCA), "Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences", 26 May, 2021, <https://www.arbitration-icca.org/right-physical-hearing-project-newly-released-reports-confirm-core-trends-and-divergences>, accessed on August 5th 2021.

²⁷*Ibid.*

²⁸*Ibid.*

²⁹Maxi Scherer, *Op. Cit.*, p. 15.

³⁰Erica Stein, *Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings* in Maxi Scherer, Niuscha Bassiri, et al. (eds.), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International, 2020, p. 4-5.

³¹Janet Walker, "Virtual Hearings: An Arbitrator's Perspective", 2020, p. 1, <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf>

³²Gabrielle Nater-Bass and Stefanie Pfisterer, *Op.cit.*, p.4-5, paras. 39-41.

³³*Ibid.*

evidence on difficult technical or factual issues, such as those in construction disputes. Due to this difficulties, the party who does not satisfy may assert a violation of due process, which may provide justification for setting aside the arbitration judgment or explain why an arbitration award was not enforced.

To solve this difficulty, the parties can agree on a date for a hearing that can be held remotely. In most cases, it is acceptable to communicate arguments via virtual methods. Cross-examination, on the other hand, is not, especially when dealing with technical or factual issues of great complexity.

5. Technology Infrastructure Problem

Another factor that tribunals may examine when deciding whether or never to hold a hearing remotely is the availability of interpreters. While the remedies are addressed below, the addition of interpretation to the arrangement of distant hearings adds complexity, which tribunals should consider. It will very likely become an issue if there is insufficient technical infrastructure and/or stable energy supply to allow such equipment to function.

In the beginning, the arbitrator must be convinced that everyone remote sides have sufficient connectivity and technical infrastructure.³⁴ Although it could not be guaranteed in domestic court proceedings, it should be less of a concern in international arbitration proceedings. With enough time and money, the appropriate set-up can usually be organized with expert assistance. The more links there are, the more likely there are to be technological or practical difficulties. Another solution option is to limit the number of people who can participate in a hearing if at all practicable.

6. Time-zone Problem

The tribunal may desire to identify ahead of time number of remote links are necessary, out of which places and time zones. When participants are in multiple time zones, time differences must always impact the participants in a remote situation.³⁵ If sides are advised by counsel in New Jersey and Hongkong, for illustration, arranging a remote connection may be challenging without having New Jersey counsel work early in the morning or Hong kong counsel work late at night.

As the solution to the time-zone problem, the hearing days should be reduced. However, the capacity to solve this difficulty may be limited. When coping with this issue, arbitrators must be extremely cautious when sitting in the very same time zone like one participant but not in another, in terms of avoiding selecting a hearing day in which, although convenient for the arbitrator or judges, could potentially give one side an advantage over the other.

From all of the above-elucidated problems, we can conclude some the uncertain nature of this procedural practice. Although the uncertain aspect of remote hearing covers a wide problems, the paper will focus on uncertainty with regard to confidentiality, the need for consent, mandatory preparation, control, and most importantly enforcement of the arbitral award. These uncertainties also be used to assess the remote hearing practice in the comparative part of this paper.

C. Regulation and Implementation of Remote Hearing in International Practice

The regulations and implementation of remote hearings in International Practice are summarized below. Each of the elements listed below may overlap with one another.

³⁴ *Ibid.*, p. 23.

³⁵ Erica Stein, *Op. Cit.*, p. 1-2

1. Confidentiality

Confidentiality is a significant prerequisite for the success of international arbitration procedure. The confidentiality during arbitral process, as opposed to litigation, is one of the reasons why arbitration is preferred over litigation. Arbitration participants have such a collateral assurance that all personal and business secrets will be kept confidential.³⁶ Notwithstanding their critical necessity, confidentiality cannot be assumed worldwide in various jurisdictions. As a consequence, this is critical for arbitrator get a full awareness of the legal frameworks problems involving confidentiality to carefully resolve conflicts over whether or not elements of the arbitration must be declassified.

