

Appendix D – Template Procedural Order for Conduct of Evidentiary Hearing via Videoconference

Note. This template pre-hearing Procedural Order only includes language that parties and tribunals may consider using to address specific issues and challenges that may arise in connection with organising a hearing through videoconference.¹ Parties and tribunals should consider any additional language that may be appropriate for matters that regularly arise during hearings (e.g. scope of witness cross-examination, method of time keeping).

Two situations are envisaged:

- > **Option 1**, where the parties and tribunal use the services of a third-party service provider to offer technical support throughout the hearing; and
- > **Option 2**, where no such vendor is engaged.

If no third-party service provider is engaged, the parties and tribunal may wish to consider appointing a tribunal technical assistant for the hearing (e.g. a representative from the arbitral institution, the tribunal secretary, a paralegal in the President's law firm). The tribunal technical assistant would assist the Tribunal in managing the technical issues that arise during a hearing (e.g. reconnecting disconnected participants to a virtual hearing) so that the Tribunal's attention can remain focused on the substantive issues discussed during the hearing.

I. Hearing via videoconference

1. The Tribunal has determined that the evidentiary hearing will be conducted substantially in accordance with the following procedures, subject to any modifications as it may consider appropriate in the exercise of its discretion under Article 26(1) of the ICC Rules.
2. Before issuing this Order, the Parties were invited to review a draft and to comment on various logistical and procedural issues during a pre-hearing conference held on [date] via [video platform], hosted by [option 1: Third Party Service Provider] / [option 2: Tribunal President].

II. [Video platform] hosting and platform settings

3. The evidentiary hearing will be convened via [video platform], hosted by [option 1: Third Party Service Provider] / [option 2: Tribunal President]. The hearing will be deemed to take place at the seat of arbitration, which is [___]. (See ICC Rules, Art. 18(2).)
4. [Option 1: A hearing technician from Third Party Service Provider will be designated as the 'host' of the hearing and will facilitate the hearing, acting under the direction of the Tribunal. As a backup and to avoid disruption in the event that the hearing technician is disconnected, the Third-Party Service Provider will designate [a secondary technician/ the Tribunal President] as a 'co-host'.]

¹ This template builds on hearing procedures suggested by others. See e.g. S. Cohen, 'Draft Zoom Hearing Procedural Order', *TDM* (14 Apr. 2020); AAA-ICDR, 'Model Order and Procedures for a Virtual Hearing via Videoconference' (2021); R.F. Ziegler, 'Draft Procedural Order to Govern Virtual Arbitration Proceedings', *TDM* (9 Apr. 2020).

[**Option 2:** The Tribunal President will be designated as the 'host' of the hearing and will facilitate the hearing, with a Tribunal technical assistant acting as 'co-host' under the direction of the Tribunal President.]

5. In general, the hearing 'host' and 'co-host' will assist in verifying attendees, managing participants' access to the Main Hearing Room and Break-Out Rooms, monitoring departures from the hearing, displaying demonstratives and exhibits, and providing technical support.
6. The [*video platform*] settings that will be used for the hearing, as well as options to be applied when managing Break-Out Rooms, are set forth in Exhibit A to this Procedural Order.
7. The settings in Exhibit A have been made in consideration of preferences expressed by the Parties after discussion with [**option 1:** Third Party Service Provider and the Tribunal] / [**option 2:** the Tribunal], as well as new settings added to the [*video platform*] since then, if applicable. The Parties are responsible for verifying that Exhibit A accurately reflects the settings discussed with the Tribunal. In the event that [*video platform*] changes any available settings after the date of this Order, [**option 1:** Third Party Service Provider will endeavor to draw such changes to the Tribunal's attention] / [**option 2:** the Tribunal will draw attention to any changes for discussion with the Parties and will determine how to apply the new or changed settings].
8. The Parties acknowledge and agree that they have made their own investigations into the suitability, adequacy, and risks of the [*video platform*] and these settings for the evidentiary hearing, including the risk that there will be mistakes in applying the settings in Exhibit A.

