

THE VIENNA PROTOCOL

A PRACTICAL CHECKLIST FOR REMOTE HEARINGS

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The Vienna Protocol – A Practical Checklist for Remote Hearings aims, in the form of a checklist, at providing guidance for arbitrators and the parties in determining whether the conduct of a remote hearing is reasonable and appropriate in the specific circumstances of a case. The Vienna Protocol does not purport to give advice on what is best in a specific situation, nor is it exhaustive or binding. It simply encourages arbitrators and parties to apply sensible checks on the use of remote hearings and aims at facilitating the conduct of a remote hearing where such a hearing is appropriate.

If you have any further questions, the Secretariat will be happy to assist. You can reach our team by telephone at +43 5 90 900 4397 or by email to office@viac.eu. In addition, our website www.viac.eu contains further information on hearings.

INDEX

- I. Preliminary Considerations 2
 - 1. Regulatory Framework 2
 - 2. Assess Viability of the Remote Hearing 3
- II. Select the Platform for the Remote Hearing 3
- III. Pre-Hearing Preparatory Measures 4
 - 1. Scheduling the Time for the Remote Hearing 4
 - 2. Pre-Hearing Organizational Conference 5
 - 3. Remote Hearing Protocol 6
 - 4. Test Run 6
- VI. Remote Hearing 6

The current COVID-19 pandemic has confronted parties and arbitral tribunals with the need to seek alternatives to in-person hearings. So-called “remote hearings” can often be a viable alternative to conducting a physical hearing. Indeed, with increasing concerns about the cost of travel and its impact on climate change and the environment, remote hearings may in some circumstances be preferable to in-person meetings even after the COVID-19 pandemic will have subsided.

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I. PRELIMINARY CONSIDERATIONS

1. REGULATORY FRAMEWORK

Applicable national law, in particular the law of the seat of the arbitration, and applicable institutional arbitration rules (if any) might contain specific provisions on remote hearings. Most national laws or arbitration rules neither expressly permit nor prohibit the conduct of remote hearings, and so are silent on this issue. It is therefore advisable to:

- Consider if remote hearings are in principle permissible under the applicable law at the seat of the arbitration and under applicable rules, if any.
- Consider if remote hearings are likely to raise enforcement issues.
- If remote hearings are permissible in principle, consider whether the conduct of a remote hearing raises issues of due process in the particular circumstances of the case.

Note: The Vienna Rules are currently silent on the permissibility of conducting hearings remotely rather than in person. Article 30 (1) of the Vienna Rules only requires an “oral hearing”, if a party so requests, but not a hearing “in person”: a remote hearing that allows parties to orally present their case satisfies this provision in principle.

Rather, in deciding whether and how to conduct a remote hearing, and absent any party agreement to the contrary, tribunals have considerable discretion to conduct the proceedings pursuant to Article 28 of the Vienna Rules, and thus to decide whether to hold a hearing remotely through technological means. Article 28 specifically requires the arbitrators (i) to conduct the arbitration in an effective and cost-efficient manner (which may often be a factor in favor of holding a hearing remotely), and (ii) to respect at all times the fundamental principles of the parties’ right to be heard and the equal treatment of parties.

As a result, arbitrators in principle have the discretionary power to hold hearings remotely, but they have to consider whether conducting (or not conducting) a remote hearing in the individual circumstances of the case is (i) fair to the parties; and (ii) allows them an adequate and equal opportunity to present their case.

2. ASSESS VIABILITY OF THE REMOTE HEARING

Amongst the factors, determining whether a remote hearing is appropriate in the specific circumstances of a case, arbitrators may wish to consider:

- Reasons for a remote hearing (e.g. travel restrictions, costs, health concerns etc., including whether any restrictions on personal hearings are only temporary or likely to persist longer-term).
- Content of the planned hearing (for the purposes of case management; on procedural or jurisdictional issues; only for the exchange of legal arguments; or also for examination of witnesses and/or experts etc.).
- Timing (status of the proceedings; impact of the likely delay if parties have to wait for an in-person hearing; length and nature of the planned hearing).
- Number of participants and their location (sufficient internet bandwidth; different time zones; internet security and privacy; need for interpreters and court reporters).
- Costs compared to an in-person hearing.
- Technical set-up available to accommodate the needs of the remote hearing (volume of data; number of remote participants having sufficient internet connection; availability of equipment).