During caucuses meetings, a breakout room or a distinct room from virtual hearing room can indeed be utilized to maintain remote hearing confidentiality. The opposition side must not be able to listen or observe muffled caucus deliberations since members' gestures and emotions may compromise the whole concept of caucus secrecy.³⁷

It is vital that the technology used guarantees that all participants in a remote hearing have trust in the secrecy of the material they provide. All remote hearing rooms and breakout rooms should be confined to the personnel who have been allocated to them.³⁸ All participants in a remote hearing, include but are not restricted to counsel, parties, witnesses, translators, arbitral officials, and technicians, and also one's assigned virtual hearing and breakout rooms, must have their real names and positions distributed in ahead of time and strictly adhered to by both sides and neutrals.³⁹

Participants' physical spaces, either at one's residences, office buildings, or specific hearing establishments, must be totally distinct from non-participants inside the remote hearing, soundproofed in which feasible, and visible enough to minimize the chance of unrevealed nonparticipating people in the space and/or the certain audio/video recording.⁴⁰ Headphones are recommended to increase participant privacy as well as audibility. Sides can request an assurance of confidentiality from any and all participants at the outset of the proceedings.⁴¹

2. The Need for Consent of the Parties

When trying to decide upon that appropriate procedural methods to move ahead with the arbitration in a timely and cost-effective way, an arbitrator must consider all of the conditions, namely those tends to result from Covid-19 pandemic, the existence and length of the meeting or hearing, the sophistication of the particular instance and number of people involved, and if there are any additional reasons to continue with the arbitration in a timely and cost-effective fashion.⁴²

Arbitrator and participants must take every opportunity to rearrange the hearing or meeting in a timely manner if the participants agreed or the arbitrator determines that gathering at a single place is necessary but impossible under the current circumstances.⁴³ In such cases, parties and tribunals should examine available options for moving on with at least part of the case notwithstanding the postponement.

³⁶ Bernarndo M. Cremandes and Rodrigo Cortes, "The Principle of Confidentiality in Arbitration: A Necessary Crisis", *Journal of Arbitration Studies*, Vol. 23, No. 3., 2013, p. 26.

³⁷ Chartered Institute of Arbitrators (CI Arb), *Op. Cit.*, para. 3.2.

³⁸ *Ibid.*, para. 6.1.

³⁹ *Ibid.*, para. 6.2.

⁴⁰ *Ibid.*, para. 6.3.

⁴¹ *Ibid.*, para. 6.4.

⁴² International Chamber of Commerce, "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic", 2020, para. 18.

⁴³ *Ibid.*, para. 19.

Furthermore, if indeed the participants intended or the arbitrator considers that attending in a single place is necessary and desirable amidst present circumstances, the arbitrator and the parties must encounter in such a timely way to talk and implement the particular rules and advisory guidance at the physical place of the hearing, as well as the necessary hygienic steps to protect the safety of any and all participants.⁴⁴

If an arbitrator wants to hold a virtual hearing without such participants' consent or despite one's objections, such arbitrator must carefully look at the circumstances, such as those arising out from Covid-19 pandemic, the essence and length of the meeting or hearing, the difficulty of the case as well as number of participants, and if there are any particular reasons to move ahead with the arbitration in such a prompt and cost-effective way, and finally if the award would be enforceable.⁴⁵ Arbitrator may opt to employ their considerable procedural powers, such as Article 22(2) of the ICC Rules, which permits them to make such a determination upon consulting with the participants.

3. Mandatory Preparation

Arbitration, whether institutional or *ad hoc*, is usually conducted in private under the substantive law and rules. Hearings for the tribunal and the parties are held in a separate chamber. The proceedings are only open to the disputants. Physical attendance of all parties is required, like in the conventional court system. The hearings are usually held in person. Both the applicant and the respondent must appear in person before the panel. Remote hearing is rarely used.

Any remote hearing needs a communication between the tribunal and the parties with the purpose of establishing protections – generally referred to as a cyber-protocol – enough to conform with just about any relevant data protection rules.⁴⁶ These mandatory preparations also concern the secrecy of the proceedings and the security of digital communications inside the arbitration procedure as well as any electronic file platform.

4. Control

Arbitration is governed by a state's substantive law. The arbitration law also apply to it. The London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Swiss Chamber's Arbitration Institution (SCAI) have their own set of rules. Rules of arbitration is also known as Arbitration procedure rules. Legislation governing arbitration procedures choose the manner in which the disagreement will be presented, the tribunal's composition, the parties' hearing, and the arbitrator's decision.⁴⁷ These laws and regulation should also govern how to control a remote hearing procedure.

