

## Appendix B - Sample Procedural Language Relating to Technology Tools and Solutions

The sample language in this Appendix is for guidance only and should be adapted to the facts and circumstances of each case. It is not intended to be exhaustive and does not constitute or operate as a substitute for legal advice on any matters of applicable law. Square brackets are used where different options may be considered.

### I. Sample Procedural Directions in Preparing for the First Case Management Conference

#### Example I.1 – Proposing a case management conference via videoconference

Unless either Party would prefer to convene the case management by telephone, in which case the conference will proceed in that manner, the Tribunal proposes that the conference be convened via videoconference. In addition, unless the Parties notify the Tribunal by [date] that they have agreed to alternative arrangements, the Tribunal proposes that [the President] host the videoconference via the [identify videoconferencing platform to be used].

#### Example I.2 – Inviting consideration of how technology will be used to enhance the arbitral process

In order to ensure effective case management pursuant to Article 22(2) of the ICC Rules, in advance of the case management conference, the Parties are invited to confer and consider how technology tools and solutions may be used to help move the arbitration forward efficiently and to save time and costs. Matters that the Parties may wish to consider are described in the ICC Report 'Leveraging Technology for Fair, Effective, and Efficient International Arbitration Proceedings'. In particular, the Parties are invited to consider:

- (a) The means of electronic exchange to be used for communications, exhibits, and other submissions, including whether this case would benefit from a shared case management platform.
- (b) Whether hard copies may be dispensed with or will also or sometimes be provided.
- (c) Prescribed rules for electronic file organisation, naming conventions, and file format.
- (d) Whether the Terms of Reference and/or awards and other decisions may be signed in counterparts and scanned for electronic transmittal to the Secretariat, subject to any requirements of mandatory law.
- (e) Whether the Tribunal and other Party will be required to use any specialised hardware or software in connection with a Party's presentation of case, and, if so, whether any related technical tutorials or conferences should be scheduled.
- (f) Whether any subsequent case management conferences should be conducted by physical attendance or remotely via videoconference or teleconference (and if by videoconference, any preferences regarding the platform to be used, conference host, and/or platform security or other settings).
- (g) Possible use of e-briefs or e-bundles.
- (h) Whether there are any other technology tools or practices that may facilitate the arbitration.
- (i) Any concerns about cost, inadequate access to infrastructure or resources, or fair and equal treatment of the Parties.

- (j) Data protection and information security (addressed further below).
- (k) If there is to be an evidentiary hearing, whether it should be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication (with further details to be addressed at a pre-hearing conference).

### Example I.3 – Inviting consideration of data protection and information security

In accordance with [paragraphs 115 and following of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 Jan. 2021) / *other applicable guidance or rules*], the Tribunal reminds the Parties that the European Union Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the ‘General Data Protection Regulation’ or ‘GDPR’) and/or other data protection laws and regulations apply to the arbitration and that their personal data may be collected, transferred, published and archived pursuant to the arbitration agreement or the legitimate interests to resolve the dispute and arbitration proceedings operate fairly and efficiently. (See ICC Data Privacy Notice for ICC Dispute Resolution Proceedings.)

Accordingly, the Parties should be prepared to discuss issues of information security and data protection at the case management conference and are invited to consider the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration and the ICCA-IBA Roadmap to Data Protection in International Arbitration for guidance.

Following the case management conference, the Tribunal may give further directions to the Parties regarding preparation of a data protection protocol for the arbitration to ensure that:

- (a) The Parties, their representatives, as well as their witnesses, party-appointed experts and any other individual appearing on their behalf or in their interest in the arbitration are aware that their personal data may have to be collected, transferred, published and archived for purposes of the arbitration.
- (b) Applicable data protection regulations, including the GDPR are complied with.
- (c) Appropriate technical and organisational measures are put in place to ensure a reasonable level of security appropriate to the arbitration, taking into account the scope and risk of the processing, the state of the art, the impact on the data subjects, the capabilities and regulatory requirements of all those involved in the arbitration, the costs of implementation, and the nature of the information being processed or transferred, including whether it includes personal data or sensitive business, proprietary or confidential information.
- (d) Breaches of the security and confidentiality of personal data, such as unauthorised access to or use of personal data or inadvertent disclosure to persons who should not have been identified as recipients, are reported as may be required by applicable data protection laws and regulations, including to the individual whose personal data may be affected and to the Secretariat.

## II. Sample Wording for Terms of Reference Regarding Electronic Notifications and Communications

### Example II.1 - Notifications and communications

- (a) Pursuant to Article 3 of the Rules, the Parties and the Tribunal must send copies of all written correspondence directly to all other Parties’ representatives, each arbitrator and the Secretariat simultaneously to the addresses indicated on page [\_\_\_].