In the end, any discretionary exercise of Article 28 of the Vienna Rules will weigh the potential benefits resulting from a remote hearing against the potential prejudice to any party and proceed within the confines of procedural fairness.

II. SELECT THE PLATFORM FOR THE REMOTE HEARING

There are many providers of arbitration-specific platforms but also publicly available video conference platforms that can be chosen (e.g. Zoom Business, GoToMeeting, Microsoft Teams, WebEx, Immediation etc.). The platforms vary in the features they offer and the internet bandwidth they require from their users for a stable connection.

The following considerations may be helpful when selecting the platform:

- Whether the platform is solely web-based or offers more stable desktop application.
- Audio and visual requirements: High-resolution video imaging and quality audio of participants will be necessary (see Annex 1 of the Seoul Protocol on Video Conferencing in International Arbitration¹); the use of headsets is recommended to increase privacy and audibility of participants.
- Document sharing: Consider how documents will be accessed during the hearing (via a cloud platform, screen sharing, separate cameras to screen physical documents etc.).

¹ [https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-\(1\).pdf](https://globalarbitrationreview.com/digital_assets/9eb818a3-7fff-4faa-aad3-3e4799a39291/Seoul-Protocol-on-Video-Conference-in-International-Arbitration-(1).pdf).

- Private remote rooms: Some platforms provide separate remote rooms and thus enable sub-groups of participants (e.g. for the arbitrators' deliberations, breakout rooms for the parties etc.). Alternatively, a different communication channel can be selected to confer privately.
- Technical assistance: Consider the availability and type of support offered by the platform to monitor the connectivity and assist the participants on technical issues throughout the hearing. In any event, it is advisable to organize technical assistance at each remote location if no remote room manager is available.
- Chat function: Consider whether chats between participants should be available and if separate chat channels for the tribunal members to communicate are required. Verify which private messages are permitted. Consider whether/how the chat history will be archived.
- Audio and video recording: Consider using the recording function of the platform, including where and by whom the recording, if any, will be stored.
- Accessing the remote hearing room: Consider how access is granted, in particular if participants should gain access to the remote hearing only upon admission by the hearing host (e.g. remote waiting room, individual access links etc.).
- Data security / Confidentiality: Ensure the platform offers sufficient protection against unwanted third-party access so that unauthorized persons cannot gain access to the remote hearing room (e.g. password protection, sufficient encryption, locking of the remote room etc.). Review the general conditions of the platform for data protection; some platform providers may assume ownership rights of the data transmitted during the remote hearing.
- Tutorials: Consider whether detailed tutorials are available for participants. If not, made-to-measure tutorial or training sessions on the use of the platform can be considered.
- Select a second platform as a back-up solution: It is advisable to organize a fallback solution in advance, should the access to the primarily selected platform fail or lack sufficient quality during the remote hearing. Consider distributing dial-in details for a telephonic conference during which hearing participants can assess the situation in case the back-up solution fails.

III. PRE-HEARING PREPARATORY MEASURES

1. SCHEDULING THE TIME FOR THE REMOTE HEARING

- Find a time for the hearing that accommodates the relevant time zones.
- Consider shorter hearing days; shorter examination periods for experts and witnesses; and regular breaks, to account for diminished attention span for remote participants (possibility to shorten the daily hearing time and instead increase the number of hearing days).
- Ensure sufficient time reserves in case of technical problems.

- Allow sufficient time to prepare the technical needs for the remote hearing including time slots for test runs.