There are techniques that can be used to organize arbitral proceedings and keep their time and expense under control. The purpose of this is to urge them to establish a fresh dynamic at the start of an arbitration in which the parties may evaluate the recommended approaches and agree on acceptable processes, or the tribunal can decide on such procedures if they cannot agree.⁴⁸

The tribunal and the parties might consider whether a hearing is required for the arbitral panel to reach a decision.⁴⁹ If the arbitral tribunal can resolve the issue only on the basis of papers, expenses and time will be considerably reduced.

⁴⁴ *Ibid.*, para. 20.

⁴⁵ *Ibid.*, para. 22.

⁴⁶ *Ibid.*, para. 28.

⁴⁷ Huala Adolf, "The Impact of Pandemic on Legal System: Impact on Arbitration Law", *Indonesian Law Journal*, Vol. 13, No.2, 2020, p. 139.

⁴⁸ International Chamber of Commerce, "ICC Commission Report: Controlling Time and Costs in Arbitration", 2018, p. 5.

⁴⁹ *Ibid.*, p. 10.

5. Enforcement and Setting Aside the Award

A most important is the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), which has been incorporated into arbitration legislation.⁵⁰ The Model Law has been included into the arbitration laws of about 83 nations. The majority of Association of Southeast Asian Nations (ASEAN) members have ratified the Model Law although Indonesia, Laos, and Vietnam are not on the list.⁵¹

The Model Law, on the other hand, is silent on whether or not arbitration can take place through remote hearing. The Model Law's primary parts cover all aspects of arbitration, including case filing, tribunal composition, arbitration proceedings, and arbitral awards. These can be utilized for arbitration under regular conditions. The phrase "regular conditions" refers to arbitration taking place within the context of the participants and the arbitral tribunal at a specific location.

There are no laws or norms that govern the practice of arbitration during the epidemic. Furthermore, prominent arbitration institutions throughout the globe, such as the International Chamber of Commerce (ICC) arbitration and the American Arbitration Association (AAA), are not working because to the Covid-19.⁵² During the pandemic, no arbitration cases have been recorded. For a period of time during the pandemic, no hearings were held.

Clearly, this preceding comment may be called into doubt. Of course since the confidential nature of arbitration proceedings, the arbitration may take place in other countries or locations where these activities are not recorded. Assuming that the previous observation is valid, it is stated that the absence of international arbitration is justified in light of the strict execution of lockdown in significant nations around the globe, such as in France, England, and the USA.

Notwithstanding the above stipulation, an award based on a remote hearing procedure still prone to challenge of unenforceable and get set aside. Despite the fact that modern electronic technology is rapidly now being a widely accepted commercial and legal instrument, critical procedural documents should be retained in both soft and hard copies, with participant signatures where applicable.⁵³ The same is true for arbitral awards since certain national courts may refuse to enforce such paper if they were created entirely through digital methods.⁵⁴

D. Regulation and Implementation of Remote Hearing in Indonesia

The Indonesian arbitration law - Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Law 30/1999**") - governs all local and international arbitrations seated in Indonesia. Prior to the enactment of Law 30/1999, the legislation on arbitration was derived from Dutch law as the colonial arbitration law. These regulations were included in Sections 615-651 of the Code of Civil Procedure (*Reglement op de Burgerlijke Rechtsvordering* or "**Rv**"), that extended to the European demographic group in Indonesia at the time.⁵⁵ Different sets of laws were applied to different

⁵⁰ Huala Adolf, *Op. Cit.*, p. 141.

⁵¹ United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

⁵² Morgan Lewis, "ICC Issues Guidance on Possible Measures to Mitigate Effects of COVID-19", <https://www.morganlewis.com/pubs/icc-issues-guidance-on-possible-measures-to-mitigate-effects-of-COVID-19-cv19-If>; American Arbitration Association, "The AAA announced that AAA-ICDR remains active and operational, no hearings will take place in AAAICDR hearing facilities until at least June 1, 2020", (<https://go.adr.org/covid19.html>)

⁵³ Chartered Institute of Arbitrators (CIArb), *Op. Cit.*, para. 7.4.