III. Hearing notice and authorised attendees

9. In accordance with Article 26(3) of the ICC Rules, the hearing shall be private.
10. By [*date*], the Parties shall submit to the Tribunal a list of the names and e-mail addresses of the persons who will be attending the hearing on their behalf, including counsel, corporate representatives, witnesses, and any support personnel, as well as the physical location they will be joining the hearing from. The Parties shall also include the names and e-mail addresses of the stenographer(s) and language interpreter(s) they have agreed to engage for the hearing.
11. [**Option 1**] The Tribunal will send a consolidated list of authorised hearing attendees to Third Party Service Provider.
12. Before the hearing, [**option 1:** Third Party Service Provider] / [**option 2:** Tribunal President] will e-mail a [*video platform*] weblink, 'Meeting ID,' and passcode to each person whom the Tribunal identifies as an authorised attendee. Unless the Tribunal determines otherwise, only those persons shall be authorised to attend the hearing, subject to any rules on witness sequestration.
13. E-mail invitations shall be unique to each attendee and shall not be shared with others.
14. The Parties acknowledge and agree that unless either Party requests otherwise by [*date*], the passcode may be provided by [**option 1:** Third Party Service Provider] / [**option 2:** the Tribunal President] in the same communication as the [*video*] weblink and Meeting ID.
15. The hearing invitation will also contain the contact information (name, e-mail, and telephone number) of [**option 1:** the Third Party Service Provider personnel who will facilitate the hearing] / [**option 2:** the Tribunal technical assistant].

16. [*Revise as applicable*: The Parties acknowledge and agree that some attendees will join the hearing from their own, individual locations while others may join the hearing from the same location. This means that some witnesses may testify in the presence of counsel (and others not), some counsel teams may be together (and others not), and some counsel and client representatives may be together (and others not). No attendees will be present at the same location as the Tribunal.]

IV. Technical capabilities and pre-hearing testing

17. [**Option 1**: Counsel shall discuss whether Third Party Service Provider will provide equipment to any hearing participant.] / [**Option 2**: The Parties shall be responsible for their own technical equipment.]
18. To optimise the video hearing, dual monitors are recommended, with the [*video platform*] running on one screen.
19. A [*video platform*] test among [*Include as applicable*: all participants/counsel, the Tribunal, witnesses, experts interpreters, stenographers] [**option 1**: and Third-Party Service Provider] was conducted on [*date*], as part of the pre-hearing conference on [*date*].
20. The purpose of the test was to allow the hearing participants to assess the quality of their audio and video transmissions and to make necessary adjustments, as well as to experience key platform functions, including microphone muting, display options, transitions between the Waiting Room, Hearing Room, and Break-Out Rooms, and screensharing.
21. If the Tribunal determines following the test that [*video platform*] will be inadequate to allow the Parties to present their cases, the Tribunal reserves discretion to determine that the evidentiary hearing will be conducted by other means.
22. Before the hearing, each Party shall be responsible for testing the [*video platform*] with its witnesses, client representatives, and any other persons attending the hearing on its behalf to ensure that such persons: (i) have suitable equipment to use [*video platform*] and participate in the hearing; (ii) are familiar with basic features of the [*video platform*]; and (iii) that they are familiar and comply with all logistical and other requirements of this Order. In particular, as concerns witnesses, each Party shall advise its witnesses of this paragraph [22] and of the further provisions in paragraphs [24-26] regarding connecting to [*video platform*] and paragraphs [38-41, 43] with respect to testifying.
23. The Parties also undertake to take reasonable steps to confirm with the stenographer(s) and interpreter(s) that they have suitable equipment to use the [*video platform*] and participate in the hearing and that they are familiar with the basic features of the [*video platform*] and any applicable requirements of this Order.
24. Hearing attendees shall be responsible for ensuring that the [*video platform*] application on their device is up-to-date. As of the date of this Order, the latest version of [*video platform*] is [].
25. To safeguard the privacy of the video hearing, no participant shall join from a public setting or use unsecured, public Wi-Fi.

26. Hearing participants shall make reasonable efforts to ensure that there will be clear video and audio transmission during the hearing. Among other things, participants should consider:
- (a) Accessing the [video platform] through whatever device or combination of devices that provides the best combination of audio and video quality, including (as appropriate) using a phone (rather than a computer) for audio and, if there is to be simultaneous language interpretation, a headset with microphone.
 - (b) Steps that may establish a more reliable, high-speed internet connection, including:
 - > using a hard-wired rather than wireless internet connection; and
 - > turning any unnecessary computer applications off rather than leaving them running in the background.
 - (c) Steps that may improve audio transmission, such as:
 - > using the computer microphone and reserving the optional dial-in number in case of poor quality internet access;
 - > considering whether a headset would improve transmission;
 - > eliminating foreseeable background noise and warning any unauthorised persons in close proximity that a hearing will be taking place and is not to be disturbed.
 - (d) Steps that may concern camera positioning and lighting to optimise video images, such as:
 - > avoiding sitting near a window;
 - > positioning lights in front of (not behind) the camera; and
 - > raising the webcam to eye level.
 - (e) Whether computing devices and related equipment such as headsets are adequately charged and whether power cables or back-up batteries are available as may be necessary.
 - (f) Steps that may accommodate multiple participants joining from the same endpoint, including optimum seating arrangements, camera positioning, and checking for potential negative audio feedback or static arising from multiple devices.