2. PRE-HEARING ORGANIZATIONAL CONFERENCE

Discuss the administrative and technical requirements with the parties in detail and in advance:

- Location: How many remote locations will there be and in which time zones?
- Interpreters and court reporters: Consider whether there is a need for interpreters and court reporters, and how to let them perform their tasks in the remote hearing room.
- Hearing etiquette: Online speaking etiquette, muting microphones, raising hands, gesturing etc.
- Room arrangement: Sufficient light, what should be seen in the picture (head, head & shoulders); if more persons will attend the remote hearing from the same physical location, determine a seating plan and ensure that local distancing rules are complied with (if they are using separate equipment to dial into the hearing, ensure there is no audio feedback); the use of remote break-out rooms to confer privately.
- Presentation of documents: Ensure full and fair access to documents on which the witnesses or experts may be examined; discuss how electronic documents will be shared during the remote hearing; discuss preparation and use of electronic hearing bundles, and if documents should be physically present in any remote location.
- Witnesses: In case 360° cameras or similar equipment are not used, consider checking participants' rooms by turning the camera around at the start of their examination; consider additional affirmations to witnesses by videoconferencing and direct and cross-examination rules.
- Confidentiality: Discuss all necessary steps to ensure the confidentiality of the proceedings, if required.
- Data security: Address security concerns of the parties.
- Recording: Prohibit participants from recording any part of the proceedings without advance permission of the participants and the arbitral tribunal. Determine whether the arbitral tribunal or any authorized person (e.g. the court reporter) may record the hearing.
- List of attendees: Include contact details to reach each participant in case of disconnection during the remote hearing.
- Costs: Determine who will bear the costs of the remote hearing set-up (including for the platform), pending the final decision on costs by the arbitral tribunal.
- Hearing agenda: Consider shorter hearing days to accommodate different time zones but also because remote hearings often require increased focus from the participants. Include breaks to allow parties and counsel who are not at the same physical location to consult privately; the same applies for arbitrators. Determine the order in which

witnesses and experts will be heard, and the time and logistics for asking them into the remote hearing room.

3. REMOTE HEARING PROTOCOL

Procedures to be followed, hearing etiquette and room arrangements can be defined in a protocol to be distributed to the participants of the remote hearing in advance. It helps to have a common and clear understanding about what to expect at the hearing.

4. TEST RUN

- Organize 1-2 test runs to ensure the compatibility and connectivity of each participant's equipment (software, hardware) and to check that each participant has sufficient audio and video presence in the remote hearing room including witnesses and experts.
- Allow each participant during the test run to familiarize him- or herself with the features of the platform and test the presentation of documents in the remote hearing room.
- After the test run, it is advisable to have the quality of the remote hearing room approved by the parties and to take this on record.

VI. REMOTE HEARING

- Ensure the presence of all authorized participants at the commencement of the remote hearing.
- Lock the remote hearing room after attendance has been confirmed.
- Test the quality of the audio and visual presence of each participant at the start of the hearing and have this also confirmed by each participant.
- Monitor the quality of the settings during the remote hearing also in light of the parties' right to be heard and the right to equal treatment. Should you have concerns that the provided quality negatively affects the hearing, address this situation with the participants and adapt to the situation. You might require technical support or consider choosing the available back-up system. Ask the parties to immediately address any concerns on the set-up or conduct of the remote hearing.
- To the extent possible, ensure before the start of the witness examination that the settings for the witnesses and experts comply with the agreed procedure and the given directions of the arbitral tribunal.
- Monitor compliance with the agreed hearing etiquette, room arrangement and the procedures as set out in the Remote Hearing Protocol (see item III.).

VIAC actively assists and provides services to support the organization of remote hearings: Please contact office@viac.eu.



**Vienna International Arbitral Centre
of the Austrian Federal Economic Chamber (VIAC)**

Wiedner Hauptstrasse 63, A-1045 Vienna

T +43 (0)5 90 900 4398

F +43 (0)5 90 900 216

E office@viac.eu

www.viac.eu