- (b) Communications shall be sent to the Party representatives' e-mail addresses as set out above on or before any date set by the Tribunal and by courier only when required.
- (c) Documents must be sent to the Secretariat in electronic form only.
- (d) *[Any requirement regarding notification and/or depositing of an award at the place of arbitration may need to be addressed.]*
- (e) Subject to any requirements of mandatory law that may be applicable, and unless the Parties agree otherwise, (i) the Terms of Reference may be signed in counterparts and (ii) such counterparts may be scanned and communicated to the Secretariat pursuant to Article 3 of the Rules by e-mail or any other means of telecommunication that provides a record of the sending thereof.
- (f) Likewise, subject to any requirements of mandatory law that may be applicable, the Parties may agree (i) that any award be signed by the members of the Tribunal in counterparts and/or (ii) that all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by e-mail or any other means of telecommunication that provides a record of the sending thereof, pursuant to Article 34 of the Rules.

### III. Sample wording for first procedural orders

#### Example III.1 – Communications via e-mail and file share

All submissions and other written communications shall be submitted via e-mail directly to the Arbitral Tribunal, provided that each Party's counsel and the ICC Secretariat are copied simultaneously at the e-mail addresses specified below: *[insert list of names and e-mails]*.

Electronic communications are deemed to be validly made as of the date and time sent.

The Parties agree that e-mail attachments such as submissions and exhibits may be transmitted via Counsel's secure file share sites. In order to facilitate smooth and secure transmissions, any e-mail providing the link for a submission that has been uploaded to a file share site shall: (i) include the name and contact information of a technology support person who members of the Tribunal and opposing Counsel may contact directly in the event of, and for the sole purpose of addressing, any individual difficulties accessing the file share site; (ii) if applicable, state the date on which use of the link will expire; and (iii) identify the specific documents being transmitted (e.g. exhibits CX1-43). Each Party shall designate one person who is to be copied on any communications with the other Party's technology support person and it shall not otherwise be necessary that such communications be copied to the full distribution list.

#### Example III.2 – Electronic communications (general)

All submissions shall be sent: (i) via e-mail to all Parties and the Tribunal, with copy to the Secretariat, using the e-mail addresses specified below; (ii) where the Parties agree, via a case management website or other service provider; or (iii) via any other means agreed by the Parties.

#### Example III.3 – Electronic communications via file repository or case management platform

- (a) The Parties shall cooperate with a view to setting up by *[dd/mm/yyyy]* a secure online case management platform.
- (b) Unless otherwise allowed by the Tribunal upon agreement between the Parties, the platform shall be provided by a service provider with an established track record whose terms and conditions ensure that only authorised users may access stored information and that agents or employees of the service provider will have no writing/reading/deletion rights unless the

Tribunal provides written authorisation for the purposes of the individual case. The service provider must be subject to the standards governing the protection of personal data in [country].

- (c) The software environment within which the platform operates must generate logs for (i) access details and (ii) read, write and delete operations concerning each user, which the Tribunal can request from the service provider at any time. Whenever a file is uploaded or downloaded, the system shall automatically send an e-mail containing the pertinent user information to an address to be specified by the Tribunal. Any file upload shall trigger a notification e-mail to all Parties and members of the Tribunal, with a link to the repository where file or files have been uploaded.
- (d) Each member of the Tribunal and each counsel will be assigned a personal user ID and password which only he/she may use and must keep strictly confidential.
- (e) The file repository shall have the following subdirectories:
  - (i) **Arbitral Tribunal.** In this subdirectory, the Tribunal will upload all communications for the Parties, such as procedural orders and letters. Each arbitrator shall have the right to write and read files in this subdirectory. The [President/Sole Arbitrator] shall also have the right to delete files. Any Party shall have the right to read files, except those that are for the Arbitral Tribunal only, such as communications among its members.
  - (ii) **Claimant.** In this subdirectory, the Claimant shall upload all of its written submissions. It may store and download but not alter or delete any files already uploaded in its section. Any deletions must be requested, and will be made only by the Tribunal. The Respondent and the Tribunal shall have the right to read and download files from this subdirectory.
  - (iii) **Respondent.** In this subdirectory, the Respondent shall upload all its written submissions. It may store and download but not alter or delete any files already uploaded in its section. Any deletions must be requested, and will be made only by the Tribunal. The Claimant and the Tribunal shall have the right to read and download files from this subdirectory.
  - (iv) Each of the subdirectories shall include **further subdirectories** (to be created when a submission is made) stating in their file name the date of upload. Within each such subdirectory, the uploading party shall store the submission. Unless a different file structure is technically required for e-briefs, files with attachments to the written submission shall be stored within that same subdirectory.
  - (v) Files uploaded in the repository must be in **searchable PDF** format unless otherwise directed by the Tribunal. The following file formats are also permitted: *[insert file formats]*.
- (f) The access rights specified in subsection (e), (i)-(iv) above shall be implemented technically by the service provider. The Tribunal may direct the service provider to create for its internal communications a private subdirectory from which the Parties are fully excluded. The Parties hereby renounce and waive any right to be given direct or indirect access to this subdirectory in any legal proceedings. If a Party attempts to obtain such access, the members of the Tribunal shall be held harmless and shall bear no direct or indirect cost associated therewith.
- (g) Any difficulty in uploading, downloading, or accessing the file repository must be notified to the Tribunal immediately and in no event later than 48 hours after the first occurrence was noticed. The Tribunal may issue any directions to any Party or the service provider that the Tribunal deems appropriate under the circumstances. The Parties shall provide the Tribunal with the required authorisations, declarations and signatures that the Tribunal may require in order to issue instructions to the service provider.

