

NOTE ON GUIDELINES FOR THE ORGANIZATION OF VIRTUAL HEARINGS

Approved by the Plenary of the Court on 21 April 2020

I. Introduction

1. The global crisis caused by the spread of COVID-19 virus has led to many changes in our social life. Arbitration has also had to adapt to the new environment, marked by the emergence of different restrictions of yet uncertain duration in terms of mobility and social distancing.
2. A milestone in the arbitration proceedings in which these restrictions are particularly relevant is the holding of hearings. So far, the Court has predominantly held in-person hearings.
3. In this context, the Court has adopted the highest standards in order to protect the health of those taking part in the in-person hearings in its facilities.
4. However, the above-referred restrictions have revived the interest in holding hearings through remote communication systems, particularly by videoconference (hereinafter, "**Virtual Hearings**" or individually "**Virtual Hearing**").
5. This renewed interest explains the issuance of this Note, the purpose of which is to provide a framework to guide arbitrators and counsel to prepare and conduct Virtual Hearings efficiently, while at the same time respecting the arbitration users' rights and expectations.¹
6. For the time being, the experience in holding Virtual Hearings is limited. Thus, this practice is expected to evolve rapidly, as its use becomes widespread. In fact, it cannot be ruled out that once current mobility restrictions and social distancing have been overcome, the use of Virtual Hearings will be consolidated in the arbitrations administered by the Court. It is likely, in consequence, that due to this future development, this Note will be complemented later on.

II. General recommendations

7. The Court considers that Virtual Hearings can provide an effective solution to facilitate arbitrations to be processed efficiently and without delay, in accordance with article 20.5 of the Rules.²

¹ In the preparation of this Note, the Court has taken into consideration the best international practices in the field and specially the following documents. We are grateful to their efforts for their contribution as sources of inspiration. We refer to the [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#), the [Seoul Protocol on Video Conferencing in International Arbitration](#) and the [Draft Zoom Hearing Procedural Order](#) published by Transnational Dispute Management. The Court would also like to thank the following persons for their reflections and contributions during the drafting process of this Note: Filipa Cansado, Manuel de Lorenzo, Ignacio Díez-Picazo, José Carlos Fernández Rozas, Javier Fernández-Samaniego, Elena Gutiérrez, Clifford Hendel, Julio Legazpi, Carmen Martínez, Lucía Montes, Aníbal Sabater, Antonio Sánchez-Pedreño and Cristina Vidal.

² "All persons participating in the arbitration proceedings shall act in accordance with the principle of good faith and will ensure that the arbitration is carried out efficiently and without delay."

8. For this reason, in general terms, the Court recommends arbitrators, counsel and users to consider the possibility of holding Virtual Hearings.
9. The holding of Virtual Hearings should be consulted by the arbitrators with the parties, either:
 - (i) On the occasion specifically foreseen prior to the issuance of the First Procedural Order (article 23.1 of the Rules);³
 - (ii) When setting the terms of the hearing (article 30.5 of the Rules);⁴ or
 - (iii) At any other appropriate time, considering the arbitrators' general powers for conducting the proceedings (article 20.1 of the Rules).⁵
10. When assessing the possibility of holding Virtual Hearings, arbitrators and parties are invited to take into account at least the following factors:
 - (i) the estimated impact on the procedural calendar in case of waiting until the moment when holding an in-person hearing is possible;
 - (ii) if this estimated impact would generate an excessive delay, given the circumstances of the case (and, particularly, if there are special urgent reasons that advise a speedy case-management);
 - (iii) the object of the hearing (arbitrators' decisions on the evidence, examination of witnesses or experts, submission of closing statements, etc.) and particularly, the impact of holding a Virtual Hearing in the means of evidence to be taken (for example, in the case of a visual inspection);
 - (iv) the available guarantees to properly participate in Virtual Hearings, to safeguard the privacy of the information exchanged in them and to prevent unauthorized third parties from having access to that information and to the hearings;
 - (v) the expected duration of the hearing;
 - (vi) the number of persons participating in the hearing, their availability to travel and their geographical locations, especially if they are in different time zones;
 - (vii) the possibility to split the hearing into different sessions, virtual and in-person hearings;⁶ and

³ "The arbitrators will issue, upon prior consultation with the parties and within 30 days of the acceptance of the last arbitrator, a procedural order setting out, at least, the following issues: (...)"

⁴ "Duly in advance and after consulting the parties, the arbitrators will establish, in the form of a procedural order, the rules by which the hearing will be conducted, the manner in which witnesses or experts are to be examined and the order in which they will be called."