⁵⁴ *Ibid.*

⁵⁵ Article 615 of the Rv

demographic groupings throughout the colonial period. Although Article 377 HIR and Article 705 RBg relate directly to the arbitration law contained in Rv for native Indonesians to non-native Indonesians' arbitration, the *Herziene Indonesisch Reglement* ("**HIR**") and the *Rechtsreglement Buitengewesten* ("**RBg**") only apply to native Indonesians.⁵⁶

After the proclamation of independence in 1945, the distinction between demographic groupings as well as the distinct implementation of Dutch colonial legislation in Indonesia were abolished.⁵⁷ Following 1945, the Rv's stipulations persisted through 1999 since no national legislation having superseded them⁵⁸ only after the enactment of Law 30/1999. Article 37 paragraph 3 of Law 30/1999, on the other hand, states that inquiry of witness testimony and expert testimony before the arbitration tribunal shall be conducted in compliance with the conditions of the code of civil procedure, which is interpreted as a regard towards the Rv, HIR, and RBg regulations.⁵⁹ These colonial legislations, while no longer part of the Indonesian arbitration law, are nevertheless important in arbitral practice.

The regulations and implementation of remote hearings in Indonesia Practice are summarized below. Each of the elements listed below may overlap with one another.

1. Confidentiality

According to Article 27 of Law 30/1999, an examination conducted in private deviates from the requirements of civil process applicable in the District Court, that are in essence accessible to the general public. This would be to better meet an arbitration settlement's confidential character.⁶⁰ This is further affirmed on Explanatory Note of Law 30/1999 that explains that, in general, arbitration institutions have advantages compared to other institutions. One of the advantages is guaranteed confidentiality of the parties' dispute.⁶¹

2. The Need for Consent of the Parties

Physical hearings are not recognized as a right under the Indonesian arbitration law, according to several sections of Law 30/1999. To begin, Article 36 of Law 30/1999 specifies as, by nature, arbitration proceedings under Indonesian Legislation are document-only proceedings, with verbal hearings conducted only with the permission of the participants or if the arbitral tribunal deems it necessary.⁶² Further, the arbitrators have the authority under Article 37, paragraph 2, of Law 30/1999 to hear witness evidence or hold meetings at a location other than the arbitral seat if they deem it necessary.⁶³ Furthermore, Article 31 of Law 30/1999 specifies that the participants are free to specify the method that the arbitral tribunal would use throughout the proceedings in their arbitration agreement, provided the method does not violate Law 30/1999.⁶⁴ Finally, when it comes to witness examination, the arbitration law does not allow the arbitral tribunal the ability to request that a State court call the witness or personally question the witness.⁶⁵ To summarize, those four reasons are incompatible with just about any assumption that a right to a physical hearing occurs within Law 30/1999. In contrast, based on the many clauses

⁵⁶ Jan K. Schaefer, "Leaving the Colonial Arbitration Laws Behind: South East Asia's Move into the International Arbitration Arena", *Arbitration International*, Vol. 16, No. 3, 2000, p. 297-302.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Daniel Pakpahan, "ICCA Projects: Does a Right to a Physical Hearing Exist in International Arbitration?", https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Indonesia-Right-to-a-Physical-Hearing-Report.pdf

⁶⁰ Article 27 Law 30/1999

⁶¹ The Explanatory Note to Law 30/1999, General Part, paragraph 4

⁶² Article 36, paragraphs 1 and 2, Law 30/1999

⁶³ Article 37, paragraph 2, Law 30/1999

⁶⁴ Article 31, paragraphs 1 and 2, Law 30/1999

⁶⁵ Daniel Pakpahan, *Op.cit.*, p. 6.

providing extensive discretion upon arbitrators to decide how and where hearings should be conducted, it seems to reason that Law 30/1999 would preclude such a right.

Furthermore, with the exception of the process for the questioning of witnesses and expert testimony, which is related to HIR,⁶⁶ Law 30/1999 can not seem to enable court procedural rules to fill certain holes in the law of arbitration.⁶⁷ This is a considerable departure from the former stance of the law prior to Law 30/1999, when the whole Rv, HIR, and RBg standards of evidence had been adhered towards both court proceedings and arbitral proceedings.⁶⁸ Although HIR is applicable under Article 37 paragraph 2 of Law 30/1999, this does not entail that witnesses should be onsite for the physical questioning. The applicable HIR guidelines simply allow witnesses to testify individually and verbally, without the use of any attorney,⁶⁹ to not testify physically, especially as arbitrators are unable to impose fines on refractory witnesses and compel them to appear physically. As a consequence, it is clear that the arbitration law does not intend to mandate any requirement for physical hearings generally or bodily examinations for evidence particularly.

