

**CHECKLIST FOR A PROTOCOL  
ON VIRTUAL HEARINGS**

and

**SUGGESTED CLAUSES FOR CYBER-PROTOCOLS  
AND PROCEDURAL ORDERS  
DEALING WITH THE ORGANISATION  
OF VIRTUAL HEARINGS**

This document sets out in Annex I, a Checklist for a Protocol on Virtual Hearings (“Checklist”), and in Annex II, Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings (“Cyber-Protocol”).

The Annexes previously formed part of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated 9 April 2020. The guidance on virtual hearings provided in the latter are now included in section VII(C) of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, dated 1 January 2021.

## ANNEX I

### CHECKLIST FOR A PROTOCOL ON VIRTUAL HEARINGS

#### A. PRE-HEARING PLAN, SCOPE AND LOGISTICS

- (i) Identifying whether and which issues are essential to be on a hearing agenda and which can be dealt with on "documents only";
- (ii) Agreeing the number and list of participants (arbitrators, parties, counsel, witnesses, experts, administrative secretaries, interpreters, stenographers, technicians, etc.);
- (iii) Agreeing the number of participants per virtual room and whether a 360° view for all participating rooms is required or necessary;
- (iv) Agreeing regarding virtual rooms that will permit the arbitrators, and each side in the case, to confer privately amongst themselves during the hearing;
- (v) Identifying all log-in locations and points of connection;
- (vi) Agreeing that each individual present in each virtual room will be identified at the start of the videoconference; and
- (vii) In light of the above, consulting and agreeing among parties and tribunal on the hearing date, duration and daily timetable taking into account the different time zones.

#### B. TECHNICAL ISSUES, SPECIFICATIONS, REQUIREMENTS AND SUPPORT STAFF

- (i) Consultation between the tribunal and the parties regarding:
  - the preferred platform and technology to be used (including legal access to such platform and technology);
  - the minimum system specifications and technical requirements for smooth connectivity (audio and video), adequate visibility and lighting in each location;
  - whether certain equipment is required in each location (phones, back-up computers, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary by the parties);
- (ii) Preliminary check on compatibility of selected platform and technology to be used;
- (iii) Considering the need for tutorials for participants who are not familiar with the technology, platform, applications and/or equipment to be used in the hearing;
- (iv) Consultation between the tribunal and the parties regarding the contingency measures to be implemented in case of sudden technical failures, disconnection, power outages (alternative communication channels and virtual technical support for all participants); and
- (v) Running a minimum of two mock sessions within the month preceding the hearing to test connectivity and streaming, with the last session being held one day before the hearing to ensure everything is in order.

#### C. CONFIDENTIALITY, PRIVACY AND SECURITY

- (i) Consultation between the tribunal and the parties on whether the virtual hearing will remain private and confidential to participants;
- (ii) Agreeing an access and confidentiality undertaking that binds all participants;
- (iii) Consultation between the tribunal and the parties on:

- the recording of the virtual hearing (audio-visual recording, confidentiality of the recording and value of recording compared to any produced written transcript, etc.);
- any overriding privacy requirements or standards that may impact access or connectivity of certain participants; and
- the minimum requirements of encryption to safeguard the integrity and security of the virtual hearing against any hacking, illicit access, etc.

#### **D. ONLINE ETIQUETTE AND DUE PROCESS CONSIDERATIONS**

- (i) Consultation between the tribunal and the parties on the practices needed to safeguard the rights and obligations of participants in a virtual environment. This includes: identifying lead speakers, non-interruption, observing reasonable and responsible use of the platform and bandwidth, avoiding use of equipment that interferes with connectivity or allows illicit recording, agreeing a procedure for objections, etc.;
- (ii) Obtaining written statements from the parties/counsel that the tested platform and technology are adequate as tested by the parties;
- (iii) Confirming the parties' agreement on proceeding with a virtual hearing or identifying the legal basis for proceeding with a virtual hearing absent such agreement by the parties; and
- (iv) Advising the parties on their duty to cooperate on technical matters prior to and during the virtual hearing.

#### **E. PRESENTATION OF EVIDENCE AND EXAMINATION OF WITNESSES AND EXPERTS**

- (i) Consultation between the tribunal and the parties on the organisation and presentation of oral pleadings;
- (ii) Identifying whether counsel will be using multi-screens for online pleadings, presentation of evidence and agreeing the modalities for submitting and showing demonstrative exhibits in a virtual environment;
- (iii) Consultation between the tribunal and the parties on the examination of witnesses and experts (order of calling and examining witnesses/experts, connection time and duration of availability, virtual sequestration, the permission/prohibition of synchronous or asynchronous communications between witnesses and parties/counsel in chat rooms or through concealed channels of communications, interaction between the examiner and the witness/expert in an online environment, etc.); and
- (iv) Consultation between the tribunal and the parties on virtual transcription and the use of stenographers and interpreters that are capable and able to deliver the necessary level of service in a virtual environment.

