

GUIDELINES ON VIRTUAL HEARINGS

Approved by the Court's Plenary on April 21st, 2020

I. Introduction

1. The global crisis resulting from the spread of the COVID-19 virus has brought about many changes in our social life. Arbitration has also had to adapt to the new environment, marked by the emergence of various constraints on movement and social distancing.
2. One milestone in the arbitral proceedings where these limitations become particularly evident is the holding of hearings, which so far, in the practice of the Court, have been predominantly face-to-face.
3. In this context, the Court has adopted the highest standards in terms of fitting out its facilities in order to protect the health of those participating in face-to-face hearings.
4. However, the limitations to which we have already referred to have fuelled interest in holding hearings through remote means of communication, in particular, videoconferencing (hereinafter, "**Virtual Hearings**" or, individually, "**Virtual Hearing**").
5. This renewed interest explains the issuance of this Guideline, the purpose of which is to provide arbitrators and lawyers with a framework to guide them in preparing and holding Virtual Hearings in an efficient manner, respecting the rights and expectations of arbitration users¹.
6. For the time being, there is limited experience in holding virtual hearings. Therefore, it is foreseeable that this practice will evolve rapidly as its use becomes more widespread. In fact, it cannot be ruled out that, once the current limitations of movement and social distancing have been overcome, the use of Virtual Hearings will be consolidated in the arbitrations administered by the Court. It is likely, therefore, that this future development will make it advisable to supplement this Note at a later stage.

II. General recommendations

¹ The Court has taken into consideration what it has identified as best international practices in the field and particularly the following documents, whose authors are thanked for their contribution as sources of inspiration: [ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic](#), [Seoul Protocol on Video Conferencing in International Arbitration](#) and [Draft Zoom Hearing Procedural Order](#) published by Transnational Dispute Management. The Court is also grateful for the reflections and contributions received during the process of drafting this Note from the following persons: 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.

7. The Court considers that virtual hearings can provide an effective solution to facilitate the efficient and expeditious conduct of proceedings, in line with the mandate of article 20.5 of the Rules of Procedure².
8. For this reason, as a general rule, the Court recommends that arbitrators, lawyers and users consider the possibility of holding Virtual Hearings.
9. The holding of Virtual Hearings should be consulted by the arbitrators with the parties, either:
 - a. in the procedure specifically provided for prior to the issuance of the First Procedural Order (Article 23.1 of the Rules of the Court);³
 - b. at the time of setting the conditions for the conduct of the hearing (Article.20.3 of the Rules of the Court)⁴
 - c. on such other occasion as may be deemed appropriate, within the framework of the general powers of the arbitrators to conduct the proceedings (Article 20(1) of the Rules of the Court)⁵
10. When assessing the possibility of holding Virtual Hearings, arbitrators and parties are invited to consider at least the following factors:
 - a. the estimated impact on the procedural timetable of waiting until a face-to-face hearing is possible;
 - b. whether such an estimated impact would lead to excessive delay, given the circumstances of the case (and in particular whether there are particular reasons of urgency which make more rapid processing desirable);
 - c. the purpose of the hearing (decisions of the arbitrators on evidence, examination of witnesses or experts, formulation of conclusions, etc.) and, in particular, the impact that the holding of a Virtual Hearing would have on the means of evidence to be taken (e.g. an ocular inspection);
 - d. the safeguards available 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 themselves;
 - e. the scheduled duration of the hearing;

² "All those involved in the arbitral proceedings shall act in good faith and shall endeavour to ensure that the arbitration is conducted efficiently and without delay."

³ "The arbitrators shall, after consultation with the parties, and within thirty days after the acceptance of the last arbitrator, issue a procedural order setting out at least the following matters: (...)"

⁴ "With due notice and after consultation with the parties, the arbitrators shall, by issuing a procedural order, lay down the rules in accordance with which the hearing shall be conducted, the manner in which witnesses or experts are to be examined and the order in which they are to be called."

⁵ "Subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate, always observing the principle of equality of the parties and affording each party sufficient opportunity to present its case."