As previously stated, Indonesian law does not need a physical arbitration hearing. Nonetheless, the parties' basic contract freedom permits them to stipulate that hearings will be held in person.⁷⁰ The nature of the agreement and when the parties reached it decide whether a arbitral tribunal can impose a remote hearing over the parties' consent to a physical hearing. The parties have the right to agree on process, subject to any necessary rules, under Law 30/1999, although this liberty may be restricted for two justifications:

- the explicit and writing agreement established
- previously to the establishment of the arbitral tribunal.⁷¹

As a result, the legal consequences of the tribunal's decision will change depending on whether the parties agree to a physical hearing before to the hearing itself in the signed arbitration agreement or after the arbitration has commenced.

3. Mandatory Preparation

In Indonesia, the remote hearing technologies are available and beneficial. People may readily converse electronically through a variety of channels. The platforms enable virtual contact between persons who live in various locations, cities, or even countries. During the pandemic, people all around the world used this tool to interact electronically with their families, friends, and coworkers.

The parties and the arbitration tribunal can utilize the procedure above for the arbitration procedure, including remote hearing, both theoretically and practically. *First*, if indeed the participants and tribunal consent to use technology, it may aid arbitration proceedings. *Second*, the participants are having difficulty getting to the hearing place.

Since there no certain laws or rules with regard to remote hearing, there are also no mandatory preparation that the parties and the arbitral tribunal should do in the preliminary of arbitration process. This condition certainly become uncertainty as the mandataroy preparation is essential in enssurring the remote hearing can go smoothly and with minimum problems.

⁶⁶ Art. 37, paragraph 3, Law 30/1999

⁶⁷ Art. 31, paragraph 2, Law 30/1999

⁶⁸ Daniel Pakpahan, *Op.cit.*, p. 10.

⁶⁹ *Ibid.*

⁷⁰ Article 1338 Indonesian Civil Code

⁷¹ Article 31, paragraphs 1 and 2, Law 30/1999

4. Control

Law 30/1999 has a number of clauses that are extremely unexpected. The Law 30/1999 contemplates the option of initiating arbitration under unusual circumstances. The law allows for the use of technology or electronic communication to initiate arbitration proceedings.

The agreement to arbitrate can be made via email or any other form of communication, according to Article 4 paragraph (3) of Law 30/1999. There is no clarification as to what the so-called any other kind of communication entails. This rule implies, *first* and foremost, that as far as the participants were in agreement, any means of communication would indeed be appropriate. Any communication expressing the parties' agreement to submit their dispute to arbitration falls under this category.⁷²

Second, the participants' decision to arbitrate was formed by "email or any other form of communication," meaning that the law does not interfere with the parties' method or manner of contact. If this view is correct, the manner of communication would be the participants' freedom of communication. It would have been up to the participants to decide whether or not to use a specific form or medium of communication that was accessible to either of them and that they had agreed on.

The freedom to utilize a certain means of communication would also imply that the tribunal may employ that mode of communication. The parties may agree to communicate with the tribunal via a specific form of communication, such as internet-based communication. This design suggests that remote hearing is a viable option. The only need is that both sides consent and also that the arbitrator approves. The only stipulation for employing this technique is that it does not contradict any of the law's obligatory provisions. These include the confidentiality of the proceedings, respect to the *audi alteram et partem* concept, and so forth.⁷³

The parties and the tribunal can hold their hearings over the internet under the BANI Arbitration Rules. The arbitration panel has a greater discretion to consent or refuse under the BANI Arbitration Rules. This stipulation, which is established in Article 14.4 of the BANI Rules, addresses the venue of arbitration. Because this stipulation demonstrates that the venue of communication is intrinsically tied to the location of hearing. Internet communication can occur on a number of platforms, depending on the preferences of the parties and the arbitration tribunal.

In conclusion, the above-mentioned Indonesian Arbitration Law and BANI Rules encourage arbitration procedures to be conducted using online communication. Arbitration proceedings can be conducted remotely provided the participants and the arbitral tribunal allow.

5. Enforcement and Setting Aside the Award

Surprisingly, Law 30/1999 can not specify the consequences of an arbitrator's ruling that is contrary to the arbitration agreement. The article dealing to award annulment remains quiet on issues such as breaches of due process, excess of jurisdiction, irregularities in the formation on arbitral tribunals, and other comparable offenses.⁷⁴ The Central Jakarta District Court, on the other hand, ruled to throw aside an award in the *Karaha Bodas* case⁷⁵ due to procedural irregularities in the tribunal's composition and the tribunal's abuse of power. As a result, while Indonesian judges may be willing to overturn decisions where the arbitration method violates the

⁷² Huala Adolf, *Op.cit.*, p. 142.