## ANNEX II

### SUGGESTED CLAUSES FOR CYBER-PROTOCOLS AND PROCEDURAL ORDERS DEALING WITH THE ORGANISATION OF VIRTUAL HEARINGS

#### I. PARTICIPANTS

"The tribunal confirms and directs that the hearing scheduled for *(insert date and time)* shall be conducted by videoconference.

Based on the information currently provided by the parties, the following participants ("**Participants**") shall take part in the hearing from the locations specified herein below:

- a. **Claimant**  
*(List names and log-in location(s) and point of connection)*
- b. **Claimant's Counsel**  
*(List names and log-in location(s) and point of connection)*
- c. **Respondent**  
*(List names and log-in location(s) and point of connection)*
- d. **Respondent's Counsel**  
*(List names and log-in location(s) and point of connection)*
- e. **Tribunal**  
*(List names of members of the tribunal and their location(s) and point of connection)*
- f. **Witnesses / Experts / Transcription Provider / Support Staff & Technicians / Other participants (as applicable)**  
*(List names and log-in location(s) and point of connection)*

Each Participant will promptly notify, by email communication circulated to all Participants, any change to their log-in location or connection details."

#### II. TECHNICAL ISSUES, SPECIFICATIONS, REQUIREMENTS AND SUPPORT STAFF

"The parties shall each secure a reliable video link connection of sufficient quality that will enable all Participants to participate effectively in the hearing through the chosen platform. The parties shall discuss amongst themselves and shall furnish the tribunal with a joint list of agreed providers of reliable video conferencing services within \_\_\_\_\_ days from the date hereof, and the tribunal shall consult the parties on their preferred choice from the list of agreed providers prior to selecting a provider.

The parties shall consult and seek to agree on the following within \_\_\_\_\_ days from the date hereof:

- (i) the minimum system specifications and technical requirements for continuous and adequate audio-visual connectivity *(types of operating systems to be used, processors' speeds, RAM capacity, transmission speeds, network bandwidth, etc.)*;
- (ii) any hardware, equipment *(display screens, high-resolution webcams, noise cancelling microphones or headphones, phones, back-up computers, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary by the parties)* and software applications required for the hearing; and

- (iii) any location-specific requirements with respect to any location from which a connection is initiated.

If no agreement is reached regarding the points listed above, the parties shall communicate to the tribunal their separate proposals together with an explanation of technical reasons for the specifications and requirements they contend are reasonably required for the selected videoconference provider/platform within \_\_\_\_\_ days from the expiry of the date set in the prior paragraph. The parties' separate proposals shall be submitted to the tribunal in the format attached to this PO No. \_\_\_\_\_ as Annex (1).

The tribunal shall consider the parties' joint proposal or separate proposals and confirm or determine the reasonable requirements and technical specifications to be adopted for the hearing. In determining the said reasonable requirements and specifications the tribunal may be assisted by two party nominated IT experts or a tribunal appointed expert (at the parties' cost), acting independently and objectively assist the tribunal to facilitate the determination of the reasonable requirements and specifications. If needed, the tribunal shall, following consultation with the parties, issue any necessary protocol to set out the work and assistance to be provided by the IT experts.

When agreeing all or part of the specifications and requirements listed above, or when the parties communicate to the tribunal their separate proposals, the parties shall consider the compatibility of their reasonable requirements and specifications with (i) any requirements of the selected provider/platform and (ii) any location-specific requirements for all other participants.

Any tutorials needed for effective and efficient utilisation of the services of the selected video conference service shall be promptly scheduled. The parties shall furnish to the tribunal, within \_\_\_\_\_ days from the date of selection of the video conference provider/platform, a proposed schedule for such tutorials. The said tutorials will provide an overview of the features and tools available to Participants.

The parties shall consult and agree (or make separate proposals) on detailed contingency measures to be followed in case of technical failures, disconnection, power outages, or other interruptions to the hearing within \_\_\_\_\_ days from the date hereof.

Representatives of the parties, each of the members of the tribunal and any other Participants in the hearing shall participate in a minimum of two test runs to (i) establish that the equipment and technical requirements adopted for the hearing are functional and adequate, and (ii) simulate the connections for hearing conditions within the month preceding same. The parties shall coordinate and agree with the tribunal the dates, times and duration of such test runs.

For the avoidance of doubt, it is understood and agreed that the parties, in fulfilling their obligations herein, shall use competent support staff possessing the requisite expertise.

The above requirements shall apply regardless of the type of videoconferencing used, including point-to-point videoconferencing, multi-point video conferencing, web-based videoconferencing, videoconferencing over ISDN, etc.)."

### **III. CONFIDENTIALITY, PRIVACY AND SECURITY**

"As a matter of principle, attendance at the hearing will be restricted to the Participants identified in this PO No. \_\_\_\_\_ or in accordance with its terms. For the avoidance of doubt, any technical consultants/support staff working with the Participants to facilitate the conduct of the hearing shall also be considered to be attending the hearing and shall be identified as Participants. In the event that a party wishes any other person to attend any portion of the hearing, it shall raise a request well in advance with the reasons such attendance is necessary or desirable. The parties shall attempt to reach agreement on such requests, failing which the tribunal shall decide whether to authorise the request.