⁵ "Subject to the provisions of this Rules, the arbitrators may conduct the arbitration in the manner they deem appropriate, always abiding by the principle of equality of the parties and giving each of them sufficient opportunity of presenting their case."

(viii) the impact of holding Virtual Hearings on the validity and enforceability of the award to be rendered.

11. Arbitrators are invited to request the parties to motivate their positions when presenting argument on whether holding Virtual Hearings is advisable.

III. Specific recommendations

12. For those cases in which, in light of the circumstances, the decision is to hold Virtual Hearings, the Court recommends that the guidelines described below are followed. The Court is ready to assist arbitrators and users in their implementation.

A. Prior to the Virtual Hearings

13. There are different ways of holding a Virtual Hearing. For example, all the arbitrators can connect from the same location to the chosen platform and thus participate in the hearing; location that may (or may not) be shared with all or some of the parties' counsel. Likewise, witnesses or experts may also participate from different locations.⁷ On the other point of the spectrum, each participant can connect from a different location. The decision on the appropriate format will depend on the circumstances of each case and the preferences indicated by the parties.
14. Nevertheless, in case of discrepancies regarding which modality should be used, we recommend the one that ensures the most equality of the parties. Thus, for example, in the absence of other agreement, if the parties' respective counsel cannot participate in the hearing from the same location as the arbitrators, it is recommended that all counsel attend the hearing from a different location to that of the arbitrators. Likewise, if the three arbitrators cannot participate from same location, it would be preferable for each arbitrator to attend the hearing from a different location. However, the fact that the President of the Arbitral Tribunal or the Sole Arbitrator shares the location with the administrative secretary or with an assistant to the Arbitral Tribunal is no ground for objection.
15. The choice of the technological platform through which the hearing will be held shall be made as soon as practically possible, taking into account the particular needs of each case. In this way, participants will be allowed sufficient time in advance to familiarize themselves with the platform and confirm that it complies with the necessary confidentiality and security requirements.
16. There are numerous alternatives on the market that allow holding Virtual Hearings. In any case, the Court has Zoom and LoopUp accounts, which are available to arbitrators and users in case they are considered appropriate.

⁶ The reason is that if part of the content initially planned for a hearing is transferred to the virtual format, presumably the length needed for the in-person hearing will be reduced. This can make it easier to find dates close in time when participants can meet in person, which improves duration of the proceedings.

⁷ Most of the experience accumulated so far in Virtual Hearings refers to cases in which only one witness or expert participates from a different location to that of the rest of the participants in the hearing. This Note can also serve as a guide in those cases, which will probably continue to be part of the hearing landscape.

17. A number of minimal technical requirements to be met by the devices to be used by participants in Virtual Hearings as well as their internet access conditions should be set.
18. It is advisable to carry out a joint test with all the participants sufficiently in advance, in order to solve any technical issue. If it is not possible or advisable, individual tests with each participant are recommended.
19. A protocol shall be set in case technical issues with the chosen platform arise during the Virtual Hearing. This might include the assistance of the Court's team, of a technician specifically hired for that purpose or the use of an alternative platform.
20. Measures to ensure confidentiality and data protection shall be set by the arbitrators together with the parties, so the concerns of the parties on this matter can be reasonably addressed sufficiently in advance. In this regard, at least the following should be decided:
 - (i) who will attend the Virtual Hearing (or part of it);⁸
 - (ii) how will they have access to the chosen platform (for example requiring a password, which is advisable);
 - (iii) whether the Virtual Hearing will be recorded, as it is advisable and the general practice of the Court (and, if so, whether it will be recorded only in audio or also in video); and
 - (iv) who will be in charge of the recording (as an example, an arbitrator, the administrative secretary, the Court team or a technician specifically hired for that purpose).
21. In case of multiple arbitrators that are not participating from the same location, they shall also have a private communication channel. Thereby, if it is necessary and even if this means interrupting the hearing, the arbitrators may deliberate separately from the parties and other participants. This private channel may be a breakout room enabled by the technological platform used for the hearing or a telephone communication system if the arbitrators consider it appropriate.
22. With sufficient advance, the arbitrators shall set in writing the specifics of the Virtual Hearings. In doing so, they shall take into consideration at least the issues detailed below, in section III.B.