- f. the number of people who will participate in the hearing, their availability to travel, and their geographic locations, especially if they are in different time zones;
 - g. the possibility of dividing the hearing into different sessions, virtual and face-to-face⁶; and
 - h. the impact of the holding of Virtual Hearings on the validity and enforceability of the award that may be rendered.
11. The arbitrators are invited to request the parties to state their reasons when deciding on the convenience of holding Virtual Hearings

III. Particular recommendations

12. For those cases in which, in the light of the circumstances of the case, it is agreed to hold Virtual Hearings, the Court recommends the following guidelines and remains at the disposal of its arbitrators and users to assist them in their application.

A. Prior to the Virtual Hearing

13. There are different ways of holding Virtual Hearings. For example, all arbitrators can connect from the same location to the chosen platform and thus participate in the hearing; a location that can be shared (or not) with all or some of the parties' lawyers. Similarly, witnesses or experts can participate from different locations. At the other extreme, each participant may participate from a different location. The decision as to which modality is appropriate will depend on the circumstances of each case and the expressed preferences of the parties.
14. However, in the event that there is disagreement as to which modality should be chosen, it is recommended to opt for the one that ensures the greatest balance between the parties. Thus, for example, in the absence of a different agreement, if the parties' respective teams of counsel cannot participate in the hearing from the same location as the arbitrators, it is recommended that both teams of counsel attend the hearing from different locations from the arbitrators.⁷ Similarly, if the three arbitrators are unable to share location, it is preferable that each arbitrator attends the hearing from a different location. On the other hand, it shall not be objectionable for the Chairman of the Arbitral Tribunal or the Sole Arbitrator to be in the same location as the administrative secretary or an assistant of the Arbitral Tribunal.
15. The choice of the technological platform through which the hearing is to be held should be made as soon as possible, taking into account the particular needs of

⁶ The reason is that if some of the content initially planned for a hearing is moved to a virtual format, presumably the length of the in-person hearing that is required will be reduced. This may make it easier to find dates close in time when participants are available to meet in person, so that there is an improvement in the length of the proceedings.

⁷ Most of the experience to date with Virtual Hearings has involved cases in which only one witness or expert witness testifies from a different location from the other participants in the hearing, and this Note may also serve as a guide where applicable.

each case. This will allow participants to familiarize themselves with the platform well in advance and to check that it meets the appropriate confidentiality and security conditions.

16. There are numerous alternatives on the market that allow the holding of Virtual Hearings. In any case, the Court has accounts on the Zoom and Loopup platforms, which it makes available to its arbitrators and users should they consider them appropriate.
17. The minimum technical conditions to be met by both the devices and the type of connection of those who will participate in the Virtual Hearings should be established.
18. It is recommended to carry out a joint test with all the participants in the hearing well in advance, in order to remedy any incident. If the above is not possible or advisable, it is recommended to conduct an individual test with each participant.
19. A protocol of action will be foreseen in the event that problems are experienced with the chosen technological platform during the Virtual Hearing. This may include recourse to Court staff, specifically contracted technical staff or the use of an alternative platform.
20. Measures to ensure confidentiality and data protection should be discussed by the arbitrators with the parties, so that the concerns of the parties in this matter are reasonably addressed in good time. In this regard, at least the following should be decided:
 - a. who will attend the Virtual Hearing (or part of it);⁸
 - b. how they will be allowed access to the chosen platform (e.g. by requiring a password, as is advisable);
 - c. whether the Virtual Hearing will be audio-recorded, as is recommended and the general practice of the Court (and, if so, whether it will be audio-only or will also include video); and
 - d. who will be responsible for the recording (e.g., an arbitrator, the administrative secretary, Court staff or a technician specifically hired for the purpose).
 - e.
21. If there are several referees and they do not participate from the same location, they will also have a private communication channel. Thus, if necessary and even if this may entail interrupting the hearing, the arbitrators may deliberate outside the parties and other participants. This private channel may be a special room enabled by the technological platform used for the hearing or a telephone communication system if, in the opinion of the arbitrators, this option is appropriate.

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

22. Well in advance of the Virtual Hearings, the arbitrators should set out in writing the specific conditions for their conduct. In setting those conditions, they are invited to consider, at a minimum, the issues detailed below in section III.B.