- (h) The Parties agree that upon completion of the arbitration proceedings, the online file repository may be taken off-line and all stored files deleted from the internet server, subject to a full copy of all files in the repository having been stored on an appropriate data carrier before deletion. This includes the log files. The data carrier shall be stored for a period of [ ] from the conclusion of the proceedings with [the President of the Arbitral Tribunal/ notary public/ other service provider bound to observe strict confidentiality].
- (i) Costs associated with setting up and maintaining the file repository shall be paid [in equal shares/ *describe any other appropriate proportion of payment*] by the parties and become part of the costs of the arbitration that are to be allocated in the final award. The Tribunal is authorised to issue directions in regard to the payment of costs as it deems fit (Art. 38 of the ICC Rules). This includes an order that a specific deposit be paid for this purpose.
- (j) The Tribunal has the power to amend or change the above as it deems fit if this is required in its view by the circumstances that may arise. Before issuing such directions, the Tribunal will consult the parties.

**Example III.4 – E-mail filing followed by upload to file sharing platform, including naming conventions for files; directions for compilation of materials to be provided immediately before the evidentiary hearing**

- (a) By the relevant filing date, the parties shall submit by e-mail to the Tribunal Secretary and the opposing party an electronic version of the pleading with witness statements and expert reports; and
- (b) One working day following the filing date, the parties shall upload the pleading with all the supporting documentation and updated index to the file sharing platform that will be created for purposes of this case.
- (c) Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e. OCR PDF or Word).
- (d) All pleadings shall be accompanied by a cumulative index to all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number and the pleading with which it was submitted. [*Please follow the naming conventions contained below*].
- (e) At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal so requests, the parties shall courier to each Member of the Tribunal a USB drive containing an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a 'Consolidated Hyperlinked Index' of all documents.
- (f) The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by e-mail.

**Naming conventions**

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the language in which they are submitted (e.g. SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both (i) in the name used to identify each individual electronic file and (ii) in the Consolidated Hyperlinked Index (which shall be attached to each submission).

For cases with a single procedural language, the 'LANGUAGE' designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

Submission Type	Electronic File Naming Guidelines
Main Pleadings	<b>Title of Pleading-LANGUAGE</b>
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
Supporting Documentation Exhibits	<b>C-####-LANGUAGE</b> <b>R-####-LANGUAGE</b> To be produced sequentially throughout the case.
	<b>Claimant's factual exhibits</b>
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	<b>Respondent's factual exhibits</b>
	<i>R-0001-FR</i>
	<i>R-0002-SPA</i>
Legal Authorities	<b>CL-####-LANGUAGE</b> <b>RL-####-LANGUAGE</b> To be produced sequentially throughout the case.
	<b>Claimant's legal authorities</b>
	<i>CL-0001-ENG</i>
	<i>CL-0002-FR</i>
	<b>Respondent's legal authorities</b>
	<i>RL-0001-SPA</i>
	<i>RL-0002-ENG</i>
Witness Statements	<b>Witness Statement-Name of Witness-Name of Submission-LANGUAGE</b>
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	<b>Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE</b>
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>
Legal Opinions	<b>Legal Opinion-Name of Expert-Name of Submission-LANGUAGE</b>
	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>
	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>

Exhibits to Witness Statements, Expert Reports, Legal Opinions	<b>Witness/Expert Initials-####</b>
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>
	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
	<i>LS-0002</i>
Indices	<b>Consolidated Hyperlinked Index</b>
	<b>Index of Exhibits-C-#### to C-####</b>
	<i>Index of Exhibits-C-0001 to C-0023</i>
	<b>Index of Legal Authorities-RLA-### to RLA-###</b>
Other Applications	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
	<b>Name of Application-[Party]-LANGUAGE</b>
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimant]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimant]-ENG</i>
	<i>Post-Hearing Brief-[Claimant]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
	<i>Observations to Request for [XX]-[Claimant]-SPA</i>

### Example III.5 – Limitation on hard copies; naming and organisation of pre-hearing submissions, including compilation of materials immediately before the evidentiary hearing

The Tribunal will require hard copies only of witness statements (if any), expert reports, and legal memoranda, but not exhibits or legal authorities, which shall be provided only in electronic format. Absent further instruction, the Tribunal does not require and will not accept submissions on physical media such as thumb drives. All submissions shall be made via secure e-mail and password protected, uploaded electronically to a secure FTP site, or as otherwise agreed.