B. During the Virtual Hearings

23. According to article 30.4 of the Rules, the "*conduct of the hearing falls exclusively to the arbitral tribunal*". In the context of Virtual Hearings, this authority includes the organization of the hearing through the chosen platform, including the tools and features it provides. This is without prejudice to the fact that its purely operational aspect can be delegated to the administrative secretary, an assistant

⁸ Arbitrators, administrative secretaries or assistants of the Arbitral Tribunal, counsel, representatives of the parties, witnesses, experts, interpreters, stenographers, as well as other members of the Court, technicians or support staff.

of the Arbitral Tribunal, the team of the Court or a technician specifically hired for that purpose.

24. The arbitrators may end the hearing if they consider that the virtual modality is prejudicial to one of the parties, there is evidence that the confidentiality or security of the hearing is not being guaranteed or for any other reason it is not appropriate to continue the hearing.
25. Unauthorized persons will not participate in the Virtual Hearings. Furthermore:
 - (i) at the beginning of the hearing all participants shall be identified and each party shall appoint its speaker(s); and
 - (ii) as far as possible, efforts shall be made to minimize the number of speakers as well as the number of persons who may have their microphone activated simultaneously.
26. Whatever technological platform is chosen, measures should be taken to avoid unauthorized persons having access to the Virtual Hearings or to the parts of the hearing in which they should not participate. Those measures include the following:
 - (i) using the “waiting room” functionality or equivalent to control the access (the President or Sole Arbitrator or a delegate will be in charge of the authorizations);
 - (ii) requiring the participants to identify themselves with their own names and surnames, not with alias or nicknames;
 - (iii) the possibility for the arbitrators to see the face of all participants at all times; and
 - (iv) using the “gallery” function or equivalent.
27. In general terms, participants shall speak following an order and distribution of time set prior to the holding of the Virtual Hearing. In particular, regarding witnesses and experts, the order in which they will intervene, the estimated duration of their interventions and the method chosen to allow them to be heard and to raise objections shall be set in advance.
28. In case that more than one person connects to the Virtual Hearing from the same physical location (for example, different members of the same counsel team), the necessary measures will be taken in order to prevent issues related to audio or other technical problems.
29. If the chosen platform has a “chat” function and it is decided that its use is allowed, this option shall not be used to send private *ex parte* communications to the arbitrators.
30. The examination of witnesses and experts throughout videoconference poses a specific challenge. There are different methods to ensure that such examination takes place properly, without the assistance of unauthorized persons. Arbitrators

and parties are invited to adopt a solution that provides sufficient guarantees to the parties, taking into account the nature of the case.

31. The system that usually provides most guarantees is the presence at the place from which the witness testifies of a member of the counsel team which does not represent that witness. If this system is not possible or efficient, it is advisable that it is possible to verify, at any time, that no unauthorized persons access this physical location. This can be achieved, for example, by having two cameras: one that focuses directly on the witness in a close shot and another that provides a broader view of the room from which the witness provides testimony. Another option is to request the witness to place him or herself at such a distance from the camera so as to allow the arbitrators to have a broader view of the room. The correct location of the witness or expert shall be one of the issues to be verified in the joint test described in paragraph 18 of this Note.
32. Additionally, it is recommended that the witness or expert:
 - (i) appears from a room specifically arranged for the occasion, only with the technological devices, documents and materials required to participate in the hearing;
 - (ii) reasonably proves that any mobile phone is turned off when providing testimony and is not turned on during the hearing;
 - (iii) reasonably proves that, other than the exchanges required by his or her testimony with the participants who pose the questions, he or she does not communicate with other persons without the authorization of the arbitrators; and
 - (iv) signs an affidavit indicating the compliance with the requirements described above.
33. When Virtual Hearings involve geographical dispersion, the Court, through its network of national and international alliances, shall assist arbitrators and users to find suitable venues for the witnesses to connect for the purpose of providing testimony. Likewise, the Court will be at the disposal of its users to provide any other support when organizing Virtual Hearings, particularly to ensure the integrity of witnesses' and experts' statements.
34. In any case, arbitrators shall ask the questions they may consider appropriate or make the necessary verifications in order to preserve the integrity of every statement.
35. The sharing of documents during the Virtual Hearing will follow a previously agreed method, either through the functionalities of the platform chosen for the hearing (by arbitrators, counsel or another person in charge) or by sending the documents to the witness or expert through electronic means or hard copies. In any case, a channel shall be provided for documents to be shared with the arbitrators and parties.
36. The transcription of Virtual Hearings, if appropriate, shall also follow a previously agreed method.

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