⁷³ Article 28, paragraf 1, Law 30/1999

⁷⁴ Daniel Pakpahan, *Op.cit.*, p. 11.

⁷⁵ Central Jakarta District Court, Judgment No. 86/Pdt.G/2002/PN.Jkt.Pst, *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC and PT PLN (Persero)*

sides' arbitration agreement, the special characteristics underlying the Karaha Bodas case render the resolution of the difficulties of limited relevance as a precedent.⁷⁶ Finally, given Law 30/1999 without precisely established reasons for setting aside, there is no clear response to the ramifications of an arbitrator breaking the participants' agreed-upon procedure.

It is uncertain if a party that wishes to contest the decision on the premise of a violation of such a right must do so within the processes. Although there is no specific provision in Law 30/1999 allowing parties to waive their power to overturn a judgment, it is usually accepted that certain waiver is permissible.⁷⁷ The much more critical problem of presumptive waiver – in which a party is barred against appealing an award if it is aware of an abnormality in the execution of the agreed-upon procedure yet failed to file a complaint in a timely way – is similarly unaddressed.⁷⁸

Regardless of the lack of Law 30/1999, the Supreme Court upheld a district court decision in *Manunggal Engineering v. BANI*, which refused an attempt to set aside a BANI award on the basis of implied waiver.⁷⁹ The controversy centers on BANI's nomination with one arbitrator, that reportedly violated the arbitration agreement's provisions, which required prior consultation with both the parties. That Court decided that the parties were consented to such alleged disobedience all through the processes, and therefore the award appeal was rejected.⁸⁰ This indicates that failing to protest to a procedural violation in a timely manner, such as a breach of an agreement to hold physical hearings, will almost certainly prevent parties from challenging an award in Indonesian courts.

Article 70 of Law 30/1999, the primary requirement on setting aside, just enables for specific grounds for setting aside an arbitral award, such as the submission of untrue as well as solidified writings or files during proceedings, the revelation of material records purposefully hidden by such a party just after award is resolved, and wherever an award has been made as nothing more than a result of corruption undertaken by one of disputing parties.⁸¹ In practice, the uncertainty around Article 70 of Law 30/1999 – if the requirements listed are exhaustive or broad – has created a great deal of uncertainty..⁸²

The Explanatory Note of Law 30/1999 does not provide a solution to this problem; in addressing the section on setting aside arbitral awards, the Explanatory Note simply indicates that the justifications for setting aside arbitral awards include "among others," the three justifications specified in the article.⁸³ Like one would expect, this uncertainty had led to inconsistencies in the treatment of applications that have been placed on hold. Various court rulings saw Article 70 of Law 30/1999 as exhaustive,⁸⁴ yet others had not hesitate to insert the phrase "among others" in the Explanatory Note, which left the door open to a plethora of

⁷⁶ Indonesia Supreme Court, Judgment No. 444 PK/Pdt/2007, *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC and PT PLN (Persero)*,

⁷⁷ Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge: Cambridge University Press, 2011, p. 424

⁷⁸ Daniel Pakpahan, *Op.cit.*, p. 13.

⁷⁹ Indonesia Supreme Court, Judgment No. 770 K/Pdt.Sus/2011, *PT Manunggal Engineering v. Badan Arbitrase Nasional Indonesia (BANI)*

⁸⁰ Daniel Pakpahan, *Op.cit.*, p. 14.

⁸¹ Art. 70 Law 30/1999

⁸² Daniel Pakpahan, *Op.cit.*, p. 15.

⁸³ The Explanatory Note to Law 30/1999, General Part, paragraph 18

⁸⁴ Indonesia Supreme Court, Judgment No. 709 K/Pdt.Sus/2011, *Kepala Dinas Pekerjaan Umum Provinsi Riau v. Badan Arbitrase Nasional Indonesia (BANI)*; Indonesia Supreme Court, Judgment No. 268 K/Pdt.Sus/2012, *PT. Sumi Asih v. Vinmar Overseas Ltd. and The American Arbitration Association (AAA)*

additional justifications for overturning the law, such as breach of public interest, incorrect tribunal constitution, failure to implement Indonesian law, and several others.⁸⁵ Finally, because of the ambiguity of the provision on setting aside an award and the relatively permissive law concerning the treatment of the parties under Law 30/1999, a tribunal's rejection to retain physical hearings in response to the parties' objections seems to be doubtful to be justification for setting aside an award.