All substantive submissions, including letters, shall be accompanied by electronic copies of the principal case and other legal authorities relied upon, which shall be premarked with highlighting to identify the portions of the authority to which the Party is specifically referencing. The Parties are not required to supply authorities they have supplied previously or every authority in a string cite.

All submissions (including exhibits and legal authorities) provided in electronic form shall be text searchable, i.e. OCR PDF (not flattened) or Word.

Prior to the hearing the Parties shall also provide the Tribunal with an electronic hearing compilation containing an index of the case record (with hyperlinks to the extent feasible without incurring undue time or expense). The hearing compilation shall be organised into the folders and files listed below. **Each exhibit shall be separately numbered and shall be accessible as a separate document.**

Folder **1**: Parties' Pleadings and Submissions (including key substantive correspondence)

Folder **2**: Procedural Orders

Folder **3**: Witness Statements

Folder **4**: Expert Reports

Folder **5**: Claimant's Factual Exhibits

Folder **6**: Respondent's Factual Exhibits

Folder **7**: Claimant's Legal Authorities

Folder **8**: Respondents' Legal Authorities

Folder **9**: Reserved for Opening Statement Slides and Demonstrative exhibits, if any

#### Example III.6 – Naming and organisation of pre-hearing submissions

- (a) Electronic versions of written submissions (briefs, memorials, witness statements and expert reports; for fact exhibits and legal authorities, see paragraphs (b)-(d) below) shall be submitted in a fully text-searchable format (preferably PDF) and, if possible, in an e-brief version, containing hyperlinks to the witness statements, exhibits, and legal authorities cited.
- (b) Electronic versions of witness statements and exhibits shall be submitted in text-searchable (scanned or non-scanned) PDF format, together with a list describing each of the exhibits by exhibit number, date, name of the document, author and recipient (as applicable).
- (c) Legal authorities shall be submitted in electronic format only (unless a hard copy is specifically requested by the Tribunal), following the directions provided for witness statements and exhibits.
- (d) Each witness statement, exhibit or legal authority shall constitute a single electronic document. Electronic versions of exhibits shall commence with the appropriate letter and number ('C-01' or 'CLA-01', and 'R-01' or 'RLA-01'), so that they may be ordered consecutively in the electronic file.

#### Example III.7 – Designation of technical support person

- (a) Each Party shall designate one person for the duration of the arbitration as an initial point of contact for technology issues (the 'IT Point Person').
- (b) The IT Point Person shall be reasonably available during office hours:
  - > to troubleshoot and resolve technical errors with file share sites or any other software or technology tools jointly being used by the Parties and the Tribunal to facilitate the arbitration; and
  - > to test and ensure the proper functioning of such technology.
- (c) Provided that both Parties' IT Point Persons are copied on communications, it shall not be necessary to direct communications about technology issues to the full distribution list.



### Example III.8 – Document production requests

In preparing their document requests, the Parties are encouraged to consider addressing:

- (a) proposed search parameters for electronically stored documents; and
- (b) in order that any concerns about information security and/or technological capability can be addressed appropriately, (i) the proposed format of production (e.g. PDF vs. native format, OCR-searchable or not) and (ii) the proposed means of exchanging documents (e.g. via file transfer site communicated by e-mail) and any associated passwords.

### Example III.9 – Use of electronic presentation technologies

- (a) If it wishes to do so, a Party may project a true and accurate image of an exhibit onto a screen in the hearing room. The image must be visible to all counsel, the Tribunal and the witness, and must be large enough to be legible.
- (b) Any counsel who intends to examine a witness about a particular exhibit should offer to provide the witness with a paper copy of the exhibit.
- (c) If both Parties wish to project images, they should cooperate to ensure that they both have equal access to the technology and that duplicative projection equipment is not necessary.

### Example III.10 – Joint hearing bundles on tablet

The entire record shall be placed on tablets. The Parties will share equally the cost of four tablets: three for the members of the Tribunal and one for the Tribunal Secretary. The Parties may order additional tablets at their own cost for their own use and for use with the testifying witness. The tablets will be distributed to the Tribunal and the Tribunal Secretary, as requested [*at the hearing venue*] and shall be returned to the Parties at the end of the hearing.