No recording of any part of the hearing (including the audio track) may be made unless authorised in advance by the tribunal. An audio recording of the hearing shall be made by the stenographers retained for the purposes of preparing a common transcript. Any other proposed recording shall be requested at least 48 hours in advance of the relevant portion of the hearing.

In any event, the official record of the hearing shall be the written transcript as corrected or commented upon by the parties.

The parties are responsible for jointly considering and raising well in advance of the hearing (no less than two weeks) any laws applicable at the location of any Participant that may present an obstacle or issue of legal compliance with privacy, confidentiality, data protection and security requirements. After consulting the parties, the tribunal shall decide on what measures, if any, to take to address any applicable privacy and security requirements or standards that may impact the access or connectivity of any of the Participants.

In the event that any party considers that further security measures are required to safeguard the integrity of the hearing or reduce the risk of cyber attacks, infiltration or unauthorised access to the hearing, that party must raise such concerns immediately upon learning of the reason for such concerns. After consulting the parties, the tribunal shall decide what further measures, if any, shall be taken in this regard."

#### **IV. ONLINE ETIQUETTE AND DUE PROCESS CONSIDERATIONS**

"To achieve the necessary level of cooperation and coordination for a successful hearing by videoconference, each Participant undertakes to observe the following:

- (i) identify its lead speaker(s);
- (ii) refrain from interrupting any speaker;
- (iii) reasonable and responsible use of the video conference facilities;
- (iv) avoid using equipment that interferes with connectivity;
- (v) refrain from any unauthorised recording;
- (vi) avoid wasting time during the hearing;
- (vii) mute microphones when not speaking;
- (viii) require the Participants which it brings to the hearing to observe the same obligations; and
- (ix) take whatever measures or practices are necessary to support the procedural efficiency of the hearing.

The tribunal - in consultation with the parties - shall set the mechanism for objections on the first hearing day during the introductory discussion of housekeeping matters.

The parties shall each, within \_\_\_\_\_ days from the date hereof, confirm in writing that (i) they have conducted the test runs envisaged above and (ii) the service provider, equipment, technical specifications and requirements are adequate for their participation in the hearing."

## **V. PRESENTATION OF EVIDENCE AND EXAMINATION OF WITNESSES AND EXPERTS**

"The tribunal understands that the parties' oral pleadings will include the use of demonstrative exhibits and presentation of certain evidence on record. Accordingly, the parties should ensure that the demonstrative exhibits will be clear and visible on a screen to all tribunal members, the other party [parties] and any Participants authorised to attend that portion of the hearing. If multi-screens are required for the presentation of demonstrative exhibits and evidence, the parties should ensure that such multi-screens are included in the list of required equipment.

The parties shall coordinate amongst themselves, with a view to agreeing the following within \_\_\_\_\_ days from the date hereof:

- (i) order of calling and examining witnesses/experts;
- (ii) connection time and duration of availability for each witness/expert;
- (iii) modalities for virtual sequestration of witnesses/experts (if any);
- (iv) permissibility/prohibition of synchronous or asynchronous communications between witnesses/experts and parties/counsel in chat rooms or through concealed channels of communications;
- (v) whether the witness/expert will be sitting in his/her location together with anyone else and whether he/she will be assisted by anyone whilst giving his/her testimony; and
- (vi) whether a witness/expert will require the assistance of an interpreter and the arrangements needed to ensure that the interpreter is able to provide his/her services virtually, and whether interpretation will be simultaneous or consecutive, and whether certain additional equipment is needed to ensure that the examination process is efficiently well managed.

In case no agreement is reached regarding any or all of the items listed above, the parties shall communicate to the tribunal their separate proposals within \_\_\_\_\_ days from the expiry of the date set above.

The tribunal shall consider the parties' joint proposal or separate proposals with a view to making its determination.

The parties agree that the hearing shall be transcribed and the parties undertake to jointly propose a virtual transcription provider/stenographer who is capable and able to promptly deliver its service via video conference. If the use of transcription requires further additional equipment, then parties shall agree with the tribunal on the additional equipment which shall be included in the list of required equipment established per the above.

The tribunal may agree with the parties or require them to make their witnesses/experts available for a hot-tubbing session. If so agreed or required, the parties should ensure that their witnesses/experts are readily available at the time and for the duration of the hot-tubbing and the process shall proceed as instructed by the tribunal."

## ANNEX TO PROCEDURAL ORDER

### Technical/Technological Requirements [to be discussed/agreed with the parties – case specific]

	Party xxx	Party yyy	Provider/platform requirements	Tribunal's Determination
<b>System Specifications</b>				
<b>Connection Requirements</b>				
<b>Hardware &amp; Equipment</b>				
<b>Software Applications</b>				
<b>Other Requirements</b>				