B. During the holding of the Virtual Hearing

23. In accordance with Article 30.4 of the Rules, "*the management of the hearings corresponds exclusively to the arbitral tribunal*". In the context of the Virtual Hearings, this power includes the management of the hearing through the chosen platform, with the utilities and functionalities that it allows; all without prejudice to the fact that its purely operational facet may be delegated to the administrative secretary, an assistant of the Arbitral Tribunal, the Court staff or a technician specifically hired for this purpose.
24. The arbitrators may terminate the hearing if they consider that the virtual mode is prejudicial to either party, there are indications that the confidentiality or security of the hearing is not being ensured or, for any other reason, it is not appropriate for the hearing to proceed.
25. Persons not previously authorized will not participate in the Virtual Hearings. In addition:
 - a. at the beginning of the hearing, all participants will be identified and each party will designate its spokesperson(s); and
 - b. as far as possible, efforts should be made to minimize the number of speakers, as well as the number of people who can have the microphone open simultaneously.
26. Regardless of the technological platform chosen, it is recommended that measures be taken to prevent unauthorized persons from accessing the Virtual Hearings or portions of those hearings in which they should not participate. Such measures include the following:
 - a. use the "waiting room" function or equivalent to control access, and be authorized by the Chairman or Sole Arbitrator (or his delegate);
 - b. require that participants be identified by their first and last names, not by aliases or nicknames;
 - c. the permanent possibility for referees to see the faces of all participants; and
 - d. the use of the "gallery" function or equivalent.
27. In general, the different participants will intervene following an order and distribution of time fixed in advance of the holding of the Virtual Hearing. In particular, with regard to witnesses and experts, the order in which they will testify, the estimated duration of these statements and the method chosen to give them the floor and to formulate objections will be established.

28. In the event that more than one person participates in the Virtual Hearing from the same physical location (e.g., different members of the same team of lawyers), measures will be taken to avoid sound coupling or other technological problems.
29. In the event that the chosen platform has a "chat" option and it is agreed to allow its use, this channel must not be used by the parties to send communications to the arbitrators that cannot be seen by the other parties.
30. The examination of witnesses and experts via videoconference poses a unique challenge. There are different methods to ensure that such examination takes place properly, without the assistance of unauthorized persons. A solution that offers sufficient guarantees to the parties, given the nature of the case, is invited.
31. The most protective system is usually the presence, at the place where the witness testifies, of a member of the team of lawyers of the party opposing the party presenting the witness. In the event that it is not possible or efficient to adopt this precaution, it is recommended that it should be possible to check at any time that persons not authorized by the arbitrators do not enter the room from which the witness or expert witness is appearing. This can be achieved, for example, by having two cameras: one that focuses directly on the witness in close-up and one that provides an overview of the room from which the witness is appearing. Another option is to ask the witness to stand at such a distance from the camera that the arbitrators have a wider view of the courtroom. The correct positioning of the witness or expert will be one of the issues to be checked in the test under paragraph 18 of this Note.
32. Additionally, it is recommended that the witness or expert witness:
 - a. appear from a room specifically set up for the occasion, with only the technological devices and the documentation and materials necessary to participate in the hearing;
 - b. reasonably establishes that he disconnects his mobile phone at the beginning of his appearance and does not connect it during the course of his appearance;
 - c. reasonably establishes that, apart from the exchanges required by his statement with the participants who ask him questions, he does not communicate with other persons during the hearing, without the authorization of the arbitrators; and
 - d. sign a declaration stating that you have fulfilled the conditions listed above.
33. Where Virtual Hearings involve geographical dispersion, the Court may assist arbitrators and users in identifying suitable rooms from which to conduct the hearings. The Court is also in a position to provide other support as necessary in the organization of virtual hearings, in particular to ensure the integrity of the testimony of witnesses and experts. Similarly, the Court stands ready to provide other necessary support in the organization of Virtual Hearings, in particular to ensure the integrity of the testimony of witnesses and experts.
34. In any case, the arbitrators shall ask such questions or make such checks as they deem appropriate so as to preserve the integrity of the statement in question.
35. The display of documents during the Virtual Hearing shall follow a previously agreed method, either through the functionalities of the platform chosen for the videoconference (by the arbitrators, counsel or other person in charge) or by



MADRID COURT
OF ARBITRATION

sending them to the witness or expert by other means, electronic or on paper. In any event, there shall be a channel for the documents exhibited to be also accessible to the arbitrators and the parties.

36. The preparation of transcripts of Virtual Hearings, if deemed appropriate, will also follow a pre-agreed method.

* * * * *