V. Hearing exhibits

27. *[Counsel to discuss whether some or all witnesses will be sent packages with exhibit binders to be opened on camera OR whether exhibits will only be displayed electronically via screenshare. Counsel should also consider whether a different protocol is appropriate for expert witnesses. If hard copies are necessary, a protocol such as the following might apply.]*

The Parties have agreed as follows with respect to providing witnesses with clean, unannotated exhibits and witness statements prior to the hearing, for use during the hearing:

- (a) By [date], Counsel shall coordinate providing each witness with one or more binders containing: (i) a clean, unannotated hard copy of the witness' witness statement(s); and (ii) a clean, unannotated hard copy of each of the exhibits which Counsel intends to show the witness on either direct or cross-examination ('Hearing Bundle').
- (b) The Hearing Bundle should contain all documents that, before the hearing, Counsel reasonably believes will be shown to the witness. However, a full set of the exhibits will also be available electronically and displayed by [option 1: Third Party Service Provider] / [option 2: the Tribunal technical assistant] via screenshare during witness examinations.
- (c) If a witness will attend the hearing outside the presence of Counsel, that witness will be provided with the Hearing Bundle in a sealed package or envelope that must remain sealed until the witness is instructed to open it, on camera, at the commencement of the witness' testimony.

28. [**Option 1:** Counsel to discuss with Third Party Service Provider and the Tribunal: (i) timing and means of submitting electronic exhibits and demonstratives to Third Party Service Provider; (ii) whether there will be exhibits in different formats (e.g. Excel, video clips, etc.); (iii) shared nomenclature for pulling up exhibits (e.g. individual exhibit number plus page number).]

VI. Hearing schedule

29. The hearing schedule below includes [] hours of time in reserve, to be used in the event of unforeseen technical problems that may occur during the video hearing.

VII. Procedures upon joining the hearing

30. To ensure a timely start of the hearing, on at least the first day of the hearing (or the first day for any witness) participants should access the [video] hearing using the credentials provided by [**option 1:** Third Party Service Provider] / [**option 2:** the Tribunal President] at least [] minutes before the scheduled start time. Before the scheduled start time, participants will be directed to a virtual Waiting Room where they will remain until the Tribunal is ready to start the hearing and directs [**option 1:** Third Party Service Provider] / [**option 2:** the Tribunal technical assistant] to admit the participants to the Hearing Room.
31. When it appears that all participants have established their audio and video connections and are ready to begin, the Tribunal will verify who is in attendance visually and with reference to the [video platform] participants list. Anyone connecting by telephone will be asked to speak and confirm their identity and, if also connecting separately by video, may have their connections 'merged' so that they are listed only once as a participant. Attendees may also be renamed to display first and last name and role/affiliation (e.g. 'Jane Doe, President' or, in case of multiple attendees at one location, 'Claimant Room').
32. Participants may not use a 'Virtual Background'. Instead, the remote room in which they are located must be visible.
33. After verifying who is in attendance, the Tribunal will ask that all hearing participants: (i) mute their microphones unless they are speaking or need to interject; and (ii) turn off their video feeds. Notwithstanding the foregoing, the following persons shall leave their video feed on during the hearing, unless determined otherwise by the Tribunal:
- > lead Counsel;
 - > any witness who is testifying;
 - > the interpreter, if language interpretation is being provided; and
 - > the Tribunal.²
34. [**Option 1:** Third Party Service Provider] / [**option 2:** the Tribunal President] may mute participants if necessary (e.g. to reduce background noise from someone who has neglected to mute).

² By controlling whose video feed is operational in this manner, all attendees will be able to optimise their view of key participants by choosing 'hide non-video participants' in their individual 'video settings' (available from the drop-down menu next to the video camera icon in the lower left-hand side of the screen).

35. To avoid unnecessary disruption during the hearing as well as concern about whether an attendee is experiencing difficulty establishing or maintaining technical connection to the hearing, the Tribunal expects that hearing attendees shall make best efforts to avoid joining the hearing late or departing from the hearing without prior warning (to be given at an appropriate time such as at the beginning or end of a break).

VIII. Hearing record

36. Except as provided herein, no recordings (whether audio, video, or screenshot) shall be permitted. No unauthorised persons shall be given access to live video or audio feed of the proceedings.
37. The Parties agree that the stenographer will transcribe and provide the official record for the proceedings and acknowledge that the stenographer may record the proceedings in connection with his or her regular business practices to prepare the final transcript. From time to time, the stenographer may intervene to clarify items for the record.