There is a scarcity of case law in Indonesia on the justifications for refusing to enforce foreign arbitral awards. The Supreme Court Regulations No. 1 of 1990 on the Procedure of Enforcement of Foreign Arbitral Awards ("SCCL 1/1990"), as well as Articles 65-69 of Law 30/1999, regulate the enforcement of foreign arbitral awards in Indonesia as the implementing law for the New York Convention. Indonesian courts have so far not confined refusal of enforcement to the justifications expressly laid out in Law 30/1999, in the same manner that they have never limited refusal of enforcement to the justifications expressly set out in Law 30/1999. Courts may applied directly the justifications laid out in Article V of the New York Convention, but no consistent – or well-reasoned – approach has been taken by Indonesian courts for dealing with the problems outlined there.

E. Recommended Regulatory Model of Remote Hearing in Indonesia

To resolve the uncertainty, Indonesia needs to regulate remote hearing by learning from the international practice. In reference to the above stipulation, problems encountered regarding the remote hearing regulations in international practice have similarities with practices in Indonesia. Thus, from comparing those practices, we can provide a recommendation for Indonesian regulation concerning remote hearing as will be elaborated below.

It should be noted that this paper has position of amending Law 30/1999. The modification of such law should run concurrently with the future international arbitration law. Proposed laws, particularly international arbitration law and revisions to the Arbitration Law, should contain provisions allowing for remote hearings in the case of a pandemic or other force majeure event. A number of concerns, both technological and legal, must be addressed in accordance with some proposition below.

**Table. 1: Recommendation for Indonesian regulation concerning Remote Hearing
 (Source: Author)**

Aspect	Elaboration
Confidentiality	Photographing, recording, and broadcasting should be prohibited subject to some exceptions given by the arbitrator themselves.
The Need for Consent of The Parties	It would be up to the parties to determine whether or not to utilize remote hearing that was viable to both of them and agreed upon by them.
Mandatory Preparation	To avoid problems with the remote hearing, the arbitrator may exercise the power on all or any one of the following: <ul style="list-style-type: none"> • Three days before the proceedings, the parties must conduct technical preparation for the proceedings;

⁸⁵ Central Jakarta District Court, Judgment No. 736/Pdt/G/VI/1988/PN.Jkt.Pst, *E.D. & F. Man (Sugar) v. Yani Haryanto*; Central Jakarta District Court, Judgment No. 86/Pdt.G/2000/PN.Jkt.Pst, *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co. LLC.*; South Jakarta District Court, Judgment No. 454/PDT.G/1999/PN.Jak.Sel., *Bankers Trust International v. PT Mayora Indah*

<ul style="list-style-type: none"> • The technical preparation is conducted by the parties and arbitration secretary; • Technical preparation includes testing and verifying the equipment and platform to be utilized in remote hearing. <p>The parties should make a list of who will be present at the remote hearing proceedings.</p>	
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Control	<p>To control the remote hearing, the arbitrator may issue an order about any one of the following:</p> <ul style="list-style-type: none"> • the participants who might have been present at the place in which the witness is providing evidence; • that a participant be excluded from the location when the witness is providing testimony; • the participants in the room who must be clearly audible, seen or and heard, by the witness and the people with the witness; • the participants in the hearing who must be able to communicate and share the witness, as well as the people with the witness; • the phases in the hearing that a specified part of the order is to affect; • the technique of procedure of the live video or live television link system, including compliance with the kind of minimum technical standards; • any other order that the arbitral tribunal deems absolutely essential in the justice process.
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Enforcement	<ul style="list-style-type: none"> • An arbitral award based on remote hearing proceeding can be enforced as long as it maintain procedural fairness; • Make exhaustive list of justifications for non-enforcement.

III. CONCLUSIONS

To conclude, the regulations regarding remote hearing in Indonesia are uncertain in several aspects, i.e., confidentiality, the need for consent from the parties, mandatory preparation, control, and enforcement. However, in principle, laws governing remote hearings should address issues highlighted by its extensive engagement in arbitration. The Indonesian government can fix the aforementioned problem by enacting a particular procedural legislation that contains laws governing the practice of remote hearing with the elaborated recommendation above.

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