XIX. Witness examination procedure

38. **Witness camera and remote venue set-up.** Witnesses' faces must be clearly visible while testifying. To the extent possible, a witness' webcam should be positioned at face level, relatively close to the witness (e.g. by positioning a laptop on a stack of books).
39. If two cameras are used for the purpose of examining a witness, the second camera shall be placed behind the witness, in a location that allows a view of the entire room, as well as of the witness' desk or table.
40. Witnesses should give evidence from a clear desk or table. If this is not strictly possible, the Tribunal may ask a witness to orient their webcam to provide a closer view of any materials in the witness' environment in order to verify that the witness is not referring to or relying upon unsanctioned information while testifying.
41. At any time, the Tribunal may ask a witness to orient their webcam to provide a 360-degree view of the remote venue in order to confirm that no unauthorised persons are present and that no unauthorised devices or notes are being used or relied upon.
42. **Language interpretation.** By [date], the Parties shall inform the Tribunal: (i) whether the interpreter will attend in the same or a remote location from the testifying witness; (ii) whether certain materials such as witness statements or an agreed glossary of terms will be provided to the interpreter for preparation purposes prior to the hearing; and (iii) whether the interpreter will be provided Hearing Bundles or only view exhibits and witness statements electronically via screenshare. As noted above, the interpreter will have access to the real-time transcript.
43. **Instructions.** The Tribunal will instruct the witness regarding the following and seek the witness' confirmation that:
- (a) The witness will not rely on any notes while testifying or receive any assistance with his or her testimony.
 - (b) The witness will not make any recordings or screenshots of the proceedings or provide access to the live audio or video to any person.

- (c) In the case of any witness who is testifying outside the presence of Counsel:
 - > no one else is present in the remote room where the witness is testifying;
 - > except for any device being used to connect to [video platform], all other devices in the witness' presence (including smartphones, computers, and tablets) are turned off; and
 - > any device being used to connect to [video platform] shall not be used for any other purpose during the hearing unless permitted by the Tribunal;
 - (d) In the event of a disconnection or other technical difficulty, the witness understands how to contact [option 1: Third Party Service Provider] / [option 2: the Tribunal technical assistant] (i.e. using the information provided in the hearing invitation).
44. The Parties agree that Counsel shall be prohibited from conferring with any witness from the time that witness begins being cross-examined until the time he or she is dismissed, including during any breaks in his or her testimony.

X. Private communications

45. The 'Chat' function in [video platform] will be disabled.
46. To avoid delay and difficulty reconnecting, hearing attendees should not disconnect from the [video] hearing during any recess. Ordinarily, the Tribunal will direct that participants be separated into 'Claimant', 'Respondent', 'Tribunal', 'Interpreter', and 'Stenographer' Break-Out Rooms (or such other Break-Out Rooms as may be appropriate) to facilitate private conversations during recesses. Any witness who is testifying will remain in the Main Hearing Room.
47. [Video platform] settings that will apply when Break-Out Rooms are used are set forth in Exhibit A and include the following:
- (a) Participants will be moved to Break-Out Rooms automatically upon being assigned to a room by Third Party Service Provider.
 - (b) When a Break-Out Room is closed, a countdown of 60 seconds shall apply before participants are returned to the Main Hearing Room. Once the countdown begins, participants may return to the Main Hearing Room on their own.

XI. Technical support

48. [Option 1: Third Party Service Provider] / [option 2: the Tribunal technical assistant] will provide the Parties with technical support during the hearing.
49. Technical support from [video platform], including video tutorials that cover the basics of using [video platform], is available at [link]. The [option 1: Third Party Service Provider] / [option 2: Tribunal technical assistant] shall provide a telephone number where they can be reached throughout the Hearing.

50. In the event that a participant is disconnected from the videoconference or experiences some other technical failure:
- (a) upon being alerted to the issue, the Tribunal may take steps to ‘pause’ the hearing and ask [option 1: Third Party Service Provider] / [option 2: the Tribunal technical assistant] to assist the participant with reconnecting or resolving the technical issue;
 - (b) the participant suffering from technical failure should immediately seek to re-connect and to contact [option 1: Third Party Service Provider] / [option 2: the Tribunal technical assistant] by phone or e-mail if his or her initial attempt to re-connect is unsuccessful;
 - (c) once the disconnected participant has re-joined the hearing, if necessary, the Tribunal will recap what the participant missed; and
 - (d) if, in a timely manner, connection cannot be re-established or the issue cannot be resolved, the Tribunal may consider other measures, including but not limited to moving participants into Break-Out Rooms, taking a recess, or directing participants to dial-in to a back-up audio conference line.
51. If the Tribunal deems it unfair to any Party to continue the video hearing because of a technical failure, or otherwise determines that the platform does not permit the Parties to adequately present their cases, the Tribunal may terminate the videoconference at any time and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.

[date]

SO ORDERED

[Arbitrators]